IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JOSHUA D. POERTNER,

Plaintiff,

v. **CASE NO: 6:12-CV-00803-GAP-DAB**

THE GILLETTE COMPANY and THE PROCTER & GAMBLE COMPANY, **CLASS ACTION**

Defendants.
_____/

PLAINTIFF'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND AWARD OF ATTORNEYS' FEES AND INCORPORATED MEMORANDUM

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Plaintiff Joshua D. Poertner, on his own behalf and on behalf of the Settlement Class certified in this case, hereby moves for final approval of the settlement described in the Class Action Settlement Agreement dated September 13, 2013, Doc. 113-1 ("Agreement" or "Settlement"). After more than sixteen months of hard-fought litigation and intensive negotiations through formal mediation, Plaintiff and Defendants agreed to the Settlement, which provides substantial financial benefits to Class Members. After the Settlement was reached, the parties negotiated a separate attorneys' fees and expenses amount to be paid to Class Counsel by Defendants. By Order dated November 5, 2013, Doc. 118, this Court granted preliminary approval of the Settlement and certified a Settlement Class under Rule 23(b)(3).[1] For the reasons discussed below, the Court should approve the Settlement as fair, adequate, and in the Settlement Class Members' best interests. The Court also should approve Class Counsel's requested attorneys' fees and expenses and the class representative's service award and enter the Proposed Final Judgment and Order of Dismissal, thereby concluding this litigation.[2]

I. THE LITIGATION

This Settlement resolves two similar, independent actions against Defendants.[3] The factual and procedural background for each of the cases is set forth in detail in Plaintiff's Memorandum in Support of Unopposed Motion for Order Preliminarily Approving Class Action

[1] Pursuant to the Preliminary Approval Order, notice was issued to the members of the Settlement Class previously certified in this case. *See* Declaration of Deborah McComb, ¶ 15, Doc. 122. The Notice described, *inter alia*, the Settlement terms, provided Class Members with the appropriate claim form, advised them that Class Counsel would seek approval of the Settlement and an award of attorneys' fees and expenses, noted the approval hearing was scheduled for March 21, 2014, and advised them of their right to file objections to the Settlement or opt out on or before February 28, 2014. There were six timely objections filed, to which Plaintiff is separately responding, and twelve class members opted out. CAFA notice was also provided to the U.S. and state attorneys general, as ordered by the Court. No governmental actor has objected to the Settlement.

[2] The Proposed Final Judgment and Order of Dismissal ("Final Judgment") is attached hereto as Exhibit A.

[3] The Settlement encompasses *Heindel v. The Gillette Company, et al*., Case no. CV-12-01778 EDL (N.D. Cal.) ("the California case").

Settlement, Doc. 114, and in the Settlement Agreement, Doc. 113-1. For purposes of this motion, Class Counsel reemphasize that in the course of this litigation, counsel in each case separately engaged in motion practice, reviewed hundreds of thousands of pages of documents produced by Defendants, engaged experts, tested hundreds of batteries, prepared expert reports, and took depositions of Defendants' employees involved in market analysis and sales marketing. Defendants deposed the plaintiff and plaintiff's experts in each case and obtained written discovery responses and document production from the plaintiffs, and counsel for the California plaintiff deposed defendants' expert witness.

Class motions were fully briefed and pending in this action, and the California plaintiff filed a detailed class certification motion. The filings included expert reports, deposition excerpts, discovery responses, pertinent documents produced in discovery, declarations, and legal authorities. Defendants responded with their briefs in opposition in this action and moved to strike Plaintiff's expert report. The parties argued Plaintiff's motion for class certification in this case on September 4, 2013, and it was taken under advisement. Doc. 104.

The Court required mediation in this case, and the parties selected a mediator from the Court's panel of approved mediators, Rodney A. Max, Esq. of Upchurch, Watson, White & Max. The parties agreed that counsel in the California action would participate in the joint mediation in an attempt to resolve both cases on a nationwide basis.

The settlement negotiations and mediation efforts were extensive, contentious, and hard fought. Beginning in May 2013, the parties commenced mediation through numerous telephone discussions and emails. The initial in-person mediation was on August 1, 2013 at Mr. Max's offices in Miami, Florida and lasted over ten hours. Although progress was made, no settlement was reached and the parties agreed to a second in-person session on August 12, 2013. The

August 12 session, which exceeded eight hours, also failed to produce a settlement. However, the parties continued their settlement discussions through Mr. Max and through numerous direct telephone conversations and emails over the course of another month. *Lowe Decl*. Doc. 114-1 at ¶ 8; *Schubert Decl*. Doc. 114-2 at ¶ 8; *Declaration of Rodney A. Max* ("Max Decl."), Doc. 114-3 at ¶ 13. The parties in this action also continued to litigate the class issues and argued Plaintiff's Motion for Class Certification to this Court on September 4, 2013. Doc. 104.

On September 13, 2013, with the assistance of Mr. Max, all Parties reached agreement on the material terms of settlement and entered into a Memorandum of Understanding ("MOU"). *Lowe Decl*. Doc. 114-1at ¶ 8; *Schubert Decl*. Doc. 114-2 at ¶ 8. The parties thereafter prepared and executed the Settlement Agreement.

II. TERMS OF THE SETTLEMENT

The Settlement provides significant relief to Class Members in the form of cash payments and provides for certain in-kind payments and injunctive relief. The Settlement Class includes over 7.26 million persons in the United States (including U.S. territories and Puerto Rico) who purchased AA or AAA size Duracell brand Ultra Advanced and/or Ultra Power batteries at retail from or after June 2009. The monetary benefits available to Class Members under the Settlement are significant and within the upper range of what could have been recovered had plaintiffs prevailed at trial in each case.

Defendants agreed to compensate Settlement Class Members who submit a valid claim request form as follows:

> To each qualifying Claimant who purchased Ultra Batteries (in size AA and/or AAA), P&G will refund three dollars ($3.00) per pack, subject to the limitations described herein. If the qualifying Claimant provides valid Proof of Purchase, the Claimant shall be entitled to receive a maximum of up to four (4) refunds for the Claimant's household or address (i.e., for a total maximum refund of twelve

> dollars ($12.00) per household or address). If the qualifying Claimant does not submit valid Proof of Purchase, the qualifying Claimant shall be entitled to receive a maximum of up to two (2) refunds for the Claimant's household or address (i.e., for a total maximum refund of six dollars ($6.00) per household or address).

Settlement Agreement at ¶ 59. Doc. 113-1.

The $3.00 per pack payment to Class Members approximates the average retail price differential between the subject Ultra batteries and the lower-priced Duracell CopperTops. Declaration of Felix Appiah in Support of Final Approval of Class Action Settlement ("Appiah Decl.") ¶¶ 6-16. As plaintiffs explained in their respective class certification memoranda, the Class Members' damages may be calculated by subtracting the retail price of Duracell's comparator batteries, the Coppertops, from the retail price charged for the Ultras during the Class Period. That difference was approximately 39 cents per AA and 41 cents per AAA battery. *Id.* ¶ 14. The average number of cells per pack was 7.4 for AAs and 7.1 for AAAs. *Id*. ¶¶ 9 & 11. Therefore, the average overcharge per pack could be reasonably estimated at $2.89 for AAs and $2.91 for AAAs.[4] On average, Class Members purchased 1.4 packs of AAs or 1.3 packs of AAAs during the Class Period, and thus paid an estimated overcharge on average of between $3.78 and $4.04. *See* Appiah Decl. ¶ 13.

Under the Settlement, each Class Member is entitled to receive, without proof of purchase, up to $6.00, or the estimated premium incurred for the purchase of fifteen batteries. With proof of purchase, Class Members can receive up to $12.00 per household, i.e., the premium charged for thirty batteries. And since Defendants agreed to pay all valid claims received, there is no cap on the amount of total class compensation.

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[4] This does not include batteries purchased at Costco stores. Mr. Appiah estimates that 11% of AA consumers and 5% of AAA consumers purchased the Ultras at Costco stores. Appiah Decl. ¶ 13. For those consumers, the average per battery price difference was less – approximately $0.13 for AA batteries and $0.06 for AAA batteries. Appiah Decl. ¶ 15. The average per pack differential ranged from $2.08 to $3.90 for AAs and was $0.96 per pack for the AAA batteries sold at Costco. Appiah Decl. ¶ 15.

Accordingly, Class Counsel have created a settlement with a total value of at least $49.87 million, computed by adding the $43.56 million in available monetary benefits ($6 × 7.26 million Class Members) with the $5.68 million in fees and expenses and $632,095 in notice and administration costs paid by Defendants.

Defendants further agreed to make an in-kind payment of $6 million (retail value) of Duracell products over a five-year period. The products will be donated to charitable organizations, including but not limited to first responder charitable organizations, the Toys for Tots charity, The American Red Cross, or other 501(c)(3) organizations. The in-kind payment is separate and distinct from, and will not include, any donations of products which Duracell has already donated or Duracell was committed to donate as of the date of execution of the MOU. Settlement Agreement, Doc. 113-1 at ¶ 61. The $6 million in-kind payment will be new commitments to donate Duracell products in the future after the court approves the settlement in this matter, such that the $6 million in-kind payment will be above and beyond any existing commitments Duracell has made. Declaration of Jeff Jarrett in Support of Final Approval of Class Settlement ("Jarrett Decl.") ¶ 9. Furthermore, the donated batteries will be quality batteries well within the period of guaranteed freshness, and any other products donated will be products of quality equivalent to similar products sold at retail. Jarrett Decl. ¶ 10.

The efforts of Class Counsel also resulted in significant remedial and injunctive relief that advances the purposes of the consumer statutes that were the basis of plaintiffs' claims in each action. In the settlement agreement, P&G and Gillette agreed that they will cease packaging the Ultra Batteries in the United States in their current chemical formulation with the statement "Our Longest Lasting" or other words to the effect that the Ultra Batteries last longer than Duracell CopperTop batteries on the packaging or displays for Ultra Batteries in the United

States and on Duracell's website. Furthermore, P&G and Gillette admitted that the present litigation was a material factor in the decision to cease packaging, marketing, selling and distributing the Ultra Batteries in the United States with the statement "Our Longest Lasting" on the package and store displays. Jarrett Decl. ¶ 4. Although this relief is significant, Plaintiffs have not calculated or included the monetary value of the injunctive relief in the total benefit to the Class for purposes of this motion.

The Settlement, which was reached after extensive arm's-length negotiations among counsel with the duty of vigorously representing their clients, is more than fair and reasonable. The claims in this case were complex and fraught with difficult issues, and the recovery for the Class is a good result by any standard. Specifically, plaintiffs faced significant risks in (1) not obtaining class certification, based on Defendants' contention that the challenged representation varied from pack-to-pack; and (2) not being able to prove at trial that the Ultra batteries did not, in fact, last longer, based on a dispute between the parties as to how to measure and evaluate battery life; and (3) not being able to prove that damages were equal to the full-price difference between Ultra and CopperTop batteries, because some Ultra batteries also included an additional PowerCheck feature. For a more detailed discussion of each of these issues, see Defendants' Response to Objections to Final Approval of Class Settlement at 4-6. While Plaintiffs dispute the merits of Defendants' arguments, it is clear that the case against Defendants was far from a "sure thing," and there would have been a long, complex, and expensive battle over these issues.

It also must be recognized that even a victory in the District Court is no guarantee of ultimate success. Assuming that plaintiffs had prevailed at class certification and won every issue at trial, and obtained judgments that exceed the benefits provided by the proposed Settlement, Defendants' inevitable appeals could have seriously and adversely affected the scope of the

recovery, if not wiped it out altogether. *See, e.g., Berkey Photo, Inc. v. Eastman Kodak, Inc.* 603 F.2d 263 (2d Cir. 1979) (reversing multi-million dollar judgment after a lengthy trial); *Transworld Airlines, Inc. v. Hughes,* 312 F. Supp. 478 (S.D.N.Y. 1970) (plaintiffs' judgment overturned after years of litigation and appeals).

