

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO: 500-06-000612-123

(Class Action)
SUPERIOR COURT

E. FOCSA

Petitioner

-vs.-

DIAMOND PET FOODS INC., legal person duly constituted, having its head office at 103 North Olive, City of Meta, State of Missouri, 65058, U.S.A.

and

SCHELL & KAMPETER, INC., legal person duly constituted, having its head office at 103 North Olive, City of Meta, State of Missouri, 65058, U.S.A.

and

COSTCO WHOLESALE CORPORATION, legal person duly constituted, having its head office at 999 Lake Drive, City of Issaquah, State of Washington, 98027, U.S.A.

and

COSTCO WHOLESALE CANADA LTD., legal person duly constituted, having its head office at 415 West Hunt Club Road, City of Ottawa, Province of Ontario, K2E 1C5

and

TRACTOR SUPPLY COMPANY, legal person duly constituted, having its head office at 200 Powell Place, City of Brentwood, State of Tennessee, 37027, U.S.A.

Respondents

**MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION
&
TO ASCRIBE THE STATUS OF REPRESENTATIVE
(Art. 1002 C.C.P. and following)**

TO ONE OF THE HONOURABLE JUSTICES OF THE SUPERIOR COURT,
SITTING IN AND FOR THE DISTRICT OF MONTREAL, YOUR PETITIONER
STATES AS FOLLOWS:

I. GENERAL PRESENTATION

A) The Action

1. Petitioner wishes to institute a class action on behalf of the following group, of which he is a member, namely:
 - all residents 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 Respondents and which were subsequently recalled on April 6, April 26, April 30, and May 4/5 of 2012 [as well as any future recall relating to the issue at present], or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who purchased and/or whose pets consumed Pet Food Products that were manufactured, distributed, sold, and/or placed onto the market by the Respondents and which were subsequently recalled on April 6, April 26, April 30, and May 4/5 of 2012 [as well as any future recall relating to the issue at present], or any other group to be determined by the Court;
2. The present action involves a voluntary recall of certain Pet Food Products manufactured by Diamond Pet Foods due to a *Salmonella* contamination at its manufacturing plant in South Carolina;
 3. Currently, the following products have been implicated in Canada:
 - A. “Kirkland Signature Pet Food Products”:

- “Kirkland Signature Super Premium Adult Dog Lamb, Rice & Vegetable Formula” (Best Before December 9, 2012 through January 31, 2013)
- “Kirkland Signature Super Premium Adult Dog Chicken, Rice & Vegetable Formula” (Best Before December 9, 2012 through January 31, 2013)
- “Kirkland Signature Super Premium Mature Dog Chicken, Rice & Egg Formula” (Best Before December 9, 2012 through January 31, 2013)
- “Kirkland Signature Super Premium Healthy Weight Dog Formulated with Chicken & Vegetables” (Best Before December 9, 2012 through January 31, 2013)
- “Kirkland Signature Super Premium Maintenance Cat Chicken & Rice Formula” (Best Before December 9, 2012 through January 31, 2013)
- “Kirkland Signature Super Premium Healthy Weight Cat Formula” (Best Before December 9, 2012 through January 31, 2013)
- “Kirkland Signature Nature’s Domain Salmon Meal & Sweet Potato Formula for Dogs” (Best Before December 9, 2012 through January 31, 2013),

B. “Diamond Pet Food Products” include:

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

B) The Respondents

2. Respondent Schell & Kampeter, Inc. (“S&K”) is an American corporation with its head office in Missouri, doing business as Diamond Pet Foods. It is the registrant of the trade-marks DIAMOND (TMA471435) which was filed on January 23rd 1996, PREMIUM EDGE (TMA485897) which was filed on January 23rd 1996, and TASTE OF THE WILD (TMA793635) which was filed on May 20th 2010, the whole as appears more fully from a copy of the reports from the CIPO Canadian trade-marks database, produced herein *en l’asseur* as **Exhibit R-1**;
3. Respondent Diamond Pet Foods Inc., (“Diamond Pet Foods”) is an American company with its head office in Missouri. It is the name under which S&K does business as a U.S.-based commercial pet food manufacturer with plants located in Meta, Missouri, Lathrop, California and Gaston, South Carolina;

