UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL GRAVES, KEITH GREN, and MICHAEL WHEALEN, on behalf of themselves, all others similarly situated, and the general public,

Plaintiffs,

vs.

UNITED INDUSTRIES CORPORATION,

Defendant.

Case No. 2:17-cv-06983-CAS-SK

CLASS ACTION

ORDER GRANTING PLAINTIFFS' RENEWED UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

[REDACTED PUBLIC VERSION]

Plaintiffs Michael Graves, Keith Gren, and Michael Whealen ("Plaintiffs"), individually and on behalf of the Class defined below, move this Court for preliminary approval of the proposed settlement in the above-captioned action. This Court has reviewed and considered Plaintiffs' Renewed Unopposed Motion for Preliminary Approval and supporting materials. Now, having fully considered the record and the requirements of law, this Court orders that the Motion for Preliminary Approval is **GRANTED** as set forth below.

IT IS ORDERED that the settlement (including all terms of the Settlement Agreement and exhibits thereto) is hereby **PRELIMINARILY APPROVED**. The Court further finds and orders as follows:

I. BACKGROUND

This action was filed by original plaintiff Gregory Arthur ("Arthur") on September 21, 2017. (ECF No. 1). On November 27, 2017, Arthur filed a First Amended Class Action Complaint. (ECF No. 16). The gravamen of Arthur's First Amended Complaint was that the "Makes Up To __ Gallons" representation on the Spectracide® Concentrate products sold by United Industries Corporation ("UIC") is deceptive because UIC fails to disclose that "the Spectracide Concentrates were in fact only capable of making a fraction of the number of gallons represented when diluted to the same strength as 'Ready-to-use' Spectracide according to UIC's own instructions." (FAC ¶ 16). Arthur alleged that "[g]iven the dilutions set forth on the back panel of each Spectracide® Concentrate, the specified number of gallons that UIC represents the Spectracide® Concentrates are capable of making is only a fraction what they are actually capable of making when mixed with water according to UIC's own instructions 'for general weed control.'" (FAC ¶ 18).

"However, reasonable consumers like plaintiff would expect that the advertised 'makes up to' amount would be for the product's intended purpose, which is 'general weed control.'" (FAC ¶ 19). Arthur sought both monetary damages and injunctive relief for the following claims: (1) Violations of the Consumers Legal

Remedies Act, Cal. Civ. Code Sections 1750, *et seq.*; (2) Violations of the False Advertising law, Cal. Bus. & Prof. Code Sections 17500, *et seq.*; and (3) Violations of the Unfair Competition Law, Cal. Bus. & Prof. Code Sections 17200, *et seq.* (ECF No. 16).

On January 12, 2018, Defendant United Industries Corporation moved to dismiss Arthur's First Amended Complaint. (ECF No. 22). Then, on January 15, 2018, Arthur filed a Motion for Class Certification and to appoint class counsel. (ECF No. 23). On March 23, 2018, the Court entered an Order granting in part and denying in part UIC's Motion to Dismiss Arthur's First Amended Complaint. (ECF No. 34). The Court dismissed Arthur's request for injunctive relief, but granted him leave to amend to file a Second Amended Complaint. (ECF No. 34). On April 16, 2018, Arthur filed his Second Amended Complaint (ECF No. 39), which UIC answered on April 30, 2018 (ECF No. 40). On May 17, 2018, the Court entered an Order denying Arthur's Motion for Class Certification without prejudice, holding that Arthur could not adequately represent the putative class. (ECF No. 47).

On June 25, 2018, Arthur and UIC filed a Joint Stipulation to dismiss Arthur from the Litigation, for leave to substitute Michael Graves and Keith Gren as plaintiffs and putative class representatives, and for leave for Graves and Gren to file a Third Amended Complaint. (ECF No. 53). On June 26, 2018, the Court entered an Order substituting Graves and Gren as named plaintiffs and proposed class representatives, dismissing Arthur from the Litigation, and granting Graves and Gren leave to file a Third Amended Complaint. (ECF No. 54). On June 28, 2018, Graves and Gren filed their Third Amended Class Action Complaint against UIC (ECF No. 55), which UIC answered on July 19, 2018. (ECF No. 59).

On July 12, 2018, the Court entered an Order staying the Litigation pursuant to a Joint Stipulation filed by Graves, Gren, and UIC, seeking time to allow them to engage in settlement discussions (ECF No. 58). On September 7, 2018, Michael Whealen sent UIC a consumer notice and demand letter on behalf of himself and a

proposed nationwide class concerning the Products. On May 15, Class Counsel filed a Fourth Amended Complaint adding Whealen as a named Plaintiff in addition to Graves and Gren. (ECF No. 63). The Fourth Amended Complaint also adds a cause of action under the Missouri Merchandising Practices Act, Mo. Rev. Stat. §§ 407.010, et seq., in addition to causes of action under California's consumer protection laws. (ECF No. 63 at ¶¶ 52-58).

