

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

BETTY ANN MARTIN

Plaintiff

and

HILL'S PET NUTRITION, INC.
and HILL'S PET NUTRITION CANADA INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*, SO 1992, c 6.

STATEMENT OF CLAIM

TO THE DEFENDANTS

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

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

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 forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date _____ Issued by _____
Local Registrar

Address of court office: London Courthouse
80 Dundas Street
London, Ontario N6A 6A3

**TO: HILL'S PET NUTRITION, INC.
400 South West 8th Street
Topeka, KS 66603
USA**

**AND TO: HILL'S PET NUTRITION CANADA INC.
2 Morneau Shepell Centre, 5th Floor, 895 Don Mills Road
Toronto, ON M3C 1W3**

CLAIM

1. The Plaintiff, on her own behalf and on behalf of all Class Members, seeks:
 - (a) an order certifying this action as a class proceeding and appointing the Plaintiff as the representative plaintiff of the proposed national class pursuant to the *Class Proceedings Act, 1992*, SO 1992, c 6;
 - (b) a declaration that the Representations (as defined below) made by the Defendants regarding the characteristics of the Defective Products (as defined below) were contrary to sections 14 and 17 of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A (the “*Consumer Protection Act*”), and the parallel provisions of provincial consumer protection legislation (the “Consumer Protection Legislation”) and were contrary to section 52(1) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the *Competition Act*);
 - (c) a declaration pursuant to section 18(15) of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation that it is in the interest of justice to disregard the requirement to give notice;
 - (d) a declaration that the Defendants were negligent with respect to the Representations;
 - (e) a declaration that the Defendants were negligent in the research, development, testing, manufacture, production, marketing, advertising, promotion, distribution, sale, and warranty of the Defective Products;

- (f) a declaration that the Defendants breached their implied warranty of fitness for a particular purpose;
- (g) a declaration that the Defendants breached their implied warranty of merchantability;
- (h) damages in the amount of \$40,000,000 pursuant to the following statutes and causes of action:
 - (i) section 36(1) of the *Competition Act*;
 - (ii) section 18(2) of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation
 - (iii) negligent misrepresentation;
 - (iv) negligent production;
 - (v) breach of warranty;
 - (vi) breach of the *Sale of Goods Act* and parallel provisions of provincial Sale of Goods Legislation; and
 - (vii) unjust enrichment;
- (i) a declaration that the Defendants are jointly and severally liable for any and all damages awarded;
- (j) exemplary, punitive, and aggravated damages in the amount of \$2,000,000;

- (k) in the alternative to the claim for damages, an accounting or other such restitutionary remedy disgorging the revenues realized by the Defendants from the sale of the Defective Products (as hereinafter defined);
- (l) a declaration that any funds received by the Defendants through the sale of the Defective Products are held in trust for the benefit of the Plaintiff and Class Members;
- (m) a reference to decide any issues not decided at the trial of the common issues;
- (n) costs of administration and notice, plus applicable taxes, pursuant to section 26(9) of the *Class Proceedings Act, 1992*, SO 1992, c 6;
- (o) costs of this action pursuant to the *Class Proceedings Act, 1992*, SO 1992, c 6, the *Courts of Justice Act*, RSO 1990, c C 43, and the *Rules of Civil Procedure*, RRO 1990, Reg 194;
- (p) prejudgment interest in accordance with section 128 of the *Courts of Justice Act*, RSO 1990, c C 43, as amended;
- (q) post-judgment interest in accordance with section 129 of the *Courts of Justice Act*, RSO 1990, c C 43, as amended; and
- (r) such further and other relief as to this Honourable Court may seem just.

