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17  
 18 UNITED STATES DISTRICT COURT  
 19 SOUTHERN DISTRICT OF CALIFORNIA

20 In re MORNING SONG BIRD FOOD  
 LITIGATION

) Lead Case No.  
 3:12-cv-01592-JAH-RBB

21 This Document Relates To:  
 22 ALL ACTIONS.

) CLASS ACTION  
 ) SECOND AMENDED  
 ) CONSOLIDATED CLASS ACTON  
 ) COMPLAINT FOR VIOLATIONS OF:

23 [Caption continued on following page]

- 24 ) 1. 18 U.S.C. §1962(c) and (d);  
 25 ) 2. CAL. CIVIL CODE §1750, *et seq.*;  
 26 ) 3. CAL. BUS. & PROF. CODE  
 27 ) §17200, *et seq.*

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LAURA CYPHERT, MILT CYPHERT,  
BARBARA COWIN, ELLEN  
LARSON, and DAVID KIRBY,  
Individually and on Behalf of All Others  
Similarly Situated,

Plaintiffs,

vs.

THE SCOTTS MIRACLE-GRO  
COMPANY, THE SCOTTS  
COMPANY LLC, JAMES  
HAGEDORN, and DOES 2 through 20,  
inclusive,

Defendants.

- 4. CAL. BUS. & PROF. CODE §17500, *et seq.*;
  - 5. KY. REV. STAT. ANN. §367.110, *et seq.*;
  - 6. MINN. STAT. §§325F.68-325F.69;
  - 7. MO. REV. STAT. §407.010, *et seq.*;
  - 8. BREACH OF IMPLIED WARRANTY;
  - 9. BREACH OF THE COMMON LAW IMPLIED WARRANTY OF FITNESS FOR CONSUMPTION BY ANIMALS;
  - 10. INTENTIONAL MISREPRESENTATION;
  - 11. NEGLIGENT MISREPRESENTATION
- DEMAND FOR JURY TRIAL

1 Plaintiffs Laura Cyphert, Milt Cyphert, Barbara Cowin, Ellen Larson, and  
2 David Kirby (“Plaintiffs”), by and through their undersigned attorneys, bring this class  
3 action against defendants The Scotts Miracle-Gro Company (“SMG” or the  
4 “Company”), The Scotts Company LLC (“Scotts LLC”), James Hagedorn  
5 (“Hagedorn”), and individual Doe defendants 1-20 (collectively, “Defendants”), on  
6 their own behalf and on behalf of a class of similarly situated persons or entities (the  
7 “Class” or “Class Members”). Plaintiffs allege the following upon their own  
8 knowledge, or where there is no personal knowledge, upon the investigation of  
9 counsel and/or upon information and belief.

## 10 INTRODUCTION

11 1. This nationwide class action challenges Defendants’ unlawful and  
12 unethical scheme to knowingly market and sell toxic bird food to millions of  
13 consumers throughout the United States.

14 2. Scotts Miracle-Gro Company is the world’s largest marketer of branded  
15 consumer lawn and garden products, and a leading maker of wild bird food.  
16 Hagedorn is the Company’s Chief Executive Officer (“CEO”) and Chairman of its  
17 Board of Directors, positions he has held since January 2003. SMG markets such  
18 products through a number of subsidiaries – each a separate legal entity. On  
19 January 25, 2012, SMG entered into a plea agreement with the federal government,  
20 admitting guilt to 11 criminal misdemeanors relating to its misuse of Storcide II and  
21 Actellic 5E and misbranding of various other pesticides. SMG’s plea revealed that  
22 SMG had *knowingly* manufactured, marketed, and sold approximately 73 million bags  
23 of its popular wild bird food products marketed under various brand names, including  
24 Morning Song, Country Pride, Scotts’ Songbird Selections, and Scotts’ Wild Bird  
25 Food (collectively, “Morning Song Bird Food”), containing harmful amounts of  
26 pesticides that are known to be, and/or labeled as, toxic to birds and other wildlife.  
27 SMG was sentenced to pay approximately \$4.5 million in penalties and charitable  
28 donations.

1           3.       Specifically, Defendants' Morning Song Bird Food contained pesticides,  
2 including Storcide II and Actellic 5E, which are known to be, and/or expressly labeled  
3 as, poisonous to birds and wildlife. Indeed, the Environmental Protection Agency's  
4 ("EPA") approved label for Storcide II warns that "Storcide II insecticide is extremely  
5 toxic to fish and toxic to birds and other wildlife." It further warns: "Exposed treated  
6 seeds are hazardous to birds and other wildlife. Dispose of all excess treated seeds  
7 and seed packaging by burial away from bodies of water." Despite these clear  
8 warnings, SMG and Scotts LLC used Storcide II to make Morning Song Bird Food,  
9 which they marketed, sold, and distributed for the express purpose of feeding birds.

10           4.       As early as June 2006, SMG's Environmental, Health and Safety  
11 Regional Manager flagged the use of Storcide as an "item of concern" during her site  
12 visit to a Morning Song Bird Food processing plant in Doland, South Dakota and  
13 noted that the pesticide was being "used for purposes that it may not be approved for."

14           5.       In summer and fall 2007, at least four individuals – including an  
15 ornithologist and two regulatory personnel – working for SMG warned SMG about  
16 the threat to birds from the Company's inclusion of Storcide II and Actellic 5E in its  
17 bird food products. These warnings followed consumer reports of birds dying all over  
18 the United States, including wild birds. By October 16, 2007, the matter was of such  
19 grave concern that SMG's Director of Innovations raised the issue at a meeting with  
20 SMG's top executives, including defendant Hagedorn. Disregarding these warnings,  
21 Defendants continued to make and sell millions of bags of the hazardous Morning  
22 Song Bird Food.

23           6.       By early 2008, the ornithologist who had previously flagged the issue  
24 grew so upset with Defendants' continued use of the pesticides in Morning Song Bird  
25 Food, he threatened to report Defendants to the EPA. By that time, Defendants knew  
26 that they were already the subjects of an EPA investigation into other illegal activities.  
27 Due to the pressure from the ornithologist and the existing EPA investigation,  
28 Defendants' scheme shifted tactics. On March 25, 2008, SMG telephoned the FDA

1 and on March 26 and 27, 2008, it sent letters to the FDA. Although these  
2 communications to the authorities purported to be notices of a voluntary recall of the  
3 Morning Song Bird Food, they were actually lulling communications that downplayed  
4 Defendants' illegal pesticide use. In addition, the communications falsely stated that  
5 the Company's executive management only became informed of the illegal pesticide  
6 use on March 10, 2008, in an attempt to create the false impression that Defendants  
7 had acted expeditiously when in fact SMG had knowingly applied illegal pesticides  
8 for years. These communications lulled and deceived the FDA and, in turn, the  
9 public. They caused the FDA to issue an enforcement report that not only failed to  
10 disclose that Morning Song Bird Food had been treated with a pesticide that rendered  
11 it hazardous to wild birds and other wildlife, but actually misrepresented that because  
12 of the pesticides, Morning Song Bird Food should be used *only* for wild birds and  
13 wild animals.

14         7. Defendants also issued an innocuously-worded letter to "Fellow Bird  
15 Lover[s]" saying it was replacing Morning Song Bird Food with a new product due to  
16 its inclusion of "certain insect controls." However, Defendants concealed the  
17 identities of the pesticides contained in the bird food, concealed the warnings that the  
18 pesticides themselves carried on their labels, concealed the danger those pesticides  
19 posed to the animals the food was to nourish, disregarded warnings of its own  
20 employees, concealed how long Morning Song Bird Food had been manufactured  
21 with such pesticides, did not offer to take back any unused Morning Song Bird Food  
22 or provide refunds for the same, and affirmatively misrepresented that the bird food  
23 did not pose a significant health risk to wild birds or small animals. Accordingly,  
24 many retailers did not remove the products from their shelves and consumers  
25 continued to purchase and use the products without being apprised of the true dangers  
26 of the products. In fact, of the 73 million units at issue in this case, less than 2 million  
27 units were recovered as a result of Defendants' "Fellow Bird Lover" letter, and  
28

1 Plaintiffs have reason to believe that Defendants continued to treat the seeds with  
2 pesticides thereafter.

3 8. Plaintiffs purchased Defendants' toxic bird food both before and after  
4 Defendants issued its "Fellow Bird Lover" letter in the spring of 2008. Plaintiffs  
5 could not discern its illegality or the pesticides' harmful effects because they used the  
6 food for wild birds. No one, including Plaintiffs, would have purchased the Morning  
7 Song Bird Food if they had not been misled as to its true nature, including that it  
8 contained toxic pesticides that are hazardous to birds.

9 9. Plaintiffs bring this action on behalf of themselves and all others who  
10 purchased, and have not yet received a full refund for, a SMG wild bird food product  
11 containing Storcide II, Actellic 5E, or their active ingredients, chlorpyrifos-methyl or  
12 pirimiphos-methyl, respectively. All persons who purchased, and have not yet  
13 received a full refund for, a SMG wild bird food product between November 2005 and  
14 May 2008 are necessarily part of this Class.

15 10. Plaintiffs allege violations of the Racketeer Influenced and Corrupt  
16 Organizations Act, 18 U.S.C. §1962 ("RICO"); violations of California's Consumers  
17 Legal Remedies Act, California Civil Code §1750, *et seq.*; violations of California's  
18 Unfair Competition Law, California Business and Professions Code §17200, *et seq.*;  
19 violations of California's False and Misleading Advertising Law, California Business  
20 and Professions Code §17500, *et seq.*; violations of the Kentucky Consumer  
21 Protection Act, Ky. Rev. Stat. Ann. §§367.110-367.360; violations of the Minnesota  
22 Consumer Fraud Act, Minn. Stat. §§325F.68-325F.69; violations of the Missouri  
23 Merchandising Practices Act, Mo. Rev. Stat. §407.010, *et seq.*; breach of implied  
24 warranty of merchantability; breach of the common law of implied warranty of fitness  
25 for consumption by animals; intentional misrepresentation; and negligent  
26 misrepresentation.

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1 11. Plaintiffs seek, on behalf of themselves and all Class Members  
2 nationwide, monetary damages, restitution, injunctive relief, and all relief deemed  
3 appropriate, arising out of Defendants' illegal scheme and conspiracy alleged herein.

#### 4 **JURISDICTION AND VENUE**

5 12. This Court has original jurisdiction over the subject matter of this action  
6 pursuant to 28 U.S.C. §1331, because Plaintiffs' claims arise under the RICO Statute,  
7 18 U.S.C. §1962. This Court has personal jurisdiction over Defendants pursuant to 18  
8 U.S.C. §1965(b) and (d), and Cal. Code Civ. P. §410.10. The Court has supplemental  
9 jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. §1367. This Court  
10 also has jurisdiction pursuant to 28 U.S.C. §1332, as modified by the Class Action  
11 Fairness Act of 2005, because at least one member of the Class is a citizen of a  
12 different state than Defendants, there are more than 100 members of the Class, and the  
13 aggregate amount in controversy exceeds \$5,000,000, exclusive of interest and costs.

14 13. Venue properly lies in this District pursuant to 28 U.S.C. §1391(a),  
15 because the Cyphert plaintiffs reside here, and Defendants have transacted substantial  
16 business within this District within the meaning of 28 U.S.C. §1391(a), as defined in  
17 28 U.S.C. §1391(c), and because a substantial part of the events giving rise to the  
18 claims alleged herein occurred in the Southern District of California. Specifically,  
19 Defendants marketed and sold their Morning Song Bird Food throughout the State of  
20 California, including throughout this District, and the Cyphert plaintiffs, as well as  
21 other members of the Class, purchased Defendants' toxic Morning Song Bird Food  
22 from retail outlets located within this District.

#### 23 **PARTIES**

##### 24 **Plaintiffs**

25 14. **Plaintiffs Laura Cyphert** and **Milt Cyphert** reside in San Diego  
26 County, California. From 2005-2010, the Cypherts were among the members of the  
27 unsuspecting public whom Defendants defrauded into buying toxic Morning Song  
28 Bird Food. Approximately every one to three months throughout the period of 2005

1 through January 2010, the Cypherts purchased approximately one bag of wild bird  
2 seed marketed under Defendants' Morning Song Bird Food line from various San  
3 Diego County grocers and retailers, including Wal-Mart. The Cypherts used the  
4 Morning Song Bird Food to provide nourishment for wild birds in the wild bird feeder  
5 that they had maintained for well over a decade. The Cypherts relied on labeling on  
6 the Morning Song Bird Food packaging that the Defendants' products were intended  
7 (and thus safe) as food for birds, expressly including finches. The labels omitted  
8 material information, including that the Morning Song Bird Food products contained  
9 pesticides that are "extremely toxic to fish and toxic to birds and other wildlife" and  
10 that: "Exposed treated seeds are hazardous to birds and other wildlife. Dispose of all  
11 excess treated seeds and seed packaging by burial away from bodies of water." The  
12 Cypherts would not have purchased the Morning Song Bird Food if they had been  
13 notified that the food was hazardous to birds or of the presence of, and warnings on,  
14 the pesticides.

