

THE HONORABLE RONALD B. LEIGHTON

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U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

NICOLE and GUY MAEL, NADINE
VIGLIANO, BRITNEY MOREA, CAROL
CONWAY, ANGELA BERTUCCI and TINA
WIEPERT, on behalf of themselves and all
others similarly situated,

Plaintiffs,

vs.

EVANGER’S DOG AND CAT FOOD
CO., INC., NUTRIPACK, LLC, AGAINST THE
GRAIN PET FOODS, and SHER SERVICES
COMPANY INCORPORATED,

Defendants.

NO. 3:17-cv-05469-RBL

**AMENDED ORDER GRANTING
PLAINTIFFS’ MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Plaintiffs Nicole and Guy Mael, Nadine Vigliano, Britney Morea, Angela Bertucci, and
Tina Wiepert (“Plaintiffs”) on behalf of themselves and a proposed Settlement Class and
Evanger’s Dog and Cat Food Co., Inc., Nutripack, LLC, Against the Grain Pet Foods, and Sher
Services Company Inc. (“Defendants”) have entered into a Settlement Agreement. Plaintiffs
and Defendants together constitute the “Parties,”

Plaintiffs have moved for, and Defendants do not oppose, entry of this order, which
(a) conditionally certifies the Settlement Class (as defined below) for settlement purposes only;
(b) preliminarily approves the proposed Settlement as fair, reasonable and adequate; (c)

1 appoints the Settlement Administrator; (d) provides for notice of the Settlement Agreement to
2 Settlement Class members in accordance with the terms of the Settlement Agreement; (e)
3 establishes procedures for objecting to, and opting out of, the proposed Settlement Agreement;
4 (f) describes procedures for submitting claims; and (g) sets a date for hearing to finally approve
5 the Settlement Agreement (“Final Approval Hearing”).

6 The Court has considered the Settlement Agreement (Dkt. No. 116-1), the declarations
7 of Plaintiffs’ counsel (Dkt. Nos. 116 & 117), and the declaration of the Settlement
8 Administrator (Dkt. No. 118).

9 **IT IS ORDERED THAT:**

10 1. The Court has jurisdiction over the subject matter of this Action and personal
11 jurisdiction over the Parties and the conditionally certified Settlement Class, as defined below.

12 2. This Order incorporates by reference the definitions in the Settlement
13 Agreement, and all capitalized terms used in this Order will have the same meanings as set
14 forth in the Settlement Agreement, unless otherwise defined in this Order.

15 3. Solely for the purposes of effectuating the proposed settlement, the Parties have
16 agreed to and the Court provisionally certifies the following “Settlement Class:”

17 All persons in the United States who purchased (i) Evanger’s Hunk of Beef,
18 (ii) Evanger’s Braised Beef, or (iii) Against the Grain Pulled Beef with Gravy
19 between the dates of December 1, 2015 and June 30, 2017.

20 4. The Court finds that conditional certification of the Settlement Class for
21 settlement purposes only is appropriate under Federal Rule of Civil Procedure 23(a) and (b)(3).

22 a. Numerosity is satisfied because the parties agree that the class consists of
23 at least 2,592 members. *Rannis v. Recchia*, 380 F. App’x 646, 651 (9th
24 Cir. 2010) (numerosity is generally satisfied when a class has at least 40
25 members).

26 b. The test for common questions of law and fact is “qualitative rather than
27 quantitative—one significant issue common to the class may be

1 sufficient to warrant certification.” *See Gray’s Harbor Adventist Christ*
2 *School v. Carrier Corp.*, 242 F.R.D. 568, 572 (W.D. Wash. 2007). In this
3 case, the members of the Class share common issues of fact and law for
4 certification for settlement purposes regarding (1) whether Defendants
5 misrepresented the quality of Evanger’s Hunk of Beef, Evanger’s
6 Braised Beef, or Against the Grain Pulled Beef with Gravy (collectively
7 the “Pet Food”); (2) whether any alleged misrepresentations relating to
8 the Pet Food are material to a reasonable consumer; and (3) whether
9 Defendants’ conduct violated consumer protection laws turn on common
10 evidence and can be fairly resolved for all class members at once. *See In*
11 *re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 973 (C.D. Cal. 2015)
12 (identifying similar common questions). For certification for settlement
13 purposes, these are questions that if resolved for one class member,
14 could be resolved for all class members.

