

THE HONORABLE RONALD B. LEIGHTON

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

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

Plaintiffs,

vs.

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

Defendants.

EVANGER’S DOG AND CAT FOOD CO., INC.,

Counterclaimant,

vs.

NICOLE MAEL,

Counterdefendant.

NO. 3:17-cv-05469-RBL

**PLAINTIFFS’ MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT**

**Hearing Set on Motion Calendar:
June 12, 2020, 9:30 a.m.**

TABLE OF CONTENTS

Page No.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

- I. INTRODUCTION..... 1
- II. STATEMENT OF FACTS 2
 - A. Factual and procedural background..... 2
 - B. The notice program was successful..... 3
 - C. The Settlement Fund will provide complete relief to all Claimants..... 4
 - 1. The Net Settlement Fund covers 100% of all approved claims for veterinary expenses..... 5
 - 2. The Net Settlement Fund is sufficient to pay all Settlement Class Members in cash for 100% of their verified product purchases 5
 - 3. The Net Settlement Fund is sufficient to cover the costs of direct mailing of pet food to Claimants who had no proof of purchase and who would otherwise receive product certificates..... 6
 - D. No Settlement funds will revert to Defendants..... 6
 - E. The Settlement requires Defendants to change their business Practices..... 7
- III. AUTHORITY AND ARGUMENT 7
 - A. Plaintiffs and Class Counsel have adequately represented the class..... 9
 - B. The Settlement is the result of arm’s-length, non-collusive negotiations 9
 - C. The relief provided for the Class is adequate 10
 - 1. The relief provided by the Settlement is adequate in light of the costs, risks, and delay of trial and appeal..... 10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

2. Approved Claimants will receive cash payments reimbursing them for 100% of their veterinary expenses and product purchases, and Claimants who had no proof of purchase will receive direct mailing of products..... 12

3. Class Counsel seek an award of attorneys’ fees that represents a fraction of their total lodestar, which will be paid only after final approval..... 14

D. The Settlement treats Class Members equitably relative to each other 15

E. The Court-ordered Notice Program is constitutionally sound 16

F. The Settlement Class should be finally certified..... 17

G. Class Counsel’s requested fees and the Class Representatives’ requested service awards should be approved 17

IV. CONCLUSION 17

TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

1

2

3

4

5 *Allen v. Bedolla,*
787 F.3d 1218 (9th Cir. 2015)..... 15

6 *Amchem Prods. v. Windsor,*
7 521 U.S. 591 (1997)..... 16

8 *Churchill Vill., L.L.C. v. Gen. Elec.,*
9 361 F.3d 566 (9th Cir. 2004)..... 8

10 *Gehrich v. Chase Bank USA, N.A.,*
11 316 F.R.D. 215 (N.D. Ill. 2015) 15

12 *In re Hyundai and Kia Fuel Econ. Litig.,*
13 926 F.3d 539 (9th Cir. 2019)..... 10

14 *In re Online DVD-Rental Antitrust Litig.,*
15 779 F.3d 934 (9th Cir. 2015)..... 10

16 *In re Pet Food Prods. Liab. Litig.,*
17 Case No. 07-2867 (NLH), 2011 WL 1322878 (D. N.J. April 5, 2011) 11

18 *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.,*
19 895 F.3d 597 (9th Cir. 2018)..... 8, 15

20 *Ortiz v. Fiberboard Corp.,*
21 527 U.S. 815 (1999)..... 9

22 *Rawa v. Monsanto Co.,*
23 934 F.3d 862, 866 (8th Cir. 2019)..... 11

24 *Retta v. Millenium Prods., Inc., et al.,*
25 Case Nos. CV-15-1801 PSG AJWx, CV-16-3780 PSG AJWx, 2017 WL 5479637
26 (C.D. Cal. Aug. 22, 2017)..... 11, 15

27 *Rinky Dink, Inc. v. World Bus. Lenders,*
No. C14-0268-JCC, 2016 WL 3087073 (W.D. Wash. May 31, 2016) 11

1 *Rodriguez v. West Publ'g Corp.*,
563 F.3d 948 (9th Cir. 2009)..... 12

2
3 *Six (6) Mexican Workers v. Ariz. Citrus Growers*,
904 F.2d 1301 (9th Cir. 1990)..... 14

4
5 **STATE STATUTES**

6 73 Pa. Stat. § 201-9.2(a)..... 14

7 815 Ill. Comp. Stat. 505/10a 14

8 N.J. Stat. Ann. § 56:8-19..... 14

9 N.Y. Gen. Bus. Law § 349 14

10 RCW 19.86.090 14

11
12 **FEDERAL RULES**

13 Fed. R. Civ. P. 23(c)(2)(B) 16

14 Fed. R. Civ. P. 23(e)(1)..... 16

15
16
17 **OTHER AUTHORITIES**

18 Fed. R. Civ. P. 23(e)(2) advisory committee’s note to 2018 amendment..... 9

19
20
21
22
23
24
25
26
27

I. INTRODUCTION

1
2 Plaintiffs Nicole and Guy Mael, Nadine Vigliano, Britney Morea, Angela Bertucci and
3 Tina Wiefert request the Court grant final approval of the class action Settlement that they
4 reached with Defendants Evanger’s Dog and Cat Food Co., Inc. (“Evanger’s”), Nutripack, L.L.C.,
5 Against the Grain Pet Foods, and Sher Services, Co. Plaintiffs and their counsel believe the
6 Settlement—which requires Defendants to pay \$545,000, to continue testing its pet food, and
7 to change its business practices, including its advertising—is fair, adequate, and reasonable,
8 and in the best interests of the Settlement Class.¹

