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15

16 UNITED STATES DISTRICT COURT
17 SOUTHERN DISTRICT OF CALIFORNIA

18 In re MORNING SONG BIRD FOOD
LITIGATION

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

19 _____
20 This Document Relates To:

) CLASS ACTION

21 ALL ACTIONS.
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) STIPULATION OF CLASS ACTION
SETTLEMENT

1 This Stipulation of Class Action Settlement is entered into December 7, 2018,
2 by and among the Plaintiffs Laura Cyphert, Milt Cyphert, Ellen Larson, and David
3 Kirby, individually and on behalf of all others similarly situated, and defendants The
4 Scotts Miracle-Gro Company, The Scotts Company LLC, and James Hagedorn,
5 Scotts' Chief Executive Officer, by and through their respective undersigned counsel,
6 with respect to all claims that have been asserted or could have been asserted against
7 Defendants in the above-captioned action and all of the actions consolidated into it.¹
8 Subject to the Court's approval, the Parties hereby stipulate and agree that, in
9 consideration for the promises and covenants set forth in this Agreement, and upon the
10 occurrence of the Effective Date, this Action shall be fully and finally resolved,
11 settled, and compromised on a classwide basis on the terms and conditions set forth
12 below.

13 **I. INTRODUCTION**

14 This is a nationwide consumer class action brought by Plaintiffs on behalf of
15 themselves and a certified nationwide class of "persons who, prior to May 1, 2008,
16 purchased and have not yet received a full refund for, a Scotts Miracle-Gro wild bird
17 food product containing Storcide II, Actellic 5E, or their active ingredients,
18 chlorpyrifos-methyl or pirimiphos-methyl, respectively." ECF 326 at 27.²

19 Scotts entered the wild bird food business on November 15, 2005, with its
20 purchase of Gutwein & Co. In connection with its manufacture of certain wild bird
21 food products, Scotts used a pesticide called Storcide II and then used another
22 pesticide, Actellic 5E, during certain periods from November 15, 2005 to March 10,
23 2008.

24

25

26 ¹ All capitalized terms not otherwise separately defined shall have the meaning set forth in Section II.

27 ² Page number citations to docket entries ("ECF") refer to the page numbers generated
28 by the electronic case filing (CM/ECF) system.

1 On June 27, 2012, Plaintiffs Laura and Milt Cyphert, individually and on behalf
2 of consumers who had purchased Morning Song Bird Food, filed a putative class
3 action against Scotts, seeking refunds for Morning Song Bird Food, among other
4 relief. *See* ECF 1.

5 On September 11, 2012, the Court consolidated the Cypherts' case with other
6 putative class actions filed by Plaintiffs Ellen Larson and David Kirby, among others,
7 also seeking relief individually and on behalf of consumers who had purchased
8 Morning Song Bird Food. *See* ECF 9. In the same order, the Court appointed Robbins
9 Geller Rudman & Dowd LLP and Dowd & Dowd P.C. to serve as co-lead counsel
10 (*id.*), later amending the order to add The Driscoll Firm, P.C. (*see* ECF 18).

11 On October 9, 2012, Plaintiffs, individually and on behalf of a putative class of
12 consumers who had purchased Morning Song Bird Food, filed their original
13 consolidated complaint, asserting 19 claims against Scotts, including alleged
14 violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"),
15 alleged violations of certain state statutes, and certain common law claims. ECF 10.
16 Scotts moved to dismiss the complaint. ECF 21.

17 On January 31, 2013, Plaintiffs, individually and on behalf of the putative class,
18 filed an amended consolidated complaint, asserting 17 claims against Scotts, including
19 (1) alleged violations of RICO; (2) alleged violations of the Kentucky Consumer
20 Protection Act ("KCPA"), the California Unfair Competition Law ("UCL"), the
21 California False and Misleading Advertising Law ("FAL"), the California Legal
22 Remedies Act ("CLRA"), the Missouri Merchandising Practices Act ("MPA"), the
23 Minnesota Consumer Fraud Act ("CFA"), the New Mexico Unfair Practices Act; and
24 (3) certain common law claims. ECF 26. Scotts moved to dismiss the complaint.
25 ECF 32.

26 On September 30, 2013, the Court granted in part and denied in part Scotts'
27 motion to dismiss and issued an order allowing Plaintiffs' claims to proceed, except
28 for their Magnuson-Moss Warranty Act, the Arkansas Deceptive Trade Practices Act,

1 breach of express warranty, negligent misrepresentation (as to Plaintiffs Laura and
2 Milt Cyphert), and unjust enrichment claims, which were dismissed. ECF 44.

3 In March 2014, Scotts sold its wild bird food business and, therefore, no longer
4 manufactures, markets, or sells the Morning Song Bird Food at issue in this Action.

5 On October 20, 2014, Plaintiffs moved for certification of a nationwide class of
6 all consumers who purchased Morning Song Bird Food for the RICO claim, as well as
7 three subclasses of California, Missouri, and Minnesota consumers who had
8 purchased Morning Song Bird Food for the state statutory claims: (1) California for
9 the UCL, FAL, and CLRA claims; (2) Missouri for the MPA claim; and (3) Minnesota
10 for the CFA claim. ECF 93-1.

11 On December 1, 2014, Scotts filed its opposition to the motion for class
12 certification. ECF 115-123.

13 On December 2, 2014, Scotts filed a motion for summary judgment, which the
14 Court ultimately withdrew on March 31, 2017 (after issuing its decision on the
15 Plaintiffs' class certification motion), without prejudice to Scotts' refileing the
16 summary judgment motion. ECF 128, 327.

17 On October 9, 2015, Plaintiffs filed the Second Amended Consolidated Class
18 Action Complaint (the "Complaint"), adding as a defendant Mr. Hagedorn. ECF 260.
19 Plaintiffs, individually and on behalf of a putative class of consumers who had
20 purchased Morning Song Bird Food, alleged violations of RICO, the CLRA, the UCL,
21 the FAL, the KCPA, the CFA, and the MPA; for breach of implied warranty of
22 merchantability and of the common law of implied warranty of fitness for
23 consumption by animals; and for intentional misrepresentation and negligent
24 misrepresentation (as to certain Plaintiffs).

25 On December 14, 2015, Mr. Hagedorn moved to dismiss the Complaint,
26 arguing, among other things, that Plaintiffs failed to establish personal jurisdiction
27 over him and that they failed to state valid claims against him. ECF 279.

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1 On September 29, 2016, the Court granted in part and denied in part Mr.
2 Hagedorn's motion to dismiss, allowing the RICO claim to proceed against Mr.
3 Hagedorn and dismissing all other claims against him. ECF 309.

4 On December 2, 2016, Mr. Hagedorn filed his opposition to Plaintiffs' pending
5 motion for certification of the nationwide RICO class. ECF 317.

6 On March 31, 2017, the Court granted Plaintiffs' motion for class certification,
7 certifying a nationwide class as to Scotts and Mr. Hagedorn for alleged violations of
8 RICO and, as to Scotts only, three subclasses for alleged violations of the UCL, the
9 FAL, the CLRA, the MPA, and the CFA. ECF 326 at 8, 27. The class was defined as:
10 "All persons who, prior to May 1, 2008, purchased and have not yet received a full
11 refund for, a Scotts Miracle-Gro wild bird food product containing Storcide II,
12 Actellic 5E, or their active ingredients, chlorpyrifos-methyl or pirimiphos-methyl,
13 respectively ("MSBF")." *Id.* at 27. The Court also appointed Plaintiffs to serve as
14 class representatives and appointed Class Counsel. *See* ECF 326.

15 On April 13, 2017, Scotts and Mr. Hagedorn filed a petition to the United States
16 Court of Appeals for the Ninth Circuit pursuant to Federal Rule of Civil Procedure 23,
17 seeking permission to appeal the Court's class certification order ("Rule 23(f)
18 Petition").

19 On June 12, 2017, a Ninth Circuit panel denied the Rule 23(f) Petition.
20 ECF 342.

21 On July 17, 2017, Scotts moved to dismiss or, in the alternative, for judgment
22 on the pleadings in light of the U.S. Supreme Court's decision in *Bristol-Myers*
23 *Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017). ECF 344. Mr.
24 Hagedorn also moved for reconsideration of the Court's September 2016 order on his
25 motion to dismiss based on *Bristol-Myers*. ECF 345. In March 2018, the Court denied
26 both motions. ECF 419.

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1 On May 17, 2018, Ray Hill moved to intervene and substitute for plaintiff
2 Barbara Cowin (now deceased) as class representative, and Defendants opposed that
3 motion. ECF 442, 452.

4 Throughout the six years that this Action has been pending, the Parties have
5 engaged in intensive litigation, before not only this Court but also the Ninth Circuit,
6 the Sixth Circuit, and half-a-dozen district courts around the country, where witnesses
7 and documents are located. In total, the Parties briefed over 80 motions, including five
8 motions to dismiss; a class certification motion and two related appeals; motions for
9 both summary judgment and for judgment on the pleadings; and over two dozen
10 discovery motions, including a related discovery appeal in the Sixth Circuit.

11 Prior to entering into this Settlement, the Parties engaged in fact discovery for
12 over four years and were within six weeks of the fact discovery cut off. The Parties
13 produced and analyzed over 289,000 pages of documents, took 21 depositions, and
14 served and responded to hundreds of written discovery requests.

15 The Parties also engaged in extensive settlement discussions before reaching
16 this Settlement. On November 19, 2013, the Honorable Ruben Brooks presided over
17 an in-person Early Neutral Evaluation Conference, as well as several subsequent in-
18 person or telephonic settlement conferences, but the Parties were unable to resolve the
19 Action at those times.

20 On June 4, 2018, the Parties engaged in a full day of mediation in New York
21 City before the Honorable Layn Phillips (retired), but were unable to reach an
22 agreement to resolve the Action. The Parties continued to explore potential resolution
23 of the Action with the assistance of Judge Phillips and his team, and ultimately, on
24 August 17, 2018, the Parties executed a term sheet, setting forth the principal terms of
25 settlement between Plaintiffs, on behalf of themselves and the Settlement Class, and
26 Defendants. The Parties informed the Court of their agreement in principle to settle
27 the Action by telephone on August 15, 2018, and by written notice filed on August 20,
28

1 2018. ECF 503, 506. The motion seeking preliminary approval of the Settlement must
2 be filed by December 7, 2018. ECF 509.

3 Plaintiffs and Class Counsel have extensively investigated the facts and law
4 relating to the class claims and Defendants' defenses. While Plaintiffs and Class
5 Counsel believe the class claims are meritorious, they also recognize the expense and
6 effort that it would take to prosecute this Action against Defendants through trial and
7 any subsequent appeals. Plaintiffs and Class Counsel have also taken into account the
8 uncertain outcome and risk involved in any litigation, especially complex actions such
9 as this one, including the difficulties and delays inherent in the litigation process. With
10 all of these factors in mind, Plaintiffs and Class Counsel are confident that the
11 Settlement is fair, reasonable, adequate, and in the best interests of the Settlement
12 Class.

13 Defendants deny all of the claims and contentions in the Action, any
14 wrongdoing, any liability to Plaintiffs or any Settlement Class Member, and any
15 alleged wrongdoing or liability arising out of or relating to any of the conduct,
16 statements, acts, or omissions alleged in the Action. Defendants believe there are
17 meritorious defenses and legal challenges to Plaintiffs' claims, both in regards to their
18 certification as a class and their underlying merits. Defendants further deny that they
19 committed any wrongful act or violation of law or duty alleged in the Action and
20 contend that they acted in good faith in connection with Plaintiffs and the Settlement
21 Class. Taking into account the costs, burden, and uncertainty inherent in any litigation,
22 however, Defendants have concluded that it is desirable and beneficial that the Action
23 be fully and finally settled and terminated in the manner and upon the terms and
24 conditions set forth in this Agreement.

