

CANADA)
PROVINCE OF MANITOBA)

Suit No.: _____

The Queen's Bench
Winnipeg Centre

BETWEEN:

BARB SILVA and BOBBY-JOE ROVENSKY

PLAINTIFFS

AND

MENU FOODS INCOME FUND, MENU FOODS CORPORATION,
MENU FOODS ACQUISITION INC., MENU FOODS LIMITED,
MENU FOODS INVESTMENTS LTD., and MENU FOODS GENPAR LIMITED

DEFENDANTS

Proceedings under the Class Proceedings Act

Statement of Claim

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TO THE DEFENDANT:

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

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a Manitoba lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Queen's Bench Rules, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it in this court office, WITHIN 20 DAYS after this statement of claim is served on you, if you are served in Manitoba.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is 40 days. If you are served outside Canada and the United States of America, the period is 60 days.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

MAR 30 2007

_____, 2007

Issued by: _____

D. SABOURIN
DEPUTY REGISTRAR
COURT OF QUEEN'S BENCH
Deputy Registrar

TO: Menu Foods Income Fund
8 Falconer Drive
Streetsville, Ontario
L5N 1B1

AND TO: Menu Foods Corporation
8 Falconer Drive
Streetsville, Ontario
L5N 1B1

AND TO: Menu Foods Acquisition Inc.
8 Falconer Drive
Streetsville, Ontario
L5N 1B1

AND TO: Menu Foods Limited
8 Falconer Drive
Streetsville, Ontario
L5N 1B1

AND TO: Menu Foods Investments Ltd.
8 Falconer Drive
Streetsville, Ontario
L5N 1B1

AND TO: Menu Foods Genpar Limited
8 Falconer Drive
Streetsville, Ontario
L5N 1B1

STATEMENT OF CLAIM

The Plaintiffs

1. These class proceedings concern contaminated pet food produced, distributed and ultimately offered for sale by the Defendants.
2. The Plaintiff, Barb Silva, is a resident of Winnipeg, Manitoba, and is a member of the proposed Class as a purchaser of the Defendants' contaminated pet food.
3. The Plaintiff, Bobby-Joe Rovensky, is a resident of Didsbury, Alberta, and is a member of the proposed Class as a purchaser of the Defendants' contaminated pet food.
4. The same Plaintiffs are part of a large class of similarly effected consumers who have purchased or used pet foods manufacturer and distributed by the Defendants.

The Defendants

5. The Defendant, Menu Foods Income Fund, is an income trust fund formed pursuant to the Laws of Canada.
6. The Defendant, Menu Foods Corporation, is a corporation incorporated pursuant to the laws of Ontario, operating and conducting business in Canada.
7. The Defendant, Menu Foods Acquisition Inc., is a corporation incorporated pursuant to the laws of Ontario, operating and conducting business in Canada.
8. The Defendant, Menu Foods Limited, is a corporation incorporated pursuant to the laws of Ontario, operating and conducting business in Canada.

9. The Defendant, Menu Foods Investments Ltd., is a corporation incorporated pursuant to the laws of Ontario, operating and conducting business in Canada.
10. The Defendant, Menu Foods Genpar Limited, is a corporation incorporated pursuant to the laws of Ontario, operating and conducting business in Canada.
11. Hereinafter, the Defendants, Menu Foods Income Fund, Menu Foods Corporation, Menu Foods Acquisition Inc., Menu Foods Limited, Menu Foods Investments Ltd., and Menu Foods Genpar Limited, are collectively referred to as the "Defendant" or "Defendants".
12. The Defendants are the leading North American private label and contract manufacturers 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 have provided pet food products to or for Proctor & Gamble, Inc. and other companies.
13. The Defendants have manufactured or produced pet food for private labels for many of the leading retailers in Canada and the United States of America.
14. The Defendants' 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, Sophistacat, Special Kitty US, Springfield Prize, Sprout, Total Pet, Wegmans, Western Family, White Rose, and Wynn Dixie.

