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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 MACLAIN MULLINS, Individually and
17 on Behalf of All Others Similarly Situated,

18 Plaintiff,

19 v.

20 BIG HEART PET BRANDS, INC., a
21 Delaware corporation,

22 Defendant.

) Case No.

) **CLASS ACTION COMPLAINT FOR:**

-) (1) NEGLIGENT
-) MISREPRESENTATION;
-) (2) VIOLATIONS OF THE
-) CALIFORNIA CONSUMER LEGAL
-) REMEDIES ACT;
-) (3) VIOLATIONS OF THE
-) CALIFORNIA FALSE ADVERTISING
-) LAW;
-) (4) VIOLATIONS OF THE
-) CALIFORNIA UNFAIR COMPETITION
-) LAW;
-) (5) BREACH OF EXPRESS
-) WARRANTY; AND
-) (6) BREACH OF IMPLIED WARRANTY

26 DEMAND FOR JURY TRIAL

1 1. Plaintiff Maclain Mullins ("Plaintiff"), individually and on behalf of all
2 others similarly situated, by and through his undersigned attorneys, bring this Class Action
3 Complaint against defendant Big Heart Pet Brands, Inc. ("Defendant"), to cause Defendant
4 to disclose its pet food sold throughout the United States is adulterated and contains
5 pentobarbital and to restore monies to the consumers and businesses who purchased the
6 Contaminated Dog Foods (as defined herein) during the time that Defendant failed to make
7 such disclosures. Plaintiff alleges the following based upon personal knowledge as well as
8 investigation by his counsel and as to all other matters, upon information and belief
9 (Plaintiff believes that substantial evidentiary support will exist for the allegations set forth
10 herein after a reasonable opportunity for discovery).

11 **DEFENDANT'S CONTAMINATED DOG FOOD CONTAINS**
12 **PENTOBARBITAL, A SUBSTANCE LARGELY USED TO EUTHANIZE**
13 **ANIMALS**

14 2. Defendant manufactures, markets, advertises, labels, distributes, and sells
15 Gravy Train Chunks in Gravy with Beef Chunks, Gravy Train Chunks in Gravy with T-
16 Bone Flavor Chunks, Gravy Train Chunks in Gravy with Chicken Chunks, Gravy Train
17 Strips in Gravy Beef Strips and Gravy Train With Lamb & Rice Chunks (the
18 "Contaminated Dog Foods").¹ The Contaminated Dog Foods contain pentobarbital, a
19 barbiturate drug used as a sedative and anesthetic for animals. Pentobarbital is now most
20 commonly used to euthanizing dogs and cats.²

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24 _____
25 ¹ Discovery may reveal additional products that also contain Pentobarbital and Plaintiff reserves
their right to include any such products in this action.

26 ²Petplace, "Penobarbital for Dogs and Cats, July 16, 2015, [https://www.petplace.com/article/drug-](https://www.petplace.com/article/drug-library/drug-library/library/pentobarbital-for-dogs-and-cats/)
27 [library/drug-library/library/pentobarbital-for-dogs-and-cats/](https://www.petplace.com/article/drug-library/drug-library/library/pentobarbital-for-dogs-and-cats/)

1 3. Pentobarbital is a Class II controlled substance and there is no safe or set
2 level for pentobarbital in pet food. If it is present, the food is adulterated.³ The ingestion of
3 pentobarbital by your pet can lead to adverse health issues, including:

- 4 • tyalism (salivation)
- 5 • Emesis (vomiting)
- 6 • Stool changes (soft to liquid stools, blood, mucus, urgency, explosive
7 nature, etc.)
- 8 • Hyporexia (decreased appetite)
- 9 • Lethargy/depression
- 10 • Neurologic abnormalities (tremor, seizure, vocalization, unusual eye
11 movements)
- 12 • Ataxia (difficulty walking)
- 13 • Collapse
- 14 • Coma
- 15 • Death⁴

16 4. Despite laws governing pet foods and providing government oversight, the
17 FDA has stated that “[p]et food manufacturers are responsible for taking appropriate
18 steps to ensure that the food they produce is safe for consumption and properly labeled
19 including verifying the identity and safety of the ingredients from suppliers.⁵ “It is not
20 acceptable to use animals euthanized with a chemical substance in pet or other animal
21 foods...The detection of pentobarbital in pet food renders the product adulterated. It is the
22 responsibly of the manufacturer to take the appropriate steps to ensure that the food they
23 produce is safe for consumption and properly labeled.”⁶

24 ³<http://www.fda.gov/AnimalVeterinary/SafetyHealth/ProductSafetyInformation/ucm544348.htm>

25 ⁴The Honest Kitchen, “Pentobarbital- What Is It, How it Entered the Pet Food Supply Chain, and what You Can Do To Protect Your Canines & Felines,” March 1, 2017, <https://www.thehonestkitchen.com/blog/pentobarbital-entered-pet-food-supply-chain-can-protect-pet/>

26 ⁵<https://www.fda.gov/AnimalVeterinary/SafetyHealth/ProductSafetyInformation/ucm544348.htm> (last visited Feb. 5, 2018)

27 ⁶ *Id.*

1 5. Pentobarbital residue from euthanized animals will continue to be present in
2 pet food, even if it is rendered or canned at high temperature or pressure.⁷

3 6. Pentobarbital is routinely used to euthanize animals, and the most likely way
4 it could get into dog food would be in rendered animal products. Rendered products come
5 from a process that converts animal tissues to feed ingredients, including tissues from
6 animals that have been euthanized, decomposed or were diseased. Pentobarbital from
7 euthanized animals survives the rendering process and could be present in the rendered
8 feed ingredients used in pet food. The FDA's testing of dry dog food confirmed some
9 samples contained pentobarbital. The FDA concluded that pentobarbital was entering pet
10 foods from euthanized, rendered cattle or horses because of the lack of dog and cat DNA.