9 The Settlement is an excellent result for the Settlement Class. The non-reversionary
10 Settlement Fund will be used to provide substantial refunds to Settlement Class Members
11 whose product purchases were verified or who incurred approved costs associated with
12 veterinarian bills from pets that experienced illness related to pentobarbital poisoning after
13 consuming the recalled pet foods. Indeed, now that the claims period has concluded, the
14 parties have determined the Net Settlement Fund is sufficient to pay 100% of all approved
15 veterinarian bills and cash refunds of 100% to all verified purchasers. The Settlement also
16 provides that Claimants who have no proof of purchase are entitled to three cans of
17 Defendants’ pet food, which the parties agree can be mailed directly to Claimants instead of
18 providing product certificates. Finally, the Settlement requires Defendants to significantly
19 change their business practices. For two years, Defendants must subject their Hand-Packed
20 Products to random independent third-party testing, at their own expense up to \$5,000 per
21 year, every three months for two years. And Defendants agreed to stop labeling their pet food
22 as “human grade,” unless they verify their compliance with FDA requirements.

23 Because the requirements of Federal Rules of Civil Procedure 23(e) and (h) are
24 satisfied, Plaintiffs request the Court grant final approval of the Settlement by: (1) approving

25
26
27 ¹ Unless otherwise defined, capitalized terms have the same meaning as ascribed to them in the Settlement Agreement. Dkt. No. 116-1 (Settlement Agreement).

1 the Settlement Agreement; (2) determining that adequate notice was provided to the
2 Settlement Class; (3) finally certifying the Settlement Class; (4) granting Class Counsel
3 \$295,000 in attorneys' fees and costs; and (5) approving service awards for the Class
4 Representatives not to exceed \$2,500 each.

5 II. STATEMENT OF FACTS

6 A. Factual and procedural background.

7 Plaintiffs brought this class action alleging they paid a premium price for meat-based
8 pet foods based on Defendants' advertising of their pet foods as "human grade," produced in
9 USDA-inspected facilities or with USDA-inspected meats, and "people food for pets." Plaintiffs
10 further allege that three of Defendants' products produced during the class period were
11 eventually recalled because they contained pentobarbital (the "Recalled Products") that
12 injured some of Plaintiffs' pets and caused the death of one. Dkt. No. 31 at p. 1.

13 Defendants moved to dismiss twice and the parties engaged in an early mediation with
14 the Honorable Peter D. Lichtman (Ret.), which was not successful. After Defendants' motions
15 to dismiss were denied, the parties engaged in substantial discovery, including responding to
16 each other's written discovery and exchanging documents. Dkt. No. 116 ¶ 11–14. Plaintiffs
17 also served third-party subpoenas and made freedom of information act requests. By the time
18 the parties agreed to resume settlement talks—this time with Magistrate Judge Creatura—
19 Plaintiffs had analyzed approximately 40,000 pages of documents. *Id.* ¶ 13.

20 The parties participated in three in-person mediation sessions with Judge Creatura. *Id.*
21 ¶ 15. After the third mediation session, the parties actively continued their negotiations with
22 Judge Creatura's assistance and agreed to the final terms of the Settlement on October 18,
23 2019. *Id.* ¶ 9; *see also* Dkt. No. 116-1 (Settlement Agreement).

24 On October 24, 2019, the Court entered an order preliminarily approving the class
25 action Settlement. Dkt. No. 120. The Court entered an amended order the next day. Dkt. No.
26 121. Plaintiffs refer to this amended order as the Preliminary Approval Order.
27

1 **B. The notice program was successful.**

2 After the Court granted preliminary approval of the Settlement, the Settlement
3 Administrator, CPT Group, commenced the notice program. *See* Declaration of Ani S. Sarich.²
4 The notice program included direct notice by email to any person identified in Evanger's
5 records as having purchased the Recalled Products during the class period. Online retailers
6 Amazon.com, Chewy.com, and PetFlow also identified consumers who purchased the Recalled
7 Products during the class period and email notice was sent to those consumers as well.
8 Evanger's emailed the notice to consumers who purchased the products through Evanger's
9 and PetFlow's websites. *See* Sarich Decl. Amazon.com and Chewy.com emailed notice to
10 consumers who purchased the Recalled Products through their respective websites. *See*
11 Declaration of Sara Rawson; Declaration of Roberto Wong.

12 Collectively, CPT Group, Amazon.com, and Chewy.com sent the notice by email to
13 4,489 Class Members. Sarich Decl. ¶¶ 20, 22; Rawson Decl. ¶ 4; Wong Decl. ¶4. All of the
14 email notices sent by Amazon.com and Chewy.com were delivered successfully. Rawson Decl.
15 ¶ 4; Wong Decl. ¶4. Of the 333 email notices CPT Group sent, just nine bounced. Sarich Decl.
16 ¶¶ 20, 22. CPT Group conducted a National Change of Address search on those individuals
17 and sent Notice Postcards by U.S. Mail; there are no undeliverable Summary Notice Postcards.
18 *Id.* ¶¶ 23-25. The direct notice program therefore reached 100% of the individuals for whom
19 the parties had contact information.