15 c. Typicality is satisfied for settlement purposes only because Plaintiffs’
16 claims arise from the same course of alleged conduct as all Settlement
17 Class Members’ claims: misrepresentations of the quality of the pet
18 Food. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011)
19 (typicality exists when class representatives and class members are
20 subjected to and injured by the same course of conduct).

21 d. Adequacy is satisfied because Plaintiffs have no conflicts of interest with
22 the other proposed class members, have demonstrated their commitment
23 to the class by actively participating in the litigation, and have retained
24 qualified and committed counsel. *Ellis*, 657 F.3d at 985 (citation
25 omitted).
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- 1 e. Predominance is satisfied for settlement purposes because the common
2 questions could predominate over any questions affecting only individual
3 Settlement Class Members. For example, one potential predominant
4 question is whether a reasonable person would have been misled by
5 Defendants' advertisements. *In re Hyundai and Kia Fuel Econ. Litig.*,
6 926 F.3d 539, 559 (9th Cir. 2019) (holding predominance "readily met"
7 where "class members were exposed to uniform . . . misrepresentations
8 and suffered identical injuries within only a small range of damages.")).
9 Class treatment here, in the context of the Settlement, will facilitate the
10 favorable resolution of all class members' potential claims.
- 11 f. Superiority is satisfied because classwide resolution is the most efficient
12 and fair method of addressing the claims that arise out of the alleged
13 conduct in this case. There are thousands of class members with modest
14 individual claims, most of whom likely lack the resources necessary to
15 seek individual legal redress. *See Local Joint Exec. Bd. of Culinary/
16 Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163
17 (9th Cir. 2001) (cases involving "multiple claims for relatively small
18 individual sums" are particularly well suited to class treatment); *see also*
19 *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir.
20 2010) ("Where recovery on an individual basis would be dwarfed by the
21 cost of litigating on an individual basis, this factor weighs in favor of
22 class certification.")).
- 23 g. Because certification of the Class is proposed in the context of a
24 settlement, the court need not inquire whether the case, if tried as a class
25 action, would present intractable management problems.
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1 5. The Court preliminarily approves the Settlement as fair, reasonable, and
2 adequate. In making this determination, the Court has considered the criteria set forth in
3 recently amended Federal Rule of Civil Procedure 23, and the factors outlined in *Hanlon v.*
4 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998), and *Churchill Village, L.L.C. v. General*
5 *Electric*, 361 F.3d 566, 575-76 (9th Cir. 2004).

6 6. Under the Settlement, Evanger's agrees to pay \$545,500 into a Settlement Fund
7 that the Parties propose to use to (1) make payments to all Settlement Class Members who
8 submit timely and valid claims for cash payments; (2) pay the Settlement Administrator the
9 costs of notice and Settlement Administration Costs in an amount capped at \$150,000; (3) pay
10 Service Awards in the amount of \$2,500 to each Class Representative; and (4) pay Class
11 Counsel's attorneys' fees and costs in an amount not to exceed \$295,000. The Settlement also
12 gives Settlement Class Members the option to redeem product certificates in lieu of a cash
13 payment. Settlement Class Members with proof of purchase either from their own records or
14 from records obtained during the litigation have the option of choosing a certificate worth 50%
15 of the verified value of their total Pet Food purchases. Settlement Class Members who lack
16 proof of purchase may submit a claim to receive a certificate for three (3) cans of Defendants'
17 products.

18 7. The Settlement also provides prospective relief. Defendants have agreed to
19 change to their advertising practices, fund additional third-party testing of the Pet Food, notify
20 their distributors and retailers of these practice changes, and confirm in writing that they are in
21 compliance with all FDA requirements regarding supplier and ingredient safety for the beef
22 they use in the Pet Food. The Settlement Fund is non-reversionary and any amounts remaining
23 after the initial distribution to Settlement Class Members and a second distribution, if necessary
24 and administratively feasible, will be distributed to North Shore Animal League America.

25 8. The Court has considered the terms of the Settlement Agreement in light of
26 Plaintiffs' and Class Counsel's representation of the Settlement Class, the arm's length
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1 negotiations that led to the Settlement, the experience and views of counsel, the equitable
2 treatment of Settlement Class members, and the relief that will be provided to the Settlement
3 Class. In preliminarily approving the relief to the Settlement Class, the Court has considered,
4 among other things, the amount offered in settlement, the stage of the proceedings, the strength
5 of Plaintiffs' case and the costs, risks, and delay of continued litigation; the method of
6 distributing relief to the class, which will include the option of electronic payments; and the
7 proposed attorneys' fee award and service awards to Plaintiffs.

