IN THE CIRCUIT COURT, SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.:
DIVISION:

ASTORRIA SASSANO,

Plaintiff,

CLASS REPRESENTATION

vs.

PETSMART, INC., a Foreign
For-Profit Corporation

Defendant.
_____/

CLASS ACTION COMPLAINT

Plaintiff, ASTORRIA SASSANO individually, and on behalf of all others similarly situated in Florida, by and through her undersigned counsel, hereby files this Class Action Complaint, against Defendant, PETSMART, INC. (hereinafter referred to as "Petsmart" or "Defendant"), and in support thereof alleges as follows:

I. PARTIES, JURISDICTION AND VENUE

1. This is a class action for damages pursuant to Florida Rule of Civil Procedure 1.220(b) in excess of Thirty Thousand Dollars ($30,000.00) exclusive of interest, costs and attorney's fees.

2. Plaintiff is an individual consumer over the age of eighteen, who resides in Broward County Florida. Plaintiff seeks injunctive relief and damages on behalf of Plaintiff and the Class, and respectfully requests a jury trial on damage claims.

3. Defendant is a foreign for-profit corporation, doing business in Broward County, Florida.

4. Venue for this action properly lies in Broward County, Florida, pursuant to

the provisions of Section 47.051, Fla. Stat. and Chapter 501.207 et seq. Fla. Stat. because Defendant transacts business in Broward County, Florida and the transactions out of which this action arose occurred in Broward County, Florida.

5. There is not federal jurisdiction of this Action under the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (2005), which explicitly provides for the original jurisdiction of the Federal Courts of any class action in which any member of the plaintiff class is a citizen of a state different from any Defendant, and in which the matter in controversy exceeds in the aggregate the sum of $5,000,000.00, exclusive of interest and costs. The issue at hand does not exceed this requisite amount.

IV. FACTUAL ALLEGATIONS

6. On or about April 19, 2020, Plaintiff purchased Only Natural Pet Hemp Seed Oil with Krill and Cod Liver 8.0 FL OZ/237 ML bottle (hereinafter also referred to as "Product"), from PETSMART located at 1700 N. Federal Highway, Fort Lauderdale, Florida. A copy of the receipt is attached hereto as **Exhibit "A."**

7. The Product had not been altered between manufacture and point of sale. A photograph of the Product's packaging is attached hereto as composite **Exhibit "B."**

8. The back of the Product's packaging states "Only Natural Pet Hemp Seed Oil with Krill & Cod Liver provides a concentrated source of Omega 3 & 6's to support the immune system, cardiovascular health and vitality. **Hemp seed is packed with phytonutrients and antioxidants** while krill & cod liver oil delivers a healthy dose of phospholipids and astaxanthin, **all which work together to support overall health and wellness**." *See* Exhibit "B."

9. The product is also advertised on Defendant's website at: https://www.petsmart.com/dog/dental-care-and-wellness/vitamins-and-supplements/only-natural-pet-hemp-seed-dog-oil-immunity-skin-and-coat-support---krill-and-cod-liver-57057.html.

10. Screenshots of Defendant's website advertising and marketing the Product to consumers is attached hereto as composite **Exhibit "C."**

11. Defendant's website also advertises and represents that the Product "[h]elps support a healthy inflammatory response and immune system" and also [h]elps support cardiovascular health, healthy brain development & function." *See* Ex. "C."

12. Defendant's website also advertises and represents that the "**Health Consideration**" for which the Product is designed and intended for are "Immune system, Skin & Coat." See Ex. "C."

13. The Product's packaging, as well as Defendant's advertising and marketing of the Product, makes clear that the Product's contents are intended to treat, mitigate, or prevent disease and/or are intended to affect the structure or any function of the body; specifically, to support the immune system, cardiovascular system, and brain development or function.