20 In addition to direct notice, CPT Group implemented an online media notice effort that
21 included digital banner advertisements designed to reach the target audience by serving a
22 total of 23,759,492 gross ad impressions. *Id.* ¶ 14. This digital media program was designed to
23 reach 87% of the target audience with direct notification reaching approximately 1% of the
24 target audience, for a total reach of 87.9%. *Id.* ¶ 17-18. And it was successful. *Id.* ¶ 18. CPT
25
26

27 ² CPT Group also mailed all required notices under the Class Action Fairness Act. Sarich Decl. ¶ 4.

1 Group reports that it received 52,977 clicks on these banner advertisements, which then
2 redirected the consumer to the Settlement Website. *Id.* ¶ 15.

3 CPT Group established both a toll-free telephone number and a case-specific email
4 address through which members of the Settlement Class could obtain the Notice, including
5 information about the claims process. Sarich Decl. ¶¶ 9-10. CPT Group also established a case
6 website where Settlement Class Members could access relevant documents and submit
7 claims. *Id.* ¶ 11-12. CPT Group received 118 calls to the case telephone support line,
8 responded to 114 emails submissions, and the Settlement Website received more than
9 166,092 views. *Id.* ¶¶ 9-12.

10 The deadline for submitting claims was April 8, 2019. A total of 5,581 Settlement Class
11 members submitted claims. Sarich Decl. ¶ 29. As of May 22, 2020, 151 claims had been
12 approved for reimbursement of cash purchases totaling over \$39,567. *Id.* ¶¶ 38-39. CPT
13 Group also received 4,353 claims from households (representing 4,691 claimants) who did not
14 provide proof of purchase. *Id.* ¶ 29. Each of these households is entitled to receive three cans
15 of Evanger's dog food. The estimated value of the three cans is \$8.10. Declaration of Jennifer
16 Rust Murray in Support of Final Approval ("Murray Final Approval Decl.") ¶ 2. CPT Group also
17 received forty claims for reimbursement of veterinary bills. Five of these claims, totaling
18 \$8,332.81, were approved. *Id.* ¶¶ 34-36. CPT Group received 20 claims it has identified as
19 deficient and is still processing. *Id.* ¶ 32. CPT Group will file a supplemental declaration once
20 the deficiencies have been resolved.

21 The deadline for opting out of or objecting to the Settlement was also April 8, 2019. No
22 Settlement Class Members have objected and one person submitted an untimely opt-out
23 request that CPT Group denied. *Id.* ¶¶ 26-28.

24 **C. The Settlement Fund will provide complete relief to all Claimants.**

25 The Settlement requires Defendants to establish a non-reversionary Settlement Fund
26 of \$545,500 to pay Settlement Class Members' approved veterinary expenses, make cash
27

1 payments to Settlement Class Members who purchased the Recalled Products and opt for a
2 cash payment; and to pay settlement administration costs, attorneys' fees and litigation
3 expenses, and service awards to Plaintiffs approved by the Court. Settlement Agreement
4 §§ 1.36, 2.2. If approved by the Court, these amounts include \$150,000 for Settlement
5 Administration Costs, \$295,000 for attorneys' fees and costs, and service awards of \$2,500 to
6 each Plaintiff. *Id.* §§ 1.7; *see also* Dkt. No. 127 (Plaintiffs' Motion for Attorneys' Fees, Costs
7 and Service Awards).

8 Now that the claims period has closed, the parties have determined the Settlement
9 Fund can provide more relief to Settlement Class Members than bargained for, subject to the
10 Court's approval.

- 11 1. The Net Settlement Fund covers 100% of all claims for approved veterinary
12 expenses.

13 Pursuant to the Settlement Agreement, Settlement Class Members whose pets got sick
14 after eating the Recalled Products and who submitted a claim are entitled to receive an award
15 for their verified veterinary expenses. Settlement Agreement §§ 2.2(f), 2.4(a). CPT received 40
16 requests for reimbursement of veterinary expenses. Sarich Decl. ¶ 34. The parties met and
17 conferred regarding these claims and jointly agreed to accept five requests. *Id.* ¶ 35. Three
18 requests were sent to a neutral veterinarian retained by the parties for further review, none
19 of which were approved. *Id.* The remaining 32 were denied due to no verifiable proof of
20 purchase and/or no supporting documentation from a veterinarian demonstrating illness
21 related to pentobarbital poisoning. *Id.*

22 The total value of the five accepted out-of-pocket requests is \$8,332.81. *Id.* ¶ 36. All of
23 these requests will be paid in full from the Settlement Fund.

- 24 2. The Net Settlement Fund is sufficient to pay all Settlement Class Members in
25 cash for 100% of their verified product purchases.

26 Settlement Class Members who purchased Recalled Products online could file claims
27 electing to receive a check in the amount of 25% of their purchases or a product certificate for

1 50% of their purchase amount. *Id.* §§ 2.2(d), (e), 2.3, 2.4(b). The Settlement Agreement
 2 further provides that if any funds remain after paying these amounts, the remaining funds will
 3 be distributed to Settlement Class Members proportionally based on the total amount of their
 4 verified purchases up to 100%. *Id.* § 2.4(b)(ii). As of May 22, 2020, CPT Group approved 151
 5 claims for reimbursement of product purchases. Sarich Decl. ¶ 37.