II. SUMMARY OF SETTLEMENT

Plaintiff now moves for preliminary approval of a Settlement Class defined as follows:

> All persons residing in the United States who during the Class Period[1] purchased in any state, for personal or household use and not for resale or distribution, any of the Products.[2, 3]

The Settlement Agreement provides that UIC will pay $2,500,000.00 into a settlement fund. Agreement at § 7.4. This fund will be used, among other things, to pay authorized claims to the Settlement Class Members, to pay the costs of settlement administration and notice to the Class Members, to pay Class Counsel's fees and expenses, and to pay incentive awards to the named Plaintiffs. Agreement at § 7.6. For Authorized Claimants, UIC will provide $6.25 in cash from the Settlement Fund for each Claim submitted by a household, with a limit of four (4)

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[1] The term "Class Period" means September 21, 2013 to the date on which the Notice is disseminated to the Settlement Class. Agreement at § 2.7.

[2] The term "Products" means UIC's herbicide products that are (a) sold under the "Spectracide®" tradename and (b) are sold in a "concentrate" product form (in other words, designed to be manually mixed by consumers with water prior to use on targeted vegetation). Agreement at § 2.20.

[3] The Settlement Class specifically excludes (1) any judicial officer presiding over the Litigation, (2) UIC and Released Parties, and each of their current or former officers, directors, and employees, (3) legal representatives, successors, or assigns of any such excluded person, and (4) any person who properly executes and files a timely Request for Exclusion. Ageement at § 2.26.

claims per household (total payable per household in no event to exceed $25, unless distribution is increased pro rata). Agreement at § 7.2.1. The settlement provides for a *pro rata* reduction if the claims exceed the amount in the settlement fund (Agreement at § 7.2.3) or a pro rata increase if the settlement fund is not exhausted. Agreement at § 7.2.3. If after all accepted Claims (plus other authorized fees, costs and expenses) are paid and money remains in the Settlement Fund after pro rata distribution to Authorized Claimants, any remaining settlement funds thereafter will be awarded cy pres to the National Advertising Division of the Better Business Bureau.

In addition to monetary relief, UIC agrees to the following injunctive relief: If, with respect to any Product manufactured by UIC after June 1, 2020, UIC elects to state on its Product label that such Product "Makes Up to __ Gallons" of end-use herbicide, Defendant shall include on such labeling, mixing directions that are acceptable to EPA-equivalent agencies of the State(s) in which the Product is registered for sale (such acceptability being deemed by virtue of such agency(ies) registration of such Product). The ultimate timing and content of any label changes shall be at the sole discretion of UIC. Agreement at § 7.3.

III. APPROVAL OF CLASS ACTION SETTLEMENT

Approval of a proposed class action settlement is governed by Federal Rule of Civil Procedure 23(e). "[T]he 2018 amendment to Rule 23(e) establishes core factors district courts must consider when evaluating a request to approve a proposed settlement." *Zamora Jordan v. Nationstar Mortg., LLC*, No. 2:14-CV-0175-TOR, 2019 WL 1966112, at *2 (E.D. Wash. May 2, 2019).

Rule 23(e) now provides that the Court may approve a class action settlement "only after a hearing and only on a finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other."

Fed. R. Civ. P. 23(e)(2).

"Under Rule 23(e), both its prior version and as amended, fairness, reasonableness, and adequacy are the touchstones for approval of a class-action settlement." *Zamora*, 2019 WL 1966112, at *2. "The purpose of the amendment to Rule 23(e)(2) is establish [sic] a consistent set of approval factors to be applied uniformly in every circuit, without displacing the various lists of additional approval factors the circuit courts have created over the past several decades." Id. Factors that the Ninth Circuit have typically considered include (1) the strength of plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; and (6) the experience and views of counsel. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).

"While the Ninth Circuit has yet to address the amendment to Rule 23(e)(2)….the factors in amended Rule 23(e)(2) generally encompass the list of relevant factors previously identified by the Ninth Circuit." *Zamora*, 2019 WL 1966112, at *2 (alteration in original). Indeed, "[t]he goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core

concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment. "Accordingly, the Court applies the framework set forth in Rule 23 with guidance from the Ninth Circuit's precedent, bearing in mind the Advisory Committee's instruction not to let '[t]he sheer number of factors' distract the Court and parties from the 'central concerns' underlying Rule 23(e)(2)." *In re Extreme Networks, Inc. Securities Litigation*, No. 15-CV-04883-BLF, 2019 WL 3290770, at *6 (N.D. Cal. July 22, 2019); *see also Hefler v. Wells Fargo & Co.*, No. 16-CV-05479-JST, 2018 WL 6619983, at *4 (N.D. Cal. Dec. 18, 2018).

