

IN THE CIRCUIT COURT OF PHELPS COUNTY, MISSOURI

CHRISTINE MENDOZA and TANYA DOOLEY, individually and on behalf of all others similarly situated,

Plaintiffs,

Case No. 21PH-CV00670

v.

UNITED INDUSTRIES CORPORATION,

Defendant.

PLAINTIFFS’ SUGGESTIONS IN SUPPORT OF PLAINTIFFS’ UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Plaintiffs Christine Mendoza and Tanya Dooley (“Plaintiffs”), Individually and as Class Representatives on Behalf of a proposed Settlement Class, respectfully request that the Court preliminarily approve the class action Settlement that is described in detail in the *Class Action Settlement Agreement* attached as Exhibit A, filed contemporaneously herewith; grant certification of the proposed Settlement Class for the purposes of the Settlement; approve the provision of Notice to the Settlement Class; appoint Digital Settlements Group as the Settlement Administrator; appoint the Plaintiffs as Class Representatives; and appoint (i) Bursor & Fisher, P.A.; (ii) KamberLaw LLC; and (iii) Steelman & Gaunt as Class Counsel.¹

At this preliminary approval stage, the Court need only review the proposed settlement to determine whether it is within the permissible “range of possible judicial approval” and thus, whether the notice to the class and the scheduling of the formal fairness hearing is appropriate.

¹ Capitalized terms used herein but not defined herein shall have the meaning ascribed to such terms in the Settlement Agreement.

See FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, § 21.632 (4th ed. 2004); 4 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 11:25 (4th ed. 2002); *see also State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 377 (Mo. Ct. App. 1997) (stating that the purpose of a preliminary approval hearing is for the court to make a “preliminary examination of the record before it and make a preliminary determination as to whether it appears that a settlement class should be tentatively certified.”).

I. BACKGROUND OF THE LITIGATION

This case arises out of Plaintiffs’ allegations that Defendant United Industries Corporation (“Defendant”) deceptively and unlawfully marketed and labeled pest control products sold under the following brand names: registered citronella candles sold under the Cutter and Repel brands and total release foggers sold under the Black Flag, Do It Best, Eliminator, Green Thumb, Hot Shot, No Pest, Real-Kill, Rid-A-Bug, Spectracide, and TAT brands, collectively referred to herein as “Covered Products” or a “Covered Product.” Specifically, Plaintiffs allege that Defendant represented that its citronella candle products would repel mosquitoes, and that its insect fogger products would kill and/or repel insects. Plaintiffs’ Class Action Petition was filed on May 4, 2021 and includes claims for violations of the Missouri consumer protection laws, fraud, breach of express warranty, and unjust enrichment.

This Settlement is a product of engagement between the Parties, which was preceded by intensive case investigation by Plaintiffs. Over the last several months, the parties have engaged in intensive settlement discussions, which ultimately resulted in the Settlement Agreement.

II. NATURE OF THE SETTLEMENT

As explained in the proposed Settlement Agreement, Defendant has agreed to provide both monetary and substantial injunctive relief that will correct the issues identified in the Complaint. Defendant has agreed to a two-tiered structure for monetary relief to class members whereby

Defendant will provide cash benefits to Settlement Class Members who timely file Claims by the Claims Deadline and who provide all the necessary information to the Settlement Administrator. Defendant has agreed to pay of \$7.00 per unit purchased to Settlement Class Members who do not have a valid Proof of Purchase, up to a maximum of two units, and a full refund for up to six units for Settlement Class Members who provide valid Proof(s) of Purchase. Defendant will provide a Maximum Settlement Amount of US \$3,600,000 in the aggregate. In addition, Defendant will provide important Injunctive Relief within 1 year of this Settlement as summarized below and as set forth in the Settlement Agreement.

III. TERMS OF THE SETTLEMENT

The key terms of the Settlement Agreement are detailed below.