6 The parties have determined the Settlement Fund is sufficient to pay all 151 claims in
 7 cash for 100% of their verified purchases, totaling \$39,567.57. Sarich Decl. ¶ 39. No
 8 Settlement Class Members will need to be paid in product certificates. If approved by the
 9 Court, Class Counsel will notify the Claimants who requested product certificates that they will
 10 be paid in cash. Murray Final Approval Decl. ¶ 3.

- 11 3. The Net Settlement Fund is sufficient to cover the costs of direct mailing of pet
 12 food to Claimants who had no proof of purchase and who would otherwise
 13 receive product certificates.

14 The Settlement provides that Claimants who have no proof of purchase are entitled to
 15 a certificate that allows them to obtain at no cost three cans of Evanger's or Against the Grain
 16 products from a retailer. Settlement Agreement § 2.3(b).

17 In light of Covid-19 and the stay at home orders in effect across the country, the
 18 parties request the Court approve direct mailing of the products valued at \$8.10 to
 19 approximately 4,353 households (representing 4,691 Claimants), instead of providing
 20 Claimants with product certificates they would have to redeem in person. The Net Settlement
 21 Fund is sufficient to cover these mailing costs and will allow Claimants to obtain the benefits
 22 of the Settlement while staying safe at home. Murray Final Approval Decl. ¶ 3. Defendants will
 23 provide the Court with a declaration confirming the shipments occurred and substantiating
 24 any shipping costs. *Id.* ¶ 4.

25 **D. No Settlement funds will revert to Defendants.**

26 If any funds remain after allocation of the cash awards set forth above and the funding
 27 of the direct product mailings, the remaining amounts shall be distributed in *cy pres* to the

1 North Shore Animal League of America. Settlement Agreement § 2.4(b)(iv). A “*cy pres* remedy
 2 must account for the nature of the plaintiffs’ lawsuit, the objectives of the underlying statutes,
 3 and the interests of the silent class members” *Lane v. Facebook, Inc.*, 696 F.3d 811, 820-21
 4 (9th Cir. 2012) (citation omitted). North Shore Animal League America satisfies these criteria
 5 because it operates no-kill animal shelters across the country.

6 **E. The Settlement requires Defendants to change their business practices.**

7 Defendants have also agreed to significant non-monetary relief, designed to protect all
 8 Settlement Class Members and remediate the alleged false and misleading advertising cited in
 9 the Action. Defendants (i) will only use the term “human grade” in their advertising if they
 10 comply with the voluntary criteria established by the Association of American Feed Control
 11 Officials (“AAFCO”); (ii) will no longer use the phrase “people food for pets”; (iii) will no longer
 12 produce videos showing people eating their pet foods; (iv) will inform their retailers by letter
 13 of this Settlement and these advertising restrictions; (v) will provide Plaintiffs’ counsel with a
 14 letter confirming compliance with all FDA requirements regarding supplier and ingredient
 15 safety for any of their Hand Packed Products; and (vi) will subject their Hand Packed Products
 16 to random independent third-party testing, at their own expense of up to \$5,000 per year,
 17 every three months for the next two years. Settlement Agreement § 2.1. One month after the
 18 Final Settlement Date, Defendants will also file a verification with the Court affirming their
 19 compliance with these and other Settlement terms. *Id.* § 2.1(f).

20 **III. AUTHORITY AND ARGUMENT**

21 Under Rule 23(e)(2), the Court may approve a class action settlement “only after a
 22 hearing and only on finding that it is fair, reasonable, and adequate” after considering
 23 whether:

- 24 (A) the class representative and class counsel have adequately
 25 represented the class;
- 26 (B) the proposal was negotiated at arm’s length;
- 27

- 1 (C) the relief provided for the class is adequate, taking into
2 account:
- 3 (i) the costs, risks, and delay of trial and appeal;
- 4 (ii) the effectiveness of any proposed method of
5 distributing relief to the class, including the method of
6 processing class member claims;
- 7 (iii) the terms of any proposed award of attorney's fees,
8 including timing of payment; and
- 9 (iv) any agreement required to be identified under Rule
10 23(e)(3); and
- 11 (D) the proposal treats class members equitably relative to each
12 other.

13 The amendment to Rule 23 adopting these factors took effect on December 1, 2018,
14 so there is no binding authority addressing them yet. But the factors are largely consistent
15 with those previously identified by the Ninth Circuit as guides to determining whether a
16 proposed settlement is fair, adequate, and reasonable. The factors previously discussed by the
17 Ninth Circuit are: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and
18 likely duration of further litigation; (3) the risk of maintaining class action status throughout
19 the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the
20 stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a
21 governmental participant; and (8) the reaction of the class members to the proposed
22 settlement. *See Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575–76 (9th Cir. 2004). The
23 Ninth Circuit has characterized these factors as “guideposts” and explained that “[d]eciding
24 whether a settlement is fair” is “best left to the district judge who can develop a firsthand
25 grasp of the claims, the class, the evidence, and the course of the proceedings—the whole
26 gestalt of the case.” *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab.*
27 *Litig.*, 895 F.3d 597, 611 (9th Cir. 2018).