14. At all material times, Defendant, Petsmart, was a retailer selling, marketing, and distributing the Product.

15. The Product, according to its explicit advertising, marketing, labeling and packaging, is clearly intended mitigate, treat, or prevent disease in animals, and therefore are drugs within the meaning of section 201(g)(1)(B) of the FD&C Act, 21 U.S.C. 321(g)(1)(B).

16. Additionally, the Product, according to its explicit advertising, marketing, labeling and packaging, is a "new animal drugs" under section 201(v) of the FD&C Act, 21 U.S.C. 321(v), because it is not the subject of a final FDA regulation published through notice and comment rulemaking finding that the drug has been generally recognized among experts qualified by scientific training and experience to evaluate the safety and effectiveness of animal drugs, as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling.

17. To be legally marketed, a new animal drug must have an approved new animal drug application, conditionally approved new animal drug application, or a listing on the Index of Legally Marketed Unapproved New Animal Drugs for Minor Species ("index listing") under section 512, 571, or 572 of the FD&C Act [21 U.S.C. § 360b, 360ccc, or 360ccc-1], respectively

18. New animal drugs that lack the required approval or index listing are "unsafe" and "adulterated" under sections 512(a) and 501(a)(5) of the FD&C Act [21 U.S.C. §§ 360b(a) and 351(a)(5)]. Introduction of an adulterated animal drug into interstate commerce is prohibited under section 301(a) of the FD&C Act [21 U.S.C. § 331(a)].

19. The Product is not approved by the FDA or indexed and therefore the Product is considered unsafe under section 512(a) of the FD&C Act, 21 U.S.C. 360b(a), and adulterated under section 501(a)(5) of the FD&C Act, 21 U.S.C. 351(a)(5).

20. The FDA has sent numerous warning letters to companies manufacturing, advertising and marketing products that are intended mitigate, treat, or prevent disease in animals and/or "new animal drugs" Examples of some of these warning letters can be

viewed at: https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/curaleaf-inc-579289-07222019; https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/dr-gs-marine-aquaculture-inc-606979-04152020; and are also attached hereto as **Exhibit "D."**

21. For these reasons, the Product is an unapproved new animal drug and cannot lawfully be sold.

22. The introduction or delivery for introduction into interstate commerce of the Product, as a misbranded drug, violates section 301(a) of the FD&C Act, 21 U.S.C. 331(a).

23. A Product that cannot lawfully be sold has no value. *Debernardis v. IQ Formulations, LLC*, D.C. Docket No. 1:17 – cv -21562-DPG (11th Cir. Nov. 14, 2019) (finding a claim under FDUTPA should survive a motion to dismiss where the plaintiff purchased a product which was subject to an FDA warning letter to the manufacturer that the product could not lawfully be sold).

24. Defendant, in its respective role as a distributor, was aware of and disregarded these laws when it advertised, marketed, and/or sole the Product at its stores.

25. Defendant's actions of advertising, marketing, and/or selling an unapproved and/or misbranded new drug constitutes false and deceptive conduct.

26. Defendant did not disclose to consumers, including Plaintiff and putative Class Members, that the Product could not lawfully be sold because it was an unapproved new animal drug and/or because it was misbranded.

27. When purchasing the Product, consumers were misled into believing Defendant had complied with applicable laws and regulations and that Defendant could lawfully sell the Product.

28. Defendants intended for Plaintiff and putative Class Members to be misled.

29. Defendant's misleading and deceptive practices proximately caused harm to Plaintiff and Class Members. Defendant has sold Products that are unapproved and/or misbranded and are worthless because they could not be lawfully sold to consumers.

30. The Product's labeling, marketing, and advertising, as outlined and explained above, contain representations which are misleading and deceptive and that are likely to mislead a consumer acting reasonably in the circumstances to her detriment by purchasing a Product the consumer would reasonably believe was legally sold, approved, and properly branded in accordance with applicable law and regulations.

31. In reliance on the Product label, marketing, and advertising, as well as Defendant's actions of offering the Product for sale, the Plaintiff, a consumer, reasonably believed she was purchasing a Product that was could legally be sold.

