

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

DAMIAN MONTELEONE, an individual and  
on behalf of all others similarly situated,

Plaintiff,

vs.

THE NUTRO COMPANY, a Delaware  
corporation; MARS, INCORPORATED, a  
Delaware corporation; and DOES 1 through  
100, inclusive,

Defendants.

Case No. 2:14-cv-00801-ES-JAD

CLASS ACTION

**NOTICE OF MOTION FOR ORDER  
GRANTING PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT, APPROVING FORM  
AND MANNER OF NOTICE, AND  
SCHEDULING FAIRNESS HEARING**

PLEASE TAKE NOTICE THAT on **February 2, 2015** at 9:00 in the forenoon, or as soon as counsel may be heard, the undersigned attorneys for Plaintiff DAMIAN MONTELEONE (“Plaintiff”) shall move before the United States District Court for the District of New Jersey, before the Honorable Esther Salas, U.S. District Judge, at the Martin Luther King Building & U.S. Courthouse, 50 Walnut Street, Newark, NJ 07101, for an Order: (1) Granting Preliminary Approval of Class Settlement, (2) Approving the Form and Manner of Notice to Be Sent to Class Members; and (3) Scheduling a Fairness Hearing.

PLEASE TAKE FURTHER NOTICE that in support of thereof, the undersigned shall rely upon the memorandum of law submitted herewith; Declaration of John H. Donboli, Esq., and annexed exhibits, submitted herewith; settlement papers, and other documents; the pleadings, orders, transcripts, and other papers on file in this matter; and any further evidence and arguments as may be presented at the hearing of this matter.

A proposed form of Order is submitted herewith.

Dated: January 16, 2015

Respectfully submitted,

GORDON & REES LLP

By: /s/ Peter G. Siachos  
Peter G. Siachos

*Attorneys for Plaintiff*

18 Columbia Turnpike, Suite 220

Florham Park, New Jersey 07932

Telephone: (973) 549-2500

Facsimile: (973) 377-1911

e-mail: [psiachos@gordonrees.com](mailto:psiachos@gordonrees.com)

John H. Donboli

DEL MAR LAW GROUP, LLP

12250 El Camino Real, Suite 120

San Diego, California 92130

Telephone (858) 793-6244

Facsimile: (858) 793-6005

[jdonboli@delmarlawgroup.com](mailto:jdonboli@delmarlawgroup.com)

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

DAMIAN MONTELEONE, an individual and  
on behalf of all others similarly situated,

Plaintiff,

vs.

THE NUTRO COMPANY, a Delaware  
corporation; MARS, INCORPORATED, a  
Delaware corporation; and DOES 1 through  
100, inclusive,

Defendants.

**Case No. 2:14-cv-00801-ES-JAD**

**CLASS ACTION**

**MEMORANDUM OF LAW IN SUPPORT  
OF PLAINTIFF'S MOTION FOR AN  
ORDER GRANTING PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT, APPROVING FORM  
AND MANNER OF NOTICE, AND  
SCHEDULING FAIRNESS HEARING**

**I.**

**INTRODUCTION**

Plaintiff DAMIAN MONTELEONE ("Plaintiff") submits this Memorandum of Law in support of the proposed class action settlement ("Settlement"), and entry of an order: (1) preliminarily approving the proposed settlement in the above-captioned class action litigation with defendants THE NUTRO COMPANY ("Nutro") and MARS, INCORPORATED (collectively "Defendants"); (2) approving the form and manner of notice be given to Settlement Class Members; and (3) scheduling a Fairness Hearing. At the Fairness Hearing (alternatively referred to herein as the "Final Approval Hearing"), the following will be considered: (i) the request for final approval of the proposed Settlement, and (ii) the [Proposed] Final Order and Judgment of Dismissal. Plaintiff also intends to apply this Court for an award of attorneys' fees and reimbursement of expenses along with an enhancement fee award to Plaintiff for his service as the class representative at time of the Fairness Hearing.

The proposed Order Granting Preliminary Approval of Class Settlement, Approving Form and Manner of Notice, and Scheduling Fairness Hearing (the "Preliminary Approval Order"), filed concurrently herewith, establishes certain dates for the mailing of notice to the

Settlement Class and the procedure and timing for filing of objections, if any, to the settlement or requests for exclusion by members of the Settlement Class.

This case represents the culmination a four-year journey that began in California in December 2010 with an investigation into defendants THE NUTRO COMPANY (“Nutro”) and MARS, INCORPORATED (collectively “Defendants”) alleged unlawful practice of improperly labeling and selling certain dog food products with a “Guaranteed Analysis” regarding the amount of *Bacillus* Species (a probiotic) contained therein within the relevant four-year statutory time period.<sup>1</sup> This investigation led to the filing a California lawsuit captioned as *Clark v. The Nutro Company, et al.*, San Diego Superior Court Case No.: 37-2011-00090424-CU-BT-CTL (the “California Action”) in May 2011. The California Action was mediated before a well-respected former jurist of the San Diego Superior Court and a settlement was ultimately reached as to the California Class.

The Settlement Agreement in the California Action was ultimately deemed fair, reasonable, and adequate and in the best interest of the California Class by the Honorable Judge of the San Diego Superior Court on or about September 11, 2012, when the case was dismissed pursuant to a Final Order and Judgment of Dismissal. The Final Order and Judgment of Dismissal required Defendants to promulgate notice, establish a claims process, and a common fund of \$540,000 that was distributed to eligible Settlement Class Members who purchased an Affected Product (as defined in the Settlement Agreement). California Settlement Class Members who returned a valid Claim Form received a single payment of \$2.00 or a \$5.00 Gift Certificate towards the purchase of any Nutro product. Alternatively, California Settlement Class Members could have elected to donate Defendants’ dry kibble product worth \$5.00 at retail price to a reputable California animal shelters.

The resolution and class wide settlement in the California Action, however, left consumers outside of California without any relief, which is what eventually led to the filing of

---

<sup>1</sup> Notwithstanding the accuracy of the afore-mentioned *Bacillus* labeling, at no time were animals ever at risk due to the presence or lack thereof of *Bacillus* in the dog food products at issue in this litigation. Rather, the allegation (if proven true) would establish that an additive (a probiotic) was substantially missing from the dog food products. See Declaration of John H. Donboli dated January 16, 2015.

this action on or about January 3, 2014. The New Jersey state court action was removed by Defendants to this Honorable Court on or about February 11, 2014. The litigation seeks, among other things, an award of damages and/or restitution against Defendants as a result of this alleged conduct. This Settlement is undoubtedly a fair result for the class as Defendants' customers nationwide (sans California) will receive the same benefit afforded California consumers in 2012, which is to receive cash and/or a gift certificate for their purchase of an Affected Product.

If Plaintiff would have rejected the Settlement and continued to litigate this action through trial, there would have been a significant risk that no monetary recovery would have been obtained. In view of this risk, this Settlement is undoubtedly fair, just and adequate.

## II.

### NATURE OF THE CASE

On or about January 3, 2014, a putative class action Complaint was filed in the Superior Court of New Jersey Law Division: Essex County as Docket No. ESX-L9885013, styled as *Monteleone v. The Nutro Company et al.* (the "National Action"). The putative class action case extends to all of Defendants' customers nationwide (except for the already resolved California Class) based on three causes of action: (1) Equitable Fraud; (2) Negligent Misrepresentation (pursuant to state common law); and (3) Violations of New Jersey's Consumer Fraud Act. This is all predicated on Defendants' labeling of its dog food products with a "Guaranteed Analysis" regarding the amount of *Bacillus* Species (a probiotic) contained therein.

The Settlement Class in this case is comprised of a similar Class as in the California Action; however, the Settlement Class in this case extends to consumers in the other 49 states and the District of Columbia (the "National Class"). This National Class is defined as "all persons in the United States (excluding persons in California) who purchased or used the Affected Product. Excluded from the Settlement Class are all persons who are employees, directors, officers, and agents of Defendants or their subsidiaries and affiliated companies, as well as the Court and its immediate family and staff." (Exhibit "1", at page 5, Section II, 20)

The term "Affected Product" shall mean "the following Ultra brand dry dog kibble purchased between April 1, 2007 and June 30, 2009, and Ultra brand dog biscuits purchased between April 1, 2007 and April 30, 2011: (a) Ultra Adult Dry; (b) Ultra Large Breed Adult Dry;

(c) Ultra Large Breed Puppy Dry; (d) Ultra Puppy Dry; (e) Ultra Senior Dry; (f) Ultra Small Breed Adult Dry; (g) Ultra Weight Management Dry; (h) Ultra Adult Biscuits; (i) Ultra Puppy Biscuits; (j) Ultra Senior Biscuits; and (k) Ultra Weight Management Biscuits.” (Exhibit “1”, at page 3, Section II, 1).

Class Counsel and Defense Counsel conducted a thorough investigation into the facts of the class action, including diligently pursuing an investigation of the relevant facts. Class Counsel is of the opinion that the settlement with Defendants for the consideration and on the terms set forth in the Settlement Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Defendants, and the potential risk of no monetary recovery. The Settlement is undoubtedly fair and in the best interest of the Settlement Class. (Declaration of John H. Donboli, ¶ 19).

### III.

#### **DESCRIPTION OF THE PROPOSED SETTLEMENT**

The Parties agreed to a proposed settlement, which, if approved by this Honorable Court, will result in dismissal of the Action with prejudice and the provision of certain benefits to the Settlement Class Members. Under the terms of the Settlement Agreement, if the Settlement is finally approved by the Court, Defendants will reserve up to Five Hundred Thousand Dollars (\$500,000.00) for a common fund to be distributed to eligible Settlement Class Members who purchased the Affected Product (as that term is defined in the Settlement Agreement). Each eligible Settlement Class Member who returns a valid Claim Form may elect to receive a single payment of \$2.00 or a \$5.00 Gift Certificate towards the purchase of any Nutro product. Alternatively, Settlement Class Members can elect to donate Defendants’ dry kibble product worth \$5.00 at retail price to animal shelters and/or animal charities of the Defendants’ choice after consultation with Class Counsel.

Any of Defendants’ customers nationwide (sans California) who complete and sign a Claims Form to attest to his or her purchase of an Affected Product (as defined by the Settlement Agreement) pursuant to the terms and conditions set forth in the Settlement Agreement, Notice, and Summary Notice shall receive payment as detailed above. (Declaration of John H. Donboli,

¶ 4; Exhibit “1,” at ¶¶ 26-32).

The settlement will administered by a professional Claims Administrator to administer the claims and payment process. Defendants and/or the Claims Administrator shall obtain an appropriate URL specifically to handle the Settlement process (the "Settlement Website"). (Declaration of John H. Donboli, ¶ 11).

Both Class Counsel and Defense Counsel shall ensure that Defendants properly reject invalid claims (if any) and reports all such determinations of invalidity to Class Counsel within thirty (30) days of any such determination. (Declaration of John H. Donboli, ¶ 11; Exhibit “1,” at ¶ 52).

Class Counsel intends to file and have heard a motion for the recovery of attorneys' fees and costs to be approved by this Honorable Court, including all reasonable fees, costs and expenses related to Plaintiff's prosecution of the Action in a *not to exceed* amount of \$375,000.00. Class Counsel shall also seek confirmation by this Court, at that time, of a single \$5,000 payment as an incentive award for Plaintiff for serving as Class Representative. (Declaration of John H. Donboli, ¶ 12; Exhibit “1,” at ¶¶ 34-37).

#### IV.

#### **NOTICE AND ADMINISTRATION OF THE SETTLEMENT**

The Settlement contains a Notice (Long-Form Notice) and Summary Notice (Short-Form Notice), substantially in the form set forth in Exhibits “B” and “E” to the Settlement Agreement that will be distributed to Settlement Class Members once the Court enters the Preliminary Approval Order. (See Exhibit “C” to Settlement Agreement for copy of proposed Preliminary Approval Order). Specifically, upon entry of the Preliminary Approval Order, Defendants, in cooperation with its professional Claims Administrator, shall take the following actions:

1. Publish a link to the Notice on the Nutro home webpage (<http://www.Nutro.com>), for the duration of the Claim Period.
2. Email, on or before the Notice Date as specified in the Preliminary Approval Order, the Notice (substantially in the form attached as Exhibit “B” to the Settlement Agreement), to the last known email addresses of the Settlement Class to the extent such email address information exists in Nutro's consumer

databases, is a valid email address, and the Settlement Class Member has not withheld his/her consent to being contacted by Nutro via email.

3. Mail, on or before the notice date, to in-house counsel for PetSmart and Petco requesting that they post the Summary Notice of the settlement (substantially in the form attached as Exhibit “E” to the Settlement Agreement) at the point of purchase in their stores for the duration of the Claim Period, provided however that the parties shall not represent, warrant, or guarantee that PetSmart and Petco actually will post the Summary Notice in their stores.
4. Provide a website address in the Notice and Summary Notice to a settlement website to be designed and administered by the Settlement Administrator that will contain the settlement documents (including but not limited to the Notice and Claim Form), a list of important dates, and any other information to which the Parties may agree.

(Declaration of John H. Donboli ¶¶ 13-17; Exhibit “1” thereto). These methods are designed to meaningfully reach the largest possible number of potential Settlement Class Members.

Defendants agree to pay the Settlement Administrator up to Forty-Five Thousand Dollars (\$45,000.00) toward reasonable costs, fees, and expenses of providing notice to the Settlement Class and administering the Settlement in accordance with the Settlement Agreement. Class Counsel may pay up to an additional Five Thousand Dollars (\$5,000) to help further promulgate notice. (\$30,000.00) shall be the responsibility of Defendants. (Declaration of John H. Donboli ¶ 18; Exhibit “1” thereto at ¶ 49).

#### V.

#### **THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO GRANT PRELIMINARY APPROVAL**

When a proposed class-wide settlement is reached, the settlement must be submitted to the court for approval. Newberg & Conte, *NEWBERG ON CLASS ACTIONS* (2003) at § 11.41. Preliminary approval is the first of three steps that comprise the approval procedure for settlements of class actions. The second step is the dissemination of notice of the settlement to all

Class Members. The third step is a final settlement approval hearing, at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented and Class Members may be heard regarding the settlement. *Turner v. NFL (In re NFL Players' Concussion Injury Litigation)*, 301 F.R.D. 191, 197 (E.D. Pa. 2014); Manual for Complex Litigation (Fourth) § 21.61 (2004).

The question presented on a motion for preliminary approval of a proposed class action settlement is whether the proposed settlement is “within the range of possible approval.” Manual for Complex Litigation (Fourth), §21.632 at 320, n. 976. Preliminary approval is merely the prerequisite to giving notice so that “the proposed settlement” may be submitted to members of the prospective Class for their acceptance or rejection. *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 323 F.Supp. 364, 372 (E.D. Pa. 1970). There is an initial presumption of fairness when a proposed settlement, which was negotiated at arm’s length by counsel for the Class, is presented for court approval. 4 Newberg §11.41. The ultimate question, however, of whether the proposed settlement is fair, reasonable and adequate is made after notice of the settlement is given to the Settlement Class Members and a final settlement hearing is held by the Court.

**A. The Role of the Court in Preliminary Approval of a Class Action Settlement**

The approval of a proposed settlement of a class action suit is a matter within the broad discretion of the trial court. *Girsh v. Jepson*, 521 F.2d 153, 156 (3<sup>rd</sup> Cir. 1975). Preliminary approval does not require the trial court to answer the ultimate question of whether a proposed settlement is fair, reasonable and adequate. That determination is made only after notice of the settlement has been given to the class members and after they have been given an opportunity to voice their views of the settlement or to be excluded from the settlement, which is customarily addressed at the final settlement approval hearing. Manual for Complex Litigation (Fourth), §21.634 at 322; *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 797 (3<sup>rd</sup> Cir. 1995).<sup>2</sup>

---

<sup>2</sup> A lesser standard of scrutiny applies to certification of a *settlement* class as opposed to cases wherein certification is disputed. *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801,

The question whether a proposed settlement is fair, reasonable and adequate necessarily requires a judgment and evaluation by the attorneys for the parties based upon a comparison of “the terms of the compromise with the likely rewards of litigation.” *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982), *cert. denied* 464 U.S. 818 (1983). With regard to class action settlements, the opinions of counsel should be given considerable weight both because of counsel’s familiarity with this litigation and previous experience with cases such as these. *Seidman v. American Mobile Systems*, 965 F. Supp. 612, 618-19 (E.D. Pa. 1997); *Austin v. Pennsylvania Department of Corrections*, 876 F. Supp. 1437, 1472 (E.D. Pa. 1995). Accordingly, the parties’ decision regarding the respective merits of their position has an important bearing on this case.

**B. Factors to Be Considered In Granting Preliminary Approval**

A number of factors are to be considered in evaluating a settlement for purposes of preliminary approval. No one factor should be determinative, but rather all factors should be considered. The Settlement meets all of these criteria.

**1. The Settlement is the Product of Serious, Informed and Noncollusive Negotiations**

This Settlement is the result of extensive negotiations. Defendants expressly deny and continue to deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Nonetheless, Defendants concluded that it is desirable that this Action be settled in the manner and upon the terms and conditions set forth in the Settlement Agreement in order to avoid the expense, inconvenience, and burden of further legal proceedings, and the uncertainties of trial and appeals. Defendants also determined that it is desirable and beneficial to put to rest the released claims of the Settlement Class.

Class Counsel and Defense Counsel conducted a thorough investigation into the facts of the class action, including diligently pursuing an investigation of the relevant facts. Class Counsel is of the opinion that the settlement with Defendants for the consideration and on the

---

1807, fn 19(1996); *Wershba v. Apple Computer, Inc.*, (2001) 91 Cal.App.4th 224, 239-240 (2001).

terms set forth in the Settlement Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Defendants, and the potential risk of no monetary recovery. (Declaration of John H. Donboli, ¶ 19.)

Here, the litigation has been hard-fought with aggressive and capable advocacy on both sides, and the Settlement was the result of arms-length negotiations and a mediation session with a respected mediator, the Hon. Mark B. Epstein, J.S.C. (Ret.). “[T]he participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm’s length and without collusion between the parties.” *Milliron v. T-Mobile USA, Inc.*, 2009 U.S. Dist. LEXIS 101201, 15 (D.N.J. Sept. 10, 2009) citing *Bert v. AK Steel Corp.*, 2008 U.S. Dist. LEXIS 111711 (S.D. Ohio Oct. 23, 2008).

**2. The Settlement Has No “Obvious Deficiencies” and Falls Well Within the Range for Approval**

The proposed Settlement has no “obvious deficiencies” and is well within the range of possible approval. All Settlement Class Members will receive the same opportunity to participate in and receive payment as those afforded Defendants’ California customers (a settlement that was approved by a California Court in 2012). It is undeniable that the goal of this litigation, to seek redress for the Class, has been met. (Declaration of John H. Donboli, ¶ 19).

There is a substantial risk, given the current legal landscape in terms of properly quantifying and measuring damages in cases predicated on false advertising claims, that, if this action was not settled, Plaintiff would have been unable to either obtain class certification or prevail at trial; thereby ensuring zero recovery on behalf of consumers. (Declaration of John H. Donboli, ¶ 20).

Restitution is generally limited to measurable amounts acquired by a defendant from consumers by means of unfair competition. In this case, there was a serious risk that if Plaintiff was able to establish liability at trial, the remedy awarded would not have included any monetary relief to the Class. In light of the above-referenced risk, expense, and complexity of this case,

the parties agreed to resolve this matter as set forth in the Settlement Agreement. (Declaration of John H. Donboli, ¶¶ 19-20).

**3. The Settlement Does Not Improperly Grant Preferential Treatment to the Class Representative or Segments Of The Class**

The relief provided in the Settlement will benefit all Settlement Class Members equally. The Settlement does not improperly grant preferential treatment to Plaintiff or segments of the Class in any way. Each qualified Settlement Class Member, including Plaintiff, who files a timely claim, shall receive the aforementioned \$2.00 check or \$5.00 gift certificate or elect to have \$5.00 of Defendants' dry kibble product donated to animal charities. Plaintiff will receive no more than any other Class Member who submits a timely claim. In addition, Plaintiff will apply to the Court for a modest service award of \$5,000 to the extent permitted by this Court (enhancement fees are at times awarded in the \$50,000 range).

**4. The Stage of The Proceedings Are Sufficiently Advanced To Permit Preliminary Approval Of The Settlement**

The stage of the proceedings at which this Settlement was reached militates in favor of preliminary approval and ultimately, final approval of the settlement. The agreement to settle did not occur until Class Counsel possessed sufficient information to make an informed judgment regarding the likelihood of success on the merits and the results that could be obtained through further litigation. Class Counsel conducted a thorough investigation into the facts, including litigating the underlying matter for nearly two years in California. (Declaration of John H. Donboli, ¶ 4).