4. Respondent Costco Wholesale Corporation (“Costco USA”) is an American company with its head office in Washington. It is the registrant of the trade-mark KIRKLAND SIGNATURE (TMA702890) which was filed on April 26th 2007, the whole as appears more fully from a copy of the report from the CIPO Canadian trade-marks database, produced herein as **Exhibit R-2**;
5. Respondent Costco Wholesale Canada Ltd. (“Costco Canada”) is a wholly owned subsidiary of Costco that does business throughout Canada, including the province of Quebec, and to which has registered the trade-name “Kirkland Signature”, the whole as appears more fully from a copy of an extract from the *Registre des enterprise*, produced herein as **Exhibit R-3**;
6. Respondent Tractor Supply Company is an American Company with its head office in Tennessee. It is the sole distributor of the Diamond Pet Foods brand 4Health;
7. During the relevant time period, Respondents S&K and Diamond Pet Foods have been responsible for the manufacture of the Pet Food Products that were sold throughout Canada, including the Province of Quebec. Respondents Costco USA and Costco Canada have been responsible for the distribution and sale of the Kirkland Signature Pet Food Products throughout Canada, including the Province of Quebec;
8. Collectively, S&K, Diamond Pet Foods, Costco USA, Costco Canada, and Tractor Supply Company will be referred to herein as the “Respondent Pet Food Companies”;

C) The Situation

9. The bacterium called *Salmonella*, once ingested by an animal can lead to serious illness. Transmission in dogs and cats usually occurs either directly or indirectly by the faecal–oral route;
10. 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, the whole as appears more fully from a copy of extracts from the book *Salmonella in Domestic Animals* published in 2000, produced herein as **Exhibit R-4**;

11. In April 2012, Diamond initiated three (3) voluntary recalls of Diamond manufactured dry dog food due to potential Salmonella contamination:
- April 6th, 2012: Diamond Naturals Lamb Meal & Rice
 - April 26th, 2012: Chicken Soup for the Pet Lover's Soul Adult Light Formula
 - April 30th, 2012: Diamond Puppy Formula

The whole as appears more fully from a copy of said Press Releases, produced herein *en liasse* as **Exhibit R-5**;

12. On May 5th, 2012, Diamond published a further press release announcing the expansion of the recall to include an additional nine (9) brands of dry pet food formulas manufactured between December 9, 2011 and April 7, 2012 due to potential Salmonella contamination. These included brands are Chicken Soup for the Pet Lover's Soul, Country Value, Diamond, Diamond Naturals, Premium Edge, Professional, 4Health, and Taste of the Wild; the whole as appears more fully from a copy of said Press Release, produced herein as **Exhibit R-6**;
13. While some retailers may be willing to provide refunds to their customers, such as Costco Canada, there are some outlets that do not have any reimbursement programs in place;
14. Therefore, a significant portion of the public has discarded their Pet Food Products and have no meaningful way of being refunded for the sale price that they paid;
15. In addition, no program has been set up to compensate pet owners for the costs of various other types of economic damages, including health screening tests and related veterinary expenditures, including, but not limited to medication and medical costs;

II. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER

16. Petitioner purchased Kirkland Signature Super Premium Adult Dog Chicken, Rice & Vegetable Formula on or about the end of April 2012 from Costco at 300 rue Bridge, in Montreal, Quebec for approximately \$28 plus taxes;
17. Within the two (2) weeks that followed, Petitioner fed his dog the potentially harmful food (approximately half) of the bag;
18. On Saturday, May 5th 2012, Petitioner learned of the recall of his Costco dog food on the news;

