

Jeffrey B. Cereghino, SBN 099480
 Email: jbc@rocklawcal.com
 Michael F. Ram, SBN 104805
 Email: mram@rocklawcal.com
 Matt J. Malone, SBN 221545
 Email: mjm@rocklawcal.com
 RAM, OLSON, CEREGHINO
 & KOPCZYNSKI LLP
 101 Montgomery Street, Suite 1800
 San Francisco, California 94104
 Telephone: (415) 433-4949

[Additional Counsel Appear on Signature Page]

Attorneys for Plaintiffs and Proposed Class

UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRANK LUCIDO, ALMACEO AND
 LAURAE CAMPBELL, RICHARD
 CARTER, REGGIE SMITH, DAVID
 BALMER, KAREN PHILLIPS, WAYNE
 COLELLO, KAREN BAKER, RICKY
 BISHARAT, HOPE BENHAM, ROBIN
 BENHAM, VIRGINIA BURGARDT,
 CYNTHIA XENAKIS, DIANE PORTER,
 LANCE CARLSON, GRACE
 ARMSTRONG, JENNIFER HICKEY,
 THOMAS AND SHARON NORMAND,
 CHRISTINA WINTERS, ROBERT
 BRYDEN, REGINA BOLLINGER, PAT
 KELLY, AMERICA PENA, ELIZABETH
 RODARTE, and KACY KIMBALL, on
 behalf of themselves and all others similarly
 situated,

Plaintiffs,

v.

NESTLÉ PURINA PETCARE COMPANY, a
 Missouri corporation; and DOES1 through 200,
 inclusive,

Defendants.

Case No. 3:15-cv-00569-EMC

**SECOND AMENDED CLASS
 ACTION COMPLAINT**

CLASS ACTION

JURY TRIAL DEMAND

1 Plaintiffs identified below, individually and on behalf of the Classes defined below of
 2 similarly situated persons, file this First Amended Class Action Complaint against Defendant
 3 Nestlé Purina PetCare Company (“Purina”).

4 **I. NATURE OF THE CASE**

5 1. Purina failed to disclose that Beneful dog food contains Industrial Grade
 6 Glycols, which are not approved for use in food, mycotoxins, lead, and/or arsenic. Plaintiffs
 7 would not have purchased Beneful had they known Beneful contained any one of these
 8 substances. Plaintiffs bring this class action on behalf of all persons who purchased Beneful
 9 brand dog food, including persons who incurred out of pocket costs resulting from their dogs
 10 becoming ill or dying after ingesting Beneful.

11 **II. PARTIES**

12 2. Plaintiff Frank Lucido has at all material times been a resident of Discovery
 13 Bay, California. In late December 2014 or early January 2015, Plaintiff Lucido purchased a
 14 bag of Beneful for the first time. Between late December or early January 2015 and
 15 approximately January 15, 2015, Plaintiff Lucido’s dogs—Nella, a four-year old purebred
 16 German Shepherd sired by a champion show dog, and Remo, an eleven year-old Labrador—ate
 17 exclusively Beneful Healthy Fiesta and Healthy Weight . On approximately January 15, 2015,
 18 Plaintiff’s Lucido’s wife noticed that Nella, his healthy German Shepherd, was losing large
 19 amounts of hair and producing an unusual and unpleasant odor. Plaintiff Lucido became
 20 concerned about the possibility that Beneful was causing this. Shortly thereafter, on the night
 21 of January 17th, Nella became violently ill. Veterinary examination and testing revealed signs
 22 of internal bleeding in her stomach and liver malfunction consistent with poisoning, and Nella
 23 continues to have ongoing health problems. Remo, who lived in a different location from
 24 Nella, also became ill at almost the same time as Nella; he lost total mobility in his lower body,
 25 among other symptoms, before dying. Plaintiff Lucido would not have purchased Beneful had
 26 he known Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a
 27 result, Plaintiff Lucido has suffered substantial damages.

1 3. Plaintiffs Almaceo and Laurae Campbell have at all material times been
2 residents of Oakland, California. Plaintiffs Campbell owned Shaba Ranks, a six-year old
3 Rhodesian Ridgeback, who ate Purina Beneful Original for approximately four years. After
4 eating this product, Shaba Ranks experienced blood in the stool, diarrhea, internal bleeding,
5 kidney failure, lethargy, liver malfunction or failure, loss of appetite, seizures, vomiting, and
6 excessive thirst before dying on January 6, 2015. Plaintiffs Campbell would not have
7 purchased Beneful had they known Beneful contained Industrial Grade Glycols, Mycotoxins,
8 Lead or Arsenic. As a result, the Campbells have suffered substantial damages.

9 4. Plaintiff Richard Carter has at all material times been a resident of Yuba City,
10 California. Plaintiff Carter owns Molly, a female Queensland Heeler, who is nine years old and
11 ate Beneful dog food for the three years prior to November 2014. Although Molly was
12 previously in good physical health, in November 2014, she fell ill, with unusually high amounts
13 of thirst, vomiting and bloody diarrhea. This illness resolved itself without veterinary
14 treatment. But in February 2015, Molly again fell ill, with the same symptoms as before, only
15 to a much more severe degree. Plaintiff Carter would not have purchased Beneful had he
16 known Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a result,
17 Plaintiff Carter has suffered substantial damages.

18 5. Plaintiff Reggie Smith has at all material times been a resident of Oceanside,
19 California. Plaintiff Smith owned Nadia, a five-year old Siberian Husky-Alaskan Malamute
20 Mix, who ate Purina Beneful Original or Purina Beneful Playful Life for approximately two
21 and one-half years. After eating these products, Nadia experienced diarrhea, internal bleeding,
22 kidney failure, lethargy, liver malfunction or failure, vomiting, and panicked breathing before
23 dying on March 2, 2015. Plaintiff Smith would not have purchased Beneful had he known
24 Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a result,
25 Plaintiff Smith has suffered substantial damages.

26 6. Plaintiffs David Balmer and Karen Phillips have at all material times been
27 residents of Colorado. Plaintiffs Balmer and Phillips owned Scout, a six-year old Vizsla, who

1 ate Purina Beneful Original consistently starting in or about November 2014. After eating
2 Beneful for just a few months, in January 2015, Scout experienced decreased appetite, less
3 energy, and occasional episodes of vomiting. Plaintiffs Balmer and Phillips have two other
4 dogs. They did not eat Beneful and did not experience symptoms or otherwise become sick.
5 Starting on February 6, 2015, Scout's symptoms worsened. Over the next ten days, Scout had
6 several seizures, collapsed on several occasions, was lethargic weak, and sleepy, and
7 experienced vomiting, diarrhea with blood in the stool, and decreased appetite before he died in
8 Plaintiffs' arms on February 15, 2015. Plaintiffs Balmer and Phillips would not have purchased
9 Beneful had they known Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or
10 Arsenic. As a result, Plaintiffs Balmer and Phillips have suffered substantial damages.

11 7. Plaintiff Wayne Colello has at all material times been a resident of Kissimmee,
12 Florida. Plaintiff Colello owns Shiner, a three-year old Border Collie, who ate Beneful Healthy
13 Weight for six months to one year. After eating this product, Shiner experienced vomiting,
14 weakness, kidney failure, and liver failure starting December 21, 2014. Plaintiff Colello would
15 not have purchased Beneful had he known Beneful contained Industrial Grade Glycols,
16 Mycotoxins, Lead or Arsenic. As a result, Plaintiff Colello has suffered substantial damages.

17 8. Plaintiff Karen Baker has at all material times been a resident of Springfield,
18 Illinois. Plaintiff Baker owns Chloe, a ten-month old German shepherd, who ate Purina
19 Beneful Puppy Chow & Healthy Growth for Puppies for the first ten months of her life.
20 Starting in March 2015, after eating these products, Chloe suffered liver damage. Plaintiff
21 Baker would not have purchased Beneful had she known Beneful contained Industrial Grade
22 Glycols, Mycotoxins, Lead or Arsenic. As a result, Plaintiff Baker has suffered substantial
23 damages.

24 9. Plaintiff Ricky Bisharat has at all material times been a resident of
25 Bloomingdale, Illinois. Plaintiff Bisharat owns Tyson, a six-year old Pit Bull mix, who ate
26 Purina Beneful Original and Purina Beneful Healthy Radiance for four years. Starting in 2011,
27 and continuing during the four years in which Tyson ate these products, he experienced liver

1 malfunction or failure, loss of appetite, and vomiting, among other symptoms. Plaintiff
2 Bisharat would not have purchased Beneful had he known Beneful contained Industrial Grade
3 Glycols, Mycotoxins, Lead or Arsenic. As a result, Plaintiff Bisharat has suffered substantial
4 damages.

5 10. Plaintiff Hope Benham has at all material times been a resident of Versailles,
6 Indiana. Plaintiff Benham owns Willie, a five-year old Shih Tzu, who ate Purina Beneful
7 Healthy Fiesta and Purina Incredibites for one year. After eating these products, Willie
8 experienced blood in the stool, blood in the urine, diarrhea, kidney failure, lethargy, loss of
9 appetite, vomiting, and weight loss starting in December 2014. Willie has ceased eating
10 Beneful, but it is unclear whether he will ever fully recover from these symptoms. Plaintiff
11 Benham would not have purchased Beneful had she known Beneful contained Industrial Grade
12 Glycols, Mycotoxins, Lead or Arsenic. As a result, Plaintiff Benham has suffered substantial
13 damages.

14 11. Plaintiff Robin Benham has at all material times been a resident of Versailles,
15 Indiana. Plaintiff Benham owned Sadie, a seven-year old Miniature Fox Terrier, who ate
16 Purina Beneful Original and Purina Healthy Growth for Puppies for four months. After eating
17 these products, Sadie experienced blood in the stool, blood in the urine, diarrhea, lethargy, liver
18 malfunction or failure, vomiting, and weight loss before dying in October 2013. Plaintiff
19 Benham would not have purchased Beneful had Plaintiff Benham known Beneful contained
20 Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a result, Plaintiff Benham has
21 suffered substantial damages.

22 12. Plaintiff Virginia Burgardt has at all material times been a resident of Wichita,
23 Kansas. Plaintiff Burgardt owns Skye, a thirteen-month old Great Dane, who ate Purina
24 Beneful Original for four months. After eating this product, Skye experienced dehydration,
25 diarrhea, lethargy, and vomiting. Plaintiff Burgardt would not have purchased Beneful had she
26 known Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a result,
27 Plaintiff Burgardt has suffered substantial damages.

1 13. Plaintiff Cynthia Xenakis has at all material times been a resident of Wayland,
2 Massachusetts. Plaintiff Xenakis owned Piccolo, a seven-year old Maltese, who ate Beneful
3 Healthy Weight for approximately four months. After eating this product, Piccolo experienced
4 loss of appetite and liver damage beginning in January 2015. Plaintiff Xenakis would not have
5 purchased Beneful had she known Beneful contained Industrial Grade Glycols, Mycotoxins,
6 Lead or Arsenic. As a result, Plaintiff Xenakis has suffered substantial damages.

7 14. Plaintiff Diane Porter has at all material times been a resident of Mora,
8 Minnesota. Plaintiff Porter owns Oliver, a six-year old Pug, who ate Beneful Healthy Weight
9 for his entire life. After eating this product, Oliver experienced blood in the urine, among other
10 symptoms, beginning in July 2012, resulting in two extensive surgeries. Plaintiff Porter would
11 not have purchased Beneful had she known Beneful contained Industrial Grade Glycols,
12 Mycotoxins, Lead or Arsenic. Consequently, Plaintiff Porter has suffered substantial damages.

13 15. Plaintiff Lance Carlson has at all material times been a resident of Helena,
14 Montana. Plaintiff Carlson owned Hunter, a five-year old Dachshund, who ate Beneful
15 Healthy Weight for two months. After eating this product, Hunter experienced diarrhea, kidney
16 failure, liver failure, vomiting, and weight loss among other symptoms before dying on
17 February 2, 2015. Plaintiff Carlson would not have purchased Beneful had he known Beneful
18 contained Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a result, Plaintiff
19 Carlson has suffered substantial damages.

20 16. Plaintiff Grace Armstrong has at all material times been a resident of Stratford,
21 New Jersey. Plaintiff Armstrong owns Rocky, a five-and-one-half-year old Beagle, who ate
22 Beneful Incredibites for three years. After eating this product, Rocky experienced blood in the
23 stool, dehydration, kidney failure, loose stool, and vomiting, starting October 12, 2014.
24 Plaintiff Armstrong would not have purchased Beneful had she known Beneful contained
25 Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a result, Plaintiff Armstrong has
26 suffered substantial damages.

1 17. Plaintiff Jennifer Hickey has at all material times been a resident of Queensbury,
2 New York. Plaintiff Hickey owns Dash, a seven-year old Dachshund, who ate Purina Beneful
3 Healthy Weight for one-and-one-half months. After eating this product, Dash experienced
4 kidney failure and lethargy, among other symptoms, before dying on February 11, 2015.
5 Plaintiff Hickey would not have purchased Beneful had she known Beneful contained
6 Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a result, Plaintiff Hickey has
7 suffered substantial damages.

8 18. Plaintiffs Thomas and Sharon Normand have at all material times been residents
9 of Rochester, New York. Plaintiffs Normand owned Irie, an eleven-year old American
10 Staffordshire terrier, who ate Beneful Healthy Fiesta Dry dog food for approximately two
11 years. After eating this product, Irie experienced blood in the stool, weight loss, vomiting,
12 lethargy, and kidney failure before dying on August 7, 2013. Plaintiffs Normand would not
13 have purchased Beneful had they known Beneful contained Industrial Grade Glycols,
14 Mycotoxins, Lead or Arsenic. As a result, Plaintiffs Normand have suffered substantial
15 damages.

16 19. Plaintiff Christina Winters has at all material times been a resident of Newton
17 Falls, Ohio. Plaintiff Winters owned eight dogs: (1) Patti-Jo, an eight-year old Lhasa Apso, (2)
18 Bailey, a thirteen-year-and-eleven-month old Lhasa Apso, (3) Charlotte, a thirteen-year old
19 Lhasa Apso, (4) Toby, a thirteen-year old Lhasa Apso, (5) Jack, a ten-year old Lhasa Apso, (6)
20 Benji, a ten-year old Lhasa Apso, (7) Phoebe, a fourteen-year-and-eleven-month old Maltese
21 Yorkie, and (8) JJ, a ten-month old Shih Tzu. All of Plaintiff Winters' dogs ate Purina Beneful
22 Healthy Weight and Healthy Radiance, except for JJ, who ate Purina Beneful Puppy. Plaintiff
23 Winters' dogs began eating Beneful in December 2013. After eating these products, each dog
24 became ill. After eating Beneful for almost two months, Patti-Jo experienced lethargy,
25 vomiting, blood from her rectum, an extended stomach, and liver and kidney failure, before
26 dying on January 28, 2014. Approximately six months later, the other dogs started getting sick.
27 Phoebe experienced an extended stomach and liver and kidney failure before dying on

1 December 22, 2014. Bailey experienced blindness, diarrhea, vomiting, and an extended
2 stomach. Charlotte, Toby, Jack and Benji each experienced lethargy, diarrhea, and vomiting. JJ
3 experienced vomiting. Plaintiff Winters would not have purchased Beneful had she known
4 Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a result,
5 Plaintiff Winters suffered substantial damages.

6 20. Plaintiff Robert Bryden has at all material times been a resident of Pittsburgh,
7 Pennsylvania. Plaintiff Bryden owned Mason, a six-year old Doberman pinscher, who ate
8 Purina Beneful Healthy Weight for six weeks. After eating this product, Mason experienced
9 lethargy, loss of appetite, and weight loss, before dying in June 2013. Plaintiff Bryden would
10 not have purchased Beneful had he known Beneful contained Industrial Grade Glycols,
11 Mycotoxins, Lead or Arsenic. As a result, Plaintiff Bryden suffered substantial damages.

12 21. Plaintiff Regina Bollinger has at all material times been a resident of Derry,
13 Pennsylvania. Plaintiff Bollinger owned Josie, a seven-and-one-half-month old Collie
14 Shepherd Mix, who ate Purina Beneful Healthy Growth for Puppies for her entire life. After
15 eating this product, Josie experienced diarrhea, kidney failure, lethargy, loss of appetite, and
16 vomiting before dying on February 10, 2015. Plaintiff Bollinger would not have purchased
17 Beneful had she known Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or
18 Arsenic. As a result, Plaintiff Bollinger suffered substantial damages.

19 22. Plaintiff Pat Kelly has at all material times been a resident of Feasterville,
20 Pennsylvania. Plaintiff Kelly owned Apollo Creed, a six-month old Boxer, who ate Purina
21 Healthy Growth for Puppies for his entire life. After eating this product, Apollo Creed
22 experienced lethargy, loss of appetite, vomiting, weight loss, excessive thirst and kidney failure
23 before dying on February 21, 2015. Plaintiff Kelly would not have purchased Beneful had
24 Plaintiff Kelly known Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or
25 Arsenic. As a result, Plaintiff Kelly suffered substantial damages.

26 23. Plaintiff America Pena has at all material times been a resident of Pharr, Texas.
27 Plaintiff Pena owned Minnie, a seven-year old Great Dane, who ate Purina Beneful Healthy

1 Fiesta and Purina Beneful Original for four years. After eating these products, Minnie
2 experienced diarrhea, lethargy, loss of appetite, seizures, vomiting, weight loss, and liver
3 failure, among other symptoms, before dying in October 2012. Plaintiff Pena would not have
4 purchased Beneful had Plaintiff Pena known Beneful contained Industrial Grade Glycols,
5 Mycotoxins, Lead or Arsenic. As a result, Plaintiff Pena suffered substantial damages.

6 24. Plaintiff Elizabeth Rodarte has at all material times been a resident of San
7 Antonio, Texas. Plaintiff Rodarte owned T-Bone, a five-year old Mastiff, who ate Purina
8 Beneful Original for one year. After eating this product, T-Bone experienced internal bleeding,
9 lethargy, liver malfunction or failure, loss of appetite and weight loss before dying on
10 December 22, 2012. Plaintiff Rodarte would not have purchased Beneful had she known
11 Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a result,
12 Plaintiff Rodarte suffered substantial damages.

13 25. Plaintiff Kacy Kimball has at all material times been a resident of Port Angeles,
14 Washington. Plaintiff Kimball owns Buffalo, a seven-year old Jack Russell Terrier, who ate
15 Beneful Healthy Weight and Beneful Original for his entire life. After eating these products,
16 Buffalo experienced blood in the urine, jaundice, and liver malfunction or failure, among other
17 symptoms, starting January 26, 2015. Plaintiff Kimball would not have purchased Beneful had
18 Plaintiff Kimball known Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or
19 Arsenic. As a result, Plaintiff Kimball suffered substantial damages.

20 26. Defendant Nestlé Purina (“Purina”) manufactures, distributes, markets, and sells
21 pet foods, including Beneful. It is a Missouri corporation, with its principal place of business at
22 Checkerboard Square, St. Louis, Missouri. It does business in California and throughout the
23 United States. Purina has sold dog food since 1957, including Beneful since 2001. It has spent
24 millions of dollars promoting trust and confidence among consumers in its pet food products.
25 It holds itself out to the public as a manufacturer of safe, nutritious and high-quality pet food.
26 Purina’s marketing and public relations efforts have been successful, such that reasonable
27

1 consumers believe that Purina always makes and sells safe, nutritious and high-quality pet
2 food.

3 **III. JURISDICTION AND VENUE**

4 27. This class action is within the original jurisdiction of this Court pursuant to 28
5 U.S.C. § 1332(a) and 28 U.S.C. § 1332(d)(2) (the Class Action Fairness Act). The amount in
6 controversy exceeds five million dollars (\$5,000,000), exclusive of interest and costs, and at
7 least one member of the putative classes is a citizen of a state different than Purina.

8 28. Members of the proposed Class are citizens of California and the United States.
9 Plaintiffs are informed and believes that more than two-thirds of the proposed Class members
10 are citizens of states different from the home state(s) of Nestlé Purina.

11 29. Venue in this District satisfies the requirements of 28 U.S.C. § 1391(b)(2)
12 because a substantial amount of the events and occurrences giving rise to the claims occurred in
13 this District or a substantial part of the property that is the subject of this action is situated in
14 this District. Moreover, Purina intentionally avails itself of the markets within California
15 through the promotion, sale, marketing, and distribution of its products, including Beneful, and
16 has sufficient minimum contacts in California such that it is subject to personal jurisdiction
17 here. Purina is deemed to reside in this District pursuant to 28 U.S.C. § 1391(c). Purina also
18 committed a significant number of tortious acts that are the subject of this complaint in
19 California, including within this District.

20 **IV. FACTUAL ALLEGATIONS**

21 **A. The Products**

22 30. Purina manufactures, markets, distributes, and sells dog food under the brand
23 name “Beneful,” including various dry or “kibble” dog foods. This action concerns only the
24 dry or kibble variety of foods sold under the Beneful name. These products include the
25 following: Beneful Healthy Weight, Beneful Original, Beneful Incredibites, Beneful Healthy
26 Growth For Puppies, Beneful Healthy Smile, Beneful Healthy Fiesta, Beneful Healthy
27

1 Radiance, and Beneful Playful Life. These products are referred to collectively here as
2 “Beneful.”

3 **B. Purina’s Claims and Representations about Beneful**

4 31. At all times material and throughout the relevant time period, Purina made and
5 continues to make various positive material representations about the health benefits, quality,
6 nutritional value, safety and other attributes of Beneful on the product packaging, on its
7 website, and in various advertising media, including television, as illustrated by the following
8 examples:

9 a) The Product Packaging and Labeling

- 10 • “100% Complete and Balanced Nutrition”
- 11 • “Satisfaction Guaranteed. If you’re not happy, we’re not happy.
12 Complete satisfaction or your money back...”
- 13 • “23 Essential vitamins & minerals”
- 14 • “At Purina, we’re unconditionally devoted to pets. We’ve
15 dedicated over 80 years to developing the high-quality products
16 that satisfy the needs of dogs and cats.”
- 17 • “Yes, dogs can have it all—and should! How? A special blend of
18 wholesome ingredients, including grains, real beef, and accents
19 of vitamin-rich veggies! It gives dogs the complete nutrition they
20 need and a taste they love.” (Beneful Original)
- 21 • “Made with wholesome rice, real chicken, soy, and accented with
22 veggies and apples, it has the complete nutrition adult dogs
23 need...” (Beneful Healthy Weight)
- 24 • “With real chicken, wholesome rice, and accents of vitamin-rich
25 veggies, it has the complete nutrition puppies need...” (Beneful
26 Healthy Growth for Puppies”)

- “When your puppy is grown, Beneful has so many delicious ways to help keep him healthy and happy.” (Beneful Healthy Growth for Puppies)

b) The Website: <https://www.beneful.com/products/dry-dog-food> (last visited June 1, 2015).

- “It has the complete nutrition dogs need and the taste they love.” (all Beneful products);
- “Our omega-rich, complete and balanced nutrition helps support a shiny coat and healthy skin.” (Beneful Healthy Radiance);
- “Here’s to being healthy and happy! Yes, dogs can have it all—and should!” (Beneful Original);
- “Our protein-rich blend, with real beef and egg, is made for a playful dog like yours!” (Beneful Playful Life);
- “Especially for puppies, our calcium-rich blend is made with the added goodness of real milk.” (Beneful Growth for Puppies);
- “Helps your dog maintain a healthy weight with our calorie-smart blend—with 10% fewer calories than Beneful® Original.” (Beneful Healthy Weight);
- “Our protein-rich blend, with real beef, is made with your little buddy in mind.” (Beneful IncrediBites);
- “Our vitamin-rich blend, with real chicken, helps support overall good health.” (Beneful Healthy Fiesta).

c) Television Advertising

- “Make your dog happy—choose Beneful.” (television ad)
- “Be Healthy. Healthful. Flavorful. Beneful.” (television ad)
- “Beneful keeps my dog healthy and happy.” (television ad)
- “Healthy with a side of happy.” (television ad)

C. Purina Failed to Disclose that Beneful Contains Harmful or Toxic Ingredients

32. Purina failed to disclose in the list of ingredients on its packaging, or otherwise, that Beneful contains **Industrial Grade Glycols**, which the FDA has not approved for use in foods and which should not be used in foods.

33. Purina also failed to disclose that Beneful contains **Mycotoxins**, a group of toxins produced by fungus that occurs in grains, which are a principal ingredient in Beneful. Independent consumer advocate group The Association for Truth In Pet Food conducted testing of Beneful Original and found that it contained dangerous levels of Mycotoxins.

(<http://associationfortruthinpetfood.com/wp-content/uploads/2015/01/PFTestInfoGraphic.jpg>)

Mycotoxins are a known, significant health risk to dogs. Consumer complaints about Beneful report symptoms that are consistent with Mycotoxin poisoning.

(<http://news.cornell.edu/stories/2005/12/vet-college-caring-dogs-poisoned-contaminated-food>).

34. Purina further failed to disclose that Beneful contains **Lead**.

35. Purina further failed to disclose that Beneful contains **Arsenic**.

36. The presence of the **Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic**, whether alone or combined, are harmful or toxic to dogs.

37. Plaintiffs, members of the proposed Classes, and reasonable consumers would not have purchased Beneful had they known Beneful contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic.

D. Complaints by Dog Owners About Beneful

38. Plaintiffs allege that, as a direct and proximate result of the consumption of Beneful, their dogs became ill or died. They are not alone. The Internet is replete with thousands of complaints from dog owners about Beneful and the adverse effects on their dogs from Beneful, including serious injury and death. The dogs show consistent symptoms, including stomach and related internal bleeding, liver malfunction or failure, vomiting, diarrhea, dehydration, weight loss, seizures, bloat, and kidney failure, as illustrated by the following:

- 1 • On May 16, 2015, a pet owner reported: "I have fed my Yellow Lab Beneful for a few
2 years now. A few months ago my dog starting throwing up and having seizures. It
3 happened twice. At the same time I started reading about the harm that Beneful has
4 caused some dogs. I stopped using Beneful for about a month and everything was fine.
5 Long story short, I still had the Beneful in a tub and by mistake fed it to my dog and the
6 same day she had the same thing - throwing up and a seizure. This time made sure I
7 threw out the Beneful. It just seems so hard to believe that it is just a coincidence."
- 8 • On May 8, 2015, a pet owner reported: "I believe 2 of my dogs have died due to me
9 feeding them Beneful not knowing it was harmful to them. They both had the symptoms
10 described in the class action suit. My other 2 also have some symptoms but I stopped
11 feeding them the food. One is holding steady for now and the other who is stronger, and
12 younger is improving. My smallest dog became sick, first throwing up and eventually
13 after the vets were unable to figure out and help, his stomach started internally bleeding
14 and there was nothing they could do.
- 15 The next was my other boy and he started throwing up and died within the week
16 because his kidneys were failing and it was awful. My oldest girl coughs all the time,
17 she is on some medicine to try and help but it is gradually getting worse. The last girl
18 had severe itching which caused an infection which we have gotten cleared up and are
19 hoping she doesn't come down with any more symptoms and is on the way to good
20 health with no more Beneful food."
- 21 • On May 7, 2015, a pet owner reported: "We started feeding our dogs Beneful in early
22 2014. By July, our three year old, eight pound Yorkie began suffering from violent,
23 severe seizures. We spent over \$1000 on vets, tears, anti anxiety meds and treatments.
24 In February 2015 I heard reports that Beneful was making dogs sick. I immediately
25 replaced our dog food with another, more "natural" brand and our dog's seizures have
26 completely disappeared. After weekly (or more) seizures, there have been none since
27 replacing her food. This is too much a coincidence for me to believe Purina's claims that
this food is safe and healthy."
- On April 26, 2015, a pet owner reported: "My dog who is 7 years old has eaten Beneful
dog food most of his life. Three months ago he started to vomit. I changed him to
chicken and rice for a few days thinking he had a tummy bug. I put him back on
Beneful and again he vomited. I then decided to try the all natural recipe from a
different brand. He was fine but didn't like it very much. Two months went and he was
fine. Due to the fact that he didn't LOVE the new food and expense I went back to
Beneful yesterday. Last night he vomited. There is something very wrong with this
food. Now I will have to put him back on the expensive brand that he isn't crazy about
because there is something in Beneful that is making my perfectly healthy dog, sick!"
- On January 31, 2015, a pet owner reported: "after eating Beneful for just over a week,
my dogs liver failed. She was drinking way more than usual, stopped eating and was
vomiting. She spent 2 days in intensive care with IV fluids and antibiotics."

- 1 • On December 23, 2014, another pet owner reported: “we started using Beneful dog food
2 for our 9-year old dog Roxie a few weeks ago. A few days later our dog started going to
3 the bathroom all over our house. She also started drinking a lot more water than
usual...brought her to the Vet for blood work and her liver functions were really
high...Two days later our dog had passed away in our family room.”
- 4 • On October, 19, 2014, another pet owner reported: “My dog Daisy started getting bad
5 sick after my vet recommended Purina Beneful dog food. She’s vomiting, very weak,
6 dehydrated, lethargic, couldn't walk. She’s always been a happy playful yorkie. We
been to vet, spend 300 dollars on her.”
- 7 • “Dog (8 years old) getting surgery on 10/20/2014. Vet said it was bladder stones, large
8 ones. Asked us what type of dog food we use. Beneful. He said that makes sense, a lot
9 of dogs come in with this condition, always Beneful.” - published October 17, 2014.
- 10 • “My 1 1/2 year old dog has been suffering with vomiting, diarrhea, lethargic and no
11 desire to eat for the last three weeks. We've been back and forth to the vet and vet
12 hospital many times. I've spent over \$6,000 on overnight stays and exploratory
surgery...My dog had been home for four days and all he was eating was chicken,
13 cheerios, yogurt and pumpkin. Last night he ate beneficial and today we are back to
square one...This food should not be on the market!!” Published October 2, 2014.
- 14 • “I rescued a very healthy pug three years ago. About two and a half years ago I had a
15 coupon for Beneful. My dog got very sick stopped eating was weak and had loose
diarrhea...Three months later my wonderful dog was dead. I sent the UPC to Beneful.
16 They reimbursed me for the vet bills that were about \$700.00.” Published September
21, 2014.
- 17 • “We ran out of dog food one day and my husband brought home a bag of Beneful
18 Healthy Fiesta...My 5 year old shar pei ate half a bowl and the next morning was kinda
mopey looking. I came home from work that night and he was throwing up bile
19 everywhere. We tried giving him water and he wouldn't even drink. The next morning I
found my dog dead. Up until the day this food was given to him, he was a lively and
20 happy dog. I attribute his death to this horrible dog food that is still being sold. After
reading all of the complaints on this dog food, Purina should be ashamed and made to
21 take this brand off of the shelves.” Published September 20, 2014.
- 22 • “...I bought a bag of Beneful from Walmart. I weened my dog into it using the
23 remainder of her science diet. As soon as she started eating the Beneful on its own, she
would throw it up. Every night for a week I would be woken up by her puking. On
24 Sunday I switched her back to the regular science diet (not sensitive) but she wouldn't
eat it so I tried giving her Beneful and she wouldn't eat that...We're talking about a dog
25 who LOVES her some boiled chicken. Anyway after 3 days of her not eating anything
except grass and barely drinking any water I took her to the vet. They took her
26 temperature rectally and when they pulled out the thermometer there was blood. After
lab work was done and came back clear, they did some feeling around and found her
27 lower intestine to be swollen. She has never had issues like this before...” Posted

September 4, 2014.

- “After opening a new bag of Playful Life by Beneful my dog was horribly sick. He was vomiting, diarrhea, lethargic, wheezing and couldn't walk or eat. We rushed him to the vet where he was put on steroids, IV to re-hydrate and antibiotics. He almost died. He was there for four days... This past Monday we started him back on Beneful (the same bag). He was worse than before in just hours. We got him to the hospital and the vet got him on an IV and flushed his system. He was sure it was this Lot of food.” Posted August 7, 2014.

E. Purina Has Been Paying Injured Consumers for their Silence

39. Purina has been contacting dog owners soon after they post anything on social media, including Beneful's Facebook page and Facebook discussion groups focused on the dangers of Beneful. Purina denies liability and offers monetary compensation in exchange for confidentiality agreements. Purina's tactics have been downright persistent and aggressive, consisting of repeated calls and frequent voicemails.

40. Purina's settlement offers have ranged from the purchase price of a bag of the food up to a few thousand dollars. In exchange, Purina requires consumers to enter into a nondisclosure agreement (“NDA”). Several consumers have reported on social media that the NDA is remarkably restrictive, prohibiting a public disclosure. Below is an example of an NDA Purina sought from a dog owner:

Claim No: [REDACTED]

SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS

IN CONSIDERATION of the payment of [REDACTED], receipt of which is hereby acknowledged by [REDACTED] residing at [REDACTED] (there in after the undersigned"), for my/our self(ves) spouse(s), children, agents, heirs, representatives, executors, predecessors, successors and assigns, release and forever discharge Nestlé Purina PetCare Company and its shareholders, subsidiaries, affiliates, divisions, officers, directors, employees, agents, representatives, insurers, predecessors, successors and assigns and all other persons, firms, companies, and corporations and/or independent contractors (including, but not limited to, all distributors, handlers, brokers, prepared food purveyors, wholesale sellers, retail sellers, grocery stores and/or chains and all other such parties charged or chargeable with responsibility), of and from any and all claims, demands, debts, damages, actions or causes of action, injuries, loss of use, loss of services, veterinary and or medical expenses or any other liabilities arising out of or in any way connected with the incident that was reported on or about 04/19/2015, involving product: Beneful Dry Dog Food.

