

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re Scotts EZ Seed Litigation	:	12-CV-4727 (VB)
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**STIPULATION OF SETTLEMENT**

This Stipulation of Settlement is entered into by Plaintiffs Michael Arcuri, David Browne, Gwen Eskinazi, Stacy Lonardo, Lance Moore, Vance Smith, and Nancy Thomas (collectively, “Plaintiffs” or “Class Representatives”), individually and on behalf of the Settlement Class (defined herein), and by Defendants The Scotts Miracle-Gro Company, Inc., and The Scotts Company LLC (collectively, “Scotts”), in the above-captioned action. This Settlement Agreement is intended by the Settling Parties to fully and finally compromise, resolve, discharge, and settle the Released Claims, as defined herein, subject to the terms and conditions set forth below and the final approval of the District Court.

**RECITALS**

WHEREAS:

1. On June 15, 2012, Plaintiffs Arcuri, Moore, Thomas, Browne and Smith commenced a proposed class action in the Southern District of New York against Scotts, the Home Depot, Inc., and Lowe’s HIW, Inc. in *Arcuri v. The Scotts Miracle-Gro Company*, No. 12-4727-VB (S.D.N.Y.) in connection with Defendants’ sale of Scotts EZ Seed grass seed product.
2. On June 19, 2012, Plaintiffs Eskinazi and Lonardo also commenced a proposed class action in the Southern District of New York against Scotts, the Home Depot, Inc., and True Value

Company in *Eskinazi v. The Scotts Miracle-Gro Co.*, No. 12-4787-VB (S.D.N.Y.) in connection with Defendants' sale of Scotts EZ Seed grass seed product.

3. On July 9, 2012, the Court entered a Stipulation and Order to Consolidate Related Action, consolidating *Eskinazi v. The Scotts Miracle-Gro Co.*, 12-4787 (VB) and *Arcuri v. The Scott Miracle Gro Co.*, 12-4727 (VB) "for all purposes." The Action proceeded as *In re Scotts EZ Seed Litigation*, 12-4727 (VB) (S.D.N.Y.).
4. On August 9, 2012, Plaintiffs filed a Consolidated Class Action Complaint against Scotts, the Home Depot, Inc. ("Home Depot"), Lowe's Home Centers, Inc. ("Lowe's"), and the True Value Company ("True Value"). In the Consolidated Class Action Complaint, Plaintiffs alleged claims under the federal Magnuson-Moss Warranty Act (MMWA), the California Consumers Legal Remedies Act (CLRA), the California Unfair Competition Law (UCL), the California False Advertising Law (FAL), the California Commercial Code for breach of express and implied warranties, the New York General Business Law, the New York Commercial Code for breach of express and implied warranties, and unjust enrichment.
5. The Consolidated Class Action Complaint alleged, *inter alia*, that the "50% Thicker" Claim advertised on Scotts EZ Seed was false or misleading.
6. On September 21, 2012, the Court entered a Partial Stipulation and Order dismissing True Value from the Action.
7. On October 9, 2012, Lowe's and Scotts filed a Motion to Dismiss, and Home Depot also filed a Motion to Dismiss. Plaintiffs opposed both Motions on November 20, 2012.
8. In a Memorandum Decision dated May 22, 2013, the Court granted, in part, and denied, in part, Defendants' Motions to Dismiss.

9. On March 24, 2014, the Court entered a Stipulation and Order dismissing Home Depot from the Action.
10. On March 31, 2014, Plaintiffs filed a Motion to Certify Class, moving to certify two classes, all persons who purchased EZ Seed in the state of California labeled with the “50% Thicker” Claim, excluding persons who purchased for purpose of resale (the “California Class”), and all persons who purchased EZ Seed in the state of New York labeled with the “50% Thicker” Claim, excluding persons who purchased for purpose of resale (the “New York Class”). Lowe’s and Scotts opposed this motion on May 30, 2014.
11. In a Memorandum Opinion dated January 26, 2015, the Court granted, in part, and denied, in part, Plaintiffs’ Motion to Certify Class. The motion was denied with respect to the Rule 23(b)(2) class, and with respect to the claims for express and common law breach of warranty under New York law. Plaintiffs’ Motion to Certify was otherwise granted. The law firms of Bursor & Fisher, P.A., and Faruqi & Faruqi, LLP were appointed as Class Counsel, and Michael Arcuri, David Browne, Gwen Eskinazi, Stacy Lonardo, Lance Moore, Vance Smith, and Nancy Thomas were appointed as Class Representatives.
12. On March 16, 2015, the Court entered a Partial Stipulation and Order dismissing Lowe’s from the Action.
13. On July 23, 2015, the Court approved the Notice of Pendency of Class Action, encompassing a Short Form Notice, Long Form Notice, Postcard Notice, Retailer Letter, and Press Release. The Notice was disseminated within fourteen days of the Court’s approval.
14. Served on June 30, 2016, but filed and entered on the docket January 5, 2017, the Parties submitted Cross Motions for Summary Judgment, along with nine *Daubert* motions,

Defendants' Motion to Decertify, and four motions to strike. In an Opinion and Order dated August 8, 2017, Plaintiffs withdrew one expert, the Court granted, in part, one *Daubert* motion, denied the other *Daubert* motions and the Motion to Decertify, and granted, in part, and denied, in part, Defendants' Motion for Summary Judgment, finding that Defendants were entitled to summary judgment on the California UCL, FAL, and CLRA claims.

