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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO DIVISION

19 DANIEL ZEIGER, DANZ DOGGIE) Case No.
20 DAYTRIPS, and AMY FREEBORN,)
21 Individually and on Behalf of All Others) CLASS ACTION COMPLAINT FOR:
22 Similarly Situated,)
23) (1) NEGLIGENT MISREPRESENTATION;
24) (2) VIOLATIONS OF THE CALIFORNIA
25) CONSUMER LEGAL REMEDIES ACT;
26) (3) VIOLATIONS OF THE CALIFORNIA
27) FALSE ADVERTISING LAW;
28) (4) VIOLATIONS OF THE CALIFORNIA
UNFAIR COMPETITION LAW;
) (5) BREACH OF EXPRESS WARRANTY;
) (6) BREACH OF IMPLIED WARRANTY;
) AND
) (7) NEGLIGENCE PER SE
) DEMAND FOR JURY TRIAL

1 ("FDA") have set limits concerning the allowable limit of arsenic at 10 parts per billion ("ppb").
2 For the FDA, the 10 ppb level regulates apple juice and for the EPA it governs drinking water.²

3 5. Moreover, the FDA is considering limiting the action level for arsenic in rice to
4 100 ppb:

5 The action level for inorganic arsenic in infant rice cereals that FDA considers
6 achievable with the use of such practices is 100 μ g/kg or 100 ppb (see Ref.
7 14).... The proposed action level for inorganic arsenic in infant rice cereals is
8 intended to reduce the possible risk for infants fed rice cereal by reducing
9 exposure to inorganic arsenic that may be found in rice cereal for infants. FDA
10 considers this reduction in exposure to infants fed rice cereal will lead to a
11 quantifiable reduction in the lifetime risk of certain cancers associated with
12 exposure to inorganic arsenic, as well as an unquantifiable reduction in the risk of
13 certain non-cancer adverse health outcomes reviewed in the risk assessment,
14 including neurodevelopmental effects in infants.³

12 6. The Contaminated Dog Foods also contain material and significant levels of lead,
13 which is another carcinogen and developmental toxin known to cause health problems to
14 consumers. Exposure to lead in food builds up over time. Buildup can and has been
15 scientifically demonstrated to lead to the development of chronic poisoning, cancer,
16 developmental, and reproductive disorders, as well as serious injuries to the nervous system, and
17 other organs and body systems.

18 7. Despite the known risks of arsenic and lead exposure, Defendants have
19 negligently, recklessly, and/or knowingly sold the Contaminated Dog Foods despite containing
20 alarming levels of arsenic and lead. The independent lab testing of the Contaminated Dog Foods
21 found that Wellness CORE Adult Dry Ocean Whitefish, Herring Meal and Salmon Meal
22 contains 1,500 ppb of arsenic and 221 ppb of lead and Wellness Complete Health Adult Dry
23 Whitefish and Sweet Potato contains 1,200 ppb of arsenic and 220 ppb of lead.

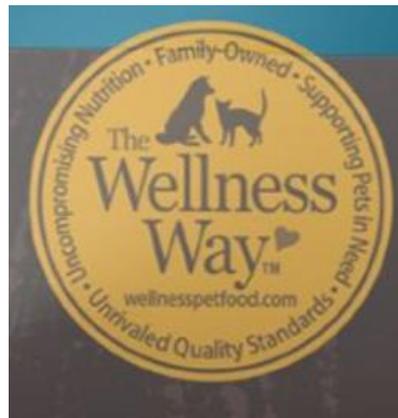
24 ² The FDA has taken action based on consumer products exceeding this limit, including testing
25 and sending warning letters to the manufacturers. *See, e.g.*, Warning Letter from FDA to Valley
26 Processing, Inc. (June 2, 2016), <https://www.fda.gov/iceci/enforcementactions/warningletters/2016/ucm506526.htm>.

27 ³ FDA, Draft Guidance for Industry: Inorganic Arsenic in Rice Cereals for Infants: Action Level
28 (Apr. 2016), <https://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocuments/RegulatoryInformation/UCM493152.pdf>.

1 8. Additionally, Defendants knew or should have been aware that a consumer would
2 be feeding the Contaminated Dog Foods multiple times each day to his or her dog being the
3 main, if not only, source of food for the dog. This leads to repeated exposure of the toxins to the
4 dog.

5 9. Defendants have wrongfully advertised and sold the Contaminated Dog Foods
6 without any label or warning indicating to consumers that these products contain arsenic or lead,
7 or that these toxins can over time accumulate in the dog's body to the point where poisoning,
8 injury, and/or disease can occur.

9 10. Defendants' omissions are not only material but also false, misleading, and
10 reasonably likely to deceive the public. This is true especially in light of the long-standing
11 campaign by Defendants to market the Contaminated Dog Foods as healthy and safe to induce
12 consumers, such as Plaintiffs to purchase the products. For instance, not only did Defendants
13 chose a brand name for their dog food, "Wellness," that in itself suggests a healthy product, they
14 market the Contaminated Dog Foods by promising "Uncompromising Nutrition" and "Unrivaled
15 Quality Standards":



24 11. Moreover, the Contaminated Dog Foods declare themselves as offering complete
25 health and nothing in excess:

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12. Using such descriptions and promises makes Defendants' advertising campaign deceptive based on the unsafe and alarming levels of arsenic and lead in the Contaminated Dog Foods. Defendants' statements, partial disclosures, and omissions are false, misleading, and crafted to deceive the public as they create an image that the Contaminated Dog Foods are healthy and safe.

