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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE MORNING SONG BIRD FOOD
LITIGATION,

Lead Case No.: 12cv01592 JAH - AGS

**ORDER GRANTING PLAINTIFF’S
MOTION FOR CLASS
CERTIFICATION; DENYING
PLAINTIFFS’ EX PARTE MOTION
FOR LEAVE TO SUBMIT NEWLY
DISCOVERED EVIDENCE; AND
DENYING DEFENDANTS’ MOTION
TO STAY THE COURT’S RULING
[Doc. Nos. 93, 187, 276]**

INTRODUCTION

Plaintiffs Laura Cyphert and Milt Cyphert originally filed an action on June 27, 2012, asserting a class action against Defendants The Scotts Miracle-Gro Company (“SMG”) and The Scotts Company, LLC (“Scotts”). Upon the parties’ joint motion, the Court consolidated the matter with several other cases seeking the same relief against the same defendants. Plaintiffs filed a Consolidated Class Action Complaint on October 9, 2012, and an Amended Consolidated Class Action Complaint on January 31, 2013. After the Court granted leave to amend, Plaintiffs filed a Second Amended Consolidated Class Action Complaint on October 9, 2015, asserting claims for violations of the Racketeer

1 Influenced and Corrupt Organizations Act (“RICO”), California Consumer Remedies Act
2 (“CLRA”), California’s Unfair Competition Law (“UCL”), California False and
3 Misleading Advertising law (“FAL”), Kentucky Consumer Protection Act (“KCPA”),
4 Minnesota Consumer Fraud Act, Missouri Merchandising Practices Act, breach of implied
5 warranty of merchantability, breach of the common law implied warranty of fitness for
6 consumption by animals, intentional misrepresentation, and negligent misrepresentation
7 against SMG, Scotts and James Hagedorn.

8 Plaintiffs now seek an order certifying the class. See Doc. No. 93. Defendants filed
9 an opposition to the motion to certify and Plaintiffs filed a reply. See Doc. Nos. 115, 140.
10 Defendants filed a surreply with leave of Court, and Plaintiffs filed a response to the
11 surreply. See Doc. Nos. 161-2, 174. Defendants also filed a notice of supplemental
12 authority in support of its opposition. See Doc. No. 169. The motion was taken under
13 submission without oral argument. The parties, however, filed numerous documents
14 addressing the issues in the pending motion, including: Plaintiff’s request to submit newly
15 discovered evidence in support of their motion, Defendants’ response and Plaintiffs’ reply
16 (Doc. Nos. 187, 194, 195); Plaintiffs’ application for leave to submit new evidence,
17 summary of the evidence¹ and Defendants’ response to the summary (Doc. Nos, 210, 237,
18 247); Plaintiffs’ notice of recent authority in support of their motion and Defendants’
19 response (Doc. Nos. 240, 246); Defendants’ ex parte motion seeking leave to file recent
20 decisions regarding materials sought by Plaintiffs in their request to submit newly
21 discovered evidence² (Doc. No. 248); Defendants’ motion to stay the decision on the
22 motion for class certification, Plaintiffs’ opposition and Defendants’ reply (Doc. Nos. 276,
23 295, 298); Plaintiffs’ request for judicial notice in support of the motion to certify the class,
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26 ¹ The Court granted the motion, granted Plaintiffs’ request to file the evidence under seal
27 and directed Plaintiffs to file a summary of the evidence no later than July 17, 2015. See
28 Doc. No. 232. Plaintiffs complied with the order and filed the summary on July 17,
2015. See Doc. No. 237.

² This Court granted the motion. See Doc. No. 256.

1 Defendants’ response and Plaintiffs’ reply (Doc. Nos. 305, 306, 307); Plaintiffs’ notice of
2 recent authority and Defendants’ response (Doc. Nos. 319, 323).

3 Defendant Hagedorn sought and was granted leave to file a response to the motion
4 following this Court’s ruling on his motion to dismiss. He filed an opposition to which
5 Plaintiffs filed a reply (Doc. Nos. 317, 318).³

6 For the reasons discussed in detail below, the Court DENIES Defendants’ motion to
7 stay and GRANTS Plaintiffs’ motion to certify the class.

8 **I. Motion to Stay**

9 Defendants ask the Court to stay its decision on Plaintiffs’ motion for class
10 certification pending the outcome of cases pending before the Ninth Circuit and the
11 Supreme Court, namely Brazil v. Dole Packaged Foods, LLC, No. 14-17480 (9th Cir., filed
12 Dec. 18, 2014), Jones v. ConAgra Foods, Inc., No. 14-16327 (9th Cir., filed July 15, 2014),
13 Tyson Foods, Inc. v. Bouaphakeo, No. 14-1146 (U.S., cert. granted June 8, 2015), and
14 Spokeo, Inc. v. Robins, No. 13-1339 (U.S., cert. granted April 27, 2015). Defendants
15 maintain the pending appeals will offer further guidance regarding key issues in the motion
16 for class certification. They further maintain a stay will permit Defendant Hagedorn, who
17 was recently added to this matter as a defendant, to conduct discovery and challenge class
18 allegations himself. Defendants also contend a stay would preserve the Court’s resources
19 and prevent the parties from incurring unnecessary costs.

20 In opposition, Plaintiffs argue they will be harmed by a stay because discovery has
21 already been stayed pending ruling on the class certification. They further argue
22 Defendants will not be harmed by proceeding because new defendants are routinely added
23 to cases without the proceedings as to the original defendants being stayed. Plaintiffs
24 maintain it will not take Defendant Hagedorn an excessive amount of time to “catch up”
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28 ³ Defendant Hagedorn also filed a request for oral argument. The Court finds the motion remains suitable for disposition without oral argument and DENIES that request.

1 because he is not a stranger to the litigation and there is no indication he would have any
2 unique defenses as to certification.

3 Plaintiffs further maintain a stay will not forward the orderly course of justice
4 because the four cases pending before the Supreme Court are unlikely to alter the Court's
5 analysis of certification in this case. Specifically, they maintain Jones, which Defendants
6 contend will provide guidance on ascertainability and damage models, will not effect the
7 pending motion because Plaintiffs have gone beyond the existing ascertainability
8 requirements. Additionally, they maintain the factual differences in Jones demonstrate any
9 ruling is unlikely to alter the Court's analysis. With regard to Brazil, Plaintiffs contend the
10 damages model issue in the case is inapplicable to this action because it involves the
11 difference between a product marketed as "all natural" and the product sold, whereas, here,
12 Plaintiffs are seeking full refunds of every bag of bird food they purchased. Plaintiffs
13 further contend Tyson/Spokeo, involve questions of standing where numerous class
14 members suffered no injury as compared to this case where Plaintiffs have limited the class
15 to only those who purchased the tainted wild bird food, and therefore suffered an injury.

