UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF MISSOURI

JOSHUA RAWA, ELISABETH MARTIN, ROBERT RAVENCAMP, AMY WARD, CYNTHIA DAVIES, CHRISTOPHER ABBOTT, OWEN OLSON, JEANNIE A. GILCHRIST, ZACHARY SHOLAR, MATTHEW MYERS, JOHN W. BEARD, JR., and MICHAEL OVERSTREET on behalf of themselves, all others similarly situated, and the general public, Plaintiffs, v. MONSANTO COMPANY, Defendant.	Case No.: 4:17-cv-01252-AGF

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF NATIONWIDE CLASS ACTION SETTLEMENT *BY CONSENT*

With defendant Monsanto's consent, plaintiffs respectfully move for preliminary approval of a proposed nationwide Settlement Agreement.[1]

INTRODUCTION

This is a consumer fraud class action in which Plaintiffs allege that the neck label on certain sizes of Monsanto's Roundup® Weed & Grass Killer Concentrate Plus ("Concentrate Plus") and Roundup® Weed & Grass Killer Super Concentrate ("Super Concentrate," collectively "Roundup® Concentrates") overstated the number of gallons of spray solution made.

Ninety days after serving Monsanto with her October 2016 lawsuit, plaintiff Elisabeth Martin moved for and, shortly thereafter obtained certification of a class of California purchasers. The parties agreed to mediate and, after two full-day sessions, settled on a nationwide basis with Monsanto agreeing to establish a **$21.5 million Common Fund** against which Class Members can claim refunds of 50% of the purchase price, for up to 20 units, with either a proof of purchase

[1] The Settlement Agreement is attached to the Fitzgerald Declaration as Exhibit 1. All capitalized terms herein have the meaning specified in the Settlement Agreement.

or an affirmation under penalty of perjury of the identity and quantity purchased.

This is an excellent settlement for the Class, allowing for robust Class Notice, and permitting Class Members to claim significant monetary refunds—50% of the purchase price, or $11 to $53 per unit, depending on size—for as much product as they reasonably could have purchased. No portion of the fund will revert to Monsanto. And, partially as a result of plaintiffs' lawsuits (particularly Ms. Martin's), Monsanto has accelerated efforts to remove the offending language from Roundup® Super Concentrate products, and has agreed to consult with Class Counsel on labeling revisions to further clarify the mixing and dilution instructions. Thus, the lawsuits and settlement, if approved, will benefit not only Class Members, but the general public as well. Accordingly, "the settlement is within the range of possible approval," *see Schoenbaum v. E.I. Dupont De Nemours & Co.*, 2009 WL 4782082, at *3 (E.D. Mo. Dec. 8, 2009) (citations omitted).

FACTS

I. PROCEDURAL HISTORY PRIOR TO JULY 2017

Plaintiffs' September 22 Amended Consolidated Complaint (Dkt. No. 28) consolidates two actions—*Rawa* and *Martin*—and adds as putative class representatives several plaintiffs who previously had pending in various jurisdictions other, related actions against Monsanto.

A. *Martin v. Monsanto*

Martin v. Monsanto Co., No. 16-cv-2168-JFW (C.D. Cal.) ["*Martin*"], filed on October 13, 2016, was the first case filed regarding misrepresentations of gallons made on Monsanto's Roundup® Concentrates. Ms. Martin alleged she was misled when she purchased Roundup® Super Concentrate that promised a certain number of gallons, which she alleged was achievable only by diluting the solution to about half normal strength. (*See generally Martin* Dkt. No. 1.)

The Central District of California has a Local Rule requiring any class certification motion

to be filed within 90 days of serving the defendant. C.D. Cal. Civ. L.R. 23-3. After serving Monsanto on November 4, 2016, Class Counsel immediately began pursuing discovery. The same day as the parties' 26(f) conference, on December 15, 2016, Class Counsel served document requests, interrogatories, and served a dozen third-party document subpoenas. The day after receiving Monsanto's written responses on January 17, Ms. Martin sent a letter seeking a conference with respect to various deficiencies, after which she began the required joint briefing process. (*See Martin* Dkt. No. 51-3 ¶¶ 51, 54, 59.) Meanwhile, between January 23 and 25, Monsanto produced 11,230 pages of documents (*id.* ¶¶ 53, 55-56), which Class Counsel reviewed *in full* before taking Monsanto's Rule 30(b)(6) deposition on January 27 (*id.* ¶ 57).[2]

