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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK  
ROCHESTER DIVISION**

THERESA ACQUARD and TOM BUTLER,  
*individually and on behalf of all others  
similarly situated,*

Plaintiff,

– against –

BIG HEART PET BRANDS, INC.,

Defendant.

Case No. 19-CV-6021

**CLASS ACTION COMPLAINT**

**DEMAND FOR JURY TRIAL**

Plaintiffs Theresa Acquard and Tom Butler (“Plaintiffs”), by and through their undersigned counsel, brings this Class Action Complaint against Defendant Big Heart Pet Brands, Inc. (“Defendant” or “Big Heart”), on behalf of themselves and all others similarly situated, and alleges upon personal knowledge as to their own actions, and upon information and belief as to counsel’s investigations and all other matters, as follows:

**NATURE OF THE ACTION**

1. Plaintiffs bring this consumer protection and false advertising class action lawsuit against Defendant, based on Defendant’s false and misleading representations regarding a number of its “Nature’s Recipe” brand products (the “Product(s)”<sup>1</sup>).

2. Defendant has falsely and deceptively labeled and advertised the Products with the following representations<sup>2</sup>: “All Natural,” “All Natural Dog Food,” and/or “All Natural Cat Food” (collectively, the “Natural Representations”).

3. However, the Products are not all natural, contrary to Defendant’s representations.

4. In fact, the Products contain non-natural, artificial, and/or synthetic ingredients including but not limited to sodium tripolyphosphate (“STPP”), synthetic vitamins and minerals, citric acid, and lactic acid.

5. Defendant purposefully, knowingly, recklessly, and/or negligently made the false and misleading Natural Representations, as it knew, or should have known, that the Products contain synthetic and/or artificial ingredients.

6. Plaintiffs and other consumers relied on Defendant’s false and misleading Natural Representations when purchasing the Products. Had Plaintiffs and the other consumers known that

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<sup>1</sup> See full list *infra* and in **Exhibit “A.”**

<sup>2</sup> Including, but not limited to, these representations. A detailed list of all alleged representations can be found in **Exhibit “A.”**

Defendant's Natural Representations were false and misleading, they would not have purchased the Products or would have paid significantly less for the Products. Consequently, Plaintiffs and the other consumers have suffered injury in fact as a result of Defendant's false and misleading Natural Representations.

7. Plaintiffs bring this class action lawsuit on behalf of themselves and all others similarly situated. Plaintiffs seek to represent a class of New York residents who purchased Defendant's Products (the "Class" as defined below).

8. Plaintiffs seek damages, restitution, declaratory and injunctive relief, and all other remedies the Court deems appropriate.

#### **JURISDICTION AND VENUE**

9. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A) because this case is a class action where the aggregate claims of all members of the proposed Classes are in excess of \$5,000,000, exclusive of interest and costs, and Plaintiffs, as well as most members of the proposed Classes, which total more than 100 class members, are citizens of states different from the states of Defendant.

10. This Court has personal jurisdiction over Defendant in part because Defendant has sufficient minimum contacts with New York. Plaintiffs' claims arise out of Defendants' conduct within New York, including Plaintiffs' purchases of the Products in New York based on Defendant's false and misleading Natural Representations about the Products.

11. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2). A substantial part of the events or omissions giving rise to Plaintiffs' claims occurred within this District, including Plaintiffs' purchases of the Products within this District based on Defendant's false and misleading Natural Representations about the Products.

**PARTIES**

12. Plaintiff Theresa Acquard is a citizen of New York, residing in North Java, New York. Approximately every 13 weeks since July, 2015 to October, 2018, Ms. Acquard purchased: Adult Grain Free Chicken, Sweet Potato & Pumpkin Recipe both in Alden, New York and Java, New York. Ms. Acquard purchased the Products online at Chewy.com at a premium price, relying on Defendant's representation on the Products that the Products were "All Natural Dog Food." Ms. Acquard would not have purchased the Products or would have paid significantly less for them had she know that Defendant's Natural Representations were false and misleading. Ms. Acquard therefore suffered injury in fact and lost money as a result of Defendant's misleading, false, unfair, and fraudulent practices, as described herein. Despite being deceived, Ms. Acquard would likely purchase the Products in the future if they were reformulated to be free of artificial and synthetic ingredients.

13. Plaintiff Tom Butler is a citizen of New York, residing in Ballston Lake. Between mid-2017 and mid-2018, Mr. Butler purchased the following Products for his dog: Puppy Chicken Meal & Rice Recipe, Grain Free Puppy Chicken Sweet Potato & Pumpkin Recipe, and Grain Free Salmon and Potato Recipe. Mr. Butler purchased the foregoing Products from a Hannaford market in Malta, New York, and Price Chopper in Clifton Park, New York. Mr. Butler purchased the Products at a premium price, relying on Defendant's representation on the Products' labeling that the Products were "All Natural Dog Food." Mr. Butler would not have purchased the Products or would have paid significantly less for them had he known that Defendant's Natural Representations were false and misleading. Mr. Butler therefore suffered injury in fact and lost money as a result of Defendant's misleading, false, unfair, and fraudulent practices, as described herein. Despite being deceived, Mr. Butler would likely purchase the Products in the future if they

were reformulated to be free of artificial and synthetic ingredients.

14. Defendant Big Heart Pet Brands, Inc., is a Delaware corporation with its principal place of business in San Francisco, California. Defendant, and/or its agents, formulates, manufactures, labels, packages, advertises, distributes, and sells the Products nationwide, including in New York. Big Heart has maintained substantial distribution, sales, and marketing operations in this District.

### **FACTUAL ALLEGATIONS**

#### **A. Background**

15. The United States Food and Drug Administration (“FDA”) -- which has responsibility for regulating the labeling of the animal food products at issue in this case -- has not promulgated a regulation or law defining the terms “natural” or “all natural.” However, the agency has established a policy defining the outer boundaries of the use of the term “natural” by clarifying that it “has not objected to the use of the term if the food does not contain added color, artificial flavors, or synthetic substances.”<sup>3</sup>

16. Specifically, the FDA has stated that:

the agency will maintain its policy [] regarding the use of “natural,” as meaning that nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food.

Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993).

17. Other federal agencies provide further explanation of the term “natural.” According

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<sup>3</sup> *What Is the Meaning of “Natural” on the Label of Food?*, [www.FDA.GOV](http://www.FDA.GOV) (June 28, 2017), <https://goo.gl/XYqaUs> (Internet Archive WayBack Machine capture); *see also* “Natural” on Food Labeling, [www.FDA.GOV](http://www.FDA.GOV) (Nov. 11, 2017), <https://goo.gl/mvteUK>.

to the United States Department of Agriculture's ("USDA") Food Safety and Inspection Service ("FSIS"), a "natural" product is:

[a] product containing no artificial ingredient or added color and is only minimally processed. Minimal processing means that the product was processed in a manner that does not fundamentally alter the product. The label must include a statement explaining the meaning of the term natural (such as "no artificial ingredients; minimally processed").<sup>4</sup>

18. In the FSIS's *Food Standards and Labeling Policy Book*, the FSIS informs the public about processes that are "clearly" not considered to be "minimal": "[r]elatively severe processes, e.g., solvent extraction, acid hydrolysis, and chemical bleaching would clearly be considered more than minimal processing."<sup>5</sup>

19. According to USDA regulations, an ingredient is nonsynthetic (natural) if it is:

[a] substance that is derived from mineral, plant, or animal matter and does not undergo a synthetic process as defined in section 6502(21) of the Act (7 U.S.C. § 6502(21)). For the purposes of this part, nonsynthetic is used as a synonym for natural as the term is used in the Act.

7 C.F.R. § 205.2.

20. Further, an ingredient is synthetic if it is:

[a] substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring plant, animal, or mineral sources, except that such term shall not apply to substances created by naturally occurring biological processes.

*Id.*

21. The following ingredients, which are found in the Products, are synthetic and/or

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<sup>4</sup> See FOOD SAFETY & INSPECTION SERV., U.S. DEP'T OF AGRIC., *Meat and Poultry Labeling Terms*, at 3 of 3 (2011), available at <https://goo.gl/k7Syls>.

<sup>5</sup> See FOOD SAFETY & INSPECTION SERV., U.S. DEP'T OF AGRIC., *Food Standards and Labeling Policy Book*, at 108 of 187 (2005), available at <https://goo.gl/o6szaF>.

artificial and therefore cannot be “natural” under the federal regulations and FDA policy referenced above:

- a. **Sodium Tripolyphosphate (“STPP”)** is a suspected neurotoxin according to the National Institute for Occupational Safety and Health’s (“NIOSH”) Registry of Toxic Effects of Chemical Substances.<sup>6</sup> Food-grade STPP may cause acute skin irritation.<sup>7</sup> The United States Environmental Protection Agency has listed STPP as a registered pesticide pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act,<sup>8</sup> and it is also listed as an air contaminant under California’s Occupational Safety and Health Act.<sup>9</sup> STPP is also used in products such as home laundry detergent builder, industrial and institutional detergents, and dish washing detergents. According to the FSIS, STPP is an “anti-coagulant for use in recovered livestock blood which is subsequently used in food products[.]”<sup>10</sup> According to a summary on

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<sup>6</sup> Varelzis Patroklos et al., *Plackett-Burman Experimental Design for Investigating the Effect of Porcine Plasma Protein, Trehalose and Bovine Meat Protein Isolate on Cook Yield and Texture of Minced Bovine Meat*, 2.3 J. FOOD RES. 122, 122 (2013), available at <https://goo.gl/bmdCyb> (click “PDF” link next to words “Full Text”).

<sup>7</sup> INNOPHOS, *Material Safety Data Sheet: Sodium Tripolyphosphate, Food Grade*, at 2 of 11 (2009), available at <https://goo.gl/7tCtCZ>.

<sup>8</sup> See *Chemical Profiles: Regulatory Coverage: Sodium Tripolyphosphate*, SCORECARD.GOODGUIDE.COM (2011), <https://goo.gl/rNsuFB>; see also *Registered Pesticides (Federal Insecticide, Fungicide, and Rodenticide Act)*, SCORECARD.GOODGUIDE.COM (2011), <https://goo.gl/byKcmV>.

<sup>9</sup> See *Chemical Profiles: Regulatory Coverage: Sodium Tripolyphosphate*, SCORECARD.GOODGUIDE.COM (2011), <https://goo.gl/rNsuFB>; see also *Air Contaminants (California Occupational Safety and Health Act)*, SCORECARD.GOODGUIDE.COM (2011), <https://goo.gl/ExiKHm>.

<sup>10</sup> FOOD SAFETY & INSPECTION SERV., U.S. DEP’T OF AGRIC., *Table of Safe and Suitable Ingredients: Miscellaneous Update 5/25/2017*, at 1 of 18 (2017), available at <https://goo.gl/S3682u>.

STPP by the United States National Library of Medicine (“USNLM”), STPP is “[p]repared by molecular dehydration of mono- & disodium phosphates” or by “[c]ontrolled calcination of sodium orthophosphate mixture from sodium carbonate & phosphoric acid.”<sup>11</sup> According to the USNLM, animal studies have shown that this chemical induces emesis (vomiting) in dogs and that dietary administration in animals has caused a decrease in iron content in bone, liver, and spleen, and bone depletion of calcium.<sup>12</sup>

b. **Added Vitamins:**

- i. **Thiamine mononitrate** is the synthetic version of vitamin B1,<sup>13</sup> and “occurs as white crystals or a white crystalline powder and is prepared from thiamine hydrochloride by dissolving the hydrochloride salt in alkaline solution followed by precipitation of the nitrate half-salt with a stoichiometric amount of nitric acid.” 21 C.F.R. § 184.1878(a). Thiamine mononitrate is not a naturally occurring substance in foods and is produced synthetically, according to the FDA.<sup>14</sup>

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<sup>11</sup> U.S. NAT’L LIBRARY OF MED., NAT’L INSTS. OF HEALTH, *Pentasodium Triphosphate: 10.2 Methods of Manufacturing*, PUBCHEM.NCBI.NLM.NIH.GOV (2018), <https://goo.gl/o1VQa6>.