A. ADEQUATE REPRESENTATION

A determination of adequacy of representation requires that "two questions be addressed: (a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000), *as amended* (June 19, 2000) (citing *Hanlon*, 150 F.3d at 1020); *see also Hefler*, 2018 WL 6619983, at *6.

The Court finds that Class Counsel and the Class Representatives have adequately represented the Class. The proposed class representatives in this action have no conflicts of interest with other class members and each have prosecuted this action vigorously on behalf of the Class. Each of the named Plaintiffs have suffered the same injuries as the absent class members because each purchased a Spectracide Concentrate product, for personal and household use, in reliance on the "Makes Up To ___" gallons statement on the front of the label which they took to mean would, in fact, make up to the advertised amount of gallons when used as directed for general weed control. (*See* Fourth Amended Complaint, ECF No. 63 at ¶¶ 30-32). Each of the named Plaintiffs have been dedicated to vigorously pursuing this action on behalf of the class and each have kept themselves informed about the status of the proceedings.

Class Counsel have also vigorously represented the Class and have no conflicts of interest. The Settlement was negotiated by counsel with extensive experience in consumer class action litigation. Through the discovery process, Class Counsel obtained sufficient information and documents to evaluate the strengths and weaknesses of the case. The information reviewed by class counsel includes sales information for the Spectracide Concentrate products during the class period, the labels for the Spectracide Concentrate products in use during the class period, and Defendant's communications with the Environmental Protection Agency ("EPA") relating to the labels of the Products. Class Counsel have concluded that the Settlement provides exceptional results for the class while sparing the class from the uncertainties of continued and protracted litigation. *See, e.g., In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) ("The recommendations of plaintiffs' counsel should be given a presumption of reasonableness."); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 976 (9th Cir. 2009) (Deference to Class Counsel's evaluation of the Settlement is appropriate because "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation.").

Accordingly, the Court finds that Class Counsel and the Class Representatives have been diligent in their representation of the class.

B. ARM'S LENGTH NEGOTIATIONS

Regarding the negotiation process, the Court finds that the Settlement Agreement is the result of an adversarial, non-collusive, and arms-length negotiation. The Parties did not begin settlement discussions until after the Court had ruled on Defendant's motion to dismiss (ECF No. 34) and Plaintiff Arthur's motion for class certification (ECF No. 46). Settlement discussions also did not begin until after the Parties had exchanged written discovery and documents, which speaks to the fundamental fairness of the process. *See Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004)

("A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair."). The several months that it took to work out significant details and vigorous disagreements between the parties demonstrate that this proposed resolution was the product of heavily disputed and arm's length negotiation. The settlement negotiations were hard-fought, with both Parties and their counsel thoroughly familiar with the applicable facts, legal theories, and defenses on both sides.

Accordingly, the Court finds no signs of conflicts of interest, collusion, or bad faith in the parties' settlement negotiation process.

C. ADEQUATE RELIEF

The Court concludes that the relief provided for the Class is adequate. UIC has agreed to settle this matter for a non-reversionary total of $2,500,000. Agreement at § 7.4. During the class period, UIC sold [REDACTED] retail units of Spectracide concentrate products in the United States and UIC's total sales of Spectracide Concentrate Products in the United States totals [REDACTED]. The $2,500,000 nationwide settlement amount is reasonable considering that damages would be limited to a fraction of total sales if Plaintiffs were to prevail at trial.

As previously explained by Plaintiffs' damages expert, Charlene L. Podlipna, CPA, the Spectracide Concentrate products are underfilled by 36% to 38% based on Plaintiffs' claims that reasonable consumers' intend purpose for the Products is "general weed control." (ECF No. 23-14 [Podlipna Decl., ¶ 13]). Damages for the nationwide class would be based on the Benefit of the Bargain method, which is based on the difference between the amount Plaintiffs reasonably expected to receive and the actual amount received. (ECF No. 23-14 [Podlipna Decl., ¶ 15]). Accordingly, the projected maximum for nationwide class damages would be approximately [REDACTED] if Plaintiffs were to prevail at trial. ([REDACTED] nationwide sales x .38 underfill percentage = [REDACTED]). The $2,500,000 settlement fund accounts for [REDACTED]% of total damages that would be