16 In reply, Defendants argue Plaintiffs provide a misleading characterization of the
17 stay on discovery. They maintain both parties have been addressing ongoing discovery
18 needs. Defendants also contend the stay will allow this Court to have the benefit of the
19 Ninth Circuit's and Supreme Court's guidance on controlling issues of law before ruling
20 on the class certification. They argue the class certification motion implicates Jones,
21 Brazil, and Tyson/Spokeo. Specifically, they argue the Ninth Circuit is poised to articulate
22 the Circuit's standard for ascertainability in Jones. Defendants contend Plaintiffs
23 oversimplify the facts of this case and they overstate their ability to identify consumers
24 through retailer records to meet the ascertainability requirement. Additionally, they
25 contend Jones will likely provide guidance on Plaintiffs' "full refund" model of class
26 damages. Defendants further argue the Ninth Circuit's decision in Brazil will provide
27 guidance on damages issues in Plaintiffs' motion for class certification because Plaintiffs
28 will be forced to engage in the difference-in-value calculations at issue in Brazil. They

1 also argue the Supreme Court’s decision in Tyson/Spokeo bears on the issues in this case
2 because the proposed class contains uninjured class members in that their injury turns on
3 whether each consumer perceived a benefit of his or her bargain.

4 A court has the inherent power to stay proceedings in order “to control the
5 disposition of the causes on its docket with economy of time and effort for itself, for
6 counsel, and for litigants.” Landis v. North Am. Co., 299 U.S. 248, 254 (1936). A stay
7 may be granted pending the outcome of other legal proceedings related to the case in the
8 interests of judicial economy. Leyva v. Certified Grocers of Cal., Ltd., 593 F.2d 857, 863–
9 64 (9th Cir.1979). The district court's determination of whether a stay is appropriate, “must
10 weigh competing interests and maintain an even balance.” Landis, 299 U.S. at 254-55.

11 These competing interests include:

12 the possible damage which may result from the granting of a stay, the hardship
13 or inequity which a party may suffer in being required to go forward, and the
14 orderly course of justice measured in terms of the simplifying or complicating
15 of issues, proof, and questions of law which could be expected to result from
a stay.

16 CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962) (citing Landis, 299 U.S. at 254-55).

17 While the cases pending before the Ninth Circuit and Supreme Court may lend some
18 guidance to this Court in issuing a decision on the motion to certify the class, the Court
19 finds a significant stay of the motion would serve to prejudice Plaintiff in light of the length
20 of time the case and motion have been pending, and the fact that certain discovery is stayed
21 pending the ruling on the motion to certify. Furthermore, this Court delayed ruling on the
22 motion to permit Defendant Hagedorn to file a separate opposition to a motion to certify
23 the class. The Court also notes it retains discretion to revisit class certification throughout
24 the legal proceedings and may rescind, modify, or amend the class certification in light of
25 subsequent developments. See FED.R.CIV.P. 23(c)(1)(C); General Telephone Co. Of
26 Southwest v. Falcon, 457 U.S. 147, 160 (1982).

27 Accordingly, the motion to stay is DENIED.

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1 **II. Motion to Certify the Class**

2 **A. Plaintiff's Requests to Submit Evidence**

3 **1. Application to Submit Newly Discovered Evidence**

4 Plaintiff filed a request seeking to submit newly discovered evidence in support of
5 their motion, in which they request leave to file under seal documents that contradict
6 Defendants' representations in their opposition and surreply. They maintain the documents
7 are critical evidence because it confirms that there were significant questions about the
8 safety of Defendants' product at issue in this matter.

9 Defendant oppose the request. They argue the evidence is not newly discovered
10 because Plaintiffs have known for over a year before seeking leave that the government
11 believed there was some harm from Defendants' product and made those contentions in
12 the criminal proceedings in the United States District Court for the Southern District of
13 Ohio. They further argue Plaintiffs' unauthorized use of the inadvertently produced
14 materials is prohibited by federal law. Defendants contend Plaintiffs sought authorization
15 from the Ohio court to release the presentence materials that were inadvertently produced
16 by Defendants and the request was still pending at the time Plaintiff filed the current
17 application. They argue Plaintiff should not be rewarded for circumventing the Ohio court
18 and its rules. Even if Plaintiff is permitted to produce the materials, Defendants contend,
19 they do not support class certification.

20 Defendants also notified this Court of the decisions rendered by the Honorable
21 Ruben B. Brooks and the District Court of Ohio rejecting Plaintiff's arguments regarding
22 the presentence materials and denying Plaintiff's requests.

23 Judge Brooks denied Plaintiffs' request to use presentence materials from the Ohio
24 court in this litigation and to compel Defendants to produce other sentencing submissions
25 related to the presentence materials. Judge Brooks determined the Ohio court is in a
26 better position to interpret and apply its rules which principles of comity and sound
27 judicial administration dictate should apply. See Doc. No. 217. Judge Brooks, later,
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1 denied Plaintiffs' motion for reconsideration upon finding Plaintiffs did not offer any new
2 law or facts justifying consideration. See Doc. No. 243.

3 The Ohio District Court also denied Plaintiffs' request for authorization to disclose
4 the presentence report and related documents.⁴ The court found Plaintiffs did not meet
5 their burden to demonstrate the disclosure was necessary to meet the ends of justice and
6 the information is not available through other means, and policy considerations support
7 nondisclosure of the requested documents.

8 In their response, Plaintiffs maintain the decisions are not dispositive of the instant
9 request, because the Ohio court did not include whether this Court has the authority to
10 consider, under seal, portions of the sentencing letters Defendants produced in discovery.

11 This Court finds the documents Plaintiffs seek to submit under seal are not newly
12 discovered and finds the rationale of the district court and the Sixth Circuit Court of
13 Appeals persuasive. The Court further finds the documents are not relevant to the pending
14 motion. As discussed further below, the Court finds the dispute over the toxicity levels of
15 the bird food at issue in this matter requires this Court address the merits of the claims
16 further than the limited inquiry necessary to make a decision on the motion to certify the
17 class. Accordingly, Plaintiff's application is DENIED.

18 **2. Request for Judicial Notice**

19 Plaintiffs seek judicial notice of a statement contained in the Sixth Circuit's decision
20 affirming the Ohio District Court's denial of Plaintiffs request for authorization to use
21 presentence documents. Defendants oppose the request.

22 Because the Court finds the subject fact or statement irrelevant to its decision on the
23 pending motion, the request for judicial notice is DENIED as moot.