Leading up to the February 6 certification motion (*Martin* Dkt. No. 51), Class Counsel obtained retail sales data from Home Depot, Lowe's, and Wal-Mart (*id.* ¶¶ 63, 67, 69, 71), which allowed the class's damages expert, Colin B. Weir, to provide a detailed damages model and calculation in support of certification. (*See Martin* Dkt. No. 51-16.) While Monsanto prepared its certification opposition, Class Counsel continued pursuing discovery, obtaining additional sales data from Lowe's and Amazon.com (*see Martin* Dkt. No. 66-1, at ¶¶ 11-12), and coordinating with Mr. Weir to provide an updated damages estimate (*see id.* ¶ 13-14; *Martin* Dkt. No. 66-7). Class Counsel also defended Mr. Weir's and Ms. Martin's depositions on February 9 and 10.

Monsanto filed its class certification opposition on February 20 (*Martin* Dkt. No. 60). Two days before Ms. Martin's reply was due, Monsanto produced a document reflecting thousands of consumer complaints, which Monsanto had located in responding to Ms. Martin's motion to compel. Though lengthy, Class Counsel incorporated this information into Ms. Martin's

[2] While discovery proceeded, on December 16, 2016, Monsanto moved to dismiss *Martin*. (*Martin* Dkt. No. 26.) Ms. Martin opposed on December 30 (*Martin* Dkt. No. 35). On February 16, Judge Walter largely denied Monsanto's motion. (*Martin* Dkt. No. 57.)

February 27 reply. (*See Martin* Dkt. Nos. 66, 81-1, 81-2, 81-3.)

On March 24, Judge Walter granted Ms. Martin's motion. (*Martin* Dkt. No. 89 (published at *Martin*, 2017 WL 1115167).) He found Class Counsel had "conducted a significant amount of work in identifying and investigating the claims of the class members, and in preparing this motion for class certification within the 90-day deadline," *Martin*, 2017 WL 1115167, at *5. This included "present[ing] evidence that [Ms. Martin] acted like thousands of other purchasers" "present[ing] sufficient evidence to demonstrate that the 'Makes up to _ Gallons' statement is material to the reasonable consumer," and demonstrating "that thousands of consumers were misled in the same manner as plaintiff." *Id.* at *3, *4, *7.

B. *Rawa v. Monsanto*

Mr. Rawa, represented by Ms. Martin's counsel, filed this action, *Rawa v. Monsanto Co.*, No. 17-cv-1252-AGF (E.D. Mo.) (Fliessig, J., presiding) ["*Rawa*"], on April 5, 2017, asserting under the Missouri Merchandising Practices Act (MMPA), on behalf of Roundup® Concentrate purchasers in the United States, other than in California, claims substantially similar to those asserted by Ms. Martin. (Dkt. No. 1, Compl.) Monsanto moved to dismiss the action on June 8 (Dkt. No. 20), Mr. Rawa opposed (Dk.t No. 23), and Monsanto filed a reply (Dkt. No. 24). On August 7, the Court largely denied the motion, but found Mr. Rawa could not represent purchasers of Roundup® Concentrate Plus, giving him leave to amend. (Dkt. No. 25.)

C. The Other State Actions

Three days after Ms. Martin filed her class certification motion, on February 9, 2017, Mr. Ravencamp, represented by different counsel, filed a Missouri state court action asserting similar claims, on behalf of a class of Missouri purchasers, styled *Ravencamp v. Monsanto Co.*, No. 1716-CV03336 (Mo. Cir. Ct.) (Phillips, J., presiding) ["*Ravencamp*"]. On April 20, Monsanto moved to dismiss, and Mr. Ravencamp opposed. On May 25, the court denied the motion without

decision. In the meanwhile, after Ms. Martin obtained certification of a California class, nine similar lawsuits were filed throughout the country by plaintiffs represented by other counsel, including:

a. *Amy Ward v. Monsanto Company*, Case No. 1:17-cv-03335 (N.D. Ill.)
b. *Christopher Abbott v. Monsanto Company*, Case No. 3:17-cv-00315 (W.D. Ky.)
c. *Owen Olson v. Monsanto Company*, Case No. l:l 7-cv-01333 (D. Colo.)
d. *Jeannie A. Gilchrist v. Monsanto Company*, Case No. 5:17-cv-266 (E.D.N.C.)
e. *Zachary Sholar v. Monsanto Company*, Case No. 4:17-cv-00100 (S.D. Ind.)
f. *Matthew Myers v. Monsanto Company*, Case No. l:l 7-cv-02045 (N.D. Ga.)
g. *John Beard et al v. Monsanto Company*, Case No. l:l 7-cv-00171 (E.D. Tenn.)
h. *Michael Overstreet v. Monsanto Company*, Case No. 2:17-cv-2740 (E.D. Penn.)

