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7

8  
9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE EASTERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA, ) CASE NO: 1:08-CR-00448 SMS  
12 )  
Plaintiff, ) PLEA AGREEMENT BETWEEN  
13 ) ORGANIC PASTURES DAIRY  
v. ) COMPANY LLC AND THE  
14 ) UNITED STATES  
15 )  
ORGANIC PASTURES DAIRY COMPANY )  
16 )  
LLC, and MARK L. McAFEE, )  
17 )  
Defendants. )  
18

19 Pursuant to Rule 11(c) of the Federal Rules of Criminal  
20 Procedure, the United States of America, by and through McGregor W.  
21 Scott, the United States Attorney for the Eastern District of  
22 California, and Assistant United States Attorneys Mark E. Cullers and  
23 Kirk E. Sherriff; and defendant ORGANIC PASTURES DAIRY COMPANY LLC  
24 ("ORGANIC PASTURES") and its attorney, David G. Cox, David G. Cox Law  
25 Firm, have agreed as follows:

26 **1. Complete Agreement**

27 This document contains the complete Plea Agreement ("Agreement")  
28 between the United States Attorney's Office for the Eastern District

1 of California ("United States") and defendant ORGANIC PASTURES  
2 regarding this case. This Agreement is limited to the United States  
3 Attorney's Office for the Eastern District of California and cannot  
4 bind any other federal, state, or local prosecuting, administrative,  
5 or regulatory authorities.

6 **2. Charges**

7 Defendant acknowledges that it will be charged in an Information  
8 as follows:

9 Counts One & Two: Misdemeanor introduction and delivery  
10 for introduction into interstate  
11 commerce of misbranded food, in  
12 violation of Title 21, United States  
13 Code, Sections 331(a) and 333(a)(1).

14 **3. Nature, Elements and Possible Defenses**

15 Defendant has reviewed the charges against it contained in the  
16 Information, and those charges have been fully explained to it by its  
17 attorney. Further, defendant fully understands the nature and  
18 elements of the crime in the Information to which it is pleading  
19 guilty, together with the possible defenses thereto, and has  
20 discussed them with its attorney.

21 The elements of the crime of Introduction and Delivery for  
22 Introduction into Interstate Commerce of Misbranded Food are:

23 First, that the defendant caused food, unpasteurized raw milk  
24 products, to be introduced or delivered for  
25 introduction into interstate commerce that was labeled  
26 as, or otherwise represented to be, pet food; and

27 Second, that the food was misbranded as described at 21 U.S.C.  
28 § 343(a) when so introduced or delivered into

1 interstate commerce, in that it was falsely labeled as  
2 "pet food" when it was actually intended for human  
3 consumption.

4 **4. Agreements by the Defendant**

5 (a) Defendant agrees that this Agreement shall be filed with the  
6 court and become a part of the record of the case.

7 (b) Defendant agrees to enter a plea of guilty to the  
8 Information which charges it with misdemeanor Introduction and  
9 Delivery for Introduction into Interstate Commerce of Misbranded  
10 Food, in violation of Title 21, United States Code, Sections 331(a)  
11 and 333(a)(1).

12 (c) Defendant agrees that, at or before the entry of plea  
13 proceeding, it will sign a written waiver of prosecution by  
14 indictment and will consent to proceed by information rather than by  
15 indictment.

16 (d) Defendant understands and agrees that it will not be  
17 allowed to withdraw its plea should the Court fail to follow the  
18 government's sentencing recommendations.

19 (e) Defendant expressly agrees that:

20 i. It will comply with the Federal Food, Drug, and  
21 Cosmetic Act, 21 U.S.C. § 301 *et seq.*, and the Public  
22 Health Service Act, 42 U.S.C. § 201 *et seq.*, and their  
23 implementing regulations, and with all federal, state,  
24 and local laws pertaining to unpasteurized raw milk  
25 and raw milk products;

26 ii. It will immediately cease introducing or causing to be  
27 introduced into interstate commerce, and cease  
28 delivering or causing to be delivered for introduction

1 into interstate commerce, any unpasteurized raw milk  
2 or raw milk products, as defined at 21 C.F.R.  
3 § 1240.3(i) and (j), including without limitation any  
4 products containing raw milk, regardless of how  
5 labeled, described, represented, or designated  
6 (hereafter, "unpasteurized raw milk or raw milk  
7 products"), unless specifically authorized in writing  
8 by the Federal Food and Drug Administration ("FDA") in  
9 advance of any such introduction or delivery for  
10 introduction into interstate commerce;

