

**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.:

**NOTICE OF REMOVAL**

**TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT:**

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1332(d), 1441, 1446 and 1453 Defendants, The Nutro Company (“Nutra”) and Mars Incorporated (“Mars”), (collectively the “Mars Defendants”) give notice of removal of an action filed against them in the Superior Court of the State of New Jersey, Essex County, to the United States District Court for the District of New Jersey. The grounds for removal are as follows:

**THE REMOVED CASE**

1. On or about December 26, 2013, Damian Monteleone (“Plaintiff”), filed a putative nationwide class action complaint (“Complaint”) in the Superior Court of New Jersey, Law Division, Essex County, captioned *Damian Monteleone, an individual and on behalf of all others similarly situated v. The Nutro Company, a Delaware corporation, Mars Incorporated, a Delaware corporation, and Does 1 through 100, inclusive*, Docket No. ESX-L-9885-13.

2. In the Complaint, Plaintiff, “on behalf of all purchasers of dog food products manufactured, distributed, marketed, and/or sold by [the Mars Defendants] nationwide, except

California,” alleges that the Mars Defendants falsely claimed that their “dog food products are or were a source of live microbial spores.” Compl. ¶¶ 1-2. Based on this alleged conduct, Plaintiff purports to plead claims against the Mars Defendants for (1) common law equitable fraud; (2) common law negligent misrepresentation; and (3) violations of New Jersey Consumer Fraud Act, N.J. Stat. 56:8-1, *et seq.*

#### **THE REMOVAL IS TIMELY**

3. The removal is timely under 28 U.S.C. § 1446(b). Plaintiff served the Mars Defendants with copies of the Complaint on January 9, 2014. *See* Fed. R. Civ. P. 4(e)(1). The Mars Defendants filed this Notice of Removal within thirty (30) days of service, as required under the law. *See, e.g., Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999).

#### **THE CONSENT REQUIREMENT IS INAPPLICABLE**

4. The Mars Defendants are the only named defendants in the case (excluding the fictitious “Doe” defendants, which are disregarded for purposes of removal, *see* 28 U.S.C. § 1441(a); *Green v. Am. Online (AOL)*, 318 F.3d 465, 470 (3d Cir. 2003) (“John Doe” defendants not required to consent because “the general rule that all defendants must join in a notice of removal may be disregarded where . . . the non-joining defendants are unknown”)) and the Mars Defendants consent to removal. In any event, this case could be removed without the consent of any other defendant as provided by 28 U.S.C. § 1453(b).

#### **THE VENUE REQUIREMENT IS MET**

5. Venue is proper under 28 U.S.C. § 1441(a) because this Court is the United States District Court for the district and division embracing the place where the state court case was pending.

### FEDERAL JURISDICTION EXISTS

6. Federal jurisdiction exists under the Class Action Fairness Act of 2005 (“CAFA”), Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. §§ 1332(d), 1335, 1441, 1453, 1603, and 1711-1715). CAFA confers federal jurisdiction over putative class actions involving: (a) minimal diversity (*i.e.*, diversity between any defendant and any putative class member); (b) at least 100 putative class members; and (c) at least \$5 million in controversy, exclusive of interest and costs. *See* 28 U.S.C. § 1332(d); *Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. 1345, 1348 (2013). This case satisfies CAFA’s requirements.

#### A. The Parties Are Diverse

7. The parties are minimally diverse because the Mars Defendants and Plaintiff are, and were at all relevant times, citizens of different states. *See* 28 U.S.C. § 1332(d)(2)(A) (providing that for purposes of CAFA jurisdiction, minimal diversity requires “any member of a class of plaintiffs” to be “a citizen of a State different from any defendant”).

8. Plaintiff was (and is) a New Jersey resident and citizen. *See* Compl. ¶ 3 (“Plaintiff is an individual and consumer residing in Glenn Ridge, New Jersey”); *see also* 28 U.S.C. § 1332(a)(1) (an individual is a citizen of the state in which he or she is domiciled); *Dist. of Columbia v. Murphy*, 314 U.S. 441, 455 (1941) (while residence alone is not the equivalent of citizenship, residence is properly taken as domicile “until facts adduced establish the contrary”); *Krasnov v. Dinan*, 465 F.2d 1298, 1300 (3d Cir. 1972) (listing residence creates a rebuttable presumption of domicile).

9. A corporation is deemed to be a citizen of the state in which it is incorporated and where it has its principal place of business. 28 U.S.C. § 1332(c)(1). At the time of the filing of the pleadings and this notice of removal, Mars was (and remains) incorporated in Delaware. *See* Compl. at 1. Mars’ headquarters and principal place of business was (and remains) in McLean,

Virginia. *See id.* ¶ 5. At the time of the filing of the pleadings and this notice of removal, Nutro was (and remains) incorporated in California, with a principal place of business in Franklin, Tennessee. *See* Compl. ¶ 4; *see also* Declaration of Monica Glass (“Glass Decl.”) ¶ 3 (attached hereto as Exhibit B).

**B. The Proposed Nation-Wide Putative Class Exceeds 100**

10. The Mars Defendants do not concede the propriety of Plaintiff’s putative class or that Plaintiff has pled a proper class. Defendants do not waive and, to the contrary, reserve their rights to challenge the propriety of the putative class in all respects. However, the Court looks to a plaintiff’s allegations respecting class size for purposes of removal. *See Standard Fire Ins. Co.*, 133 S.Ct. at 1348.

