

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

■ **POTESTIO AND** ■ **KHOSHO**

Plaintiffs

- and -

**DIAMOND PET FOODS INC., SCHELL & KAMPETER, INC., COSTCO WHOLESALE
CORPORATION AND COSTCO WHOLESALE CANADA LTD.**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiffs' lawyer or, where the plaintiffs do not have a lawyer, serve it on the plaintiffs, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: September 28, 2012

Issued by

Local Registrar

Address of court office: 161 Elgin Street
2nd Floor
Ottawa, ON K2P 2K1

TO: Diamond Pet Foods Inc.
103 North Olive
Meta, Missouri 65058
USA

Tel: 573-229-4203
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AND TO: Schell & Kampeter, Inc.
103 North Olive
Meta, Missouri 65058
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AND TO: Costco Wholesale Corporation
999 Lake Drive
Issaquah, Washington 98027
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Tel: 425-313-8100
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AND TO: Costco Wholesale Canada Ltd.
415 West Hunt Club Road
Ottawa, Ontario
K2E 1C5

Tel: 613-221-2000
Fax: 613-221-2001

DEFINED TERMS

1. In this Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

- (a) “**Pets**” means domesticated dogs and cats;

- (b) “**Pet Food Products**” means the **Kirkland Signature Pet Food Products** and the **Diamond Pet Food Products** that were manufactured, distributed, sold, and/or placed onto the market by the **Defendants** and which were subsequently recalled on April 6, April 26, April 30, and May 5 of 2012;

- (c) “**Kirkland Signature Pet Food Products**” includes:
 - (i) “Kirkland Signature Super Premium Adult Dog Lamb, Rice & Vegetable Formula” (Best Before December 9, 2012 through January 31, 2013);
 - (ii) “Kirkland Signature Super Premium Adult Dog Chicken, Rice & Vegetable Formula” (Best Before December 9, 2012 through January 31, 2013);
 - (iii) “Kirkland Signature Super Premium Mature Dog Chicken, Rice & Egg Formula” (Best Before December 9, 2012 through January 31, 2013);
 - (iv) “Kirkland Signature Super Premium Healthy Weight Dog Formulated with Chicken & Vegetables” (Best Before December 9, 2012 through January 31, 2013);
 - (v) “Kirkland Signature Super Premium Maintenance Cat Chicken & Rice Formula” (Best Before December 9, 2012 through January 31, 2013);
 - (vi) “Kirkland Signature Super Premium Healthy Weight Cat Formula” (Best Before December 9, 2012 through January 31, 2013);
 - (vii) “Kirkland Signature Nature’s Domain Salmon Meal & Sweet Potato Formula for Dogs” (Best Before December 9, 2012 through January 31, 2013);

(d) “**Diamond Pet Food Products**” includes:

- (i) “Chicken Soup for the Pet Lover’s Soul” (Best Before December 9, 2012 and April 7, 2013)
- (ii) “Country Value” (Best Before December 9, 2012 and April 7, 2013)
- (iii) “Diamond” (Best Before December 9, 2012 and April 7, 2013)
- (iv) “Diamond Naturals” (Best Before December 9, 2012 and April 7, 2013)
- (v) “Premium Edge” (Best Before December 9, 2012 and April 7, 2013)
- (vi) “Professional” (Best Before December 9, 2012 and April 7, 2013)
- (vii) “4Health” (Best Before December 9, 2012 and April 7, 2013)
- (viii) “Taste of the Wild” (Best Before December 9, 2012 and April 7, 2013)

(e) “*Courts of Justice Act*” means the *Ontario Courts of Justice Act*, RSO 1990, c C-43, as amended;

(f) “**Class**” or “**Class Members**” means all people in Canada who purchased and/or whose **Pets** consumed **Pet Food Products** that were manufactured, distributed, sold, and/or placed onto the market by the **Defendants** and which were subsequently recalled on April 6, April 26, April 30, and May 5 of 2012;

(g) “*Class Proceedings Act*” means the *Class Proceedings Act, 1992*, SO 1992, c 6, as amended;

(h) “*Consumer Protection Act*” means the *Consumer Protection Act, 2002*, SO 2002, c 30, Schedule A, as amended;