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26 ⁴ Plaintiff notified this Court it filed a notice of appeal of the decision. See Pla's
27 Response at 1 (Doc. No. 253). The Sixth Circuit determined the Ohio District Court did
28 not abuse its discretion in denying Plaintiffs' request for authorization to use the
sentencing materials and affirmed the district court's order. Sixth Circuit Decision, Plas'
Exhibit 1 (Doc. No. 305-1).

1 **B. Legal Standard**

2 Whether to grant class certification is within the discretion of the court.
3 Montgomery v. Rumsfeld, 572 F.2d 250, 255 (9th Cir. 1978). A cause of action may
4 proceed as a class action if a plaintiff meets the threshold requirements of Rule 23(a) of the
5 Federal Rules of Civil Procedure: numerosity, commonality, typicality, and adequacy of
6 representation. FED.R.CIV.P. 23(a). In addition, a party seeking class certification must
7 meet one of the three criteria listed in Rule 23(b).

8 Courts should certify a class only if they are “satisfied, after a rigorous analysis,”
9 that Rule 23 prerequisites have been met. Falcon, 457 U.S. at 161. “Frequently that
10 ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying
11 claim,” which “cannot be helped.” Wal-Mart Inc. v. Dukes, 564 U.S. 338, 351 (2011).
12 However, examination of the merits is limited to determining whether certification is
13 proper and “not to determine whether class members could actually prevail on the merits
14 of their claims. Ellis v. Costco Wholesale Corp., 657 F.3d 970, 983 n. 8 (9th Cir. 2011)
15 (citation omitted).

16 **C. Discussion**

17 Plaintiffs requests the Court certify the following class for their RICO claim:

18 All persons who purchased, and have not yet received a full refund for, a
19 Scotts Miracle-Gro wild bird food product containing Storcide II, Actellic 5E,
20 or their active ingredients, chlorpyrifos-methyl or pirimiphos-methyl,
respectively (“MSBF”).

21 They further ask the Court to certify three subclasses for claims in California, for counts 3
22 through 5; in Missouri for count 10; and Minnesota, for count 9.

23 **1. Rule 23(a)**

24 Plaintiffs argues class certification is warranted and maintain the requirements of
25 Rule 23(a) are met. Defendants argue the proposed class is not ascertainable, and Plaintiffs
26 cannot meet the commonality and typicality requirements of Rule 23(a).

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1 **a. Numerosity**

2 Rule 23 requires that the class be “so numerous that joinder of all members is
3 impracticable.” FED.R.CIV.P. 23(a)(1). Plaintiffs contend the class which consists of
4 millions of persons who purchased the Morning Song Bird Food are sufficiently numerous.
5 They further contend the proposed subclasses each consist of tens of thousands of people.
6 Defendants do not dispute Plaintiffs’ contentions.

7 Plaintiffs meet the numerosity requirement.

8 **b. Commonality and Typicality**

9 Questions of law or fact must be common to the class. See FED.R.CIV.P. 23(a)(2).
10 This requires the plaintiffs’ claims be dependent on a common contention which is capable
11 of class-wide resolution “in one stroke.” Dukes, 564 U.S. at 350. Typicality under
12 subsection Rule 23 requires that “the claims or defenses of the representative parties are
13 typical of the claims or defenses of the class.” FED.R.CIV.P. 23(a)(3).

14 Plaintiffs contend there are common questions of fact or law. Specifically, Plaintiffs
15 contend their RICO claims focus on Defendants’ scheme which ensnared Plaintiffs and the
16 other class members alike and the class’s injuries derive from Defendants’ unitary course
17 of conduct. They further maintain commonality exists for the state claims as Plaintiffs’
18 and the classes’ claims derive from Defendants’ distribution of Morning Song Bird Food
19 without disclosing it was illegally treated with toxic pesticides hazardous to birds.
20 Plaintiffs maintain the deceptiveness and materiality of Defendants’ concealment of their
21 illegal conduct and the illegality of their poison-laced product are common questions of
22 law and fact for all class members and all claims.

23 Plaintiffs argue the claims of the class representatives are typical of the class. They
24 maintain the same course of conduct that injured Plaintiffs also injured other class
25 members. Specifically, they maintain the Cypherts, Barbara Cowin, Ellen Larson, and
26 David Kirby were unlawfully induced into purchasing Morning Song Bird Food they
27 would not have purchased had Defendants disclosed the product(s) was illegally treated
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1 with pesticides that are toxic and hazardous to birds and other wildlife. Plaintiffs argue
2 because the scheme that harmed Plaintiffs is the same as to the class, typicality is met.

3 Defendants argue numerous factual questions must be answered to resolve any
4 consumer's liability claims over the bird food at issue and the answers to those questions
5 will necessarily vary from class member to class member. Defendants also maintain
6 Plaintiffs cannot establish on a class wide basis that all of the bird food at issue was toxic
7 or that all purchasers would have changed their behavior if Scotts had disclosed the
8 pesticide use based on the totality of the scientific evidence. They maintain Plaintiffs,
9 therefore, cannot meet the typicality, commonality and predominance requirements.

10 Because Defendants combine their typicality, commonality and predominance
11 arguments, the Court will address these arguments in the discussion involving
12 predominance below.

13 **c. Adequacy**

14 To ensure due process requirements are met, "absent class members must be
15 afforded adequate representation before entry of a judgment which binds them." Hanlon
16 v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). There are two criteria used to
17 evaluate whether this requirement is met: 1) does the named class representatives and their
18 counsel have any conflicts of interest with other class members; and 2) will the named
19 representatives and their counsel prosecute the action vigorously on behalf of the class. Id.

20 Plaintiffs maintain they will adequately represent the class. They contend they do
21 not have any interests antagonistic to class members and will vigorously protect their
22 interests. They understand their duties and agree to consider class members' interests and
23 will continue to actively participate in the litigation. Plaintiffs also contend the Cypherts
24 will represent California, Cowin will represent Missouri, Larson will represent Minnesota
25 to ensure the proposed class representatives' claims are materially identical to other class
26 members they seek to represent.

27 Plaintiffs also maintain co-lead counsel are highly qualified lawyers who have
28 experience in successfully prosecuting high-stakes complex cases and consumer class

1 actions, and they stand ready, willing a able to devote the resources necessary to see this
2 case through to a successful outcome.