Here, Class Counsel obtained sufficient information from Defendants during the pendency of the action to establish the following:

- a. **Relatively Low Price of Nutro Products** – Defendants' dog food products at issue in this case are sold to Defendants' retail customers for less than \$25 per unit (when averaged across all Affected Products sold in California). As such, a \$2.00 or \$5.00 restitution amount, as set forth in the Settlement Agreement, is

commensurate with the level of harm (as alleged) that was bestowed upon Class Members. This is especially true given the lack of clarity as it relates to quantifying the measure of damages in false advertising cases. (Declaration of John H. Donboli, ¶¶ 19-20).

**5. The Settlement Class is Appropriate**

Generally speaking, a lesser standard of scrutiny applies to certification of a settlement class than to certification of a class in litigation where class certification is disputed. *See Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801, 1807, fn 19(1996). This Court is not required to determine that certification of a settlement class is appropriate until the final settlement approval. *See In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 797 (3d Cir. 1995). As such, the Settlement Class meets all the requirements for certification at this stage.

**VI.**

**THE PROPOSED METHOD OF CLASS NOTICE IS APPROPRIATE**

The Court has broad discretion in approving a practical notice program. The parties have agreed upon procedures by which the Class will be provided with notice of the Settlement. Class notice is sufficient when, as in this case, it informs potential class members about the amount of money that they could expect to receive under the settlement, the procedure for objecting, excluding oneself altogether from the settlement, the amount of fees and costs that may be awarded by the Court, and the date of the Fairness Hearing.

This notice program was designed to meaningfully reach the largest possible number of potential Class Members (including, for example, emailing Settlement Class Members directly and mailing notice to the in-house counsels at PetSmart and Petco where the Affected Products were sold to request that they post the Summary Notice of the Settlement in their stores). Therefore, it complies fully with applicable case law that the notice given should have a reasonable chance of reaching a substantial percentage of the Class Members. The notice program contemplated in this Settlement satisfies the requirements of due process, and is the best

notice practicable under the circumstances and constitutes due and sufficient notice to all persons entitled thereto. The Notice is accurate, informative, provides information on the terms and provisions of the settlement, the benefits that settlement provides for Class Members, and the procedure and deadlines for submitting comments, objections, and requests for exclusion.

Therefore, the proposed notice procedures comply fully with applicable case law because the notice should have a reasonable chance of reaching a substantial percentage of the Class members. See Manual for Complex Litigation (Fourth) § 21.311 at 291-92.

### VIII.

#### CONCLUSION

After weighing the substantial, certain, and immediate benefits of this settlement against the uncertainty of trial and appeal, Plaintiff and Class Counsel believe that the proposed settlement is fair, reasonable and adequate, and warrants this Court's preliminary approval. Accordingly, Plaintiff respectfully requests that the Honorable Court preliminarily approve and sign the proposed Preliminary Approval Order filed contemporaneously herewith to permit the distribution and manner of notice.

Dated: January 16, 2015

Respectfully submitted,

GORDON & REES LLP

By: /s/ Peter G. Siachos

Attorneys for Plaintiff

18 Columbia Turnpike, Ste 220

Florham Park, New Jersey 07932

Telephone: (973) 549-2500

Facsimile: (973) 377-1911

e-mail: [psiachos@gordonrees.com](mailto:psiachos@gordonrees.com)

John H. Donboli

DEL MAR LAW GROUP, LLP

12250 El Camino Real, Suite 120

San Diego, California 92130

Telephone (858) 793-6244

Facsimile: (858) 793-6005

[jdonboli@delmarlawgroup.com](mailto:jdonboli@delmarlawgroup.com)

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

DAMIAN MONTELEONE, an individual and  
on behalf of all others similarly situated,

Plaintiff,

vs.

THE NUTRO COMPANY, a Delaware  
corporation; MARS, INCORPORATED, a  
Delaware corporation; and DOES 1 through  
100, inclusive,

Defendants.

Case No. 2:14-cv-00801-ES-JAD

**CLASS ACTION**

**DECLARATION OF JOHN H. DONBOLI  
IN SUPPORT OF PLAINTIFF'S  
MOTION FOR AN ORDER GRANTING  
PRELIMINARY APPROVAL OF CLASS  
ACTION SETTLEMENT, APPROVING  
FORM AND MANNER OF NOTICE,  
AND SCHEDULING FAIRNESS  
HEARING**

JOHN H. DONBOLI, ESQ. hereby declares under the penalties of perjury, pursuant to 28 U.S.C. § 1746, that:

1. I am an attorney at law, duly licensed to practice before all the Courts of the State of California and admitted *pro hac vice* in this action. I am a partner with the law firm of Del Mar Law Group, LLP, co-counsel of record for Plaintiff DAMIAN MONTELEONE (“Plaintiff”) and the putative class in the above-referenced action. I have personal knowledge of the facts set forth herein, and if called as a witness, I could and would testify competently to the matters set forth below.

2. This declaration is being submitted in support of Plaintiff’s Motion for Preliminary Approval of Class Settlement. Lodged herewith as Exhibit “1” is a fully executed copy of the Settlement Agreement that contains within it separately marked Exhibits “A” through “E.”

**Fairness of Settlement**

3. This case represents the culmination a four-year journey that began in California in December 2010 with an investigation into Defendants THE NUTRO COMPANY (“Nutro”) and MARS, INCORPORATED’s (collectively “Defendants”) alleged unlawful practice of improperly labeling and selling certain dog food products with a “Guaranteed Analysis”

regarding the amount of *Bacillus* Species (a probiotic) contained therein within the relevant four-year statutory time period.<sup>1</sup>

The California Action

4. In December 2010, my firm was retained by a California consumer (Louise Clark) to investigate the improper “Guaranteed Analysis” on Defendants’ dog food products. This investigation led to the filing a California lawsuit captioned as *Clark v. The Nutro Company, et al.*, San Diego Superior Court Case No.: 37-2011-00090424-CU-BT-CTL (the “California Action”) in May 2011.

5. During the pendency of the California Action, our office conducted a thorough investigation into the facts of the class action case, including an extensive review of relevant documents and data, and diligently pursued an investigation of all relevant facts. The case was mediated before a well-respected former jurist of the San Diego Superior Court and a settlement was ultimately reached as the California Class.

6. The Settlement Agreement in the California Action was ultimately deemed fair, reasonable, and adequate and in the best interest of the California Class by the Honorable Judge of the San Diego Superior Court on or about September 11, 2012, when the case was dismissed pursuant to a Final Order and Judgment of Dismissal. The Final Order and Judgment of Dismissal required Defendants to promulgate notice, establish a claims process, and a common fund of \$540,000 that was distributed to eligible Settlement Class Members who purchased an Affected Product (as defined in the Settlement Agreement). California Settlement Class Members who returned a valid Claim Form received a single payment of \$2.00 or a \$5.00 Gift Certificate towards the purchase of any Nutro product. Alternatively, California Settlement Class Members could have elected to donate Defendants’ dry kibble product worth \$5.00 at retail price to a reputable California animal shelters.

7. The resolution and class wide settlement in the California Action left consumers

---

<sup>1</sup> I am informed that notwithstanding the accuracy of the afore-mentioned *Bacillus* labeling, at no time were animals ever at risk due to the presence or lack thereof of *Bacillus* in the dog food products at issue in this litigation. Rather, the allegation (if proven true) would establish that an additive (a probiotic) was substantially missing from the dog food products.

outside of California without any relief, which is what eventually led to the filing of this action on or about January 3, 2014. The New Jersey state court action was removed by Defendants to this Honorable Court on or about February 11, 2014.

#### The Current New Jersey Action

8. The Settlement Class in this case is comprised of a similar Class as in the California Action; however, the Settlement Class in this case extends to consumers in the other 49 states and the District of Columbia (the “National Class”). This National Class is defined as “all persons in the United States (excluding persons in California) who purchased or used the Affected Product. Excluded from the Settlement Class are all persons who are employees, directors, officers, and agents of Defendants or their subsidiaries and affiliated companies, as well as the Court and its immediate family and staff.” (Exhibit “1”, at page 5, Section II, 20).

9. The term “Affected Product” shall mean “the following Ultra brand dry dog kibble purchased between April 1, 2007 and June 30, 2009, and Ultra brand dog biscuits purchased between April 1, 2007 and April 30, 2011: (a) Ultra Adult Dry; (b) Ultra Large Breed Adult Dry; (c) Ultra Large Breed Puppy Dry; (d) Ultra Puppy Dry; (e) Ultra Senior Dry; (f) Ultra Small Breed Adult Dry; (g) Ultra Weight Management Dry; (h) Ultra Adult Biscuits; (i) Ultra Puppy Biscuits; (j) Ultra Senior Biscuits; and (k) Ultra Weight Management Biscuits.” (Exhibit “1”, at page 3, Section II, 1).

#### Description of the Proposed Settlement

10. Under the terms of the current Settlement Agreement, if the Settlement is finally approved by the Court, Defendants will reserve up to Five Hundred Thousand Dollars (\$500,000.00) for a common fund to be distributed to eligible Settlement Class Members who purchased the Affected Product (as that term is defined in the Settlement Agreement). Each eligible Settlement Class Member who returns a valid Claim Form will receive the same benefit afforded Defendants’ California consumers, which is either a single payment of \$2.00 or a \$5.00 Gift Certificate towards the purchase of any Nutro product. Alternatively, Settlement Class Members can elect to donate Defendants’ dry kibble product worth \$5.00 at retail price to California animal shelters and/or animal charities of the Defendants’ choice after consultation with Class Counsel. Any of Defendants’ customers (sans its California customers) who

complete and sign a Claims Form to attest to his or her purchase of an Affected Product (as defined by the Settlement Agreement) shall receive payment as detailed above. (See Settlement Agreement, ¶¶ 26-33; Exhibit “1” hereto).

11. The settlement will be administered by a professional Claims Administrator to administer the claims and payment process. Defendants and/or the Claims Administrator shall obtain an appropriate URL specifically to handle the Settlement process. Both Class Counsel and Defense Counsel shall ensure that Defendants properly reject invalid claims (if any) and reports all such determinations of invalidity to Class Counsel within thirty (30) days of any such determination. (See Exhibit “A” hereto, at ¶ 52).

12. Our office intends to file and have heard a motion for the recovery of attorneys' fees and costs to be approved by this Honorable Court, including all reasonable fees, costs and expenses related to Plaintiff's prosecution of the Action in a *not to exceed* amount of \$375,000.00. We shall also seek confirmation by this Court, at that time, of a single \$5,000 payment as an incentive award for Plaintiff for serving as Class Representative. (See Exhibit “A” hereto, at ¶¶ 34-38).

#### Notice and Administration of the Settlement

13. The Settlement contains a Notice (Long-Form Notice) and Summary Notice (Short-Form Notice), substantially in the form set forth in Exhibits “B” and “E” to the Settlement Agreement that will be distributed to Settlement Class Members once the Court enters the Preliminary Approval Order. (See Exhibit “C” to Settlement Agreement for copy of proposed Preliminary Approval Order). Specifically, upon entry of the Preliminary Approval Order, Defendants, in cooperation with its professional Claims Administrator, shall take the following actions:

14. Publish a link to the Notice on the Nutro home webpage (<http://www.nutro.com>) for the duration of the Claim Period.

15. Email, on or before the Notice Date as specified in the Preliminary Approval Order, the Notice (substantially in the form attached as Exhibit “B” to the Settlement Agreement), to the last known email addresses of the Settlement Class to the extent such email address information exists in Nutro's consumer databases, is a valid email address, and the

Settlement Class Member has not withheld his/her consent to being contacted by Nutro via email.

16. Mail, on or before the notice date, to in-house counsel for PetSmart and Petco requesting that they post the Summary Notice of the settlement (substantially in the form attached as Exhibit “E” to the Settlement Agreement) at the point of purchase in their stores for the duration of the Claim Period, provided however that the parties shall not represent, warrant, or guarantee that PetSmart and Petco actually will post the Summary Notice in their stores.

17. Provide a website address in the Notice and Summary Notice to a settlement website to be designed and administered by the Settlement Administrator that will contain the settlement documents (including but not limited to the Notice and Claim Form), a list of important dates, and any other information to which the Parties may agree.

18. Defendants agree to pay the Settlement Administrator up to Forty-Five Thousand Dollars (\$45,000.00) toward reasonable costs, fees, and expenses of providing notice to the Settlement Class and administering the Settlement in accordance with the Settlement Agreement. Class Counsel may pay up to an additional Five Thousand Dollars (\$5,000) to help further promulgate notice. (See Exhibit “A” hereto, at ¶ 49).

#### The Settlement

19. The proposed settlement herein has no “obvious deficiencies” and is well within the range of possible approval. All Class members (sans California consumers) will receive the same opportunity to participate in and receive payment. It is undeniable that the goal of this litigation, to seek redress for the National Class (that was never afforded any relief in 2012), has been met in that all participating National Class Members will receive real value (including cash/checks in the amount of \$2.00 or a \$5.00 gift card).

20. There is a substantial risk, given the current legal landscape in terms of properly quantifying and measuring damages in cases predicated on false advertising claims, that, if this action was not settled, Plaintiff would have been unable to either obtain class certification or prevail at trial; thereby ensuring zero recovery on behalf of consumers.

Experience of Class Counsel

21. Del Mar Law Group, LLP, and myself in particular, are competent counsel to represent the Class. I have had significant class action and litigation experience. I have been licensed to practice law in all Courts in the State of California since 1999 and have been actively involved in the representation of both plaintiffs and defendants in many complex class action and representative plaintiff cases pending in federal and state courts that have involved hundreds of millions of dollars in controversy.

22. The law firm of Del Mar Law Group, LLP has represented plaintiffs in consumer class actions since its inception in 2006. Del Mar Law Group, LLP and its attorneys have extensive experience in consumer protection, false advertising, and cases involving violations of various consumer statutes. Specifically, I have been personally involved with virtually all aspects of litigation in this matter along with my esteemed co-counsel of Gordon & Rees, LLP. Our firm, myself included, have been certified as class counsel in multiple class action cases, including, but not limited to the following:

- a. *Cleary v. Door to Door Storage, Inc.*, San Diego Superior Court ("SDSC"), Case No. GIC875359;
- b. *Goestl v. Thunder Power, Inc.*, SDSC, Case No. GIC879513;
- c. *Hofmann v. Horizon Hobby, Inc.*, SDSC, Case No. GIC881803;
- d. *Stewart v Channellock*, SDSC, Case No. 37-2008-00081963-CU-BT-CTL;
- e. *Paz v. Lights of America, Inc.*, SDSC, Case No. 37-2009-00091565-CU-BT-CTL;
- f. *Card v Bell Sports, Inc.*, SDSC, Case No. 37-2010-00083292-CU-BT-CTL.
- g. *Chambers v. Weber-Stephen Products, LLC*, SDSC, Case No. 37-2011-00085919-CU-BT-CTL;
- h. *Paz v. Ideal Industries, Inc.*, SDSC, Case No. 37-2011-00087389-CU-BT-CTL;
- i. *Clark v The Nutro Company*, SDSC, Case No. 37-2011-00090424-CU-BT-

CTL;

j. *Hofmann v. K-Tec, Inc.*, SDSC, Case No. 37-2012-00093192-CU-BT-CTL.

k. *Hecht-Nielsen v. Lifetime Products, Inc.*, SDSC Case No. 37-2011-00089380-CU-BT-CTL.

Class Size and Restitution Calculation

23. Defendants' dog food products at issue in this case are sold to Defendants' retail customers for less than \$25 per unit (when averaged across all Affected Products sold in California). As such, a \$2.00 or \$5.00 restitution amount, as set forth in the Settlement Agreement, is commensurate with the level of harm (as alleged) that was bestowed upon Class Members. This is especially true given the lack of clarity in California case law as it relates to quantifying the measure of damages in false advertising cases.

I declare under penalty of perjury under the laws of the State of New Jersey and the United States of America that the foregoing is true and correct. Executed this 16<sup>th</sup> day of January, 2015.

Respectfully submitted,

/s/ John H. Donboli

JOHN H. DONBOLI

# **EXHIBIT 1**

## SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is made and entered into by and between Damian Monteleone (“Plaintiff”) as class representative on behalf of the putative class, on the one hand, and The Nutro Company (“Nutro”) and Mars, Incorporated (collectively, “Defendants”), on the other hand, by and through their respective counsel, in consideration for and subject to the promises, terms, and conditions contained in this Agreement, subject to Court approval pursuant to Federal Rule of Civil Procedure 23(e). Plaintiff and Defendants are sometimes referred to herein as “the Parties.”

### I. RECITALS

WHEREAS, on or about December 26, 2013, Plaintiff initiated a putative class action lawsuit on behalf of a nationwide class of consumers (excluding California consumers) against Defendants in the Superior Court of New Jersey, Essex County, alleging equitable fraud, negligent misrepresentation, and violation of the New Jersey Consumer Fraud Act, N.J. Stat. § 56:8-1 *et seq.*, in an action captioned *Damian Monteleone v. The Nutro Company, et al.*, Case No. ESX-L 9885-13 (the “Action”);

WHEREAS, Defendants removed the Action to the United States District Court for the District of New Jersey on February 7, 2014, where it proceeded under the caption *Damian Monteleone v. The Nutro Company, et al.*, Case No. 2:14-cv-00801-ES-JAD;

WHEREAS, Plaintiff made several allegations relating to Defendants’ products in his complaint, including: (1) Defendants manufactured, marketed, and sold a variety of dog food products to the general public with a “Guaranteed Analysis” pertaining to live microbials (“*Bacillus*”) when Defendants’ dog food products were incapable of forming live *Bacillus* species once ingested as marketed; (2) Plaintiff and class members relied on Defendants’ false representation concerning the *Bacillus* guarantee when purchasing Defendants’ dog food products; (3) Defendants’ *Bacillus* guarantee is false and misled consumers; and (4) Defendants’ dog food products with the *Bacillus* guarantee are not worth the purchase price paid by consumers;

WHEREAS, Defendants represent that their only dog food products sold in the United States that have contained a *Bacillus* guarantee were Nutro’s Ultra brand dry dog kibble and Ultra brand dog biscuits;

WHEREAS, the Parties acknowledge that Nutro removed the *Bacillus* guarantee from the Ultra brand dry dog kibble in June 2009 and from the Ultra brand dog biscuits in April 2011 before the Plaintiff filed the above-referenced Action. The Parties agree that the relevant time period for purposes of calculating a potential award to the Class would be April 1, 2007 to June 30, 2009 for the Ultra brand dry dog kibble and April 1, 2007 to April 30, 2011 for the Ultra brand dog biscuits;

WHEREAS, Defendants have vigorously denied and continue to vigorously deny all of Plaintiff’s allegations, deny any and all allegations of wrongdoing, fault, liability or damage of

any kind to Plaintiff and the putative class, deny that they acted improperly or wrongfully in any way, and believe that the Action has no merit;

WHEREAS, Plaintiff, by and through his respective counsel, has conducted an extensive investigation into the facts and law relating to the matters alleged in his complaint, including conducting scientific tests of some of the products at issue as well as legal research as to the sufficiency of the claims;

WHEREAS, Plaintiff and his counsel hereby acknowledge that in the course of their investigation they received, examined, and analyzed information and materials that they deem necessary and appropriate to enable them to enter into the Agreement on a fully informed basis;

WHEREAS, this Agreement was reached as a result of extensive arm's length negotiations between counsel for Plaintiff and counsel for Defendants, and a mediation session with a respected mediator: the Honorable Mark B. Epstein (Ret.);

WHEREAS, counsel for Plaintiff has considered that, if the claims asserted in his lawsuit are not settled now by voluntary agreement among the Parties, future proceedings (including appeals) would be protracted and expensive, would involve highly complex legal and factual issues relating to class certification, liability, and damages, and would involve substantial uncertainties, delays, and other risks inherent in litigation. In light of these factors, counsel for Plaintiff has concluded that it is desirable and in the best interests of Plaintiff and the members of the putative class to settle the claims asserted in the Action at this time upon the terms set forth in this Agreement, and that the settlement terms confer exceptional benefits upon putative class members, particularly in light of the damages that Plaintiff and his counsel believe are potentially recoverable at trial;

WHEREAS, based on their evaluation, Plaintiff and his counsel have determined that the terms and conditions of this Agreement are fair, reasonable, and in the best interests of Plaintiff and the putative class;

WHEREAS, Defendants also have considered the risks and potential costs of continued litigation of the Action, on the one hand, and the benefits of the proposed settlement, on the other hand, and desire to settle the Action upon the terms and conditions set forth in this Agreement;

WHEREAS, Defendants have agreed to class action treatment of the claims alleged in the Action solely for the purpose of compromise and settlement of these claims on a class basis as set forth herein;

NOW, THEREFORE, it is hereby agreed, by and between the Parties, through their respective counsel, that: (a) the Action will be fully and finally compromised, settled, and released upon final settlement approval by the Court after the hearings as provided for in this Agreement; and (b) upon such approval by the Court, a Final Order and Judgment, substantially in the form attached hereto as Exhibit "A," be entered dismissing the Action with prejudice, once the Effective Date (as defined below) has been reached, all upon the following terms and conditions:

## II. DEFINITIONS

In addition to the foregoing defined terms, for purposes of the Agreement and all Exhibits hereto, the following terms shall have the meanings as set forth below:

1. “Affected Product” shall mean the following Ultra brand dry dog kibble purchased between April 1, 2007 and June 30, 2009, and Ultra brand dog biscuits purchased between April 1, 2007 and April 30, 2011: (a) Ultra Adult Dry; (b) Ultra Large Breed Adult Dry; (c) Ultra Large Breed Puppy Dry; (d) Ultra Puppy Dry; (e) Ultra Senior Dry; (f) Ultra Small Breed Adult Dry; (g) Ultra Weight Management Dry; (h) Ultra Adult Biscuits; (i) Ultra Puppy Biscuits; (j) Ultra Senior Biscuits; and (k) Ultra Weight Management Biscuits.