available at trial, which is well within the range of reason. *See, e.g., Stovall-Gusman v. W.W. Granger, Inc.*, No. 13-cv-02540-HSG, 2015 WL 3776765, at *4 (N.D. Cal. June 17, 2015) (granting final approval of a net settlement amount representing 7.3% of the plaintiffs' potential recovery at trial); *Balderas v. Massage Envy Franchising, LLC*, No. 12-cv-06327NC, 2014 WL 3610945, at *5 (N.D. Cal. July 21, 2014) (granting preliminary approval of a net settlement amount representing 5% of the projected maximum recovery at trial); *Ma v. Covidien Holding, Inc.*, No. SACV 12-02161-DOC (RNBx), 2014 WL 360196, at *5 (C.D. Cal. Jan. 31, 2014) (finding a settlement worth 9.1% of the total value of the action "within the range of reasonableness"); *Downey Surgical Clinic, Inc. v. Optuminsight, Inc.*, No. CV09-5457PSG (JCx), 2016 WL 5938722 at *5 (C.D. Cal. May 16, 2016) (granting final approval where recovery was as low as 3.21% of potential recovery at trial).

The amount of recovery per class member is also adequate considering that Settlement Class Members can claim $6.25 in cash from the Settlement Fund for each Claim submitted by a household, with a limit of four (4) claims per household (total payable per household in no event to exceed $25, unless distribution is increased pro rata). Agreement at § 7.2.1. This recovery is significant considering that a 64-ounce bottle of Spectracide® Concentrate, the most expensive bottle size, sells for approximately $30.00 at retail stores like Home Depot. The $6.25 recovery per purchase (up to four purchases per household) for each Settlement Class member is an excellent result considering it represents a large fraction of total damages that would be recoverable at trial. Indeed, $6.25 represents approximately 57.8% of the total potential recovery for purchasers of the 64-ounce bottle size ($30.00 x .36 underfill amount for 64-ounce bottle size = $10.80). Moreover, the settlement agreement provides for injunctive relief, which further supports the adequacy of relief to the class. Agreement at § 7.3.

1. Costs, risks, and delay of trial and appeal

The Court concludes that the costs, risks, and delay of trial and appeal further support preliminary approval. Proceeding in this litigation in the absence of settlement poses various risks such as failing to certify a class, having summary judgment granted against Plaintiffs, or losing at trial. Such considerations have been found to weigh heavily in favor of settlement. *See Rodriguez*, 563 F.3d at 966; *Curtis-Bauer v. Morgan Stanley & Co., Inc.*, No. C 06-3903 TEH, 2008 WL 4667090, at *4 (N.D. Cal. Oct. 22, 2008) ("Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class."). Even if Plaintiffs are able to certify a class, there is also a risk that the Court could later decertify the class action. *See In re Netflix Privacy Litig.*, No. 5:11-cv-00379 EJD, 2013 WL 1120801, at *6 (N.D. Cal. Mar. 18, 2013) ("The notion that a district court could decertify a class at any time is one that weighs in favor of settlement.") (internal citations omitted). The Settlement eliminates these risks by ensuring Class Members a recovery that is "certain and immediate, eliminating the risk that class members would be left without any recovery . . . at all." *Fulford v. Logitech, Inc.*, No. 08-cv-02041 MNC, 2010 U.S. Dist. LEXIS 29042, at *8 (N.D. Cal. Mar. 5, 2010).

2. Effectiveness of proposed method of distributing relief to the Class

The Court finds that the claims process is straightforward and allows Settlement Class members to make a claim by submitting a valid and timely Claim Form to the Settlement Administrator without complication. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 8:10ML 02151 JVS, 2013 WL 3224585, at *18 (C.D. Cal. June 17, 2013) ("The requirement that class members download a claim form or request in writing a claim form, complete the form, and mail it back to the settlement administrator is not onerous.").

Significantly, if there is any remaining cash amount in the Settlement Fund after payment of Notice and Settlement Administrator expenses, a Fee and Expense Award, any necessary taxes, tax expenses, Incentive Awards, and the total amount of all Authorized Claims, the Settlement Administrator shall divide any remaining monetary amounts equally among the Authorized Claimants and shall pay each such Authorized Claimant his or her pro rata share of the remaining monetary amount. Agreement at § 7.2.3. This pro rata distribution ensures that Settlement Class Members will receive the maximum amount of the settlement fund and that no money will revert back to Defendant. *See McGrath v. Wyndham Resort Dev. Corp.*, No. 15CV1631 JM (KSC), 2018 WL 637858, at *6 (S.D. Cal. Jan. 30, 2018) (finding a non-reversionary settlement fund to be "fair, reasonable, and adequate.").

