

Action No.:

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

BOBBY-JOE ROVENSKY and CHARMAINE McBAIN

PLAINTIFFS

AND

MENU FOODS INCOME FUND

DEFENDANT

Proceedings under the Class Proceedings Act

Statement of Claim

The Plaintiff

1. These class proceedings concern contaminated pet food produced, distributed and ultimately offered for sale by the Defendant.
2. The Plaintiff, Bobby-Joe Rovensky, is a resident of Didsbury, Alberta, and is a member of the proposed Class as a purchaser of the Defendant's contaminated pet food.
3. The Plaintiff, Charmaine McBain, is a resident of Saskatoon, Saskatchewan, and is a member of the proposed Class as a purchaser of the Defendant's contaminated pet food.

The Defendant

4. The Defendant, Menu Foods Income Fund, is an income trust fund formed pursuant to the

Laws of Canada.

Alberta Class Members

5. The Plaintiffs make this claim as a representative of a class of persons, corporations, and other entities, more particularly described as follows:
 - a) All persons (including their estates, executors, or personal representatives), corporations, and other entities in Canada (except for the province of Quebec), who purchased recalled pet food manufactured, distributed or ultimately offered for sale and sold to the public in Canada by the Defendant, its affiliates, or retailers supplied with products by the Defendant.

Non-Alberta Class Members

6. The Plaintiffs also make this claim as a representative of a non-Alberta resident sub class of persons, corporations, and other entities not resident or situated in the Province of Alberta, but who are resident or situated in another Canadian Province or Territory, more particularly described as follows:
 - a) All persons (including their estates, executors, or personal representatives), corporations, and other entities in Canada (except for the province of Quebec), who purchased recalled pet food manufactured, distributed or ultimately offered for sale and sold to the public in Canada by the Defendant, its affiliates, or retailers supplied with products by the Defendant.

(hereinafter both resident and non-resident Class Members are collectively referred to as the "Plaintiff(s)", "Class Member(s)", the "Class", "consumers", or the "public").

Overview

7. The Plaintiffs, individually and as representatives of a class of similarly situated persons, claim as against the Defendant for offering for sale and selling to the Plaintiffs and class members contaminated pet food and food products, known as “cut and gravy” products.
8. The Defendant is an income trust doing business and operating in Canada.
9. The Defendant recalled cat and dog food products that are sold under numerous brands by several national chain stores in Alberta, and other Provinces and Territories in Canada.
10. The pet food products were produced by Defendant, a private label manufacturer, labeled by the Defendant, and then distributed and ultimately sold to the Plaintiffs and Class Members.
11. The pet food products recalled by the Defendant were intended to be placed in the stream of commerce and distributed and offered for sale and sold to the Plaintiffs and other Class Members in Alberta and other Provinces and Territories in Canada and fed to their pets, cats and dogs.
12. The Plaintiffs purchased the recalled pet food product made by or for the Defendant, and the Plaintiffs’ pets ate or consumed said pet food. Thousands of other consumers, including the Plaintiffs and other Class Members, purchased the recalled or contaminated products from retailers of the Defendant, its agents, and affiliates. The products were purchased for consumption for the pets of the Plaintiffs and the Class Members. The Defendant made or caused the products to be offered for sale and sold to the public, including the Plaintiffs and the Class Members.