Following this Court's preliminary approval of the settlement, the Claims Administrator disseminated notice to the Class and opened the Claims Period. Class Members submitted 55,346 claims, representing 114,950 packages of batteries. Declaration of Deborah McComb Re Settlement Claims at ¶ 6 ("McComb Decl."). This claim filing rate is above average when compared to class settlements in other recent consumer class-action cases. McComb Decl. at ¶ 6.

Under the circumstances, and for the reasons set forth in greater detail below, this Court should grant final approval of the proposed Settlement.

III. THE SETTLEMENT SATISFIES THE APPLICABLE LEGAL STANDARDS FOR FINAL APPROVAL

"Compromises of disputed claims are favored by the Courts." *Williams v. First Nat'l Bank,* 216 U.S. 582, 585 (1910). This policy applies with particular force to class action suits, the complexity and expense of which impose special burdens borne by the judicial system as well as the litigants. *E.g., In re U.S. Oil and Gas Litig.,* 967 F.2d 489, 493 (l1th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits."); *Cotton v. Hinton,* 559 F.2d 1326, 1331 (5th Cir. 1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement.").

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of any class action settlement. This requirement, manifested in the substantive and procedural aspects of Rule 23, is designed to afford protection to absent class members "whose interests may be

compromised in the settlement process." *Pettway v. American Cast Iron Pipe Co.,* 576 F.2d 1157, 1169 (5th Cir.1978). "In determining whether to approve a proposed settlement, the cardinal rule is that the District Court must find that the settlement is fair, adequate and reasonable and not the product of collusion between the parties." *Cotton,* 559 F.2d at 1330. In reaching this determination, the "inquiry should focus upon the terms of the settlement," together with "an analysis of the facts and the law relevant to the proposed compromise." *Id.* at 1330. The settlement should be compared "with the likely rewards the class would have received following a successful trial of the case," subject to the following qualifications. *Id.*

First, courts have continuously stressed that it should not "be forgotten that compromise is the essence of Settlement." *Cotton*, 559 F.2d at 1330. As a result, in evaluating the terms of settlement in relation to the likely benefits of a successful trial, "the trial judge ought not try the case in the settlement hearings," nor should the court "make a proponent of a proposed settlement justify each term of the settlement against a hypothetical or speculative measure of what concessions might have been gained." *Id.* To the contrary, "the court must be mindful that inherent in compromise is a yielding of absolutes and an abandonment of highest hopes." *Ruiz v. McKaskle, 724* F.2d 1149 (5th Cir. 1984) (citing *Cotton,* 559 F.2d at 1330).

Secondly, courts have also consistently stressed that in performing the balancing test necessary to weigh the benefits of the settlement against the risk of continued litigation, the District Court "is entitled to rely upon the judgment of experienced counsel for the parties." *Cotton,* 559 F.2d at 1330: *Behrens v. Wometco, Enter., Inc.,* 118 F.R.D. 534, 538 (S.D. Fla. 1988). In fact, a review of pertinent decisions in this area leads to the conclusion that "[c]ourts have consistently refused to substitute their business judgment for that of counsel, absent

evidence of fraud or overreaching." *In re King Resources Co. Sec. Litig.,* 420 F. Supp. 610, 625 (D. Colo. 1976).

Thirdly, courts have also stressed that "litigants should be encouraged to determine their respective rights between themselves" and that there is an "overriding public interest in favor of settlement." *Cotton, 559* F.2d at 1331. This principle is particularly compelling in class actions, which "have a well deserved reputation as being most complex." *Id.* As the Eleventh Circuit has emphasized, "Public policy strongly favors the pretrial settlement of class action lawsuits .... complex litigation - like the instant case - can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive." *In re U.S. Oil and Gas,* 967 F.2d at 493; *see also United States v. City of Miami,* 614 F.2d 1322 (5th Cir. 1980) (compromises are highly favored).

Finally, in addition to examining the merits of the proposed settlement and ascertaining the views of counsel, the court should also take into account practical considerations such as the complexity of the case and the expense and likely duration of the litigation. *Susquehanna Corp. v. Korholz,* 84 F.R.D. 315 (E.D. Ill. 1979). One of those practical considerations is the vagaries of litigation and the benefits of an immediate recovery as compared "to the mere possibility of relief in the future, after protracted and expensive litigation." *In re King Resources,* 420 F. Supp. at 625.

Guided by these overriding principles, the Eleventh Circuit has outlined several factors which may be used to determine whether a proposed class action settlement is fair, adequate, and reasonable. *See Bennett v. Behring Corp.,* 737 F.2d 982 (11th Cir. 1984). These factors are: (a) the likelihood of success at trial; (b) the range of possible recovery; (c) the point at or below the range of possible recovery at which a settlement is fair, adequate, and reasonable; (d) the

complexity, expense, and duration of the litigation; (e) the substance and amount of opposition to the settlement; and (f) the stage of proceedings at which the settlement is achieved. *Id.* at 987. A review of these standards, guided by the principles described above, fully supports the conclusion that the Settlement should be approved.

A. Plaintiff's Likelihood of Success

Plaintiff believes he was likely to succeed at trial. Plaintiff's tenacious pursuit of discovery, aggressive motion practice, and dogged prosecution of the Motion for Class Certification evidence this belief. The Court's analysis of this factor, however, must be tempered by Defendants' equally firm belief that *they* ultimately would prevail, if not at trial, then on appeal. Defendants expressly deny liability in the Settlement documents and asserted substantial defenses, both procedural and substantive. Indeed, if Plaintiff had failed to obtain class certification, the Class Members' ability to recover anything would have been eviscerated. This fact, considered along with the ongoing risk of a reversal of a favorable judgment on appeal, argues in favor of approving the Settlement.

In any event, the Court should not resolve the parties' disagreement on the merits by issuing an advisory opinion about Plaintiff's likely success, nor is a specific finding regarding Plaintiff's likelihood of success necessary or appropriate when evaluating the fairness of the Settlement.

> As settlements are constructed upon compromise, the merits of the parties' claims and defenses are deliberately left undecided. Judicial evaluation of a proposed settlement of a class action thus involves a limited inquiry into whether the possible rewards of continued litigation with its risks and costs are outweighed by the benefits of the settlement.

Ressler v. Jacobson, 822 F. Supp. 1551, 1552-53 (M.D. Fla. 1992); *see also Strube v. American Equity Life Ins. Co.*, 226 F.R.D. 688, 687-98 (M.D. Fla. 2005) ("[T]he Court can limit its inquiry to determining whether the possible rewards of continued litigation with its risks and costs are

outweighed by the benefits of the settlement'"). Such a "limited inquiry" clearly favors approval of this Settlement, given the substantial benefits obtained.

B. The Amount of the Settlement is Fair, When Compared With the Range of Possible Recovery

The determination of a "reasonable" settlement is not susceptible to a simple mathematical equation yielding a particular sum. Rather, "there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir.), *cert. denied*, 409 U.S. 1039 (1972). Or, as Judge King put it, "a just result is often no more than an arbitrary point between competing notions of reasonableness." *Behrens v. Wometco*, 118 F.R.D. at 538 (citation omitted). As set forth above, in this Settlement, each Class Member is provided the right to recover nearly as much as, if not all of, the damages he or she allegedly sustained and can do so without further litigation or delay. Defendants also agreed to make certain in-kind payments of $6 million and to prospective remedial and injunctive relief.

C. The Complexity and Stage of the Litigation Support Approval

Consideration of the complexity and the stage of the litigation also support approval of the Settlement as fair, reasonable, and adequate. Due to the complex nature of this case, any future proceedings would have been costly and time consuming. Such costs would have likely reduced any ultimate recovery obtained on behalf of the Class. Avoidance of such costs is a clear benefit to the Class. Further, if the Settlement were not approved, future proceedings would have included not only trial but appeals. The Settlement, in contrast, provides for definite, immediate benefits without waiting additional years. This is a further benefit to the Class. *See, e.g., In re Warner Communications Sec. Litig., 618* F. Supp. 735, 745 (S.D.N.Y. 1985), *aff'd,* 798 F.2d 35 (2d Cir. 1986).

The stage of the proceedings also supports the Settlement because extensive discovery, briefing, and argument of class issues put Class Counsel in a position to properly analyze the benefits of the Settlement compared to the risk of proceeding through trial and inevitable appeals in an effort to obtain a larger recovery against the Defendants. Given the discovery, briefing, and argument undertaken in the cases, as well as the information that has been reviewed, there can be no question about Class Counsel's ability to objectively analyze the Settlement. *In re Warner Communications*, 618 F. Supp. at 740. Based on that thorough investigation and research, Class Counsel determined that the Settlement is fair, reasonable, and in the best interests of the Class.

D. The Reaction of the Class Supports Approval

The reaction of the Class also favors approval. Detailed notices were issued in accordance with the Agreement and the Court's Order of preliminary approval. Class Members were required to object to the Settlement by February 28, 2014. In total, only *six Class Members objected and only twelve requested exclusion* during the opt-out period. That only 0.00008% of more than 7.2 million people objected to the Settlement—and only 0.0002% of the Class requested exclusion—weighs heavily in favor of the fairness, reasonableness, and adequacy of the Settlement. The dearth of objections weighs in favor of the Settlement. *Maher v. Zapata Corp.,* 714 F.2d 436, 456 n.3 5 (5th Cir. 1983); *In re Warner Communications,* 618 F. Supp. at 746; *Ressler v. Jacobson,* 822 F. Supp. 1551, 1556 (M.D. Fla. 1992).

Additionally, the claim filing rate is above average when compared to class settlements in other recent similar consumer class-action cases. McComb Decl. at ¶ 6. Based on a recent study of consumer class-action settlements, the median claims rate in similar consumer cases where only media and not direct notice is possible is 0.023%. McComb Decl. at ¶ 5. The claims rate in this case, 0.76%, is therefore substantially above average and further shows the positive reaction of Class Members to the Settlement benefits. McComb Decl. at ¶ 6.

Plaintiff has achieved a hard-fought victory for the Class. The recovery of a significant portion (if not all) of the Class' premiums paid for the Ultra batteries (plus the in-kind payments and injunctive relief) has been achieved despite strenuous opposition. This Settlement falls well within the range of reasonableness under the criteria set forth by the Eleventh Circuit in *Bennett* and should be approved.

IV. THE REQUESTED ATTORNEY'S FEE AND EXPENSE AMOUNT SATISFIES APPLICABLE LEGAL STANDARDS AND IS FAIR AND REASONABLE

Class Counsel request approval of the separately negotiated attorneys' fee and expense amount of $5,680,000.[5] Class Counsel's expenses total $272,275.60, and thus, the attorneys' fee is $5,407,724.40. *See* Lowe Decl. at ¶ 10; Gale Decl. at ¶ 8; Schubert Declaration at ¶ 22. Compared to the total common fund and financial benefit created for the Class by the Settlement, the attorneys' fee is less than 10.9% of the estimated common fund of $49.94 million. This is well below the 25-30% "benchmark" range of percentages recognized as appropriate by the Eleventh Circuit under *Waters v. Int,'l Precious Metals Corp.,* 190 F.3d 1291 (11th Cir. 1999) and *Camden I Condominium Ass'n v. Dunkle,* 946 F.2d 768, 974 (1lth Cir. 1991), as well as that awarded by District Courts in this Circuit and elsewhere.