11 7. Despite its findings, the FDA has not aggressively taken action under FDCA,
12 § 342 (a)(1) or (5), against the pet food companies that it found to have used non-
13 slaughtered animals and contain pentobarbital in their pet foods. Therefore, manufacturers
14 in the pet food industry, including Defendant, have continued their illegal practice of using
15 non-slaughtered animals that may contain poisonous substances, like pentobarbital, in their
16 pet foods.⁸It is not acceptable to use animals euthanized with a chemical substance in pet
17 food, and the detection of pentobarbital in pet food renders the product adulterated.

18 8. Here, it has been revealed that Defendant is also knowingly, recklessly and/or
19 negligently selling contaminated dog food containing pentobarbital, a substance largely
20 used to euthanize animals.

21 9. On February 8, 2018, it was reported on WJLA that an independent
22 investigation determined that the Contaminated Dog Foods contained pentobarbital. The
23 independent investigation utilized two independent labs and both showed the inclusion of
24 pentobarbital the Contaminated Dog Foods.

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26 _____
27 ⁷ *Id.*
28

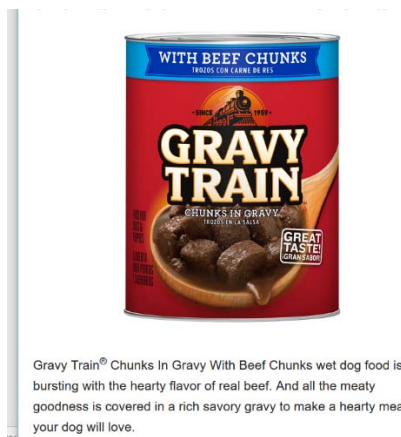
1 10. Defendant knew the real risk that pentobarbital may appear in the
2 Contaminated Dog Foods if the manufacturing and sourcing were not properly monitored.
3 Indeed, this is not the first time that the Gravy Train line of food has been determined to
4 include pentobarbital: “Back in 2001, [analyses by the FDA](#) found residue of the sedative
5 in popular brands like Nutro, Gravy Train and Kibbles ‘n Bits.”⁹

6 11. Consumers have increasingly become more aware and cautious about the
7 products they purchase.

8 12. Additionally, Defendant knew that a consumer would be feeding the
9 Contaminated Dog Foods multiple times each day to his or her dog. This leads to repeated
10 exposure of the barbiturate to the dog.

11 13. Defendant wrongfully advertised and sold the Contaminated Dog Foods
12 without any label or warning indicating to consumers that these products contained any
13 level of Pentobarbital or that Defendant utilized animals that have been euthanized as a
14 protein or meat by-product source.

15 14. Instead, the advertising and labels intentionally omit any reference to the
16 food being adulterated:



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25 ⁹ [https://www.care2.com/causes/fda-says-pet-food-company-cannot-donate-](https://www.care2.com/causes/fda-says-pet-food-company-cannot-donate-recalled-products-to-shelter.html)
26 [recalled-products-to-shelter.html](https://www.care2.com/causes/fda-says-pet-food-company-cannot-donate-recalled-products-to-shelter.html)

1 15. Defendant’s claim that the Contaminated Dog Foods are “100 percent
2 complete and balanced nutrition” without any mention that the Contaminated Dog Foods
3 are in fact adulterated and contain Pentobarbital.¹⁰

ABOUT THIS ITEM

Disclaimer: While we aim to provide accurate product information, it is provided by manufacturers, suppliers and others, and has not been verified by us. See our [disclaimer](#).

Serve your four legged friend a deliciously hearty meal with Gravy Train Chunks In Gravy with T-Bone Flavor Chunks Wet Dog Food. Each mouthwatering bite has the flavor of T-Bone steak and all the meaty goodness is covered in a savory gravy that dogs love. This gravy train dog food offers a satisfying meal that provides 100 percent complete and balanced nutrition for all life stages. Feed it to your furry friend as a reward for good behavior or learning a new trick or serve it as a regular meal. Gravy Train Chunks In Gravy with T-Bone Flavor Chunks Wet Dog Food comes in a 13.2 oz can.

10 16. Defendant’s’ omissions are not only material but also false, misleading, and
11 reasonably likely to deceive the public. This is true especially in light of the long-standing
12 campaign by Defendant to market all its products, including the Contaminated Dog Foods
13 and "providing safe, healthy, and high quality food” with the as healthy and safe with “the
14 purest ingredients”¹¹

15 17. Moreover, Defendant’s Corporate Responsibility Policy says the top priority
16 is the “safety and quality” of its products: ¹²

Pet food safety and quality. Big Heart Pet Brands top priority is the safety and quality of our products. Our goal is to produce the finest pet food products available on the market today. All of our products are made under a system of strict food safety and quality controls combined with ongoing inspection and monitoring. All of our programs are designed to exceed the Global Food Safety Initiative standards. Our products are made with nutritious, quality ingredients that meet the applicable standards and specifications of the U.S. Department of Agriculture (USDA), Association of American Feed Control Officials (AAFCO) and the Food & Drug Administration (FDA). Each of our products is processed and packaged following strict food safety and quality control procedures that comply with the Good Manufacturing Practices established by the FDA. These procedures ensure that the resulting food will be pure, wholesome and safe for pets.