Defendant, Its Business, and the Recall

13. The Defendant is the leading North American private label and contract manufacturer of wet pet food products sold by supermarket retailers, mass merchandisers, pet specialty retailers, and other wholesale and retail outlets, including Wal-Mart, Safeway, Real Canadian Superstore, Pet Value, Petcetra, and other large retail chains, and has provided pet food products to or for Proctor & Gamble, Inc. and other companies.
14. The Defendant has manufactured or produced pet food for private labels for many of the leading retailers in Canada.
15. The Defendant's business includes manufacturing, producing, distributing, or selling cat food under various brands or labels, and/or for third party firms, including: America's Choice, Preferred Pets, Authority, Best Choice, Companion, Compliments, Demoulus Market Basket, Eukanuba, Fine Feline Cat, Food Lion, Food Town, Giant Companion, Hannaford, Hill Country Fare, Hy-Vee, Iams, Laura Lynn, Li'l Red, Loving Meals, Meijer's Main Choice, Nutriplan, Nutro Max Gourmet Classics, Nutro Natural Choice, Paws, Pet Pride, President's Choice, Priority, Sav-a-Lot, Schnucks, Science Diet Feline Savory Cuts Cans, Sophsitacat, Special Kitty US, Springfield Prize, Sprout, Total Pet, Wegmans, Western Family, White Rose, and Wynn Dixie.
16. The Defendant's business includes manufacturing, producing, distributing, or selling dog food under various brands or labels, and/or for third party firms, including: America's Choice, Preferred Pets, Authority, Award, Best Choice, Big Bet, Big Red, Bloom, Bruiser, Cadillac, Companion, Demoulus Market Basket, Eukanuba, Food Lion, Giant Companion, Great Choice, Hannaford, Hill Country Fare, Hy-vee, Iams, Laura Lynn, Li'l Red, Loving Meals, Meijer's Main Choice, Mixables, Nutriplan, Nutro Max, Nutro Ultra, Nutro, Ol'Roy US, Paws, Pet Essentials, Pet Pride - Good & Meaty, President's Choice, Price Chopper, Priority, Publix, Roche Brothers, Sav-a-Lot, Schnucks, Shep Dog, Sprout, Statler Bros, Total Pet, Western Family, White Rose, Wynn Dixie, and Your Pet.

17. After reports or complaints from pet owners about symptoms - such as vomiting or lethargy- suggesting kidney failure in their dogs and cats and/or after reports of deaths of certain pets, from or through its Canadian office or affiliates, the Defendant caused or issued a recall of certain specified pet products, reportedly totaling between 40 and 60 million cans.
18. On the Defendant's website as of March 17, 2007, it listed by, brands, size of the container or pouch, dates of manufacture, the products subject to a recall.
19. Many consumers who fear for the health of their pets will no longer have the product because it has been fed to the pets.
20. According to reports from government testing performed in the United States, pet food products produced by the Defendant have been found to contain, *inter alia*, aminopterin, a rodenticide, commonly used as a rat poison. Aminopterin is banned from use or illegal in many North American jurisdictions.
21. The Defendant is North America's largest producer of pet food and would reasonably be expected to maintain appropriate standards of production when producing and manufacturing their products. The Plaintiffs assert that the Defendant failed and was inadequate in properly supervising the production and manufacturing of its products, failed to maintain proper safety standards, failed to properly check, testing, and sampling the quality of its products, and asserts that it failed to discharge its duty of care to consumers and maintain appropriate standards in production and manufacturing of its products.
22. The Defendant knows or understands that millions or tens of millions of cans or pouches of the pet food products that it manufactures or produces will be advertised, promoted, and sold in British Columbia and Canada generally, including a significant or substantial part of the recalled pet food.

23. The Defendant knows or understands that the promotion and advertising of pet food produced at its plants in part targets consumers and customers in Alberta and consumers and customers in Canada, generally.
24. The Defendant desires that consumers and others who purchase or consider purchasing a pet food product made or produced in one of its plants, by whatever label or brand, believe that the pet food product is safe for their pets to eat.
25. Class members and others have purchased the pet products that were recalled across Canada and in Alberta specifically.
26. Class members who purchased or fed Defendant's products to their pets did so in Alberta and in Canada generally.
27. Class members have taken their pets to a veterinarian for treatment or diagnosis related to their pets eating the recalled pet food and more will do so as word of the recall spreads.
28. Class members have suffered and will suffer injuries, losses, or damage as a result of the recall and/or feeding their animals the food that was recalled.
29. 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 Defendant knew or should have known about the risks and possible injury.
30. The Plaintiff, Bobby-Joe Rovensky, purchased recalled brands of Special Kitty pet food from a national chain grocery/retail store, Walmart, operating in Alberta. Walmart, like other retailers, did not alter the product produced by the Defendant in any way prior to selling it to the Plaintiff, Bobby-Joe Rovensky, and other Class Members throughout Canada.