THE PARTIES

The Plaintiff

2. The Plaintiff, Betty Ann Martin, is a resident of Windsor, Ontario. The Plaintiff owned a Shih Tzu, Bailey, who was born on February 9, 2006. Up until the events described below, Bailey had suffered no ill health effects.
3. In or about February 2017, the Plaintiff began to feed Bailey the Defendants' products and did so consistently until Bailey's death as detailed below. On December 5, 2018, the Plaintiff purchased 8 cans of Science Diet Perfect Weight Chicken and Vegetable Entrée (the "Perfect Weight") from a PetValu pet store in Windsor, Ontario. At that time, the Plaintiff also bought 4 Adult Chicken and Barley Entrée as PetValu did not have enough of the Perfect Weight in stock.
4. In late December 2018, in and around the Christmas holidays, Bailey began consuming the Perfect Weight purchased on December 5, 2018. Within approximately one week of eating the food purchased on December 5, 2018, Bailey began exhibiting alarming symptoms including, but not limited to, the following: vomiting, diarrhea, loss of balance, weakness, loss of appetite, lethargy, head bobbing/tremors, and uncontrolled movements.
5. As Bailey's symptoms worsened, in the early morning of January 2, 2019, the Plaintiff took Bailey to an emergency veterinarian clinic, St. Charles Veterinary Hospital, in Davenport, Florida. After numerous tests were conducted and multiple treatment options were administered, unfortunately, Bailey's condition rapidly deteriorated and Bailey was euthanized on January 2, 2019.
6. The Plaintiff became aware of the recall, as described in detail below, thereafter on or about January 31, 2019. The Perfect Weight was included in the recall.

The Class

7. The Plaintiff seeks to represent the following class (the “Class”) of which the Plaintiff is a Class Member:

All persons resident in Canada who purchased Hill’s canned Prescription Diet and Science Diet dog foods with the following Product Name, SKU Number, and Date Code/Lot Code:

Product Name	SKU Number	Date Code / Lot Code
*Hill's® Prescription Diet® k/d® with Lamb Canine 13oz	*2697	*102020T25
Hill's® Prescription Diet® c/d® Multicare Canine Chicken & Vegetable Stew 12.5oz	3384	*092020T29 102020T10 102020T25
*Hill's® Prescription Diet® c/d® Multicare Canine Chicken & Vegetable Stew 5.5oz	*3388	*102020T18
Hill's® Prescription Diet® i/d® Canine Chicken & Vegetable Stew 12.5oz	3389	*092020T28 *102020T24 *102020T25 102020T04 102020T10 102020T19 102020T20 **102020T21
*Hill's® Prescription Diet® i/d® Low Fat Canine Rice, Vegetable & Chicken Stew 5.5oz	*3391	*092020T27
*Hill's® Prescription Diet® r/d® Canine 12.3oz	*7014	*092020T28 *102020T27 *102020T28
*Hill's® Science Diet® Adult Perfect Weight Chicken & Vegetable Entrée Dog Food 13oz	*2975	*092020T28
*Hill's® Science Diet® Adult Beef & Barley Entrée Dog Food 13oz	*7039	*092020T31 *102020T21
*Hill's® Science Diet® Mature Adult Healthy Cuisine Chicken & Carrots Stew Dog Food 12.5oz	*10449	*092020T28

*Hill's® Science Diet® Adult Healthy Cuisine Braised Beef, Carrots & Peas Stew Dog Food 12.5oz	*10451	*102020T28
Hill's® Prescription Diet® i/d® Canine Chicken & Vegetable Stew 5.5oz	3390	102020T11 112020T23 122020T07
Hill's® Prescription Diet® g/d® Canine 13oz	7006	112020T19 *092020T22 112020T20
Hill's® Prescription Diet® i/d® Canine 13oz	7008	*092020T21 092020T30 102020T07 102020T11 112020T22 112020T23
Hill's® Prescription Diet® j/d® Canine 13oz	7009	112020T20
Hill's® Prescription Diet® k/d® Canine 13oz	7010	102020T10 102020T11
Hill's® Prescription Diet® w/d® Canine 13oz	7017	*102020T24 *102020T25 *112020T09 *112020T10 092020T30 102020T11 102020T12
Hill's® Prescription Diet® z/d® Canine 13oz	7018	102020T04 112020T22
Hill's® Prescription Diet® Metabolic + Mobility Canine Vegetable & Tuna Stew 12.5oz	10086	102020T05 102020T26
Hill's® Prescription Diet® w/d® Canine Vegetable & Chicken Stew 12.5oz	10129	*112020T05 *112020T11 102020T04 102020T21
Hill's® Prescription Diet® i/d® Low Fat Canine Rice, Vegetable & Chicken Stew 12.5oz	10423	*092020T27 *092020T28 102020T17 102020T19 112020T04
Hill's® Prescription Diet® Derm Defense® Canine Chicken & Vegetable Stew 12.5oz	10509	102020T05