25 Without any admission or concession on the part of the Plaintiffs as to the lack
26 of merit of the Action whatsoever and without any admission or concession of liability
27 or wrongdoing or the lack of merit of any defense whatsoever by any of the
28 Defendants, it is hereby stipulated and agreed by the undersigned, on behalf of

1 Plaintiffs and the Settlement Class, and Defendants, that the Action be settled,
2 compromised, released, and dismissed on the merits and with prejudice, subject to the
3 Court’s approval as required by Rule 23 of the Federal Rules of Civil Procedure on
4 the following terms and conditions:

5 **II. DEFINITIONS**

6 As used in this Agreement, including all the attached Exhibits, the terms
7 defined in this Agreement have the meanings below, unless the Agreement expressly
8 provides otherwise.

9 1. “Action” means the consolidated action captioned *In re Morning Song*
10 *Bird Food Litigation*, Lead Case No. 3:12-cv-01592-JAH-AGS, pending before the
11 Honorable John A. Houston and the Honorable Andrew G. Schopler, and all of the
12 actions consolidated in and related to it: *Cyphert v. SMG, et al.*, Case No. 12-cv-1592-
13 JAH-AGS (S.D. Cal. filed June 27, 2012); *Kirby v. SMG*, Case No. 12-cv-1729-JAH-
14 AGS (S.D. Cal. filed July 12, 2012); *Salkeld v. SMG*, Case No. 12-cv-1728-JAH-AGS
15 (S.D. Cal. filed July 13, 2012); and *Brumfield v. SMG*, Case No. 12-cv-1901-JAH-
16 AGS (S.D. Cal. filed Aug. 1, 2012). *See* ECF 18.

17 2. “Agreement” means this Stipulation of Class Action Settlement dated
18 December 7, 2018, including all the attached Exhibits, which are an integral part of
19 the Agreement and incorporated in their entirety by reference.

20 3. “Attorneys’ Fees and Expenses” means the award of money paid to Class
21 Counsel for their representation of Plaintiffs and the Settlement Class in the Action
22 and the litigation expenses incurred by Class Counsel in connection with the Action.
23 Any award of Attorneys’ Fees and Expenses must be approved by the Court, shall be
24 paid in full from the Settlement Fund in accordance with the terms of any Court order,
25 and shall be separate from the Settlement, such that approval of the Settlement shall
26 not be contingent upon an Attorneys’ Fees and Expenses award at all or in any
27 particular amount, as set forth in this Agreement.

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1 4. “CAFA Notice” means the notice of the Settlement to the appropriate
2 federal and state officials, as provided by the Class Action Fairness Act, 28 U.S.C.
3 § 1715 *et seq.* (“CAFA”).

4 5. “Claims Deadline” means the date, 120 days after the Notice Date, by
5 when a Settlement Class Member must submit to the Settlement Administrator a
6 Claim Form with Proof of Purchase to receive a Proof of Purchase Refund or a Claim
7 Form with Claim Form Affidavit to receive a Claim Form Refund.

8 6. “Claim Form” means the form, substantially in the form attached as
9 Exhibit A, to be completed by a Settlement Class Member and submitted to the
10 Settlement Administrator to seek a Proof of Purchase Refund or a Claim Form
11 Refund.

12 7. “Claim Form Affidavit” means a sworn affidavit under penalty of perjury
13 by a Settlement Class Member stating the quantity of Morning Song Bird Food that he
14 or she purchased, the likely retailer from which the purchase was made, the
15 approximate date or dates of purchase, and the dollar amount of Morning Song Bird
16 Food purchased.

17 8. “Claim Form Refund” means the refund, up to \$100 per Household, in
18 the form of a check to be received by a Settlement Class Member without Proof of
19 Purchase who submits a valid Claim Form and Claim Form Affidavit by the Claims
20 Deadline.

21 9. “Class Counsel” means Robbins Geller Rudman & Dowd LLP, Dowd &
22 Dowd P.C., and The Driscoll Firm, P.C.

23 10. “Class Period” means November 1, 2005 through May 1, 2008.

24 11. “Correction Form” means the form, substantially in the form attached as
25 Exhibit B, to be provided via regular, first-class mail or via email (depending on
26 which is available in the Retailer Records) to Settlement Class Members identified
27 through a reasonable inquiry of Retailer Records for whom the Retailer Records
28 provide the required product and purchase information for issuance of Retailer-

1 Identified Refunds (as described in this Agreement) and to be returned by such
2 Settlement Class Members, within 30 days of the Notice Date, correcting any
3 incorrect name or contact information and identifying the correct recipient and address
4 for Retailer-Identified Refunds.

5 12. “Court” means the United States District Court for the Southern District
6 of California, the Honorable John A. Houston presiding.

7 13. “Defendants” means, collectively, The Scotts Miracle-Gro Company,
8 The Scotts Company LLC, and James Hagedorn.

9 14. “Defendants’ Counsel” shall mean the following counsel of record for
10 Defendants: Jones Day (for Scotts) and Kirkland & Ellis LLP (for James Hagedorn).

11 15. “Defendants’ Released Claims” is defined in Section XIII.7 of this
12 Agreement.

13 16. “Defendants’ Unknown Claims” is defined in Section XIII.7 of this
14 Agreement.

15 17. “Effective Date,” or the date upon which this Settlement becomes
16 “effective” or “final,” means the date by when the Court’s Final Order and Judgment
17 becomes a final and binding determination of all issues within its scope and is not
18 subject to further review on appeal or otherwise. Without limitation, the Final Order
19 and Judgment becomes “final” when the last of the following has occurred: (a) the
20 expiration of the time to file a motion to reconsider, alter or amend the judgment or
21 order without any such motion having been filed; (b) the time in which to appeal the
22 judgment or order has passed without any appeal having been taken; and (c) if a
23 motion to reconsider, alter or amend is filed or if an appeal is taken, immediately after
24 the determination of that motion or appeal so that it is no longer subject to any further
25 judicial review or appeal whatsoever, whether by reason of affirmance by a court of
26 last resort, lapse of time, voluntary dismissal of the appeal or otherwise in such a
27 manner as to permit the consummation of the Settlement substantially in accordance
28 with the terms and conditions of this Agreement. For purposes of this paragraph, an

1 “appeal” shall include any petition for a writ of certiorari or other writ that may be
2 filed in connection with approval or disapproval of this Settlement, but shall not
3 include any appeal which concerns only the amount of Attorneys’ Fees and Expenses
4 or the procedures for determining Settlement Class Members’ claims in a manner that
5 does not otherwise impact the validity or finality of the Settlement.

6 18. “Escrow Agent” means a qualified escrow agent to be mutually agreed
7 upon by Class Counsel and Scotts’ Counsel.

8 19. “Exhibits” means the exhibits attached to this Agreement.

9 20. “Fairness Hearing” means the hearing held by the Court to determine
10 whether to finally approve this Agreement as fair, reasonable, and adequate.

11 21. “Final Order and Judgment” means the order, substantially in the form
12 attached as Exhibit C, that the Parties shall ask the Court to enter at the Fairness
13 Hearing granting final approval of the Settlement, which shall constitute a judgment
14 regarding the Action.

15 22. “Household” means any number of Persons occupying the same dwelling
16 unit at a given address.

17 23. “Initial Costs Cap” means the initial cap of Notice and Administration
18 Expenses that can be paid from the Settlement Fund prior to the Effective Date,
19 agreed to by the Parties in the amount of \$1,200,000, which can be modified by
20 agreement of Class Counsel and Scotts’ Counsel or by Court order, for payment of all
21 costs and expenses by the Settlement Administrator, other agreed-upon costs and
22 expenses related to providing notice of the Settlement to the Settlement Class, and the
23 administration of the Settlement.

24 24. “Long-Form Notice” means the notice, substantially in the form attached
25 as Exhibit D, to be provided by the Settlement Administrator via regular, first-class
26 mail or email (depending on which is available in the records provided) to Settlement
27 Class Members identified through a reasonable inquiry of Retailer Records and other
28

1 applicable records produced in discovery in the Action and provided to the Settlement
2 Administrator.

3 25. “Maximum Residual Sum” means those residual funds in the Settlement
4 Fund, if any, that shall revert (if at all) to Scotts in an amount not to exceed Twenty-
5 Two Million Five Hundred Thousand Dollars (\$22,500,000), plus accrued interest.

6 26. “Morning Song Bird Food” means any Scotts wild bird food product
7 containing Storcide II, Actellic 5E, or their active ingredients, chlorpyrifos-methyl or
8 pirimiphos-methyl, respectively, as set forth in the list of products attached as
9 Exhibit E.

10 27. “Net Settlement Fund” means the Settlement Fund less all Notice and
11 Administration Expenses (including the Initial Costs Cap), Taxes and Tax Expenses
12 (as defined in Section VI of this Agreement), Attorneys’ Fees and Expenses, Service
13 Awards, and any other Court-approved deductions as costs or expenses for class
14 administration.

15 28. “Notice and Administration Expenses” means all costs and expenses
16 incurred by the Settlement Administrator to administer the Notice Plan and Settlement
17 Fund pursuant to this Agreement and all other applicable Court orders and any other
18 agreed-upon costs and expenses related to providing notice of the Settlement to the
19 Settlement Class or administering the Settlement.

20 29. “Notice Date” means the deadline, which the Parties shall request to be
21 thirty (30) days after entry of the Preliminary Approval Order, by which the
22 Settlement Administrator must have commenced the mailing and/or emailing of the
23 Retailer-Identified Refund Notices and Long-Form Notices. The Settlement
24 Administrator shall commence publication of the Publication Notice, as set forth in
25 Section III of this Agreement, within thirty (30) days after entry of the Preliminary
26 Approval Order or as soon as reasonably practicable thereafter.

27 30. “Notices” means, collectively, the forms of notice to Settlement Class
28 Members, substantially in the forms attached as Exhibits D, G, and H to this

1 Agreement, specifically the Retailer-Identified Refund Notice, the Long-Form Notice,
2 and the Publication Notice.

3 31. “Notice Plan” means the plan of notice, as set forth in Section III of this
4 Agreement, setting forth the method of notifying members of the Settlement Class of
5 the pendency of the Action and their rights under this Settlement.

6 32. “Objection Date” means the date set forth in the Preliminary Approval
7 Order by which a Settlement Class Member must file and serve an objection to the
8 Settlement.

9 33. “Opt-Out Deadline” means the date set forth in the Preliminary Approval
10 Order by which a Settlement Class Member must submit a request for exclusion from
11 the Settlement Class.

12 34. “Parties” means the Plaintiffs and Defendants, collectively, as each of
13 those terms is defined in this Agreement. “Party” means any one of Plaintiffs or
14 Defendants.

15 35. “Person” means an individual, corporation, limited liability corporation,
16 professional corporation, partnership, limited partnership, limited liability partnership,
17 association, joint stock company, joint venture, estate, legal representative, trust,
18 unincorporated association, government or any political subdivision or agency thereof,
19 and any business or legal entity, and including any of their heirs, successors,
20 representatives, or assignees.

21 36. “Plaintiffs” means Laura Cyphert, Milt Cyphert, Ellen Larson, and David
22 Kirby.

23 37. “Plaintiffs’ Released Claims” is defined in Section XIII.2 of this
24 Agreement.

25 38. “Preliminary Approval Order” means the order, substantially in the form
26 attached as Exhibit F to this Agreement, to be entered by the Court, preliminarily
27 approving this Settlement, among other things.

28

1 39. “Proof of Purchase” means an original sales receipt sufficient to show the
2 quantity of Morning Song Bird Food purchased, the retailer from which the purchase
3 was made, the date of purchase, and the dollar amount of Morning Song Bird Food
4 purchased during the Class Period, or a copy of such receipt.

5 40. “Proof of Purchase Refund” means the refund, in the form of a check to
6 be received by a Settlement Class Member who submits a valid Claim Form with
7 Proof of Purchase by the Claims Deadline.

8 41. “Publication Notice” means the summary notice, substantially in the form
9 attached as Exhibit G to this Agreement, to be published as set forth in Section III of
10 this Agreement.