23 ¹⁰Walmart, Gravy Train T-Bone Flavor Wet Dog Food,
24 <https://www.walmart.com/ip/Gravy-Train-T-Bone-Flavor-Wet-Dog-Food-13-2-Oz/44465093#read-more>

25 ¹¹Big Heart Pet Brands, “Pets,” <http://www.bigheartpet.com/corporate-responsibility/pets.aspx>

26 ¹²
27 Corporate Responsibility Policy,” [http://www.bigheartpet.com/assets/CR-](http://www.bigheartpet.com/assets/CR-Policy.pdf)
28 Policy.pdf

1 18. In this same document, Defendant claims that it has a “rigorous supplier
2 approval process” and only purchases ingredients from “reputable suppliers.” And
3 Defendant goes further to declare, that once a supplier is approved, “a comprehensive
4 testing program is in place to assess the safety and quality of the ingredients upon receipt.
5 This includes a combination of laboratory analysis and physical inspection of the
6 ingredients.”¹³

7 19. Finally, Defendant highlights the strict oversight it supposedly applies across
8 all its brands, include Gravy Train, to ensure high quality products “from start to finish,
9 inside and out:”¹⁴

10
11 We apply the same expectations of quality that we
12 hold for ourselves to our suppliers. Our supplier
13 management program includes an extensive evaluation
14 of manufacturing locations and a comprehensive testing
15 program that is used to assess the safety and quality
16 of ingredients upon receipt. This program includes
17 a combination of laboratory analysis and physical
18 inspection.

19
20 Through rigorous commitment to the quality of our
21 products—from start to finish, inside and out—Big Heart
22 Pet Brands is able to nurture the bond between pets and
23 the people who love them.

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25 20. Defendant’s advertising campaign is deceptive by using these descriptions,
26 promises, and representations because there was no label or warning indicating to
27 consumers that these products contained any level of Pentobarbital or that Defendant
28 utilized animals that have been euthanized as a protein or meat by-product source.
Defendant's statements, partial disclosures, and omissions are false, misleading, and crafted
to deceive the public as they create an image that the Contaminated Dog Foods are healthy,
safe, have only pure ingredients and is manufactured under rigorous standards.

25 _____
26 ¹³ *Id.*

27 ¹⁴Big Heart Pet Brands, “Corporate Responsibility Summary
28 2014,” <http://www.bigheartpet.com/assets/CorporateResponsibilitySummaryBrochure2014.pdf>

1 21. Moreover, a reasonable consumer, such as Plaintiff and other members of the
 2 Class (as defined herein), would have no reason to expect and anticipate that the
 3 Contaminated Dog Foods are made up of anything other than pure ingredients from
 4 reputable suppliers and that quality is the top priority as promised by Defendant. Non-
 5 disclosure and concealment of any level of Pentobarbital or utilization of animals that have
 6 been euthanized as a protein or meat by-product source in the Contaminated Dog Foods
 7 coupled with the partial disclosures and/or misrepresentations that the food is pure, quality,
 8 healthy and safe by Defendant is intended to and does, in fact, cause consumers to purchase
 9 a product Plaintiff and Class members would not have bought if the true quality and
 10 ingredients were disclosed, including that the fact the Contaminated Dog Foods are
 11 adulterated. As a result of these false statements, omissions, and concealment, Defendant
 12 has generated substantial sales of the Contaminated Dog Foods.

13 22. Plaintiff brings this action individually and on behalf of all other similarly
 14 situated consumers within the United States who purchased the Contaminated Dog Foods,
 15 in order to cause the disclosure of the inclusion of Pentobarbital and/or the utilization of
 16 euthanized animals as a protein or meat by-product source in the Contaminated Dog Foods,
 17 to correct the false and misleading perception Defendant has created in the minds of
 18 consumers that the Contaminated Dog Foods are high quality, safe, and healthy and to
 19 obtain redress for those who have purchased the Contaminated Dog Foods.

20 **JURISDICTION AND VENUE**

21 23. This Court has original jurisdiction over all causes of action asserted herein
 22 under the Class Action Fairness Act, 28 U.S.C. §1332(d)(2), because the matter in
 23 controversy exceeds the sum or value of \$5,000,000 exclusive of interest and costs and
 24 more than two-thirds of the Class reside in states other than the states in which Defendant
 25 is a citizen and in which this case is filed, and therefore any exemptions to jurisdiction
 26 under 28 U.S.C. §1332(d) do not apply.

27 24. Venue is proper in this Court pursuant to 28 U.S.C. §1391, because Plaintiff
 28 suffered injury as a result of Defendant's acts in this district, many of the acts and

1 transactions giving rise to this action occurred in this district, Defendant conducts
2 substantial business in this district, Defendant has intentionally availed themselves of the
3 laws and markets of this district, and Defendant is subject to personal jurisdiction in this
4 district.