13. Moreover, a reasonable consumer, such as Plaintiffs and other members of the Class (as defined herein), would have no reason to not expect and anticipate that the

1 Contaminated Dog Foods are made up of "Uncompromising Nutrition" and "Unrivaled Quality
2 Standards" that has nothing in excess as promised by Defendants. Non-disclosure and
3 concealment of the toxins in the Contaminated Dog Foods coupled with the partial disclosures
4 and/or misrepresentations that the food provides complete health and is safe by Defendants is
5 intended to and does, in fact, cause consumers to purchase a product Plaintiffs and Class
6 members would not have bought if the true quality and ingredients were disclosed. As a result of
7 these false statements, omissions, and concealment, Defendants have generated substantial sales
8 of the Contaminated Dog Foods.

9 14. Plaintiffs bring this action individually and on behalf of all other similarly situated
10 consumers within the United States who purchased the Contaminated Dog Foods, in order to
11 cause the disclosure of the presence of material and significant levels of arsenic and lead in the
12 Contaminated Dog Foods, to correct the false and misleading perception Defendants have
13 created in the minds of consumers that the Contaminated Dog Foods are high quality, safe, and
14 healthy and to obtain redress for those who have purchased the Contaminated Dog Foods.

15 **JURISDICTION AND VENUE**

16 15. This Court has original jurisdiction over all causes of action asserted herein under
17 the Class Action Fairness Act, 28 U.S.C. §1332(d)(2), because the matter in controversy exceeds
18 the sum or value of \$5,000,000 exclusive of interest and costs and more than two-thirds of the
19 Class reside in states other than the states in which Defendants are citizens and in which this case
20 is filed, and therefore any exemptions to jurisdiction under 28 U.S.C. §1332(d) do not apply.

21 16. Venue is proper in this Court pursuant to 28 U.S.C. §1391, because Plaintiffs
22 reside and suffered injury as a result of Defendants' acts in this district, many of the acts and
23 transactions giving rise to this action occurred in this district, Defendants conduct substantial
24 business in this district, Defendants have intentionally availed themselves of the laws and
25 markets of this district, and Defendants are subject to personal jurisdiction in this district.

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1 **INTRADISTRICT ASSIGNMENT**

2 17. A substantial portion of the transactions and wrongdoings which gave rise to the
3 claims in this action occurred in the County of Marin, and as such, this action is properly
4 assigned to the San Francisco division of this Court.

5 **THE PARTIES**

6 18. Plaintiff Daniel Zeiger ("Zeiger") is, and at all times relevant hereto has been, a
7 citizen of the state of California. Plaintiff Zeiger purchased the Contaminated Dog Foods and
8 fed it to his three-year-old American Bulldog named Mack. Plaintiff Zeiger has purchased the
9 Contaminated Dog Foods approximately once every two months for the past three years.

10 19. Plaintiff Danz Doggie Daytrips ("Danz Doggie"), is, and at all times relevant
11 hereto has been, a citizen of the state of California. Plaintiff Danz Doggie is a dog sitting
12 business that used the Contaminated Dog Foods as one of the primary foods fed to its clients'
13 dogs.

14 20. Plaintiff Amy Freeborn ("Freeborn") is, and at all times relevant hereto has been,
15 a citizen of the state of California. Plaintiff Freeborn purchased the Contaminated Dog Foods
16 and fed it to her three-year-old Labrador Retriever named Olivia.

17 21. As the result of Defendants' deceptive conduct as alleged herein, Plaintiffs were
18 injured when they paid the purchase price or a price premium for the Contaminated Dog Foods
19 that did not deliver what it promised. They paid the above sum on the assumption that the
20 labeling of the Contaminated Dog Foods was accurate and that it was healthy, clean, and safe for
21 dogs to ingest. Plaintiffs would not have paid this money had they known that the Contaminated
22 Dog Foods contained an excessive degree of arsenic and lead. Damages can be calculated
23 through expert testimony at trial. Further, should Plaintiffs encounter the Contaminated Dog
24 Foods in the future, they could not rely on the truthfulness of the packaging, absent corrective
25 changes to the packaging and advertising of the Contaminated Dog Foods.