The undersigned further covenant(s) and agree(s) to protect, indemnify, and hold harmless Nestlé Purina PetCare Company and its shareholders, subsidiaries, affiliates, officers, directors, employees, agents, representatives, insurers, predecessors, successors and assigns, and/or independent contractors of and from any further loss, damage or expense by reason of litigation or otherwise arising out of or in any way connected with the subject claim.

The undersigned understands that this settlement is a compromise of a disputed claim, the liability for which is expressly denied and that this settlement is not to be construed as an admission of liability on the part of any persons, corporations, companies, divisions or other entities released herein.

The undersigned agree that this release expresses a FULL, FINAL AND COMPLETE SETTLEMENT of the liability claimed as well as AN ACCORD AND SATISFACTION. It is also agreed that this release reflects the ENTIRE AGREEMENT between the parties hereto and that the terms of this release are contractual and not a mere recital, consideration therefore having been given and accepted.

I/WE AGREE THAT THIS RELEASE CONSTITUTES A CONFIDENTIAL SETTLEMENT OF THIS ENTIRE MATTER, BARRING ALL PARTIES FROM PUBLIC DISCLOSURE OF ANY DETAILS, DISCUSSIONS, SOCIAL MEDIA POSTINGS, ETC., WHATSOEVER, REGARDING IT.

This release contains the ENTIRE AGREEMENT between the parties hereto, and the terms of this release are contractual and not a mere recital.

I/We further state that we have carefully read the foregoing release and know the contents thereof, and I/we sign the same as our own free act.

Date: _____ By: _____

V. CLASS ACTION ALLEGATIONS

41. Plaintiffs bring this action on behalf of themselves and all others similarly situated, as members of the Classes proposed below, under Federal Rule of Civil Procedure 23. The requirements of subsections (a), (b)(2), and (3) to Rule 23 are met with respect to the Classes defined below.

42. Plaintiffs seek to represent, and bring this action on behalf of, the following Classes:

- a) **California**: Plaintiffs Frank Lucido, Almaceo Campbell, and Laurae Campbell (collectively, “California Plaintiffs”) are members and proposed class representatives of the following California Class: all persons residing in California who purchased Beneful for personal, family or household use at any time during the period that begins four years prior to February 5, 2015 to the date of class certification.
- b) **Colorado**: Plaintiff Karen Phillips is a member and putative class representative of the following Colorado Class: all persons residing in Colorado who purchased Beneful for personal, family or household use at any time during the period that begins three years prior to February 5, 2015 to the date of class certification.
- Florida**: Plaintiff Wayne Colello (“Florida Plaintiff”) is a member and putative class representative of the following Florida Class: all persons residing in Florida who purchased Beneful for personal, family or household use at any time during the period that begins four years prior to February 5, 2015 to the date of class certification.
- c) **Illinois**: Plaintiff Ricky Bisharat is a member and putative class representative of the following Illinois Class: all persons residing in Illinois who purchased Beneful for personal, family or household use at

any time during the period that begins five years prior to February 5, 2015 to the date of class certification.

- d) **Indiana**: Plaintiffs Robin Benham and Hope Benham (collectively, “Indiana Plaintiffs”) are members and putative class representatives of the following Indiana Class: all persons residing in Indiana who purchased Beneful for personal, family or household use at any time during the period that begins four years prior to February 5, 2015 to the date of class certification.
- e) **Kansas**: Plaintiff Virginia Burgardt (“Kansas Plaintiff”) is a member and putative class representative of the following Kansas Class: all persons residing in Kansas who purchased Beneful for personal, family or household use at any time during the period that begins five years prior to February 5, 2015 to the date of class certification.
- f) **Massachusetts**: Plaintiff Cynthia Xenakis (“Massachusetts Plaintiff”) is a member and putative class representative of the following Massachusetts Class: all persons residing in Massachusetts who purchased Beneful for personal, family or household use at any time during the period that begins four years prior to February 5, 2015 to the date of class certification.
- g) **Minnesota**: Plaintiff Diane Porter (“Minnesota Plaintiff”) is a member and putative class representative of the following Minnesota Class: all persons residing in Minnesota who purchased Beneful for personal, family or household use at any time during the period that begins six years prior to February 5, 2015 to the date of class certification.
- h) **Montana**: Plaintiff Lance Carlson (“Montana Plaintiff”) is a member and putative class representative of the following Montana Class: all persons residing in Montana who purchased Beneful for personal, family

1 or household use at any time during the period that begins four years
2 prior to February 5, 2015 to the date of class certification.

3 i) **New Jersey:** Plaintiff Grace Armstrong (“New Jersey Plaintiff”) is a
4 member and putative class representative of the following New Jersey
5 Class: all persons residing in New Jersey who purchased Beneful for
6 personal, family or household use at any time during the period that
7 begins six years prior to February 5, 2015 to the date of class
8 certification.

9 j) **New York:** Plaintiffs Thomas and Sharon Normand (“New York
10 Plaintiffs”) are members and putative class representatives of the
11 following New York Class: all persons residing in New York who
12 purchased Beneful for personal, family or household use at any time
13 during the period that begins six years prior to February 5, 2015 to the
14 date of class certification.

15 k) **Ohio:** Plaintiff Christina Winters (“Ohio Plaintiff”) is a member and
16 putative class representative of the following Ohio Class: all persons
17 residing in Ohio who purchased Beneful for personal, family or
18 household use at any time during the period that begins six years prior to
19 February 5, 2015 to the date of class certification.

20 l) **Pennsylvania:** Plaintiff Robert Bryden is a member and putative class
21 representative of the following Pennsylvania Class: all persons residing
22 in Pennsylvania who purchased Beneful for personal, family or
23 household use at any time during the period that begins six years prior to
24 February 5, 2015 to the date of class certification.

25 m) **Texas:** Plaintiffs America Pena and Elizabeth Rodarte (“Texas
26 Plaintiffs”) are members and putative class representatives of the
27 following Texas Class: all persons residing in Texas who purchased

1 Beneful for personal, family or household use at any time during the
 2 period that begins four years prior to February 5, 2015 to the date of
 3 class certification.

4 n) **Washington:** Plaintiff Kacy Kimball (“Washington Plaintiff”) is a
 5 member and putative class representative of the following Washington
 6 Class: all persons residing in Washington who purchased Beneful for
 7 personal, family or household use at any time during the period that
 8 begins four years prior to February 5, 2015 to the date of class
 9 certification.

10 43. The above proposed Classes exclude: (1) Purina, any entity in which Purina has
 11 a controlling interest, and their legal representatives, officers, directors, employees, assigns,
 12 and successors; (2) all Judges and Justices to whom this case is ever assigned and all member
 13 of their staffs and immediate families; and (3) Class Counsel.

14 44. Plaintiffs are informed and believe that Purina sold many hundreds of thousands
 15 of packages of Beneful which contain substances that are harmful or toxic to dogs. While the
 16 precise number and identities of the members of the Classes are unknown to Plaintiffs, this
 17 information can be ascertained through reasonable discovery, diligence and appropriate notice.
 18 Give Purina’s sales volumes, Plaintiffs are informed and believe that there will be tens of
 19 thousands of Class members in each State Class and hundreds of thousands of Class members
 20 in several of the State Classes.

21 45. There are numerous common questions of law and fact that predominate over
 22 any questions affecting only individual members of the Classes. Among these common
 23 questions of law and fact are the following:

- 24 a) Whether the Beneful products contain ingredients that are harmful or
 25 toxic to dogs;
- 26 b) Whether Purina made representations, including on the packaging and
 27 labels, regarding the safety and quality of Beneful;

- c) Whether the representations Purina made regarding the safety and quality of Beneful were true;
- d) Whether Purina knew or should have known that Beneful contained substances that are harmful or toxic to dogs;
- e) Whether Purina failed to disclose that Beneful contained substances that are harmful or toxic to dogs;
- f) Whether Plaintiffs' and Class members' dogs became ill or died as a result of having consumed Beneful;
- g) Whether, by its misconduct as set forth here, Purina has engaged in unlawful, unfair, deceptive, or fraudulent business practices;
- h) Whether Purina breached an express warranty;
- i) Whether Purina breached an implied warranty of merchantability;
- j) Whether Purina violated its statutory consumer protection obligations;
- k) Whether Plaintiffs and members of the Classes have suffered damages as a result of the conduct alleged here, and if so, the measure of such damage;
- l) Whether Purina has been unjustly enriched as a result of the conduct complained of here; and
- m) Whether Plaintiffs and Class members are entitled to equitable relief, including but not limited to restitution or disgorgement of all Purina's gross revenues from the sale of Beneful.

46. The claims of the Plaintiffs are typical of the claims of the members of the Classes. They all arise out of the same pattern of conduct by Purina and under the same legal theories, and Purina has no defenses unique to Plaintiffs or to any individual Plaintiff.

47. Plaintiffs have no interests antagonistic to those of the Classes and will protect the interests of the Classes fairly and adequately. Plaintiffs have retained attorneys experienced in complex class action litigation.

1 48. The questions of fact and law common to all Class members predominate over
2 any questions affecting only individual Class members. Purina is alleged to have engaged in
3 the same misconduct with respect to all Class members, including, among other things, falsely,
4 deceptively and misleadingly labeling and advertising Beneful and failing to disclose the
5 presence of hazardous and toxic ingredients in Beneful; all Class members suffered the same
6 injury caused by Purina's misconduct, i.e., paying money to purchase a falsely advertised
7 product as a result of purchasing Beneful and feeding it to their dogs; all Class members would
8 not have purchased Beneful had they known it contained the contaminants and toxins described
9 herein..

10 49. A class action is superior to any other available means for the fair and efficient
11 adjudication of this controversy, and no unusual difficulties are likely to be encountered in the
12 management of this class action. The damages or other financial detriment suffered by
13 Plaintiffs and the other Class members are relatively small compared to the burden and expense
14 that would be required to individually litigate their claims against Purina, so it would be
15 impracticable for Class members to individually seek redress for Purina's wrongful conduct.
16 Even if the Class members could afford individual litigation, the court system could not.
17 Individualized litigation creates a potential for inconsistent or contradictory judgments, and
18 increases the delay and expense to all parties and the court system. By contrast, the class action
19 device presents far fewer management difficulties, and provides the benefits of single
20 adjudication, economies of scale, and comprehensive supervision by a single court.

21 50. Purina has acted or refused to act on grounds generally applicable to Plaintiffs
22 and the other members of the Classes, thereby making appropriate final injunctive relief and
23 declaratory relief with respect to the members of the Classes as a whole. The misconduct
24 alleged herein on the part of Purina is continuing as of the present time: Purina has not stopped
25 the false, deceptive and misleading labeling and advertising of Beneful, but continues to insist
26 that Beneful is healthy and safe for dogs; Purina has not removed the hazardous and toxic
27 ingredients from Beneful; and dogs are continuing to get sick and die from eating Beneful.

1 Injunctive relief is necessary in order to force Purina to cease engaging in these unlawful
2 practices and take corrective action.

3 51. Plaintiffs do not anticipate any difficulty in the management of this litigation.

4 **VI. TOLLING AND ESTOPPEL**

5 52. Plaintiffs' causes of action did not arise until Plaintiffs discovered, or by the
6 exercise of reasonable diligence should have discovered, that they were injured by Purina's
7 wrongful conduct as alleged here. Because Purina concealed and failed to disclose to Plaintiffs
8 and members of the Classes the dangers of feeding Beneful to their dogs, and because Purina
9 affirmatively warranted and misrepresented that Beneful constituted safe, healthy food for
10 dogs, Plaintiffs did not and could not have discovered the defect through reasonable diligence
11 until shortly before the filing of the Complaint in this case. The applicable statutes of
12 limitations have been tolled by Purina's knowing and active concealment of the material facts
13 concerning the dangers of feeding Beneful to their dogs and by Purina's affirmative warranties
14 and representations that Beneful constituted safe, healthy food for dogs. Purina kept Plaintiffs
15 and the members of the Classes ignorant of vital information essential to pursue their claims,
16 without any fault or lack of diligence on the part of Plaintiffs and Class members.

17 53. Purina was and is under a continuous duty to disclose to Plaintiffs and the
18 members of the Classes the true character, quality and nature of Beneful. At all relevant times,
19 and continuing to this day, Purina knowingly, affirmatively and actively misrepresented and
20 concealed the true character, quality and nature of Beneful, including that it was dangerous for
21 dogs, rather than a safe, healthy food for dogs, as promised. Therefore, Purina is estopped from
22 relying on any statutes of limitation in defense of this action

23 54. Pursuant to the doctrines of Equitable Tolling, Equitable Estoppel, and
24 Fraudulent Concealment, the claims asserted herein are not barred due to any statute of
25 limitations or statute of repose. With respect to each and every claim for relief asserted here,
26 Plaintiffs expressly plead Equitable Tolling, Equitable Estoppel, and Fraudulent Concealment
27 and its application to that claim for relief.

55. Purina knew or should have known that Beneful was not a safe, healthy food for dogs, despite advertisements, marketing and representations promising that Beneful constitutes “healthy,” “great nutrition” for dogs, which promotes “healthy growth.”

56. Purina knew or should have known that Beneful contains substances known to be dangerous to dogs, including Industrial Grade Glycols, Mycotoxins, Lead and/or Arsenic.

57. All conditions precedent to the filing of this First Amended Complaint have been satisfied.

VII. CAUSES OF ACTION

A. CALIFORNIA CAUSES OF ACTION

COUNT 1

**Asserted as to the California Plaintiffs and the California Class
(Violation of the Consumers Legal Remedies Act (Cal. Civ. Code § 1750, *et seq.*))**

58. The California Plaintiffs incorporate herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

59. The California Plaintiffs bring this claim on behalf of themselves and the California Class.

60. Purina’s sale of dangerous and defective pet food constitutes an unlawful, deceptive and unfair business act within the meaning of the Consumers Legal Remedies Act, California Civil Code section 1750, *et seq.*

61. Purina is a “person” as defined under California Civil Code section 1761(c).

62. Purina violated Civil Code sections 1770(a)(5) and (a)(7) when it failed to disclose that Beneful contains Industrial Grade Glycols, Mycotoxins, Arsenic or Lead.

Purina's sale of hazardous pet food has the capacity to deceive a substantial portion of the public and to affect the public interest.

63. As a result of the practices described here, Purina has committed the following violations of section 1770:

- a) Purina has represented that Beneful has characteristics or benefits that it does not have, including that it is “healthy” and offers “great nutrition” and omitted to disclose that it contains Industrial Grade Glycols, Mycotoxins, Arsenic or Lead (section 1770(a)(5)); and
- b) Purina has falsely represented that Beneful is of a particular standard, quality, or grade (section 1770(a)(7)).

64. Purina undertook its deceptive practices with the design and purpose of inducing the California Plaintiffs and members of the California Class to purchase Beneful, which they did. Purina engaged in marketing efforts to reach the California Plaintiffs and members of the California Class and persuade members to purchase Beneful, which was defective, leading to the injuries to their pets and other damages.

65. As a result of Purina's unfair and deceptive acts and practices, the California Plaintiffs and members of the California Class have suffered damages including the difference in value between the Beneful as warranted (the full purchase price) and the Beneful as actually delivered (\$0.00, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Arsenic, or Lead).

66. The California Plaintiffs and members of the California Class have provided Purina with the notice required by the Consumers Legal Remedies Act by giving notice of Purina's violation of the Act by certified mail. As such, the California Plaintiffs have complied with California Civil Code section 1782(a).

COUNT 2

**Asserted as to the California Plaintiffs and the California Class
(Violation of the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200, *et seq.*))**

67. The California Plaintiffs incorporate herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

68. The California Plaintiffs bring this claim on behalf of themselves and the California Class.

1 69. Purina's practices as alleged in this First Amended Complaint constitute
2 unlawful, unfair and fraudulent business acts and practices under the UCL, Bus. & Prof. Code
3 §§ 17200, *et seq.*

4 70. The UCL prohibits acts of "unfair competition," including any unlawful, unfair,
5 or fraudulent business act or practice.

6 71. A violation of another law is treated as "unlawful competition" that is
7 independently actionable. A business practice is "unfair" if: a) the utility of Purina's conduct is
8 substantially outweighed by the gravity of the harm to the alleged victim; b) Purina's practice
9 violates public policy as declared by specific constitutional, statutory, or regulatory provisions
10 or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers; or
11 c) Purina's practice would deceive a reasonable consumer.

12 72. Purina committed unlawful practices because it violated the CLRA.

13 73. Purina committed unfair practices because it manufactured and distributed
14 Beneful, which is harmful to dogs, despite knowledge of the defect, and in a manner that would
15 deceive a reasonable consumer.

16 74. Purina engaged in unfair, deceptive, untrue or misleading advertising by
17 representing that Beneful was "healthy," constituted "great nutrition," and that it promoted
18 "healthy growth" and that Purina guaranteed satisfaction, despite the fact that Beneful was not
19 safe for consumption by dogs and Purina did not guarantee satisfaction, and by omitting to
20 disclose that Beneful contained Industrial Grade Glycols, Mycotoxins, Arsenic or Lead.

21 75. Purina committed unfair, unlawful or fraudulent practices by: (a) representing
22 that Beneful was safe for dogs to consume when it was not; and (b) continuing to represent the
23 health benefits of Beneful despite being aware of numerous complaints from users of Beneful
24 that their dogs had become ill or died after consuming it; and (c) omitting to disclose that
25 Beneful contained Industrial Grade Glycols, Mycotoxins, Arsenic or Lead.

76. The California Plaintiffs and members of the California Class relied on such statements and omissions. Had they known that Beneful contained Industrial Grade Glycols, Mycotoxins, Arsenic or Lead, they never would have purchased it.

77. Accordingly, Plaintiffs seek an injunction requiring Purina to cease selling Beneful and to recall any of the product currently in distribution, restitution, and all other relief this Court deems appropriate.

COUNT 3

**Asserted as to the California Plaintiffs and the California Class
(Violation of the False Advertising Law (Cal. Bus. & Prof. Code §17500 *et seq.*))**

78. The California Plaintiffs reallege all prior allegations as though fully set forth herein.

79. The California Plaintiffs bring this claim on behalf of themselves and the California Class.

80. Purina disseminated advertising within California and throughout the United States. Purina disseminated or caused to be disseminated the materially untrue and misleading advertising described in this First Amended Complaint with the intent to directly or indirectly induce the California Plaintiffs and the members of the California Class to purchase Beneful.

81. The advertising misrepresenting Beneful's health benefits, and omitting to state that Beneful contained Industrial Grade Glycols, Mycotoxins, Arsenic, or Lead, were untrue, misleading, and deceptive, as set forth in this First Amended Complaint.

82. When Purina disseminated the advertising described here, it knew, or by the exercise of reasonable care should have known, that the statements concerning Beneful were untrue or misleading, or omitted to state the truth about Beneful, in violation of the False Advertising Law, Cal. Bus. & Prof. Code §17500, *et seq.*

83. The California Plaintiffs, on their own behalf and on behalf of the California Class, seek restitution, disgorgement, injunctive relief, and all other relief allowable under §17500, *et seq.*

B. COLORADO CAUSES OF ACTION**COUNT 4****Asserted as to the Colorado Plaintiffs and the Colorado Class
(Breach of Express Warranty)**

84. The Colorado Plaintiffs incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

85. The Colorado Plaintiffs bring this action on behalf of themselves and the Colorado Class.

86. Purina constitutes a “merchant” and a “seller” in connection with its sales of Beneful, as those terms are defined in the Colorado Uniform Commercial Code. Further, the Colorado Plaintiffs and the Colorado Class members constitute “buyers” in connection with their purchases of Beneful from Purina, as that term is defined in the Colorado Uniform Commercial Code. Further, Beneful constitutes “goods,” as that term is defined in the Colorado Uniform Commercial Code.

87. By affirmations of fact, promises and descriptions made on Beneful’s packaging and which relate to such goods, Purina provided the Colorado Plaintiffs and the members of the Colorado Class with written express warranties before or at the time of purchase, including the following:

a) “Satisfaction Guaranteed. If you’re not happy, we’re not happy. Complete satisfaction or your money back....”

b) “At Purina, we’re unconditionally devoted to pets. We’ve dedicated over 80 years to developing the high-quality products that satisfy the needs of dogs and cats.”

c) “100% Complete and Balanced Nutrition”

d) “Made with wholesome rice, real chicken, soy, and accented with veggies and apples, it has the complete nutrition adult dogs need....”

e) “Healthy.”

1 88. These affirmations of facts and promises made by Purina to the Colorado
2 Plaintiffs and the members of the Colorado Class related to Beneful and became part of the
3 bases of the bargains between them and Purina and thereby created express warranties that
4 Beneful would conform to those affirmations and promises. Furthermore, the aforementioned
5 descriptions of Beneful were part of the bases of the bargains for the purchases of Beneful
6 between Purina and the Colorado Plaintiffs and the members of the Colorado Class and they
7 created an express warranty that the goods would conform to those descriptions. As previously
8 noted, because Beneful contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic, it
9 did not conform to the affirmations, promises and descriptions previously mentioned, resulting
10 in breaches of express warranties.

11 89. Beneful was marketed directly to consumers by Purina, came in sealed
12 packages, and did not change from the time it left Purina's possession until it was purchased by
13 consumers in stores.

14 90. The Colorado Plaintiffs have complied with all conditions precedent to filing
15 this breach of warranty claim, including providing timely notice of these breaches of warranty
16 to Purina on behalf of themselves and the Colorado Class within a reasonable time after
17 discovering that Beneful might have proximately caused the damages described herein. Such
18 notice was reasonable based on the circumstances of this case, including the fact Purina has
19 engaged in a campaign to prevent other affected consumers from publicly discussing similar
20 claims while at the same time expressly denying any relationship between the failure to
21 disclose that Beneful contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic, and
22 the injuries here at issue. Alternatively, this pleading constitutes adequate notice on behalf of
23 the Colorado Plaintiffs and the members of the Colorado Class. Alternatively, notice need not
24 have been given to Purina because it had actual notice of its breaches of warranty as to the
25 Colorado Plaintiffs and the members of the Colorado Class.

26 91. As a proximate result of Purina's breach of express warranties, the Colorado
27 Plaintiffs and the members of the Colorado Class have suffered actual damages as follows: the

1 difference in value between the value of the Beneful as expressly warranted (the full purchase
 2 prices) and the value of the Beneful as actually accepted and delivered (\$0, because consumers
 3 would not have paid anything for it had they known it contained Industrial Grade Glycols,
 4 Mycotoxins, Lead, or Arsenic); i.e., the full purchase price of the Beneful. The Colorado
 5 Plaintiffs and members of the Colorado Class cannot return Beneful to Purina for repair as the
 6 subject defect is irreparable.

7 **COUNT 5**

8 **Asserted as to the Colorado Plaintiffs and the Colorado Class** 9 **(Breach of the Implied Warranty of Merchantability, Colo. Rev. Stat. § 4-2-314)**

10 92. The Colorado Plaintiffs incorporate by reference each preceding and succeeding
 11 paragraph as though fully set forth at length herein.

12 93. Purina constituted both a “merchant” and a “seller” in connection with its sale of
 13 Beneful to the Colorado Plaintiffs and the Colorado Class, as those terms are defined in the
 14 Colorado Uniform Commercial Code. Further, the Colorado Plaintiffs and the members of the
 15 Colorado Class constituted “buyers” as that term is defined in the Colorado Uniform
 16 Commercial Code. Beneful, itself, constituted “goods,” as that term is defined in the Colorado
 17 Uniform Commercial Code.

18 94. As part of the sales to the Colorado Plaintiffs and members of the Colorado
 19 Class, Purina impliedly warranted that Beneful was merchantable. Among other things, to be
 20 merchantable, Beneful had to pass without objection in the trade under the contract
 21 description, be fit for the ordinary purposes for which Beneful is used, be adequately contained,
 22 packaged and labeled, and conform to the promises or affirmations of fact made on the
 23 containers or labels.

24 95. Beneful breached the implied warranty of merchantability initially because it
 25 would not pass without objection in the trade under the contract description. Specifically,
 26 Beneful will not pass without objection in the trade under the description of dog food, because
 27 it contained Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. In addition, Purina
 breached the implied warranty as to Beneful, because Beneful was not fit for the ordinary

1 purpose for which it is used, which is safely feeding dogs. Further, Purina breached the
2 implied warranty of merchantability because Beneful was not adequately contained, packaged
3 or labeled because it failed to warn of the dangers of its consumption by dogs.

4 96. At the time of sale to the Colorado Plaintiffs and the members of the Colorado
5 Class throughout the Class Period, Purina made promises and affirmations of fact on the
6 packaging of Beneful to the effect that Beneful was safe for consumption by pets. Said
7 representations included, but were not limited to, Beneful being “healthy,” offering “great
8 nutrition” to dogs, promoting “healthy growth” and that customers’ satisfaction would be
9 guaranteed.

10 97. However, Purina breached the implied warranty of merchantability because
11 Beneful did not conform to those promises and affirmations of fact in that Beneful was in fact
12 not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth” and
13 customers’ satisfaction was not guaranteed. For the reasons set forth above, Beneful was
14 defective, such defect was present when Beneful left Purina’s control, and such defect caused
15 the Colorado Plaintiffs and the members of the Colorado Class members' injuries.

16 98. Within a reasonable time after the discovery of Purina’s breach of the implied
17 warranty and the possible link of Beneful to the illness and death of their pet, the Colorado
18 Plaintiffs gave notice of such breaches on behalf of themselves and members of the Colorado
19 Class. Alternatively, this pleading constitutes adequate notice on behalf of the Colorado
20 Plaintiff and the members of the Colorado Class. Alternatively, no notice was required because
21 Purina was already aware of its breaches as to the Colorado Plaintiffs and the members of the
22 Colorado Class.

23 99. As a proximate result of this breach of implied warranty by Purina, the Colorado
24 Plaintiffs and the Colorado Class have been damaged in the following manner: the difference in
25 value between the value of the Beneful as warranted (the full purchase price) and the value of
26 the Beneful as actually delivered (\$0, because consumers would not have paid anything for it
27 had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

COUNT 6**Asserted as to the Colorado Plaintiffs and the Colorado Class
(Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et. seq.* (“MMWA”))**

100. The Colorado Plaintiffs incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

101. The Colorado Plaintiffs bring this claim on behalf of themselves and the Colorado Class.

102. At all times relevant hereto, there was in full force and effect the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (the “MMWA”).

103. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

104. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

105. The Colorado Plaintiffs and the members of the Colorado Class are “consumers” as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons entitled under applicable state law to enforce against the warrantor the obligations of its implied warranty.

106. Pursuant to 15 U.S.C. § 2310(e), the Colorado Plaintiffs and the members of the Colorado Class are entitled to bring this action and are not required to give Purina notice and an opportunity to cure until such time as the Court determines the representative capacity of the Colorado Plaintiffs pursuant to Rule 23 of the Federal Rules of Civil Procedure. However, the Colorado Plaintiffs already gave any required notice on behalf of themselves and the members of the Colorado Class by letter dated April 28, 2015.

107. In connection with its sale of Beneful, Purina gave an implied warranty as defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its ordinary purpose as safe dog food, (b) would pass without objection in the trade under its contract description as dog food, (c) was adequately contained, packaged and labeled, and (d) conformed to the promises and affirmations of fact set forth on its container and label.

1 108. Purina is liable to the Colorado Plaintiffs and the members of the Colorado
2 Class pursuant to 15 U.S.C. § 2310(d)(1), because it breached the implied warranty of
3 merchantability.

4 109. Purina initially breached the implied warranty of merchantability as to the
5 Colorado Plaintiffs and the members of the Colorado Class because Beneful was not fit for the
6 ordinary purposes for which it is used—a safe, healthy dog food. Specifically, Beneful was
7 unsafe and toxic to dogs and defective because it contained Industrial Grade Glycols,
8 Mycotoxins, Lead, or Arsenic. These substances in Beneful made it unfit for its ordinary
9 purpose of providing safe, healthy dog food. In fact, Beneful has caused injury and death to
10 thousands of dogs.

11 110. Purina further breached its implied warranty of merchantability to the Colorado
12 Plaintiffs and the members of the Colorado Class because Beneful would not pass without
13 objection in the trade under its contract description as dog food, as it contained Industrial Grade
14 Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic.

15 111. Purina further breached its implied warranty of merchantability to the Colorado
16 Plaintiffs and the members of the Colorado Class because Beneful was not adequately
17 contained, packaged, and labeled. The directions and labeling that accompanied the Beneful
18 dog food did not warn the Colorado Plaintiffs and the members of the Colorado Class of the
19 dangers of feeding Beneful to their dogs.

20 112. Purina further breached its implied warranty of merchantability to the Colorado
21 Plaintiffs and the members of the Colorado Class because Beneful did not conform to the
22 promises and affirmations of fact set forth on its container and label, as described above.
23 Specifically, Beneful did not constitute safe, healthy food, was not “healthy,” did not offer
24 “great nutrition” to dogs, did not promote “healthy growth,” and customers’ satisfaction was
25 not guaranteed.

26 113. Pursuant to 15 U.S.C. § 2310(d)(1), the Colorado Plaintiffs and the members of
27 the Colorado Class are entitled to recover the following damages proximately caused to them

1 by Purina's breach of the implied warranty of merchantability: the difference in value between
2 the Beneful as warranted (the full purchase price) and the Beneful as actually delivered (\$0.00,
3 because consumers would not have paid anything for it had they known it contained Industrial
4 Grade Glycols, Mycotoxins, Lead, or Arsenic).

5 114. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the Colorado Plaintiffs and the
6 members of the Colorado Class are entitled to recover a sum equal to the aggregate amount of
7 costs and expenses (including attorneys' fees based on actual time expended) determined by the
8 Court to have been reasonably incurred by the Colorado Plaintiffs and the members of the
9 Colorado Class in connection with the commencement and prosecution of this action.

10 **COUNT 7**

11 **Asserted as to the Colorado Plaintiffs and the Colorado Class**
(Assumpsit/Money Had and Received/Unjust Enrichment/Restitution)

12 115. The Colorado Plaintiffs incorporate by reference each preceding and succeeding
13 paragraph as though fully set forth at length herein.

14 116. The Colorado Plaintiffs bring this claim on behalf of themselves and the
15 Colorado Class.

16 117. This claim in quasi-contract is based upon principles of restitution. A person
17 who has been unjustly enriched at the expense of another is required to make restitution to the
18 other.

19 118. The Colorado Plaintiffs and the members of the Colorado Class conferred a
20 benefit on Purina by purchasing Beneful in the form of the gross revenues Purina derived from
21 such sales, which they would not have conferred had the true facts detailed above been
22 disclosed by Purina.

23 119. At the expense of the Colorado Plaintiffs and members of the Colorado Class,
24 Purina received and accepted benefits in the form of the gross revenues Purina derived from
25 sales of Beneful to the Colorado Plaintiffs and the members of the Colorado Class.

26 120. For the reasons detailed above, Purina has profited and accepted such benefits
27 under circumstances where it engaged in improper, deceitful or misleading conduct that would

1 make it inequitable and unjust for Purina to retain such benefit without repaying the value it
2 received from the sales of such products.

3 121. The Colorado Plaintiffs and the members of the Colorado Class are entitled to
4 restitution of the entire amount Purina received from Purina's sales of Beneful to them.

5 **COUNT 8**

6 **Asserted as to the Colorado Plaintiffs and the Colorado Class**
7 **(Violation of the Colorado Consumer Protection Act, Colo.Rev.Stat. § 6-1-105, et seq.)**

8 122. The Colorado Plaintiffs incorporate by reference each preceding and succeeding
9 paragraph as though fully set forth at length herein.

10 123. The Colorado Plaintiffs bring this claim on behalf of themselves and the
11 Colorado Class.

12 124. The Colorado Plaintiffs and the members of the Colorado Class were actual
13 purchasers and users of Beneful manufactured, marketed, distributed and sold by Purina.

14 125. As set forth in detail above, Purina disseminated unhealthy and dangerous
15 Beneful despite making numerous uniform material representations about its allegedly
16 guaranteed and healthy nature, and it omitted material facts to the contrary, including that
17 Beneful contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic. In so doing, Purina
18 engaged in and/or caused others to engage in a deceptive trade practice. In violation of the
19 following provisions of Colo.Rev.Stat. § 6-1-105, Purina:

20 “(b) Knowingly makes a false representation as to the source, sponsorship,
21 approval or certification of goods

22 “(e) Knowingly makes a false representation as to the characteristics,
23 ingredients, uses [or] benefits ... of goods ... or a false representation as to the
24 sponsorship, approval, status, affiliation, or connection of a person therewith;

25 “(g) Represents that goods ... are of a particular standard, quality, or grade,
26 or that goods are of a particular style or model, if he knows or should know that
27 they are of another;

“(i) Advertises goods ... with intent not to sell them as advertised;

“(r) Advertises or otherwise represents that goods or services are guaranteed without clearly and conspicuously disclosing the nature and extent of the guarantee, any material conditions or limitations in the guarantee which are imposed by the guarantor, the manner in which the guarantor will perform, and the identity of such guarantor....