A. Counsel Who Create a Common Fund Are Entitled to A Percentage of the Fund

The Supreme Court has recognized that when attorneys create a common fund for the benefit of a class, "a reasonable fee is based on the percentage of the fund bestowed on the class." *Blum v. Stenson,* 465 U.S. 886, 900 n. 16 (1984); *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980) (Since the 1880s, "this Court has recognized consistently that a litigant or

[5] Settlement of disputes, including settlement of attorneys' fees issues, should be encouraged. See *Malchman v. Davis*, 761 F.2d 893 (2d Cir. 1985), *abrogated on other grounds*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

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"). Awards of attorneys' fees from a common fund, such as the fund created here, serve the dual purpose of encouraging redress of damages caused to an entire class, and discouraging future similar misconduct:

> [C]ourts … have acknowledged the economic reality that in order to encourage 'private attorney general' class actions brought to enforce the securities laws on behalf of persons with small individual losses, a financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid.

Mashburn v. Nat 'l Healthcare, Inc., 684 F. Supp. 679, 687 (M.D. Ala. 1988). Consumer protection statutes expressly recognize these policy interests, including the Florida Deceptive and Unfair Trade Practices Act. *See Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc*., 693 So. 2d 602, 606 (Fla. 2nd DCA 1997) ("[B]y promulgating the FDUTPA the Florida legislature has clearly intended as a matter of public policy … to create a simplified statutory cause of action which bestows additional substantive remedies on the citizens of this state to recover economic damages related solely to a product or service purchased in a consumer transaction infected with unfair or deceptive trade practices or acts."). *See also Dolgow v. Anderson,* 43 F.R.D. 472, 494 (E.D.N.Y. 1968) ("In some areas of the law society is dependent upon the initiative of lawyers for the assertion of rights and the maintenance of desired standards of conduct.") (citations omitted).

Plaintiff knows of no individual actions that were brought to challenge Defendants' conduct in selling Ultra batteries. Plaintiffs and Class Counsel in each case have furthered important public policy interests through the two class actions.

B. The Eleventh Circuit Employs The Percentage Of The Fund Approach

Reflecting the overwhelming national trend toward the percentage-of-the-fund method, the Eleventh Circuit has held that attorneys' fees in common fund cases such as this should be based on a reasonable percentage of the fund made available to the class. Under Circuit precedent, counsel may request attorneys' fees based upon a percentage of the common fund they created for the benefit of the class:

> After reviewing *Blum,* the [1985 Third Circuit] Task Force Report, and the foregoing cases from other circuits, we believe that the percentage of the fund approach is the better reasoned in a common fund case. 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.

Camden I, 946 F.2d at 774-75. The *Camden I* court pointed out that "[t]he majority of common fund fee awards fall between 20% to 30% of the fund," while 25% of the fund is viewed as a "benchmark percentage fee award." *Id.* (Noting that 50% generally represents an upper limit, "although even larger percentages have been awarded").

The court in *Waters* went further, concluding that 25 to 30% is the "benchmark range" for common fund fee awards in this Circuit. 190 F.3d at 1294-95 (affirming fee award of one-third of $40 million common fund). In calculating the appropriate percentage, pertinent factors include the time required to reach the settlement, whether there are a substantial number of objections by class members to the settlement terms or the fees requested, the monetary and non-monetary benefits conferred on the class, and the economics involved in prosecuting the case. *Camden I,* 946 F.2d at 774-75. There also usually will be additional factors unique to the case, as there are here.[6] *Id.*

[6] Although the *Camden I* court declined to follow the "lodestar" approach in common fund cases, certain time and hourly fee-related factors remain pertinent to the reasonableness of the percentage award, including "the time required to reach a settlement" and factors used in statutory fee-shifting cases under *Johnson, supra* (where the

The *Camden I* court held that "there is no hard and fast rule mandating a certain percentage of a common fund which may reasonably be awarded a fee because the amount of any fee must be determined upon the facts of each case." 946 F.2d at 774-75. A review of Class Counsel's efforts herein demonstrates that they satisfy the criteria of *Camden I* and that the particular circumstances more than merit the requested fee.

As previously noted, attorneys who create a common fund or benefit for a group of persons are entitled to have their fees and costs based on the common benefit achieved. *Boeing Co.*, 444 U.S. at 478. Moreover, this method of awarding attorneys fees is utilized regardless of whether each class member redeems the benefits made available to class members or whether the benefits revert to the defendant. *See Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423, 200 (2d Cir. 2007) (holding that in determining counsel fees, trial court erred in calculating percentage of the fund on the basis of claims made against the fund rather than on the entire fund created by efforts of counsel); *Waters v. Intern. Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999) (upholding an attorney fee award based on the entire settlement fund although a portion reverted to the defendant); *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026 (9th Cir. 1997) (holding that the district court abused its discretion by awarding only one-third of the $10,000 claimed against the common fund rather than one-third of the entire $4.5 million settlement fund in a case where unclaimed funds reverted to the defendant); *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806 (E.D. Wis. 2009) (awarding 33% of the available fund, an award that exceeded the amount actually claimed); *Stahl v. Mastec, Inc*., 2008 WL 2267469, *1 (M.D. Fla. May 20, 2008) ("Notably, the Supreme Court and the Eleventh Circuit have held that it is appropriate that the attorney's fees be awarded on the entire Maximum

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lodestar method is appropriate), which include "the time and labor required" and "the customary fee." *Camden I,* 946 F.2d at 775, 772 and n.3.

Gross Settlement Amount even though amounts to be paid to settlement class members who do not file a claim form will remain the sole and exclusive property of the defendant").

In this and the California case, Class Counsel rendered their services for the benefit of the Class. Those services operated to create a fund available for the benefit of all members of the Settlement Class conservatively estimated at $49.94 million, from which each member of the Class is entitled to his or her refund. Whether a particular Class Member claims the refund to which he or she is entitled is that Class Member's choice, but that choice does not affect the benefit Class Counsel created for the Settlement Class or the proportionate share of fees to which Class Counsel are entitled. *See Boeing Co.,* 444 U.S. at 478. In *Boeing*, the United States Supreme Court affirmed the Court of Appeals' holding that absentee class members had received a benefit within the meaning of the common-fund doctrine and addressed the question of "whether a proportionate share of the fees awarded to lawyers who represented the successful class may be assessed against the unclaimed portion of the fund created by a judgment." *Id*. at 473. It held that the attorney was entitled to a reasonable fee from the fund as a whole:

> The members of the Class, whether or not they assert their rights, are at least the equitable owners of their respective shares in the recovery [and whether they claim the money or not] cannot defeat each class member's equitable obligation to share the expenses of litigation.

Id. at 481-82.

Accordingly, the total monies available to the Class is the proper measure of the common fund created, not the number of claims that may be made against the fund. The only question remaining is what percentage of the common fund is appropriate as a fee award in this case. *Camden I*, 946 F.2d 768, supplies the applicable guidelines for making that determination.

C. The *Camden I* Factors Support Counsel's Requested Fee

It is indisputable that substantial "time and labor was required" to litigate this case for over sixteen months. *Camden I*, 946 F. 2d at 775, 772 n.3 (quoting *Johnson v. Georgia Highway Express. Inc.,* 488 F.2d 714, 718 (5th Cir. 1974)). Class Counsel spent thousands of hours litigating the two cases and negotiating the Settlement. *See* Lowe Decl. at ¶ 4; Gale Decl. at ¶ 6; Schubert Decl. at ¶ 21. It also is beyond dispute that this litigation was complex, involving difficult issues of law and fact. Defendants have denied and continue to deny all allegations of wrongdoing. Defendants have also denied and continue to deny that plaintiffs and the Class suffered any damages. The complexity of this litigation and "novelty and difficulty of the questions involved" highlight the nature and magnitude of the risk assumed by Plaintiffs' counsel in accepting representation on a fully contingent basis. *See Camden I,* 946 F.2d at 772 n. 3; *Walco v. Thenen,* 168 F.R.D. 315, 327 (S.D. Fla. 1996). In this case, Class Counsel's competence and experience in class actions clearly was a significant factor in both: (a) overcoming Defendants' resistance to settlement and (b) obtaining the result achieved for the Class. In assessing the quality of representation by Plaintiffs' counsel, the Court also should consider the quality of the opposition. *E.g., Camden I,* 946 F.2d at 772 n. 3; *Johnson*, 488 F.2d at 718; *Ressler v. Jacobson,* 149 F.R.D. 651 (M.D. Fla. 1992); *Angoff v. Goldfine,* 270 F.2d 185, 192 (1st Cir. 1959). The excellent quality of that opposition (by well-known firms Jones Day and Carlton Fields) is no less apparent.

In determining the appropriate fee, the Court should also consider "the economics involved in prosecuting a class action." *Camden I, 946* F.2d at 775, 77 n. 3 (related *Johnson* factor is "whether the fee is fixed or contingent"). The two actions were prosecuted on a purely contingent basis by Class Counsel who have assumed the risk of no payment for a considerable amount of work for over twenty-two months. The claims in the cases were difficult and the

contingency risk was substantial. Class Counsel expended more than six thousand otherwise billable hours to these cases, worth approximately $3.5 million at their normal hourly rates, and advanced over $270,000 in out of pocket expenses. Lowe Decl. at ¶¶ 4 & 10; Gale Decl. at ¶¶ 6 & 8; Schubert Decl. at ¶¶ 21 & 22.

Although Class Counsel expended a significant number of hours in prosecuting the two cases, it is important to note that courts awarding percentage fees in common fund cases have warned against "focus[ing] too narrowly on the number of hours billed or the hourly rate in contingency fee cases." That is because, as one court recognized, where success is a condition precedent to compensation, "hours of time expended" is a nebulous, highly variable standard. *In re King Resources Sec. Litig.,* 420 F. Supp. 610, 631 (D.Colo.1976) (quoting George D. Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 Harv. L.Rev. 658, 660 (1956)); *see also Shaw v. Toshiba American Information Systems, Inc.,* 91 F. Supp. 2d 942, 964 (E.D. Tex. 2000) ("Few among us would contend that an operation by a gifted surgeon who removes an appendix in fifteen minutes is worth only one sixth of that performed by his marginal colleagues who require an hour and a half for the same operation."). Yet this particular case is one where both the hours spent and the recovery obtained justify the fee requested. The fee requested, $5.41 million, represents a 1.56 multiplier over the usual and ordinary time value of the hours expended by Class Counsel. Such a multiplier is well below those adopted by other Courts as appropriate in awarding Class Counsel fees. *See, e.g., Pinto v. Princess Cruise Lines, Ltd.,* 513 F.Supp.2d 1334, 1343–44 (S.D. Fla. 2007) (a multiplier of three appears to be the average; in many cases, multipliers much higher than three have been approved).

Furthermore, the lodestar approach should not be imposed through the back door via a "cross-check." Lodestar "creates an incentive to keep litigation going in order to maximize the

number of hours included in the court's lodestar calculation." *In re Quantum Health Resources, Inc.,* 962 F.Supp. 1254, 1256 (C.D.Cal.1997). In *Camden I,* the Eleventh Circuit criticized lodestar and the inefficiencies that it creates. 946 F.2d at 773–75. In so doing, the Court "mandate[d] the *exclusive* use of the percentage approach in common fund cases, reasoning that it more closely aligns the interests of client and attorney and more faithfully adheres to market practice." *Id.; see also Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 50 (2d Cir.2000) (emphasis added). Under *Camden I*, courts in this Circuit regularly award fees based on a percentage of the recovery, without discussing lodestar at all. *See, e.g., David v. American Suzuki Motor Corp.,* 2010 WL 1628362 (S.D. Fla. Apr. 15, 2010).[7] "[A] common fund is itself the measure of success and represents the benchmark on which a reasonable fee will be awarded…. In this context, monetary results achieved predominate over all other criteria." *Camden I,* 946 F.2d at 774 (citations and alterations omitted).