15. On August 17, 2017, Scotts filed a Motion for Reconsideration with respect to the Court's decision finding that Plaintiffs' California express warranty and unjust enrichment claims were not barred under safe harbor, permitting certain testimony by Plaintiffs' expert, and excluding certain testimony by Defendants' expert.
16. On August 17, 2017, Scotts further filed a Motion for Leave to Appeal under 28 U.S.C. § 1292(b) and Fed. R. App. P. 5, seeking to certify for interlocutory appeal the question of whether the New York General Business Law provides for the recovery of statutory damages in federal court in class actions.
17. Following the filing of the appeal with the Second Circuit, the Court entered an Order staying the Action on August 31, 2017.
18. The Motion for Leave to Appeal was denied by the Second Circuit on January 8, 2018.
19. On January 16, 2018, the stay on the Action was lifted, and the Court instructed Scotts to refile its Motion for Reconsideration. That motion was denied on March 5, 2018.
20. On January 31, 2018, the Court entered a Stipulation and Order Setting Schedule for Pretrial Procedures. In February and March 2018, the Parties exchanged portions of a Joint Pretrial Order to be submitted to the Court by April 20, 2018.

21. The Parties engaged in substantial discussions in December 2017 to April 2018 in an effort to resolve the Action.
22. Scotts, while continuing to deny all allegations of wrongdoing, and disclaiming all liability with respect to all claims, considers it desirable to resolve the Action on the terms stated herein to avoid further expense, inconvenience, and burden, and therefore determines that this Stipulation and Settlement Agreement is in Scotts' best interests.
23. The Parties have engaged in extensive litigation, including completion of fact and expert discovery, and have had a full and fair opportunity to evaluate the strengths and weaknesses of their respective positions. This Agreement was reached after extensive review of the underlying facts, after extensive arm's length negotiations between Class Counsel and Scotts' Counsel, and after mediation conducted by the Hon. Wayne Andersen.
24. Weighing risks and uncertainties of continued litigation and all factors bearing on the merits of settlement, Plaintiffs and Class Counsel are satisfied that the terms and conditions of this settlement are fair, reasonable, adequate, and in the best interests of the Plaintiffs and the Settlement Class Members.
25. NOW, THEREFORE, without any admission or concession of liability or wrongdoing or the lack of merit of any defense whatsoever by Scotts, or any admission or concession of the lack of merit of this Action whatsoever by Plaintiffs, it is hereby stipulated and agreed by the undersigned, on behalf of Plaintiffs, the Settlement Class, and Scotts, that the Action and all claims of the Settlement Class be settled, compromised, and dismissed on the merits and with prejudice, subject to Court approval as required by Federal Rules of Civil Procedure 23, on the terms and conditions set forth herein and upon the Effective Date (as defined below).

26. Each Party affirms that the Recitals above are true and accurate and are hereby made a part of this Settlement Agreement.

**I. DEFINITIONS**

27. As used in this Settlement Agreement and the exhibits hereto, in addition to any definitions set forth elsewhere in this Agreement, the following terms shall have the meanings set forth below. Unless otherwise indicated, defined terms include the plural as well as the singular.

28. **“50% Thicker” Claim** means the advertising claim previously found on Scotts EZ Seed labeling or packaging, reading in full:

50% THICKER WITH HALF THE WATER\*\*

\*\*Versus ordinary seed when each was watered at half the recommended rate. Results may vary.

And an alternative version of the claim stating:

50% THICKER WITH HALF THE WATER††

††Results 32 days after planting; each watered at half the recommended rate for ordinary seed. Results may vary.

29. **“Action”** means the consolidated class action initiated by Plaintiffs Michael Arcuri, David Browne, Gwen Eskinazi, Stacy Lonardo, Lance Moore, Vance Smith, and Nancy Thomas, *In re Scotts EZ Seed Litigation*, 12-4727 (VB), in the United States District Court for the Southern District of New York.

30. **“Agreement,” “Settlement Agreement”** or **“Stipulation of Settlement,”** means this Settlement Agreement, and its Exhibits attached hereto and incorporated herein.

31. **“Claims Administrator”** means Heffler, which will administer and oversee, among other things, the processing, handling, reviewing, and approving of claims made by Claimants, communicating with Claimants, and distributing payments to qualified Claimants.

32. “**Claim Deadline**” means 120 days after the Notice Date, by which Settlement Class Members must submit a claim to obtain the Class Benefit described in Section II of this Agreement.
33. “**Claim Form**” means the form, attached here as Exhibit 3, that Settlement Class Members must submit to the Claims Administrator in order to obtain the Class Benefit described in this Agreement.
34. “**Claims Period**” means the period of time from the Notice Date until the Claim Deadline.
35. “**Claimant**” means a Settlement Class Member that submits a Claim Form.
36. “**Class Benefit**” means the monetary payment described in Section II, available to Settlement Class Members who meet eligibility requirements and submit a timely and valid Claim Form.
37. “**Class Counsel**” or “**Plaintiffs’ Counsel**” means the law firms of Bursor & Fisher, P.A. and Faruqi & Faruqi, LLP.
38. “**Class Representatives**” or “**Plaintiffs**” means Plaintiffs Michael Arcuri, David Browne, Gwen Eskinazi, Stacy Lonardo, Lance Moore, Vance Smith, and Nancy Thomas.
39. “**Court**” means the United States District Court for the Southern District of New York.
40. “**Defendants**” or “**Scotts**” means The Scotts Miracle-Gro Company and The Scotts Company LLC.
41. “**Defendants’ Counsel**,” “**Defense Counsel**,” or “**Scotts’ Counsel**” means the law firm of Hunton Andrews Kurth LLP.
42. “**Effective Date**” means the date on which the Court enters an Order and Final Judgment, if no appeal is taken. If an appeal is taken, the Effective Date shall mean the first date all appellate rights (including proceedings in the Supreme Court) with respect to said Order

and Final Judgment have expired or been exhausted in such a manner as to affirm the Order and Final Judgment.