2. “*Bacillus* Guarantee” shall mean the “Total *Bacillus* Species” (Listed as Colony Forming Units (“CFUs”) per pound) that Nutro added to its “Guaranteed Analysis” on its Ultra kibble and biscuit products in March 2005.

3. “Bar Date” means the final time and date by which a Claim Form must be received by the Settlement Administrator in order for a Settlement Class Member to be entitled to any of the settlement consideration contemplated in this Agreement.

4. “Claim Form” means the proof of claim and release form(s) substantially in the form attached hereto as Exhibit “D,” which may be modified to meet the requirements of the Claims Administrator, pursuant to which Settlement Class Members can recover one of the benefits described in Paragraphs 26 through 33.

5. “Claim Period” means the time period from the Notice Date through the Bar Date, which is the time period that Settlement Class Members will have to claim the award contemplated by Paragraphs 26 through 33 of this Agreement.

6. “Class Counsel” means John H. Donboli and his firm, the Del Mar Law Group, LLP, together with Peter G. Siachos and JoAnna Doherty with their law firm, Gordon & Rees, LLP.

7. “Court” means the United States District Court for the District of New Jersey and the Judge assigned to the Action.

8. “Defense Counsel” means David A. Forkner and his firm, Williams & Connolly LLP, together with Stephen J. DeFeo with his law firm, Brown & Connery, LLP.

9. “Effective Date” means the date on which the Final Order and Judgment (defined below) in the Action becomes “Final.” As used in this Agreement, “Final” means three (3) business days after all of the following conditions have been satisfied:

- (a) the Final Order and Judgment has been entered; and

- (b)(i) if reconsideration and/or appellate review is not sought from the Final Order and Judgment, the expiration of the time for the filing or noticing of any motion for reconsideration, appeal, petition, and/or writ; or
- (b)(ii) if reconsideration and/or appellate review is sought from the Final Order and Judgment: (A) the date on which the Final Order and Judgment is affirmed and is no longer subject to judicial review, or (B) the date on which the motion for reconsideration, appeal, petition, or writ is dismissed or denied and the Final Order and Judgment is no longer subject to judicial review.

10. “Fairness Hearing” means the hearing that is to take place after the entry of the Preliminary Approval Order and after the Notice Date for purposes of: (a) entering the Final Order and Judgment and dismissing the Action with prejudice; (b) determining whether the Settlement should be approved as fair, reasonable, adequate and in the best interests of the Settlement Class Members; and (c) to rule upon an application by Class Counsel for an award of attorneys’ fees.

11. “Final Order and Judgment” means an order fully and finally approving the Settlement and dismissing the Action with prejudice, substantially in the form attached hereto as Exhibit “A.”

12. “Notice” means the form “NOTICE OF SETTLEMENT,” substantially in the form attached hereto as Exhibit “B.”

13. “Notice Date” means the date that the Notice and/or Summary Notice is initially published (as appropriate).

14. “Preliminary Approval Order” means the Order Preliminarily Approving Settlement and Notice Procedures, substantially in the form attached hereto as Exhibit “C.”

15. “Released Claims” means and includes any and all claims, demands, rights, damages, obligations, suits, debts, liens, and causes of action of every nature and description whatsoever, ascertained or unascertained, suspected or unsuspected, existing or claimed to exist, including unknown claims (as described in Paragraph 42 below) as of the Effective Date by Plaintiff and all Settlement Class Members (and Plaintiff’s and Settlement Class Members’ respective heirs, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns) that:

(a) were brought or that could have been brought against the Released Parties (as hereinafter defined), or any of them, and that arise out of or are related in any way to any or all of the acts, omissions, facts, matters, transactions, or occurrences that were or could have been directly or indirectly alleged or referred to in the Action (including, but not limited to alleged violations of state consumer protection and unfair competition laws (including, but not limited to, N.J. Stat. 56:8-1 *et seq.*); fraud; negligent misrepresentation; breach of contract; breach of express or implied warranty; unjust enrichment, restitution, trespass, conversion,

declaratory or injunctive relief, and other equitable claims or claims sounding in contract and tort); and

(b) relate in any way to the *Bacillus* Guarantee, including but not limited to all claims that relate in any way to (i) Nutro's representation that its Ultra kibble and biscuits contained a specified amount of "Total *Bacillus* Species" (listed as CFUs per pound) in its "Guaranteed Analysis" or (ii) Nutro's representation that its Ultra kibble and biscuits were a source of live microbials.

16. "Released Parties" means:

(a) Defendants and each of their employees, assigns, attorneys, agents, and all of their past, present, and future officers and directors;

(b) All of Defendants' parents, subsidiaries, divisions, affiliates, predecessors, and successors, and each of their respective employees, assigns, attorneys, agents, resellers and past, present, and future officers and directors; and

(c) Any and all persons, entities, or corporations involved in any way in the manufacture and sale of *Bacillus* to the Defendants.

17. "Releasing Parties" means Plaintiff, all Settlement Class Members, and each of their predecessors, successors, assigns, heirs, or executors.

18. "Settlement" means the settlement embodied in this Agreement.

19. "Settlement Administrator" means the qualified third party selected by the Parties and approved by the Court in the Preliminary Approval Order to administer the Settlement, including providing Notice and Summary Notice. The Parties agree to recommend that the Court appoint The Garden City Group, Inc. as the Settlement Administrator.

20. "Settlement Class" means all persons in the United States (excluding persons in California) who purchased or used the Affected Product. Excluded from the Settlement Class are all persons who are employees, directors, officers, and agents of Defendants or their subsidiaries and affiliated companies, as well as the Court and its immediate family and staff.

21. "Settlement Class Member(s)" means any member of the Settlement Class who does not elect exclusion or opt out from the Settlement Class pursuant to the terms and conditions for exclusion set out in this Agreement, the Notice, and the Summary Notice.

22. "Summary Notice" means the summary "Notice of Proposed Class Action Settlement," substantially in the form attached hereto as Exhibit "E."

### **III. SUBMISSION OF THE SETTLEMENT TO THE COURT FOR REVIEW**

23. As soon as is practicable but no later than December 19, 2014, Class Counsel shall apply to the Court for entry of the Preliminary Approval Order (substantially in the form attached as Exhibit “C”), for the purpose of, among other things:

(a) Approving the Notice and Summary Notice, substantially in the forms set forth in Exhibits “B” and “E,” respectively;

(b) Finding that the requirements for provisional certification of the Settlement Class have been satisfied, appointing Plaintiff as the representative of the Settlement Class, and Class Counsel as counsel for the Settlement Class, and preliminarily approving the Settlement as being within the range of reasonableness such that the Notice and Summary Notice should be provided pursuant to this Agreement;

(c) Scheduling the Fairness Hearing not earlier than 120 days following the entry of the Preliminary Approval Order and not later than ninety (90) days following the Notice Date to determine whether the Settlement should be approved as fair, reasonable, adequate and in the best interests of the Settlement Class Members, and to determine whether a Final Order and Judgment should be entered dismissing the Action with prejudice.

(d) Preliminarily approving the form of the Final Order and Judgment;

(e) Directing that notice of the Settlement and of the Fairness Hearing shall be given to the Settlement Class as follows:

(i) by emailing, on or before the Notice Date as specified in the Preliminary Approval Order, the Notice substantially in the form attached as Exhibit “B” hereto, to the last known email addresses of the Settlement Class to the extent such email address information exists in Nutro’s consumer databases, is a valid email address, and the Settlement Class Member has not withheld his/her consent to being contacted by Nutro via email;

(ii) by mailing, on or before the Notice Date as specified in the Preliminary Approval Order, the Notice and Summary Notice substantially in the forms attached as Exhibit “B” and “E” hereto, to in-house counsel for PetSmart and Petco requesting that they post the Summary Notice of the settlement substantially in the form attached as Exhibit “E” hereto at the point of purchase in their stores for the duration of the Claim Period, provided however that the parties shall not represent, warrant, or guarantee that PetSmart and Petco actually will post the Summary Notice in their stores;

(iii) by publishing a link to the Notice on Nutro’s website (nutro.com), to be marked for “Customers Only” on the top half of the website’s homepage, for the duration of the Claim Period; and

(iv) by providing a website address in the Notice and Summary Notice to a settlement website to be designed and administered by the Settlement Administrator that will

contain the settlement documents (including but not limited to the Notice and Claim Form), a list of important dates, and any other information to which the Parties may agree;

(f) Providing that Settlement Class Members will have until the Bar Date to submit Claim Forms;

(g) Providing that any objections by any Settlement Class Member to the certification of the Settlement Class and the proposed Settlement contained in this Agreement, and/or the entry the Final Order and Judgment, shall be heard and any papers submitted in support of said objections shall be considered by the Court at the Fairness Hearing only if, on or before the date(s) specified in the Notice, the Summary Notice and Preliminary Approval Order, such objector files with the Court a notice of the objector's intention to appear, and otherwise complies with the requirements in Paragraphs 61 through 66 of this Agreement;

(h) Establishing dates by which the Parties shall file and serve all papers in support of the application for final approval of the Settlement and/or in response to any valid and timely objections;

(i) Providing that all Settlement Class Members will be bound by the Final Order and Judgment dismissing the Action with prejudice unless such members of the Settlement Class timely file valid written requests for exclusion or opt out in accordance with this Agreement and the Notice;

(j) Providing that Settlement Class Members wishing to exclude themselves from the Settlement will have until the date specified in the Notice, the Summary Notice and the Preliminary Approval Order to submit a valid written request for exclusion or opt out to the Settlement Administrator;

(k) Providing a procedure for Settlement Class Members to request exclusion or opt out from the Settlement;

(l) Pending the Fairness Hearing, staying all proceedings in the Action, other than proceedings necessary to carry out or enforce the terms and conditions of this Agreement and the Preliminary Approval Order; and

(m) Pending the Fairness Hearing, enjoining Plaintiff and Settlement Class Members, or any of them, from commencing or prosecuting, either directly or indirectly, any action asserting any of the Released Claims.

24. Following the entry of the Preliminary Approval Order, the Notice and Summary Notice shall be given and published in the manner directed and approved by the Court. The Notice and Summary Notice will expressly state that at no time were animals ever at risk due to the presence or lack thereof of *Bacillus* CFUs in Defendants' products.

25. The Parties agree that the notice plan contemplated by this Agreement is valid and effective, that it provides reasonable notice to the Settlement Class, and that it represents the best practicable notice under the circumstances.

#### IV. THE SETTLEMENT CONSIDERATION

26. Subject to Paragraph 49, Defendants will reserve up to Five Hundred Thousand Dollars (\$500,000.00) for a common fund to be distributed to eligible Settlement Class Members who purchased the Affected Product. Each eligible Settlement Class Member will be given the following election of awards on the Notice and Claim Form:

- (a) one \$5 Gift Certificate for any Nutro product (the “Gift Certificate”); or
- (b) one \$2 check (the “Check”); or
- (c) one donation of Defendants’ dry kibble product worth \$5 at retail price to animal shelters and/or animal charities of the Defendants’ choice (the “Donation”).

Separately, Defendants will donate dry kibble worth a total of Five Hundred Thousand Dollars (\$500,000.00) at retail price to animal shelters and/or animal charities of the Defendants’ choice. Defendants will meet and confer with Class Counsel concerning the animal shelters and charities that Defendants choose prior to making this donation.

27. Settlement Class Members who purchased the Affected Product may, during the Claim Period, make their election to receive the Gift Certificate, Check, or Donation described in Paragraph 26 provided they satisfy the eligibility requirements set forth below. Regardless of the number of Affected Products purchased, Settlement Class members may only elect to receive one award under this Agreement. The actual amount of this award may be reduced on a *pro rata* basis as provided in Paragraph 29. Settlement Class Members seeking this award must complete the Claim Form by providing their name, email address, mailing address, and the date (month and year) and location (retailer) where they purchased the Affected Product. The Claim Form and signed attestation form can be submitted electronically on the settlement website or by mail to the Settlement Administrator. Settlement Class Members seeking this award must further submit a signed attestation form in which they represent that they saw and relied upon a “Guaranteed Analysis” that included a reference to *Bacillus* CFUs in purchasing the product. For online claims submissions, Class Members will be permitted to check an appropriate box to affirm their attestation, and the online form shall notify Class members that checking such box shall have the same legal force and effect as submitting a personally signed attestation.

28. The Gift Certificates described in Paragraphs 26 through 33 shall have the following characteristics:

- (a) They will be fully transferrable;
- (b) They cannot be used in combination with other rebates or coupons for Nutro’s products;

- (c) Only one Gift Certificate may be used per purchase order;
- (d) A Gift Certificate may be used only once;
- (e) Each Gift Certificate will be valid for six (6) months from the date of issuance;
- (f) Gift Certificates cannot be exchanged for cash and will not have cash value; and
- (g) Gift Certificates will be redeemable for any Nutro product at participating pet specialty stores, including but not limited to, Petco and PetSmart.

29. Subject to Paragraph 49, if the aggregate value of the Gift Certificates, Checks, and Donations to be awarded to Settlement Class Members pursuant to valid Claim Forms exceeds Five Hundred Thousand Dollars (\$500,000.00), then the value of the individual Gift Certificate, Check and Donation to be provided shall be reduced on a *pro rata* basis, such that the aggregate value of the award does not exceed \$500,000.00. For example and by way of illustration only, if the aggregate value of the total number of Gift Certificates, Checks and Donations redeemed by Settlement Class Members is \$1,000,000.00, then the value of each Gift Certificate, Check and Donation shall be reduced by fifty per cent (50%) to ensure that the aggregate value of the total number of Gift Certificates, Checks and Donations does not exceed \$500,000.00.

30. The Settlement Administrator shall determine each authorized Settlement Class Member's *pro rata* share based upon each Settlement Class Member's Claim Form, the total number of valid Claim Forms received, and the total amount of the Settlement Administrator's reasonable costs, fees and expenses. Accordingly, the actual amount recoverable by each Settlement Class Member will not be determined until after the Claims Period has ended and all Claims Form have been received. In no event shall an individual Settlement Class Member's award exceed the individual recovery cap established in Paragraph 26.

31. Subject to Paragraph 49, Defendants are not obligated to provide the full amount of \$500,000.00 in the form of Gift Certificates, Checks and Donations unless there are sufficient Claim Forms submitted and approved to reach the \$500,000.00 limit. For example, and for purposes of illustration only, if \$100,000.00 in valid Claim Forms are submitted and accepted, Defendants shall only be obligated to provide \$100,000.00 to Settlement Class Members in the form of Gift Certificates, Checks and Donations, with the remaining \$400,000.00 dispensed as provided for in Paragraph 32. The attorneys' fees and stipend payment to named Plaintiff described in Paragraphs 34 through 38 are not included in this \$500,000.00 limitation.

32. Subject to Paragraph 49, if Defendants do not provide \$500,000.00 in Gift Certificates, Checks and Donations because there are insufficient Claim Forms to reach the \$500,000.00 limit at the close of the Claims Period, then Defendants will contribute the remaining balance in the form of Defendants' kibble products to animal shelters and/or animal

charities of Defendants' choice. Defendants will meet and confer with Class Counsel concerning the animal shelters and charities that Defendants choose prior to making this donation. The value of Defendants' donation of kibble products will be calculated at retail price.

33. No Settlement Class Member shall receive any benefits described in Paragraphs 26 through 33 prior to the Effective Date.

**V. ATTORNEYS' FEE-AND-EXPENSE AWARD AND CLASS REPRESENTATIVE AWARD**

34. Class Counsel may submit an application to the Court for an award of attorneys' fees, costs, and expenses. Defendants do not oppose, and will not encourage or assist a third party in opposing, Class Counsel's request for attorneys' fees, costs and expenses up to Three Hundred Seventy-Five Thousand Dollars (\$375,000.00), nor do Defendants contest the reasonableness of the amount. The ultimate amount awarded is to be determined by the Court, and Defendants are not agreeing to pay any specific amount other than the amount awarded by the Court. Class Counsel acknowledges and agrees that any award of attorneys' fees, costs, and expenses shall be inclusive of any incentive award to be paid to the named Plaintiff herein, as set forth in paragraph 37 below, for serving as class representative.

35. Subject to Court approval, Defendants will pay Class Counsel the sum of Three Hundred Seventy-Five Thousand Dollars (\$375,000.00). Such payment by Defendants will be in lieu of statutory fees Plaintiff and/or his attorneys might otherwise have been entitled to recover, and this amount shall be inclusive of all fees and costs of Class Counsel in the Action. Class Counsel will not seek in excess of \$375,000.00 for attorneys' fees, costs and expenses and, in any event, Class Counsel agree that Defendants shall not pay, or be obligated to pay, in excess of \$375,000.00 for attorneys' fees, costs and expenses. The Parties negotiated attorneys' fees, costs, and expenses only after reaching an agreement upon the relief provided to the Settlement Class as provided in Paragraphs 26 through 33.

36. The attorneys' fees are based on the amount of time Class Counsel reasonably expended working on this Action. Class Counsel shall support their fee application with appropriate documentation to establish their fees.

37. In recognition of the time and effort the named Plaintiff expended in pursuing this action and in fulfilling his obligations and responsibilities as class representative, and of the benefits conferred on all Settlement Class Members by the Settlement, Class Counsel will ask the Court for the payment of an incentive award from Defendants to the named Plaintiff (Damian Monteleone) not to exceed \$5,000.00. Defendants do not oppose this request by Class Counsel for stipend payment. Class Counsel will not seek in excess of \$5,000.00 for the named Plaintiff's incentive award and, in any event, Class Counsel agrees that Defendants shall not pay, or be obligated to pay, in excess of \$5,000.00 to the Plaintiff for stipend. Class Counsel further agrees that named Plaintiff's stipend shall be paid from any award of costs and attorneys' fees made to Class Counsel in accordance with paragraphs 34 and 35, above.

38. Defendants shall pay such attorneys' fees-and-expenses and class representative incentive award as awarded by the Court by wire to the Del Mar Law Group Client Trust Account within thirty (30) days after the Effective Date or by August 3, 2015 (whichever is later), subject to compliance with the terms of the Agreement. Class Counsel shall have discretion to allocate the attorneys' fees amongst Class Counsel as they may see fit subject to the applicable rules of professional responsibility. Defendants shall have no liability or other responsibility for allocation of any such attorneys' fees and costs awarded, and, in the event that any dispute arises relating to the allocation of fees, Class Counsel agree to hold Defendants harmless from any and all such liabilities, costs, and expenses of such dispute.

39. The procedure for and the allowance or disallowance by the Court of any application for attorneys' fees, costs, expenses, or reimbursement to be paid to Class Counsel are not part of the settlement of the Released Claims as set forth in this Agreement, and are to be considered by the Court separately from the Court's consideration of the fairness, reasonableness, and adequacy of the settlement of the Released Claims as set forth in this Agreement. Any such separate order, finding, ruling, holding, or proceeding relating to any such applications for attorneys' fees, or any separate appeal from any separate order, finding, ruling, holding, or proceeding relating to them or reversal or modification of them, shall not operate to terminate or cancel this Agreement or otherwise affect or delay the finality of the Final Order and Judgment or the Settlement.

## **VI. RELEASES AND DISMISSAL OF ACTION**

40. Upon the Effective Date, the Releasing Parties shall be deemed to have, and by operation of the Final Order and Judgment shall have, fully, finally and forever released, relinquished, and discharged all Released Claims against the Released Parties.

41. Members of the Settlement Class who have opted out of the Settlement by the date set by the Court do not release their claims and will not obtain any benefits of the Settlement.