11 42. “Refunds” means, collectively, Retailer-Identified Refunds, Proof of
12 Purchase Refunds, and Claim Form Refunds, and, as applicable, the Supplemental
13 Claim Form Refunds and the Second Supplemental Claim Form Refunds.

14 43. “Released Defendants” is defined in Section XIII.3 of this Agreement.

15 44. “Released Plaintiffs and Settlement Class Members” is defined in
16 Section XIII.7 of this Agreement.

17 45. “Releasing Defendants” means Released Defendants, as defined in
18 Section XIII.3 of this Agreement.

19 46. “Releasing Plaintiffs and Settlement Class Members” is defined in
20 Section XIII.4 of this Agreement.

21 47. “Retailer Records” means those existing retailer-furnished records
22 (a) that were produced in discovery in the Action by Tractor Supply Company, Sam’s
23 West, Inc. (d.b.a. Sam’s Club), PetSmart, Inc., Menard, Inc., and Orscheln Farm and
24 Home LLC or that were produced by Sam’s Club on November 12, 2018 (reflecting
25 certain transaction-level detail of purchases of Morning Song Bird Food during the
26 Class Period by Settlement Class Members identified by membership number); and
27 (b) that contain information sufficient to determine (i) the identity of the Settlement
28 Class Member, (ii) his or her postal, email, or fax number for directing settlement-

1 related communications, (iii) the quantity of Morning Song Bird Food purchased
2 during the Class Period, (iv) the dates of those purchase(s), and (v) the total amount
3 paid for those purchase(s).

4 48. “Retailer-Identified Refund” means the refund, in the form of a check to
5 be received by a Settlement Class Member without Proof of Purchase who is
6 identified through a reasonable inquiry of Retailer Records for the purchase price(s) of
7 his or her purchase(s) of Morning Song Bird Food during the Class Period to the
8 extent such refunds can be processed from the information set forth in the Retailer
9 Records and distributed to such Settlement Class Member from the contact
10 information set forth in the Retailer Records and any Correction Form.

11 49. “Retailer-Identified Refund Notice” means notice, substantially in the
12 form attached as Exhibit H, to be provided via regular, first-class mail or email
13 (depending on which is available in the respective Retailer Record) to Settlement
14 Class Members identified through a reasonable inquiry of Retailer Records informing
15 such Settlement Class Members of the Retailer Records and setting forth all required
16 information for a Retailer-Identified Refund.

17 50. “Scotts” means The Scotts Miracle-Gro Company and The Scotts
18 Company LLC and, where applicable, other affiliates of those companies.

19 51. “Second Supplemental Claim Form Refund” means the refund in the
20 form of a check that may be distributed as set forth in Section IV.9 of this Agreement,
21 only in the event there is a balance in the Settlement Fund as set forth in
22 Section VI.B.1 of this Agreement, to a Settlement Class Member without Proof of
23 Purchase who submits a valid Claim Form and Claim Form Affidavit for more than
24 \$175 by the Claims Deadline and who receives and cashes his or her initial Claim
25 Form Refund.

26 52. “Service Awards” means the Court-approved amounts awarded to
27 Plaintiffs in recognition of their time and effort in pursuing the Action and fulfilling
28 their obligations and responsibilities as class representatives.

1 53. “Settlement” means the terms embodied by this Agreement.

2 54. “Settlement Administrator” means the third-party agent that shall
3 implement and administer the Notice Plan and the Settlement, including the claims
4 process and Refunds as described in Sections III and IV of this Agreement. KCC LCC
5 shall serve as the Settlement Administrator, subject to approval by the Court.

6 55. “Settlement Amount” means the total amount of up to Eighty-Five
7 Million Dollars (\$85,000,000), to be paid by Scotts on behalf of Defendants as set
8 forth in Section VI.A of this Agreement.

9 56. “Settlement Class” or “Settlement Class Members” mean all Persons
10 who, between November 1, 2005 and May 1, 2008, purchased and have not yet
11 received a full refund for their Morning Song Bird Food purchases. The following
12 entities and individuals are excluded from the Settlement Class: (a) Defendants and
13 their immediate families, the officers, directors and affiliates of Defendants, at all
14 relevant times, members of their immediate families and their legal representatives,
15 heirs, successors or assigns, and any entity in which Defendants have or had a
16 controlling interest; (b) distributors, retailers, and other resellers of Morning Song
17 Bird Food; (c) judicial officers and their immediate family members and associated
18 court staff assigned to this case; and (d) all those otherwise in the Settlement Class
19 who timely and properly exclude themselves from the Settlement Class as provided in
20 this Agreement.

21 57. “Settlement Fund” means the Settlement Amount, plus all accrued
22 interest, which may be reduced by payments or deductions as provided in this
23 Agreement or by Court order. The Settlement Fund is intended to be a “qualified
24 settlement fund” within the meaning of Treas. Reg. § 1.468B-1, to the fullest extent
25 possible.

26 58. “Settlement Fund Account” means an interest-bearing account that is
27 subject to the oversight and control of Defendants’ Counsel and Class Counsel
28

1 pursuant to an escrow agreement and into which the Settlement Amount shall be
2 transferred.

3 59. “Supplemental Claim Form Refund” means the refund, up to \$75 per
4 Household, in the form of a check that may be distributed as set forth in Section IV.8
5 of this Agreement, only in the event there is a balance in the Settlement Fund in
6 excess of the Maximum Residual Sum as set forth in Section VI.B.1 of this
7 Agreement, to a Settlement Class Member without Proof of Purchase who submits a
8 valid Claim Form and Claim Form Affidavit for more than \$100 by the Claims
9 Deadline.

10 60. “Tax” or “Taxes” mean any and all taxes, fees, levies, duties, tariffs,
11 imposts, and other charges of any kind (together with any and all interest, penalties,
12 additions to tax and additional amounts imposed with respect thereto) imposed by any
13 governmental authority.

14 61. “Unknown Claims” is defined in Section XIII.5 of this Agreement.

15 62. All capitalized terms include the plural as well as the singular.

16 63. The word “including” has the same meaning as the phrase “including,
17 without limitation” and other similar phrases.

18 **III. NOTICE OF THE SETTLEMENT**

19 1. Pursuant to the Court’s order (ECF 509), the Parties shall file the
20 Agreement with the Court, together with a Motion for Preliminary Approval of the
21 Agreement and Approval of Notice, no later than December 7, 2018.

22 2. Not later than ten (10) days after the filing of this Agreement with the
23 Court, Defendants’ Counsel shall serve notice of the proposed Settlement upon the
24 appropriate federal and state officials, as provided by CAFA.

25 3. In accordance with all the terms of the Court’s Preliminary Approval
26 Order, the Settlement Administrator shall disseminate the Notices and the Claim
27 Form, shall establish a post-office box for the receipt of any Settlement-related
28 correspondence, shall establish a toll-free telephone number that will provide

1 automated Settlement-related information to Settlement Class Members; shall respond
2 to inquiries or requests from Settlement Class Members, in consultation with Class
3 Counsel and Defendants' Counsel; and shall respond to inquiries or requests from
4 Class Counsel, Defendants' Counsel, and the Court.

5 4. **Retailer-Identified Refund Notice:** The Settlement Administrator shall
6 be responsible for: (a) printing and mailing by regular, first-class mail and emailing
7 (depending on which is available in the respective Retailer Records) Retailer-
8 Identified Refund Notices (substantially in the form attached as Exhibit H), along with
9 Correction Forms, Long-Form Notices, and Claim Forms to those specific Settlement
10 Class Members identified through a reasonable inquiry of Retailer Records that have
11 all the required information for a Retailer-Identified Refund and that qualify for a
12 Retailer-Identified Refund; (b) updating any known Settlement Class Member address
13 information using the National Change of Address (NCOA) system; and (c) handling
14 returned Retailer-Identified Refund Notices not delivered to Settlement Class
15 Members.

16 5. **Long-Form Notice:** The Settlement Administrator shall be responsible
17 for (a) printing and mailing by regular, first-class mail and emailing (to the extent
18 reasonably practicable) Long-Form Notices (substantially in the form attached as
19 Exhibit D), along with Claim Forms, to Settlement Class Members identified through
20 a reasonable inquiry of Retailer Records and other applicable records produced in
21 discovery in the Action and provided to the Settlement Administrator; (b) updating
22 any known Settlement Class Member address information using the National Change
23 of Address (NCOA) system; and (c) handling returned Long-Form Notices not
24 delivered to Settlement Class Members.

25 6. **Publication Notice:** The Settlement Administrator shall be responsible
26 for, without limitation: (a) soliciting bids for Publication Notice in the form approved
27 by the Court for the national editions of three consumer magazines (Birds & Blooms,
28 National Geographic, and People Magazine); two trade publications (JAVMA and

1 Veterinary Practice News); and four online/mobile platforms (Conversant - Mobile,
2 Facebook, Google Ad Network, and Yahoo! Ad Network) or similar substitute
3 publications and platforms, in consultation with counsel for the Parties; (b) typesetting
4 the Publication Notice for print; and (c) ensuring dissemination of the Publication
5 Notice in accordance with the Preliminary Approval Order so as to provide the best
6 practicable notice to the Settlement Class.

7 7. **Website Notice:** The Settlement Administrator shall be responsible for
8 establishing a settlement website to which Settlement Class Members may refer for
9 information about the Action and Settlement and submit online Claim Forms and
10 inquiries. The Settlement Administrator shall post the Long-Form Notice and Claim
11 Form on the website as well as other important documents and deadlines, in
12 consultation with counsel for the Parties.

13 8. Class Counsel may post the Long-Form Notice and Claim Form on their
14 firm websites. Released Defendants shall refer inquiring Settlement Class Members to
15 the Settlement Administrator, the toll-free number, and the settlement website.

16 9. No later than seven (7) days before the Fairness Hearing, the Settlement
17 Administrator shall file with the Court the details outlining the scope, method, and
18 results of the Notice Plan.

19 10. The Settlement Administrator shall have the responsibility to receive and
20 maintain on behalf of the Court any Settlement Class Member correspondence,
21 including inquiries, Claim Forms, requests for exclusion, and/or objections to the
22 Settlement. The Settlement Administrator shall also forward written inquiries to Class
23 Counsel or its designee for a response, if warranted, and shall simultaneously provide
24 copies of all such documents to Defendants' Counsel.

25 **IV. REFUNDS TO SETTLEMENT CLASS MEMBERS**

26 1. As set forth in this Agreement, including in Sections IV and V,
27 Settlement Class Members may receive the following Refunds: (1) Retailer-Identified
28 Refunds; (2) Proof of Purchase Refunds; or (3) Claim Form Refunds. Settlement Class

1 Members who timely submit valid Claim Forms and Claim Form Affidavits for a
2 refund in excess of \$100 may be eligible for Supplemental Claim Form Refunds as
3 described below. Settlement Class Members who timely submit valid Claim Forms
4 and Claim Form Affidavits for a refund in excess of \$175 may be eligible for Second
5 Supplemental Claim Form Refunds as described below.

6 2. Settlement Class Members may submit Claim Forms for Proof of
7 Purchase Refunds and/or Claim Form Refunds with all supporting documentation
8 (including Proof of Purchase and Claim Form Affidavit, respectively) to the
9 Settlement Administrator by regular, first-class mail, fax, email, or via the settlement
10 website.

11 3. Refunds will not be issued prior to the Effective Date but will be issued
12 within ninety (90) days after the Effective Date or as otherwise agreed by the Parties
13 or ordered by the Court.

14 4. Any check issued pursuant to this Agreement shall be valid for 120 days
15 or as otherwise agreed by the Parties or ordered by the Court, except for checks issued
16 for Supplemental Claim Form Refunds and Second Supplemental Claim Form
17 Refunds, which shall be valid for 30 days unless otherwise agreed by the Parties or
18 ordered by the Court.