1 **A. Plaintiffs and Class Counsel have adequately represented the class.**

2 The Court previously found that Plaintiffs have no conflicts of interest with the other
3 Settlement Class Members and have demonstrated their commitment to the class by actively
4 participating in the litigation. Dkt. No. 121 at 3:21-25. Nothing has changed. Plaintiffs and
5 Class Counsel have continued to vigorously represent the class and have no conflicts of
6 interest with any Class Members. Each of the Class Representatives responded to
7 interrogatories and requests for production, and they also assisted in drafting the complaints
8 and review of other motions and briefs throughout the litigation. Dkt. No. 116 ¶ 14; Dkt. No.
9 129 ¶¶ 11-18.

10 **B. The Settlement is the result of arm's-length, non-collusive negotiations.**

11 The parties negotiated the Settlement at arm's length, during several months of
12 settlement negotiations that included three in-person mediation sessions with a member of
13 this Court. "[O]ne may take a settlement amount as good evidence of the maximum available
14 if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure
15 through arms-length bargaining." *Ortiz v. Fiberboard Corp.*, 527 U.S. 815, 852 (1999). The
16 negotiations were conducted with the assistance of Magistrate Judge Creatura, an
17 experienced judge and mediator, who facilitated the in-person mediations and the
18 negotiations that followed. Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018
19 amendment ("the involvement of a neutral or court-affiliated mediator or facilitator in
20 [settlement] negotiations may bear on whether they were conducted in a manner that would
21 protect and further the class interests").

22 Class Counsel negotiated the Settlement with the benefit of many years of prior
23 experience and a solid understanding of the facts and law of this case. See Dkt. Nos. 116 and
24 117. Class Counsel have extensive experience litigating and settling class actions, including
25 consumer protection and false labeling claims in particular. *Id.* They believe the Settlement is
26
27

1 fair, reasonable, adequate, and in the best interests of the Settlement Class as a whole. See
2 Dkt. No. 116 ¶ 16; Dkt. No. 117 ¶ 16.

3 The Ninth Circuit has identified “red flags” that may suggest that plaintiffs’ counsel
4 allowed pursuit of their own self-interest to infect settlement negotiations, including when
5 counsel receive a disproportionate portion of the settlement, the parties agree to a “clear
6 sailing” arrangement providing for the payment of attorneys’ fees separate and apart from
7 the class funds, or the parties agree that any fees not awarded will revert to defendants
8 rather than be added to the class fund. *In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d 539,
9 569 (9th Cir. 2019). None are present here. Because Class Counsel will be paid from the same
10 Settlement Fund as Settlement Class Members, they were incentivized to negotiate the
11 largest fund possible. None of the Settlement Fund will revert to Defendants; any requested
12 fees or Service Awards not approved by the Court will be distributed to Settlement Class
13 Members. Settlement Agreement § 2.7.

14 **C. The relief provided for the Class is adequate.**

15 In determining whether the relief provided to the Settlement Class is adequate, courts
16 must balance the strength of the plaintiff’s case against the risk, expense, complexity, and
17 likely duration of further litigation. See *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934,
18 944 (9th Cir. 2015). Here, Defendants’ agreement to pay \$545,500 to settle this case is more
19 than adequate given the risks and delay of continued litigation.

- 20 1. The relief provided by the Settlement is adequate in light of the costs, risks, and
21 delay of trial and appeal.

22 The parties have been litigating this action for nearly three years and have sufficient
23 information to make an informed decision with respect to the Settlement. Dkt. No. 116 ¶¶ 9–
24 15; Dkt. No. 117 ¶¶ 3–5. Before reaching agreement on a settlement, both parties responded
25 to interrogatories and requests for production. Dkt. No. 116 ¶ 12. Through these discovery
26 requests, Plaintiffs obtained and analyzed approximately 40,000 pages of documents,
27

1 including sales data, ingredient lists, FDA reports, product testing reports, communications
2 with consumers, and inspection data for Defendants' products and facilities. *Id.* Plaintiffs had
3 engaged in sufficient discovery to assess the strength of their claims and the risks of continued
4 litigation. As a result, "the parties had enough information to make an informed decision
5 about the strength of their cases and the wisdom of settlement." *Rinky Dink, Inc. v. World Bus.*
6 *Lenders*, No. C14-0268-JCC, 2016 WL 3087073, at *3 (W.D. Wash. May 31, 2016).

