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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO DIVISION

19 DANIEL ZEIGER, DANZ DOGGIE
20 DAYTRIPS, and AMY FREEBORN,
21 Individually and on Behalf of All Others
22 Similarly Situated,

21 Plaintiffs,

22 v.

23 WELLPET LLC, a Delaware corporation, and
24 BERWIND CORPORATION, a Pennsylvania
25 corporation,

25 Defendants.

) Case No. 3:17-CV-04056-WHO
)
) FIRST AMENDED 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;
) (6) BREACH OF IMPLIED WARRANTY;
) AND
) (7) VIOLATION OF CALIFORNIA
) HEALTH & SAFETY CODE SECTION
) 113095.

28 DEMAND FOR JURY TRIAL

1 1. Plaintiffs Daniel Zeiger, Danz Doggie Daytrips, and Amy Freeborn ("Plaintiffs"),
2 individually and on behalf of all others similarly situated, by and through their undersigned
3 attorneys, as and for this First Amended Class Action Complaint against defendants WellPet
4 LLC and Berwind Corporation ("Defendants"), for their negligent, reckless, and/or intentional
5 practice misrepresenting and failing to fully disclose the presence of dangerous substances and
6 chemicals in their pet food sold throughout the United States. Plaintiff seeks both injunctive and
7 monetary relief on behalf of the proposed Classes (as defined herein), including requiring full
8 disclosure of all such substances in its marketing, advertising, and labeling and restoring monies
9 to the members of the proposed Classes members. Plaintiffs allege the following based upon
10 personal knowledge as well as investigation by their counsel, including independent testing of
11 the products, and as to all other matters, upon information and belief (Plaintiffs believe that
12 substantial evidentiary support will exist for the allegations set forth herein after a reasonable
13 opportunity for discovery).

14 **THE DANGEROUS MAKE-UP OF DEFENDANTS' DOG FOOD**

15 2. Defendants manufacture, market, advertise, label, distribute, and sell Wellness®
16 CORE® Adult Dry Ocean Whitefish, Herring Meal and Salmon Meal ("CORE Ocean") and
17 Wellness® Complete Health Adult Dry Whitefish and Sweet Potato (collectively the
18 "Contaminated Dog Foods").¹ The Contaminated Dog Foods contain material and significant
19 levels of arsenic and lead—both known dangerous toxins for both humans and animals,
20 including dogs. Some foods, like rice and sweet potato, have been determined to absorb arsenic
21 in water during cooking and therefore increase exposure.

22 3. Inorganic arsenic is a *known human carcinogen*. It can contribute to cancers,
23 heart disease, diabetes, declines in intellectual function, and can decrease a body's ability to
24 respond to viruses. The organic form of arsenic—the form found in arsenic-containing
25 compounds—has been shown in recent studies to easily convert to inorganic arsenic.

26
27 ¹ Discovery may reveal additional products that also contain unsafe levels of heavy metals and
28 Plaintiffs reserve their right to include any such products in this action.

1 4. Based on the risks associated with exposure to high levels of arsenic, both the
2 U.S. Environmental Protection Agency ("EPA") and U.S. Food and Drug Administration
3 ("FDA") have set limits concerning the allowable limit of arsenic at 10 parts per billion ("ppb").
4 For the FDA, the 10 ppb level regulates apple juice and for the EPA it governs drinking water.²

5 5. Moreover, the FDA is considering limiting the action level for arsenic in rice to
6 100 ppb:

7 The action level for inorganic arsenic in infant rice cereals that FDA considers
8 achievable with the use of such practices is 100 μ g/kg or 100 ppb (see Ref.
9 14).... The proposed action level for inorganic arsenic in infant rice cereals is
10 intended to reduce the possible risk for infants fed rice cereal by reducing
11 exposure to inorganic arsenic that may be found in rice cereal for infants. FDA
12 considers this reduction in exposure to infants fed rice cereal will lead to a
13 quantifiable reduction in the lifetime risk of certain cancers associated with
14 exposure to inorganic arsenic, as well as an unquantifiable reduction in the risk of
15 certain non-cancer adverse health outcomes reviewed in the risk assessment,
16 including neurodevelopmental effects in infants.³

17 6. The Contaminated Dog Foods also contain material and significant levels of lead,
18 which is another carcinogen and developmental toxin known to cause health problems to
19 consumers. Exposure to lead in food builds up over time. Buildup can and has been
20 scientifically demonstrated to lead to the development of chronic poisoning, cancer,
21 developmental, and reproductive disorders, as well as serious injuries to the nervous system, and
22 other organs and body systems.

23 7. Despite the known risks of arsenic and lead exposure, Defendants have
24 negligently, recklessly, and/or knowingly sold the Contaminated Dog Foods despite containing
25 alarming levels of arsenic and lead. The independent lab testing of the Contaminated Dog Foods
26 found that CORE Ocean contains 1,500 ppb of arsenic and 221 ppb of lead and Wellness

24 ² The FDA has taken action based on consumer products exceeding this limit, including testing
25 and sending warning letters to the manufacturers. *See, e.g.*, Warning Letter from FDA to Valley
26 Processing, Inc. (June 2, 2016), <https://www.fda.gov/iceci/enforcementactions/warningletters/2016/ucm506526.htm>.

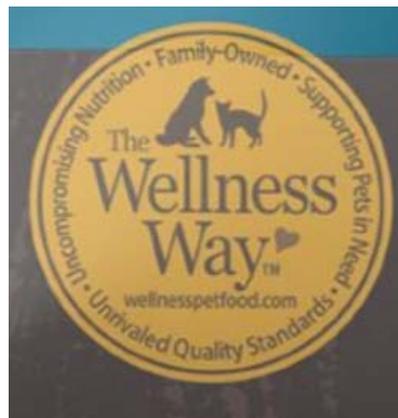
27 ³ FDA, Draft Guidance for Industry: Inorganic Arsenic in Rice Cereals for Infants: Action Level
28 (Apr. 2016), <https://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/UCM493152.pdf>.

1 Complete Health Adult Dry Whitefish and Sweet Potato contains 1,200 ppb of arsenic and 220
2 ppb of lead.

3 8. Additionally, Defendants knew or should have been aware that a consumer would
4 be feeding the Contaminated Dog Foods multiple times each day to his or her dog being the
5 main, if not only, source of food for the dog. This leads to repeated exposure of the toxins to the
6 dog.