Hill's® Science Diet® Puppy Chicken & Barley Entrée 13oz	7036	102020T12
Hill's® Science Diet® Adult Chicken & Barley Entrée Dog Food 13oz	7037	*092020T22 102020T13 102020T14 112020T23 112020T24
Hill's® Science Diet® Adult Turkey & Barley Dog Food 13oz	7038	102020T06
Hill's® Science Diet® Adult Chicken & Beef Entrée Dog Food 13oz	7040	*112020T10 *112020T11 102020T13
Hill's® Science Diet® Adult Light with Liver Dog Food 13oz	7048	112020T19
Hill's® Science Diet® Adult 7+ Chicken & Barley Entrée Dog Food 13oz	7055	092020T31 102020T13
Hill's® Science Diet® Adult 7+ Beef & Barley Entrée Dog Food 13oz	7056	*102020T28 092020T31 112020T20 112020T24
Hill's® Science Diet® Adult 7+ Healthy Cuisine Braised Beef, Carrots & Peas Stew dog food 12.5oz	10452	*102020T28 102020T14 102020T21
Hill's® Science Diet® Adult 7+ Youthful Vitality Chicken & Vegetable Stew dog food 12.5oz	10763	102020T04 102020T05 112020T11

(hereinafter collectively the “Defective Products”).

The Defendants

8. The Defendant, Hill’s Pet Nutrition, Inc. (hereinafter “Hill’s US”), is a Kansas corporation with its principal place of business located in Topeka, Kansas.

9. The Defendant, Hill’s Pet Nutrition Canada Inc. (hereinafter “Hill’s Canada”), is a corporation incorporated under the laws of the province of Ontario with its head office located in located in Toronto, Ontario.

10. The Defendants, Hill's US and Hill's Canada, are herein collectively referred to as the "Defendants" or "Hill's". The Plaintiff has no knowledge with respect to the precise corporate structure of the Defendants but such information is in the direct knowledge of the Defendants. The Defendants are jointly and severally liable for the allegations as plead herein.
11. At all material times, the Defendants researched, developed, tested, manufactured, produced, marketed, advertised, promoted, distributed, sold, and warranted the Defective Products in Canada. The Defective Products were sold to the public in Canada by authorized sellers.
12. The Defendants were located or resident in Ontario under section 2(1) of the *Consumer Protection Act* and in the applicable province under the parallel provisions of the Consumer Protection Legislation.

THE DEFECTIVE PRODUCTS

13. The Defendants research, develop, test, manufacture, produce, market, advertise, promote, distribute, sell, and warrant premium brand pet food in Canada. The Defendants sell their products through veterinary clinics, pet speciality chains, as well as through online vendors.
14. Veterinarians prescribe the Science Diet and Prescription Diet product lines to address various nutritional deficiencies and health issues in dogs. The premium ingredients in these products are an important characteristic to consumers, including the Plaintiff and

Class Members, and reflect the premium pricing for the Defendants' products. The Defendants charge a premium price for the Defective Products and in many cases, the prices charged command a substantial premium over other dog food products.

The Representations

15. The products sold by the Defendants are marketed as being specifically formulated and intended for dogs with specific needs or illness including, but not limited, the following: age-specific dietary needs, breed-specific dietary needs, digestive issues, heart issues, liver issues, or kidney issues.

16. Through advertising, marketing material, and packaging, the Defendants make the following representations regarding their products:
 - (a) that Hill's products provide "nutrition that can transform pets' lives";

 - (b) that Hill's safety standards are modeled after human food manufacturers and that "We only accept ingredients from suppliers whose facilities meet stringent quality standards and who are approved by Hill's. Not only is each ingredient examined to ensure its safety, we also analyze each product's ingredient profile for essential nutrients to ensure your pet gets the stringent, precise formulation they need.";

 - (c) that Hill's product manufacturing ensures quality and that "We conduct annual quality systems audits for all manufacturing facilities to ensure we meet the high standards your pet deserves. We demand compliance with current Good Manufacturing Practices (cGMP) and Hill's high quality standards, so you pet's food is produced under clean and sanitary conditions.";

- (d) that Hill's product manufacturing includes daily safety checks and that "We conduct final safety checks daily on every Hill's pet food product to help ensure the safety of your pet's food. Additionally, all finished products are physically inspected and tested for key nutrients prior to release to help ensure your pet gets a consistent product bag to bag.";
- (e) that Hill's products contain the "precise balance" of nutrients needed for a health dog as "Guided by science, we formulate our food with precise balance so your pet gets all the nutrients they need – and none they don't."; and
- (f) the packaging for Hill's products include claims that Hill's products, among other things:
 - (i) "support [...] a healthy immune system";
 - (ii) "improve and lengthen quality of life";
 - (iii) "can be used long-term";
 - (iv) "protect vital kidney & heart function";
 - (v) [s]upport your dog's natural ability to build lean muscle daily"; and
 - (vi) "meet [...] the special nutritional needs of puppies and adult dogs."