“(u) Fails to disclose material information concerning goods ... which information was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction”.

126. These deceptive trade practices occurred in the course of Purina’s business.

127. These deceptive trade practices significantly impacted the public as there are thousands of actual or potentially affected purchasers and users of Beneful in Colorado, and Beneful was disseminated in part from Colorado throughout the United States.

128. As a result of these deceptive trade practices, the Colorado Plaintiffs and members of the Colorado Class were injured and suffered actual damages or losses, which include the difference in value between the value of the Beneful as expressly warranted (the full purchase prices) and the value of the Beneful as actually accepted and delivered (\$0, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic).

C. FLORIDA CAUSES OF ACTION

COUNT 9

Asserted as to the Florida Plaintiff and the Florida Class **Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et. seq.**

129. The Florida Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

130. The Florida Plaintiff brings this claim on behalf of himself and the Florida Class.

1 131. At all times relevant hereto, there was in full force and effect the Magnuson-
2 Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (the “MMWA”).

3 132. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

4 133. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

5 134. The Florida Plaintiff and the members of the Florida Class are “consumers” as
6 defined in 15 U.S.C. § 2301(3). They are consumers because they are persons entitled under
7 applicable state law to enforce against the warrantor the obligations of its implied warranty.

8 135. Pursuant to 15 U.S.C. § 2310(e), the Florida Plaintiff and the members of the
9 Florida Class are entitled to bring this class action and are not required to give Purina notice
10 and an opportunity to cure until such time as the Court determines the representative capacity
11 of the Florida Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure. However,
12 Florida Plaintiff Wayne Colello already gave the required notice on behalf of himself and the
13 Florida Class by letter dated June 3, 2015.

14 136. In connection with its sale of Beneful, Purina gave an implied warranty as
15 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
16 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
17 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
18 contract description as dog food, (c) was adequately contained, packaged and labeled as the
19 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
20 container and label. Fla. Stat. § 672.314.

21 137. Purina is liable to the Florida Plaintiff and members of the Florida Class
22 pursuant to 15 U.S.C. § 2310(d)(1), because it breached the implied warranty of
23 merchantability.

24 138. Purina initially breached the implied warranty of merchantability as to the
25 Florida Plaintiff and members of the Florida Class because Beneful was not fit for the ordinary
26 purposes for which it is used—a safe, healthy dog food. Specifically, Beneful contained
27 Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or

1 Arsenic, making Beneful unfit for its ordinary purpose of providing safe, healthy dog food. In
2 fact, Beneful has caused injury and death to thousands of dogs.

3 139. Purina further breached its implied warranty of merchantability to the Florida
4 Plaintiff and the members of the Florida Class because Beneful would not pass without
5 objection in the trade under its contract description as dog food, as it contained Industrial Grade
6 Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic.

7 140. Purina further breached its implied warranty of merchantability to the Florida
8 Plaintiff and members of the Florida Class because Beneful was not adequately contained,
9 packaged, and labeled. The directions and labeling that accompanied the Beneful dog food did
10 not warn the Florida Plaintiff and members of the Florida Class that Beneful contained
11 Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or
12 Arsenic.

13 141. Purina finally breached its implied warranty of merchantability to the Florida
14 Plaintiff and the members of the Florida Class because Beneful did not conform to the
15 promises and affirmations of fact set forth on its container and label, as described above.
16 Specifically, Beneful did not constitute safe, healthy food, was not “healthy,” did not offer
17 “great nutrition” to dogs, did not promote “healthy growth,” and customers’ satisfaction was
18 not guaranteed.

19 142. Pursuant to 15 U.S.C. § 2310(d)(1), the Florida Plaintiff and the members of the
20 Florida Class are entitled to recover the following damages proximately caused to them by
21 Purina’s breach of the implied warranty of merchantability: the difference in value between the
22 Beneful as warranted (the full purchase price) and the Beneful as actually delivered (\$0.00,
23 because consumers would not have paid anything for it had they known it contained Industrial
24 Grade Glycols, Mycotoxins, Lead, or Arsenic).

25 143. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the Florida Plaintiff and the
26 members of the Florida Class are entitled to recover a sum equal to the aggregate amount of
27 costs and expenses (including attorneys’ fees based on actual time expended) determined by the

1 Court to have been reasonably incurred by the Florida Plaintiff and the members of the Florida
 2 Class in connection with the commencement and prosecution of this action.

COUNT 10
Asserted as to the Florida Plaintiff and the Florida Class
Breach of Express Warranty - Fla. Stat. § 672.313

3
 4 144. The Florida Plaintiff incorporates herein the allegations of all of the preceding
 5 and subsequent paragraphs as if fully set forth here verbatim.

6
 7 145. The Florida Plaintiff brings this claim on behalf of himself and the Florida
 8 Class.

9 146. Purina constituted both a “merchant” and a “seller,” as those terms are defined
 10 in Fla. Stat. §§ 672.103 and 672.104, in connection with its sale of Beneful to the Florida
 11 Plaintiff and the members of the Florida Class. Further, the Florida Plaintiff and the members
 12 of the Florida Class constituted “buyers,” as that term is defined in Fla. Stat. § 672.103.
 13 Beneful, itself, constituted “goods,” as that term is defined in Fla. Stat. § 672.105.

14 147. The representations on Purina’s packaging for Beneful created express
 15 warranties, including that Beneful was safe for consumption by pets, under both common law
 16 and Fla. Stat. § 672.313. Said representations include, but are not limited to, Beneful dog food
 17 being “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that
 18 customers’ satisfaction would be guaranteed.

19 148. The representations regarding Beneful described in detail above constituted
 20 affirmations of fact and promises relating to Beneful that became part of the basis for the
 21 bargain for the purchase of Beneful and created an express warranty that Beneful would
 22 conform to those affirmations of fact and promises.

23 149. Likewise, the representations as described in detail above constituted
 24 descriptions of Beneful that became part of the basis of the bargain for the purchase of Beneful
 25 and created an express warranty that Beneful would conform to those descriptions.

26 150. Beneful contained Industrial Grade Glycols, which have not been approved for
 27 use in food, Mycotoxins, Lead, or Arsenic, constituting a breach of these express warranties.

151. The Florida Plaintiff and the members of the Florida Class were injured as a proximate result of Purina's aforementioned breaches in the amount of the difference in value between the value of the Beneful as warranted (its full purchase prices) and the Beneful as actually delivered (\$0, because consumers would not have paid anything for it had they know it contained Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic).

152. Within a reasonable time after their discovery of Purina's breaches, the Florida Plaintiff gave notice of the breaches of the express warranties on behalf of himself and the members of the Florida Class. Alternatively, this pleading constitutes a sufficient notice of Purina's breaches of the express warranties. Alternatively, it was not necessary for the Florida Plaintiff or members of the Florida Class to give Purina notice of its breaches of the express warranties because Purina had actual notice of the fact that Beneful contained excessive amounts of substances which made it toxic and deadly to dogs.

COUNT 11

**Asserted as to the Florida Plaintiff and the Florida Class
Breach of the Implied Warranty of Merchantability—Fla. Stat. § 672.314**

153. The Florida Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

154. The Florida Plaintiff brings this claim on behalf of himself and the Florida Class.

155. Purina is a "seller" and "merchant" as to Beneful within the meaning of Fla. Stat. § 672.104. Purina designed, manufactured and sold Beneful, which constitutes "goods" within the meaning of Fla. Stat. § 672.105. The Florida Plaintiff and members of the Florida Class constituted "buyers" within the meaning of Fla. Stat. § 672.103. Consequently, pursuant to Florida law Purina impliedly warranted that Beneful was merchantable, including that it: (a) was fit for its ordinary purposes as safe, healthy dog food, (b) could pass without objection in the trade under its contract description as dog food, (c) was adequately contained, packaged,

1 and labeled as the agreements required, and (d) conformed to the promises and affirmations of
2 fact set forth on its container and labels.

3 156. Beneful was sold in sealed packaging, and the defects existed when it left
4 Purina's control.

5 157. When Purina designed, manufactured and sold Beneful, it knew the purpose for
6 which Beneful was intended; *i.e.*, that it would be consumed by dogs.

7 158. Purina initially breached the implied warranty of merchantability as to the
8 Florida Plaintiff and the members of the Florida Class because Beneful was not fit for the
9 ordinary purposes for which it is used—a safe, healthy dog food. Specifically, Beneful
10 contained Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins,
11 Lead, or Arsenic, making it unfit for its ordinary purpose of providing safe, healthy dog food.
12 In fact, Beneful has caused injury and death to thousands of dogs.

13 159. Purina further breached its implied warranty of merchantability to the Florida
14 Plaintiff and the members of the Florida Class because Beneful would not pass without
15 objection in the trade under its contract description as dog food, as it contained Industrial Grade
16 Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic.

17 160. Purina further breached its implied warranty of merchantability to the Florida
18 Plaintiff and the members of the Florida Class because Beneful was not adequately contained,
19 packaged, and labeled. The directions and labeling that accompanied Beneful did not warn the
20 Florida Plaintiff and the members of the Florida Class of the dangers of feeding Beneful to their
21 dogs.

22 161. Purina finally breached its implied warranty of merchantability to the Florida
23 Plaintiff and the members of the Florida Class because Beneful did not conform to the promises
24 and affirmations of fact set forth on its container and label, as described above. Specifically,
25 Beneful did not constitute safe, healthy food, was not “healthy,” did not offer “great nutrition”
26 to dogs, did not promote “healthy growth,” and customers’ satisfaction was not guaranteed.
27

162. The Florida Plaintiff and members of the Florida Class were injured as a proximate result of Purina's aforementioned breaches as follows: the amount of the difference in value between the value of the Beneful as warranted (its full purchase prices) and the Beneful as actually delivered (\$0, because consumers would not have paid anything for it had they know it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

163. Within a reasonable time after their discovery of Purina's breaches, the Florida Plaintiff gave notice of the breaches of the implied warranty of merchantability on behalf of themselves and members of the Florida Class. Alternatively, this pleading constitutes a sufficient notice of Purina's breaches of the implied warranty of merchantability. Alternatively, it was not necessary for the Florida Plaintiff or members of the Florida Class to give Purina notice of its breaches of the implied warranty of merchantability because Purina had actual notice of the fact that the Beneful contained excessive amounts of substances which made it toxic and deadly to dogs.

COUNT 12
Asserted as to the Florida Plaintiff and the Florida Class
Violation of Florida’s Deceptive and Unfair Trade Practices Act, Ch. 501, Part II

164. The Florida Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

165. The Florida Plaintiff brings this claim on behalf of himself and the Florida Class.

166. The Florida Plaintiff and the members of the Florida Class are “consumers” as defined in Fla. Stat. § 501.201.

167. The stated purpose of the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”) is to “protect the consuming public . . . from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.” Fla. Stat. Ann. § 501.202(2).

1 168. The Florida Plaintiff and the members of the Florida Class are consumers, and
 2 Beneful is considered a good, within the meaning of the FDUTPA. Purina is engaged in trade
 3 or commerce within the meaning of the FDUTPA.

4 169. Fla. Stat. § 501.204(1) declares unlawful “[u]nfair methods of competition,
 5 unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any
 6 trade or commerce.”

7 170. Purina has violated the FDUTPA by engaging in the unfair and deceptive
 8 practices, including its omission that Beneful contained Industrial Grade Glycol, Mycotoxins,
 9 Arsenic or Lead, which offend public policies and are immoral, unethical, unscrupulous, and
 10 substantially injurious to consumers.

11 171. Fla. Stat. § 501.203(3) provides that a: “[v]iolation of this part” means any
 12 violation of this act or the rules adopted under this act and may be based upon any of the
 13 following as of July 1, 2013:

14 ...(c) Any law, statute, rule, regulation, or ordinance which
 15 proscribes unfair methods of competition, or unfair, deceptive, or
 16 unconscionable acts or practices.

17 172. Florida laws provide protection to purchasers of animal food from unfair,
 18 deceptive and unconscionable practices in Fla. Stat. § 580.071 (Adulteration) and Fla. Stat. §
 19 580.081 (Misbranding).

20 173. Specifically, § 580.071 provides that “[n]o person shall distribute an adulterated
 21 commercial feed or feedstuff.” A commercial feed or feedstuff shall be deemed to be
 22 adulterated under (1)(a) if “it bears or contains any poisonous, deleterious, or nonnutritive
 23 substance that may render it injurious to animal or human health, or (b) If it bears or contains
 24 any food additive or added poisonous, deleterious, or nonnutritive substance that is unsafe
 25 within the meaning of s. 406 of the Federal Food, Drug, and Cosmetic Act, other than a
 26 pesticide chemical in or on a raw agricultural commodity”; or “(5) if its composition or quality
 27 falls below or differs from that which it is purported or is represented to possess by its
 labeling”. Fla. Stat. § 580.071 (2013).

1 174. Purina omitted to disclose that Beneful contained Industrial Grade Glycols,
2 which have not been approved for use in food, Mycotoxins, Lead, or Arsenic. Therefore, the
3 composition or quality of Beneful falls below what is purported or represented by its label.
4 Purina's omissions injured the Florida Plaintiffs and the members of the Florida Class.
5 Moreover, these substances injured the dogs of the Florida Plaintiff and the members of the
6 Florida Class.

7 175. Fla. Stat. § 580.081 (Misbranding) provides that "[n]o person shall distribute
8 misbranded commercial feed or feedstuff."

9 176. Commercial feed or feedstuff shall be deemed to be misbranded under
10 subsection (1) if "its labeling is false or misleading in any particular or under subsection (6) if it
11 is not appropriate for its intended or purported use." Fla. Stat. § 580.081.

12 177. Purina's conduct, as more fully described herein, violated Fla. Stat. § 580.071
13 and § 580.081. Violations of these laws, which are designed to protect consumers like
14 Plaintiffs, constitute per se violations of FDUTPA pursuant to Fla. Stat. § 501.203(3)(c).

15 178. Under Fla. Stat. § 501.211(1), the Florida Plaintiff and members of the Florida
16 Class seek a declaratory judgment and court order enjoining the above described wrongful acts
17 and practices of Purina and for restitution and disgorgement of the gross revenues derived by
18 Purina from its sale of Beneful to them, along with any other equitable relief to which they are
19 entitled, pursuant to Florida law.

20 179. Under Fla. Stat. §§ 501.211(2) and 501.2105, the Florida Plaintiff and the
21 members of the Florida Class make additional claims for damages, attorneys' fees, and costs.

22 180. Purina's violations of FDUTPA were the producing cause of actual economic
23 damages to the Florida Plaintiff and members of the Florida Class equal to the amount they
24 paid for Beneful; the difference in value between the value of Beneful as represented (the full
25 purchase prices) and the value of Beneful as actually accepted and delivered (\$0, because
26 consumers would not have paid anything for it had they known Beneful contained Industrial
27 Grade Glycols, Mycotoxins, Lead, or Arsenic).

COUNT 13**Asserted as to the Florida Plaintiff and the Florida Class
Unjust Enrichment**

181. The Florida Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

182. The Florida Plaintiff brings this claim on behalf of himself and the Florida Class.

183. The Florida Plaintiff and members of the Florida Class purchased Beneful, which was defective, not merchantable, and unreasonably dangerous and therefore had no value to them.

184. The Florida Plaintiff and members of the Florida Class purchased Beneful designed, manufactured and marketed by Purina in various retail stores. Purina has received and retained a benefit from the Florida Plaintiff and the members of the Florida Class – the gross revenues resulting from their purchases. Purina is not entitled to retain these revenues because of the diminished value, inherent defects, adulterated state, misbranded content and general lack of merchantability of Beneful.

185. The Florida Plaintiff and members of the Florida Class lack an adequate remedy at law.

186. Principles of fairness and equity demand that Purina disgorge the above-referenced revenues to the Florida Plaintiff and the members of the Florida Class.

D. ILLINOIS CAUSES OF ACTION**COUNT 14****Asserted Against Purina on Behalf of the Illinois Plaintiffs and the Illinois Class
(Violation of the Illinois Consumer Fraud and Deceptive Business Practices Act)**

187. The Illinois Plaintiffs incorporate herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

188. The Illinois Plaintiffs bring this action on behalf of themselves and the Illinois Class.

189. This cause of action is brought pursuant the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1 *et seq.* ("ICFA").

190. The acts and omissions, specifically including Purina's omission that Beneful contained Industrial Grade Glycol, Mycotoxins, Arsenic or Lead, occurred in the conduct of trade or commerce as that term is used therein.

191. Section 2 of ICFA prohibits unfair or deceptive acts or practices used or employed in the conduct of any trade or commerce, as well as deceptive acts or practices which are committed in the course of trade or commerce and with the intent that others rely upon them. 815 ILCS 505/2.

192. Section 2 of the ICFA provides, in full:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section, consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act."

815 ILCS 505/2.

193. Purina's acts, representations and omissions, as alleged in detail *supra*, are by their very nature unfair, deceptive and unlawful within the meaning of the ICFA.

194. Purina has disseminated or caused to be disseminated advertising, labeling, packaging, marketing, and promotion of Beneful that is deceptive and otherwise violates the ICFA, because at all times material hereto, the advertising, labeling, packaging, marketing and promotion of Beneful included false and/or misleading statements or representations concerning the quality of Beneful and/or failed to disclose and/or concealed or omitted material

1 facts, including without limitation, known defects and risks concerning the quality of Beneful,
2 the healthiness of Beneful, that Beneful contained Industrial Grade Glycol, Mycotoxins,
3 Arsenic or Lead, and the safety of Beneful.

4 195. In making and disseminating the representations and omissions alleged herein,
5 Purina intended to deceive reasonable consumers, including the Illinois Plaintiffs and the
6 Illinois Class.

7 196. Purina made and disseminated the representations and omissions alleged herein
8 in the course of conduct involving trade and commerce.

9 197. The utility of Purina's practices related to the advertising, labeling, packaging,
10 marketing, promotion and selling of Beneful while making affirmative misrepresentations and
11 without properly disclosing its true nature and/or characteristics is negligible, if any, when
12 weighed against the harm to the general public, the Illinois Plaintiffs and the Illinois Class.

13 198. The harmful impact upon members of the general public targeted by such
14 practices and the members of the Illinois Class who purchased and used Beneful outweighs any
15 reasons or justifications by Purina for the unfair and deceptive business practices Purina
16 employed to sell Beneful described herein.

17 199. Purina had an improper motive (profit before accurate marketing) in its practices
18 related to the advertising, labeling, packaging, marketing, promotion and selling of Beneful, as
19 set forth *supra*.

20 200. The use of such unfair and deceptive business acts and practices was and is
21 under the sole control of Purina, and was deceptively hidden from the Illinois Plaintiffs and the
22 members of the Illinois Class, and the general public in Purina's advertising, labeling,
23 packaging, marketing, promotion and selling of Beneful in a deceptive effort to put profit over
24 accurate marketing. These deceptive acts and practices had a capacity, tendency, and/or
25 likelihood to deceive or confuse reasonable consumers into believing that Beneful was healthy,
26 was free of excessive harmful toxic substances and was otherwise safe.

1 201. As a direct and proximate result of Purina's deceptive and unfair conduct and/or
2 violations of the ICFA, Plaintiffs and the members of the Illinois Class have suffered and
3 continue to suffer damages, including without limitation the difference in value between the
4 value of Beneful as represented (the full purchase prices) and the actual value of Beneful (\$0,
5 because consumers would not have paid anything for it had they known it contained Industrial
6 Grade Glycols, Mycotoxins, Lead, or Arsenic); i.e., the full purchase prices of the Beneful.

7 202. Illinois also provides protection to purchasers of animal food from unfair and
8 deceptive practices. 505 ILCS 30/7 (Adulteration), 505 ILCS 30/8 (Misbranding), and 505
9 ILCS 30/11.1 (Prohibited Acts).

10 203. A commercial feed is adulterated if it "bears or contains any poisonous or
11 deleterious substance which may render it injurious to health;" 505 ILCS 30/7, and a
12 commercial feed is misbranded if its "labeling is false or misleading in any particular." 505
13 ILCS 30/8. Illinois law also prohibits the "manufacture or distribution of any commercial feed
14 that is adulterated or misbranded." 505 ILCS 30/11.1.

15 204. Beneful contains poisonous, deleterious or nonnutritive substances, which
16 injured the dogs of the Illinois Plaintiff and the members of the Illinois Class, and the
17 composition or quality of Beneful falls below what is purported or represented by its label, as
18 set forth above.

19 205. Plaintiffs and the other members of the Illinois Class further seek to enjoin such
20 unlawful deceptive acts and practices as described above. Each of the Illinois Class members
21 will be irreparably harmed unless the unlawful actions of Purina are enjoined, in that Purina
22 will continue to falsely and misleadingly market and advertise and represent on its packaging
23 the healthy nature of Beneful. Towards that end, the Illinois Plaintiffs and the Illinois Class
24 request an order granting them injunctive relief requiring removal of the unsafe product from
25
26
27

1 retail outlets, corrective disclosures and/or disclaimers on the labeling and advertising of
2 Beneful and/or the removal of the harmful ingredients before sales resume.

3 206. Absent injunctive relief, Purina will continue to manufacture and sell unsafe
4 Beneful without warning to consumers of its harmful effects.

5 207. In this regard, Purina has violated, and continues to violate, the Illinois
6 Consumer Fraud and Deceptive Business Practices Act, which makes unfair or deceptive acts
7 or practices used or employed in the conduct of any trade or commerce unlawful. As a direct
8 and proximate result of Purina's violation of the Illinois Consumer Fraud and Deceptive
9 Business Practices Act as described above, the Illinois Plaintiffs and the members of the Illinois
10 Class have suffered damages, as set forth above.

11 **COUNT 15**

12 **Asserted Against Purina on Behalf of the Illinois Plaintiffs and the Illinois Class** 13 **(Breach of Express Warranty)**

14 208. The Illinois Plaintiffs incorporate herein the allegations of all of the preceding
15 and subsequent paragraphs as if fully set forth here verbatim.

16 209. The Illinois Plaintiffs bring this action on behalf of themselves and the Illinois
17 Class.

18 210. Purina constitutes a "merchant" and a "seller" in connection with its sales of
19 Beneful, as those terms are defined in the Illinois Uniform Commercial Code. Further, the
20 Illinois Plaintiffs and the members of the Illinois Class constitute "buyers" in connection with
21 their purchases of Beneful from Purina, as that term is defined in the Illinois Uniform
22 Commercial Code. Further, Beneful constitutes "goods," as that term is defined in the Illinois
23 Uniform Commercial Code.

24 211. By affirmations of fact, promises and descriptions made on Beneful's
25 packaging, Purina provided Plaintiffs and the other members of the Illinois Class with written
26 express warranties before or at the time of purchase, including the following:

27 f) "Satisfaction Guaranteed. If you're not happy, we're not happy.

Complete satisfaction or your money back..."

1 g) “At Purina, we’re unconditionally devoted to pets. We’ve dedicated over
2 80 years to developing the high-quality products that satisfy the needs of
3 dogs and cats.”

4 h) “100% Complete and Balanced Nutrition”;

5 i) “Made with wholesome rice, real chicken, soy, and accented with
6 veggies and apples, it has the complete nutrition adult dogs need...”

7 j) “Healthy.”
8

9 212. These affirmations of facts and promises made by Purina to the Illinois Plaintiffs
10 and the Illinois Class members related to Beneful and became part of the bases of the bargains
11 between them and Purina and thereby created express warranties that the Beneful would
12 conform to those affirmations and promises. Furthermore, the aforementioned descriptions of
13 the Beneful were part of the bases of the bargains for the purchases of Beneful between Purina
14 and the Illinois Plaintiffs and the Illinois Class members and they created an express warranty
15 that the goods would conform to those descriptions. As previously noted, because Beneful
16 contained Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins,
17 Lead, or Arsenic, it did not conform to the affirmations, promises and descriptions previously
18 mentioned, resulting in breaches of express warranties.
19

20 213. Beneful was marketed directly to consumers by Purina, came in sealed
21 packages, and did not change from the time it left Purina’s possession until it was purchased by
22 consumers in stores.
23

24 214. The Illinois Plaintiffs have complied with all conditions precedent to filing this
25 breach of warranty claim, including providing notice of the breach of warranty to the Purina on
26 behalf of themselves and the Illinois Class, prior to filing this action. Alternatively, the filing
27 of this First Amended Complaint provides sufficient notice of breach to Purina on behalf of the

1 Illinois Plaintiffs and the Illinois Class. Alternatively, notice need not have been given to
 2 Purina because it had actual notice of its breaches of warranty as to the Illinois Plaintiffs and
 3 the Illinois Class.

4 215. As a proximate result of Purina's breach of express warranties, Plaintiffs and the
 5 members of the Illinois Class have suffered actual damages as follows: the difference in value
 6 between the value of the Beneful as expressly warranted (the full purchase prices) and the value
 7 of the Beneful as actually accepted and delivered (\$0, because consumers would not have paid
 8 anything for it had they known it contained Industrial Grade Glycols, which have not been
 9 approved for use in food, Mycotoxins, Lead, or Arsenic); i.e., the full purchase price of the
 10 Beneful.

11 **COUNT 16**

12 **Asserted Against Purina on Behalf of the Illinois Plaintiffs and the Illinois Class** 13 **(Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et. seq.* ("MMWA"))**

14 216. The Illinois Plaintiffs incorporate herein the allegations of all of the preceding
 15 and subsequent paragraphs as if fully set forth here verbatim.

16 217. The Illinois Plaintiffs bring this claim on behalf of themselves and the Illinois
 17 Class.

18 218. At all times relevant hereto, there was in full force and effect the Magnuson-
 19 Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (the "MMWA").

20 219. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

21 220. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

22 221. The Illinois Plaintiffs and the members of the Illinois Class are "consumers" as
 23 defined in 15 U.S.C. § 2301(3). They are consumers because they are persons entitled under
 24 applicable state law to enforce against the warrantor the obligations of its implied warranty.

25 222. Pursuant to 15 U.S.C. § 2310(e), the Illinois Plaintiffs and the members of the
 26 Illinois Class are entitled to bring this class action and are not required to give Purina notice
 27 and an opportunity to cure until such time as the Court determines the representative capacity

1 of the Illinois Plaintiffs pursuant to Rule 23 of the Federal Rules of Civil Procedure. However,
2 the Illinois Plaintiff already gave the required notice by letters dated May 15 and 20, 2015.

3 223. In connection with its sale of Beneful, Purina gave an implied warranty as
4 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
5 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
6 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
7 contract description as dog food, (c) was adequately contained, packaged and labeled as the
8 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
9 container and label.

10 224. Purina is liable to the Illinois Plaintiffs and the Illinois Class pursuant to 15
11 U.S.C. § 2310(d)(1), because it breached the implied warranty of merchantability.

12 225. Purina initially breached the implied warranty of merchantability as to the
13 Illinois Plaintiffs and the members of the Illinois Class because Beneful was not fit for the
14 ordinary purposes for which it is used—a safe, healthy dog food. Specifically, Beneful
15 contained Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins,
16 Lead, or Arsenic, making Beneful unfit for its ordinary purpose of providing safe, healthy dog
17 food. In fact, Beneful has caused injury and death to thousands of dogs.

18 226. Purina further breached its implied warranty of merchantability to the Illinois
19 Plaintiffs and the members of the Illinois Class because Beneful would not pass without
20 objection in the trade under its contract description as dog food because it contained Industrial
21 Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic.

22 227. Purina further breached its implied warranty of merchantability to the Illinois
23 Plaintiffs and the members of the Illinois Class because Beneful was not adequately contained,
24 packaged, and labeled. The directions and labeling that accompanied the Beneful dog food did
25 not warn the Illinois Plaintiffs and the members of the Illinois Class of the dangers of feeding
26 Beneful to their dogs.
27

228. Purina finally breached its implied warranty of merchantability to the Illinois Plaintiffs and the members of the Illinois Class because Beneful did not conform to the promises and affirmations of fact set forth on its container and label, as described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’ satisfaction was not guaranteed.

229. Pursuant to 15 U.S.C. § 2310(d)(1), the Illinois Plaintiffs and the members of the Illinois Class are entitled to recover the following damages proximately caused to them by Purina’s breach of the implied warranty of merchantability: the difference in value between the Beneful as warranted (the full purchase price) and the Beneful as actually delivered (\$0.00, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

230. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the Illinois Plaintiffs and the members of the Illinois Class are entitled to recover a sum equal to the aggregate amount of costs and expenses (including attorneys’ fees based on actual time expended) determined by the Court to have been reasonably incurred by the Illinois Plaintiffs and the members of the Illinois Class in connection with the commencement and prosecution of this action.

COUNT 17

Asserted Against Purina on Behalf of the Illinois Plaintiffs and the Illinois Class (Assumpsit/Money Had and Received/Unjust Enrichment/Restitution)

231. The Illinois Plaintiffs incorporate herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

232. The Illinois Plaintiffs bring this action on behalf of themselves and the Illinois Class.

233. The Illinois Plaintiffs and the Illinois Class members conferred a benefit on Purina by purchasing Beneful—the gross revenues Purina derived from such sales.

234. Purina accepted and retained the benefit in the amount of the gross revenues it received from sales of Beneful to the Illinois Plaintiffs and the Illinois Class members.

235. Purina has thereby profited under circumstances which would make it unjust for Purina to be permitted to retain the benefit.

236. The Illinois Plaintiffs and the Illinois Class members are entitled to restitution of the entire amount Purina received from Purina's sales of Beneful to them.

E. INDIANA CAUSES OF ACTION

COUNT 18

Asserted Against Purina on Behalf of the Indiana Plaintiff and the Indiana Class (Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et. seq.* ("MMWA"))

237. The Indiana Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

238. The Indiana Plaintiff brings this claim on behalf of herself and the Indiana Class

239. At all times relevant hereto, there was in full force and effect the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (the "MMWA").

240. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

241. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

242. The Indiana Plaintiff and the members of the Indiana Class are "consumers" as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons entitled under applicable state law to enforce against the warrantor the obligations of its implied warranty.

243. Pursuant to 15 U.S.C. § 2310(e), the Indiana Plaintiffs and the members of the Indiana Class are entitled to bring this class action and are not required to give Purina notice and an opportunity to cure until such time as the Court determines the representative capacity of the Indiana Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure. However, Indiana Plaintiffs Benham already gave the required notice on behalf of herself and the Indiana Class by letter dated May 15, 2015.

244. In connection with its sale of Beneful, Purina gave an implied warranty as defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its ordinary purpose as safe dog food, (b) would pass without objection in the trade under its

1 contract description as dog food, (c) was adequately contained, packaged and labeled as the
2 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
3 container and label. Ind. Code §§ 26-1-2-314(2)(a), (c), (e) and (f).

4 245. Purina is liable to the Indiana Plaintiff and the Indiana Class pursuant to 15
5 U.S.C. § 2310(d)(1), because it breached the implied warranty of merchantability.

6 246. Purina initially breached the implied warranty of merchantability as to the
7 Indiana Plaintiff and the members of the Indiana Class because Beneful was not fit for the
8 ordinary purposes for which it is used—a safe, healthy dog food. Specifically, Beneful
9 contained Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins,
10 Lead, or Arsenic, which made it unfit for its ordinary purpose of providing safe, healthy dog
11 food. In fact, Beneful has caused injury and death to thousands of dogs.

12 247. Purina further breached its implied warranty of merchantability to the Indiana
13 Plaintiff and the members of the Indiana Class because Beneful would not pass without
14 objection in the trade under its contract description as dog food, as it contained Industrial Grade
15 Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic.

16 248. Purina further breached its implied warranty of merchantability to the Indiana
17 Plaintiff and the members of the Indiana Class because Beneful was not adequately contained,
18 packaged, and labeled. The directions and labeling that accompanied the Beneful dog food did
19 not warn the Indiana Plaintiff and the members of the Indiana Class of the dangers of feeding
20 Beneful to their dogs.

21 249. Purina finally breached its implied warranty of merchantability to the Indiana
22 Plaintiff and the members of the Indiana Class because Beneful did not conform to the
23 promises and affirmations of fact set forth on its container and label, as described above.
24 Specifically, Beneful did not constitute safe, healthy food, was not “healthy,” did not offer
25 “great nutrition” to dogs, did not promote “healthy growth,” and customers’ satisfaction was
26 not guaranteed.

250. Pursuant to 15 U.S.C. § 2310(d)(1), the Indiana Plaintiff and the members of the Indiana Class are entitled to recover the following damages proximately caused to them by Purina's breach of the implied warranty of merchantability: the difference in value between the Beneful as warranted (the full purchase price) and the Beneful as actually delivered (\$0.00, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

COUNT 19

Asserted Against Purina on Behalf of the Indiana Plaintiff and the Indiana Class (Breach of Express Warranty, Ind. Code § 26-1-2-313)

251. The Indiana Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

252. The Indiana Plaintiff brings this claim on behalf of herself and the Indiana Class.

253. Purina constituted both a "merchant" and a "seller," as those terms are defined in Ind. Code §§ 26-1-2-103 and 104, in connection with its sale of Beneful to the Indiana Plaintiff and the Indiana Class. Further, the Indiana Plaintiff and the members of the Indiana Class constituted "buyers," as that term is defined in Ind. Code § 26-1-2-103. Beneful, itself, constituted "goods," as that term is defined in Ind. Code § 26-1-2-105.