<sup>12</sup> U.S. NAT’L LIBRARY OF MED., NAT’L INSTS. OF HEALTH, *Pentasodium Triphosphate: 13.1.7 Toxicity Summary*, PUBCHEM.NCBI.NLM.NIH.GOV (2018), <https://goo.gl/hR37Bq>.

<sup>13</sup> D. Burdick, *Thiamine (B1)*, in KIRK-OTTMER ENCYCLOPEDIA OF CHEMICAL TECHNOLOGY (2000).

<sup>14</sup> Warning Letter from Anne E. Johnson, Food and Drug Administration, to Franco DiGiacomo, P&S Ravioli Company (Aug. 4, 2015), *available at* <https://goo.gl/xtiBmQ>.



- ii. **Menadione sodium bisulfite** is a synthetic vitamin (vitamin K3).<sup>15</sup> Menadione sodium bisulfite can cause carcinogenic effects and “is toxic to kidneys, lungs, liver, [and] mucous membranes.”<sup>16</sup> “Repeated or prolonged exposure to the substance can produce target organs damage.”<sup>17</sup>
- iii. **Niacin**, or vitamin B3, is chemically synthesized.<sup>18</sup>
- iv. **Folic Acid** is synthetically made by “the reaction of 2,3-dibromopropanol, 2,4,5-triamino-6-hydroxypyrimidine and para-aminobenzoyl glutamic acid.”<sup>19</sup>
- v. **D-calcium pantothenate** is a commercial source for vitamin B5, and is a chemical made in a lab from D-pantothenic acid, according to the USNLM.<sup>20</sup> Calcium pantothenate is the calcium salt of the dextrorotary isomer of pantothenic acid.<sup>21</sup> It is used as a growth-prompting vitamin.

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<sup>15</sup> SAUNDERS COMPREHENSIVE VETERINARY DICTIONARY (4th ed. 2012).

<sup>16</sup> *Material Safety Data Sheet: Menadione-Sodium Bisulfite MSDS*, at 1 of 5, SCIENCELAB.COM (2013), available at <https://goo.gl/JqojoM>; SAUNDERS COMPREHENSIVE VETERINARY DICTIONARY (4th ed. 2012).

<sup>17</sup> *Material Safety Data Sheet: Menadione-Sodium Bisulfite MSDS*, at 1 of 5, SCIENCELAB.COM (2013), available at <https://goo.gl/JqojoM>.

<sup>18</sup> W. Friedrich, *Vitamins* (1988); Joseph E. Toomey, Jr., *Electrochemical Synthesis of Niacin and Other N-Heterocyclic Compounds* (1993), available at <https://goo.gl/KutLgN> (patent application EP0536309A1).

<sup>19</sup> U.S. NAT’L LIBRARY OF MED., NAT’L INSTS. OF HEALTH, *Folic Acid: 10 Use and Manufacturing*, PUBCHEM.NCBI.NLM.NIH.GOV (2018), <https://goo.gl/Ceyj2n>.

<sup>20</sup> U.S. NAT’L LIBRARY OF MED., NAT’L INSTS. OF HEALTH, *Medline Plus: Pantothenic Acid*, MEDLINEPLUS.GOV (2018), <https://goo.gl/gE1nQV>.

<sup>21</sup> INFORMATICS INC., *Monograph on Pantothenates*, at 11 of 408 (1974).

- vi. **Riboflavin** “occurs as yellow to orange-yellow needles that are crystallized from 2N acetic acid, alcohol, water, or pyridine.” 21 C.F.R. § 184.1695(a). “It may be prepared by chemical synthesis, [or] biosynthetically by the organism *Eremothecium ashbyii* . . . .”  
*Id.*
- vii. **Pyridoxine Hydrochloride**, a form of vitamin B6, is “the chemical 3-hydroxy-4,5-dihydroxymethyl-2-methylpyridine hydrochloride that is prepared by chemical synthesis.” 21 C.F.R. § 184.1676(a).<sup>22</sup>
- viii. **Beta-carotene** is “synthesized by saponification of vitamin A acetate.” 21 C.F.R. § 184.1245(a). “The resulting alcohol is either reacted to form vitamin A Wittig reagent or oxidized to vitamin A aldehyde.” *Id.* “Vitamin A Wittig reagent and vitamin A aldehyde are reacted together to form beta-carotene.” *Id.*
- ix. **Vitamin A Supplement** is produced from a multi-step synthetic procedure.<sup>23</sup>

c. **Added Minerals:**

- i. **Sodium Selenite** is a white colored crystalline solid that is “prepared by evaporating an aqueous solution of sodium hydroxide and selenious acid between 60 and 100 deg C; . . . by heating a mixture of sodium chloride and selenium oxide.”<sup>24</sup> The

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<sup>22</sup> See also U.S. NAT’L LIBRARY OF MED., NAT’L INSTS. OF HEALTH, *Pyridoxine Hydrochloride: 9 Use and Manufacturing*, PUBCHEM.NCBI.NLM.NIH.GOV (2018), <https://goo.gl/62kNcn>.

<sup>23</sup> T.W.G. Solomons & C.B. Fryhle, *Organic Chemistry* (7th ed. 2000).