If after all accepted Claims (plus other authorized fees, costs and expenses) are paid and money remains in the Settlement Fund after pro rata distribution to Authorized Claimants, any remaining settlement funds thereafter will be awarded cy pres to the National Advertising Division of the Better Business Bureau ("NAD"). Agreement at § 7.2.3. The proposed *cy pres* recipient will only receive funds that are no longer economically feasible to distribute to the class after a pro rata distribution. The Court finds that NAD is a suitable *cy pres* recipient. *See Rawa v. Monsanto Co.*, No. 4:17CV01252 AGF, 2018 WL 2389040, at *11 (E.D. Mo. May 25, 2018) (approving NAD as a cy pres recipient and noting that it "monitors national advertising in all media for goods and services, enforce[es] high standards of truth and accuracy, and accepts complaints from consumers").

3. Terms of any proposed award of attorneys' fees

The Settlement Agreement provides that Class Counsel may request an award of attorneys' fees and out-of-pocket expenses of up to 33.33% of the Settlement Fund, subject to this Court's approval. Agreement at § 8.1. Although the "benchmark" for attorneys' fees in the Ninth Circuit is typically 25% of the common fund, *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011),

Class Counsel's fee request appears to be within the range of what courts have approved in other class action cases. Class Counsel are instructed to fully address the reasonableness of their requested fee award in their Motion for Attorneys' Fees, Costs, and Incentive Awards.

4. Agreements required to be identified under Rule 23(e)(3)

The Court has not been advised of any side agreements made in connection with the proposed settlement pursuant to Rule 23(e)(3). Thus, there is nothing for the Court to consider.

D. The Settlement Agreement Treats Class Members Equitably

The Court finds that the apportionment of relief among Class Members treats class members equitably. Each class member can make a claim for $6.25 in cash from the Settlement Fund for each Claim submitted by a household, with a limit of four (4) claims per household (total payable per household in no event to exceed $25, unless distribution is increased pro rata). Agreement at § 7.2.1. Because each class member is treated equally, the Court will preliminarily approve the settlement as fair, reasonable, and adequate.

IV. CERTIFICATION OF THE SETTLEMENT CLASS

When presented with a proposed settlement, a court must first determine whether the proposed settlement class satisfies the requirements for class certification under Rule 23. In assessing those class certification requirements, a court may properly consider that there will be no trial. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial."). For the reasons below, the Court finds that the Settlement Class meets the requirements of Rule 23(a) and (b).

A. Rule 23(a)

1. Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." *See* Rule 23(a)(1). "As a general matter, courts have found that numerosity is satisfied when class size exceeds 40 members, but not satisfied when membership dips below 21." *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000). Here, the proposed Class is comprised of thousands of consumers who purchased the Products – a number that obviously satisfies the numerosity requirement. Accordingly, the Court finds that the Settlement Class is so numerous that joinder of their claims is impracticable.

2. Commonality

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." See Rule 23(a)(2). Commonality is established if plaintiffs and class members' claims "depend on a common contention," "capable of class-wide resolution . . . [meaning] that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Because the commonality requirement may be satisfied by a single common issue, it is easily met.

The Court finds that there are ample issues of both law and fact here that are common to the members of the Class. All of the Class Members' claims arise from a common nucleus of facts and are based on the same legal theories. Plaintiffs allege that UIC's "Makes Up To __" gallons statement on the Spectracide® Concentrate Product labels is false and misleading because the Products yield only a fraction of the advertised "Makes Up To" amount when mixed for "general weed control" purposes. These alleged misrepresentations were made in a uniform manner to each of the Class Members. Accordingly, commonality is satisfied by the existence of these common factual issues. *See Arnold v. United Artists Theatre Circuit, Inc.*, 158

F.R.D. 439, 448 (N.D. Cal. 1994) (commonality requirement met by "the alleged existence of common discriminatory practices").

Second, Plaintiffs' claims are brought under legal theories common to the Class as a whole. Alleging a common legal theory alone is enough to establish commonality. *See Hanlon*, 150 F.3d at 1019 ("All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class."). Here, all of the legal theories asserted by Plaintiffs are common to all Class Members. Given that there are virtually no issues of law which affect only individual members of the Class, the Court finds that commonality is satisfied.

3. Typicality

Rule 23(a)(3) requires that the claims of the representative plaintiffs be "typical of the claims . . . of the class." *See* Rule 23(a)(3). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *See Hanlon*, 150 F.3d at 1020. In short, to meet the typicality requirement, the representative plaintiffs simply must demonstrate that the members of the settlement class have the same or similar grievances. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

The Court finds that the claims of the named Plaintiffs are typical of those of the Class. Like those of the Class, their claims arise out of the purchase of Spectracide® Concentrate products for personal or household use after relying on UIC's allegedly misleading "Makes Up To __" gallons representations. The named Plaintiffs have precisely the same claims as the Class and must satisfy the same elements of each of their claims, as must other Class Members. Supported by the same legal theories, the named Plaintiffs and all Class Members share claims based on the same alleged course of conduct. The named Plaintiffs and all Class Members

have been injured in the same manner by this conduct. Therefore, the typicality requirement is satisfied.