7 The monetary benefits of the Settlement alone, which provide for 100% of actual
8 damages for Settlement Class Members with verified veterinary expenses and product
9 purchases, exceed similar settlements approved by other courts. *See, e.g. In re Pet Food*
10 *Prods. Liab. Litig.*, Case No. 07-2867 (NLH), 2011 WL 1322878, at *3 (D. N.J. April 5, 2011)
11 (approving class action settlement of \$250,000 in mislabeled and contaminated pet food case
12 where product purchase claimants received 43.6% of their estimated actual damages); *Rawa*
13 *v. Monsanto Co.*, 934 F.3d 862, 866 (8th Cir. 2019) (affirming district court's approval of class
14 action settlement providing claimants with a 50% refund for mislabeled products); *Retta v.*
15 *Millenium Prods., Inc., et al.*, Case Nos. CV-15-1801 PSG AJWx, CV-16-3780 PSG AJWx, 2017
16 WL 5479637, at *5 (C.D. Cal. Aug. 22, 2017) (approving class action settlement providing
17 approximately 21% of the estimated potential recovery). Indeed, the Settlement Fund will be
18 able to provide more monetary relief to Claimants than the parties anticipated—all Claimants
19 with verified veterinary expenses will be reimbursed for 100% of those costs and, instead of
20 providing verified product purchaser Claimants with either 25% of their product purchases in
21 cash or a product certificate for 50% of their purchase amount, the Settlement Fund will
22 refund all approved product purchasers 100% in cash. *See Murray Decl.* ¶ 3; *see also*
23 *Settlement Agreement* § 2.4(b)(ii) (providing remaining funds "will be distributed to
24 Settlement Class Members proportionally based on the total amount of their verified
25 purchases up to 100%."). In addition to these monetary benefits, approximately 4,353
26 households whose purchases were not verified will receive three cans of dog food valued at
27

1 \$8.10, which the parties can mail directly to Claimants with the Court's approval. *See Murray*
2 Decl. ¶¶ 2-3.

3 The Settlement also provides benefits to all Settlement Class Members in the form of
4 significant injunctive relief that requires Defendants to stop representing that their products
5 are "People Food for Pets," cease using the term "human grade" unless they comply with
6 independent standards and guidelines for use of the term, submit to additional testing on
7 several specific pet food products, and verify their compliance with FDA requirements
8 regarding supplier and ingredient safety for the products bought by Settlement Class
9 Members. Settlement Agreement § 2.1.

10 Plaintiffs have been confident in the merits of their case, but are well aware that
11 litigation can be unpredictable and that Defendants intended to aggressively pursue defenses
12 available to them. Moreover, Plaintiffs still had several hurdles to clear before resolution
13 through further litigation, including additional discovery, class certification, dispositive
14 motions likely to be filed by both parties, and ultimately trial and any appeal that followed.
15 And even assuming Plaintiffs successfully certified the class, Defendants could have moved to
16 decertify or appeal after trial. Plaintiffs therefore faced the ongoing risk that individual
17 Settlement Class Members would have filed their own lawsuits or that any payments to the
18 Settlement Class would be substantially delayed by appeals.

19 Litigating this case to trial and through any appeals would be expensive and time-
20 consuming and would present risks to both parties. The Settlement, by contrast, provides
21 prompt and certain relief for Settlement Class Members. *See Rodriguez v. West Publ'g Corp.*,
22 563 F.3d 948, 966 (9th Cir. 2009).

- 23 2. Approved Claimants will receive cash payments reimbursing them for 100% of
24 their veterinary expenses and product purchases, and Claimants who had no
25 proof of purchase will receive direct mailing of products.

26 Rule 23(e)(2)(C)(ii) requires consideration of the effectiveness of any proposed method
27 of distributing relief to the class, including the method of processing class-member claims.

1 The Settlement Agreement provides that Settlement Class Members whose pets got a
2 pentobarbital related illness after eating the Recalled Products and who submitted a claim are
3 entitled to receive an award for their approved veterinary expenses. Settlement Agreement
4 §§ 2.2(f), 2.4(a). The five Settlement Class Members with verified veterinary expenses will be
5 mailed a check reimbursing them for 100% of their vet bills, totaling \$8,332.81. Sarich Decl.
6 ¶¶ 34-36.

7 Settlement Class Members who purchased Recalled Products online could file claims
8 electing to receive a check in the amount of 25% of their purchases or a product certificate for
9 50% of their purchase amount. *Id.* §§ 2.2(d), (e), 2.3, 2.4(b). The Settlement Agreement
10 further provides that if any funds remain after paying these amounts, the remaining funds will
11 be distributed to Settlement Class Members proportionally based on the total amount of their
12 verified purchases up to 100%. *Id.* § 2.4(b)(ii). The parties have determined the remaining
13 funds should be sufficient to pay all 151 Settlement Class Members who purchased Recalled
14 Products online in cash for 100% of their verified purchases, totaling \$39,567. Sarich Decl.
15 ¶ 39. No Settlement Class Members will need to be paid in product certificates. If approved by
16 the Court, Class Counsel will notify the Claimants who requested product certificates that they
17 will be paid in cash. Murray Final Approval Decl. ¶ 3.

18 Finally, the Settlement provides that Claimants who have no proof of purchase are
19 entitled to a certificate that allows them to obtain at no cost three cans of Evanger's or
20 Against the Grain products from a retailer. Settlement Agreement § 2.3(b). In light of Covid-19
21 and the stay at home orders in effect across the country, however, the parties request that
22 the Court permit Evanger's to mail the three cans of product directly to the 4,353 Claimants
23 whose claims lack proof of purchase. The total value of the products to the Class is \$35,259
24 (\$8.10 x 4,353 households). The Net Settlement Fund should be sufficient to cover these
25 mailing costs and will allow Claimants to obtain the benefits of the Settlement while staying
26 safe at home. Murray Final Approval Decl. ¶ 4.
27

- 1 3. Class Counsel seek an award of attorneys' fees that represents a fraction of
2 their total lodestar, which will be paid only after final approval.