43. **“Fairness Hearing”** means the hearing that is to take place after the entry of a Preliminary Approval order and after the Notice Date for purposes of (a) determining whether the Settlement should be approved as fair, reasonable, adequate and in the best interests of the Class Members; (b) entering the Order and Final Judgment and dismissing the Action with prejudice; and (c) ruling upon an application by Class Counsel for an award of attorneys’ fees, costs and expenses, and Class Representative Incentive Awards.
44. **“Fee Award”** means an award of reasonable fees, costs and expenses in an amount no greater than \$9,700,000.00, sought by application and approved by the Court, that is payable to Class Counsel.
45. **“Final Approval”** means the Court’s entry of an Order and Final Judgment following the Fairness Hearing.
46. **“Fraudulent Claims”** means any Claim Forms the Claims Administrator determines in good faith contain indicia of fraud, deceit or other invalidity, including but not limited to any attempts to bypass the terms and limitations set out in this Agreement regarding Claim Forms, Claimants, Class Members and Class Benefits.
47. **“Incentive Award”** means the monetary award, sought by application and approved by the Court, that is payable to the Class Representatives.
48. **“No Quibble Guarantee”** means Scotts’ refund policy providing:

“If for any reason you, the consumer, are not satisfied after using this product, you are entitled to get your money back. Simply send us the original evidence of purchase and we will mail you a refund check promptly.”

49. **“Notice”** or **“Settlement Notice”** means notice of the proposed settlement to be provided to Settlement Class Members substantially in the forms attached as Exhibits 1 and 2, but which may be modified as necessary to comply with the provisions of any order of Preliminary Approval entered by the Court, and which is to be provided to the Settlement Class Members pursuant to this Agreement.
50. **“Notice Date”** means the date that the Settlement Notice and/or Email Notice is published in accord with the plan of notice set forth below.
51. **“Notice of Missing or Inaccurate Information”** means the notice sent by the Claims Administrator to a Claimant who has submitted a Claim Form with inaccurate, disqualifying, incomplete or missing information that is required for the Claimant to be considered eligible for the Class Benefit provided by this Settlement.
52. **“Objection/Exclusion Deadline”** means the date to be set by the Court as the deadline for Settlement Class Members to submit Objection Statements and Requests for Exclusion. The Parties shall request that the Court set an Objection/Exclusion Deadline 90 days after the Notice Date.
53. **“Objection Statements”** or **“Objection”** means written objections to the Settlement Agreement, as provided in Section VI of this Agreement, submitted by Settlement Class Members that must (1) state the basis of the objection and all required information from the Settlement Notice; (2) be mailed to the Claims Administrator, Class Counsel, and Scotts’ Counsel; and (3) be filed with the Court by the Objection/Exclusion Deadline.
54. **“Order and Final Judgment”** means the final order and the final judgment to be issued by the Court, substantially in the form of Exhibits 5 and 6 hereto, approving the Settlement pursuant to the terms and conditions of this Agreement, confirming the certification of the

Settlement Class for purposes of this Agreement only, dismissing the Action with prejudice, and releasing all claims of Plaintiffs and the Settlement Class Members.

55. “**Person**” means any individual, corporation, trust, partnership, limited liability company, or other legal entity and their respective successors or assigns.
56. “**Parties**” or “**Settling Parties**” means Plaintiff Class Representatives, Michael Arcuri, David Browne, Gwen Eskinazi, Stacy Lonardo, Lance Moore, Vance Smith, and Nancy Thomas on the one hand, and Defendants The Scotts Miracle-Gro Company and The Scotts Company LLC on the other.
57. “**Preliminary Approval**” shall mean the issuance of an order by the Court, substantially in the form of Exhibit 4 hereto, preliminarily approving this Agreement, and authorizing the distribution of Settlement Notice.
58. “**Proof of Purchase**” means the receipt, invoice, package UPC from the package(s) of Scotts EZ Seed purchased, or other similar type of documentation evidencing the purchase of Scotts EZ Seed by the Settlement Class Member.
59. “**Released Claim**” means any claim, cross-claim, liability, right, demand, suit, matter, obligation, damage, restitution, disgorgement, loss or cost, attorneys’ fee, cost or expense, action or cause of action, of every kind and description that the Releasing Party had or has, including assigned claims, whether in arbitration, administrative, or judicial proceedings, whether as individual claims or as claims asserted on a class basis or on behalf of the general public, whether known or unknown, asserted or unasserted, suspected or unsuspected, latent or patent, that is, has been, could reasonably have been or in the future might reasonably be asserted by the Releasing Party in the Action against any of the Released Parties arising out of or relating to the allegations in the complaint filed in the

Action, or arising out of or relating to the marketing, advertising, promoting, sale or distributing of the Scotts EZ Seed product prior to the Effective Date of this Agreement, including but not limited to all claims that were brought or could have been brought in the Action.

60. **“Released Parties”** means each of The Scotts Miracle-Gro Company, The Scotts Company LLC, and all of its current and former parents, predecessors, successors, assigns, subsidiaries, divisions, departments, and affiliates, and any and all of their past, present and/or future officers, directors, employees, stockholders, partners, agents, servants, successors, attorneys, representatives, advisors, consultants, resellers, brokers, distributors, wholesalers, retailers (including but not limited to Lowe’s Home Centers, LLC, The Home Depot, Inc. and True Value Company), subrogees and assigns of any of the foregoing, and representatives of any and all of the foregoing.
61. **“Releasing Party”** means the Plaintiffs, each Settlement Class Member, and any Person claiming by or through him/her/it as his/her/its spouse, parent, child, heir, guardian, associate, co-owner, attorney, agent, administrator, devisee, predecessor, successor, assignee, representative of any kind, shareholder, partner, director, employee, or affiliate.
62. **“Request for Exclusion”** is the written communication that a Settlement Class Member must submit to the Claims Administrator by the Objection/Exclusion Deadline in order to be excluded from the Settlement as provided for in Section VI below.
63. **“Scotts EZ Seed”** means any variation of Scotts EZ Seed combination mulch, grass seed, and lawn fertilizer which bore any version of the “50% Thicker” Claim. Upon reasonable investigation by Scotts, March 4, 2014 was the last ship date of Scotts EZ Seed bearing the “50% Thicker” Claim.