The agreed-upon attorneys' fee is less than 10.9% of the $49.94 million in total available benefits provided by the Settlement. Considering "awards in similar cases," there are numerous decisions in the Eleventh Circuit awarding up to (and sometimes in excess of) one-third of the settlement value.[8]

It also is significant that the requested fee and expense amount is substantially less than the standard contingent fee in the marketplace. "The object in awarding a reasonable attorney's

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[7] See also *Stahl v. MasTec, Inc.,* 2008 WL 2267469 (M.D. Fla. May 20, 2008); *Sands Point Partners, L.P. v. Pediatrix Med. Group, Inc.,* 2002 WL 34343944 (S.D. Fla. May 3, 2002); *Fabricant v. Sears Roebuck & Co.,* 2002 WL 34477904 (S.D. Fla. Sept. 18, 2002).

[8] *See, e.g., Waters, supra,* Case No. 90-6863-Civ-Ungaro-Benages (S.D. Fla. 1997) (awarding *33 1/3%* of $40 million fund) (11th Cir. 2000), *aff'd,* 190 F.3d 1291 (11th Cir. 1999); *In re Int'l Recovery Corp. Sec. Litig.,* Case No. 92-1474-Civ-Atkins (S.D. Fla., June 2, 1994) (fee award represented 30% of class benefit); *In re Sound Advice, Inc. Sec. Litig.,* Case No. 92-6457-Civ- Ungaro-Benages (S.D. Fla. March 25, 1994) (awarding 30%); *In re Perfumania, Inc., Sec. Litig.,* Case No. 92-1490-Civ-Marcus (S.D. Fla. Sept. 1993) (awarding 30%); *Tapken v. Brown,* Case No. 90-0691-Civ-Marcus (S.D. Fla. 1995) (awarding 33%); *Kaser v. Swann,* Case No. 90-607-Civ-Orl-3A18 (M.D. Fla. 1993) (awarding 30%); *Ressler,* 149 F.R.D. at 655-56 (awarding *30%); In re Aero Systems, Inc. Sec. Litig.,* Case No. 90-0083-Civ-Paine (S.D. Fla. 1993) (awarding 28%). These cases confirm the fairness and reasonableness of the fee requested here.

fee … is to simulate the market." *In re Continental Illinois Sec. Litig.,* 962 F.2d 566, 572 (7th Cir. 1992). The requested fee is consistent with marketplace practice, where contingent fee arrangements ranging from 30% to 40% are customary. In their concurring opinion in *Blum v. Stenson,* 465 U. S. 886 (1984), Justices Brennan and Marshall observed that "[i]n tort suits, an attorney might receive one-third of whatever amount Plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery." *Id.* at 904; *see Kirchhoff v. Flynn,* 786 F.2d 320, 323, 325 n.5 (7th Cir. 1986) (observing that "40% is the customary fee in tort litigation"); *In re Public Service Co.,* Fed. Sec. L. Rep. (CCH) ¶ 96,988, at 94,291-92 (S.D. Cal. 1992) ("If this were a non-representative litigation, the customary fee arrangement would be contingent on a percentage basis, and in the range of 30% to 40% of the recovery."). If Class Members had retained their own counsel, as Plaintiff did, they would have paid a contingent fee equal to or greater than that requested.[9]

D. The Fee Award Is Also Proper Under a Lodestar Multiplier Analysis

If the Court, however, views the settlement as a set of discrete components (Class Members' claims, injunctive relief, additional charitable benefits, notice and administration, and attorneys' fees and expense) and not a common fund, Class Counsel's proposed fee award is also justified by their substantial lodestar and a multiplier that reflect the significant value made available to the class. Across two separate cases prosecuted by two sets of firms in both Florida and California, Class Counsel expended 6,385.3 billable hours, worth $3,467,516.25 at their normal hourly rates and advanced $272,275.60 in out-of-pocket expenses. Lowe Decl. at ¶¶ 4 &

[9] Class Counsel further request that they be reimbursed for their litigation costs and expenses in the amount of $272,275.60, which are included in the proposed $5.68 million fee and expense award. Under the common fund doctrine, Class Counsel are entitled to reimbursement of all reasonable out-of-pocket expenses incurred in prosecution of the claims in obtaining a settlement. *Harris v. Marhoefer*, 24 F. 3d 16, 19 (9th Cir. 1994); *Vincent v. Hughes Air West*, *Inc*., 557 F. 2d 759, 769 (9th Cir. 1977). The Declarations submitted by Class Counsel establish that all of the expenses were reasonable, necessary, and incurred for the benefit of the Class. Clay Decl. at ¶ 10; Gale Decl. at ¶ 8; Schubert Decl. at ¶ 23.

10; Gale Decl. at ¶¶ 6 & 8; Schubert Decl. at ¶¶ 21-22. Based on Class Counsel's requested fee award of $5.41 million, this represents a multiplier of 1.56, which is entirely consistent with other reasonable multipliers awarded in the Eleventh Circuit.

In the Eleventh Circuit, the average multiplier is approximately three times lodestar. *See Pinto*, 513 F.Supp.2d at 1344 (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.'") (quoting *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 549 (S.D. Fla. 1988)). Here, Class Counsel's proposed lodestar multiplier of 1.56 is substantially less than the 3.0 average for the Eleventh Circuit and in fact falls at the bottom end of the Eleventh Circuit's range for lodestar multipliers in complicated class actions.

In addition, in considering the reasonableness of a lodestar multiplier, courts consider the benefits made available to the class, the quality of class counsel's work, the complexity of the issues, and the contingency of payment. *Holman v. Student Loan Xpress, Inc.*, 778 F.Supp.2d 1306, 1314 (M.D. Fla. 2011). Class Counsel's proposed lodestar multiplier is strongly supported by each of these factors.

First, the Settlement provides not only substantial benefits but, on average, approximately 100% relief to Class Members nationwide. Class Counsel achieved this nationwide result, even though the underlying actions in Florida and California each only sought damages for Florida and California Class Members. Class Members nationwide will all receive the same substantial benefits, even though some Class Members live in states with significantly weaker consumer-protection laws that would make successful prosecution of the claims much more difficult. Schubert Decl. at ¶ 13.

Second, the quality of Class Counsel's work supports the proposed lodestar multiplier. Unlike some cases, this was not a "shotgun" settlement. 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 six months. As discussed *supra*, Class Counsel's prosecution of the case also came against substantial opposition from two well-known and well-regarded defense firms, which vigorously defended their clients.

Third, the complex legal and technical issues involved in the case weigh in favor of the reasonableness of the proposed lodestar multiplier. Not only were there myriad complex legal issues spread across two separate bodies of law in two jurisdictions, as discussed *supra*, there were also numerous complex scientific and technical issues. While the case at heart involved the misrepresentation of Duracell Ultra batteries, Class Counsel devoted significant time to understanding the technical issues that govern battery performance, including battery chemistry, testing methodologies and procedures, and statistical modeling. These technical issues also required the retention of expert consultants. Lowe Decl. at ¶ 6. Schubert Decl. at ¶ 24.

Fourth, both the Florida and California actions were taken and prosecuted on a purely contingent basis. Class Counsel have not been paid for over twenty-two months and have assumed all of the risk of non-payment in the actions. In addition, Class Counsel advanced out-of-pocket expenses of $272,275.60, including the retention of expert technical and economic consultants. The fully contingent nature of Class Counsel's work, therefore, also supports the proposed lodestar multiplier.

In sum, Class Counsel prosecuted two separate actions in Florida and California on behalf of state-only classes in each jurisdiction and successfully returned a settlement that provided, on average, full relief for all Class Members nationwide. This is an exceptional result. Class Counsel's proposed fees, based on lodestar and multiplier, are entirely consistent with—and in fact, significantly lower than—similar settlements in the Eleventh Circuit. Under these circumstances, even if the Court elects to use the lodestar method, Class Counsel's proposed fee award of $5.68 million is reasonable and justified.

V. PAYMENT TO CLASS REPRESENTATIVE POERTNER

Class Counsel also request the Court to award Class Representative Poertner the amount of $1,500 in support of his service, as contemplated by the Agreement. Doc. 113-1 at ¶ 66, p. 29. Class Representative payments "compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Allapattah Services, Inc. v. Exxon Corp.,* 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006). "[T]here is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action." *David v. American Suzuki Motor Corp.,* 2010 WL 1628362, at *6 (S.D. Fla. Apr. 15, 2010). Courts have consistently found service awards to be an efficient and productive way to encourage members of a class to become class representatives. *See, e.g., Ingram v. The Coca–Cola Co.,* 200 F.R.D. 685, 694 (N.D. Ga. 2001) (awarding class representative payments); *Spicer v. Chi. Bd. Options Exchange, Inc.,* 844 F.Supp. 1226, 1267–68 (N.D. Ill. 1993) (collecting cases approving service awards ranging from $5,000 to $100,000, and awarding $10,000 to each named plaintiff).

The factors for determining a class representative payment include: (1) the actions the class representatives took to protect the interests of the class; (2) the degree to which the class benefited from those actions; and (3) the amount of time and effort the class representatives

expended in pursuing the litigation. *See, e.g., Cook v. Niedert,* 142 F.3d 1004, 1016 (7th Cir. 1998). Here, Poertner participated in drafting the Complaint and amendments, participated in responding to Defendants' pleadings and written discovery, reviewed discovery responses, sat for a seven-hour deposition, and participated in the initial face-to-face mediation. The proposed $1,500 incentive payment to Plaintiff is reasonable and warranted in light of the time and effort he committed to this litigation and the resulting benefits to the Class.

VI. CONCLUSION

The Settlement and the requested Attorneys' Fee and Expense award are therefore fair and reasonable. The *Bennett* factors fully support the Settlement, and the Fee and Expense amount easily satisfies *Camden I,* particularly in light of the complicated nature of the case; the time, effort, and skill required to create the Settlement Fund; the substantial risk assumed by Class Counsel; and the significant results obtained for Class Members. For these reasons, Plaintiff respectfully requests that the Court give final approval to the Settlement and enter Final Judgment and approve the Fee and Expense amount, as well as the service award to Class Representative Poertner.

Respectfully submitted,

/s/ E. Clayton Lowe, Jr.
E. Clayton Lowe, Jr.
Pro Hac Vice admission
The Lowe Law Firm, LLC
301 19th Street North, Ste. 525
Birmingham, Alabama 35203
Telephone: (205) 314-0607
Facsimile: (205) 314-0707
Email: clowe@claylowelaw.com

Joshua R. Gale (FL Bar No. 63283)
Wiggins, Childs, Quinn & Pantazis, LLC
101 N. Woodland Blvd., Ste. 600

DeLand, FL 32720
Telephone: 386-675-6946
Facsimile: 386-675-6947
Email: JGale@WCQP.com

Robert C. Schubert
Pro Hac Vice admission
Noah M. Schubert
Pro Hac Vice admission
Schubert Jonckheer & Kolbe LLP
3 Embarcadero Ctr Ste 1650
San Francisco, CA 94111
Telephone: 415-788-4220
Facscimile: 415-788-0161
Email: rschubert@schubertlawfirm.com
Email: nschubert@schubertlawfirm.com

Peter A. Grammas
Pro Hac Vice admission
The Law Office of Peter A. Grammas
1114 Lake Colony Lane
Vestavia, AL 35242
Telephone: 205-970-9708
E-mail: pete@grammaslaw.com

Class Counsel and Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 22, 2014, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

Christopher Batman
441 Coral Place
Corpus Christi, TX 78411

Sam P. Cannata
30799 Pinetree Rd., #254
Pepper Pike, OH 44124

Wanda J. Cochran
10121 Page Road
Streetsboro, OH 44241

Paul Dorsey
110 Westminster Drive
West Hartford, CT 06107

Wendy L. Young
4430 W. Fairmount Ave.
Lakewood, FL 32801

/s/ Noah M. Schubert
Noah M. Schubert
Pro Hac Vice admission
Schubert Jonckheer & Kolbe LLP
3 Embarcadero Ctr Ste 1650
San Francisco, CA 94111
Telephone: 415-788-4220
Facscimile: 415-788-0161
Email: nschubert@schubertlawfirm.com

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JOSHUA D. POERTNER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO: 6:12-CV-00803-GAP-DAB**
	)	
THE GILLETTE COMPANY and THE PROCTER & GAMBLE COMPANY,	)	
	)	
Defendants.	)	

DECLARATION OF ROBERT C. SCHUBERT IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND AWARD OF ATTORNEYS' FEES

I, **ROBERT C. SCHUBERT**, declare as follows:

1. I am a member of the Bar of the States of California, New York, and Massachusetts, and I am the senior partner in the law firm of Schubert Jonckheer & Kolbe LLP (the "Schubert Firm"), one of the counsel for the Settlement Class in this action. I was admitted *pro hac vice* to appear before this Court.