8 9. Plaintiffs' motion to preliminarily approve the Settlement Agreement and certify
9 the Settlement Class is granted. The Court will make a final determination as to the fairness,
10 reasonableness, and adequacy of the Settlement after the Final Approval Hearing.

11 10. The Court appoints Nicole Mael, Guy Mael, Nadine Vigliano, Britney Morea,
12 Angela Bertucci, and Tina Wiefert as Class Representatives and Terrell Marshall Law Group
13 PLLC and Andersen Sleater Sianni LLC as Class Counsel.

14 11. The Court appoints CPT Group, Inc. as Settlement Administrator to fulfill the
15 functions, duties, and responsibilities of the Settlement Administrator as set forth in the
16 Settlement Agreement and this Order. By accepting this appointment, the Settlement
17 Administrator has agreed to the Court's jurisdiction solely for purposes of enforcement of the
18 Settlement Administrator's obligations under the Settlement Agreement. The Court approves
19 the estimated Settlement Administration Expenses.

20 12. The Court finds that the method of providing notice to Settlement Class
21 members specified in section five of the Settlement Agreement, the forms of notice, the method
22 for submitting claims, and the manner of providing for exclusion requests and objections to the
23 Settlement specified in section seven of the Settlement Agreement are reasonable and
24 appropriate, and satisfy the requirements of due process and the Federal Rules of Civil
25 Procedure.
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1 13. The Settlement Administrator shall cause the Notice Plan to be commenced on
2 or before **January 7, 2020**. The Notice Plan includes Email Notice to Settlement Class
3 Members for whom an email address is available and who did not purchase the Pet Food on
4 Amazon.com and Chewy.com, mailed Postcard Notice to all Settlement Class Members for
5 whom a mailing address can be obtained and who did not purchase the Pet Food on
6 Amazon.com and Chewy.com, and an online media campaign that is designed to reach over
7 70% of Settlement Class Members. The Settlement Administrator will send an email no later
8 than 30 days before the expiration of the Claim Period to all Settlement Class Members who
9 have not submitted claims for whom an email address is available. The Settlement
10 Administrator will also make the Long Form Notice and other relevant documents, including
11 Class Counsel's motion for attorneys' fees, litigation costs and Service Awards, available on
12 the Settlement Website.

13 14. Amazon.com will separately notify Settlement Class Members who purchased
14 the Pet Food on Amazon.com. The Court specifically approves the email that Amazon.com will
15 send. This email will be in substantially the form as that attached as Exhibit H to the Settlement
16 Agreement. The Court directs Amazon.com to send the email on or before **January 7, 2020**.

17 15. The Court further directs Amazon.com to provide the Settlement Administrator
18 with a spreadsheet, indicating the total amount (in dollars) of (i) Evanger's Hunk of Beef, (ii)
19 Evanger's Braised Beef, or (iii) Against the Grain Pulled Beef with Gravy that those Settlement
20 Class members purchased from Amazon.com between the dates of December 1, 2015 and June
21 30, 2017. The Settlement Administrator will use these amounts to verify qualified claimants'
22 purchases for purposes of submitting a claim. Amazon.com must provide the Settlement
23 Administrator with this spreadsheet on or before **December 9, 2019**.

24 16. Chewy.com also will separately notify Settlement Class Members who
25 purchased the Pet Food on Chewy.com. The Court specifically approves the email that
26 Chewy.com will send. This email will be in substantially the form as that attached as Exhibit I
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1 to the Settlement Agreement. The Court directs Chewy.com to send the email on or before
2 **January 7, 2020**.

3 17. The Court further directs Chewy.com to send to the Settlement Administrator by
4 **December 9, 2019** a spreadsheet containing names, contact information, and the total amount
5 (in dollars) of (i) Evanger's Hunk of Beef, (ii) Evanger's Braised Beef, or (iii) Against the
6 Grain Pulled Beef with Gravy that those Settlement Class members purchased from
7 Chewy.com between the dates of December 1, 2015 and June 30, 2017. The Settlement
8 Administrator will use these amounts to verify qualified claimants' purchases for purposes of
9 submitting a claim.