254. The statements on Purina's packaging for Beneful created express warranties, including that Beneful was safe for consumption by pets, under both common law and Ind. Code § 26-1-2-313. Said statements include, but are not limited to, Beneful dog food being "healthy," offering "great nutrition" to dogs, promoting "healthy growth" and that customers' satisfaction would be guaranteed.

255. The statements regarding Beneful described in detail above constituted affirmations of fact and promises relating to Beneful that became part of the basis for the bargain for the purchase of Beneful and created an express warranty that Beneful would conform to those affirmations of fact and promises.

256. Likewise, the statements as described in detail above constituted descriptions of Beneful that became part of the basis of the bargain for the purchase of Beneful and created an express warranty that Beneful would conform to those descriptions.

257. Beneful contained Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic, constituting a breach of these express warranties.

258. The Indiana Plaintiff and the members of the Indiana Class were injured as a proximate result of Purina's aforementioned breaches as follows: in the amount of the difference in value between the value of the Beneful as warranted (its full purchase prices) and the Beneful as actually delivered (\$0, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

259. Within a reasonable time after their discovery of Purina's breaches, the Indiana Plaintiff gave notice of the breaches of the express warranties on behalf of herself and the Indiana Class. Alternatively, this pleading constitutes a sufficient notice of Purina's breaches of the express warranties. Alternatively, it was not necessary for the Indiana Plaintiff to give Purina notice of its breaches of the express warranties because Purina had actual notice of its breaches of warranty as to the Indiana Plaintiff and the Indiana Class.

COUNT 20

**Asserted Against Purina on Behalf of the Indiana Plaintiff and the Indiana Class
(Breach of the Implied Warranty of Merchantability, Ind. Code § 26-1-2-314)**

260. The Indiana Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

261. The Indiana Plaintiff brings this claim on behalf of herself and the Indiana Class.

262. Purina is a “seller” and “merchant” as to Beneful within the meaning of Ind. Code §§ 26-1-2-103 and 104. Purina designed, manufactured and sold Beneful, which constitutes “goods” within the meaning of Ind. Code § 26-1-2-105. The Indiana Plaintiff and the members of the Indiana Class constituted “buyers” within the meaning of Ind. Code § 26-1-2-103. Consequently, pursuant to Ind. Code §§ 26-1-2-314(2)(a), (c), (e) & (f), Purina impliedly warranted that Beneful was merchantable, including that it: (a) was fit for its ordinary

1 purposes as safe, healthy dog food, (b) could pass without objection in the trade under its
2 contract description as dog food, (c) was adequately contained, packaged, and labeled as the
3 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
4 container and labels.

5 263. Purina initially breached the implied warranty of merchantability as to the
6 Indiana Plaintiff and the members of the Indiana Class because Beneful was not fit for the
7 ordinary purposes for which it is used -- a safe, healthy dog food. Specifically, Beneful
8 contained Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins,
9 Lead, or Arsenic, which made it unfit for its ordinary purpose of providing safe, healthy dog
10 food. In fact, Beneful has caused injury and death to thousands of dogs.

11 264. Purina further breached its implied warranty of merchantability to the Indiana
12 Plaintiff and the members of the Indiana Class because Beneful would not pass without
13 objection in the trade under its contract description as dog food, as it contained Industrial Grade
14 Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic.

15 265. Purina further breached its implied warranty of merchantability to the Indiana
16 Plaintiff and the members of the Indiana Class because Beneful was not adequately contained,
17 packaged, and labeled. The directions and labeling that accompanied Beneful did not warn the
18 Indiana Plaintiff and the members of the Indiana Class of the dangers of feeding Beneful to
19 their dogs.

20 266. Purina finally breached its implied warranty of merchantability to the Indiana
21 Plaintiff and the members of the Indiana Class because Beneful did not conform to the
22 promises and affirmations of fact set forth on its container and label, as described above.
23 Specifically, Beneful did not constitute safe, healthy food, was not "healthy," did not offer
24 "great nutrition" to dogs, did not promote "healthy growth," and customers' satisfaction was
25 not guaranteed.

26 267. The Indiana Plaintiff and the members of the Indiana Class were injured as a
27 proximate result of Purina's aforementioned breaches as follows: in the amount of the

1 difference in value between the value of the Beneful as warranted (its full purchase prices) and
 2 the Beneful as actually delivered (\$0, because consumers would not have paid anything for it
 3 had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

4 268. Within a reasonable time after their discovery of Purina's breaches, the Indiana
 5 Plaintiff gave notice of the breaches of the implied warranty of merchantability on behalf of
 6 herself and the Indiana Class. Alternatively, this pleading constitutes a sufficient notice of
 7 Purina's breaches of the implied warranty of merchantability. Alternatively, it was not
 8 necessary for the Indiana Plaintiff to give Purina notice of its breaches of the implied warranty
 9 of merchantability because Purina had actual notice of its breaches of warranty as to the
 10 Indiana Plaintiff and the Indiana Class.

11 **COUNT 21**

12 **Asserted on Behalf of the Indiana Plaintiff and the Indiana Class** 13 **(Violation of Indiana's Deceptive Consumer Sale Act ("IDCSA"), Ind.** 14 **Code § 24-5-0.5, et seq.)**

15 269. The Indiana Plaintiff incorporates herein the allegations of all of the preceding
 16 and subsequent paragraphs as if fully set forth here verbatim.

17 270. The Indiana Plaintiff brings this claim on behalf of herself and the Indiana Class.

18 271. The Indiana Plaintiff and the members of the Indiana Class are "persons" within
 19 the meaning of Ind. Code § 24-5-.0.5-2(a)(2).

20 272. Purina is a "supplier" within the meaning of Ind. Code § 24-5-0.5-2(a)(3).

21 273. The sale of Beneful to the Indiana Plaintiff and the members of the Indiana
 22 Class constituted a "consumer transaction" within the meaning of Ind. Code § 24-5-0.5-2(a)(1),
 23 and Purina's actions as set forth herein occurred in the conduct of trade or commerce.

24 274. The IDCSA prohibits a supplier from committing an unfair, abusive, or
 25 deceptive act, omission, or practice in connection with a consumer transaction. Ind. Code § 24-
 26 5-0.5-3(a). The following acts and representations as to the subject matter of a consumer
 27 transaction by a supplier, *inter alia*, constitute deceptive acts under the IDCSA: (1) "That such
 subject of a consumer transaction has ... performance, characteristics, accessories, uses, or

benefits it does not have which the supplier knows or should reasonably know it does not have,” and (2) “That such subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not and if the supplier knows or should reasonably know that it is not.” Ind. Code §§ 24-5-0.5-3(b)(1) & (2).

275. By marketing and selling Beneful containing Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic, as described in detail, *supra*, Purina engaged in unfair, abusive and deceptive acts, omissions and practices prohibited by IDCSA, including: representing that the Beneful had characteristics, benefits and qualities (safe, healthy dog food) which it did not have when it knew or reasonably should have known that it did not; and representing that it was of a particular standard, quality, and grade (safe, healthy dog food) when it was not when it knew or reasonably should have known that it was not; and knowingly failing to disclose the presence of Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic.

276. Pursuant to Ind. Code § 24-5-0.5-5(a), by letter dated May 15, 2015, the Indiana Plaintiff gave Purina written notice, on her own behalf, on behalf of the Indiana Class, of the nature of Purina’s deceptive acts and the actual damages suffered from those acts. By letter dated May 18, 2015, Purina refused to make a cure, making Purina’s deceptive acts uncured under the IDCSA. Purina’s deceptive acts are also incurable, because they were engaged in by Purina as a part of a scheme, artifice, or device with an intent to defraud or mislead in that Purina was aware that Beneful contained Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic, yet it continued to market and sell Beneful as being “healthy,” offering “great nutrition,” and promoting “healthy growth.”

277. The Indiana Plaintiff and the members of the Indiana Class relied upon Purina’s uncured and incurable deceptive acts in purchasing Beneful. Purina’s conduct in the sale and marketing of Beneful was uniform with respect to the Indiana Plaintiff and the members of the Indiana Class, such that reliance can be determined on a class-wide basis. Indeed, had Purina not represented that it was safe, healthy food or had it disclosed the truth about Beneful, it can

1 be presumed that any reasonable consumer, including the Indiana Plaintiff and the members of
 2 the Indiana Class, would not have purchased Beneful, and, therefore, that all of them relied
 3 upon Purina's uncured and incurable deceptive acts.

4 278. As a direct and proximate cause of Purina's violations of the IDCSA, the
 5 Indiana Plaintiff and other members of the Indiana Class have suffered injury in fact and/or
 6 actual damages.

7 279. Pursuant to Ind. Code § 24-5-0.5-4(a), the Indiana Plaintiff and the members of
 8 the Class are entitled to recover the following damages from Purina: the difference in value
 9 between the Beneful as warranted (the full purchase price) and the Beneful as actually
 10 delivered (\$0.00, because consumers would not have paid anything for it had they known it
 11 contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

12 COUNT 22

13 **Asserted Against Purina on Behalf of the Indiana Plaintiff and the Indiana Class** 14 **(Assumpsit/Money Had and Received/Unjust Enrichment/Restitution)**

15 280. The Indiana Plaintiff incorporates herein the allegations of all of the preceding
 16 and subsequent paragraphs as if fully set forth here verbatim.

17 281. The Indiana Plaintiff brings this claim on behalf of herself and the Indiana Class.

18 282. The Indiana Plaintiff and the members of the Indiana Class purchased Beneful,
 19 which was defective, not merchantable, and unreasonably dangerous and therefore had no value
 20 to them.

21 283. Purina holds money, namely the gross revenues it derived from its sale of
 22 Beneful to, and at the expense of, the Indiana Plaintiff and the members of the Indiana Class,
 23 which in equity and good conscience belongs to the Indiana Plaintiff and the members of the
 24 Indiana Class.

25 284. Based upon assumpsit/money had and received unjust enrichment/restitution, the
 26 Indiana Plaintiff and the members of the Indiana Class are entitled to recover the full amount of
 27 all gross revenue derived by Purina from the sale of Beneful to them.

F. KANSAS CAUSES OF ACTION

COUNT 23

**Asserted Against Purina on Behalf of the Kansas Plaintiff and the Kansas Class
(Breach of Express Warranty)**

285. The Kansas Plaintiff and the Kansas Class members incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

286. The Kansas Plaintiff brings this action on behalf of herself and the Kansas Class.

287. Purina constitutes a “merchant” and a “seller” in connection with its sales of Beneful, as those terms are defined in the Kansas Uniform Commercial Code. Further, the Kansas Plaintiff and the Kansas Class members constitute “buyers” in connection with their purchases of Beneful from Purina, as that term is defined in the Kansas Uniform Commercial Code. Further, Beneful constitutes “goods,” as that term is defined in the Kansas Uniform Commercial Code. As these are consumer transactions, no direct contractual relationship is required between Purina and Kansas Class members.

288. By affirmations of fact, promises and descriptions made on Beneful’s packaging and which relate to such goods, Purina provided the Kansas Plaintiff and the members of the Kansas Class with written express warranties before or at the time of purchase, including the following:

- k) “Satisfaction Guaranteed. If you’re not happy, we’re not happy. Complete satisfaction or your money back....”
- l) “At Purina, we’re unconditionally devoted to pets. We’ve dedicated over 80 years to developing the high-quality products that satisfy the needs of dogs and cats.”
- m) “100% Complete and Balanced Nutrition”;
- n) “Made with wholesome rice, real chicken, soy, and accented with veggies and apples, it has the complete nutrition adult dogs need....”

1 o) “Healthy”

2 289. These affirmations of facts and promises made by Purina to the Kansas Plaintiff
3 and the Kansas Class members related to Beneful and became part of the bases of the bargains
4 between them and Purina and thereby created express warranties that Beneful would conform
5 to those affirmations and promises. Furthermore, the aforementioned descriptions of Beneful
6 were part of the bases of the bargains for the purchases of Beneful between Purina and the
7 Kansas Plaintiff and the Kansas Class members and they created an express warranty that the
8 goods would conform to those descriptions. As previously noted, because Beneful contained
9 Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or
10 Arsenic, it did not conform to the affirmations, promises and descriptions previously
11 mentioned, resulting in breaches of express warranties.
12

13 290. Beneful was marketed directly to consumers by Purina, came in sealed
14 packages, and did not change from the time it left Purina’s possession until it was purchased by
15 consumers in stores.
16

17 291. The Kansas Plaintiff has complied with all conditions precedent to filing this
18 breach of warranty claim, including providing timely notice of these breaches of warranty to
19 Purina on behalf of herself and the Kansas Class within a reasonable time after discovering that
20 Beneful might have proximately caused the damages described herein. Such notice was
21 reasonable based on the circumstances of this case, including the fact Purina has engaged in a
22 campaign to prevent other affected consumers from publicly discussing similar claims while at
23 the same time expressly denying any relationship between the consumption of Beneful and the
24 injuries here at issue. Alternatively, this pleading constitutes adequate notice on behalf of the
25 Kansas Plaintiff and the Kansas Class. Alternatively, notice need not have been given to
26
27

1 Purina because it had actual notice of its breaches of warranty as to the Kansas Plaintiff and the
2 Kansas Class.

3 292. As a proximate result of Purina's breach of express warranties, the Kansas
4 Plaintiff and the members of the Kansas Class have suffered actual damages as follows: the
5 difference in value between the value of the Beneful as expressly warranted (the full purchase
6 prices) and the value of the Beneful as actually accepted and delivered (\$0, because consumers
7 would not have paid anything for it had they known it contained Industrial Grade Glycols,
8 Mycotoxins, Lead, or Arsenic); i.e., the full purchase price of the Beneful.
9

10 **COUNT 24**

11 **Asserted as to the Kansas Plaintiff and the Kansas Class** **(Breach of the Implied Warranty of Merchantability, K.S.A. § 84-2-314)**

12 293. The Kansas Plaintiff and the Kansas Class members incorporate by reference
13 each preceding and succeeding paragraph as though fully set forth at length herein.

14 294. Purina constituted both a "merchant" and a "seller" in connection with its sale of
15 Beneful to the Kansas Plaintiff and the Kansas Class, as those terms are defined in the Kansas
16 Uniform Commercial Code. Further, the Kansas Plaintiff and the Kansas Class members
17 constituted "buyers" as that term is defined in the Kansas Uniform Commercial Code. Beneful,
18 itself, constituted "goods," as that term is defined in the Kansas Uniform Commercial Code.
19 As this is a consumer transaction, no direct contractual relationship is required between the
20 Kansas Plaintiff and the Kansas Class and Purina.
21

22 295. As part of the sales to the Kansas Plaintiff and the Kansas Class, Purina
23 impliedly warranted that Beneful was merchantable. Among other things, to be merchantable,
24 Beneful had to pass without objection in the trade under the contract description, be fit for the
25 ordinary purposes for which Beneful is used, be adequately contained, packaged and labeled,
26 and conform to the promises or affirmations of fact made on the containers or labels.
27

1 296. Beneful breached the warranty of implied merchantability initially because it
2 would not pass without objection in the trade under the contract description. Specifically, dog
3 food that is unsafe for consumption for dogs and that is highly likely to cause illness and death
4 will not pass without objection in the trade under the description of dog food, nor could such a
5 defect reasonably be discovered by any reasonable form of examination prior to use or
6 consumption. In addition, Purina breached the implied warranty as to Beneful, because
7 Beneful was not fit for the ordinary purpose for which it is used, which is safely feeding dogs.
8 Further, Purina breached the implied warranty of merchantability because Beneful was not
9 adequately contained, packaged or labeled because it failed to warn of the dangers of its
10 consumption by dogs. The Kansas Plaintiff and the Kansas Class members' reasonable
11 expectations as to the function of such products was that they would not injure or kill their dogs
12 once consumed, or would not contain or have a probability, likelihood or tendency to Industrial
13 Grade Glycols, Mycotoxins, Lead, or Arsenic.
14

15 297. At the time of sale to the Kansas Plaintiff and the Kansas Class and throughout
16 the Class Period, Purina made promises and affirmations of fact on the packaging of Beneful to
17 the effect that Beneful was safe for consumption by pets. Said representations included, but
18 were not limited to, Beneful being “healthy,” offering “great nutrition” to dogs, promoting
19 “healthy growth” and that customers’ satisfaction would be guaranteed.
20

21 298. However, Purina breached the implied warranty of merchantability because
22 Beneful did not conform to those promises and affirmations of fact in that Beneful was in fact
23 not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth” and
24 customers’ satisfaction was not guaranteed. For the reasons set forth above, Beneful was
25 defective, such defect was present when Beneful left Purina’s control, and such defect caused
26 the Kansas Plaintiff and the Kansas Class members' injuries.
27

299. Within a reasonable time after the discovery of Purina's breach of the implied warranty and the possible link of Beneful to the illness and death of their pet, the Kansas Plaintiff gave notice of such breaches on behalf of herself and the Kansas Class. Alternatively, this pleading constitutes adequate notice on behalf of the Kansas Plaintiff and the Kansas Class. Alternatively, no notice was required because Purina was already aware of its breaches as to the Kansas Plaintiff and the Kansas Class.

300. As a proximate result of this breach of implied warranty by Purina, the Kansas Plaintiff and the Kansas Class have been damaged in the following manner: the difference in value between the value of the Beneful as warranted (the full purchase price) and the value of the Beneful as actually delivered (\$0, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

COUNT 25

Asserted as to the Kansas Plaintiff and the Kansas Class (Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et. seq.* ("MMWA"))

301. The Kansas Plaintiff and the Kansas Class members incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

302. The Kansas Plaintiff brings this claim on behalf of herself and the Kansas Class.

303. At all times relevant hereto, there was in full force and effect the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (the "MMWA").

304. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

305. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

306. The Kansas Plaintiff and the members of the Kansas Class are "consumers" as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons entitled under applicable state law to enforce against the warrantor the obligations of its implied warranty.

307. Pursuant to 15 U.S.C. § 2310(e), the Kansas Plaintiff and the members of the Kansas Class are entitled to bring this action and are not required to give Purina notice and an opportunity to cure until such time as the Court determines the representative capacity of the

1 Kansas Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure. However, the
2 Kansas Plaintiff already gave any required notice on behalf of herself and the Kansas Class by
3 letter dated May 13, 2015.

4 308. In connection with its sale of Beneful, Purina gave an implied warranty as
5 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
6 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
7 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
8 contract description as dog food, (c) was adequately contained, packaged and labeled, and (d)
9 conformed to the promises and affirmations of fact set forth on its container and label.

10 309. Purina is liable to the Kansas Plaintiff and the Kansas Class pursuant to 15
11 U.S.C. § 2310(d)(1), because it breached the implied warranty of merchantability.

12 310. Purina initially breached the implied warranty of merchantability as to the
13 Kansas Plaintiff and the members of the Kansas Class because Beneful was not fit for the
14 ordinary purposes for which it is used—a safe, healthy dog food. Specifically, Beneful
15 contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead,
16 or Arsenic, which made it unfit for its ordinary purpose of providing safe, healthy dog food. In
17 fact, Beneful has caused injury and death to thousands of dogs.

18 311. Purina further breached its implied warranty of merchantability to the Kansas
19 Plaintiff and the members of the Kansas Class because Beneful would not pass without
20 objection in the trade under its contract description as dog food, as it contained Industrial Grade
21 Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic.

22 312. Purina further breached its implied warranty of merchantability to the Kansas
23 Plaintiff and the members of the Kansas Class because Beneful was not adequately contained,
24 packaged, and labeled. The directions and labeling that accompanied the Beneful dog food did
25 not warn the Kansas Plaintiff and the members of the Kansas Class of the dangers of feeding
26 Beneful to their dogs.
27

313. Purina further breached its implied warranty of merchantability to the Kansas Plaintiff and the members of the Kansas Class because Beneful did not conform to the promises and affirmations of fact set forth on its container and label, as described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’ satisfaction was not guaranteed.

314. Pursuant to 15 U.S.C. § 2310(d)(1), the Kansas Plaintiff and the members of the Kansas Class are entitled to recover the following damages proximately caused to them by Purina's breach of the implied warranty of merchantability: the difference in value between the Beneful as warranted (the full purchase price) and the Beneful as actually delivered (\$0.00, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

315. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the Kansas Plaintiff and the members of the Kansas Class are entitled to recover a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) determined by the Court to have been reasonably incurred by the Kansas Plaintiff and the members of the Kansas Class in connection with the commencement and prosecution of this action.

COUNT 26

**Asserted as to the Kansas Plaintiff and the Kansas Class
(Assumpsit/Money Had and Received/Unjust Enrichment/Restitution)**

316. The Kansas Plaintiff and the Kansas Class members incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

317. This claim in quasi-contract is based upon principles of restitution. A person who has been unjustly enriched at the expense of another is required to make restitution to the other, and will restore to the person entitled thereto that which in equity and good conscience belongs to another.

318. The Kansas Plaintiff and the Kansas Class members conferred a benefit on Purina by purchasing Beneful in the form of the gross revenues Purina derived from such sales.

1 which they would not have conferred had the true facts detailed above been disclosed by
2 Purina.

3 319. At the expense of the Kansas Plaintiff and the Kansas Class, Purina received,
4 appreciated and accepted benefits in the form of the gross revenues Purina derived from sales
5 of Beneful to the Kansas Plaintiff and the Kansas Class members.

6 320. For the reasons detailed above, Purina has profited and accepted such benefits
7 under circumstances where it engaged in improper, deceitful or misleading conduct that would
8 make it inequitable and unjust for Purina to retain such benefit without repaying the value it
9 received from the sales of such products.

10 321. The Kansas Plaintiff and the Kansas Class members are entitled to restitution of
11 the entire amount Purina received from Purina's sales of Beneful to them.

12 **COUNT 27**

13 **Asserted as to the Kansas Plaintiff and the Kansas Class** 14 **(Violation of the Kansas Consumer Protection Act, Kan. Stat. Ann. § 50-626, *et seq.*)**

15 322. The Kansas Plaintiff and the Kansas Class members incorporate by reference
16 each preceding and succeeding paragraph as though fully set forth at length herein.

17 323. The Kansas Plaintiff and the Kansas Class members were actual purchasers and
18 users of Beneful products that were introduced into the stream of commerce, manufactured,
19 distributed and sold by Purina throughout Kansas and the United States. Purina is a "supplier"
20 for purposes of this statute

21 324. As set forth in detail above Purina disseminated unhealthy and dangerous
22 Beneful dog food despite making numerous uniform material representations about the
23 guaranteed and healthy nature of the Product, and it omitted and willfully failed to disclose
24 material facts to the contrary despite having learned of the potential presence of dangerous
25 substances in Beneful, including Industrial Grade Glycols, which are not approved for use in
26 food, Mycotoxins, Lead, or Arsenic, prior to such sales. In so doing, Purina engaged in and/or
27 caused others to engage in deceptive or unconscionable acts in connection with consumer

1 transactions. In violation of the following provisions of K.S.A. § 50-626 and -627, Purina,
 2 either knowingly or with reason to know, misleadingly claimed that Beneful:

3 “(b)(1)(A) has sponsorship, approval, characteristics, ingredients, uses or
 4 benefits that they do not have;

5 “(D) are of a particular standard, quality, grade, style or model, if they
 6 are of another which differs materially from the representation;

7 “(F) has uses, benefits or characteristics unless [Purina] relied upon
 8 and possesses a reasonable basis for making such representation;
 9 or

10 “(G) use, benefit or characteristic of property has been proven or
 11 otherwise substantiated unless [Purina] relied upon and possesses
 12 the type and amount of proof or substantiation represented to
 13 exist”;

14 (2) willfully used, in any written representation, an exaggeration,
 15 falsehood, innuendo or ambiguity as to a material fact; and

16 (3) willfully failed to state a material fact, or the willfully concealed,
 17 suppressed or omitted a material fact.

18 325. These deceptive trade practices occurred in the course of Purina’s business.

19 326. The Kansas Plaintiff and the Kansas Class members would not have purchased
 20 Beneful products at the prices that they did, if at all, but for Purina’s wrongful failure to
 21 disclose the tendency of those products to contain Industrial Grade Glycols, which are not
 22 approved for use in food, Mycotoxins, Lead, or Arsenic.

23 327. As a result of the commission of these deceptive trade practices and failure to
 24 disclose the above material omitted facts by Purina, the Kansas Plaintiff and the Kansas Class
 25 members were injured and suffered actual damages or economic losses, which include the
 26 difference in value between the value of the Beneful as expressly warranted (the full purchase
 27 prices) and the value of the Beneful as actually accepted and delivered (\$0, because it was

unsafe and unfit for its ordinary purpose and thus reduced or eliminated its value); i.e., the full purchase price of the Beneful.

G. MASSACHUSETTS CAUSES OF ACTION

COUNT 28

Asserted as to the Massachusetts Plaintiff and the Massachusetts Class (Unfair and Deceptive Conduct in Violation of M.G.L., c. 93A, § 2)

328. The Massachusetts Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth herein verbatim.

329. This Count is brought by the Massachusetts Plaintiff on behalf of herself and the Massachusetts Class.

330. Purina's conduct, as alleged herein constituted unfair or deceptive acts or practices and unfair methods of competition in trade or commerce in violation of M.G.L., c. 93A, § 2, and the regulations promulgated thereunder, including, without limitation, the following:

- a) 940 C.M.R. § 3.02 (prohibiting, among other things, statements or illustrations used in advertisements which create a false impression of the grade, quality, value, or usability of the product offered);
- b) 940 C.M.R. § 3.05(1) (prohibiting claims or representations "made by any means concerning a product which, directly, or by implication, or by failure to adequately disclose additional relevant information, has the capacity or tendency or effect of deceiving buyers or prospective buyers in any material respect");
- c) 940 C.M.R. § 3.05(2) (prohibiting the use of any advertisement "which would mislead or tend to mislead buyers or prospective buyers, through pictorial representations or in any other manner, as to the product being offered for sale");

- 1 d) 940 C.M.R. § 3.08(2) (providing that it “shall be an unfair and deceptive
2 act or practice to fail to perform or fulfill any promises or obligations
3 arising under a warranty”);
- 4 e) 940 C.M.R. § 3.16(2) (providing that it is a violation of c. 93A, § 2 to
5 “fail to disclose to a buyer or prospective buyer any fact, the disclosure
6 of which may have influenced the buyer or prospective buyer to enter
7 into the transaction”); and
- 8 f) 940 C.M.R. § 3.16(3) (providing that an act or practice violates c. 93A, §
9 2 if it “fails to comply with existing statutes, rules, regulations or laws,
10 meant for the protection of the public’s health, safety or welfare
11 promulgated by the Commonwealth or any political subdivision thereof
12 intended to provide consumers of this Commonwealth protection”).

13
14
15 331. Purina’s unlawful conduct, in violation of c. 93A, § 2 and the regulations
16 referenced in the preceding paragraph, include, but are not limited to: (a) its false and
17 misleading statements, representations, and depictions in its labeling, packaging, marketing and
18 advertising for Beneful, including representing that Beneful offers “100% complete and
19 balanced nutrition,” that is “healthy” for dogs and that it promotes dogs’ “healthy growth”; (b)
20 the fact that, contrary to Purina’s representations of Beneful as healthy and safe for dogs,
21 Purina omitted that Beneful instead contained Industrial Grade Glycols, which are not approved
22 for use in food, Mycotoxins, Lead, or Arsenic; (c) Beneful was hazardous and toxic to dogs
23 and caused the Massachusetts Plaintiff’s and the Massachusetts Class members’ dogs to
24 become ill and, in some cases, die; and (d) its breach of the implied warranty of
25 merchantability, all as alleged in greater detail herein.

26 332. Massachusetts laws provide protection to purchasers of animal food from unfair,
27 deceptive and unconscionable practices in its commercial feed statute. M.G.L., c. 128, §§ 56

1 (prohibiting adulteration and misbranding of commercial feed); 54 (defining adulteration); and
2 55 (misbranding).

3 333. The commercial feed statute provides that “[n]o person shall (a) manufacture or
4 distribute any commercial feed that is adulterated or misbranded; (b) adulterate or misbrand
5 any commercial feed.” M.G.L. c. 128, § 56. A commercial feed shall be deemed to be
6 adulterated if: “(1) it bears or contains any poisonous or deleterious substance which may
7 render it injurious to health; (2) it bears or contains any added poisonous, added deleterious or
8 added non-nutritive substance which is unsafe within the meaning of section four hundred and
9 nine of the Federal Food, Drug and Cosmetic Act, other than one which is (i) a pesticide
10 chemical in or on a raw agricultural commodity; or (ii) a food additive”; or “(7) its composition
11 or quality falls below or differs from that which it is purported or represented to possess by its
12 labeling.” M.G.L. c. 128, § 54. Commercial feed is misbranded when, among other things, “its
13 labeling is false or misleading in any particular manner.” M.G.L. c. 128, § 55.

14 334. Beneful contains poisonous, deleterious or non-nutritive substances which
15 injured the dogs of the Massachusetts Plaintiff and the Massachusetts Class, and the
16 composition or quality of Beneful falls below what is purported or represented by its label, as
17 set forth above.

18 335. Further, Beneful is misbranded in that its labeling is false and misleading for the
19 reasons set forth in detail herein.

20 336. Accordingly, Purina’s conduct, as alleged in detail herein, violated M.G.L. c.
21 128, §§ 55 and 56. Violations of these provisions, which are designed to protect consumers,
22 constitute *per se* violations of c. 93A § 2, pursuant to 940 C.M.R. § 3.16(3).

23 337. The Massachusetts Plaintiff and the Massachusetts Class members have been
24 injured by Purina’s unfair and deceptive conduct, as alleged herein.

25 338. The Massachusetts Plaintiff and the Massachusetts Class members suffered
26 actual damages, which they seek to recover in at least the following categories: the amounts
27 they paid for Beneful: the difference between the value of Beneful as represented (the purchase

price) and the value of Beneful as actually accepted and delivered (which was \$-0-, because of the unsafe and hazardous nature of the product).

339. Purina's unfair and deceptive acts or practices, as alleged herein, were willful or knowing violations of M.G.L. c. 93A, § 2, within the meaning of M.G.L. c. 93A, § 9(3).

340. On May 4, 2015, Massachusetts Class member Paul Malcolm served Purina with a demand letter, in accordance with M.G.L. c. 93A, § 9(3). The demand letter explained and described the nature of the unfair or deceptive acts or practices, the injuries suffered by the members of the Massachusetts Class, as well as demanding compensation for those injuries and other relief.

341. Purina failed to tender a reasonable offer of relief in response to the demand letter.

342. Pursuant to M.G.L. c. 93A, §§ 9(3) and 9(4), the Massachusetts Plaintiff and each of the members of the Massachusetts Class are entitled to recover their actual damages, as set forth above (or statutory damages of \$25, whichever is greater), double or treble their actual damages, plus their reasonable attorneys' fees and the costs of this action, and injunctive relief directing Purina to stop engaging in the unfair and deceptive acts and practices alleged herein.

COUNT 29

Asserted as to the Massachusetts Plaintiff and the Massachusetts Class (Breach of the Implied Warranty of Merchantability M.G.L. c. 106 § 2-314)

343. The Massachusetts Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

344. The Massachusetts Plaintiff brings this claim on her own behalf and on behalf of the Massachusetts Class.

345. Purina constituted both a "merchant" and a "seller" in connection with its sale of Beneful to the Massachusetts Plaintiff and the Massachusetts Class, as those terms are defined in the Massachusetts Uniform Commercial Code. Further, the Massachusetts Plaintiff and the Massachusetts Class members constituted "buyers" as that term is defined in the Massachusetts

1 Uniform Commercial Code. Beneful, itself, constituted “goods,” as that term is defined in the
2 Massachusetts Uniform Commercial Code.

3 346. As part of the sales to the Massachusetts Plaintiff and the Massachusetts Class,
4 Purina impliedly warranted that Beneful was merchantable. Among other things, to be
5 merchantable, Beneful had to pass without objection in the trade under the contract description,
6 be fit for the ordinary purposes for which Beneful is used, be adequately contained, packaged
7 and labeled as the agreements may have required, and conform to the promises or affirmations
8 of fact made on the containers or labels.

9 347. Purina breached the implied warranty of merchantability as to Beneful initially
10 because Beneful would not pass without objection in the trade under the contract description.
11 Specifically, dog food that contains Industrial Grade Glycols, which are not approved for use in
12 food, Mycotoxins, Lead, or Arsenic, and/or is unsafe for consumption for dogs and that is
13 highly likely to cause illness and death will not pass without objection in the trade under the
14 description of dog food. In addition, Purina breached the implied warranty as to Beneful,
15 because Beneful was not fit for the ordinary purpose for which it is used, safely feeding dogs.
16 Further, Purina breached the implied warranty of merchantability because Beneful was not
17 adequately labeled as the agreements might have required because it failed to warn of the
18 dangers of its consumption by dogs.