- (i) “**Competition Act**” means the *Competition Act*, RSC 1985, c C-34, as amended;
- (j) “**Negligence Act**” means the *Negligence Act*, R.S.O. 1990, c. N-1, as amended;
- (k) “**Sale of Goods Act**” means the *Sale of Goods Act*, R.S.O. 1990, c S.1, as amended;
- (l) “**Defendants**” or “**Defendant Pet Food Companies**” means Diamond Pet Foods Inc., Schell and Kampeter, Inc., Costco Wholesale Corporation and Costco Wholesale Canada Ltd.;
- (m) “**Plaintiffs**” means ■ Potestio and ■ Khosho;
- (n) “**Representation**” means the **Defendants**’ false, misleading or deceptive representations that the **Pet Food Products** were fit for the purpose for which they were intended, that the Pet Food Products were free from contaminants and that the Pet Food Products were suitable for consumption by the consumers’ Pets.

CLAIM

2. The proposed Representative Plaintiffs, ■ Potestio and ■ Khosho, claim on their own behalves and on behalf of the members of the class of persons as defined in defined in paragraph 5 below (the “Class”) as against Diamond Pet Foods Inc., Schell & Kampeter, Inc., Costco Wholesale Corporation and as against Costco Wholesale Canada Ltd. (collectively the “Defendants”):

- (a) An order pursuant to the *Class Proceedings Act* certifying this action as a class proceeding and appointing the Plaintiffs as Representative Plaintiffs for the Class Members;
- (b) General damages in the amount of \$75,000,000.00 or in an amount to be determined for each member of the Class;
- (c) Special damages in the amount of \$50,000,000.00 or in an amount to be determined for each member of the Class;
- (d) An accounting of revenues received by the Defendants resulting from the sale of the contaminated Pet Food Products to members of the Class;
- (e) Restitution or a refund of all monies paid to or received by the Defendants by the sale of contaminated Pet Food Products to members of the Class;
- (f) Punitive, aggravated, and exemplary damages in the amount of \$10,000,000 or as this Honourable Court deems appropriate;
- (g) An order compelling the creation of a plan of distribution pursuant to ss. 23, 24, 25 and 26 of the *Class Proceedings Act*;
- (h) A declaration that the Defendants are jointly and severally liable for any and all damages awarded;

- (i) Pre-judgment and post-judgment interest on the foregoing sums in the amount of 2% per month, compounded monthly, or alternatively, pursuant to ss. 128 and 129 of the *Courts of Justice Act*;
- (j) Costs of notice and administration of the plan of distribution of recovery in this action plus applicable taxes pursuant to s.26 (9) of the *Class Proceedings Act*;
- (k) A declaration, if necessary, that it is in the interests of justice to waive the notice requirement under Part III and s. 101 of the *Consumer Protection Act*;
- (l) Costs of this action on a substantial indemnity basis including any and all applicable taxes payable thereon pursuant to the *Excise Tax Act*, R.S.C. 1990. C. E-15; and
- (m) Such further and other relief as counsel may advise and/or this Honourable Court may deem just and appropriate in all the circumstances.

THE PARTIES

The Representative Plaintiffs

3. The Plaintiff, ■ Potestio, is an individual residing in the City of Barrie, in the Province of Ontario. Between November 2011 and April 2012, R. Potestio was purchasing and, feeding to her dog, Kirkland Signature Super Premium Adult Dog Lamb, Rice & Vegetable Formula.

4. The Plaintiff, ■ Khosho, is an individual residing in the City of Barrie, in the Province of Ontario. Between November 2011 and April 2012, ■ Khosho was purchasing and, feeding to his dog, Kirkland Signature Super Premium Adult Dog Lamb, Rice & Vegetable Formula.

The Class

5. The Plaintiffs seek to represent the following class of which they are members (the “Proposed Class”):

All persons resident in Canada that purchased and/or whose pets consumed Pet Food Products that were manufactured, distributed, sold, and/or placed onto the market by the Defendants and which were subsequently recalled on April 6, April 26, April 30, and May 5 of 2012 [as well as any future recall relating to the issue at present].

The Defendants

6. The Defendant Schell & Kampeter, Inc. (“S&K”) is a company based in the United States of America with its principal place of business in Meta, Missouri. It manufactures and markets dog and cat food products including the Pet Food Products involved in this Action.

7. The Defendant Diamond Pet Foods Inc. (“Diamond Pet Foods”) is a company based in the United States of America with its principal place of business in Meta, Missouri. It is the name under which S&K does business as a United States-based commercial pet food manufacturer with plants located in Meta, Missouri, Lathrop, California and Gaston, South Carolina.