10 18. To participate in the Settlement, Settlement Class Members must submit a
11 simple Claim Form no later than **March 9, 2020**, which they may do by mail or online through
12 the Settlement Website.

13 19. Any member of the Settlement Class may request to be excluded from the
14 Settlement Class by sending, by first class mail, a written exclusion to the Settlement
15 Administrator postmarked on or before **March 9, 2020**. The request for exclusion must include
16 the name of this action, *Mael v. Evanger's Dog and Cat Food Co.*, the Settlement Class
17 member's name, address, and telephone number where he or she may be contacted and a
18 statement that the member of the Settlement Class submitting the request wishes to be excluded
19 from the Settlement of this litigation, and personally signed by the member of the Settlement
20 Class submitting the request. Any member of the Settlement Class who submits a timely and
21 valid exclusion request shall not: (i) be bound by the Final Approval Order and Judgment; (ii)
22 be entitled to relief under this Settlement Agreement; (iii) gain any rights by virtue of this
23 Agreement; or (iv) be entitled to object to any aspect of this Agreement.

24 20. Any member of the Settlement Class may object to this Agreement by filing a
25 written statement with the Court by **March 9, 2020** that includes: his or her full name; address;
26 telephone number where he or she may be contacted; the telephone number or numbers that he
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1 or she maintains were called; all grounds in detail for the objection, with factual and legal
2 support for each stated ground; whether the objection applies only to the objector, to a specific
3 subset of the Settlement Class, or to the entire Settlement Class; the identity of any witnesses
4 he or she may call to testify; copies of any exhibits that he or she intends to introduce into
5 evidence at the Final Approval Hearing; the identity (including name, address, phone number
6 and email) of any lawyer who will be representing him or her with respect to any objection, and
7 a statement of whether he or she intends to appear at the Final Approval Hearing with or
8 without counsel. Any payment or other consideration given to an objector or objector's counsel
9 for forgoing or withdrawing an objection, or forgoing, dismissing, or abandoning an appeal
10 from a judgment approving a class settlement shall require Court approval.

11 21. The Court directs the Settlement Administrator to file with the Court no later
12 than 20 days before the Final Approval Hearing a sworn declaration containing the information
13 set forth in section 6.4 of the Settlement Agreement. This information includes (a) confirmation
14 that the Email and Postcard Notices were sent to Settlement Class members as section 6.4
15 requires; (b) confirmation that the Online Notices were timely published in accordance with the
16 Notice Plan; (c) a tally of persons who opted out of the Settlement Class pursuant to section
17 7.2; (d) a tally of objections received; (e) confirmation that the Settlement Administrator timely
18 reviewed all claims for deficiencies and fraud in accordance with the Settlement Agreement; (f)
19 a tally of the total number of valid claims submitted; and (g) confirmation that the Settlement
20 Administrator complied with 28 U.S.C. § 1715 by serving notice of the settlement upon the
21 various state attorneys general and any other appropriate officials.

22 22. The Court directs Amazon.com and Chewy.com to file with the Court no later
23 than 20 days before the Final Approval Hearing sworn declarations confirming that
24 Amazon.com and Chewy.com sent emails addresses associated with Amazon.com and
25 Chewy.com to customers who purchased the Pet Foods between December 1, 2015 and June
26 30, 2017.

1 23. The Settlement Administrator, Amazon.com, and Chewy.com shall provide
2 Class Counsel with a draft of the declarations five business days before the declarations are
3 filed.

4 24. The Court will hold a Final Approval Hearing on **May 8, 2020, at 9:30 a.m.** in
5 Courtroom B of the U.S. Courthouse, 1717 Pacific Avenue, Room 3100, Tacoma, Washington
6 98402-3200 to finally determine whether the Settlement Class should be certified under Rule
7 23(a) and (b)(3) of the Federal Rules of Civil Procedure; to determine whether the Settlement
8 Agreement is fair, reasonable, and adequate, and should be approved by the Court; to determine
9 whether the Final Approval Order and Judgment should be entered; to consider the motion for
10 attorneys' fees, reimbursement of litigation costs, and Service Awards; and to rule on any
11 other matters that the Court may deem appropriate. At the Final Approval Hearing, the Court
12 may enter the Final Approval Order and Judgment in accordance with the Settlement
13 Agreement that will adjudicate the rights of Settlement Class Members.