19. On Monday, May 7th, 2012, Petitioner returned the tainted dog food to Costco for a full refund of the purchase price;
20. Petitioner was and is extremely nervous for the health of his dog and is carefully monitoring his pet and himself for any possible signs and symptoms of a *Salmonella* infection. Petitioner has also set up an appointment with a veterinarian to have his dog screened by a medical professional;
21. In consequence of the foregoing, Petitioner is justified in claiming:
 - a) economic damages in the amount of the costs associated with his upcoming veterinary appointment, including any and all costs associated with health screening tests, medicine and/or treatment; and
 - b) moral damages for the fear and anxiety of becoming ill during the gestation period of the bacteria;
22. Petitioner's damages are a direct and proximate result of the Respondent's conduct;

III. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP

23. Every member of the class has purchased and/or whose pets consumed Kirkland and/or Diamond Pet Food Products that was recalled;
24. The claims of each class member are founded on the same general facts as the Petitioner's;
25. Such persons have suffered and/or will suffer in the future some or all of the following damages:
 - a. The purchase price of the Pet Food Products
 - b. The associated veterinary costs, including any and all costs associated health screening tests, medicine and/or treatment
 - c. Moral prejudice for the fear and anxiety of their pet and/or themselves becoming ill during the gestation period of the bacteria
 - d. Pain and suffering if the pet and/or the person became ill
26. All of these damages to the class members are a direct and proximate result of the Respondents' conduct;

IV. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

- A) The composition of the class renders the application of articles 59 or 67 C.C.P. difficult or impractical
27. Petitioner is unaware of the specific number of persons who purchased and/or whose pets consumed Kirkland and/or Diamond Pet Food Products that was recalled, however, given their tremendous distribution, it is safe to estimate that it is in the tens of thousands;
28. The potential number of group members can be estimated from records kept by the Respondents only;
29. Class members are numerous and are scattered across the entire province and country;
30. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Respondents. Even if the class members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by the conduct of the Respondents would increase delay and expense to all parties and to the court system;
31. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory judgements on questions of fact and law that are similar or related to all members of the class;
32. These facts demonstrate that it would be impractical, if not impossible, to contact each and every member of the class to obtain mandates and to join them in one action;
33. In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice;
- B) The questions of fact and law which are identical, similar, or related with respect to each of the class members with regard to the Respondent and that which the Petitioner wishes to have adjudicated upon by this class action
34. Individual questions, if any, pale by comparison to the numerous common questions that predominate;

35. The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, Respondents' misconduct;
36. The recourses of the members raise identical, similar or related questions of fact or law, namely:
- a) Did the Respondents place onto the market Pet Food Products that were contaminated with *Salmonella* bacteria?
 - b) Did the Respondents take adequate precautions to make sure that their products were free of harmful contamination?
 - c) Did the Respondents institute a proper refund and reimbursement program for those customers that had purchased their Pet Food Products?
 - d) Were Class Members prejudiced by the Respondents' conduct, and, if so, what is the appropriate measure of these damages?
 - e) Are the Respondents responsible to pay compensatory and/or punitive damages to class members and in what amount?
37. The interests of justice favour that this motion be granted in accordance with its conclusions;

V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

38. The action that the Petitioner wishes to institute on behalf of the members of the class is an action in damages;
39. The conclusions that the Petitioner wishes to introduce by way of a motion to institute proceedings are:

GRANT the class action of the Petitioner and each of the members of the class;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioner and each of the members of the class;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

A) The Petitioner requests that he be attributed the status of representative of the Class

40. Petitioner is a member of the class;

41. Petitioner is ready and available to manage and direct the present action in the interest of the members of the class that he wishes to represent and is determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the class, as well as, to dedicate the time necessary for the present action before the Courts of Quebec and the *Fonds d'aide aux recours collectifs*, as the case may be, and to collaborate with his attorneys;

