

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-000396-073

SUPERIOR COURT
(Class Action)

CHANTAL DES CÔTEAUX, residing at
4585, 10th Street, Laval, Quebec H7R 2V9

Petitioner

v.

MENU FOODS GENPAR LIMITED

-and-

**MENU FOODS LIMITED
PARTNERSHIP**

-and-

MENU FOODS ACQUISITION INC.

-and-

MENU FOODS LIMITED

-and-

**MENU FOODS OPERATING
LIMITED PARTNERSHIP**

-and-

MENU FOODS HOLDINGS, INC.

-and-

MENU FOODS INC.

-and-

**MENU FOODS MIDWEST
CORPORATION**

-and-

**MENU FOODS SOUTH DAKOTA
INC.**

all having their head office at 8 Falconer
Drive, Streetsville, Ontario L5N 1B1

-and-

ROBERT W. LUBA, in his quality as
trustee of Menu Foods Operating Trust
and as trustee of Menu Foods Income
Fund, having a business establishment at 8
Falconer Drive, Streetsville, Ontario L5N
1B1

-and-

ALEXANDER R. AIRD, in his quality as trustee of Menu Foods Operating Trust and as trustee of Menu Foods Income Fund, having a business establishment at 8 Falconer Drive, Streetsville, Ontario L5N 1B1

-and-

SERGE K. DARKAZANLI, in his quality as trustee of Menu Foods Operating Trust and as trustee of Menu Foods Income Fund, having a business establishment at 8 Falconer Drive, Streetsville, Ontario L5N 1B1

-and-

ERIC A. DEMIRIAN, in his quality as trustee of Menu Foods Operating Trust and as trustee of Menu Foods Income Fund, having a business establishment at 8 Falconer Drive, Streetsville, Ontario L5N 1B1

-and-

THOMAS A. DI GIACOMO, in his quality as trustee of Menu Foods Operating Trust and as trustee of Menu Foods Income Fund, having a business establishment at 8 Falconer Drive, Streetsville, Ontario L5N 1B1

Respondents

**AMENDED MOTION FOR AUTHORIZATION TO INSTITUTE A CLASS
ACTION AND TO OBTAIN THE STATUS OF REPRESENTATIVE
(Art. 1002 et seq. C.C.P.)**

IN SUPPORT OF HER AMENDED MOTION FOR PERMISSION TO INSTITUTE A CLASS ACTION AND OBTAIN THE STATUS OF A REPRESENTATIVE, PETITIONER RESPECTFULLY SUBMITS AS FOLLOWS:

1. Petitioner wishes to institute a class action on behalf of all the persons forming part of the Group hereinafter described and of which the Petitioner is a Member, namely:

*All physical persons resident in Quebec and in Canada who purchased "cuts and gravy" style domestic animal food manufactured by the Respondents between November 8, 2006 and March 6, 2007, and sold as one of the brands listed in **Exhibit P-I** of this amended Motion for Authorization to Institute a Class Action and to Obtain the Status of Representative.*

2. On March 16, 2007, a press release was issued implicating the Respondents. This press release announced the recall of "cuts and gravy" style dog and cat food ("Products") manufactured by Respondents between November 8, 2006, and March 6, 2007. The press release states that the Products recall is being done in response to feedback that raised concerns about the health of animals who had consumed the Products, as appears from a copy of the press release dated March 16, 2007, communicated herewith as **Exhibit P-2**;
3. On March 19, 2007, a second press release was issued implicating the Respondents. This press release listed the particular brands of dog and cat food manufactured by Respondents that were being recalled, as well as the applicable production periods, as appears from a copy of the press release dated March 19, 2007, communicated herewith as **Exhibit P-3**;
4. Additional press releases implicating the Respondents were issued after March 19, 2007 and additional announcements were made during a news conference held on March 30, 2007. More specifically, the following admissions were made on behalf of the Respondents:
 - Testing was underway to try to determine the cause of renal failure in dogs and cats, as appears from a copy of the press release dated March 24, 2007, communicated herewith as **Exhibit P-4**;