3 Under Rule 23(e)(2)(C)(iii) the Court should consider "the terms of any proposed award
4 of attorney's fees, including timing of payment." The Settlement Agreement provides that
5 attorneys' fees and costs shall be paid from the Settlement Fund in an amount approved by
6 the Court. Settlement Agreement § 2.6.

7 Class Counsel seek a fee award of \$295,000, which is approximately 29% of Class
8 Counsel's total lodestar of more than \$1 million. See Dkt. No. 127, p. 2 n.1. The requested fee
9 award also includes costs. Class Counsel do not seek a separate award of the more than
10 \$28,440 in out-of-pocket costs they incurred prosecuting this action. When costs are
11 considered, Class Counsel seek a fee award of \$266,560 ($\$295,000 - \$28,440 = \$266,560$),
12 which is less than 27% of their total lodestar ($\$266,560 / \$1,009,017 = .264$). Courts generally
13 use the lodestar method to award fees under statutes like Washington's Consumer Protection
14 Act and the other consumer protection statutes at issue, which provide for fee shifting. See,
15 e.g., *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)
16 (explaining that "statutory awards of attorneys' fees are subject to 'lodestar' calculation
17 procedures"); RCW 19.86.090 (providing for recovery of "actual damages sustained... together
18 with the costs of the suit, including a reasonable attorneys' fee"); and see 815 Ill. Comp. Stat.
19 505/10a (providing that a successful plaintiff may obtain an award of attorneys' fees); 73 Pa.
20 Stat. § 201-9.2(a) (providing for recovery of "actual damages or one hundred dollars (\$100),
21 whichever is greater" and that the court may also award to the plaintiff "costs and reasonable
22 attorney fees"); N.J. Stat. Ann. § 56:8-19 (providing for an award of "reasonable attorneys'
23 fees, filing fees and reasonable costs of suit"); N.Y. Gen. Bus. Law § 349 (providing for
24 "reasonable attorney's fees to a prevailing plaintiff"). The lodestar-multiplier method confirms
25 the propriety of the requested fee here as set forth in Plaintiffs' Motion for Attorneys' Fees,
26 Costs and Service Awards. See Dkt. No. 127.
27

1 In addition, fees will be paid only after the Settlement is finally approved by the Court,
2 the time for any appeal has elapsed, or any appeal has been resolved, and the Settlement has
3 taken effect. And the Settlement Agreement contains no “clear sailing” provision. *See Allen v.*
4 *Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015) (a clear sailing provision is “an arrangement
5 where defendant will not object to a certain fee request by class counsel.”). Though free to do
6 so, no Class Member has objected to the award sought by Class Counsel.

7 **D. The Settlement treats Class Members equitably relative to each other.**

8 Under Rule 23(e)(2)(D), the Court must consider whether the Settlement Agreement
9 treats Settlement Class Members equitably relative to each other. Each Settlement Class
10 Member’s share will be based on his or her actual damages. Settlement Class Members with
11 verified product purchases will be reimbursed for 100% of their actual damages, while
12 Settlement Class Members without proof of purchase will receive products instead of cash.
13 Settlement Agreement §§ 2.2-2.3. This settlement structure mirrors structures approved as
14 fair and reasonable in prior food mislabeling cases. *See, e.g., Retta*, 2107 WL 5479637
15 (approving settlement fund from which class members could claim differing amounts in either
16 cash or product vouchers based on whether they could provide proof of purchase); *In re*
17 *Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, 895 F.3d 597, 607–609
18 (9th Cir. 2018) (affirming certification of settlement class and final approval of settlement
19 where settlement class members with weaker claims likely benefitted from inclusion in a class
20 with members who had stronger claims); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 225
21 (N.D. Ill. 2015) (when some class members have stronger claims than others, it is appropriate
22 to provide larger settlement awards to those class members.). Similarly, any Settlement Class
23 Members whose pets may have required veterinary care due to illness related to
24 pentobarbital poisoning experienced additional damages as a result of Defendants’ failure to
25 honor their marketing promises, and it is therefore fair and reasonable to allow them to claim
26 additional compensation from the Settlement Fund.
27

1 **E. The Court-ordered Notice Program is constitutionally sound.**

2 Rule 23(e)(1) requires the Court to “direct notice in a reasonable manner to all class
3 members who would be bound by” a proposed settlement. Fed. R. Civ. P. 23(e)(1). Class
4 members are entitled to the “best notice that is practicable under the circumstances” of any
5 proposed settlement before it is finally approved by the Court. Fed. R. Civ. P. 23(c)(2)(B). To
6 comply with due process, notice must be “the best notice practicable under the
7 circumstances, including individual notice to all members who can be identified through
8 reasonable effort.” *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997).