<sup>24</sup> *The Merck Index: An Encyclopedia of Chemicals, Drugs, and Biologicals*, at 1489 (M.J.

chemical may irritate skin, eyes, and mucous membranes upon contact. Furthermore, the chemical is toxic by ingestion, inhalation, and skin absorption.<sup>25</sup> According to the NIOSH, prolonged exposure to sodium selenite may cause paleness, coated tongue, stomach disorders, nervousness, metallic taste, and a garlic odor of the breath.<sup>26</sup> “Fluid in the abdominal cavity, damage to the liver and spleen, and anemia have been reported in animals.”<sup>27</sup>

- ii. **Copper Sulfate** “is prepared by the reaction of sulfuric acid with cupric oxide or with copper metal.” 21 C.F.R. § 184.1261(a).
- iii. **Calcium Iodate** “does not occur naturally but can be prepared by passing chlorine into a hot solution of lime (CaCO<sub>3</sub>) in which iodine has been dissolved.” 21 C.F.R. § 184.1206(a).
- d. **Citric Acid** is recognized by the FDA as an unnatural substance when used as a food additive. *See* Warning Letter from Food and Drug Administration to Hirzel Canning Company (Aug. 29, 2001) (“[T]he addition of . . . citric acid to these products preclude use of the term natural to describe this product.”). Citric acid may be manufactured through a solvent extraction process, which involves use of synthetic isoparaffinic petroleum

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O’Neil ed., 2006).

<sup>25</sup> U.S. NAT’L LIBRARY OF MED., NAT’L INSTS. OF HEALTH, *Sodium Selenite*, PUBCHEM.NCBI.NLM.NIH.GOV (2018), <https://goo.gl/w2fEJr>.

<sup>26</sup> U.S. NAT’L LIBRARY OF MED., NAT’L INSTS. OF HEALTH, *Toxicology Data Network: Sodium Selenite*, TOXNET.NLM.NIH.GOV, <https://goo.gl/2YHFmV> (last visited Sept. 26, 2018).

<sup>27</sup> U.S. DEP’T OF HEALTH & HUMAN SERVS. & U.S. DEP’T OF LABOR, *Occupational Health Guideline for Selenium and Its Inorganic Compounds (as Selenium)*, at 1 (1978), available at <https://goo.gl/cSLpyr>.

hydrocarbons. *See* 21 C.F.R. 173.280.

- e. **Lactic Acid** is a synthetic substance used as a food additive. 21 C.F.R. § 172.515. Lactic acid is synthetically formulated commercially through the fermentation of carbohydrates or by a procedure involving formation of lactonitrile from acetaldehyde and hydrogen cyanide and subsequent hydrolysis. 21 C.F.R. § 184.1061(a).

**B. Defendant's false and misleading representations of the Products**

22. At all relevant times, Defendant and/or its agents formulated, manufactured, labeled, packaged, distributed, advertised, and sold the following Products:

a. Nature's Recipe Dog Recipes:

i. Puppy Dog Recipes:

- 1. Small Bites Chicken Meal & Rice Recipe;
- 2. Puppy Chicken Meal & Rice Recipe;
- 3. Grain Free Puppy Chicken Sweet Potato & Pumpkin Recipe;
- 4. Large Breed Puppy Recipe;
- 5. Puppy Lamb Meal & Rice Recipe.

ii. Adult Dog Recipes:

- 1. Adult Lamb & Rice Recipe Cuts in Gravy;
- 2. Adult Lamb Meal & Rice Recipe;
- 3. Pure Essentials™ Adult Duck & Brown Rice Recipe;
- 4. Pure Essentials™ Adult Lamb & Brown Rice Recipe;
- 5. Pure Essentials™ Adult Salmon & Brown Rice Recipe;
- 6. Pure Essentials™ Grain Free Adult Chicken & Sweet Potato Recipe;

7. Adult Chicken Meal & Rice Recipe.
- iii. Senior Dog Recipes:
    1. Senior Lamb & Rice Recipe Cuts in Gravy;
    2. Senior Lamb Meal & Rice Recipe.
- iv. Special Needs—Healthy Skin:
    1. Healthy Skin Vegetarian Recipe Cuts in Gravy;
    2. Healthy Skin Venison & Rice Recipe Cuts in Gravy;
    3. Healthy Skin Venison & Rice Recipe Homestyle Ground;
    4. Healthy Skin Vegetarian Recipe;
    5. Healthy Skin Venison Meal & Rice Recipe.
- v. Special Needs—Easy to Digest:
    1. Large Breed Grain Free Easy to Digest Chicken Sweet Potato & Pumpkin Recipe;
    2. Small Breed Grain Free Easy to Digest Chicken Sweet Potato & Pumpkin Recipe;
    3. Easy to Digest Chicken Rice & Barley Recipe Cuts in Gravy;
    4. Easy to Digest Chicken Rice & Barley Recipe Homestyle Ground;
    5. Easy to Digest Lamb Rice & Barley Recipe Cuts in Gravy;
    6. Easy to Digest Lamb Rice & Barley Recipe Homestyle Ground;
    7. Easy to Digest Chicken Meal Rice & Barley Recipe;
    8. Easy to Digest Fish Meal & Potato Recipe.
- vi. Special Needs—Breed Specific:
    1. Terrier Breed Chicken Rice & Barley Recipe;

2. Toy Breed Chicken Barley & Rice Recipe;
3. Large Breed Chicken & Oatmeal Recipe.
- vii. Special Needs—Healthy Weight:
  1. Healthy Weight Chicken Meal Rice & Barley Recipe.
- viii. Special Needs—High Protein:
  1. High Protein Chicken Meal & Lamb Meal Recipe.
- ix. Special Needs—Joint Health:
  1. Joint Health Fish Meal & Chicken Meal Recipe.
- x. Premium—Grain Free:
  1. Grain Free Chicken & Turkey Stew;
  2. Grain Free Chicken & Venison Stew;
  3. Grain Free Easy to Digest Chicken Sweet Potato & Pumpkin Recipe;
  4. Grain Free Easy to Digest Salmon Sweet Potato & Pumpkin Recipe;
  5. Grain Free Puppy Chicken Sweet Potato & Pumpkin Recipe;
- xi. Wholesome Treats:
  1. Grain Free Biscuits Salmon & Potato Recipe;
  2. Grain Free Biscuits Turkey & Sweet Potato Recipe.
- b. Nature's Recipe Cat Recipes:
  - i. Grain Free:
    1. Grain Free Indoor Chicken and Potato Recipe;
    2. Grain Free Salmon and Potato Recipe.
  - ii. Culinary Favorites™:

1. Culinary Favorites™ Rotisserie Recipe with Real Chicken & a Touch of Garden Vegetables;
2. Culinary Favorites™ Grilled Recipe with Real Salmon & a Touch of Garden Vegetables.