- *“A compound called melamine has been identified as being present in the food that caused the pet illnesses and deaths (...) The recalled product is unfit for consumption by pets. It contains melamine”*, as appears from a copy of the document entitled *Remarks by Paul K. Henderson* dated March 30, 2007, communicated herewith as **Exhibit P-5**;
 - the Respondents *“expanded its pet food recall for selected “cuts and gravy” pet food products, manufactured back to November 8, 2006”*, as appears from a copy of the press release dated April 5, 2007, communicated herewith as **Exhibit P-6**.
5. The Products are available for purchase by the public at large through retail stores in Quebec and elsewhere throughout Canada in both dry form sold in bags and in cans and pouches of “cuts and gravy” style, for consumption by domestic cats and dogs in Quebec and elsewhere throughout Canada;
 6. The Respondents’ Products have been associated with various adverse symptoms, including adverse renal failure in cats and dogs who have consumed the Products. As a result of the consumption of the Products by domestic cats and dogs in Quebec and elsewhere throughout Canada, the domestic cats and dogs have suffered from various adverse symptoms, including acute renal failure causing, *inter alia*, death or serious bodily harm, fatigue, vomiting, diarrhea, lack of water intake or excessive water intake, disorientation, difficulties with mobility, and lack of appetite;
 7. The Respondents knew, or ought to have known, that the Products manufactured between November 8, 2006 and March 6, 2007 caused or materially contributed to various adverse symptoms, including an increased risk of renal failure in domestic cats and dogs that ingested the Products, which led to death and/or serious bodily harm. The Respondents therefore ought not to have proceeded to manufacture, sell and market the Products in Quebec and elsewhere throughout Canada, and ought to have immediately recalled the Products from sale in the public marketplace as early as November 2006, when adverse health events were reported;
 8. Respondents are liable in damages to Petitioner and to the class members and each of the Respondent Menu Foods companies is responsible for the acts and omissions of the others for the following reasons:
 - a. Each was the agent of the other;
 - b. Each company’s business was operated so that it was inextricably interwoven with the business of the others;
 - c. Each company entered into a common advertising and business plan and shared the common purpose of developing, manufacturing, distributing, marketing and selling the Products in Canada and Quebec for profit;

- d. Each company owed a duty to the other and to each class member by virtue of the common business plan to manufacture, distribute and sell the Products; and
 - e. Each company intended that its business be run as one global business organization.
9. At all material times:
- a. The shares of the Respondent Menu Foods Genpar Limited were owned by Menu Foods Operating Trust, whose shares were owned by Menu Foods Income Fund;
 - b. Respondents Robert W. Luba, Alexander R. Aird, Serge K. Darkazanli, Eric A. Demirian and Thomas A. Di Giacomo were trustees of Menu Foods Operating Trust, whose activities are restricted to the conduct of the business of, and the ownership, operation and lease of assets and property in connection with, the manufacture and sale of pet foods;
 - c. The Respondent Menu Foods Genpar Limited and Menu Foods Operating Trust were partners in the Respondent Menu Foods Limited Partnership, a partnership;
 - d. The Respondent Menu Foods Limited Partnership owned the shares of the Respondent Menu Foods Limited;
 - e. The Respondent Menu Foods Acquisition Inc. owned the shares of the Respondent Menu Foods Limited;
 - f. The Respondent Menu Foods Limited owned the shares of the Respondent Menu Foods Holdings Inc.;
 - g. The Respondent Menu Foods Holdings Inc. owned the shares of the Respondents Menu Foods Inc., Menu Foods Midwest Corporation and Menu Foods South Dakota Inc.; and
 - h. The Respondents Menu Foods Limited Partnership and Menu Foods Limited were partners in Menu Foods Operating Limited, a partnership.

THE PETITIONER

10. The Petitioner, Chantal Des Côteaux, is 47 years old and is a customer service agent for the Laurentian Bank;

11. The Petitioner is the owner of an 11 year old cat named Midnight;
12. The Petitioner purchased "cuts and gravy" cat food ("Cat Food") on a regular basis between 1996 and mid-February 2007 and, in particular, purchased Iams brand cat food during this period which constitutes Cat Food forming part of the Products referred to in this amended Motion;
13. The Cat Food was purchased at a retail store in Ste-Dorothée, Quebec;
14. In mid-January 2007, the Petitioner began to notice that Midnight appeared ill. More specifically, Midnight experienced substantial weight loss, its fur was less shiny than usual and Midnight started vomiting regularly, containing traces of blood;
15. The Petitioner took Midnight to the *Hôpital Général Vétérinaire de St-Eustache* on February 19, 2007;
16. Midnight was examined by two vets, namely Jérard Derminasyan and Dominique Ducharme who concluded that Midnight had been poisoned and would probably die in a short period of time. More specifically, Midnight has been diagnosed with mutations in the liver and with kidney damage;