19 5. **Retailer-Identified Refunds:**

20 (a) Settlement Class Members identified through a reasonable inquiry
21 of Retailer Records that have all the required information for a Retailer-Identified
22 Refund shall receive a Retailer-Identified Refund Notice informing such Settlement
23 Class Member of the information set forth in the Retailer Records. Such Settlement
24 Class Members shall have thirty (30) days from the Notice Date to review the
25 Retailer-Identified Refund Notice and return to the Settlement Administrator the
26 Correction Form with corrections to any incorrect name or contact information
27 provided and information to identify the correct recipient and address for the Retailer-
28 Identified Refund.

1 (b) If no Correction Form is received within thirty (30) days from the
2 Notice Date, the Settlement Administrator shall issue a refund from the Net
3 Settlement Fund in the form of a check to the Settlement Class Member that qualifies
4 for a Retailer-Identified Refund using the contact information as set forth in the
5 Retailer-Identified Refund Notice.

6 (c) If a Correction Form is received within thirty (30) days from the
7 Notice Date, the Settlement Administrator shall issue a refund, in the form of a check
8 to the Settlement Class Member using the contact information as set forth in the
9 Correction Form.

10 (d) Any Settlement Class Member whose Retailer-Identified Refund
11 Notice is returned as undeliverable, and who cannot be located, shall not receive a
12 Retailer-Identified Refund.

13 (e) There is no monetary cap on Retailer-Identified Refunds.

14 (f) Any Settlement Class Member who receives a Retailer-Identified
15 Refund may also file a Claim Form supported by a Proof of Purchase or Claim Form
16 Affidavit seeking a refund of the purchase price of additional purchases of Morning
17 Song Bird Food, only to the extent those purchases were not already included in the
18 Retailer-Identified Refund, subject to the limitations set forth in this Agreement.

19 **6. Proof of Purchase Refunds:**

20 (a) Any Settlement Class Member with Proof of Purchase may submit
21 a Claim Form for a refund for the total purchase price of his or her purchases of
22 Morning Song Bird Food during the Class Period to the extent not included in a
23 Retailer-Identified Refund. To be eligible for a Proof of Purchase Refund, the
24 Settlement Class Member must submit a valid Claim Form and Proof of Purchase to
25 the Settlement Administrator by the Claims Deadline. Settlement Class Members who
26 timely submit valid Claim Forms and Proofs of Purchase, as determined by the
27 Settlement Administrator, shall receive refunds, in the form of a check from the Net
28 Settlement Fund.

1 (b) In consultation with the Settlement Administrator and Class
2 Counsel, Defendants shall have the right to establish reasonable fraud control
3 measures and standards to be applied by the Settlement Administrator to claims for
4 Proof of Purchase Refunds, including, without limitation, the use of price term sheets
5 for Morning Song Bird Food.

6 (c) There is no monetary cap on Proof of Purchase Refunds.

7 **7. Claim Form Refunds:**

8 (a) Any Settlement Class Member without Proof of Purchase may
9 submit a Claim Form for a refund of his or her purchases of Morning Song Bird Food
10 during the Class Period to the extent not included in a Retailer-Identified Refund. To
11 be eligible for a Claim Form Refund, the Settlement Class Member must submit a
12 valid Claim Form and Claim Form Affidavit to the Settlement Administrator by the
13 Claims Deadline. Such Settlement Class Members will receive a refund from the Net
14 Settlement Fund, in the form of a check of the amount claimed in the Claim Form and
15 supported by the Claim Form Affidavit, up to \$100 per Household.

16 (b) In consultation with the Settlement Administrator and Class
17 Counsel, Defendants shall have the right to establish reasonable fraud control
18 measures and standards to be applied by the Settlement Administrator to claims for
19 Claim Form Refunds, including, without limitation, the use of price term sheets for
20 Morning Song Bird Food.

21 (c) Claim Form Refunds shall not increase the amount of the
22 Settlement Fund. In the event total Claim Form Refunds (with a \$100-per-Household
23 limit) exceed the balance in the Net Settlement Fund as set forth in Section IV of this
24 Agreement, the Claim Form Refunds will be distributed on a reduced *pro rata* basis.

25 **8. Supplemental Claim Form Refunds:**

26 (a) If, after a reasonable period of time and no sooner than 120 days
27 after the issuance of the Claim Form Refunds, there is a balance in the Net Settlement
28 Fund in excess of the Maximum Residual Sum as set forth in Section VI.B.1 of this

1 Agreement, those Settlement Class Members who timely submitted valid Claim
2 Forms and Claim Form Affidavits for more than \$100 per Household may receive
3 additional amounts from the balance in the Net Settlement Fund in excess of the
4 Maximum Residual Sum, on a *pro rata* basis, not to exceed an additional \$75 per
5 Household for a total of \$175 per Household for all Claim Form and Supplemental
6 Claim Form Refunds. Such Settlement Class Members will receive a refund in the
7 form of a check.

8 (b) In the event payment of all Supplemental Claim Form Refunds
9 would exceed the balance in the Net Settlement Fund in excess of the Maximum
10 Residual Sum as set forth above, the amount of the Supplemental Claim Form
11 Refunds will be distributed on a reduced *pro rata* basis.

12 **9. Second Supplemental Claim Form Refunds:**

13 (a) If there is a balance in the Net Settlement Fund in excess of the
14 Maximum Residual Sum as set forth in Section VI.B.1 of this Agreement, those
15 Settlement Class Members who timely submitted valid Claim Forms and Claim Form
16 Affidavits for more than \$175 per Household and who received and cashed their
17 initial Claim Form Refunds may receive additional amounts from the balance in the
18 Net Settlement Fund in excess of the Maximum Residual Sum, on a *pro rata* basis,
19 not to exceed the total purchase amount in the Claim Form. Such Settlement Class
20 Members will receive a refund in the form of a check.

21 (b) In the event payment of all Second Supplemental Claim Form
22 Refunds would exceed the amount available for distribution as set forth above, the
23 amount of the Second Supplemental Claim Form Refunds will be distributed on a
24 reduced *pro rata* basis.

25 **V. CLAIMS PROCESS AND ADMINISTRATION**

26 1. The process for submitting a Claim Form is designed to be as simple and
27 convenient as possible.

28

1 2. Subject to the supervision and direction of the Court, the Settlement
2 Administrator will oversee the implementation and administration of the claims
3 process, including (a) calculation of Retailer-Identified Refunds based on Retailer
4 Records; (b) validation of Claim Forms and approval of payment of Proof of Purchase
5 Refunds and Claim Form Refunds based on information and documents submitted by
6 Settlement Class Members and information and documents provided by Class Counsel
7 and Defendants, subject to reasonable fraud control measures and standards
8 established by Defendants, in consultation with the Settlement Administrator and
9 Class Counsel; (c) distribution of Refunds from the Net Settlement Fund; and
10 (d) preparation and dissemination of reports, on a monthly or other periodic basis and
11 as requested, to Class Counsel and Defendants' Counsel regarding the status of the
12 claims process and of Retailer-Identified Refunds, Proof of Purchase Refunds, and
13 Claim Form Refunds.

14 3. In consultation with the Settlement Administrator and Class Counsel,
15 Defendants shall have the right to establish reasonable fraud control measures and
16 standards to be applied by the Settlement Administrator in reviewing and processing
17 Claim Forms and Refunds, including, without limitation, the use of price term sheets
18 for Morning Song Bird Food. All documents, information, or materials provided to the
19 Settlement Administrator to administer the Settlement (including reviewing and
20 processing Claim Forms and Refunds) shall be made available to any Party upon
21 request.

22 4. In administering the claims process, the Settlement Administrator shall
23 act in good faith and make reasonable efforts to determine whether a Claim Form is
24 valid and payable in accordance with this Agreement, the reasonable fraud control
25 measures and standards established by Defendants in consultation with the Settlement
26 Administrator and Class Counsel, and any Court order. That determination shall be
27 based on: (a) the information provided on the Claim Form; (b) the documentation or
28 information provided by Class Counsel and Defendants and through Retailer Records;

1 (c) any Proof of Purchase; or (d) the completeness or substantial completeness of the
2 information required to be included in the Claim Form Affidavit. The validity of a
3 Claim Form and amount of any Proof of Purchase Refund or Claim Form Refund will
4 be assessed by the Settlement Administrator based on the totality of the information
5 and documentation.

6 5. The Settlement Administrator shall have the right to contact Settlement
7 Class Members to complete or validate their Claim Forms, and such Settlement Class
8 Members shall be permitted to try to cure any deficiencies with their claims within
9 thirty (30) days after the Claims Deadline or the date of the deficiency notification
10 sent by the Settlement Administrator, whichever is later. If a timely Claim Form is
11 rejected by the Settlement Administrator as deficient (for example, the Settlement
12 Class Member failed to sign the Claim Form), the Settlement Administrator shall
13 notify the claimant in writing. Such Settlement Class Members shall have thirty (30)
14 days from the Claims Deadline or the date of the deficiency notification sent by the
15 Settlement Administrator, whichever is later, to cure the deficiency.

16 6. If a Settlement Class Member wishes to dispute the rejection of a Claim
17 Form or the calculation of his or her Proof of Purchase Refund or Claim Form Refund
18 (if any), he or she may so notify the Settlement Administrator and must produce any
19 supporting information or documentation requested by the Settlement Administrator
20 no later than thirty (30) days after the Claims Deadline or the date of the deficiency
21 notification sent by the Settlement Administrator, whichever is later.

22 7. The Settlement Administrator will evaluate any additional information or
23 documentation submitted by the Settlement Class Member, consult with Class
24 Counsel and Defendants' Counsel, and then decide whether the Claim Form should be
25 accepted and/or if the payments of any Proof of Purchase Refund or Claim Form
26 Refund should be adjusted.

27
28

1 8. The determination by the Settlement Administrator will be final and
2 binding and the Settlement Administrator will notify the Settlement Class Member of
3 the final determination as to his or her dispute.

4 9. Any Settlement Class Member who fails to timely submit a valid Claim
5 Form and Proof of Purchase and/or Claim Form Affidavit by the Claims Deadline
6 (except for those Settlement Class Members who timely cure any deficiency with their
7 Claim Form, Proof of Purchase, and/or Claim Form Affidavit) shall be forever barred
8 from receiving any Refund, payment, or other monetary relief pursuant to this
9 Agreement, but will in all other respects be subject to and bound by the provisions of
10 this Agreement, the releases (as described in Section XIII in this Agreement), and the
11 Final Order and Judgment. Notwithstanding the foregoing, the Settlement
12 Administrator shall have the discretion (but not the obligation) to accept Claim Forms
13 for review that are received shortly after the Claims Deadline if Class Counsel and
14 Defendants' Counsel agree.

15 10. No Person shall have any claim against Plaintiffs, Class Counsel, or the
16 Settlement Administrator, or any other Person designated by Class Counsel, based on
17 the amount of a Refund, or the determination, calculation, or distribution of a Refund
18 made substantially in accordance with this Agreement and the Settlement set forth in
19 this Agreement or further order(s) of the Court.

20 11. Released Defendants shall have no responsibility for, interest in, or
21 liability whatsoever with respect to the amount or calculation of any Refund, the
22 determination, distribution, or administration of any Refund or the Settlement Fund,
23 the payment or withholding of Taxes or Tax Expenses, or any losses incurred in
24 connection with such matters. Plaintiffs, Settlement Class Members, and Class
25 Counsel hereby release Released Defendants from any and all liability and claims
26 arising from or with respect to the administration, investment, or distribution of the
27 Settlement Fund.

28

1 12. The Court retains the ongoing and exclusive jurisdiction and independent
2 case management authority regarding the general operation of the Settlement
3 Administration and those appointed to implement and oversee it.

4 **VI. SETTLEMENT FUND**

5 **A. The Settlement Amount and the Settlement Fund Account**

6 1. Within thirty (30) days after the entry of the Preliminary Approval Order,
7 Scotts, on behalf of itself and all Defendants, shall pay, deposit, or otherwise transfer
8 into the Settlement Fund Account the first installment of the Settlement Amount in the
9 amount of Forty-Two Million Five Hundred Thousand Dollars (\$42,500,000).