8. The Defendant Costco Wholesale Corporation (“Costco USA”) is an American company with its principal place of business in Issaquah, Washington. Costco USA operates an

international chain of membership warehouses that carry merchandise including its private label, Kirkland Signature, which includes the Kirkland Signature Pet Food Products.

9. The Defendant Costco Wholesale Canada Ltd. (“Costco Canada”) is a wholly-owned subsidiary of Costco USA and is carrying on business throughout Canada including within the Province of Ontario.

10. During the relevant time period, Defendants S&K and Diamond Pet Foods have been responsible for the manufacture of the Pet Food Products that were sold throughout Canada, including within the Province of Ontario. Defendants Costco USA and Costco Canada have been responsible for the distribution and sale of the Kirkland Signature Pet Food Products throughout Canada, including within the Province of Ontario.

11. The Defendants are residents in Ontario for the purpose of s 2 of the *Consumer Protection Act*.

12. The Defendants are jointly and severally liable for the acts and omissions of each other.

THE NATURE OF THE CLAIM

13. The Defendants are and, have been at all relevant times, engaged in the business of manufacturing, producing, distributing and/or selling Pet Food Products under various brands or labels, including Kirkland Signature Pet Food Products and Diamond Pet Food Products.

14. These class proceedings concern contaminated Pet Food Products produced, distributed and ultimately offered for sale to the public by the Defendants.

15. The Pet Food Products were found to have been exposed to a *Salmonella* contamination at the Defendants' manufacturing plants in South Carolina. *Salmonella* is a bacterium that, once ingested by an animal, can lead to serious illness.

16. The Pet Food Products were recalled by the Defendants on four (4) separate occasions – April 6, 2012, April 26, 2012, April 30, 2012 and May 5, 2012.

17. The recalled Pet Food Products were intended to be placed in the stream of commerce, to be distributed, offered for sale and sold to the Plaintiffs and to the public in Ontario and in other Provinces and Territories in Canada to be fed to their Pets.

18. The Plaintiffs purchased the recalled Pet Food Products made by or for the Defendants and the Plaintiffs' Pet(s) ate or consumed said pet food. Thousands of other consumers/customers –including the Plaintiffs and other Class Members– purchased the recalled or contaminated products from retailers that the Defendants, its agents, affiliates, controlled, sold or made available to them. In turn, retailers or others sold these recalled products to the general public, including the Plaintiffs and the Class Members. The recalled products were purchased for consumption by the Pet(s) of the Plaintiffs and of the Class Members. The Defendants made or caused the recalled products to be offered for sale and sold to the public, including the Plaintiffs and the Class Members.

19. The Class Members have purchased the Pet Food Products that were recalled across Canada. Many who feared for the health of their Pets may no longer have the product in their possession because it has been fed to the Pets.

20. The Class Members have taken their Pets to a veterinarian for treatment or diagnosis related to their Pets consuming the recalled Pet Food Products and more will do so as word of the recall spreads.

21. The Class Members have suffered and will suffer injuries, losses or damages as a result of the recall and/or feeding their Pets the food that was recalled.

22. Canadian consumers were never compensated for damages incurred as a result of purchasing the Defendants' contaminated Pet Food Products.

BACKGROUND

23. The majority of *Salmonella* infections in dogs and cats are asymptomatic. The main symptoms, in both animal species, are an acute enterocolitis and septicaemia, with resultant endotoxaemia. In other words, the animal will develop watery and/or bloody diarrhea, accompanied by vomiting, fever, lack of appetite or anorexia, lethargy, abdominal pain, progressive dehydration and respiratory distress. Symptoms usually appear approximately three (3) to five (5) days after infection and will last up ten (10) weeks.

24. The Plaintiffs assert that the Defendants failed and were inadequate in properly supervising the production and manufacturing of its products, failed to maintain proper safety standards, failed to properly check, test and sample the quality of its products and failed to discharge their duty of care to consumers and to maintain appropriate standards in the production and manufacturing of their products.

25. The Defendants know or understand that the promotion and advertising of their Pet Food Products in part targets consumers and customers in Canada.

26. The Defendants desire that consumers and others who purchase or consider purchasing a Pet Food Product made or produced in one of their plants, by whatever label or brand, believe that the Pet Food Products are safe for their Pets to eat.