11. As pled, Plaintiff’s proposed class easily exceeds 100 putative members. *See* 28 U.S.C. § 1332(d)(5)(B). Plaintiff purports to maintain a nationwide putative class action (excluding California) on behalf of all purchasers who, from December 2007 through April 2011, “purchased [the Mars] Defendants’ dog food products with a ‘Guaranteed Analysis’ that included a reference to millions of *Bacillus* CFUs (the ‘Class’).” Compl. ¶ 22. During this period, the Mars Defendants’ sold the products at issue in this case to over 1,000 retail outlets nationwide (excluding California), which in turn sold such products to consumers. *See* Glass Decl. ¶¶ 4-5. Thus, the proposed putative nation-wide class well exceeds 100 members.

**C. The Amount In Controversy Exceeds \$5 Million**

12. To determine the amount in controversy under CAFA, the Court first reads the complaint filed in the state court. *See Samuel-Bassett v. KIA Motors Am., Inc.*, 357 F.3d 392, 398 (3d Cir. 2004). Where, as here, the plaintiff has not specifically averred in the complaint that the amount in controversy is less than \$5 million, the case may be removed unless “it appears to a legal certainty that the plaintiff cannot recover the jurisdictional amount.”

*Frederico v. Home Depot*, 507 F.3d 188, 196-97 (3d Cir. 2007). Here, although Defendants deny that Plaintiff or the putative class is entitled to any relief, it does not appear “to a legal certainty” that the amount in controversy falls below \$5 million.

13. “To ‘determine whether the matter in controversy’ exceeds [\$5 million], ‘the claims of the individual class members shall be aggregated.’” *Standard Fire Ins. Co.*, 133 S.Ct. at 1348 (quoting 28 U.S.C. § 1332(d)(6)). “And those ‘class members’ include ‘persons (named or unnamed) who fall within the definition of the *proposed* or certified class.’” *Id.* (quoting 28 U.S.C. § 1332(d)(1)(D) (emphasis in original)). As applied here, the Court must aggregate the value of the claim of each person who falls within the definition of the proposed class and determine whether the resulting sum exceeds \$5 million. It does here for several reasons.

14. First, for each putative class member, Plaintiff seeks “an amount equal to the purchase price they paid plus applicable sales tax” over a six-year period. Compl. ¶ 19; *see also id.* ¶ 41 (“Plaintiff and Class Members seek the full return of their purchase monies, plus the return of applicable sales taxes paid by Class Members.”). During the relevant time period, the Mars Defendants sold the dog food products at issue to over 1,000 retail outlets nationwide (excluding California) for re-sale to consumers. *See Glass Decl.* ¶¶ 4-5. The Mars Defendants’ gross wholesale revenues from those sales exceeded \$10 million. *See id.*

15. Second, Plaintiff seeks attorney’s fees, which the Court must consider when determining the amount in controversy. *See Frederico*, 507 F.3d at 199; Compl. ¶ 54 (“Plaintiff seeks the recovery of attorneys’ fees, filing fees, and costs pursuant to N.J. Stat § 56:8-19”). As recognized by the Third Circuit, “Attorney’s fees can be as much as thirty percent of the judgment.” *Frederico*, 507 F.3d at 199; *see also In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 303 (3d Cir. 2005) (citing a study done by the Federal Judicial Center that found a “median percentage recovery fee range of 27–30%” for “all class actions resolved or settled over a four-year period”).

16. Third, Plaintiff seeks treble and punitive damages, which the Court also must consider when determining the amount in controversy for purposes of CAFA. *See Frederico*, 507 F.3d at 199; *see* Compl. ¶ 41 (seeking punitive damages); *id.* at 7 (seeking treble damages). New Jersey law provides for both treble and punitive damages. *See, e.g.*, N.J. Stat. Ann. § 56:18-19 (permitting treble damages); *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610, 691 A.2d 350, 367 (1997) (permitting punitive damages for fraud). Trebling the amount of compensatory damages Plaintiff seeks on behalf of a putative nationwide class would well exceed the \$5 million jurisdictional threshold.

#### **PAPERS FROM THE REMOVED ACTION**

17. Pursuant to 28 U.S.C. § 1446(a), true and correct copies of all process, pleadings, orders and other papers or exhibits filed in the State court have been filed with the Court. *See* Exhibit (“Ex.”) A.

#### **NOTICE TO ADVERSE PARTY AND STATE COURT**

18. Pursuant to 28 U.S.C. § 1446(d), the Mars Defendants are serving written notice of the removal of this case on Plaintiff’s counsel:

Ronald A. Giller, Esq.  
Jeffrey Y. Spiegel, Esq.  
GORDON & REES LLP  
18 Columbia Turnpike, Suite 220  
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19. Pursuant to 28 U.S.C. § 1446(d), the Mars Defendants will promptly file a Notice of Filing Removal with the Clerk of the Superior Court of New Jersey Law Division: Essex County. A true and correct copy of this Notice is attached hereto as Exhibit C.

**CONCLUSION**

20. The Mars Defendants hereby remove the above-captioned action from the Superior Court of New Jersey Law Division: Essex County, and requests that further proceedings be conducted in this Court as provided by law.