CONSUMER PROTECTION ACT, LATENT DEFECT AND SAFETY DEFECTS

17. At the time of purchase of the Products, the Petitioner was a consumer as defined in Article 1e) of the *Consumer Protection Act*, R.S.Q., c. P-40.1. ("CPA");
18. The Cat Food was purchased for use as food for the Petitioner's pet. By being dangerous to the health of the Petitioner's pet, the Cat Food was clearly not fit for the purpose for which it was intended, contrary to Article 37 of the CPA;
19. Furthermore, by being unsafe for consumption by domestic animals, the Cat Food had a latent defect that the Petitioner had no ability to discern. Per Article 1726 of Quebec Civil Code ("Civil Code"), the Cat Food has a latent defect because the presence of ingredients dangerous for consumption by animals renders the Cat Food unfit for the use for which it was intended;
20. Per Articles 53 and 54 CPA, and Article 1730 of the Civil Code, the Petitioner may legally pursue the Respondents, as manufacturer of the Cat Food, for the damages resulting from the facts that the Cat Food was not fit for purpose per Article 37 CPA and that the Cat Food had a latent defect per Article 1726 of the Civil Code.
21. The Petitioner, in purchasing the Cat Food as food for her pet, was normally entitled to expect a level of safety that the Cat Food would not be actually or

potentially harmful or dangerous to her pet. By being actually or potentially harmful or dangerous, the Cat Food has a safety defect, per Article 1469 of the Civil Code. Per Article 1469 of the Civil Code, the Respondents, as manufacturer, are liable to reparation for injury suffered by the Petitioner as a result of the safety defect.

RESPONDENTS' NEGLIGENCE

22. The Petitioner relied on the Respondents to ensure that safe products were being put into the stream of commerce. The Respondents knew or ought to have known that the Petitioner was relying on the Respondents to manufacture food that was safe and fit for its intended purposes. The Respondents were negligent in not taking the appropriate steps to ensure the safety and fitness for purpose of the Products manufactured by the Respondents.
23. At all material times, the Respondents failed to comply with their legal obligations to do the following:
 - a. Ensure that the Products were fit for their intended purposes;
 - b. Conduct appropriate testing to ensure that the Products were safe for consumption by domestic dogs and cats before releasing the Products onto the Quebec and Canadian market;
 - c. Conduct ongoing clinical trials and tests as to the safety and efficacy of the Products after releasing the Products to the Quebec and Canadian market;
 - d. Adequately monitor and investigate reports of adverse reactions to the Products in Quebec and Canadian market, as well as to adequately monitor studies investigating the efficacy and safety of the Products and to act promptly to protect the Quebec and Canadian public in view of raising public controversy surrounding a link between the Products and adverse reactions and questions concerning its safety;
 - e. To take immediate steps to remove from the market the Products once the Respondents became aware (or through reasonable due diligence, could have become aware) of the presence of contaminants or substances that could be harmful to domestic dogs or cats.
24. Respondents, their servants and agents were negligent in the design, development, testing, licensing, distribution, monitoring, marketing and sale of the Products, particulars of which, *inter alia*, include the following:
 - a. In placing the Products on the market, when they knew, or ought to have known, that the Products were unsafe, unfit for domestic cat and dog

consumption and defective, and that they could cause death and serious and potentially life threatening side effects including, but not limited to, renal failure;

- b. In marketing the Products, having conducted inadequate studies and tests to establish their safety;
 - c. In failing to properly supervise their employees, their subsidiaries, and their affiliating corporations;
 - e. In failing to recall the Products in a timely manner;
 - f. In failing to take appropriate steps to protect safety of the domestic cats and dogs owned by the Petitioner and class members;
 - g. In representing to the public that the Products were safe and fit for their intended purpose and were of merchantable quality when they knew or ought to have known that these representations were false.
25. The risks of serious renal failure in domestic cats and dogs associated with the ingestion of the Products, including but not limited to, death and serious bodily harm, were in the exclusive knowledge and control of the Respondents. The Petitioner and class members, as consumers, continued to purchase the Products for ingestion by their domestic cats and dogs, and continued to do so prior to the recall and removal of the Products from the Quebec and Canadian marketplace;
26. The deaths or injuries of their domestic cats and dogs would not have occurred but for the negligence of the Respondents in failing to ensure that the Products were safe for consumption by domestic cats and dogs;