26 22. Defendant WellPet LLC is incorporated in Delaware with its headquarters located
27 at 200 Ames Pond Drive, Tewksbury, Massachusetts. Defendant WellPet LLC is a subsidiary of
28 defendant Berwind Corporation that is incorporated in Pennsylvania with its headquarters

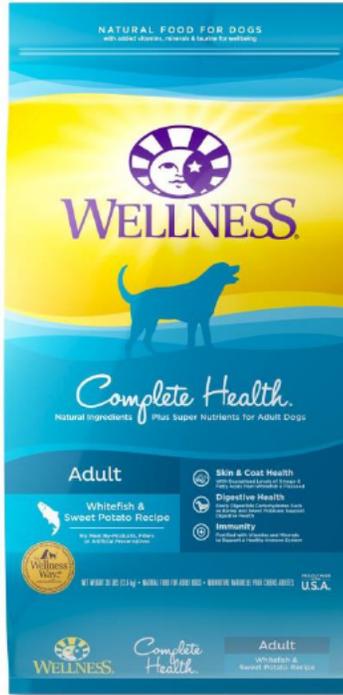
1 located at 3000 Centre Square West, 1500 Market Street, Philadelphia, Pennsylvania.
2 Defendants formulate, develop, manufacture, label, distribute, market, advertise, and sell the
3 Contaminated Dog Foods under the Wellness dog food brand name throughout the United States.
4 The advertising for the Contaminated Dog Foods, relied upon by Plaintiffs, was prepared and/or
5 approved by Defendants and their agents, and was disseminated by Defendants and their agents
6 through advertising and labeling that contained the misrepresentations alleged herein. The
7 advertising and labeling for the Contaminated Dog Foods was designed to encourage consumers
8 to purchase the Contaminated Dog Foods and reasonably misled the reasonable consumer, i.e.,
9 Plaintiffs and the Class, into purchasing the Contaminated Dog Foods. Defendants own,
10 manufacture, and distribute the Contaminated Dog Foods, and created and/or authorized the
11 unlawful, fraudulent, unfair, misleading, and/or deceptive labeling and advertising for the
12 Contaminated Dog Foods.

13 23. The Contaminated Dog Foods, at a minimum, include:

14 (a) Wellness CORE Adult Dry Ocean Whitefish, Herring Meal and Salmon
15 Meal:



(b) Wellness Complete Health Adult Dry Whitefish and Sweet Potato:



FACTUAL ALLEGATIONS

Both Arsenic and Lead Are Exceptionally Dangerous When Ingested

24. Toxins like arsenic and lead can cause serious illness to humans and animals. A company should be vigilant to take all reasonable steps to avoid causing family pets to ingest these toxins.

25. Arsenic is a semi-metal element in the periodic table. It is odorless and tasteless. Arsenic occurs naturally in the environment as an element of the earth's crust; it is found in rocks, soil, water, air, plants, and animals. Elemental arsenic is combined with other elements such as oxygen, chlorine, and sulfur to form inorganic arsenic compounds. Historically, arsenic compounds were used in many industries, including: (i) as a preservative in pressure-treated lumber; (ii) as a preservative in animal hides; (iii) as an additive to lead and copper for hardening; (iv) in glass manufacturing; (v) in pesticides; (vi) in animal agriculture; and (vii) as arsine gas to enhance junctions in semiconductors. The United States has canceled the approvals of some of these uses, such as arsenic-based pesticides, for health and safety reasons. Some of

1 these cancellations were based on voluntary withdrawals by producers. For example,
2 manufacturers of arsenic-based wood preservatives voluntarily withdrew their products in 2003
3 due to safety concerns, and the EPA signed the cancellation order. In the Notice of Cancellation
4 Order, the EPA stated that it "believes that reducing the potential residential exposure to a known
5 human carcinogen is desirable." Arsenic is an element—it does not degrade or disappear.

6 26. Inorganic arsenic is a known cause of human cancer. The association between
7 inorganic arsenic and cancer is well documented. As early as 1879, high rates of lung cancer in
8 miners from the Kingdom of Saxony were attributed, in part, to inhaled arsenic. By 1992, the
9 combination of evidence from Taiwan and elsewhere was sufficient to conclude that ingested
10 inorganic arsenic, such as is found in contaminated drinking water and food, was likely to
11 increase the incidence of several internal cancers. The scientific link to skin and lung cancers is
12 particularly strong and longstanding, and evidence supports conclusions that arsenic may cause
13 liver, bladder, kidney, and colon cancers as well.

14 27. Lead is a metallic substance formerly used as a pesticide in fruit orchards, but the
15 use of such pesticides is now prohibited in the United States. Lead, unlike many other poisons,
16 builds up in the body over time as the person is exposed to and ingests it, resulting in a
17 cumulative exposure which can, over time, become toxic and seriously injurious to health. Lead
18 poisoning can occur from ingestion of food or water containing lead. Acute or chronic exposure
19 to material amounts of lead can lead to severe brain and kidney damage, among other issues, and
20 ultimately cause death.

21 28. The State of California has included arsenic and lead as a known carcinogen and
22 developmental toxin on the Proposition 65 list, pursuant to the Safe Drinking Water and Toxic
23 Enforcement Act of 1986.

24 29. The FDA has set standards that regulate the maximum parts per billion of lead
25 permissible in water: bottled water cannot contain more than 5 ppb of total lead or 10 ppb of total
26 arsenic. *See* 21 C.F.R. §165.110(b)(4)(iii)(A).

1 **Defendants Falsely Advertise the Contaminated Dog Foods as Healthy While Omitting Any**
2 **Mention of Arsenic or Lead**

3 30. Defendants formulate, develop, manufacture, label, distribute, market, advertise,
4 and sell their extensive Wellness lines of dry and wet pet food products in California and across
5 the United States.