7 9. Defendants have wrongfully advertised and sold the Contaminated Dog Foods
8 without any label or warning indicating to consumers that these products contain arsenic or lead,
9 or that these toxins can over time accumulate in the dog's body to the point where poisoning,
10 injury, and/or disease can occur.

11 10. Defendants' omissions are not only material but also false, misleading, and
12 reasonably likely to deceive the public. This is true especially in light of the long-standing
13 campaign by Defendants to market the Contaminated Dog Foods as healthy and safe to induce
14 consumers, such as Plaintiffs to purchase the products. For instance, not only did Defendants
15 chose a brand name for their dog food, "Wellness," that in itself suggests a healthy product, they
16 market the Contaminated Dog Foods by promising "Uncompromising Nutrition" and "Unrivaled
17 Quality Standards":



26 11. Moreover, the Contaminated Dog Foods declare themselves as offering complete
27 health and nothing in excess:

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21 12. Using such descriptions and promises makes Defendants' advertising campaign
22 deceptive based on the unsafe and alarming levels of arsenic and lead in the Contaminated Dog
23 Foods. Defendants' statements, partial disclosures, and omissions are false, misleading, and
24 crafted to deceive the public as they create an image that the Contaminated Dog Foods are
25 healthy and safe. Moreover, Defendants knew or should have reasonably expected that the
26 presence of arsenic and lead in its Contaminated Dog Foods is something an average consumer
27 would consider in purchasing dog food. Thus, Defendants' omissions are false, misleading, and
28 reasonably likely to deceive the public.

1 13. Moreover, a reasonable consumer, such as Plaintiffs and other members of the
2 Class (as defined herein), would have no reason to not expect and anticipate that the
3 Contaminated Dog Foods are made up of "Uncompromising Nutrition" and "Unrivaled Quality
4 Standards" that has nothing in excess as promised by Defendants. Non-disclosure and
5 concealment of the toxins in the Contaminated Dog Foods coupled with the partial disclosures
6 and/or misrepresentations that the food provides complete health and is safe by Defendants is
7 intended to and does, in fact, cause consumers to purchase a product Plaintiffs and Class
8 members would not have bought if the true quality and ingredients were disclosed. As a result of
9 these false statements, omissions, and concealment, Defendants have generated substantial sales
10 of the Contaminated Dog Foods.

11 14. Plaintiffs bring this action individually and on behalf of all other similarly situated
12 consumers within the United States who purchased the Contaminated Dog Foods, in order to
13 cause the disclosure of the presence of material and significant levels of arsenic and lead in the
14 Contaminated Dog Foods, to correct the false and misleading perception Defendants have
15 created in the minds of consumers that the Contaminated Dog Foods are high quality, safe, and
16 healthy and to obtain redress for those who have purchased the Contaminated Dog Foods.

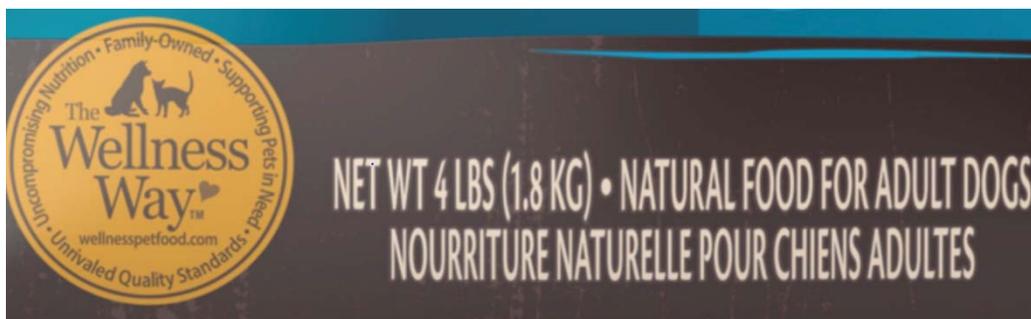
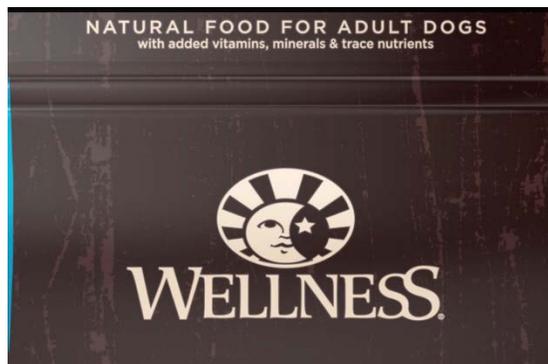
17 **THE PRESENCE OF BISPHENOL A ("BPA") IN CORE OCEAN**

18 15. Moreover, CORE Ocean contains material and significant levels of BPA—an
19 industrial chemical that "is an endocrine disruptor. It's an industrial chemical that according to
20 Medical News Today '... interferes with the production, secretion, transport, action, function and
21 elimination of natural hormones.'"⁴ BPA has been linked to various health issues, including
22 reproductive disorders, heart disease, diabetes, cancer, and neurological problems.⁵

23
24
25 ⁴Dr. Karen Beeker, *A Major Heads Up: Don't Feed This to Your Dog*, Healthy Pets (Feb. 13,
26 2017), <https://healthypets.mercola.com/sites/healthypets/archive/2017/02/13/dogs-canned-food-dangers.aspx>.

27 ⁵ Christian Nordquist, *Bisphenol A: How Does It Affect Our Health?* Medical News Today (May
28 24, 2017), <https://www.medicalnewstoday.com/articles/221205.php>.

1 16. Despite the presence of this harmful chemical, Defendants prominently
2 warranted, claimed, featured, represented, advertised, or otherwise marketed that CORE Ocean
3 was "natural." Indeed, each bag states on the front in two different places that CORE Ocean is
4 natural food:



18 17. Defendants' website also warrants, claims, features, represents, advertises, or
19 otherwise markets that its products, including CORE Ocean, are natural. In fact, WellPet's motto
20 according to the website is "WellPet – The Healthiest Natural Products For Pets:"

21 **WellPet - The Healthiest Natural Products for Pets**

22 www.wellpet.com/ ▼

23 Check out WellPet in magazines, newspapers and more! We're a diverse group, but it's a shared love of
24 pets & natural food that brings us all together! more.

25 **OUR PHILOSOPHY**

26 WellPet is home to the family of premium pet food brands including Wellness[®], Old Mother Hubbard[®], Eagle Pack[®],
27 Holistic Select[®] and Sojo's[®]. We have a long history of delivering on the promise of making the healthiest natural
28 products for pets.