3 Defendants do not specifically address this requirement.

4 The Court finds Plaintiffs meets the adequacy requirement.

5 **d. Ascertainability**

6 While the Ninth Circuit has not addressed the issue, many courts in this circuit,
7 including this Court, have recognized an implied requirement that a class is ascertainable.
8 See Amaro v. Gerawan Farming, 2016 WL 3924400 (E.D.Cal. 2016); Flo & Eddie, Inc. v.
9 Sirius XM Radio, Inc., 2015 WL 4776932 (C.D.Cal. 2015); Krueger v. Wyeth, Inc., 310
10 F.R.D. 468 (S.D.Cal. 2015); Stitt v. Citibank, 2015 WL 9177662 (N.D.Cal. 2015). A class
11 is ascertainable if it is administratively feasible to determine whether a particular individual
12 is a class member with a potential right to recover. See Parkinson v. Hyundai Motor Am.,
13 258 F.R.D. 580, 593–94 (C.D.Cal. 2008); Wolph v. Acer Am. Corp., 2012 WL 993531, at
14 *1 (N.D.Cal. 2012). The class members must be identifiable through objective criteria.
15 Kosta v. Del Monte Foods, Inc., 308 F.R.D. 217, 223 (N.D.Cal. 2015). Ascertainability
16 does not require “every potential class member ... [to] be identified at the commencement
17 of the action.” O’Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 319 (C.D.Cal.1998); see
18 also Knutson v. Schwan’s Home Serv., Inc., 2013 WL 3746118, at *5 (S.D.Cal. Jul. 15,
19 2013) (“Class certification hinges on whether the identity of the putative class members
20 can be objectively ascertained; the ascertaining of their actual identities is not required.”).

21 Defendants argue the proposed class is not ascertainable because there is no
22 administratively feasible means of determining class membership. They maintain class
23 membership cannot be determined at all, let alone based on any objective criteria, because
24 Scotts never sold wild bird food directly to consumers, and thus has no master consumer
25 list. They further maintain Plaintiffs repeatedly testified that they did not retain their
26 product packaging, receipts, or other documents for their purchases and, thus, have no
27 means of supporting or determining their purchases. Defendants argue affidavits would be
28 the only potential option for ascertaining the class, and they cannot suffice here because,

1 assuming all proposed class members would be honest, the class members would probably
2 not remember the products they purchased. In support, Defendants contend Plaintiffs'
3 testimony in this action lacks credibility as they have denied being parties to other lawsuits
4 filed against them, denied prior criminal proceedings, gave conflicting testimony about
5 their alleged purchases, contradicted themselves during their depositions and, in one case,
6 contradicted sworn testimony after the deposition was completed.

7 Defendants further argue there is no possible means of determining who purchased
8 a bag of bird food qualifying for class membership. They contend no class member can
9 determine when the bird food bag that he or she purchased was manufactured, what
10 pesticides, if any, were on the bird food, what application levels were used, or even if a
11 particular bag was manufactured by Scotts. They maintain this is significant in this case
12 because Scotts did not acquire Gutwein, the original manufacturer of the bird food, until
13 November 2005, and Plaintiffs are not asserting any liability for bird food sold prior to
14 November 2005, but the length of time retailers keep product on their shelves varies
15 significantly and a consumer who purchased a bag of bird food in May 2006 or January
16 2007, has no way of determining whether that bag was manufactured before November
17 2005 without the package. Defendants further maintain Plaintiffs have no way of knowing
18 whether their bird food was treated by Scotts with Storcide II, Actellic 5E, something else,
19 or nothing at all, because Scotts ceased applying any pesticides in March 2008. They
20 contend the packaging is the only way to find the manufacture date and determine what
21 pesticide, if any, was applied.

22 Defendants also argue the proposed class is overbroad and unmanageable because
23 the pesticide application and degradation rates varied for different products, as did any risk
24 of harm, and purchasers cannot determine the level at which any pesticides were applied
25 or whether their products were treated with Storcide II or Actellic 5E.

26 Defendants maintain that without a package, no purchaser can ever determine
27 whether he or she purchased a bag of bird food manufactured by Scotts that falls within the
28 class definition or that otherwise qualifies for liability, and there is no means for Scotts to

1 raise challenges and defenses to Plaintiffs' claims without engaging in mini-trials for every
2 putative class member.

3 In reply, Plaintiffs argue ascertainability is not an express requirement of Rule 23,
4 although some courts hold it is implied. They contend the class is defined with objective
5 criteria, including (1) the illegal pesticides and their active ingredients; and (2) time frame
6 of manufacture. They maintain Defendants admitted guilt for applying Storcide II and
7 Actellic 5E to the products from November 2005 to March 2008, and products remained
8 on shelves for several months, and, thus, Plaintiffs offer to end the class period in May
9 2008 to ensure ascertainability.

10 Plaintiffs further argue it is irrelevant to their theory of the case whether a product
11 was treated with Storcide II or Actellic 5E because it is illegal to apply either pesticide in
12 any amount and both are known to be highly toxic to birds. Additionally, Plaintiffs argue
13 Defendants theory of ascertainability would defeat class actions. They maintain
14 Defendants have records reflecting which products were treated with the pesticides and
15 which were shipped to which retailers. In turn, they maintain, retailers track their
16 inventories and retain consumer purchases. Plaintiffs argue it is not the law in the Ninth
17 Circuit that consumers keep their receipts to prove purchase of the products.

18 In their surreply, Defendants argue Plaintiffs attempt to side-step the ascertainability
19 problem by offering to end the class period in May 2008, but this does not resolve the
20 ascertainability issues. They contend they stopped using Storcide II and Actellic 5E in
21 March 2008 and those who bought bird food in April or May 2008 have no way of knowing
22 whether their bird food was treated by Scotts with Storcide II, Actellic 5E or nothing at all.

23 They further argue Plaintiffs' assertion that retailers track their inventories is
24 speculative and false, in that Plaintiffs served retailers with subpoenas to obtain consumer
25 information and only one retailer provided a substantive response stating they cannot
26 provide any information for consumers during the time Scotts was applying Storcide II or
27 Actellic 5E.

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1 Defendants also argue it was improper for Plaintiffs to submit a notice plan for the
2 first time in their reply brief because Defendants did not have an opportunity to submit its
3 own notice expert to access the plan. Nevertheless, they argue the proposed plan is
4 irrelevant because providing notice to potential bird enthusiasts solves none of the
5 ascertainability problems.

6 Plaintiffs argue Defendants' extreme version of the ascertainability requirement is
7 an ideologically inspired immunity accepted by some courts and rejected by others. They
8 maintain the Ninth Circuit has never "embraced" the requirement.

9 They contend no ascertainability issues affects Defendants' exposure because
10 Defendants know the exact number of bags of bird "food" they manufactured and, thus,
11 there is no risk that total amount of damages for which they are liable will extend beyond
12 the verified number of bags. They further contend Defendants have no legitimate interest
13 in any potential ascertainability issues because these issues will have no impact on their
14 exposure.