6 31. Based on Defendants' decision to advertise, label, and market their Contaminated
7 Dog Foods as made up of "Uncompromising Nutrition" and "Unrivaed Quality Standards" that
8 has nothing in excess and offers complete health, they had a duty to ensure that the these
9 statements were true. As such, Defendants knew or should have known that the Contaminated
10 Dog Foods included concerning and higher levels of arsenic and lead.

11 32. The Contaminated Dog Foods are available at numerous retail and online outlets.

12 33. The Contaminated Dog Foods are widely advertised.

13 34. The official Wellness Pet Food website displays the Contaminated Dog Foods'
14 descriptions and full lists of ingredients for the Contaminated Dog Foods and includes the
15 following promise:

16 **Our Standards. Our Promise.**

17
18 At Wellness, your pet's health is at the core of all we do. That's why we have
19 developed an extensive quality assurance program, guaranteeing that all of our
products are safe, pure and balanced.

20 35. The Defendants' webpages again and again repeat the misleading statements
21 about the benefits of the Contaminated Dog Foods described above, without any mention of the
22 arsenic and lead they contain.

23 36. As a result of Defendants' omissions, a reasonable consumer would have no
24 reason to suspect the presence of arsenic and lead in the Contaminated Dog Foods without
25 conducting his or her own scientific tests, or reviewing third-party scientific testing of these
26 products.

1 37. That is exactly what Plaintiffs did here. Plaintiffs' independent lab testing of the
2 Contaminated Dog Foods found that Wellness CORE Adult Dry Ocean Whitefish, Herring Meal
3 and Salmon Meal contains 1,500 ppb of arsenic and 221 ppb of lead and Wellness Complete
4 Health Adult Dry Whitefish and Sweet Potato contains 1,200 ppb of arsenic and 220 ppb of lead.

5 **DEFENDANTS' STATEMENTS AND OMISSIONS VIOLATE CALIFORNIA LAWS**

6 38. California law is designed to ensure that a company's claims about its products are
7 truthful and accurate. Defendants violated California law by incorrectly claiming that the
8 Contaminated Dog Foods are pure, healthy, and safe for consumption and by not accurately
9 detailing that the products contain the toxins arsenic and lead. Instead, Defendants represented
10 that the Contaminated Dog Foods as made up of "Uncompromising Nutrition" and "Unrivaled
11 Quality Standards" that has nothing in excess and offers complete health.

12 39. Defendants' marketing and advertising campaign has been sufficiently lengthy in
13 duration, and widespread in dissemination, that it would be unrealistic to require Plaintiffs to
14 plead relying upon each advertised misrepresentation.

15 40. Defendants have engaged in this long-term advertising campaign to convince
16 potential customers that the Contaminated Dog Foods were pure, healthy, safe for consumption,
17 and did not contain harmful ingredients, such as arsenic and lead.

18 **PLAINTIFFS' RELIANCE WAS REASONABLE AND FORESEEN BY DEFENDANTS**

19 41. Plaintiffs reasonably relied on Defendants' own statements, misrepresentations,
20 and advertising concerning the particular qualities and benefits of the Contaminated Dog Foods.

21 42. Plaintiffs read and relied upon the labels of the Contaminated Dog Foods in
22 making their purchasing decisions.

23 43. A reasonable consumer would consider the labeling of a product when deciding
24 whether to purchase. Here, Plaintiffs relied on the specific statements and misrepresentations by
25 Defendants that the Contaminated Dog Foods were healthy and made up of "Uncompromising
26 Nutrition" and "Unrivaled Quality Standards" that has nothing in excess and offers complete
27 health with no disclosure of the inclusion of arsenic or lead.

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1 **DEFENDANTS' KNOWLEDGE AND NOTICE OF THEIR BREACHES**
2 **OF THEIR EXPRESS AND IMPLIED WARRANTIES**

3 44. Defendants had sufficient notice of their breaches of express and implied
4 warranties. Defendants have, and had, exclusive knowledge of the physical and chemical make-
5 up of the Contaminated Dog Foods. Moreover, Defendants were put on notice by the Clean
6 Label Project on the inclusion of heavy metals in its dog food products.

7 **PRIVITY EXISTS WITH PLAINTIFFS AND THE PROPOSED CLASS**

8 45. Defendants knew that consumers such as Plaintiffs and the proposed Class would
9 be the end purchasers of the Contaminated Dog Foods and the target of their advertising and
10 statements.

11 46. Defendants intended that the advertising, labeling, statements, and representations
12 would be considered by the end purchasers of the Contaminated Dog Foods, including Plaintiffs
13 and the proposed Class.

14 47. Defendants directly marketed to Plaintiffs and the proposed Class through
15 statements on their website, labeling, advertising, and packaging.

16 48. Plaintiffs and the proposed Class are the intended beneficiaries of the expressed
17 and implied warranties.

18 **CLASS ACTION ALLEGATIONS**

19 49. Plaintiffs bring this action individually and on behalf of the following Class
20 pursuant to Rule 23(a) and 23(b)(2) and (3) of the Federal Rules of Civil Procedure:

21 All persons who are citizens of the United States who, from July 1, 2013 to the
22 present, purchased the Contaminated Dog Foods for household or business use,
and not for resale (the "Class").