(Fitzgerald Decl. ¶ 12.)

II. SETTLEMENT NEGOTIATIONS & POSTURE FOLLOWING SETTLEMENT

There were no settlement negotiations in this case until after the California class was certified in March, but shortly afterwards, the parties agreed to go to mediation in Chicago, on June 21, before the Honorable James F. Holderman (Ret.), former Chief Judge of the Northern District of Illinois. (Fitzgerald Decl. ¶ 7.) Before the mediation, Judge Holderman gave the parties a briefing schedule, and they exchanged multiple, lengthy briefs such that each was well informed of the others' position. (*Id.* ¶ 8.)

On June 21, the parties participated in a full-day mediation session with Judge Holderman. Before doing so, Class Counsel conducted a focus group to help determine (and convince Monsanto) of the strength of the Class's claims. The mediation began with a joint session, during which Class Counsel presented the focus group results to Monsanto. (*Id.* ¶ 9.)

Although the parties negotiated for a full day, they did not reach an agreement during the first session. However, they had made enough progress that they, and Judge Holderman, agreed it was worth engaging in a second session. The parties thus scheduled a second session on July 11, during which—only in the evening, after another full day of negotiating—the parties reached a

tentative nationwide settlement. (*Id.* ¶ 10; *see also generally* Holderman Decl. ¶¶ 4-7.) Over the next few weeks, the parties memorialized the settlement in the form of a full Settlement Agreement. (Fitzgerald Decl. ¶ 11.)

Procedurally, Monsanto believed the appropriate jurisdiction for consideration was before this Court, since Monsanto resides in this district and the 49-state class action was pending here. (*See Martin* Dkt. No. 106.) Therefore, the parties filed, pursuant to 28 U.S.C. § 1404, a motion to transfer *Martin* to this district. (*Martin* Dkt. No. 107.) Judge Walter granted the motion, finding good cause, in part because "transfer will promote an efficient and economical consideration of the proposed nationwide settlement, and transfer will not affect the substantive rights of the class certified in this action." (*Martin* Dkt. No. 108).

Finally, after the Settlement was achieved, Class Counsel has reached out to each of the plaintiffs in the nine related actions. *All* agreed that the nationwide settlement was strong, and worth supporting. Thus, each of these plaintiffs was referred to Class Counsel, to be added to the Complaint, and their original actions dismissed. (*See* Fitzgerald Decl. ¶ 12.)

III. THE SETTLEMENT'S TERMS

The Settlement is on behalf of all persons in the United States, who, during the Class Period,[3] purchased in the United States, for personal or household use and not for resale or distribution, Roundup® Concentrate Plus or Super Concentrate, in packaging whose neck or shoulder label stated that the product "makes up to" a specified number of gallons, other than those who received a full refund. (*See* Settlement Agreement ¶ A.11.)

[3] The "Class Period" means the applicable statute of limitations for the false advertising law in the state where each Claimant is domiciled, triggered by the date the Complaint was filed in *Martin* for California residents (October 13, 2016), and by the date the Complaint was filed in *Rawa* for all other states' residents (April 5, 2017). (*See* Settlement Agreement ¶ A.15 & Ex. A.)

D. The Settlement's Benefits for the Class

1. Monetary Relief: $21.5 Million Non-Reversionary Common Fund

Monsanto will place into a Qualified Settlement Fund $21,500,000 to cover all expenses associated with the Settlement (the "Common Fund"). (*Id.* ¶ E.1.) The Common Fund will be used to pay claims, Notice costs, administration expenses, incentive awards, and attorneys' fees and expenses. (*Id.* ¶ E.2.) Interest on the fund will inure to the benefit of the Class. (*Id.*)

a. Class Notice and Administration Costs

The parties have agreed, with the Court's approval, to hire Dahl Administration as the Claim Administrator. (*Id.* ¶ H.) Dahl designed the Notice Plan to reach 85-90% of the Class at a 3x frequency, and estimates notice and administration expenses will range from about $700,000 to $1.3 million for rates from about 2% to about 20%). (Fellows Decl. ¶¶ 10-16; *see also generally id.* ¶¶ 10-41 & Exs. 1-3 (describing Notice Plan in detail); Fitzgerald Decl. ¶ 20.)