Our Standards. Our Promise.

At Wellness, your pet's health is at the core of all we do. That's why we have developed an extensive quality assurance program, guaranteeing that all of our products are safe, pure and balanced.

18. In promoting its promise, warranty, claim, representation, advertisement, or otherwise marketing that CORE Ocean is safe and pure, Defendant further assures that:

Our mission is to provide you with *wholesome, natural pet food that is the best it can be*. Nothing is overlooked in our quest for excellence. We require all suppliers to meet stringent requirements and adhere to the highest standards, *exceeding even the strictest requirements from the FDA*. We are determined to go further, to do better and to take as many precautions with our pet food, as is taken with food for humans. *Because at Wellness, we are passionate about providing your pet with safe, uncompromising nutrition.*⁶

19. To this end, Defendants' website further warrants, claims, features, represents, advertises, or otherwise markets that its products, including CORE Ocean, are manufactured in such a way that would prevent BPA forming by closely monitoring temperatures and quality.⁷

Unsurpassed Food Safety Programs

During production, rigorous standards and practices are put in place to protect the nutritional integrity of our food. Our processing plant is meticulously sanitized in order to control bacterial growth or pest infestation. In our zeal to provide you with only the highest-quality pet food, we take extra precautions to make sure ingredients are stored properly, temperatures are monitored and products are routinely tested. We believe these measures are absolutely essential to producing the finest pet food that can nourish and energize your pet to the core. Our food is carefully handled, carefully prepared and undoubtedly safe.

⁶ <https://www.wellnesspetfood.com/our-philosophy/our-standards-our-promise> (emphasis added), visited Oct. 25, 2017.

⁷ *Id.*

THE PARTIES

1
2 25. Plaintiff Daniel Zeiger ("Zeiger") is, and at all times relevant hereto has been, a
3 citizen of the state of California. Plaintiff Zeiger purchased the Contaminated Dog Foods and
4 fed it to his three-year-old American Bulldog named Mack. Plaintiff Zeiger started purchasing
5 the Contaminated Dog Foods in or around October 2014 and continued to purchase
6 approximately one small bag monthly (priced at around \$15.00 per bag) until approximately July
7 2017 when he discovered that the food was contaminated. Plaintiff purchased the Contaminated
8 Dog Foods from the following places: (1) Pet Club in Corte Madera, CA; (2) Woodlands Pet
9 Food & Treats in Greenbrae, CA; (3) Woodlands Pet Food & Treats in Mill Valley, CA. Prior to
10 purchasing the Contaminated Dog Foods, Plaintiff Zeiger saw the products at the Bay Area Pet
11 Fair and the Golden Gate Kennel Club Dog Show at Cow Palace in San Francisco. During the
12 fair and dog show he received samples of the products and saw the nutritional claims, which he
13 relied on in deciding to purchase the Contaminated Dog Foods. During that time, based on the
14 false and misleading claims, warranties, representations, advertisements and other marketing by
15 Defendant, Plaintiff was unaware that the Contaminated Dog Foods contained any level of lead,
16 arsenic, or BPA and would not have purchased the food if that was fully disclosed.

17 26. Plaintiff Danz Doggie Daytrips ("Danz Doggie"), is, and at all times relevant
18 hereto has been, a citizen of the state of California. Plaintiff Danz Doggie is a dog sitting
19 business that used the Contaminated Dog Foods as one of the primary foods fed to its clients'
20 dogs. Plaintiff Danz Doggie started purchasing the Contaminated Dog Foods in or around
21 October 2014 and continued to purchase approximately one small bag monthly (priced at around
22 \$15.00 per bag) and ceased purchasing in approximately July 2017 upon discovery that the food
23 was contaminated. Plaintiff purchased the Contaminated Dog Foods from the following places:
24 (1) Pet Club in Corte Madera, CA; (2) Woodlands Pet Food & Treats in Greenbrae, CA; (3)
25 Woodlands Pet Food & Treats in Mill Valley, CA. Prior to purchasing the Contaminated Dog
26 Foods, Plaintiff saw the products at the Bay Area Pet Fair and the Golden Gate Kennel Club Dog
27 Show at Cow Palace in San Francisco. During that time, based on the false and misleading
28 claims, warranties, representations, advertisements, and otherwise marketing by Defendants,

1 Plaintiff was unaware that the Contaminated Dog Foods contained any level of lead, arsenic, or
2 BPA and would not have purchased the food if that was fully disclosed.

3 27. Plaintiff Amy Freeborn ("Freeborn") is, and at all times relevant hereto has been,
4 a citizen of the state of California. Plaintiff Freeborn started purchasing the Contaminated Dog
5 Foods in or around January 2010 and fed it to her Labrador Retrievers, including her three year
6 old Lab, Olivia. She stopped buying the Contaminated Dog Foods in July 2017 when she
7 discovered that the food was contaminated. Plaintiff Freeborn generally purchased one 40 to 60
8 pound bag of dog food per month. She sometimes purchased smaller bags of dog food for her
9 dog when traveling for work. The larger bags ran from \$50 to \$70 dollars and \$20 to \$40 dollars
10 for the smaller bags. Plaintiff purchased the products from various stores, including PetSmart,
11 Petco, and Instacart. During that time, based on the false and misleading claims, warranties,
12 representations, advertisements and other marketing on the labels and packaging, Plaintiff
13 Freeborn was unaware that the Contaminated Dog Foods contained any level of lead, arsenic, or
14 BPA and would not have purchased the food if that was fully disclosed.

15 28. As the result of Defendants' negligent, reckless, and/or knowingly deceptive
16 conduct as alleged herein, Plaintiffs were injured when they paid the purchase price or a price
17 premium for the Contaminated Dog Foods that did not deliver what it promised. They paid the
18 above sum on the assumption that the labeling of the Contaminated Dog Foods was accurate and
19 that it was healthy, clean, and safe for dogs to ingest, as well as natural and pure. Plaintiffs
20 would not have paid this money had they known that the Contaminated Dog Foods contained an
21 excessive degree of arsenic and lead or BPA. Damages can be calculated through expert
22 testimony at trial. Further, should Plaintiffs encounter the Contaminated Dog Foods in the
23 future, they could not rely on the truthfulness of the packaging, absent corrective changes to the
24 packaging and advertising of the Contaminated Dog Foods.