19 348. At the time of sale throughout the Class Period, Purina made promises and
20 affirmations of fact on the containers and labels of Beneful to the effect that Beneful was safe
21 for consumption by pets. Said representations included, but were not limited to, Beneful being
22 “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that customers’
23 satisfaction would be guaranteed.

24 349. However, Purina breached the implied warranty of merchantability because
25 Beneful did not conform to those promises and affirmations of fact in that Beneful was in fact
26 not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth” and
27 customers’ satisfaction was not guaranteed.

350. Within a reasonable time after the discovery of Purina's breach, Massachusetts Class member Paul Malcolm gave notice of the breaches on behalf of himself and the Massachusetts Class. Alternatively, this pleading constitutes sufficient notice of breach. Alternatively, to the extent it is determined that notice of the breaches was not given, Purina did not suffer any prejudice thereby.

351. As a proximate result of this breach of warranty by Purina, the Massachusetts Plaintiff and the Massachusetts Class have been damaged in the following ways: the difference in value between the value of the Beneful as warranted (the full purchase price) and the value of the Beneful as actually delivered (\$0, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

COUNT 30

**Asserted as to the Massachusetts Plaintiff and the Massachusetts Class
(Breach of Express Warranty
M.G.L. c. 106 § 2-313)**

352. The Massachusetts Plaintiff incorporates herein all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

353. The Massachusetts Plaintiff brings this claim on behalf of herself and the Massachusetts Class.

354. Purina constituted both a "merchant" and a "seller" in connection with its sale of Beneful to the Massachusetts Plaintiff and the Massachusetts Class, as those terms are defined in the Massachusetts Uniform Commercial Code. Further, the Massachusetts Plaintiff and the Massachusetts Class members constituted "buyers" as that term is defined in the Massachusetts Uniform Commercial Code. Beneful, itself, constituted "goods," as that term is defined in the Massachusetts Uniform Commercial Code.

355. Under section 2-313 of the Uniform Commercial Code, the statements on Purina's containers and labels created express warranties, including that Beneful was safe for consumption by pets. Said statements include, but are not limited to, Beneful being "healthy,"

1 offering “great nutrition” to dogs, promoting “healthy growth” and that customers’ satisfaction
2 would be guaranteed.

3 356. The statements regarding Beneful described in detail above constituted
4 affirmations of fact and promises relating to Beneful that became part of the basis for the
5 bargain for the purchase of Beneful and created an express warranty that Beneful would
6 conform to those affirmations of fact and promises.

7 357. Likewise, the statements as described in detail above constituted descriptions of
8 Beneful that became part of the basis of the bargain for the purchase of Beneful that created an
9 express warranty that Beneful would conform to the description.

10 358. Beneful was not safe for pets to consume and caused pets to become ill and/or
11 die. The unsafe nature of the pet food constituted a breach of these express warranties.

12 359. The Massachusetts Plaintiff and the Massachusetts Class members were injured
13 as a direct and proximate result of Purina’s aforementioned breaches as follows: the difference
14 in value between the value of the Beneful as warranted (its full purchase price) and the value of
15 the Beneful as actually delivered (\$0, because consumers would not have paid anything for it
16 had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

17 360. Within a reasonable time after the discovery of Purina’s breaches,
18 Massachusetts Class member Paul Malcolm gave notice of the breach on behalf of the
19 Massachusetts Class. Alternatively, this pleading constitutes a sufficient notice of breach.
20 Alternatively, to the extent it is determined that notice of the breach was not given, Purina did
21 not suffer any prejudice thereby.

22 361. The Massachusetts Plaintiff and the members of the Massachusetts Class
23 demand judgment against Purina for damages, as set forth above, plus interest, costs and such
24 additional relief as the Court may deem appropriate or to which the Massachusetts Plaintiff and
25 the Massachusetts Class members may be entitled.

COUNT 31

**Asserted Against Purina on Behalf of the Massachusetts
Plaintiff and the Massachusetts Class
(Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et. seq.* (“MMWA”))**

362. The Massachusetts Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

363. The Massachusetts Plaintiff brings this claim on behalf of herself and the Massachusetts Class.

364. At all times relevant hereto, there was in full force and effect the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (the “MMWA”).

365. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

366. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

367. The Massachusetts Plaintiff and the members of the Massachusetts Class are “consumers” as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons entitled under applicable state law to enforce against the warrantor the obligations of its implied warranty.

368. Pursuant to 15 U.S.C. § 2310(e), the Massachusetts Plaintiff and the members of the Massachusetts Class are entitled to bring this class action and are not required to give Purina notice and an opportunity to cure until such time as the Court determines the representative capacity of the Massachusetts Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure. However, Massachusetts Class member Paul Malcolm already gave the required notice on behalf of the Massachusetts Class by letter dated May 4, 2015.

369. In connection with its sale of Beneful, Purina gave an implied warranty as defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its ordinary purpose as safe dog food, (b) would pass without objection in the trade under its contract description as dog food, (c) was adequately contained, packaged and labeled as the

1 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
2 container and label. M.G.L. c. 106 § 2-314(d)(2) (a), (c), (e) and (f).

3 370. Purina is liable to the Massachusetts Plaintiff and the Massachusetts Class
4 pursuant to 15 U.S.C. § 2310(d)(1), because it breached the implied warranty of
5 merchantability.

6 371. Purina initially breached the implied warranty of merchantability as to
7 Massachusetts Plaintiff and the members of the Massachusetts Class because Beneful was not
8 fit for the ordinary purposes for which it is used—a safe, healthy dog food. Specifically,
9 Beneful contained Industrial Grade Glycols, which are not approved for use in food,
10 Mycotoxins, Lead, or Arsenic, which made it unfit for its ordinary purpose of providing safe,
11 healthy dog food. In fact, Beneful has caused injury and death to thousands of dogs.

12 372. Purina further breached its implied warranty of merchantability to the
13 Massachusetts Plaintiff and the members of the Massachusetts Class because Beneful would
14 not pass without objection in the trade under its contract description as dog food, as it contained
15 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
16 Arsenic.

17 373. Purina further breached its implied warranty of merchantability to the
18 Massachusetts Plaintiff and the members of the Massachusetts Class because Beneful was not
19 adequately contained, packaged, and labeled. The directions and labeling that accompanied the
20 Beneful dog food did not warn the Massachusetts Plaintiff and the members of the
21 Massachusetts Class of the dangers of feeding Beneful to their dogs.

22 374. Purina finally breached its implied warranty of merchantability to the
23 Massachusetts Plaintiff and the members of the Massachusetts Class because Beneful did not
24 conform to the promises and affirmations of fact set forth on its container and label, as
25 described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,”
26 did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’
27 satisfaction was not guaranteed.

375. Pursuant to 15 U.S.C. § 2310(d)(1), the Massachusetts Plaintiff and the members of the Massachusetts Class are entitled to recover the following damages proximately caused to them by Purina's breach of the implied warranty of merchantability: the difference in value between the Beneful as warranted (the full purchase price) and the Beneful as actually delivered (\$0.00, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

COUNT 32

Asserted Against Purina on Behalf of the Massachusetts Plaintiff and the Massachusetts Class

(Assumpsit/Money Had and Received/Unjust Enrichment/Restitution)

376. The Massachusetts Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth herein verbatim.

377. The Massachusetts Plaintiff brings this action on behalf of herself and the Massachusetts Class.

378. The Massachusetts Plaintiff and the Massachusetts Class members conferred a benefit on Purina in the form of the gross revenues Purina derived from the money they paid to purchase Beneful.

379. Purina had an appreciation or knowledge of the benefit conferred on it by the Massachusetts Plaintiff and the Massachusetts Class members.

380. Purina accepted and retained the benefit in the amount of the gross revenues it derived from sales of Beneful to the Massachusetts Plaintiff and the Massachusetts Class members.

381. Purina has thereby profited by retaining the benefit under circumstances which would make it unjust for Purina to be permitted to retain the benefit.

382. The Massachusetts Plaintiff and the Massachusetts Class are entitled to restitution of the entire amount Purina derived from its sales of Beneful to them.

1 **H. MINNESOTA CAUSES OF ACTION**

2 **COUNT 33**

3 **Asserted Against Purina on Behalf of the Minnesota Plaintiff and the Minnesota Class**
 4 **(Violation of Minnesota Uniform Deceptive Trade Practices Act,**
 5 **M.S.A. § 325D.43, et seq).**

6 383. The Minnesota Plaintiff incorporates herein the allegations of all of the
 7 preceding and subsequent paragraphs as if fully set forth herein verbatim.

8 384. This Count is brought by the Minnesota Plaintiff on behalf of herself and the
 9 Minnesota Class.

10 385. Purina's conduct, as alleged herein, constituted deceptive trade practices in the
 11 course of its business in violation of M.S.A. § 325D.44, including the following types of
 12 conduct specified in § 325D.44,1:

- 13 a) Representing that goods or services have characteristics, ingredients,
 14 uses or benefits that they do not have (§ 325D.44,1(5));
- 15 b) Representing that goods are of a particular standard, quality or grade, if
 16 they are of another (§ 325D.44,1(7));
- 17 c) Advertising goods or services with intent not to sell them as advertised
 18 (§ 325D.44,1(9)); and
- 19 d) Engaging in conduct that creates a likelihood of confusion or
 20 misunderstanding (§ 325D.44, 1(13)).

21 386. Purina's deceptive practices (including conduct prohibited by the provisions
 22 cited in subparagraphs (a) through (d) above), as alleged in greater detail herein, include, but
 23 are not limited to: (a) its false and misleading statements, representations, and depictions in its
 24 labeling, packaging, marketing, promotion and advertising for Beneful, including that Beneful
 25 offers "100% complete and balanced nutrition," that is "healthy" for dogs and that it promotes
 26 dogs' "healthy growth"; (b) its omissions, contrary to Purina's representations, that Beneful
 27 contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead,
 or Arsenic and therefore create confusion or misunderstanding; and (b) its omission that these

1 substances caused the Minnesota Plaintiff and the Minnesota Class members' dogs to become
2 ill and in some cases die.

3 387. The Minnesota Plaintiff and the Minnesota Class members have been damaged
4 by Purina's deceptive trade practices, and members of the Minnesota Class are likely to be
5 damaged by Purina's deceptive trade practices.

6 388. The Minnesota Plaintiff and the Minnesota Class members are entitled to an
7 injunction directing Purina to: remove the false and misleading statements, representations, and
8 depictions from its labeling, packaging, marketing, promotion and advertising for Beneful;
9 issue corrective statements, including making full disclosure of Beneful's inclusion of
10 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
11 Arsenic; and otherwise cease engaging in the deceptive trade practices alleged herein.

12 **COUNT 34**

13 **Asserted Against Purina on Behalf of the Minnesota Plaintiff and the Minnesota Class** 14 **(Violation of Minnesota Unfair Trade Practices Act, M.S.A. § 325D.09, et seq.)**

15 389. The Minnesota Plaintiff incorporates herein the allegations of all of the
16 preceding and subsequent paragraphs as if fully set forth herein verbatim.

17 390. This Count is brought by the Minnesota Plaintiff on behalf of herself and the
18 Minnesota Class.

19 391. At all times relevant hereto, the Minnesota Plaintiff and the Minnesota Class
20 members were "persons" within the meaning of M.S.A. § 325D.10(a).

21 392. Purina's conduct, as alleged herein, constituted unlawful trade practices, in
22 violation of M.S.A. § 325D.09, including conduct in violation of M.S.A. § 325D.13, in that, in
23 connection with the sale of Beneful, Purina knowingly misrepresented, directly or indirectly,
24 the true quality, ingredients and origin of Beneful.

25 393. Purina's unlawful trade practices (including conduct prohibited by § 325D.13),
26 as alleged in greater detail herein, include, but are not limited to: (a) its false and misleading
27 statements, representations, and depictions in its labeling, packaging, marketing, promotion and
advertising for Beneful, including representing that Beneful offers "100% complete and

1 balanced nutrition,” that is “healthy” for dogs and that it promotes dogs’ “healthy growth”; and
2 (b) the fact that, contrary to Purina’s representations, Purina omitted that Beneful contained
3 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
4 Arsenic; and/or (c) that those substances caused the Minnesota Plaintiff and the Minnesota
5 Class members’ dogs to become ill and, in some cases, die.

6 394. As a result of Purina’s unlawful trade practices, the Minnesota Plaintiff and the
7 Minnesota Class members have suffered injury within the meaning of M.S.A. § 325D.15,
8 which they seek to recover, consisting of at least the following: the difference between the
9 value of Beneful as represented (the purchase price) and the value of Beneful as actually
10 accepted and delivered (which was \$-0-, because of the unsafe and hazardous nature of the
11 product).

12 395. The Minnesota Plaintiff and the Minnesota Class members are entitled to
13 recover these actual damages and injunctive relief (to, among other things, direct Purina to
14 cease its deceptive conduct, as alleged herein, and to issue corrective statements and
15 advertising) pursuant to M.S.A. § 325D.15.

16 396. Alternatively, the Minnesota Plaintiff and the Minnesota Class members are
17 entitled to bring an action for damages under the Minnesota Private Attorney General Statute,
18 M.S.A. § 8.31, 3a, because this action has a public benefit. The public benefit of this action is
19 demonstrated by at least the following:

- 20 a) this action seeks injunctive relief in order to stop Purina from continuing
21 to engage in the unfair trade practices alleged herein, including to
22 eliminate Purina’s false and misleading advertising and to direct it to
23 issue corrective statements and advertising, in an effort to protect
24 members of the Minnesota Class and members of the public;
- 25 b) this action seeks to address a pervasive problem with an unreasonably
26 dangerous product manufactured and sold by Purina, that is causing dogs
27 who eat it to get sick and die. Beneful is estimated to have caused the

1 death and injury of over 3,000 dogs during the last few years, including
 2 the Minnesota Plaintiff and the Minnesota Class members' dogs. By
 3 bringing this action, the Minnesota Plaintiff hopes to prevent additional
 4 dogs from suffering the same fate from consumption of Beneful;

5 c) the toxic and hazardous nature of Beneful has caught the attention of the
 6 Association for Truth in Pet Food ("ATPF"), which has tested Beneful
 7 and found it to contain high risk levels of Mycotoxins and bacteria and
 8 has given Beneful a Risk Equivalent Quality Rating of 32, where
 9 anything over 20 indicates a high risk; and

10 d) members of the public have been and are concerned about the risk to
 11 their dogs of consuming Beneful, as evidenced by, among other things,
 12 the thousands of complaints by dog owners about Beneful that can be
 13 found on the Internet and the hundreds of calls undersigned counsel have
 14 received from dog owners whose dogs have become ill and died from
 15 consuming Beneful.

16 **COUNT 35**

17 **Asserted Against Purina on Behalf of the Minnesota Plaintiff and the Minnesota Class** 18 **(Violation of Minnesota Consumer Fraud Act, M.S.A. § 325F.68, et seq.)**

19 397. The Minnesota Plaintiff incorporates herein the allegations of all of the
 20 preceding and subsequent paragraphs as if fully set forth herein verbatim.

21 398. This Count is brought by the Minnesota Plaintiff on behalf of herself and the
 22 Minnesota Class.

23 399. At all times relevant hereto, Purina was a "person" within the meaning of
 24 M.S.A. § 325F.68(3).

25 400. Purina's conduct, as alleged herein, constituted unlawful practices, in violation
 26 of M.S.A. § 325F.69,1, including fraud, false pretense, false promises, misrepresentations,
 27 misleading statements, and/or deceptive practices, with the intent that others rely thereon, in

1 connection with the sale of Beneful to the Minnesota Plaintiff and the Minnesota Class
2 members.

3 401. Purina's unlawful practices (including fraud, misrepresentation, and deceptive
4 practices prohibited by § 325F.69,1)), as alleged in greater detail herein, include, but are not
5 limited to: (a) its false and misleading statements, representations, and depictions in its
6 labeling, packaging, marketing, promotion and advertising for Beneful, including representing
7 that Beneful offers "100% complete and balanced nutrition," that is "healthy" for dogs and that
8 it promotes dogs' "healthy growth"; (b) its omission that Beneful contained Industrial Grade
9 Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic; and/or (c) its
10 omission that these substances caused the Minnesota Plaintiff and the Minnesota Class
11 members' dogs to become ill and in some cases die.

12 402. As a result of Purina's fraud, misrepresentation and deceptive practices, the
13 Minnesota Plaintiff and the Minnesota Class members have suffered injury within the meaning
14 of M.S.A. § 8.31,3a, which they seek to recover, consisting of at least the following: the
15 difference between the value of Beneful as represented (the purchase price) and the value of
16 Beneful as actually accepted and delivered (which was \$-0-, because of the unsafe and
17 hazardous nature of the product).

18 403. The Minnesota Plaintiff and the Minnesota Class members also seek injunctive
19 relief pursuant to M.S.A. § 8.31,3a, directing Purina to cease the unlawful practices alleged
20 herein and to issue corrective statements and advertising.

21 404. The Minnesota Plaintiff and the Minnesota Class members are entitled to bring
22 an action for damages and injunctive under M.S.A. § 8.31, 3a, because this action has a public
23 benefit. The public benefit of this action is demonstrated by at least the following:

- 24 a) this action seeks injunctive relief in order to stop Purina from continuing
25 to engage in the fraud, false pretense, false promises, misrepresentations,
26 misleading statements, and/or deceptive practices alleged herein, and to
27

1 issue corrective statements and advertising, in an effort to protect
2 members of the Minnesota Class and members of the public;

3 b) this action seeks to address a pervasive problem with an unreasonably
4 dangerous product manufactured and sold by Purina, that is causing dogs
5 who eat it to get sick and die. Beneful is estimated to have caused the
6 death and injury of over 3,000 dogs during the last few years, including
7 the Minnesota Plaintiff and the Minnesota Class members' dogs. By
8 bringing this action, the Minnesota Plaintiff hopes to prevent additional
9 dogs from suffering the same fate from consumption of Beneful;

10 c) the toxic and hazardous nature of Beneful has caught the attention of the
11 Association for Truth in Pet Food ("ATPF"), which has tested Beneful
12 and found it to contain high risk levels of Mycotoxins and bacteria and
13 has given Beneful a Risk Equivalent Quality Rating of 32, where
14 anything over 20 indicates a high risk; and

15 d) members of the public have been and are concerned about the risk to
16 their dogs of consuming Beneful, as evidenced by, among other things,
17 the thousands of complaints by dog owners about Beneful that can be
18 found on the Internet and the hundreds of calls undersigned counsel have
19 received from dog owners whose dogs have become ill and died from
20 consuming Beneful.

21 **COUNT 36**

22 **Asserted Against Purina on Behalf of the Minnesota Plaintiff and the Minnesota Class**
23 **(Violation of Minnesota False Statement in Advertisement Act, M.S.A. § 325F.67)**

24 405. The Minnesota Plaintiff incorporates herein the allegations of all of the
25 preceding and subsequent paragraphs as if fully set forth herein verbatim.

26 406. This Count is brought by the Minnesota Plaintiff on behalf of herself and the
27 Minnesota Class.

1 407. Purina’s conduct, as alleged herein, constituted the making, dissemination or
2 publishing of advertisements containing material assertions, representations or statements of
3 fact that were untrue, deceptive or misleading, in connection with the promotion, marketing and
4 sale of Beneful to the Minnesota Plaintiff and the Minnesota Class members, in violation of
5 M.S.A. § 325F.67.

6 408. Purina’s untrue, misleading and deceptive statements, as alleged in greater detail
7 herein, include, but are not limited to: (a) its false and misleading statements, representations,
8 and depictions in its labeling, packaging, marketing, promotion and advertising for Beneful,
9 including representing that Beneful offers “100% complete and balanced nutrition,” that it is
10 “healthy” for dogs and that it promotes dogs’ “healthy growth”; and (b) the fact that, contrary
11 to Purina’s representations, Beneful was hazardous and toxic to dogs, containing Industrial
12 Grade Glycol, Mycotoxins, Arsenic or Lead and caused the Minnesota Plaintiff and the
13 Minnesota Class members’ dogs to become ill and in some cases die.

14 409. As a result of Purina’s untrue, misleading and deceptive statements, the
15 Minnesota Plaintiff and the Minnesota Class members have suffered injury within the meaning
16 of M.S.A. § 8.31,3a, which they seek to recover, consisting of at least the following: the
17 amounts they paid for Beneful: the difference between the value of Beneful as represented (the
18 purchase price) and the value of Beneful as actually accepted and delivered (which was \$-0-,
19 because of the unsafe and hazardous nature of the product).

20 410. The Minnesota Plaintiff and the Minnesota Class members also seek injunctive
21 relief pursuant to M.S.A. § 8.31,3a, directing Purina to stop making the untrue, misleading and
22 deceptive statements alleged herein and to issue corrective statements and advertising.

23 411. The Minnesota Plaintiff and the Minnesota Class members are entitled to bring
24 an action for damages and injunctive under M.S.A. § 8.31, 3a, because this action has a public
25 benefit. The public benefit of this action is demonstrated by at least the following:

- 26 a) this action seeks injunctive relief in order to stop Purina from continuing
27 to make the untrue, misleading and deceptive statements alleged herein,

and to issue corrective statements and advertising, in an effort to protect members of the Minnesota Class and members of the public;

b) this action seeks to address a pervasive problem with an unreasonably dangerous product manufactured and sold by Purina, that is causing dogs who eat it to get sick and die. Beneful is estimated to have caused the death and injury of over 3,000 dogs during the last few years, including the Minnesota Plaintiff and the Minnesota Class members' dogs. By bringing this action, the Minnesota Plaintiff hopes to prevent additional dogs from suffering the same fate from consumption of Beneful;

c) the toxic and hazardous nature of Beneful has caught the attention of the Association for Truth in Pet Food ("ATPF"), which has tested Beneful and found it to contain high risk levels of Mycotoxins and bacteria and has given Beneful a Risk Equivalent Quality Rating of 32, where anything over 20 indicates a high risk; and

d) members of the public have been and are concerned about the risk to their dogs of consuming Beneful, as evidenced by, among other things, the thousands of complaints by dog owners about Beneful that can be found on the Internet and the hundreds of calls undersigned counsel have received from dog owners whose dogs have become ill and died from consuming Beneful.

COUNT 37

Asserted Against Purina on Behalf of the Minnesota Plaintiff and the Minnesota Class

(Breach of the Implied Warranty of Merchantability M.S.A. § 336.2-314)

412. The Minnesota Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

413. The Minnesota Plaintiff brings this claim on her own behalf and on behalf of the Minnesota Class.

1 414. Purina constituted both a “merchant” and a “seller” in connection with its sale of
2 Beneful to the Minnesota Plaintiff and the Minnesota Class, as those terms are defined in the
3 Minnesota Uniform Commercial Code. Further, the Minnesota Plaintiff and the Minnesota
4 Class members constituted “buyers” as that term is defined in the Minnesota Uniform
5 Commercial Code. Beneful, itself, constituted “goods,” as that term is defined in the
6 Minnesota Uniform Commercial Code.

7 415. As part of the sales to the Minnesota Plaintiff and the Minnesota Class, Purina
8 impliedly warranted that Beneful was merchantable. Among other things, to be merchantable,
9 Beneful had to pass without objection in the trade under the contract description, be fit for the
10 ordinary purposes for which Beneful is used, be adequately contained, packaged and labeled as
11 the agreements may have required, and conform to the promises or affirmations of fact made on
12 the containers or labels.

13 416. Purina breached the implied warranty of merchantability as to Beneful initially
14 because Beneful would not pass without objection in the trade under the contract description.
15 Specifically, dog food that is unsafe for consumption for dogs and that is highly likely to cause
16 illness and death will not pass without objection in the trade under the description of dog food.
17 In addition, Purina breached the implied warranty as to Beneful, because Beneful was not fit
18 for the ordinary purpose for which it is used, safely feeding dogs. Further, Purina breached the
19 implied warranty of merchantability because Beneful was not adequately labeled as the
20 agreements might have required because it failed to warn of the dangers of its consumption by
21 dogs.

22 417. At the time of sale throughout the Class Period, Purina made promises and
23 affirmations of fact on the containers and labels of Beneful to the effect that Beneful was safe
24 for consumption by pets. Said representations included, but were not limited to, Beneful being
25 “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that customers’
26 satisfaction would be guaranteed.

1 424. Under section 2-313 of the Uniform Commercial Code, the statements on
2 Purina's containers and labels created express warranties, including that Beneful was safe for
3 consumption by pets. Said statements include, but are not limited to, Beneful being "healthy,"
4 offering "great nutrition" to dogs, promoting "healthy growth" and that customers' satisfaction
5 would be guaranteed.

6 425. The statements regarding Beneful described in detail above constituted
7 affirmations of fact and promises relating to Beneful that became part of the basis of the
8 bargain for the purchase of Beneful and created an express warranty that Beneful would
9 conform to those affirmations of fact and promises.

10 426. Likewise, the statements as described in detail above constituted descriptions of
11 Beneful that became part of the basis of the bargain for the purchase of Beneful that created an
12 express warranty that Beneful would conform to the description.

13 427. Beneful was not safe for pets to consume and caused pets to become ill and/or
14 die. The unsafe nature of the pet food constituted a breach of these express warranties.

15 428. The Minnesota Plaintiff and the Minnesota Class members were injured as a
16 direct and proximate result of Purina's aforementioned breaches as follows: the difference in
17 value between the value of the Beneful as warranted (its full purchase price) and the value of
18 the Beneful as actually delivered (\$0, because consumers would not have paid anything for it
19 had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

20 429. Within a reasonable time after the discovery of Purina's breaches, the Minnesota
21 Plaintiff gave notice of the breach on her own behalf and on behalf of the Minnesota Class.
22 Alternatively, this pleading constitutes a sufficient notice of breach. Alternatively, notice was
23 not required because Purina already had specific knowledge of its breaches of warranty as to
24 the Minnesota Plaintiff and the Minnesota Class.

25 430. The Minnesota Plaintiff and the members of the Minnesota Class demand
26 judgment against Purina for damages, as set forth above, plus interest, costs and such additional
27

1 relief as the Court may deem appropriate or to which the Minnesota Plaintiff and the Minnesota
2 Class members may be entitled.

3 **COUNT 39**

4 **Asserted Against Purina on Behalf of the Minnesota Plaintiff and the Minnesota Class** 5 **(Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et. Seq.* (“MMWA”))**

6 431. The Minnesota Plaintiff incorporates herein the allegations of all of the
7 preceding and subsequent paragraphs as if fully set forth here verbatim.

8 432. The Minnesota Plaintiff brings this claim on behalf of herself and the Minnesota
9 Class.

10 433. At all times relevant hereto, there was in full force and effect the Magnuson-
11 Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (the “MMWA”).

12 434. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

13 435. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

14 436. The Minnesota Plaintiff and the members of the Minnesota Class are
15 “consumers” as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons
16 entitled under applicable state law to enforce against the warrantor the obligations of its implied
17 warranty.

18 437. Pursuant to 15 U.S.C. § 2310(e), the Minnesota Plaintiff and the members of the
19 Minnesota Class are entitled to bring this class action and are not required to give Purina notice
20 and an opportunity to cure until such time as the Court determines the representative capacity
21 of the Minnesota Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure.
22 However, the Minnesota Plaintiff Porter already gave the required notice on behalf of herself
23 and the Minnesota Class by letter dated May 13, 2015.

24 438. In connection with its sale of Beneful, Purina gave an implied warranty as
25 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
26 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
27 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
contract description as dog food, (c) was adequately contained, packaged and labeled as the

1 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
2 container and label. M.S.A. § 336.2-314(2) (a), (c), (e) and (f).

3 439. Purina is liable to the Minnesota Plaintiff and the Minnesota Class pursuant to
4 15 U.S.C. § 2310(d)(1), because it breached the implied warranty of merchantability.

5 440. Purina initially breached the implied warranty of merchantability as to the
6 Minnesota Plaintiff and the members of the Minnesota Class because Beneful was not fit for
7 the ordinary purposes for which it is used – a safe, healthy dog food. Specifically, Beneful
8 contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead,
9 or Arsenic, which made it unfit for its ordinary purpose of providing safe, healthy dog food. In
10 fact, Beneful has caused injury and death to thousands of dogs.

11 441. Purina further breached its implied warranty of merchantability to the Minnesota
12 Plaintiff and the members of the Minnesota Class because Beneful would not pass without
13 objection in the trade under its contract description as dog food, as it contained Industrial Grade
14 Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic.

15 442. Purina further breached its implied warranty of merchantability to the Minnesota
16 Plaintiff and the members of the Minnesota Class because Beneful was not adequately
17 contained, packaged, and labeled. The directions and labeling that accompanied the Beneful
18 dog food did not warn the Minnesota Plaintiff and the members of the Minnesota Class of the
19 dangers of feeding Beneful to their dogs.

20 443. Purina finally breached its implied warranty of merchantability to the Minnesota
21 Plaintiff and the members of the Minnesota Class because Beneful did not conform to the
22 promises and affirmations of fact set forth on its container and label, as described above.
23 Specifically, Beneful did not constitute safe, healthy food, was not “healthy,” did not offer
24 “great nutrition” to dogs, did not promote “healthy growth,” and customers’ satisfaction was
25 not guaranteed.

26 444. Pursuant to 15 U.S.C. § 2310(d)(1), the Minnesota Plaintiff and the members of
27 the Minnesota Class are entitled to recover the following damages proximately caused to them

by Purina's breach of the implied warranty of merchantability: the difference in value between Beneful as warranted (the full purchase price) and Beneful as actually delivered (\$0.00, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

COUNT 40

Asserted Against Purina on Behalf of the Minnesota Plaintiff and the Minnesota Class (Assumpsit/Money Had and Received/Unjust Enrichment/Restitution)

445. The Minnesota Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth herein verbatim.

446. The Minnesota Plaintiff brings this action on behalf of herself and the Minnesota Class.

447. The Minnesota Plaintiff and the Minnesota Class members conferred a benefit on Purina in the form of the gross revenues it derived from their purchases of Beneful.

448. Purina had an appreciation or knowledge of the benefit conferred on it by the Minnesota Plaintiff and the Minnesota Class members.

449. Purina knowingly accepted and retained the benefit in the amount of the gross revenues it earned from sales of Beneful to the Minnesota Plaintiff and the Minnesota Class members.

450. Purina has thereby profited by retaining the benefit under circumstances which would make it inequitable for Purina to be permitted to retain the benefit.

451. The Minnesota Plaintiff and the Minnesota Class members are entitled to restitution of the entire amount Purina received from Purina's sales of Beneful to them.

I. MONTANA CAUSES OF ACTION

COUNT 41

Asserted Against Purina on Behalf of the Montana Plaintiff and the Montana Class (Breach of Express Warranty)

452. The Montana Plaintiff and the Montana Class members incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

1 453. The Montana Plaintiff brings this action on behalf of himself and the Montana
2 Class.

3 454. Purina constitutes a “merchant” and a “seller” in connection with its sales of
4 Beneful, as those terms are defined in the Montana Uniform Commercial Code. Further, the
5 Montana Plaintiff and the Montana Class members constitute “buyers” in connection with their
6 purchases of Beneful from Purina, as that term is defined in the Montana Uniform Commercial
7 Code. Further, Beneful constitutes “goods,” as that term is defined in the Montana Uniform
8 Commercial Code. As these are consumer transactions, no direct contractual relationship is
9 required between Purina and the Montana Class members.

10 455. By affirmations of fact, promises and descriptions made on Beneful’s packaging
11 and which relate to such goods, Purina provided Plaintiff and the members of the Montana
12 Class with written express warranties before or at the time of purchase, including the following:

- 13 p) “Satisfaction Guaranteed. If you’re not happy, we’re not happy.
14 Complete satisfaction or your money back....”
15 q) “At Purina, we’re unconditionally devoted to pets. We’ve dedicated
16 over 80 years to developing the high-quality products that satisfy the
17 needs of dogs and cats.”
18 r) “100% Complete and Balanced Nutrition”;
19 s) “Made with wholesome rice, real chicken, soy, and accented with
20 veggies and apples, it has the complete nutrition adult dogs need....”
21 t) “Healthy”
22
23

24 456. These affirmations of facts and promises made by Purina to the Montana
25 Plaintiff and the Montana Class members related to Beneful and became part of the bases of the
26 bargains between them and Purina and thereby created express warranties that Beneful would
27 conform to those affirmations and promises. Furthermore, the aforementioned descriptions of

1 Beneful were part of the bases of the bargains for the purchases of Beneful between Purina and
2 the Montana Plaintiff and the Montana Class members and they created an express warranty
3 that the goods would conform to those descriptions. As previously noted, because Beneful
4 contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead,
5 or Arsenic, it did not conform to the affirmations, promises and descriptions previously
6 mentioned, resulting in breaches of express warranties.

7 457. Beneful was marketed directly to consumers by Purina, came in sealed
8 packages, and did not change from the time it left Purina's possession until it was purchased by
9 consumers in stores.

