UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 19-1203 JVS (DFMx)	Date	August 11, 2021
Title	Will Kaupelis et al. v. Harbor Freight Tools		

Present: The Honorable	**James V. Selna, U.S. District Court Judge**

Lisa Bredahl	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **[IN CHAMBERS] Order Regarding Motion for Preliminary Approval of Class Action Settlement**

Plaintiffs Will Kaupelis ("Kaupelis") and Frank Ortega ("Ortega") (collectively – "Plaintiffs") move for preliminary approval of their class action settlement with Defendant Harbor Freight Tools USA, Inc. ("Harbor Freight"). Mot., ECF No. 174-1. Harbor Freight does not oppose. Notice of Non-Opposition, ECF No. 175. Plaintiffs also submitted a supplemental brief in response to a Court request for further information. Supp. Br., ECF No. 177.

For the following reasons, the Court **GRANTS** the motion.

I. BACKGROUND

A. Allegations

At issue in this case is the Portland 14-inch electric chainsaw (the "chainsaw"). Compl., ECF No. 1, ¶ 12. Kaupelis purchased a chainsaw from Harbor Freight in the fall of 2016. Kaupelis Dep., ECF No. 33-2, at 13. Ortega purchased one in early 2017. Ortega Dep., ECF No. 33-2, at 42. Shortly thereafter, both plaintiffs found that their chainsaws continued to run when the power switch was in the "off" position. Kaupelis Dep. at 17, 20-21; Ortega Dep. at 45-47. Three to four months later, Plaintiffs threw their respective chainsaws in the garbage because of the problem. Kaupelis Dep. at 174; Ortega Dep. at 49.

Plaintiffs allege that Kaupelis and Ortega both purchased chainsaws that contained a severe product defect that led to Harbor Freight's March 2018 recall of the chainsaws.

Compl. ¶ 1. The key defect alleged for the chainsaws is the existence of a single pole internal power switch that was prone to becoming fused in the "on" position. Response to Interrogatory No. 11, ECF No. 33-2, at 88. Since June 2015, Harbor Freight had sold approximately 440,710 chainsaws across the country. Weir Decl., ECF No. 33-2, at 366. The chainsaws were sold for $49.99 each. Tomlin Decl., ECF No. 73-2, at 318 ¶ 50. Until late 2020, 6.6% of customers participated in a recall. Mohorovic Decl., ECF No. 73-2, at 405 ¶ 51 n.61.

On June 17, 2019, Plaintiffs filed their complaint in the instant suit. Compl. Plaintiffs raise claims for (1) violation of California's Consumers Legal Remedies Act ("CLRA"), Civil Code §§ 1750, et seq.; (2) violation of California's Unfair Competition Law, Business and Professions Code §§ 17200-17210; (3) fraud by omission; (4) unjust enrichment; (5) breach of implied warranty under the Song-Beverly Act, California Civil Code 1790 et seq. and California Commercial Code § 2314; and (6) violations of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, et seq. Id. ¶ 2.

The Court has previously granted class certification for the following two classes:

> ***California Class*:** All persons in California who purchased a Portland 14" electric chainsaw for personal, family, or household use from June 17, 2013 through May 13, 2018.
>
> ***Multi-State Implied Warranty Class*:** All persons who purchased a Portland 14" electric chainsaw for personal, family, or household use:
>
> (1) in Alaska, Arkansas, California, Delaware, District of Columbia, Hawaii, Indiana, Kansas, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, or Wyoming on or after June 17, 2015 through May 13, 2018; or
>
> (2) in Colorado or Massachusetts on or after June 17, 2016 through May 13, 2018.

Class Cert. Order, ECF No. 136, at 24.

B. Summary of the Settlement

1. The Settlement Class

The Settlement Class is defined as:

> "all people who have purchased a Class Product during the Class Period. Excluded from the Class are: (a) anyone who has participated in the Chainsaw Recall prior to the date of the Preliminary Approval Order; (b) Defendant and its employees, principals, officers, directors, agents, affiliated entities, legal representatives, successors and assigns; (c) the judges to whom the Action has been or is assigned and any members of their immediate families; and, (d) all persons who have filed a timely Request for Exclusion from the Class."

Settlement Agreement, ECF No. 174-2, Ex. A, ¶ 8. The Class Products are defined as "any 14" Electric Chainsaws sold under the Portland, One Stop Gardens, or Chicago Electric brands, and with SKU No. 67255 or 61592." Id. ¶ 14. The Class Period is defined as the period from March 11, 2011, "up to and including the date this Agreement is fully executed." Id. ¶ 13. The date of the last signatures added to the Settlement Agreement is July 7, 2021.[1] See generally id. The Settlement Class consists of approximately 800,000 individuals. Mot. at 4.