25 29. Defendant WellPet LLC is incorporated in Delaware with its headquarters located
26 at 200 Ames Pond Drive, Tewksbury, Massachusetts. Defendant WellPet LLC is a subsidiary of
27 defendant Berwind Corporation that is incorporated in Pennsylvania with its headquarters
28 located at 3000 Centre Square West, 1500 Market Street, Philadelphia, Pennsylvania.

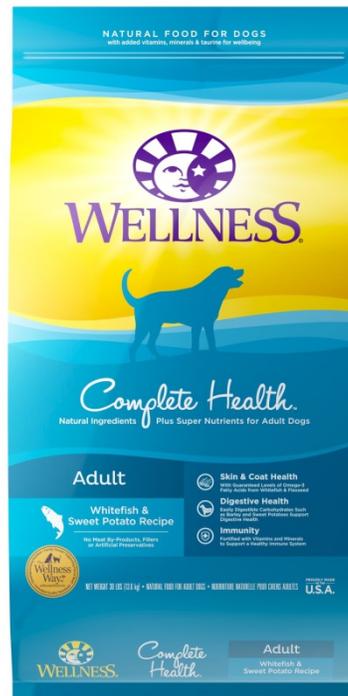
1 Defendants formulate, develop, manufacture, label, distribute, market, advertise, and sell the
2 Contaminated Dog Foods under the Wellness dog food brand name throughout the United States.
3 The advertising, labeling, and packaging for the Contaminated Dog Foods, relied upon by
4 Plaintiffs, was prepared, reviewed, and/or approved by Defendants and their agents, and was
5 disseminated by Defendants and their agents through marketing, advertising, packaging, and
6 labeling that contained the misrepresentations alleged herein. The marketing, advertising,
7 packaging and labeling for the Contaminated Dog Foods was designed to encourage consumers
8 to purchase the Contaminated Dog Foods and reasonably misled the reasonable consumer, i.e.,
9 Plaintiffs and the Classes, into purchasing the Contaminated Dog Foods. Defendants own,
10 manufacture, and distribute the Contaminated Dog Foods, and created, allowed, negligently
11 oversaw, and/or authorized the unlawful, fraudulent, unfair, misleading, and/or deceptive
12 labeling and advertising for the Contaminated Dog Foods.

13 30. The Contaminated Dog Foods, at a minimum, include:

14 (a) Wellness CORE Adult Dry Ocean Whitefish, Herring Meal and Salmon
15 Meal:



(b) Wellness Complete Health Adult Dry Whitefish and Sweet Potato:



FACTUAL ALLEGATIONS

Both Arsenic and Lead Are Exceptionally Dangerous When Ingested

31. Toxins like arsenic and lead can cause serious illness to humans and animals. A company should be vigilant to take all reasonable steps to avoid causing family pets to ingest these toxins.

32. Arsenic is a semi-metal element in the periodic table. It is odorless and tasteless. Arsenic occurs naturally in the environment as an element of the earth's crust; it is found in rocks, soil, water, air, plants, and animals. Elemental arsenic is combined with other elements such as oxygen, chlorine, and sulfur to form inorganic arsenic compounds. Historically, arsenic compounds were used in many industries, including: (i) as a preservative in pressure-treated lumber; (ii) as a preservative in animal hides; (iii) as an additive to lead and copper for hardening; (iv) in glass manufacturing; (v) in pesticides; (vi) in animal agriculture; and (vii) as arsine gas to enhance junctions in semiconductors. The United States has canceled the approvals of some of these uses, such as arsenic-based pesticides, for health and safety reasons. Some of

1 these cancellations were based on voluntary withdrawals by producers. For example,
2 manufacturers of arsenic-based wood preservatives voluntarily withdrew their products in 2003
3 due to safety concerns, and the EPA signed the cancellation order. In the Notice of Cancellation
4 Order, the EPA stated that it "believes that reducing the potential residential exposure to a known
5 human carcinogen is desirable." Arsenic is an element—it does not degrade or disappear.

6 33. Inorganic arsenic is a known cause of human cancer. The association between
7 inorganic arsenic and cancer is well documented. As early as 1879, high rates of lung cancer in
8 miners from the Kingdom of Saxony were attributed, in part, to inhaled arsenic. By 1992, the
9 combination of evidence from Taiwan and elsewhere was sufficient to conclude that ingested
10 inorganic arsenic, such as is found in contaminated drinking water and food, was likely to
11 increase the incidence of several internal cancers. The scientific link to skin and lung cancers is
12 particularly strong and longstanding, and evidence supports conclusions that arsenic may cause
13 liver, bladder, kidney, and colon cancers as well.

14 34. Lead is a metallic substance formerly used as a pesticide in fruit orchards, but the
15 use of such pesticides is now prohibited in the United States. Lead, unlike many other poisons,
16 builds up in the body over time as the person is exposed to and ingests it, resulting in a
17 cumulative exposure which can, over time, become toxic and seriously injurious to health. Lead
18 poisoning can occur from ingestion of food or water containing lead. Acute or chronic exposure
19 to material amounts of lead can lead to severe brain and kidney damage, among other issues, and
20 ultimately cause death.

21 35. The State of California has included arsenic and lead as a known carcinogen and
22 developmental toxin on the Proposition 65 list, pursuant to the Safe Drinking Water and Toxic
23 Enforcement Act of 1986.

24 36. The FDA has set standards that regulate the maximum parts per billion of lead
25 permissible in water: bottled water cannot contain more than 5 ppb of total lead or 10 ppb of total
26 arsenic. *See* 21 C.F.R. §165.110(b)(4)(iii)(A).

27

28

1 **Defendants Falsely Advertise the Contaminated Dog Foods as Healthy While Omitting Any**
2 **Mention of Arsenic or Lead, as Well as Claim CORE Ocean Is Natural, Pure and Safe**
3 **Despite the Inclusion of the Industrial Chemical BPA**

4 37. Defendants formulate, develop, manufacture, label, package, distribute, market,
5 advertise, and sell their extensive Wellness lines of dry and wet pet food products in California
6 and across the United States.

7 38. Based on Defendants' decision to warrant, claim, state, represent, advertise, label,
8 and market their Contaminated Dog Foods as made up of "Uncompromising Nutrition" and
9 "Unrivaled Quality Standards" that has nothing in excess and offers complete health, they had a
10 duty to ensure that the these statements were true. As such, Defendants knew or should have
11 known that the Contaminated Dog Foods included concerning and higher levels of arsenic and
12 lead.