Dated: February 7, 2014

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## **EXHIBIT A**



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behalf of all others similarly situated

DEC 26 2013

FILED IN DIVISION  
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DAMIAN MONTELEONE, an individual and  
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Plaintiff,

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

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: ESSEX COUNTY

DOCKET NO.: ESX-L 9885-13

CLASS ACTION  
COMPLAINT

DEMAND FOR JURY TRIAL

COMES NOW, plaintiff DAMIAN MONTELEONE ("Plaintiff"), as an individual and  
on behalf of the general public and all others similarly situated, by her undersigned attorneys,  
alleges as follows:

NATURE OF THE CASE

1. This is a class action case brought on behalf of all purchasers of dog food  
products manufactured, distributed, marketed, and/or sold by defendants THE NUTRO  
COMPANY ("Nutro") and/or MARS, INCORPORATED ("Mars") nationwide, except  
California. Through an unlawful, deceptive and unfair course of conduct, Nutro, Mars, and  
DOES 1 through 100 (collectively "Defendants"), manufactured, marketed, and/or sold a variety  
of dog food products to the United States general public during the relevant six year statutory  
time period with a "Guaranteed Analysis" pertaining to health-promoting, *Bacillus* in Nutro

brand dog food kibble and Nutro brand dog food biscuits that are marketed as a live source of microbials. (Hereinafter, Nutro brand dog food kibble and Nutro brand dog food biscuits may also be referred to as "dog food products".) Generally speaking, the *Bacillus* genus is a group of "healthy" spore forming bacteria (such as *Bacillus licheniformis* and *Bacillus subtilis* - both of which are advertised as being present in Defendants' dog food products). The "Guaranteed Analysis" is and/or was prominently printed on the product packaging during the relevant statutory time period.

2. The representation that Defendants' dog food products are or were a source of live microbial spores during the relevant statutory time period is and/or was false, deceptive and misleading pursuant to New Jersey law.<sup>1</sup>

#### PARTIES

3. Plaintiff is an individual and consumer residing in Glen Ridge, New Jersey.

4. Defendant THE NUTRO COMPANY ("Nutro") is a corporation that is organized and exists under the laws of the State of California. Nutro may be served with process in this matter by serving its California registered agent for service of process, CT Corporation, 818 W 7th Street, Los Angeles, CA 90017. Nutro is a leading manufacturer of dog food products, including but not limited to the Nutro brand dog biscuits and Nutro brand dog food kibble purchased by Plaintiff on multiple occasions, including but not limited to from December 2007 until April 2011 in or around Glen Ridge, New Jersey.

5. Defendant MARS, INCORPORATED ("Mars") is a worldwide manufacturer of confectionary, pet food and other food products with nearly \$33 billion in annual sales. Mars is ranked as the 5th largest privately-held company in the United States by Forbes. Mars is

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<sup>1</sup> Plaintiff intends to seek nationwide class wide relief (excluding California) on behalf of purchasers of any of Defendants' dog food product that included false representations regarding live microbials – not just the specific brands of Defendants' dog food products purchased by Plaintiff.

headquartered in McLean, Virginia. Mars operates in six business segments in the United States: (a) Chocolate (Hackettstown, New Jersey), Petcare (Franklin, Tennessee), Wm. Wrigley Jr. Company (Chicago, Illinois), Food (Los Angeles, California), Drinks (West Chester, Pennsylvania), and Symbioscience (Rockville, Maryland).

6. Plaintiff is ignorant of the true names and capacities of the defendants sued herein as DOES 1-100, inclusive; therefore, Plaintiff sues these defendants by such fictitious names. Plaintiff is informed and believes that each of the fictitious named defendants are legally responsible in some manner for the occurrences herein alleged, assisted in and about the wrongs complained herein by providing financial support, advice, resources or other assistance. Plaintiff will amend the complaint to allege their true names and capacities when ascertained.

7. Plaintiff is informed and believes that all Defendants were agents, servants and employees of their co-defendants, and in doing the things hereinafter mentioned, were acting within the scope of their authority as such agents, servants and employees with the permission and consent of their co-defendants.

8. At all relevant times, all Defendants constituted a "person" as defined in the Consumer Fraud Act, *N.J.S.A. 56:8-1(d)*.

#### **JURISDICTION AND VENUE**

9. This Court has jurisdiction in this matter because Defendants routinely transact business in Essex County.

10. Venue in this Court is proper because Defendants do business and Plaintiff's transaction took place in Essex County.

#### **GENERAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

11. Plaintiff incorporates herein each and every allegation contained in paragraphs 1

through 10, inclusive, as though fully set forth herein.

12. Defendants manufactured, marketed, and/or sold dog food products that have printed on the product packaging a "Guaranteed Analysis" pertaining to *Bacillus* species (i.e., colony forming units).

13. On information and belief, during the relevant six-year statutory time period, Defendants' dog food products were incapable of forming live *Bacillus* species once ingested.

14. On further information and belief, at some point during the statutory time period, Defendants attempted to change its formula so that live *Bacillus* species could form once ingested; however, such re-formulation does not come near the levels represented by Defendants in the "Guaranteed Analysis." Defendants possess superior knowledge of the true facts which were not disclosed, thereby tolling the running of any applicable statute of limitations.

15. Consumers are particularly vulnerable to these deceptive and fraudulent practices. Consumers rely upon information, such as the "Guaranteed Analysis" on the dog food products purchased by Plaintiff and other members of the nationwide class of consumers (excluding California). In fact, such reliance is undoubtedly justified and a material factor in many individuals' purchasing decisions.