15 Plaintiffs seek a class consisting of purchasers of the wild bird food Defendants
16 admitted to having treated with the pesticides Storcide II and Actellic 5E. Defendants
17 admit to having used the pesticides from November 2005 through March 2008. Plaintiffs
18 agree to limit the class to May 2008, reasoning that tainted bird food remained on stores
19 shelves for several months.

20 Plaintiffs provide an objective way of ascertaining the purchasers. Using
21 Defendants' records that provided evidence of when the products treated with the
22 pesticides were shipped and to which retailers, Plaintiff subpoenaed the retailers records
23 and have been able to get information identifying purchasers of the products during the
24 time the products were shipped to retailers from Defendants. Defendants argue the data
25 received from the retailers provides, at most, limited information about the identity of only
26 6% of the purchasers. Defendants also argue the class members cannot be identified
27 because there is no way of knowing whether the bird food purchased during the class period
28 actually contained the pesticides without viewing the packaging. Plaintiffs are not required

1 to identify all class members at the time of certification. See Astiana v. Kashi Co., 291
 2 F.R.D. 493, 500 (S.D.Cal. 2013). They need only provide an objective means for
 3 identifying the class members, which they have done. See Wolph, 2012 WL 993531.

4 Plaintiffs use a specific date range for purchases of a specific product and there is no
 5 information that packaging for the wild bird food varied or that the pesticides were not
 6 placed in all packages of the wild bird food during the time-frame identified by Plaintiffs.⁵
 7 As such, the Court finds the class is ascertainable. See Miller v. Fuhu, Inc., 2015 WL
 8 7776794 (C.D.Cal. 2015) (Determining a class ascertainable where the class definition
 9 allowed class members to be identified by objective criteria, including a clear date range,
 10 place of purchase, and type of purchase, and further noting some purchasers registered their
 11 products with the defendant and could be, thereby, identified.).

12 **2. Rule 23(b)(3)**

13 Plaintiffs argue the Rule 23(b)(3) requirements are readily met.

14 **a. Predominance**

15 The predominance inquiry presumes the existence of common issues of fact or law
 16 have been established pursuant to commonality requirement of Rule 23(a)(2). Hanlon, 150
 17 F.3d at 1022. However, meeting the commonality requirement is insufficient to fulfill the
 18 predominance requirement. Id. “When common questions present a significant aspect of
 19 the case and they can be resolved for all members of the class in a single adjudication, there
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 23 ⁵ This differs from cases in which district courts have found the class unascertainable
 24 based upon the varieties of products and labels sold by the defendants during the class
 25 period. See Jones v. ConAgra Foods, Inc., 2014 WL 2702726 (N.D.Cal. 2014) (Finding
 26 the many varieties of the products which had different labels and ingredients, and only
 27 some included the labels with the misleading language made the class unascertainable);
 28 Kosta v. Del Monte Foods, Inc., 308 F.R.D. 217 (N.D.Cal. 2015) (“[T]he product labels
 and packaging at issue here do not fall into neatly separate categories such that one can
 say with any confidence that the purchaser of an item in that category was subject to the
 alleged violations.”)

1 is clear justification for handling the dispute on a representative rather than an individual
2 basis.” Id.

3 Plaintiffs contend common issues of law and fact will predominate in this consumer
4 case based on uniform omissions. They argue common issues present a significant aspect
5 of this case, and, thus, it is a good candidate for certification.

6 Plaintiffs contend the RICO claim raises common questions that will turn on
7 common proof that will yield common answers. In support, they maintain issues of law
8 and fact in a RICO action are generally common to all the plaintiffs, because the plaintiffs
9 are asserting a single fraudulent scheme by the defendants which injured each plaintiff.
10 Here, they argue, every class member would prove the elements of Plaintiffs’ RICO claims,
11 (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity, with the
12 same evidence, and the answer would be the same as to each. Specifically, they maintain
13 they will prove Defendants engaged in a scheme to make and sell the Morning Song Bird
14 Food with common proof of their conduct and knowledge and uniform omissions. They
15 argue RICO does not require Plaintiffs to prove individual reliance, and even if reliance is
16 required the RICO claims are entitled to a presumption of reliance as they primarily allege
17 omissions. They further argue, even if the Court does not apply a presumption of reliance,
18 certification of the RICO claims is still warranted as the material omissions were a
19 substantial factor in the sequence of responsible causation as to all class members, and the
20 causal relationship between Defendants’ scheme and the victims is the same for everyone.
21 They maintain the natural and intended consequence of the omissions about the pesticides
22 was that Plaintiffs and the Class would purchase the Morning Song Bird Food, and given
23 that Plaintiffs and the class paid for bird food but received bird poison, proximate cause for
24 purposes of the RICO claim will be simple to resolve on a classwide basis.

25 Plaintiffs maintain the California consumer fraud claims will be proved with
26 common proof of Defendants’ material omissions about the illegal use of pesticides that
27 are toxic and hazardous to birds. They contend there is no reason to look at the
28 circumstances of each individual class member because these claims focus on Defendants’

1 misrepresentations, made by omission, and the fact finder need only determine if they
2 would mislead a reasonable consumer. As such, they argue, common issues will
3 predominate as the claims are about the deceptive marketing by Defendants. Plaintiffs
4 maintain courts frequently find that common questions of law and fact predominate when
5 the focus of the proposed class action will be on the words and conduct of defendants rather
6 than on the behavior of individual class members, as is the case here. They further argue
7 individual issues will not predominate because the success of Plaintiffs' California claims
8 will depend on the effect of Defendants' failure to disclose its illegal use of Storcide II and
9 Actellic 5E upon a reasonable consumer, not a particular consumer. Plaintiffs maintain
10 relief under the UCL is available without individualized proof of deception, reliance and
11 injury when the defendant is engaged in a common course of conduct. Similarly, they
12 maintain misrepresentations may be inferred to the class if the named plaintiff in a CLRA
13 claim can show that material misrepresentations or omissions were made to the class
14 members, and false advertisements in violation of section 17500 are suitable for class
15 treatment where, as here, defendant disseminated standardized materials, such as the
16 packaging, that did not disclose the pesticides.

17 Plaintiffs contend the Missouri consumer fraud claims will also be proved with
18 common proof. They contend they are required to show Ms. Cowin and the class suffered
19 an ascertainable loss of money or property, and an ascertainable loss includes the harm to
20 consumers deprived of the ability to make an informed choice about the product, such as
21 material omissions about the safety of a product. Plaintiffs contend courts routinely find
22 common issues predominate in MMPA claims because individualized reliance is not
23 required. They argue Plaintiffs and the class suffered an ascertainable loss as the product
24 was worthless as bird food or any use other than sitting in a landfill, and Plaintiffs and the
25 class were deprived of their ability to make an informed choice about the Morning Song
26 Bird Food because Defendants failed to disclose their illegal pesticide use.