42. The Released Claims include known and unknown claims relating to the Action, and this Agreement is expressly intended to cover and include all such injuries or damages, including all rights of action thereunder. To the fullest extent possible, Settlement Class Members hereby expressly, knowingly, intelligently, and voluntarily waive any and all rights they may have under applicable state or federal laws restricting or limiting the scope and effect of the general release given herein to claims known or suspected by Settlement Class Members at the time this Agreement is executed. In connection with such waiver and relinquishment, the Settlement Class Members hereby acknowledge that they are aware that they or their attorneys may hereafter discover claims or facts in addition to or different from those that they now know or believe exist with respect to Released Claims, but that it is their intention to hereby fully, finally, and forever settle and release all of the Released Claims known or unknown, suspected or unsuspected, that they have against the Released Parties. In furtherance of such intention, the release herein given by the Settlement Class Members to the Released Parties shall be and remain in effect as a full and complete general release notwithstanding the discovery or existence of any such additional different claims or facts. Each of the Parties expressly acknowledges that

it has been advised by its attorney of the contents and effect of any state and federal law restricting or limiting the scope and effect of the general release given herein to claims known or suspected at the time this Agreement is executed, and with knowledge, each of the Parties hereby expressly waives whatever benefits it may have had pursuant to such laws. Plaintiff acknowledges, and the Settlement Class Members shall be deemed by operation of the Final Judgment to have acknowledged, that the foregoing waiver was separately bargained for and a material element of the Settlement of which this release is a part.

43. Upon the Effective Date, the Action shall be dismissed with prejudice. Class Counsel shall have the responsibility for ensuring that the Action is dismissed with prejudice in accordance with the terms of this Agreement.

44. The Court shall retain jurisdiction over the Parties to this Agreement with respect to the future performance of the terms of this Agreement. In the event that any applications for relief are made, such applications shall be made to the Court.

45. Upon the Effective Date: (a) the Agreement shall be the exclusive remedy for any and all Released Claims of Settlement Class Members; and (b) the Settlement Class Members shall be permanently barred and enjoined from initiating, asserting, or prosecuting against the Released Parties in any federal or state court or tribunal any and all Released Claims.

## **VII. ADMINISTRATION OF THE SETTLEMENT**

46. Within thirty (30) days after the entry of the Preliminary Approval Order, Defendants will coordinate with the Settlement Administrator to provide notice to the Settlement Class as provided in this Agreement. Defendants will use information from Nutro's consumer databases reflecting the names and email addresses of the Settlement Class Members, to the extent such information is available, for purposes of providing email notice pursuant to the Settlement. Defendants will not send emails to those Settlement Class Members who have expressly indicated to Defendants that they do not consent to being contacted via email. The Notice and Summary Notice will expressly state that at no time were animals ever at risk due to the presence or lack thereof of *Bacillus* CFUs in Defendants' products.

47. Because the names, email addresses, and other personal information about Settlement Class Members will be provided to the Settlement Administrator for purposes of providing Gift Certificates, Checks, and Donations, and for purposes of processing opt out requests, the Settlement Administrator will execute a non-disclosure agreement with Defendants and will take all reasonable steps to ensure that any information provided to it by Settlement Class Members will be used solely for the purpose of effecting this Settlement. Any such information provided to the Settlement Administrator will not be provided to Plaintiff or Class Counsel; however, Class Counsel will designate one attorney as its representative who may inspect such information upon his or her execution of, and subject to, the terms of the nondisclosure agreement. Defendants will not be obligated to send emails to those Settlement Class Members who have expressly indicated to Defendants that they do not consent to being contacted via email.

48. The Settlement Administrator shall administer the Settlement in accordance with the terms of this Agreement and, without limiting the foregoing, shall:

(a) Treat any and all documents, communications and other information and materials received in connection with the administration of the Settlement as confidential and shall not disclose any or all such documents, communications or other information to any person or entity except as provided for in this Agreement or by court order;

(b) Receive opt out and other requests from members of the Settlement Class to exclude themselves from the Settlement and provide to Class Counsel and Defense Counsel a copy thereof within three (3) days of receipt. If the Settlement Administrator receives any exclusion forms or other requests from Settlement Class Members to exclude themselves from the Settlement after the deadline for the submission of such forms and requests, the Settlement Administrator shall promptly provide Class Counsel and Defense Counsel with copies thereof.

49. Defendants agree to pay the Settlement Administrator up to Forty-Five Thousand Dollars (\$45,000.00) toward reasonable costs, fees, and expenses of providing notice to the Settlement Class and administering the Settlement in accordance with this Agreement. The Settlement Administrator shall notify and obtain the approval of Class Counsel in the event that it appears that the Settlement Administrator's reasonable costs, fees, and expenses are likely to exceed \$45,000.00. Class Counsel may pay up to Five-Thousand (\$5,000) of any administration fees or expenses that exceed \$45,000. Counsel shall make every effort to accomplish the notice required to implement and obtain Court approval for this Settlement.

50. Each Settlement Class Member shall submit a Claim Form as prescribed in paragraph 27.

51. Any Settlement Class Member who, in accordance with the terms and conditions of this Agreement, neither seeks exclusion from the Settlement Class nor files a Claim Form will not be entitled to receive any Gift Certificate, Check, Donation, or any other relief pursuant to this Agreement, but will be bound together with all Settlement Class Members by all of the terms of this Agreement, including the terms of the Final Order and Judgment to be entered in the Action and the releases provided for herein, and will be barred from bringing any action against any of the Released Parties concerning the Released Claims.

52. Claim Forms that do not meet the requirements set forth in this Agreement and in the Claim Form instructions shall be rejected by the Claims Administrator. Where a good faith basis exists, the Settlement Administrator may reject a Settlement Class Member's Claim Form for, among other reasons, the following:

(a) The Settlement Class Member did not purchase an Affected Product;

(b) The Settlement Class Member fails to submit a signed attestation form that represents (or, in the case of an online submission, fails to check the appropriate box on the online Claim Form to attest) that they saw and relied upon a "Guaranteed Analysis" that included a reference to *Bacillus* CFUs in purchasing the Affected Product;

- (c) Failure to materially complete and/or sign the Claim Form;
- (d) Illegible Claim Form;
- (e) The Claim Form is fraudulent;
- (f) The Claim Form is duplicative of another Claim Form;
- (g) The person submitting the Claim Form is not a Settlement Class Members;
- (h) Failure to submit a Claim Form by the Bar Date; and/or
- (i) The Claim Form otherwise does not meet the requirements of this Agreement.

53. The Settlement Administrator shall determine whether a Claim Form meets the requirements set forth in this Agreement. Each Claim Form shall be submitted to and reviewed by the Settlement Administrator, who shall determine in accordance with the terms and conditions of this Agreement the extent, if any, to which each claim shall be allowed. The Settlement Administrator shall use all reasonable efforts and means to identify and reject duplicate and/or fraudulent claims, including, without limitation, indexing the name, email address, and mailing address of the Settlement Class Member to whom any award has been provided.

54. Claim Forms that do not meet the terms and conditions of this Agreement shall be promptly rejected by the Settlement Administrator. The Settlement Administrator shall have thirty (30) days from the end of the Claim Period to exercise the right of rejection. The Settlement Administrator shall notify the Settlement Class Member through the email address provided in the Claim Form of the rejection. Class Counsel and Defense Counsel shall be provided with copies of all such notifications to Settlement Class Members. If any claimant whose Claim Form has been rejected, in whole or in part, desires to contest such rejection, the claimant must, within ten (10) business days from receipt of the rejection, transmit to the Settlement Administrator by e-mail or U.S. mail a notice and statement of reasons indicating the claimant's grounds for contesting the rejection, along with any supporting documentation, and requesting further review by the Settlement Administrator, in consultation with Class Counsel and Defense Counsel, of the denial of the claim. If Class Counsel and Defense Counsel cannot agree on a resolution of claimant's notice contesting the rejection, the disputed claim shall be presented to the Court or a referee appointed by the Court for summary and non-appealable resolution.

55. No person shall have any claim against Defendants, Defense Counsel, Plaintiff, Plaintiff's counsel, the Settlement Class, Class Counsel, and/or the Settlement Administrator based on any eligibility determinations, distributions, or awards made in accordance with this Agreement. This provision does not affect or limit in any way the right of review by the Court or referee of any disputed Claim Forms as provided in this Agreement.

56. Any Settlement Class Member who fails to submit a Claim Form by the Bar Date shall be forever barred from receiving any benefit pursuant to this Agreement, but shall in all other respects be bound by all of the terms of this Agreement including the terms of the Final Order and Judgment to be entered in the Action and the releases provided for herein, and will be barred from bringing any action against any of the Released Parties concerning any of the Released Claims. A Claim Form shall be submitted electronically at the settlement website to be designed and administered by the Settlement Administrator or by mail to the Settlement Administrator's address. The Claim Form will be deemed to have been submitted when it is either electronically submitted or posted, if received with a postmark, or equivalent mark by a courier company indicated on the envelope or mailer and if mailed with pre-paid postage and addressed in accordance with the instructions set out in the Claim Form.

57. Class Counsel and Defense Counsel shall have the right to inspect the Claim Forms and supporting documentation received by the Settlement Administrator at any time upon reasonable notice.

58. The Settlement Administrator shall distribute benefits to eligible Settlement Class Members on a date that occurs only after the Effective Date.

59. If the Settlement is not approved or for any reason the Effective Date does not occur, no payments or distributions of any kind shall be made pursuant to this Agreement.

60. Defendants and the Released Parties are not and will not be obligated to compute, estimate, or pay any taxes on behalf of Plaintiff, any Settlement Class Member, Plaintiff's counsel, Class Counsel, and/or the Settlement Administrator.

#### **VIII. OBJECTIONS AND OPT-OUTS BY SETTLEMENT CLASS MEMBERS**

61. Any Settlement Class Member who intends to object to the fairness, reasonableness, and/or adequacy of the Settlement must send a written objection by fax, U.S. mail, or e-mail to the Settlement Administrator and send by U.S. mail or e-mail a copy to Class Counsel and Defense Counsel at the address set forth below postmarked no later than the date specified in the Preliminary Approval Order. Settlement Class Members who object must set forth their full name, current address, and telephone number. Objections must be served:

Upon Class Counsel at:

JOHN H. DONBOLI  
DEL MAR LAW GROUP, LLP  
12250 El Camino Real  
Suite 120  
San Diego, CA 92130  
(858) 793-6244 (tel.)  
(858) 724-1490 (fax)  
Email: JDonboli@delmarlawgroup.com

Upon Defendants at:

DAVID F. FORKNER  
WILLIAMS & CONNOLLY LLP  
725 Twelfth Street NW  
Washington, DC 20005  
(202) 434-5000 (tel.)  
(202) 434-5029 (fax)  
Email: DForkner@wc.com

62. Objecting class members must state in writing all objections and the reasons for each objection, and state whether the objecting class member intends to appear at the Fairness Hearing either with or without separate counsel. No member of the Settlement Class shall be entitled to be heard at the Fairness Hearing (whether individually or through separate counsel) or to object to the Settlement, and no written objections or briefs submitted by any member of the Settlement Class shall be received or considered by the Court at the Fairness Hearing, unless written notice of the objecting class member's intention to appear at the Fairness Hearing and copies of any written objections and/or briefs shall have been filed with the Court and served on Class Counsel and Defense Counsel on or before the date specified in the Preliminary Approval Order. Members of the Settlement Class who fail to file and serve timely written objections in the manner specified above shall be deemed to have waived all objections and shall be foreclosed from making any objection (whether by appeal or otherwise) to the Settlement.

63. Settlement Class Members may elect to opt out of the settlement, relinquishing their rights to benefits hereunder. Settlement Class Members who opt out of the Settlement will not release their claims pursuant to this Agreement. Putative class members wishing to opt out of the Settlement must send to the Settlement Administrator by fax, U.S. Mail, or email a letter including their name, address, and telephone number and providing a clear statement communicating that they elect to be excluded from the Settlement Class, do not wish to be a Settlement Class Member, and elect to be excluded from any judgment entered pursuant to the Settlement. Any request for exclusion or opt out must be post-marked on or before the opt-out deadline provided in the Court's Preliminary Approval Order. The date of the postmark on the return mailing envelope shall be the exclusive means used to determine whether a request for exclusion has been timely submitted. Members of the Settlement Class who fail to submit a valid and timely request for exclusion on or before the date specified in the Court's Preliminary Approval Order shall be bound by all terms of this Agreement and the Final Order and Judgment, regardless of whether they have requested exclusion from the Settlement.

64. Any member of the Settlement Class who submits a timely request for exclusion or opt-out may not file an objection to the Settlement and shall be deemed to have waived any rights or benefits under this Agreement.

65. Not later than three (3) business days after the deadline for submission of requests for exclusion or opt out, the Settlement Administrator shall provide to Class Counsel and defense Counsel a complete opt out list together with copies of the opt out requests. Notwithstanding any other provision of this Agreement, if more than one hundred (100) members of the Settlement

Class opt out of the Settlement, Defendants, in their sole discretion, may rescind and revoke the entire Settlement and this Agreement, thereby rendering the Settlement null and void in its entirety, by sending written notice that Defendants revoke the Settlement pursuant to this paragraph to Class Counsel within ten (10) business days following the date the Settlement Administrator informs Defendants of the number of Settlement Class members who have requested to opt out of the Settlement pursuant to the provisions set forth above.

66. On the date set forth in the Preliminary Approval Order, a Fairness Hearing shall be conducted to determine final approval of the Settlement. Upon final approval of the Settlement by the Court at or after the Fairness Hearing, the Parties shall present the Final Order and Judgment, substantially in the form attached to this Agreement as Exhibit "A," to the Court for approval and entry.

**IX. SCOPE AND EFFECT OF CERTIFICATION OF THE SETTLEMENT CLASS**

67. For purposes of settlement only, the Parties and their counsel agree that the Court should make preliminary findings and enter the Preliminary Approval Order (substantially in the form attached at Exhibit "C") granting provisional certification of the Settlement Class subject to final findings and ratification in the Final Order and Judgment, and appointing Plaintiff as the representative of the Settlement Class and Class Counsel as counsel for the Settlement Class.

68. Defendants do not consent to certification of the Settlement Class for any purpose other than to effectuate the Settlement of the Action. If this Agreement is terminated pursuant to its terms, or the Effective Date for any reason does not occur, the order certifying the Settlement Class for purposes of effectuating this Agreement, and all preliminary and/or final findings regarding that class certification order, shall be automatically vacated upon notice of the same to the Court, the Action shall proceed as though the Settlement Class had never been certified pursuant to this Agreement and such findings had never been made, and the Action shall return to the procedural status quo in accordance with this paragraph.

69. In the event the terms or conditions of this Agreement, other than terms pertaining to attorneys' fees and/or stipend payments, are materially modified by any court, either party in its sole discretion to be exercised within fourteen (14) days after such a material modification may declare this Agreement null and void. For purposes of this paragraph, material modifications include but are not limited to any modifications to the definitions of the Settlement Class, Settlement Class Members, or Released Claims, changes to the notice plan described in Paragraph 23, and/or any modifications to the terms of the settlement consideration described in Paragraphs 26 through 33.

**X. SETTLEMENT NOT EVIDENCE AGAINST PARTIES**

70. The provisions contained in this Agreement are not and shall not be deemed a presumption, concession, or admission by Defendants of any default, liability, or wrongdoing as to any facts or claims alleged or asserted in the Action, or in any actions or proceedings, nor shall they be interpreted, construed, deemed, invoked, offered, or received in evidence or otherwise

used by any person in the Action, or in any other action or proceeding, whether civil, criminal or administrative. Defendants do not admit that they or any of the Released Parties have engaged in any illegal or wrongful activity or that any person has sustained any damage by reason of any of the facts complained of in the Action. Defendants do not consent to certification of the Settlement Class for any purpose other than to effectuate the Settlement of the Action.

## **XI. BEST EFFORTS**

71. Class Counsel shall take all necessary actions to accomplish approval of the Settlement, notice, and dismissal of the Action. The Parties and their counsel agree to cooperate fully with one another and to use their best efforts to effectuate the Settlement, including without limitation in seeking preliminary and final Court approval of the Agreement and the Settlement embodied herein, carrying out the terms of this Agreement, and promptly agreeing upon and executing all such other documentation as may be reasonably required to obtain final approval by the Court of the Settlement. In the event that the Court fails to approve the Settlement or fails to issue the Final Order and Judgment, the Parties agree to use all reasonable efforts, consistent with this Agreement and subject to Paragraph 69, to cure any defect identified by the Court.

72. Each party will cooperate with the other party in connection with effectuating the Settlement or the administration of claims thereunder. Any requests for cooperation shall be narrowly tailored and reasonably necessary for the requesting party to recommend the Settlement to the Court, and to carry out its terms.

## **XII. MISCELLANEOUS PROVISIONS**

73. Recitals. The Parties agree that the recitals are contractual in nature and form a material part of this Agreement.

74. Integration/Entire Agreement. This Agreement and its accompanying Exhibits constitute a single integrated contract setting forth the entire agreement and understanding of the Parties. No promise, inducement or agreement other than that expressed herein has been made by either party. The Parties represent, understand and expressly agree that this Agreement sets forth all of the agreements, covenants and understandings of the Parties, superseding all other prior and contemporaneous oral and written agreements, discussions, or promises, if any. The Parties agree that no other agreements or covenants will be binding upon the Parties unless set forth in a writing signed by the Parties or their authorized representatives, and that each of the Parties is authorized to make the representations and agreements herein set forth by or on behalf of each such party. No change or termination of this Agreement shall be effective unless in writing and signed by Class Counsel and Defense Counsel. Any and all previous agreements and understandings between or among the Parties regarding the subject matter of this Agreement, whether written or oral, are superseded by this Agreement.

75. Choice of Law. This Agreement and the Settlement contemplated herein shall be governed by, and construed in accordance with, the laws of the State of New Jersey, without regard to conflict of laws principles.

76. Voluntary Agreement. This Agreement is freely and voluntarily executed by the Parties. All of the Parties warrant and represent that: (a) they have carefully and thoroughly read this Agreement; (b) they have obtained the advice of counsel with respect to the Agreement and its legal interpretation and implications; (c) they fully understand the terms of this Agreement and their significance; (d) they have had a full and complete opportunity to review this Agreement and to make suggestions or changes; (e) they have executed this Agreement willingly and without acting under duress; and (f) the terms of this Agreement have been bargained for after negotiations between the Parties. The Parties expressly acknowledge that no person has made any promise, representation or warranty whatsoever, express or implied, not contained herein, concerning the subject matter hereof, to induce such Parties to execute this Agreement, and further acknowledge that they are not executing this Agreement in reliance upon any promise, representation or warranty not expressly contained herein.

77. Waiver. The waiver by any party of a breach of any term of this Agreement shall not operate or be construed as a waiver of any subsequent breach by any party. The failure of a party to insist upon strict adherence to any provision of the Agreement shall not constitute a waiver or thereafter deprive such party of the right to insist upon strict adherence.

78. Headings. The headings in this Agreement are inserted merely for the purpose of convenience and shall not affect the meaning or interpretation of this document.

79. Authority and Capacity. The Parties expressly represent and warrant that they have the authority and capacity to execute this Agreement, to perform each of the respective obligations required of the Parties, and to provide the releases set forth herein. The Parties also represent that the individual executing this Agreement is authorized to do so on behalf of the respective party. As a condition to this Agreement, the Parties further expressly represent and warrant that they have not assigned, sold, conveyed, transferred or otherwise disposed of any rights, claims, or remedies being released by this Agreement or attempted to do so.

80. Construction. This Agreement has been negotiated among and drafted by Class Counsel and Defense Counsel. To the extent there is any uncertainty or ambiguity in this Agreement, none of the Parties will be deemed to have caused any such uncertainty or ambiguity. Accordingly, this Agreement shall not be construed against the party preparing it, but shall be construed as if all Parties hereto, and each of them, jointly prepared it, and any uncertainty or ambiguity shall not be interpreted against any one party.

81. Press Releases. Except as specifically provided in this Agreement, the Parties and/or their counsel will not issue any press releases or similar statements regarding the Settlement or the Action without prior approval of all Parties. The Parties agree that Class Counsel may promulgate the Notice in accordance with his duties as Class Counsel. In this regard, Class Counsel may post a notice of settlement on the Del Mar Law Group website and/or its social media. The content of such postings shall state as follows: "In December 2013, Plaintiff Damian Monteleone, represented by Del Mar Law Group, LLP, filed suit on behalf of a putative nationwide class (excluding California) of purchasers of certain Ultra™ brand dog food products manufactured by The Nutro Company. The suit alleged that an additive (a probiotic known as *Bacillus*) was substantially missing from the products. The suit did not allege that any

dogs were at any time harmed or endangered by the absence of *Bacillus*. The parties agreed in 2014 to settle the suit on behalf of a settlement class consisting of all individuals nationwide (excluding California) who purchased certain Ultra™ brand dog food between April 2007 and June 2009 and/or certain Ultra™ brand dog biscuits between April 2007 and April 2011. In agreeing to the settlement, Nutro did not admit any of the facts alleged in Plaintiff's complaint and continues to deny any liability or wrongdoing. The parties also sought to avoid the costs and uncertainties associated with further litigation. If you are a Class Member and reside outside of California, you are entitled to participate in the settlement and receive one of three things: (1) a \$5.00 Gift Certificate for any Nutro product; (2) a Check for \$2.00; or (3) a Donation of Dry Kibble (worth \$5.00) to animal shelters and/or animal charities of Nutro's choice. Doing nothing may affect your legal rights. For further information on the settlement, please email [info@gcginc.com](mailto:info@gcginc.com) or [info@delmarlawgroup.com](mailto:info@delmarlawgroup.com). To submit a claim, please visit [www.ultradogfoodsettlement.com](http://www.ultradogfoodsettlement.com)." In addition, the content of such postings shall in all respects comport with language in this Agreement and/or the related Exhibits hereto. Plaintiff and Class Counsel agree not to refer to MARS in promoting or publicizing the settlement of this action and shall simply refer to Defendants as "Nutro." If the Parties or their attorneys are ever asked by third parties (excluding their counsel or tax advisors (only to the extent that it is required for the rendering of professional services), or as required by any governmental agency or to comply with a lawfully-issued subpoena or court order) about the resolution of this matter, they may only refer them to the Notice attached as Exhibit B or say, in words or substance, the content of the language quoted above.