23 50. In addition, Plaintiffs brings this action individually and on behalf of the
24 following Subclass pursuant to Rule 23(a) and 23(b)(2) and (3) of the Federal Rules of Civil
25 Procedure:

26 All persons in California who, from July 1, 2013 to the present, purchased the
27 Contaminated Dog Foods for household or business use, and not for resale (the
28 "Subclass").

1 51. Excluded from the Class are the Defendants, any parent companies, subsidiaries,
2 and/or affiliates, officers, directors, legal representatives, employees, co-conspirators, all
3 governmental entities, and any judge, justice, or judicial officer presiding over this matter.

4 52. This action is brought and may be properly maintained as a class action. There is
5 a well-defined community of interests in this litigation and the members of the Class are easily
6 ascertainable.

7 53. The members in the proposed Class are so numerous that individual joinder of all
8 members is impracticable, and the disposition of the claims of all Class members in a single
9 action will provide substantial benefits to the parties and Court.

10 54. Questions of law and fact common to Plaintiffs and the Class and Subclass
11 include, but are not limited to, the following:

- 12 (a) whether Defendants owed a duty of care to the Class;
- 13 (b) whether Defendants knew or should have known that the Contaminated
14 Dog Foods contained higher levels of arsenic and/or lead;
- 15 (c) whether Defendants represented and continue to represent that the
16 Contaminated Dog Foods are made up of "Uncompromising Nutrition" and "Unrivaled Quality
17 Standards" that has nothing in excess and offers complete health;
- 18 (d) whether Defendants represented and continue to represent that the
19 Contaminated Dog Foods are healthy and safe for consumption;
- 20 (e) whether Defendants failed to state that the Contaminated Dog Foods
21 contained arsenic and lead;
- 22 (f) whether Defendants' representations in advertising and/or labeling are
23 false, deceptive, and misleading;
- 24 (g) whether those representations are likely to deceive a reasonable consumer;
- 25 (h) whether Defendants had knowledge that those representations were false,
26 deceptive, and misleading;
- 27 (i) whether Defendants continue to disseminate those representations despite
28 knowledge that the representations are false, deceptive, and misleading;

1 (j) whether a representation that a product is healthy and safe for
2 consumption and do not contain arsenic and/or lead is material to a reasonable consumer;

3 (k) whether Defendants' representations and descriptions on the labeling of
4 the Contaminated Dog Foods are likely to mislead, deceive, confuse, or confound consumers
5 acting reasonably;

6 (l) whether Defendants violated California Business & Professions Code
7 sections 17200, *et seq.*;

8 (m) whether Defendants violated California Business & Professions Code
9 sections 17500, *et seq.*;

10 (n) whether Defendants violated California Civil Code sections 1750, *et seq.*;

11 (o) whether Plaintiffs and the members of the Class are entitled to actual,
12 statutory, and punitive damages; and

13 (p) whether Plaintiffs and members of the Class are entitled to declaratory and
14 injunctive relief.

15 55. Defendants engaged in a common course of conduct giving rise to the legal rights
16 sought to be enforced by Plaintiffs individually and on behalf of the other members of the Class.
17 Identical statutory violations and business practices and harms are involved. Individual
18 questions, if any, are not prevalent in comparison to the numerous common questions that
19 dominate this action.

20 56. Plaintiffs' claims are typical of Class members' claims in that they are based on
21 the same underlying facts, events, and circumstances relating to Defendants' conduct.

22 57. Plaintiffs will fairly and adequately represent and protect the interests of the
23 Class, have no interests incompatible with the interests of the Class, and have retained counsel
24 competent and experienced in class action, consumer protection, and false advertising litigation.

25 58. Class treatment is superior to other options for resolution of the controversy
26 because the relief sought for each Class member is small such that, absent representative
27 litigation, it would be infeasible for Class members to redress the wrongs done to them.

28

1 59. Questions of law and fact common to the Class predominate over any questions
2 affecting only individual Class members.

3 60. As a result of the foregoing, Class treatment is appropriate.

4 **COUNT I**

5 **(Negligent Misrepresentation Against Defendants on Behalf of the Class)**

6 61. Plaintiffs incorporate by reference and reallege each and every allegation
7 contained above, as though fully set forth herein.

8 62. Plaintiffs reasonably placed their trust and reliance in Defendants' representations
9 that the Contaminated Dog Foods are made up of "Uncompromising Nutrition" and "Unrivaled
10 Quality Standards" that has nothing in excess and offers complete health.

11 63. Plaintiffs reasonably placed their trust and reliance in Defendants that the
12 Contaminated Dog Foods marketed and advertised to them and the Class were healthy and safe
13 for consumption and did not contain arsenic and lead.

14 64. Because of the relationship between the parties, the Defendants owed a duty to
15 use reasonable care to impart correct and reliable disclosures concerning the presence of arsenic
16 and lead in the Contaminated Dog Foods or, based upon their superior knowledge, having
17 spoken, to say enough to not be misleading.