A. Definitions

1. Section 2.32 of the Settlement Agreement defines the “Settlement Class” as: all Persons who purchased one or more Covered Products during the Class Period. Excluded from the Settlement Class are: (i) all Persons who purchased or acquired the Covered Products for resale; (ii) Defendant and its employees; (iii) any Person who properly and timely opts out pursuant to this Agreement; (iv) federal, state, and local governments (including all agencies and subdivisions thereof, but employees thereof are not excluded); and (v) the judges to whom this Action is assigned and any member of their immediate family.

2. Section 2.28 of the Settlement Agreement defines “Released Claims” as: any claim, liability, right, demand, suit, matter, obligation, lien, damage, punitive damage, exemplary damage, penalty, loss, cost, expense, debt, action, or cause of action, of every kind and/or nature whatsoever whether now known or unknown, suspected or unsuspected, asserted or unasserted, latent or patent, which any Releasing Party now has, or at any time ever had,

regardless of legal theory or type or amount of relief or damages claimed, which: (i) in any way arises out of, is based on, or relates in any way to representations pertaining to the efficacy of the Covered Products; and/or (ii) is asserted in the Complaint filed in this Action. However, Released Claims shall not include claims for personal injury.

3. Section 2.29 of the Settlement Agreement defines “Releasing Parties” as the Settlement Class and its members, agents, attorneys, partners, joint venturers, affiliates, predecessors, successors, spouses, heirs, assigns, insurers, and any other Persons or entities claiming by or through the Settlement Class, in their capacities as such.

B. The Requested Settlement Class

The Parties stipulate to and request the certification of the Class as defined in the Settlement Agreement, for settlement purposes only, pursuant to Rules 52.08(a), (b)(2) and (b)(3) of the Missouri Rules of Civil Procedure. “Among current applications of Rule 23(b)(3), the ‘settlementonly’ class has become a stock device.” *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 377 (Mo.Ct. App. 1997), quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 138 L.Ed.2d 689 (1997). *Amchem* specifically approved of the use of a temporary settlement class in order to facilitate settlement. *Id.*

C. Monetary Relief

The Settlement Agreement provides that Defendant will pay or cause to be paid, by cash benefits, all Valid Claims made by Settlement Class Members. The monetary relief shall be administered by the Settlement Administrator. *See* Claim Form attached hereto as Exhibit B.

D. Non-Monetary Relief

In addition to the payments described above, and as described in detail in the Settlement Agreement, Defendant will provide significant non-monetary relief to class members. The Settlement Agreement provides that Defendant will cease sales of the Candles by one year

following the Preliminary Approval Order unless it obtains and provides to Class Counsel additional substantiation for its labeling claims. Further, within one year of the date of preliminary approval, Defendant will review the substantiation for the efficacy claims made on the Foggers and make and provide to Class Counsel any necessary modifications to the packaging. This Court shall have continuing jurisdiction if a dispute arises between Class Counsel and Defendant concerning Non-Monetary Benefits.

E. Notice

The Settlement Agreement provides for a direct notice to known Settlement Class Members, Internet Notice, a Settlement Website, and telephonic support of the notice campaign. *See* Long Form Notice and Short Form Notice attached hereto as Exhibits C and D, respectively. The Settlement Administrator identified by the Parties and approved by the Court shall administer and oversee the notice program and claims administration. *See* Declaration of Mark Schey attached hereto as Exhibit E. The full cost of notice and administration and effectuation of the Settlement Agreement shall be paid by Defendant.