b. Enhancement Awards and Attorneys' Fees and Costs

Plaintiffs and Class Counsel will apply for an order awarding from the Common Fund attorneys' fees and costs, and service awards. Monsanto may respond in any manner it chooses, including opposing or not responding. (Settlement Agreement ¶ G.1.[4]) Any fees awarded will be paid under a "quick-pay" provision, subject to repayment. (*Id.* ¶ G.2.)

c. Payment of Class Members' Claims

Class members will be able to claim refunds by submitting (i) contact information; (ii) proof of purchase or an affirmation under penalty of perjury of the identity and quantity

[4] Although the parties have not reached any specific agreement regarding attorneys' fees or incentive awards, Class Counsel intends to apply for fees of up to one-third of the Common Fund, and plaintiffs and Class Counsel intend to apply for incentive awards of up to $10,000 for Ms. Martin and up to $5,000 each for Mr. Rawa and Mr. Ravencamp, and up to $2,500 each for the remaining plaintiffs. (Fitzgerald Decl. ¶ 13.) Both the attorneys' fees and incentive awards would be taken from the Common Fund.

purchased; (iii) the retail location (city, state, and street name) of the purchase(s); and (iv) the approximate date of the purchase(s). (*Id.* ¶¶ J.3-4.) Claimants will receive a per-unit amount approximately equal to 50% the weighted average retail price for each size at issue during the Class Period, which is as follows:

Roundup® Product	Weighted Average Retail Price	Per Unit Payment
Super Concentrate 35.2 fl. oz.	$42.48	$21
Super Concentrate 53.7 oz. (0.42 gal.)	$62.88	$31
Super Concentrate - 64 fl. oz. (1/2 gal.)	$72.64	$36
Super Concentrate - 128 fl. oz. (1 gal.)	$105.85	$53
Concentrate Plus 32 oz. (1 qt.)	$21.31	$11
Concentrate Plus 36.8 oz.	$22.97	$11.50
Concentrate Plus 40 oz.	$26.40	$13
Concentrate Plus 64 oz. (1/2 gal.)	$44.54	$22

(*Id.* ¶ F.1.) If Class Member claims exceed the Common Fund, claim amounts will be reduced *pro rata* (*id.* ¶ E.4), while any remaining funds shall be donated *cy pres* (*id.* ¶ M).

2. Labeling Changes

Monsanto removed the gallons statement from Concentrate Plus in 2014, but it remained on Super Concentrate until recently. After Ms. Martin obtained certification, Monsanto began the process of removing it from Super Concentrate. Monsanto acknowledges the lawsuit accelerated this action. (Fitzgerald Decl. ¶ 14.) Monsanto has now agreed to undertake further labeling revisions to clarify the products' dilution rates and mixing instructions and Monsanto will consult with Class Counsel regarding potential label changes. (Settlement Agreement ¶ D.1.)

E. The Settlement's Class Release

Class Members who do not opt out will fully release Monsanto and related entities from all claims that could have been asserted in the litigation. (*Id.* ¶ N.1.)

F. Procedures for Opting Out or Objecting

Class Members who wish to opt out must download from the Settlement Website and

submit by the deadline, an Opt-Out Form. (*Id.* ¶¶ K.1-3.) Class Members who wish to object must file and serve a written objection by the deadline. (*Id.* ¶¶ L.1-3.)

ARGUMENT

I. THE COURT SHOULD CERTIFY THE NATIONWIDE SETTLEMENT CLASS

A class action can only be settled with court approval. Fed. R. Civ. P. 23(e). "In the context of Rule 23(e), this Court may, upon request of the parties, certify a class solely for purposes of settlement after making a determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b)." *Simmons v. Enter. Holdings, Inc.*, 2012 WL 718640, at *1 (E.D. Mo. Mar. 6, 2012) (Fleissig, J.) (quotation omitted).

