

THE HONORABLE RONALD B. LEIGHTON

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U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

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

Plaintiffs,

vs.

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

Defendants.

EVANGER'S DOG AND CAT FOOD CO., INC.,

Counterclaimant,

vs.

NICOLE MAEL,

Counterdefendant.

NO. 3:17-cv-05469-RBL

**[PROPOSED] FINAL APPROVAL ORDER  
AND JUDGMENT**

This matter came before the Court upon consideration of Plaintiffs' Motion for Final  
Approval of Class Action Settlement and Class Counsel's Motion for an Award of Fees, Costs,

1 and Class Representative Service Awards. After considering the motions and the declarations  
2 and exhibits submitted with the motions, the Court enters this Final Approval Order and  
3 Judgment (“Final Approval Order”), which constitutes a final adjudication on the merits of all  
4 claims of the Class. It is **HEREBY ORDERED** that the motions are **GRANTED**, the Class is  
5 certified, the Settlement Agreement is finally approved, Class Counsel are awarded \$\_\_\_\_\_ in  
6 fees and costs, and Service Awards are approved in the amount of \$\_\_\_\_\_ each  
7 for Plaintiffs Nicole and Guy Mael, Nadine Vigliano, Britney Morea, Angela Bertucci and Tina  
8 Wiepert (\$\_\_\_\_\_ total).

9 **WHEREAS**, on October 18, 2019, the Parties filed the Settlement Agreement (Docket  
10 No. 116-1), which set forth the terms and conditions of the Settlement and release of certain  
11 claims (i.e., the Released Claims) against Defendants and all other Released Parties  
12 (“Settlement”);

13 **WHEREAS**, Plaintiffs and Class Counsel have filed motions, pursuant to Rule 23 of the  
14 Federal Rules of Civil Procedure, for an order finally approving the Settlement Agreement,  
15 which will dismiss this Action with prejudice, and granting Class Counsel’s request for an  
16 award of fees and costs, and Service Awards to the Plaintiffs;

17 **WHEREAS**, the Court preliminarily approved the Settlement on October 24, 2019  
18 (Docket No. 120) and entered an amended order the next day (Docket No. 121), referred to  
19 herein as the “Preliminary Approval Order,” and notice was given to Settlement Class  
20 Members in accordance with the Preliminary Approval Order;

21 **WHEREAS**, the Court has reviewed and considered all papers filed in support of the  
22 Settlement and all exhibits thereto and, after notice to the Settlement Class, held a hearing on  
23 June 12, 2020 (“Final Approval Hearing”), at which time the Parties and all interested persons  
24 were heard in support of and in opposition to the Settlement; and  
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1           **WHEREAS**, upon consideration of the above, the Court finds that the Settlement is fair,  
2 adequate, and reasonable to the Settlement Class, within the authority of the parties, and the  
3 result of extensive arm’s-length negotiations.

4           **THEREFORE**, the following is **HEREBY ORDERED**:

5           1.       The Court has jurisdiction over the subject matter of this Action and personal  
6 jurisdiction over the parties and the Settlement Class. The definitions and provisions of the  
7 Settlement Agreement are incorporated in this Order as though fully set forth herein.

8           2.       Pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, and for the  
9 purposes of settlement only, the Settlement Class is certified as follows: All persons in the  
10 United States who purchased Evanger’s Hunk of Beef, Evanger’s Braised Beef, or Against the  
11 Grain Pulled Beef with Gravy between the dates of December 1, 2015 and June 30, 2017.

12           3.       For purposes of settlement, the Court appoints Plaintiffs Nicole and Guy Mael,  
13 Nadine Vigliano, Britney Morea, Angela Bertucci and Tina Wiepert as “Class Representatives.”

14           4.       For purposes of settlement, the Court appoints the attorneys at Terrell  
15 Marshall Law Group PLLC and Andersen Sleater Sianni LLC as Class Counsel.