10 2. Within thirty (30) days of the Effective Date, Scotts, on behalf of itself
11 and all Defendants, shall pay, deposit, or otherwise transfer into the Settlement Fund
12 Account the second installation of the Settlement Amount in the amount of at least
13 Twenty Million Dollars (\$20,000,000) and up to Forty-Two Million Five-Hundred
14 Thousand Dollars (\$42,500,000), in consultation with the Settlement Administrator
15 and Class Counsel, and depending on the status of the payment of Refunds. This
16 provision shall not alter Scotts' obligation, on behalf of itself and all Defendants, to
17 pay, deposit, or otherwise transfer into the Settlement Fund Account the full amount
18 of the second installation of the Settlement Amount in the amount up to Forty-Two
19 Million Five-Hundred Thousand Dollars (\$42,500,000) if necessary.

20 3. Within thirty (30) days of the Effective Date or as otherwise agreed by
21 the Parties, Scotts, on behalf of itself and all Defendants, shall pay, deposit, or
22 otherwise transfer into the Settlement Fund Account any additional amounts required
23 to cover the Retailer-Identified Refunds and Proof of Purchase Refunds in
24 consultation with the Settlement Administrator subject to the terms and conditions of
25 this Agreement.

26 4. Upon receipt of each installment of the Settlement Amount, the Escrow
27 Agent shall invest (or cause to be invested) the Settlement Amount deposited into the
28 Settlement Fund Account in United States agency or Treasury securities or other

1 instruments backed by the Full Faith and Credit of the United States government or
2 federal agency or fully insured by the United States government or a federal agency
3 and shall reinvest (or cause to be reinvested) the proceeds of these instruments as they
4 mature in similar instruments at their then-current market rates. All risks related to the
5 investment of the Settlement Fund in accordance with the investment guidelines set
6 forth in this paragraph shall be borne by the Settlement Fund and Released Defendants
7 shall have no responsibility for, interest in, or liability whatsoever with respect to
8 investment decisions or the actions of the Escrow Agent, or any transactions executed
9 by the Escrow Agent.

10 **B. Payment Priority**

11 1. Within ninety (90) days of the Effective Date or as otherwise agreed by
12 the Parties or as otherwise ordered by the Court, refunds, costs, and expenses shall be
13 paid from the Net Settlement Fund in the following order: (a) Proof of Purchase
14 Refunds and Retailer-Identified Refunds; (b) Claim Form Refunds; (c) Supplemental
15 Claim Form Refunds, if any; and (d) Second Supplemental Claim Form Refunds, if
16 any.

17 (a) *Proof of Purchase and Retailer-Identified Refunds*: If the total
18 amount of dollars to be distributed as Proof of Purchase and Retailer-Identified
19 Refunds exceeds the balance remaining in the Net Settlement Fund, Scotts, on behalf
20 of Defendants, shall transfer or cause to be transferred additional amounts, sufficient
21 to cover all Proof of Purchase and Retailer-Identified Refunds, into the Settlement
22 Fund within thirty (30) days upon a request by the Settlement Administrator pursuant
23 to this provision and in consultation with the Settlement Administrator.

24 (b) *Claim Form Refunds*: If the total amount of dollars to be
25 distributed as Claim Form Refunds exceeds the balance remaining in the Net
26 Settlement Fund after payment of item (a) and after payment of any Court-approved
27 award of Attorneys' Fees and Expenses and Service Awards, the remaining balance
28 will be distributed for Claim Form Refunds on a *pro rata* basis. If no money remains

1 in the Net Settlement Fund after payment of item (a), Claim Form Refunds shall not
2 be distributed. Claim Form Refunds shall not increase the amount of the Settlement
3 Fund.

4 (c) *Supplemental Claim Form Refunds*: If there is a balance in excess
5 of the Maximum Residual Sum in the Net Settlement Fund after payment of items (a)
6 through (b) and after payment of any Court-approved award of Attorneys' Fees and
7 Expenses and Service Awards, the remaining balance in excess of the Maximum
8 Residual Sum shall be distributed for Supplemental Claim Form Refunds on a *pro*
9 *rata* basis, not to exceed an additional \$75 per Household, for a total not to exceed
10 \$175 per Household. Supplemental Claim Form Refunds shall not increase the amount
11 of the Settlement Fund.

12 (d) *Maximum Residual Sum*: If, after payment of items (a) through (b)
13 and after payment of any Court-approved award of Attorneys' Fees and Expenses and
14 Service Awards (before the payment of Supplemental Claim Form Refunds), money
15 remains in the Net Settlement Fund, those residual funds shall revert to Scotts within
16 180 days after the Effective Date (or such other date as may be set with Defendants'
17 consent to allow sufficient time for processing of claims and Refunds from the
18 Settlement Fund) and may thereafter be retained by Scotts as Scotts' money. In no
19 event shall the residual funds paid back to Scotts be greater than the Maximum
20 Residual Sum plus accrued interest on the actual residual amount.

21 (e) *Second Supplemental Claim Form Refund*: If there is a balance in
22 the Net Settlement Fund, after payment of items (a) through (c), after payment of any
23 Court-approved award of Attorneys' Fees and Expenses and Service Awards, after the
24 return of the Maximum Residual Sum to Scotts, and after the payment of
25 Supplemental Claim Form Refunds, the remaining balance shall be distributed for
26 Second Supplemental Claim Form Refunds on a *pro rata* basis to those Settlement
27 Class Members who timely submitted valid Claim Forms and Claim Form Affidavits
28 for more than \$175 per Household and who received and cashed their initial Claim

1 Form Refunds, in an amount not to exceed the total purchase price in the valid Claim
2 Forms and Claim Form Affidavits timely submitted by such Settlement Class
3 Members. Second Supplemental Claim Form Refunds shall not increase the amount
4 of the Settlement Fund.

5 (f) *Residual Charitable Donation*: If there is a balance in the Net
6 Settlement Fund after payment of items (a) through (c) and item (e), any balance that
7 remains shall, unless otherwise ordered by the Court on motion or otherwise, be
8 donated to the National Audubon Society, a bird-related charitable organization
9 mutually agreed upon by Class Counsel and Scotts' Counsel. The Parties agree that
10 the Court shall retain jurisdiction over the distribution of any balance in the Net
11 Settlement Fund described in this paragraph and that any exercise of the Court's
12 discretion with regard to the distribution of such balance pursuant to this provision
13 shall not constitute a material alteration of the Settlement for purposes of Section XIV
14 relating to termination.

15 2. After the Effective Date, the Escrow Agent may order payment of all
16 additional Notice and Administration Expenses reasonably incurred by the Settlement
17 Administrator without further order of the Court.

18 3. Any Court-approved award of Attorneys' Fees and Expenses and
19 Services Awards shall be paid from the Settlement Fund and shall not increase the
20 Settlement Amount.

21 **C. Taxes**

22 **1. Qualified Settlement Fund**

23 (a) The Parties and the Escrow Agent agree to treat the Settlement
24 Fund as being at all times a "qualified settlement fund" within the meaning of Treas.
25 Reg. § 1.468B-1, to the fullest permissible extent. It is intended that all transfers by
26 Scotts, on behalf of itself and all Defendants, to the Settlement Fund will satisfy the
27 "all events test" and the "economic performance" requirement of § 461(h)(1) of the
28 Internal Revenue Code of 1986, as amended, and the regulations promulgated

1 thereunder (the “Code”), and Treas. Reg. § 1.461-1(a)(2). As such, Scotts shall not be
2 taxed on the income of the Settlement Fund. The Settlement Fund shall be taxed on its
3 modified gross income determined in accordance with Treas. Reg. § 1.468B-2(b).

4 (b) The Escrow Agent shall timely make such elections as necessary
5 or advisable to carry out the provisions of this Agreement, including, if appropriate,
6 the “relation-back election” (as defined in Treas. Reg. § 1.468B-1(j)(2)) to treat the
7 Settlement Fund as coming into existence as a qualified settlement fund as of the
8 earliest permitted date. Such elections shall be made in compliance with the
9 procedures and requirements contained in such regulations. It shall be the
10 responsibility of the Escrow Agent to timely and properly prepare and deliver the
11 necessary documentation for signature by all necessary parties and thereafter to cause
12 the appropriate filing to occur.

13 (c) For the purpose of Treas. Reg. §§ 1.468B-1 through 1.468B-4, the
14 “transferor” shall be Scotts. The transferor shall supply to the Escrow Agent the
15 statement required by Treas. Reg. § 1.468B-3(e) by February 15 of the year following
16 the calendar year(s) in which any installment of the Settlement Amount is paid to the
17 Settlement Fund, including any additional amounts required to pay Retailer-Identified
18 Refunds or Proof of Purchase Refunds.

19 (d) The “administrator” of the Settlement Fund within the meaning of
20 Treas. Reg. § 1.468B-2(k) shall be the Escrow Agent. The Escrow Agent shall apply
21 for an employer identification number for the Settlement Fund in accordance with
22 Treas. Reg. § 1.468B-2(k)(4). The Escrow Agent shall timely and properly file all
23 informational and other tax returns as are necessary or advisable with respect to the
24 Settlement Fund (including, without limitation, the returns described in Treas. Reg.
25 § 1.468B-2(k)). In accordance with the provisions of Treas. Reg. § 1.468B-2(l), the
26 Escrow Agent shall cause to be filed all required federal, state, and local information
27 returns as are necessary or advisable with respect to any payments made to Settlement
28 Class Members. The Escrow Agent may retain certified public accountants and legal

1 counsel to consult with and advise it with respect to the preparation of any and all
2 appropriate income tax returns, information returns, or compliance withholding
3 requirements.

4 (e) The Escrow Agent shall be empowered to take all such actions as it
5 deems necessary to ensure that the Settlement Fund is treated as a “qualified
6 settlement fund” under Treas. Reg. § 1.468B-1. The Escrow Agent may petition the
7 Court to amend, either in whole or in part, any administrative provision of this
8 Agreement that causes unanticipated tax consequences or liabilities inconsistent with
9 the foregoing.

10 (f) In accordance with Treas. Reg. § 1.468B-2(j), the taxable year of
11 the Settlement Fund shall be the calendar year and the Settlement Fund shall use an
12 accrual method of accounting within the meaning of § 446(c) of the Code.

13 (g) All (i) Taxes (including any estimated Taxes, interest, or penalties)
14 arising with respect to the income earned by the Settlement Fund, including any Taxes
15 or tax detriments that may be imposed upon Released Defendants or Released
16 Plaintiffs and Settlement Class Members or their respective counsel with respect to
17 any income earned by the Settlement Fund for any period during which the Settlement
18 Fund does not qualify as a “qualified settlement fund” for federal or state income tax
19 purposes, and (ii) expenses and costs incurred in connection with the operation and
20 implementation of this Section of the Agreement (including, without limitation,
21 expenses of tax attorneys and/or accountants and mailing and distribution costs and
22 expenses relating to filing, or failing to file, the returns described in this paragraph)
23 (“Tax Expenses”), shall be paid out of the Settlement Fund. In all events, Released
24 Defendants and their counsel shall have no liability or responsibility for the Taxes or
25 the Tax Expenses. The Escrow Agent shall indemnify and hold each of the Released
26 Defendants and their counsel harmless for Taxes and Tax Expenses (including,
27 without limitation, Taxes payable by reason of any such indemnification). Taxes and
28 Tax Expenses shall be treated as, and considered to be, a cost of administration of the

1 Settlement Fund and shall be timely paid by the Escrow Agent out of the Settlement
2 Fund without prior order from the Court, and the Escrow Agent shall be authorized
3 (notwithstanding anything in this Agreement to the contrary) to withhold from
4 distribution to Settlement Class Members any funds necessary to pay such amounts,
5 including the establishment of adequate reserves for any Taxes and Tax Expenses (as
6 well as any amounts that may be required to be withheld under Treas. Reg. § 1.468B-
7 2(1)(2)). Neither the Released Defendants nor their counsel are responsible nor shall
8 they have any liability for any Taxes or Tax Expenses. The Parties agree to cooperate
9 with the Escrow Agent, each other, and their tax attorneys and accountants to the
10 extent reasonably necessary to carry out the provisions of this paragraph of the
11 Agreement.