5 **INTRADISTRICT ASSIGNMENT**

6 25. A substantial portion of the transactions and wrongdoings which gave rise to
7 the claims in this action occurred in the County of Marin, and as such, this action is properly
8 assigned to the San Francisco division of this Court.

9 **THE PARTIES**

10 26. Plaintiff Maclain Mullins ("Mullins") is, and at all times relevant hereto has
11 been, a citizen of the state of Kentucky. Plaintiff Mullins purchased certain lines of the
12 Contaminated Dog Foods (including Gravy Train Chunks in Gravy and Chunks in Gravy
13 with Beef Chunks) and fed it to his Boxer named Cawood. Plaintiff Mullins started
14 purchasing the Contaminated Dog Foods in or around January 2009 approximately ten to
15 twenty times a year and continued to purchase until approximately January 2015. Plaintiff
16 Mullins also fed Cawood Gravy Train dry food. Plaintiff primarily purchased the
17 Contaminated Dog Foods from Heartland Kroger in Lexington, Kentucky. During that
18 time, based on the false and misleading claims, warranties, representations, advertisements
19 and other marketing by Defendant, Plaintiff was unaware that the Contaminated Dog Foods
20 contained any level of Pentobarbital, a substance largely used to euthanize animals.

21 27. As the result of Defendant's deceptive and negligent conduct as alleged
22 herein, Plaintiff was injured when he purchased the Contaminated Dog Foods that did not
23 deliver what it promised and did business with a Company he would not have if he knew
24 that the Contaminated Dog Foods contained any level of Pentobarbital or that Defendant
25 utilized animals that have been euthanized as a protein source. He purchased the
26 adulterated Contaminated Dog Foods on the assumption that the labeling of the
27 Contaminated Dog Foods was accurate and that it was unadulterated, pure, high quality,
28 healthy and safe for dogs to ingest and did not include euthanized animals as a protein

1 source. Further, should Plaintiff encounter the Contaminated Dog Foods in the future, he
2 could not rely on the truthfulness of the packaging, absent corrective changes to the
3 packaging and advertising of the Contaminated Dog Foods.

4 28. Defendant Big Heart Pet Brands, Inc, is a subsidiary of J.M. Smucker
5 Company and its headquarters are located at One Maritime Plaza, San Francisco,
6 California. Defendant that manufactures, formulates, produces, distributes, labels,
7 markets, advertises, and sells the Contaminated Dog Foods under the Gravy Train dog food
8 brand name throughout the United States. The advertising for the Contaminated Dog
9 Foods, relied upon by Plaintiff, was prepared and/or approved by Defendant and their
10 agents, and was disseminated by Defendant and its agents through advertising and labeling
11 that contained the misrepresentations and omissions alleged herein. The advertising and
12 labeling for the Contaminated Dog Foods was designed to encourage consumers to
13 purchase the Contaminated Dog Foods and reasonably misled the reasonable consumer,
14 i.e., Plaintiff and the Class, into purchasing the Contaminated Dog Foods. Defendant owns,
15 manufactures, and distributes the Contaminated Dog Foods, and created and/or authorized
16 the unlawful, fraudulent, unfair, misleading, and/or deceptive labeling and advertising for
17 the Contaminated Dog Foods.

18 29. The Contaminated Dog Foods, at a minimum, include:

19 (a) Gravy Train Chunks in Gravy with Beef Chunks:



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(b) Gravy Train Chunks in Gravy with T-Bone Flavor Chunks:



(c) Gravy Train Chunks in Gravy with Chicken Chunks:



(d) Gravy Train Strips in Gravy Beef Strips:



(e) Gravy Train Chunks in Gravy with Lamb and Rice Chunks:



FACTUAL ALLEGATIONS

The Contaminated Dog Foods Are Adulterated

30. An independent seven month investigation determined that the Contaminated Dog Foods contained pentobarbital. The independent investigation utilized two different labs and both showed that the Contaminated Dog Foods tested positive for pentobarbital. In fact, it was the only brand that tested positive for pentobarbital.¹⁵

31. The report further stated that pentobarbital is not used on farm animals so if it is not from euthanized dogs, cats or horses, where is the pentobarbital coming from. Defendant has not responded to the specific questions raised and instead stated: “We launched and are conducting a thorough investigation, including working closely with our suppliers, to determine the accuracy of these results and the methodology used.”¹⁶

32. The FDA has not responded to the findings as disclosed by WJLA.

¹⁵<http://wjla.com/features/7-on-your-side/fda-to-investigate-after-abc7-exposes-euthanasia-drug-in-dog-food>

¹⁶ *Id.*

1 **Defendant Falsely Advertises the Contaminated Dog Foods as Pure, Quality, Healthy**
2 **While Omitting Any That it is Adulterated with Pentobarbital**

3 33. Defendant formulates, develops, manufactures, labels, distributes, markets,
4 advertises, and sells its extensive Gravy Train lines of dry and wet pet food products in
5 California and across the United States. Indeed, Defendant maintains it keeps rigorous
6 quality and supplier standards from “start to finish” and performs three-tier auditing that
7 includes, third party auditors, to ensure pure ingredients and fair labor are used in its
8 Products, including Contaminated Dog Foods. As such, Defendant knew that the
9 Contaminated Dog Foods were adulterated pet food.¹⁷

10 34. Defendant chose to advertise, label, and market its Contaminated Dog Foods
11 with no disclosure that it was adulterated pet food, contained any level of Pentobarbital,
12 and instead advertised, labeled, and marketed its Products, including the Contaminated
13 Dog Foods, as pure, high quality, healthy and safe for dogs to ingest and failed to mention
14 that the Contaminated Dog Foods contain pentobarbital. The Contaminated Dog Foods
15 are available at numerous retail and online outlets.