27. There have been other reported prior incidents of pet food being recalled as a result of possible or actual concerns or problems with the pet food and its or their effects on Pets. The Defendants knew or should have known about the risks and possible injury.

28. Before their purchases, the Defendants never warned the Plaintiffs and Class Members that the Pet Food Products that they purchased for feeding their Pets may or would cause health problems or concerns or that they would have to take their Pets to a veterinarian due to a health concern relating to or resulting from the tainted pet food.

29. The Plaintiffs and thousands of other Class Members will now have incurred or will incur veterinary bills to have their Pets evaluated for *Salmonella* infections and/or to treat the symptoms.

30. The Plaintiffs and Class Members bought the Pet Food Products for their intended purpose – to feed their Pets.

31. The Defendants placed these Pet Food Products into the stream of commerce in Ontario and elsewhere with the expectation that consumers, such as the Plaintiffs and Class Members, would feed these products to their Pets.

THE REPRESENTATIVE PLAINTIFFS

32. Between November 2011 and April 2012, the Plaintiffs jointly purchased approximately fifteen (15) bags of Kirkland Signature Super Premium Adult Dog Lamb, Rice & Vegetable Formula from Costco-Barrie, in Barrie, Ontario for a total purchase price of approximately \$250 plus taxes. This dog food was fed to their dog from a specialized dry pet food storage bin.

33. On Sunday, March 18th 2012, their dog became very ill; he was vomiting, regurgitating water and releasing watery diarrhea. This went on for some time until their dog became completely unresponsive and lost consciousness.

34. At this point, the Plaintiffs rushed their dog to the Huronia Veterinary Emergency Clinic at 115 Bell Farm Road #110, in Barrie, Ontario, L4M 5G1 where they took x-rays and performed tests for various possible explanations for the symptoms, but the dog consistently tested negative. He remained at the clinic overnight on Intravenous therapy until which time the Plaintiffs transferred the dog to their regular veterinarian. Upon discharge on March 19th, 2012, the bill totalled \$1007.27.

35. On March 19th, 2012, the Plaintiffs took their dog to Innisfil Veterinary Clinic at 1538 Innisfil Beach Rd, in Innisfil, Ontario, L9S 4B8 where their dog was again put on Intravenous therapy and examined until he was discharged without a diagnosis. The bill for this came to \$175.29.

36. Subsequently, the Plaintiffs brought their dog back to the Innisfil Veterinary Clinic to conduct an Exocrine Pancreatic Insufficiency (EPI) test as a possible reason for the dog's continued illness. This test proved negative and the bill totalled \$242.95.

37. Cumulatively, the Plaintiffs have paid a total of approximately \$1,425.51 in veterinary expenses related to the *Salmonella* bacterial infection.

38. Since the Plaintiffs had received no concrete answer as to why their dog was so sick and rejecting his stomach contents, they were quite nervous and worried for the health of their Pet.

39. In the spring, the Plaintiffs received a phone call from Costco informing them about the potential *Salmonella* contamination and the associated product recalls. They were instructed to bring their dog food bags to Costco for a refund of the purchase price. The Plaintiffs informed the representative that they no longer had the bag in their possession as they feed their dog through the specialized dry food storage bin. The Plaintiffs were told to go to Costco where they would nonetheless receive a refund.

40. The Plaintiffs returned to Costco within the week after receiving the distressing phone call, but the refund was refused due to the fact that they could not produce the dog food bag.

41. In August 2012, they sent a letter via courier to Costco's head office and have yet to receive any response either by mail or by phone.

42. Since receiving the phone call from Costco, the Plaintiffs called their veterinarian who informed them that it was too late to test for *Salmonella* as the feces had re-hardened and the infection would be undetectable.

43. The Plaintiffs have suffered damages as a result of purchasing the Pet Food Products, including worry and concern, the costs of purchasing the contaminated food product and replacing it with a safe food product, including sales taxes, the costs of making an additional trip to a retail store to purchase safe, non-contaminated pet food, the price of postage to secure a refund offered by the Defendants, the cost of the veterinarians, treatment and the trip(s) to make such visits for diagnosis and treatment, and otherwise.