16. New Jersey laws are designed to protect consumers from this type of false representation and predatory conduct.

17. Further, the New Jersey Administrative Code § 13:45A-9.2, entitled "General Advertising Practices," provides, in pertinent part, that the failure of an advertiser to substantiate through documents, records or other written proof any claim made regarding the safety, performance, efficiency, quality or price of advertised merchandise, shall constitute a *per se* violation of the New Jersey Consumer Fraud Act [N.J.S.A. 56:8-1 *et seq.*]. Defendants have no

such written substantiations of their claims.

### THE PLAINTIFF TRANSACTION

18. At all times during the relevant time period, Plaintiff, and all other consumers similarly situated ("Class Members"), purchased improperly labeled Nutro brand dog food kibble and Nutro brand dog food biscuits at various times during the statutory time period beginning in December 2007 and continuing until the time when Nutro apparently corrected the improper labeling in or around April 2011.

19. Plaintiff and Class Members suffered an actual and ascertainable loss in that they parted with their purchase monies (plus sales tax) for a falsely labeled product. As such, Plaintiff and Class Members suffered actual damages in an amount equal to the purchase price they paid plus applicable sales tax.

20. In making the purchase, Plaintiff saw, read, and relied upon the false "Guaranteed Analysis" related to *Bacillus* species contained in the Nutro dog food products. Plaintiff was offended and felt cheated (post-purchase) to learn that the "Guaranteed Analysis" related to *Bacillus* species contained in the Nutro dog food products was a false representation and, as such, seeks restitution and/or the return of the purchase price he paid for the various Nutro brand dog food products that he purchased during the relevant statutory time period, but he also prays for similar relief for all other Class Members nationwide.

21. The putative Class in this case is not intended to apply to California consumers.

### CLASS ALLEGATIONS

22. Plaintiff brings this action on behalf of himself as an individual and on behalf of all other persons similarly situated in the United States (except California) who purchased Defendants' dog food products with a "Guaranteed Analysis" that included a reference to

millions of *Bacillus* CFUs (the "Class").

23. The Class also does not include any persons who previously filed suit against Defendants for similar violations of New Jersey law.

24. The members of the Class are so numerous that joinder of all members is impracticable. The disposition of their claims in a class action will provide substantial benefits to the parties and the Court. On information and belief, the exact number and identities of the members of the Class are ascertainable from the records in Defendants' possession and/or Defendants' retail customers.

25. There is a well-defined community of interest in the questions of law and fact involved in this case.

26. All causes of action herein have been brought and may properly be maintained as a class action pursuant to the provisions of Rule 4:32-1(a) because there is a well-defined community of interest in the litigation and the proposed class is easily ascertainable:

a. Numerosity: On information and belief, the Class is so numerous that the individual joinder of all members would be impracticable.

b. Common Questions Predominate: Common questions of law and fact exist as to all members of the Class, and those questions clearly predominate over any questions that might affect members individually. These common questions of law and fact include, for example, whether Defendants' misrepresentations relating to the amount of CFUs in the "Guaranteed Analysis" constitute an unfair, unlawful, or fraudulent business practice pursuant to N.J.S.A. 56:8-1 et seq. of the New Jersey Consumer Fraud Act.

c. Typicality: On information and belief, Plaintiff's claims are typical of the claims of the members of the Class. Plaintiff and all members of the Class sustained damages

arising out of Defendant's common course of conduct complained herein.

d. Adequacy: Plaintiff will fairly and adequately protect the interest of the members of the Class because Plaintiff has no interests which are adverse to the interests of absent class members and because Plaintiff has retained counsel who possesses significant litigation experience regarding alleged violations of consumer statutes.

e. Superiority: A class action is superior to other available means for the fair and efficient adjudication of this controversy since individual joinder of all members would be impracticable. Class action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently and without the unnecessary duplication of effort and expense that numerous individual actions would engender. Furthermore, since most class members' individual claims for damages are likely to be modest, the expenses and burdens of litigating individual actions would make it difficult or impossible for individual members of the Class to redress the wrongs done to them. An important public interest will be served by addressing the matter as a class action, substantial economies to the litigants and to the judicial system will be realized and the potential for inconsistent or contradictory judgments will be avoided.

#### **FIRST CAUSE OF ACTION**

##### **(For Equitable Fraud Against All Defendants)**

27. Plaintiff re-alleges and incorporates herein by reference each and every allegation contained in Paragraphs 1 through 26, as though set forth in full.

28. During the relevant statutory time period, Defendants engaged in acts and conduct whereby they willfully and intentionally manufactured and sold falsely labeled dog food products with a "Guaranteed Analysis" that was known to be false.

29. Plaintiff is informed and believes and thereon alleges, that when Defendants made these material misrepresentations, they knew them to be false and such representations were made with the intention to deceive and defraud Plaintiff and Class Members and to induce them to act in reliance on Defendants' false representations in the manner herein alleged, or with expectation that Plaintiff and Class Members would so act.

30. Plaintiff and Class Members, at the time these representations were made by Defendants and at the time Plaintiff and Class Members took the actions herein alleged, were ignorant of the falsity of Defendants' representations and believed them to be true. In reliance on these representations, Plaintiff and Class Members were induced to purchase the falsely labeled dog food products that they would not have normally bought. Had Plaintiff and Class Members known the actual facts, they would not have taken such action and would not have purchased Defendants' offending dog food products.

31. As a proximate result of the fraudulent conduct of Defendants as herein alleged, Plaintiff and Class Members were subjected to a material and false representation that turned out after the fact to be false.