64. **“Settlement”** means the settlement embodied in this Agreement.
65. **“Settlement Class Members,” “Class Members,” “Class,” or “Settlement Class”** means: All persons who purchased Scotts EZ Seed in the states of New York and California containing the label statement “50% Thicker” Claim. For the purposes of this definition, individuals living in the same household shall be deemed to be a single class member. Excluded from the Settlement Class are: (a) Scotts’ employees, officers and directors, (b) persons or entities who purchased the Products for the purpose of re-sale, (c) retailers or re-sellers of the Products, (d) governmental entities, (e) persons who timely and properly exclude themselves from the Settlement Class as provided herein, (f) the Court, the Court’s immediate family, and Court staff, and (g) counsel of record for the Parties.
66. **“Settlement Class Period”** means the period of time from January 1, 2009 through September 30, 2014.
67. **“Settlement Notice”** means Notice as defined above.
68. **“Settlement Website”** means the website to be established by the Claims Administrator within 30 days of Preliminary Approval for purpose of providing notice, Claim Forms and other information regarding this Agreement.

## **II. SETTLEMENT CONSIDERATION**

### **Class Benefits**

69. To each Settlement Class Member who follows the procedures set forth in Section III of this Stipulation of Settlement, who has not previously received money back in full under the No Quibble Guarantee, and who submits a valid Claim Form, Scotts will pay a monetary benefit as follows:

- a. **With Proof of Purchase.** For Settlement Class Members who submit a valid Claim Form, along with Proof of Purchase establishing purchase of Scotts EZ Seed bearing the “50% Thicker” Claim, and revealing the actual price paid for Scotts EZ Seed, Scotts will offer a full refund of the purchase price for up to six (6) unit purchases of Scotts EZ Seed during the Settlement Class Period. Settlement Class Members who submit a valid Claim Form, along with Proof of Purchase that does not reveal the actual price paid for Scotts EZ Seed will receive a refund of \$15.00 for each such unit up to six (6) units.
- b. **Without Proof of Purchase.** For Settlement Class Members who submit a valid Claim Form without Proof of Purchase, but who submit attestation of Claimant’s purchase and of the presence of the “50% Thicker” Claim under penalty of perjury, Scotts will pay up to \$45, *i.e.*, \$15.00 each for up to three (3) unit purchases of Scotts EZ Seed during the Settlement Class Period.
- c. For purposes of Section II, individuals residing in the same household shall not be permitted to submit multiple claims for each member of the household.

### **III. CLAIMS PROCESS AND PAYMENT**

#### **Submission of Claims**

70. To be eligible to receive the Class Benefit under the Settlement Agreement, Settlement Class Members must submit a claim to the Claims Administrator by either: (a) completing, certifying, and mailing the Claim Form to the Claims Administrator; or (b) electronically completing, certifying, and submitting the Claim Form on the Settlement Website. The Claim Form must be postmarked or electronically submitted no later than the Claim Deadline. Claim Forms postmarked or electronically submitted after the Claim

Deadline shall be denied by the Claims Administrator, and Scotts will not be obligated to make any payment on such claims.

71. No Claim Form will be deemed valid unless it is signed in hard copy or electronically by the Settlement Class Member under penalty of perjury, and is postmarked on or before the Claim Deadline.

#### **Review of Claims**

72. The Claims Administrator shall review all submitted Claim Forms within a reasonable time to determine each Settlement Class Member's eligibility for the Class Benefit, and the amount of such relief, if any. Copies of submitted Claim Forms shall be provided to Scotts' Counsel and to Class Counsel upon request. Settlement Class Members who submit valid Claim Forms shall be entitled to relief as set forth in Section II of this Settlement Agreement. Settlement Class Members who submit Claims Forms that do not meet the eligibility requirements described herein shall not be entitled to such relief.

#### **Invalid/Fraudulent Claims**

73. The Claims Administrator shall use good faith and appropriate procedures to prevent, detect, and reject the payment of Fraudulent Claims and ensure payment of only legitimate claims.. The Claims Administrator shall notify the claimant via email of the rejection. If any claimant whose Claim Form has been rejected, in whole or in part, desires to contest such rejection, the claimant must, within 10 business days from receipt of the rejection, mail or email the Claims Administrator a notice and statement of reasons indicating the grounds for contesting the rejection along with any supporting documentation, requesting further review by the Claims Administrator, in consultation with Scotts' Counsel and Class Counsel, of denial of the claim. The Claims Administrator, in consultation with Scotts'

Counsel and Class Counsel, shall notify the claimant of its decision by email within 10 business days from receipt of the claimant's reply contesting the rejection. If the rejection is upheld, the claimant shall have 10 business days from receipt of that notice to file a motion with the Court disputing the rejection.

**Incomplete or Inaccurate Claim Forms**

74. If the Claims Administrator determines that a Submitted Claim contains inaccurate or disqualifying information or omits required information, the Claims Administrator shall, if possible, email the claimant a Notice of Missing or Inaccurate Information explaining what information is missing or inaccurate, or a Notice of Denial of Claim.
75. Settlement Class Members who receive a Notice of Missing or Inaccurate Information shall have until the end of the Claims Period, or 30 days from when the Notice of Missing or Inaccurate Information was mailed, whichever is later, to reply to the Notice of Missing or Inaccurate Information and provide the required information.
76. If a Settlement Class Member fails to respond by the end of the Claims Period or within 30 days from when the Notice of Missing or Inaccurate Information was mailed, whichever is later, or the Claims Administrator is unable to provide a Notice of Missing or Inaccurate Information as a result of the omitted information, the Claims Administrator will reject such Settlement Class Member's claim, and Scotts will not be obligated to make any payment on such claim.