11 iii. Within fifteen (15) calendar days of entry of the  
12 guilty plea in this case: (i) defendant will provide  
13 notice in writing to all employees, agents, officers,  
14 and board members of ORGANIC PASTURES, instructing  
15 them to immediately cease offering to introduce,  
16 introducing, or causing to be introduced into  
17 interstate commerce, and to immediately cease  
18 delivering or causing to be delivered for introduction  
19 into interstate commerce, any unpasteurized raw milk  
20 or raw milk products, unless specifically authorized  
21 in writing by the FDA in advance of any such  
22 introduction or delivery for introduction into  
23 interstate commerce, and (ii) it will provide a copy  
24 of such written notice(s) to the United States  
25 Attorney's Office;

26 iv. Within thirty (30) calendar days of entry of the  
27 guilty plea in this case: (i) defendant will provide  
28 notice in writing to all out-of-state persons or

1 entities, including without limitation all customers,  
2 to whom ORGANIC PASTURES or any agent thereof, sold,  
3 delivered, or caused to be delivered any unpasteurized  
4 raw milk or raw milk products, within one year prior  
5 to the entry of the guilty plea in this case,  
6 confirming that ORGANIC PASTURES will immediately  
7 cease offering for introduction, introducing, or  
8 causing to be introduced into interstate commerce, and  
9 will immediately cease delivering or causing to be  
10 delivered for introduction into interstate commerce,  
11 any unpasteurized raw milk or raw milk products,  
12 unless specifically authorized in writing by the FDA  
13 in advance of any such introduction or delivery for  
14 introduction into interstate commerce, and (ii) it  
15 will provide a copy of such written notice(s) to the  
16 United States Attorney's Office;

17 v. Within fifteen (15) calendar days of entry of the  
18 guilty plea in this case, defendant will post a  
19 written notice on ORGANIC PASTURES' web site  
20 confirming that ORGANIC PASTURES will no longer offer  
21 for introduction, introduce, or cause to be introduced  
22 into interstate commerce, or deliver or cause to be  
23 delivered for introduction into interstate commerce,  
24 any unpasteurized raw milk or raw milk products,  
25 unless specifically authorized in writing by the FDA  
26 in advance of any such introduction or delivery for  
27 introduction into interstate commerce; and  
28

1 vi. Defendant will permit representatives of the FDA,  
2 without prior notice and as and when the FDA deems  
3 necessary, to make inspections of defendants' dairy  
4 operations, including any new locations. Such  
5 inspections may include the examination and copying of  
6 any sales or inventory records relating to any  
7 unpasteurized raw milk or raw milk products. Such  
8 inspections shall be permitted upon presentation of a  
9 copy of this Agreement and appropriate credentials.  
10 Such inspection authority granted by this Agreement is  
11 apart from, and in addition to, any FDA authority to  
12 make inspections under the Act, 21 U.S.C. § 374. Upon  
13 request by the United States, ORGANIC PASTURES shall  
14 also promptly provide to the United States any  
15 information and records regarding the out-of-state  
16 sale, shipment, and/or delivery of any unpasteurized  
17 raw milk or raw milk products.

18 (f) Defendant further understands and agrees that this  
19 Agreement does not address or limit, in any respect, any civil and/or  
20 regulatory claims of the United States or any agency thereof.

21 (g) Defendant agrees to cooperate fully with the United States  
22 for purposes of determining its compliance with the terms of this  
23 Agreement, and with any other federal, state, or local law  
24 enforcement agency, as directed by the United States. As used in  
25 this Plea Agreement, "cooperation" requires defendant: (1) to  
26 respond, through a duly authorized representative, truthfully and  
27 completely to all questions, whether in interviews, in  
28 correspondence, telephone conversations, before a grand jury, or at

1 any trial or other court proceeding; (2) to produce voluntarily any  
2 and all documents, records, or other tangible evidence requested by  
3 the United States; and (3) not to participate in any criminal  
4 activity while cooperating with the United States.

5 (h) Defendant knowingly and voluntarily waives its  
6 Constitutional and statutory rights to appeal its plea, conviction,  
7 and sentence. This waiver of appeal includes, but is not limited to,  
8 an express waiver of defendant's right to appeal its plea,  
9 conviction, and sentence on any ground, including the waiver of any  
10 appeal right conferred by 18 U.S.C. § 3742. Defendant further agrees  
11 not to contest its plea, conviction, or sentence in any post-  
12 conviction proceeding, including but not limited to a proceeding  
13 under 28 U.S.C. §§ 2241 or 2255.