F. Opt-Outs and Objectors

The Settlement Agreement provides mechanisms by which members of the Class may opt out of, or object to, the proposed settlement. Any Settlement Class Member who intends to object to the Settlement must do so on or before the “Objection Deadline.” In order to object, the Settlement Class Member must file with the Court, and provide a copy to the Settlement Administrator, Class Counsel, and Defendant’s counsel, a document that includes all of the following: (a) the name of this Action; (b) the objector’s full name, address, and telephone number (and, if applicable, the objector’s lawyer’s full name, address, and telephone number); (c) a statement of his or her membership in the Settlement Class, including a verification under oath of Covered Product(s) purchased and, to the extent known, the location, approximate date, and

approximate price paid; (d) a written statement of all grounds for the objection, including any legal support for the objection; (e) copies of any papers, briefs, or other documents upon which the objection is based; (f) a list of any and all Persons who will be called to testify in support of the objection; (g) a statement of whether the objector or the objector's attorney intends to appear at the Final Approval Hearing; (h) a list and copies of any and all exhibits that the objector or the objector's lawyer intends to offer at the Final Approval Hearing; (i) the identity of any current or former lawyer who may be entitled to compensation for any reason related to the objection; and (j) a list of any other objections submitted by the Settlement Class member and/or his attorney(s) to any proposed class settlement in any state or federal court within the previous 5 years.

Any Settlement Class member who does not wish to participate in this settlement must send to the Settlement Administrator a written request to exclude himself or herself from this Agreement, which request should contain the Settlement Class member's name, address, and telephone number. Such request for exclusion must be postmarked or received by the Settlement Administrator before the end of the Opt-Out Period.

G. Service Award

Class Counsel shall also submit to the Court an application seeking leave to pay Service Awards in accordance with the terms of the Settlement Agreement.

H. Attorneys' Fees

Class Counsel will submit to the Court an application seeking a Fee and Expense Award of not more than \$900,000 in attorneys' fees, expenses, and costs. Defendant agrees that it will deposit the sums awarded and approved by the Court in an account established and maintained by the Settlement Administrator no later than ten (10) business days following the earlier of (i) the Final Effective Date or (ii) such date that Class Counsel provides payment security in a form agreed

by Class Counsel and Defendant (which security shall provide for recovery of all fees and expenses paid to Class Counsel in the event that the final judgment or Attorneys' Fees and Costs Awards is reversed or otherwise reduced); provided, that the date described in clause (ii) shall not occur prior to the entry of the Final Approval Order and award of the Attorneys' Fees and Costs Award.

I. Release

Upon the entry of a final order approving this settlement and following the expiration of the time for appeal or the entry of a decision on such appeal, the Class Representatives and each and every member of the Settlement Class who has not timely filed a request to be excluded from the Settlement Class will release and forever discharge the Released Parties as further explained in the attached Settlement Agreement.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask that the Court grant preliminary approval of the proposed Settlement Agreement, enter the proposed Order attached hereto as Exhibit F, and grant such further relief as the Court deems reasonable and just.

Dated: June 7, 2021

Respectfully submitted,

Christine Mendoza and Tanya Dooley, Individually,
and on Behalf of all Others Similarly Situated, Plaintiffs

By: /s/ Bryce C. Crowley
Bryce C. Crowley, #64800
bcrowley@steelmanandgaunt.com
David L. Steelman, #27334
dstelman@steelmanandgaunt.com
Stephen F. Gaunt, #33183
sgaunt@steelmanandgaunt.com
STEELMAN & GAUNT
901 Pine Street, Suite 110
Rolla, Missouri 65401
Tel: (573) 458-5231
Fax: (573) 341-8548

Scott A. Kamber, #70534
skamber@kamberlaw.com
KAMBERLAW, LLC
201 Milwaukee Street, Suite 200
Denver, Colorado 80206
Tel: (303) 222-9008
Fax: (212) 202-6364

Yitzchak Kopel (*pro hac vice*)
ykopel@bursor.com
BURSOR & FISHER, P.A.
888 7th Avenue
New York, New York 10019
Tel: (646) 837-7150
Fax: (212) 989-9163

Attorneys for Plaintiffs and the Putative Class

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served by email to all counsel of record on this 7th day of June, 2021.

By: /s/ Bryce C. Crowley
Bryce C. Crowley