31. Without knowing that the Defendant would recall the product after it was offered for sale and sold to her, the Plaintiff, Bobby-Joe Rovensky, purchased and fed the product(s) to her cats, her pets. Her pets became ill, and consumed large amounts of water and experienced increased urination as well as a substantial reduction in weight.
32. The Plaintiff, Charmaine McBain purchased recalled brands of Iams and Nutro pet food from a national chain grocery/retail store, Walmart and the Real Canadian Superstore, in Saskatoon, Saskatchewan. Walmart and the Real Canadian Superstore, like other retailers, did not alter the product produced by the Defendant in any way prior to selling it to the Plaintiff, Charmaine McBain, and other Class Members throughout Canada.
33. Without knowing that the Defendant would recall the product after it was offered for sale and sold to her, the Plaintiff, Charmaine McBain, purchased and fed the product(s) to her dog, her pet. Her pet became lethargic, experienced a loss of appetite, swollen stomach, vomiting and diarrhea and began drinking large amounts of water. The Plaintiff, Charmaine McBain's pet died in January of 2007 as a result of its deteriorating health all of which occurred prior to the Defendant's recall notice.
34. Before their purchase, the Defendant never warned the Plaintiffs that the pet food product 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 contaminated pet food.
35. The Plaintiffs and thousands of other Class Members have incurred or will incur veterinary bills to have their pets evaluated for kidney damage.
36. The products that the Plaintiffs purchased were products recalled by the Defendant.
37. After the Plaintiffs purchased the pet food and fed it to their pets, they learned about the

recall and the problems and concerns from purchasing and feeding the product to their pets.

38. The Plaintiffs bought the product(s) for their intended purpose to feed their pets.
39. The Defendant placed the contaminated pet products in the stream of commerce in Alberta and elsewhere expecting that consumers such as the Plaintiffs, the Class Members, and the general public would feed these products to their pets.

Plaintiff, Class Members, and Others' Losses, Damages, and Injuries

40. As a result of the purchases of the said pet food, set forth above, the Plaintiffs and other Class Members have suffered and will suffer a loss, damage, injury, and sustained damages, including consequential and incidental damages, *inter alia*, worry and concern, loss of companionship and protection, the costs of purchasing the contaminated food product and replacing it with a safe food product, including sale tax or a similar tax, 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 Defendant, the cost of veterinarians, treatment, medicines and the trip(s) to make such visits for diagnosis and treatment, and otherwise.

Manufacture, Design, Testing and Sale

41. In regards to the manufacture, design, testing, distribution and sale of the contaminated pet foods, the Defendant had a positive duty to ensure that the pet food manufactured and offered for sale to Class Members was fit for the purpose for which they were purchased. By not doing so, the Defendant produced and sold tainted pet food that the Class Member could not be aware of at time of purchase.

Misrepresentation & Negligence

42. The Class Members relied on the representations made by the Defendant or its affiliates as to the suitable quality and condition of the tainted pet food. In particular, but not exclusively, the Class Members relied on the Defendant's representations that:
 - a) the pet food was fit for the purpose for which it was intended;
 - b) the pet food was free of contaminants; and
 - c) the pet food was suitable for consumption by consumer's pets.
43. The Defendant misrepresented to Class Members the quality and condition of the pet food. The Defendant did this knowing that Class Members were relying on this information to inform their purchases. The Class Member had no other way of knowing of the contaminated nature of the pet food products.
44. The Defendant owed the Plaintiffs and the Class Members a duty to only offer safe, non-contaminated products for consumption by pets for sale in the stream of commerce.
45. Though its failure to exercise due care the Defendant owed the Plaintiffs and other Class Members, the Defendant was negligent in producing, processing, manufacturing, and offering for sale the recalled pet food and pet food products it offered for sale and sold to the Plaintiffs and other Class Members.
46. The Defendant failed to use sufficient quality control, to do adequate testing, to perform proper manufacturing, production, or processing, or failed to take sufficient measures to prevent the pet food products that were recalled from being offered for sale, sold, or fed to pets.
47. The Defendant knew or should have known that the said pet food that was recalled presented an unacceptable risk to the pets of the Plaintiffs and other Class Members, and would result in damage that was foreseeable and reasonably avoidable.

48. The loss, damage, and injuries were foreseeable.
49. The Defendant's negligence proximately caused the loss, damage, injury, and damages to the Plaintiff and other Class Members.