A. The Numerosity Requirement of Rule 23(a)(1) is Satisfied

The Settlement covers about 4,050,000 units, bought by an estimated 3.5 million Class Members, representing about $164 million in retail sales (*see* Fitzgerald Decl. ¶ 15; Fellows Decl. Ex. 2, Grudnowski Decl. ¶ 6), satisfying numerosity. *Compare Martin*, 2017 WL 1115167, at *3.

B. The Commonality Requirement of Rule 23(a)(2) is Satisfied

"[C]ommonality requires that the class members' claims 'depend upon a common contention" such that "determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). "Even a single common question that meets this standard satisfies Rule 23(a)(2)," *Davenport v. Charter Commc'ns, LLC*, 302 F.R.D. 520, 529 (E.D. Mo. 2014) (Fleissig, J.). Commonality is satisfied where "the class members' claims derive from a common nucleus of operative facts." *Hopkins v. Kan. Teachers Cmty. Credit Union*, 265 F.R.D. 483, 487 (W.D. Mo. 2010) (quotation omitted). Here, all Class Members' claims arise from Monsanto's alleged misleading advertising of its Roundup® Concentrates as capable of making more gallons of spray solution than they are actually capable of making when following the back label instructions for

normal use. Thus, "[a] classwide proceeding in this case has the capacity to generate common answers to common questions apt to drive the resolution of the litigation," *see Martin*, 2017 WL 1115167, at *4; *see also Claxton v. Kum & Go, L.C.*, 2015 WL 3648776, at *3 (W.D. Mo. June 11, 2015).

C. The Typicality Requirement of Rule 23(a)(3) is Satisfied

"Typicality means that 'other members of the class . . . have the same or similar grievances as the Plaintiffs,' in that they have been subjected to the same allegedly unlawful treatment." *Boswell v. Panera Bread Co.*, 311 F.R.D. 515, 528 (E.D. Mo. 2015) (Fleissig, J.) (quotation omitted). The "requirement is 'fairly easily met' and it is considered satisfied where 'the claims or defenses of the representatives and the members of the class . . . are based on the same legal or remedial theory.'" *Claxton*, 2015 WL 3648776, at *3 (quotation omitted). Here, "[p]laintiff[s'] claims are sufficiently typical of the class claims" because plaintiffs "allege[ ] that [they] and all class members were exposed to the same statement . . . and that they were all injured in the same manner, i.e., the Roundup® Concentrates provided less spray solution than promised when diluted in accordance with the instructions on the back label." *Martin*, 2017 WL 1115167, at *4; *see also Van Orden v. Meyers*, 2011 WL 4600688, at *8 (E.D. Mo. Sept. 30, 2011) (Fleissig, J.).

D. The Adequacy Requirement of Rule 23(a)(4) is Satisfied

"The adequacy requirement . . . focuses on 'whether: (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel.'" *Boswell*, 311 F.R.D. at 529 (quoting *Paxton v. Union Nat. Bank*, 688 F.2d 552, 562-63 (8th Cir. 1982)). Ms. Martin and Class Counsel have already been found adequate. *Martin*, 2017 WL 1115167, at *5. The remaining plaintiffs also "ha[ve] standing, ha[ve] no conflict of interest with other class members, [are] aware of [their] obligations as a class representative[s], and ha[ve] been and will continue prosecuting

the action vigorously on behalf of the class." *See id.*; Fitzgerald Decl. ¶ 16 & Exs. 2-3.

E. Common Questions of Law or Fact Predominate

"At the core of Rule 23(b)(3)'s predominance requirement is the issue of whether the defendant's liability to all plaintiffs may be established with common evidence." *Komoroski v. Util. Serv. Partners Private Label, Inc.*, 2017 WL 3261030, at *6 (W.D. Mo. July 31, 2017) (quoting *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1029 (8th Cir. 2010)). "If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question." *Id.* (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005)). In certifying the California class, Judge Walter found that common issues predominate because "[w]hether [the Gallons Statement] constitutes an express warranty, whether that warranty is breached, and whether that statement was likely to deceive a reasonable consumer are issues subject to common and generalized proof." *Martin*, 2017 WL 1115167, at *7. The same is true of the claims asserted here under the MMWA and MMPA. Indeed, under the MMPA, "defendant's conduct . . . determines whether a violation has occurred," *Murphy v. Stonewall Kitchen, LLC*, 503 S.W.3d 308, 311 (Mo. Ct. App. 2016) (citation omitted), and Monsanto's conduct was the same as to all Class Members. Finally, for purposes of certifying the Settlement Class, Monsanto does not contest predominance. (*See generally* Settlement Agreement ¶ B.)