15. The Defendants' 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.

The Class

16. The Plaintiffs, individually and as representatives of a class of similarly situated persons, claim as against the Defendants for offering for sale and selling to the Plaintiffs and Class Members contaminated pet food and food products, known as "cut and gravy" products.
17. The pet food products were produced by the Defendants, private label manufacturers, labeled by the Defendants, and then distributed and ultimately sold to the Plaintiffs, Class Members, and others.
18. The pet food products recalled by the Defendants were intended to be placed in the stream of commerce and distributed and offered for sale and sold to the Plaintiffs and the public in Manitoba, other Provinces and Territories in Canada, and the United States of America, and fed to their pets, cats and dogs.
19. The Plaintiffs purchased the recalled pet food product made by or for the Defendants, and the Plaintiffs pets ate or consumed said pet food. Thousands of other consumers/customers - including the Plaintiffs and other Class Members - purchased the recalled or contaminated

products from retailers that the Defendants, their agents, affiliates, controlled, sold or made available to them. In turn, retailers or others sold these recalled products to the general public, including the Plaintiffs, and other Class Members. The recalled products were purchased for consumption by the pets of the Plaintiffs and the Class Members. The Defendants made or caused the recalled products to be offered for sale and sold to the public, including the Plaintiffs and the Class Members.

Manitoba Class Members

20. The Plaintiffs bring this action on behalf of a Manitoba resident class defined as follows:

All persons (including their estates, executors, or personal representatives), corporations, and other entities in Canada (except for the province of Quebec) and abroad, who purchased recalled pet food manufactured, distributed or ultimately offered for sale and sold to the public by the Defendant, its affiliates, or retailers supplied with products by the Defendant.

Non-Resident Class Members

21. The Plaintiffs bring this action on behalf of a Non-Resident class, defined as follows:

All persons (including their estates, executors, or personal representatives), corporations, and other entities in Canada (except for the province of Quebec) and abroad, who purchased recalled pet food manufactured, distributed or ultimately offered for sale and sold to the public 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").

The Plaintiffs Facts and Claim

22. The Defendants recalled cat and dog food products that are sold under numerous brands by several national grocery and pet stores in Manitoba, other Provinces and Territories in Canada, and the United States of America.
23. The pet food products were produced by the Defendants, private label manufacturers, labeled by the Defendants, and then distributed and ultimately sold to the Plaintiffs and Class Members.
24. The pet food products recalled by the Defendants 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 Manitoba, other Provinces and Territories in Canada, and the United States of America, and fed to their pets, cats and dogs.
25. The Plaintiffs purchased the recalled pet food product made by or for the Defendants, 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 that the Defendants, their agents, and affiliates controlled, sold or made available to them. The products were purchased for consumption for the pets of the Plaintiffs and the Class Members. The Defendants made or caused the products to be offered for sale and sold to the public, including the Plaintiffs and the Class Members.
26. 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 their Canadian offices or affiliates, the Defendants caused or issued a recall of certain specified pet products, reportedly totaling between 40 and 60 million cans.
27. On the Defendants' 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.

28. Many consumers who fear for the health of their pets will no longer have the product because it has been fed to the pets.
29. According to reports from government testing performed in the United States, pet food products produced by the Defendants 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.
30. The Defendants are North America's largest producers 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 Defendants failed and were inadequate in properly supervising the production and manufacturing of their products, failed to maintain proper safety standards, failed to properly check, testing, and sampling the quality of their products, and asserts that they failed to discharge their duty of care to consumers and maintain appropriate standards in production and manufacturing of their products.
31. The Defendants know or understand that millions or tens of millions of cans or pouches of the pet food products that their manufactures or produces will be advertised, promoted, and sold generally, including a significant or substantial part of the recalled pet food.
32. The Defendants know or understand that the promotion and advertising of pet food produced at their plants in part targets consumers and customers.
33. The Defendants desire that consumers and others who purchase or consider purchasing a pet food product made or produced in one of their plants, by whatever label or brand, believe that the pet food product is safe for their pets to eat.
34. Class members have purchased the pet products that were recalled across Canada and the

United States of America.