Common Issues

50. 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) Whether the Defendant sold pet food products that were recalled or subject to a recall?
 - b) Whether the Defendant advertised, represented, or held itself out as producing or manufacturing a pet food product that was safe for pets of the class members?
 - c) Whether the Defendant warranted these products?
 - d) Whether the Defendant impliedly warranted these products for fitness for a particular purpose?
 - e) Whether the Defendant impliedly warranted these products for merchantability?
 - f) Whether the Defendant intended that the pet food products be purchased by the Plaintiffs, Class Members, or others?
 - g) Whether the Defendant intended or foresaw that the Plaintiffs, Class Members, or others would feed their pet food products to their pets?
 - h) Whether the Defendant recalled the pet food products appropriately?
 - i) Whether the Defendant was negligent in manufacturing or processing the pet food products?
 - j) Whether using the products as intended - to feed their pets - resulted in loss, injury, damage, or damages to the Class?

- k) Whether the Defendant's negligence proximately caused loss or injury to damages?
- l) Whether the Class Members suffered direct losses or damages?
- m) Whether the Class Members suffered indirect losses or damages?
- n) Whether the Defendants' acts or practices breached *The Sale of Goods Act*, R.S.A. 1980, c. S-2 or other similar/equivalent legislation.

Efficacy of Class Proceedings

- 51. 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.
- 52. Counsel to this Action have already been contacted by over 800 individual consumers who have purchased products manufactured by the Defendant. This number is considerable, given that it is a large number of complaints received between March 17 to 23, 2007 alone, and it demonstrates the significant size of the Class and the significant issues to be addressed by this Honourable Court on behalf of the Public. Class Counsel have received various independent and individual reports from Class Members, who have reported the loss of a pet due to illness thought to be caused by the Defendant's products.
- 53. Class counsel proposes to prosecute these claims on behalf of the Class through this Action and through other actions commenced by offices of the Merchant Law Group. These actions include *Mark Sorois v. Menu Foods Income Fund*, an action commenced before the Quebec Superior Court in Montreal (March 22, 2007, File No.: 500-06-000392-072) and *Charmaine McBain et al v. Menu Foods Income Fund*, an action issued before the Court of Queen's Bench of Saskatchewan in Regina (March 21, 2007, Court File No: 415 of 2007).
- 54. 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.

55. 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.

Statutory Obligations

56. The Defendant is in breach of its statutory duty or obligation to consumers under *The Sale of Goods Act*, R.S.A. 1980, c. S-2 or other similar/equivalent legislation.
57. 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 Defendant's inappropriate and unfair business practices, which includes the Defendants being in breach of applicable Consumer Protection laws.

Unjust Enrichment

58. Further, the Plaintiffs state that the Defendant was unjustly enriched as a result of the revenues generated from the sale of the contaminated pet food in that:
- a) The Defendant has obtained an enrichment through revenues and profit from the sale

- of the contaminated pet food;
- b) The Plaintiffs and other Class Members have suffered a corresponding deprivation including the value of their pet, the price of the contaminated pet food, and associated veterinary costs to treat conditions associated with the consumption of the contaminated pet food and specifically kidney damage; and
 - c) The benefit obtained by the Defendant and corresponding detriment experienced by the Plaintiffs and Class Members has occurred without juristic reason.

Causation

- 59. The acts, omissions, wrongdoings, and breaches of legal duties and obligations of the Defendant has caused or materially contributed to the Class Members suffering injury, economic loss, and damages.
- 60. 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 Defendant, and are therefore entitled to the relief sought and judgment against the Defendant.

Aggravated, Punitive and Exemplary Damages

- 61. The Defendant has demonstrated and taken a cavalier and arbitrary approach with respect to their obligations to the Class Members.
- 62. At all material times, the conduct of the Defendant as set forth above was malicious, deliberate and oppressive towards its customers and the general public, and the Defendant conducted itself in a willful, wonton, and reckless manner, as set forth above.
- 63. The Defendant's aforesaid acts, omissions, wrong doings, and breaches of legal duties and

obligations constitute unfair business practices and dealings with its customers and the public.