18 65. Defendants breached their duty to Plaintiffs and the Class by providing false,
19 misleading, and/or deceptive information regarding the nature of the Contaminated Dog Foods.

20 66. Plaintiffs and the Class reasonably and justifiably relied upon the information
21 supplied to them by the Defendants. As a result, Plaintiffs and the Class purchased the
22 Contaminated Dog Foods at a premium.

23 67. Defendants failed to use reasonable care in their communications and
24 representations to Plaintiffs and Class.

25 68. By virtue of Defendants' negligent misrepresentations, Plaintiffs and the Class
26 have been damaged in an amount to be proven at trial or alternatively, seek rescission and
27 disgorgement under this Count.

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COUNT II

(Violations of California's Consumer Legal Remedies Act, California Civil Code §§1750, *Et Seq.*, Against Defendants on Behalf of the Subclass)

69. Plaintiffs Zeiger and Freeborn incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

70. Plaintiffs Zeiger and Freeborn and each proposed Subclass member is a "consumer," as that term is defined in California Civil Code section 1761(d).

71. The Contaminated Dog Foods are "goods," as that term is defined in California Civil Code section 1761(a).

72. Defendants are a "person" as that term is defined in California Civil Code section 1761(c).

73. Plaintiffs Zeiger and Freeborn and each proposed Subclass member's purchase of Defendants' products constituted a "transaction," as that term is defined in California Civil Code section 1761(e).

74. Defendants' conduct alleged herein violates the following provisions of California's Consumer Legal Remedies Act (the "CLRA"):

(a) California Civil Code section 1770(a)(5), by representing that the Contaminated Dog Foods are healthy and safe for consumption and by failing to make any mention of arsenic and lead in the Contaminated Dog Foods;

(b) California Civil Code section 1770(a)(7), by representing that the Contaminated Dog Foods were of a particular standard, quality, or grade, when they were of another;

(c) California Civil Code section 1770(a)(9), by advertising the Contaminated Dog Foods with intent not to sell them as advertised; and

(d) California Civil Code section 1770(a)(16), by representing that the Contaminated Dog Foods have been supplied in accordance with previous representations when they have not.

COUNT IV

(Violations of the Unfair Competition Law, California Business & Professions Code §§17200, *Et Seq.*, Against Defendants on Behalf of the Subclass)

84. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

85. The Unfair Competition Law prohibits any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code §17200.

Fraudulent

86. Defendants' statements that the Contaminated Dog Foods are healthy and safe for consumption are literally false and likely to deceive the public, as is Defendants' failing to make any mention of arsenic and lead in the Contaminated Dog Foods.

Unlawful

87. As alleged herein, Defendants have advertised the Contaminated Dog Foods with false or misleading claims, such that Defendants' actions as alleged herein violate at least the following laws:

- The CLRA, California Business & Professions Code sections 1750, *et seq.*; and
- The False Advertising Law, California Business & Professions Code sections 17500, *et seq.*

Unfair

88. Defendants' conduct with respect to the labeling, advertising, marketing, and sale of the Contaminated Dog Foods is unfair because Defendants' conduct was immoral, unethical, unscrupulous, or substantially injurious to consumers and the utility of its conduct, if any, does not outweigh the gravity of the harm to its victims.

89. Defendants' conduct with respect to the labeling, advertising, marketing, and sale of the Contaminated Dog Foods is also unfair because it violates public policy as declared by specific constitutional, statutory, or regulatory provisions, including, but not limited to, the False Advertising Law and the CLRA.

1 90. Defendants' conduct with respect to the labeling, advertising, marketing, and sale
2 of the Contaminated Dog Foods is also unfair because the consumer injury is substantial, not
3 outweighed by benefits to consumers or competition, and not one consumers, themselves, can
4 reasonably avoid.

5 91. In accordance with California Business & Professions Code section 17203,
6 Plaintiffs seek an order enjoining Defendants from continuing to conduct business through
7 fraudulent or unlawful acts and practices and to commence a corrective advertising campaign.
8 Defendants' conduct is ongoing and continuing, such that prospective injunctive relief is
9 necessary.

10 92. On behalf of themselves and the Subclass, Plaintiffs also seek an order for the
11 restitution of all monies from the sale the Contaminated Dog Foods, which were unjustly
12 acquired through acts of fraudulent, unfair, or unlawful competition.

13 **COUNT V**

14 **(Breach of Express Warranty, California Commercial Code §2313,**
15 **Against Defendants on Behalf of the Subclass)**

16 93. Plaintiffs incorporate by reference and reallege each and every allegation
17 contained above, as though fully set forth herein.

18 94. As set forth herein, Defendants made express representations to Plaintiffs and the
19 Subclass that the Contaminated Dog Foods as made up of "Uncompromising Nutrition" and
20 "Unrivaled Quality Standards" that has nothing in excess and offers complete health.

21 95. Defendants also made express representations to Plaintiffs and the Subclass that
22 the Contaminated Dog Foods were pure, healthy, and safe for consumption.

23 96. These promises became part of the basis of the bargain between the parties and
24 thus constituted express warranties.