32. Plaintiff and Class Members are entitled to rescind the fraudulently induced purchase transactions as it relates to Plaintiff and each and every individual Class Member. Plaintiff and Class Members will return offending products in their possession (if any such products exist) to Defendants to the extent practical and as required by New Jersey law in this regard.

33. Defendants' aforementioned conduct was despicable, malicious, oppressive, fraudulent, and engaged in with a willful and conscious disregard of Plaintiff's and Class Members' rights and with the intention, on the part of Defendants, of thereby depriving Plaintiff



and Class Members of their money (thereby causing an economic harm to Plaintiff and Class Members). Defendants' outrageous conduct, described herein, subjected Plaintiff and Class Members to unjust hardship in a conscious and willful disregard of their rights. By the conduct alleged herein, Defendants are guilty of fraud, oppression, and malice entitling Plaintiff and Class Members to an award of exemplary and punitive damages in addition to their actual damages in amount to be proven at trial.

**SECOND CAUSE OF ACTION**

**(For Negligent Misrepresentation Against All Defendants)**

34. Plaintiff re-alleges and incorporates herein by reference each and every allegation contained in Paragraphs 1 through 33, as though set forth in full.

35. During the relevant statutory time period, Defendants engaged in acts and conduct whereby they willfully and intentionally manufactured and sold falsely labeled dog food products with a "Guaranteed Analysis" that was false.

36. Plaintiff is informed and believes and thereon alleges, that when Defendants made these representations, they knew or should have known the representations were false and such representations were would likely deceive Plaintiff and Class Members and/or induce them to act in reliance of the false representations.

37. When Defendants made the representations set forth above, they had no reasonable grounds for believing them to be true.

38. Plaintiff and Class Members, at the time the representations were made by Defendants, and at the time it took the actions herein alleged, were ignorant of the falsity of the representations and believed them to be true. In reliance on these representations, Plaintiff and Class Members were induced to and did pay monies to purchase Defendants' products.

39. Had Plaintiff and Class Members known the actual facts, they would not have taken such action.

40. As a proximate result of the fraudulent conduct of Defendants as herein alleged, Plaintiff and Class Members paid monies to Defendants, through Defendants' regular retail sales channels, to which Defendants are not entitled, and have been damaged in an amount to be proven at trial.

41. Plaintiff and Class Members seek the full return of their purchase monies, plus the return of applicable sales taxes paid by Class Members, prejudgment interest, punitive damages (based on the malicious, fraudulent, and oppressive conduct repeatedly detailed throughout this complaint), and reasonable attorneys' fees and costs as will be determined at time of trial.

### **THIRD CAUSE OF ACTION**

**(Violation of New Jersey's Consumer Fraud Act, N.J. Stat. 56:8-1 *Et Seq.*  
Against All Defendants)**

42. Plaintiff re-alleges and incorporates herein by reference all of the allegations contained in Paragraphs 1 through 41, inclusive, of this complaint as though fully set forth herein.

43. The New Jersey Consumer Fraud Act prohibits "[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise" including any sale or distribution of any services. N.J.S.A. 56:8-2; N.J.S.A. 56:8-1(c), (e).

44. Beginning at or around December, 2007 and continuing up through the time Nutro apparently corrected the improper labeling, in or around April 2011, Defendants committed those acts as described above, by engaging in a pattern of unlawful acts and practices

as numerated in N.J.S.A. 56:8-1 *et seq.*, by manufacturing, distributing, marketing products with false information pertaining the *Bacillus* CFU, which is in violation of New Jersey laws.

45. Defendants engaged in a pattern of unfair business practices that violate the wording and intent of the statutes, by engaging in practices that threatens a violation of law, or violates the policy or spirit of laws because its effects are comparable to or the same as a violation by manufacturing, distributing, and marketing products with the false representations referenced herein.

46. Defendants' conduct with respect to the promotion and marketing of their dog food products, including that these products have printed on the product packaging a "Guaranteed Analysis" pertaining to *Bacillus* species (i.e., colony forming units) when on information and belief, during the relevant six-year statutory time period, Defendants' dog food products were incapable of forming live *Bacillus* species once ingested, constitutes unconscionable commercial practices, deceptions, frauds, false promises or misrepresentations of material facts and a knowing concealment, suppression and omission of a material fact with the intent that others rely upon such concealment, suppression or omission.

47. Defendants' business practices described herein have created an impression that is misleading and deceptive to the ordinary or average consumer.

48. As a result of Defendant's misrepresentations and omissions described herein, Plaintiff and the Class Members purchased Defendants' dog food products after viewing one or more of the misleading dog food products described above and/or the misleading statements described above on the dog food products labeling, because the misleading dog food product labeling led them to believe that they were capable of forming live *Bacillus* species once ingested, which was false.

49. Defendants engaged in these unlawful, unfair and fraudulent business practices for the primary purpose of collecting unlawful and unauthorized monies from Plaintiff and all others similarly situated; thereby unjustly enriching Defendants.

50. As a result of the repeated violations described herein, Defendants received unearned commercial benefits at the expense of their competitors and the public.

51. Plaintiff reserves the right to identify additional violations by Defendants as may be established through discovery.

52. As a direct and legal result of their unlawful, unfair and fraudulent conduct described herein, Defendants have been and will be unjustly enriched by the receipt of ill-gotten gains from customers, including Plaintiff, who unwittingly provided their money to Defendants based on Defendants' fraudulent country of origin designation.