2. I have personal knowledge of the matters set forth in this Declaration, which is filed in support of the Plaintiff's Motion for Final Approval of Settlement and Award of Attorneys' Fees. The Schubert Firm represents Helen Heindel ("Heindel"), who is the named plaintiff in a substantially similar case involving Duracell Ultra Advanced and Ultra Power batteries currently pending in the U.S. District Court for the Northern District of California. *Heindel v. The Gillette Company*, *et al.*, 12-CV-01778-

EDL (N.D. Cal.) (the "California Action"). Along with counsel in the *Poertner* action, I was one of the primary negotiators of the terms of this Settlement. If called to testify, I could and would competently testify to the following facts.

3. Before the original Complaint was filed in the California Action on April 10, 2012, the Schubert Firm conducted an extensive investigation into the underlying factual and legal bases of the Complaint and retained an expert battery consultant to test and evaluate the advertised claims that Defendants' Duracell Ultra batteries lasted longer than CopperTop batteries. An Amended Complaint was filed in the California Action on May 31, 2012, which Defendants answered on June 15, 2012.[1]

4. Beginning in July 2012 in the California Action, my firm began propounding multiple sets of written discovery on Defendants, including requests for production of documents, interrogatories, and requests for admission. In response, Defendants produced over 250,000 pages of documents during the course of the action, which the Schubert Firm carefully reviewed and analyzed. Defendants' counsel also served several sets of written discovery on the plaintiff in the California Action beginning in July 2012, to which the plaintiff served timely responses and produced documents.

5. In October 2012, my firm deposed a key employee of Defendants who provided information relevant to facts at issue in this case, including key marketing and sales information, and in April 2013 deposed Defendants' rebuttal expert witness, Quinn C. Horn, Ph.D., on the consumer use of batteries and battery testing methodology. This

[1] Heindel was substituted in as Plaintiff in the California Action by order of the Northern District of California Court in October 2013.

information played an important role in showing the appropriateness of class certification in this case. It also allowed the Schubert Firm to assess the strengths and weaknesses of the case. The original plaintiff in the California Action, also represented by the Schubert Firm, sat for a seven-hour deposition in November 2012, and plaintiff's battery performance and testing expert, Walter van Schalkwijk, Ph.D., was deposed in March 2013. Plaintiffs' counsel also oversaw Defendants' inspection of Dr. van Schalkwijk's Manchester, New Hampshire laboratory in March 2013. If this litigation had continued to trial, it would have involved significant additional discovery and depositions of additional fact witnesses and experts.

6. The Schubert firm drafted the various pleadings filed on the California plaintiff's behalf, including a motion for class certification in May 2013; briefed and researched key issues, including the applicable standards for violations of California's consumer-protection statutes, the industry standards for battery evaluation and testing, and the calculation of Class damages; and represented the interests of Plaintiff and the putative class in motion practice and in contested negotiations. While the case at heart involved the alleged misrepresentation of Duracell Ultra batteries, attorneys within my firm devoted significant time to understanding the technical issues that govern battery performance, including battery chemistry, testing methodologies and procedures, and statistical modeling. These technical issues also necessitated the retention of expert consultants: Dr. van Schalkwijk, an expert regarding battery performance and testing, and Robert H. Wallace, a Certified Public Accountant retained to opine on restitution and

damages issues. These expert consultants were retained at substantial expense to establish and support the California plaintiff's claims against Defendants.

7. After my firm filed a class certification motion in the California Action in May 2013, the Parties' counsel discussed and agreed to participate in mediation to attempt to resolve this case. To that end, by Stipulation and Order in May 2013, the plaintiff and Defendants agreed to continue the then-scheduled July 2013 class certification hearing date in the California Action until November 2013. The Schubert Firm joined with plaintiff's counsel in the *Poertner* Action in an effort to negotiate a nationwide resolution of both actions with Defendants. The Parties in both actions also agreed to utilize Rodney A. Max as mediator.

8. Negotiations regarding a potential settlement were thorough, protracted, and exhaustive. In advance of formal mediations, the Parties frequently consulted with each other on a broad framework for settlement, including numerous emails and multiple conference calls between the Parties. The Parties also exchanged preliminary settlement proposals over the summer of 2013.

9. For the more than four months that the Parties actively worked to resolve the two actions, the Parties worked with mediator Rodney A. Max, one of several possible mediators proposed by the Court in the *Poertner* Action. Mr. Max was selected because of his substantial experience and success in mediating consumer class actions and complex commercial litigation cases. On August 1st and 12th, 2013, counsel for the Parties held face-to-face mediation sessions with Mr. Max at his offices in Miami, Florida. The first session exceeded ten hours. The second session exceeded eight hours.

Each face-to-face session produced some progress. However, no settlement was reached at the time. Nonetheless, Mr. Max was persistent in his efforts to continue discussions among the parties and continued to engage in telephonic mediations and "shuttle diplomacy" between the Parties throughout the negotiation process.

10. Counsel for the Parties had numerous discussions, sometimes on a daily basis, throughout the negotiation process. After the two in-person mediation sessions, telephone calls among counsel, mediated telephone negotiation sessions, and numerous emails, a Memorandum of Understanding was executed on September 13, 2013. Thereafter, the final Class Action Settlement Agreement ("Settlement Agreement" or "Settlement") was prepared and signed. The Settlement Agreement was filed with the Court on October 25, 2013.

11. The plaintiff filed the California Action to stop the alleged abuses in the way Duracell Ultra Advanced and Ultra Power alkaline batteries were being marketed to consumers. Specifically, plaintiff alleged that Defendants misrepresented Ultra batteries as "more powerful" and "longer lasting" than Duracell CopperTop batteries, when in fact there was no material difference between Ultra and CopperTop batteries. Plaintiff, therefore, alleged that Ultra batteries were sold at unjustified premium prices. In particular, the Complaint in the California Action asserted claims based upon the advertisements that (i) Duracell Ultra Advanced batteries last "Up to 30% Longer in Toys*" which the Complaint alleges misleads consumers into believing that that Ultra batteries last materially longer than CopperTop batteries, and (ii) Duracell Ultra Power batteries are Duracell's "Longest Lasting" alkaline batteries. The terms of the Settlement

are tailored to redress these allegations and claims. The relief is within the upper range of what plaintiff could have obtained if successful at trial, and in fact, substantially exceeds the average amount that a typical class member was damaged during the Class Period. Additionally, the relief is significantly more valuable to Class Members because it will be received sooner than could have been accomplished without an early settlement and without the additional expense of extensive further litigation over complex and contested issues.

12. Absent a settlement, Settlement Class Members faced substantial risks of delay before any recovery could be achieved, as well as the risk of no recovery at all. Throughout the litigation, Defendants have vigorously denied the claims and allegations in the California Action and in this case, and even now continue to deny any liability or wrongdoing. Furthermore, if plaintiffs were unable to obtain class certification, the Class Members' ability to recover anything would be eviscerated. Defendants have put on a vigorous defense in both cases and undoubtedly would continue to do so through trials and appeals, if necessary. Even under the best-case analysis of the Schubert firm, had the case been tried, there would have been long delays before a single Settlement Class Member would have received any recovery. This is a case in which Settlement Class Members are best served by immediate relief.

13. Under the Settlement, Settlement Class Members have the right to recover approximately 100% of their damages and can obtain this valuable relief on an expedited basis and without risks and delays of ongoing litigation. Class Counsel achieved this nationwide result, even though the underlying actions in Florida and California each only

sought damages for Florida and California Class Members. Class Members nationwide will all receive the same substantial benefits, even though some Class Members live in states with significantly weaker consumer-protection laws that would make successful prosecution of the claims much more difficult.

14. In addition, the class notice program fully advised Settlement Class Members regarding all their alternatives, so that they could make an informed choice either to accept the Settlement or to opt out to pursue their own claims.

15. On November 5, 2013, this Court certified a plaintiff class for settlement purposes only in accordance with the terms of the Settlement Agreement. Dkt. No. 118. This Court found, that for settlement purposes only and conditioned upon a Final Order and Judgment and the occurrence of the Effective Date, the prerequisites for a class action under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure were satisfied.

16. As an additional term of the Settlement Agreement, Plaintiffs' counsel in this case and the California Action have requested that Defendants pay attorneys' fees and expenses of $5,680,000.00 and that Plaintiff Poertner receive a Named Plaintiff Payment of $1,500.00. The Named Plaintiff in the California Action, Ms. Heindel, has not sought and will not receive any Named Plaintiff Payment as part of the Settlement. Plaintiff's counsel in this case and the California Action have, to date, collectively incurred thousands of hours of attorney time and substantial expenses and costs. Payment of the requested fees and expenses will not reduce the recovery to Settlement Class Members.

17. After negotiations on all substantive terms of the Settlement were completed, the parties began separate negotiations regarding attorneys' fees and expenses. Mr. Max proposed a fee and expense number to the Parties, which in his opinion as a mediator represented a fair and reasonable award. However, the fee and expense number ultimately agreed to by the Parties is substantially less than the number proposed by Mr. Max. Attorneys' fees, expenses, and Named Plaintiff Payment negotiations all took place with the direct involvement of Mr. Max to ensure there was no potential conflict between the negotiations over the principal terms of the Settlement and any fee or incentive award negotiations. The attorneys' fees and expenses were agreed to only *after* the material terms of the Settlement had been agreed to in principle and reflect the work of Plaintiff's counsel in this and the California Action to prosecute and successfully resolve both cases.

18. I believe that the requested fee and expense amount is reasonable when compared to the overall compensation made available to the Settlement Class, valued at approximately $49.87 million—computed by multiplying the 7.26 million Class Members by the expected average Settlement payment of $6.00, plus the $5.68 million in attorneys' fees and expenses and $632,095 in notice and administration costs. Thus, the fee and expense request is approximately 11.4% of the overall monetary value made available for the Class, without inclusion of any value for the significant injunctive relief obtained or the $6 million in-kind contribution of Duracell products that Defendants agreed to make under the terms of the Settlement. When Class Counsel's combined expenses of $272,276.60 are subtracted from the total fee and expense award requested,

Class Counsel's fee represents just 10.85% of the overall compensation made available to the Settlement Class.

19. My firm maintains contemporaneous billing records for all of our cases. Based upon my review of my firm's timekeeping records, the Schubert Firm has expended a total of 2,386.3 hours to date prosecuting this litigation, performing the tasks described above. Multiplied by each attorney's current hourly billing rates, the Schubert Firm has accrued a total lodestar of $1,211,055.00, representing an average hourly rate of $507.50. All of the time described above was reasonably and necessarily expended, in my opinion, and does not include anticipated future time in preparation for and participation at the hearing on Plaintiff's Motion for Final Approval of the Settlement.