CAUSES OF ACTION

Duties of Care Owed by the Defendants to the Plaintiffs and to the Class

44. The Plaintiffs plead that the Defendants owed to the Plaintiffs and to the Class the following positive duties of care to avoid the acts and omissions detailed below:

- (a) To ensure that the Pet Food Products were of a suitable quality and condition and that they were fit for the purpose for which they was intended;
- (b) To ensure that the Pet Food Products were manufactured safely and properly so that they would not be exposed to contamination;
- (c) To ensure that the Pet Food Products were suitable for consumption by consumers' Pets; and
- (d) To only offer into the stream of commerce safe, non-contaminated products for consumption by Pets.

45. Further, the Defendants were subject to an express warranty and/or an implied warranty at common law or under the *Sale of Goods Act* to supply the Pet Food Products fit for their intended purpose.

Misrepresentation and Negligence of the Defendants

46. The Defendants breached their duty of care to the Plaintiffs and to the Class Members by negligently producing, processing, manufacturing, designing, testing, distributing and selling the contaminated Pet Food Products. Thus, the Defendants offered for sale products that were unfit for the purpose for which they were purchased. By not fulfilling their positive duties of care, the Defendants produced and sold contaminated Pet Food Products that the Class Members could not have been aware of at the time of purchase.

47. The Class Members relied on the Representations made by the Defendants as to the suitable quality and condition of the tainted Pet Food Products. In particular, the Class Members relied on the Defendants' Representations that:

- (a) The Pet Food Products were fit for the purpose for which they were intended;
- (b) The Pet Food Products were free from contaminants; and
- (c) The Pet Food Products were suitable for consumption by the consumers' Pets.

48. The Defendants misrepresented to Class Members the quality and condition of the Pet Food Products. The Defendants did this with the full knowledge that the Class Members were relying on this information to inform their purchases. The Class Members had no other way of

knowing of the contaminated nature of the Defendants' Pet Food Products. The aforesaid loss suffered by the Plaintiffs and the Class Members was caused by this negligence and negligent misrepresentation, particulars of which include, but are not limited to, the following:

- (a) The Defendants failed to properly manufacture, produce and/or process the Pet Food Products such that, when using the product for their intended purpose, Class Members Pets were exposed to the *Salmonella* Bacterium;
- (b) The Defendants failed to use sufficient quality control and to perform adequate testing of the Pet Food Products to ensure that the pet food manufactured and offered for sale to the Class Members was fit for the purpose for which they were purchased;
- (c) The Defendants failed to take sufficient measure to prevent the Pet Food Products that were subsequently recalled from being offered for sale, sold or fed to the Class Members' Pets;
- (d) The Defendants failed to accurately represent the nature and quality of their Pet Food Products; and
- (e) The Defendants consciously accepted the risk of their negligence and of the possibility of contamination.

49. By virtue of the acts and omissions described above, the Defendants were negligent and caused damage to and posed a real and substantial risk to the health and safety of the Plaintiffs and of the Class Members.

50. The loss, damage and injuries were foreseeable.

51. The Defendants' negligence proximately caused the loss, damage, injury and damages to the Plaintiffs and to the other Class Members.

CAUSATION

52. The acts, omissions, wrongdoings, and breaches of legal duties and obligations of the Defendants are the direct and proximate cause of the Plaintiffs' and Class Members' injuries.

53. The Class Members have suffered real and substantial injury, economic loss, and damages arising from the aforesaid acts, omissions, wrong doings, and breaches of legal duties and obligations of the Defendants and are therefore entitled to the relief sought as well as judgment against the Defendants.

54. In the alternative, the Defendants' tainted Pet Food Products have materially contributed to the Class Members suffering injury, economic loss and damages.

55. The Plaintiffs plead that by virtue of the acts and omissions described above, the Defendants are liable in damages to him and to the Class Members and that each Defendant is responsible for the acts and omissions of the other Defendants for the following reasons:

- (a) Each was the agent of the other;
- (b) Each companies' business was operated so that it was inextricably interwoven with the business of the other as set out above;

- (c) Each company entered into a common advertising and business plan to manufacture, distribute, market, test and sell the Pet Food Products;
- (d) Each Defendant owed a duty of care to the other and to each Class Member by virtue of the common business plan to manufacture, distribute, market, test and sell the Pet Food Products; and
- (e) The Defendants intended that their businesses be run as one global business organization.

56. The Plaintiffs and the Class Members are entitled to legal and equitable relief against the Defendants, including damages, consequential damages, specific performance, rescission, attorneys' fees, costs of suit and other relief as appropriate.