16 35. In fact, Defendant made affirmative misleading representations that its
17 Products, including the Contaminated Dog Foods, were not adulterated or would contain
18 any controlled substance, including Pentobarbital. Specifically, Defendant promises to its
19 consumers that all produces meets USDA, AAFCO and FDA standards.¹⁸

20 36. This is untrue as the Contaminated Dog Foods are adulterated which is not
21 proper under state and federal laws and regulations. Specifically, under the FDCA, a food
22 is adulterated if it “bears or contains any poisonous or deleterious substance which may
23 render it injurious to health.” 21 U.S.C. §342. Under California law, pet food is considered
24 adulterated if “it bears or contains any poisonous or deleterious substance that may render
25 it injurious to health...” or “if damage or inferiority has been concealed in any manner.”

26 _____
27 ¹⁷ <http://www.bigheartpet.com/assets/CR-Policy.pdf>

28 ¹⁸ <http://www.bigheartpet.com/assets/CR-Policy.pdf>

1 Cal. Health & Safety Code §113090(a), (h). California’s statute also provides that pet food
2 ingredients “of animal or poultry origin shall be only from animals or poultry slaughtered
3 or processed in an approved or licensed establishment... Animal or poultry classified as
4 ‘deads’ are prohibited.” Cal. Health & Safety Code §113035.

5 37. The Contaminated Dog Foods are widely advertised.

6 38. The Defendant's webpage and adopted corporate policies repeatedly make
7 the misleading statements about the Contaminated Dog Foods described above, without
8 any mention of Pentobarbital, a substance largely used to euthanize animals or that
9 Defendant utilized animals that have been euthanized as a protein or meat by-product
10 source.

11 39. As a result of Defendant's omissions and misrepresentations, a reasonable
12 consumer would have no reason to suspect the presence of Pentobarbital without
13 conducting his or her own scientific tests, or reviewing third-party scientific testing of these
14 products.

15 **DEFENDANT'S STATEMENTS AND**
16 **OMISSIONS VIOLATE CALIFORNIA LAWS**

17 40. California law is designed to ensure that a company's claims about its
18 products are truthful and accurate. Defendant violated California law by incorrectly
19 claiming that the Contaminated Dog Foods are pure, healthy, quality, and safe and offers
20 100 percent complete and balanced nutrition with the purest ingredients while meeting all
21 relevant federal regulations when in fact it is adulterated food that contains a controlled
22 substance that is not healthy, quality or pure and causes the product not to meet the so-
23 called rigorous supplier standards utilized by Defendant. Indeed, Defendant chose to omit
24 that that the Contaminated Dog Foods were adulterated, contained Pentobarbital and/or
25 that Defendant utilized animals that have been euthanized as a protein source in the
26 Contaminated Dog Foods.

27 41. Defendant's marketing and advertising campaign has been sufficiently
28 lengthy in duration, and widespread in dissemination.

1 42. Defendant has engaged in this long-term advertising campaign to convince
2 potential customers that the Contaminated Dog Foods are pure, quality, healthy, and safe
3 for consumption and offers 100 percent complete and balanced nutrition with the purest
4 ingredients.

5 **PLAINTIFF'S RELIANCE WAS**
6 **REASONABLE AND FORESEEN BY DEFENDANT**

7 43. Plaintiff reasonably relied on Defendant's own statements,
8 misrepresentations, omissions and advertising concerning the particular qualities and
9 benefits of the Contaminated Dog Foods.

10 44. Plaintiff read and relied upon the labels of the Contaminated Dog Foods in
11 making his purchasing decisions.

12 45. A reasonable consumer would consider the labeling of a product when
13 deciding whether to purchase. Here, Plaintiff relied on the specific statements and
14 misrepresentations by Defendant did not disclose that the Contaminated Dog Foods were
15 adulterated or contained Pentobarbital, a substance largely used to euthanize animals.

16 **DEFENDANT'S KNOWLEDGE AND NOTICE OF THEIR BREACHES**
17 **OF ITS EXPRESS AND IMPLIED WARRANTIES**

18 46. Defendant had sufficient notice of its breaches of express and implied
19 warranties. Defendant have, and had, exclusive knowledge of the physical and chemical
20 make-up of the Contaminated Dog Foods.

21 47. Defendant also had notice of the real risk that pentobarbital may appear in
22 the Contaminated Dog Foods if the manufacturing and sourcing were not properly
23 monitored. Indeed, this is not the first time that the Gravy Train line of food has been
24 determined to include pentobarbital.¹⁹

25 ¹⁹ [https://www.care2.com/causes/fda-says-pet-food-company-cannot-donate-
26 recalled-products-to-shelter.html](https://www.care2.com/causes/fda-says-pet-food-company-cannot-donate-recalled-products-to-shelter.html)

PRIVITY EXISTS WITH PLAINTIFFS AND THE PROPOSED CLASS

48. Defendant knew that consumers such as Plaintiff and the proposed Class would be the end purchasers of the Contaminated Dog Foods and the target of its advertising and statements.