**Provision of Class Benefit**

77. All Settlement Class Members who are eligible and who submit a valid Claim Form shall be sent cash awards within 30 days of the Effective Date. Scotts shall pay the Claims Administrator the aggregate value of all cash awards to be distributed to Settlement Class

Members no later than 15 days after the Effective Date. All cash awards to Settlement Class Members will be in the form of checks.

#### **IV. NOTICE**

78. Settlement Notice shall conform to all applicable requirements of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clauses), the Class Action Fairness Act of 2005, 28 U.S.C. § 1715, and any other applicable law, and shall otherwise be in the manner and form approved by the Court.

#### **Forms of Notice**

79. Upon Preliminary Approval of this Agreement, Settlement Notice shall be made as follows:
- a. Email Notice: Within 45 days following Preliminary Approval, the Settlement Administrator shall cause a copy of the content of the Post Card Notice to be sent by email to all class members for whom email addresses have previously been identified. The Email Notice will provide prominent links to the Long Form Notice, the Claim Form, and the Settlement Website;
  - b. Post Card Notice: Within 45 days of Preliminary Approval, the Settlement Administrator shall cause a copy of the Post Card Notice to be sent by regular mail to all class members for whom the Parties do not have a valid email address but do have a mailing address. The Post Card Notice will prominently provide information for accessing the Settlement Website, the Claim Form, and the Long Form Notice.
  - c. Website Notice: On the Settlement Website, the Claims Administrator will post links to the Settlement Notice, this Settlement Agreement, the Claim Form, and

information relating to filing a claim, objecting to the Settlement, opting out of the Settlement, and deadlines relating to the Settlement.

- d. Other Publication Notice: The Claims Administrator will purchase Internet banner notice ads which will allow access to the Settlement Website through an embedded hyperlink contained within the banner notice ad. Ads will be served to users in California and New York via display, mobile and keyword search by targeting keywords and topics including, but not limited to, Scotts EZ Seed, grass seed, and Home Depot. Ads will also be targeted to people in California or New York who shop at Home Depot, Wal-Mart, Lowe's and True Value with an interest in gardening, as well as targeting mobile devices whose IP addresses are identified as physically being in or around the same stores. The Claims Administrator will also include a Facebook and Instagram ad campaign targeting California and New York users who follow Scotts Lawn Care's Facebook page, are part of a custom audience match to known class members, and followers of the Home Depot, Wal-Mart, Lowe's and True Value Facebook pages who have been identified by Facebook as having an interest in gardening. The Claims Administrator shall also issue an informational press release to approximately 2,000 press outlets through California and New York. The release will include the Settlement Website address so that Settlement Class Members can easily access information about the Action.

**V. ADMINISTRATION OF SETTLEMENT**

80. All costs of administering the Settlement and for disseminating Notice in accord with the Notice plan as described herein shall be paid by Scotts.

81. The Claims Administrator will help implement the terms of this Stipulation of Settlement. The Claims Administrator shall be responsible for administrative tasks, including, without limitation:
- a. Arranging, as set forth in this Section and in the Preliminary Approval Order, for distribution of Settlement Notice (in the form approved by the Court) and Claims Forms (in the form approved by the Court) to Settlement Class Members,
  - b. Answering inquiries from Settlement Class Members and/or forwarding such written inquiries to Class Counsel or their designee,
  - c. Receiving and maintaining on behalf of the Court and the Parties any Settlement Class Member correspondence regarding Requests for Exclusion from the Settlement Agreement,
  - d. Posting notices, Claim Forms, and other related documents on the Settlement Website,
  - e. Receiving and processing Claim Forms, including sending Notices of Missing or Inaccurate Information where applicable,
  - f. Distributing cash payments to Settlement Class Members, and
  - g. Otherwise assisting with implementation and administration of the Settlement Agreement terms.

## **VI. OBJECTIONS AND OPT-OUTS**

### **Objections**

82. Settlement Class Members shall have the right to appear and present Objections as to any reason why the terms of this Agreement should not be given Final Approval. Any objection must be in writing and filed with the Court, with a copy delivered to Class

Counsel and Scotts' Counsel at the addresses set forth in the Settlement Notice, no later than the Objection/Exclusion Deadline.

83. Any Objection regarding or related to the Agreement shall contain a caption or title that identifies it as "Objection to Class Settlement in *In re Scotts EZ Seed*," shall be served upon Scotts' Counsel and Class Counsel so that such papers are actually received by said counsel by the date specified in the Settlement Notice, and also shall contain:
- a. Information sufficient to identify and contact the objecting Settlement Class Member, including name, address, telephone number, and, if available, email address, and if represented by counsel, of his/her counsel,
  - b. A clear and concise statement of the Settlement Class Member's Objection, including all bases and grounds for the Objection,
  - c. Documents sufficient to establish the person's standing as a Settlement Class Member, *i.e.*, verification under penalty of perjury as to the date and location of the person's purchase of Scotts EZ Seed or a Proof of Purchase,
  - d. The facts supporting the Objection,
  - e. The legal grounds on which the Objection is based,
  - f. A list of any other objections submitted by the Settlement Class Member, or his/her counsel, to any proposed class action settlements submitted in any court, whether state or federal, in the United States in the previous five (5) years. If the Settlement Class Member or his/her counsel has not objected to any other class action settlement in any other court in the previous 5 years, he or she shall affirmatively state so, and
  - g. State whether the person intends to appear at the Fairness Hearing.