15         15. The Cypherts bought their last bag of Morning Song Bird Food from the  
16 Wal-Mart in El Cajon, California, in approximately January 2010. Plaintiffs  
17 maintained both wild bird feeders and an aviary. This particular bag was "Morning  
18 Song Premium Year-Round Wild Bird Food."

19         16. Although the Cypherts had previously used other Morning Song Bird  
20 Food for their wild bird feeders and different food for their aviary, on one occasion in  
21 January 2010, they ran out of finch food and substituted Morning Song Bird Food for  
22 the approximately 100 Zebra Finches in their aviary. Less than 24 hours later, all but  
23 eight of the Finches were dead. In attempting to determine what killed their birds, the  
24 Cypherts captured and quarantined over two-dozen field mice. They provided the  
25 field mice with water and food for a few days while observing them and waiting to  
26 relocate them. Plaintiffs observed no signs of illness. Eventually, Plaintiffs  
27 supplemented the mice's food with the Morning Song Bird Food. They did this only  
28 once. Twenty-four hours later, all but two of the field mice were dead.



1           17. The Cypherts contacted their local Wal-Mart where they purchased the  
2 product and the Food and Drug Administration (“FDA”) to report what had occurred.  
3 The Cypherts also sent feed samples to SMG and the FDA. SMG claimed that the  
4 samples contained “normal” levels of pesticides, but did not identify the pesticides or  
5 describe what purportedly constituted a “normal” level of pesticides in bird food. The  
6 FDA declined to share with the Cypherts the results of its tests. Neither SMG nor the  
7 FDA informed the Cypherts of any prior issues with Defendants’ Morning Song Bird  
8 Food.

9           18. **Plaintiff David Kirby** is a domiciliary and citizen of the State of  
10 Kentucky and purchased Defendants’ Morning Song Bird Food in the State of  
11 Kentucky. During the relevant time period, between 2005 and 2008, Plaintiff Kirby  
12 purchased bags of bird seed from his local Wal-Mart and Rural King marketed under  
13 Defendants’ Morning Song Bird Food line approximately every other week, and  
14 purchased more than 50 bags of seed, including Black Oil Sunflower seed, Morning  
15 Song Chickadee & Nuthatcher (Blended) food, and Morning Song Deluxe Wild Bird  
16 Food (Blend). Plaintiff used the products as feed for wild birds. The labeling on each  
17 of the products purchased by Plaintiff omitted material information, including that the  
18 Morning Song Bird Food products contained pesticides which were “extremely toxic  
19 to fish and toxic to birds and other wildlife” and that: “Exposed treated seeds are  
20 hazardous to birds and other wildlife. Dispose of all excess treated seeds and seed  
21 packaging by burial away from bodies of water.” Plaintiff relied on these material  
22 omissions, as well as on statements made by Defendants on the Morning Song Bird  
23 Food packaging, that the Defendants’ product was “wild bird seed” and that the  
24 product was in fact food for wild birds. Plaintiff Kirby would not have purchased the  
25 Morning Song Bird Food if he had been notified that the food was hazardous to birds  
26 or of the presence of, and warnings on, the pesticides.

27           19. **Plaintiff Ellen Larson** is a domiciliary and citizen of the State of  
28 Minnesota and purchased Defendants’ Morning Song Bird Food in the State of

1 Minnesota. Plaintiff Larson purchased the Morning Song Bird Food from Wal-Mart  
2 during the relevant time period between 2005 and 2008. Plaintiff used the Morning  
3 Song Bird Food as feed for wild birds. The labeling on each of the products  
4 purchased by Plaintiff omitted material information, including that the Morning Song  
5 Bird Food products contained pesticides which were “extremely toxic to fish and toxic  
6 to birds and other wildlife” and that: “Exposed treated seeds are hazardous to birds  
7 and other wildlife. Dispose of all excess treated seeds and seed packaging by burial  
8 away from bodies of water.” Plaintiff relied on these material omissions, as well as on  
9 statements made by Defendants on the Morning Song Bird Food packaging, that the  
10 Defendants’ product was “wild bird seed” and that the product was in fact food for  
11 wild birds. Plaintiff Larson would not have purchased the Morning Song Bird Food if  
12 she had been notified that the food was hazardous to birds or of the presence of, and  
13 warnings on, the pesticides.

14       20. **Plaintiff Barbara Cowin** is a domiciliary and citizen of the State of  
15 Missouri and purchased Defendants’ Morning Song Bird Food in the State of  
16 Missouri. Plaintiff Cowin purchased a bag marketed under Defendants’ Morning  
17 Song Bird Food line approximately once a week during the relevant time period from  
18 2005 through 2008 from Wal-Mart and local pet stores. Plaintiff used the products as  
19 wild bird feed. The labeling on each of the products purchased by Plaintiff omitted  
20 material information, including that the Morning Song Bird Food products contained  
21 pesticides which were “extremely toxic to fish and toxic to birds and other wildlife”  
22 and that: “Exposed treated seeds are hazardous to birds and other wildlife. Dispose of  
23 all excess treated seeds and seed packaging by burial away from bodies of water.”  
24 Plaintiff relied on these material omissions, as well as on statements made by  
25 Defendants on the Morning Song Bird Food packaging, that the Defendants’ products  
26 were “wild bird seed” and that the products were in fact food for wild birds. Plaintiff  
27 Cowin would not have purchased the Morning Song Bird Food if she had been  
28

1 notified that the food was hazardous to birds or of the presence of, and warnings on,  
2 the pesticides.

3 21. Defendants concealed that each bag of the Morning Song Bird Food  
4 containing Storcide II and Actellic 5E was illegal to sell. The illegality of the wild  
5 bird food rendered the name and packaging misleading. None of the Plaintiffs, Class  
6 Members or retailers would have purchased the Morning Song Bird Food had it been  
7 accurately labeled and marketed as illegal, and it was a fact material to their purchase.

8 22. None of the Plaintiffs received SMG's "Fellow Bird Lover" letter at the  
9 time it was purportedly issued in early 2008, nor were any Plaintiffs aware of  
10 Defendants' conduct or that the seed they had purchased (and/or the chemicals used to  
11 treat them) was toxic to birds until, at the earliest, the federal government disclosed its  
12 criminal prosecution of SMG in January of 2012. Plaintiffs would not have purchased  
13 Morning Song Bird Food had they known that the products contained pesticides that  
14 were toxic and harmful to birds. Nor would Plaintiffs have purchased Morning Song  
15 Bird Food had the packaging contained the pesticide warnings, including that  
16 Storcide II is toxic to birds and other wildlife and that exposed treated seeds are so  
17 hazardous to birds and other wildlife that they should be disposed of by burial away  
18 from bodies of water. Indeed, no reasonable consumer seeking to purchase seed to  
19 feed wild birds would have purchased SMG's Morning Song Bird Food if it were  
20 accurately labeled and marketed as containing toxic pesticides and contained warnings  
21 that the chemicals used to treat the seeds rendered the seeds so hazardous to birds and  
22 other wildlife that they should be disposed of by burial away from bodies of water.

23 23. Each of the Plaintiffs purchased Morning Song Bird Food as consumers,  
24 not for resale, and for use as bird feed. Each of the Plaintiffs suffered actual damages  
25 and an economic injury in fact when they spent money to purchase SMG's Morning  
26 Song Bird Food, which was worthless because it was not fit for consumption by wild  
27 birds. Instead, Plaintiffs were deceived into paying for seed that was rendered  
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1 worthless because it was illegally treated with pesticides that were actually poisonous,  
2 toxic, and hazardous to birds and other wildlife.

### 3 **Defendants**

4       24. At all relevant times, **defendant The Scotts Miracle-Gro Company**  
5 (**“SMG”**) was a publicly-traded Ohio corporation with its corporate headquarters  
6 located in Marysville, Ohio. SMG manufactures and sells products, including  
7 pesticides, herbicides, fertilizers, and bird and animal foods under numerous brand  
8 names. SMG operates through an array of subsidiaries and shell corporations through  
9 which SMG manufactures and markets products throughout the entire country.  
10 SMG’s practice of conducting its business through subsidiaries and shell corporations  
11 is designed, in part, to shield SMG from legal liability for misconduct.

12       25. **Defendant The Scotts Company LLC (“Scotts LLC”)** is a private  
13 company based in Marysville, Ohio that produces, markets, and supplies products for  
14 lawn and garden care, as well as bird seed. SMG owns Scotts LLC.

15       26. **Defendant James Hagedorn (“Hagedorn”)** is SMG’s CEO and  
16 Chairman, positions he has held since at least January 2003. In addition, Hagedorn is  
17 an executive officer of defendant Scotts LLC and Gutwein & Co. (“Gutwein”). By  
18 virtue of his positions with the Company and power over its affairs, Hagedorn had  
19 control of the enterprise and ultimate authority over the illegal scheme and conspiracy.  
20 Further, Hagedorn knew about and/or recklessly disregarded SMG’s illegal pesticide  
21 use. Hagedorn made millions of dollars in annual salary and incentive compensation  
22 throughout the relevant time period, and such compensation derived in part from the  
23 sales of tens of million bags of bird poison that was sold as bird food to unwitting  
24 consumers. Hagedorn was made aware of reports of bird deaths by at least  
25 October 16, 2007, during a meeting with other top Company executives. Hagedorn  
26 ignored the warnings and pleas to stop, and his actions and failures to act when  
27 required to do so directly led to the illegal product being sold to consumers, including  
28 in this District, which caused injury to Plaintiffs and the Class. Due to the misconduct

1 that occurred under his watch, the Company ultimately pled guilty to 11 criminal  
2 misdemeanors relating to its misuse of Storcide II and Actellic 5E and misbranding of  
3 various other pesticides.

4 27. Doe Defendants 2-20 are individual employees of SMG and/or its  
5 subsidiaries defendant Scotts LLC and Gutwein, who were involved in the marketing,  
6 design, decision to sell, and decision to continue to sell, Morning Song Bird Food,  
7 even though it contained known toxic pesticides and was hazardous to birds and other  
8 wildlife, and/or who were involved in creating and circulating the deceptive letters  
9 described herein.

10 28. Defendants SMG, Scotts LLC, Hagedorn, and Doe Defendants 2-20 are  
11 referred to herein collectively as “Defendants.”

## 12 **COMMON FACTUAL ALLEGATIONS**

### 13 **Defendants’ Illegal Scheme and Conspiracy to Sell Toxic Bird Food**

14 29. At all relevant times, Defendants directed an illegal scheme to deceive  
15 consumers into buying Morning Song Bird Food by misrepresenting and concealing  
16 its true nature: a substance so hazardous to birds and other wildlife that it was  
17 required to be disposed of by burial away from any bodies of water, due to  
18 Defendants’ secret use of harmful pesticides, including Storcide II and Actellic 5E, to  
19 improve its shelf life (referred to herein as the “Illegal Scheme”).

20 30. On January 25, 2012, SMG entered into a plea agreement with the federal  
21 government, admitting guilt to 11 misdemeanors relating to its misuse and  
22 misbranding of various pesticides. SMG’s plea agreement revealed that, under  
23 Hagedorn’s leadership, SMG had knowingly manufactured, marketed, and sold  
24 approximately 73 million bags of wild bird food, including its popular “Morning  
25 Song” and “Country Pride” brands, containing harmful pesticides that are known to  
26 be, and/or labeled as, toxic to birds and other wildlife. SMG also pled guilty to 10  
27 other misdemeanors related to their falsification of pesticide registration documents in  
28 connection with other products. SMG was sentenced to pay a \$4 million penalty and

1 \$500,000 in charitable donations to 5 organizations whose missions are to protect bird  
2 habitat environments. This fine represents the largest criminal penalty in the history  
3 of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. §136,  
4 *et seq.*, which governs the manufacture, distribution, and sale of pesticides.

5 31. SMG’s guilty plea marked the first time it had publicly revealed that it  
6 had added to its popular bird food the pesticides Storcide II and Actellic 5E, which are  
7 poisonous to birds. Indeed, the EPA’s approved label for Storcide II warns that  
8 “Storcide II insecticide is extremely toxic to fish and toxic to birds and other wildlife.”  
9 It further warns: “Exposed treated seeds are hazardous to birds and other wildlife.  
10 Dispose of all excess treated seeds and seed packaging by burial away from bodies of  
11 water.” The EPA fact sheet states that the active ingredient “pirimphos-methyl [sic] is  
12 highly toxic to birds and fish.” In fact, on or about October 27, 2004, the  
13 manufacturer of Storcide II applied to the EPA for permission to market Storcide II  
14 with an equivocal warning label that read, “Exposed treated seeds *may* be hazardous  
15 to birds and other wildlife,”<sup>1</sup> but the EPA rejected this equivocal language and  
16 required an unequivocal warning label that read: “Exposed treated seeds *are*  
17 hazardous to birds and other wildlife. Dispose of all excess treated seeds and seed  
18 packaging by burial away from bodies of water.” Despite this clear warning,  
19 Defendants continued to make and market the products as bird food even though  
20 Defendants had treated it with chemicals that rendered it indisputably hazardous to  
21 birds and other wildlife.