4. Adequacy

The final requirement of Rule 23(a) is set forth in subsection (a)(4) which requires that the representative parties "fairly and adequately protect the interests of the class." *See* Rule 23(a)(4). As discussed above, the Court finds that Class Counsel and the Class Representatives have adequately represented the Class. Accordingly, the Court hereby appoints Plaintiffs Michael Graves, Keith Gren, and Michael Whealen as Class Representatives for the Settlement Class. The Court also appoints the Law Offices of Ronald A. Marron, APLC as Settlement Class Counsel to Federal Rule of Civil Procedure 23(g).

B. Rule 23(b)(2)

In addition to meeting the prerequisites of Rule 23(a), Plaintiffs must also meet one of the three requirements of Rule 23(b) to certify the proposed class. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Under Rule 23(b)(3), a class action may be maintained if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See* Rule 23(b)(3). Certification under Rule 23(b)(3) is appropriate and encouraged "whenever the actual interests of the parties can be served best by settling their differences in a single action." *Hanlon*, 150 F.3d at 1022.

1. Predominance

The Court finds that the proposed Class is well-suited for certification under Rule 23(b)(3) because questions common to the Class Members predominate over questions affecting only individual Class Members. Predominance exists "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *Id.* As the U.S. Supreme Court

has explained, when addressing the propriety of certification of a settlement class, courts take into account the fact that a trial will be unnecessary and that manageability, therefore, is not an issue. *Amchem*, 521 U.S. at 619-62. In this case, common questions of law and fact exist and predominate over any individual questions, including, in addition to whether this settlement is reasonable (*see Hanlon*, 150 F.3d at 1026-27), *inter alia*: (1) whether UIC's representations regarding its "Makes up to ___" gallons claim were false and misleading or reasonably likely to deceive consumers; (2) whether UIC violated the CLRA, UCL, FAL and the MMPA; (3) whether UIC had defrauded Plaintiff and the Class Members; and (4) whether the Class has been injured by the wrongs complained of, and if so, whether Plaintiffs and the Class are entitled to damages, injunctive and/or other equitable relief, including restitution, and if so, the nature and amount of such relief.

There are also no concerns here about certifying a nationwide settlement class under *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 590 (9th Cir. 2012). In *Mazza*, the Ninth Circuit held that, when certifying a nationwide class, the burden is on the defendant to show "'that foreign law, rather than California law, should apply to class claims.'" *See also In re MDC Holdings Securities Litigation*, 754 F. Supp. 785, 803–04, 808 (S.D. Cal. 1990) (the "court presumes that California law controls unless and until defendants show that choice of law problems render the common law claims inappropriate for class treatment."); *In re Seagate Technologies Sec. Litigation*, 115 F.R.D. 264, 269, 274 (N.D. Cal. 1987) (applying California law to nationwide class because "[a]bsent the defendant carrying [its] burden, California law would govern the foreign state plaintiffs' claims" and noting several other decisions reaching this conclusion).

The Ninth Circuit recently held that differences in state law do not defeat predominance in the settlement class context. *See In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 561 (9th Cir. 2019). This is especially relevant here because

UIC is not opposing the certification of a nationwide class involving California and Missouri law. Consequently, UIC is voluntarily subjecting itself to California and Missouri law, including California's Consumer Legal Remedies Act and Missouri's Merchandising Practices Act, which provide greater protections to consumers than other jurisdictions. Where, as here, UIC's products were widely distributed and there are significant contacts with California residents, and where UIC does not oppose California law applying to the nationwide class, the *Mazza* choice of law analysis is easily satisfied because the interests of other states will not be impaired. *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d at 561. Missouri's MMPA can also be applied to the nationwide Settlement Class because UIC maintains its principal place of business in Missouri and Missouri has significant contacts with the claims of each class member.

Moreover, the considerations driving the rest of the *Mazza* analysis are inapplicable here. In the settlement context, other states' interests would not be undermined by the application of California and Missouri law because UIC is opting into a regime that protects consumers more vigorously than other states. In *Hanlon*, the Ninth Circuit also held that "the idiosyncratic differences between state consumer protection laws are not sufficiently substantive to predominate over the shared claims." *Hanlon*, 150 F.3d at 1022–23; *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d at 561 ("no party argued that California's choice-of-law rules should not apply to this class settlement"); *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 301 (3d Cir. 2011) ("variations in the rights and remedies available to injured class members under the various laws of the fifty states [do] not defeat commonality and predominance."); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 315 (N.D. Cal. 2018) (finding that differences between state consumer protection laws do not defeat predominance and certifying nationwide settlement class). Accordingly, the Court finds that common issues predominate.