14 (i) Defendant further acknowledges that its plea of guilty is  
15 voluntary and that no force, threats, promises or representations  
16 have been made to anybody, nor agreement reached, other than those  
17 set forth expressly in this agreement, to induce defendant to plead  
18 guilty.

19 (j) Defendant agrees to waive all rights under the "Hyde  
20 Amendment," Pub. L. No. 105-109, § 617, 111 Stat. 2519 (1997), to  
21 recover attorneys' fees or other litigation expenses in connection  
22 with the investigation and prosecution of all charges in the above-  
23 captioned matter and of any related allegations (including without  
24 limitation any charges to be dismissed pursuant to this Agreement and  
25 any charges previously dismissed).

26 **5. Agreements by the United States**

27 (a) In exchange for defendant's guilty plea and willingness to  
28 (i) acknowledge responsibility for its conduct and for the conduct of

1 ORGANIC PASTURES' agents and employees, as detailed in the Factual  
2 Basis; (ii) cooperate with the United States; (iii) demonstrate its  
3 future good conduct and full compliance with the Federal Food, Drug,  
4 and Cosmetic Act, 21 U.S.C. § 301 *et seq.*, and the Public Health  
5 Service Act, 41 U.S.C. § 201 *et seq.*, and their implementing  
6 regulations; and (iv) implement remedial measures, including without  
7 limitation the remedial measures listed in Section 4 above; the  
8 government agrees not to oppose defendant's request that sentencing  
9 in this matter be continued for twenty-four (24) months. If  
10 defendant abides by the conditions set forth in this Agreement, the  
11 United States will not oppose defendant's motion to withdraw the plea  
12 and will enter a *nolle prosequi* in the case at the time of  
13 sentencing.

14 (b) Except in the event of a breach of this Agreement, the  
15 United States agrees that it will not bring any additional charges  
16 against defendant arising from the facts, and within the time period,  
17 contained in the Factual Basis set forth in this Agreement.

18 Defendant understands and acknowledges that this Agreement does not  
19 relate to or cover any conduct by defendant other than the conduct  
20 set forth in the Factual Basis.

21 (c) Defendant acknowledges and understands that the United  
22 States makes no other representations to it.

23 **6. Breach of Agreement**

24 (a) Defendant agrees that if it fails to comply with any of the  
25 provisions of this Agreement, makes false or misleading statements  
26 before the Court, commits any further violations of the Federal Food,  
27 Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*, the Public Health  
28 Service Act, 41 U.S.C. § 201 *et seq.*, or their implementing



1 regulations, or attempts to withdraw the plea in a manner other than  
2 provided for in Section 5 above, the government will have the right  
3 to characterize such conduct as a breach of this Agreement.

4 Moreover, if during an investigation or prosecution defendant should  
5 commit any act of contempt, or obstruct justice, the government may  
6 prosecute it for these offenses to the fullest extent provided by  
7 law.

8 (b) In the event of a breach of this Agreement, (i) the  
9 government will be free from its obligations under the Agreement and  
10 may take whatever position it believes appropriate as to defendant's  
11 sentence (for example, should defendant commit any conduct after the  
12 date of this agreement that would form the basis for an increase in  
13 defendant's offense level or justify an upward departure - examples  
14 of which include, but are not limited to, obstruction of justice and  
15 criminal conduct while pending sentencing - the government is free  
16 under this Agreement to seek an increase in the offense level based  
17 on that post-Agreement conduct); (ii) defendant will not have the  
18 right to move to withdraw the guilty plea; (iii) defendant shall be  
19 fully subject to criminal prosecution for any other crimes which it  
20 has committed or might commit, if any, including but not limited to  
21 obstruction of justice; and (iv) the government will be free to use  
22 against defendant, directly and indirectly, in any criminal or civil  
23 proceeding, any of the information or materials provided by defendant  
24 pursuant to this Agreement.

25 (c) In the event of a dispute as to whether defendant has  
26 breached this Agreement, and if defendant so requests, the matter  
27 shall be submitted to the Court and shall be resolved by the Court in  
28 an appropriate proceeding at which any information provided to the

1 government prior to, during, or after the execution of the Agreement  
2 shall be admissible and at which the government shall have the burden  
3 to establish a breach by a preponderance of the evidence.