10 458. The Montana Plaintiff has complied with all conditions precedent to filing this
11 breach of warranty claim, including providing timely notice of these breaches of warranty to
12 Purina on behalf of himself and the Montana Class within a reasonable time after discovering
13 that Beneful might have proximately caused the damages described herein. Such notice was
14 reasonable based on the circumstances of this case, including the fact Purina has engaged in a
15 campaign to prevent other affected consumers from publicly discussing similar claims while at
16 the same time expressly denying any relationship between the consumption of Beneful and the
17 injuries here at issue. Alternatively, this pleading constitutes adequate notice on behalf of the
18 Montana Plaintiff and the Montana Class. Alternatively, notice need not have been given to
19 Purina because it had actual notice of its breaches of warranty as to the Montana Plaintiff and
20 the Montana Class.

21 459. As a proximate result of Purina's breach of express warranties, the Montana
22 Plaintiff and the members of the Montana Class have suffered actual damages as follows: the
23 difference in value between the value of the Beneful as expressly warranted (the full purchase
24 prices) and the value of the Beneful as actually accepted and delivered (\$0, because consumers
25 would not have paid anything for it had they known it contained Industrial Grade Glycols,
26 Mycotoxins, Lead, or Arsenic); i.e., the full purchase price of the Beneful;

COUNT 42**Asserted as to the Montana Plaintiff and the Montana Class**
(Breach of the Implied Warranty of Merchantability, R.C.M. § 87A-2-314)

460. The Montana Plaintiff and the Montana Class members incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

461. Purina constituted both a “merchant” and a “seller” in connection with its sale of Beneful to the Montana Plaintiff and the Montana Class, as those terms are defined in the Montana Uniform Commercial Code. Further, the Montana Plaintiff and the Montana Class members constituted “buyers” as that term is defined in the Montana Uniform Commercial Code. Beneful, itself, constituted “goods,” as that term is defined in the Montana Uniform Commercial Code. Particularly as this is a consumer transaction, no direct contractual relationship is required between the Montana Plaintiff, the Montana Class members and Purina.

462. As part of the sales to the Montana Plaintiff and the Montana Class, Purina impliedly warranted that Beneful was merchantable. Among other things, to be merchantable, Beneful had to pass without objection in the trade under the contract description, be fit for the ordinary purposes for which Beneful is used, be adequately contained, packaged and labeled, and conform to the promises or affirmations of fact made on the containers or labels.

463. Beneful breached the warranty of implied merchantability initially because it would not pass without objection in the trade under the contract description. Specifically, dog food that contains Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic will not pass without objection in the trade under the description of dog food, nor could such a defect reasonably be discovered by any reasonable form of examination prior to use or consumption. In addition, Purina breached the implied warranty as to Beneful, because Beneful was not fit for the ordinary purpose for which it is used, which is safely feeding dogs. Further, Purina breached the implied warranty of merchantability because Beneful was not adequately contained, packaged or labeled because it failed to warn of the dangers of its consumption by dogs. The Montana Plaintiff and the Montana Class members' reasonable expectations as to the function of such products was that they would not injure or

1 kill their dogs once consumed, or would not contain or have a probability, likelihood or
2 tendency to contain Industrial Grade Glycols, which are not approved for use in food,
3 Mycotoxins, Lead, or Arsenic.

4 464. At the time of sale to the Montana Plaintiff and the Montana Class and
5 throughout the Class Period, Purina made promises and affirmations of fact on the packaging of
6 Beneful to the effect that Beneful was safe for consumption by pets. Said representations
7 included, but were not limited to, Beneful being “healthy,” offering “great nutrition” to dogs,
8 promoting “healthy growth” and that customers’ satisfaction would be guaranteed.

9 465. However, Purina breached the implied warranty of merchantability because
10 Beneful did not conform to those promises and affirmations of fact, in that Beneful was in fact
11 not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth” and
12 customers’ satisfaction was not guaranteed. For the reasons set forth above Beneful was
13 defective, such defects were present when Beneful left Purina’s control, and such defects
14 caused the Montana Plaintiff and the Montana Class members' injuries.

15 466. Within a reasonable time after the discovery of Purina’s breach of the implied
16 warranty and the possible link of Beneful to the illness and death of their pet, the Montana
17 Plaintiff gave notice of such breaches on behalf of himself and the Montana Class.
18 Alternatively, this pleading constitutes adequate notice on behalf of the Montana Plaintiff and
19 the Montana Class. Alternatively, no notice was required because Purina was already aware of
20 its breaches as to the Montana Plaintiff and the Montana Class.

21 467. As a proximate result of this breach of implied warranty by Purina, the Montana
22 Plaintiff and the Montana Class have been damaged in the following manner: by the difference
23 in value between the value of the Beneful as warranted (the full purchase price) and the value
24 of the Beneful as actually delivered (\$0, because consumers would not have paid anything for it
25 had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

COUNT 43**Asserted Against Purina on Behalf of the Montana Plaintiff and the Montana Class
(Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et. seq.* (“MMWA”))**

468. The Montana Plaintiff and the Montana Class members incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

469. The Montana Plaintiff brings this claim on behalf of himself and the Montana Class.

470. At all times relevant hereto, there was in full force and effect the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (the “MMWA”).

471. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

472. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

473. The Montana Plaintiff and the members of the Montana Class are “consumers” as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons entitled under applicable state law to enforce against the warrantor the obligations of its implied warranty.

474. Pursuant to 15 U.S.C. § 2310(e), the Montana Plaintiff and the members of the Montana Class are entitled to bring this action and are not required to give Purina notice and an opportunity to cure until such time as the Court determines the representative capacity of the Montana Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure. However, the Montana Plaintiff already gave any required notice on behalf of himself and the Montana Classy letter dated May 13, 2015.

475. In connection with its sale of Beneful, Purina gave an implied warranty as defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its ordinary purpose as safe dog food, (b) would pass without objection in the trade under its contract description as dog food, (c) was adequately contained, packaged and labeled, and (d) conformed to the promises and affirmations of fact set forth on its container and label.

476. Purina is liable to the Montana Plaintiff and the Montana Class pursuant to 15 U.S.C. § 2310(d)(1), because it breached the implied warranty of merchantability.

1 477. Purina initially breached the implied warranty of merchantability as to the
2 Montana Plaintiff and the members of the Montana Class because Beneful was not fit for the
3 ordinary purposes for which it is used—a safe, healthy dog food. Specifically, Beneful
4 contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead,
5 or Arsenic, which made it unfit for its ordinary purpose of providing safe, healthy dog food. In
6 fact, Beneful has caused injury and death to thousands of dogs.

7 478. Purina further breached its implied warranty of merchantability to the Montana
8 Plaintiff and the members of the Montana Class because Beneful would not pass without
9 objection in the trade under its contract description as dog food, as it contained Industrial Grade
10 Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic.

11 479. Purina further breached its implied warranty of merchantability to the Montana
12 Plaintiff and the members of the Montana Class because Beneful was not adequately contained,
13 packaged, and labeled. The directions and labeling that accompanied the Beneful dog food did
14 not warn the Montana Plaintiff and the members of the Montana Class of the dangers of
15 feeding Beneful to their dogs.

16 480. Purina further breached its implied warranty of merchantability to the Montana
17 Plaintiff and the members of the Montana Class because Beneful did not conform to the
18 promises and affirmations of fact set forth on its container and label, as described above.
19 Specifically, Beneful did not constitute safe, healthy food, was not “healthy,” did not offer
20 “great nutrition” to dogs, did not promote “healthy growth,” and customers’ satisfaction was
21 not guaranteed.

22 481. Pursuant to 15 U.S.C. § 2310(d)(1), the Montana Plaintiff and the members of
23 the Montana Class are entitled to recover the following damages proximately caused to them by
24 Purina’s breach of the implied warranty of merchantability: the difference in value between the
25 Beneful as warranted (the full purchase price) and the Beneful as actually delivered (\$0.00,
26 because consumers would not have paid anything for it had they known it contained Industrial
27 Grade Glycols, Mycotoxins, Lead, or Arsenic).

**Asserted Against Purina on Behalf of the Montana Plaintiff and the Montana Class
(Negligence)**

484. Purina owed a duty of care to the Montana Plaintiff and the Montana Class to provide pet food that was safe for consumption by dogs, free from toxins that could have harmful effects if consumed.

486. Purina should have known that Beneful posed a risk of harm to dogs; that purchasers of Beneful, including the Montana Plaintiff and the Montana Class, would not recognize the risk; and that consumption of Beneful by dogs would foreseeably result in injury and death to those dogs, constituting property damage to the Montana Plaintiff and the Montana Class beyond and in addition to their damages from purchasing the worthless Beneful.

487. As a proximate result of Purina's negligent acts alleged herein, the Montana Plaintiff and the Montana Class suffered injury to property, specifically in the illness and deaths of their dogs and the expenses incurred therewith.

COUNT 45**Asserted Against Purina on Behalf of the Montana Plaintiff and the Montana Class
(Strict Products Liability)**

488. The Montana Plaintiff and the Montana Class members incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

489. Purina designed, manufactured, distributed and sold Beneful, which was in an unsafe condition to the ultimate consumer of such products at time of sale because it contained toxins and had other harmful effects as alleged in the factual section above.

490. The existence of Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic in Beneful was, at all times material hereto, an unreasonably dangerous defect and/or condition. The failure of Purina to warn on its package of the dangerousness of Beneful also constituted an unreasonably dangerous defect and/or condition.

491. These unreasonably dangerous defects and/or conditions existed at the time Beneful left Purina's control and thus are directly traceable to Purina.

492. Beneful came in sealed packages, and both the product and its packaging did not change from the time it left Purina's possession through the time it arrived in stores to be sold to consumers and consumers purchased and took possession of it.

493. The unreasonably dangerous defects and/or conditions of Beneful proximately caused injury and death to dogs, constituting property damage to the Montana Plaintiff and the Montana Class beyond and in addition to their damages from purchasing the worthless Beneful.

494. Accordingly, Purina is strictly liable for the damages caused to the Montana Plaintiff and the Montana Class by the consumption of the unreasonably dangerous Beneful, specifically the illness and deaths of their dogs and the expenses incurred therewith.

COUNT 46**Asserted Against Purina on Behalf of the Montana Plaintiff and the Montana Class
(Assumpsit/Money Had and Received/Unjust Enrichment/Restitution)**

495. The Montana Plaintiff and the Montana Class members incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

1 503. As set forth in detail above, Purina disseminated unhealthy and dangerous
2 Beneful dog food despite making numerous uniform material representations about the
3 guaranteed and healthy nature of the Product, and omitted and willfully failed to disclose
4 material facts to the contrary, including that Beneful contains Industrial Grade Glycols, which
5 are not approved for use in food, Mycotoxins, Lead, or Arsenic, despite having learned of the
6 potential presence of dangerous levels of ingredients and mycotoxins in the Beneful dog food
7 prior to such sales. In so doing, Purina engaged in and/or caused others to engage in deceptive
8 or unfair acts in the conduct of any trade or commerce, in violation of the Montana Unfair
9 Trade Practices and Consumer Protection Act.

10 504. These unfair or deceptive trade practices occurred in the course of Purina
11 conducting its business, trade or commerce, which included the advertising, offering for sale,
12 sale, or distribution of Beneful, directly or indirectly affecting the people of Montana.

13 505. The Montana Plaintiff and the Montana Class members would not have
14 purchased Beneful products at the prices that they did, if at all, but for Purina's wrongful failure
15 to disclose Industrial Grade Glycols, which are not approved for use in food, Mycotoxins,
16 Lead, or Arsenic.

17 506. As a result of the commission of these unfair or deceptive trade practices and
18 failure to disclose the material omitted facts by Purina, the Montana Plaintiff and the Montana
19 Class members were injured and suffered an ascertainable loss of money or property. Based on
20 the nature of the conduct of Purina as set forth above, they thus are entitled to actual, treble or
21 statutory damages or economic losses to the extent permitted by law and in amounts to be
22 determined at trial, which include the difference in value between the value of the Beneful as
23 expressly warranted (the full purchase prices) and the value of the Beneful as actually accepted
24 and delivered (\$0, because it was unsafe and unfit for its ordinary purpose and thus reduced or
25 eliminated its value); i.e., the full purchase price of the Beneful.

J. NEW JERSEY CAUSES OF ACTION

COUNT 48

Asserted as to the New Jersey Plaintiff and the New Jersey Class

**(Violations of the New Jersey Consumer Fraud Act
N.J. Stat. Ann. § 56:8-19)**

507. The New Jersey Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

508. The New Jersey Plaintiff brings this claim on her own behalf and on behalf of the New Jersey Class.

509. Purina affirmatively misrepresented that Beneful was safe for consumption by pets. Said misrepresentations include, but are not limited to, misrepresentations on its packaging, such as Beneful being “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that customers’ satisfaction would be guaranteed. Beneful was, in fact, unsafe for dogs, causing injury and death to thousands.

510. Purina’s claims were thus false, misleading, and/or deceptive.

511. Purina’s affirmative misrepresentations constituted an unconscionable commercial practice, deception, fraud, false promise, and/or misrepresentation as to the nature of the goods, in violation of the New Jersey Consumer Fraud Act.

512. Moreover, Purina failed to disclose that Beneful contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic.

513. This material omission also constituted a violation of the New Jersey Consumer Fraud Act.

514. The New Jersey Plaintiff and the New Jersey Class members suffered ascertainable losses caused by Purina’s misrepresentations and material omissions because they paid the purchase price, or paid a price premium, due to the misleading and false advertising and deceptive promises of the safety of Beneful, when, in fact, Beneful was unsafe for pets to consume. Simply put, the New Jersey Plaintiff and the New Jersey Class members paid for the

1 represented benefits of Beneful and did not get what they paid for. Indeed, their purchases
2 were of no value because Beneful was unsafe for their pets to consume.

3 515. Beneful, which was designed, manufactured, advertised, marketed, and sold by
4 Purina, is considered “merchandise” within the meaning of the New Jersey Consumer Fraud
5 Act, and the New Jersey Plaintiff and the New Jersey Class are “persons” and “consumers”
6 within the meaning of the New Jersey Consumer Fraud Act, such that they demand judgment
7 against Purina for the statutory remedies made available under the New Jersey Consumer Fraud
8 Act and such additional relief as the Court may deem appropriate or to which the New Jersey
9 Plaintiff and the New Jersey Class may be entitled, pursuant to N.J.S.A. § 56:8-19.

10 516. More specifically, the New Jersey Plaintiff and the New Jersey Class are entitled
11 to recover the following, among other possible relief: the difference in value between the value
12 of the Beneful as represented (the full purchase price) and the value of the Beneful as delivered
13 (\$0, because consumers would not have paid anything for it had they known it contained
14 Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

15 517. New Jersey law also provides protection to purchasers of animal food from
16 unfair, deceptive and unconscionable practices. N.J. Stat. § 4:4-20.6 (Misbranding), N.J. Stat.
17 § 4:4-20.7 (Adulteration), and N.J. Stat. § 4:4-20.8 (Prohibited Acts).

18 518. A commercial feed is adulterated if it “bears or contains any poisonous or
19 deleterious substance which may render it injurious to health;” N.J. Stat. § 4:4-20.7, and a
20 commercial feed is misbranded if its “labeling is false or misleading in any particular.” N.J.
21 Stat. § 4:4-20.6. New Jersey law prohibits the “manufacture or distribution of any commercial
22 feed that is adulterated or misbranded.” N.J. Stat. § 4:4-20.8.

23 519. Beneful contains poisonous, deleterious or nonnutritive substances, which
24 injured the dogs of the New Jersey Plaintiff and the New Jersey Class members, and the
25 composition or quality of Beneful falls below what is purported or represented by its label, as
26 set forth above.
27

521. Plaintiff and the other members of the New Jersey Class further seek to enjoin such unlawful deceptive acts and practices as described above. Each of the New Jersey Class members will be irreparably harmed unless the unlawful actions of Purina are enjoined, in that Purina will continue to falsely and misleadingly market and advertise and represent on its packaging the healthy nature of Beneful. Towards that end, the New Jersey Plaintiff and the New Jersey Class request an order granting them injunctive relief requiring removal of the unsafe product from retail outlets, corrective disclosures and/or disclaimers on the labeling and advertising of Beneful and/or the removal of the harmful ingredients before sales resume.

522. Absent injunctive relief, Purina will continue to manufacture and sell unsafe Beneful without warning to consumers of its harmful effects.

523. In this regard, Purina has violated, and continues to violate, the New Jersey Consumer Fraud Act, which makes deception, fraud, false promise, and/or misrepresentation of goods unlawful. As a direct and proximate result of Purina's violation of the New Jersey Consumer Fraud Act, as described above, the New Jersey Plaintiff and the members of the New Jersey Class have suffered damages, as set forth above.

COUNT 49

**Asserted as to the New Jersey Plaintiff and the New Jersey Class
(Breach of Express Warranty
N.J. Stat. Ann. § 12A:2-313)**

524. The New Jersey Plaintiff incorporates herein all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

525. The New Jersey Plaintiff brings this claim on her own behalf and on behalf of the New Jersey Class.

1 526. Purina constituted both a “merchant” and a “seller” in connection with its sale of
2 Beneful to the New Jersey Plaintiff and the New Jersey Class, as those terms are defined in the
3 New Jersey Uniform Commercial Code. Further, the New Jersey Plaintiff and the New Jersey
4 Class members constituted “buyers” as that term is defined in the New Jersey Uniform
5 Commercial Code. Beneful, itself, constituted “goods,” as that term is defined in the New
6 Jersey Uniform Commercial Code.

7 527. Under section 2-313 of the Uniform Commercial Code, the statements on
8 Purina’s packaging created express warranties, including that Beneful was safe for
9 consumption by pets. Said statements include, but are not limited to, Beneful being “healthy,”
10 offering “great nutrition” to dogs, promoting “healthy growth” and that customers’ satisfaction
11 would be guaranteed.
12

13 528. The statements regarding Beneful described in detail above constituted
14 affirmations of fact and promises relating to Beneful that became part of the basis for the
15 bargain for the purchase of Beneful and created an express warranty that Beneful would
16 conform to those affirmations of fact and promises.
17

18 529. Likewise, the statements as described in detail above constituted descriptions of
19 Beneful that became part of the basis of the bargain for the purchase of Beneful that created an
20 express warranty that Beneful would conform to the descriptions.

21 530. Beneful contained Industrial Grade Glycols, which are not approved for use in
22 food, Mycotoxins, Lead, or Arsenic, which constituted a breach of these express warranties.
23

24 531. The New Jersey Plaintiff and the New Jersey Class members were injured as a
25 direct and proximate result of Purina’s aforementioned breaches as follows: the difference in
26 value between the value of the Beneful as warranted (its full purchase price) and the value of
27

1 the Beneful as actually delivered (\$0, because consumers would not have paid anything for it
2 had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

3 532. Within a reasonable time after the discovery of Purina's breaches and the New
4 Jersey Plaintiff gave notice of the breach on her own behalf and on behalf of the New Jersey
5 Class. Alternatively, this pleading constitutes a sufficient notice of breach. Alternatively, no
6 notice was required because Purina specifically knew of its breaches of warranty as to the New
7 Jersey Plaintiff and the New Jersey Class.

8
9 533. The New Jersey Plaintiff and the members of the New Jersey Class demand
10 judgment against Purina for damages, as set forth above, plus interests, costs and such
11 additional relief as the Court may deem appropriate or to which the New Jersey Plaintiff and
12 the New Jersey Class members may be entitled.

13 **COUNT 50**
14 **Asserted as to the New Jersey Plaintiff and the New Jersey Class**
15 **(Breach of the Implied Warranty of Merchantability**
N.J. Stat. Ann. § 12A:2-314)

16 534. The New Jersey Plaintiff incorporates herein the allegations of all of the
17 preceding and subsequent paragraphs as if fully set forth here verbatim.

18 535. The New Jersey Plaintiff brings this claim on behalf of herself and the New
19 Jersey Class.

20 536. Purina constituted both a "merchant" and a "seller" in connection with its sale of
21 Beneful to the New Jersey Plaintiff and the New Jersey Class, as those terms are defined in the
22 New Jersey Uniform Commercial Code. Further, the New Jersey Plaintiff and the New Jersey
23 Class members constituted "buyers" as that term is defined in the New Jersey Uniform
24 Commercial Code. Beneful, itself, constituted "goods," as that term is defined in the New
25 Jersey Uniform Commercial Code.

26 537. As part of the sales to the New Jersey Plaintiff and the New Jersey Class, Purina
27 impliedly warranted that Beneful was merchantable. Among other things, to be merchantable,

1 the Beneful had to pass without objection in the trade under the contract description, be fit for
2 the ordinary purposes for which Beneful is used, be adequately contained, packaged and
3 labeled as the agreements may have required, and conform to the promises or affirmations of
4 fact made on the containers or labels.

5 538. Beneful breached the warranty of implied merchantability initially because it
6 would not pass without objection in the trade under the contract description. Specifically, dog
7 food that contains Industrial Grade Glycols, which are not approved for use in food,
8 Mycotoxins, Lead, or Arsenic will not pass without objection in the trade under the description
9 of dog food. In addition, Purina breached the implied warranty as to Beneful, because Beneful
10 was not fit for the ordinary purpose for which it is used, safely feeding dogs. Further, Purina
11 breached the implied warranty of merchantability because Beneful was not adequately labeled
12 as the agreements might have required because it failed to warn of the dangers of its
13 consumption by dogs.

14 539. At the time of sale throughout the Class Period, Purina made promises and
15 affirmations of fact on the packaging of Beneful to the effect that Beneful was safe for
16 consumption by pets. Said representations included, but were not limited to, Beneful being
17 “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that customers’
18 satisfaction would be guaranteed.

19 540. However, Purina breached the implied warranty of merchantability because
20 Beneful did not conform to those promises and affirmations of fact in that Beneful was in fact
21 not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth” and
22 customers’ satisfaction was not guaranteed.

23 541. Within a reasonable time after the discovery of Purina’s breach, the New Jersey
24 Plaintiff gave notice of the breaches on behalf of herself and the New Jersey Class.
25 Alternatively, this pleading constitutes sufficient notice of breach. Alternatively, no notice was
26 required because Purina was already aware of its breaches as to the New Jersey Plaintiff and
27 the New Jersey Class.

542. As a proximate result of this breach of warranty by Purina, the New Jersey Plaintiff and the New Jersey Class have been damaged in the following manners: by the difference in value between the value of the Beneful as warranted (the full purchase price) and the value of the Beneful as actually delivered (\$0, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

COUNT 51

Asserted Against Purina on Behalf of the New Jersey Plaintiff and the New Jersey Class (Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et. seq.* (“MMWA”))

543. The New Jersey Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

544. The New Jersey Plaintiff brings this claim on behalf of herself and the New Jersey Class.

545. At all times relevant hereto, there was in full force and effect the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (the “MMWA”).

546. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

547. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

548. The New Jersey Plaintiff and the members of the New Jersey Class are “consumers” as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons entitled under applicable state law to enforce against the warrantor the obligations of its implied warranty.

549. Pursuant to 15 U.S.C. § 2310(e), the New Jersey Plaintiff and the members of the New Jersey Class are entitled to bring this class action and are not required to give Purina notice and an opportunity to cure until such time as the Court determines the representative capacity of the New Jersey Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure. However, New Jersey Plaintiff, Armstrong, already gave the required notice on behalf of herself and the New Jersey Class by letter dated May 15, 2015.

1 550. In connection with its sale of Beneful, Purina gave an implied warranty as
2 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
3 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
4 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
5 contract description as dog food, (c) was adequately contained, packaged and labeled as the
6 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
7 container and label.

8 551. Purina is liable to the New Jersey Plaintiff and the New Jersey Class pursuant to
9 15 U.S.C. § 2310(d)(1), because it breached the implied warranty of merchantability.

10 552. Purina initially breached the implied warranty of merchantability as to the New
11 Jersey Plaintiff and the members of the New Jersey Class because Beneful was not fit for the
12 ordinary purposes for which it is used—a safe, healthy dog food. Specifically, Beneful
13 contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead,
14 or Arsenic which made it unfit for its ordinary purpose of providing safe, healthy dog food. In
15 fact, Beneful has caused injury and death to thousands of dogs.

16 553. Purina further breached its implied warranty of merchantability to the New
17 Jersey Plaintiff and the members of the New Jersey Class because Beneful would not pass
18 without objection in the trade under its contract description as dog food, as it contained
19 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
20 Arsenic.

21 554. Purina further breached its implied warranty of merchantability to the New
22 Jersey Plaintiff and the members of the New Jersey Class because Beneful was not adequately
23 contained, packaged, and labeled. The directions and labeling that accompanied the Beneful
24 dog food did not warn the New Jersey Plaintiff and the members of the New Jersey Class of the
25 dangers of feeding Beneful to their dogs.

26 555. Purina finally breached its implied warranty of merchantability to the New
27 Jersey Plaintiff and the members of the New Jersey Class because Beneful did not conform to

1 the promises and affirmations of fact set forth on its container and label, as described above.
 2 Specifically, Beneful did not constitute safe, healthy food, was not “healthy,” did not offer
 3 “great nutrition” to dogs, did not promote “healthy growth,” and customers’ satisfaction was
 4 not guaranteed.

5 556. Pursuant to 15 U.S.C. § 2310(d)(1), the New Jersey Plaintiff and the members of
 6 the New Jersey Class are entitled to recover the following damages proximately caused to them
 7 by Purina’s breach of the implied warranty of merchantability: the difference in value between
 8 the Beneful as warranted (the full purchase price) and the Beneful as actually delivered (\$0.00,
 9 because consumers would not have paid anything for it had they known it contained Industrial
 10 Grade Glycols, Mycotoxins, Lead, or Arsenic).

11 557. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the New Jersey Plaintiff and the
 12 members of the New Jersey Class are entitled to recover a sum equal to the aggregate amount
 13 of costs and expenses (including attorneys’ fees based on actual time expended) determined by
 14 the Court to have been reasonably incurred by the New Jersey Plaintiff and the members of the
 15 New Jersey Class in connection with the commencement and prosecution of this action.

16 **COUNT 52**

17 **Asserted as to the New Jersey Plaintiff and the New Jersey Class** 18 **(Assumpsit/Money Had and Received/Unjust Enrichment/Restitution)**

19 558. The New Jersey Plaintiff incorporates herein the allegations of all of the
 20 preceding and subsequent paragraphs as if fully set forth here verbatim.

21 559. The New Jersey Plaintiff brings this claim on her own behalf and on behalf of
 22 the New Jersey Class.

23 560. The New Jersey Plaintiff and the New Jersey Class members conferred a benefit
 24 on Purina by purchasing Beneful in the form of the gross revenues Purina received from those
 25 sales.

26 561. Purina has been unjustly enriched by retaining the gross revenues derived from
 27 the New Jersey Plaintiff and the New Jersey Class members’ purchases of Beneful, which
 retention under these circumstances is unjust and inequitable.

**Asserted Against Purina on Behalf of the New York Plaintiffs and the New York Class
(Breach of Implied Warranty of Merchantability)**

567. Beneful breached the warranty of implied merchantability initially because it would not pass without objection in the trade under the contract description. Specifically, dog food that contains Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic will not pass without objection in the trade under the description

1 of dog food. In addition, Purina breached the implied warranty as to Beneful, because Beneful
2 was not fit for the ordinary purpose for which it is used, safely feeding dogs. Further, Purina
3 breached the implied warranty of merchantability because Beneful was not adequately labeled
4 as the agreements might have required because it failed to warn of the dangers of its
5 consumption by dogs.

6 568. At the time of sale throughout the Class Period, Purina made promises and
7 affirmations of fact on the containers and labels of Beneful to the effect that Beneful was safe
8 for consumption by pets. Said representations included, but were not limited to, Beneful being
9 “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that customers’
10 satisfaction would be guaranteed.

11 569. However, Purina breached the implied warranty of merchantability because
12 Beneful did not conform to those promises and affirmations of fact in that Beneful was in fact
13 not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth” and
14 customers’ satisfaction was not guaranteed.

15 570. Within a reasonable time after the discovery of Purina’s breach, the New York
16 Plaintiffs gave notice of the breaches on behalf of themselves and the New York Class.
17 Alternatively, this pleading constitutes sufficient notice of breach. Alternatively, no notice was
18 required because Purina specifically knew of its breaches of warranty as to the New York
19 Plaintiffs and the New York Class.

20 571. As a proximate result of this breach of warranty by Purina, the New York
21 Plaintiffs and the New York Class have been damaged in the following manners: by the
22 difference in value between the value of the Beneful as warranted (the full purchase price) and
23 the value of the Beneful as actually delivered (\$0, because consumers would not have paid
24 anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or
25 Arsenic).

COUNT 54**Asserted Against Purina on Behalf of the New York Plaintiffs and the New York Class
(Breach of Express Warranty)**

572. The New York Plaintiffs incorporates herein all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

573. The New York Plaintiffs brings this claim on their own behalves and on behalf of the New York Class.

574. Purina constituted both a “merchant” and a “seller” in connection with its sale of Beneful to the New York Plaintiffs and the New York Class, as those terms are defined in the New York Uniform Commercial Code. Further, the New York Plaintiffs and the New York Class members constituted “buyers” as that term is defined in the New York Uniform Commercial Code. Beneful, itself, constituted “goods,” as that term is defined in the New York Uniform Commercial Code.

575. Under section 2-313 of the Uniform Commercial Code, the statements on Purina’s packaging created express warranties, including that Beneful was safe for consumption by pets. Said statements include, but are not limited to, Beneful being “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that customers’ satisfaction would be guaranteed.

576. The statements regarding Beneful described in detail above constituted affirmations of fact and promises relating to Beneful that became part of the basis for the bargain for the purchase of Beneful and created an express warranty that Beneful would conform to those affirmations of fact and promises.

577. Likewise, the statements as described in detail above constituted descriptions of Beneful that became part of the basis of the bargain for the purchase of Beneful that created an express warranty that Beneful would conform to the descriptions.

578. Beneful contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic, constituting a breach of these express warranties.

579. The New York Plaintiffs and the New York Class members were injured as a direct and proximate result of Purina's aforementioned breaches as follows: by the difference in value between the value of the Beneful as warranted (its full purchase price) and the value of the Beneful as actually delivered (\$0, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

580. Within a reasonable time after the discovery of Purina's breaches, the New York Plaintiffs gave notice of the breach on their own behalf and on behalf of the New York Class. Alternatively, this pleading constitutes a sufficient notice of breach. Alternatively, no notice was required because Purina specifically knew of its breaches of warranty as to the New York Plaintiffs and the New York Class.

581. The New York Plaintiffs and the members of the New York Class demand judgment against Purina for damages, as set forth above, plus interests, costs and such additional relief as the Court may deem appropriate or to which the New York Plaintiffs and the New York Class members may be entitled.

COUNT 55

Asserted Against Purina on Behalf of the New York Plaintiffs and the New York Class (Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et. seq.* ("MMWA"))

582. The New York Plaintiffs incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

583. The New York Plaintiffs brings this claim on behalf of themselves and the New York Class.

584. At all times relevant hereto, there was in full force and effect the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (the "MMWA").

585. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

586. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

587. The New York Plaintiffs and the members of the New York Class are "consumers" as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons

1 entitled under applicable state law to enforce against the warrantor the obligations of its implied
2 warranty.

3 588. Pursuant to 15 U.S.C. § 2310(e), the New York Plaintiffs and the members of
4 the New York Class are entitled to bring this class action and are not required to give Purina
5 notice and an opportunity to cure until such time as the Court determines the representative
6 capacity of the New York Plaintiffs pursuant to Rule 23 of the Federal Rules of Civil
7 Procedure. However, New York Plaintiffs Normand already gave the required notice on behalf
8 of themselves and the New York Class by letter dated May 22, 2015 and Plaintiff Hickey
9 already gave the required notice on behalf of themselves and the New York Class by letter
10 dated May 28, 2015.

11 589. In connection with its sale of Beneful, Purina gave an implied warranty as
12 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
13 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
14 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
15 contract description as dog food, (c) was adequately contained, packaged and labeled as the
16 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
17 container and label.

18 590. Purina is liable to the New York Plaintiffs and the New York Class pursuant to
19 15 U.S.C. § 2310(d)(1), because it breached the implied warranty of merchantability.

20 591. Purina initially breached the implied warranty of merchantability as to the New
21 York Plaintiffs and the members of the New York Class because Beneful was not fit for the
22 ordinary purposes for which it is used—a safe, healthy dog food. Specifically, Beneful
23 contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead,
24 or Arsenic, which made it unfit for its ordinary purpose of providing safe, healthy dog food. In
25 fact, Beneful has caused injury and death to thousands of dogs.

26 592. Purina further breached its implied warranty of merchantability to the New York
27 Plaintiff and the members of the New York Class because Beneful would not pass without

1 objection in the trade under its contract description as dog food, as it contained Industrial Grade
2 Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic.

3 593. Purina further breached its implied warranty of merchantability to the New York
4 Plaintiffs and the members of the New York Class because Beneful was not adequately
5 contained, packaged, and labeled. The directions and labeling that accompanied the Beneful
6 dog food did not warn the New York Plaintiffs and the members of the New York Class of the
7 dangers of feeding Beneful to their dogs.