2. Settlement Amount

Under the terms of the Settlement, Harbor Freight will offer the following remedies to individuals who have not already engaged in Harbor Freight's recall of the Class Products. First, Settlement Class Members who still have their chainsaws are entitled to returning their Class Product to a Harbor Freight store in exchange for $50 cash, a replacement chainsaw valued at approximately $50, or a $50 Harbor Freight gift card. Settlement Agreement ¶ 46. The $50 cash and the $50 Harbor Freight gift card are

[1] Plaintiffs describe the Class as "[a]ll consumers in the Unites States from 2009-present who purchased Harbor Freight Tools chainsaws bearing SKU numbers 67255 or 61592 and who have not participated in Harbor Freight's Chainsaw Recall." Mot. at 4. The Court does not see where the 2009 date comes from, given that the Class Period is defined as starting on March 11, 2011. Settlement Agreement ¶ 13. Moreover, the date of execution is July 7, 2021, and not the date of the issuance of this Order. See, e.g., Proposed Order Approving Preliminary Approval, ECF No. 174-2, Ex. B, 1.

only available options during the "Claims Period." Id. ¶ 46. The term "Claims Period" is undefined in the Settlement Agreement. Id. But the Parties "construe the term to be the 45-day period from the 'Notice Date' to the 'Claims Deadline.'" Supp. Br. at 1.

Second, a different form of relief is available to Settlement Class Members who no longer possess their Class Products but who have either a proof of purchase or a proof of destruction and Settlement Class Members who are unable to return their Class Product to a Harbor Freight store and have proof of destruction. Id. ¶ 47. These Settlement Class Members may receive either a gift card for $50 or a check for $50. Id. To obtain this relief, the Settlement Class members must complete an online application that "(1) identifies the date and description of disposal or destruction of the Class Product; (ii) [sic] declares that the Class Member has not participated in the Chainsaw Recall either before or after the date of the Preliminary Approval Order, [sic] and (iii) [sic] provides the Proof of Purchase or Proof of Destruction." Id.

Third, Settlement Class Members who do not have their Class Product, a Proof of Purchase, or a Proof of Destruction may elect to receive either a gift card valued at $25 or receive a check for $10. Id. ¶ 48. To receive one of these remedies, Settlement Class Members will have to complete an online application that "(1) states the date and store location that [sic] the Class Product was purchased; (ii) [sic] declares that the Class Member has not participated in the Chainsaw Recall either before or after the date of the Preliminary Approval Order, [sic] and (iii) [sic] identifies the date and description of disposal of the Class Product." Id.

All gift cards given to Settlement Class Members will have no expiration date, be freely transferable, be redeemable at any Harbor Freight store, and be redeemable for all Harbor Freight products. Id. ¶ 49.

3. Attorneys' Fees and Costs

Class Counsel have agreed not to seek attorney's fees and costs no greater than $665,000. Id. ¶ 61.

4. Administrative Expenses and Service Awards

Harbor Freight has agreed to separately pay for all Administrative Expenses, including sending a notice of the Settlement by first-class mail. Id. ¶ 52. Harbor Freight will also not oppose an application for an incentive award of $3,000 each for Kaupelis and Ortega. Id. ¶ 60.

5. Release

On final approval of the Settlement Agreement, "the Releasing Parties shall be deemed to have, and by operation of the Final Order and Final Judgment shall have, fully, finally and forever released, relinquished, and discharged all Released Claims, each Releasing Party shall be deemed as of the Effective Date of have expressly, knowingly, and voluntarily waived any and all provisions, rights, benefits conferred by Section 1542 of the California Civil Code, and any statute, rule and legal doctrine similar, comparable, or equivalent to Section 1542 . . .." Settlement Agreement ¶ 64.

The "Releasing Parties" are "Plaintiffs and all Class Members, and any person claiming by or through each Class Member, including but not limited to spouses, children, wards, heirs, devisees, invitees, employees, associates, co-owners, attorneys, agents, administrators, predecessors, successors, assignees, representatives of any kind, shareholders, partners, directors, or affiliates." Id. ¶ 33. The "Released Claims" are "any and all claims, causes of action, demands, debts, suits, liabilities, obligations, damages, entitlements, losses, actions, rights of action and remedies of any kind, nature and description, whether known or unknown, asserted or unasserted, foreseen or unforeseen, regardless of any legal or equitable theory, existing now or arising in the future, by Plaintiffs and any and all Class Members (including their successors, heirs, assigns and representatives) which in any way relate to the failure or propensity for failure of the power switch in Class Products . . .." Id. ¶ 31.