13 39. Likewise, by warranting, claiming, stating featuring, representing, advertising or
14 otherwise marketing that CORE Ocean is natural, safe, and pure, Defendants had a known duty
15 to ensure that there were no chemicals included in the Contaminated Dog Foods. In fact,
16 Defendants offered further assurances by representing that the quality control over the
17 manufacturing of their Wellness dog food products was a rigid process that monitored
18 temperature. As such, Defendants knew or should have known that higher temperatures coupled
19 with the type of containers used in manufacturing create a real risk of significant levels of BPA
20 in their products.

21 40. The Contaminated Dog Foods are available at numerous retail and online outlets.

22 41. The Contaminated Dog Foods are widely advertised and WellPet LLC includes a
23 Vice President of Marketing as part of its advertised leadership team.

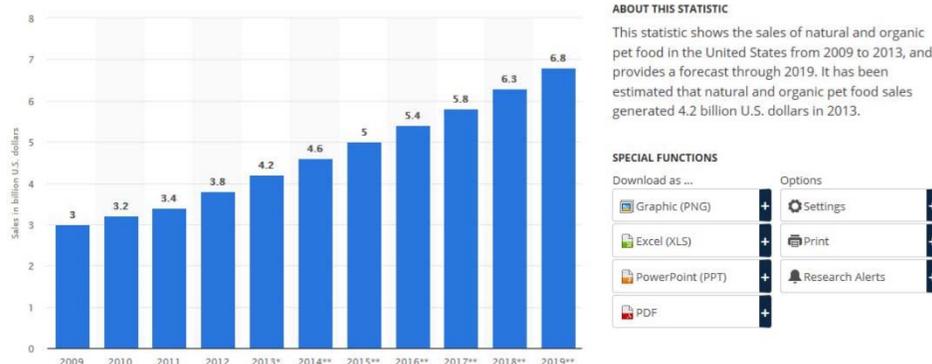
24 42. The official Wellness Pet Food website displays the Contaminated Dog Foods'
25 descriptions and full lists of ingredients for the Contaminated Dog Foods and includes the
26 following promise:
27
28

Our Standards. Our Promise.

At Wellness, your pet's health is at the core of all we do. That's why we have developed an extensive quality assurance program, guaranteeing that all of our products are safe, pure and balanced.

43. The Defendants' webpages again and again repeat the false and misleading claims, warranties, representations, advertisements, and other marketing about the Contaminated Dog Foods benefits, quality, purity, and natural make-up, without any mention of the arsenic and lead they contain or the BPA contained in CORE Ocean. This is not surprising given that natural pet food sales represent over \$5.5 billion in the United States and have consistently risen over the years.⁸

Natural and organic pet food sales in the United States from 2009 to 2019 (in billion U.S. dollars)



44. Moreover, WellPet LLC has itself acknowledged the importance to quality dog food to the reasonable consumer: "People are increasingly concerned with what they eat and where their food comes from, and this concern has influenced the pet food space as well," agrees Carly White, digital marketing specialist at WellPet LLC, makers of Wellness pet foods. "More

⁸ Statista, *Natural and Organic Pet Food Sales in the U.S. from 2009 to 2019*, The Statistics Portal (accessed Oct. 25, 2017). <https://www.statista.com/statistics/548957/us-sales-of-natural-and-organic-pet-food/>

1 and more, pet parents are taking an active role in their pet's nutrition, with a focus on quality
2 ingredients that are [conscientiously] sourced."⁹

3 45. As a result of Defendants' omissions, a reasonable consumer would have no
4 reason to suspect the presence of arsenic and lead or BPA in the Contaminated Dog Foods
5 without conducting his or her own scientific tests, or reviewing third-party scientific testing of
6 these products.

7 46. That is exactly what Plaintiffs did here. Plaintiffs' independent lab testing of the
8 Contaminated Dog Foods found that CORE Ocean contains 1,500 ppb of arsenic and 221 ppb of
9 lead and Wellness Complete Health Adult Dry Whitefish and Sweet Potato contains 1,200 ppb of
10 arsenic and 220 ppb of lead.

11 **DEFENDANTS' STATEMENTS AND OMISSIONS VIOLATE CALIFORNIA LAWS**

12 47. California law is designed to ensure that a company's claims about its products are
13 truthful and accurate. Defendants violated California law by negligently, recklessly, and/or
14 intentionally incorrectly claiming that the Contaminated Dog Foods are pure, healthy, and safe
15 for consumption and by not accurately detailing that the products contain the toxins arsenic and
16 lead. Instead, Defendants represented that the Contaminated Dog Foods as made up of
17 "Uncompromising Nutrition" and "Unrivaled Quality Standards" that has nothing in excess and
18 offers complete health Defendants further violated California law by negligently, recklessly,
19 and/or intentionally incorrectly claiming that CORE Ocean is natural, pure, and safe when it
20 contains BPA.

21 48. Defendants' marketing and advertising campaign has been sufficiently lengthy in
22 duration, and widespread in dissemination, that it would be unrealistic to require Plaintiffs to
23 plead relying upon each advertised misrepresentation.

24 49. Defendants have engaged in this long-term advertising campaign to convince
25 potential customers that the Contaminated Dog Foods were pure, healthy, safe for consumption,

26

27 ⁹ Melissa Breau, *Pet Food Evolution*, Pet Business (Oct. 16, 2015), (alteration in original)
28 <http://www.petbusiness.com/Pet-Food-Evolution/>

1 and did not contain harmful ingredients, such as arsenic and lead. Likewise, Defendants have
2 engaged in this long-term advertising campaign to convince potential customers that CORE
3 Ocean is natural, pure, and safe despite the presence of BPA in the food.

4 **PLAINTIFFS' RELIANCE WAS REASONABLE AND FORESEEN BY DEFENDANTS**

5 50. Plaintiffs reasonably relied on Defendants' own claims, warranties,
6 representations, advertisements, and other marketing concerning the particular qualities and
7 benefits of the Contaminated Dog Foods.

8 51. Plaintiffs read and relied upon the labels and packaging of the Contaminated Dog
9 Foods in making their purchasing decisions.

