

**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**

**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 (“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 December 7, 2015 at 10:30 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 45 calendar days from the date that Notice is mailed, 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, 45 calendar days from the date that Notice is mailed, 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



*45 calendar days from the date that  
Notice is mailed*

, 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 *45 calendar days from the date that  
Notice is mailed*, 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 4<sup>th</sup> day of August, 2015.

It is further ordered that the parties are to file a Motion for Final Approval of the settlement and attorneys' fees no later than 24 calendar days before the date of the final approval hearing.

  
Hon. Esther Salas, U.S. District Judge