4 **7. Factual Basis**

5 Defendant will plead guilty because it is in fact guilty of the  
6 crimes set forth in Counts One and Two of the Information. Defendant  
7 also agrees that the following are the facts of this case, although  
8 it acknowledges that, as to other facts, the parties may disagree:

9 On October 10, 2007, one or more of defendant  
10 Organic Pastures' agents or employees, with the  
11 knowledge and consent of Organic Pastures, caused  
12 a box of raw milk and dairy products, labeled as  
13 or otherwise represented to be "pet food," to be  
14 sent by defendant Organic Pastures from Fresno,  
15 California to Renton, Washington, knowing that  
16 the intended use of such foods and/or dietary  
17 supplements was for human consumption. The box  
18 contained one ½ gallon of unpasteurized raw whole  
19 milk and one ½ gallon of unpasteurized raw Super  
20 Choco Colostrum. The invoice number was  
21 #356546557.

22 On October 16, 2007, one or more of defendant  
23 Organic Pastures' agents or employees, with the  
24 knowledge and consent of Organic Pastures, caused  
25 one box of raw milk and dairy products, labeled  
26 as or otherwise represented to be "pet food," to  
27 be sent by defendant Organic Pastures from  
28 Fresno, California to Reno, Nevada, knowing that  
the intended use of such foods and/or dietary  
supplements was for human consumption. The box  
contained one ½ gallon of unpasteurized raw whole  
milk and one pint of unpasteurized raw colostrum.  
The invoice number was #165465524.

These products were foods and/or dietary  
supplements, and were misbranded when so  
introduced into or delivered for introduction  
into interstate commerce, in that they were  
falsely and misleadingly labeled as, or otherwise  
represented to be "pet food," when they were  
actually intended for human consumption, in  
violation of Title 21, United States Code,  
Sections 331(a) and 333(a)(1).

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1           **8.    Potential Sentence**

2           The following is the maximum potential sentence that defendant  
3 faces:

4                   Count One:

5                   (a) Probation.

6                               Maximum: Five (5) years probation.

7                   (b) Fine.

8                               Maximum: Two Hundred Thousand Dollars (\$200,000.00).

9                   (c) Both such probation and fine.

10                   (d) Restitution - Mandatory.

11                   (e) Penalty Assessment.

12                               Mandatory: One Hundred Twenty-Five Dollars (\$125.00).

13                   Count Two:

14                   (a) Probation.

15                               Maximum: Five (5) years probation.

16                   (b) Fine.

17                               Maximum: Two hundred Thousand Dollars (\$200,000.00).

18                   (c) Both such probation and fine.

19                   (d) Restitution - Mandatory.

20                   (e) Penalty Assessment.

21                               Mandatory: One Hundred Twenty-Five Dollars (\$125.00).

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1           **9. Waiver of Rights**

2           (a) Defendant understands that by pleading guilty it is waiving  
3 certain rights, including the following: (i) to plead not guilty and  
4 to persist in that plea if already made; (ii) to have a trial at  
5 which it would be presumed not guilty of the charges and the United  
6 States would have to prove every essential element of the charged  
7 offense beyond a reasonable doubt for it to be found guilty; (iii) to  
8 be represented at trial by an attorney; (iv) to subpoena witnesses to  
9 testify on its behalf; and (v) to confront and cross-examine  
10 witnesses against it.

11           (b) If defendant ever attempts to vacate its plea, dismiss the  
12 underlying charges, or reduce or set aside its sentence on any  
13 count(s) to which it is pleading guilty (other than as provided in  
14 Section 5 above), the United States shall have the right (i) to  
15 prosecute defendant on any and all count(s) to which it pleaded  
16 guilty, (ii) to reinstate any counts that may be dismissed pursuant  
17 to this Agreement, and (iii) to file any new charges that would  
18 otherwise be barred by this Agreement. The decision to pursue any or  
19 all of these options is solely in the discretion of the United States  
20 Attorney's Office. By signing this Agreement, defendant agrees to  
21 waive any objections, motions, and defenses it might have to the  
22 government's decision. Defendant specifically agrees not to raise  
23 any objections based on the passage of time with respect to such  
24 counts including, but not limited to, any statutes of limitation or  
25 any objections based on the Speedy Trial Act or the Speedy Trial  
26 Clause of the Sixth Amendment.

27           (c) Defendant understands that by pleading guilty it is waiving  
28 all of the rights set forth above. Defendant acknowledges that its

1 attorney has explained to it those rights and the consequences of its  
2 waiver of such rights.