82. Dispute Resolution. In the event of any dispute concerning the validity, interpretation, enforcement or breach of this Agreement, the dispute shall be resolved by arbitration in Newark, New Jersey, in accordance with the then-existing rules of the JAMS, by a single Arbitrator who is a retired judge with JAMS chosen by the Parties, or if the Parties cannot agree, selected in accordance with the JAMS rules. Judgment upon any arbitration award may be entered by any state or federal court having jurisdiction thereof. The Arbitrator's decision in any such arbitration shall be final and binding on the Parties. The Parties intend this arbitration provision to be valid, enforceable, irrevocable and construed as broadly as possible. In the event of arbitration between the Parties to enforce or interpret any provision of this Agreement, the prevailing party shall be entitled to all reasonable costs, including attorneys' fees, actually incurred by the prevailing party.

83. Arms'-Length Agreement. The Parties believe that this Agreement is a fair, adequate, and reasonable settlement of the Action, and they have arrived at this Settlement through arms'-length negotiations, taking into account all relevant factors, present and potential.

84. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original and all of which, when taken together, shall constitute one and the same instrument. The date of execution shall be the latest date on which any party signs the Agreement.

85. Facsimile, Copy and pdf Signatures. A facsimile, copy or pdf signature on this Agreement shall have the same force and effect as an original signature thereto. This

Agreement, regardless of whether it has original, facsimile, copy, or pdf signatures, shall be binding and enforceable upon the affixing of such signatures of the Parties to this Agreement.

IN WITNESS WHEREOF, the Parties hereto, by and through their respective attorneys, and intending to be legally bound hereby, have duly executed this Agreement as of the date set forth below.

Dated: \_\_\_\_\_, 2014

\_\_\_\_\_  
Damien Monteleone  
Plaintiff

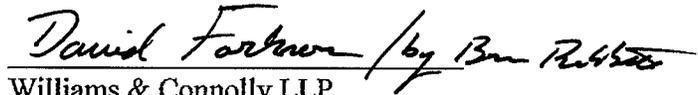
Dated: \_\_\_\_\_, 2014

\_\_\_\_\_  
Del Mar Law Group, LLP  
Attorneys for Plaintiff and Settlement Class

Dated: 12-4, 2014

  
\_\_\_\_\_  
Bo Segers  
The Nutro Company and Mars, Incorporated

Dated: 12-17, 2014

  
\_\_\_\_\_  
David Fortner / by Ben Robbins  
Williams & Connolly LLP  
Attorneys for The Nutro Company and Mars,  
Incorporated

Agreement, regardless of whether it has original, facsimile, copy, or photocopied signatures, shall be binding and enforceable upon the affixing of such signatures of the Parties to this Agreement.

IN WITNESS WHEREOF, the Parties hereto, by and through their respective attorneys, and intending to be legally bound hereby, have duly executed this Agreement as of the date set forth below.

Dated: 12-7, 2014



\_\_\_\_\_  
Damian Monteleone  
Plaintiff

Dated: 12-8, 2014



\_\_\_\_\_  
Del Mar Law Group, LLP  
Attorneys for Plaintiff and Settlement Class

Dated: \_\_\_\_\_, 2014

\_\_\_\_\_  
Bo Segers  
The Nutro Company and Mars, Incorporated

Dated: \_\_\_\_\_, 2014

\_\_\_\_\_  
Williams & Connolly LLP  
Attorneys for The Nutro Company and Mars,  
Incorporated

# **EXHIBIT A**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

DAMIAN MONTELEONE, an individual and  
on behalf of all others similarly situated,

Plaintiff,

v.

THE NUTRO COMPANY, a Delaware  
corporation; MARS, INCORPORATED, a  
Delaware corporation; and DOES 1 through  
100, inclusive,

Defendants.

Electronically filed

**Case No.: 2:14-cv-00801-ES-JAD**

**[PROPOSED]  
FINAL ORDER AND JUDGMENT OF  
DISMISSAL WITH PREJUDICE**

**WHEREAS** Plaintiff DAMIAN MONTELEONE (“Plaintiff”), both individually and on behalf of all members of the class, and defendants THE NUTRO COMPANY and MARS, INCORPORATED (“Defendants”), through their respective attorneys of record, having stipulated to the entry of this Final Order and Judgment of Dismissal with Prejudice (“Final Order and Judgment”) without the taking of proof, without trial or adjudication of any fact or law herein, without the Judgment constituting evidence of or an admission by Defendants regarding any issue of fact or law alleged in the complaint herein, and without Defendants admitting any liability, and good cause appearing;

**WHEREAS**, by order dated \_\_\_\_\_, 2015 (“Preliminary Approval Order”), this Court granted preliminary approval of the proposed class action settlement between the Parties;

**WHEREAS**, the Court also provisionally certified a Settlement Class and appointed Class Counsel and a class representative for settlement purposes only, and approved the procedure for giving notice and the forms of notice.

**WHEREAS**, on \_\_\_\_\_, 2015, the Court held a duly noticed final fairness hearing (“Fairness Hearing”) to consider, *inter alia*: (1) whether the terms and conditions of the Settlement Agreement (the “Agreement”) are fair, reasonable, and adequate; (2) whether the

Settlement Class should be finally certified for purposes of settlement only; (3) whether a judgment should be entered dismissing Plaintiff's complaint on the merits and with prejudice in favor of Defendants and against all persons or entities who are Settlement Class Members; and (4) whether and what amount to award attorneys' fees and expenses to counsel for the Settlement Class;

**WHEREAS**, the Court considered all matters submitted to it at the Fairness Hearing and otherwise, and it appears that notice substantially in the form approved by the Court in the Preliminary Approval Order was given in the manner that the Court ordered;

**WHEREAS**, the settlement was the result of extended, arms'-length negotiations as well as mediation with a respected mediator, the Honorable Mark B. Epstein (Ret.);

**WHEREAS**, counsel for the parties are highly experienced in this type of litigation, with full knowledge of the risks inherent in this Action, and independent investigations by counsel for the parties suffices to enable the parties to make an informed decisions as to the fairness and adequacy of the Settlement;

**WHEREAS**, the Court has determined after careful consideration that the proposed settlement of the claims of the Settlement Class Members against Defendants, as well as the release of Defendants and the Released Parties, the significant relief provided to the Settlement Class Members—in the form of Defendants' agreement to distribute up to Five Hundred Thousand Dollars (\$500,000.00) to eligible Settlement Class Members who purchased the Affected Product—as described in the Agreement, and the award of attorneys' fees and expenses requested, are fair, reasonable and adequate.

**NOW, THEREFORE**, it is hereby **ORDERED, ADJUDGED, AND DECREED** that:

1. **Incorporation of Settlement Agreement.** The Agreement, including any attachments thereto, is expressly incorporated by reference into this Final Order and Judgment and made a part hereof for all purposes. Except where otherwise noted, all capitalized terms used in this Final Order and Judgment shall have the meanings set forth in the Agreement.

2. **Jurisdiction.** This Court has subject-matter jurisdiction over this Action, including, without limitation, jurisdiction to approve the proposed settlement, to grant final certification of the Settlement Class, to settle and release all claims arising out of the transactions alleged in Plaintiff's complaint in the Action, and to dismiss this Action on the merits and with prejudice. This Court has personal jurisdiction over the parties to this action, including the Settlement Class Members.

3. **Final Certification of Settlement Class.** The Court finds, for settlement purposes only and conditioned upon the entry of this Final Order and Judgment and upon occurrence of the Effective Date, that the prerequisites for a class action under Federal Rule of Civil Procedure 23(a) and (b)(3) have been satisfied as provided for in the Preliminary Approval Order. The Court hereby finds that the Settlement Class meets all requirements of Federal Rule of Civil Procedure 23(a) and (b)(3) for certification of the class claims alleged in the Action, including: (a) numerosity; (b) commonality; (c) typicality; (d) adequacy of the class representative and Class Counsel; (e) predominance of common questions of fact and law among the Settlement Class; and (f) superiority.

4. The Court hereby finally certifies this Action for settlement purposes only as a class action on behalf of the following settlement class (the "Settlement Class"):

All person in the United States (excluding residents of the State of California) who purchased Ultra brand dry dog kibble between April 1, 2007 and June 30, 2009 and/or Ultra brand dog biscuits between April 1, 2007 and April 30, 2011. Excluded from the Settlement Class are all persons who are employees, directors, officers, and agents of Defendants or its subsidiaries and affiliated companies, as well as the Court and its immediate family and staff.

5. As defined in the Agreement, "Settlement Class Member(s)" means any member of the Settlement Class who does not elect exclusion or opt out from the Settlement Class pursuant to the terms and conditions for exclusion set out in the Agreement, the Notice, and the

Summary Notice. Pursuant to Federal Rule of Civil Procedure 23(c)(3), all Settlement Class Members are bound by this Final Order and Judgment.

6. Pursuant to Federal Rule of Civil Procedure, Rule 23(a), the Court finds that the Plaintiff in the Action, Damian Monteleone, is a member of the Settlement Class, his claims are typical of the Settlement Class, and he has fairly and adequately protected the interests of the Settlement Class throughout the proceedings in the Action. Accordingly, the Court hereby appoints Damian Monteleone as class representative.

7. Having considered the factors set forth in Federal Rule of Civil Procedure 23(g)(1), the Court finds that Class Counsel has fairly and adequately represented the Settlement Class for purposes of entering into and implementing the settlement, and thus, hereby appoints Class Counsel as counsel to represent the Settlement Class Members.

8. **Final Approval of Notice.** The Court finds that notice was provided in accordance with the terms of the Agreement and this Court's Preliminary Approval Order and that such notice:

(a) constituted the best practicable notice under the circumstances of this Action to Settlement Class Members and all other all persons and entities entitled to be provided with such notice;

(b) fully satisfied the requirements of Federal Rule of Civil Procedure 23, the requirements of due process, 28 U.S.C. § 1715, and any other applicable law(s); and

(c) was reasonably calculated, under the circumstances, to apprise Settlement Class Members of the (i) the nature and pendency of this class action, (ii) the definition of the class certified; (iii) the class claims, issues, and/or defenses; (iv) their right to enter an appearance through an attorney; (v) their right to exclude themselves from the Settlement Class and the proposed settlement upon request, (vi) their right to object to any aspect of the proposed settlement, (vii) the time and manner for requesting exclusion; (viii) their right to appear at the Fairness Hearing, and (ix) the binding effect of the orders and Final Order and Judgment in this

Action, whether favorable or unfavorable, on all persons who do not request exclusion from the Settlement Class under Rule 23(c)(3);

9. **Final Approval of Settlement.** Because it appears that (1) settlement negotiations occurred at arm's length; (2) there was sufficient discovery and investigation of claims; (3) the proponents of the settlement are highly experienced in similar litigation; and (4) [only a small fraction] / [none] of the class objected, the Court will apply a presumption of fairness to the settlement. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004). In addition, because settlement in this matter preceded class certification, the Court has applied a heightened standard and has carefully assessed whether the terms of the settlement, as reflected in the Agreement, are fair, reasonable, and adequate pursuant to Federal Rule of Civil Procedure 23(e)(2). *See In re Gen. Motors Corp. Prods. Liab. Litig.*, 55 F.3d 768, 805–06 (3d Cir. 1995). After application of the relevant factors, the Court finds that the terms and provisions of the settlement, as set forth in the Agreement, including any and all amendments and exhibits, have been entered into in good faith and are hereby fully and finally approved as fair, reasonable and adequate as to, and in the best interests of, Plaintiff and the Settlement Class Members. *See Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *In re Prudential Ins. Co. Sales Practice Litig.*, 148 F.3d 283, 323 (3d Cir. 1998). Because this settlement includes a *cy pres* component, the Court has considered the degree of direct benefit provided to class members in making this determination. *See In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013).

10. **Dismissal.** This Action is hereby DISMISSED WITH PREJUDICE and without costs as against Defendants and the Released Parties. All Settlement Class Members who have not timely and validly opted out of this settlement are hereby bound by this Final Order and Judgment and the Release provided herein.

11. **Release.** Upon the Effective Date, the Releasing Parties (as that term is defined in the Agreement) shall be deemed to have, and by operation of this Final Order and Judgment shall have, fully, finally, and forever released, relinquished, and discharged all Released Claims against the Released Parties. Released Claims means and includes any and all claims, demands,

rights, damages, obligations, suits, debts, liens, and causes of action of every nature and description whatsoever, ascertained or unascertained, suspected or unsuspected, existing or claimed to exist, including unknown claims as of the Effective Date by Plaintiff and all Settlement Class Members (and Plaintiff's and Settlement Class Members' respective heirs, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns) that:

(a) were brought or that could have been brought against the Released Parties, or any of them, and that arise out of or are related in any way to any or all of the acts, omissions, facts, matters, transactions, or occurrences that were or could have been directly or indirectly alleged or referred to in the Action (including, but not limited to alleged violations of state consumer protection and unfair competition laws (including, but not limited to, N.J. Stat. § 56:8-1 *et seq.*); fraud; negligent misrepresentation; breach of contract; breach of express or implied warranty; unjust enrichment, restitution, trespass, conversion, declaratory or injunctive relief, and other equitable claims or claims sounding in contract and tort); and

(b) relate in any way to the *Bacillus* Guarantee, including but not limited to all claims that relate in any way to (i) Nutro's representation that its Ultra kibble and biscuits contained a specified amount of "Total Bacillus Species" (listed as CFUs per pound) in its "Guaranteed Analysis" or (ii) Nutro's representation that its Ultra kibble and biscuits were a source of live microbials.

12. The Released Claims include known and unknown claims relating to the Action, and the Agreement is expressly intended to cover and include all such injuries or damages, including all rights of action thereunder. To the fullest extent possible, Settlement Class Members hereby expressly, knowingly, intelligently, and voluntarily waive any and all rights they may have under applicable state or federal laws restricting or limiting the scope and effect of the general release given herein to claims known or suspected by Settlement Class Members at the time the Agreement was executed. Settlement Class Members have expressly waived and relinquished any and all rights and benefits that they may have under, or that may be conferred

upon them by such state or federal laws, to the fullest extent that they may lawfully waive such rights or benefits pertaining to the Released Claims. In connection with such waiver and relinquishment, the Settlement Class Members have acknowledged that they are aware that they or their attorneys may hereafter discover claims or facts in addition to or different from those that they now know or believe exist with respect to Released Claims, but that it is their intention to hereby fully, finally, and forever settle and release all of the Released Claims known or unknown, suspected or unsuspected, that they have against the Released Parties. In furtherance of such intention, the release herein given by the Settlement Class Members to the Released Parties shall be and remain in effect as a full and complete general release notwithstanding the discovery or existence of any such additional different claims or facts. Each of the parties expressly acknowledges that it has been advised by its attorney of the contents and effect of any state and federal law restricting or limiting the scope and effect of the general release given herein to claims known or suspected at the time the Agreement was executed, and with knowledge, each of the parties has expressly waived whatever benefits it may have had pursuant to such laws. Plaintiff has acknowledged, and the Settlement Class Members shall be deemed by operation of the Final Order and Judgment to have acknowledged, that the foregoing waiver was separately bargained for and a material element of the settlement of which this release is a part.

13. Members of the Settlement Class who have opted out of or sought exclusion from the settlement by the date set by the Court do not release their claims and will not obtain any benefits of the settlement.

14. **Other Actions.** The Court orders that, upon the Effective Date, the Agreement shall be the exclusive remedy for any and all Released Claims of Settlement Class Members. The Court thus hereby permanently bars and enjoins Plaintiff, all Settlement Class Members, and all persons acting on behalf of, or in concert or participation with such Plaintiff or Settlement Class Members (including but not limited to the Releasing Parties), from: (a) filing, commencing, asserting, prosecuting, supporting, maintaining, pursuing, continuing, intervening in, or participating in, or receiving any benefits from, any lawsuit, arbitration, or administrative,

regulatory or other proceeding or order in any jurisdiction based upon or asserting any of the Released Claims; (b) bringing a class action on behalf of Plaintiff or Settlement Class Members, seeking to certify a class that includes Plaintiff or Settlement Class Members, or continuing to prosecute or participate in any previously filed and/or certified class action, in any lawsuit based upon or asserting any of the Released Claims.

15. **No Admission.** Neither the Agreement, nor any of its terms and provisions, nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein, nor any of the documents or statements generated or received pursuant to the claims administration process, shall be:

(a) offered by any person or received against Defendants as evidence or construed as or deemed to be evidence of any presumption, concession, or admission by Defendants of the truth of the facts alleged by the Plaintiff or any Settlement Class Member or the validity of any claim that has been or could have been asserted in the Action or in any litigation, or other judicial or administrative proceeding, or the deficiency of any defense that has been or could have been asserted in the Action or in any litigation, or of any liability, negligence, fault or wrongdoing of Defendants;

(b) offered by any person or received against Defendants as evidence of a presumption, concession or admission of any fault, misrepresentation or omission with respect to any statement or written document approved or made by Defendants or any other wrongdoing by Defendants;

(c) offered by any person or received against Defendants or as evidence of a presumption, concession, or admission with respect to any default, liability, negligence, fault, or wrongdoing, or in any way interpreted, construed, deemed, invoked, offered, received in evidence, or referred to for any other reason against any of the Parties, in any civil, criminal, or administrative action or proceeding; provided, however, that nothing contained in this paragraph shall prevent the Agreement (or any agreement or order relating thereto) from being used, offered, or received in evidence in any proceeding to approve, enforce, or otherwise effectuate

the settlement (or any agreement or order relating thereto) or the Judgment, or in which the reasonableness, fairness, or good faith of the Parties in participating in the settlement (or any agreement or order relating thereto) is an issue, or to enforce or effectuate provisions of the Agreement or the Judgment; or

(d) offered by any person or received against Plaintiff as evidence or construed as or deemed to be evidence that any of Plaintiff's claims lack merit.

16. Notwithstanding the foregoing, Defendants may file the Agreement, this Final Order and Judgment, and/or any of the documents or statements referred to therein in support of any defense or claim that is binding on and shall have *res judicata*, *collateral estoppel*, and/or preclusive effect in all pending and future lawsuits or other proceedings maintained by or on behalf of Plaintiff and/or any other Settlement Class Members, and each of them as well as their heirs, executors, administrators, successors, assigns, and/or any other of the Releasing Parties.

17. **Retention of Jurisdiction.** Without in any way affecting the finality of this Final Order and Judgment, this Court retains exclusive and continuing jurisdiction over the Parties, including the Settlement Class, and all matter relating to the administration, consummation, validity, enforcement and interpretation of the Agreement and of this Judgment, including, without limitation, for the purpose of:

(a) enforcing the terms and conditions of the Agreement and resolving any disputes, claims or causes of action that, in whole or in part, are related to or arise out of the Agreement, and/or this Final Order and Judgment (including, without limitation, whether a person or entity is or is not a Settlement Class Member; whether claims or causes of action allegedly related to this Action are or are not barred or released by this Final Order and Judgment; and whether persons are enjoined from pursuing any claims against Defendants);

(b) enabling any party to this Final Order and Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment;

(c) entering such additional orders, if any, as may be necessary or appropriate to protect or effectuate this Final Order and Judgment and the Agreement (including, without limitation, orders enjoining persons from pursuing any claims against Defendants), or to ensure the fair and orderly administration of the Settlement; and

(d) entering any other necessary or appropriate orders to protect and effectuate this Court's retention of continuing jurisdiction over the Agreement, the Parties, and the Settlement Class Members.

18. **Disputes.** The Parties agree to negotiate in good faith to try to resolve any disputes that may arise relating to this Final Order and Judgment. Plaintiff shall give Defendants twenty (20) days notice before filing an application or other pleading seeking contempt of court or other sanctions for any purported violation of this Judgment.