6. Notice

The Parties have selected RG2 Claims Administration, LLC ("RG2") to be the Settlement Administrator. Settlement Agreement ¶ 52. There is no information provided in the Settlement Agreement itself about the means of providing notice to the Settlement Class Members about the Settlement Agreement. See generally Settlement Agreement. In

the motion, Plaintiffs state that RG2 will direct notice to be provided by email "to every Class member that Defendant can identify in its records," with follow-up physical mail sent to any Class Member whose email address results in a "bounced email."[2] Mot. at 5. This will be done by having Harbor Freight provide RG2 with a list of all potential Settlement Class Members' email and physical addresses in RG2's records. Id. Harbor Freight estimates that it has the email addresses for about 350,000 Settlement Class Members and the physical mailing address for about 20,000 Settlement Class Members. Wickersham Decl. ¶ 16. There will also be "an internet notice campaign and publication." Mot. at 5. RG2 will disseminate notice no later than 30 days after this Court grants the motion for preliminary approval. Id. This means of providing notice is estimated to reach 80% of the Settlement Class. Wickersham Decl. ¶ 6. RG2 will create a website,[3] where Settlement Class Members will be able to find the Long Form Notice, submit a claim, review key filings (including all briefing related to approval of the Settlement Agreement), and review certain frequently asked questions. Mot. at 6.

The Long-Form Notice of the Settlement Agreement purports to include such information as a summary of the claims asserted, with an associated link to the Settlement Website where the Complaint will be posted, the definition of the Settlement Class, the possible benefits that Settlement Class Members may receive, how Settlement Class Members can file claims for payment, how Settlement Class Members can object to the Settlement Agreement,[4] how Settlement Class Members can request exclusion from the Settlement Agreement, that the Settlement Agreement will be binding on Settlement Class Members who do not request exclusion, that Settlement Class Members can hire their own lawyers, and information about the attorney's fees and costs that can be

[2] The Court notes that RG2's representative states that the Settlement Class includes all individuals who purchased the Class Products between March 11, 2011, and February 6, 2018, who have not participated in the recall of the Class Products. Wickersham Decl., ECF No. 174-3, ¶ 10. The Court notes that under the terms of the Settlement Agreement the last date on which the Settlement Class Members could purchase the Class Products is the date of preliminary approval of the Settlement Agreement. Settlement Agreement ¶ 8.

[3] This website will be at www.chainsawsettlement.com.

[4] The Court notes that the Long Form Notice does not provide an accurate description of the steps that a Settlement Class Member must take to object to the Settlement Agreement. This issue is addressed in the next subsection. See infra Section I.B.7.

claimed. See Long-Form Notice, ECF No. 174-2, Ex. 1, Ex. D.

Finally, RG2 will create a toll-free number that Settlement Class Members can call to seek additional information about the Settlement Agreement. Wickersham Decl. ¶ 27.

7. Opt-Out and Objection Process

Settlement Class Members will be able to opt-out of the Settlement Agreement by submitting a signed, written request to RG2 postdated by the Opt-Out Date, a date that the Parties have not specified. Settlement Agreement ¶ 86; see also Mot. (not listing an opt-out date). Any Settlement Class Member who wishes to object to the Settlement Agreement will similarly have to submit a written statement to the Court "through the Court's Case Management/Electronic Case Filing system or through any other method in which the Court will accept objections," to RG2, to Class Counsel, and to Harbor Freight's counsel. Settlement Agreement ¶ 90. This must be done before the objection deadline, which the Parties do not specify. Id.; see also Mot. (not listing an objection deadline).

The written notice of the objection must include: 1) the objector's full name, address, and telephone number; 2) "a statement, sworn under penalty of perjury, attesting to the fact that (i) "the objector purchased one or more of the Class Products during the Class Period, (ii) describing the model Class Product . . ., and (iii) the date and location of purchase;" 3) a written statement of the grounds for objection "accompanied by any legal support for such objection;" 4) "copies of any papers, briefs, or other documents upon which the objection is based and pertinent to the objection;" 5) the name, address, and telephone number of any lawyer representing the objector; and 6) "a list of all other objections submitted by the objector, or the objector's counsel, to any class action settlements submitted in any court in the United States in the previous five (5) years, including the full case name, the jurisdiction in which it was filed and the docket number." Settlement Agreement ¶ 92. "If the Class Member or his, her, their or its counsel has not objected to any other class action settlement in the United States in the previous five (5) years, he/she/they/it shall affirmatively so state in the objection." Id.

The Court notes that the long-form notice includes three discrepancies from the Settlement Agreement, including: 1) not specifying that notice be sent to RG2, Class Counsel, and Harbor Freight's counsel, 2) stating that the objection must include

"Kaupelis v. Harbor Freight Tools USA, Inc., Case Number 8:19-cv-01203," and 3) requiring that the objection include the bar number of any counsel representing the objector. See Long-Form Notice at 5.