35. Class members who purchased or fed the Defendants' products to their pets did so in Canada and the United States of America.
36. 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.
37. 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.
38. There have been other reported prior incidents of pet food being recalled as a result of possible or actual concerns or problems with the pet food and its or their effects on pets. The Defendants knew or should have known about the risks and possible injury.
39. The Plaintiff, Barb Silva, purchased recalled brands of Special Kitty pet food from a national chain grocery/retail store, Wal-Mart, in Winnipeg, Manitoba. Wal-Mart, like other retailers, did not alter the product produced by the Defendants in any way prior to selling it to the Plaintiff, Barb Silva, and other Class Members throughout Canada and the United States of America.
40. Without knowing that the Defendants would recall the product after it was offered for sale and sold to her, the Plaintiff, Barb Silva, purchased and fed the product(s) to her cat, her pet. Her pet became lethargic and experienced decreased appetite and vomiting. The Plaintiff, Barb Silva's pet became so ill that euthanasia was necessary.
41. The Plaintiff, Bobby-Joe Rovensky, purchased recalled brands of Special Kitty pet food from a national chain grocery/retail store, Wal-Mart, in Alberta. Wal-Mart, like other retailers, did not alter the product produced by the Defendants in any way prior to selling it to the Plaintiff,

Bobby-Joe Rovensky, and other Class Members throughout Canada and the United States of America.

42. Without knowing that the Defendants 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.
43. Before their purchases, the Defendants 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.
44. The Plaintiffs and thousands of other class members will now have incurred or will incur veterinary bills to have their pets evaluated for, *inter alia*, kidney damage.
45. The products that the Plaintiffs purchased were products recalled by the Defendants.
46. 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.
47. The Plaintiffs bought the product(s) for their intended purposes to feed their pets.
48. The Defendants placed these pet products in the stream of commerce in Manitoba and elsewhere expecting that consumers such as the Plaintiffs, the Class members, and the general public would feed these products to their pets.

Class Members Losses, Damages, and Injuries

49. As a result of their 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 sales 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 Defendants, 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

50. In regards to the manufacture, design, testing, distribution and sale of the contaminated pet foods, the Defendants 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 Defendants produced and sold contaminated pet food that the Class Member could not be aware of at time of purchase.

Misrepresentation & Negligence

51. The Class Members relied on the representations made by the Defendants or their affiliates as to the suitable quality and condition of the tainted pet food. In particular, but not exclusively, the Class Members relied on the Defendants' 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 consumers' pets.

52. The Defendants misrepresented to Class Members the quality and condition of the pet food. The Defendants did this knowing that Class Members were relying on this information to

inform their purchases. The Class Members had no other way of knowing of the contaminated nature of the pet food products.

53. The Defendants owed the Plaintiffs and the Class Members a duty to only offer into the stream of commerce safe, non-contaminated products for consumption by pets.
54. Though its failure to exercise due care the Defendants owed the Plaintiffs and other Class Members, the Defendants were negligent in producing, processing, manufacturing, and offering for sale the recalled pet food and pet food products they offered for sale and sold to the Plaintiffs and other Class Members.
55. The Defendants 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.
56. The Defendants 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.
57. The loss, damage, and injuries were foreseeable.
58. The Defendants' negligence proximately caused the loss, damage, injury, and damages to the Plaintiffs and other Class Members.

Waiver of Tort

59. As a result of the Defendants' conduct described herein, the Plaintiffs reserve the right to elect at the Trial of the Common Issues to Waive the Tort of Negligence and to have

damages assessed in an amount equal to the gross revenues earned by the Defendants, or the net income received by the Defendants, or a percent of the sale of the contaminated pet food as a result of the Defendants' failure to recall on a timely fashion and warn pet owners of the contaminated pet food which resulted in revenues and profit for the Defendants.

Unjust Enrichment

60. Further, the Plaintiffs state that the Defendants were unjustly enriched as a result of the revenues generated from the sale of the contaminated pet food and as much, *inter alia*, that:
- a) The Defendants have 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 and specifically kidney damage; and
 - c) The benefit obtained by the Defendants and corresponding detriment experienced by the Plaintiffs and Class Members has occurred without juristic reason.

Common Issues

61. 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 Defendants sold pet food products that were recalled or subject to a recall?
 - b) Whether the Defendants advertised, represented, or held themselves out as producing or manufacturing a pet food product that was safe for pets of the class members?