(hereinafter collectively the "Representations").

17. As demonstrated by the recall discussed below and the sickness and death suffered by many animals owned by the Plaintiff and Class Members, the Defendants'

Representations about quality, ingredient supply, and product manufacturing and oversight are false, misleading, and deceptive. The Representations falsely warrant that the Defective Products are of a high standard and quality which the Defective Products are not. Further, the Representations claim characteristics, ingredients, benefits, or qualities that the Defective Products do not have.

18. Although pet foods vary in the quality of ingredients, formula, manufacturing processes, inspection quality, and nutritional value, premium or ultra-premium pet foods, like the Defective Products, typically have higher standards with respect to each of these important variables. Hill's emphasizes the nutritional value of their products and pet owners like the Plaintiff and Class Members purchase these products based on such claims.

The Recall

19. On January 31, 2019, the Defendants announced an initial recall of canned Prescription Diet and Science Diet products. Hill's issued a press release detailing the risk of excessive vitamin D consumption and identifying certain affected products. On February 7, 2019, the Defendants announced an expansion of the recall to include additional SKU and lot numbers of canned Prescription Diet and Science Diet products.
20. The recall was posted on Hill's website and states, in part, the following:

While Vitamin D is an essential nutrient for dogs, ingestion of elevated levels can lead to potential health issues depending on the level of vitamin D and the length of exposure, and dogs may exhibit symptoms such as vomiting, loss of appetite, increased thirst, increased urination, excessive drooling, and weight loss. Vitamin D, when consumed at very high levels, can lead to serious health issues in dogs including renal dysfunction. Pet parents with dogs who have consumed any of the

products listed and are exhibiting any of these signs should contact their veterinarian. In most cases, complete recovery is expected after discontinuation of feeding. The affected canned dog foods were distributed through retail pet stores and veterinary clinics and e-commerce. No dry foods, cat foods, or treats are affected.

21. The recall includes the following Defective Products:

22. Product Name		
*Hill's® Prescription Diet® k/d® with Lamb Canine 13oz	*2697	*102020T25
Hill's® Prescription Diet® c/d® Multicare Canine Chicken & Vegetable Stew 12.5oz	3384	*092020T29 102020T10 102020T25
*Hill's® Prescription Diet® c/d® Multicare Canine Chicken & Vegetable Stew 5.5oz	*3388	*102020T18
Hill's® Prescription Diet® i/d® Canine Chicken & Vegetable Stew 12.5oz	3389	*092020T28 *102020T24 *102020T25 102020T04 102020T10 102020T19 102020T20 **102020T21
*Hill's® Prescription Diet® i/d® Low Fat Canine Rice, Vegetable & Chicken Stew 5.5oz	*3391	*092020T27
*Hill's® Prescription Diet® r/d® Canine 12.3oz	*7014	*092020T28 *102020T27 *102020T28
*Hill's® Science Diet® Adult Perfect Weight Chicken & Vegetable Entrée Dog Food 13oz	*2975	*092020T28
*Hill's® Science Diet® Adult Beef & Barley Entrée Dog Food 13oz	*7039	*092020T31 *102020T21
*Hill's® Science Diet® Mature Adult Healthy Cuisine Chicken & Carrots Stew Dog Food 12.5oz	*10449	*092020T28
*Hill's® Science Diet® Adult Healthy Cuisine Braised Beef, Carrots & Peas Stew Dog Food 12.5oz	*10451	*102020T28