8 594. Purina finally breached its implied warranty of merchantability to the New York
9 Plaintiffs and the members of the New York Class because Beneful did not conform to the
10 promises and affirmations of fact set forth on its container and label, as described above.
11 Specifically, Beneful did not constitute safe, healthy food, was not “healthy,” did not offer
12 “great nutrition” to dogs, did not promote “healthy growth,” and customers’ satisfaction was
13 not guaranteed.

14 595. Pursuant to 15 U.S.C. § 2310(d)(1), the New York Plaintiffs and the members of
15 the New York Class are entitled to recover the following damages proximately caused to them
16 by Purina’s breach of the implied warranty of merchantability: the difference in value between
17 the Beneful as warranted (the full purchase price) and the Beneful as actually delivered (\$0.00,
18 because consumers would not have paid anything for it had they known it contained Industrial
19 Grade Glycols, Mycotoxins, Lead, or Arsenic).

20 596. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the New York Plaintiffs and the
21 members of the New York Class are entitled to recover a sum equal to the aggregate amount of
22 costs and expenses (including attorneys’ fees based on actual time expended) determined by the
23 Court to have been reasonably incurred by the New York Plaintiffs and the members of the
24 New York Class in connection with the commencement and prosecution of this action.
25
26
27

COUNT 56**Asserted Against Purina on Behalf of the New York Plaintiffs and the New York Class
(New York General Business Law (“GBL”) § 349 Deceptive Acts and Practices Unlawful)**

597. The New York Plaintiffs incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

598. The New York Plaintiffs and the members of the New York Class are consumers who purchased Beneful, which was designed, manufactured, marketed and distributed by Purina. They bring this action pursuant to New York Business Law Section 349.

599. Purina has engaged in deceptive practices in the sale of Beneful to consumers, including: (1) false and misleading marketing and advertising, including false representations on Beneful’s packaging concerning the safety and quality of Beneful, and (2) failing to disclose and/or concealing a known defect and risk, the dangers of Beneful.

600. Such actions and failures to act have caused direct, foreseeable and proximate damages to the New York Plaintiffs and the other members of the New York Class. Those damages include the difference in value between the value of Beneful as represented (the full purchase prices) and the value of Beneful as actually accepted and delivered (\$0, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

601. New York law also provides protection to purchasers of animal food from unfair, deceptive and unconscionable practices. N.Y. Agric. & Mkts. Law § 131 (Misbranding), N.Y. Agric. & Mkts. Law § 132 (Adulteration), and N.Y. Agric. & Mkts. Law § 133 (Prohibited Acts).

602. A commercial feed is adulterated if it “bears or contains any poisonous or deleterious substance which may render it injurious to health” (N.Y. Agric. & Mkts. Law § 132) and a commercial feed is misbranded if its “labeling is false or misleading in any particular.” N.Y. Agric. & Mkts. Law § 131. New York law prohibits the “manufacture or distribution of any commercial feed that is adulterated or misbranded.” N.Y. Agric. & Mkts. Law § 133.

1 603. Beneful contains poisonous, deleterious or nonnutritive substances, including
2 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
3 Arsenic, which Purina omitted from consumers. These substances injured the dogs of the New
4 York Plaintiffs and the New York Class members, and the composition or quality of Beneful
5 falls below what is purported or represented by its label, as set forth above.

6 604. Purina's conduct, as more fully described herein, violated N.Y. Agric. & Mkts.
7 Law § 131-133. Violations of these laws, which are designed to protect consumers like the
8 New York Plaintiffs and the New York Class, form an alternate basis for their GBL § 349
9 claim.

10 605. Plaintiffs and the other members of the New York Class further seek to enjoin
11 such unlawful deceptive acts and practices as described above. Each of the New York Class
12 members will be irreparably harmed unless the unlawful actions of the Purina are enjoined, in
13 that Purina will continue to falsely and misleadingly market and advertise and represent on its
14 packaging the healthy nature of Beneful, and omit that Beneful contains Industrial Grade
15 Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic. Towards that
16 end, the New York Plaintiffs and the New York Class request an order granting them injunctive
17 relief requiring removal of unsafe product from retail outlets, corrective disclosures and/or
18 disclaimers on the labeling and advertising of Beneful and/or the removal of the harmful
19 ingredients before sales resume.

20 606. Absent injunctive relief, Purina will continue to manufacture and sell unsafe
21 Beneful without warning to consumers of its harmful effects.

22 607. In this regard, Purina has violated, and continues to violate, section 349 of the
23 New York General Business Law (GBL), which makes deceptive acts and practices unlawful.
24 As a direct and proximate result of Purina's violation of GBL § 349 as described above, the
25 New York Plaintiffs and the members of the New York Class have suffered damages as set
26 forth above.
27

COUNT 57**Asserted Against Purina on Behalf of the New York Plaintiffs and the New York Class
(Unjust Enrichment under New York Common Law)**

608. The New York Plaintiffs incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

609. As a result of Purina's deceptive, fraudulent, and misleading labeling, advertising, marketing, and sale of Beneful, Purina was enriched at the expense of the New York Plaintiffs and the New York Class members by the gross revenues it derived from their payment of the purchase prices for Beneful.

610. Under the circumstances, it would be against equity and good conscience to permit Purina to retain the gross revenues that it derived from the sale of Beneful to the New York Plaintiffs and the New York Class members in light of the fact that Beneful was unsafe. Thus, it would be unjust or inequitable for Purina to retain those gross revenues without restitution to the New York Plaintiffs and the New York Class members of those amounts.

L. OHIO CAUSES OF ACTION**COUNT 58****Asserted as to the Ohio Plaintiff and the Ohio Class****(Violation of the Magnuson-Moss Warranty Act,
15 U.S.C. § 2301, et. seq. ("MMWA"))**

611. The Ohio Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

612. The Ohio Plaintiff brings this claim on behalf of herself and the Ohio Class.

613. At all times relevant hereto, there was in full force and effect the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et seq. (the "MMWA").

614. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

615. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

1 616. The Ohio Plaintiff and the members of the Ohio Class are “consumers” as
2 defined in 15 U.S.C. § 2301(3). They are consumers because they are persons entitled under
3 applicable state law to enforce against the warrantor the obligations of its implied warranty.

4 617. Pursuant to 15 U.S.C. § 2310(e), the Ohio Plaintiff and the members of the Ohio
5 Class are entitled to bring this class action and are not required to give Purina notice and an
6 opportunity to cure until such time as the Court determines the representative capacity of the
7 Ohio Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure. However, Ohio
8 Plaintiff Winters already gave the required notice on behalf of herself and the Ohio Class by
9 letter dated May 20, 2015.

10 618. In connection with its sale of Beneful, Purina gave an implied warranty as
11 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
12 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
13 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
14 contract description as dog food, (c) was adequately contained, packaged and labeled as the
15 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
16 container and label. Ohio Rev. Code § 1302.27.

17 619. Purina is liable to the Ohio Plaintiff and the Ohio Class pursuant to 15 U.S.C. §
18 2310(d)(1), because it breached the implied warranty of merchantability.

19 620. Purina initially breached the implied warranty of merchantability as to the Ohio
20 Plaintiff and the members of the Ohio Class because Beneful was not fit for the ordinary
21 purposes for which it is used—a safe, healthy dog food. Specifically, Beneful contained
22 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
23 Arsenic, which made it unfit for its ordinary purpose of providing safe, healthy dog food. In
24 fact, Beneful has caused injury and death to thousands of dogs.

25 621. Purina further breached its implied warranty of merchantability to the Ohio
26 Plaintiff and the members of the Ohio Class because Beneful would not pass without objection
27

1 in the trade under its contract description as dog food, as it contained Industrial Grade Glycols,
2 which are not approved for use in food, Mycotoxins, Lead, or Arsenic.

3 622. Purina further breached its implied warranty of merchantability to the Ohio
4 Plaintiff and the members of the Ohio Class because Beneful was not adequately contained,
5 packaged, and labeled. The directions and labeling that accompanied the Beneful dog food did
6 not warn the Ohio Plaintiff and the members of the Ohio Class of the dangers of feeding
7 Beneful to their dogs.

8 623. Purina finally breached its implied warranty of merchantability to the Ohio
9 Plaintiff and the members of the Ohio Class because Beneful did not conform to the promises
10 and affirmations of fact set forth on its container and label, as described above. Specifically,
11 Beneful did not constitute safe, healthy food, was not “healthy,” did not offer “great nutrition”
12 to dogs, did not promote “healthy growth,” and customers’ satisfaction was not guaranteed.

13 624. Pursuant to 15 U.S.C. § 2310(d)(1), the Ohio Plaintiff and the members of the
14 Ohio Class are entitled to recover the following damages proximately caused to them by
15 Purina’s breach of the implied warranty of merchantability: the difference in value between the
16 Beneful as warranted (the full purchase price) and the Beneful as actually delivered (\$0.00,
17 because consumers would not have paid anything for it had they known it contained Industrial
18 Grade Glycols, Mycotoxins, Lead, or Arsenic).

19 625. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the Ohio Plaintiff and the
20 members of the Ohio Class are entitled to recover a sum equal to the aggregate amount of costs
21 and expenses (including attorneys’ fees based on actual time expended) determined by the
22 Court to have been reasonably incurred by the Ohio Plaintiff and the members of the Ohio
23 Class in connection with the commencement and prosecution of this action.

COUNT 59**Asserted as to the Ohio Plaintiff and the Ohio Class****(Breach of Express Warranty****Ohio Rev. Code § 1302.26)**

626. The Ohio Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

627. The Ohio Plaintiff brings this claim on behalf of herself and the Ohio Class.

628. Purina constituted both a “merchant” and a “seller,” as those terms are defined in Ohio Rev. Code § 1302.01(A)(4) & (5), in connection with its sale of Beneful to the Ohio Plaintiff and the Ohio Class. Further, the Ohio Plaintiff and the members of the Ohio Class constituted “buyers,” as that term is defined in Ohio Rev. Code § 1302.01(A)(1). Beneful, itself, constituted “goods,” as that term is defined in Ohio Rev. Code § 1302.01(A)(8).

629. The statements on Purina’s packaging for Beneful created express warranties, including that Beneful was safe for consumption by pets, under both common law and Ohio Rev. Code § 1302.26. Said statements include, but are not limited to, Beneful dog food being “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that customers’ satisfaction would be guaranteed.

630. The statements regarding Beneful described in detail above constituted affirmations of fact and promises relating to Beneful that became part of the basis for the bargain for the purchase of Beneful and created an express warranty that Beneful would conform to those affirmations of fact and promises.

631. Likewise, the statements as described in detail above constituted descriptions of Beneful that became part of the basis of the bargain for the purchase of Beneful and created an express warranty that Beneful would conform to those descriptions.

632. Beneful contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic, constituting a breach of these express warranties.

633. The Ohio Plaintiff and the members of the Ohio Class were injured as a proximate result of Purina’s aforementioned breaches as follows: in the amount of the

1 difference in value between the value of the Beneful as warranted (its full purchase prices) and
 2 the Beneful as actually delivered (\$0, because consumers would not have paid anything for it
 3 had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

4 634. Within a reasonable time after their discovery of Purina's breaches, the Ohio
 5 Plaintiff gave notice of the breaches of the express warranties on behalf of herself and the Ohio
 6 Class. Alternatively, this pleading constitutes a sufficient notice of Purina's breaches of the
 7 express warranties. Alternatively, it was not necessary for the Ohio Plaintiff and the Ohio
 8 Class members to give Purina notice of its breaches of the express warranties as to them
 9 because Purina already had actual notice of those breaches.

10 **COUNT 60**

11 **Asserted as to the Ohio Plaintiff and the Ohio Class**
 12 **Breach of the Implied Warranty of Merchantability**
 13 **Ohio Rev. Code § 1302.27**

14 635. The Ohio Plaintiff incorporates herein the allegations of all of the preceding and
 15 subsequent paragraphs as if fully set forth here verbatim.

16 636. The Ohio Plaintiff brings this claim on behalf of herself and the Ohio Class.

17 637. Purina is a "seller" and "merchant" as to Beneful within the meaning of Ohio
 18 Rev. Code § 1302.01(A)(4) & (5). Purina designed, manufactured and sold Beneful, which
 19 constitutes "goods" within the meaning of Ohio Rev. Code § 1302.01 (A)(8). The Ohio
 20 Plaintiff and the members of the Ohio Class constituted "buyers" within the meaning of Ohio
 21 Rev. Code § 1302.01(A)(1). Consequently, pursuant to Ohio Rev. Code § 1302.27, Purina
 22 impliedly warranted that Beneful was merchantable, including that it: (a) was fit for its ordinary
 23 purposes as safe, healthy dog food, (b) it could pass without objection in the trade under its
 24 contract description as dog food, (c) was adequately contained, packaged, and labeled as the
 25 agreements required, and (d) it conformed to the promises and affirmations of fact set forth on
 26 its container and labels.

27 638. Beneful was sold in sealed packaging, and the defects existed when it left
 Purina's control.

1 639. When Purina designed, manufactured, distributed and sold Beneful, it knew the
2 purpose for which Beneful was intended, *i.e.*, that it would be consumed by dogs.

3 640. Purina initially breached the implied warranty of merchantability as to the Ohio
4 Plaintiff and the members of the Ohio Class because Beneful was not fit for the ordinary
5 purposes for which it is used—a safe, healthy dog food. Specifically, Beneful contained
6 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
7 Arsenic, which made it unfit for its ordinary purpose of providing safe, healthy dog food. In
8 fact, Beneful has caused injury and death to thousands of dogs.

9 641. Purina further breached its implied warranty of merchantability to the Ohio
10 Plaintiff and the members of the Ohio Class because Beneful would not pass without objection
11 in the trade under its contract description as dog food, as it contained Industrial Grade Glycols,
12 which are not approved for use in food, Mycotoxins, Lead, or Arsenic.

13 642. Purina further breached its implied warranty of merchantability to the Ohio
14 Plaintiff and the members of the Ohio Class because Beneful was not adequately contained,
15 packaged, and labeled. The directions and labeling that accompanied Beneful did not warn the
16 Ohio Plaintiff and the members of the Ohio Class of the dangers of feeding Beneful to their
17 dogs.

18 643. Purina finally breached its implied warranty of merchantability to the Ohio
19 Plaintiff and the members of the Ohio Class because Beneful did not conform to the promises
20 and affirmations of fact set forth on its container and label, as described above. Specifically,
21 Beneful did not constitute safe, healthy food, was not “healthy,” did not offer “great nutrition”
22 to dogs, did not promote “healthy growth,” and customers’ satisfaction was not guaranteed.

23 644. The Ohio Plaintiff and the members of the Ohio Class were injured as a
24 proximate result of Purina’s aforementioned breaches as follows: in the amount of the
25 difference in value between the value of the Beneful as warranted (its full purchase prices) and
26 the Beneful as actually delivered (\$0, because consumers would not have paid anything for it
27 had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

645. Within a reasonable time after their discovery of Purina's breaches, the Ohio Plaintiff gave notice of the breaches of the implied warranty of merchantability on behalf of herself and the Ohio Class. Alternatively, this pleading constitutes a sufficient notice of Purina's breaches of the implied warranty of merchantability. Alternatively, it was not necessary for the Ohio Plaintiff to give Purina already notice of its breaches of the implied warranty of merchantability as to her, the Ohio Class because Purina had actual notice of such breaches.

COUNT 61
Asserted as to the Ohio Plaintiff and the Ohio Class
(Violation of Ohio's Consumer Sales Practices Act, Ohio Rev. Code § 1345.01 et seq.)

646. The Ohio Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

647. The Ohio Plaintiff brings this claim on behalf of herself and the Ohio Class.

648. The Ohio Plaintiff and the members of the Ohio Class are "consumers" as defined in Ohio Rev. Code § 1345.02.

649. The purpose of the Ohio Consumer Sales Practices Act ("CSPA") is to protect consumers from suppliers who commit deceptive or unconscionable sales practices.

650. The Ohio Plaintiff and the Ohio Class members are consumers, and the transfer of Beneful to the Ohio Plaintiff and the Ohio Class members is considered a "consumer transaction" within the meaning of the CSPA. *See* Ohio Rev. Code § 1345.01.

651. Ohio Rev. Code § 1345.02 declares unlawful any unfair or deceptive act or practice in connection with a consumer transaction. "It shall be a deceptive act or practice in connection with a consumer transaction for a supplier to (A) Make any representations, claims, or assertions of fact, whether orally or in writing, which would cause a reasonable consumer to believe such statements are true, unless, at the time such representations, claims, or assertions are made, the supplier possesses or relies upon a reasonable basis in fact such as factual, objective, quantifiable, clinical or scientific data or other competent and reliable evidence

1 which substantiates such representations, claims, or assertions of fact.” Ohio Adm. Code
2 109:4-3-10.

3 652. Although Ohio Adm. Code 109:4-3-10 provided Purina with prior notice that the
4 conduct described therein was deceptive or unconscionable, Purina violated the CSPA by
5 representing to the Ohio Plaintiff and the members of the Ohio Class that Beneful constituted
6 safe, healthy food, when Purina did not have a reasonable basis in fact such as factual,
7 objective, quantifiable, clinical or scientific data or other competent and reliable evidence, to
8 substantiate representations, claims, or assertions that Beneful was “healthy,” offered “great
9 nutrition” to dogs, and promoted “healthy growth.” Moreover, Purina omitted that Beneful
10 contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead,
11 or Arsenic.

12 653. Purina’s violations of the CSPA were the proximate cause of actual economic
13 damages to the Ohio Plaintiff and the members of the Ohio Class equal to: (a) the amount the
14 Ohio Plaintiff and the members of the Ohio Class paid for the worthless Beneful: the difference
15 in value between the value of Beneful as represented (the full purchase prices) and the value of
16 Beneful as actually accepted and delivered (\$0, because consumers would not have paid
17 anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or
18 Arsenic).

19 **COUNT 62**

20 **Asserted as to the Ohio Plaintiff and the Ohio Class**
(Unjust Enrichment/Restitution/Assumpsit/Money Had and Received)

21 654. The Ohio Plaintiff incorporates herein the allegations of all of the preceding and
22 subsequent paragraphs as if fully set forth here verbatim.

23 655. The Ohio Plaintiff brings this claim on behalf of herself and the Ohio Class.

24 656. The Ohio Plaintiff and the members of the Ohio Class purchased Beneful, which
25 was defective, not merchantable, and unreasonably dangerous and therefore had no value to
26 them.
27

657. The Ohio Plaintiff and the members of the Ohio Class purchased Beneful designed, manufactured and marketed by Purina in various retail stores. Purina knowingly received and retained a benefit from the Ohio Plaintiff and the Ohio Class members, the gross revenues resulting from their purchases. Purina is not justified in retaining these revenues because of the diminished value, inherent defects, adulterated state, misbranded content and general lack of merchantability of Beneful.

658. Principles of fairness and equity demand that Purina disgorge the above-referenced revenues to the Ohio Plaintiff and the Ohio Class members.

M. PENNSYLVANIA CAUSES OF ACTION

COUNT 63

**Asserted as to the Pennsylvania Plaintiffs and the Pennsylvania Class
(Violation of Pennsylvania Unfair Trade Practices & Consumer Protection Law, 73 P.S. § 201-1, *et seq.*)**

659. The Pennsylvania Plaintiffs incorporate herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth herein verbatim.

660. This Count is brought by the Pennsylvania Plaintiffs on behalf of themselves and the Pennsylvania Class.

661. At all times relevant hereto, the Pennsylvania Plaintiffs and the Pennsylvania Class members were “persons” within the meaning of 73 P.S. § 201-2(3)..

662. Purina’s conduct, as alleged herein, constituted unfair or deceptive acts or practices and unfair methods of competition in trade or commerce (within the meaning of 73 P.S. § 201-2(4)), in violation of 73 P.S. § 201-3, and regulations promulgated thereunder, including the following types of conduct specified in 73 P.S. § 201-2:

- a) Representing that goods or services have characteristics or ingredients that they do not have (§ 201-2(vi));
- b) Representing that goods are of a particular standard, quality or grade, if they are of another (§ 201-2(vii));

- 1 c) Advertising goods or services with intent not to sell them as advertised
- 2 (§ 201-2(ix));
- 3 d) Failing to comply with the terms of a written guaranty or warranty given
- 4 to the buyer at, prior to or after a contract for the purchase of goods or
- 5 services is made (§ 201-2(xiv)); and
- 6 e) Engaging in fraudulent or deceptive conduct that creates a likelihood of
- 7 confusion or misunderstanding (§ 201-2(xxi)).

8 663. Purina's unfair and deceptive acts and practices (including conduct prohibited
 9 by the provisions cited in subparagraphs (a) through (e) above), as alleged in greater detail
 10 herein, include, but are not limited to: (a) its false and misleading statements, representations,
 11 and depictions in its labeling, packaging, marketing, promotion and advertising for Beneful,
 12 including representing that Beneful offers "100% complete and balanced nutrition," that is
 13 "healthy" for dogs and that it promotes dogs' "healthy growth"; (b) the fact that, contrary to
 14 Purina's representations, Purina omitted that Beneful contained Industrial Grade Glycols,
 15 which are not approved for use in food, Mycotoxins, Lead, or Arsenic, leading to confusion or
 16 misunderstanding; and (d) that these substances caused the Pennsylvania Plaintiffs and the
 17 Pennsylvania Class members' dogs to become ill and, in some cases, die; and (c) and its
 18 breaches of the implied warranty of merchantability and its express warranties.

19 664. As a result of Purina's unfair and deceptive acts and practices, the Pennsylvania
 20 Plaintiffs and the Pennsylvania Class have suffered ascertainable losses of money or property
 21 within the meaning of 73 P.S. § 201-9.2, which they seek to recover, consisting of at least the
 22 following: the amounts they paid for Beneful: the difference between the value of Beneful as
 23 represented (the purchase price) and the value of Beneful as actually accepted and delivered
 24 (which was \$-0-, because of the unsafe and hazardous nature of the product).

25 665. The Pennsylvania Plaintiffs and the Pennsylvania Class members are entitled to
 26 recover these actual damages or statutory damages of \$100, whichever is greater, plus multiple
 27 damages.

COUNT 64**Asserted as to the Pennsylvania Plaintiffs and the Pennsylvania Class
(Breach of the Implied Warranty of Merchantability, 13 Pa. C.S.A. § 2314)**

666. The Pennsylvania Plaintiffs incorporate herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

667. The Pennsylvania Plaintiffs bring this claim on their own behalves and on behalf of the Pennsylvania Class.

668. Purina constituted both a “merchant” and a “seller” in connection with its sale of Beneful to the Pennsylvania Plaintiffs and the Pennsylvania Class, as those terms are defined in the Pennsylvania Uniform Commercial Code. Further, the Pennsylvania Plaintiffs and the Pennsylvania Class members constituted “buyers” as that term is defined in the Pennsylvania Uniform Commercial Code. Beneful, itself, constituted “goods,” as that term is defined in the Pennsylvania Uniform Commercial Code.

669. As part of the sales to the Pennsylvania Plaintiffs and the Pennsylvania Class Purina impliedly warranted that Beneful was merchantable. Among other things, to be merchantable, Beneful had to pass without objection in the trade under the contract description, be fit for the ordinary purposes for which Beneful is used, be adequately contained, packaged and labeled as the agreements may have required, and conform to the promises or affirmations of fact made on the containers or labels.

670. Purina breached the warranty of implied merchantability as to Beneful initially because Beneful would not pass without objection in the trade under the contract description. Specifically, Beneful contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic. Dog food that is unsafe for consumption for dogs and that is highly likely to cause illness and death will not pass without objection in the trade under the description of dog food. In addition, Purina breached the implied warranty as to Beneful, because Beneful was not fit for the ordinary purpose for which it is used, safely feeding dogs. Further, Purina breached the implied warranty of merchantability because Beneful was not

adequately labeled as the agreements might have required because it failed to warn of the dangers of its consumption by dogs.

671. At the time of sale throughout the Class Period, Purina made promises and affirmations of fact on the containers and labels of Beneful to the effect that Beneful was safe for consumption by pets. Said representations included, but were not limited to, Beneful being “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that customers’ satisfaction would be guaranteed.

672. However, Purina breached the implied warranty of merchantability because Beneful did not conform to those promises and affirmations of fact in that Beneful was in fact not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth” and customers’ satisfaction was not guaranteed.

673. Within a reasonable time after the discovery of Purina’s breach, the Pennsylvania Plaintiffs gave notice of the breaches on behalf of themselves and the Pennsylvania Class. Alternatively, this pleading constitutes sufficient notice of breach. Alternatively, notice was not required because Purina already had specific knowledge of its breaches of warranty as to the Pennsylvania Plaintiffs and the Pennsylvania Class.

674. As a proximate result of this breach of warranty by Purina, the Pennsylvania Plaintiffs and the Pennsylvania Class have been damaged in the following ways: the difference in value between the value of the Beneful as warranted (the full purchase price) and the value of the Beneful as actually delivered (\$0, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

COUNT 65

Asserted as to the Pennsylvania Plaintiffs and the Pennsylvania Class (Breach of Express Warranty 13 Pa. C.S.A. § 2313)

675. The Pennsylvania Plaintiffs incorporate herein all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

676. The Pennsylvania Plaintiffs bring this claim on behalf of themselves and the Pennsylvania Class.

1 677. Purina constituted both a “merchant” and a “seller” in connection with its sale of
2 Beneful to the Pennsylvania Plaintiffs and the Pennsylvania Class, as those terms are defined in
3 the Pennsylvania Uniform Commercial Code. Further, the Pennsylvania Plaintiffs and the
4 Pennsylvania Class members constituted “buyers” as that term is defined in the Pennsylvania
5 Uniform Commercial Code. Beneful, itself, constituted “goods,” as that term is defined in the
6 Pennsylvania Uniform Commercial Code.

7 678. Under section 2-313 of the Uniform Commercial Code, the statements on
8 Purina’s containers and labels created express warranties, including that Beneful was safe for
9 consumption by pets. Said statements include, but are not limited to, Beneful being “healthy,”
10 offering “great nutrition” to dogs, promoting “healthy growth” and that customers’ satisfaction
11 would be guaranteed.

12 679. The statements regarding Beneful described in detail above constituted
13 affirmations of fact and promises relating to Beneful that became part of the basis for the
14 bargain for the purchase of Beneful and created an express warranty that Beneful would
15 conform to those affirmations of fact and promises.

16 680. Likewise, the statements as described in detail above constituted descriptions of
17 Beneful that became part of the basis of the bargain for the purchase of Beneful that created an
18 express warranty that Beneful would conform to the descriptions.

19 681. Beneful was not safe for pets to consume and caused pets to become ill and/or
20 die. The unsafe nature of the pet food constituted a breach of these express warranties.

21 682. The Pennsylvania Plaintiffs and the Pennsylvania Class members were injured
22 as a direct and proximate result of Purina’s aforementioned breaches as follows: the difference
23 in value between the value of the Beneful as warranted (its full purchase price) and the value of
24 the Beneful as actually delivered (\$0, because consumers would not have paid anything for it
25 had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

26 683. Within a reasonable time after the discovery of Purina’s breaches, the
27 Pennsylvania Plaintiffs gave notice of the breaches on their own behalves and on behalf of the

1 Pennsylvania Class. Alternatively, this pleading constitutes a sufficient notice of breach.
 2 Alternatively, notice was not required because Purina already had specific knowledge of its
 3 breaches of warranty as to the Pennsylvania Plaintiffs and the Pennsylvania Class.

4 684. The Pennsylvania Plaintiffs and the members of the Pennsylvania Class demand
 5 judgment against Purina for damages, as set forth above, plus interest, costs and such additional
 6 relief as the Court may deem appropriate or to which the Pennsylvania Plaintiffs and the
 7 Pennsylvania Class members may be entitled.

8 **COUNT 66**
Asserted Against Purina on Behalf of the Pennsylvania
Plaintiffs and the Pennsylvania Class
(Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et. Seq. (“MMWA”))

10 685. The Pennsylvania Plaintiffs incorporate herein the allegations of all of the
 11 preceding and subsequent paragraphs as if fully set forth here verbatim.

12 686. The Pennsylvania Plaintiffs bring this claim on behalf of themselves and the
 13 Pennsylvania Class.

14 687. At all times relevant hereto, there was in full force and effect the Magnuson-
 15 Moss Warranty Act, 15 U.S.C. § 2301, et seq. (the “MMWA”).

16 688. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

17 689. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

18 690. The Pennsylvania Plaintiffs and the members of the Pennsylvania Class are
 19 “consumers” as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons
 20 entitled under applicable state law to enforce against the warrantor the obligations of its implied
 21 warranty.

22 691. Pursuant to 15 U.S.C. § 2310(e), the Pennsylvania Plaintiffs and the members of
 23 the Pennsylvania Class are entitled to bring this class action and are not required to give Purina
 24 notice and an opportunity to cure until such time as the Court determines the representative
 25 capacity of the Pennsylvania Plaintiffs pursuant to Rule 23 of the Federal Rules of Civil
 26 Procedure. However, the Pennsylvania Plaintiffs already gave the required notice on behalf of
 27 themselves and the Pennsylvania Class by letters dated May 13, 2015.

1 692. In connection with its sale of Beneful, Purina gave an implied warranty as
2 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
3 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
4 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
5 contract description as dog food, (c) was adequately contained, packaged and labeled as the
6 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
7 container and label. 13 Pa. C.S.A. § 2314(b)(1), (3), (5) and (6).

8 693. Purina is liable to the Pennsylvania Plaintiffs and the Pennsylvania Class
9 pursuant to 15 U.S.C. § 2310(d)(1), because it breached the implied warranty of
10 merchantability.

11 694. Purina initially breached the implied warranty of merchantability as to the
12 Pennsylvania Plaintiffs and the members of the Pennsylvania Class because Beneful was not fit
13 for the ordinary purposes for which it is used – a safe, healthy dog food. Specifically, Beneful
14 contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead,
15 or Arsenic, which made it unfit for its ordinary purpose of providing safe, healthy dog food. In
16 fact, Beneful has caused injury and death to thousands of dogs.

17 695. Purina further breached its implied warranty of merchantability to the
18 Pennsylvania Plaintiffs and the members of the Pennsylvania Class because Beneful would not
19 pass without objection in the trade under its contract description as dog food, as it contained
20 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
21 Arsenic.

22 696. Purina further breached its implied warranty of merchantability to the
23 Pennsylvania Plaintiffs and the members of the Pennsylvania Class because Beneful was not
24 adequately contained, packaged, and labeled. The directions and labeling that accompanied the
25 Beneful dog food did not warn the Pennsylvania Plaintiffs and the members of the
26 Pennsylvania Class of the dangers of feeding Beneful to their dogs.

697. Purina finally breached its implied warranty of merchantability to the Pennsylvania Plaintiffs and the members of the Pennsylvania Class because Beneful did not conform to the promises and affirmations of fact set forth on its container and label, as described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’ satisfaction was not guaranteed.

698. Pursuant to 15 U.S.C. § 2310(d)(1), the Pennsylvania Plaintiffs and the members of the Pennsylvania Class are entitled to recover the following damages proximately caused to them by Purina’s breach of the implied warranty of merchantability: the difference in value between Beneful as warranted (the full purchase price) and Beneful as actually delivered (\$0.00, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

699. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the Pennsylvania Plaintiffs and the members of the Pennsylvania Class are entitled to recover a sum equal to the aggregate amount of costs and expenses (including attorneys’ fees based on actual time expended) determined by the Court to have been reasonably incurred by the Pennsylvania Plaintiffs and the members of the Pennsylvania Class in connection with the commencement and prosecution of this action.

COUNT 67

Asserted as to the Pennsylvania Plaintiffs and the Pennsylvania Class

(Assumpsit/Money Had and Received/Unjust Enrichment/Restitution)

700. The Pennsylvania Plaintiffs incorporate herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth herein verbatim.

701. The Pennsylvania Plaintiffs bring this action on behalf of themselves and the Pennsylvania Class.

1 702. The Pennsylvania Plaintiffs and the Pennsylvania Class members conferred a
2 benefit on Purina in the form of the gross revenues Purina derived from the money they paid to
3 purchase Beneful.

4 703. Purina had an appreciation or knowledge of the benefit conferred on it by the
5 Pennsylvania Plaintiffs and the Pennsylvania Class members.

6 704. Purina accepted and retained the benefit in the amount of the revenues it earned
7 from sales of Beneful to the Pennsylvania Plaintiffs and the Pennsylvania Class members.

8 705. Purina has thereby profited by retaining the benefit under circumstances which
9 would make it unjust for Purina to be permitted to retain the benefit.

10 706. The Pennsylvania Plaintiffs and the Pennsylvania Class are entitled to restitution
11 of the entire amount Purina received from Purina's sales of Beneful to them.

12 **N. TEXAS CAUSES OF ACTION**

13 **COUNT 68**

14 **Asserted Against Purina on Behalf of the Texas Plaintiffs and the Texas Class** 15 **(Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et. seq. ("MMWA"))**

16 707. The Texas Plaintiffs incorporate herein the allegations of all of the preceding
17 and subsequent paragraphs as if fully set forth here verbatim.

18 708. The Texas Plaintiffs bring this claim on behalf of themselves and the Texas
19 Class.