10 52. A reasonable consumer would consider the labeling of a product when deciding
11 whether to purchase. Here, Plaintiffs relied on the specific statements and misrepresentations by
12 Defendants that the Contaminated Dog Foods were healthy and made up of "Uncompromising
13 Nutrition" and "Unrivalled Quality Standards" that has nothing in excess and offers complete
14 health with no disclosure of the inclusion of arsenic or lead.

15 **DEFENDANTS' KNOWLEDGE AND NOTICE OF THEIR BREACHES**
16 **OF THEIR EXPRESS AND IMPLIED WARRANTIES**

17 53. Defendants had sufficient notice of their breaches of express and implied
18 warranties. Defendants have, and had, exclusive knowledge of the physical and chemical make-
19 up of the Contaminated Dog Foods. Moreover, Defendants were put on notice by the Clean
20 Label Project on the inclusion of heavy metals in its dog food products.

21 **PRIVITY EXISTS WITH PLAINTIFFS AND THE PROPOSED CLASS**

22 54. Defendants knew that consumers such as Plaintiffs and the proposed Classes
23 would be the end purchasers of the Contaminated Dog Foods and the target of their advertising
24 and statements.

25 55. Defendants intended that the warranties, advertising, labeling, statements, and
26 representations would be considered by the end purchasers of the Contaminated Dog Foods,
27 including Plaintiffs and the proposed Classes.

1 56. Defendants directly marketed to Plaintiffs and the proposed Classes through
2 statements on their website, labeling, advertising, and packaging.

3 57. Plaintiffs and the proposed Class are the intended beneficiaries of the expressed
4 and implied warranties.

5 **CLASS ACTION ALLEGATIONS**

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

8 All persons who are citizens of the United States who, from July 1, 2013 to the
9 present, purchased the Contaminated Dog Foods for household or business use,
and not for resale (the "Class").

10 59. Plaintiffs also bring this action individually and on behalf of the following Class
11 pursuant to Rules 23(a) and 23(b)(2) and (3) of the Federal Rules of Civil Procedure.

12 All persons who are citizens of the United States who, from July 1, 2013 to the
13 present, purchased CORE Ocean for household or business use, and not for resale
14 (the "Natural Claims Class").

15 60. In addition, Plaintiffs brings this action individually and on behalf of the
16 following Subclasses pursuant to Rules 23(a) and 23(b)(2) and (3) of the Federal Rules of Civil
17 Procedure:

18 All persons in California who, from July 1, 2013 to the present, purchased the
19 Contaminated Dog Foods for household or business use, and not for resale

20 and

21 All persons in California who, from July 1, 2013 to the present, purchased the
22 CORE Ocean for household or business use, and not for resale. (collectively
"California Subclasses").¹⁰

23 61. Excluded from the Classes are the Defendants, any parent companies,
24 subsidiaries, and/or affiliates, officers, directors, legal representatives, employees, co-
25 conspirators, all governmental entities, and any judge, justice, or judicial officer presiding over
26 this matter.

27 _____
28 ¹⁰ All classes collectively are referred to as the "Classes."

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

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

7 64. Questions of law and fact common to Plaintiffs and the Classes include, but are
8 not limited to, the following:

9 (a) whether Defendants owed a duty of care;

10 (b) whether Defendants knew or should have known that the Contaminated
11 Dog Foods contained higher levels of arsenic and/or lead;

12 (c) whether Defendants knew or should have known that CORE Ocean
13 contained BPA;

14 (d) whether Defendants represented and continue to represent that the
15 Contaminated Dog Foods are made up of "Uncompromising Nutrition" and "Unrivaled Quality
16 Standards" that has nothing in excess and offers complete health;

17 (e) whether Defendants represented and continue to represent that the
18 Contaminated Dog Foods are healthy and safe for consumption;

19 (f) whether Defendants represented and continue to represent that the CORE
20 Ocean is natural dog food;

21 (g) whether Defendants represented and continue to represent that the CORE
22 Ocean is pure and safe;

23 (h) whether Defendants represented and continue to represent that the
24 manufacturing of their Wellness dog food products is subjected to rigorous standards, including
25 temperature;

26 (i) whether Defendants failed to state that the Contaminated Dog Foods
27 contained arsenic, lead, and/or BPA;

28

1 (j) whether Defendants' representations in advertising, warranties, packaging,
2 and/or labeling are false, deceptive, and misleading;

3 (k) whether those representations are likely to deceive a reasonable consumer;

4 (l) whether Defendants had knowledge that those representations were false,
5 deceptive, and misleading;

6 (m) whether Defendants continue to disseminate those representations despite
7 knowledge that the representations are false, deceptive, and misleading;

8 (n) whether a representation that a product is healthy and safe for
9 consumption and does not contain arsenic and/or lead is material to a reasonable consumer;

10 (o) whether Defendants' representations and descriptions on the labeling of
11 the Contaminated Dog Foods are likely to mislead, deceive, confuse, or confound consumers
12 acting reasonably;

13 (p) whether Defendants violated California Business & Professions Code
14 sections 17200, *et seq.*;

15 (q) whether Defendants violated California Business & Professions Code
16 sections 17500, *et seq.*;

17 (r) whether Defendants violated California Civil Code sections 1750, *et seq.*;

18 (s) whether Plaintiffs and the members of the Classes are entitled to actual,
19 statutory, and punitive damages;

20 (t) whether Defendants violated California Health & Safety Code section
21 113095; and

22 (u) whether Plaintiffs and members of the Classes are entitled to declaratory
23 and injunctive relief.

24 65. Defendants engaged in a common course of conduct giving rise to the legal rights
25 sought to be enforced by Plaintiffs individually and on behalf of the other members of the Class.
26 Identical statutory violations and business practices and harms are involved. Individual
27 questions, if any, are not prevalent in comparison to the numerous common questions that
28 dominate this action.

1 75. Because of the relationship between the parties, the Defendants owed a duty to
2 use reasonable care to impart correct and reliable disclosures concerning the presence of arsenic,
3 lead, and BPA in the Contaminated Dog Foods and CORE Ocean or, based upon their superior
4 knowledge, having spoken, to say enough to not be misleading.

5 76. Defendants breached their duty to Plaintiffs and the Classes by providing false,
6 misleading, and/or deceptive information regarding the nature of the Contaminated Dog Foods
7 and CORE Ocean.