27 Plaintiffs maintain the Minnesota Consumer Fraud Act does not require a showing
28 of individualized reliance, and the claims will be also be proven by common evidence.

1 Defendants argue Plaintiffs cannot meet the typicality, commonality and
2 predominance requirements because (i) a trial is required on the “science” of every
3 consumer’s allegations; (ii) every class member’s claim must be scrutinized for individual
4 statute of limitations issues; (iii) establishing whether putative class members suffered an
5 injury entails countless individual inquiries; (iv) causation and reliance issues preclude
6 class certification; and (v) Plaintiffs fail to satisfy the Comcast requirement to provide a
7 reliable class-wide damage model.

8 **i. “Science” of the Allegations**

9 Defendants argue the named Plaintiffs’ allegations are subject to multiple Plaintiff-
10 specific defenses that will plague the class. They maintain the allegations of bird deaths
11 and their lack of foundation when the evidence is reviewed illustrate the plaintiff-specific
12 nature of their claims and defenses. By way of example, Defendants point to the allegations
13 of the Cypherts. They contend the Cypherts purchased wild bird food in 2010, and the
14 packaging shows it was manufactured in 2009, long after Scotts stopped using Storicde II
15 and Actellic 5E. Further, they contend, the Cypherts misused the bird food by feeding it
16 to their domestic zebra finches when the label warned against feeding it to domesticated
17 birds. Defendants further maintain there are many other explanations for the Cypherts’
18 incident, such as infectious diseases, parasites, toxicoses and cold weather.

19 Defendants argue this demonstrates the defenses requires a scientific analysis of the
20 allegations for the consumers and these unique issues would swallow the class claims.

21 Defendant Hagedorn similarly argues consumers’ differing views on the scientific
22 risks are individualized and foreclose class certification.

23 In reply, Plaintiffs contend Defendants’ scientific arguments are premature. They
24 maintain they will disprove Defendants’ experts’ opinions regarding the toxicity and harm
25 to consumers in due course, and that class certification is not a mini-trial. They further
26 maintain they have not had the opportunity to test the admissibility of the opinions, and
27 argue the opinions are facially vulnerable to challenge. Plaintiffs also contend Defendants’
28 attempt to litigate the merits issues based on science emphasize the appropriateness of

1 class certification because Plaintiffs' claims are about worthless bird food that focuses on
2 Defendants' illegal scheme and not bird injuries or death.

3 The Court finds the science of the allegations addresses the merits of Plaintiffs'
4 claims more than is necessary to determine whether class certification is appropriate in that
5 the Court would be required to determine whether Plaintiffs would prevail on the merits
6 based upon the scientific evidence submitted. See Ellis, 657 at 983 n. 8. The Court's
7 consideration of the merits should be limited at this state of the proceedings.

8 **ii. Statute of Limitations**

9 Defendants argue individual, fact-intensive inquiries are required to determine
10 whether the putative class members' claims survive the applicable statutes of limitations.
11 They maintain the claims are governed by a statute of limitations of four years or less and
12 are subject to the discovery rule. In other words, they contend, each putative class
13 member's claim accrued when he or she knew or should have known of a potential claim,
14 and, they argue, the time when that occurred will differ for every purported class member
15 and will require mini-trials. They further contend allegations of fraudulent concealment is
16 another basis for finding a lack of predominance.

17 Defendant Hagedorn also argues limitations issues are individualized.⁶

18 Plaintiffs argue all the facts that Defendants suggest satisfy the discovery rule are
19 the same as to all class members and the individual issues of compliance with the
20 limitations period, given the scheme, do not defeat predominance. Plaintiffs argue the
21 representations made by Defendants before 2012 concealed the crime, and whether class
22 members saw the pre-January 2012 statement is irrelevant because Defendants never issued
23

24
25 ⁶ Relying on Defendants' motion for summary judgment, he maintains former Plaintiff
26 Kloeppe was on notice of his claim in 2008 but the fact was not uncovered until he was
27 deposed. He argues identifying other Kloeppe like class members will require individual
28 trials. The Court finds it not appropriate to base its findings on argument set forth in a
motion to which Plaintiff has not had the opportunity to address.

1 a consumer level recall, never identified the affected products by name, which pesticides
2 were at issue, their toxicity to birds or provided notice by way of their warning labels. They
3 maintain the “Fellow Bird Lover” letter claims the pesticides did not constitute a significant
4 health risk to wild birds and were safe on human food and forged the signature of a bird
5 doctor without authorization. They maintain consumers had no way of knowing of
6 Defendants’ misconduct prior to the January 2012 guilty plea. Additionally, they argue
7 any consumer who noticed problems or injured birds could not discover the crime as
8 Defendants concealed the existence pesticides, misrepresented the risk and marketed the
9 products for wild birds that fly away, and Defendants’ own expert argues birds die for a
10 variety of reasons.

11 The Court finds Plaintiff sufficiently demonstrate the facts surrounding the statute
12 of limitations and the discovery rule, including any issues of fraudulent concealment, are
13 not individualized but, instead, are common to the class members as it involves
14 Defendants’ conduct in pleading guilty to the criminal charges in January 2012. The Court
15 further finds the issues are typical of the class and the common issues predominate.

16 **iii. Establishing Injury**

17 Defendants maintain Plaintiffs must establish all class members suffered an “injury
18 in fact” and that there is a causal connection between the injury and Defendants’ alleged
19 conduct. They argue Plaintiffs make no effort to define the class in a way that would
20 exclude uninjured class members, instead, they maintain, Plaintiffs allege they did not
21 receive the benefit of their bargain. Defendant contends the alleged injury turns on whether
22 each consumer received the perceived benefit of his or her bargain, which will necessarily
23 vary by consumer depending on that consumer’s expectations. They further contend, if a
24 consumer used the product, liked it, and experienced no problems with it, that consumer
25 received the benefit of his or her bargain. Additionally, Defendants maintain whether a
26 consumer received the benefit of his or her bargain also turns on whether the consumer
27 would have considered the product’s level of risk to be of any importance, which will vary
28

1 by consumers. Therefore, they argue, economic analysis required to assess “benefit of the
2 bargain” necessarily varies among consumer.