57. The Plaintiffs and the Class Members are entitled to recover damages and costs of administering the plan to distribute the recovery of the action in accordance with the *Consumer Protection Act*.

STATUTORY REMEDIES

58. The Defendants are in breach of the *Sale of Goods Act*, the *Consumer Protection Act* and the *Competition Act* and/or other similar/equivalent legislation.

59. The Plaintiffs plead and rely upon competition, consumer protection and trade legislation and common law, as it exists in this jurisdiction, and the equivalent/similar legislation and common law in other Canadian provinces and territories. The Class Members have suffered injury, economic loss and damages caused or materially contributed to by the Defendants' inappropriate and unfair business practices, which includes the Defendants being in breach of applicable Consumer Protection laws.

Breach of the *Sale of Goods Act*

60. At all times relevant to this action, the Plaintiffs and Class Members were “buyer[s]” within the meaning of that term as defined in s.1 of the *Sale of Goods Act*.

61. At all times relevant to this action, the Defendants were “seller[s]” within the meaning of that term as defined in s.1 of the *Sale of Goods Act*.

62. The transactions by which the Plaintiffs and Class Members purchased their “goods” from the Defendants were “sale[s]” within the meaning of those terms as defined in s.1 of the *Sale of Goods Act*.

63. The Defendants were aware that the consumers purchased the Pet Food Products for the particular purpose of feeding their Pets and there is therefore an implied condition that the goods will be reasonably fit for such purpose as well as being of a merchantable quality.

64. The Defendants committed a fault or wrongful act by breaching the implied conditions as to quality or fitness for a particular purpose. By placing into the stream of commerce a product that was unfit for consumption and therefore unmerchantable as per s.15 of Part I of the *Sale of*

Goods Act, the Defendants are liable. The Class is entitled to maintain an action for breach of warranty under ss. 51 & 55 of the *Sale of Goods Act*.

Breach of the *Consumer Protection Act*

65. At all times relevant to this action, the Plaintiffs and Class Members were “consumer[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

66. At all times relevant to this action, the Defendants were “supplier[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

67. The transactions by which the Plaintiffs and Class Members purchased their Pet Food Products from the Defendants were “consumer transaction[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

68. The Defendants have engaged in an unfair practice by making a Representation to Class Members which was and is “false, misleading or deceptive” and/or “unconscionable” within the meaning of ss. 14, 15 and 17 of the *Consumer Protection Act* as follows:

- (a) Representing that the Pet Food Products were of a suitable standard and quality, which they were not; and
- (b) The Defendants knew or ought to have known about the risk that the consumer would be unable to receive a substantial benefit from the tainted Pet Food Products.

69. The Plaintiffs state that the Representation was false, misleading, deceptive and/or unconscionable such that it constituted an unfair practice which induced the Plaintiffs and the Class to purchase the Pet Food Products as a result of which they are entitled to damages pursuant to the *Consumer Protection Act*.

70. The Plaintiffs and the Class Members relied on the Representation.

71. The reliance upon the Representation by the Plaintiffs and Class Members is established by his or her purchase and/or use of the Pet Food Products. Had the Plaintiffs and Class Members known that the Representation was false and misleading they would not have purchased and/or used the Pet Food Products.

Breach of the *Competition Act*

72. Further or alternatively, the Defendants' acts are in breach of s. 52 of Part VI of the *Competition Act*, were and are unlawful, and render the Defendants jointly and severally liable to pay damages and costs of investigation pursuant to s. 36 of the *Competition Act*.

73. The Defendants made the Representation to the public and in so doing breached s.52 of the *Competition Act* because the Representation:

- (a) Was made for the purpose of promoting the business interests of the Defendants;
- (b) Was made to the public;
- (c) Was false and misleading in a material respect; and

- (d) Stated a standard and quality of the Pet Food Products that was not based on adequate and proper testing.

74. The Plaintiffs and the Class Members relied upon the Representation by buying or using the Pet Food Products and suffered damages and loss.

75. Pursuant to s 36 of the *Competition Act*, the Defendants are liable to pay the damages which resulted from the breach of s. 52.

76. Pursuant to s. 36 of the *Competition Act*, the Plaintiffs and the Class Members are entitled to recover their full costs of investigation and substantial indemnity costs paid in accordance with the *Competition Act*.