53. Plaintiff and the Class suffered an "injury in fact" because Plaintiff's money was taken by Defendants as a result of Defendants' false representations. Were it not for Defendants' unconscionable practices, Plaintiff and the Class would not have purchased the dog food products as described herein. Accordingly, Plaintiff and the Class suffered an ascertainable loss as a result of being improperly induced to purchase the dog food products during the class period.

54. In prosecuting this action for the enforcement of important rights affecting the public interest, Plaintiff seeks the recovery of attorneys' fees, filing fees, and costs pursuant to N.J. Stat § 56:8-19.

WHEREFORE, Plaintiff prays for relief and judgment against Defendants, as follows:

**PRAYER**

1. Damages according to proof;

2. For a judgment declaring this action to be a proper class action;
3. An order rescinding the purchase transaction of all Class Members and returning the full value of the product purchased to each and every Class Member, including any applicable sales tax;
4. Declaring that Defendants violated the provisions of the New Jersey Consumer Fraud Act, N.J. Stat § 56:8-1 *et seq.*
5. Requiring Defendants to provide restitution to compensate, and to restore all persons in interest, including all Class Members, with all monies acquired by means of Defendants' unfair competition;
6. Punitive and exemplary damages to the extent permitted by New Jersey law under the First and Second Causes of Action;
7. In addition to any other appropriate legal or equitable relief awarded, threefold the damages sustained by any person in interest, including Plaintiff and all Class Members, pursuant to the New Jersey Consumer Fraud Act, N.J. Stat § 56:8-19;
8. Plaintiff's reasonable attorneys' fees and costs as it relates to all causes of action pursuant to, N.J. Stat § 56:8-19;
9. For prejudgment interest as allowed by law; and
10. For such other and further relief as this Court finds just, equitable and proper, including, but not limited to, the remedy of disgorgement.

Dated: December 24, 2013

GORDON & REES LLP  
*Attorneys for Plaintiff*

By: \_\_\_\_\_

Ronald A. Giller  
Jeffrey Y. Spiegel

**JURY DEMAND**

Demand is hereby made for trial by jury as to all issues.

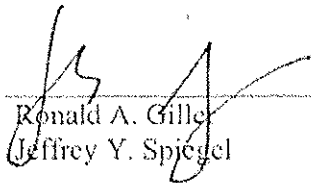
**DESIGNATION OF TRIAL COUNSEL**

Plaintiff hereby designates Ronald A. Giller, Jeffrey Y. Spiegel and Gordon & Rees LLP as trial counsel in this matter.

Dated: December 24, 2013

GORDON & REES LLP  
*Attorneys for Plaintiff*

DEC 27

By:   
\_\_\_\_\_  
Ronald A. Giller  
Jeffrey Y. Spiegel

**CERTIFICATION PURSUANT TO RULE 4:5-1(b)(2)**

It is hereby certified that the matter in controversy is not the subject of any other action pending in any other court or of a pending arbitration proceeding to the best of my knowledge and belief. It is also my understanding and belief that no other action or proceeding is contemplated. At this time, I know of no other parties that should be joined in the above action. I recognize the continuing obligation of each party to file and serve on all parties and the court an amended certification if there is a change in the facts stated in this original certification.

Dated: December 24, 2013

GORDON & REES LLP  
*Attorneys for Plaintiff*

By:   
\_\_\_\_\_  
Ronald A. Giller  
Jeffrey Y. Spiegel

NOTIFICATION TO ATTORNEY GENERAL




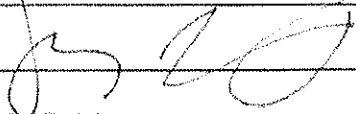
Pursuant to N.J.S.A. 56:8-20, I certify that a copy of this complaint will be served on the Office of the Attorney General, CN 080, Trenton, NJ 08625 as well as the Division of Consumer Affairs, 124 Halsey Street, PO Box 45027, Newark, NJ 07101 within ten days after filing the complaint with the court.