19. **Effective Date.** This Final Order and Judgment shall take effect immediately upon entry thereof, without further notice to Plaintiff, Defendants, or Settlement Class Members.

20. **Approval of Attorneys' Fees, Costs, and Incentive Award.** After considering the parties' submissions and all relevant factors, including the result achieved by Class Counsel on behalf of Settlement Class Members, the Court finds that an attorneys' fee award of \$375,000.00 is fair and reasonable and awards same to Class Counsel, which is in lieu of statutory fees Plaintiff and/or his attorneys might otherwise have been entitled to recover, and this amount shall be inclusive of any and all reimbursements to Class Counsel for litigation costs and expenses.

21. The Court further awards Plaintiff Damian Monteleone an incentive award of \$5,000.00, which the Court finds fair and reasonable, and which is to be paid out of the attorneys' fee award to Class Counsel.

22. The attorneys' fees award, reimbursement of expenses and the Plaintiff's incentive award shall be paid within sixty (60) days after this Final Order and Judgment becomes Final. If not so paid, then interest on such award, fees and expenses shall accrue from the date of this Final Order and Judgment until paid at the maximum rate allowed by applicable law.

23. **Miscellaneous.** Without further order of the Court, the Parties may agree to reasonably necessary extensions of time to carry out any provisions of the Agreement.

24. In the event that the Effective Date does not occur, class certification shall be automatically vacated and this Final Order and Judgment, and all other orders entered and releases delivered in connection herewith, shall be vacated and shall become null and void.

25. The Clerk shall enter this Final Order and Judgment forthwith.

**IT IS SO ORDERED** on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Hon. Esther Salas, U.S. District Judge

## **EXHIBIT B**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

DAMIAN MONTELEONE, an individual and  
on behalf of all others similarly situated,

Plaintiff,

v.

THE NUTRO COMPANY, a Delaware  
corporation; MARS, INCORPORATED, a  
Delaware corporation; and DOES 1 through  
100, inclusive,

Defendants.

Case No.: 2:14-cv-00801-ES-JAD

**NOTICE OF CLASS ACTION  
SETTLEMENT**

**IF YOU PURCHASED THE NUTRO COMPANY'S ULTRA™ BRAND DOG FOOD OR  
BISCUITS IN THE UNITED STATES, YOU MAY BE ENTITLED TO RECOVERY IN A  
CLASS ACTION SETTLEMENT.**

**YOUR LEGAL RIGHTS ARE AFFECTED WHETHER YOU ACT OR DON'T ACT.  
PLEASE READ THIS NOTICE CAREFULLY.**

**A FEDERAL COURT AUTHORIZED THIS NOTICE. THIS IS NOT A SOLICITATION.**

**1. Introduction** - This notice advises you of a proposed settlement (the "Settlement") of a lawsuit (the "Action") against THE NUTRO COMPANY and MARS, INCORPORATED (collectively "Defendants") on behalf of all persons who purchased Ultra™ brand dry dog kibble between April 1, 2007 and June 30, 2009 and/or Ultra™ brand dog biscuits between April 1, 2007 and April, 30 2011 that contained a "Guaranteed Analysis" regarding the amount of *Bacillus* Species contained therein. The Action is currently pending in United States District Court for the District of New Jersey (the "Court"). The Court has certified the Action to proceed as a class action, for purposes of settlement only, on behalf of the class described below. The details of the proposed settlement are set forth below in the Proposed Settlement paragraph. This notice explains your legal rights, what benefits are available in the settlement, who can claim them, and how to get them. You should read this notice carefully because your legal rights may be affected whether you act or not.

**2. Court Approval** - This Notice of Settlement and the Settlement Agreement have been approved by the Court. This is not a solicitation from a lawyer.

**3. Purpose of This Notice** - This notice is intended (1) to inform you of the Settlement of the Action, (2) to describe the Settlement, and (3) to advise you of your rights and your options with respect to the Settlement, including how to make a claim in the Settlement, how to exclude yourself from the Settlement, and how to object to the Settlement.

**4. Description of the Action** – The Action alleges that Defendants violated New Jersey law by improperly labeling and selling certain dog food products with a “Guaranteed Analysis” regarding the amount of *Bacillus* Species contained therein. Notwithstanding the accuracy of the aforementioned *Bacillus* labeling, **AT NO TIME WERE ANIMALS EVER HARMED OR AT RISK DUE TO THE PRESENCE OR LACK THEREOF OF BACILLUS IN THE DOG FOOD PRODUCTS AT ISSUE IN THIS LITIGATION.** Rather, the allegation (if proven true) would establish that an additive (a probiotic) was substantially missing from the dog food products. The Action seeks, among other things, an award of civil penalties against Defendants as a result of this alleged conduct.

**5. Defendants’ Denial** – There has been no determination as to who is right in this Action. Defendants deny each and every one of the allegations of the Complaint and have asserted a number of defenses to the claims. Both sides have agreed to this settlement to avoid the costs and risk of a trial.

**6. Definition of the Class** – You should read the following carefully to determine whether you are a member of the Settlement Class. The Settlement Class is defined as all persons in the United States (excluding residents of California) who purchased the following Ultra™ brand dry dog kibble between April 1, 2007 and June 30, 2009, and Ultra™ brand dog biscuits between April 1, 2007 and April 30, 2011 that contained a “Guaranteed Analysis” regarding the amount of *Bacillus* Species contained therein:

- a. Ultra™ Adult Dry
- b. Ultra™ Large Breed Adult Dry
- c. Ultra™ Large Breed Puppy Dry
- d. Ultra™ Puppy Dry
- e. Ultra™ Senior Dry
- f. Ultra™ Small Breed Adult Dry
- g. Ultra™ Weight Management Dry
- h. Ultra™ Adult Biscuits
- i. Ultra™ Puppy Biscuits
- j. Ultra™ Senior Biscuits
- k. Ultra™ Weight Management Biscuits

**7. The Proposed Settlement** – The following describes the compensation you may receive if you are a Settlement Class member and if you submit a proper claim. The parties have reached a proposed settlement of this action, which the attorneys for the Settlement Class believe is fair, reasonable, adequate and in the best interest of class members. Defendants have agreed to

the settlement, without admitting liability, to avoid the costs and other burdens of continued litigation. The parties acknowledge that Defendants removed the *Bacillus* guarantee from the Ultra™ brand dry dog kibble in June of 2009 and from the Ultra™ brand dog biscuits in April of 2011. The proposed settlement provides payment to every Class Member who does not opt out of the settlement and returns a valid Claim Form of either:

- (i) **Cash:** a \$2.00 check, subject to the terms and limitations described in paragraph 8 below;
- (ii) **Gift Certificate:** a \$5.00 Gift Certificate good towards the purchase of any Nutro product; or
- (iii) **Donation:** a donation of Defendants' dry kibble product worth \$5.00 at retail price to animal shelters and/or animal charities of the Defendants' choice after consultation with Class Counsel.

Subject to the total amount of the Settlement Administrator's reasonable costs, fees, and expenses, Defendants agreed to establish up to a **\$500,000.00 settlement fund** for Class Members. This fund will be used to pay claims by Class Members.

All claims made will be reduced from the fund and the unclaimed remainder, if any, will be donated in the form of Defendants' kibble products to animal shelters and/or animal charities of Defendants' choice. Defendants will meet and confer with Class Counsel concerning the animal shelters and charities that Defendants choose prior to making this donation. Defendants shall be required to submit a signed declaration under penalty of perjury establishing the value of the common fund at \$500,000.00. Defendants are required to submit a signed declaration, if necessary, confirming the transfer of Defendants' kibble products to the yet to be determined animal shelters and/or animal charities.

Pending Court approval, the parties also agreed to an incentive award to the class representative Damian Monteleone and payment by Defendants of Class Counsel's attorneys' fees (such payments will not diminish the settlement fund). As such, Plaintiff shall file a motion in the Court wherein Plaintiff will petition the Court for an award of:

- (i) a class representative incentive award to Damian Monteleone in the amount of **\$5,000.00**; and
- (ii) payment by Defendants of Class Counsel's attorneys' fees in the amount of **\$375,000.00**.

The incentive award will be paid out of Class Counsel's attorneys' fee award. Defendants have agreed not to oppose such request so long as it is within the stated limits.

**8. Terms of Payment to Class Members** - Class Members submitting a Claim Form must represent that they saw and relied upon a "Guaranteed Analysis" that included a reference to *Bacillus* in purchasing the product. Class Members who do not opt out and who return a valid Claim Form establishing their class membership will receive either (i) a \$2.00 check, (ii) a \$5.00 Gift Certificate towards the purchase of any Nutro product, or may elect (iii)

a donation of Defendants' dry kibble product worth \$5.00 at retail price to animal shelters and/or animal charities of the Defendants' choice after consultation with Class Counsel.

The Gift Certificates shall have the following characteristics:

- a) They will be fully transferable;
- b) They cannot be used in combination with other rebates or coupons for Nutro's products;
- c) Only one Gift Certificate may be used per purchase order;
- d) A Gift Certificate may be used only once;
- e) Each Gift Certificate will be valid for six (6) months from the date of issuance;
- f) Gift Certificates will have no cash value; and
- g) Gift Certificates will be redeemable for any Nutro product at participating pet specialty stores, including but not limited to, Petco and PetSmart.

Subject to the total amount of the Settlement Administrator's reasonable costs, fees, and expenses, if the aggregate value of the Gift Certificates, Checks, and Donations to be awarded to Settlement Class Members pursuant to valid Claim Forms exceeds Five Hundred Thousand Dollars (\$500,000.00), then the value of the individual Gift Certificate, Check and Donation to be provided shall be reduced on a *pro rata* basis, such that the aggregate value of the award does not exceed \$500,000.00. For example and by way of illustration only, if the aggregate value of the total number of Gift Certificates, Checks and Donations redeemed by Settlement Class Members is \$1,000,000.00, then the value of each Gift Certificate, Check and Donation shall be reduced by fifty per cent (50%) to ensure that the aggregate value of the total number of Gift Certificates, Checks and Donations does not exceed \$500,000.00.

The Settlement Administrator will determine each authorized Settlement Class Member's *pro rata* share based upon each Settlement Class Member's Claim Form, the total number of valid Claim Forms received and the total amount of the Settlement Administrator's reasonable costs, fees and expenses. Accordingly, the actual amount recoverable by each Settlement Class Member will not be determined until after the Claims Period has ended and all Claims Form have been received. In no event shall an individual Settlement Class Member's award exceed the individual recovery cap described above.

Defendants have agreed to pay the Settlement Administrator up to Forty-Five Thousand Dollars (\$45,000.00) toward reasonable costs, fees, and expenses of providing notice to the Settlement Class and administering the Settlement in accordance with this Agreement. To the extent, if any, that the Settlement Administrator's reasonable costs, fees, and expenses exceed \$45,000.00, Class Counsel may pay up to Five-Thousand Dollars (\$5,000) of such excess.

Subject to the total amount of the Settlement Administrator's reasonable costs, fees, and expenses, Defendants are not obligated to provide the full amount of \$500,000.00 in Gift Certificates, Checks and Donations unless there are sufficient Claim Forms submitted and approved to reach the \$500,000.00 limit.

9. **Releases** - In return for the settlement award described above, members of the Settlement Class who do not request exclusion from the class agree to fully, finally and forever

release, relinquish, and discharge any current or future claims you might have against Defendants that relate to the claims in this lawsuit. The release provisions contained in the Settlement Agreement are set forth below:

“Released Parties” means (a) Defendants and each of their employees, assigns, attorneys, agents, and all of their past, present, and future officers and directors; (b) All of Defendants’ parents, subsidiaries, divisions, affiliates, predecessors, and successors, and each of their respective employees, assigns, attorneys, agents, resellers and past, present and future officers and directors; and (c) Any and all persons, entities, or corporations involved in any way in the manufacture and sale of *Bacillus* to the Defendants.

“Released Claims” means and includes any and all claims, demands, rights, damages, obligations, suits, debts, liens, and causes of action of every nature and description whatsoever, ascertained or unascertained, suspected or unsuspected, existing or claimed to exist, including unknown claims (as described in Paragraph b) below) as of the Effective Date by Plaintiff and all Settlement Class Members (and Plaintiff’s and Settlement Class Members’ respective heirs, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns) that:

- a) were brought or that could have been brought against the Released Parties (as hereinafter defined), or any of them, and that arise out of or are related in any way to any or all of the acts, omissions, facts, matters, transactions, or occurrences that were or could have been directly or indirectly alleged or referred to in the Action (including, but not limited to alleged violations of state consumer protection and unfair competition laws (including, but not limited to alleged violations of state consumer protection and unfair competition laws (including, but not limited to, N.J. Stat. 56:8-1 *et seq.*); fraud; negligent misrepresentation; breach of contract; breach of express or implied warranty; unjust enrichment, restitution, trespass, conversion, declaratory or injunctive relief, and other equitable claims or claims sounding in contract and tort); and
- b) relate in any way to the *Bacillus* Guarantee, including but not limited to all claims that relate in any way to (i) Nutro’s representation that its Ultra™ kibble and biscuits contained a specified amount of “Total *Bacillus* Species” (listed as CFUs per pound) in its “Guaranteed Analysis” or (ii) Nutro’s representation that its Ultra™ kibble and biscuits were a source of live microbials.

The Released Claims include known and unknown claims relating to the Action, and this Agreement is expressly intended to cover and include all such injuries or damages, including all rights of action thereunder. To the fullest extent possible, Settlement Class Members hereby expressly, knowingly, intelligently, and voluntarily waive any and all rights they may have under applicable state or federal laws restricting or limiting the scope and effect of the general release given herein to claims known or suspected by Settlement Class Members at the time this Agreement is executed. In connection with such waiver and relinquishment, the Settlement Class Members hereby acknowledge that they are aware that they or their attorneys may hereafter discover claims or facts in addition to or different from those that they now know or believe exist with respect to Released Claims, but that it is their intention to hereby fully, finally,

and forever settle and release all of the Released Claims known or unknown, suspected or unsuspected, that they have against the Released Parties. In furtherance of such intention, the release herein given by the Settlement Class Members to the Released Parties shall be and remain in effect as a full and complete general release notwithstanding the discovery or existence of any such additional different claims or facts. Each of the Parties expressly acknowledges that it has been advised by its attorney of the contents and effect of any state and federal law restricting or limiting the scope and effect of the general release given herein to claims known or suspected at the time this Agreement is executed, and with knowledge, each of the Parties hereby expressly waives whatever benefits it may have had pursuant to such laws. Plaintiff acknowledges, and the Settlement Class Members shall be deemed by operation of the Final Judgment to have acknowledged, that the foregoing waiver was separately bargained for and a material element of the Settlement of which this release is a part.

**10. How to Make a Claim** - Only Class Members who submit a valid Claim Form postmarked no later than \_\_\_\_\_ will be eligible to participate in the settlement. Claim Forms postmarked after \_\_\_\_\_ will not be considered. If you received this Notice by email, a Claim Form is attached. If you received this Notice in any other way or do not have a Claim Form, you may go to [www.ultradogfoodsettlement.com](http://www.ultradogfoodsettlement.com) to obtain a copy of the form. Once completed, electronically submit the claim form at [www.ultradogfoodsettlement.com](http://www.ultradogfoodsettlement.com), or mail the claim form to:

Ultra Dog Food Class Action  
Settlement Administrator  
THE GARDEN CITY GROUP, INC.  
815 Western Ave, Suite 200  
Seattle, WA 98104

Approved claims will be paid after the Settlement Effective Date and processing of all Claims Forms.

**11. How To Request for Exclusion from the Class** - If you are a member of the Settlement Class, you have the right to be excluded from the class. If you wish to be excluded from the class, you must send to the Settlement Administrator by fax, U.S. Mail, or email a letter that it is postmarked no later than \_\_\_\_\_ at the address listed in paragraph 10 above. The letter must clearly state your full name, current mailing address, phone number, and signature and include the following statement: “I want to be excluded from the plaintiff class in *Monteleone v. The Nutro Company, et al.*, United States District Court for the District of New Jersey, Case No. 2:14-cv-00801-ES-JAD.”

The request for exclusion must be submitted in your own name and signed by you personally; no individual may request that other persons be excluded from the class. Do not send a letter requesting exclusion if you wish to remain a class member or file a claim for an award under the settlement. **If you exclude yourself from the class, you will not be entitled to share in any benefits that the class may obtain.** If you do not exclude yourself, you will not be able to file a separate claim against Defendants based on the events, circumstances and/or practices alleged in the Action.

**12. How To Object To This Settlement** - If you do not request exclusion, you may still object to the proposed settlement. You may also move to appear in the action.

If you wish to object, you must send a written objection by fax, U.S. mail, or email to the Settlement Administrator and send by U.S. mail or e-mail a copy to Class Counsel and Defense Counsel at the address set forth below postmarked no later than \_\_\_\_\_.

If you wish to object, you must also file a written objection with the Court. The objection must include: (1) your complete name and current residence and business address (giving the address of any lawyer who represents you is not sufficient); (2) a statement that you fall within the definition of the class; (3) each ground for comment or objection and any supporting papers you wish the Court to consider (*i.e.*, a mere statement that “I object” will not be deemed sufficient); and (4) whether you intend to appear at the Fairness Hearing either with or without separate counsel.

You or your personal attorney may attend the settlement hearing and state your support or objection to this settlement orally, but you are not required to do so. If you intend to attend the hearing and orally state your opinion, your written objection must also state “**I intend to appear at the hearing.**” Only class members, or their attorneys, who have submitted a timely written objection, will have their objections considered by the Court, or be heard at the final hearing on approval of the settlement. To be considered, a written objection must be filed with the Court and mailed to the Settlement Administrator and both Class and Defense Counsel no later than \_\_\_\_\_ at the following addresses:

Court

United States District Court for the District of New Jersey  
Newark Division  
Martin Luther King Building & U.S. Courthouse  
50 Walnut Street  
Newark, NJ 07101

Class Counsel

John H. Donboli  
DEL MAR LAW GROUP, LLP  
12250 El Camino Real  
San Diego, CA 92130  
Tel: (858) 793-6244

Defense Counsel

David F. Forkner  
WILLIAMS & CONNOLLY LLP  
725 Twelfth Street NW  
Washington, DC 20005  
Tel: (202) 434-5000

If you wish to submit a brief to the Court in support of any objection, such brief must be filed with the Court, and served by mail on both Class and Defense Counsel, at the addresses listed above no later than \_\_\_\_\_.

**13. Court Hearing On Settlement** - The Court will hold a Final Approval Hearing to consider: (a) whether the tentative settlement summarized above is fair, reasonable, adequate, and in the best interests of the plaintiff class, and (b) whether Plaintiff and his attorneys have fully, fairly and adequately represented the plaintiff class in the action and in negotiating the settlement. The Final Approval Hearing is scheduled for \_\_\_\_\_, **2015 at** \_\_\_\_\_

**a.m./p.m.** before Judge Esther Salas in the United States District Court for the District of New Jersey, Newark Division, 50 Walnut Street, Newark, NJ 07101. The time and date of the approval may be changed by the court order without further notice to the class.

**14. Court Hearing On Class Counsel Fees and Class Representative Incentive Award** - The Court will also hold a hearing on \_\_\_\_\_, 2015 at \_\_\_\_\_ **a.m./p.m.** in the United States District Court for the District of New Jersey, Newark Division, 50 Walnut Street, Newark, NJ 07101, to consider whether to award attorneys' fees and costs to Class Counsel and whether to award a class representative fee to Damian Monteleone. The time and date of the hearing may be changed by the Court without further notice to the class. At this Court hearing, Plaintiff shall request that the Court grant: (i) a class representative incentive award to Damian Monteleone in the amount of \$5,000.00; and (ii) payment by Defendants of Class Counsel's attorneys' fees in the amount of \$375,000.00. Defendants have agreed not to oppose the above-stated request.

**15. More Information** - If you wish to receive additional information about this notice or the settlement, you may:

- (i) Examine the Court's file on the case at the address shown above;
- (ii) Contact Class Counsel in writing at the address in paragraph 12 above; or
- (iii) Visit **[www.ultradogfoodsettlement.com](http://www.ultradogfoodsettlement.com)**

**Do not contact Defendants or the Court regarding this Notice or the lawsuit.**

**THE COURT HAS NOT RULED IN FAVOR OF OR AGAINST THE PLAINTIFF OR DEFENDANTS ON THE MERITS OF ANY OF THEIR CLAIMS, DENIALS, OR DEFENSES IN THIS CASE.**

**YOUR LEGAL RIGHTS ARE AFFECTED WHETHER YOU ACT OR DON'T ACT.  
PLEASE READ THIS NOTICE CAREFULLY.**

# **EXHIBIT C**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

DAMIAN MONTELEONE, an individual and  
on behalf of all others similarly situated,

Plaintiff,

v.