14 25. Any interested person who has not excluded himself or herself from the
15 Settlement Class and who filed a written objection on or before **March 9, 2020** may appear at
16 the Final Approval Hearing to show cause why the proposed Settlement Agreement should or
17 should not be approved as fair, reasonable, and adequate. The Court will consider all properly
18 submitted objections. Any Settlement Class Member who does not submit an objection in the
19 manner provided above shall be deemed to have waived any objection to the Settlement
20 Agreement and shall forever be foreclosed from making any objection to certification of the
21 Settlement Class, to the fairness, adequacy and reasonableness of the Settlement Agreement,
22 and to any attorneys' fees, litigation cost reimbursements, and Service Awards approved by the
23 Court.

24 26. Class Counsel's motion for approval of attorneys' fees, litigation costs, and
25 Service Awards shall be filed on or before **February 10, 2020**, which is 30 days before the
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1 deadline for Settlement Class members to opt out or object to the Settlement Agreement. This
2 deadline complies with *In re Mercury Interactive Corp.*, 618 F.3d 988, 994 (9th Cir. 2010).

3 27. All memoranda, declarations, responses to objections, and other evidence in
4 support of the motion for final approval of the Settlement Agreement shall be filed on or before
5 **April 20, 2020.**

6 28. All proceedings in this Action other than those that are necessary to carry out, or
7 incidental to carrying out, the terms and conditions of this Order are stayed and suspended until
8 further order of the Court.

9 29. Pending entry of the Final Approval Order and Judgment, Plaintiffs, Settlement
10 Class members, and any person or entity allegedly acting on behalf of the Settlement Class,
11 either directly, representatively, or in any other capacity, are preliminarily enjoined from
12 commencing or prosecuting against the Released Parties any action or proceeding in any court
13 or tribunal asserting any of the Released Claims provided, however, that this injunction shall
14 not apply to individual claims of any Settlement Class Member who timely exclude themselves
15 in a manner that complies with this Order. This injunction is necessary to protect and effectuate
16 the Settlement Agreement, this Order, and the Court's flexibility and authority to effectuate this
17 Settlement Agreement and to enter judgment when appropriate, and is ordered in aid of the
18 Court's jurisdiction and to protect its judgments pursuant to 28 U.S.C. § 1651(a).

19 30. The Court retains jurisdiction over the Action and all matters arising out of or
20 connected with the proposed Settlement Agreement. The Court reserves the right to adjourn or
21 continue the date of the Final Approval Hearing without further notice to Settlement Class
22 members, and retains jurisdiction to consider all further applications arising out of or connected
23 with the Settlement Agreement. The Court may approve or modify the Settlement Agreement
24 without further notice to Settlement Class members.

25 31. If the Effective Date does not occur, the Parties will return to the status quo ex
26 ante, for all litigation purposes, as if no settlement had been negotiated or entered into and thus
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1 this Order and all other findings or stipulations regarding the Settlement, including but not
 2 limited to certification of the Settlement Class will be automatically void, vacated, and treated
 3 as if never filed.

4 32. The following timeline will govern proceedings through the Final Approval
 5 Hearing:

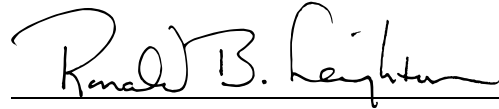
DEADLINE	EVENT
November 18, 2019	Defendants make initial payment to Settlement Administrator
December 9, 2019	Chewy.com to provide Settlement Administrator with spreadsheet listing Settlement Class Members who purchased products on Chewy.com and the total amount of those purchases.
December 9, 2019	Amazon.com to provide Settlement Administrator with spreadsheet listing Settlement Class Members who purchased products on Amazon.com and the total amount of those purchases.
December 9, 2019	Settlement Website is active
January 7, 2020	Deadline to commence Notice Plan
February 10, 2020	Deadline for Class Counsel to file motion for attorneys' fees, reimbursement of litigation costs, and for service awards
March 9, 2020	Deadline for Settlement Class Members to submit claims, exclusion requests, and objections
April 8, 2020	Settlement Administrator completes review of claims.
April 20, 2020	Deadline to file responses to objections, motion for final approval, Settlement Administrator declaration, and Amazon declaration

1 May 8, 2020 at 9:30 a.m.

Final Approval Hearing

2 IT IS HEREBY ORDERED.

3 DATED this 25th day of October, 2019.

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8 Ronald B. Leighton
9 United States District Judge