- c) Whether the Defendants warranted these products?
- d) Whether the Defendants impliedly warranted these products for fitness for a particular purpose?
- e) Whether the Defendants intended that the pet food products be purchased by the Plaintiffs, Class Members, or others?
- f) Whether the Defendants intended or foresaw that the Plaintiffs or other Class Members, would feed their pet food products to their pets?
- g) Whether the Defendants recalled the pet food products appropriately?
- h) Whether the Defendants were negligent in manufacturing or processing the pet food products?
- i) Whether using the products as intended - to feed their pets - resulted in loss, injury, damage, or damages to the Class?
- j) Whether the Defendants' negligence proximately caused loss or injury and damages?
- k) Whether the Class Members suffered direct losses or damages?
- l) Whether the Class Members suffered indirect losses or damages?
- m) Whether the Defendants' acts or practices breached *The Sale of Goods Act*, R.S.M. 1987, c. S10, or other similar/equivalent legislation.

Efficacy of Class Proceedings

- 62. 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.
- 63. Counsel to this Action have already been contacted by over 1,7000 individual consumers who have purchased products manufactured by the Defendants. This number is considerable, given that it is a large number of complaints received between March 17 to 29, 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 Defendants' products.

64. 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).
65. 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.
66. 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

67. The Defendants are in breach of their statutory duty or obligation to consumers under the *The Sale of Goods Act*, R.S.M. 1987, c. S10, or other similar/equivalent legislation.
68. The Plaintiffs plead and rely upon competition, consumer protection and trade legislation,

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

Causation

69. The acts, omissions, wrongdoings, and breaches of legal duties and obligations of the Defendants have caused or materially contributed to the Class Members suffering injury, economic loss, and damages.
70. The Class Members have suffered real and substantial injury, economic loss, and damages arising from the aforesaid acts, omissions, wrong doings, and breaches of legal duties and obligations of the Defendants, and are therefore entitled to the relief sought and judgment against the Defendants.

Aggravated, Punitive and Exemplary Damages

71. The Defendants have demonstrated and taken a cavalier and arbitrary approach with respect to their obligations to the Class Members.
72. At all material times, the conduct of the Defendants as set forth above was malicious, deliberate and oppressive towards their customers and the general public, and the Defendant conducted themselves in a willful, wonton, and reckless manner, as set forth above.
73. The Defendants' aforesaid acts, omissions, wrongdoings, and breaches of legal duties and obligations constitute unfair business practices and dealings with their customers and the public.

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

Damages

75. The Plaintiffs plead and rely upon the *Class Proceedings Act, C.C.S.M., c. C130*, and/or similar legislation where applicable.

76. The Plaintiffs, as representatives of the class of persons, corporations, and entities resident or situated in Manitoba, and a subclass of persons, corporations, and entities not resident or situated in the Province of Manitoba, but resident or situated in another Canadian province or territory, have suffered injury, economic loss, and damages as a result of the Defendants' 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. **WHEREFORE THE PLAINTIFFS ON BEHALF OF THEMSELVES AND ALL CLASS MEMBERS CLAIM FOR THE FOLLOWING RELIEF, ON A JOINT AND SEVERAL BASIS, AGAINST THE DEFENDANTS:**

- a) An order pursuant to the *Class Proceedings Act* certifying this action as a class proceeding and appointing the Plaintiffs and/or other members of the Class to act as Representative Plaintiffs of the Class;
- b) General damages for each member of the Class;

- c) Special damages for each member of the Class;
- d) Restitution or a refund of all monies paid to or received by the Defendants by the sale of contaminated pet food and/or pet products to members of the Class;
- e) An accounting of revenues received by the Defendants resulting from the sale of contaminated pet food and/or pet products to members of the Class;
- f) Punitive, aggravated, and exemplary damages as this Honourable Court deems appropriate.
- g) A refund of all monies paid to or received by the Defendants from the sale of pet food and/or pet product to members of the Class;
- h) Pre-judgment interest on the foregoing sums in the amount of 2% per month, compounded monthly, or alternatively, in such other amount as this Honourable Court may allow;
- i) Post-judgment interest on the foregoing sums in the amount of 2% per month, compounded monthly, or alternatively, in such other amounts as this Honourable Court may allow;
- j) Costs of this action, on a substantial indemnity basis, and taxes thereon; and,
- k) Such further and other relief as counsel may advise and/or this Honourable Court may allow.

DATED at Winnipeg, Manitoba this 30th day of March, 2007.

MERCHANT LAW GROUP

Per: 

Solicitors for the Plaintiffs

This document prepared by:

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