32. Plaintiff is aggrieved by the deceptively labeled and marketed Product as she relied on the misleading and deceptive marketing and advertising and she was deprived of the benefit of the bargain she reasonably anticipated from the Product's marketing, advertising, and sale; specifically, she was deprived of the benefit she paid for a Product she reasonably believed was legally sold and properly branded.

33. Reasonable consumers, such as the Plaintiff, will continue to be aggrieved by the deceptive and misleading marketing, advertising, and sale of the Product as reasonable consumers will continue to make the plausible connection that they are purchasing a Product that can legally be sold and that is properly branded.

34. Defendant unlawfully marketed, advertised, sold, and/or distributed the Product to Florida purchasers.

35. Defendant's false and misleading representations and omissions deceive Florida consumers for the reasons previously alleged, above.

36. Plaintiff has performed all conditions precedent to bringing this Action.

37. As an immediate, direct, and proximate result of Defendant's false, misleading, and deceptive representations and conduct, Defendant injured Plaintiff and the other Class members in that Plaintiff and other Class members:

a. paid a sum of money for the Products that was not as represented;

b. paid a premium price for the Products that was not as represented;

c. were deprived the benefit of the bargain because the Products they purchased was different than what Defendant warranted;

d. were deprived the benefit of the bargain because the Products they purchased had less value than what was represented by Defendant;

e. did not receive a Products that measured up to their expectations as created by Defendant;

f. purchased a Product that was other than what was represented by Defendant;

g. purchased a Product that Plaintiff and the other members of the Class did not expect or consent to;

h. purchased a Product that was of a lower quality than what Defendant promised;

i. were denied the benefit of knowing what they purchased.

38. Had Defendant not made the false, misleading, and deceptive representations and omissions, or engaged in false, misleading, and deceptive conduct, Plaintiff and the other Class members would not have been economically injured because Plaintiff and the other Class members would not have purchased the Product.

39. Accordingly, Plaintiff and the other Class members have suffered injury in fact and lost money or property as a result of Defendant's wrongful conduct.

40. Plaintiff and the other Class members did not obtain the full value of the advertised Product due to Defendant's misrepresentations and omissions.

41. Plaintiff and the other Class members purchased, purchased more of, or paid more for the Product than they would have done had they known the truth about the Product.

ANTICIPATED DEFENSE

42. In anticipation of a defense that may be raised by Defendant, and only in response to that anticipated defense, Plaintiff pleads that in addition to violating Florida consumer protection laws, the Product also fails to comply with applicable federal law, as alleged previously.

V. CLASS ALLEGATIONS

43. Plaintiff re-alleges and incorporates by reference the allegations set forth

in each of the preceding paragraphs of this *Class Action Complaint* as if fully set forth herein.

44. Pursuant to Rule 1.220, *Florida Rules of Civil Procedure,* Plaintiff brings this class action and seeks certification of the claims and certain issues in this action on behalf of a Class defined as:

> **All persons throughout Florida, who, within the four years preceding the filing the original Complaint ("Class Period"), purchased one or more of the Product from Defendant ("Class") with a credit or debit account.**

45. Excluded from the Class is Defendant, its subsidiaries, affiliates, and employees; all persons who make a timely election to be excluded from the Class; governmental entities; and the Judge(s) to whom this case is assigned and any immediate family members thereof.

46. Certification of Plaintiff's claims for class-wide treatment is appropriate because Plaintiff can prove the elements of Plaintiff's claims on a class-wide basis using the same evidence as would be used to prove those claims in individual actions alleging the same claims.

A. Numerosity

47. The members of the Class are so numerous that individual joinder of all class members is impracticable.

48. The precise number of members of the Class is unknown to Plaintiff, but it is clear that the number greatly exceeds the number that would make joinder practicable, particularly given Defendant's comprehensive distribution and sales network throughout Florida.