77. The Plaintiffs and the Class Members are also entitled to recover as damages or costs, in accordance with the *Competition Act*, the costs of administering the plan to distribute the recovery in this action and the costs to determine the damages of each Class Member.

Compensatory Damages (Economic and Non-Economic Losses)

78. As a result of their regretful purchase of the Pet Food Products, the Plaintiffs and the Class Members have suffered and will suffer loss, damage, injury and sustained damages, the particulars of which include, *inter alia*:

- (a) Worry and concern;

- (b) Loss of companionship and protection;
- (c) The costs of purchasing the contaminated Pet Food Product and replacing it with a safe food product, including sales tax or a similar tax;
- (d) The costs of making an additional trip to a retail store to purchase safe, non-contaminated Pet Food Products;
- (e) The price of postage to secure a refund offered (if any) by the Defendants;
- (f) The cost of veterinarians, including any and all tests, treatments and medicines;
- (g) The costs of making the trip to the veterinarian for diagnosis and treatment, including any and all additional trips to obtain medicine and otherwise.
- (h) Other damages as described herein.

Punitive, Exemplary and Aggravated Damages

79. The Defendants have demonstrated and taken a cavalier and arbitrary approach with respect to their obligations to the Class Members.

80. At all material times, the conduct of the Defendants as set forth above was reckless towards its customers and to the general public.

81. The Defendants' aforesaid acts, omissions, wrongdoings and breaches of legal duties and obligations constitute unfair business practices and dealings with its customers and with the public.

82. As a result of the aforesaid acts, omissions, wrong doings and breaches of legal duties and obligations by the Defendants, the Plaintiffs and Class Members have sustained substantial injury, economic loss and damages, and are entitled to awards of aggravated, punitive, and exemplary damages.

WAIVER OF TORT, UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST

83. The Plaintiffs plead and rely on the doctrine of waiver of tort and state that the Defendants' conduct, including the alleged breaches of any of the *Sale of Goods Act*, the *Consumer Protection Act*, or the *Competition Act* constitutes wrongful conduct which can be waived in favour of an election to receive restitutionary or other equitable remedies.

84. The Plaintiffs reserve the right to elect at the Trial of the Common Issues to Waive the Tort of Negligence and to have damages assessed in an amount equal to the gross revenues earned by the Defendants or the net income received by the Defendants or a percent of the sale of the contaminated Pet Food Products as a result of the Defendants' failure to recall in a timely fashion and to warn pet owners of the contaminated pet food which resulted in revenues and profit for the Defendants.

85. Further, the Defendants have been unjustly enriched as a result of the revenues generated from the sale of contaminated Pet Food Products and as such, *inter alia*, that:

- (a) The Defendants have obtained an enrichment through revenues and profit from the sale of the contaminated Pet Food Products;
- (b) The Plaintiffs and the other Class Members have suffered a corresponding deprivation including the value of their Pet, the price of the contaminated Pet Food Products, and associated veterinary costs to treat conditions associated with the consumption of the contaminated Pet Food Products; and
- (c) The benefit obtained by the Defendants and corresponding detriment experienced by the Plaintiffs and Class Members has occurred without juristic reason. Since the monies that were received by the Defendants resulted from the Defendants' wrongful acts, there is and can be no juridical reason justifying the Defendants' retaining any portion of such money paid.

86. The Defendants are constituted as constructive trustees in favour of the Class Members for all of the monies received because, among other reasons:

- (a) The Defendants were unjustly enriched by receipt of the monies paid for the Pet Food Products;
- (b) The Class Members suffered a corresponding deprivation by purchasing the Pet Food Products;
- (c) The monies were acquired in such circumstances that the Defendants may not in good conscience retain them;

- (d) Equity, justice and good conscience require the imposition of a constructive trust;
- (e) The integrity of the pet food market would be undermined if the court did not impose a constructive trust; and
- (f) There are no factors that would render the imposition of a constructive trust unjust.

87. Further, or in the alternative, the Plaintiffs claim an accounting and disgorgement of the benefits which accrued to the Defendants.

COMMON ISSUES

88. Common questions of law and fact exist for the Class Members and predominate over any questions affecting individual members of the Class. The common questions of law and fact include:

- (a) Did the Defendants sell Pet Food Products that were recalled or subject to a recall?
- (b) Did the Defendants advertise, represent, or hold themselves out as producing or manufacturing Pet Food Products that were safe for Pets of the Class Members?
- (c) Did the Defendants warrant these products?
- (d) Did the Defendants impliedly warrant these products for fitness for a particular purpose?