F. A Class Action is the Superior Method for Adjudicating this Controversy

A class action is the superior method for adjudicating this controversy under Rule 23(b)(3) because class members' interest in individually controlling the prosecution of separate actions, *see* Fed. R. Civ. P. 23(b)(3)(A), is small given the products' low cost. *See Martin*, 2017 WL 1115167, at *9; *Tinsley v. Covenant Care Services, LLC*, 2016 WL 393577, at *11 (E.D. Mo. Feb. 2, 2016). While a few other cases have been filed against Monsanto asserting similar claims, *see* Fed. R. Civ. P. 23(b)(3)(B), this is the lead litigation; the other suits were all filed after Ms. Martin obtained

certification, using nearly identical copies of her Complaint. No discovery has been had in those cases. Thus, this nationwide settlement is the superior method for resolving Class's claims. *See In re Processed Egg Products Antitrust Litig.*, 284 F.R.D. 249, 265 (E.D. Pa. 2012).

Moreover, it is desirable to concentrate litigation in this forum, *see* Fed. R. Civ. P. 23(b)(3)(C), because Monsanto resides in this district, and a substantial part of the events giving rise to the claims occurred in this district. *See Simmons*, 2012 WL 718640, at *2. Thus, the superiority requirement is satisfied. *See Pollard v. Remington Arms Co., LLC*, 2017 WL 991071, at *6 (W.D. Mo. Mar. 14, 2017) (superiority satisfied where "the settlement provides concrete, substantial remedies to individuals," and "avoids duplicative litigation"); *Khaliki v. Helzberg Diamond Shops, Inc.*, 2011 WL 13136960, at *1 (W.D. Mo. Oct. 21, 2011).

II. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

"When a proposed class-wide settlement is reached, it must be submitted to the court for preliminary approval." *Komoroski v. Util. Serv. Partners Private Label, Inc.*, 2017 WL 3261030, at *1 (W.D. Mo. July 31, 2017) (citation omitted). "[T]he issue" in considering a motion for preliminary approval, "is whether the proposed settlement falls within the range of fairness so that notice of the proposed settlement should be given to class members and a hearing scheduled to consider final approval." *Id.* (citation omitted). "In making this preliminary determination, courts should consider issues such as whether the settlement carries the hallmarks of collusive negotiation or uninformed decision-making, is unduly favorable to class representatives or certain class members, or excessively compensates attorneys." *Schoenbaum*, 2009 WL 4782082, at *3.

Courts also frequently consider factors the Eighth Circuit has set forth to guide decisions whether to grant final approval, namely (1) "the merits of the plaintiff's case[ ] weighed against the terms of the settlement," (2) "the defendant's financial condition," (3) "the complexity and expense of further litigation," and (4) "the amount of opposition to the settlement." *In re Uponor,*

Inc., F1807 Plumbing Fittings Prod. Liab. Litig., 716 F.3d 1057, 1063 (8th Cir. 2013) ["*Uponor*"] (quoting *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988)); *see also Risch*, 2012 WL 3242099, at *2 (listing same factors); *Simmons*, 2012 WL 718640, at *2 (same).

"In evaluating the settlement, the Court[ ] should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery." *In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694, 700 (E.D. Mo. 2002) (quotation omitted).

A. The Settlement is the Product of Arms' Length, Informed Negotiations

While the Settlement was reached less than a year after Ms. Martin filed her action, it comes on the heels of a tremendous amount of work by Class Counsel, both to investigate the case and formulate the liability and damages theories, then, after filing, to obtain certification just a few short months into the litigation. This includes several depositions, thousands of pages of documents, and an exchange of expert reports. And, the settlement was reached only after two full-day mediation sessions, preceded by an exchange of even more information. "Courts are less likely to find collusion when a settlement agreement was preceded by a significant period of litigation or negotiations were conducted by a third-party mediator." *Heldt v. Payday Fin., LLC*, 2016 WL 96156, at *6 (D. S.D. Jan. 8, 2016) (citation omitted).