84. No Settlement Class Member shall be entitled to be heard at the Fairness Hearing (whether individually or through separate counsel) or to object to the Agreement, and no written objections or briefs submitted by any Settlement Class Member shall be received or considered by the Court at the Fairness Hearing, unless written notice of the Settlement Class Member's intention to appear at the Fairness Hearing, and copies of any written Objections or briefs, shall have been filed with the Court and served on counsel for the Parties on or before the Objection/Exclusion Deadline.
85. Settlement Class Members who fail to file and timely serve written Objections in the manner specified above shall be deemed to have waived any objections and shall be foreclosed from making any objection (whether by appeal or otherwise) to the Settlement Agreement and shall be bound, to the extent allowed by law, by the terms of the Settlement Agreement.

**Right to Respond to Objections**

86. Class Counsel and Scotts shall have the right to respond to any Objection prior to the Fairness Hearing.

**Requests for Exclusion/Opt Out**

87. Any Settlement Class Member who does not wish to participate in this Settlement must submit a Request for Exclusion to the Claims Administrator stating an intention to be "excluded" from this Settlement. The written request for exclusion must contain the Settlement Class Member's name, current address, and telephone number. The Request for Exclusion must be personally signed by the Settlement Class Member, dated and mailed to the Claims Administrator and postmarked on or before the Objection/Exclusion Deadline. So-called "mass" or "class" opt-outs shall not be allowed.

88. The date of the postmark on the return mailing envelope shall be the exclusive means used to determine whether a Request for Exclusion has been timely submitted. Any Settlement Class Member whose request to be excluded from the Settlement Class is approved by the Court will not be bound by this Settlement Agreement or have any right to object, appeal, or comment thereon.
89. Settlement Class Members who fail to submit a valid and timely Request for Exclusion on or before the Objection/Exclusion Deadline shall be bound, to the extent allowed by law, by all terms of the Settlement Agreement and any Judgment entered in the Action if the Settlement Agreement is approved by the Court, regardless of whether they have requested exclusion from the Class.

**No Solicitation of Objections or Exclusions**

90. The Parties and their counsel agree to use their best efforts to carry out this Agreement. At no time shall any of the Parties or their counsel seek to solicit or otherwise encourage any Party or Settlement Class Member to submit Objection Statements or Requests for Exclusion from this Agreement, or to appeal from the Court's Judgment.

**VII. ATTORNEYS' FEES & EXPENSES, AND CLASS REPRESENTATIVE INCENTIVE AWARDS**

**Attorneys' Fees and Expenses**

91. Class Counsel shall submit a request for an award of attorneys' fees, costs and expenses, including expert fees and costs incurred for the dissemination of the notice of pendency of class action, in an amount not to exceed \$9,700,000.00 (Nine Million Seven Hundred Thousand Dollars and Zero Cents). Scotts will not oppose or undermine that request or solicit others to do so.

92. The Fee Award shall be the total obligation of Scotts to pay for attorneys' fees, costs, and/or expenses of any kind (including, but not limited to, travel, filing fees, court reporter and videographer expenses, expert fees and costs, notice of pendency costs and expenses, and document review and production costs) related to this Action.
93. The Fee Award shall be paid by Scotts by wire transfer to Bursor & Fisher, P.A. within 10 days following Final Approval, subject to Class Counsel providing a signed Acknowledgment & Guarantee for each firm that will receive a share of the Fee Award in the form attached hereto as Exhibit 7.
94. Class Counsel shall have the sole and absolute discretion to allocate the Fee Award amongst Plaintiffs' Counsel and any other attorneys for Plaintiffs. Scotts shall have no liability or other responsibility for allocation of any such attorney's fees, costs and expenses awarded in the Fee Award.

**Class Representative Incentive Awards**

95. Class Counsel shall also petition the Court for, and Scotts shall not oppose, an incentive award in an amount of \$10,000.00 (Ten Thousand Dollars and Zero Cents) to each of the Class Representatives, in recognition of their efforts on behalf of the Settlement Class. The Court's award of any Incentive Award shall be separate from its determination of whether to approve the Settlement as set forth in this Agreement.
96. In the event the Court approves the Settlement, but declines to award an Incentive Award in the amount requested by Class Counsel, the Settlement will nevertheless be binding on the Parties. If the Court declines to approve the Settlement, no Incentive Award shall be paid.

97. Incentive Awards approved by the Court shall be paid by Scotts within 10 days after the Effective Date. Payment by Scotts of the Incentive Awards is separate from, and in addition to, the other relief afforded to the Settlement Class Members in this Agreement.

### **VIII. PRELIMINARY APPROVAL**

#### **Motion for Preliminary Approval**

98. As soon as reasonably practicable after the signing of this Agreement, the Parties shall file with the Court a Joint Motion for Preliminary Approval of Class Settlement that seeks entry of the Preliminary Approval Order, which, in accordance with the terms of this Agreement, for settlement purposes only would:
- a. Certify a Settlement Class under Federal Rule of Civil Procedure 23(b)(3) composed of the Settlement Class Members;
  - b. Preliminarily approve this Settlement Agreement;
  - c. Approve the Claims Administrator;
  - d. Approve and authorize the contents and distribution of the Settlement Notice;
  - e. Approve and authorize the procedures for submitting Objections and Requests for Exclusion and the binding nature thereof;
  - f. Set deadlines for submitting papers in support of the Motion for Final Approval, the Motion for Attorneys' Fees, Costs, and Expenses and Class Representative Incentive Awards, and any responses to timely and valid Objections; and
  - g. Schedule the Fairness Hearing to determine the Final Approval of the Settlement Agreement; and

- h. Stay all activity in the Action except to the extent necessary to effectuate this Agreement unless and until this Agreement is terminated pursuant to its terms and conditions.