8. Revocation of Agreement

The Parties retain the right to terminate the Settlement Agreement if "(a) The preliminary or final approval of this Agreement is not obtained without substantial modification, which modification the Parties did not agree to and which modification the terminating Party deems in good faith to be material . . .; or (b) The Final Order and Final Judgment is reversed, vacated, or modified in any material respect by another court, except that it is expressly agreed by the Parties that any reduction of the Court's award of Attorneys' Fees and Expenses shall not be grounds to terminate this Agreement." Settlement Agreement ¶ 99.

II. LEGAL STANDARD

Federal Rule of Civil Procedure Rule 23(e) states that "[t]he claims … of a certified class—or a class proposed to be certified for purposes of settlement—may be settled . . . or compromised only with the court's approval." "The parties must provide the court with information sufficient to enable it to determine whether to give notice of the propos[ed] [settlement] to the class." Fed. R. Civ. P. 23(e)(1)(A). "The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the propos[ed] [settlement] under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Id. 23(e)(1)(B)(i)(ii).

III. DISCUSSION

A. Class Certification

A motion for class certification involves a two-part analysis. First, the plaintiffs must demonstrate that the proposed class satisfies the requirements of Rule 23(a): (1) the members of the proposed class must be so numerous that joinder of all claims would be impracticable; (2) there must be questions of law and fact common to the class; (3) the claims or defenses of the representative parties must be typical of the claims or defenses

of absent class members; and (4) the representative parties must fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). The plaintiffs may not rest on mere allegations, but must provide facts to satisfy these requirements. Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1309 (9th Cir. 1977) (citing Gillibeau v. Richmond, 417 F.2d 426, 432 (9th Cir. 1969)).

Second, the plaintiffs must meet the requirements for at least one of the three subsections of Rule 23(b). Under Rule 23(b)(1), a class may be maintained if there is either a risk of prejudice from separate actions establishing incompatible standards of conduct or judgments in individual lawsuits would adversely affect the rights of other members of the class. Under Rule 23(b)(2), a plaintiff may maintain a class where the defendant has acted in a manner applicable to the entire class, making injunctive or declaratory relief appropriate. Finally, under Rule 23(b)(3), a class may be maintained if "questions of law or fact common to class members predominate over any questions affecting only individual members," and if "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis added).

The plaintiffs bear the burden of demonstrating that Rule 23 is satisfied. See Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001), amended by 273 F.3d 1266 (2001). The district court must rigorously analyze whether the plaintiffs have met the prerequisites of Rule 23. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (quoting Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982)). Rule 23 confers "broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court." Armstrong v. Davis, 275 F.3d 849, 872 n.28 (9th Cir. 2001), abrogated on other grounds by Johnson v. California, 543 U.S. 499, 504–05 (2005). The district court need only form a "reasonable judgment" on each certification requirement "[b]ecause the early resolution of the class certification question requires some degree of speculation." Gable v. Land Rover N. Am., Inc., No. SACV 07-0376 AG (RNBx), 2011 U.S. Dist. LEXIS 90774, at *8 (C.D. Cal. July 25, 2011) (internal quotation marks omitted); see also Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975). This may require the court to "'probe behind the pleadings before coming to rest on the certification question,'" and the court "'must consider the merits' if they overlap with Rule 23(a)'s requirements." Wang v. Chinese Daily News, 709 F.3d 829, 834 (9th Cir. 2013) (quoting Dukes,564 U.S. at 351; Ellis v. Costco Wholesale Corp., 657 F.3d 970, 983 (9th Cir. 2011)).

1. Rule 23(a) Prerequisites

a. Numerosity

Rule 23(a)(1) requires that a class be sufficiently numerous such that it would be impracticable to join all members individually. In determining whether a proposed class is sufficiently numerous to sustain a class action, the court must examine the specific facts because the numerosity requirement "imposes no absolute limitations." Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 330 (1980). "[A] reasonable estimate of the number of purported class members satisfies the numerosity requirement." In re Badger Mountain Irrigation Dist. Sec. Litig., 143 F.R.D. 693, 696 (W.D. Wash. 1992). The Settlement Class is estimated to include approximately 800,000 individuals. Mot. at 4. This is more than sufficient to meet the numerosity requirements as joining hundreds of thousands of Settlement Class Members is impracticable.

b. Commonality

Rule 23(a)(2) requires that questions of law or fact be common to the class. "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." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). A common question "must be of such a nature that it is capable of classwide resolution—which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke." Dukes, 564 U.S. at 350. As the Ninth Circuit explained in Wang, 709 F.3d at 834, there must be at least "a single common question" to satisfy the commonality requirement of Rule 23(a)(2)."