22 32. As early as June 2006, SMG’s Environmental, Health and Safety  
23 Regional Manager, Sara Brenner, flagged the use of Storcide as an “item of concern”  
24 during her site visit to a Morning Song Bird Food processing plant in Doland, South  
25 Dakota and noted that the pesticide was being “used for purposes that it may not be  
26 approved for.”

27 \_\_\_\_\_  
28 <sup>1</sup> Unless otherwise indicated all emphases in this pleading are added.

1           33. By the summer of 2007, Defendants had received reports about numerous  
2 birds dying all over the United States, including wild birds. On August 13, 2007, a  
3 Texas customer complained that, “[w]hen he feeds the birds, he finds a few dead each  
4 day. When [he] doesn’t put the feed out, [he] doesn’t find any dead birds.” And, on  
5 August 19, 2007, an Oklahoma customer called and “claim[ed] it’s killing his  
6 sparrows, caller said it was a brand new feeder and he has seen found (*sic*) 2 dead by  
7 the feeder and 1 twitching on the ground near it.”

8           34. Defendants received additional complaints from within their own ranks.  
9 Mario Olmos, an ornithologist; Senior Specialist in the Regulatory Department, Kris  
10 Mantey; and its Director of Regulatory Affairs, Kathleen Lee, all tried to stop SMG’s  
11 illegal practice. Olmos would later reveal to the Ohio Bureau of Criminal  
12 Identification & Investigation that after receiving numerous consumer complaints  
13 about bird deaths he warned SMG’s senior management about the illegal practice: “I  
14 went to the top and told them that you are using mislabeled products for almost a year  
15 now and you can go to jail for this.” Olmos’s pleas went unheeded, as, in his  
16 experience, SMG felt it could “get away with anything” because of its “money, power  
17 and influence.”

18           35. By October 16, 2007, the matter was of such grave concern that SMG’s  
19 Director of Innovations, Andrew Wong, seized an opportunity at an Innovation &  
20 Technology Advisory Board meeting to advise SMG’s highest-ranking officers about  
21 this illegal practice. SMG’s CEO and Chairman, defendant Hagedorn, and Senior  
22 Counsel, Juan Johnson, were among those present. But that warning fell on deaf ears,  
23 as Defendants continued with their Illegal Scheme for another five months while they  
24 illegally sold millions more bags of this illicit product to unwitting consumers.

25           36. Mantey and Olmos told senior-level employees to stop using Storcide II.  
26 In an October 19, 2007 email, Mantey wrote: “Stop using Storacide (*sic*) – it is not  
27 labeled for use with birds. The label & MSDS states – toxic to birds other wildlife.”  
28 But SMG’s management ignored their own regulatory affairs personnel and these

1 recommendations went unheeded. By November, a Director of Regulatory Affairs  
2 had taken up the torch with the Director of Bird Food in an effort to stop the illegal  
3 conduct, writing an email to SMG's Director of Bird Food and Gutwein's Manager of  
4 Operations & Engineering to express her concern that Defendants were "still using a  
5 product in a manner that is inconsistent with its legal label" and "not approved for this  
6 particular use."

7 37. By the spring of 2008, Olmos was so upset with Defendants' continued  
8 use of the pesticides in Morning Song Bird Food that he threatened to report  
9 Defendants to the EPA. By that time, Defendants knew they were already the subjects  
10 of an EPA investigation into other illegal activities. That made the threat of going to  
11 the EPA a potent weapon. Due to these pressures, Defendants decided to shift their  
12 tactics.

13 38. On March 25, 2008, SMG telephoned the FDA and on March 26 and 27,  
14 2008, it sent letters to the FDA. Although these communications purported to be  
15 notices of a voluntary recall of Morning Song Bird Food, they were actually lulling  
16 communications. These communications downplayed Defendants' illegal pesticide  
17 use and falsely represented that Company executives had only recently learned of the  
18 issue. These communications lulled and deceived the FDA and, in turn, the public.  
19 They caused the FDA to issue an enforcement report that not only failed to disclose  
20 that Morning Song Bird Food had been treated with a pesticide that rendered it  
21 hazardous to wild birds and other wildlife, but actually misrepresented that because of  
22 the pesticides, Morning Song Bird Food should be used *only* for wild birds and wild  
23 animals.

24 39. In late March or early April 2008, Defendants issued an innocuously-  
25 worded letter to "Fellow Bird Lover[s]" that said it was replacing the Morning Song  
26 Bird Food with a new product due to its inclusion of "certain insect controls."  
27 However, Defendants concealed the identities of the pesticides contained in the bird  
28 food, concealed the warnings the pesticides themselves carried on their labels,



1 concealed the danger those pesticides posed to the animals the food was to nourish,  
2 concealed the disregarded warnings of its own employees, concealed how long  
3 Morning Song Bird Food had been manufactured with such pesticides, did not offer to  
4 take back any unused Morning Song Bird Food or give refunds, and affirmatively  
5 misrepresented that the bird food did not pose a significant health risk to wild birds or  
6 small animals. In this letter, Defendants misleadingly stated: “*We believe that the*  
7 *wild bird food and wild animal food did not constitute a significant health risk to*  
8 *wild birds . . . .*”

9       40. Due to Defendants’ obfuscation, many retailers did not remove the  
10 products from their shelves, and consumers continued to purchase and use the  
11 products without being apprised of their true nature and the hazards they posed. In  
12 fact, of the approximately 73 million units at issue in this case, less than 2 million  
13 units were recovered as a result of SMG’s “Fellow Bird Lover” letter.

14       41. On April 10, 2008, Defendants were forced to send another letter to the  
15 FDA acknowledging that some of the Company’s executive management knew about  
16 the pesticides longer than previously acknowledged. Although the letter disavowed  
17 knowledge of “illegal” or “off-label” use, it stated, in part: “[I]t has become apparent  
18 from our ongoing review that statements were made at a meeting in October 2007, at  
19 which members of the Company’s executive management were present, regarding the  
20 Company’s application of pesticides to wild bird food products.” An October 17,  
21 2007 email from Mantey to Lee and others confirmed that customer complaints about  
22 bird deaths were discussed at this meeting.

23       42. On May 5, 2008, Hagedorn and other SMG executives discussed the  
24 purported bird food recall on an earnings call with the Company’s investors. In his  
25 prepared remarks, Hagedorn stated:

26       The facts around our Wild Bird Food recall are pretty simple. We had  
27       been using an unapproved pest control product on our seed, a fact that  
28       had been true for years prior to us buying the business. Although the  
      control was approved for human food use and we don’t believe wild  
      birds were ever harmed we recognized that we had an off label use of an

1 active ingredient. Once our senior management learned of the issue we  
2 reached out to both the EPA and FDA with a voluntary recall plan and  
got the product off the retail shelf. This effort is nearly complete.

3 43. Defendant Hagedorn failed to mention that he himself along with other  
4 senior management had known about the illegal pesticide use for months prior to  
5 notifying the EPA and FDA, that the Company had received multiple reports of bird  
6 deaths from consumers, and that only a tiny fraction of the illegal product would ever  
7 be returned to the Company as a result of the recall.

8 44. Defendants, overseen by Hagedorn as chairman and CEO, continued to  
9 deceive the public into buying the Morning Song Bird Food, and avoided detection of  
10 the Illegal Scheme, by marketing the products as suitable for use as food for *wild* birds  
11 and animals, whom Defendants expected would take the bird food and fly, swim, or  
12 scurry away, so that any toxic effects of the Morning Song Bird Food would go  
13 undetected.

14 45. The fact that Defendants had actual knowledge of, and recklessly  
15 disregarded, the hazardous nature of the Morning Song Bird Food is demonstrated by,  
16 among other things:

17 (a) The decision to begin using Storcide II on wild bird food was made  
18 contemporaneously with the Company's decision to acquire Gutwein and involved  
19 employees hired by Defendants;

20 (b) The warning label on the packaging of the Storcide II pesticides  
21 themselves, which Defendants, including their agents and employees, handled on a  
22 daily basis, expressly warned that the pesticides were "extremely toxic to fish and  
23 toxic to birds and other wildlife" and that "Exposed treated seeds [which is what  
24 Defendants were selling] are hazardous to birds and other wildlife. Dispose of all  
25 excess treated seeds and seed packaging by burial away from bodies of water."  
26 Actellic 5E is also known to be toxic to birds. Defendants disregarded these warnings  
27 and continued to manufacture, sell, and distribute millions of packages of Morning  
28 Song Bird Food;

1 (c) SMG has admitted that, at least throughout the time period of  
2 November 2005 through March 2008, at least three of its employees were specifically  
3 aware that Morning Song Bird Food was being treated with Storcide II;

4 (d) Throughout the time period of November 2005 through March  
5 2008, SMG received numerous reports about birds dying, deaths that the Company's  
6 own ornithologist attributed to SMG's illegal sale of toxic wild bird food;

7 (e) As early as June 2006, SMG's Environmental, Health and Safety  
8 Regional Manager flagged the use of Storcide as an "item of concern" during her site  
9 visit to a Morning Song Bird Food processing plant in Doland, South Dakota and  
10 noted that the pesticide was being "used for purposes that it may not be approved for";

11 (f) In summer and fall 2007, at least four individuals who worked for  
12 SMG – Mario Olmos (an ornithologist), Kris Mantey (a regulatory specialist),  
13 Kathleen Lee (a director of regulatory affairs), and Andrew Wong (a director of  
14 innovation) – all warned SMG against using the pesticides in Morning Song Bird  
15 Food and tried to convince SMG to stop doing so. Defendants disregarded these  
16 warnings and continued to manufacture, sell, and distribute millions of packages of  
17 Morning Song Bird Food;

18 (g) The complaints of bird deaths and off-label pesticide use were  
19 discussed at an October 16, 2007 meeting attended by defendant Hagedorn and other  
20 senior Company executives;

21 (h) Even after this meeting, Defendants again knowingly switched to  
22 Storcide II;

23 (i) The subject of illegal and off-label pesticides use in Morning Song  
24 Bird Food was discussed in multiple emails and telephonic conference calls between  
25 regulatory personnel and other senior employees following the October 16, 2007  
26 meeting;

27 (j) By early 2008, the ornithologist Olmos was so upset with  
28 Defendants' continued use of the pesticides in Morning Song Bird Food, he threatened

1 to report Defendants to the EPA. By that time, Defendants knew that they were  
 2 already the subjects of an EPA investigation into other illegal activities.<sup>2</sup> Due to the  
 3 pressure from Olmos and the existing EPA investigation, Defendants' scheme shifted  
 4 tactics. On March 25, 2008, SMG telephoned the FDA and on March 26 and 27,  
 5 2008, it sent letters to the FDA. Although these communications purported to be  
 6 notices of a voluntary recall of Morning Song Bird Food, they were actually lulling  
 7 communications. These communications lulled and deceived the FDA. They caused  
 8 the FDA to issue an enforcement report that not only failed to disclose that the  
 9 pesticides Defendants had applied to the Morning Song Bird Food had rendered it so  
 10 hazardous to wild birds and other wildlife that the product was required to be disposed  
 11 of by burial away from a body of water, but actually misrepresented that because of  
 12 the pesticides, Morning Song Bird Food should be used *only* for wild birds and wild  
 13 animals.

14 (k) In fact, the FDA Enforcement Report read:

15 ~~Manufacturers: The Scotts Company LLC, Omaha, NE. Field initiated recall is ongoing.~~

16 **REASON**

17 Animal food intended for feeding non-domestic birds and other wildlife species were found to have been  
 18 treated with pesticides which were not labeled with instructions for approved use only on wild bird or wild  
 19 animal products or on all of the individual components that might be present in such stored grain mixtures.

20 **VOLUME OF PRODUCT IN COMMERCE**

21 61,019,671 units (includes totals for V-114/V-161-2008)

22 **DISTRIBUTION**

23 Nationwide

24 **END OF ENFORCEMENT REPORT FOR MAY 28, 2008**

25 ###

26 Compare this to the Storcide II Warning Label:

27 **ENVIRONMENTAL HAZARDS**

28 STORCIDE II insecticide is extremely toxic to fish and toxic to birds and other wildlife. Do not  
 apply directly to water, or to areas where surface water is present or to intertidal areas below  
 the mean high water mark. Do not discharge directly or indirectly into surface waters. Do not  
 contaminate water by cleaning of equipment or disposal of wastes.

Exposed treated seeds are hazardous to birds and other wildlife. Dispose of all excess treated  
 seeds and seed packaging by burial away from bodies of water.

This pesticide is highly toxic to bees exposed to direct treatment or residues on crops or  
 weeds. Do not apply STORCIDE II insecticide or allow it to drift onto crops or weeds on which  
 bees are actively foraging.

<sup>2</sup> SMG has now entered into a settlement with the EPA with respect to these other  
 illegal activities, including approximately \$8 million in penalties.