42. Petitioner has the capacity and interest to fairly and adequately protect and represent the interest of the members of the class;

43. Petitioner has given the mandate to his attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;

44. Petitioner, with the assistance of his attorneys, is ready and available to dedicate the time necessary for this action and to collaborate with other members of the class and to keep them informed;

45. Petitioner is in good faith and has instituted this action for the sole goal of having his rights, as well as the rights of other class members, recognized and protected so that they may be compensated for the damages that they have suffered as a consequence of the Respondents' conduct;

46. Petitioner understands the nature of the action;

47. Petitioner's interests are not antagonistic to those of other members of the class;

B) The Petitioner suggests that this class action be exercised before the Superior Court of justice in the district of Montreal

48. A great number of the members of the class reside in the judicial district of Montreal and in the appeal district of Montreal;

49. The Petitioner's attorneys practice their profession in the judicial district of Montreal;

50. The present motion is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages;

ASCRIBE the Petitioner the status of representative of the persons included in the class herein described as:

- all residents 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 Respondents and which were subsequently recalled on April 6, April 26, April 30, and May 4/5 of 2012 [as well as any future recall relating to the issue at present], or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who purchased and/or whose pets consumed Pet Food Products that were manufactured, distributed, sold, and/or placed onto the market by the Respondents and which were subsequently recalled on April 6, April 26, April 30, and May 4/5 of 2012 [as well as any future recall relating to the issue at present], or any other group to be determined by the Court;

IDENTIFY the principle questions of fact and law to be treated collectively as the following:



- a) Did the Respondents place onto the market Pet Food Products that were contaminated with *Salmonella* bacteria?
- b) Did the Respondents take adequate precautions to make sure that their products were free of harmful contamination?
- c) Did the Respondents institute a proper refund and reimbursement program for those customers that had purchased their Pet Food Products?
- d) Were Class Members prejudiced by the Respondents' conduct, and, if so, what is the appropriate measure of these damages?
- e) Are the Respondents responsible to pay compensatory and/or punitive damages to class members and in what amount?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioner and each of the members of the class;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioner and each of the members of the class;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;



DECLARE that all members of the class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the class that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;

ORDER the publication of a notice to the members of the group in accordance with article 1006 C.C.P. within sixty (60) days from the judgement to be rendered herein in the NATIONAL POST, the GLOBE & MAIL, THE GAZETTE, and LA PRESSE;

ORDER that said notice be available on the Respondents' websites with a link stating "Notice to Pet Food purchasers";

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

THE WHOLE with costs, including all publications fees.

Montreal, May 9, 2012

(S) Jeff Orenstein

CONSUMER LAW GROUP INC.

Per: Me Jeff Orenstein

Attorneys for the Petitioner

NOTICE OF PRESENTATION

TO: **SCHELL & KAMPETER, INC.**

103 North Olive
Meta, Missouri
65058, USA.

AND: **DIAMOND PET FOODS INC.**

103 North Olive
Meta, Missouri
65058, USA.

AND: **COSTCO WHOLESALE CORPORATION**

999 Lake Drive
Issaquah, Washington
98027, USA.

AND: **COSTCO WHOLESALE CANADA LTD.**

415 West Hunt Club Road
Ottawa, Ontario
K2E 1C5

AND: **TRACTOR SUPPLY COMPANY**

200 Powell Place
Brentwood, Tennessee
37027, U.S.A.

TAKE NOTICE that the present motion will be presentable for adjudication before The Superior Court, at the Palais de Justice in Montreal, located at 1 Notre Dame East (Quebec, Canada), in **room 2.16** on the **3rd day of August, 2012** at **9h00** in the morning, or as soon as the Court so decides.

Montreal, May 9, 2012

(S) Jeff Orenstein

CONSUMER LAW GROUP INC.

Per: Me Jeff Orenstein
Attorneys for the Petitioner