Dated: December 24, 2013

GORDON & REES LLP  
*Attorneys for Plaintiff*

By:   
Ronald A. Giller  
Jeffrey Y. Spiegel

Appendix XII-B1

	<b>CIVIL CASE INFORMATION STATEMENT (CIS)</b> Use for initial Law Division Civil Part pleadings (not motions) under <i>Rule 4:5-1</i> Pleading will be rejected for filing, under <i>Rule 1:5-6(c)</i> , if information above the black bar is not completed or attorney's signature is not affixed		FOR USE BY CLERK'S OFFICE ONLY	
			PAYMENT TYPE: <input type="checkbox"/> CK <input type="checkbox"/> CB <input type="checkbox"/> CA CHG/CK NO:	
			AMOUNT:	
			OVERPAYMENT: BATCH NUMBER:	
ATTORNEY / PRO SE NAME Jeffrey Y. Spiegel		TELEPHONE NUMBER (973) 549-2500	COUNTY OF VENUE Essex	
FIRM NAME (if applicable) Gordon & Rees LLP		DOCKET NUMBER (when available) ESX-L-9885-13		
OFFICE ADDRESS 18 Columbia Turnpike, Suite 220 Florham Park, NJ 07932		DOCUMENT TYPE Class Action Complaint		
		JURY DEMAND <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		
NAME OF PARTY (e.g., John Doe, Plaintiff) Damian Monteleone-Plaintiff		CAPTION Damian Monteleone v. The Nutro Company, MARS Incorporated et al.		
CASE TYPE NUMBER (See reverse side for listing) 508	HURRICANE SANDY RELATED? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	IS THIS A PROFESSIONAL MALPRACTICE CASE? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO IF YOU HAVE CHECKED "YES," SEE N.J.S.A. 2A:53A-27 AND APPLICABLE CASE LAW REGARDING YOUR OBLIGATION TO FILE AN AFFIDAVIT OF MERIT.		
RELATED CASES PENDING? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		IF YES, LIST DOCKET NUMBERS		
DO YOU ANTICIPATE ADDING ANY PARTIES (arising out of same transaction or occurrence)? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		NAME OF DEFENDANT'S PRIMARY INSURANCE COMPANY (if known) <input type="checkbox"/> NONE <input checked="" type="checkbox"/> UNKNOWN		
THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE.				
CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION				
DO PARTIES HAVE A CURRENT, PAST OR RECURRENT RELATIONSHIP? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		IF YES, IS THAT RELATIONSHIP: <input type="checkbox"/> EMPLOYER/EMPLOYEE <input type="checkbox"/> FRIEND/NEIGHBOR <input type="checkbox"/> OTHER (explain) <input type="checkbox"/> FAMILIAL <input checked="" type="checkbox"/> BUSINESS		
DOES THE STATUTE GOVERNING THIS CASE PROVIDE FOR PAYMENT OF FEES BY THE LOSING PARTY? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO				
USE THIS SPACE TO ALERT THE COURT TO ANY SPECIAL CASE CHARACTERISTICS THAT MAY WARRANT INDIVIDUAL MANAGEMENT OR ACCELERATED DISPOSITION Class Action				
				
 Do you or your client need any disability accommodations? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		IF YES, PLEASE IDENTIFY THE REQUESTED ACCOMMODATION		
Will an interpreter be needed? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		IF YES, FOR WHAT LANGUAGE?		
I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with <i>Rule 1:38-7(b)</i> .				
ATTORNEY SIGNATURE 				



**Side 2**



# CIVIL CASE INFORMATION STATEMENT (CIS)

Use for initial pleadings (not motions) under *Rule 4:5-1*

**CASE TYPES** (Choose one and enter number of case type in appropriate space on the reverse side.)

**Track I - 150 days' discovery**

- 151 NAME CHANGE
- 175 FORFEITURE
- 302 TENANCY
- 399 REAL PROPERTY (other than Tenancy, Contract, Condemnation, Complex Commercial or Construction)
- 502 BOOK ACCOUNT (debt collection matters only)
- 505 OTHER INSURANCE CLAIM (including declaratory judgment actions)
- 506 PIP COVERAGE
- 510 UM or UIM CLAIM (coverage issues only)
- 511 ACTION ON NEGOTIABLE INSTRUMENT
- 512 LEMON LAW
- 801 SUMMARY ACTION
- 802 OPEN PUBLIC RECORDS ACT (summary action)
- 999 OTHER (briefly describe nature of action)

**Track II - 300 days' discovery**

- 305 CONSTRUCTION
- 509 EMPLOYMENT (other than CEPA or LAD)
- 599 CONTRACT/COMMERCIAL TRANSACTION
- 603N AUTO NEGLIGENCE - PERSONAL INJURY (non-verbal threshold)
- 603Y AUTO NEGLIGENCE - PERSONAL INJURY (verbal threshold)
- 605 PERSONAL INJURY
- 610 AUTO NEGLIGENCE - PROPERTY DAMAGE
- 621 UM or UIM CLAIM (includes bodily injury)
- 699 TORT - OTHER

**Track III - 450 days' discovery**

- 005 CIVIL RIGHTS
- 301 CONDEMNATION
- 602 ASSAULT AND BATTERY
- 604 MEDICAL MALPRACTICE
- 606 PRODUCT LIABILITY
- 607 PROFESSIONAL MALPRACTICE
- 608 TOXIC TORT
- 609 DEFAMATION
- 616 WHISTLEBLOWER / CONSCIENTIOUS EMPLOYEE PROTECTION ACT (CEPA) CASES
- 617 INVERSE CONDEMNATION
- 618 LAW AGAINST DISCRIMINATION (LAD) CASES

**Track IV - Active Case Management by Individual Judge / 450 days' discovery**

- 156 ENVIRONMENTAL/ENVIRONMENTAL COVERAGE LITIGATION
- 303 MT. LAUREL
- 508 COMPLEX COMMERCIAL
- 513 COMPLEX CONSTRUCTION
- 514 INSURANCE FRAUD
- 620 FALSE CLAIMS ACT
- 701 ACTIONS IN LIEU OF PREROGATIVE WRITS

**Multicounty Litigation (Track IV)**

- |  |   |
|--|---|
| 266 HORMONE REPLACEMENT THERAPY (HRT)  | 288 PRUDENTIAL TORT LITIGATION                            |
| 271 ACCUTANE/ISOTRETINOIN              | 289 REGLAN  |
| 274 RISPERDAL/SEROQUEL/ZYPREXA         | 290 POMPTON LAKES ENVIRONMENTAL LITIGATION                |
| 278 ZOMETAVAREDA                       | 291 PELVIC MESH/GYNECARE                                  |
| 279 GADOLINIUM                         | 292 PELVIC MESH/BARD                                      |
| 281 BRISTOL MYERS SQUIBB ENVIRONMENTAL | 293 DEPUY ASR HIP IMPLANT LITIGATION                      |
| 282 FOSAMAX                            | 295 ALLODERM REGENERATIVE TISSUE MATRIX                   |
| 284 NUVARING                           | 296 STRYKER REJUVENATE/ABC II MODULAR HIP STEM COMPONENTS |
| 285 STRYKER TRIDENT HIP IMPLANTS       | 297 MIRENA CONTRACEPTIVE DEVICE                           |
| 286 LEVAQUIN                           | 601 ASBESTOS  |
| 287 YAZ/YASMIN/OCELLA                  | 623 PROPECIA  |

If you believe this case requires a track other than that provided above, please indicate the reason on Side 1, in the space under "Case Characteristics."