12 2. Released Defendants are not and shall not be obligated to compute,
13 estimate or pay any taxes on behalf of any Plaintiff, any Settlement Class Member,
14 Class Counsel, and/or the Escrow Agent. Defendants do not make and have not made
15 any representations regarding the taxability of any Refunds made pursuant to this
16 Agreement or the Settlement. Any income or other tax, including any interest,
17 penalties, or other payment obligations ultimately determined to be payable from or
18 with respect to any payments made pursuant to the Agreement or the Settlement, as
19 well as any state or federal reporting obligations imposed on Plaintiffs and Settlement
20 Class Members arising from the Settlement, shall not be Defendants' responsibility
21 and Defendants shall have no liability with respect to any such matters.

22 **VII. REQUESTS FOR EXCLUSION**

23 1. The Notices will provide instructions regarding the procedures that must
24 be followed to opt out of the Settlement Class pursuant to Fed. R. Civ. P.
25 23(c)(2)(B)(v). The Parties agree that, to opt out validly from the Settlement Class, a
26 Settlement Class Member must personally sign and submit a written request to opt out
27 stating "I wish to exclude myself from the Settlement Class in *In re Morning Song*
28 *Bird Food Litigation*" (or substantially similar clear and unambiguous language) to

1 the Settlement Administrator on or before the Opt-Out Deadline. That written request
2 also shall contain: (a) the Settlement Class Member's printed name, address, and
3 telephone number; (b) a statement that the Settlement Class Member is a Settlement
4 Class Member; and (c) the Morning Song Bird Food purchased with approximate
5 dates, retailers, product type, and purchase price. The Settlement Administrator shall
6 provide copies of all opt out requests to Class Counsel and Defendants' Counsel
7 within seven (7) days of the receipt of each such request.

8 2. All Settlement Class Members who do not timely and validly opt out of
9 the Settlement Class shall in all respects be bound by all terms of this Agreement and
10 the Court's Final Order and Judgment upon the Effective Date. Group opt outs,
11 including "mass" or "class" opt outs, are strictly prohibited.

12 3. Any Settlement Class Member who elects to opt out pursuant to this
13 Section may not also object to the Settlement, pursuant to Section VIII of this
14 Agreement. Any Settlement Class Member who elects to object pursuant to
15 Section VIII cannot opt out pursuant to this Section.

16 4. Not later than seven (7) days before the Fairness Hearing, the Settlement
17 Administrator shall file with the Court a list of those Persons who have timely and
18 validly excluded themselves from the Settlement.

19 5. The Settlement Administrator and the Parties shall promptly send copies
20 of any requests for exclusion, objections, and related correspondence to each other.

21 **VIII. OBJECTIONS TO THE SETTLEMENT**

22 1. The Notices will provide instructions regarding the procedures that must
23 be followed to object to the Settlement pursuant to Fed. R. Civ. P. 23(e)(5). Provided
24 that a Settlement Class Member has not submitted a written request to opt out, as set
25 forth above in Section VII, such Settlement Class Member may present written
26 objections, if any, explaining why he or she believes the Settlement should not be
27 approved by the Court as fair, reasonable, and adequate. No later than such date as is
28 ordered by the Court, a Settlement Class Member who wishes to object to any aspect

1 of the Settlement must file with the Court a written statement of the objection, which
2 must include a detailed statement of the Settlement Class Member's objection(s), as
3 well as the specific reasons, if any, for each such objection, including any evidence
4 and legal authority the Settlement Class Member wishes to bring to the Court's
5 attention. That written statement also must contain the Settlement Class Member's
6 printed name, address, telephone number, and Morning Song Bird Food product
7 purchases forming the basis of the Settlement Class Member's inclusion in the
8 Settlement Class, and any other supporting papers, materials, or briefs the Settlement
9 Class Member wishes the Court to consider when reviewing the objection.

10 2. A Settlement Class Member may object on his or her own behalf or
11 through a lawyer hired at that Settlement Class Member's own expense, provided the
12 Settlement Class Member has not submitted a written request to opt out, as set forth in
13 Section VII of this Agreement. The objection must state whether it applies only to the
14 objector, to a specific subset of the Settlement Class, or to the entire Settlement Class,
15 and must state with specificity the grounds for the objection. Lawyers asserting
16 objections on behalf of Settlement Class Members must file a notice of appearance
17 with the Court by the date set forth in the Preliminary Approval Order or as the Court
18 otherwise may direct.

19 3. A Settlement Class Member (or counsel individually representing him or
20 her, if any) seeking to make an appearance at the Fairness Hearing must file with the
21 Court, by the date set forth in the Preliminary Approval Order, a written notice of his
22 or her intent to appear at the Fairness Hearing, in accordance with the requirements set
23 forth in the Preliminary Approval Order, or by such time and in such manner as the
24 Court may otherwise direct.

25 4. Unless the Court directs otherwise, any Settlement Class Member who
26 fails to comply with this Section of the Agreement, shall waive and forfeit any and all
27 rights he or she may have to object to the Settlement and/or to appear and be heard on
28 his or her objection at the Fairness Hearing.

1 5. Any Settlement Class Member who intends to object to the fairness of the
2 Settlement, Class Counsel's request for Attorneys' Fees and Expenses, or Plaintiffs'
3 request for Service Awards must do so in writing on or before the Objection Date, and
4 in accordance with all the requirements set forth in the Preliminary Approval Order.

5 6. The Parties shall request that any Settlement Class Member who fails to
6 comply with the Preliminary Approval Order shall waive and forfeit any and all rights
7 that he or she may have to be heard, appear separately, and/or to object, and shall be
8 bound by all the terms of this Agreement and by all proceedings, orders and
9 judgments, including, but not limited to, the release of the Plaintiffs' Released Claims.

10 7. The Parties shall request that any Person filing an objection shall, by
11 doing so, submit himself or herself to the exclusive jurisdiction and venue of the
12 Court, and shall agree to be subject to discovery by the Parties with respect to both the
13 objection and any objections to other class action settlements lodged by the objector.

14 **IX. COURT APPROVAL OF THE SETTLEMENT**

15 1. The Parties and their respective counsel agree to cooperate fully with one
16 another and to take all actions and steps as reasonably necessary in seeking and
17 obtaining Court approval of the Settlement and in the execution of such documents as
18 are reasonably necessary and appropriate to obtain approval of and to implement the
19 Agreement.

20 2. On or before December 7, 2018, and in compliance with the Court's
21 order (ECF 509), the Parties shall file this Agreement with the Court and move the
22 Court for preliminary approval, including issuance of a proposed Preliminary
23 Approval Order, substantially in the form attached as Exhibit F.

24 3. The Parties shall request that the Fairness Hearing be set at least
25 one hundred (100) days after the Court's Preliminary Approval Order is entered. The
26 Parties agree that the Fairness Hearing may be rescheduled or postponed without
27 resending the Notices.

28

1 4. Class Counsel shall file with the Court a Final Approval Motion seeking
2 entry of the Final Order and Judgment on or before the deadline set forth in the
3 Court's Preliminary Approval Order.

4 **X. ATTORNEYS' FEES AND EXPENSES AND SERVICE**
5 **AWARDS**

6 1. After preliminary approval of the Settlement, Class Counsel may apply to
7 the Court for an award of Attorneys' Fees and Expenses and for Service Awards for
8 Plaintiffs in recognition of their time and service to the Settlement Class. Class
9 Counsel shall file any application by the deadline set forth in the Preliminary
10 Approval Order.

11 2. Any award of Attorneys' Fees and Expenses shall not increase the
12 Settlement Amount. Service Awards shall be paid from the Settlement Fund and are in
13 addition to any Refunds for which Plaintiffs may be eligible under this Agreement.

14 3. Any award of Attorneys' Fees and Expenses and any Service Award shall
15 be paid as set forth in Section VI.B.1 of this Agreement within ten (10) business days
16 of entry by the Court of the order awarding Attorneys' Fees and Expenses and/or
17 Service Awards. If, after payment of the Attorneys' Fees and Expenses and/or Service
18 Awards pursuant to this paragraph, the award of Attorneys' Fees and Expenses and/or
19 Service Awards is disapproved or reduced or if the Agreement is terminated, Class
20 Counsel shall, within ten (10) business days, repay the Attorneys' Fees and Expenses
21 and the Service Awards to the Settlement Fund in an amount consistent with such
22 disapproval or reduction.

23 4. Any award of Attorneys' Fees and Expenses and any Service Award shall
24 be separate from the Settlement, and approval of the Settlement shall not be
25 contingent upon an award of Attorneys' Fees and Expenses or any Service Award at
26 all or in any particular amount. If the Court reduces or disapproves Class Counsel's
27 request for an award of Attorneys' Fees and Expenses and/or Service Awards, that
28 shall not be grounds to terminate the Settlement.

1 5. Plaintiffs and Class Counsel shall have the right to appeal the Court's
2 determination as to the amount of any award of Attorneys' Fees and Expenses and of
3 any Service Award.

4 6. Other than as stated in this Settlement with respect to establishing the
5 Settlement Fund, Plaintiffs release the Released Defendants (as defined below) and
6 the Released Defendants shall have no responsibility for and no liability with respect
7 to any Attorneys' Fees and Expenses award or the allocation of any Attorneys' Fees
8 and Expenses among Class Counsel and/or any other person who may assert a claim
9 to Attorneys' Fees and Expenses.

10 **XI. DEFENDANTS' DENIALS OF WRONGDOING AND LIABILITY**

11 1. Except as expressly admitted in Scotts' 2012 plea to a misdemeanor
12 violation of the Federal Insecticide, Fungicide, and Rodenticide Act, Scotts: (a) has
13 denied, and continues to deny, that Scotts has committed any act or omission giving
14 rise to any liability or violation of law; (b) has expressly denied, and continues to
15 deny, each of the claims alleged by Plaintiffs in the Action, along with all the charges
16 of wrongdoing or liability against Scotts arising out of any of the conduct, statements,
17 acts, or omissions that were alleged, or that could have been alleged, in the Action;
18 (c) has denied, and continues to deny, among other allegations, the allegations that
19 Plaintiffs or the Settlement Class have suffered any damage, that Plaintiffs or the
20 Settlement Class are entitled to full refunds of their purchases of Morning Song Bird
21 Food, or that Plaintiffs or the Settlement Class were harmed by any conduct alleged in
22 the Action or that could have been alleged in the Action; (d) has asserted, and
23 continues to assert, that its conduct was at all times proper, and believes that the
24 evidence developed to date supports Scotts' position that it acted properly at all times
25 and that the Action is without merit; (e) maintains that it has meritorious defenses to
26 all claims alleged in the Action; and (f) enters into this Agreement subject to and
27 without waiving any personal jurisdiction defenses asserted in the litigation.

28

1 2. Mr. Hagedorn has denied, and continues to deny, that he has committed
2 any act or omission giving rise to any liability or violation of law. Mr. Hagedorn has
3 expressly denied, and continues to deny, each of the claims alleged by Plaintiffs in the
4 Action, along with all the charges of wrongdoing or liability against him arising out of
5 any of the conduct, statements, acts, or omissions that were alleged, or that could have
6 been alleged, in the Action. Mr. Hagedorn also has denied, and continues to deny,
7 among other allegations, the allegations that Plaintiffs or the Settlement Class have
8 suffered any damage, that Plaintiffs or the Settlement Class are entitled to full refunds
9 of their purchases of Morning Song Bird Food, or that Plaintiffs or the Settlement
10 Class were harmed by any conduct alleged in the Action or that could have been
11 alleged in the Action. Mr. Hagedorn has asserted, and continues to assert, that his
12 conduct was at all times proper, and believes that the evidence developed to date
13 supports his position that he acted properly at all times and that the Action is without
14 merit. In addition, Mr. Hagedorn maintains that he has meritorious defenses to all
15 claims alleged in the Action and enters into this Agreement subject to and without
16 waiving any personal jurisdiction defenses asserted in the litigation.