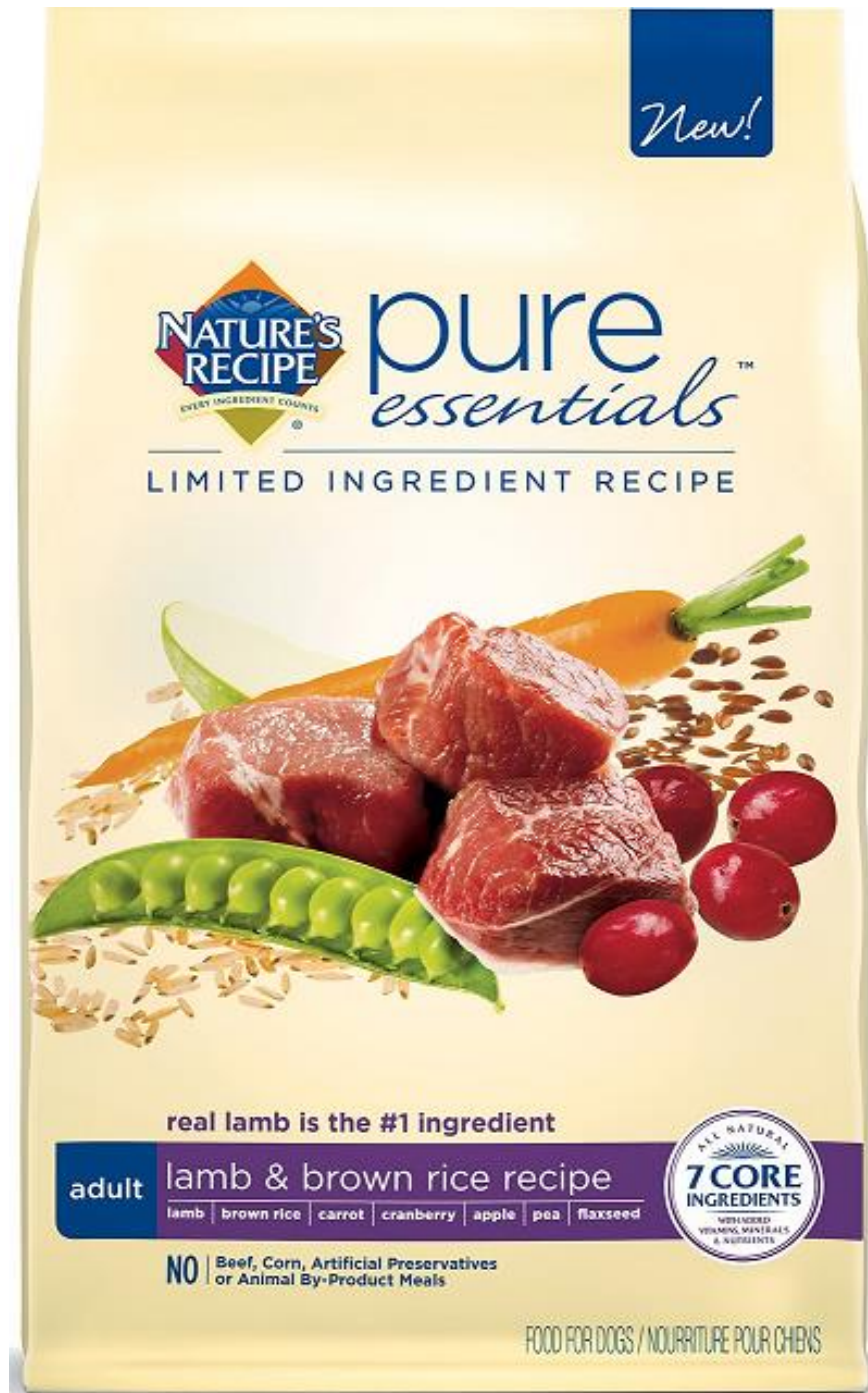
23. At all relevant times, Defendant conspicuously labeled and advertised the Products on their primary display panels with at least one of the Natural Representations, as the following examples show.<sup>28</sup>

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<sup>28</sup> E.g., *Nature's Recipe Grain-Free Chicken, Sweet Potato & Pumpkin Dry Dog Food*, PETCO.COM, <https://goo.gl/nxAqq3> (last visited July 5, 2017); *Nature's Recipe Pure Essentials Limited Ingredient Adult Lamb & Brown Rice Recipe Dry Dog Food*, WWW.CHEWY.COM, <https://goo.gl/taqfMp> (last visited July 5, 2017). For full list of Products and representations, see **Exhibit "A."**







24. At all relevant times, Defendant made the Natural Representations because consumers perceive all natural foods as better, healthier, and more wholesome. In fact, the demand for all natural foods has grown rapidly in recent years. The January 2015 Nielsen Global Health

and Wellness Survey, along with its accompanying report titled “We Are What We Eat,” noted that “[t]he most desirable attributes are foods that are fresh, natural, and minimally processed” and that “[f]oods with all natural ingredients . . . are . . . considered very important to 43% of global respondents.”<sup>29</sup> Further, a March 2016 Nielson report titled “The Humanization of Pet Food” noted that “many consumers perceive natural foods to have unique advantages.”<sup>30</sup> This is a trend that Defendant has exploited through its false and deceptive Natural Representations.