Hill's® Prescription Diet® i/d® Canine Chicken & Vegetable Stew 5.5oz	3390	102020T11 112020T23 122020T07
Hill's® Prescription Diet® g/d® Canine 13oz	7006	112020T19 *092020T22 112020T20
Hill's® Prescription Diet® i/d® Canine 13oz	7008	*092020T21 092020T30 102020T07 102020T11 112020T22 112020T23
Hill's® Prescription Diet® j/d® Canine 13oz	7009	112020T20
Hill's® Prescription Diet® k/d® Canine 13oz	7010	102020T10 102020T11
Hill's® Prescription Diet® w/d® Canine 13oz	7017	*102020T24 *102020T25 *112020T09 *112020T10 092020T30 102020T11 102020T12
Hill's® Prescription Diet® z/d® Canine 13oz	7018	102020T04 112020T22
Hill's® Prescription Diet® Metabolic + Mobility Canine Vegetable & Tuna Stew 12.5oz	10086	102020T05 102020T26
Hill's® Prescription Diet® w/d® Canine Vegetable & Chicken Stew 12.5oz	10129	*112020T05 *112020T11 102020T04 102020T21
Hill's® Prescription Diet® i/d® Low Fat Canine Rice, Vegetable & Chicken Stew 12.5oz	10423	*092020T27 *092020T28 102020T17 102020T19 112020T04
Hill's® Prescription Diet® Derm Defense® Canine Chicken & Vegetable Stew 12.5oz	10509	102020T05
Hill's® Science Diet® Puppy Chicken & Barley Entrée 13oz	7036	102020T12
Hill's® Science Diet® Adult Chicken & Barley Entrée Dog Food 13oz	7037	*092020T22

		102020T13 102020T14 112020T23 112020T24
Hill's® Science Diet® Adult Turkey & Barley Dog Food 13oz	7038	102020T06
Hill's® Science Diet® Adult Chicken & Beef Entrée Dog Food 13oz	7040	*112020T10 *112020T11 102020T13
Hill's® Science Diet® Adult Light with Liver Dog Food 13oz	7048	112020T19
Hill's® Science Diet® Adult 7+ Chicken & Barley Entrée Dog Food 13oz	7055	092020T31 102020T13
Hill's® Science Diet® Adult 7+ Beef & Barley Entrée Dog Food 13oz	7056	*102020T28 092020T31 112020T20 112020T24
Hill's® Science Diet® Adult 7+ Healthy Cuisine Braised Beef, Carrots & Peas Stew dog food 12.5oz	10452	*102020T28 102020T14 102020T21
Hill's® Science Diet® Adult 7+ Youthful Vitality Chicken & Vegetable Stew dog food 12.5oz	10763	102020T04 102020T05 112020T11

23. The recall did not adequately convey the dangers associated with excess vitamin D in dogs. The presence of toxic levels of vitamin D in the Defective Products directly lead to a high probability of endangering the health of the dogs and ultimately resulted in the sickness and death of many animals, including the death of the Plaintiff's dog, Bailey.

CAUSES OF ACTION

Breach of the Consumer Protection Act

24. At all material times, the Plaintiff and Class Members were “consumer[s]” within the meaning of that term as defined in section 1 of the *Consumer Protection Act* and the

parallel Consumer Protection Legislation. At all material times, the Defendants were “supplier[s]” within the meaning of that term as defined in section 1 of the *Consumer Protection Act* and the parallel Consumer Protection Legislation.

25. At all material times, the Defendants used the false, misleading or deceptive Representations in their advertising, marketing material, and packaging. The Defendants engaged in an extensive, nationwide, uniform marketing and advertising campaign replete with the Representations.
26. At all material times, the Defendants had knowledge of or were reckless with regard to the material discrepancies between the Representations and the true quality of the Defective Products. In so doing, the Defendants knowingly or recklessly failed to disclose the dangerous defects which existed in the Defective Products.
27. The Representations were designed to, and did in fact, exploit the Plaintiff’s and Class Members’ desire for high quality, premium, and safe pet food in order to sell the Defective Products. The Plaintiff and Class relied on, or should be deemed to have relied on the Representations.
28. The Representations were featured in a variety of advertising. The Defective Products are repeatedly advertised as described in paragraphs 15 through 18 above.
29. The Representations were false, misleading or deceptive as follows:
 - (a) the Defective Products were not of high quality and in fact were unsafe for consumption; and

- (b) the Defective Products did not achieve positive health benefits and instead lead to the sickness and death of many animals.
- 30. The Defendants engaged in unfair practices by making the false, misleading or deceptive Representations contrary to sections 14 and 17 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation.
- 31. In particular, but without limiting the scope of the Defendants' unfair practices contrary to sections 14 and 17 of the *Consumer Protection Act* and the Consumer Protection Legislation, the Defendants falsely, misleadingly or deceptively made:
 - (a) the Representations that the Defective Products had performance characteristics, benefits or qualities which they did not have;
 - (b) the Representations that the Defective Products were of a particular standard and quality which they were not; and
 - (c) the Representations using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact where such use or failure tended to deceive.
- 32. As a result of the Defendants' Representations, deceptive conduct, and unfair practices, the Plaintiff and Class Members suffered actual damages and economic losses.