49. Members of the Class may be notified of the pendency of this action by

recognized, Court-approved notice dissemination methods, which may include U.S. Mail, electronic mail, Internet postings, and/or published notice.

B. Commonality and Predominance

50. This action involves common questions of law or fact, which predominate over any questions affecting individual members of the Class. All members of the Class were exposed to Defendant's deceptive and misleading advertising and marketing claims and omissions, and/or Defendant's deceptive and misleading conduct, alleged herein.

51. Furthermore, common questions of law or fact include:

a. whether Defendant engaged in the conduct as alleged herein;

b. whether Defendant's practices violate applicable law cited herein;

c. whether Plaintiff and the other members of the Class are entitled to actual, statutory, or other forms of damages, and/or other monetary relief; and

d. whether Plaintiff and the other members of the Class are entitled to equitable relief, including but not limited to injunctive relief.

52. Defendant engaged in a common course of conduct in contravention of the laws Plaintiff seeks to enforce individually, and on behalf of the other members of the Class. Similar or identical statutory legal violations, business practices, and injuries are involved. Individual questions, if any, pale by comparison, in both quality and quantity, to the numerous common questions that dominate this action. Moreover, the common questions will yield common answers.

C. Typicality

53. Plaintiff's claims are typical of the claims of the other members of the

Class because, among other things, all members of the Class were comparably injured through the same uniform misconduct described herein. Further, there are no defenses available to Defendant that are unique to Plaintiffs.

D. Adequacy of Representation

54. Plaintiff is an adequate representative of the members of the Class because Plaintiff's interests do not conflict with the interests of the other members of the Class that Plaintiff seeks to represent. Plaintiff has retained counsel competent and experienced in complex class action litigation and Plaintiff will prosecute this action vigorously. The Class' interests will be fairly and adequately protected by Plaintiff and Plaintiff's counsel. Undersigned counsel has represented consumers in a wide variety of actions where they have sought to protect consumers from fraudulent and deceptive practices.

E. Declaratory and Injunctive Relief

55. Defendant has acted or refused to act on grounds generally applicable to Plaintiff and the other members of the Class, thereby making appropriate final injunctive relief and declaratory relief, as described herein, with respect to the members of the Class as a whole.

F. Superiority

56. A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. The damages or other financial detriment suffered by Plaintiff and the other members of the Class are relatively small compared to the burden and expense that would be required to individually litigate their

claims against Defendant, so it would be impracticable for members of the Class to individually seek redress for Defendant's wrongful conduct. Even if the members of the Class could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments, and increases the delay and expense to all parties and the court system and thereby unnecessarily clogging of dockets.

57. By contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court. Given the similar nature of the members of the Class' claims and the absence of material or dispositive differences in laws upon which the claims are based, the Class will be easily managed by the Court and the parties.

FIRST CAUSE OF ACTION:
VIOLATION OF THE FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT, FLA. STAT. § 501.201 *et seq.*

58. Plaintiff re-alleges and incorporates by reference the allegations set forth in the preceding paragraphs of this Complaint as if fully set forth herein verbatim.

59. This cause of action is brought pursuant to the Florida Deceptive and Unfair Trade Practices Act, Sections 501.201 to 501.213, *Florida Statutes*.

60. The express purpose of FDUTPA is to "protect the consuming public . . . from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." Section 501.202(2), *Florida Statutes*.

61. Section 501.204(1), *Florida Statutes* declares as unlawful "unfair methods

of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce."

62. The sale of the Product at issue in this cause was a "consumer transaction" within the scope of FDUTPA.

63. Plaintiff is a "consumer" as defined by Section 501.203, *Florida Statutes*.

64. The Product sold by Defendant is a good within the meaning of FDUTPA and Defendant is engaged in trade or commerce within the meaning of FDUTPA.

65. For the reasons discussed herein, Defendant violated and continues to violate FDUTPA by engaging in unconscionable, deceptive, unfair acts or practices proscribed by Section 501.201, *Florida Statute*, et. seq.