17 3. As set forth below, neither the Settlement nor any of the terms of this
18 Agreement shall constitute an admission or finding of any fault, liability, wrongdoing,
19 or damage whatsoever or any infirmity in the defenses that Defendants have, or could
20 have, asserted. Defendants are entering into this Agreement solely to eliminate the
21 burden and expense of further litigation. Defendants have determined that it is
22 desirable and beneficial to them that the Action be settled in the manner and upon the
23 terms and conditions set forth in this Agreement.

24 **XII. PLAINTIFFS' CLAIMS AND THE BENEFITS OF SETTLEMENT**

25 1. Class Counsel believes that the Plaintiffs' claims have merit based on
26 proceedings to date, but Class Counsel acknowledges that Defendants would continue
27 to assert legal and factual defenses to the claims made in the Action.
28

1 2. Plaintiffs and Class Counsel recognize and acknowledge the expense and
2 length of continued proceedings necessary to prosecute the Action against Defendants
3 through trial and through appeals. Plaintiffs and Class Counsel also have taken into
4 account the uncertain outcome and the risk of any litigation, especially in complex
5 actions such as this Action, as well as the difficulties and delays inherent in such
6 litigation. Plaintiffs and Class Counsel also acknowledge the inherent problems of
7 proof of, and possible defenses to, the claims asserted in the Action.

8 3. Based on their evaluation, Plaintiffs and Class Counsel have determined
9 that the Settlement set forth in this Agreement confers substantial benefits upon the
10 Settlement Class and is in the best interests of the Settlement Class.

11 **XIII. RELEASES**

12 1. As of the Effective Date, the Action shall be dismissed with prejudice
13 against all Defendants.

14 2. As of the Effective Date, any and all claims of every nature and
15 description whatsoever, whether direct, derivative or brought in any other capacity,
16 whether class or individual, ascertained or unascertained, suspected or unsuspected,
17 asserted or unasserted, accrued or unaccrued, existing or claimed to exist, known and
18 unknown, foreseen or unforeseen, fixed or contingent, liquidated or not liquidated, in
19 law or equity that have been or could have been asserted against any of the Released
20 Defendants (as defined below), in any court, tribunal, or proceeding (including, but
21 not limited to, any claims arising under federal, state, or common law and any
22 statutory claims), by or on behalf of Releasing Plaintiffs and Settlement Class
23 Members (as defined below), related to, arising from, or based upon, in whole or in
24 part, the manufacture, sale, marketing, business operations, communications,
25 transactions, or any other activity relating to Morning Song Bird Food or the
26 manufacture or sale of wild bird food by any Scotts affiliate or the litigation or
27 defense of this Action (“Plaintiffs’ Released Claims”) shall be released, fully
28 discharged, waived, and finally terminated. This release shall include the release of

1 Unknown Claims (as defined below). For avoidance of doubt, Plaintiffs’ Released
2 Claims shall not include the right to enforce the terms of the Settlement or this
3 Agreement, Preliminary Approval Order, Final Order and Judgment, and other orders
4 or judgments issued by the Court relating to Notice or the Settlement.

5 3. “Released Defendants” means each and all of the Defendants and
6 Defendants’ Counsel and, to the fullest extent permissible under law, each of their
7 respective current and former employees, fiduciaries, control persons, general or
8 limited partners or partnerships, joint ventures, member firms, limited liability
9 companies, parents, subsidiaries, divisions, affiliates, associated entities, stockholders,
10 principals, officers, managers, directors, managing directors, members, managing
11 members, managing agents, predecessors, predecessors-in-interest, successors,
12 successors-in-interest, assigns, advisors, consultants, attorneys, personal or legal
13 representatives, accountants, insurers (and anyone whom any of them may have an
14 obligation to indemnify regarding the subject matter of the Action), coinsurers,
15 reinsurers, family members, spouses, heirs, trusts, trustees, executors, estates,
16 administrators, beneficiaries, foundations, agents, and associates of each and all of the
17 foregoing.

18 4. “Releasing Plaintiffs and Settlement Class Members” means every
19 current and former plaintiff and each Settlement Class Member, in their individual or
20 representative capacities, and Class Counsel, and their respective heirs, agents,
21 attorneys, trusts, executors, estates, assigns, representatives, spouses, family members,
22 or anyone claiming injury on their behalf.

23 5. “Unknown Claims” means any of Plaintiffs’ Released Claims that any
24 Releasing Plaintiff or Settlement Class Member does not know or suspect to exist in
25 his or her favor at the time of the release, which, if known by him or her, might have
26 affected his or her settlement with and release of the Released Defendants, or might
27 have affected his or her decision not to object to this Settlement or seek exclusion
28 from this Settlement. With respect to any and all Plaintiffs’ Released Claims, the

1 Parties stipulate and agree that, upon the Effective Date, Plaintiffs shall expressly
2 waive and relinquish and each of the Settlement Class Members shall be deemed to
3 have, and by operation of the Final Order and Judgment shall have, expressly waived
4 and relinquished, to the fullest extent permitted by law, the provisions, rights, and
5 benefits of any state, federal or foreign law or principle of common law, which may
6 have the effect of limiting the release set forth herein. This includes a waiver by the
7 Releasing Plaintiffs and Settlement Class Members of any rights pursuant to section
8 1542 of the California Civil Code (or any similar, comparable, or equivalent provision
9 of any federal, state, or foreign law, or principle of common law), which provides:

10 ***A general release does not extend to claims which the creditor does not***
11 ***know or suspect to exist in his or her favor at the time of executing the***
12 ***release, which if known by him or her must have materially affected***
13 ***his or her settlement with the debtor.***

14 Releasing Plaintiffs and Settlement Class Members may hereafter discover facts in
15 addition to or different from those which he, she or it now knows or believes to be true
16 with respect to the subject matter of the Plaintiffs' Released Claims, but Plaintiffs
17 shall expressly settle and release and each Settlement Class Member, upon the
18 Effective Date, shall be deemed to have, and by operation of the Final Order and
19 Judgment shall have, fully, finally, and forever settled and released any and all
20 Plaintiffs' Released Claims, without regard to the subsequent discovery or existence
21 of such different or additional facts. Plaintiffs acknowledge, and the Settlement Class
22 Members shall be deemed by operation of the Final Order and Judgment to have
23 acknowledged, that the foregoing waiver was separately bargained for and a key
24 element of the Settlement of which this Release is a part.

25 6. Upon the Effective Date, the Agreement shall be the sole and exclusive
26 remedy for any and all of Plaintiffs' Released Claims, including Unknown Claims, by
27 any and all of Releasing Plaintiffs and Settlement Class Members against any and all
28 Released Defendants. No Released Defendant shall be subject to liability of any kind
to any Releasing Plaintiff or Settlement Class Member with respect to any of

1 Plaintiffs’ Released Clams. Upon the Effective Date, and subject to fulfillment of all
2 of the terms of this Agreement, each and every Releasing Plaintiff and Settlement
3 Class Member shall be permanently barred and enjoined from initiating, asserting
4 and/or prosecuting any of Plaintiffs’ Released Claim, including any Unknown Claim,
5 against the Released Defendants in any court or any forum.

6 7. On the Effective Date, each of the Released Defendants shall all release,
7 discharge, and waive any and all claims (including Defendants’ Unknown Claims)
8 related to the institution, prosecution, or settlement of the Action other than to enforce
9 the terms of the Settlement or this Agreement, Preliminary Approval Order, Final
10 Order and Judgment, and other orders or judgments issued by the Court relating to
11 Notice or the Settlement (“Defendants’ Released Claims”), against every current and
12 former plaintiff, each Settlement Class Member, and Class Counsel (“Released
13 Plaintiffs and Settlement Class Members”). “Defendants’ Unknown Claims” means
14 any of Defendants’ Released Claims that Released Defendants do not know or suspect
15 to exist in their favor at the time of the release, which, if known by them, might have
16 affected their decision to settle with and release the Defendants’ Released Claims
17 against the Released Plaintiffs and Settlement Class Members. Released Defendants
18 acknowledge that they have been informed by Defendants’ Counsel of section 1542 of
19 the California Civil Code and expressly waive and relinquish any rights or benefits
20 available to them under it and any similar state statute.

21 8. The Parties agree that the Court shall retain exclusive and continuing
22 jurisdiction over all Parties, the Action, and this Agreement to resolve any dispute that
23 may arise regarding this Agreement or in relation to this Action, including any dispute
24 regarding validity, performance, interpretation, administration, enforcement,
25 enforceability, or termination of the Agreement.

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1 **XIV. MODIFICATION OR TERMINATION OF THIS**
2 **AGREEMENT**

3 1. The terms and provisions of this Agreement may be amended, modified,
4 or expanded by written agreement of all the Parties and approval of the Court;
5 provided, however, that after entry of the Final Order and Judgment, the Parties may
6 by written agreement effect such amendments, modifications, or expansions of this
7 Agreement and its implementing documents (including exhibits hereto) without
8 further notice to the Settlement Class or approval by the Court if such changes are
9 consistent with the Court's Final Order and Judgment and do not limit the rights of
10 Settlement Class Members.

11 2. This Agreement shall terminate at the discretion of either Defendants or
12 Plaintiffs, if: (a) the Court, or any appellate court(s), rejects, modifies, or denies
13 approval of any portion of the proposed Settlement that the terminating Party in its (or
14 their) judgment reasonably determine(s) is material, including, without limitation, the
15 terms of relief, the findings, or conclusions of the Court, the provisions relating to
16 Notice, the definition of the Settlement Class, and/or the terms of the Release; or
17 (b) the Court, or any appellate court(s), does not enter or completely affirm, or alters,
18 narrows or expands, any portion of the Final Order and Judgment, or any of the
19 Court's findings of fact or conclusions of law, that the terminating Party in its (or
20 their) judgment reasonably determine(s) is material. The terminating Party must
21 exercise the option to withdraw from and terminate this Agreement, as provided in
22 this Section XIV, by a signed writing served on the other Parties no later than thirty
23 (30) days after receiving notice of the event prompting the termination.

24 3. This Agreement shall terminate at the discretion of Defendants if 1,000
25 or more Settlement Class Members choose to opt out of the Settlement or if
26 Settlement Class Members whose total amount of purchases of Morning Song Bird
27 Food during the Class Period exceeds \$100,000 choose to opt out of the Settlement. In
28 either instance, Defendants may, but are not obligated to, terminate the Settlement.

1 4. The Parties agree that the definition and scope of “Retailer Records” (as
2 set forth in this Agreement) is a material term and a key element of the Settlement. To
3 the extent there is any departure from the definition and scope of “Retailer Records,”
4 Defendants may, but are not obligated to, terminate the Settlement.

5 5. In the event of termination of the Settlement, and consistent with the
6 applicable evidentiary rules, neither the existence of this Agreement and the term
7 sheet nor their contents shall be admissible in evidence or shall be referred to for any
8 purpose in the Action or in any other proceeding. Further, in such event, the Parties
9 shall be restored to their respective positions status quo ante, and this Agreement and
10 all negotiations, transactions, and proceedings in connection herewith shall not be
11 deemed to prejudice in any way their respective positions, and Defendants shall not be
12 precluded from challenging whether the case may proceed as a class action, from
13 challenging whether the Court has personal jurisdiction over Defendants, or from
14 asserting any other argument, defense, or position.