25 97. There was a sale of goods from Defendants to Plaintiffs and the Subclass
26 members.

27 98. On the basis of these express warranties, Defendants sold to Plaintiffs and the
28 Subclass the Contaminated Dog Foods.

1 99. Defendants knowingly breached the express warranties by including arsenic and
2 lead in the Contaminated Dog Foods.

3 100. Defendants were on notice of this breach as they were aware of the included
4 arsenic and lead in the Contaminated Dog Foods, and based on the public investigation by the
5 Clean Label Product that showed their dog food products as unhealthy.

6 101. Privity exists because Defendants expressly warranted to Plaintiffs and the
7 Subclass that the Contaminated Dog Foods were healthy and safe for consumption.

8 102. Plaintiffs and the Subclass reasonably relied on the express warranties by
9 Defendants.

10 103. As a result of Defendants' breaches of their express warranties, Plaintiffs and the
11 Subclass sustained damages as they paid money for the Contaminated Dog Foods that were not
12 what Defendants represented.

13 104. Plaintiffs, on behalf of themselves and the Subclass, seeks actual damages for
14 Defendants' breach of warranty.

15 **COUNT VI**

16 **(Breach of Implied Warranty, California Commercial Code**
17 **§2314, Against Defendants on Behalf of the Subclass)**

18 105. Plaintiffs incorporate by reference and reallege each and every allegation
19 contained above, as though fully set forth herein.

20 106. As set forth herein, Defendants made affirmations of fact on the Contaminated
21 Dog Foods' labels to Plaintiffs and the Subclass that the Contaminated Dog Foods as made up of
22 "Uncompromising Nutrition" and "Unrivalled Quality Standards" that has nothing in excess and
23 offers complete health.

24 107. Defendants also made affirmations of fact on the Contaminated Dog Foods' labels
25 to Plaintiff and the Subclass that the Contaminated Dog Foods were pure, healthy, and safe for
26 consumption and did not contain arsenic or lead.

27 108. The Contaminated Dog Foods did not conform to these affirmations and promises
28 as they contained arsenic and lead at alarming and unsafe levels.

1 109. These promises became part of the basis of the bargain between the parties and
2 thus constituted implied warranties.

3 110. Defendants are merchants engaging in the sale of goods to Plaintiffs and the
4 Subclass.

5 111. There was a sale of goods from Defendants to Plaintiffs and the Subclass
6 members.

7 112. Defendants breached the implied warranties by selling the Contaminated Dog
8 Foods that failed to conform to the promises or affirmations of fact made on the container or
9 label as each product contained arsenic and lead.

10 113. Defendants were on notice of this breach as they were aware of the arsenic and
11 lead included in the Contaminated Dog Foods, and based on the public investigation by the
12 Clean Label Product that showed their dog food products as unhealthy.

13 114. Privity exists because Defendants impliedly warranted to Plaintiffs and the
14 Subclass through the advertising, marketing, and labeling that the Contaminated Dog Foods were
15 pure, healthy, and safe for consumption and by failing to make any mention of arsenic or lead in
16 the Contaminated Dog Foods.

17 115. As a result of Defendants' breach of their implied warranties of merchantability,
18 Plaintiffs and the Subclass sustained damages as they paid money for the Contaminated Dog
19 Foods that were not what Defendants represented.

20 116. Plaintiffs, on behalf of themselves and the Subclass, seek actual damages for
21 Defendants' breach of warranty.

22 **COUNT VII**

23 **(Negligence Per Se Against Defendants on Behalf of the Class)**

24 117. Plaintiffs incorporate by reference and reallege each and every allegation
25 contained above, as though fully set forth herein.

26 118. Defendants have a statutory duty to not mislabel its products under California
27 Health & Safety Code section 113095. Under section 113095, a pet food is mislabeled:

28 (a) "If its labeling is false or misleading in any particular"; or

1 (b) "If its container is so made, formed or filled as to be misleading."

2 119. This statute sets out the standard of care for Defendants that they failed to meet by
3 failing to disclose that the Contaminated Dog Foods contained higher and/or unsafe levels of
4 arsenic and lead as a reasonable consumer would expect when the label states it is healthy and
5 safe.

6 120. Defendants also have a statutory duty to not sell adulterated products under
7 California Health & Safety Code section 113090. Under California Health & Safety Code
8 section 113090, a pet food is adulterated, including:

9 (a) "If any valuable constituent has been in whole or in part omitted or
10 abstracted therefrom";

11 (b) "If any substance has been substituted wholly or in part therefor"; or

12 (c) "If damage or inferiority has been concealed in any manner."

13 121. This statute sets out the standard of care for Defendants that they failed to meet by
14 failing to disclose that the Contaminated Dog Foods were inferior based on the unsafe level of
15 arsenic and lead included.

16 122. Defendants' violations of these statutes were a substantial factor in the harm
17 suffered by Plaintiffs and the Class, including paying a premium price for the Contaminated Dog
18 Foods based on the misrepresentations.

19 123. Plaintiffs and the Class as consumers of dog food are within the class of persons
20 the legislature intended to protect under these statutes.