DAMAGES

27. Particulars of the past and ongoing losses or damages suffered by the Petitioner and the class members include, *inter alia*, the following:
- a. Pain and suffering as a result of observing their dogs or cats' deteriorating health following consumption of the Products, and in some cases, their death;
 - b. Pain and suffering as a result of learning that the Products which they personally selected to feed their dogs or cats have caused their dogs or cats to suffer adverse health effects, and, in some cases, to die;
 - c. The costs incurred to diagnose and treat the injuries sustained by their dogs or cats following consumption of the Products;

- d. The costs incurred in connection with the burial or cremation of dogs or cats who died after consuming the Products;
- e. The costs of the Products whether consumed or not, and the costs of purchasing other pet food to replace the wasted Products;
- f. Such further and other particulars as may be provided prior to the trial of this action; and
- g. Such other damages as this Court sees fit to award.

THE RECOURSES OF THE MEMBERS RAISE IDENTICAL, SIMILAR OR RELATED QUESTIONS OF LAW OR FACT

28. The claims of each Group Member are founded on the same general facts as the Petitioner's claims as pertains to the acts and omissions of the Respondents regarding the safety of the Products, whether these Products were fit for the purpose for which they were produced and sold, whether the Products had a latent defect, whether the Products have a safety defect, and whether the Respondents were negligent in any aspect of bringing the Products into the stream of commerce;
29. The identical, similar or related questions of law or fact between each Group Member are:
 - Are the Group Members "consumers" per Article 1e) of the CPA?
 - Were the Products fit for the purpose for which they were intended, per Article 37 of the *Consumer Protection Act*?
 - Did the Products have a latent defect, per Article 1726 of the Quebec Civil Code? If the Products did have a latent defect, was this defect discernable to Group Members?
 - Did the Products have a safety defect, as defined by Article 1469 of the Civil Code?
 - Were the Respondents negligent in any aspect of the testing, manufacture, of distribution of the Products?
 - Are the Respondents civilly responsible for damages suffered by Group Members due to illness or death of pets belonging to Group Members?
 - What are the categories of damages suffered by Group Members?

- Are the Respondents liable to pay exemplary damages as result of its acts or omissions?

THE COMPOSITION OF THE GROUP MAKES THE APPLICATION OF ARTICLE 59 OR 67 OF THE CODE OF CIVIL PROCEDURE DIFFICULT OR IMPRACTICABLE

30. The composition of the Group makes the application of articles 59 or 67 of the Code of Civil Procedure difficult or impractical because:

- The members of the Group are so numerous that joinder of all members is impracticable. While the exact number of Group members is unknown to the Petitioner at the present time, there are thousands of potential Group Members who have purchased the products between November 8, 2006, and March 6, 2007. The recall list includes 53 brands of dog food and 42 brands of cat food. Many of these brands are sold in the Province of Quebec and throughout Canada;
- The potential number of Group members can be estimated from records kept by the Respondents;
- The potential Group members are widely dispersed geographically in the Province of Quebec and throughout Canada.

THE PETITIONER IS IN A POSITION TO REPRESENT THE MEMBERS ADEQUATELY

31. Petitioner requests that she be ascribed the status of representative for the following reasons:

- She is a Group Member;
- She is well informed of the facts initiating this action;
- She has the required time, determination and energy to bring this matter to a conclusion;
- She collaborates fully with her attorneys, responds diligently and intelligently to requests her attorneys make and comprehends the nature of the class action proceedings;
- She is not in a conflict of interest with other Group Members.