25. Furthermore, according to a presentation made by Jim Barrit, government and regulatory affairs manager for Mars Petcare US, at the 2015 Feed & Pet Food Joint Conference on pet food labels, “NO ONE reads the back of pet food labels . . . they are confusing and overwhelming . . . . If they do, they are only looking at 2-3 first ingredients . . . .”<sup>31</sup> The Conference was attended by two Big Heart compliance employees.<sup>32</sup>

26. Defendant knew what representations it made about the Products, as the Natural Representations appeared on the Products’ labels. Defendant also knew what ingredients were added to each of the Products, since it formulated and manufactured, or oversaw the formulation and manufacturing of, the Products and then listed all the Products’ ingredients on the packaging. Furthermore, the Products are governed by federal regulations that control the labeling of the Products, and therefore Defendant was aware or should have been aware that some of the ingredients have been federally declared to be synthetic substances and/or require extensive processing to be used in food. Defendant knew that “all natural” and “natural” claims are material

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<sup>29</sup> See Exhibit “B,” at 8.

<sup>30</sup> See Exhibit “C,” at 7.

<sup>31</sup> See Exhibit “D,” at 3.

<sup>32</sup> NAT’L GRAIN & FEED ASS’N, *2015 Feed & Pet Food Joint Conference Attendees* (2015), available at <https://goo.gl/xFgnCY>.

to consumers and sought to exploit that trend, as stated above. Defendant knew or should have known that consumers expect pet food labeled “all natural” and “natural,” including the Products at issue (which were labeled with the Natural Representations), to be free of synthetic ingredients.

**C. The Products do not conform to the Natural Representations**

27. Contrary to the Natural Representations, the Products contain ingredients that are synthetic and/or artificial, including but not limited to STPP, synthetic vitamins and minerals, citric acid, and lactic acid.

28. **Exhibit “A”** to this Class Action Complaint depicts a full list of the Products, along with the false and misleading Natural Representations and a list of the ingredients for each of the Products. Ingredients that have been bolded are ingredients that are synthetic and/or artificial ingredients.

29. Because the Products contain ingredients that are synthetic and/or artificial, Defendant’s Natural Representations are false and misleading.

30. Defendant knew or should have known that the Products contain ingredients that are synthetic and/or artificial and therefore are not all natural.

31. Defendant knew or should have known that Plaintiff and other consumers would rely on said material Natural Representations concerning the Products and would be misled and induced into purchasing the Products as a result of the Natural Representations.

32. Plaintiffs reasonably understood Defendant’s Natural Representations to mean that the Products did not contain any unnatural, synthetic, or artificial ingredients.

33. In reasonable reliance on Defendant’s Natural Representations, Plaintiffs purchased the Products at a premium price. Plaintiffs and other consumers would not have purchased the Products or would have paid significantly less for the Products had they known that

the Natural Representations were false and misleading. Therefore, Plaintiffs and other consumers purchasing the Products suffered injury in fact and lost money as a result of Defendant's false, unfair, and fraudulent practices, as described herein.

34. Each consumer has been exposed to the same or substantially similar material misrepresentations about the Products, which appear prominently on the Products' packaging (i.e., the Natural Representations).

35. Despite being misled, Plaintiffs would likely repurchase the Products in the future if the Products were each reformulated to be free of the challenged ingredients and other synthetic and/or artificial ingredients. Plaintiffs regularly visits pet stores or websites which carry the Products and will continually be presented with the labeling and packaging of the Products. However, Plaintiffs, who are not an expert on pet food, nutrition, and ingredients, will remain unable to rely, with confidence, on the Natural Representations because they have no way of determining at the point of sale whether the Products would be free of the challenged ingredients and other synthetic and/or artificial ingredients.

**CLASS ACTION ALLEGATIONS**

36. Plaintiffs bring this case as a class action pursuant to Federal Rule of Civil Procedure 23(a), (b)(2) and (b)(3) on behalf of themselves and a proposed class defined as follows:

All persons who, within the relevant statute of limitations periods, purchased the Products in New York.

Plaintiffs ask the Court to adjudicate all remedies through the Class.

37. Excluded from the Class are Defendant, the officers and directors of Defendant at all relevant times, members of their immediate families, and their legal representatives, heirs, successors, or assigns, and any entity in which Defendant has or had a controlling interest. Any judge and/or magistrate judge to whom this action is assigned and any members of such judges' staffs and immediate families are also excluded from the Class. Also excluded from the Class are persons or entities that purchased the Products for purposes of resale.

38. Plaintiffs hereby reserve the right to amend or modify the class definitions, including but not limited to modifying or amending them with greater specificity or division, after having had an opportunity to conduct discovery.

39. Plaintiffs are members of the Class.

40. Numerosity: Defendant has sold at least thousands of units of the Products. Defendant's Products are available for sale through third party retailers and vendors (including online), such as Petco, PetSmart, and Amazon. Accordingly, members of the Class are so numerous that their individual joinder herein is impractical. While the precise number of class members and their identities are unknown to Plaintiffs at this time, the number may be determined through discovery.

41. Common Questions Predominate: Common questions of law and fact exist as to all members of the Class and predominate over questions affecting only individual class members.

Common legal and factual questions include, but are not limited to, the following: whether Defendant's Natural Representations were false and misleading and therefore violated consumer protection law and the common law.

42. Typicality: Plaintiffs' claims are typical of the claims of the Class they seek to represent in that Plaintiffs and other members of the Class were exposed to the same or substantially similar false and misleading Natural Representations, purchased the Products relying on the false and misleading Natural Representations, and suffered losses as a result of such purchases.

43. Adequacy: Plaintiffs are adequate representatives of the Class because their interests do not conflict with the interests of the members of the Class they seek to represent; they have retained competent counsel experienced in prosecuting class actions; and they intend to prosecute this action vigorously. Plaintiffs and their counsel will fairly and adequately protect the interests of the Class members.