THE NUTRO COMPANY, a Delaware  
corporation; MARS, INCORPORATED, a  
Delaware corporation; and DOES 1 through  
100, inclusive,

Defendants.

Electronically filed

Case No.: 2:14-cv-00801-ES-JAD

**[PROPOSED]  
ORDER GRANTING PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT, CONDITIONALLY  
CERTIFYING SETTLEMENT CLASS,  
APPROVING FORM AND MANNER OF  
NOTICE, AND SCHEDULING FAIRNESS  
HEARING**

**WHEREAS**, this action is pending before this Court as a putative class action brought by plaintiff Damian Monteleone (“Plaintiff”) on behalf of putative class members in 49 states; and

**WHEREAS**, the parties have applied to this Court for an Order preliminarily approving the settlement (“Preliminary Approval Order”) of the above-captioned litigation (“Action”) in accordance with the parties’ Settlement Agreement (“Agreement”), dated \_\_\_\_\_, 2014, which, together with the exhibits annexed thereto, sets forth the terms and conditions for a proposed settlement of the Action (the “Settlement”), and for dismissal of the Action with prejudice against defendants The Nutro Company (“Nutra”) and Mars, Incorporated (“Mars”) (collectively, “Defendants”) upon the terms and conditions set forth therein; and

**WHEREAS**, the Court having received, read and considered the Agreement and the exhibits annexed thereto, which have been filed with the Court, and the parties’ submissions; and

**WHEREAS**, it appearing that the parties entered into the Agreement after lengthy, arm’s-length negotiations, including a mediation session with a respected mediator; and

**WHEREAS**, the Court has reviewed the parties’ application for the Preliminary

Approval Order, and found good cause for the same,

**NOW, THEREFORE**, it is hereby **ORDERED, ADJUDGED** and **DECREED** as follows:

1. **Review of Settlement and Incorporation of Terms.** The Court has carefully reviewed the Agreement and the terms of the Settlement. This Preliminary Approval Order incorporates by reference the definitions in the Agreement, and all terms used herein shall have the same meaning as set forth in the Agreement.

2. **Preliminary and Conditional Certification of Settlement Class.** The Court conditionally finds, for settlement purposes only and conditioned upon the entry of this Preliminary Approval Order and the Final Order and Judgment, and the occurrence of the Effective Date, that the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3) have been satisfied, in that (a) the Settlement Class is so numerous that joinder of all individual Settlement Class Members is impracticable; (b) there are questions of law and fact common to the Settlement Class and those common questions of law and fact predominate over any individual questions; (c) the claims of the Plaintiff are typical of the claims of the Class; (d) the Plaintiff and Class Counsel will fairly and adequately represent the interests of the Class; and (e) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

3. Accordingly, the Court hereby conditionally certifies the Settlement Class for settlement purposes only. The Settlement Class is defined as follows:

All person in the United States (excluding residents of the State of California) who purchased Ultra brand dry dog kibble between April 1, 2007 and June 30, 2009 and/or Ultra brand dog biscuits between April 1, 2007 and April 30, 2011. Excluded from the Settlement Class are all persons who are employees, directors, officers, and agents of Defendants or its subsidiaries and affiliated companies, as well as the Court and its immediate family and staff.

4. Having considered the relevant factors set forth in Rule 23, the Court has made a preliminary determination that Plaintiff Damian Monteleone and Class Counsel are adequate

representatives of the Settlement Class and hereby appoints them as such solely for purposes of settlement.

5. **Preliminary Approval of Settlement.** The Parties have agreed to settle the Action upon the terms and conditions set forth in the Agreement, which has been filed with and reviewed by the Court.

6. The Court preliminarily finds: (a) that Plaintiff in the Action, by and through his counsel, has investigated the facts and law relating to the matters alleged in his complaint and evaluated the risks associated with continued litigation, trial, and/or appeal; (b) that the Settlement was reached as a result of arm's-length negotiations between counsel for Plaintiff and counsel for Defendants and a mediation session with a respected mediator, the Honorable Mark B. Epstein (Ret.); (c) that the proponents of the settlement, counsel for the parties, are experienced in similar litigation; and (d) that the Settlement confers substantial benefits upon the Settlement Class, particularly in light of the damages that Plaintiff and Class Counsel believe are potentially recoverable or provable at trial, without the costs, uncertainties, delays, and other risks associated with continued litigation, trial, and/or appeal.

7. Accordingly, the Court preliminarily approves the Agreement and the terms and conditions of the Settlement as fair, reasonable, and adequate pursuant to Federal Rule of Civil Procedure 23(e), subject to further consideration at the Fairness Hearing (as described below).

8. **Fairness Hearing.** Pursuant to Rule 23(e), a hearing (the "Fairness Hearing") will be held before this Court at the Martin Luther King Building & U.S. Courthouse, 50 Walnut Street, Newark, NJ 07101 on \_\_\_\_\_, 2015 at \_\_\_\_ a.m./p.m., for the following purposes: (a) to determine whether the Settlement Class meets all applicable requirements of Federal Rules of Civil Procedure 23 and, thus, the Settlement Class should be finally certified for purposes of effectuating the Settlement; (b) to determine whether the proposed Settlement of the Action on the terms and conditions provided for in the Agreement are fair, reasonable and adequate in accordance with Federal Rule of Civil Procedure 23(e) and therefore should be approved by the Court; (c) to consider the application of Class Counsel for attorneys' fees, costs,

and expenses, as provided for in the Agreement; (d) to consider the application of Plaintiff for an incentive award for serving as class representative, as provided for in the Agreement; (e) to determine whether a final approval order and judgment should be entered herein; (f) to consider the release provided for in the Settlement Agreement; and (g) to consider and determine such other matters as the Court deems just and appropriate.

9. The Court may adjourn or continue the Fairness Hearing without further notice to the Settlement Class.

10. The parties may further modify the Agreement prior to the Fairness Hearing so long as such modifications do not materially change the terms of the Settlement provided thereunder. The Court may approve the Agreement with such modifications as may be agreed to by the parties, if appropriate, without further notice to the Settlement Class.

11. After the Fairness Hearing, the Court may enter a Final Order and Judgment in accordance with the Agreement that will adjudicate the rights of the Settlement Class Members (as defined in the Agreement) with respect to the claims being settled.

12. **Approval of Form of Notice.** The Court hereby approves, as to form and content, the proposed notice annexed as Exhibit “B” to the Settlement Agreement (“Notice”) and the short-form notice that is annexed as Exhibit “E” to the Settlement Agreement (“Summary Notice”). The Court finds that the Notice and Summary Notice meet the requirements of Federal Rule of Civil Procedure 23(c)(2)(B) and (e), and due process, and are the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all persons entitled thereto.

13. **Approval of Notice Procedures.** The Court hereby approves the procedures set forth in the Settlement Agreement, and described below, for providing notice to the proposed Settlement Class. The Court finds that the procedures are fair, reasonable, and adequate; the best notice practicable under the circumstances; consistent with due process; and shall constitute due and sufficient notice to all persons entitled thereto.

14. As soon as possible after the entry of this Preliminary Approval Order, but not

later than thirty (30) days after the entry of this Preliminary Approval Order, Plaintiff and Defendants will coordinate with the Settlement Administrator (as defined below) to provide notice to the Settlement Class as follows:

(a) by emailing the Notice substantially in the form attached as Exhibit “B” to the Agreement, to the last known email addresses of each potential member of the Settlement Class to the extent such email address information exists in Nutro’s consumer databases, is a valid email address, and the Settlement Class Member has not withheld his/her consent to being contacted by Nutro via email;

(b) by mailing the Notice and Summary Notice substantially in the forms attached as Exhibit “B” and “E” to the Agreement, to in-house counsel for PetSmart and Petco requesting that they post the Summary Notice of the settlement substantially in the form attached as Exhibit “E” to the Agreement at the point of purchase in their stores for the duration of the Claim Period, provided however that the Parties shall not represent, warrant, or guarantee that PetSmart and Petco actually will post the Summary Notice in their stores;

(c) by publishing the Notice on Nutro’s website ([www.nutro.com](http://www.nutro.com)), to be marked for “Customers Only” on the top half of the website’s homepage, for the duration of the Claim Period; and

(d) by providing a website address in the Notice and Summary Notice ([www.ultradogfoodsettlement.com](http://www.ultradogfoodsettlement.com)) to a settlement website to be designed and administered by the Settlement Administrator that will contain the settlement documents (including but not limited to the Notice and Claim Form), a list of important dates, and any other information to which the Parties may agree.

15. The costs of providing notice to potential Settlement Class members, the processing of claims, and all other administrative expenses shall be paid in accordance with the applicable provisions of the Agreement.

16. At least 14 days prior to the Fairness Hearing, Defendants, through their counsel of record, shall cause to be filed with the Court sworn affidavits evidencing compliance with the

provisions of Agreement as it relates to providing Notice.

17. **Appointment of Settlement Administrator.** The Garden City Group, Inc. is hereby approved and appointed as Settlement Administrator for the Settlement and shall perform all of the duties of the Settlement Administrator set forth in the Agreement, including dissemination of the Notice and Summary Notice, the processing of claims, responding to inquiries from potential members of the Settlement Class, and other administrative functions, all under the direction and supervision of the Court.

18. **Participation in Settlement and Submission of Claims.** To participate in the Settlement, Settlement Class Members will have until \_\_\_\_\_, 2015 to submit their Claim Forms, as provided for in the Notice and Summary Notice, which is due, adequate, and sufficient time. The Settlement Administrator shall have authority to accept or reject claims in accordance with the Agreement.

19. Any Class member may enter an appearance in the Litigation, at his or her own expense, individually or through counsel. All Class members who do not enter an appearance will be represented by Class Counsel. All Settlement Class Members shall be bound by all determinations and judgments in the Action concerning the settlement, whether favorable or unfavorable to the Settlement Class.

20. **Objections to Settlement.** Any Settlement Class Member may object to the Settlement, the certification of the Settlement Class, the entry of the Final Order and Judgment, the amount of fees received by Class Counsel, and/or the amount of the incentive award requested by the Plaintiff. Any Settlement Class Member who intends to object must send a written, signed objection by fax, U.S. mail or email to the Settlement Administrator and send by U.S. mail or email a copy to Class Counsel and Defense Counsel at the address set forth below, postmarked (or the equivalent for fax or email) no later than \_\_\_\_\_, 2015. Objections received after the deadline will not be considered. Settlement Class Members who object must set forth their full name, current address, and telephone number.

Settlement Administrator

THE GARDEN CITY GROUP, INC.  
815 Western Ave., Suite 200  
Seattle, WA 98104  
Telephone: (206) 876-5241  
Facsimile: (206) 876-5201

Class Counsel

John H. Donboli  
DEL MAR LAW GROUP, LLP  
12250 El Camino Real  
San Diego, CA 92130  
Telephone: (858) 793-6244  
Facsimile: (858) 724-1490  
E-mail: JDonboli@delmarlawgroup.com

Defendants

David F. Forkner  
WILLIAMS & CONNOLLY LLP  
725 Twelfth Street NW  
Washington, DC 20005  
Telephone: (202) 434-5000  
Facsimile: (202) 434-5792  
E-mail: DForkner@wc.com

21. Settlement Class Members who do not serve timely written objections in the manner provided for in this Preliminary Approval Order shall be deemed to have waived all objections and shall forever be foreclosed from making any objection to or appeal of the fairness, reasonableness or adequacy of the proposed Settlement, and to the award of fees and expenses to Class Counsel and other costs, all as set forth in the Agreement and this Preliminary Approval Order. No Settlement Class Member shall be entitled to be heard at the Fairness Hearing (whether individually or through separate counsel) or to object to the Settlement, and no written objections or briefs submitted by any Settlement Class Member shall be received or considered by the Court at the Fairness Hearing, unless written notice of the objecting class member's intention to appear at the Fairness Hearing and copies of any written objections and/or briefs shall have been filed with the Court and served on Class Counsel and Defense Counsel by

\_\_\_\_\_, 2015. Settlement Class members who do not oppose the Settlement, Class Counsel's application for attorneys' fees, costs, and expenses, or Plaintiff's incentive fee aware need not take any action.

22. **Requesting Exclusion from Settlement Class.** Any member of the Settlement Class may choose to exclude himself or herself from the Settlement. Any such person who chooses to be excluded from the Settlement will not be a Settlement Class Member and shall relinquish his or her rights to benefits with respect to the Settlement, should it be approved. Any member of the Settlement Class who does not choose to exclude himself or herself from the Settlement shall be bound by the terms of the Agreement and Settlement, if finally approved by the Court, and any decisions made or orders entered in the Action.

23. Any putative Settlement Class Member who chooses to opt out of the Settlement must send a signed letter by fax, U.S. Mail, or email to: The Garden City Group, Inc., 815 Western Ave., Suite 200, Seattle, WA 98104, postmarked (or the equivalent for fax or email) no later than \_\_\_\_\_, 2015.

24. Upon the Effective Date, as defined in the Agreement, all members of the Settlement Class who have not opted out of the settlement shall be enjoined and barred from asserting any of the Released Claims against Defendants, and each Settlement Class Member shall be deemed to release any and all such Released Claims as against Defendants, as these terms are defined in the Agreement. All members of the Settlement Class who submit valid and timely requests for exclusion in the manner set forth above and in the Agreement shall have no rights under the Agreement and shall not be bound by the Agreement or the Final Order and Judgment.

25. **Other Actions and Claims.** Pending resolution of these settlement proceedings, no other action now pending or hereinafter filed arising out of all or any part of the subject matter of the Action shall be maintained as a class action and, except as provided by further order of the Court, for good cause shown, all persons are hereby enjoined, during the pendency of these settlement proceedings, from filing or prosecuting purported class actions against

Defendants with respect to any of the Released Claims as defined in the Agreement. Pending final determination of whether the proposed Settlement should be approved, no Settlement Class Member directly, derivatively, in a representative capacity, or in any other capacity, shall commence or continue any action against any of the Released Parties (as that term is defined in the Agreement) in any court or tribunal asserting any of the Released Claims (as that term is defined in the Agreement).

26. **Stay of Proceedings.** Pending the Fairness Hearing, all proceedings in the Action, other than proceedings necessary to carry out or enforce the terms and conditions of the Agreement and this Preliminary Approval Order, are stayed.

27. **Failure to Obtain Final Approval.** In the event the Agreement and Settlement are not finally approved by the Court, or for any reason the Parties fail to obtain entry of the Final Order and Judgment as contemplated in the Agreement, or the Agreement is terminated pursuant to its terms for any reason or the Effective Date does not occur for any reason, then the following shall apply:

(a) All orders and findings entered in connection with the Settlement and Agreement shall become null and void and have no force and effect whatsoever, shall not be used or referred to for any purposes whatsoever, and shall not be admissible or discoverable in this or any other proceeding;

(b) The conditional certification of the Settlement Class pursuant to this Preliminary Approval Order shall be vacated automatically, and the Action shall proceed as though the Settlement Class had never been certified pursuant to the Agreement and such findings had never been made;

(c) Nothing contained in this Preliminary Approval Order is, or may be construed as, a presumption, concession or admission by or against Defendants or Plaintiff of any default, liability or wrongdoing as to any facts or claims alleged or asserted in the Action, or in any actions or proceedings, whether civil, criminal or administrative, including, but not limited to, factual or legal matters relating to any effort to certify the Action as a class action;

(d) Nothing in this Preliminary Approval Order or pertaining to the Agreement, including any of the documents or statements generated or received pursuant to the claims administration process, shall be used as evidence in any further proceeding in the Action; and

(e) All of the Court's prior orders having nothing whatsoever to do with class certification shall, subject to this Preliminary Approval Order, remain in force and effect.

28. **No Admission.** Neither the Agreement, nor any of its terms or provisions, nor any of the negotiations or proceedings connected with it, nor this Order, shall be construed in this or any lawsuit as an admission or concession by Defendants of the truth of any of the allegations of the Action, or of any liability, fault, or wrongdoing of any kind, or by the named Plaintiff Damian Monteleone or any other member of the Settlement Class of the merit of any defense or lack of merit of any claim.

29. **Miscellaneous.** Class Counsel and Defense Counsel are hereby authorized to use all reasonable procedures in connection with approval and administration of the settlement that are not materially inconsistent with this Preliminary Approval Order or the Agreement, including making, without further approval of the Court, minor changes to the form or content of the Notice, Summary Notice, and other exhibits that they jointly agree are reasonable or necessary to effectuate the Settlement and the purposes of this Preliminary Approval Order.

30. **Continuances.** The Court reserves the right to adjourn or continue the date of the Fairness Hearing without further notice to the Settlement Class, and retains jurisdiction to consider all further applications arising out of or connected with the proposed Settlement.

**IT IS SO ORDERED** on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

---

Hon. Esther Salas, U.S. District Judge

## **EXHIBIT D**

**Ultra Dog Food Class Action  
Settlement Administrator  
THE GARDEN CITY GROUP, INC.  
815 Western Ave, Suite 200  
Seattle, WA 98104**

**PROOF OF CLAIM**

To make a Claim, you must fully complete this Claim Form so that it is postmarked no later than \_\_\_\_\_. This Claim Form is subject to verification. A complete description of the class qualifications and claim benefits is provided in the Notice of Proposed Settlement of Class Action ([www.ultradogfoodsettlement.com](http://www.ultradogfoodsettlement.com)). The fully completed Claim Form must be returned to the following address: **THE GARDEN CITY GROUP, INC., 815 Western Ave, Suite 200, Seattle, WA 98104** prior to \_\_\_\_\_ to take part in the settlement.

THE WILLFUL SUBMISSION OF A FALSE CLAIM CONSTITUTES THE CRIME OF PERJURY AND IS PUNISHABLE BY LAW.

I, \_\_\_\_\_, certify that I purchased (*please circle all that apply*)

- (a) Ultra brand dry dog kibble between April 1, 2007 and June 30, 2009; and/or
- (b) Ultra brand dog biscuits between April 1, 2007 and April 30, 2011

at the following retailer: \_\_\_\_\_. I declare that I saw and relied upon a "Guaranteed Analysis" that included a reference to Bacillus CFUs in purchasing this product.

I further certify that in consideration for the right to receive either a cash payment of \$2.00, or a \$5.00 Gift Certificate for any Nutro product, or a donation of my claim to an animal shelter and/or charities, I expressly release and agree that I shall not hereinafter institute, maintain or assert in any way any claims against The Nutro Company and Mars Incorporated, their predecessors, heirs, representatives, assigns, agents, distributors, customers, wholesalers, retailers, or employees, past and present, arising out of or relating to the purchase of Nutro's Ultra brand dry dog kibble (manufactured and/or sold between April 1, 2007 and June 30, 2009) and/or Ultra brand dog biscuits (manufactured and/or sold between April 1, 2007 and April 30, 2011).

I hereby elect to receive (*please circle one*):

- (a) **Gift Certificate** – I elect to receive one \$5.00 Gift Certificate for any Nutro product; or
- (b) **Check** – I elect to receive a \$2.00 check from Nutro; or
- (c) **Donation** – I elect to donate my claim towards Nutro's contribution of dry kibble product (worth \$5.00 at retail price) to animal shelters and/or animal charities of Nutro's choice.

I understand that The Nutro Company and Mars Incorporated have the right to verify and dispute this Claim. I declare under penalty of perjury under the laws of the state in which I execute this Claim Form and the United States of America that the foregoing is true and correct, and that this declaration was executed on:

Dated: \_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print Full Name

\_\_\_\_\_  
Email Address

\_\_\_\_\_  
Mailing Address

\_\_\_\_\_  
City, State, Zip Code

# **EXHIBIT E**

## **NOTICE OF CLASS ACTION SETTLEMENT**

*Damien Monteleone v. The Nutro Company et al.*

Case No. 2:14-cv-00801-ES-JAD, United States District Court for the District of New Jersey, Newark Division

**ATTENTION ALL PERSONS WHO PURCHASED ULTRA™ BRAND DRY DOG KIBBLE PRODUCTS AND/OR ULTRA™ BRAND DOG BISCUIT PRODUCTS WITH A GUARANTEED ANALYSIS REFERENCING *BACILLUS***

**A Federal Court has ordered distribution of this notice in connection with the settlement of a class action. This is not a solicitation.**

**THE ACTION AND THE SETTLEMENT.** This Notice concerns a proposed settlement of a class action lawsuit filed against THE NUTRO COMPANY and MARS, INCORPORATED (“Defendants”). The lawsuit alleges that Defendants violated the law by labeling and selling Nutro’s Ultra™ brand dry dog kibble (between April 1, 2007 and June 30, 2009) and/or Ultra™ brand dog biscuits (between April 1, 2007 and April 30, 2011) with a “Guaranteed Analysis” regarding the amount of *Bacillus* Species contained therein. Plaintiff believes he has viable claims, both individually and on behalf of a nationwide class of consumers (excluding California consumers), against Defendants and Defendants believe they have valid defenses. Notwithstanding, Plaintiff and Defendants (collectively the “Parties”) have agreed to settle the matter even though the Court has not held a trial or ruled in favor of either party on any disputed issues. It is important to note that notwithstanding the accuracy of the afore-mentioned *Bacillus* labeling, **at no time were animals ever harmed or at risk due to the presence or lack thereof of *Bacillus* in the dog food products at issue in this litigation.** Rather, the allegation (if proven true) would establish that an additive (a probiotic) was substantially missing from the dog food products.