Here, the Court has previously found that a common question of fact exists for this lawsuit given the common allegedly flawed internal switch that gave rise to the Class Products' defect. Class Cert. Order at 12. The Court therefore finds that commonality is satisfied here.

c. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." To meet the typicality requirement, the plaintiffs must show that: (1) "other members have the same or similar injury"; (2) "the action is based on conduct which is not unique to the named plaintiffs"; and (3) "other class members have been injured by the same course of conduct." Ellis v. Costco Wholesale Corp., 657 F.3d 970, 984 (9th Cir. 2011). "Under the rule's permissive standards, "representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." Hanlon, 150 F.3d at 1020. Plaintiffs can satisfy their burden through pleadings, affidavits, or other evidence. See Lewis v. First Am. Title Ins. Co., 265 F.R.D. 536, 556 (D. Idaho 2010).

The typicality requirement is also easily satisfied. The Court has previously found that Kaupelis and Ortega had experiences with their Class Products that were typical of other individuals who encountered the Class Products' defect. Class Cert. Order at 15. Typicality is therefore satisfied.

d. Fair and Adequate Representation

Rule 23(a)(4) requires that the representative party "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "This requirement is grounded in constitutional due process concerns: 'absent class members must be afforded adequate representation before entry of a judgment which binds them.'" Evans v. IAC/Interactive Corp., 244 F.R.D. 568, 577 (C.D. Cal. 2007) (quoting Hanlon, 150 F.3d at 1020). Representation is adequate if (1) the named plaintiffs and their counsel are able to prosecute the action vigorously and (2) the named plaintiffs do not have conflicting interests with the unnamed class members; and (3) the attorney representing the class is qualified and competent. Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978).

The Court has already concluded that attorneys from Bursor & Fisher, LLP are adequate class counsel and that the previous recall does not make a class action lawsuit an inadequate means of providing relief. Class Cert. Order at 15-17. There is also no indication that Kaupelis and Ortega have conflicting interests with unnamed class members. See Mot. at 12. Kaupelis and Ortega have also participated in the lawsuit,

including by sitting for depositions, remaining in contact with counsel, and reviewing the Complaint. Smith Decl., ECF No. 174-2, ¶ 5. The Court therefore concludes that there would be adequate representation.

2. Rule 23(b)(3)

"Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Kamm v. Cal. City Dev. Co., 509 F.2d 205, 211 (9th Cir. 1975). A class may be certified under this subdivision where common questions of law and fact predominate over questions affecting individual members, and where a class action is superior to other means to adjudicate the controversy. Fed. R. Civ. Proc. 23(b)(3).

a. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997) (citation omitted). "[I]n deciding whether to certify a settlement-only class, 'a district court need not inquire whether the case, if tried, would present intractable management problems.'" In re Hyundai and Kia Fuel Economy Litigation, 926 F.3d 539, 558 (9th Cir. 2019) (citing Amchem, 521 U.S. at 620). Because there is a heightened risk of collusion during settlement, "the aspects of Rule 23(a) and (b) that are important to certifying a settlement class are 'those designed to protect absentees by blocking unwarranted or overbroad class definitions.'" Id. (citing Amchem, 521 U.S. at 620). "A class that is certifiable for settlement may not be certifiable for litigation if the settlement obviates the need to litigate individualized issues that would make a trial unmanageable." Id. "[P]redominance is 'readily met' in cases alleging consumer fraud." Id. at 559 (citing Amchem, 521 U.S. at 625).

Predominance is present here. The Court did previously reject the Nationwide UCL Class and the Multi-State Consumer Protection Class. Class Cert. Order at 20-24. But the Court rejected each of these proposed classes because conflicts of law required that different states' laws be applied to different portions of the proposed classes, making the classes unmanageable for litigation. Id. This concern need not be considered here, where the Court is only inquiring into whether the proposed classes are sufficiently cohesive

and warranted to justify settlement. Hyundai, 926 F.3d at 558. Here — unlike in Amchem, where the Supreme Court found that predominance was not present for a settlement class — there are no material conflicts among class members. See Amchem, 521 U.S. at 623-26. Settlement Class Members allege a common cause of action: that Harbor Freight breached warranties and misled consumers by selling allegedly defective chainsaws. Settlement Class Members all must have purchased the Class Products and cannot have participated in the recall. See supra Section I.B.1. The common cause of action and alleged injury is sufficient for the Court to find that the Settlement Class is not overbroad, justifying a finding that predominance is satisfied. Cf. Hyundai, 926 F.3d at 559 (finding predominance satisfied where "class members were exposed to uniform fuel-economy misrepresentations and suffered identical injuries within only a small range of damages").

b. Superiority

Finally, the Court considers whether a class action would be superior to individual suits. Amchem, 521 U.S. at 615. "A class action is the superior method for managing litigation if no realistic alternative exists." Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234–35 (9th Cir. 1996). This superiority inquiry requires a comparative evaluation of alternative mechanisms of dispute resolution. Hanlon, 150 F.3d at 1023.