- (e) Did the Defendants intend that the Pet Food Products be purchased by the Plaintiffs, Class Members and/or others?
- (f) Did the Defendants intend or foresee that the Plaintiffs or other Class Members, would feed their Pet Food Products to their Pets?
- (g) Did the Defendants recall the Pet Food Products appropriately?
- (h) Were the Defendants negligent in manufacturing or processing the Pet Food Products?
- (i) Did using the Pet Food Products as intended - to feed their Pets - result in loss, injury, damage, or damages to the Class?
- (j) Did the Defendants' negligence proximately cause loss or injury and damages?
- (k) Did the Class Members suffer direct losses or damages?
- (l) Did the Class Members suffer indirect losses or damages?
- (m) Did the Defendants' acts or practices breach the *Sale of Goods Act*, the *Consumer Protection Act*, the *Competition Act* or other similar/equivalent legislation.

EFFICACY OF CLASS PROCEEDINGS

89. The members of the proposed Class number in the hundreds of thousands. As a result, the Class is so numerous that joinder in a single action is not practical. However, proceeding with the Class Members' claim by way of a class proceeding is both practical and feasible.

90. Class counsel proposes to prosecute these claims on behalf of the Class through this Action and through other actions commenced by offices of the Consumer Law Group. These actions include *Focsa v. Diamond Pet Foods Inc. et alii*, an action commenced before the Quebec Superior Court in Montreal (May 9, 2012, File No.: 500-06-000612-123).

91. Individual members of the proposed class do not have a significant interest in individually controlling the prosecution of their claim by way of separate actions and individualized litigation would also present the potential for varying, inconsistent and contrary judgments and would magnify the delay and expense to all parties resulting from multiple proceedings on the same issues. The cost to pursue individual actions concerning this claim would effectively deny the individual Class Members access to the Courts and appropriate legal relief.

92. The Plaintiffs will fully and adequately protect the interests of the proposed Class Members and have retained counsel to represent the Class Members who are qualified to prosecute complex class action litigation. Neither the Plaintiffs nor their solicitors have interests which are contrary to, or conflicting with, the interests of the proposed Class.

LEGISLATION

93. The Plaintiffs plead and rely on the *Class Proceedings Act*, the *Courts of Justice Act*, the *Consumer Protection Act*, the *Negligence Act*, the *Sale of Goods Act*, the *Competition Act* and other Consumer Protection Legislation.

JURISDICTION AND FORUM

Real and Substantial Connection with Ontario

94. There is a real and substantial connection between the subject matter of this action and the province of Ontario because:

- (a) Defendant Costco Wholesale Canada Ltd. has a registered office in Ontario;
- (b) The Defendants engage in business with residents of Ontario;
- (c) The Defendants derive substantial revenue from carrying on business in Ontario;
and
- (d) The damages of Class Members were sustained in Ontario.

95. The Plaintiffs propose that this action be tried in the City of Ottawa, in the Province of Ontario as a proceeding under the *Class Proceedings Act*.

Service Outside of Ontario

96. The originating process herein may be served outside Ontario, without court order, pursuant to subparagraphs (a), (c), (g), (h), (o) and (p) of Rule 17.02 of the *Rules of Civil*

Procedure. Specifically, the originating process herein may be served without court order outside Ontario, in that the claim is:

- (a) In respect of personal property situated in Ontario (rule 17.02(a));
- (b) For the interpretation and enforcement of a contract or other instrument in respect of personal property in Ontario (rule 17.02 (c));
- (c) In respect of a tort committed in Ontario (rule 17.02(g));
- (d) In respect of damages sustained in Ontario arising from a tort or breach of contract wherever committed (rule 17.02(h));
- (e) Against a person outside Ontario who is necessary and/or proper party to a proceeding properly brought against another person served in Ontario; i.e. Costco Wholesale Canada Ltd. (rule 17.02(o));
- (f) Against a person carrying on business in Ontario (rule 17.02(p)); and
- (g) The claim is authorized by statute, the *Competition Act* and the *Consumer Protection Act* (rule 17.02(n)).

| Date: September 28, 2012

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Plaintiffs

COSTCO WHOLESALE CANADA LTD. et alii
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED IN OTTAWA

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

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