1 (l) Similarly, Defendants issued a deceptively innocuous letter  
2 addressed to “Fellow Bird Lover[s]” in late March or early April 2008. However, as  
3 aforementioned, the letter perpetuated Defendants’ concealment of the Illegal Scheme  
4 by, among other things, concealing the identities of the pesticides that had rendered  
5 Morning Song Bird Food hazardous, concealing the warnings the pesticides  
6 themselves carried (*e.g.*, “exposed treated seeds are hazardous to birds and other  
7 wildlife”), concealing the dangers of the “food” to birds and other wildlife,  
8 disregarding the warnings of its own employees, concealing how long Morning Song  
9 Bird Food had been manufactured with such pesticides, failing to offer to take back  
10 any unused Morning Song Bird Food, or provide refunds, and affirmatively  
11 misrepresenting that Morning Song Bird Food did not pose a significant health risk to  
12 wild birds or small animals.

13 (m) Olmos has stated that he warned the “top” level of SMG’s  
14 management that its conspiracy to sell illegal bird food was “wrong” and that they  
15 could “go to jail for this.” Olmos has also stated that his warnings went unheeded  
16 because SMG felt it could “get away with anything.” Ultimately, Olmos terminated  
17 his work with the Company a year early because he was so upset by Defendants’  
18 improper conduct.

19 (n) SMG has admitted that it was improper to use the pesticides in  
20 Morning Song Bird Food, but that it knowingly did so from at least November 2005  
21 through March 2008.

22 (o) As to defendant Hagedorn, his position as CEO and Chairman of  
23 the Company provided him with authority over and knowledge of SMG’s affairs and  
24 business during the time it operated a criminal conspiracy to market and sell illegal  
25 bird poison as bird food to unwitting consumers.

26 46. Defendants’ execution and concealment of the Illegal Scheme deceived  
27 the public into buying approximately 73 million bags of toxic Morning Song Bird  
28 Food at a total cost of over \$500 million to consumers nationwide.

1 **RICO ALLEGATIONS**

2 47. Defendants engaged in a fraudulent scheme, common course of conduct  
3 and conspiracy to increase revenues and minimize losses for Defendants and their co-  
4 conspirators from the sale of defective Morning Song Bird Food.

5 48. To achieve these goals, Defendants entered into agreements to sell the  
6 Morning Song Bird Food to the public, disseminated misleading advertising and  
7 marketing materials to sell such feed without disclosing that it was illegal and  
8 hazardous to the very animals it was marketed to nourish. As a direct result of their  
9 conspiracy and fraudulent scheme, Defendants were able to extract revenues of  
10 hundreds of millions of dollars from Plaintiffs and the Class.

11 **The Morning Song Enterprise**

12 49. SMG was formed in 2005. It is an Ohio for-profit corporation, which is  
13 publicly traded, has extensive SEC reporting obligations, has a Board of Directors, is  
14 required to have its Board of Directors comprised of a majority of independent  
15 directors, is subject to the Sarbanes-Oxley Act, is required to have its financial  
16 statements audited by a registered public accounting firm, and has other reporting  
17 obligations, protections and responsibilities unique to publicly-traded companies and  
18 the State of Ohio's laws for corporations.

19 50. Defendant Hagedorn is the CEO and Chairman of the Board of Directors  
20 of SMG. He has held these positions since at least January 2003 and during the  
21 entirety of the time period at issue. In addition, during the relevant time period,  
22 Hagedorn was an executive officer of Scotts LLC and Gutwein. In these positions,  
23 Hagedorn has been responsible for the internal controls and reporting obligations of  
24 the Company, Scotts LLC and Gutwein, and has ultimate authority over their business  
25 and affairs.

26 51. Scotts LLC was formed in 2004. It is a domestic limited liability  
27 company that is not publicly traded, has no Board of Directors, has no independent  
28 directors, has no SEC reporting obligations, is not subject to the Sarbanes-Oxley Act,

1 is not required have its financial statements audited, but it does have reporting  
2 obligations, protections and responsibilities unique to the State of Ohio’s laws for  
3 limited liability companies.

4 52. Gutwein was formed in 1950. It is a private Indiana for-profit  
5 corporation that is not publicly traded, has no Board of Directors, has no independent  
6 directors, has no SEC reporting obligations, is not subject to the Sarbanes-Oxley Act,  
7 is not required have its financial statements audited, but it does have reporting  
8 obligations, protections and responsibilities unique to the State of Indiana’s laws for  
9 corporations.

10 53. SMG operates as a self-described “holding company” that conducts its  
11 business – legitimate and illegitimate – through a number of subsidiaries, each of  
12 which is a separate legal entity. Scotts LLC shares the same senior managing officers  
13 as SMG. In November 2005, SMG acquired Gutwein. Scotts LLC does not have any  
14 ownership interest in Gutwein, and Gutwein does not have any ownership interest in  
15 Scotts LLC. SMG and Scotts LLC both used Gutwein to manufacture Morning Song  
16 Bird Food. SMG also used Scotts LLC to market, distribute, and/or manufacture  
17 Morning Song Bird Food.

18 54. Upon forming and acquiring Gutwein, SMG installed its executive  
19 officers as the executive officers of Gutwein. For example, SMG’s CEO, defendant  
20 Hagedorn, was made CEO of Gutwein.

21 55. Gutwein constituted an “enterprise” within the meaning of 18 U.S.C.  
22 §1961(4), through which Defendants conducted the pattern of racketeering activity  
23 described herein. Gutwein engaged in, and its activities affected, interstate commerce,  
24 including manufacturing and distributing the Morning Song Bird Food.

25 56. Alternatively, Scotts LLC was associated-in-fact with Gutwein and other  
26 individuals and entities for a number of common and ongoing purposes, including  
27 executing and perpetuating the Illegal Scheme, and constituted an “enterprise” within  
28 the meaning of 18 U.S.C. §1961(4), the activities of which affected interstate

1 commerce, including manufacturing and distributing the illegal Morning Song Bird  
2 Food (the enterprises alleged in this and the previous paragraph are referred to  
3 collectively as the “Morning Song Enterprise”).

4 57. In addition to installing its Chairman and CEO as CEO of Gutwein,  
5 Defendants directed the affairs of the Morning Song Enterprise through, among other  
6 things, using SMG’s executive officers to direct critical aspects of Morning Song  
7 Enterprise operations, including the following:

8 (a) SMG’s President and Chief Operating Officer was the leader of all  
9 aspects of the operations of SMG’s subsidiaries, including Gutwein’s consumer  
10 business marketing, sales, research and development, and supply chain;

11 (b) SMG’s Executive Vice President and Chief Marketing Officer was  
12 responsible for overseeing all of the marketing activities for SMG’s wholly-owned  
13 brands, including Morning Song Bird Food; and

14 (c) SMG’s Chief Environmental Officer was responsible for  
15 regulatory and compliance processes for all of SMG’s subsidiaries, including  
16 Gutwein.

17 58. The Morning Song Enterprise constituted a single “enterprise” or  
18 multiple enterprises within the meaning of 18 U.S.C. §1961(4), as individuals and  
19 other entities associated-in-fact for the common purpose of engaging in Defendants’  
20 profit-making scheme.

21 59. The Morning Song Enterprise is an ongoing and continuing organization  
22 consisting of legal entities, such as a corporation and a limited liability company, as  
23 well as individuals associated for the common or shared purpose of manufacture,  
24 distribution, or sale of the toxic bird seed to Plaintiffs and the Class through deceptive  
25 and misleading sales tactics or materials, and deriving profits from those activities.

26 60. The Morning Song Enterprise functions by selling bird seed and other  
27 products to the consuming public. Many of these products are legitimate and non-  
28 fraudulent. However, Defendants, through the Morning Song Enterprise, have



1 engaged in a pattern of racketeering activity which also involves a fraudulent scheme  
2 to increase revenue for Defendants and the other entities and individuals associated-  
3 in-fact with the Enterprise's activities through the Illegal Scheme.

4 61. The Morning Song Enterprise engages in and affects interstate commerce  
5 because it involves commercial activities across state boundaries, such as the  
6 marketing, promotion, advertisement and sale of toxic bird seed, and the receipt of  
7 monies from the sale of the same.

8 62. Within the Morning Song Enterprise, there was a common  
9 communication network by which co-conspirators shared information on a regular  
10 basis. The Morning Song Enterprise used this common communication network for  
11 the purpose of manufacturing, marketing and selling toxic bird seed to the general  
12 public nationwide.

13 63. Each participant in the Morning Song Enterprise had a systematic linkage  
14 because there are corporate ties, contractual relationships, financial ties, and  
15 continuing coordination of activities. Through the Morning Song Enterprise,  
16 Defendants engaged in consensual decision making to implement the Illegal Scheme  
17 and to function as a continuing unit for the common purpose of exacting revenues and  
18 market advantage. Furthermore, the Morning Song Enterprise functions as a  
19 continuing unit with the purpose of assisting with, perfecting and furthering their  
20 Illegal Scheme.

21 64. While Defendants participate in, and are members of, the Morning Song  
22 Enterprise, they also have a separate and distinct existence, including separate and  
23 distinct offices, bank accounts, employees' financial statements and/or individual  
24 personhood.

25 65. Each Defendant exercised substantial control over the direction of the  
26 Morning Song Enterprise by:

27  
28

1 (a) designing bird food containing pesticides that were unsuitable for  
2 use in food for wild birds and wildlife (the pesticides, but not the bird food, were so  
3 labeled);

4 (b) knowingly manufacturing illegal bird food with toxic insecticides;

5 (c) persisting in the manufacture, distribution, and/or sale of the  
6 hazardous Morning Song Bird Food even after the dangers were admittedly known;

7 (d) designing and distributing marketing and sales materials that  
8 misrepresented and concealed the hazardous nature of the Morning Song Bird Food;

9 (e) otherwise concealing the hazardous nature of the Morning Song  
10 Bird Food from the public and regulators;

11 (f) distributing the hazardous Morning Song Bird Food all around the  
12 country;

13 (g) failing to recapture the hazardous Morning Song Bird Food from  
14 retailers and consumers;

15 (h) selling the hazardous Morning Song Bird Food to the public;  
16 and/or

17 (i) collecting revenues and profits from Plaintiffs and the Class from  
18 the sale of the products.

19 66. At all relevant times, each participant in the Morning Song Enterprise  
20 was aware of the Illegal Scheme, was a knowing and willing participant in the  
21 scheme, and reaped revenues and/or profits therefrom.

22 67. The Morning Song Enterprise has an ascertainable structure separate and  
23 apart from the pattern of racketeering activity in which Defendants have engaged.

24 68. Defendants have directed and controlled the ongoing organization  
25 necessary to implement their scheme and illicit business practices at meetings and  
26 through communications of which Plaintiffs cannot now know because such  
27 information lies in Defendants' hands.

28

1 **RICO Conspiracy**

2 69. Defendants have not undertaken the practices described herein in  
3 isolation, but as part of a common scheme and conspiracy.

4 70. Defendants have engaged in a conspiracy to increase or maintain  
5 revenues and/or minimize losses of revenues or profits for Defendants and their  
6 unnamed co-conspirators through the Illegal Scheme.

7 71. The objects of the conspiracy are: (a) to execute the Illegal Scheme;  
8 (b) to maximize profits and revenues for all Defendants; and/or (c) to minimize the  
9 losses from the defect for all Defendants.

10 72. To achieve these goals, Defendants hid from the general public the  
11 dangers of the Morning Song Bird Food and obfuscated the true nature of the defect  
12 even after they issued the “Fellow Bird Lover” letter. Defendants have also agreed to  
13 participate in other illicit and fraudulent practices, all in exchange for agreement to,  
14 and participation in, the conspiracy.

15 73. Each Defendant and member of the conspiracy, with knowledge and  
16 intent, has agreed to the overall objectives of the conspiracy and participated in the  
17 common course of conduct to commit acts of fraud and indecency in manufacturing,  
18 distributing, marketing, and selling the toxic bird food.

19 74. Indeed, for the conspiracy to succeed, each Defendant and co-conspirator  
20 had to agree to implement and use the similar devices and fraudulent tactics against  
21 their intended targets.

22 75. As a result of Defendants’ Illegal Scheme and conspiracy, Plaintiffs and  
23 the Class purchased a product that was worse than worthless. Instead of the bird food  
24 Defendants promised, Plaintiffs received an illegal product that contained bird poison.  
25 But for Defendants’ Illegal Scheme, no one would have purchased the Morning Song  
26 Bird Food. Therefore, the damages that Defendants caused Plaintiffs and the Class  
27 may be measured, at a minimum, by each dollar paid for the toxic Morning Song Bird  
28 Food, which amounts to over \$500 million.

1 **Pattern of Racketeering Activity**

2 76. Defendants, each of whom is a person associated-in-fact with the  
3 Morning Song Enterprise, did knowingly, willfully, and unlawfully conduct or  
4 participate, directly or indirectly, in the affairs of the enterprise through a pattern of  
5 racketeering activity within the meaning of 18 U.S.C. §§1961(1), 1961(5) and  
6 1962(c). The racketeering activity was made possible by Defendants' regular and  
7 repeated use of the facilities, services, distribution channels, and employees of the  
8 Morning Song Enterprise.