### **Certification of Settlement Class for Settlement Purposes Only**

99. The Parties agree, for settlement purposes only, that the Settlement Class, defined as all persons who purchased Scotts EZ Seed in the states of New York and California containing the “50% Thicker” Claim, shall be certified and proceed as a class action under Federal Rule of Civil Procedure 23(b)(3), with a class consisting of all Settlement Class Members, and with Plaintiffs Michael Arcuri, David Browne, Gwen Eskinazi, Stacy Lonardo, Lance Moore, Vance Smith, and Nancy Thomas as Class Representatives, and with Class Counsel as counsel for the Settlement Class Members.
100. In the event that the Court does not preliminarily or finally approve the Settlement Agreement, nothing herein shall be construed to alter the Court’s January 26, 2015 Certification Decision or Scotts’ ability to contest that decision.

## **IX. FINAL APPROVAL**

### **Motion for Final Approval**

101. Prior to the Fairness Hearing, Class Counsel shall petition the Court for a final order that would:
  - a. Confirm the certification of the Settlement Class as defined above;
  - b. Dismiss this Action, with prejudice, upon the Effective Date;
  - c. Decree that neither the Final Approval nor this Agreement constitutes an admission of liability, fault or wrongdoing;
  - d. Release the Released Parties from the Released Claims of the Releasing Parties;

- e. Find that this Agreement is entered into in good faith, is reasonable, fair and adequate, and is in the best interest of the Settlement Class Members; and
  - f. Make such orders as are necessary and appropriate to effectuate the terms and conditions of this Agreement.
102. Prior to the Fairness Hearing, Class Counsel and Scotts shall also have the right to respond to any Objections submitted by Settlement Class Members.

**Fairness Hearing**

103. The Court shall conduct a Fairness Hearing so that the Court may review any objections to this Agreement, consider the fairness, reasonableness and adequacy of this Agreement and consider the Parties' petition for Final Approval and Class Counsel's Application for a Fee Award and for the Class Representatives' Incentive Awards. The date of the Fairness Hearing shall be posted on the Settlement Website in advance of the hearing. If the date of the Fairness Hearing is subsequently modified by the Court, no further notice is required to be published to Settlement Class Members, except that, the Parties will notify any Settlement Class Member who has filed a timely Objection in writing of any change to the date of the Fairness Hearing.

**Dismissal of this Action**

104. The Final Approval shall provide that this Action shall be dismissed, with prejudice, upon the Effective Date.

**X. RELEASES**

**General Release from Liability**

105. Upon Final Approval, each of the Plaintiffs and each Settlement Class Member who has not validly and timely submitted a Request for Exclusion shall be deemed to release and

forever discharge any and all Released Parties of and from liability of any kind or type whatsoever for any and all Released Claims, and shall be permanently barred and enjoined from initiating, asserting and/or prosecuting any Released Claim(s) against any Released Party in any court or forum. This Agreement shall be the sole and exclusive remedy available to the Releasing Parties for any and all Released Claims against the Released Parties. No Released Party shall be subject to liability or expense of any kind to any Releasing Party with respect to any Released Claim.

106. The Parties agree that they may hereafter discover facts in addition to or different from those they believe to be true with respect to the subject matter of this Agreement. The Parties agree that, notwithstanding the discovery of the existence of any such additional or different facts that, if known, would materially affect its decision to enter into this Agreement, the releases herein given shall be and remain in effect as a full, final and complete general release of the Released Claims and the Parties shall not be entitled to modify or set aside this Agreement, either in whole or in part, by reason thereof. The Parties hereby waive and relinquish, to the fullest extent permitted by law, the rights and benefits of any statute which might otherwise render unenforceable a release contained in this Agreement.

107. With respect to all Released Claims, Plaintiffs and each of the other Settlement Class Members who have not validly opted out of this Settlement agree that they are expressly waiving and relinquishing to the fullest extent permitted by law (a) the provisions, rights and benefits conferred by Section 1542 of the California Civil Code, which provides: “A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE

TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR” and (b) any law of any state or territory of the United States, federal law or principle of common law, or of international or foreign law, that is similar, comparable or equivalent to Section 1542 of the California Civil Code.

**XI. Termination and Effect of Termination**

108. Each Party shall have the right to terminate this Settlement Agreement if: (i) the Court denies preliminary approval of this Settlement Agreement (or grants preliminary approval through an order that is not substantially similar in form and substance to Exhibit D hereto); (ii) the Court denies final approval of this Settlement Agreement (or grants final approval through an order that materially differs in substance from Exhibit E hereto); (iii) the Final Approval Order and Judgment do not become Final by reason of a higher court reversing final approval by the Court, and the Court thereafter declines to enter a further order or orders approving the Settlement on the terms set forth herein. If a Party elects to terminate this Settlement Agreement under this paragraph, that Party must provide written notice to the other Parties’ counsel, by hand delivery, mail, or e-mail within ten days of the occurrence of the condition permitting termination.
109. Scotts may unilaterally terminate this Settlement Agreement if more than 2,000 Settlement Class Members submit valid opt outs. If Scotts elects to terminate this Settlement under this paragraph, Scotts must provide written notice to Class Counsel, by hand delivery, mail, or e-mail within ten days of the occurrence of the condition permitting termination.