32. It is expedient that the bringing of a class action for the benefit of Group Members be authorized as:
- The majority of the issues to be dealt with are issues common to every Group Member;
 - The relatively small claim of individual Group Members might discourage them from pursuing this matter in any other forum.
 - The high number of potential litigants could lead to a multitude of individual legal actions in different jurisdictions, possibly leading to contradictory judgments on questions of law and fact;
33. The nature of recourse which the Petitioner wishes to exercise on behalf of the Group Members is an action in civil responsibility against the Respondents based on deficiencies in the quality and safety of domestic animal food products manufactured by the Respondents and acts and/or omissions of the Respondents during planning, testing or manufacturing of these domestic food products.

WHEREFORE PETITIONER PRAYS THIS COURT TO:

GRANT the present amended Motion for Authorization to Institute a class action and to obtain the status of Representative;

AUTHORIZE the bringing of a class action as follows:

An action in civil responsibility against the Respondents based on deficiencies in the quality and safety of domestic animal food products manufactured by the Respondents and acts and/or omissions of the Respondents during planning, testing, or manufacture of these domestic animal food products.

GRANT the status of representative to the Petitioner for bringing the said class action for the benefit of the following group of persons, namely:

All physical persons resident in Quebec and in Canada who purchased "cuts and gravy" style domestic animal food manufactured by the Respondents between November 8, 2006, and March 6, 2007, and sold as one of the brands listed in Exhibit P-1 of this amended Motion for Authorization to Institute a Class Action and to Obtain the Status of Representative.

IDENTIFY the principal questions of law and fact to be dealt with collectively as follows:

1. Are the Group Members “consumers” per Article 1e) of the Quebec CPA?
2. Were the Products fit for the purpose for which they were intended, per Article 37 of the CPA?
3. Did the Products have a latent defect, per Article 1726 of the Civil Code? If the Products did have a latent defect, was this defect discernable to Group Members?
4. Did the Products have a safety defect, as defined by Article 1469 of the Quebec Civil Code?
5. Were the Respondents negligent in any aspect of the testing, manufacture, or distribution of the Products?
6. Are the Respondents civilly responsible for damages suffered by Group Members due to illness or death of pets belonging to Group Members?
7. What are the categories of damages suffered by Group Members?
8. Are the Respondents liable to pay exemplary damages as a result of its acts or omission?

IDENTIFY the conclusions sought with relation to such questions as follows:

GRANT the relief requested against the Respondents;

CONDEMN the Respondents to compensate each of the Group Members for any material injury suffered or expense incurred by the Group Members as a result of the defects and deficiencies in the Products and any faults and negligence of the Respondents connected with these defects and deficiencies, with interest payable at the legal rate as prescribed by law;

CONDEMN the Respondents to pay each of the Group Members a monetary amount of the moral injury suffered as a result of illness or death suffered by pets belonging to Group members, with interest payable at the legal rate as prescribed by law;

CONDEMN the Respondents to pay exemplary damages;

CONDEMN the Respondents to any further relief as the Court finds appropriate;

CONDEMN the Respondents to pay the fees of experts consulted in this matter, including their time for study, analysis, attendance at Court and testifying before the Court;

THE WHOLE with costs, including the costs of all exhibits, expert reports and publication of notices.

DECLARE that any Group member who has not requested his exclusion from the Group be bound by any judgment to be rendered on the class action, in accordance with law;

DECLARE the delay for exclusion at ninety (90) days from notice to members and that at the expiry of such delay, the members of the Group who have not requested exclusion be bound by any such judgment;

ORDER that a press release be issued with a Notice to Members to be published in the following manner:

A copy of the notice to Members be sent within a set time period by the Respondents to all Group Members for whom the Respondents has Group Member's postal or e-mail address.

Publication once in each of the following daily newspapers:

La Presse, Le Journal de Montréal, The Montreal Gazette, Le Soleil, The Globe & Mail;

Publication of the Notice to the Members on Respondents' websites;

REFER the record to the Chief Justice so that he may fix the district in which the class action is to be brought and the judge before whom it will be heard. That the Clerk of this Court be ordered, upon receiving the decision of the Chief Justice, in the event that the class action be brought in another district, to transmit the present record to the clerk of the designated district.

MONTREAL, April 16, 2007

(s) Heenan Blaikie LLP

HEENAN BLAIKIE LLP
Attorneys for the Petitioner

COPIE CONFORME/TRUE COPY


HEENAN BLAIKIE S.E.N.C.R.L., S.R.L./LLP