3 **10. Right to Counsel**

4 Defendant understands that it has a right to counsel throughout  
5 its case from its initial appearance through its trial or guilty  
6 plea, or any dismissal of the case against it, and through and  
7 including any sentencing. If not for the waiver of appeal rights in  
8 this Agreement, defendant would also have a right to counsel on a  
9 direct appeal in its case.

10 **11. Entire Agreement; Voluntary Plea**

11 (a) Other than this Agreement, no agreement, understanding,  
12 promise, or condition exists between the United States and defendant.  
13 Nor will any such agreement, understanding, promise, or condition  
14 exist unless it is committed to writing and signed by defendant,  
15 counsel for defendant, and counsel for the United States. This  
16 Agreement supersedes any prior promises, agreements, or conditions  
17 between the United States and defendant.

18 (b) This plea of guilty is freely and voluntarily made and is  
19 not the result of force or threats, or of any promises apart from  
20 those specifically set forth in this Agreement.

21 **12. Court not a Party**

22 (a) It is understood by the parties that the sentencing Court  
23 is neither a party to nor bound by this Agreement. Sentencing is a  
24 matter solely within the discretion of the Court. The Court is under  
25 no obligation to accept any recommendations made by the United  
26 States, and the Court may in its discretion impose any sentence it  
27 deems appropriate up to and including the statutory maximum set forth  
28 in Section 8 above.

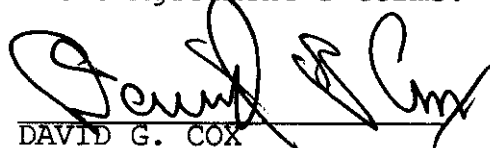
1 (b) Defendant understands that the Court must consult the  
2 Federal Sentencing Guidelines (as promulgated by the Sentencing  
3 Commission pursuant to the Sentencing Reform Act of 1984, 18 U.S.C.  
4 §§ 3551-3742 and 28 U.S.C. §§ 991-998, and as modified by United  
5 States v. Booker and United States v. Fanfan, 543 U.S. 220, 125  
6 S. Ct. 738 (2005)), and must take them into account when determining  
7 a final sentence. Defendant understands that the Court will  
8 determine a non-binding and advisory guideline sentencing range for  
9 this case pursuant to the Sentencing Guidelines. Defendant further  
10 understands that the Court will consider whether there is a basis for  
11 departure from the guideline sentencing range (either above or below  
12 the guideline sentencing range) because there exists an aggravating  
13 or mitigating circumstance of a kind, or to a degree, not adequately  
14 taken into consideration by the Sentencing Commission in formulating  
15 the Guidelines. Defendant further understands that the Court, after  
16 consultation and consideration of the Sentencing Guidelines, must  
17 impose a sentence that is reasonable in light of the factors set  
18 forth in 18 U.S.C. § 3553(a).

19 (c) In making its sentencing decision, the Court may take into  
20 consideration any and all facts and circumstances concerning the  
21 criminal activities of defendant, including activities which may not  
22 have been charged in the Information. If the Court should impose any  
23 sentence up to the statutory maximum, defendant understands that it  
24 cannot for that reason withdraw its guilty plea, and it will remain  
25 bound to fulfill all of the obligations under this Agreement.  
26 Defendant understands that neither the prosecutor, defense counsel,  
27 nor the Court can make or have made any promise regarding the  
28 sentence defendant will receive.




1 B. Defense Counsel: The undersigned is counsel for ORGANIC  
2 PASTURES DAIRY COMPANY LLC. In connection with such representation,  
3 I acknowledge that: (1) I have discussed this Agreement with my  
4 client; (2) I have fully explained each one of the Agreement's terms  
5 to my client; (3) I have fully answered each and every question put  
6 to me by my client regarding the Agreement; and (4) I believe my  
7 client completely understands all of the Agreement's terms.

8  
9 Dated: 11/26/08

  
10 DAVID G. COX  
11 LANE, ALTON & HORST LLC  
12 *David G. Cox hgw firm*  
13 Attorneys for Defendant  
14 Organic Pastures Dairy Company LLC  
15  
16  
17

18 C. Attorney for United States: I accept and agree to this  
19 Agreement on behalf of the government.

20 Dated: 12/19/08

21 MCGREGOR W. SCOTT  
22 United States Attorney  
23 By:   
24 MARK E. CULLERS  
25 KIRK E. SHERRIFF  
26 Assistant U.S. Attorneys  
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