8 77. Plaintiffs and the Classes reasonably and justifiably relied upon the information
9 supplied to them by the Defendants. A reasonable consumer would have relied on Defendants'
10 own warranties, statements, representations, advertising, packaging, labeling, and other
11 marketing as to the quality, make-up, and included ingredients of the Contaminated Dog Foods
12 and CORE Ocean. Defendants themselves admitted that consumers now "focus on quality
13 ingredients..." when purchasing dog food. ¹¹

14 78. As a result of these misrepresentations, Plaintiffs and the Classes purchased the
15 Contaminated Dog Foods and CORE Ocean at a premium.

16 79. Defendants failed to use reasonable care in their communications and
17 representations to Plaintiffs and the Classes, especially in light of their knowledge of the risks
18 and importance of considering ingredients to consumers when purchasing the Contaminated Dog
19 Foods and CORE Ocean.

20 80. By virtue of Defendants' negligent misrepresentations, Plaintiffs and the Classes
21 have been damaged in an amount to be proven at trial or alternatively, seek rescission and
22 disgorgement under this Count.

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27 ¹¹ Melissa Breau, *Pet Food Evolution*, Pet Business (Oct. 16, 2015), (alteration in original)
28 <http://www.petbusiness.com/Pet-Food-Evolution/>

COUNT II

(Violations of California's Consumer Legal Remedies Act, California Civil Code §§1750, *Et Seq.*, Against Defendants on Behalf of the California Subclasses)

81. Plaintiffs Zeiger and Freeborn incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

82. Plaintiffs Zeiger and Freeborn and each proposed California Subclasses member is a "consumer," as that term is defined in California Civil Code section 1761(d).

83. The Contaminated Dog Foods and CORE Ocean are "goods," as that term is defined in California Civil Code section 1761(a).

84. Defendants are a "person" as that term is defined in California Civil Code section 1761(c).

85. Plaintiffs Zeiger and Freeborn and each proposed California Subclasses member's purchase of Defendants' products constituted a "transaction," as that term is defined in California Civil Code section 1761(e).

86. Defendants' conduct alleged herein violates the following provisions of California's Consumer Legal Remedies Act (the "CLRA"):

(a) California Civil Code section 1770(a)(5), by negligently, recklessly, and/or intentionally representing that the Contaminated Dog Foods are healthy and safe for consumption and by failing to make any mention of arsenic and lead in the Contaminated Dog Foods;

(b) California Civil Code section 1770(a)(5), by negligently, recklessly, and/or intentionally representing that the Contaminated Dog Foods are natural, pure and safe and by failing to make any mention of BPA in CORE Ocean;

(c) California Civil Code section 1770(a)(7), by negligently, recklessly, and/or intentionally representing that the Contaminated Dog Foods were of a particular standard, quality, or grade, when they were of another;

1 (d) California Civil Code section 1770(a)(9), by negligently, recklessly,
2 and/or intentionally advertising the Contaminated Dog Foods and CORE Ocean with intent not
3 to sell them as advertised; and

4 (e) California Civil Code section 1770(a)(16), by representing that the
5 Contaminated Dog Foods and CORE Ocean have been supplied in accordance with previous
6 representations when they have not.

7 87. As a direct and proximate result of these violations, Plaintiffs Zeiger and Freeborn
8 and the California Subclasses have been harmed, and that harm will continue unless Defendants
9 are enjoined from using the misleading marketing described herein in any manner in connection
10 with the advertising and sale of the Contaminated Dog Foods.

11 88. On July 19, 2017, counsel for Plaintiffs Zeiger and Freeborn and the California
12 Subclasses sent Defendants written notice (via U.S. certified mail, return receipt requested) that
13 its conduct is in violation of the CLRA concerning the arsenic and lead omissions.

14 89. Defendants failed to provide appropriate relief for their violations of CLRA
15 sections 1770(a)(5), (7), (9), and (16) within thirty days of receipt of Plaintiffs' notification. In
16 accordance with CLRA section 1782(b), Plaintiffs and the California Subclasses are entitled,
17 under CLRA section 1780, to recover and obtain the following relief for Defendants' violations of
18 CLRA sections 1770(a)(5),(7), (9) and (16):

- 19 (a) actual damages under CLRA section 1780(a)(1);
20 (b) restitution of property under CLRA section 1780(a)(3);
21 (c) punitive damages under CLRA section 1780(a)(4) and because Defendants
22 have engaged in fraud, malice, or oppression; and
23 (d) any other relief the Court deems proper under CLRA section 1780(a)(5).

24 90. Plaintiffs Zeiger and Freeborn seek an award of attorneys' fees pursuant to, inter
25 alia, California Civil Code section 1780(e) and California Code of Civil Procedure section
26 1021.5.

COUNT III

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

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2
3
4 91. Plaintiffs incorporate by reference and reallege each and every allegation
5 contained above, as though fully set forth herein.

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

8 93. As set forth herein, Defendants' claims that the Contaminated Dog Foods are
9 healthy and safe for consumption are literally false and likely to deceive the public. Likewise,
10 Defendants' statements that CORE Ocean is natural, pure, and safe are false and likely to deceive
11 the public.

12 94. Defendants' claims that the Contaminated Dog Foods are healthy and safe for
13 consumption are untrue or misleading, as is failing to make any mention of arsenic and lead in
14 the Contaminated Dog Foods. Likewise, Defendants' statements that CORE Ocean is natural,
15 pure, and safe are untrue or misleading, as failing to disclose the presence of BPA in the dog
16 food.

17 95. Defendants knew, or reasonably should have known, that all these claims were
18 untrue or misleading.

19 96. Defendants' conduct is ongoing and continuing, such that prospective injunctive
20 relief is necessary, especially given Plaintiffs' desire to purchase these products in the future if
21 they can be assured that, so long as the Contaminated Dog Foods are, as advertised, healthy and
22 safe for consumption and do not contain arsenic or lead.

23 97. Plaintiffs and members of the California Subclass are entitled to injunctive and
24 equitable relief, and restitution in the amount they spent on the Contaminated Dog Foods and
25 CORE Ocean.

COUNT IV

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

98. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

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

Fraudulent

100. Defendants' statements that the Contaminated Dog Foods and CORE Ocean are pure, natural, and healthy, and safe for consumption are literally false and likely to deceive the public, as is Defendants' failing to make any mention of arsenic, lead and BPA in the Contaminated Dog Foods and CORE Ocean.

Unlawful

101. As alleged herein, Defendants have advertised the Contaminated Dog Foods and CORE Ocean with false or misleading claims, such that Defendants' 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

102. Defendants' conduct with respect to the labeling, packaging, advertising, marketing, and sale of the Contaminated Dog Foods and CORE Ocean is unfair because Defendants' 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.