2. Superiority

The Court finds that the class mechanism is superior to other available means for the fair and efficient adjudication of the claims of the Class Members. Each individual Class Member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendant's liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court. Accordingly, the Court finds that common questions predominate and a class action is the superior method of adjudicating this controversy and that the requirements of Rule 23(b)(3) are satisfied.

V. NOTICE TO THE CLASS

The Court has reviewed the content of the Parties' proposed Notice Plan, the long-form and short-form Notices, and the Claim Form and finds that they satisfy the requirements of Federal Rule of Civil Procedure 23(c)(2), Federal Rule of Civil Procedure 23(e)(1), and the requirements of the Due Process Clause of the United States Constitution. Accordingly, the Court approves the Notices and the Claim Form.

The Court further approves the methods for giving notice of the settlement to the members of the Settlement Class, as reflected in the Settlement Agreement and proposed in Plaintiffs' Motion for Preliminary Approval. In addition to the Notices, the Court has also reviewed the notice procedures and finds that the members of the Settlement Class will, thereby, receive the best notice practicable under the circumstances. The Court also approves payment of the costs of notice as provided for in the Settlement Agreement. The Court finds that the notice procedures, carried out with reasonable diligence, will constitute the best notice practicable under the

circumstances and will satisfy the requirements of Federal Rule of Civil Procedure 23(c)(2), Federal Rule of Civil Procedure 23(e)(1), and the Due Process Clause of the United States Constitution.

The Court further approves the appointment of Classaura LLC, or an equivalent class action administrator identified by the Parties to administer and oversee, among other things, the processing, handling, reviewing, and approving of claims made by Claimants; communicating with Claimants; and distributing payments to Authorized Claimants whose Claim Forms have been accepted and validated.

VI. MISCELLANEOUS

The Court hereby certifies a Settlement Class of all residents of the United States who, on or after September 21, 2013 until the [date notice is disseminated] (the "Class Period"), purchased in any state, for personal or household use and not for resale or distribution, any of UIC's herbicide products that are (a) sold under the "Spectracide®" tradename and (b) are sold in a "concentrate" product form (in other words, designed to be manually mixed by consumers with water prior to use on targeted vegetation). Excluded from the Settlement Class are (1) any judicial officer presiding over the action; (2) the Defendant, its subsidiaries, parent companies, successors, predecessors, and any entity in which Defendant or its parent has a controlling interest, and each of their current or former officers, directors, and employees; (3) legal representatives, successors, or assigns of any such excluded person; and (4) any person who properly executes and files a timely request for exclusion.

The Court directs that pursuant to Federal Rule of Civil Procedure 23(e)(2) a hearing will be held on February 24, 2020 at 10:00 a.m., to consider final approval of the settlement (the "Final Approval Hearing") including, but not limited to, the following issues: (a) whether the Settlement Class should be finally certified for settlement purposes only; (b) the fairness, reasonableness, and adequacy of the

settlement; (c) Class Counsel's application for an award of attorneys' fees and costs; and (d) approval of incentive awards to the Class Representatives. The Final Approval Hearing may be adjourned by the Court and the Court may address the matters set out above, including final approval of the settlement, without further notice to the Settlement Class other than notice that may be posted at the Court and on the Settlement Website.

Any member of the Settlement Class wishing to object (an "Objector") to the proposed settlement and/or be heard at the Final Approval Hearing shall comply with the following procedures:

a. To object, a member of the Settlement Class, individually or through counsel, must file a written objection with the Court, with a copy delivered to Class Counsel and Defendant's Counsel at the addresses set forth below:

Ronald A. Marron
LAW OFFICES OF RONALD A. MARRON
651 Arroyo Drive
San Diego, CA 92103
Email: ron@consumersadvocates.com

Ronie M. Schmelz
TUCKER ELLIS LLP
515 South Flower Street, 42nd Floor
Los Angeles, CA 90071
Email: ronie.schmelz@tuckerellis.com

b. A written objection filed with the Court regarding or related to the settlement shall contain all of the following information:. (a) a reference, in its first sentence, to the Litigation, *Graves et al. v. United Industries Corporation*, Case No. 2:17-cv-06983-CAS-SK; (b) the Objector's full, legal name, residential address, telephone number, and email address (and the Objector's lawyer's name, business address, telephone number, and email address if objecting through counsel); (c) a statement describing the Objector's membership in the Settlement Class, including a verification under oath as to the date, name of the Products purchased, and the