20. The prevailing market rates for attorneys' fees in the forum community for the Northern District of California, where the California Action was filed and litigated for over two years, are between $350 and $1000 per hour for attorneys of comparable skill and experience to those as the Schubert Firm. *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2013 WL 1365900, at *9 (N.D. Cal. Apr. 3, 2013) (awarding attorneys' fees based on individual billing rates between $350 and $1000 per hour in complex class-action settlement). The rates for attorneys at the Schubert Firm, which range from $400 to $850 per hour based on experience and average $507.50 per hour in this action, therefore fall within the range of reasonable market rates in the forum community.

21. Detailed below are the total hours that each attorney and paralegal at the Schubert Firm expended on this case, along with each attorney and paralegal's current hourly rate, and each attorney and paralegal's total lodestar:

Attorney	**Hours**	**Hourly Rate**	**Lodestar**
Robert C. Schubert	223.9	$850.00	$190,315.00
Willem Jonckheer	140.7	$700.00	$98,490.00
Miranda Kolbe	412.3	$700.00	$288,610.00
Dustin Schubert	73.4	$500.00	$36,700.00
Jason Pikler	37.4	$450.00	$16,830.00
Noah Schubert	1401.3	$400.00	$560,520.00
Jason Dang (paralegal)	6.5	$220.00	$1,430.00
Jackie Zaneri (paralegal)	88.5	$200.00	$17,700.00
Leah McGrath (paralegal)	2.3	$200.00	$460.00
Total Lodestar	**2386.3**	**$507.50**	**$1,211,055.00**

22. Detailed below are the expenses that my firm has expended that are unreimbursed as of this date:

Unreimbursed Expenses	**Total**
Courier and FedEx Charges	$381.31
Court Costs: Electronic Filing Fees, Court Clerk Charges, *Pro Hac Vice* Application Fees	$350.00
Facsimile and Postage	$101.57
Westlaw Legal Research and PACER Access	$14,124.04
Long Distance Telephone and Teleconference Services	$368.47
Transcripts	$8,464.13
Photocopies	$1,219.99
Mediation Fees	$6,540.63
Travel and Meals	$22,913.52
Expert Consultants	$58,084.41
Duracell Batteries for Testing	$1,274.73
Total Expenses	**$113,822.80**

The expenses attributable to this case are reflected in the books and records of my firm. These books and records are prepared from expense vouchers, check records, and other documents and are an accurate record of the expenses incurred by my firm. All of those expenses were reasonably and necessarily incurred, in my opinion.[2]

23. My firm's compensation for services rendered in this action was wholly contingent on the success of the action and was incurred at risk of total non-payment. My firm has not been paid for over twenty-three months.

24. The prosecution of this action not only involved complex legal issues, including those related to the class certification determination, but also involved mastering complex scientific and technical issues. While the case at heart involved the misrepresentation of Duracell Ultra batteries, its prosecution required attorneys within my firm to devote significant time to understanding the highly technical issues that govern battery performance, including battery chemistry, testing methodologies and procedures, and statistical modeling. The involvement of these scientific and technical issues in the case also necessitated the retention of expert consultants. The fees and unreimbursed expenses described herein have not been paid from any source and have not been the subject of any prior request or prior award in any litigation or other proceeding.

[2] The expense figures detailed above do not include additional expenses the Schubert Firm expects to incur in connection with the upcoming final approval hearing, including travel and lodging expenses.

25. I believe the Settlement and requested attorneys' fees, expenses, and incentive award are fair, adequate, and reasonable as required by Fed. R. Civ. P. 23(e)(2) and should be granted final approval by the Court.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 22nd day of April, 2014.

/s/ Robert C. Schubert
Robert C. Schubert
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JOSHUA D. POERTNER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO: 6:12-CV-00803-GAP-DAB**
	)	
THE GILLETTE COMPANY and THE PROCTER & GAMBLE COMPANY,	)	
	)	
Defendants.	)	

DECLARATION OF E. CLAYTON LOWE, JR. IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND AWARD OF ATTORNEY'S FEES AND INCORPORATED MEMORANDUM

I, **E. CLAYTON LOWE, JR**., declare as follows:

1. I am an attorney admitted to practice in Alabama and one of the attorneys of record for Plaintiff and the proposed Settlement Class. I was admitted *pro hac vice* to appear before this Court.

2. I have personal knowledge of the matters set forth in this Declaration, which is filed in support of the Plaintiff's Motion for Final Approval of Settlement and Award of Attorney's Fees and Incorporated memorandum. Along with my co-counsel in this case, and counsel from *Heindel v. The Gillette Company*, et. al, CV-12-01778 EDL (N.D. Cal) (the "California Action"), I was one of the primary negotiators of the terms of this Settlement. If called to testify, I could and would competently testify to the following facts. I also

reference and submit, as if fully set forth herein, my prior Declaration (Doc. 114-1) submitted in support of Plaintiff's Unopposed Motion for Entry of Order Preliminarily Approving Class Action Settlement Agreement.

3. The efforts of class counsel in this case created a settlement with a minimum monetary value of $49.87 million and available monetary benefits to the class of $43.56 million. In addition, we obtained prospective remedial injunctive relief for class members, which enforce applicable consumer laws. The Settlement provides not only substantial benefits but, on average, approximately 100% relief to Class Members nationwide. Class Counsel achieved this nationwide result, even though the underlying actions in Florida and California each only sought damages for Florida and California Class Members. Class Members nationwide will all receive the same substantial benefits, even though some Class Members live in states with significantly weaker consumer-protection laws that would make successful prosecution of the claims much more difficult.

4. Since inception of this case, my firm has devoted 2,827.50 hours of attorney time and advanced expenses prosecuting this matter, without repayment. I personally incurred 1,745 hours prosecuting this case to date and my partner in this case, Pete Grammas, incurred 1,081.50 hours. Our hourly rates, respectively, for this matter are $650 and $600 per hour. These rates are based upon the rates noted in the Declaration of local attorney Karen Dyer filed herewith. Applying these rates to the hours incurred, my firm's lodestar is $1,783,605.

5. Our co-counsel in this case, Wiggins, Childs, Quinn & Pantazis, LLC, also incurred significant time and expenses. That firm is submitting a Declaration as to its time and expenses. Counsel in the California action are also submitting a Declaration regarding their time and expenses. Detailed time records are available should the Court deem them necessary for its fee determination.

6. All of these attorney hours were reasonably expended in investigating and prosecuting this class action, including, but not limited to, performing the following services: interviewing potential witnesses; researching potential causes of action and other complex legal issues involved in this action; drafting pleadings and briefs; preparing and reviewing class discovery against defendants and reviewing defendants' responses to such discovery; obtaining documents from defendants; reviewing, organizing, and analyzing all documents obtained through such discovery (over 250,000 pages of material); meeting with and teleconferencing with co-counsel for plaintiff; meeting and teleconferencing with defendants' counsel regarding pleadings, scheduling, and discovery; researching and reviewing responses and correspondence in regard to defendants' various defenses; and attending depositions and court hearings. Not only were there myriad complex legal issues spread across two separate bodies of law in two jurisdictions, there were also numerous complex scientific and technical issues. While the case at heart involved the misrepresentation of Duracell Ultra batteries, Class Counsel devoted significant time to understanding the technical issues that govern battery performance, including battery chemistry, testing methodologies and procedures, and statistical modeling. These technical issues also required the retention of expert consultants.

7. The complexity of the issues in this litigation required attorneys with a high degree of skill and experience. The attorneys at my firm and I have extensive experience in prosecuting class actions and other complex litigation in both state and federal courts and involving both statewide and multi-state class actions. Moreover, highly experienced and reputable law firms in this case represented the defendants.

8. Plaintiff's counsel accepted the representation of the plaintiff and the class in this litigation on a purely contingent basis and advanced substantial out-of-pocket expenses noted below and in co-class counsel's declarations submitted herewith. Counsel knew from the outset that they might expend substantial amounts of their time and out of pocket expenses in pursuing this litigation on behalf of the plaintiffs and the class and, if the litigation were ultimately unsuccessful, they might receive no compensation whatsoever. The plaintiff's Motion for Final Approval of Settlement and Award of Attorney's Fees and Incorporated Memorandum sets forth and describes the substantial risks faced by plaintiff in this litigation and the California action. The same difficulties also constituted risks that plaintiff's counsel might not receive any compensation for their efforts if the litigation were ultimately unsuccessful. There are numerous contingency fee cases in which plaintiffs' counsel have failed to receive any compensation or recover any expenses. The loss suffered by counsel in such cases is relevant to the determination of fees in this case because it provides firms that consider taking these cases on a contingent basis some assurance that an overall fair return can be realized. Given the complexity of this litigation and the substantial recovery for the class, Class Counsels' requested fee is below the range of awards typically

granted in similar cases and recoveries. The fully contingent nature of counsel's work also supports the proposed loadstar multiplier.

9. As discussed in detail in Plaintiff's Motion for Final Approval of Settlement and Award of Attorney's Fees, Class Counsels' fee request is less than 10.9% of the estimated $49.94 million common fund benefit available to the class. This percentage is well below the range of contingency fees generally awarded in private litigation.

10. My firm also seeks reimbursement of $8,645.34 for its expenses incurred in prosecuting this litigation. The firm's expenses are broken down into the following categories:

Air fare: $3,507.40
Hotel charges: $3,048.20
Meals: $741.26
Parking: $100.00
Research/investigative: $120.80
Car rental/mileage reimbursement: $789.18
Cab fare: $338.50
Total: $8,645.34

All expenses incurred were reasonable and necessary to properly assess and prosecute this case and to refute defendants' arguments and defenses.

11. Counsel also believes that a $1,500.00 incentive award to class representative Joshua D. Poertner is appropriate. Mr. Poertner stepped forward to advance this cause, and

without his involvement in the discovery phase and prosecution of this litigation the common fund and injunctive relief could not have been obtained for the class. See also, *Lowe Decl.* Doc. 114-1. Under these circumstances, $1,500.00 is a nominal and reasonable amount, and counsel request that such incentive payment be awarded by the Court.

12. The requested fee appropriately reflects the substantial efforts expended, the excellent results achieved, and the manner with which this case has been prosecuted. For the reasons set forth herein and the briefing submitted by Class Counsel, it is my further opinion and belief that the attorneys' fee and expenses requested by Class Counsel in this litigation is supported when viewed in light of the factors set forth by the Eleventh Circuit in *Camden I Condominium Ass'n v. Dunkle*, 496 F.2d 768, 774-75 (11th Cir. 1991).

13. I strongly believe the proposed Settlement is fair, adequate and reasonable as required by Rule 23(e)(2), Fed. R. Civ. P., and should be approved by the Court.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 22nd day of April, 2014.

/s/ E. Clayton Lowe, Jr.

E. Clayton Lowe, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JOSHUA D. POERTNER, Plaintiff, v. THE GILLETTE COMPANY and THE PROCTER & GAMBLE COMPANY, Defendants.	)	CASE NO: 6:12-CV-00803-GAP-DAB

DECLARATION OF JOSHUA R. GALE
IN SUPPORT OF CLASS COUNSEL'S APPLICATION
FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

I, **JOSHUA R. GALE**, declare as follows:

1. My name is Joshua R. Gale and I am an associate with the firm of Wiggins, Childs, Quinn & Pantazis, LLC ("WCQP"). I have been associated with the firm since 2009. I have been licensed to practice law in the State of Florida since 2009. I am also licensed since 2009 to practice in the United States District Courts for the Northern, Middle, and Southern Districts of Florida. I am submitting this Affidavit in support of WCQP's application for an award of attorneys' fees and reimbursement of expenses in connection with the services rendered to Plaintiffs and the Class in the course of the above-captioned litigation.