103. Defendants' conduct with respect to the labeling, packaging, advertising, marketing, and sale of the Contaminated Dog Foods and CORE Ocean is also unfair because it

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

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

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

12 106. On behalf of themselves and the California Subclasses, Plaintiffs also seek an
13 order for the restitution of all monies from the sale the Contaminated Dog Foods and CORE
14 Ocean, which were unjustly acquired through acts of fraudulent, unfair, or unlawful competition.

15 **COUNT V**

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

18 107. Plaintiffs incorporate by reference and reallege each and every allegation
19 contained above, as though fully set forth herein.

20 108. As set forth herein, Defendants made express representations to Plaintiffs and the
21 Class that the Contaminated Dog Foods as made up of "Uncompromising Nutrition" and
22 "Unrivalled Quality Standards" that has nothing in excess and offers complete health.

23 109. Defendants also made express representations to Plaintiffs and the Class that the
24 Contaminated Dog Foods were pure, healthy, and safe for consumption.

25 110. Defendants likewise made express representations to Plaintiffs and the Natural
26 Claims Class that CORE Ocean was natural, pure, and safe.

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

1 112. There was a sale of goods from Defendants to Plaintiffs and the Classes members.

2 113. On the basis of these express warranties, Defendants sold to Plaintiffs and the
3 Classes the Contaminated Dog Foods and CORE Ocean.

4 114. Defendants knowingly breached the express warranties by including arsenic, lead,
5 and BPA in the Contaminated Dog Foods and CORE Ocean.

6 115. Defendants were on notice of this breach as they were aware of the included
7 arsenic, lead, and BPA in the Contaminated Dog Foods and CORE Ocean, and based on the
8 public investigation by the Clean Label Product that showed their dog food products as
9 unhealthy.

10 116. Privity exists because Defendants expressly warranted to Plaintiffs and the
11 California Subclasses that the Contaminated Dog Foods and CORE Ocean were healthy, safe,
12 natural, and/or pure.

13 117. Plaintiffs and the Classes reasonably relied on the express warranties by
14 Defendants.

15 118. As a result of Defendants' breaches of their express warranties, Plaintiffs and the
16 Classes sustained damages as they paid money for the Contaminated Dog Foods that were not
17 what Defendants represented.

18 119. Plaintiffs, on behalf of themselves and the Classes, seek actual damages for
19 Defendants' breach of warranty.

20 **COUNT VI**

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

23 120. Plaintiffs incorporate by reference and reallege each and every allegation
24 contained above, as though fully set forth herein.

25 121. As set forth herein, Defendants made affirmations of fact on the Contaminated
26 Dog Foods' labels to Plaintiffs and the California Subclasses that the Contaminated Dog Foods
27 are made up of "Uncompromising Nutrition" and "Unrivalled Quality Standards" that has nothing
28 in excess and offers complete health.

1 122. Defendants also made affirmations of fact on the Contaminated Dog Foods' labels
2 to Plaintiffs and the Class that the Contaminated Dog Foods were pure, healthy, and safe for
3 consumption and did not contain arsenic or lead.

4 123. The Contaminated Dog Foods did not conform to these affirmations and promises
5 as they contained arsenic and lead at alarming and unsafe levels.

6 124. Defendants also made affirmations of fact on the CORE Ocean labels to Plaintiff
7 and the Natural Claims Class that CORE Ocean was natural dog food and did not contain the
8 chemical BPA.

9 125. CORE Ocean did not conform to these affirmations and promises as it contains
10 the industrial chemical BPA.

11 126. These promises became part of the basis of the bargain between the parties and
12 thus constituted implied warranties.

13 127. Defendants are merchants engaging in the sale of goods to Plaintiffs and the
14 members of the Classes

15 128. There was a sale of goods from Defendants to Plaintiffs and the members of the
16 Classes.

17 129. Defendants breached the implied warranties by selling the Contaminated Dog
18 Foods and CORE Ocean that failed to conform to the promises or affirmations of fact made on
19 the container or label as each product contained arsenic, lead and/or BPA.

20 130. Defendants were on notice of this breach as they were aware of the arsenic, lead
21 and BPA included in the Contaminated Dog Foods and CORE Ocean, and based on the public
22 investigation by the Clean Label Product that showed their dog food products as unhealthy.

23 131. Privity exists because Defendants impliedly warranted to Plaintiffs and the
24 California Subclasses through the warranting, packaging, advertising, marketing, and labeling
25 that the Contaminated Dog Foods and CORE Ocean were pure, healthy, natural, and safe and by
26 failing to make any mention of arsenic, lead and BPA.

27

28

1 132. As a result of Defendants' breach of their implied warranties of merchantability,
2 Plaintiffs and the Classes sustained damages as they paid money for the Contaminated Dog
3 Foods and CORE Ocean that were not what Defendants represented.

4 133. Plaintiffs, on behalf of themselves and the Classes, seek actual damages for
5 Defendants' breach of warranty.

6 **COUNT VII**

7 **(Violation of California Health and Safety Code §113095 Against Defendants on Behalf of
8 the California Classes)**

9 134. Plaintiffs incorporate by reference and reallege each and every allegation
10 contained above, as though fully set forth herein.

11 135. Defendants have a statutory duty to not mislabel its products under California
12 Health & Safety Code section 113095.

13 136. Under section 113095, a pet food is mislabeled:

14 (a) "If its labeling is false or misleading in any particular"; or

15 (b) "If its container is so made, formed or filled as to be misleading."

16 137. This statute sets out the standard of care for Defendants that they failed to meet by
17 failing to disclose that the Contaminated Dog Foods contained higher and/or unsafe levels of
18 arsenic and lead as a reasonable consumer would expect when the label states it is healthy and
19 safe.

20 138. Defendants violated this statute as the CORE Ocean labels and packaging state it
21 is natural dog food and do not disclose the presence of BPA in the food.

22 139. Plaintiffs and the California Subclasses as consumers of dog food are within the
23 class of persons the legislature intended to protect under this statute. And there is not limiting to
24 a private cause of action in this section as appears in other sections of this Code.

25 **PRAYER FOR RELIEF**

26 WHEREFORE, Plaintiffs, individually and on behalf of all others similarly situated, pray
27 for judgment against the Defendants as to each and every count, including:
28

1 Dated: October 26, 2017

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