44. Superiority: A class action is superior to other available means for the fair and efficient adjudication of the claims of the members of the Class. The size of each claim is too small to pursue individually and each individual Class member lacks the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendant's liability. Individualized litigation would increase the delay and expense to all parties and multiply the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation would also present a potential for inconsistent or contradictory judgments. The class action mechanism is designed to remedy harms like this one that are too small in value to pursue on an individualized basis.

45. Declaratory and Injunctive Relief: This lawsuit is maintainable as a class action

under Federal Rule of Civil Procedure 23(b)(2) because Defendant has acted or refused to act on grounds that are generally applicable to each Class as a whole, thereby making final injunctive relief appropriate with respect to all Class.

46. Notice: Plaintiffs and their counsel anticipate that notice to the proposed Class will be effectuated through recognized, Court-approved notice dissemination methods, which may include United States mail, electronic mail, Internet postings, and/or published notice.

### **FIRST CLAIM FOR RELIEF**

#### **Violation of New York General Business Law Section 349 (*On Behalf of the Class*)**

47. Plaintiffs repeat each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

48. Plaintiffs bring this claim for violation of New York General Business Law section 349 against Defendant on behalf of themselves and the other members of the Class.

49. By engaging in the actions, misrepresentations, and misconduct set forth herein, Defendant committed unfair and deceptive acts and practices in the conduct of its business, trade and commerce in New York.

50. The foregoing deceptive acts and practices were directed at Plaintiffs and members of the Class.

51. Defendant's false and misleading Natural Representations regarding the Products are material to a reasonable consumer because they relate to the contents and characteristics of the Products purchased by the consumer. A reasonable consumer would attach importance to the Natural Representations and would be induced to act thereon in making Product purchase decisions.

52. Plaintiffs and the other members of the Class were injured as a direct and proximate result of Defendant's violations described above, as they would not have purchased the Products or would have paid significantly less for the Products, had they known Defendant's Natural Representations were false, misleading, and fraudulent.

53. On behalf of themselves and the other members of the Class, Plaintiffs seek to enjoin Defendant's deceptive and unlawful acts and practices described herein, to recover their actual damages, fifty dollars (or both), whichever is greater, as well as three times their actual damages and reasonable attorneys' fees.

**SECOND CLAIM FOR RELIEF**

**Violation of New York General Business Law Section 350  
(*On Behalf of the Class*)**

54. Plaintiffs repeat each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

55. Plaintiffs bring this claim for violation of New York General Business Law section 350 against Defendant on behalf of themselves and the other members of the Class.

56. By engaging in the actions, misrepresentations, and misconduct set forth herein, Defendant has engaged and continues to engage in false advertising in the conduct of its business, trade, and commerce in New York.

57. The false and misleading Natural Representations were directed at consumers and were likely to mislead a reasonable consumer acting reasonably under the circumstances.

58. Defendant's false and misleading Natural Representations with respect to the Products are material to a reasonable consumer because they relate to the contents and characteristics of the Products purchased by the consumer. A reasonable consumer would attach importance to the Natural Representations and would be induced to act thereon in making purchase



decisions.

59. The false and misleading Natural Representations have resulted in consumer injury or harm to the public.

60. Furthermore, Plaintiffs and the other members of the Class were injured as a direct and proximate result of Defendant's violations described above, as they would not have purchased the Products or would have paid significantly less for the Products, had they known Defendant's Natural Representations were false, misleading, and fraudulent.

61. On behalf of themselves and other members of the Class, Plaintiffs seek to enjoin Defendant's misleading and unlawful acts and practices described herein, to recover actual damages or five hundred dollars per violation (whichever is greater), three times their actual damages, and reasonable attorneys' fees.

### **THIRD CLAIM FOR RELIEF**

#### **Breach of Express Warranty under New York Law N.Y. U.C.C. § 2-313 (*On Behalf of the Class*)**

62. Plaintiffs repeat each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

63. Plaintiffs bring this claim for breach of express warranty under New York law against Defendant on behalf of themselves and the other members of Class.

64. New York Uniform Commercial Code section 2-313 provides that "(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise," and "(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description."

N.Y. U.C.C. § 2-313(a), (b).

65. By means of the Natural Representations, Defendant has expressly warranted that the Products are all natural products. The Natural Representations about the Products were affirmations made by Defendant to Plaintiffs and the other Class members that the Products are in fact all natural; became part of the basis of the bargain to purchase the Products between Defendant and Plaintiffs and the other Class members; and created an express warranty that the Products would conform to these affirmations. In the alternative, the Natural Representations about the Products are descriptions of goods which were made as part of the basis of the bargain to purchase the Products between Defendant and Plaintiffs and the other Class members and which created an express warranty that the Products would conform to the product descriptions.

66. Plaintiffs and the other members of the Class reasonably and justifiably relied on Defendant's express warranties that the Products were all natural, believing that that the Products did in fact conform to these warranties.

67. Defendant has breached the express warranties made to Plaintiffs and members of the Class by failing to manufacture, distribute, and sell the Products to satisfy those warranties.

68. Plaintiffs and members of the Class paid money for the Products but did not obtain the full value of the Products as represented. If Plaintiffs and the Class members had known of the true nature of the Products, they would not have purchased the Products or would not have been willing to pay the premium price associated with Products.

69. As a result, Plaintiffs and the Class members suffered injury and seek to recover all damages afforded under the law.

**FOURTH CLAIM FOR RELIEF**

**Breach of the Implied Warranty of Merchantability under New York Law  
N.Y. U.C.C. § 2-314  
(*On Behalf of the Class*)**

70. Plaintiffs repeat each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

71. Plaintiffs bring this claim for breach of the implied warranty of merchantability under New York law against Defendant on behalf of themselves and the other members of the Class.

72. New York Uniform Commercial Code section 2-314 provides that “[u]nless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.” N.Y. U.C.C. § 2-314(1).

73. New York Uniform Commercial Code section 2-314 further provides that “[g]oods to be merchantable must be at least such as . . . conform to the promises or affirmations of fact made on the container or label if any.” N.Y. U.C.C. § 2-314(2)(f).