2. WCQP and I have been involved in this case since the filing of the Complaint in April of 2012.

3. WCQP has offices in Birmingham, Alabama; Mobile, Alabama; Washington, DC; DeLand, Florida; and Nashville, Tennessee, with our primary practice in complex litigation with

emphasis in class actions. Our firm has litigated and/or participated in hundreds of class actions over the last several years throughout the country, and I have been involved in complex class action litigation, including Stella Koballa v. RJ Reynolds, Case No. 2007-33334-CICI, in the Seventh Judicial Circuit Court of Volusia County, Florida, and Potter v. Shell Oil, Case No. 2011-11036-CIDL in the Seventh Judicial Circuit Court of Volusia County, Florida. Dennis G. Pantazis and I, and other members of our firm, were instrumental in the prosecution of the case. Mr. Pantazis had primary responsibility for coordinating our firm's efforts. He has a wealth of experience in leadership positions (as a member of the Management Committee and/or Steering Committee) in many complex class cases. The following are some examples:

- Isaiah Evans, et al v. Unites States Pipe & Foundry, et al;
  Civil Action No.: 1:05-cv-01017-KOB,
  United States District Court for the Northern District of Alabama,
  Eastern Division;

- Charlie Almon, et al., individually and on behalf of all others similarly situated v. McWane, Inc., et al.,
  Civil Action No.: CV-04-1112,
  Circuit Court of Calhoun County, Alabama;

- In Re: Comcast Corp. Set-Top Cable Television Box Anti-Trust Litigation,
  Civil Action No.: 09-md-2034,
  United States District Court for the Eastern District of Pennsylvania;

- In re: Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litigation,
  Civil Action No.: 09-ML-2048-C,
  United States District Court for the Western District of Oklahoma;

- Karen Ann Ishee Parsons v. Bright House Networks, LLC,
  Civil Action No.: 2:09-cv-00267,
  United States District Court for the Northern District of Alabama,
  Southern Division;

- In re: Managed Care Litigation
  MDL 1334
  United States District Court for the Southern District of Florida;

- Love, et al. v. Blue Cross Blue Shield, et al.
  Civil Action No.: 1:03-cv-21296
  United States District Court for the Southern District of Florida;

- Lawrence L. Melvin, et al. v. Advanta National Bank, et al.
  Civil Action No.: CV-98-C-0898-S
  United States District Court for the Northern District of Alabama,
  Southern Division;

- Lewis, et al. v. Enterprise Leasing Co., et al.
  Civil Action No.: CV-97-6951
  Circuit Court of Jefferson County, Alabama;

- Rogers, et al. v. Transamerica Business Credit Corp.
  Civil Action No.: CV-95-736-RSM
  Circuit Court of Etowah County, Alabama;

- Rogers, et al. v. Payco, et al.,
  Civil Action No.: CV-95-736-RSM
  Circuit Court of Etowah County, Alabama;

- Beavers, et al. v. American Cast Iron Pipe Co.
  Civil Action No.: CV-86-N-1982-S
  United States District Court for the Northern District of Alabama,
  Southern Division.

4. I and other members of WCQP are familiar with the applicable law and standards as they apply to class actions.

5. I and other members of WCQP have shared overall responsibility for the case along with Lowe & Grammas, LLP and Schubert, Jonckheer & Kolbe, LLP.

6. In the prosecution of this action, WCQP expended 1171.50 hours for a lodestar amount of $472,856.25 as follows:

ATTORNEY	HOURS	HOURLY RATE	LODESTAR
Dennis Pantazis	285.9	$650.00	$243,015.00
Josh Gale	514.2	$400.00	$205,680.00
Brian Clark	35.85	$600.00	$28,680.00
D.G. Pantazis	79.5	$350.00	$27,825.00
WCQP Paralegals	256.05	$125.00	$32,006.25
TOTAL FEE	**1171.5**		**$472,856.25**

7. In my opinion, based upon our firm's experience in litigating complex, consumer class actions, this time was necessary to successfully prosecute the matter. Further, the hourly rates applied above are supported by the declaration of attorney Karen Dyer, submitted herewith.

8. In addition, WCQP has paid expenses in the amount of $149,807.46 as follows:

DESCRIPTION	AMOUNT
Documents	$24,655.50
Travel	$3,837.20
Depositions	$5,374.70
Court Costs	$515.00
Research	$466.77
Experts	$95,336.41
Mediation	$19,621.88
TOTAL	**$149,807.46**

The above expenses in this case are reasonable and necessary and of the kind one would expect in litigation of this type. Court reporting costs for depositions and trial transcripts, copying costs, court filing fees, trial costs, experts, etc. are necessary to prosecute a case of this kind.

9. We attended and participated in the following depositions: (1) Eric Gruen; (2) Felix Appiah; (3) Walter van Schalwijk; and (4) Joshua Poertner.

10. In the process of litigating this case, we reviewed hundreds of thousands of pages of documents produced by Defendant and analyzed data records from Duracell's data production. The data analysis was key in sustaining and proving classwide conduct.

11. Walter van Schalkwijk, an expert in the field of energy transfer and batteries, was retained to analyze and test the batteries to determine their relative strengths. His analysis was crucial in proving both liability and in meeting the requirements of Fed. R. Civ. P. 23.

12. As class counsel, our firm participated in the briefing of numerous legal issues, in particular the Motion for Class Certification, Motion to Transfer, and Opposing Motions to Strike Expert Witness Testimony.

13. Rodney A. Max mediated the case between August 1 and September 15, 2013. The first mediation session took place on August 1, 2013 in Miami, Florida. The parties made progress, but were unable to reach agreement on all issues. However, the parties again reconvened in person on August 12, 2013 in Miami, Florida and were able reach an agreement in principle. The parties, and Mr. Max, continued to communicate and negotiate in pursuit of a settlement between August 13, 2013 and September 15, 2013. All aspects of the settlement were agreed to before any attorney's fees were discussed.

14. After the preliminary approval of the settlement and after notice to the class, WCQP's attorneys fielded telephone calls, letters and e-mails from state Attorney General's offices. Their questions ranged from what was the nature of the class settlement, to the value to the class, and the basis of the attorney's fees.

15. In considering approval of this settlement, the Court should consider the range of possible recoveries if the case were tried. Based upon our discovery and expert analysis, the relief is within the upper range of what Plaintiffs could have obtained if successful at trial, and in

fact, substantially exceeds the average amount that a typical class member was damaged during the Class Period. Additionally, the relief is significantly more valuable to Class Members because it will be received sooner than could have been accomplished without an early settlement and without the additional expense of extensive further litigation over complex and contested issues. There was no assurance that Plaintiff and the Class would recover anything when this case was filed, but now, due to the efforts of class counsel, Plaintiff and the Class are entitled to compensation in the upper range of recovery.

16. Based upon the foregoing, the evidence of record, and included in the Affidavits of E. Clayton Lowe, Robert Schubert, and Karen Dyer, I respectfully request the Court to enter an Order awarding class counsel attorneys' fees and expenses in the amount of Five Million, Six Hundred and Eighty Thousand Dollars ($5,680,000.00).

I, Joshua R. Gale, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 22nd day of April, 2014.

/s/Joshua R. Gale
Joshua R. Gale – Affiant

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

JOSHUA D. POERTNER, individually and on behalf of all others similarly situated,	**Case No. 6:12-CV-00803-GAP-DAB**
Plaintiff,	
v.	
THE GILLETTE COMPANY, and THE PROCTER & GAMBLE COMPANY,	
Defendants.	

DECLARATION OF KAREN CAUDILL DYER

Karen Caudill Dyer declares and states as follows:

1. I am a member of the Florida Bar and a member of the Bar for the United States District Court for the Middle District of Florida. I am also admitted to various federal courts of appeal, including the Eleventh Circuit Court of Appeal.

2. I have been a member of the Florida Bar since September 1987 and have practiced in Orlando since that time. From September 1987 to May 1989, I was a law clerk to the Honorable G. Kendall Sharp of the United States District Court for the Middle District of Florida. Thereafter, I was an associate at Carlton Fields from June 1989 to approximately December 1991, when I formed my own firm Mathis & Dyer, P.A. In 1992, I became counsel at Duker & Barrett, a small litigation boutique with an office in Orlando and became a partner there in the summer of 1995. Thereafter, I joined Boies & Schiller as a non-equity partner in 1997. Boies Schiller formed an Orlando office in approximately October 1997. Boies Schiller

subsequently became Boies Schiller & Flexner, LLP. I became an equity partner at Boies Schiller & Flexner, LLP in approximately 2000. I remain at Boies Schiller & Flexner, LLP today and am the Administrative Partner for the Firm's Orlando, Florida office.

3. In the period January 2012 to the present, Boies Schiller & Flexner, LLP's Orlando office has had 6 to 7 lawyers (the Firm overall has approximately 250 lawyers nationwide). The three Orlando attorneys with approximately 25 years or more of experience since 2012, including myself, have had standard billing rates ranging from $930 to $990 per hour. The attorneys with less than 25 years of experience have had billing rates in that same period ranging from $520 to $720.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 21st day of April, 2014

/s/ John C. Digan

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JOSHUA D. POERTNER,

Plaintiff,

v. **CASE NO: 6:12-CV-00803-GAP-DAB**

THE GILLETTE COMPANY and THE PROCTER & GAMBLE COMPANY,

Defendants.
_____/

[PROPOSED] FINAL APPROVAL ORDER AND JUDGMENT

Plaintiff and Defendants have submitted for final approval a proposed settlement of this class action that is memorialized in the Class Action Settlement Agreement dated September 13, 2013, Doc. 113-1 (the "Agreement").[1] For the reasons set out in detail below, this Court has determined that the Settlement is fair, reasonable, and adequate and should therefore be approved. Accordingly, this Court issues this Final Approval Order and Judgment, approves the Settlement, and dismisses the Third Amended Complaint, Doc. 117 (the "Complaint") in this action with prejudice.

1. On May 22, 2014, this Court held a hearing to consider the fairness, reasonableness, and adequacy of the proposed Settlement (the "Final Approval Hearing").

2. In reaching its decision in this case, this Court considered the Agreement,

[1] All capitalized terms used herein shall have the meanings set forth in the Agreement.

the extensive court file, and the presentations by Plaintiff and Defendants in support of the fairness, reasonableness, and adequacy of the Settlement. This Court also considered the objections of Class Members.

3. The Settlement provides significant monetary and injunctive relief to the Class. The available monetary relief is within the upper range of the amount that may have been recovered had Plaintiff prevailed at trial with a certified nationwide class. In return for the class-wide relief, the Complaint shall be dismissed with prejudice and Defendants will receive releases from the Class Members as set forth in the Agreement.

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

members of the Settlement Class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the Class; (c) the desirability or undesirability of concentrating the litigation of the claims in this particular forum; and (d) the difficulties likely to be encountered in the management of a class action.

8. In its Order Granting Unopposed Motion for Preliminary Approval of Class Action Settlement, Doc. 118, this Court also preliminarily approved the Notice, and found that the proposed form and content of the Notice to the Class Members satisfied the requirements of due process, Rules 23(c)(2) and (e) of the Federal Rules of Civil Procedure, and the Rules of this Court. The Court reaffirms that finding and holds that the best practicable notice was given to Class Members.