49. Defendant intended that the advertising, labeling, statements, and representations would be considered by the end purchasers of the Contaminated Dog Foods, including Plaintiff and the proposed Class.

50. Defendant directly marketed to Plaintiff and the proposed Class through statements on its website, labeling, advertising, and packaging.

51. Plaintiff and the proposed Class are the intended beneficiaries of the expressed and implied warranties.

CLASS ACTION ALLEGATIONS

52. Plaintiffs bring this action individually and on behalf of the following Class pursuant to Rule 23(a) and 23(b)(2) and (3) of the Federal Rules of Civil Procedure:

All persons who are citizens of the United States who, from February 1, 2008 to the present, purchased the Contaminated Dog Foods for household or business use, and not for resale (the "Class").

53. Excluded from the Class are the Defendant, any parent companies, subsidiaries, and/or affiliates, officers, directors, legal representatives, employees, co-conspirators, all governmental entities, and any judge, justice, or judicial officer presiding over this matter.

54. This action is brought and may be properly maintained as a class action. There is a well-defined community of interests in this litigation and the members of the Class are easily ascertainable.

55. The members in the proposed Class are so numerous that individual joinder of all members is impracticable, and the disposition of the claims of all Class members in a single action will provide substantial benefits to the parties and Court.

1 56. Questions of law and fact common to Plaintiffs and the Class and Class
2 include, but are not limited to, the following:

3 (a) whether Defendant owed a duty of care to the Class;
4 (b) whether Defendant knew or should have known that the Contaminated
5 Dog Foods were adulterated or contained Pentobarbital;

6 (c) whether Defendant represented and continue to represent that the
7 Contaminated Dog Foods are healthy, quality, pure and safe;

8 (d) whether Defendant represented and continue to represent that the
9 Contaminated Dog Foods are manufactured in compliance with all governing regulations;

10 (e) whether Defendant failed to state that the Contaminated Dog Foods
11 are in fact adulterated under Federal and California law;

12 (f) whether Defendant's representations and omissions in advertising
13 and/or labeling are false, deceptive, and misleading;

14 (g) whether those representations and omissions are likely to deceive a
15 reasonable consumer;

16 (h) whether Defendant had knowledge that those representations and
17 omissions were false, deceptive, and misleading;

18 (i) whether Defendant continues to disseminate those representations and
19 omissions despite knowledge that the representations are false, deceptive, and misleading;

20 (j) whether a representation that a product is healthy, pure, quality and
21 safe for consumption coupled with omissions that the Contaminated Dog Foods were
22 adulterated or contained Pentobarbital is material to a reasonable consumer;

23 (k) whether Defendant violated California Business & Professions Code
24 sections 17200, *et seq.*;

25 (l) whether Defendant violated California Business & Professions Code
26 sections 17500, *et seq.*;

27 (m) whether Defendant violated California Civil Code sections 1750, *et*
28 *seq.*;

1 (n) whether Plaintiff and the members of the Class are entitled to actual,
2 statutory, and punitive damages; and

3 (o) whether Plaintiff and members of the Class are entitled to declaratory
4 and injunctive relief.

5 57. Defendant engaged in a common course of conduct giving rise to the legal
6 rights sought to be enforced by Plaintiff individually and on behalf of the other members
7 of the Class. Identical statutory violations and business practices and harms are involved.
8 Individual questions, if any, are not prevalent in comparison to the numerous common
9 questions that dominate this action.

10 58. Plaintiff's claims are typical of Class members' claims in that they are based
11 on the same underlying facts, events, and circumstances relating to Defendant's conduct.

12 59. Plaintiff will fairly and adequately represent and protect the interests of the
13 Class, have no interests incompatible with the interests of the Class, and have retained
14 counsel competent and experienced in class action, consumer protection, and false
15 advertising litigation.

16 60. Class treatment is superior to other options for resolution of the controversy
17 because the relief sought for each Class member is small such that, absent representative
18 litigation, it would be infeasible for Class members to redress the wrongs done to them.

19 61. Questions of law and fact common to the Class predominate over any
20 questions affecting only individual Class members.

21 62. As a result of the foregoing, class treatment is appropriate.

22 **COUNT I**

23 **(Negligent Misrepresentation Against Defendant on Behalf of the Class)**

24 63. Plaintiff incorporates by reference and realleges each and every allegation
25 contained above, as though fully set forth herein.

26 64. Plaintiff reasonably placed his trust and reliance in Defendant's
27 representations that the Contaminated Dog Foods are healthy, safe, pure, high quality, and
28 that it was not adulterated with substances such as Pentobarbital.

1 74. Defendant is a "person" as that term is defined in California Civil Code
2 section 1761(c).

3 75. Plaintiff and each proposed Class member's purchase of Defendant's
4 products constituted a "transaction," as that term is defined in California Civil Code section
5 1761(e).