The Court has previously concluded that a class action would be a superior means of resolving this action than individual suits. See Class Cert. Order at 18. The change in the class to be certified or the existence of a settlement agreement does not change the Court's previous analysis. The Court therefore finds that the superiority requirement has been met.

As each of the above factors weigh in favor of certification, the Court **GRANTS** certification of the Settlement Class.

B. Preliminary Approval of the Proposed Class Settlement

Under Rule 23(e)(2) if the proposed settlement would bind class members, the Court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate. To make this determination, the Court must consider the following factors:

(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 attorneys' 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).

Before the revisions to the Federal Rule of Civil Procedure 23(e), the Ninth Circuit had developed its own list of factors to be considered. See, e.g., In re Bluetooth Headset Products Liab. Litig., 654 F.3d 935, 964 (9th Cir. 2011) (citing Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004)). The revised Rule 23 "directs the parties to present [their] settlement to the court in terms of [this new] shorter list of core concerns[.]" Fed. R. Civ. P. 23(e)(2), 2018 Advisory Committee Notes. "The goal of [amended Rule 23(e)] is . . . to focus the [district] court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Id.

1. Adequacy of Representation by Class Representatives and Class Counsel

Under Rule 23(e)(2)(A), the first factor to be considered is whether the class representatives and class counsel have adequately represented the class. This analysis includes "the nature and amount of discovery" undertaken in the litigation. Fed. R. Civ. P. 23(e)(2)(A), 2018 Advisory Committee Notes.

There certainly has been adequate representation by the class representatives and class counsel. This case has been extensively litigated, with the complaint having been filed more than two years ago. See Complaint, ECF No. 1. Class Counsel have analyzed thousands of pages of documents, engaged in multiple fact and expert witness

depositions, and litigated multiple motions to compel. Mot. at 15. The Parties have also litigated a motion for class certification. See Class Cert. Order. Kaupelis and Ortega have also each sat for a deposition. Smith Decl. ¶ 5. This factor therefore weighs in favor of approval.

2. Negotiated at Arm's Length

The second Rule 23(e)(2) factor asks the Court to confirm that the proposed settlement was negotiated at arm's length. Fed. R. Civ. P. 23(e)(2)(B). As with the preceding factor, this can be "described as [a] 'procedural' concern[], looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement." Fed. R. Civ. P. 23(e)(2), 2018 Advisory Committee Notes. "[T]he involvement of a neutral or court-affiliated mediator or facilitator in [settlement] negotiations may bear on whether th[ose] [negotiations] were conducted in a manner that would protect and further the class interests." Fed. R. Civ. P. 23(e), 2018 Advisory Committee Notes; accord Pederson v. Airport Terminal Servs., 2018 WL 2138457, at *7 (C.D. Cal. Apr. 5, 2018) (the oversight "of an experienced mediator" reflected noncollusive negotiations).

The Court finds that the Settlement has been negotiated at arm's length. Notably, the Settlement Agreement is the result of a mediation before Magistrate Judge McCormick. Smith Decl. ¶ 4. The Parties only began to negotiate attorney's fees and expenses after the Parties reached an agreement as to all other terms of the Settlement Agreement. Id. The Court is satisfied that the conduct of the negotiations was appropriate to protect the Class's interests.

3. Adequacy of Relief Provided for the Class

The third factor the Court considers is whether "the relief provided for the class is adequate, taking in to 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 attorneys' fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C). Under this factor, the relief "to class members is a central concern." Fed. R. Civ. P. 23(e)(2)(C), Advisory Committee Notes.

The Court notes that the gift cards that would be provided to Settlement Class Members under the terms of the Settlement Agreement are not coupons that merit greater scrutiny under the Class Action Fairness Act, 28 U.S.C. § 1712. In re Online DVD-Rental Antitrust Litigation, 779 F.3d 934, 951 (9th Cir. 2015) (collecting cases distinguishing gift cards from coupons because gift cards can be used for any product at the offering store, are freely transferable, do not expire, and do not require consumers to spend their own money). The features of the gift cards discussed in DVD-Rental Antitrust are the same as the gift cards at issue here. See supra Section I.B.1.

The Court now turns to considering the factors listed in Rule 23(e)(2)(C).

a. Costs, Risks, and Delay of Trial and Appeal

"A[] central concern [when evaluating a proposed class action settlement] . . . relate[s] to the cost and risk involved in pursuing a litigated outcome." Fed. R. Civ. P. 23(e), 2018 Advisory Committee Notes. Here, the costs, risks, and delay of trial and appeal favor preliminary approval. "Proceeding in this litigation in the absence of settlement poses various risks such as . . . having summary judgment granted against Plaintiffs[] or losing at trial. Such considerations have been found to weigh heavily in favor of settlement." Graves v. United Industries Corporation, 2020 WL 953210, at *7 (C.D. Cal. Feb. 24, 2020) (citing See Rodriguez v. West Publishing Corp., 563 F.3d 948, 966 (9th Cir. 2009); Curtis-Bauer v. Morgan Stanley & Co., Inc., 2008 WL 4667090, at *4 (N.D. Cal. Oct. 22, 2008)).