15 6. If an option to terminate this Agreement arises under Section XIV.1–.3
16 above, neither Defendants nor Plaintiffs are required for any reason or under any
17 circumstance to exercise that option and any exercise of that option shall be in good
18 faith. If, but only if, this Agreement is terminated pursuant to Section XIV.1, .2, or .3,
19 then:

20 (a) This Agreement shall be null and void and shall have no force or
21 effect, and no Party shall be bound by any of its terms, except for the terms of
22 Section XIV.5;

23 (b) The Parties shall petition the Court to have any stay orders lifted;

24 (c) All of the provisions of this Agreement, and all negotiations,
25 statements, and proceedings relating to it, shall be without prejudice to the rights of
26 Defendants, Plaintiffs, or any Settlement Class Member, all of whom shall be restored
27 to their respective positions existing immediately before the execution of this
28 Agreement, except that the Parties shall cooperate in requesting that the Court set a

1 new scheduling order such that no Party's substantive or procedural rights are
2 prejudiced by the settlement negotiations and proceedings;

3 (d) The Parties expressly and affirmatively reserve all claims,
4 defenses, arguments, and motions as to all claims that have been or might later be
5 asserted in the Action;

6 (e) Plaintiffs and all other Settlement Class Members expressly and
7 affirmatively reserve and do not waive all motions as to, and arguments in support of,
8 all claims, causes of action or remedies that have been or might later be asserted in the
9 Action;

10 (f) Defendants expressly and affirmatively reserve and do not waive
11 all motions as to, and arguments in support of, any defense to all claims, causes of
12 action or remedies that have been or might later be asserted in the Action;

13 (g) Neither this Agreement, the fact of its having been entered into,
14 nor the negotiations leading to it shall be offered into evidence for any purpose
15 whatsoever;

16 (h) Any settlement-related order(s) or judgment(s) entered in this
17 Action after the date of execution of this Agreement shall be deemed vacated and shall
18 be without any force or effect;

19 (i) Scotts shall bear all reasonable and necessary costs incurred by the
20 Settlement Administrator in connection with the implementation of this Settlement up
21 until its termination, including the Initial Costs Cap and any other Notice and
22 Administration Expenses agreed to by the Parties or ordered by the Court. Neither the
23 Plaintiffs nor Class Counsel shall be responsible for any such settlement-related costs;
24 and

25 (j) Within five (5) business days, any funds in the Settlement Fund
26 Account, including any interest accrued, shall revert to Scotts, minus incurred Notice
27 and Administration Expenses.
28

1 7. Notwithstanding the terms of Section XIV.6 of this Agreement, if a
2 Settlement Class Member has (a) timely submitted a valid Claim Form, and
3 (b) received any Refund or any compensation pursuant to the Agreement prior to its
4 termination or invalidation, such a Settlement Class Member and Defendants shall be
5 bound by the terms of their respective Releases set forth in Section XIII, which terms
6 shall survive termination or invalidation of the Agreement.

7 **XV. REPRESENTATIONS AND WARRANTIES**

8 1. Class Counsel warrant and represent that: (a) they are expressly
9 authorized by Plaintiffs to enter into this Agreement and sign this Agreement on
10 behalf of Plaintiffs; and (b) they are seeking to protect the interests of the Settlement
11 Class.

12 2. Class Counsel further represents that Plaintiffs shall remain and serve as
13 representatives of the Settlement Class until the terms of this Agreement are
14 effectuated, this Agreement is terminated in accordance with its terms, or the Court at
15 any time determines that said Plaintiffs cannot represent the Settlement Class.

16 3. Each Defendant warrants and represents that the individual signing this
17 Agreement on its or his behalf is authorized to enter into and sign the Agreement on
18 behalf of that Defendant.

19 4. The Parties acknowledge and agree that they have and will not give any
20 opinion concerning the tax consequences of the proposed Settlement to Settlement
21 Class Members, nor are any representations or warranties in this regard made by
22 virtue of this Agreement. Each Settlement Class Member's tax obligations, and the
23 determination thereof, are the sole responsibility of the Settlement Class Member, and
24 it is understood that the tax consequences may vary depending on the particular
25 circumstances of each individual Settlement Class Member.

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1 **XVI. GENERAL MATTERS AND RESERVATIONS**

2 1. Parties and their respective counsel agree to use their best efforts to have
3 any collateral attack upon this Agreement or the Settlement promptly dismissed or
4 rejected.

5 2. The Parties and their respective counsel shall cooperate with each other,
6 act in good faith, and use their reasonable best efforts to ensure the timely and
7 expeditious administration and implementation of the Agreement and to minimize the
8 costs and expenses incurred therewith. The Parties agree to reasonably cooperate to
9 submit required forms or implement the Agreement in a manner that minimizes
10 unnecessary tax burdens on the Defendants.

11 3. The Parties further agree, subject to Court approval as needed, to
12 reasonable extensions of time to carry out any of the provisions of the Agreement. In
13 the event the Parties are unable to reach agreement on the form or content of any
14 document needed to implement the Agreement, or on any supplemental provisions
15 that may become necessary to effectuate the terms of this Agreement, the Parties may
16 seek the assistance of the Court to resolve such disagreement.

17 4. Except with respect to Scotts' agreement to deposit the first installment
18 of the Settlement Amount as set forth in Section VI.A.1, Defendants' obligation to
19 implement the Settlement described in this Agreement is and shall be contingent upon
20 each of the following:

21 (a) Entry by the Court of the Final Order and Judgment approving the
22 Settlement;

23 (b) The occurrence of the Effective Date; and

24 (c) The satisfaction of any other conditions set forth in this
25 Agreement.

26 5. The Parties and their counsel agree to keep the existence and contents of
27 this Agreement confidential until the date on which the Motion for Preliminary
28 Approval is filed; provided, however, that this Section shall not prevent Defendants

1 from disclosing such information, prior to the date on which the Motion for
2 Preliminary Approval is filed, to state and federal agencies, independent accountants,
3 actuaries, advisors, financial analysts, insurers, or lawyers. The Parties and their
4 counsel may also disclose the existence and contents of this Agreement to Persons
5 (such as experts, courts, co-counsel, and/or administrators) to whom the Parties agree
6 disclosure must be made in order to effectuate the terms and conditions of this
7 Agreement.

8 6. This Agreement, complete with its Exhibits and any subsequent
9 amendments thereto filed with the Court, sets forth the entire agreement among the
10 Parties with respect to its subject matter, and it may not be altered, amended, or
11 modified except by written instrument executed by Class Counsel and Defendants’
12 Counsel. The Parties expressly acknowledge that no other agreements, arrangements,
13 or understandings not expressed in this Agreement or the documents filed with the
14 Court exist among or between them, and that in deciding to enter into this Agreement,
15 they have relied solely upon their own judgment and knowledge. This Agreement and
16 the accompanying documents filed with the Court supersede any prior agreements,
17 understandings, or undertakings (written or oral) by and between the Parties regarding
18 the subject matter of this Agreement, including the August 17, 2018 term sheet
19 between the Parties.

20 7. This Agreement and any amendments thereto, and any dispute arising out
21 of or related to this Agreement, shall be governed by and interpreted according to the
22 Federal Rules of Civil Procedure and applicable jurisprudence relating thereto, and the
23 laws of the State of California notwithstanding its conflict of law provisions.

24 8. Any disagreement and/or action to enforce this Agreement shall be
25 commenced and maintained only in the United States District Court for the Southern
26 District of California.

27 9. Whenever this Agreement requires or contemplates that one of the Parties
28 shall or may give notice to the other, notice shall be provided by e-mail and/or next-

1 day (excluding Saturdays, Sundays and federal holidays) express delivery service as
2 follows:

3 If to Defendants, then to:

4 Jones Day
5 4655 Executive Drive, Suite 1500
6 San Diego, CA 92121.3134
7 Telephone: 858-314-1200

8 If to Plaintiffs and/or the Settlement Class, then to:

9 Robbins Geller Rudman & Dowd LLP
10 655 West Broadway, Suite 1900
11 San Diego, CA 92101
12 Telephone: 800-449-4900

13 10. All time periods in this Agreement shall be computed in calendar days
14 unless otherwise expressly provided. In computing any period of time in this
15 Agreement or by order of the Court, the day of the act or event shall not be included.
16 The last day of the period shall be included, unless it is a Saturday, a Sunday, or a
17 federal holiday, or, when the act to be done is the filing of a paper in court, a day on
18 which the Court is closed, in which case the period shall run until the end of the next
19 day that is not one of the aforementioned days. As used in this Agreement, "federal
20 holiday" includes holidays designated in Fed. R. Civ. P. 6(a) or by the clerk of the
21 Court.

22 11. The Parties reserve the right, subject to the Court's approval, to agree to
23 any reasonable extensions of time that might be necessary to carry out any of the
24 provisions of this Agreement.

25 12. Plaintiffs, Class Counsel, Defendants, and Defendants' Counsel shall not
26 be deemed to be the drafter of this Agreement or of any particular provision or the
27 Exhibits, nor shall they argue that any particular provision should be construed against
28 its drafter. All Parties agree that this Agreement and its Exhibits were drafted by
counsel for the Parties during extensive arm's-length negotiations. No parol or other

1 evidence may be offered to explain, construe, contradict, or clarify the Agreement's
2 terms, the intent of the Parties or their counsel, or the circumstances under which this
3 Agreement was made or executed.

4 13. The Parties expressly acknowledge and agree that this Agreement and its
5 Exhibits, along with all related drafts, motions, pleadings, conversations, negotiations,
6 related notes, and correspondence, constitute an offer of compromise and a
7 compromise within the meaning of Federal Rule of Evidence 408 and any equivalent
8 rule of evidence in any state or territory.

9 14. Plaintiffs expressly affirm that the allegations contained in each of their
10 Complaints were made in good faith, but consider it desirable for the Action to be
11 settled and dismissed only because of the substantial benefits that the Settlement will
12 provide to Settlement Class Members.

13 15. The Parties agree that Plaintiffs and Defendants and their respective
14 counsel in the Action complied with the provisions of Federal Rule of Civil Procedure
15 11 with respect thereto, and shall request a Final Order and Judgment reflecting such
16 compliance.

17 16. The Parties agree not to disparage each other regarding the Action or the
18 Settlement, provided, however, that discussing publicly available information shall not
19 constitute disparagement under this provision.

20 17. The Parties agree that the Agreement was reached voluntarily after
21 consultation with competent legal counsel.

22 18. Neither this Agreement, nor any act performed or document executed
23 pursuant to or in furtherance of this Agreement is or may be deemed to be or may be
24 used as an admission of, or evidence of, the validity of any of the Released Claims, or
25 of any wrongdoing or liability of any Released Defendant or Released Plaintiff or
26 Settlement Class Member; or is or may be deemed to be or may be used as an
27 admission of, or evidence of, any fault or omission of any Released Defendant or
28 Released Plaintiff or Settlement Class Member in any civil, criminal, regulatory, or

1 administrative proceeding in any court, administrative agency or other tribunal. Nor
2 shall this Agreement be deemed an admission by any Party as to the merits of any
3 claim or defense.

4 19. This Agreement shall be binding upon, and inure to the benefit of, the
5 successors, transferees, and assigns of Defendants, Plaintiffs, and Settlement Class
6 Members.

7 20. The Parties, their successors and assigns, and their counsel undertake to
8 implement the terms of this Agreement in good faith, and to use good faith in
9 resolving any disputes that may arise in the implementation of the terms of this
10 Agreement.

11 21. The waiver by one Party of any breach of this Agreement by another
12 Party shall not be deemed a waiver of any prior or subsequent breach of this
13 Agreement.

14 22. If one Party to this Agreement considers another Party to be in breach of
15 its obligations under this Agreement, that Party must provide the breaching Party with
16 written notice of the alleged breach and provide a reasonable opportunity to cure the
17 breach before taking any action to enforce any rights under this Agreement.

18 23. This Agreement may be signed with an electronic or facsimile signature
19 and in counterparts, each of which shall constitute a duplicate original.

20 24. In the event any one or more of the provisions contained in this
21 Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any
22 respect, such invalidity, illegality, or unenforceability shall not affect any other
23 provision if Defendants' Counsel and Class Counsel mutually agree in writing to
24 proceed as if such invalid, illegal, or unenforceable provision had never been included
25 in this Agreement. Any such agreement shall be reviewed and approved by the Court
26 before it becomes effective.

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1 DATED: December 7, 2018

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