3 Defendant Hagedorn argues Plaintiffs’ civil RICO claims require that all class
4 members establish injury caused by Mr. Hagedorn’s involvement in the alleged conspiracy,
5 and Plaintiffs cannot establish that all putative class members suffered an injury in fact
6 fairly traceable to Defendant Hagedorn’s conduct. He maintains Plaintiffs’ own motion
7 illustrates that he did not join the RICO conspiracy until October 16, 2007, and Plaintiffs
8 have not asserted any legal theory upon which he is liable for conduct prior to October
9 2007. Defendant contends putative class members who purchased the product
10 manufactured before October 16, 2007, have not been injured by conduct attributable to
11 Mr. Hagedorn, and therefore, they lack standing to pursue claims against him.

12 Plaintiffs maintain their “benefit of the bargain” theory means all class members
13 necessarily experienced an economic injury in purchasing worthless bird poison. They
14 contend Defendants’ argument that class members received a benefit ignores consumers’
15 obvious desire to purchase nourishing bird food, not bird poison.

16 Plaintiffs also argue Defendant Hagedorn misconstrues the law. They maintain
17 Defendants’ roles relate only to apportionment of liability among them, a damages question
18 they contend is not proper at this stage of the proceedings. They further maintain their
19 allegations demonstrate Hagedorn was a participant in the alleged wrongdoing as CEO and
20 Chairman of SMG and an executive officer of Scott’s LLC and Gutwein, not just because
21 of his participation in the October 16, 2007 meeting. Additionally, Plaintiffs contend they
22 need to conduct discovery to determine Defendant Hagedorn’s liability for the RICO
23 scheme, which is inappropriate for resolution on a motion for class certification.

24 Plaintiffs’ theory is that they were harmed by purchasing bird poison that
25 Defendants’ misrepresented as bird food. Plaintiffs’ class definition are those individuals
26 who purchased, Scotts Miracle-Gro wild bird food product containing Storcide II, Actellic
27 5E, or their active ingredients. As such, the class members are those who “were relieved
28 of their money by [Defendants’] deceptive conduct[,] as Plaintiffs allege,” and, therefore

1 have suffered injury. Mazza v. American Honda Motor Co., Inc., 666 F.3d 581, 595 (9th
2 Cir. 2012). The Court finds facts establishing injury are common to the class, typical of
3 the class and will not require an individualized assessment. The Court further finds
4 Defendant Hagedorn's argument regarding the level of his involvement in the conspiracy
5 is an issue on the merits which is not appropriately addressed in this motion.

6 **iv. Causation and Reliance**

7 Defendant argues individual issues of causation predominate over any common
8 RICO Issues. They maintain there are multiple questions presented for each purchaser,
9 including: (1) Why did he or she buy the product; (2) If Scotts "disclosed" the "truthful"
10 scientific information, would the consumer have read it and determined it to be important;
11 and (3) Would he or she have bought the product anyway? Defendants contend the answers
12 to those questions will vary by each consumer's individual preferences based on
13 uncontroverted expert testimony. They maintain Plaintiffs attempt to avoid individual
14 reliance by asserting that RICO does not require proof of individual reliance, first-party
15 reliance is not required for predicate acts. They further maintain Plaintiffs seek to avoid
16 individual reliance issues by asserting they are entitled to a class-wide presumption of
17 reliance, but the shortcut of a presumption has been applied in cases involving securities
18 fraud, not cases of the type present here. Additionally, they contend Plaintiffs cannot rest
19 on a presumption of reliance in this case because they affirmatively allege both
20 misrepresentations and omissions. Defendants argue individualized reliance issues related
21 to Plaintiffs' knowledge, motivations, and expectations will overwhelm any common
22 issues. They maintain the evidence shows putative class members saw different
23 representations and assigned different importance to them. Further, they argue the
24 evidence shows there is no basis for finding "materiality" as to anyone, let alone everyone.
25 Defendants argue Plaintiffs fail to carry their burden.

26 Defendants also argue, even if Plaintiffs' omission theory was otherwise viable, it
27 would vary by state, which would also defeat predominance. They contend Plaintiffs fail
28 to point to any explicit statutory duty requiring Scotts to disclose the pesticides or risks of

1 pesticides used in its products. They further contend, even assuming Plaintiffs were able
2 to point to something in the state statutes to give rise to an independent duty to disclose,
3 Plaintiffs' purported nationwide RICO class would devolve into a hodge-podge analysis of
4 all 50 states' laws. Defendants argue that even if Plaintiffs recast their case as an
5 "omissions-only" case, they fail to identify a statutory duty to disclose, fail to engage in
6 any choice of law analysis for any duty to disclose, and fail to present any trial plan for the
7 presentation and management of their disparate claims in all 50 states. They maintain the
8 complexity of the trial will be further exacerbated by looking to the laws of the 50 states.

9 Defendant Hagedorn makes the same argument in his opposition.⁷

10 Plaintiffs argue, in reply, that materiality is an objective standard and the questions
11 raised by Defendants are answered by common proof, or are irrelevant to Plaintiffs' theory
12 of the case. Specifically, they maintain whether Defendants manufactured the food,
13 whether they treated it with illegal poison and whether the product is worthless are
14 answered by common proof, while whether the poison was enough to kill birds and whether
15 the risk was significant or slight are irrelevant. They further argue, even if RICO requires
16 reliance, it can be proven class-wide because the purchases cannot be explained in any way
17 other than reliance.

18 "Courts have found that reliance can be established on a class-wide basis where the
19 behavior of plaintiffs and class members cannot be explained in any way other than reliance
20 upon the defendant's conduct." Cohen v. Trump, 303 F.R.D. 376, 358 (S.D.Cal. 2014)
21 (listing cases in which courts have found reliance is apparent or that a common sense
22 inference of reliance was appropriate). Plaintiffs' theory is Plaintiffs would not have
23 purchased the bird food if they knew it was poison. The Court finds a common sense
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25
26 ⁷ He further asserts his limited involvement in the conspiracy demonstrates Plaintiffs
27 cannot establish causation as to him on a class-wide basis. As discussed above, the
28 extent of Hagedorn's involvement in the conspiracy and liability under the conspiracy on
not proper for resolution in the motion for class certification.

1 inference can be made that the class members relied upon Defendants misrepresentation
2 that the product was bird food and not bird poison. As such, reliance can be determined
3 on a class-wide basis.

4 **v. Class Damages**

5 Plaintiffs allege they are entitled to full refunds for every bag of Morning Song Bird
6 Food purchased, which is subject to mandatory trebling under the RICO Statute. They
7 contend their method of calculating damages based upon trebled refunds is appropriate.
8 They maintain Plaintiffs may recover all damages that are the foreseeable and natural
9 consequences of the fraud, which includes the return of monies paid by them.