This case would still have to proceed through summary judgment, trial, and appeal if Plaintiffs are successful in the absence of the Settlement Agreement. This subfactor therefore favors preliminary approval of the Class Settlement because in its absence there will be inevitable costs, high risks, and delay.

b. Effectiveness of Proposed Method of Relief Distribution

Next, the Court must consider "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C). "Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims." Fed. R. Civ. P. 23(e), 2018 Advisory Committee Notes. "A claims processing method should

deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." Id.

The claims process is straightforward. Settlement Class Members who still have their Class Products can obtain relief by going to a Harbor Freight store. See supra Section I.B.2. Settlement Class Members who either no longer have a Class Product or are unable to bring their Class Product to a Harbor Freight store will be able to obtain relief by submitting a valid and timely online application. See id. This is a reasonable means of distributing relief. See In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, & Products Liability Litigation, 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."). Thus subfactor therefore weighs in favor of approval.

c. Terms of Proposed Award of Attorneys' Fees

Third, the Court must consider "the terms of any proposed award of attorneys' fees, including timing of payment." Fed. R. Civ. P. 23(e)(2)(c). In considering the proposed award of attorney's fees, the Court must scrutinize the Settlement for three factors that tend to show collusion: "(1) when counsel receives a disproportionate distribution of the settlement; (2) when the parties negotiate a "clear sailing arrangement," under which the defendant agrees not to challenge a request for an agreed-upon attorney's fee; and (3) when the agreement contains a "kicker" or "reverter" clause that returns unawarded fees to the defendant, rather than the class." Briseno v. ConAgra Foods, Inc., 2021 WL 2197968, at *6 (9th Cir. 2021) (internal quotation marks omitted) (citing In re Bluetooth Headset Products Liability Litigation, 654 F.3d 935, 947 (9th Cir. 2011)). The Court must consider whether these factors exist in post-class certification settlements. Id. at *8.

Class Counsel will have to submit a formal motion for attorneys' fees along with evidence of time spent on the case and a lodestar calculation before the Court can approve a specific amount in attorneys' fees. But the Settlement Agreement's provision for up to $665,000 in fees and costs does not strike the Court as excessive or undermining the adequacy of relief to the Class. The overall value of the Settlement Agreement is between $8 million and $40 million depending on the number of Settlement Class Members who can either provide proof of purchase or destruction or otherwise exchange

their Class Product at a Harbor Freight store. See Smith Decl. ¶ 2. Of course, many of the Settlement Class Members may not submit a claim for relief. Nevertheless, the $665,000 in fees and costs amounts to less than 10% of the lowest estimate of the Settlement Agreement's value assuming that all Settlement Class Members participate. This does not strike the Court as undermining the fairness of the Settlement Agreement.

While the Settlement Agreement does have a reverter clause were unawarded fees are returned to Harbor Freight, see Settlement Agreement ¶ 59,, there is neither a "clear sailing agreement" nor does the Court conclude that Class Counsel would receive a disproportionate distribution if the Court were to grant their motion for fees. Since the key Bluetooth factor is whether Class Counsel would receive "excessive fees," the Court does not believe that the factors weigh in favor of a conclusion that the Settlement is unreasonable. See Briseno, 2021 WL 2197968, at *9 (describing a clear sailing agreement and a kicker as protective of "excessive fees"). This subfactor therefore weighs in favor of preliminary approval.

d. Agreement Identification Requirement

The Court must also evaluate any agreement made in connection with the proposed Settlement. See Fed. R. Civ. P. 23(e)(2)(C)(iv), (e)(3). Class Counsel state that there is no agreement made outside of the Settlement Agreement. Supp. Smith Decl., ECF No. 177-1, ¶ 2.

Based on the foregoing analysis, it is clear that the adequacy of relief for the Class weighs in favor of preliminary approval of the Settlement Agreement.

4. Equitable Treatment of Class Members

The final Rule 23(e)(2) factor turns on whether the proposed settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). "Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23(e)(2)(D), 2018 Advisory Committee Notes.

The Settlement Agreement makes distinctions between (1) Settlement Class

Members who still possess Class Products and are willing and able to return their Class Products to a Harbor Freight store; (2) Settlement Class Members who either no longer possess a Class Product but have proof or purchase or proof of destruction and Settlement Class Members who still possess Class Products and have proof of destruction; and, (3) Settlement Class Members who do not have Class Products and have neither proof of purchase nor proof of destruction. See supra Section I.B.2. Settlement Class Members in the first two groups are eligible for either $50 cash or a $50 Harbor Freight gift card. See id. Settlement Class Members in the first group are also eligible to receive, as an alternative, a replacement chainsaw valued at approximately $50. See id. By contrast, Settlement Class Members in the third group are only entitled to either $10 cash or a $25 Harbor Freight gift card.