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

General

65. The Plaintiffs plead and rely upon the *Class Proceedings Act, S.A. 2003, c. C-16.5* and Rule 42 of the *Alberta Rules of Court*, and/or similar legislation where applicable.
66. The Plaintiffs, as representatives of the class of persons, corporations, and entities resident or situated in Alberta, and a subclass of persons, corporations, and entities not resident or situated in the Province of Alberta, but resident or situated in another Canadian province or territory, have suffered injury, economic loss, and damages as a result of the Defendant's acts, omissions, wrong doings, and breaches of legal duties and obligations, included but not limited to, misrepresentation, negligence, intentional and negligent misrepresentation, inappropriate and unfair trade and business practices, misleading and misinforming their customers and members of the public, failure to make proper public disclosure, and failure to fulfill their statutory and common law duties and obligations to the Plaintiffs and the Class Members.
67. **WHEREFORE THE PLAINTIFFS ON BEHALF OF THEMSELVES AND ALL CLASS MEMBERS CLAIM FOR THE FOLLOWING RELIEF AGAINST THE DEFENDANT:**
- a) An Order to certify this proceeding as a class proceeding and an order appointing

Representative Plaintiffs of the Class and subclass, as previously described;

- b) General and special damages for each member of the class in an amount to be determined at trial;
- c) General damages for breach of contract, and breach of express or implied warranty and conditions;
- d) General damages for negligence;
- e) General damages for fraudulent concealment and failure to warn;
- f) Restitution of all amounts incurred for replacement of the contaminated pet foods and associated costs and expenses, as suffered by Class Members;
- g) Disgorgement of all benefit and amounts accruing to the Defendant as a result of their wrongful acts to Class Members;
- h) Exemplary, aggravated, and punitive damages;
- i) Pre-judgment Interest on the foregoing sums in the amount of 2% per month, or alternatively, in such other amount as this Honourable Court may allow;
- j) Post-judgment Interest on the foregoing sums in the amount of 2% per month, or alternatively, in such other amount as this Honourable Court may allow;
- k) Costs of this action, on a substantial indemnity basis; and,
- l) Such further and other relief as counsel may advise and/or this Honourable Court

may allow.

THE PLACE OF TRIAL

68. The Plaintiffs propose that the trial of this action be held in the City of Calgary, in the Province of Alberta, and in the opinion of the party issuing this pleading the action will likely take more than 25 days to try.

DATED at the City of Calgary, in the Province of Alberta, this 27 day of March, 2007, **AND DELIVERED**, by Merchant Law Group, Barristers and Solicitors, 340, 521 - 3rd Avenue SW, Calgary, Alberta, T2P 3T3, solicitors for the within Plaintiff whose address for service is in care of their said solicitors.

ISSUED out of the office of the Clerk of the Court of Queen's Bench of Alberta, Judicial District of Calgary, this 27 day of March, 2007.

V.A. BRANDT



CLERK OF THE COURT

This document prepared by:

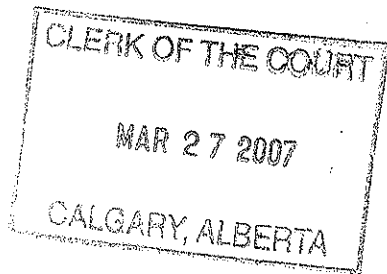
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NOTICE TO:

MENU FOODS INCOME FUND

You have been sued. You are the Defendant. You have only 15 days to file and serve a Statement of Defence or Demand of Notice in the office of the Clerk of the Court of Queen's Bench in Calgary, Alberta. You or your lawyer must also leave a copy of your Statement of Defence or Demand of Notice at the address for service for the Plaintiff named in this Statement of Claim.

WARNING: If you do not do both things within 15 days, you may automatically lose the law suit. The Plaintiff may get a Court judgment against you if you do not file, or do not give a copy to the Plaintiff, or if you do either thing late.



Action No. 0701-03248

IN THE COURT OF QUEEN'S BENCH
OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

BOBBY-JOE ROVENSKY and
CHARMAINE McBAIN

PLAINTIFFS

AND

MENU FOODS INCOME FUND

DEFENDANT

STATEMENT OF CLAIM

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Attention: E. F. Anthony Merchant, Q.C.

File No. 402508 EFA