9 77. Defendants each committed multiple "Racketeering Acts," as described  
10 below, including aiding and abetting such acts.

11 78. The Racketeering Acts were not isolated, but rather were related in that  
12 they had the same or similar purposes and results, participants, victims, and methods  
13 of commission. Further, the Racketeering Acts were continuous, occurring on a  
14 regular, and likely daily, basis beginning in November 2005.

15 79. Defendants participated in the operation and management of the Morning  
16 Song Enterprise by directing its affairs, as described above.

17 80. In devising and executing the Illegal Scheme, Defendants committed acts  
18 constituting indictable offenses under 18 U.S.C. §§1341 and 1343, in that they devised  
19 and knowingly carried out a material scheme or artifice to defraud Plaintiffs and the  
20 Class or to obtain money from Plaintiffs and the Class by means of materially false or  
21 fraudulent pretenses, representations, promises, or omissions of material facts. For the  
22 purpose of executing the Illegal Scheme, Defendants committed these Racketeering  
23 Acts, which number in the thousands, intentionally, and knowingly with, the specific  
24 intent to advance the Illegal Scheme.

25 81. Defendants used thousands of mail and interstate wire communications to  
26 create and manage their fraudulent scheme through virtually uniform  
27 misrepresentations, concealments and material omissions. Defendants' scheme  
28 includes, but is not limited to: manufacturing hazardous bird "food"; disseminating

1 false and misleading marketing materials, advertisements, agreements,  
2 correspondence, websites; and receiving payments, revenues and profits.

3 82. Defendants' fraudulent use of the mails and wires included the following  
4 items and communications sent by Defendants to each other, Plaintiffs and third  
5 parties via U.S. mail, commercial carrier, interstate wire, and/or other interstate  
6 electronic media:

7 (a) misrepresentations and material omissions about the illegal  
8 presence of toxic chemicals in Morning Song Bird Food that was hazardous to the  
9 birds and other wildlife it was intended to feed, including marketing materials,  
10 advertisements, product packaging, labels, and the "Fellow Bird Lover" letter;

11 (b) distribution and receipt of dangerous pesticides, seeds, and other  
12 ingredients used to make Morning Song Bird Food;

13 (c) distribution and receipt of Morning Song Bird Food;

14 (d) invoices and payments related to Defendants' improper scheme;

15 (e) deposits of proceeds;

16 (f) agreements; and

17 (g) other documents and things.

18 83. Defendants have communicated by U.S. mail, by interstate facsimile, and  
19 by interstate electronic mail with various subsidiaries, regional offices, affiliates,  
20 divisions and other entities in furtherance of their scheme.

21 84. Defendants and third parties have exclusive custody or control over the  
22 records reflecting the precise dates and time of the mailings and wire transmissions  
23 described above.

24 85. Throughout the Class Period, including on/in or about the dates or  
25 months set forth below, SMG, Scotts LLC and Hagedorn, for the purpose of executing  
26 the above-described scheme caused to be delivered by mail or by a private or  
27 commercial interstate carrier, or received therefrom, according to the direction  
28

1 thereon, or at the place at which it is directed to be delivered by the person to whom it  
2 is addressed, the items described above, including those alleged below:

<b>From</b>	<b>To</b>	<b>Date</b>	<b>Description</b>
3 Research Triangle 4 Park, NC	Reynolds, IN	January 2006	Containers of Storcide II
5 Research Triangle 6 Park, NC	Reynolds, IN	April 2006	Containers of Storcide II
7 Research Triangle 8 Park, NC	Reynolds, IN	July 2006	Containers of Storcide II
9 Research Triangle 10 Park, NC	Reynolds, IN	October 2006	Containers of Storcide II
11 Research Triangle 12 Park, NC	Reynolds, IN	January 2007	Containers of Storcide II
13 Research Triangle 14 Park, NC	Reynolds, IN	April 2007	Containers of Storcide II
15 Research Triangle 16 Park, NC	Reynolds, IN	July 2007	Containers of Storcide II
17 Research Triangle 18 Park, NC	Reynolds, IN	October 2007	Containers of Storcide II
19 Canal Winchester, OH	Silver Spring, MD	March 26, 2008	Purported Voluntary Recall Letter
20 Canal Winchester, OH	Silver Spring, MD	March 27, 2008	Purported Voluntary Recall Letter

21 86. Throughout the Class Period, including on/in or about the dates or  
22 months set forth below, SMG, Scotts LLC and Hagedorn, for the purpose of executing  
23 the above-described scheme caused to be transmitted in interstate commerce by means  
24 of wire communications, certain writings, signs, signals and sounds, including those  
25 alleged below:

<b>From</b>	<b>To</b>	<b>Date</b>	<b>Description</b>
26 Walmart, El 27 Cajon, CA	Banknet, O'Fallon, MO	December 2005	Credit Card Authorization
28 Walmart, San Diego, CA	Banknet, O'Fallon, MO	January 2006	Credit Card Authorization
Walmart, El Cajon, CA	Banknet, O'Fallon, MO	June 2006	Credit Card Authorization

<b>From</b>	<b>To</b>	<b>Date</b>	<b>Description</b>
Walmart, San Diego, CA	Banknet, O'Fallon, MO	December 2006	Credit Card Authorization
Walmart, El Cajon, CA	Banknet, O'Fallon, MO	January 2007	Credit Card Authorization
Walmart, San Diego, CA	Banknet, O'Fallon, MO	December 2007	Credit Card Authorization
Walmart, El Cajon, CA	Banknet, O'Fallon, MO	January 2008	Credit Card Authorization
SMG, Canal Winchester, OH	FDA, Silver Spring Maryland	March 25, 2008	Telephone Call regarding purported voluntary recall
Walmart, San Diego, CA	Banknet, O'Fallon, MO	January 2010	Credit Card Authorization

Defendants and third parties have exclusive control over the documents reflecting the precise dates and times of the mailings and wire transmissions described above.

87. Defendants' uniform acts of concealment and omissions were knowing and intentional and made for the purpose of deceiving the Class, executing the Illegal Scheme, and obtaining revenues and profits as a result thereof.

88. Defendants knew and recklessly disregarded that their misrepresentations and omissions were material and were relied upon by Plaintiffs and the Class as shown by their payment for the hazardous Morning Song Bird Food.

#### **FRAUDULENT CONCEALMENT AND EQUITABLE TOLLING**

89. Defendants have affirmatively and fraudulently concealed their unlawful scheme, conspiracy and course of conduct from Plaintiffs. Plaintiffs and Class Members did not know and could not reasonably have known of Defendants' Illegal Scheme and could not have reasonably discovered the falsity of Defendants' representations, advertising and similar documents, nor could Plaintiffs and other Class Members reasonably have known the concealed information until on or about January 25, 2012, when SMG pled guilty to crimes relating to its concealment of the pesticides in the Morning Song Bird Food. SMG's plea marked the first public

1 disclosure of the pesticides used in the bird seed, the true nature of the defect, as well  
 2 as the revelation that employees had warned SMG about the dangers long before the  
 3 product was removed from the stream of commerce.

4 90. As aforementioned, on or about March 25, 2008, SMG telephoned the  
 5 FDA, and on March 26 and 27, 2008, it sent letters to the FDA concerning the  
 6 Morning Song Bird Food. Although these communications purported to be notices of  
 7 a voluntary recall of the Morning Song Bird Food, they were actually lulling  
 8 communications. These communications lulled and deceived the FDA. They caused  
 9 the FDA to issue an enforcement report that not only failed to disclose that Morning  
 10 Song Bird Food had been treated with a pesticide that rendered it hazardous to wild  
 11 birds and other wildlife, but actually misrepresented that because of the pesticides,  
 12 Morning Song Bird Food should be used *only* for wild birds and wild animals.

13 The FDA Enforcement Report read as follows:

14 Manufacturer: The Scotts Company LLC, Corona, CA. Firm initiated recall is ongoing.

**REASON**

15 Animal food intended for feeding non-domestic birds and other wildlife species were found to have been  
 16 treated with pesticides which were not labeled with instructions for approved use only on wild bird or wild  
 17 animal products or on all of the individual components that might be present in such stored grain mixtures.

**VOLUME OF PRODUCT IN COMMERCE**

16 61,019,671 units (includes totals for V-114/V-161-2008)

**DISTRIBUTION**

17 Nationwide

**END OF ENFORCEMENT REPORT FOR MAY 28, 2008**

18 ###

19 Compare the above to the Storcide II Warning Label:

**ENVIRONMENTAL HAZARDS**

20 STORCIDE II insecticide is extremely toxic to fish and toxic to birds and other wildlife. Do not  
 21 apply directly to water, or to areas where surface water is present or to intertidal areas below  
 22 the mean high water mark. Do not discharge directly or indirectly into surface waters. Do not  
 23 contaminate water by cleaning of equipment or disposal of wastes.

24 Exposed treated seeds are hazardous to birds and other wildlife. Dispose of all excess treated  
 25 seeds and seed packaging by burial away from bodies of water.

26 This pesticide is highly toxic to bees exposed to direct treatment or residues on crops or  
 27 weeds. Do not apply STORCIDE II insecticide or allow it to drift onto crops or weeds on which  
 28 bees are actively foraging.

24 91. In addition, in a May 2008 earnings call, defendant Hagedorn acting as  
 25 CEO and spokesperson for the Company misleadingly represented that “the facts  
 26 around our Wild Bird Food recall are pretty simple,” that no “wild birds were ever  
 27 harmed,” and that the effort to get the illegal products of the shelf was “nearly  
 28 complete.” Hagedorn failed to disclose that the Company’s conduct was criminal, that



1 the Company had already received numerous reports of bird deaths, and that only a  
2 tiny fraction of the product would be returned to the Company as a result of the  
3 purported “recall.”

4 92. Similarly, Defendants’ statements in the “Fellow Bird Lover” letter in  
5 Spring 2008 were highly deceptive and intended to mislead purchasers of Morning  
6 Song Bird Food, including Plaintiffs and the Class. The Scotts Miracle-Gro  
7 Company, a publicly-traded company with billions of dollars in annual sales and  
8 millions of dollars in annual expenditures on television and other advertising, did  
9 nothing to notify and alert the public, consumers and purchasers that the bird “food”  
10 was, in fact, so hazardous to birds and other wildlife that it was required to be  
11 disposed of by burial away from any bodies of water. Rather than publicly identify  
12 the specific toxic pesticides used by Defendants or provide the necessary warnings  
13 regarding toxicity, Defendants referred to these chemicals generically as “insect  
14 controls.” Most importantly, Defendants intentionally and materially omitted the  
15 material fact that the pesticides used in Morning Song Bird Food were known to be  
16 toxic to birds and other wildlife, including when used as treatment for grain or seeds  
17 as in Morning Song Bird Food. Instead, Defendants sought to create the impression  
18 that the replacement of the products was solely a legal technicality, a “regulatory  
19 matter,” because the “insect controls” were not approved for use on animal seed,  
20 suggesting that the “Fellow Bird Lover” letter had little to do with the safety or  
21 appropriateness of Morning Song Bird Food as feed for wild birds and wildlife.

22 93. In fact, Defendants continued to deceptively suggest that Morning Song  
23 Bird Food was safe and appropriate for such use, stating to the public in the “Fellow  
24 Bird Lover” letter that: “*We believe that the wild bird food and wild animal food did*  
25 *not constitute a significant health risk to wild birds, small animals or humans who*  
26 *handle the food.*” Through these and similar statements, Defendants sought to  
27 minimize or evade liability for Defendants’ wrongdoing, prevent negative media  
28 attention and publicity regarding SMG’s wrongful use of toxic pesticides in its

1 Morning Song products, and preserve Defendants' market share and ability to sell  
2 these types of products in the future. Plaintiffs did not receive or see, and were not  
3 otherwise aware of, the "Fellow Bird Lover" letter prior to the year 2012, when the  
4 criminal prosecution came to light.

5       94. As a result of Defendants' efforts to conceal the nature and extent of its  
6 criminal and wrongful activity, Plaintiffs, the Class and the public at large could not  
7 have known of Defendants' conduct until the federal government revealed its criminal  
8 prosecution of Defendants in January of 2012, or of Hagedorn until 2014 when  
9 discovery began to reveal the extent of his knowledge and participation in the Illegal  
10 Scheme. Nor could Plaintiffs, the Class, or the public at large, have learned of  
11 Defendants' Illegal Scheme through the exercise of any level of diligence – as  
12 demonstrated, for example, by the Cypherts' extraordinary, yet fruitless, diligence,  
13 and the fact that it took state and federal law enforcement officials nearly four years to  
14 expose the Illegal Scheme. Plaintiffs, the Class, and the public at large do not have at  
15 their disposal anywhere near the investigative tools and resources that the government  
16 used to expose Defendants' Illegal Scheme, including the federal grand jury's  
17 subpoena power.

18       95. The foregoing allegations, those that follow, and those facts to be proven  
19 at trial, establish and will establish that the Defendants acted affirmatively, through  
20 active and intentional fraudulent omission, concealment, and suppression of material  
21 information to conceal Defendants' fraud from Plaintiffs and the Class.