6 76. Defendant's conduct alleged herein violates the following provisions of
7 California's Consumer Legal Remedies Act (the "CLRA"):

8 77. California Civil Code section 1770(a)(5), by representing that the
9 Contaminated Dog Foods are pure, quality, healthy and safe for consumption and by failing
10 to make any mention that the Contaminated Dog Foods were in fact adulterated by
11 containing the controlled substance of Pentobarbital

12 78. California Civil Code section 1770(a)(7), by representing that the
13 Contaminated Dog Foods were of a particular standard, quality, or grade, when they were
14 in fact adulterated and not fit for consumption;

15 (a) California Civil Code section 1770(a)(9), by advertising the
16 Contaminated Dog Foods with intent not to sell them as advertised; and

17 (b) California Civil Code section 1770(a)(16), by representing that the
18 Contaminated Dog Foods have been supplied in accordance with previous representations
19 when they have not.

20 79. As a direct and proximate result of these violations, Plaintiff and the Class
21 have been harmed, and that harm will continue unless Defendant is enjoined from using
22 the misleading marketing described herein in any manner in connection with the
23 advertising and sale of the Contaminated Dog Foods.

24 80. Plaintiff seeks an award of attorney's fees pursuant to, inter alia, California
25 Civil Code section 1780(e) and California Code of Civil Procedure section 1021.5.

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COUNT III

(Violations of California False Advertising Law, California Business & Professions Code §§17500, *Et Seq.*, Against Defendant on Behalf of the Class)

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4 81. Plaintiff incorporates by reference and realleges each and every allegation
5 contained above, as though fully set forth herein.

6 82. California's False Advertising Law prohibits any statement in connection
7 with the sale of goods "which is untrue or misleading." Cal. Bus. & Prof. Code §17500.

8 83. As set forth herein, Defendant's claims that the Contaminated Dog Foods are
9 healthy and safe for consumption are literally false and likely to deceive the public.

10 84. Defendant's claims that the Contaminated Dog Foods are pure, quality,
11 healthy and safe for consumption are untrue or misleading because these claims fail to
12 disclose that the Contaminated Dog Foods were in fact adulterated by containing the
13 controlled substance of Pentobarbital.

14 85. Defendant's claim that the Contaminated Dog Foods are 100 percent
15 complete and balanced nutrition are untrue or misleading because it fails to disclose that
16 the Contaminated Dog Foods were in fact adulterated by containing the controlled
17 substance of Pentobarbital.

18 86. Defendant knew, or reasonably should have known, that the claims were
19 untrue or misleading.

20 87. Defendant's conduct is ongoing and continuing, such that prospective
21 injunctive relief is necessary, especially given Plaintiff's desire to purchase these products
22 in the future if they can be assured that, so long as the Contaminated Dog Foods are, as
23 properly unadulterated pet food and meets the advertising claims.

24 88. Plaintiff and members of the Class are entitled to injunctive and equitable
25 relief, and restitution in the amount they spent on the Contaminated Dog Foods.

COUNT IV

(Violations of the Unfair Competition Law, California Business & Professions Code §§17200, *Et Seq.*, Against Defendant on Behalf of the Class)

89. Plaintiffs incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

90. The Unfair Competition Law prohibits any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code §17200.

Fraudulent

91. Defendant's statements that the Contaminated Dog Foods are pure, quality healthy, safe and are 100 percent complete and balance nutrition are literally false and likely to deceive the public, as is Defendant's failing to make any mention that the Contaminated Dog Foods are adulterated and contain Pentobarbital.

Unlawful

92. As alleged herein, Defendant has sold advertised the adulterated Contaminated Dog Foods with false or misleading claims, such that Defendant's actions as alleged herein violate at least the following laws:

- The CLRA, California Business & Professions Code sections 1750, *et seq.*;
- and
- The False Advertising Law, California Business & Professions Code sections 17500, *et seq.*

Unfair

93. Defendant's conduct with respect to the labeling, advertising, marketing, and sale of the Contaminated Dog Foods is unfair because Defendant's conduct was immoral, unethical, unscrupulous, or substantially injurious to consumers and the utility of its conduct, if any, does not outweigh the gravity of the harm to its victims.

94. Defendant's conduct with respect to the labeling, advertising, marketing, and sale of the Contaminated Dog Foods is also unfair because it violates public policy as

1 declared by specific constitutional, statutory, or regulatory provisions, including, but not
2 limited to, the False Advertising Law and the CLRA.

3 95. Defendant's conduct with respect to the labeling, advertising, marketing, and
4 sale of the Contaminated Dog Foods is also unfair because the consumer injury is
5 substantial, not outweighed by benefits to consumers or competition, and not one
6 consumers, themselves, can reasonably avoid.

7 96. In accordance with California Business & Professions Code section 17203,
8 Plaintiff seeks an order enjoining Defendant from continuing to conduct business through
9 fraudulent or unlawful acts and practices and to commence a corrective advertising
10 campaign. Defendant's conduct is ongoing and continuing, such that prospective
11 injunctive relief is necessary.

12 97. On behalf of himself and the Class, Plaintiff also seeks an order for the
13 restitution of all monies from the sale the Contaminated Dog Foods, which were unjustly
14 acquired through acts of fraudulent, unfair, or unlawful competition.

15 **COUNT V**

16 **(Breach of Express Warranty, California Commercial Code §2313,**
17 **Against Defendant on Behalf of the Class)**

18 98. Plaintiff incorporates by reference and realleges each and every allegation
19 contained above, as though fully set forth herein.