The Court thinks that the Settlement Agreement treats members of the first two groups of Settlement Class Members equitably. It is practical for Harbor Freight to not offer a chainsaw to Settlement Class Members who are not able to appear in person at a Harbor Freight store. Otherwise, Harbor Freight would be required to send a package to the Settlement Class Member containing a chainsaw, which would incur shipping costs and be a possible safety hazard. Settlement Class Members in the third group would receive less relief than those Settlement Class Members in the first and second groups, but this is justifiable. The Advisory Committee Notes connected to Rule 23(e)(2)(D) state that the equity inquiry looks to "whether the apportionment of relief among class members takes appropriate account of differences among their claims." Settlement Class Members who do not have their Class Products, proof of purchase, or proof of destruction will have difficulty proving that they did in fact purchase the Class Products. Consequently, Settlement Class Members in the third group would have weaker claims against Harbor Freight than Settlement Class Members in the first and second groups. Their lesser relief is therefore justified and equitable.

As each of the above factors weighs in favor of approval, the Court **GRANTS** preliminary approval of the class action settlement.

C. The Proposed Settlement Meets the Notice Requirements Under Fed. R. Civ. P. 23(c)(2)(B).

Under Rule 23(c)(2)(B), "for any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of

settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Rule 23(c)(2)(B) further states that the notice may be made by one of the following: United States mail, electronic means, or another type of appropriate means. Id. "The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Id.

The proposed judgment meets these notice requirements. Following a review of the submitted Notice, the Court concludes that it will include the substantive information that Rule 23(c)(3) requires. See supra Section I.B.6. The Parties intend to contact Settlement Class Members for whom Harbor Freight has contact information by both first-class mail and email. Wickersham Decl. ¶ 16. They will also conduct an online advertising campaign to inform Settlement Class Members about the Settlement Agreement. Id. The Court believes that this notice plan is the best notice that is practical under the circumstances. See Fed. R. Civ. P. 23(c)(2)(B).

Nevertheless, the Court has noted that there the Long-Form Notice has several differences from the Settlement Agreement, including 1) not specifying that objections be sent to RG2, Class Counsel, and Harbor Freight's counsel, 2) stating that all objections must include "Kaupelis v. Harbor Freight Tools USA, Inc., Case Number 8:19-cv-01203," and 3) requiring that the objection include the bar number of any counsel representing the objector. See Long-Form Notice at 5. The Court therefore **ORDERS** Plaintiffs to correct each of these errors in the Long-Form Notice so that it conforms with the Settlement Agreement. The Court also **ORDERS** Plaintiffs to include addresses for RG2, Class Counsel, and Harbor Freight's counsel in section of the Long-Form Notice pertaining to objections. The Court does not see a reason to require that all objectors enumerate the previous Settlements to which they have objected. Cf. supra Section I.B.7 (noting that the Settlement Agreement requires all objectors to provide "a list of all other objections submitted by the objector, or the objector's counsel, to any class action settlements submitted in any court in the United States in the previous five (5) years, including the full case name, the jurisdiction in which it was filed and the docket

number."). The Court **ORDERS** that the Parties eliminate this requirement and remove it from the Long-Form Notice.

The Parties propose that the deadline for submitting claims, objecting to the Settlement Agreement, and opting out of the Settlement Agreement be 45 days following the date of notice being distributed to the Settlement Class. See supra Sections I.B.2; Proposed Order, ECF No. 174-4, at 9-10. The Court considers this to be too little time. The Court **ORDERS** the Parties to provide the Settlement Class 75 days to object to the Settlement Agreement, opt out of the Settlement Agreement, or submit a claim. The Court **ORDERS** the Parties to make changes to the Long-Form Notice as are appropriate to reflect this change. The Court further **ORDERS** Plaintiffs to amend the Long-Form Notice to specify that individuals who intend to seek relief by bringing their Class Products to a Harbor Freight store will have until the Claim Deadline to make such an exchange.

Finally, the Court also notes that it will accept objections by mail. As such, the Court **ORDERS** Plaintiffs to change the information relating to requests for objection so that it directs Settlement Class Members to send objections to:

Class Action Clerk
United States District Court for the Central District of California
411 West 4th Street
Room 1053
Santa Ana, CA 92701-4516

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the motion.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 19-1203 JVS (DFMx)	Date	August 11, 2021
Title	Will Kaupelis et al. v. Harbor Freight Tools		

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