Breach of the *Competition Act*

- 33. At all material times, the Defendants' supervision, control, and inspection of the research, development, testing, manufacturing, production, marketing, advertising, promotion, distribution, sale, and warranty was a "business" and the Defective Products were a

“product[s]” within the meaning of those terms as defined in section 2 of the *Competition Act*.

34. The Defendants’ Representations and the acts associated with those Representations are in breach of section 52 of Part VI of the *Competition Act*, were and are unlawful, and therefore, the Defendants are jointly and severally liable to pay damages and costs of investigation pursuant to section 36 of the *Competition Act*.
35. The Defendants knowingly or recklessly made the false or misleading material Representations to the public, including the Class, for the purpose or promoting, directly or indirectly, the purchase or use of the Defective Products and in doing so, breached section 52 of the *Competition Act* as follows:
 - (a) the Representations were made for the purposes of promoting, directly or indirectly, the business interests of the Defendants;
 - (b) the Representations were made knowingly or recklessly;
 - (c) the Representations were made to the public; and
 - (d) the Representations stated a level of performance and quality that was false and was not based on adequate and property testing and/or quality control.
36. The Plaintiff and Class Members relied on the Representations by purchasing the Defective Products and suffered damages and losses as particularized herein.
37. Pursuant to section 36 of the *Competition Act*, the Defendants are liable to pay the damages which resulted from their breach of section 52 of the *Competition Act*.

38. Pursuant to section 36 of the *Competition Act*, the Plaintiff and Class Members are entitled to recover their full costs of investigation as well as their substantial indemnity costs in accordance with the provisions of the *Competition Act*. In addition, pursuant to the *Competition Act*, the Plaintiff and Class Members are entitled to recover the costs of administering the plan to distribute the recovery and the costs to determine the damages of each Class Member.

Negligent Misrepresentation

39. The Defendants were in a proximate and special relationship with the Plaintiff and Class Members by virtue of, among other things:
- (a) their research, development, testing, manufacturing, production, marketing, advertising, promotion, distribution, sale, and warranting of the Defective Products;
 - (b) their skill, experience, and expertise in the research, development, testing, manufacturing, production, marketing, advertising, promotion, distribution, sale, and warranting of the Defective Products;
 - (c) the fact that Class Members had no means of knowing or independently testing the quality or safety of the Defective Products; and
 - (d) the need for Class Members to rely on the Representations and integrity of the Defendants in respect of the Defective Products.

40. The Defendants owed a duty of care to the Plaintiff and Class Members. It was intended by the Defendants and reasonably foreseeable that the Class Members would reasonably rely upon the Representations when purchasing the Defective Products and would suffer the damage described below as a result.
41. The Representations are untrue, inaccurate, and/or misleading. The Representations were false and were made intentionally or negligently and the Defendants acted negligently in making such Representations.
42. The Plaintiff and Class Members reasonably relied on the Representations in deciding whether to purchase the Defective Products. Their reliance can be inferred on a class-wide basis from the purchase of the Defective Products. Had the Representations not been made, the Class Members would not have purchased the Defective Products and/or would not have purchased the Defective Products at the stipulated price.
43. The Plaintiff and Class Members suffered damages as a result of relying on the Representations in purchasing the Defective Products. The Defendants are liable to pay damages to the Class Members.