22       96. Defendants' conduct has been continuing in nature. There is a substantial  
23 nexus between the fraudulent conduct that occurred within the statute of limitations  
24 and the misconduct that occurred prior to, and since, that time. The acts involve the  
25 same type of illicit practices and are recurring, continuous events. Defendants'  
26 wrongful conduct and fraudulent concealment tolls the running of any statute of  
27 limitations until, at the earliest, the federal prosecution was initiated in or about  
28 January 2012. Furthermore, Defendants continued using toxic chemicals to treat

1 Morning Bird Song Food even after 2008. Defendants are estopped from asserting  
2 any statute of limitations defense in this matter because of its conduct in concealing  
3 the fraud claims of Plaintiffs and the Class and concealing the damages incurred by  
4 Plaintiffs and the Class.

5 97. Defendants' fraudulent, criminal and wrongful behavior occurred  
6 nationwide, and did not stop at the borders of any individual states. The filing of this  
7 class action complaint serves to toll and preserve the claims of the Class Members and  
8 other purchasers who were defrauded by Defendants' wrongful and unlawful acts.

9 **CLASS ACTION ALLEGATIONS**

10 98. Plaintiffs bring this action pursuant to Federal Rules of Civil Procedure  
11 23(a), (b)(2), and (b)(3), individually and as a class action on behalf: All persons who  
12 purchased, and have not yet received a full refund for, a Scotts Miracle-Gro wild bird  
13 food product containing Storcide II, Actellic 5E, or their active ingredients,  
14 chlorpyrifos-methyl or pirimiphos-methyl. All persons who purchased, and have not  
15 yet received a full refund for, a Scotts Miracle-Gro wild bird food product between  
16 November 2005 and May 2008 are necessarily part of this Class. At this time,  
17 Plaintiffs have requested that that court certify the RICO nationwide class and three  
18 subclasses for claims in California, Missouri and Minnesota.<sup>3</sup>

19 99. Specifically excluded from the proposed Class are Defendants and their  
20 officers, directors, agents, trustees, parents, corporations, trusts, representatives,  
21 employees, principals, partners, joint ventures and entities controlled by Defendants;  
22 their heirs, successors, assigns or other persons or entities related to, or affiliated with,  
23 Defendants; and the Judge(s) assigned to this action; and any member of their  
24 immediate families.

25

26

27 <sup>3</sup> Plaintiffs reserve the right to move for leave to seek class certification on other  
28 claims in this case, depending on the Court's decision on their motion for class  
certification filed on October 20, 2014.

1           100. Subject to additional information obtained through further investigation  
2 and discovery, the foregoing definition of the Class may be expanded or narrowed by  
3 amendment, amended complaint or at class certification proceedings.

4           101. **Numerosity:** Class Members are so numerous that joinder of all  
5 individual members is impracticable. While the exact number and identities of the  
6 Class Members are unknown to Plaintiffs at this time and can only be ascertained  
7 through appropriate discovery, Plaintiffs allege that the Class is comprised of  
8 thousands, if not millions, of individual members geographically disbursed throughout  
9 the United States. The number of Class Members and their geographical  
10 disbursement renders joinder of all individual members impracticable if not  
11 impossible.

12           102. **Existence and Predominance of Common Questions:** There are  
13 questions of fact and law common to Plaintiffs and Class Members that predominate  
14 over any questions affecting solely individual members including, *inter alia*, the  
15 following:

16                   (a) whether Defendants manufactured, marketed, distributed, and/or  
17 sold Morning Song Bird Food that was tainted by the pesticides as described herein;

18                   (b) whether the Morning Song Enterprise was an enterprise engaged  
19 in, or the activities of which affected, interstate or foreign commerce;

20                   (c) whether Defendants conducted or participated in the conduct of the  
21 Morning Song Enterprise's affairs through a pattern of racketeering activities;

22                   (d) whether Defendants knowingly participated in, devised, or  
23 intended to devise a scheme or plan to defraud, or a scheme or plan for obtaining  
24 money or property by means of false or fraudulent pretenses, representations,  
25 promises, or omissions;

26                   (e) whether the statements made or facts omitted as part of the scheme  
27 were material; that is, whether they had a natural tendency to influence, or were  
28 capable of influencing, a person to part with money or property;

1 (f) whether Defendants acted with the intent to defraud; that is, the  
2 intent to deceive or cheat;

3 (g) whether Defendants used, or caused to be used, the mails or  
4 interstate wire transmission to carry out, or attempt to carry out, an essential part of  
5 the scheme;

6 (h) whether Defendants advertised, represented, or held out the  
7 Morning Song Bird Food as a product that was safe for consumption by birds and  
8 wildlife;

9 (i) whether Defendants implicitly warranted the Morning Song Bird  
10 Food as a product that was safe for consumption by birds and wildlife;

11 (j) whether Defendants intended or foresaw that Plaintiffs, Class  
12 Members, or others would feed the Morning Song Bird Food to birds and wildlife;

13 (k) whether Defendants acted knowingly or with reckless disregard in  
14 manufacturing, processing, distributing, and/or selling the Morning Song Bird Food;

15 (l) whether Defendants were negligent in manufacturing and/or  
16 processing the Morning Song Bird Food;

17 (m) whether Defendants' advertisements and/or labels were false,  
18 misleading or reasonably likely to deceive;

19 (n) whether Defendants violated the RICO Statute, 18 U.S.C. §1962(c)  
20 and (d);

21 (o) whether Defendants violated the Consumers Legal Remedies Act  
22 ("CLRA"), Cal. Civ. Code §1750, *et seq.*;

23 (p) whether Defendants violated the Unfair Competition Law  
24 ("UCL"), Cal. Bus. & Prof. Code §17200, *et seq.*;

25 (q) whether Defendants violated the False and Misleading Advertising  
26 Law ("FAL"), Cal. Bus. & Prof. Code 17500, *et seq.*;

27 (r) whether Defendants violated the Kentucky Consumer Protection  
28 Act ("KCPA"), Ky. Rev. Stat. Ann. §§367.110-367.360;

1 (s) whether Defendants violated the Minnesota Consumer Fraud Act  
2 (“MCFA”), Minn. Stat. §§325F.68-325F.69;

3 (t) whether Defendants violated the Missouri Merchandising Practices  
4 Act, Mo. Rev. Stat. §407.010, *et seq.*;

5 (u) whether Defendants breached any implied warranty of  
6 merchantability to Plaintiffs and other Class Members;

7 (v) what is the measure and amount of damages suffered by Plaintiffs  
8 and Class Members;

9 (w) whether Plaintiffs and Class Members are entitled to injunctive or  
10 declaratory relief;

11 (x) whether Defendants’ actions proximately caused damages to  
12 Plaintiffs and Class Members; and

13 (y) whether Defendants are liable for punitive or exemplary damages.

14 103. **Typicality:** Plaintiffs’ claims are typical of the claims of other Class  
15 Members in that all such claims arise out of Defendants’ violations of 18 U.S.C.  
16 §§1962(c) and (d), and other violations of federal, state and common law, and  
17 Defendants’ conduct in manufacturing, producing and entering into the stream of  
18 commerce the Morning Song Bird Food, Defendants’ conduct surrounding the March  
19 2008 communications with the FDA, Defendants’ conduct surrounding the Spring  
20 2008 “Fellow Bird Lover” letter, and Plaintiffs’ and Class Members’ purchase and use  
21 of the toxic Morning Song Bird Food. Plaintiffs and Class Members seek identical  
22 remedies under identical legal theories, and there is no antagonism or material factual  
23 variation between Plaintiffs’ claims and those of other Class Members.

24 104. **Adequacy:** Plaintiffs will fairly and adequately protect the interests of  
25 the Class. Plaintiffs’ claims are coextensive with, and not antagonistic to, the claims  
26 of other Class Members. Plaintiffs are willing and able to vigorously prosecute this  
27 action on behalf of the Class, and Plaintiffs have retained competent counsel  
28 experienced in litigation of this nature.

1           **105. Superiority:** A class action is superior to all other available means for  
2 the fair and efficient adjudication of this controversy. The damages or other financial  
3 detriment suffered by individual Class Members is relatively small compared to the  
4 burden and expense that would be entailed by individual litigation of their claims  
5 against Defendants. It would thus be virtually impossible for Class Members, on an  
6 individual basis, to obtain effective redress for the wrongs done to them. Furthermore,  
7 even if Class Members could afford such individualized litigation, the court system  
8 could not. Individualized litigation would create the danger of inconsistent or  
9 contradictory judgments arising from the same set of facts. Individualized litigation  
10 would also increase the delay and expense to all parties and the court system from the  
11 issues raised by this action. By contrast, the class action device provides the benefits  
12 of adjudication of these issues in a single proceeding, economies of scale, and  
13 comprehensive supervision by a single court, and presents no unusual management  
14 difficulties under the circumstances here.

15           **106.** In the alternative, the Class may also be certified under Federal Rule of  
16 Civil Procedure 23(b)(2) because:

17                   (a) the prosecution of separate actions by individual Class Members  
18 would create a risk of inconsistent or varying adjudication with respect to individual  
19 Class Members that would establish incompatible standards of conduct for the  
20 Defendants;

21                   (b) the prosecution of separate actions by individual Class Members  
22 would create a risk of adjudications with respect to them that would, as a practical  
23 matter, be dispositive of the interests of other Class Members not parties to the  
24 adjudications, or substantially impair or impede their ability to protect their interests;  
25 and/or

26                   (c) Defendants have acted or refused to act on grounds generally  
27 applicable to the Class, thereby making appropriate final declaratory and/or injunctive  
28 relief with respect to the members of the Class as a whole.





1           112. The Morning Song Enterprise was created and/or used as a tool to carry  
2 out the elements of Defendants’ illicit scheme and pattern of racketeering activity.  
3 The Morning Song Enterprise has ascertainable structures and purposes beyond the  
4 scope and commission of Defendants’ predicate acts and conspiracy to commit such  
5 acts. The enterprise is separate and distinct from Defendants.

6           113. The members of the RICO enterprise all had the common purpose to  
7 increase and maximize revenues and profits for Defendants by increasing the shelf life  
8 of the toxic Morning Song Bird Food and continuing to sell such products despite the  
9 fact that they were known to contain harmful pesticides that poisoned rather than  
10 nourished the birds for which the products were intended.

11           114. The Morning Song Enterprise has engaged in, and its activities affected,  
12 interstate and foreign commerce by designing, manufacturing, marketing, distributing  
13 and selling the toxic Morning Song Bird Food to millions of persons within and  
14 throughout the United States.

15           115. The Morning Song Enterprise actively disguised the nature of  
16 Defendants’ wrongdoing and concealed or misrepresented Defendants’ participation  
17 in the conduct of the Morning Song Enterprise to maximize profits and market share  
18 while minimizing their exposure to criminal and civil penalties.

19           116. Each of the Defendants exerted substantial control over the Morning  
20 Song Enterprise, and participated in the operation and managed the affairs of the  
21 enterprise as described herein.

22           117. Defendants have committed or aided and abetted the commission of at  
23 least two acts of racketeering activity, *i.e.*, indictable violations of 18 U.S.C. §§1341  
24 and 1343, within the past ten years. The multiple acts of racketeering activity which  
25 Defendants committed and/or conspired to, or aided and abetted in the commission of,  
26 were related to each other, pose a threat of continued racketeering activity, and  
27 therefore constitute a “pattern of racketeering activity.”  
28

1 118. Defendants' predicate acts of racketeering within the meaning of 18  
2 U.S.C. §1961(1) include, but are not limited to:

3 (a) **Mail Fraud:** Defendants have violated 18 U.S.C. §1341, by  
4 sending or receiving materials via U.S. mail or commercial interstate carriers for the  
5 purpose of executing their scheme to manufacture, market, distribute and sell toxic  
6 Morning Song Bird Food by means of false pretenses, misrepresentations, promises,  
7 and/or omissions. The materials include, but are not limited to: the toxic bird food;  
8 marketing materials and advertisements; product packaging; contracts;  
9 correspondence; the "Fellow Bird Lover" letter issued by SMG; pesticides and other  
10 ingredients; invoices and payments; reports; and other materials relating to the  
11 marketing, distribution and sale of the bird food; and

12 (b) **Wire Fraud:** Defendants have violated 18 U.S.C. §1343, by  
13 transmitting and receiving materials by wire for the purpose of executing their scheme  
14 to defraud and obtain money on false pretenses, misrepresentations, promises, and/or  
15 omissions. The materials transmitted and/or received include, but are not limited to,  
16 those mentioned in subsection (a) above.

17 119. Many of the precise dates of Defendants' fraudulent uses of the U.S. mail  
18 and wire facilities have been deliberately hidden and cannot be alleged without access  
19 to Defendants' books and records. Indeed, the success of Defendants' scheme  
20 depends upon secrecy, and Defendants have withheld details of the scheme from  
21 Plaintiffs and Class Members. Generally, however, Plaintiffs have described  
22 occasions on which the predicate acts of mail and wire fraud would have occurred.  
23 They include thousands of communications to perpetuate and maintain the scheme,  
24 including, among other things, the materials described in the preceding paragraph.