Please check off each applicable category     Putative Class Action     Title 59

ESSEX COUNTY - CIVIL DIVISION  
SUPERIOR COURT OF NJ  
405 MARTIN LUTHER KING JR BLVD  
NEWARK NJ 07102

COURT TELEPHONE NO. (973) 593-5529  
COURT HOURS  
TRACK ASSIGNMENT NOTICE

DATE: DECEMBER 27, 2013  
RE: MONTELEONE VS THE NUTRO COMPANY  
DECKET: ESX 14-009885 13

THE ABOVE CASE HAS BEEN ASSIGNED TO: TRACK 4.

DISCOVERY IS PRESUMPTIVELY 450 DAYS BUT MAY BE ENLARGED OR SHORTENED BY THE JUDGE AND RUNS FROM THE FIRST ANGER OR 90 DAYS FROM SERVICE ON THE FIRST DEFENDANT, WHICHEVER COMES FIRST.

THE MANAGING JUDGE ASSIGNED IS: RON JAMES S. ROTHSCHILD JR

IF YOU HAVE ANY QUESTIONS, CONTACT TEAM 002  
AT: (973) 593-6443 EXT 5431.

IF YOU BELIEVE THAT THE TRACK IS INAPPROPRIATE YOU MUST FILE A CERTIFICATION OF GOOD CAUSE WITHIN 30 DAYS OF THE FILING OF YOUR PLEADING. PLAINTIFF MUST SERVE COPIES OF THIS FORM ON ALL OTHER PARTIES IN ACCORDANCE WITH R.4:5A-2.

ATTENTION:

GORDON & REES LLP  
18 COLUMBIA TURNPIKE  
SUITE 220  
FLORENZ PARK NJ 07932-2266

JUGGRED

**EXHIBIT B**

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.:

**DECLARATION OF MONICA GLASS IN  
SUPPORT OF NOTICE OF REMOVAL**

I, Monica Glass, declare as follows:

1. I am over the age of eighteen, and I am a legal resident of the State of Tennessee. I am employed by the Nutro Company ("Nutra") in Nashville, Tennessee. My current position is Senior Corporate Affairs Manager.
2. This declaration is based upon my personal knowledge and upon information provided by my staff. I have reviewed all the information included in this Declaration and I believe it to be true and correct.
3. Nutro is incorporated in California and has a principal place of business in Franklin, Tennessee.
4. From December 26, 2007 through July 2009, Nutro sold over \$5 million of Nutro brand dog kibble labeled with a "Guaranteed Analysis" that included a reference to "millions of Bacillus." Nutro sold this brand of dog kibble to more than 1,000 retail outlets in states other than California from December 26, 2007 through July 2009.

5. From December 26, 2007 through April 2011, Nutro sold over \$5 million of Nutro brand dog food biscuits labeled with a "Guaranteed Analysis" that included a reference to "millions of Bacillus." Nutro sold this brand of dog food biscuits to more than 1,000 retail outlets in states other than California from December 26, 2007 through April 2011.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 5, 2014

  
\_\_\_\_\_  
Monica Glass

## **EXHIBIT C**

IN THE SUPERIOR COURT OF THE STATE OF NEW JERSEY  
FOR ESSEX COUNTY

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.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: ESSEX COUNTY

Docket No. ESX-L9885-13

**NOTICE OF FILING OF REMOVAL TO FEDERAL COURT**

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1332(d), 1441, 1446 and 1453, Defendants, The Nutro Company (“Nutro”) and Mars Incorporated (“Mars”), (collectively the “Mars Defendants”), removed this action on February 7, 2014 from the Superior Court of the State of New Jersey for Essex County to the United States District Court for the District of New Jersey. A copy of the Notice of Removal is attached hereto as Exhibit A.

Respectfully submitted,

**BROWN & CONNERY LLP**

By:



Stephen J. DeFeo

360 Haddon Avenue  
PO Box 539  
Westmont, NJ 08108  
(856) 854-8900  
(856) 858-4967 (fax)  
sdefeo@brownconnery.com

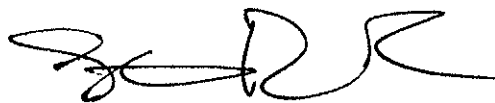
*Attorney for The Nutro Company  
and Mars, Inc.*

Dated: February 7, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that on February 7, 2014 a true and correct copy of the foregoing Notice of Filing of Removal to Federal Court and Exhibits were served on the following counsel of record for Plaintiff:

Ronald A. Giller, Esq.  
Jeffrey Y. Spiegel, Esq.  
**GORDON & REES LLP**  
18 Columbia Turnpike, Suite 220  
Florham Park, NJ 07932  
(Via FedEx)

A handwritten signature in black ink, appearing to read 'S. DeFeo', written over a horizontal line.

Stephen J. DeFeo