Negligent Production

44. The Defendants are and were in a relationship of proximity to the Plaintiff and the Class Members. It was reasonable foreseeably that if the Defective Products contained the latent defects, harm to the Plaintiff and the Class Members would result.
45. At all material times, the Defendants owed a duty of care to the Plaintiff and the Class Members to:

- (a) exercise reasonable care in the research, development, testing, manufacturing, production, marketing, advertisement, promotion, distribution, sale, and warranting of the Defective Products;
 - (b) ensure that the Defective Products were fit for intended and/or reasonably foreseeable use;
 - (c) conduct appropriate testing to determine that the Defective Products were fit for intended and/or reasonably foreseeable use;
 - (d) take all reasonable steps necessary to produce, promote, and sell a product that was not unreasonably dangerous to the animals who consume it;
 - (e) properly, adequately, and fairly warn of the magnitude and scope of the defects;
 - (f) ensure that consumers and the public were kept fully and completely informed of all defects associated with the Defective Products in a timely manner;
 - (g) not withhold from consumers and the public material facts concerning the safety of the Defective Products; and
 - (h) monitor, investigate, evaluate, and follow up on reports of defects in the Defective Products.
46. The reasonable standard of care expected in the circumstances required the Defendants to act fairly, reasonably, honestly, candidly and with due care in the course of researching, developing, testing, producing, and manufacturing the Defective Products and having them, marketed, distributed, and sold. The Defendants, through their employees, officers,

directors and agents, failed to meet the reasonable standard of care in that regard and similarly failed to warn the Plaintiff and the Class Members of the latent defects.

47. The Plaintiff's and the Class Members' damages were caused by the negligence of the Defendants. Such negligence includes, but is not limited to, the following:
- (a) the Defendants failed to adequately research, develop, test, produce, and/or manufacture the Defective Products before marketing, advertising, promoting, warranting, and selling the Defective Products as suitable and safe for use in an intended and/or reasonably foreseeable manner;
 - (b) the Defendants failed to ensure that the Defective Products were free of defects and of merchantable quality;
 - (c) the Defendants failed to adequately test the Defective Products in a manner that would fully disclose the magnitude and scope of the defects associated with the Defective Products;
 - (d) the Defendants failed to provide the Plaintiff and the Class Members with proper, adequate, and/or fair warning of the defects;
 - (e) the Defendants failed to design and establish an effective and timely procedure for recall of the Defective Products;
 - (f) the Defendants failed to adequately monitor, evaluate, and act upon reports of the defects;

- (g) the Defendants failed to provide any or any adequate updates and/or current information to the Plaintiff and the Class Members in a timely fashion respecting the defects as such information became available;
- (h) after becoming aware of problems with the Defective Products, the Defendants failed to issue adequate warnings, failed to issue a timely recall, failed to publicize the problems, and failed to otherwise act properly in a timely manner to alert the public to the defects;
- (i) the Defendants represented that the Defective Products were fit for their intended purposes and of merchantable quality when the Defendants knew or ought to have known that these representations were false;
- (j) the Defendants made misrepresentations that were unreasonable given that the defects were known or ought to have been known by the Defendants;
- (k) the Defendants knowingly and intentionally concealed from the Plaintiff and the Class Members that the Defective Products suffered from defects; and
- (l) the Defendants failed to timely cease the production, manufacturing, marketing, distribution, and/or sale of the Defective Products when it knew or ought to have known of the defects.

48. As a result of the Defendants' negligence, the Plaintiff and the Class Members suffered and will continue to suffer damages.

Breach of Warranties

49. The Defendants expressly or impliedly warranted to the Plaintiff and Class Members that the Defective Products were reasonably fit for the purpose of consumable pet food, that the Defective Products were of merchantable quality, that the Defective Products were free from defects, and/or that the Defective Products were of acceptable quality.
50. Despite and contrary to the foregoing warranties and Representations, the Defendants sold the Defective Products when they knew or ought to have known of the latent defects and the Defendants concealed or failed to disclose the latent defects to the Plaintiff and the Class Members.
51. As a direct result of the Defective Products being unfit for such purposes and/or otherwise not merchantable, the Plaintiff and Class Members suffered damages in that they did not receive the product as warranted and/or paid a premium for the Defective Products and incurred veterinary expenses to treat their ill pets.
52. The Defendants have breached the warranties with the Class Members, and as a result, the Class Members have suffered damages.

Breach of the *Sale of Goods Act*

53. At all material times, the Plaintiff and Class Members were “buyer[s]” within the meaning of that term as defined in s. 1 of the *Sale of Goods Act* and the Sale of Goods Legislation. At all material times, the Defendants were “seller[s]” within the meaning of that term as defined in s. 1 of the *Sale of Goods Act* and the Sale of Goods Legislation.
54. The excessive vitamin D in the Defective Products could no have been revealed upon examination by the Plaintiff or Class Members. As such, there were implied conditions

as to merchantable quality or fitness of the Defective Products pursuant to section 16 of the *Sale of Goods Act* and the parallel Sale of Goods Legislation as well as an implied condition with respect to defects.