20 709. At all times relevant hereto, there was in full force and effect the Magnuson-
21 Moss Warranty Act, 15 U.S.C. § 2301, et seq. (the "MMWA").

22 710. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

23 711. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

24 712. The Texas Plaintiffs and the members of the Texas Class are "consumers" as
25 defined in 15 U.S.C. § 2301(3). They are consumers because they are persons entitled under
26 applicable state law to enforce against the warrantor the obligations of its implied warranty.
27

1 713. Pursuant to 15 U.S.C. § 2310(e), the Texas Plaintiffs and the members of the
2 Texas Class are entitled to bring this class action and are not required to give Purina notice and
3 an opportunity to cure until such time as the Court determines the representative capacity of the
4 Texas Plaintiffs pursuant to Rule 23 of the Federal Rules of Civil Procedure. However, Texas
5 Plaintiff Pena already gave the required notice on behalf of herself and the Texas Class by letter
6 dated May 11, 2015.

7 714. In connection with its sale of Beneful, Purina gave an implied warranty as
8 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
9 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
10 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
11 contract description as dog food, (c) was adequately contained, packaged and labeled as the
12 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
13 container and label. Tex. Bus. Com. Code § 2.314(b)(1), (3), (5) and (6)

14 715. Purina is liable to the Texas Plaintiffs and the Texas Class pursuant to 15 U.S.C.
15 § 2310(d)(1), because it breached the implied warranty of merchantability.

16 716. Purina initially breached the implied warranty of merchantability as to the Texas
17 Plaintiffs and the members of the Texas Class because Beneful was not fit for the ordinary
18 purposes for which it is used—a safe, healthy dog food. Specifically, Beneful contained
19 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
20 Arsenic, which made it unfit for its ordinary purpose of providing safe, healthy dog food. In
21 fact, Beneful has caused injury and death to thousands of dogs.

22 717. Purina further breached its implied warranty of merchantability to the Texas
23 Plaintiffs and the members of the Texas Class because Beneful would not pass without
24 objection in the trade under its contract description as dog food, as it contained Industrial Grade
25 Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic.

26 718. Purina further breached its implied warranty of merchantability to the Texas
27 Plaintiffs and the members of the Texas Class because Beneful was not adequately contained,

1 packaged, and labeled. The directions and labeling that accompanied the Beneful dog food did
2 not warn the Texas Plaintiffs and the members of the Texas Class of the dangers of feeding
3 Beneful to their dogs.

4 719. Purina finally breached its implied warranty of merchantability to the Texas
5 Plaintiffs and the members of the Texas Class because Beneful did not conform to the promises
6 and affirmations of fact set forth on its container and label, as described above. Specifically,
7 Beneful did not constitute safe, healthy food, was not “healthy,” did not offer “great nutrition”
8 to dogs, did not promote “healthy growth,” and customers’ satisfaction was not guaranteed.

9 720. Pursuant to 15 U.S.C. § 2310(d)(1), the Texas Plaintiffs and the members of the
10 Texas Class are entitled to recover the following damages proximately caused to them by
11 Purina’s breach of the implied warranty of merchantability: the difference in value between the
12 Beneful as warranted (the full purchase price) and the Beneful as actually delivered (\$0.00,
13 because consumers would not have paid anything for it had they known it contained Industrial
14 Grade Glycols, Mycotoxins, Lead, or Arsenic).

15 721. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the Texas Plaintiffs and the
16 members of the Texas Class are entitled to recover a sum equal to the aggregate amount of
17 costs and expenses (including attorneys’ fees based on actual time expended) determined by the
18 Court to have been reasonably incurred by the Texas Plaintiffs and the members of the Texas
19 Class in connection with the commencement and prosecution of this action.

20 **COUNT 69**

21 **Asserted Against Purina on Behalf of the Texas Plaintiffs and the Texas Class**
22 **(Breach of Express Warranty, Tex. Bus. & Com. Code § 2.313)**

23 722. The Texas Plaintiffs incorporate herein the allegations of all of the preceding
24 and subsequent paragraphs as if fully set forth here verbatim.

25 723. The Texas Plaintiffs bring this claim on behalf of themselves and the Texas
26 Class.

27 724. Purina constituted both a “merchant” and a “seller,” as those terms are defined
in Tex. Bus & Com. Code §§ 2.103 & 2.104, in connection with its sale of Beneful to the Texas

1 Plaintiffs and the Texas Class. Further, the Texas Plaintiffs and the members of the Texas
2 Class constituted “buyers,” as that term is defined in Tex. Bus & Com. Code § 2.103. Beneful,
3 itself, constituted “goods,” as that term is defined in Tex. Bus & Com. Code § 2.105.

4 725. The statements on Purina’s packaging for Beneful created express warranties,
5 including that Beneful was safe for consumption by pets, under both common law and Tex.
6 Bus. Com. Code § 2.313. Said statements include, but are not limited to, Beneful dog food
7 being “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that
8 customers’ satisfaction would be guaranteed.

9 726. The statements regarding Beneful described in detail above constituted
10 affirmations of fact and promises relating to Beneful that became part of the basis for the
11 bargain for the purchase of Beneful and created an express warranty that Beneful would
12 conform to those affirmations of fact and promises.

13 727. Likewise, the statements as described in detail above constituted descriptions of
14 Beneful that became part of the basis of the bargain for the purchase of Beneful and created an
15 express warranty that Beneful would conform to those descriptions.

16 728. Beneful contained Industrial Grade Glycols, which are not approved for use in
17 food, Mycotoxins, Lead, or Arsenic, constituting a breach of these express warranties.

18 729. The Texas Plaintiffs and the members of the Texas Class were injured as a
19 proximate result of Purina’s aforementioned breaches as follows: in the amount of the
20 difference in value between the value of the Beneful as warranted (its full purchase prices) and
21 the Beneful as actually delivered (\$0, because consumers would not have paid anything for it
22 had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

23 730. Within a reasonable time after their discovery of Purina’s breaches, the Texas
24 Plaintiffs gave notice of the breaches of the express warranties on behalf of herself and the
25 Texas Class. Alternatively, this pleading constitutes a sufficient notice of Purina’s breaches of
26 the express warranties. Alternatively, it was not necessary for the Texas Plaintiffs and the
27 Texas Class members to give Purina notice of its breaches of the express warranties because

Purina had actual notice of its breaches of warranty as to the Texas Plaintiffs and the Texas Class.

COUNT 70

Asserted Against Purina on Behalf of the Texas Plaintiffs and the Texas Class (Breach of the Implied Warranty of Merchantability, Tex. Bus. & Com. Code § 2.314)

731. The Texas Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

732. The Texas Plaintiff brings this claim on behalf of herself and the Texas Class.

733. Purina is a “seller” and “merchant” as to Beneful within the meaning of Tex. Bus. & Com. Code §§ 2.103 & 2.104. Purina designed, manufactured and sold Beneful, which constitutes “goods” within the meaning of Tex. Bus. & Com. Code § 2.105. The Texas Plaintiff and the members of the Texas Class constituted “buyers” within the meaning of Tex. Bus. & Com. Code § 2.103. Consequently, pursuant to Tex. Bus. & Com. Code § 2.314(b)(1), (3), (5) & (6), Purina impliedly warranted that Beneful was merchantable, including that it: (a) was fit for its ordinary purposes as safe, healthy dog food, (b) it could pass without objection in the trade under its contract description as dog food, (c) was adequately contained, packaged, and labeled as the agreements required, and (d) it conformed to the promises and affirmations of fact set forth on its container and labels.

734. Purina initially breached the implied warranty of merchantability as to the Texas Plaintiff and the members of the Texas Class because Beneful was not fit for the ordinary purposes for which it is used—a safe, healthy dog food. Specifically, Beneful contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic, which made it unfit for its ordinary purpose of providing safe, healthy dog food. In fact, Beneful has caused injury and death to thousands of dogs.

735. Purina further breached its implied warranty of merchantability to the Texas Plaintiff and the members of the Texas Class because Beneful would not pass without objection in the trade under its contract description as dog food, as it contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic.

1 741. The Texas Plaintiffs bring this claim on behalf of herself the Texas Class.

2 742. The Texas Plaintiffs and the members of the Texas Class are “consumers” as
3 defined in Tex. Bus. & Com. Code § 17.45(4).

4 743. Beneful, itself, constituted “goods,” as that term is defined in Tex. Bus. & Com.
5 Code § 17.45(1).

6 744. Purina violated DTPA § 17.50(a)(2), because Purina breached both express and
7 implied warranties relating to Beneful, as describe in detail, *supra*.

8 745. Purina’s violations of DTPA § 17.50(a)(2) were the producing cause of actual
9 economic damages to the Texas Plaintiffs and the members of the Texas Class equal to: (a) the
10 amount the Texas Plaintiffs and the members of the Texas Class paid for the worthless Beneful:
11 the difference in value between the value of Beneful as represented (the full purchase prices)
12 and the value of Beneful as actually accepted and delivered (\$0, because consumers would not
13 have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins,
14 Lead, or Arsenic).

15 746. Alternatively, the Texas Plaintiffs and the members of the Texas Class seek
16 disgorgement and/or restitution of the gross revenue derived by Purina from its sale of Beneful
17 to them, along with any other equitable relief to which they are entitled, pursuant to DTPA §
18 17.50(b)(3). In addition to their actual economic damages, pursuant to DTPA § 17.50(d), the
19 Texas Plaintiffs and the members of the Texas Class are entitled to recover their reasonable and
20 necessary attorneys’ fees and court costs.

21 747. Purina committed the conduct in question knowingly or intentionally, pursuant
22 to DTPA § 17.50(b), as evidenced by the fact that despite knowledge of the deaths of thousands
23 of dogs as the result of eating Beneful and that it had breached its express and implied
24 warranties relating to Beneful, Purina continued to market and sell Beneful, all the while
25 omitting that Beneful contained Industrial Grade Glycols, which are not approved for use in
26 food, Mycotoxins, Lead, or Arsenic. Because Purina’s breaches of its express and implied
27 warranties relating to Beneful were made knowingly or intentionally, the Texas Plaintiffs and

1 the Texas Class are entitled to recover additional damages of not more than three times the
2 amount of their economic damages.

3 748. For those members of the Texas Class whose dogs were injured or killed by
4 consumption of Beneful more than two years before the filing of the Original Complaint in this
5 action, the statute of limitations has not run on their DTPA causes of action pursuant to Tex.
6 Bus. & Com. Code § 17.565 because they did not discover, and should not have discovered in
7 the exercise of reasonable diligence, Purina's breaches of warranties until within two years
8 prior to the filing of the Original Complaint in this action.

9 **COUNT 72**

10 **Asserted Against Purina on Behalf of the Texas Plaintiffs and the Texas Class**
11 **(Assumpsit/Money Had and Received/Unjust Enrichment/Restitution)**

12 749. The Texas Plaintiffs incorporate herein the allegations of all of the preceding
13 and subsequent paragraphs as if fully set forth here verbatim.

14 750. The Texas Plaintiffs bring this claim on behalf of herself the Texas Class.

15 751. The Texas Plaintiffs and the members of the Texas Class purchased Beneful,
16 which was defective, not merchantable, and unreasonably dangerous and therefore had no value
17 to them.

18 752. Purina holds money, namely the gross revenues it derived from its sale of
19 Beneful to the Texas Plaintiffs and the members of the Texas Class, which in equity and good
20 conscience belong to the Texas Plaintiffs and the members of the Texas Class.

21 753. Based upon money had and received, the Texas Plaintiffs and the members of
22 the Texas Class are entitled to recover the full amount of all gross revenue derived by Purina
23 from the sale of Beneful to them.

24 **O. WASHINGTON CAUSES OF ACTION**

25 **COUNT 73**

26 **Asserted as to the Washington Plaintiff and the Washington Class**

27 **(Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et. seq. ("MMWA"))**

1 754. The Washington Plaintiff incorporates herein the allegations of all of the
2 preceding and subsequent paragraphs as if fully set forth here verbatim.

3 755. The Washington Plaintiff brings this claim on behalf of herself and the
4 Washington Class.

5 756. At all times relevant hereto, there was in full force and effect the Magnuson-
6 Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (the “MMWA”).

7 757. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

8 758. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

9 759. The Washington Plaintiff and the members of the Washington Class are
10 “consumers” as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons
11 entitled under applicable state law to enforce against the warrantor the obligations of its implied
12 warranty.

13 760. Pursuant to 15 U.S.C. § 2310(e), the Washington Plaintiff and the members of
14 the Washington Class are entitled to bring this class action and are not required to give Purina
15 notice and an opportunity to cure until such time as the Court determines the representative
16 capacity of the Washington Plaintiff pursuant to Rule 23 of the Federal Rules of Civil
17 Procedure. However, Washington Plaintiff Kimball already gave the required notice on behalf
18 of herself the Washington Class by letter dated May 20, 2015.

19 761. In connection with its sale of Beneful, Purina gave an implied warranty as
20 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
21 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
22 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
23 contract description as dog food, (c) was adequately contained, packaged and labeled as the
24 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
25 container and label. Wash. Rev. Code § 62A.2–314.

26 762. Purina is liable to the Washington Plaintiff and the Washington Class pursuant
27 to 15 U.S.C. § 2310(d)(1), because it breached the implied warranty of merchantability.

1 763. Purina initially breached the implied warranty of merchantability as to the
2 Washington Plaintiff and the members of the Washington Class because Beneful was not fit for
3 the ordinary purposes for which it is used—a safe, healthy dog food. Specifically, Beneful
4 contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead,
5 or Arsenic, which made it unfit for its ordinary purpose of providing safe, healthy dog food. In
6 fact, Beneful has caused injury and death to thousands of dogs.

7 764. Purina further breached its implied warranty of merchantability to the
8 Washington Plaintiff and the members of the Washington Class because Beneful would not
9 pass without objection in the trade under its contract description as dog food, as it contained
10 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
11 Arsenic.

12 765. Purina further breached its implied warranty of merchantability to the
13 Washington Plaintiff and the members of the Washington Class because Beneful was not
14 adequately contained, packaged, and labeled. The directions and labeling that accompanied the
15 Beneful dog food did not warn the Washington Plaintiff and the members of the Washington
16 Class of the dangers of feeding Beneful to their dogs.

17 766. Purina finally breached its implied warranty of merchantability to the
18 Washington Plaintiff and the members of the Washington Class because Beneful did not
19 conform to the promises and affirmations of fact set forth on its container and label, as
20 described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,”
21 did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’
22 satisfaction was not guaranteed.

23 767. Pursuant to 15 U.S.C. § 2310(d)(1), the Washington Plaintiff and the members
24 of the Washington Class are entitled to recover the following damages proximately caused to
25 them by Purina’s breach of the implied warranty of merchantability: the difference in value
26 between the Beneful as warranted (the full purchase price) and the Beneful as actually
27

1 delivered (\$0.00, because consumers would not have paid anything for it had they known it
2 contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

3 768. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the Washington Plaintiff and the
4 members of the Washington Class are entitled to recover a sum equal to the aggregate amount
5 of costs and expenses (including attorneys' fees based on actual time expended) determined by
6 the Court to have been reasonably incurred by the Washington Plaintiff and the members of the
7 Washington Class in connection with the commencement and prosecution of this action.

8 **COUNT 74**

9 **Asserted as to the Washington Plaintiff and the Washington Class**

10 **(Breach of Express Warranty - Wash. Rev. Code § 62A.2-313)**

11 769. The Washington Plaintiff incorporates herein the allegations of all of the
12 preceding and subsequent paragraphs as if fully set forth here verbatim.

13 770. The Washington Plaintiff brings this claim on behalf of herself and the
14 Washington Class.

15 771. Purina constituted both a "merchant" and a "seller," as those terms are defined
16 in Wash. Rev. Code §§ 62A.2-104 and 62A.2-103, in connection with its sale of Beneful to the
17 Washington Plaintiff and the Washington Class. Further, the Washington Plaintiff and the
18 members of the Washington Class constituted "buyers," as that term is defined in Wash. Rev.
19 Code § 62A.2-103. Beneful, itself, constituted "goods," as that term is defined in Wash. Rev.
20 Code § 62A.2-105.

21 772. The statements on Purina's packaging for Beneful created express warranties,
22 including that Beneful was safe for consumption by pets, under both common law and Wash.
23 Rev. Code § 62A.2-313. Said statements include, but are not limited to, Beneful dog food
24 being "healthy," offering "great nutrition" to dogs, promoting "healthy growth" and that
25 customers' satisfaction would be guaranteed.

26 773. The statements regarding Beneful described in detail above constituted
27 affirmations of fact and promises relating to Beneful that became part of the basis for the

1 bargain for the purchase of Beneful and created an express warranty that Beneful would
2 conform to those affirmations of fact and promises.

3 774. Likewise, the statements as described in detail above constituted descriptions of
4 Beneful that became part of the basis of the bargain for the purchase of Beneful and created an
5 express warranty that Beneful would conform to those descriptions.

6 775. Beneful was not safe for pets to consume and caused pets to become ill and/or
7 die. The unsafe nature of Beneful constituted a breach of these express warranties.

8 776. The Washington Plaintiff and the members of the Washington Class were
9 injured as a proximate result of Purina's aforementioned breaches as follows: in the amount of
10 the difference in value between the value of the Beneful as warranted (its full purchase prices)
11 and the Beneful as actually delivered (\$0, because consumers would not have paid anything for
12 it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

13 777. Within a reasonable time after her discovery of Purina's breaches, the
14 Washington Plaintiff gave notice of the breaches of the express warranties on behalf of herself
15 the Washington Class. Alternatively, this pleading constitutes a sufficient notice of Purina's
16 breaches of the express warranties. Alternatively, it was not necessary for the Washington
17 Plaintiff and the Washington Class members to give Purina notice of its breaches of the express
18 warranties as to them because Purina already had actual notice of those breaches.

19 **COUNT 75**

20 **Asserted as to the Washington Plaintiff and the Washington Class**

21 **(Breach of the Implied Warranty of Merchantability - Wash. Rev. Code § 62A.2-314)**

22 778. The Washington Plaintiff incorporates herein the allegations of all of the
23 preceding and subsequent paragraphs as if fully set forth here verbatim.

24 779. The Washington Plaintiff brings this claim on behalf of herself the Washington
25 Class.

26 780. Purina is a "seller" and "merchant" as to Beneful within the meaning of Wash.
27 Rev. Code §§ 62A.2-103 and 62A.2-104. Purina designed, manufactured and sold Beneful,

1 which constitutes “goods” within the meaning of Wash. Rev. Code § 62A.2-105. The
2 Washington Plaintiff and the members of the Washington Class constituted “buyers” within the
3 meaning of Wash. Rev. Code § 62A.2-103. Consequently, pursuant to Wash. Rev. Code §
4 62A.2–314, Purina impliedly warranted that Beneful was merchantable, including that it: (a)
5 was fit for its ordinary purposes as safe, healthy dog food, (b) could pass without objection in
6 the trade under its contract description as dog food, (c) was adequately contained, packaged,
7 and labeled as the agreements required, and (d) conformed to the promises and affirmations of
8 fact set forth on its container and labels.

9 781. Beneful was sold in sealed packaging, and the defects existed when it left
10 Purina’s control.

11 782. When Purina designed, manufactured, distributed and sold Beneful, it knew the
12 purpose for which Beneful was intended; *i.e.*, that it would be consumed by dogs.

13 783. Purina initially breached the implied warranty of merchantability as to the
14 Washington Plaintiff and the members of the Washington Class because Beneful was not fit for
15 the ordinary purposes for which it is used—a safe, healthy dog food. Specifically, Beneful
16 contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead,
17 or Arsenic, which made it unfit for its ordinary purpose of providing safe, healthy dog food. In
18 fact, Beneful has caused injury and death to thousands of dogs.

19 784. Purina further breached its implied warranty of merchantability to the
20 Washington Plaintiff and the members of the Washington Class because Beneful would not
21 pass without objection in the trade under its contract description as dog food, as it contained
22 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
23 Arsenic.

24 785. Purina further breached its implied warranty of merchantability to the
25 Washington Plaintiff and the members of the Washington Class because Beneful was not
26 adequately contained, packaged, and labeled. The directions and labeling that accompanied
27

1 Beneful did not warn the Washington Plaintiff and the members of the Washington Class of the
2 dangers of feeding Beneful to their dogs.

3 786. Purina finally breached its implied warranty of merchantability to the
4 Washington Plaintiff and the members of the Washington Class because Beneful did not
5 conform to the promises and affirmations of fact set forth on its container and label, as
6 described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,”
7 did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’
8 satisfaction was not guaranteed.

9 787. The Washington Plaintiff and the members of the Washington Class were
10 injured as a proximate result of Purina’s aforementioned breaches as follows: in the amount of
11 the difference in value between the value of the Beneful as warranted (its full purchase prices)
12 and the Beneful as actually delivered (\$0, because consumers would not have paid anything for
13 it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

14 788. Within a reasonable time after her discovery of Purina’s breaches, the
15 Washington Plaintiff gave notice of the breaches of the implied warranty of merchantability on
16 behalf of herself the Washington Class. Alternatively, this pleading constitutes a sufficient
17 notice of Purina’s breaches of the implied warranty of merchantability. Alternatively, it was
18 not necessary for the Washington Plaintiff to give Purina already notice of its breaches of the
19 implied warranty of merchantability as to her the Washington Class because Purina had actual
20 notice of such breaches.

21 **COUNT 76**

22 **Asserted as to the Washington Plaintiff and the Washington Class and**
23 **(Violation of the Washington Consumer Protection Act, Unfair Business Practices, Wash.**
Rev. Code § 19.86.010 et seq.)

24 789. The Washington Plaintiff incorporates herein the allegations of all of the
25 preceding and subsequent paragraphs as if fully set forth here verbatim.

26 790. The Washington Plaintiff brings this claim on behalf of herself the Washington
27 Class.

1 791. The Washington Consumer Protection Act (“WCPA”) declares unlawful (i) an
2 unfair or deceptive act or practice, (ii) occurring in trade or commerce, (iii) with a public
3 interest impact, and (iv) which causes injury to Plaintiffs.

4 792. Purina is a “person” within the meaning of the WCPA, Wash. Rev. Code §
5 19.86010(1), and conducts “trade” and “commerce” within the meaning of the Washington
6 Consumer Protection Act, Wash. Rev. Code § 19.86.010(2).

7 793. The Washington Plaintiff and the Washington Class members are “persons”
8 within the meaning of the WCPA, Wash. Rev. Code § 19.86.010(1).

9 794. At all relevant times, Purina engaged in unfair acts or practices in the conduct of
10 its business by promising and affirming on its container and label that Beneful was “healthy,”
11 offered “great nutrition” to dogs, and promoted “healthy growth” when, in actuality, Purina
12 omitted that Beneful contained Industrial Grade Glycols, which are not approved for use in
13 food, Mycotoxins, Lead, or Arsenic. Purina further engaged in unfair acts or practices in the
14 conduct of its business when it continued to represent the health benefits of Beneful despite
15 being aware of numerous complaints from users of Beneful that their dogs had become ill or
16 died after consuming it.

17 795. The acts and practices described above are unfair because these acts or practices
18 (1) have caused substantial financial injury to the Washington Plaintiff and the Washington
19 Class members; (2) are not outweighed by any countervailing benefits to consumers or
20 competitors; and (3) are not reasonably avoidable by consumers.

21 796. Purina’s unfair practices have occurred in its trade or business and were and are
22 capable of injuring a substantial portion of the public. As such, Purina’s general course of
23 conduct as alleged herein is injurious to the public interest, and the acts complained of herein
24 are ongoing and/or have a substantial likelihood of being repeated.

25 797. As a direct and proximate result of Purina’s unfair acts or practices, the
26 Washington Plaintiff and the Washington Class members suffered injury in fact. As a result of
27 Purina’s unfair practices, Plaintiff and Class members suffered injury in fact and lost money.

799. The Washington Plaintiff and the Washington Class are also entitled to equitable relief as the Court deems appropriate, including, but not limited to, disgorgement, for the benefit of the Class members, or all or part of the ill-gotten profits Purina received from the sale of Beneful.

Asserted as to the Washington Plaintiff and the Washington Class
(Violation of the Washington Consumer Protection Act, Deceptive Business Practices,
Wash. Rev. Code § 19.86.010 et seq.)

800. The Washington Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

801. The Washington Plaintiff brings this claim on behalf of herself the Washington Class.

802. The Washington Consumer Protection Act (“WCPA”) declares unlawful (i) an unfair or deceptive act or practice, (ii) occurring in trade or commerce, (iii) with a public interest impact, and (iv) which causes injury to Plaintiffs.

803. Purina is a “person” within the meaning of the WCPA, Wash. Rev. Code § 19.86010(1), and conducts “trade” and “commerce” within the meaning of the Washington Consumer Protection Act, Wash. Rev. Code § 19.86.010(2).

804. The Washington Plaintiff and the Washington Class members are “persons” within the meaning of the WCPA, Wash. Rev. Code § 19.86.010(1).

1 805. At all relevant times, Purina engaged in deceptive acts or practices in the
2 conduct of its business by promising and affirming on its container and label that Beneful was
3 “healthy,” offered “great nutrition” to dogs, and promoted “healthy growth” when, in actuality,
4 Purina omitted that Beneful contained Industrial Grade Glycols, which are not approved for use
5 in food, Mycotoxins, Lead, or Arsenic. Purina further engaged in deceptive acts or practices in
6 the conduct of its business when it continued to represent the health benefits of Beneful despite
7 being aware of numerous complaints from users of Beneful that their dogs had become ill or
8 died after consuming it.

9 806. The numerous complaints that Purina concealed from the Washington Plaintiff
10 and the Washington Class members are material in that a reasonable consumer would not have
11 purchased Beneful and subjected himself or herself to injury had he or she known these facts.

12 807. Purina’s deceptive practices have occurred in its trade or business and were and
13 are capable of deceiving a substantial portion of the public. As such, Purina’s general course of
14 conduct as alleged herein is injurious to the public interest, and the acts complained of herein
15 are ongoing and/or have a substantial likelihood of being repeated.

16 808. As a direct and proximate result of Purina’s deceptive acts or practices, the
17 Washington Plaintiff and the Washington Class members suffered injury in fact. As a result of
18 Purina’s deceptive practices, Plaintiff and the Class members were overcharged for the Beneful
19 and thus lost money.

20 809. Plaintiff and the Class are therefore entitled to an order enjoining the conduct
21 complained herein; actual damages to the Washington Plaintiff and the members of the
22 Washington Class equal to: (a) the amount the Washington Plaintiff and the members of the
23 Washington Class paid for the worthless Beneful: the difference in value between the value of
24 Beneful as represented (the full purchase prices) and the value of Beneful as actually accepted
25 and delivered (\$0, because consumers would not have paid anything for it had they known it
26 contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic).

**Asserted as to the Washington Plaintiff and the Washington Class
(Unjust Enrichment/Restitution/Assumpsit/Money Had and Received)**

812. The Washington Plaintiff brings this claim on behalf of herself and the Washington Class.

814. The Washington Plaintiff and the members of the Washington Class purchased Beneful designed, manufactured and marketed by Purina in various retail stores. Purina knowingly received and retained a benefit from the Washington Plaintiff and the Washington Class members, the gross revenues resulting from their purchases. Purina is not justified in retaining these revenues because of the diminished value, inherent defects, adulterated state, misbranded content and general lack of merchantability of Beneful.

815. Principles of fairness and equity demand that Purina disgorge the above-referenced revenues to the Washington Plaintiff and the Washington Class members.

WHEREFORE, Plaintiffs and the Classes request that the Court enter an order of judgment against Purina including the following:

1. Certification of the action as a class action under Rule 23 of the Federal Rules of Civil Procedure and appointment of Plaintiffs as Class Representatives and their counsel of record as Class Counsel;

2. An order requiring Purina to pay Plaintiffs and other Class members an amount of actual, statutory, and punitive damages, and restitution in an amount to be determined at trial, and where allowed by law;

3. An order granting equitable relief in the form of restitution and/or disgorgement of all unlawful or illegal profits received by Purina as a result of the unlawful, unfair and/or deceptive conduct alleged herein;

4. An order granting Plaintiffs' reasonable costs and attorneys' fees; and

5. An order granting such other relief as may be just and proper.

JURY TRIAL DEMAND

Plaintiffs hereby demand a jury trial for all individual and Class claims so triable.

Dated: June 27, 2016

Respectfully submitted,

RAM, OLSON, CEREGHINO
& KOPCZYNSKI

By: /s/ Jeffrey B. Cereghino

Jeffrey B. Cereghino, SBN 099480

Email: jbc@rocklawcal.com

Michael F. Ram, SBN 104805

Email: mram@rocklawcal.com

Matt J. Malone, SBN 221545

Email: mjm@rocklawcal.com

Susan Brown, SBN 287986

Email: sbrown@rocklawcal.com

101 Montgomery Street, Suite 1800

San Francisco, California 94104

Telephone: (415) 433-4949

Facsimile: (415) 433-7311

John Yanchunis

Email: jyanchunis@forthepeople.com

James D. Young

Email: jyoung@forthepeople.com

MORGAN & MORGAN COMPLEX

LITIGATION GROUP

201 N Franklin Street, Floor 7

Tampa, Florida 33602

Telephone: (813)275-5272

Facsimile: (813)275-9295

Karl Molineux, SBN 152884
Donna F. Solen, SBN 297051
Email: dsolen@kkslegal.com
KIMBRELL & SOLEN LLC
660 Pennsylvania Avenue, SE, Suite 302
Washington, DC 20003
Telephone: (202) 810-1999 ext. 1
Facsimile: (202) 318-8869

Beth E. Terrell, SBN 178181
Email: bterrell@tmdwlaw.com
Adrienne D. McEntee
Email: amcentee@tmdwlaw.com
Samuel J. Strauss
Email: sstrauss@tmdwlaw.com
TERRELL MARSHALL LAW GROUP
PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603
Facsimile: (206) 350-3528

David Pastor
Email: dpastor@pastorlawoffice.com
PASTOR LAW OFFICE, LLP
63 Atlantic Avenue, 3rd Floor
Boston, Massachusetts 02110
Telephone: (617) 742-9700
Facsimile: (617) 742-9701

Preston W. Leonard
Email: pleonard@theleonardlawoffice.com
LEONARD LAW OFFICE, P.C.
63 Atlantic Avenue, 3rd Floor
Boston, Massachusetts 02110
Telephone: (617) 329-1295

Todd Garber
Email: tgarber@fbfglaw.com
Greg Blankinship
Email: gblankinship@fbfglaw.com
FINKELSTEIN, BLANKINSHIP,
FREI-PEARSON & GARBER, LLP
1311 Mamaroneck Avenue, Suite 220
White Plains, New York 10605
Telephone: (914) 298-3281, ext 2803
Facsimile: (914) 824-1561

Alan M. Mansfield, SBN 125998
Consumer Law Group of California
Email: alan@clgca.com
CONSUMER LAW GROUP
10200 Willow Creek Road, Suite 160
San Diego, California 92131
Telephone: (619) 308-5034
Facsimile: (888) 341-5048

Roger Mandel
Email: rlm@hlaw.net
LACKEY HERSHMAN, L.L.P.
3102 Oak Lawn Avenue, Suite 777
Dallas, Texas 75219
Telephone: (214) 560-2201
Facsimile: (214) 560-2203

Denise Sayer
Email: denise.sayer@paliareroland.com
Odette Soriano
Email: odette.soriano@paliareroland.com
Margaret Waddell
Email: marg.waddell@paliareroland.com
PALIARE ROLAND ROSENBERG
ROTHSTEIN LLP
155 Wellington Street W
Toronto, ON M5J, Canada
Telephone: (416) 646-4300

Kenneth G. Gilman
Email: Kgilman@gilmanpastor.com
GILMAN LAW LLP
8951 Bonita Beach Road, S.E., Suite 525
Bonita Springs, Florida 34135
Telephone: (888) 252-0048
Michael J. Flannery

Email: mflannery@cuneolaw.com
CUNEO GILBERT & LADUCA, LLP
300 North Tucker Boulevard, No. 801
St. Louis, Missouri 63101
Telephone: (202)-587-5063
Facsimile: (202) 789-1813

Jennifer R. Edwards
Email: jre@TheAnimalLawCenter.com
THE ANIMAL LAW CENTER
730 W. Hampden Avenue, #304
Englewood, Colorado 80110
Telephone: (303) 322-4355

Kim E. Richman
Email: krichman@richmanlawgroup.com
THE RICHMAN LAW GROUP
195 Plymouth Street
Brooklyn, New York 11201
Telephone: (212) 687-8291

Thomas E. Soule
Email: tsoule@edcombs.com
EDLEMAN, COMBS, LATTURNER
& GOODWIN, LLC
20 South Clark Street, Suite 1500
Chicago, Illinois 60603
Telephone: (312) 739-4200
Facsimile: (312) 419-0379

S. Chandler Visher
Email: chandler@visherlaw.com
LAW OFFICES OF S.
CHANDLER VISHER
44 Montgomery Street, Suite 3830
San Francisco, California 94104
Telephone: 415-901-0500
Facsimile: 415-901-0504

Attorneys for Plaintiff and Proposed Class