16           5.       With respect to the Settlement Class, this Court finds, for settlement purposes  
17 only, that: (a) the Settlement Class is so numerous that joinder of all members is  
18 impracticable; (b) there are questions of law or fact common to the Settlement Class; (c) the  
19 claims of the Class Representatives, identified above, are typical of the claims of the  
20 Settlement Class; (d) the Class Representatives will fairly and adequately protect the interests  
21 of the Settlement Class; (e) the questions of law or fact common to the members of the  
22 Settlement Class predominate over the questions affecting only individual members; and (f)  
23 certification of the Settlement Class is superior to other available methods for the fair and  
24 efficient adjudication of the controversy. The Court further finds that: (g) the members of the  
25 Settlement Class have a limited interest in individually prosecuting the claims at issue; (h) it is  
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1 desirable to concentrate the claims in this forum; and (i) it is unlikely that there will be  
2 difficulties encountered in administering this Settlement.

3 If the Settlement terminates for any reason, the certification of the Settlement Class  
4 shall be automatically vacated, null and void, and this Action shall revert to its status  
5 immediately prior to the execution of the Settlement Agreement.

6 6. The Court finds that the notice given to Settlement Class Members in  
7 accordance with the terms of the Settlement Agreement and the Preliminary Approval Order  
8 fully and accurately informed Settlement Class Members of all material elements of the  
9 Settlement and constituted valid, sufficient, and due notice. The notice complied with due  
10 process, Rule 23 of the Federal Rules of Civil Procedure, and all other applicable law.

11 7. No Settlement Class Members submitted timely requests for exclusion.

12 8. The Settlement requires Defendants to pay \$545,500 into a Settlement Fund  
13 that the parties propose to use to make payments to all Settlement Class Members who  
14 submit timely and valid claims; pay the Settlement Administrator the costs of notice and  
15 Settlement Administration Expenses in an amount capped at \$141,000; pay Service Awards in  
16 the amount of \$\_\_\_\_\_ each to Class Representatives Nicole Mael, Guy Mael,  
17 Nadine Vigliano, Britney Morea, Angela Bertucci and Tina Wiepert; and pay Class Counsel's  
18 attorneys' fees and costs in the amount of \$\_\_\_\_\_. The Settlement Fund is non-  
19 reversionary and any amounts remaining after the initial distribution to Settlement Class  
20 Members and a second distribution, if necessary and administratively feasible, will be  
21 disbursed *cy pres* to North Shore Animal League America, a non-profit organization dedicated  
22 to the health and welfare of pets.

23 9. Settlement Class Members who verified their product purchases or costs  
24 associated with veterinarian bills from pets that experienced illness consistent with  
25 pentobarbital poisoning after consuming the recalled pet foods will be compensated from the  
26 Settlement Fund in cash for 100% of their verified product purchases and vet bills.  
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1           10.     In light of Covid-19 and the stay at home orders in effect across the country,  
2 the Court approves direct mailing of products to Settlement Class Members who had no proof  
3 of purchase, instead of providing them with product certificates they would have to redeem in  
4 person. The Court further approves paying the shipping expenses associated with mailing the  
5 cans from the Settlement Fund so long as the shipping expenses do not reduce the amount of  
6 the class member awards below 100%.

7           11.     The Settlement also provides prospective relief. Defendants have agreed to  
8 change their advertising practices, fund additional third-party testing of the Pet Food, notify  
9 their distributors and retailers of these practice changes, and confirm in writing that they are  
10 in compliance with all FDA requirements regarding supplier and ingredient safety for the beef  
11 they use in the Pet Food.

12           12.     The Court finally approves this Settlement, and finds that it is in all respects  
13 fair, reasonable, and adequate and in the best interest of the Settlement Class Members. The  
14 Parties dispute the merits of the claims in the Action, and their dispute underscores not only  
15 the uncertainty of the outcome but also why the Court finds the Settlement Agreement to be  
16 fair, reasonable, and adequate. Had they continued to litigate, Settlement Class Members  
17 faced the challenge of certifying a litigation class, defeating summary judgment, and  
18 convincing a jury that Defendants should be held responsible for misrepresenting the quality  
19 of several products. They also would have had to survive appeals of any class certification  
20 order, summary judgment rulings, or other rulings rendered during trial. Class Counsel, who  
21 have significant experience litigating and settling these types of claims, have reviewed the  
22 Settlement Agreement and find it to be in the best interest of Settlement Class Members. For  
23 all these reasons, the Court finds that the uncertainties of continued litigation in both the trial  
24 and appellate courts, as well as the expense associated with it, weigh in favor of approving the  
25 Settlement. In making this determination, the court has considered the criteria set forth in the  
26 recently amended Federal Rule of Civil Procedure 23, and the factors outlined in *Hanlon v.*  
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1 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998), and *Churchill Village, L.L.C. v. General*  
2 *Electric*, 361 f.3d 566, 575-76 (9th Cir. 2004).