55. At all material times, the Defendants were fully aware that the Plaintiff and Class Members were purchasing the Defective Products based entirely on the Representations. Therefore, it is an implied warranty or condition that the products were as presented and were free from any and all defects, including, but not limited to, excessive vitamin D.
56. The Defendants breached this implied condition as to quality or fitness for a particular purpose and are liable pursuant to section 16 of the *Sale of Goods Act* and the parallel Sale of Goods Legislation. The Defendants placed a product into the market that was unfit for the purposes for which it was marketed and/or advertised and the Plaintiff and the Class Members are therefore entitled to maintain an action for breach of warranty under sections 52 and 53 of the *Sale of Goods Act* and the parallel Sale of Goods Legislation.

Unjust Enrichment

57. The Defendants caused the Plaintiff and the Class Members to pay for a product that they would not have otherwise purchased, or, in the alternative, for which they should have paid less than they did.
58. As a result, the Defendants were enriched by the payment or overpayment for the Defective Products.

59. The Plaintiff and Class Members suffered a deprivation equal to the Defendants' enrichment.
60. There is no juristic reason for the Defendants' enrichment and the Class Members' corresponding deprivation. The Class Members are entitled to restitution for the Defendants' unjust enrichment.

DAMAGES

61. As a result of the Defendants' misrepresentations, deceptive conduct, unfair practices, negligence, and breach of warranties, the Plaintiff and Class Members suffered damages with respect to the purchase of the Defective Products, the premium paid for a high quality product, the damages suffered to the Plaintiff and Class Members' physical property, and out of pocket costs including, but not limited to, costs associated with veterinarian treatment and related costs.
62. The Plaintiff and Class Members were willing to pay a premium for the Defective Products because these products were represented to be specifically formulated for the particular health needs of dogs and to meet certain ingredient supply, quality, and manufacturing standards. Instead, the Plaintiff and Class Members paid a premium for a product that sickened or killed many animals and the Plaintiff and Class Members were subject to expensive veterinary bills and related costs as they tried to address the illnesses caused by the Defective Products.

63. Had the Defendants been honest regarding the quality of the Defective Products, the Plaintiff and Class Members would not have purchased the Defective Products or would have paid substantially less.
64. The Defendants' conduct described above was deliberate, arrogant, high-handed, outrageous, reckless, wanton, entirely without care, secretive, callous, willful, disgraceful and in contemptuous disregard of the rights, and interests of the Plaintiff, the Class Members and the public. This conduct renders the Defendants liable to pay punitive damages to the Plaintiff and the Class Members.

SERVICE

65. The Plaintiff pleads and relies on section 17.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, allowing for service *ex juris* of foreign defendants. Specifically, this originating process may be served without court order outside Ontario in that the claim, *inter alia*, is:
 - a. in respect of personal property situated in Ontario (rule 17.02(a));
 - b. for the interpretation and enforcement of a contract or other instrument in respect of personal property in Ontario (rule 17.02(c));
 - c. against a person outside Ontario who is a necessary or proper part to a proceeding properly brought against another person served in Ontario (rule 17.02(o)); and
 - d. against a person carrying on business in Ontario (rule 17.02(p)).

PLACE OF TRIAL

66. The Plaintiff proposes that this action be tried in the City of London.

September 10, 2019

MCKENZIE LAKE LAWYERS LLP
140 Fullarton Street, Suite 1800
London, ON N6A 5P2

Michael J. Peerless (LSO # 34127P)
Matthew D. Baer (LSO # 48227K)
Emily Assini (LSO # 59137J)

Tel: 519-672-5666
Fax: 519-672-2674

Lawyers for the Plaintiff

BETTY ANN MARTIN
Plaintiff

-and- HILL'S PET NUTRITION, INC. et al
Defendants

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
LONDON

STATEMENT OF CLAIM

MCKENZIE LAKE LAWYERS LLP
140 Fullarton Street, Suite 1800
London, Ontario N6A 5P2

Michael J. Peerless (LSO # 34127P)
Matthew D. Baer (LSO # 48227K)
Emily Assini (LSO # 59137J)

Tel: 519-672-5666
Fax: 519-672-2674

Lawyers for the Plaintiff