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

10. This Court has again reviewed the Notice and the accompanying documents and finds that the "best practicable" notice was given to the Class and that the Notice was "reasonably calculated" to (a) describe the Action and the Plaintiff's and Class Members' rights in it; and (b) apprise interested parties of the pendency of the Action and of their right to have their objections to the Settlement heard. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 810 (1985). This Court further finds that Class Members were given a reasonable opportunity to opt out of the Action and that they were adequately represented by Plaintiff Joshua D. Poertner. *See Shutts,* 472 U.S. at 810. The Court thus reaffirms its findings that the Notice given to the Class satisfies the requirements of due process and holds that it has personal jurisdiction over all Class Members.[2]

11. The Court must determine whether the proposed Settlement is "fair, adequate and reasonable and is not the product of collusion" between the parties. *Leverso v. SouthTrust Bank of Ala., Nat'l Ass'n,* 18 F.3d 1527, 1530 (11th Cir. 1994); *Bennett v. Behring Corp.,* 737 F.2d 982, 986 (11th Cir. 1984); *In re Corrugated Container Antitrust Litig.,* 643 F.2d 195, 207 (5th Cir. 1981). In making this determination, the Court considers six factors: (a) the likelihood that Plaintiff would prevail at trial; (b) the range of possible recovery if Plaintiff prevailed at trial; (c) the fairness of the Settlement compared to the range of possible recovery, discounted for the risks associated with litigation; (d) the complexity, expense and duration of litigation; (e) the substance and amount of opposition to the Settlement; and (f) the stage of the proceedings at which the

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

Settlement was achieved. *Bennett,* 737 F.2d at 986; *Corrugated Container,* 643 F.2d at 212; *Behrens v. Wometco Enters., Inc.,* 118 F.R.D. 534, 538–39 (S.D. Fla. 1988), *aff'd,* 899 F.2d 21 (11th Cir. 1990).

12. In considering this Settlement, the Court need not readdress the merits of this case. This Court has considered the submissions of the parties, and the discovery conducted in this case, all of which show that not only did Plaintiff risk not succeeding on his motion for class certification and at trial, but he also faced uncertainty in whether he would ultimately prevail on his claims on appeal. Given these considerable open issues, the benefits available directly to the Class represent an excellent result. *See Bennett,* 737 F.2d at 986–87. If this case were to proceed without settlement, the resulting trial and the almost inevitable appeal would be complex, lengthy, and expensive. The Settlement eliminates a substantial risk that the Class would walk away empty-handed at the conclusion of trial or appeal. *See Ressler v. Jacobson,* 822 F. Supp. 1551, 1554 (M.D. Fla. 1992). Further, Defendants have defended this action vigorously and likely would continue to do so through trial and upon appeal, absent settlement. As a result, it could be years before Class Members would see any recovery even if they were to prevail on the merits, and they ultimately might not obtain a better recovery than they have achieved in this Settlement. *Behrens,* 118 F.R.D. at 543 (settlement "shortened what would have been a very hard-fought and exhausting period of time, which may have realistically ended with a decision similar to the terms of this settlement").

13. Only six Class Members objected, and only twelve Class members excluded themselves from the Settlement, both of which represent a minuscule

percentage of the estimated 7.26 million member Class. The Court fully considered each of the Objections made to the settlement and found that each of the Objections lacked merits for the reason stated in Plaintiff's Response to Objections to Class Action Settlement, Request for Attorneys' Fees and Expenses, and Named Plaintiff Payment and Defendants' Response to Objections to Final Approval of Class Settlement. The small number of exclusions and objections from Class Members relative to the size of the Class, and the lack of merit to the objections that were made, further support approval of this Settlement. *See, e.g., Bennett,* 737 F.2d at 988 & n. 10 (holding that the district court properly considered the number and substance of objections in approving a class settlement).

14. The last *Bennett* factor this Court must review is the stage of the proceedings at which settlement was achieved. *See Ressler,* 822 F. Supp. at 1554–55. This action was settled after more than sixteen months of motion practice, including briefing and argument on class certification. The Settlement was preceded by considerable arm's-length negotiations between Class Counsel and attorneys for the Defendants during formal mediation overseen by a well-qualified mediator appointed by this Court. The facts demonstrate that the Plaintiff was sufficiently informed to negotiate, execute, and recommend approval of this Settlement. *See, e.g., Davies v. Continental Bank,* 122 F.R.D. 475, 479–80 (E.D. Pa. 1988).

15. This Court also may consider the opinions of Class Counsel. *Parker v. Anderson,* 667 F.2d 1204, 1209 (5th Cir.), *cert. denied,* 459 U.S. 828 (1982). Class Counsel have considerable experience in the prosecution of large, complex consumer

class actions. This Court gives credence to the opinion of Class Counsel, amply supported by the Court's independent review, that this Settlement is a beneficial resolution of the Class claims.

16. In addition to finding the terms of the proposed Settlement fair, reasonable, and adequate, this Court must determine that there was no fraud or collusion between the parties or their counsel in negotiating the Settlement's terms. *Bennett,* 737 F.2d at 986; *Miller v. Republic Nat'l Life Ins. Co.,* 559 F.2d 426, 428–29 (5th Cir. 1977). In this case, there is no suggestion of fraud or collusion between the parties. Furthermore, the terms of the Settlement make it clear that the process by which the Settlement was achieved was fair. *Miller,* 559 F.2d at 429; *See Ressler,* 822 F. Supp. at 1553. Finally, there is no evidence of unethical behavior, want of skill, or lack of zeal on the part of Class Counsel.

17. The terms of the Agreement, including all exhibits thereto, are fully and finally approved as fair, reasonable, and adequate as to, and in the best interests of, representative Plaintiff Joshua D. Poertner and the Class Members. The parties and their counsel are ordered to implement and to consummate the Settlement according to its terms and provisions, as set forth in the Agreement.

18. The Agreement also provides that (a) Defendants agree to pay Class Counsel up to a total amount of $5,680,000 in attorneys' fees and expenses, (b) subject to Court approval, and (c) that Defendants agree to pay all costs of Notice and administering the Settlement. The Agreement provides that Class Counsel would make an application to this Court for an award of attorneys' fees and costs, which they have done. Adding the

requested fee and expense award of $5.68 million, the settlement administration and Notice costs to be paid by Defendants, and total benefits available to those Settlement Class Members who file claims creates a total available benefit to Class Members of $49.87 million. Under a common-fund analysis, i.e., determining Class Counsel's fee based on a percentage of that total available benefit, the fee is reasonable.[3] The total amount of fees requested (after deducting Class Counsel's expenses of $272,276) of $5,407,724 represents less than 10.9% of this overall benefit. That percentage falls well below the "benchmark" range of 25–30% recognized by Circuit precedent. *See Waters v. Int'l Precious Metals Corp.,* 190 F.3d 1291, 1294–95 (11th Cir. 1999); *Camden I, 946 F.2d at 774.* Moreover, the fee is reasonable in view of the substantial risk associated with asserting these claims, the excellent results achieved for the Class, and the extensive time and effort it took to achieve that result.[4] In reaching this determination, this Court has considered that claims were actually made by less than 1% of the Settlement Class Members. Furthermore, Class Counsel's expenses of $272,276 are reasonable and appropriate. Accordingly, a fee and expense award of $5,680,000 is hereby approved and shall be paid in accordance with the terms of the Agreement.

19. The Complaint and this Action, including all individual and class claims that were or could have been raised in this action, are hereby dismissed on the merits and

[3] Pursuant to *Camden I Condo. Assoc. v. Dunkle,* 946 F.2d 768, 774 (11th Cir. 1991), an attorneys' fee award in a class action must be "based on a reasonable percentage of the fund established for the benefit of the class." Further, the "fund established for the benefit of the class" is the total dollar amount available to the class, even though unclaimed funds will remain the property of Defendants. *See Waters v. Int'l Precious Metals, Corp.*, 190 F. 3d 1291 (11th Cir. 1999) ("In *Boeing Co. v. Van Gemert,* [444 U.S. 472 (1980)] the Supreme Court settled this question by ruling that class counsel are entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the amount actually claimed"); *Stahl v. Mastec, Inc*., 2008 WL 2267469, *1 (M.D. Fla. May 20, 2008) (same).

[4] Class Counsel's fee of $5,407,724.40 represents a 1.56 multiplier of their lodestar.

with prejudice.

20. The Agreement is hereby approved. Without limiting any term of the Agreement, this Final Approval Order and Judgment, including all exhibits hereto, shall forever be binding upon Joshua D. Poertner and all other Class Members, as well as their heirs, executors and administrators, successors and assigns. This Final Approval Order and Judgment releases the Defendants as set forth in the Agreement. This Final Approval Order and Judgment shall have *res judicata,* collateral estoppel, and all other preclusive effect on any claims for relief, causes of action, suits, petitions, demands in law or equity, or any allegations of liability, losses, damages, debts, contracts, agreements, obligations, promisses, attorneys' fees, costs, interest, or expenses, including the Released Claim as described in the Agreement, that were asserted or could have been asserted in this action.

21. The Agreement controls the terms of this final judgment and shall survive this final judgment.

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

Judgment.

23. This Court shall have exclusive jurisdiction and authority to rule upon and issue a final order with respect to the subject matter of any such action, suit, or proceeding whether judicial, administrative, or otherwise, which may be instituted by any person or entity, individually or derivatively, with respect to (i) the validity or enforceability of the Settlement Agreement; (ii) the authority of any Released Party to enter into or perform the Settlement Agreement in accordance with its terms; (iii) the remedies afforded by this Order of Final Approval and Final Judgment and the Settlement Agreement, or the attorneys' fees, representatives' fees, interest, costs, or expenses provided for in this Order of Final Approval and Final Judgment; (iv) any other foreseen or unforeseen case or controversy relating to or impacted by this Order of Final Approval and Final Judgment and Settlement Agreement; or (v) the enforcement, construction, or interpretation of the Settlement Agreement or this Order of Final Approval and Final Judgment. This reservation of jurisdiction does not limit any other reservation of jurisdiction in this Order of Final Approval and Final Judgment nor do any other such reservations limit the reservation in this sub-section.

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

DONE AND ORDERED in Chambers in the Middle District of Florida, at Orlando, Florida this ___ day of _____, 2014.

Gregory A. Presnell
District Judge

Attachment: Exclusion list

EXHIBIT A

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

JOSHUA D. POERTNER, individually and on behalf of all others similarly situated, Plaintiff, v. THE GILLETTE COMPANY, and THE PROCTER & GAMBLE COMPANY, Defendants.	Case No. 6:12-CV-00803-GAP-DAB Dept.: 5A Judge: Hon. Gregory A. Presnell

DECLARATION OF DEBORAH MCCOMB RE: REQUESTS FOR EXCLUSION FROM CLASS SETTLEMENT

I, Deborah McComb, declare and state as follows:

1. I am a Senior Consultant at Kurtzman Carson Consultants LLC ("KCC"), located at 75 Rowland Way, Suite 250, Novato, California. As a Senior Consultant at KCC, my responsibilities include overseeing and implementing legal notice campaigns in order to provide notice to class members of class action settlements. I am over 21 years of age and am not a party to this action. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently thereto.

2. KCC is the court appointed settlement administrator of the class settlement in the above-

captioned matter (the "Settlement"). I am one of the individuals at KCC responsible for KCC's work in administering the Settlement, including among other things receiving and tracking Requests for Exclusion (i.e., opt outs) received from potential class members. In accordance with the Court's Order Granting Preliminary Approval of Class Action Settlement in this matter (Doc. 118), the purpose of this declaration is to provide the parties and the Court with a list of Requests for Exclusions (i.e., opt outs) that have been received by KCC related to the Settlement.

3. As of the date of this declaration, KCC has received twelve (12) Requests for Exclusion or opt outs. A list of the individuals requesting exclusion is attached hereto as Exhibit A.

I declare under penalty of perjury pursuant to the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and that this declaration was executed this 10th day of March 2014 at Novato, California.

Deborah McComb

KCC Class Action Services
***Joshua Poertner v. The Gillette Company, et al*. Class Settlement**
List of Opt-Outs Received

Count: 12

Control #	Last	First
900042001	BOOKER	DAVE
900045001	FALLONI	TIMOTHY
900038701	HAACK	JIM
900048101	HARPER	ADAM
900050701	KONIECZNY	CHRIS
900046401	KOSTAKIS	NICHOLAS
900047801	LAHR	MATT
900044701	MARKELLOS	NIKOS
900039001	NICHOLS	CARLY
900041601	ROBERTSON	KYLE
900043301	ROOT	SEAN
900024801	YOUNG	WENDY L