location and name of the retailer from whom the Objector purchased the Products, and /or a receipt reflecting such purchases, and all other information required by the Claim Form; (d) a written statement of all grounds for the objection, accompanied by any legal support for such objection; (e) copies of any papers, briefs, or other documents upon which the objection is based; (f) a list of all persons who will be called to testify in support of the objection; (g) a statement of whether the Objector intends to appear at the Final Approval Hearing (note: if the objector intends to appear at the Final Approval Hearing through counsel, the objection must also state the identity of all attorneys representing the objector who will appear at the Final Approval Hearing); (h) a list of the exhibits that the Objector may offer during the Final Approval Hearing, along with copies of such exhibits; (i) the objector's signature. In addition, Settlement Class Members, if applicable, must include with their Objection (a) the identity of all counsel who represent the objector, including former or current counsel who may be entitled to compensation for any reason related to the objection; (b) a detailed list of any other objections submitted by the Settlement Class Member, or his/her counsel, to any class actions submitted in any court, whether state or federal, in the United States in the previous five (5) years.

c. Any member of the Settlement Class who files and serves a timely written objection in accordance with this Order may also appear at the Final Approval Hearing, to the extent permitted by the Court, either in person or through an attorney hired at the Settlement Class member's expense, to object to the fairness, reasonableness, or adequacy of the proposed settlement.

Members of the Settlement Class who elect not to participate in the settlement (i.e., "opt-out") must submit a written Request for Exclusion that is postmarked no later than January 20, 2020.

Any member of the Settlement Class who fails to timely submit a Request for Exclusion shall be bound by all subsequent proceedings, orders, and the Final

Judgment, even if he or she has a pending, or subsequently initiates, litigation, arbitration, or any other proceeding against UIC relating to the Released Claims.

In order to participate in the settlement and receive a cash payment from the Settlement Fund, members of the Settlement Class must properly complete a Claim Form (online or in paper format) and submit it to the Settlement Administrator. To be effective, any such Claim Form must be postmarked or submitted on the Internet at www.MakesUpToSettlement.com no later than January 20, 2020 and must otherwise comply with the procedures and instructions set forth in the Claim Form.

The Court hereby sets the following deadlines:

EVENT	**DEADLINE**
Publishing Notice	November 1, 2019
Filing of papers in Support of Plaintiffs' Motion for Attorneys' Fees, Costs, and Incentive Awards	January 6, 2020
Filing of papers in support of Final Approval	January 27, 2020
Deadline for submitting Claim Forms	January 20, 2020
Filing an Objection with the Court, or submitting a Request for Exclusion to the Settlement Administrator	January 20, 2020
Filing of response to Objections	February 10, 2020
Final Approval Hearing	February 24, 2020 at 10:00 a.m.

To the extent not otherwise defined herein, all defined terms in this Order shall have the meaning assigned to them in the Settlement Agreement.

In the event the settlement does not become effective for any reason, the Parties shall be restored to their respective pre-settlement positions in the action, including with regard to any agreements concerning tolling and similar agreements, and the entire Settlement Agreement shall become null and void. Additionally, the

entire amount of the Settlement Fund (to the extent it was deposited) shall be promptly returned to UIC, with any interest accrued thereon.

Nothing in this Preliminary Approval Order, the Settlement Agreement, or any documents or statements related thereto (1) is, or may be used as, an admission of, or evidence of, the validity of any Released Claim, or of any wrongdoing or liability of UIC, or of the propriety of Class Counsel to maintain the action as a class action; or (2) is, or may be used, as an admission of, or evidence of, any fault or omission of UIC in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal, except that UIC may file the Settlement Agreement or the Final Judgment in any action that may be brought against any Released Person in order to support a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar, reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

All activity in the action with respect to UIC shall be stayed unless and until the Settlement Agreement is terminated pursuant to its terms and conditions.

Pursuant to 28 U.S.C. § 1651(a) and 2283, the Court finds that issuance of this preliminary injunction is necessary and appropriate in aid of the Court's continuing jurisdiction and authority over the Action. Upon final approval of the Settlement, all Class Members who do not timely and validly exclude themselves from the Class shall be forever enjoined and barred from asserting any of the matters, claims, or causes of action released pursuant to the Settlement Agreement against any of the Released Parties, and any such Class Member shall be deemed to have forever released any and all such matters, claims, and causes of action against any of the Released Parties as provided for in the Agreement.

The Court shall retain continuing jurisdiction over the Parties and the implementation and enforcement of the terms of the Settlement Agreement, and to

assure that all payments and other actions required of any of the Parties by the Settlement Agreement are properly made or taken.

IT IS SO ORDERED.

DATED: September 18, 2019

HON. CHRISTINA A. SNYDER
United States District Judge