110. Nothing shall prevent Named Plaintiffs and/or Scotts from appealing or seeking other appropriate relief from an appellate court with respect to any denial by the Court of Final Approval of the Settlement. In the event such appellate proceedings result, by order of the appellate court or by an order after remand or a combination thereof, in the entry of an order(s) whereby the Settlement is approved in a manner substantially consistent with the substantive terms and intent of this Settlement Agreement, and dismissing all claims in the Action with prejudice, and otherwise meeting the substantive criteria of this Agreement for approval of the Settlement, such order shall be treated as a Final Approval Order.
111. If this Settlement Agreement is terminated or disapproved, or if the Effective Date should not occur for any reason, then: (i) this Settlement Agreement and all orders entered in connection therewith shall be rendered null and void; and (ii) all Parties shall be deemed to have reverted to their respective status in the Action as of the date and time immediately preceding the execution of this Settlement Agreement and, except as otherwise expressly provided, the Parties shall stand in the same position and shall proceed in all respects as if this Settlement Agreement and any related orders had never been executed, entered into, or filed, except that the Parties shall not seek to recover from one another any attorneys' fees, costs, and expenses incurred in connection with this Settlement.

**XII. Non-Admission of Fault or Liability**

112. This Agreement, whether or not consummated, and any communications exchanged or actions taken pursuant to or during the negotiation of this Agreement are for settlement purposes only. Neither the fact of nor the contents of this Agreement or its exhibits, nor

any communications exchanged, nor actions taken, pursuant to or during the negotiation of this Agreement, shall constitute, be construed as, or be admissible in evidence as an admission of the validity of any claim asserted or fact alleged in this Action or of any wrongdoing, fault, violation of law or liability of any kind on the part of Scotts.

### **XIII. Miscellaneous**

#### **Non-Admissibility**

113. This Agreement and all negotiations, correspondence and communications leading up to its execution shall be deemed to be within the protection of Federal Rule of Evidence 408 and any analogous state or federal rules or principles. Neither this Agreement, nor any terms, conditions, contents or provisions hereof or exhibits hereto, nor any negotiations, correspondence or communications leading up to the execution of this Agreement, shall constitute a precedent or be admissible for any purpose in any proceeding; provided, however, that this Agreement shall be admissible in any proceeding related to the approval of this Agreement, to enforce any of its terms and conditions, to support or defend this Agreement in an appeal from an order granting or denying Final Approval, or to enforce or assert a claim or defense of *res judicata*, *collateral estoppel*, claim preclusion, issue preclusion, settlement, release, merger and bar, or any similar claim or defense against the Plaintiffs, any Settlement Class Member, or any third party.

#### **Reservation of Rights**

This Agreement is made without prejudice to the right of Scotts to take any position in its defense of the Action, should this Agreement not be approved or implemented.

**Authority to Execute**

114. The Parties warrant and represent that the persons executing this Agreement are duly authorized to do so.

**Assignment of Claims**

115. The Parties warrant and represent that no claim or any portion of any claim referenced or released in this Agreement has been sold, assigned, conveyed, or otherwise transferred to any other entity or Person.

**Reading and Understanding**

116. The Parties warrant and represent that they have carefully read this Agreement, have consulted their attorneys regarding this Agreement, and fully understand and voluntarily accept the terms and conditions of this Agreement.

**Reliance on Own Judgment**

117. The Parties warrant and represent that they have relied upon their own judgment and that of their legal counsel regarding the sufficient and agreed upon consideration for this Agreement and that no statement or representation by any of the other Parties or their agents, employees, officers, directors or legal representatives influenced or induced them to execute this Agreement.

118. This Agreement shall be construed under and governed by the laws of the State of New York, applied without regard to laws applicable to choice of law.

**Jurisdiction of the Court**

119. The Court shall retain jurisdiction with respect to the interpretation, implementation and enforcement of the terms of this Agreement and all orders and judgments entered in connection therewith, and the parties and their counsel hereto submit to the jurisdiction of

the Court for purposes of interpreting, implementing and enforcing the resolution embodied in this Agreement and all orders and judgments entered in connection therewith.

**Entire Agreement**

120. This Agreement, including all exhibits hereto, shall constitute the entire Agreement among the Parties with regard to the subject of this Agreement and shall supersede any previous agreements, representations, communications and understandings among the Parties with respect to the subject matter of this Agreement.

**Joint Preparation**

121. This Agreement shall be construed as if the Parties jointly prepared it, and any uncertainty or ambiguity shall not be interpreted against any of the Parties.

**Recitals**

122. The Recitals are a material part of this Agreement and are incorporated herein in their entirety.

**Captions**

123. The captions used in this Agreement are for convenience and identification purposes only, and are not part of this Agreement.

**Amendment or Modification**

124. This Agreement may not be changed, modified, or amended except in writing signed by all Parties (or their successors-in-interest) and approved by the Court. Notwithstanding the foregoing, however, the claims process set forth above may be modified by mutual agreement of the Parties without Court approval and the Parties may agree to reasonable extensions of time in which to accomplish the tasks required by the terms and conditions of this Agreement.

**Cooperation**

125. The Parties and their counsel agree to cooperate fully with one another and to use their best efforts to effectuate the Settlement, including without limitation in seeking preliminary and final Court approval of the Stipulation of Settlement and the Settlement embodied herein, carrying out the terms of this Stipulation of Settlement, and promptly agreeing upon and executing all such other documentation as may be reasonably required to obtain Final Approval by the Court of the Settlement.

**No Waiver**

126. The waiver of any term or condition or breach of this Agreement shall not be deemed to be a waiver of any other term or condition or breach of this Agreement and shall not be deemed to be a continuing waiver.

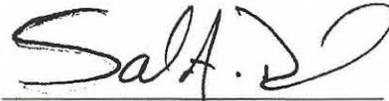
**Parties' Waiver of Right to be Excluded and Object.**

127. The Parties agree that by signing this Agreement they are bound to these terms. The Parties agree to not object to or appeal from this Agreement or the exhibits attached hereto. Plaintiffs further agree not to request to be excluded from the Class.

Dated: June 4, 2018

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