3 13. The Parties, their counsel, and the Settlement Administrator shall fulfill their  
4 obligations and duties under the Settlement Agreement.

5 14. The Court dismisses with prejudice this Action, the Released Claims, and the  
6 Released Parties, and adjudges that the Released Claims are released against the Released  
7 Parties.

8 15. The Court adjudges that Plaintiffs and Settlement Class Members are deemed  
9 to have fully, finally, completely, and forever released, relinquished, and discharged the  
10 Released Claims against the Released Parties.

11 16. Plaintiffs and Settlement Class Members are permanently enjoined and barred  
12 from asserting, initiating, prosecuting, or continuing any of the Released Claims against the  
13 Released Parties.

14 17. The Settlement Administrator, Amazon.com, and Chewy.com executed the  
15 Notice Plan according to the terms of the Settlement Agreement and in compliance with the  
16 Preliminary Approval Order. The notices apprised the Settlement Class members of the  
17 pendency of the litigation; of all material elements of the proposed Settlement, including but  
18 not limited to the relief afforded the Settlement Class under the Settlement Agreement; of  
19 the res judicata effect on Settlement Class Members and of their opportunity to object to,  
20 comment on, or opt out of, the Settlement; of the identity of Class Counsel and Class  
21 Counsel's contact information; and of the right to appear at the Final Approval Hearing. The  
22 Notice Plan prescribed by the Settlement Agreement was reasonable and provided due and  
23 adequate notice of these proceedings and of the matters set forth therein, including the terms  
24 of the Settlement Agreement, to all parties entitled to notice. The notice satisfied the  
25 requirements of Federal Rule of Civil Procedure 23 and the requirements of constitutional due  
26 process. The notices were reasonably calculated under the circumstances to apprise  
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1 Settlement Class Members of the pendency of this Action, all material elements of the  
2 Settlement, and their opportunity to exclude themselves from or object to the Settlement and  
3 to appear at the final fairness hearing. The Court has afforded a full opportunity to all  
4 Settlement Class Members to be heard. Accordingly, the Court determines that all Settlement  
5 Class Members are bound by this Final Approval Order.

6 18. Within ten (10) days after the filing of the proposed Settlement Agreement in  
7 the Court, a notice of the proposed Settlement was served upon the appropriate state official  
8 of each State in which a Settlement Class member resides and upon the Attorney General of  
9 the United States. Sarich Decl. ¶ 4. The Court finds that the notice provided satisfied the  
10 requirements of 28 U.S.C. § 1715(b) and that more than ninety days have elapsed since the  
11 required notice was provided, as required by 28 U.S.C. § 1715(d).

12 19. The Court approves payment of attorneys' fees and costs in the amount of  
13 \$\_\_\_\_\_. These amounts shall be taken out of the Settlement Fund that is paid  
14 by Defendants pursuant to the terms of the Settlement Agreement. The Court finds these  
15 amounts to be appropriate and reasonable in light of the work performed by Class Counsel  
16 and the benefits obtained by Settlement Class Members. In addition, the Court finds that the  
17 Settlement Agreement was negotiated at arms' length and without collusion.