25 120. Defendants have obtained money and property belonging to Plaintiffs and  
26 the Class as a result of these statutory violations. Plaintiffs and Class Members have  
27 been injured in their business or property by Defendants' overt acts of mail and wire  
28 fraud, and by their aiding and abetting each other's acts of mail and wire fraud.

1           221. In violation of 18 U.S.C. §1962(d), Defendants conspired to violate  
2 18 U.S.C. §1962(c), as described herein. Various other persons, firms and  
3 corporations, not named as defendants in this Complaint, have participated as co-  
4 conspirators with Defendants in these offenses and have performed acts in furtherance  
5 of the conspiracy.

6           222. Each Defendant aided and abetted violations of the above laws, thereby  
7 rendering them indictable as a principal in the 18 U.S.C. §§1341 and 1343 offenses  
8 pursuant to 18 U.S.C. §2.

9           223. Plaintiffs and the Class have been injured in their property by reason of  
10 Defendants' violations of 18 U.S.C. §1962(c) and (d), including the purchase price of  
11 the product. In the absence of Defendants' violations of 18 U.S.C. §1962(c) and (d),  
12 Plaintiffs and the Class would not have incurred these costs and expenses.

13           224. Plaintiffs and the Class relied, to their detriment, on Defendants'  
14 fraudulent misrepresentations and omissions, which were made by means of websites,  
15 mass mailings, newspaper advertisements, product packaging, telephone calls,  
16 marketing materials and virtually uniform representations or omissions. Plaintiffs'  
17 and the Class's reliance is evidenced by their purchases.

18           225. Plaintiffs' and the Class's injuries were directly and proximately caused  
19 by Defendants' racketeering activity.

20           226. Defendants knew Plaintiffs and the Class relied on their representations  
21 and omissions about the suitability of the Morning Song Bird Food as food for birds.  
22 Defendants knew and intended that consumers would incur substantial costs as a  
23 result.

24           227. Under the provisions of 18 U.S.C. §1964(c), Plaintiffs are entitled to  
25 bring this action and to recover treble damages, the costs of bringing this suit and  
26 reasonable attorneys' fees.

27           228. Defendants are accordingly liable to Plaintiffs for three times their actual  
28 damages as proved at trial plus interest and attorneys' fees.

**COUNT II**

**Violations of the Consumers Legal Remedies Act,  
California Civil Code §1750, et seq.**

**(On Behalf of Plaintiffs Laura Cyphert and Milt Cyphert and  
All California Class Members)**

129. Plaintiffs incorporate the above allegations by reference as if fully set forth herein.

130. This Count is brought pursuant to California Civil Code §1750, *et seq.* the Consumers Legal Remedies Act (“CLRA”). Plaintiffs and Class Members are consumers as defined by California Civil Code §1761(d). Their purchases of the Morning Song Bird Food constitute transactions for the sale of “goods” within the meaning of California Civil Code §§1770(a) and 1761.

131. Defendants, through their agents, employees and/or subsidiaries, violated the CLRA by engaging in the following practices proscribed by California Civil Code §1770(a), in transactions that were intended to result in, and did result in, the sale of the product in the State of California:

(a) representing that the Morning Song Bird Food had characteristics and benefits which it did not have;

(b) representing that the Morning Song Bird Food was of a particular standard, quality or grade, which it was not;

(c) advertising the Morning Song Bird Food with intent not to sell it as advertised; and

(d) representing that the Morning Song Bird Food was supplied in accordance with previous representations when it was not.

132. Defendants knew, or should have known, that their representations and advertisements regarding the Morning Song Bird Food were false and misleading.

133. Defendants’ conduct is malicious, fraudulent and wanton, and provided misleading information to Plaintiffs, the Class, and the general public.

1 134. By reason of the foregoing, Plaintiffs and Class Members have been  
2 irreparably harmed, entitling them to both injunctive relief and restitution. Thus,  
3 pursuant to California Civil Code §1782(d), Plaintiffs seek a Court order enjoining the  
4 above-described wrongful acts and practices of Defendants and for restitution and  
5 disgorgement.

6 135. Pursuant to §1782, Plaintiffs have notified Defendants in writing of the  
7 particular violations of §1770 of the Act and demanded that Defendants rectify the  
8 actions described above by providing complete monetary relief, agreeing to be bound  
9 by their legal obligations and to give notice to all affected customers of their intent to  
10 do so. Plaintiffs sent this notice by certified mail, return receipt requested, to  
11 Defendants' principal place of business.

12 136. Defendants failed to rectify or agree to rectify the problems associated  
13 with the actions detailed above or give notice to all affected consumers within 30 days  
14 of the date of written notice pursuant to California Civil Code §1782. As a result,  
15 Plaintiffs are seeking monetary damages under the CLRA.

16 137. As a proximate result of Defendants' deceptive acts, Plaintiffs and the  
17 public, including the Class, have been damaged.

18 138. Plaintiffs also seek injunctive relief for the violation of the CLRA.

19 139. Plaintiffs seek attorneys' fees and costs as allowed by law.

20 **COUNT III**

21 **Violation of California's Unfair Competition Law,**  
22 **California Business and Professions Code §17200, et seq.**

23 **(On Behalf of Plaintiffs Laura Cyphert and Milt Cyphert and**  
24 **All California Class Members)**

25 140. Plaintiffs incorporate the above allegations by reference as if fully set  
26 forth herein.

27 141. California Business and Professions Code §17200, *et seq.*, the Unfair  
28 Competition Law ("UCL") prohibits any "unlawful . . . business act or practice."  
Defendants, through their agents, employees and/or subsidiaries, violated the UCL's

1 prohibition against engaging in unlawful acts and practices by, *inter alia*, engaging in  
2 false and misleading advertising and omitting material facts, as set forth more fully  
3 herein; and violating 18 U.S.C. §1962(c) and (d); Cal. Civ. Code §§1572-1573,  
4 §§1709-1711 and §1770; and the common law.

5 142. Plaintiffs reserve the right to allege other violations of law, which  
6 constitute other unlawful business acts or practices. Such conduct is ongoing and  
7 continues to this date.

8 143. The UCL also prohibits any “unfair or fraudulent business act or  
9 practice.”

10 144. Defendants’ acts, omissions, misrepresentations, practices and non-  
11 disclosures alleged herein also constitute “unfair” business acts and practices within  
12 the meaning of the UCL in that Defendants’ conduct is substantially injurious to  
13 consumers, offends public policy and is immoral, unethical, oppressive, unscrupulous,  
14 unconscionable, and/or substantially injurious and the gravity of the conduct  
15 outweighs any alleged benefits attributable to such conduct.

16 145. As stated in this Complaint, Plaintiffs allege violations of consumer  
17 protection, unfair competition and truth-in-advertising laws in California resulting in  
18 harm to consumers. Plaintiffs assert violations of the public policy of engaging in  
19 false and misleading advertising, unfair competition and deceptive conduct towards  
20 consumers. The conduct constitutes violations of the unfairness prong of the UCL.  
21 There were reasonably available alternatives to further Defendants’ legitimate  
22 business interests, other than the conduct described herein.

23 146. Defendants’ claims, non-disclosures and misleading statements, as more  
24 fully set forth above, were false, misleading, and/or likely to deceive the consuming  
25 public within the meaning of the UCL.

26 147. Defendants’ conduct caused and continues to cause substantial injury to  
27 Plaintiffs and other Class Members. Plaintiffs have suffered injury-in-fact and have  
28 lost money as a result of Defendants’ unfair conduct.

1 148. Defendants have thus engaged in unlawful, unfair and fraudulent  
2 business acts and practices in false advertising, entitling Plaintiffs and other Class  
3 Members to judgment and equitable relief against Defendants as set forth in the Prayer  
4 for Relief.

5 149. Pursuant to California Business & Professions Code §17203, Plaintiffs  
6 and Class Members are entitled to *inter alia*:

7 (a) an order requiring Defendants to cease the unlawful and unfair acts  
8 alleged herein and requiring Defendants to engage in a corrective marketing  
9 campaign;

10 (b) full restitution of all monies paid by Plaintiffs and California Class  
11 Members for Morning Song Bird Food;

12 (c) pre-judgment interest at the highest rate allowable by law; and

13 (d) payment of their attorneys' fees and costs pursuant to, *inter alia*,  
14 California Code of Civil Procedure §1021.5.

15 **COUNT IV**

16 **Violation of California's False and Misleading Advertising Law,**  
17 **California Business & Professions Code §17500, et seq.**

18 **(On Behalf of Plaintiffs Laura Cyphert and Milt Cyphert and**  
19 **All California Class Members)**

20 150. Plaintiffs incorporate the above allegations by reference as if fully set  
21 forth herein.

22 151. Defendants' acts and practices as described herein have deceived and/or  
23 are likely to deceive Class Members and the public. Defendants falsely advertised  
24 that Morning Song Bird Food was safe as birdseed.

25 152. By their actions, Defendants disseminated uniform advertising  
26 concerning Morning Song Bird Food that by its nature is unfair, deceptive, untrue or  
27 misleading within the meaning of California Business & Professions Code §17500, *et*  
28 *seq.* Such advertisements were likely to deceive the consuming public for the reasons  
detailed herein.





1           158. This Count is brought pursuant to the Kentucky Consumer Protection Act  
2 (“KCPA”), Kentucky Revised Statutes and Rules §§367.110-367.360.

3           159. Plaintiff purchased Defendants’ Morning Song Bird Food. Plaintiff  
4 purchased Defendants’ products for his own use as a consumer, and not for resale.

5           160. At the time Plaintiff purchased Defendants’ Morning Song Bird Food, he  
6 was unaware that Morning Song Bird Food contained Storcide II and Actellic 5E,  
7 pesticides which are toxic to birds and other wildlife. Plaintiff believed he was  
8 purchasing bird seed which was safe and appropriate to feed to birds and other  
9 wildlife, and which did not contain pesticides or toxic chemicals.

10           161. Plaintiff and the Class have standing under the KCPA in that Plaintiff and  
11 the Class purchased Defendants’ products primarily for personal, family or household  
12 purposes, and have suffered an ascertainable loss of money or property as a result of  
13 Defendants’ unlawful acts in violation of the KCPA.

14           162. Plaintiff and the Class additionally have standing under Ky. Rev. Stat.  
15 §446.070, which provides that “[a] person injured by the violation of any statute may  
16 recover from the offender such damages as he sustained by reason of the violation  
17 . . . .” Plaintiff and the Class fall within the class of persons intended to be protected  
18 by Ky. Rev. Stat. §367.110, *et seq.*

19           163. The KCPA prohibits “[u]nfair, false, misleading or deceptive acts or  
20 practices in the conduct of any trade or commerce . . . .” Ky. Rev. Stat. §367.170.

21           164. Defendants’ commission of unlawful acts in violation of the KCPA  
22 includes one or more of the following:

23           a. Omitting, suppressing, and/or concealing the material fact that  
24 Defendants’ Morning Song Bird Food contained the pesticides Storcide  
II and Actellic 5E;

25           b. Omitting, suppressing, and/or concealing the material fact that the  
26 pesticides used in Defendants’ Morning Song Bird Food were known to  
be toxic to birds, fish and other wildlife, including when used as  
27 treatment on seed;

28           c. Affirmatively misrepresenting to purchasers, including through  
package labeling, advertising, and other means, that Morning Song Bird

1 Food was appropriate and proper for use as bird seed, despite the fact  
2 that the products contained toxic pesticides;

3 d. Failing to alert the public and purchasers regarding the dangers  
4 arising from Defendants' use of pesticides which were known to be toxic  
5 to birds, fish and other wildlife, including when used as treatment on  
6 seed; and

7 e. Unlawfully promoting and marketing Defendants' Morning Song  
8 Bird Food which contained registered pesticides, without the required  
9 warnings, and without disclosing these material facts to purchasers.

10 165. Defendants' aforesaid acts were false, misleading and deceptive, and  
11 therefore in violation of the KCPA. Furthermore, Defendants' acts were unfair and  
12 unconscionable, in that Defendants, in good conscience, could not sell poisoned bird  
13 seed to consumers when Defendants knew that Plaintiff and Class Members wished to  
14 purchase the products specifically to provide a benefit to birds and other wild animals.  
15 Nor could Defendants in good conscience fail to notify Plaintiff and Class Members  
16 of the toxic pesticides in the Morning Song Bird Food, thereby allowing Plaintiff and  
17 Class Members to unknowingly continue to feed toxic seed to birds and other wildlife.

18 166. As a direct result of Defendants' unlawful acts in violation of the KCPA,  
19 Plaintiff and Class Members suffered an ascertainable loss of money when they  
20 purchased Defendants' Morning Song Bird Food, which was in fact toxic and  
21 dangerous to birds and other wildlife.

22 167. Defendants' actions were committed with oppression, fraud, or malice,  
23 and/or with a complete and reckless disregard for the rights of Plaintiff and the Class,  
24 entitling Plaintiff to punitive damages under Ky. Rev. Stat. §411.184.