21 **PRAYER FOR RELIEF**

22 WHEREFORE, Plaintiffs, individually and on behalf of all others similarly situated, pray
23 for judgment against the Defendants as to each and every count, including:

24 A. An order declaring this action to be a proper class action, appointing Plaintiffs and
25 their counsel to represent the Class and Subclass, and requiring Defendants to bear the costs of
26 class notice;

27 B. An order enjoining Defendants from selling the Contaminated Dog Foods until
28 the higher and/or unsafe levels of arsenic and lead are removed;

1 C. An order enjoining Defendants from selling the Contaminated Dog Foods in any
2 manner suggesting or implying that they are healthy and safe for consumption;

3 D. An order requiring Defendants to engage in a corrective advertising campaign and
4 engage in any further necessary affirmative injunctive relief, such as recalling existing products;

5 E. An order awarding declaratory relief, and any further retrospective or prospective
6 injunctive relief permitted by law or equity, including enjoining Defendants from continuing the
7 unlawful practices alleged herein, and injunctive relief to remedy Defendants' past conduct;

8 F. An order requiring Defendants to pay restitution to restore all funds acquired by
9 means of any act or practice declared by this Court to be an unlawful, unfair, or fraudulent
10 business act or practice, untrue or misleading advertising, or a violation of the Unfair
11 Competition Law, False Advertising Law, or CLRA, plus pre- and post-judgment interest
12 thereon;

13 G. An order requiring Defendants to disgorge or return all monies, revenues, and
14 profits obtained by means of any wrongful or unlawful act or practice;

15 H. An order requiring Defendants to pay all actual and statutory damages permitted
16 under the counts alleged herein;

17 I. An order requiring Defendants to pay punitive damages on any count so
18 allowable;

19 J. An order awarding attorneys' fees and costs to Plaintiffs, the Class, and the
20 Subclass; and

21 K. An order providing for all other such equitable relief as may be just and proper.

22 **JURY DEMAND**

23 Plaintiffs hereby demand a trial by jury on all issues so triable.

24 Dated: July 19, 2017

ROBBINS ARROYO LLP
BRIAN J. ROBBINS
KEVIN A. SEELY
ASHLEY R. RIFKIN
STEVEN M. MCKANY

27 */s/Brian J. Robbins*
28 BRIAN J. ROBBINS

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Attorneys for Plaintiffs

1193575

CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Daniel Zeiger, Danz Doggie Daytrips, and Amy Freeborn, Individually and on Behalf of All Others Similarly Situated

DEFENDANTS

WellPet LLC, a Delaware corporation, and Berwind Corporation, a Pennsylvania corporation

(b) County of Residence of First Listed Plaintiff Marin County, CA (EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED. Attorneys (If Known)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Robbins Arroyo LLP
600 B Street, Suite 1900, San Diego, CA 92101
(619) 525-3990

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, LABOR, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation-Transfer
8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): Class Action Fairness Act, 28 U.S.C. §1332(d)(2)

Brief description of cause: Consumer Class Action Complaint

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: [X] Yes [] No

VIII. RELATED CASE(S), IF ANY (See instructions):

JUDGE

DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only)

- [X] SAN FRANCISCO/OAKLAND
[] SAN JOSE
[] EUREKA-MCKINLEYVILLE

DATE: 07/19/2017

SIGNATURE OF ATTORNEY OF RECORD: s/Brian J. Robbins

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS-CAND 44

Authority For Civil Cover Sheet. The JS-CAND 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)."

II. Jurisdiction. The basis of jurisdiction is set forth under Federal Rule of Civil Procedure 8(a), which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

- (1) United States plaintiff. Jurisdiction based on 28 USC §§ 1345 and 1348. Suits by agencies and officers of the United States are included here.
- (2) United States defendant. When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- (3) Federal question. This refers to suits under 28 USC § 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- (4) Diversity of citizenship. This refers to suits under 28 USC § 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)

III. Residence (citizenship) of Principal Parties. This section of the JS-CAND 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the six boxes.

- (1) Original Proceedings. Cases originating in the United States district courts.
- (2) Removed from State Court. Proceedings initiated in state courts may be removed to the district courts under Title 28 USC § 1441. When the petition for removal is granted, check this box.
- (3) Remanded from Appellate Court. Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- (4) Reinstated or Reopened. Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- (5) Transferred from Another District. For cases transferred under Title 28 USC § 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- (6) Multidistrict Litigation Transfer. Check this box when a multidistrict case is transferred into the district under authority of Title 28 USC § 1407. When this box is checked, do not check (5) above.
- (8) Multidistrict Litigation Direct File. Check this box when a multidistrict litigation case is filed in the same district as the Master MDL docket. Please note that there is no Origin Code 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC § 553. Brief Description: Unauthorized reception of cable service.

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Federal Rule of Civil Procedure 23.

Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS-CAND 44 is used to identify related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

IX. Divisional Assignment. If the Nature of Suit is under Property Rights or Prisoner Petitions or the matter is a Securities Class Action, leave this section blank. For all other cases, identify the divisional venue according to Civil Local Rule 3-2: "the county in which a substantial part of the events or omissions which give rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated."

Date and Attorney Signature. Date and sign the civil cover sheet.