The Settlement also lacks any typical signs of collusion, such as a "clear sailing" provision or a reversion of funds to Monsanto. *See McClean v. Health Sys., Inc.*, 2015 WL 12426091, at *4-5 (W.D. Mo. June 1, 2015). And it does not unduly favor plaintiffs or certain Class Members, since every Class Member that makes a claim will receive the same amount for each size, and it is fair and reasonable that plaintiffs seek incentive awards for their service. *See Risch*, 2012 WL 3242099, at *3 (preliminary approval of settlement providing $5,000 incentive awards); *Simmons*

v. Enter. Holdings, Inc., 2012 WL 2885919, at *2 (E.D. Mo. July 13, 2012) (Fleissig, J.).

B. The Settlement is Within the Range of Possible Approval

Consideration of the *Uponor* factors demonstrates that the Settlement has no obvious deficiencies, weighing in favor of preliminary approval.[5]

First, the merits, when weighed against the settlement terms, favors approval. This was a strong case on the merits, and the Settlement reflects that. The lawsuit and Settlement have resulted in Monsanto's accelerating its decision to finalize the removal of the offending neck label from Roundup® Super Concentrate, and Monsanto has agreed to consult with Class Counsel to further ensure the clarity of the label. In addition, the monetary relief is significant. The Class's damages model—which Monsanto vigorously disputes—results in damages of about 40% of the products' cost. With retail sales of $164 million, the maximum possible damages the Class might hope to obtain at a nationwide trial is therefore $65.6 million—but that could *only* happen if a nationwide class was certified, or classes under each of the 50 different states' laws (which would require several separate actions, increasing the costs and risks of obtaining such damages).[6]

Thus, another *Uponor* factor—the complexity and expense of further litigation—favors preliminary approval. "Class actions, in general, place an enormous burden of costs and expense upon parties." *Keil*, 862 F.3d at 697 (quoting *Marshall*, 787 F.3d at 512). Monsanto "has alleged numerous legal and factual defenses that, absent settlement, will require full discovery, including

[5] "[A]t this juncture, no opposition to the Settlement Agreement has been noted," and "[i]n the event that there are such objections, the Court [can] entertain them during the [final] fairness hearing," *see Risch*, 2012 WL 3242099, at *3; *Simmons*, 2012 WL 718640, at *3 (same). That *all* 10 plaintiffs with related pending cases support the settlement, however, speaks to its strong merit.

[6] This amount is so great claimants will likely receive the specified claim amount for all units purchased, with no pro rata reduction, even if notice and administration costs $1 million and the Court awards the maximum amount of fees, expenses, and incentive awards that may be requested—after which there will *still* be *significant* money left over to be donated *cy pres*. (*See* Fitzgerald Decl. ¶¶ 20-21.)

numerous depositions, briefing, and additional pre-trial work," which may include "thousands more hours of attorney time." *Id.* Moreover, "Class counsel's views" that this factor favors settlement "are entitled to deference, especially since the [California] court found that they have significant experience in class actions and complex litigation." *See id.* (citing *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995)); *compare Martin*, 2017 WL 1115167, at *5.

Finally, given Monsanto's size, there is "no indication that Defendant[] will be unable to pay, or incur undue hardship as a result of the settlement," *see Simmons*, 2012 WL 718640, at *3. And while Monsanto's "good financial standing . . . would permit it to adequately pay for its settlement obligations," Monsanto could just as easily use the Settlement funds to "continue with a spirited defense," *see Marshall v. Nat'l Football League*, 787 F.3d 502, 512 (8th Cir. 2015).

III. THE COURT SHOULD APPROVE THE NOTICE AND NOTICE PLAN

The Notice Plan (*see generally* Fellows Decl. ¶¶ 4-41) is the best notice practicable, *see* Fed. R. Civ. P. 23(c)(2)(B), because it was designed to target Class Members and reach 85% - 90% of them three times each. The proposed Notice is proper because it contains "information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment." *See In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977).

CONCLUSION

The Court should, respectfully, issue an Order, substantially in the form of the Proposed Order submitted herewith: (1) preliminarily certifying the settlement class and appointing plaintiffs and their counsel as Class Representatives and Class Counsel; (2) preliminarily approving the proposed Settlement; (3) approving the Class Notice and Notice Plan, and directing that Class Notice be disseminated pursuant to the Notice Plan; and (4) setting a fairness hearing and certain other dates in connection with the final approval of the Settlement.

Dated: October 4, 2017

Respectfully Submitted,

By: */s/ Kevin J. Dolley*

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