10 Defendants argue Plaintiffs fail to satisfy the requirements of Comcast or otherwise
11 present a reliable class-wide damage model. They argue, post-Comcast, courts around the
12 country, including federal courts in California, have rejected plaintiffs' attempts to present
13 an oversimplified and arbitrary "full refund" model of class-wide damages. Defendants
14 maintain the expert evidence in this case establishes the product was not worthless and was
15 safe for use by consumers to feed their birds, as the undisputed facts show that, at best,
16 Storcide II and Actellic 5E presented an insignificant risk of injury. They contend,
17 notwithstanding those risks, the wild bird food provided value to the purported class
18 members. Thus, Plaintiffs are not entitled to a full refund.

19 Defendants further argue that even if plaintiffs' "full refund" theory had any merit,
20 accurately calculating damages would require separate mini-trials that preclude class
21 certification. They maintain none of the Plaintiffs were able to provide any specific
22 credible information regarding: (1) how much Scotts' bird food was purchased; (2) the
23 specific type purchased; (3) when the bird food was purchased; (4) how big the bags were;
24 or (5) how much money was paid for the wild bird food as to any given bag. They further
25 maintain Plaintiffs repeatedly confused Scotts wild bird food with its competitors.
26 Defendants contend they are entitled to a jury trial on each of Plaintiffs' purported
27 recollections. Additionally, they contend Plaintiffs purport to exclude refunds from the
28 class but they have no means of determining who received a refund from retailers. As

1 such, they argue, even if they are entitled to a full refund, it is impossible to calculate an
2 accurate amount.

3 Defendant Hagedorn asserts the same argument in his opposition.

4 Plaintiff argues this district has upheld a “full refund” model of class-wide RICO
5 damages upon reasoning RICO damages depend on objective losses rather than subjective
6 valuations. They maintain the “full refund” model is appropriate here, because the products
7 were fit only for the trash dump and retailers received full refunds. They further maintain
8 Defendants’ and retailer’s records will identify the total damages.

9 At the certification stage, Plaintiffs are required to establish their damages model is
10 capable of measuring damages on a class wide basis and consistent with Plaintiffs’ theory
11 of liability. Comcast Corp. v. Behrend, 133 S.Ct. 1426, 1432-33 (2013). Plaintiffs seek a
12 full refund of monies paid for the bird food they allege was actually bird poison and
13 worthless. They further maintain the damages may be determined from their damages
14 model is Defendants’ and retailers’ records. The Court finds Plaintiff’s damages model
15 measures damages consistent with their theory and can be measured on a class-wide basis.⁸

16 Plaintiffs sufficiently demonstrate the claims of the proposed class involve the same
17 alleged injury, allege the same conduct by Defendants and will involve common proof.
18 Therefore, common issues predominate.

19 **b. Superior**

20 In addition to finding predominance, a court must also find “that a class action is
21 superior to other available methods for fairly and efficiently adjudicating the controversy.”
22 FED.R.CIV.P. 23(b)(3). A class action may be superior if “class-wide litigation of common
23 issues will reduce litigation costs and promote greater efficiency” and “if no realistic
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26 ⁸ See, e.g. In re Steroid Hormon Product Cases, 181 Cal.App.4th 145, 156-57 (2010) (The
27 plaintiff relied on the defendant’s deceptive conduct and purchased a product containing
28 an illegal substance; it was not a stretch to conclude that a reasonable person would find
the lawfulness to sell a product important when deciding whether to purchase it.).

1 alternative exists.” Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234-35 (9th Cir.
2 1996).

3 Plaintiffs maintain they are not aware of any other litigation commenced by the class
4 for refunds for the Morning Song Bird Food. They further maintain resolution of the class
5 issues will require extensive discovery into Defendants’ scienter, manufacturing processes,
6 and marketing materials, whereas proving the individual amount of damages for each class
7 Member can be adjudicated in individualized follow-on proceedings. Moreover, Plaintiffs
8 maintain members would not be able to pay an attorney to pursue their claims individually.
9 Thus, they argue, proceeding as a class action is superior.

10 In opposition, Defendants argue the difficulty of determining class membership
11 makes managing the case as a class action complicated which is sufficient to preclude a
12 finding that a class action is superior. They also contend Plaintiffs have never presented a
13 viable trial plan for the purported class claims and, they argue, the many individual
14 questions will render a class action unmanageable. Defendants further argue a class action
15 is not superior because Scotts is already offering the relief Plaintiffs seek, namely a refund.

16 Defendant Hagedorn maintains, given the individual issues of reliance and damages,
17 class action treatment would be entirely unmanageable as to him and would violate his due
18 process rights.

19 In reply, Plaintiffs argue a class action is the only realistic means to adjudicate the
20 claims. They maintain the largest recovery possible would be a miniscule fraction of the
21 cost to bring the suit, and the efficiencies gained by class treatment outweigh any
22 difficulties. Plaintiffs also argue Defendants’ due process rights will not be violated
23 because their defenses are based on facts that apply to nearly all the putative class members
24 and are subject to common proof. They maintain any individualized defenses as to
25 damages claims may be addressed after the common liability questions are resolved.
26 Additionally, Plaintiffs argue Defendants never issued a consumer-level recall nor advised
27 consumers they could get full refunds.

1 In light of the costs of bringing an individual action compared to the recovery and
2 the efficiency in addressing the common issues on a class-wide basis, the Court finds a
3 class action is superior.

4 **CONCLUSION AND ORDER**

5 Based on the foregoing IT IS HEREBY ORDERED:

6 1. Defendants' motion to stay ruling on the motion for class certification is
7 **DENIED**;

8 2. Plaintiffs' ex parte motion for leave to submit newly discovered evidence is
9 **DENIED**;

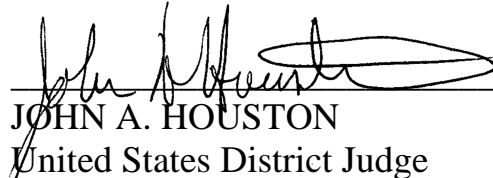
10 3. Defendants' ex parte request for oral argument is **DENIED**;

11 4. Plaintiffs' motion for class certification is **GRANTED**;

12 5. The class definition is modified, as follows:

13 All persons who, prior to May 1, 2008, purchased and have not yet received a
14 full refund for, a Scotts Miracle-Gro wild bird food product containing
15 Storcide II, Actellic 5E, or their active ingredients, chlorpyrifos-methyl or
16 pirimiphos-methyl, respectively ("MSBF").

17 DATED: March 30, 2017

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19 _____
20 JOHN A. HOUSTON
21 United States District Judge
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