25 168. Plaintiff and Class Members therefore request actual damages in an  
26 amount to be proven at trial, punitive damages, reasonable attorneys' fees and their  
27 costs herein.  
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**COUNT VI**

**Violation of Minnesota Consumer Fraud Act  
Minnesota Statutes §§325F.68-325F.69**

**(On Behalf of Plaintiff Ellen Larson and All Minnesota Class Members)**

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169. Plaintiff incorporates the above allegations by reference as if fully set forth herein.

170. This Count is brought pursuant to the Minnesota Consumer Fraud Act (“MCFA”), Minn. Stat. §§325F.68-325F.69.

171. Plaintiff purchased Defendants’ Morning Song Bird Food. Plaintiff purchased Defendants’ products for her own use as a consumer, and not for resale.

172. At the time Plaintiff purchased Defendants’ Morning Song Bird Food, she was unaware that Morning Song Bird Food contained Storcide II and Actellic 5E, pesticides which are toxic to birds and other wildlife. Plaintiff believed she was purchasing bird food which was safe and appropriate to feed to birds and other wildlife, and which did not contain pesticides or toxic chemicals.

173. Plaintiff and other Class Members are persons within the meaning of the MCFA.

174. Plaintiff and the Class have standing to bring this action pursuant to Minn. Stat. §8.31, subd. 3a, known as the Private Attorney General Act, which provides that any person injured by a violation of the MCFA may bring a civil action, including costs of investigation and reasonable attorneys’ fees.

175. The MCFA prohibits “[t]he act, use or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive trade practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby . . . .” Minn. Stat. §325F.69, subd. 1.

176. Plaintiff and the Class bring this action on behalf of the public interest and the interests of Minnesota purchasers. Among other things, this action is brought

1 to punish Defendants and to deter Defendants and other parties from engaging in  
2 wrongful conduct that is harmful to the public and to the environment, including  
3 illegally manufacturing and distributing products as animal food that contain toxic  
4 chemicals harmful to those same animals.

5 177. Defendants' commission of unlawful acts in violation of the MCFA  
6 includes one or more of the following:

7 a. Omitting, suppressing, and/or concealing the material fact that  
8 Defendants' Morning Song Bird Food contained the pesticides Storcide  
II and Actellic 5E;

9 b. Omitting, suppressing, and/or concealing the material fact that the  
10 pesticides used in Defendants' Morning Song Bird Food were known to  
11 be toxic to birds, fish and other wildlife, including when used as  
12 treatment on seed;

13 c. Affirmatively misrepresenting to purchasers, including through  
14 package labeling, advertising, and other means, that Morning Song Bird  
15 Food was appropriate and proper for use as bird seed, despite the fact  
16 that the products contained toxic pesticides;

17 d. Failing to alert the public and purchasers regarding the dangers  
18 arising from Defendants' use of pesticides which were known to be toxic  
19 to birds, fish and other wildlife, including when used as treatment on  
20 seed; and

21 e. Unlawfully promoting and marketing Defendants' Morning Song  
22 Bird Food which contained registered pesticides, without the required  
23 warnings, and without disclosing these material facts to purchasers.

24 178. As a result of the above unlawful acts, Defendants made intentional  
25 misrepresentations relating to the sale of merchandise to Plaintiff and Class Members.

26 179. Defendants' misrepresentations caused actual damage to Plaintiff and the  
27 Class and constituted the "causal nexus" of Plaintiff's and the Class Members'  
28 damages. Because Defendants failed to notify Plaintiff and the Class that its products  
contained toxic pesticides, Plaintiff and the Class purchased Defendants' Morning  
Song Bird Food based on the understanding that it was proper and appropriate to use  
the products as bird seed, and without knowing that the products in fact contained  
pesticides toxic to birds and other wildlife.

1 180. Defendants' wrongful and illegal acts show a deliberate disregard for the  
2 rights or safety of others. Defendants had knowledge of facts and/or intentionally  
3 disregarded facts that created a high probability of injury to the rights or safety of  
4 others, yet Defendants deliberately proceeded to act in conscious or intentional  
5 disregard of, and with indifference to, the high degree of probability of injury to the  
6 rights or safety of others. Defendants' conduct therefore entitles Plaintiff and the  
7 Class to an award of punitive damages pursuant to Minn. Stat. §549.20.

8 181. Plaintiff and Class Members therefore request actual damages in an  
9 amount to be proven at trial, punitive damages, reasonable attorneys' fees and their  
10 costs herein.

11 **COUNT VII**

12 **Violation of the Missouri Merchandising Practices Act**  
13 **Missouri Revised Statutes §407.010, *et seq.***

14 **(On Behalf of Plaintiff Barbara Cowin and All Missouri Class Members)**

15 182. Plaintiff incorporates the above allegations by reference as if fully set  
16 forth herein.

17 183. This Count is brought pursuant to the Missouri Merchandising Practices  
18 Act, Mo. Rev. Stat. §407.020, *et seq.*

19 184. Plaintiff purchased Defendants' Morning Song Bird Food. Plaintiff  
20 purchased Defendants' products for her own use as a consumer, and not for resale.

21 185. At the time Plaintiff purchased Defendants' Morning Song Bird Food,  
22 she was unaware that Morning Song Bird Food contained Storcide II and/or Actellic  
23 5E, pesticides which are toxic to birds and other wildlife. Plaintiff believed she was  
24 purchasing bird seed which was safe and appropriate to feed to birds and other  
25 wildlife, and which did not contain pesticides or toxic chemicals.

26 186. At all relevant times, Plaintiff and other Class Members were purchasers  
27 within the meaning of Mo. Rev. Stat. §407.025.1.  
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1 187. At all relevant times, Defendants conducted trade and commerce in the  
2 State of Missouri within the meaning of Mo. Rev. Stat. §407.010(7).

3 188. At all relevant times, Plaintiff, other Class Members, and Defendants  
4 were persons within the meaning of Mo. Rev. Stat. §407.010(5).

5 189. The Missouri Merchandising Practices Act, Mo. Rev. Stat. §407.020.1, *et*  
6 *seq.*, provides in pertinent part that:

7 The act, use or employment by any person of any deception, fraud, false  
8 pretense, false promise, misrepresentation, unfair practice or the  
9 concealment, suppression, or omission of any material fact in connection  
10 with the sale or advertisement of any merchandise in trade or  
11 commerce . . . in or from the state of Missouri, is declared to be an  
12 unlawful practice. . . . Any act, use or employment declared unlawful by  
13 this subsection violates this subsection whether committed before, during  
14 or after the sale, advertisement or solicitation.

15 190. Defendants, individually and/or jointly, by and through their employees,  
16 agents, apparent agents, liaisons, and/or sales representatives, engaged in  
17 concealment, suppressions, and/or omissions, misrepresentations, unlawful schemes  
18 and courses of conduct intended to induce Plaintiff and Class Members to purchase  
19 Morning Song Bird Food through one or more of the following unfair and/or  
20 deceptive acts and/or practices:

21 a. Omitting, suppressing, and/or concealing the material fact that  
22 Morning Song Bird Food contained the pesticides Storcide II and/or  
23 Actellic 5E;

24 b. Omitting, suppressing, and/or concealing the material fact that the  
25 pesticides used in Morning Song Bird Food were known to be toxic to  
26 birds, fish and other wildlife, including when used as treatment on seed;

27 c. Affirmatively misrepresenting to purchasers, including through  
28 package labeling, advertising, and other means, that Morning Song Bird  
Food was appropriate and proper for use as bird seed, despite the fact  
that the products contained toxic pesticides;

d. Failing to alert the public and purchasers regarding the dangers  
arising from Defendants' use of pesticides which were known to be toxic  
to birds, fish and other wildlife, including when used as treatment on  
seed; and/or

e. Unlawfully promoting and marketing Defendants' Morning Song  
Bird Food which contained registered pesticides, without the required  
warnings, and without disclosing these material facts to purchasers.

1           191. Defendants' unfair and/or deceptive acts and/or practices violated the  
2 Missouri Merchandising Practices Act, Mo. Rev. Stat. §407.020.

3           192. The facts which Defendants misrepresented, omitted, suppressed, and/or  
4 concealed as alleged in the preceding paragraphs were material in that they concerned  
5 facts that would have been important to a reasonable consumer in making a decision  
6 whether to purchase Morning Song Bird Food. Whether or not bird seed contains  
7 chemicals toxic to birds would be material and important to a reasonable consumer in  
8 deciding whether to purchase that bird seed.

9           193. Defendants' conduct as alleged in the preceding paragraphs was unfair in  
10 that it: (a) offended public policy; (b) it was immoral, unethical, oppressive, and/or  
11 unscrupulous; and/or (c) it caused substantial economic injury to consumers, namely  
12 Plaintiff and Class Members.

13           194. Defendants' unfair and/or deceptive acts and/or practices alleged in the  
14 preceding paragraphs occurred in connection with Defendants' conduct of trade and  
15 commerce in Missouri.

16           195. Defendants intended for Plaintiff and Class Members to purchase  
17 Defendants' wild bird seed products in reliance upon Defendants' unfair and/or  
18 deceptive acts and/or practices in the marketing, promotion, and sale of their products.

19           196. As a direct and proximate result of Defendants' unfair and/or deceptive  
20 acts and/or practices, Plaintiff and Class Members did not receive what they bargained  
21 for and believed they were receiving, bird seed that was appropriate for use as feed  
22 and not toxic and dangerous to birds and other wildlife, and have therefore suffered an  
23 ascertainable loss.

24           197. Defendants' unfair and/or deceptive acts and/or practices were  
25 outrageous due to Defendants' evil motive and/or reckless indifference to the rights of  
26 others; and committed with complete indifference to and conscious disregard for  
27 Plaintiffs' and the Class' rights, entitling Plaintiff and the Class to punitive damages.  
28

1 198. Plaintiff and the Class therefore request actual damages in an amount to  
2 be proven at trial, punitive damages, reasonable attorneys' fees and their costs herein.

3 **COUNT VIII**

4 **Breach of Implied Warranty of Merchantability**

5 199. Plaintiffs incorporate the above allegations by reference as if set forth  
6 herein.

7 200. Defendants, through their agents, employees and/or subsidiaries,  
8 manufactured, marketed, sold, or distributed Morning Song Bird Food. When  
9 Defendants placed Morning Song Bird Food into the stream of commerce, they knew,  
10 reasonably should have known, or were obligated to understand that the intended and  
11 ordinary purpose of Morning Song Bird Food was to provide food, not poison, to birds  
12 and other wildlife. Defendants impliedly warranted that Morning Song Bird Food was  
13 of merchantable quality and safe and fit for ordinary use.

14 201. Plaintiffs reasonably relied upon the skill, superior knowledge and  
15 judgment of Defendants as to whether Morning Song Bird Food was of merchantable  
16 quality and safe and fit for ordinary use as food for birds.

17 202. Due to Defendants' wrongful conduct as alleged herein, Plaintiffs could  
18 not have known about the risks and side effects associated with Morning Song Bird  
19 Food.

20 203. In breach of said implied warranty, Morning Song Bird Food was not of  
21 merchantable quality and was not safe or fit for ordinary use. Morning Song Bird  
22 Food cannot perform its ordinary and represented purpose of feeding birds because the  
23 product is poisonous to such animals and thus is not suitable for that purpose as was  
24 advertised by Defendants.

25 204. Plaintiffs and other Class Members purchased Morning Song Bird Food  
26 and used it for the ordinary and intended purpose of feeding birds and wildlife.  
27 Plaintiffs and Class Members entered into agreements with Defendants or their agents  
28 and received uniform warranties in connection with the purchase of such bird food.









1 the officers, agents, representatives, servants or employees of Defendants acting  
2 within the scope of their authority.

3 225. The information withheld from Plaintiffs and the Class is material and  
4 would have been considered as such by a reasonable person, as detailed herein.

5 226. Plaintiffs purchased Morning Song Bird Food under the false impression  
6 that the product was suitable as bird seed as it was advertised, the direct and proximate  
7 results of which were injury and harm to Plaintiffs and Class Members.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly  
10 situated, pray for relief and judgment against Defendants as follows:

11 A. For an order certifying the Class under the appropriate provisions of  
12 Federal Rule of Civil Procedure 23, as well as any appropriate subclasses, and  
13 appointing Plaintiffs and their legal counsel to represent the Class as Class Counsel;

14 B. Awarding actual, compensatory, and consequential damages;

15 C. Awarding punitive and treble damages as provided under relevant laws;

16 D. Awarding injunctive relief as appropriate;

17 E. Awarding declaratory relief;

18 F. For pre- and post-judgment interest to the Class, at the highest rate  
19 allowed by law;

20 G. Awarding costs, including experts' fees, and attorneys' fees and  
21 expenses, and the costs of prosecuting this action; and

22 H. Granting such other and further relief as is just and proper.  
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**JURY TRIAL DEMANDED**

Plaintiffs hereby demand a trial by jury on all issues triable by a jury.

DATED: October 9, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2015, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 9, 2015.

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- (No manual recipients)