74. Defendant is a merchant with respect to the sale of dog and cat food products, including the Products. Therefore, a warranty of merchantability was implied in every contract for sale of the Products to Plaintiffs and the other Class members.

75. In advertising the Products with Natural Representations, Defendant has made promises and/or affirmations of fact about the Products.

76. However, the Products did not and do not conform to the promises and/or affirmations of fact made by Defendant about the Products. To the contrary, the Products are not all natural.

77. Therefore, Defendant has breached its implied warranty of merchantability in regard to the Products.

78. If Plaintiffs and the other members of the Class had known that the Products did not conform to Defendant's promises or affirmations of fact, they would not have purchased the Products or would not have been willing to pay the premium price associated with Products. Therefore, as a direct and/or indirect result of Defendant's breach, Plaintiffs and the other Class members have suffered injury.

### **FIFTH CLAIM FOR RELIEF**

#### **Intentional Misrepresentation under New York Law (*On Behalf of the Class*)**

79. Plaintiffs repeat each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

80. Plaintiffs bring this claim for intentional misrepresentation under New York law against Defendant on behalf of themselves and the other members of the Class.

81. Under New York law, the elements of a claim for intentional misrepresentation are: (1) a material misrepresentation by the defendant, (2) with the intent to defraud the plaintiff, (3) the plaintiff's reasonable reliance on the misrepresentation, and (4) the plaintiff suffers damage as a result of plaintiff's reliance. As set forth below, all elements are satisfied here.

82. As detailed above, Defendant has willfully, falsely, and knowingly made Natural Representations about the Products when the Products contain ingredients that are synthetic and/or artificial. Therefore, Defendant has made misrepresentations as to the Products.

83. Defendant's Natural Representations were material to a reasonable consumer (i.e., the type of misrepresentations to which a reasonable person would attach importance and would be induced to act thereon in making purchase decisions), because they relate to the quality,

characteristics, and nutritional value of the Products.

84. Defendant knew or recklessly disregarded the fact that the Products were not all natural at the time that it made the Natural Representations.

85. Defendant intended for Plaintiffs and the other Class members to rely on its Natural Representations in purchasing the Products, as evidenced by Defendant prominently featuring the Natural Representations on the Products' packaging.

86. Plaintiffs and the other Class members have reasonably and justifiably relied on Defendant's Natural Representations when purchasing the Products; have been unaware of the true nature of the Products (i.e., the Products are not all natural, for the reasons given above); and had Plaintiffs and the Class members known the truth that the Natural Representations were false and misleading because the Products are not all natural (as detailed above), they would not have purchased the Products or would not have purchased them at the prices at which they were offered.

87. As a direct and proximate result of Defendant's false and misleading Natural Representations, Plaintiffs and the Class members have suffered economic losses and other general and specific damages, including but not limited to the monies paid to Defendant, and any interest that has accrued on those monies, all in an amount to be proven at trial.

#### **SIXTH CLAIM FOR RELIEF**

##### **Breach of Quasi-Contract/Unjust Enrichment/Restitution under New York Law (*On Behalf of the Class*)**

88. Plaintiffs repeat each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

89. Plaintiffs bring this claim for breach of quasi-contract/unjust enrichment/restoration under New York law against Defendant on behalf of themselves and the other members of the Class.

90. As detailed herein, Defendant intentionally and recklessly made false and misleading Natural Representations about the Products to Plaintiffs and the members of the Class to induce them to purchase the Products. Plaintiffs and the other members of the Class have reasonably relied on the misleading representations and have not received all of the benefits promised by Defendant. Plaintiffs and the other members of the Class therefore have been induced by Defendant's misleading and false representations about the Products, and paid for them when they would and/or should not have, or paid more money to Defendant for the Products than they otherwise would and/or should have paid.

91. Defendant has obtained benefits from Plaintiffs and the other Class members by unjust means, and Defendant would obtain an undue advantage if it were allowed to retain the monetary benefits it received from Plaintiffs and the Class members on account of its false and misleading Natural Representations.

92. The monies Defendant received were obtained under circumstances that were at the expense of Plaintiffs and the members of the Class — i.e., Plaintiffs and the other Class members did not receive the full value of the benefit conferred upon Defendant.

93. Therefore, it is inequitable and unjust for Defendant to retain the profit, benefit, or compensation conferred upon it without paying Plaintiffs and the members of the Class back for the difference of the full value of the benefit compared to the value actually received.

94. As a direct and proximate result of Defendant's unjust enrichment, Plaintiffs and the other members of the Class seek restitution, disgorgement, and/or the imposition of a constructive trust upon all profits, benefits, and other compensation obtained by Defendant from its deceptive, misleading, and unlawful conduct as alleged herein.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, individually and on behalf of the members of the Class, respectfully request the Court to enter an Order:

A. certifying the proposed Classes under Federal Rule of Civil Procedure 23(a), (b)(2), and (b)(3), as set forth above; naming Plaintiffs as representatives of the Class; and naming Plaintiffs' attorneys as Class Counsel to represent the Class;

B. declaring that Defendant is financially responsible for notifying the Class members of the pendency of this suit;

C. declaring that Defendant has committed the violations of law alleged herein;

D. providing for any and all injunctive relief the Court deems appropriate;

E. awarding statutory damages in the maximum amount for which the law provides;

F. awarding monetary damages, including but not limited to any compensatory, incidental, or consequential damages in an amount that the Court or jury will determine, in accordance with applicable law;

G. providing for any and all equitable monetary relief the Court deems appropriate;

H. awarding punitive or exemplary damages in accordance with proof and in an amount consistent with applicable precedent;

I. awarding Plaintiffs their reasonable costs and expenses of suit, including attorneys' fees;

J. awarding pre- and post-judgment interest to the extent the law allows; and

K. providing such further relief as this Court may deem just and proper.

**DEMAND FOR TRIAL BY JURY**

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

Date: January 7, 2019

Respectfully submitted,

**REESE LLP**

By: /s/ Michael R. Reese

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