20 99. As set forth herein, Defendant made express representations to Plaintiff and
21 the Class that the Contaminated Dog Foods are pure, quality, healthy and safe for
22 consumption and are 100 percent complete and balanced nutrition.

23 100. Defendant also made express representations to Plaintiff and the Class that
24 the Contaminated Dog Foods meet all applicable regulations, including that they are not
25 adulterated dog food by allowing their sale in various stores throughout the United States.

26 101. These promises became part of the basis of the bargain between the parties
27 and thus constituted express warranties.

28 102. There was a sale of goods from Defendant to Plaintiff and the Class members.

1 103. On the basis of these express warranties, Defendant sold to Plaintiff and the
2 Class the Contaminated Dog Foods.

3 104. Defendant knowingly breached the express warranties by selling the
4 Contaminated Dog Foods which are adulterated and contain Pentobarbital.

5 105. Defendant was on notice of this breach as it was aware of Pentobarbital
6 and/or the use of euthanized animals as a protein or meat by-product source in the
7 Contaminated Dog Foods.

8 106. Privity exists because Defendant expressly warranted to Plaintiff and the
9 Class that the Contaminated Dog Foods were pure, quality, healthy and safe for
10 consumption and are 100 percent complete and balanced nutrition and also that it is
11 unadulterated.

12 107. Plaintiff and the Class reasonably relied on the express warranties by
13 Defendant.

14 108. As a result of Defendant's breaches of their express warranties, Plaintiff and
15 the Class sustained damages as they paid money for the Contaminated Dog Foods that were
16 not what Defendant represented and in fact not properly sold under applicable regulations
17 and law

18 109. Plaintiff on behalf of himself and the Class, seeks actual damages for
19 Defendant's breach of warranty.

20 **COUNT VI**

21 **(Breach of Implied Warranty, California Commercial Code**
22 **§2314, Against Defendant on Behalf of the Class)**

23 110. Plaintiff incorporates by reference and realleges each and every allegation
24 contained above, as though fully set forth herein.

25 111. As set forth herein, the Contaminated Dog Foods are not fit for the ordinary
26 purposes as they were adulterated or similarly contaminated under California Health &
27 Safety Code §§ 113075 and 113090 (prohibiting “manufacture” of pet food that is
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1 “adulterated” because it contains “poisonous or deleterious substance[s]”) and 113095
2 (prohibiting “false or misleading” labeling) as alleged herein.

3 112. Defendant is a merchant engaging in the sale of goods to Plaintiff and the
4 Class.

5 113. There was a sale of goods from Defendant to Plaintiff and the Class members.

6 114. Defendant breached the implied warranties by selling the Contaminated Dog
7 Foods were not fit for their ordinary purpose as adulterated dog food that contains
8 Pentobarbital.

9 115. Defendant was on notice of this breach as it was aware of the presence of
10 Pentobarbital and/or the use of euthanized animals as a protein or meat by-product source
11 in the Contaminated Dog Foods.

12 116. Privity exists because Defendant impliedly warranted to Plaintiff and the
13 Class that the Contaminated Dog Foods unadulterated and fit for their ordinary purpose

14 117. As a result of Defendant's breach of their implied warranties of
15 merchantability, Plaintiff and the Class sustained damages as they paid money for the
16 Contaminated Dog Foods that were not what Defendant represented.

17 118. Plaintiff, on behalf of himself and the Class, seeks actual damages for
18 Defendant's breach of warranty.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated,
21 pray for judgment against the Defendant as to each and every count, including:

22 A. An order declaring this action to be a proper class action, appointing
23 Plaintiffs and their counsel to represent the Class, and requiring Defendant to bear the costs
24 of class notice;

25 B. An order enjoining Defendant from selling the Contaminated Dog Foods
26 until Pentobarbital is removed;

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1 C. An order enjoining Defendant from selling the Contaminated Dog Foods in
2 any manner suggesting or implying that they are healthy, pure, quality and safe for
3 consumption;

4 D. An order requiring Defendant to engage in a corrective advertising campaign
5 and engage in any further necessary affirmative injunctive relief, such as recalling existing
6 products;

7 E. An order awarding declaratory relief, and any further retrospective or
8 prospective injunctive relief permitted by law or equity, including enjoining Defendant
9 from continuing the unlawful practices alleged herein, and injunctive relief to remedy
10 Defendant's past conduct;

11 F. An order requiring Defendant to pay restitution to restore all funds acquired
12 by means of any act or practice declared by this Court to be an unlawful, unfair, or
13 fraudulent business act or practice, untrue or misleading advertising, or a violation of the
14 Unfair Competition Law, False Advertising Law, or CLRA, plus pre- and post-judgment
15 interest thereon;

16 G. An order requiring Defendant to disgorge or return all monies, revenues, and
17 profits obtained by means of any wrongful or unlawful act or practice;

18 H. An order requiring Defendant to pay all actual and statutory damages
19 permitted under the counts alleged herein;

20 I. An order requiring Defendant to pay punitive damages on any count so
21 allowable;

22 J. An order awarding attorneys' fees and costs to Plaintiff, the Class, and the
23 Class; and

24 K. An order providing for all other such equitable relief as may be just and
25 proper.

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JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

Dated: February 9, 2018

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