**WHO IS ENTITLED TO TAKE PART IN THE SETTLEMENT.** If you reside in the United States (excluding residents of California) and purchased an Ultra™ brand dry dog kibble product (between April 1, 2007 and June 30, 2009) and/or an Ultra™ brand dog biscuit product (between April 1, 2007 and April 30, 2011) that contained a “Guaranteed Analysis” regarding the amount of *Bacillus* Species contained therein, you are a Class Member and a proposed class action settlement (“Settlement”) could affect your legal rights. You may be entitled to file a claim for a cash payment from a fund that will be created by the Settlement. This Notice is only a summary. You can obtain the full class action notice, which explains the Settlement and your rights under it, by visiting [www.ultradogfoodsettlement.com](http://www.ultradogfoodsettlement.com). Without admitting liability, Defendants have agreed to provide Class Members (who do not opt out and who return a valid claim form establishing their class membership) with either a \$2.00 check or a \$5.00 Gift Certificate towards the purchase of Nutro dog food products (Class Members can also elect to donate their claim to charity). Nutro also has agreed to pay court-approved attorneys’ fees and expenses (in an amount *not to exceed* \$375,000.00) and a class representative incentive award (in an amount *not to exceed* \$5,000.00).

**HOW TO MAKE A CLAIM.** If you are a Class Member and wish to receive a settlement payment, you must fill out and submit a valid Claim Form. Claim Forms can be obtained or filled out online at the following website(s): [www.ultradogfoodsettlement.com](http://www.ultradogfoodsettlement.com) or [www.nutro.com](http://www.nutro.com). This must be done no later than \_\_\_\_\_.

**FINAL JUDGMENT AND RELEASE OF ALL CLAIMS.** If the Court approves the proposed settlement, it will enter a final judgment in the action on the merits as to all Class Members who do not request to be excluded from the Class. All Class Members who submit claims, and all Class Members who do not validly and timely request to be excluded from the proposed Settlement, shall be subject to a binding judgment. Such Class members will be forever barred from bringing their own lawsuits and shall be deemed to have released Defendants and their agents from all claims, causes of action or losses of whatever kind or nature that were asserted or could have been asserted in the lawsuit listed in this notice or that arise from that lawsuit.

**NOTICE OF SETTLEMENT APPROVAL HEARING.** The United States District Court for the District of New Jersey, Newark Division, will hold a hearing on \_\_\_\_\_, 20\_\_ at \_\_\_\_\_ a.m./p.m., in the Martin Luther King Building & U.S. Courthouse, located at 50 Walnut Street, Newark, New Jersey 07101, to consider whether to grant final approval to the proposed Settlement and Class Counsel’s request for attorneys’ fees and costs, incentive awards to representative Plaintiffs, and certain settlement administration expenses. You have the right to appear at the hearing, although you do not have to. You may comment on, or object to, the terms of the proposed settlement by [DATE]. The full notice describes how to submit comments or objections.

**TO EXCLUDE YOURSELF FROM THE SETTLEMENT.** If you do not wish to participate in or be bound by the Settlement, you must exclude yourself as described in the full notice, by [DATE], or you will be barred from prosecuting any legal action against Defendants related to the settled claims. If you exclude yourself, you may NOT file a claim and you will not receive any compensation under the Settlement. To view the full notice or fill out a Claim Form, please visit [www.ultradogfoodsettlement.com](http://www.ultradogfoodsettlement.com) or [www.nutro.com](http://www.nutro.com).

**DO NOT CONTACT THE COURT WITH QUESTIONS**

**YOU MAY GET MORE INFORMATION OR SUBMIT A CLAIM AT [WWW.ULTRADOGFOODSETTLEMENT.COM](http://WWW.ULTRADOGFOODSETTLEMENT.COM)**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

DAMIAN MONTELEONE, an individual and  
on behalf of all others similarly situated,

Plaintiff,

v.

THE NUTRO COMPANY, a Delaware  
corporation; MARS, INCORPORATED, a  
Delaware corporation; and DOES 1 through  
100, inclusive,

Defendants.

Electronically filed

Case No.: 2:14-cv-00801-ES-JAD

**[PROPOSED]  
ORDER GRANTING PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT, CONDITIONALLY  
CERTIFYING SETTLEMENT CLASS,  
APPROVING FORM AND MANNER OF  
NOTICE, AND SCHEDULING FAIRNESS  
HEARING**

**WHEREAS**, this action is pending before this Court as a putative class action brought by plaintiff Damian Monteleone (“Plaintiff”) on behalf of putative class members in 49 states; and

**WHEREAS**, the parties have applied to this Court for an Order preliminarily approving the settlement (“Preliminary Approval Order”) of the above-captioned litigation (“Action”) in accordance with the parties’ Settlement Agreement (“Agreement”), dated December 17, 2014, which, together with the exhibits annexed thereto, sets forth the terms and conditions for a proposed settlement of the Action (the “Settlement”), and for dismissal of the Action with prejudice against defendants The Nutro Company (“Nutro”) and Mars, Incorporated (“Mars”) (collectively, “Defendants”) upon the terms and conditions set forth therein; and

**WHEREAS**, the Court having received, read and considered the Agreement and the exhibits annexed thereto, which have been filed with the Court, and the parties’ submissions; and

**WHEREAS**, it appearing that the parties entered into the Agreement after lengthy, arm’s-length negotiations, including a mediation session with a respected mediator; and

**WHEREAS**, the Court has reviewed the parties’ application for the Preliminary

Approval Order, and found good cause for the same,

**NOW, THEREFORE**, it is hereby **ORDERED, ADJUDGED** and **DECREED** as follows:

1. **Review of Settlement and Incorporation of Terms.** The Court has carefully reviewed the Agreement and the terms of the Settlement. This Preliminary Approval Order incorporates by reference the definitions in the Agreement, and all terms used herein shall have the same meaning as set forth in the Agreement.

2. **Preliminary and Conditional Certification of Settlement Class.** The Court conditionally finds, for settlement purposes only and conditioned upon the entry of this Preliminary Approval Order and the Final Order and Judgment, and the occurrence of the Effective Date, that the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3) have been satisfied, in that (a) the Settlement Class is so numerous that joinder of all individual Settlement Class Members is impracticable; (b) there are questions of law and fact common to the Settlement Class and those common questions of law and fact predominate over any individual questions; (c) the claims of the Plaintiff are typical of the claims of the Class; (d) the Plaintiff and Class Counsel will fairly and adequately represent the interests of the Class; and (e) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

3. Accordingly, the Court hereby conditionally certifies the Settlement Class for settlement purposes only. The Settlement Class is defined as follows:

All person in the United States (excluding residents of the State of California) who purchased Ultra brand dry dog kibble between April 1, 2007 and June 30, 2009 and/or Ultra brand dog biscuits between April 1, 2007 and April 30, 2011. Excluded from the Settlement Class are all persons who are employees, directors, officers, and agents of Defendants or its subsidiaries and affiliated companies, as well as the Court and its immediate family and staff.

4. Having considered the relevant factors set forth in Rule 23, the Court has made a preliminary determination that Plaintiff Damian Monteleone and Class Counsel are adequate

representatives of the Settlement Class and hereby appoints them as such solely for purposes of settlement.

5. **Preliminary Approval of Settlement.** The Parties have agreed to settle the Action upon the terms and conditions set forth in the Agreement, which has been filed with and reviewed by the Court.

6. The Court preliminarily finds: (a) that Plaintiff in the Action, by and through his counsel, has investigated the facts and law relating to the matters alleged in his complaint and evaluated the risks associated with continued litigation, trial, and/or appeal; (b) that the Settlement was reached as a result of arm's-length negotiations between counsel for Plaintiff and counsel for Defendants and a mediation session with a respected mediator, the Honorable Mark B. Epstein (Ret.); (c) that the proponents of the settlement, counsel for the parties, are experienced in similar litigation; and (d) that the Settlement confers substantial benefits upon the Settlement Class, particularly in light of the damages that Plaintiff and Class Counsel believe are potentially recoverable or provable at trial, without the costs, uncertainties, delays, and other risks associated with continued litigation, trial, and/or appeal.

7. Accordingly, the Court preliminarily approves the Agreement and the terms and conditions of the Settlement as fair, reasonable, and adequate pursuant to Federal Rule of Civil Procedure 23(e), subject to further consideration at the Fairness Hearing (as described below).

8. **Fairness Hearing.** Pursuant to Rule 23(e), a hearing (the "Fairness Hearing") will be held before this Court at the Martin Luther King Building & U.S. Courthouse, 50 Walnut Street, Newark, NJ 07101 on \_\_\_\_\_, 2015 at \_\_\_\_ a.m./p.m., for the following purposes: (a) to determine whether the Settlement Class meets all applicable requirements of Federal Rules of Civil Procedure 23 and, thus, the Settlement Class should be finally certified for purposes of effectuating the Settlement; (b) to determine whether the proposed Settlement of the Action on the terms and conditions provided for in the Agreement are fair, reasonable and adequate in accordance with Federal Rule of Civil Procedure 23(e) and therefore should be approved by the Court; (c) to consider the application of Class Counsel for attorneys' fees, costs,

and expenses, as provided for in the Agreement; (d) to consider the application of Plaintiff for an incentive award for serving as class representative, as provided for in the Agreement; (e) to determine whether a final approval order and judgment should be entered herein; (f) to consider the release provided for in the Settlement Agreement; and (g) to consider and determine such other matters as the Court deems just and appropriate.

9. The Court may adjourn or continue the Fairness Hearing without further notice to the Settlement Class.

10. The parties may further modify the Agreement prior to the Fairness Hearing so long as such modifications do not materially change the terms of the Settlement provided thereunder. The Court may approve the Agreement with such modifications as may be agreed to by the parties, if appropriate, without further notice to the Settlement Class.

11. After the Fairness Hearing, the Court may enter a Final Order and Judgment in accordance with the Agreement that will adjudicate the rights of the Settlement Class Members (as defined in the Agreement) with respect to the claims being settled.

12. **Approval of Form of Notice.** The Court hereby approves, as to form and content, the proposed notice annexed as Exhibit “B” to the Settlement Agreement (“Notice”) and the short-form notice that is annexed as Exhibit “E” to the Settlement Agreement (“Summary Notice”). The Court finds that the Notice and Summary Notice meet the requirements of Federal Rule of Civil Procedure 23(c)(2)(B) and (e), and due process, and are the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all persons entitled thereto.

13. **Approval of Notice Procedures.** The Court hereby approves the procedures set forth in the Settlement Agreement, and described below, for providing notice to the proposed Settlement Class. The Court finds that the procedures are fair, reasonable, and adequate; the best notice practicable under the circumstances; consistent with due process; and shall constitute due and sufficient notice to all persons entitled thereto.

14. As soon as possible after the entry of this Preliminary Approval Order, but not

later than thirty (30) days after the entry of this Preliminary Approval Order, Plaintiff and Defendants will coordinate with the Settlement Administrator (as defined below) to provide notice to the Settlement Class as follows:

(a) by emailing the Notice substantially in the form attached as Exhibit “B” to the Agreement, to the last known email addresses of each potential member of the Settlement Class to the extent such email address information exists in Nutro’s consumer databases, is a valid email address, and the Settlement Class Member has not withheld his/her consent to being contacted by Nutro via email;

(b) by mailing the Notice and Summary Notice substantially in the forms attached as Exhibit “B” and “E” to the Agreement, to in-house counsel for PetSmart and Petco requesting that they post the Summary Notice of the settlement substantially in the form attached as Exhibit “E” to the Agreement at the point of purchase in their stores for the duration of the Claim Period, provided however that the Parties shall not represent, warrant, or guarantee that PetSmart and Petco actually will post the Summary Notice in their stores;

(c) by publishing the Notice on Nutro’s website ([www.nutro.com](http://www.nutro.com)), to be marked for “Customers Only” on the top half of the website’s homepage, for the duration of the Claim Period; and

(d) by providing a website address in the Notice and Summary Notice ([www.ultradogfoodsettlement.com](http://www.ultradogfoodsettlement.com)) to a settlement website to be designed and administered by the Settlement Administrator that will contain the settlement documents (including but not limited to the Notice and Claim Form), a list of important dates, and any other information to which the Parties may agree.

15. The costs of providing notice to potential Settlement Class members, the processing of claims, and all other administrative expenses shall be paid in accordance with the applicable provisions of the Agreement.

16. At least 14 days prior to the Fairness Hearing, Defendants, through their counsel of record, shall cause to be filed with the Court sworn affidavits evidencing compliance with the

provisions of Agreement as it relates to providing Notice.

17. **Appointment of Settlement Administrator.** The Garden City Group, Inc. is hereby approved and appointed as Settlement Administrator for the Settlement and shall perform all of the duties of the Settlement Administrator set forth in the Agreement, including dissemination of the Notice and Summary Notice, the processing of claims, responding to inquiries from potential members of the Settlement Class, and other administrative functions, all under the direction and supervision of the Court.

18. **Participation in Settlement and Submission of Claims.** To participate in the Settlement, Settlement Class Members will have until \_\_\_\_\_, 2015 to submit their Claim Forms, as provided for in the Notice and Summary Notice, which is due, adequate, and sufficient time. The Settlement Administrator shall have authority to accept or reject claims in accordance with the Agreement.

19. Any Class member may enter an appearance in the Litigation, at his or her own expense, individually or through counsel. All Class members who do not enter an appearance will be represented by Class Counsel. All Settlement Class Members shall be bound by all determinations and judgments in the Action concerning the settlement, whether favorable or unfavorable to the Settlement Class.

20. **Objections to Settlement.** Any Settlement Class Member may object to the Settlement, the certification of the Settlement Class, the entry of the Final Order and Judgment, the amount of fees received by Class Counsel, and/or the amount of the incentive award requested by the Plaintiff. Any Settlement Class Member who intends to object must send a written, signed objection by fax, U.S. mail or email to the Settlement Administrator and send by U.S. mail or email a copy to Class Counsel and Defense Counsel at the address set forth below, postmarked (or the equivalent for fax or email) no later than \_\_\_\_\_, 2015. Objections received after the deadline will not be considered. Settlement Class Members who object must set forth their full name, current address, and telephone number.

Settlement Administrator

THE GARDEN CITY GROUP, INC.  
815 Western Ave., Suite 200  
Seattle, WA 98104  
Telephone: (206) 876-5241  
Facsimile: (206) 876-5201

Class Counsel

John H. Donboli  
DEL MAR LAW GROUP, LLP  
12250 El Camino Real  
San Diego, CA 92130  
Telephone: (858) 793-6244  
Facsimile: (858) 724-1490  
E-mail: JDonboli@delmarlawgroup.com

Defendants

David F. Forkner  
WILLIAMS & CONNOLLY LLP  
725 Twelfth Street NW  
Washington, DC 20005  
Telephone: (202) 434-5000  
Facsimile: (202) 434-5792  
E-mail: DForkner@wc.com

21. Settlement Class Members who do not serve timely written objections in the manner provided for in this Preliminary Approval Order shall be deemed to have waived all objections and shall forever be foreclosed from making any objection to or appeal of the fairness, reasonableness or adequacy of the proposed Settlement, and to the award of fees and expenses to Class Counsel and other costs, all as set forth in the Agreement and this Preliminary Approval Order. No Settlement Class Member shall be entitled to be heard at the Fairness Hearing (whether individually or through separate counsel) or to object to the Settlement, and no written objections or briefs submitted by any Settlement Class Member shall be received or considered by the Court at the Fairness Hearing, unless written notice of the objecting class member's intention to appear at the Fairness Hearing and copies of any written objections and/or briefs shall have been filed with the Court and served on Class Counsel and Defense Counsel by

\_\_\_\_\_, 2015. Settlement Class members who do not oppose the Settlement, Class Counsel's application for attorneys' fees, costs, and expenses, or Plaintiff's incentive fee aware need not take any action.

22. **Requesting Exclusion from Settlement Class.** Any member of the Settlement Class may choose to exclude himself or herself from the Settlement. Any such person who chooses to be excluded from the Settlement will not be a Settlement Class Member and shall relinquish his or her rights to benefits with respect to the Settlement, should it be approved. Any member of the Settlement Class who does not choose to exclude himself or herself from the Settlement shall be bound by the terms of the Agreement and Settlement, if finally approved by the Court, and any decisions made or orders entered in the Action.

23. Any putative Settlement Class Member who chooses to opt out of the Settlement must send a signed letter by fax, U.S. Mail, or email to: The Garden City Group, Inc., 815 Western Ave., Suite 200, Seattle, WA 98104, postmarked (or the equivalent for fax or email) no later than \_\_\_\_\_, 2015.

24. Upon the Effective Date, as defined in the Agreement, all members of the Settlement Class who have not opted out of the settlement shall be enjoined and barred from asserting any of the Released Claims against Defendants, and each Settlement Class Member shall be deemed to release any and all such Released Claims as against Defendants, as these terms are defined in the Agreement. All members of the Settlement Class who submit valid and timely requests for exclusion in the manner set forth above and in the Agreement shall have no rights under the Agreement and shall not be bound by the Agreement or the Final Order and Judgment.

25. **Other Actions and Claims.** Pending resolution of these settlement proceedings, no other action now pending or hereinafter filed arising out of all or any part of the subject matter of the Action shall be maintained as a class action and, except as provided by further order of the Court, for good cause shown, all persons are hereby enjoined, during the pendency of these settlement proceedings, from filing or prosecuting purported class actions against

Defendants with respect to any of the Released Claims as defined in the Agreement. Pending final determination of whether the proposed Settlement should be approved, no Settlement Class Member directly, derivatively, in a representative capacity, or in any other capacity, shall commence or continue any action against any of the Released Parties (as that term is defined in the Agreement) in any court or tribunal asserting any of the Released Claims (as that term is defined in the Agreement).

26. **Stay of Proceedings.** Pending the Fairness Hearing, all proceedings in the Action, other than proceedings necessary to carry out or enforce the terms and conditions of the Agreement and this Preliminary Approval Order, are stayed.

27. **Failure to Obtain Final Approval.** In the event the Agreement and Settlement are not finally approved by the Court, or for any reason the Parties fail to obtain entry of the Final Order and Judgment as contemplated in the Agreement, or the Agreement is terminated pursuant to its terms for any reason or the Effective Date does not occur for any reason, then the following shall apply:

(a) All orders and findings entered in connection with the Settlement and Agreement shall become null and void and have no force and effect whatsoever, shall not be used or referred to for any purposes whatsoever, and shall not be admissible or discoverable in this or any other proceeding;

(b) The conditional certification of the Settlement Class pursuant to this Preliminary Approval Order shall be vacated automatically, and the Action shall proceed as though the Settlement Class had never been certified pursuant to the Agreement and such findings had never been made;

(c) Nothing contained in this Preliminary Approval Order is, or may be construed as, a presumption, concession or admission by or against Defendants or Plaintiff of any default, liability or wrongdoing as to any facts or claims alleged or asserted in the Action, or in any actions or proceedings, whether civil, criminal or administrative, including, but not limited to, factual or legal matters relating to any effort to certify the Action as a class action;

(d) Nothing in this Preliminary Approval Order or pertaining to the Agreement, including any of the documents or statements generated or received pursuant to the claims administration process, shall be used as evidence in any further proceeding in the Action; and

(e) All of the Court's prior orders having nothing whatsoever to do with class certification shall, subject to this Preliminary Approval Order, remain in force and effect.

28. **No Admission.** Neither the Agreement, nor any of its terms or provisions, nor any of the negotiations or proceedings connected with it, nor this Order, shall be construed in this or any lawsuit as an admission or concession by Defendants of the truth of any of the allegations of the Action, or of any liability, fault, or wrongdoing of any kind, or by the named Plaintiff Damian Monteleone or any other member of the Settlement Class of the merit of any defense or lack of merit of any claim.

29. **Miscellaneous.** Class Counsel and Defense Counsel are hereby authorized to use all reasonable procedures in connection with approval and administration of the settlement that are not materially inconsistent with this Preliminary Approval Order or the Agreement, including making, without further approval of the Court, minor changes to the form or content of the Notice, Summary Notice, and other exhibits that they jointly agree are reasonable or necessary to effectuate the Settlement and the purposes of this Preliminary Approval Order.

30. **Continuances.** The Court reserves the right to adjourn or continue the date of the Fairness Hearing without further notice to the Settlement Class, and retains jurisdiction to consider all further applications arising out of or connected with the proposed Settlement.

**IT IS SO ORDERED** on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

---

Hon. Esther Salas, U.S. District Judge