18 20. In the event that settlement payments exceed the threshold amounts that  
19 must be reported to the Internal Revenue Service by means of a Form 1099, Class Counsel and  
20 the Settlement Administrator will take all necessary and reasonable steps to obtain W-9s from  
21 claimants and to comply with applicable IRS regulations on issuing 1099s without a social  
22 security number or tax entity identification number, and shall take all reasonable and  
23 necessary steps to avoid imposition of IRS penalties against the Settlement Fund, including  
24 but not limited to limiting payments below the reportable threshold and/or withholding of  
25 taxes and any applicable penalties. The Settlement Administrator will contact Settlement Class  
26 Members who are entitled to payments that exceed the taxable income threshold twice, with  
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1 at least 30 days between the two contacts. Any Settlement Class Member who fails to submit  
2 a valid and timely W9 response will have their payment reduced to \$599 (below the taxable  
3 income threshold).

4 21. The Court approves the service fee payment of \$\_\_\_\_\_ each for Class  
5 Representatives Nicole Mael, Guy Mael, Nadine Vigliano, Britney Morea, Angela Bertucci and  
6 Tina Wiepert and specifically finds that amount to be reasonable in light of the service  
7 performed by the Class Representatives for the class. This amount shall be paid from the  
8 Settlement Fund in accordance with the terms of the Settlement Agreement. Any service  
9 award will be reported as "other income" in Box 3 of the Form 1099-MISC.

10 22. Neither this Final Approval Order nor the Settlement Agreement is an  
11 admission or concession by Defendants or any of the other Released Parties of the validity of  
12 any claims or of any liability or wrongdoing or of any violation of law. This Final Approval  
13 Order and the Settlement Agreement do not constitute a concession and shall not be used as  
14 an admission or indication of any wrongdoing, fault or omission by Defendants or any of the  
15 other Released Parties or any other person in connection with any transaction, event or  
16 occurrence, and neither this Final Approval Order nor the Settlement Agreement nor any  
17 related documents in this proceeding, nor any reports or accounts thereof, shall be offered or  
18 received in evidence in any civil, criminal, or administrative action or proceeding, other than  
19 such proceedings as may be necessary to consummate or enforce this Final Approval Order,  
20 the Settlement Agreement, and all releases given thereunder, or to establish the affirmative  
21 defenses of *res judicata* or collateral estoppel barring the pursuit of claims released in the  
22 Settlement Agreement. This Final Approval Order also does not constitute any opinion or  
23 position of the Court as to the merits of the claims and defenses related to this Action.

24 23. Upon the Effective Date, the Class Representatives and each Settlement Class  
25 Member will be deemed to have completely released and forever discharged the Released  
26 Parties from the Released Claims. Released Claims means all manner of action, causes of  
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1 action, claims, counterclaims, demands, rights, suits, obligations, debts, contracts,  
2 agreements, promises, liabilities, damages, charges, penalties, losses, costs, expenses, and  
3 attorneys' fees, of any nature, in law or equity, fixed or contingent, which the Parties have or  
4 may have arising out of or relating to any of the acts, omissions or other conduct that has or  
5 could have been alleged or otherwise referred to in the Action relating to the Recalled  
6 Products, including but not limited to, any and all acts, omissions, or other conduct asserting  
7 claims regarding the advertising, marketing, promotion, sale, redemption, or use of the  
8 Recalled Products. The Released Claims do not include any claims for money damages by  
9 consumers, including but not limited to Settlement Class Members, who purchased any  
10 product other than the Recalled Products.

11 24. If the Effective Date does not occur because this Order is reversed on appeal or  
12 for any other reason, the parties shall be returned to the status quo ex ante, for all litigation  
13 purposes, as if no Settlement had been negotiated or entered into and thus this Final  
14 Approval Order and all other findings or stipulations regarding the Settlement shall be  
15 automatically void, vacated, and treated as if never filed.

16 25. The Court retains jurisdiction to consider all further matters arising out of or  
17 connected with the Settlement, including implementation and enforcement of the Settlement  
18 Agreement.

19 26. There were no objections to the Settlement.

20 27. The Court finds that no justifiable reason exists for delaying entry of this Final  
21 Approval Order and, good cause appearing, it is expressly directed that this Final Approval  
22 Order and separate Judgment be entered as final and appealable and the case dismissed with  
23 prejudice.

24 **THEREFORE**, the Clerk of the Court is **HEREBY ORDERED** to enter this Final Approval  
25 Order and Judgment.

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IT IS HEREBY ORDERED.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

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

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DATED this 22nd day of May, 2020.

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