9 The Preliminary Approval Order directed that email notice be sent to known members
10 of the Class. Preliminary Approval Order ¶¶ 13-17. The Settlement Administrator,
11 Amazon.com, and Chewy.com completed the Notice Plan as directed, including completing
12 advanced address searches for Settlement Class Members whose emails bounced or were
13 undeliverable, followed by mailing of a postcard notice. Sarich Decl. ¶¶ 15-20; Rawson Decl.
14 ¶ 4; Wong Decl. ¶ 4. Direct notice reached 100% of the known Settlement Class Members for
15 whom the parties had contact information. Sarich Decl. ¶¶ 19-25; Rawson Decl. ¶ 4; Wong
16 Decl. ¶ 4; *cf. Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1046-57 (9th Cir. 2019) (due process
17 requires identifying additional means of notice reasonably calculated to reach class members
18 whose notices were undeliverable)

19 In addition, CPT Group established and maintained a publicly available website
20 containing documents relevant to the Settlement and responses to frequently asked
21 questions and provided a toll-free telephone number and email address Settlement Class
22 Members could use to contact the Administrator. Sarich Decl. ¶¶ 9-12; Rawson Decl. ¶ 4;
23 Wong Decl. ¶ 4. CPT received 118 calls and 114 emails and tracked more than 166,092 views
24 of the Settlement Website. Sarich Decl. ¶¶ 9-12.

25 CPT Group also implemented a 10-week programmatic digital banner advertising
26 campaign on the Google Display Network, general programmatic ad exchanges, as well as ad
27

1 placements on the following social media platforms: Facebook Audience Exchange Ad
2 Network, Instagram, and Twitter. Sarich Decl. ¶¶ 14-18. This was designed to reach
3 Settlement Class members for whom the parties did not have contact information. CPT Group
4 estimates that the direct notice combined with the online media program reached 87.9% of
5 the Class. *Id.* ¶ 17. The notice program satisfied Rule 23 requirements and due process.

6 **F. The Settlement Class should be finally certified.**

7 In its Preliminary Approval Order, the Court conditionally certified the Settlement Class
8 under Federal Rule of Civil Procedure 23(a) and (b)(3). Dkt. No. 121 ¶¶ 1-4. Nothing has
9 changed. The requirements of both Rule 23(a) and (b)(3) remain satisfied. For all of the
10 reasons set forth in the Court's Preliminary Approval Order, Dkt. No. 121, and Plaintiffs'
11 motion to approve notice to the Settlement Class, Dkt. No. 115 at 9-13, the Court should
12 finally certify the Settlement Class.

13 **G. Class Counsel's requested fees and the Class Representatives' requested service
14 awards should be approved.**

15 Not one Settlement Class Member objected to Class Counsel's request for reasonable
16 attorneys' fees, and service awards to Class Representatives, Guy Mael, Nicole Mael, Nadine
17 Vigliano, Britney Morea, Angela Bertucci and Tina Wierpert. For all the reasons set forth in
18 Plaintiffs' Motion for Attorneys' Fees, Costs and Service Awards, Dkt. No. 127, Class Counsel
19 respectfully request that the Court award (1) Class Counsel \$295,000 in attorneys' fees and
20 costs; and (2) Class Representative service awards in the amount of \$2,500 each in recognition
21 of their service to the Settlement Class.

22 **IV. CONCLUSION**

23 For the foregoing reasons, Plaintiffs respectfully request the Court enter an Order (1)
24 approving the Settlement Agreement; (2) determining that adequate notice was provided to
25 the Settlement Class; (3) finally certifying the Settlement Class; (4) granting Class Counsel an
26
27

1 attorneys' fees and costs award of \$295,000; and (5) approving service awards in the amount
2 of \$2,500 to each Class Representative.

3 RESPECTFULLY SUBMITTED AND DATED this 22nd day of May, 2020.

4 TERRELL MARSHALL LAW GROUP PLLC

5
6 By: /s/ Jennifer Rust Murray, WSBA #36983

Beth E. Terrell, WSBA #26759

Email: bterrell@terrellmarshall.com

Jennifer Rust Murray, WSBA #36983

Email: jmurray@terrellmarshall.com

936 North 34th Street, Suite 300

Seattle, Washington 98103-8869

Telephone: (206) 816-6603

Facsimile: (206) 319-5450

11
12 Jessica J. Sleater, *Admitted Pro Hac Vice*

Email: jessica@andersensleater.com

13 ANDERSEN SLEATER SIANNI LLC

1250 Broadway, 27th Floor

New York, New York 10001

Telephone: (646) 599-9848

16 *Attorneys for Plaintiffs*

CERTIFICATE OF SERVICE

I, Jennifer Rust Murray, hereby certify that on May 22, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

John C. Graffe, WSBA #11835
Email: johng@jgkmw.com
Katherine A. Bozzo, WSBA #42899
Email: katyb@jgkmw.com
Beth Barker
Email: bethb@jgkmw.com
JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP
925 Fourth Avenue, Suite 2300
Seattle, Washington 98104
Telephone: (206) 223-4770
Facsimile: (206) 386-7344

Brennen J. Johnson, WSBA #51665
Email: brennenj@jgkmw.com
JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP
2115 North 30th Street, Suite 101
Tacoma, Washington 98403
Telephone: (253) 572-5323
Facsimile: (253) 572-5413

Gregory A. Bedell, *Admitted Pro Hac Vice*
Email: gbedell@kkbchicago.com
KNABE, KRONING & BEDELL
33 North Dearborn Street, Suite 1010
Chicago, Illinois 60602
Telephone: (312) 977-9119
Facsimile: (312) 977-9009

Attorneys for Defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

DATED this 22nd day of May, 2020.

TERRELL MARSHALL LAW GROUP PLLC

By: /s/ Jennifer Rust Murray, WSBA #36983

Jennifer Rust Murray, WSBA #36983
Email: jmurray@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

Attorneys for Plaintiffs