66. Defendant's actions of misrepresenting and omitting material facts regarding the Product—that it could not lawfully be sold as it was an unapproved new animal drug and/or a misbranded drug—constitute unconscionable, deceptive, or unfair acts or practices, and are immoral, unethical, oppressive, and unscrupulous activities that are substantially injurious to consumers in violation of FDUTPA. Defendant knew or should have known that the product could not be lawfully sold to consumers, and Defendant failed to disclose this information to consumers.

67. Plaintiff and putative Class Members suffered damages when they purchased the Product, which could not lawfully be sold to consumers. Defendant's unconscionable, deceptive, and/or unfair practices caused actual damages to Plaintiff and putative Class Members who were unaware of this when they purchased the Product.

68. Defendant's affirmative misrepresentations, omissions, actions, and

practices described herein were likely to, and did in fact, deceive and mislead members of the public, including consumers acting reasonably under the circumstances, to their detriment.

69. Consumers, including Plaintiff and putative Class Members, could not have purchased the Product had Defendant disclosed to them and the consuming public that the Product could not lawfully be sold to consumers because it was an unapproved new animal drug and because it was misbranded.

70. As a direct and proximate result of the unconscionable, unfair, and deceptive acts or practices alleged herein, Plaintiff and putative Class Members have been damaged and are entitled to recover actual damages to the extent permitted by law, including class action rules, in an amount to be proven at trial.

71. Plaintiff and Class Members have been aggrieved by Defendant's unfair and deceptive practices in violation of FDUTPA, in that they purchased Defendant's deceptively labeled, marketed, and advertised the Product.

72. Reasonable consumers rely on Defendant to honestly market and advertise the Product to consumers by selling a Product that can legally be sold and that is properly branded.

73. Defendant has deceived reasonable consumers, like Plaintiff and the Class, into believing the Product was something it was not; specifically that the Product could legally be sold and/or that it was properly branded.

74. In addition, Plaintiff and the putative Class seeks equitable relief and injunctive relief against Defendant on terms that the Court considers reasonable, and reasonable attorneys' fees, litigation costs, and expenses.

75. Plaintiff and the Class suffered damages and are entitled to injunctive relief.

76. Pursuant to sections 501.211(2) and 501.2105, *Florida Statutes*, Plaintiff and the Class make claims for damages, attorney's fees and costs. The damages suffered by the Plaintiff and the Class were directly and proximately caused by the deceptive, misleading and unfair practices of Defendant. Additionally, pursuant to Section 501.211(1), *Florida Statutes*, Plaintiff and the Class seek injunctive relief for, *inter alia*, the Court to enjoin Defendant's above-described wrongful acts and practices, and for restitution and disgorgement.

77. Plaintiff seeks all available remedies, damages, and awards as a result of Defendant violations of FDUTPA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually, and on behalf of all others similarly situated, prays for relief pursuant to each cause of action set forth in this Complaint as follows:

i. For an order certifying that the action may be maintained as a class action, certifying Plaintiff as representative of the Class, and designating Plaintiff's attorneys Class counsel;

ii. For an award of equitable relief for all causes of action as follows:

a. Enjoining Defendant from continuing to engage, use, or employ any unfair and/or deceptive business acts or practices related to the design, testing, manufacture, assembly, development, marketing, advertising, or sale of the Products for the purpose of selling the Products in such manner as set forth in detail above, or from

making any claims found to violate FDUTPA or the other causes of action as set forth above;

b. Restoring all monies that may have been acquired by Defendant as a result of such unfair and/or deceptive act or practices; and

iii. For actual damages in an amount to be determined at trial for all causes of action;

iv. For an award of attorney's fees and costs;

v. For any other relief the Court might deem just, appropriate, or proper; and

vi. For an award of pre- and post-judgment interest on any amounts awarded.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury on all issues so triable.

Submitted: April 22, 2020.

By: /s/ Howard W. Rubinstein
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