

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

**KRISTIN DICROCE, on behalf of herself
and all others similarly situated,**

Plaintiff,

v.

**HILL’S PET NUTRITION, INC. and
COLGATE-PALMOLIVE COMPANY.,**

Defendants.

CASE NO.:

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

Kristin DiCroke (“DiCroke”) brings forth this Class Action Complaint on behalf of herself and all other similarly situated persons both nationwide (as defined herein, the “Nationwide Class”) and in Massachusetts (as defined herein, the “Massachusetts Subclass”) (collectively referred to as the “Class”), against Hill’s Pet Nutrition, Inc. and Colgate-Palmolive Company (collectively the “Defendants”), and alleges as follows:

BACKGROUND OF THE CASE

1. Defendants are responsible for designing, inspecting, manufacturing, labeling, and advertising the Products, and are responsible for distributing and selling them to consumers.

2. Defendants designed, inspected, manufactured, distributed, labeled, advertised, and sold the Products nationwide, including to consumers in Massachusetts, and promoted the Products through various affirmative representations and warranties described in detail herein, all of which emphasized Defendants’ global product theme – that their products are safe, healthy, and superior to other brands of dog food.

3. Notwithstanding these affirmative representations and warranties, including those indicating that Defendants inspected their products on a daily basis, the Products, at material times hereto, contained lethal amounts of Vitamin D that are poisonous to dogs and were sold to consumers nationwide.

4. On January 31, 2019, Defendants published a press release to their website advising the public that they had recalled several varieties of their Hill's Science Diet and Prescription Diet brand dog foods (collectively, the "Products").¹

5. As shown herein, despite declaring to consumers that they had "isolated and identified the issue. We now have tighter quality controls in place *to prevent this from happening again*. By feeding your pet Hill's, you've placed your trust in us and we are working hard to ensure that your trust is well placed,"² Defendants expanded the recall to include additional Products on March 20, 2019.³

6. Eggregiously, after expanding the recall on March 20, 2019 despite assuring consumers that the problem was under control, the United States Food and Drug Administration ("FDA") published a notification to consumers that Defendants had recalled an additional lot code which was omitted from the recall on May 20, 2019.⁴

7. Defendants recalled the Products because they are contaminated as a result of being spiked with deadly levels of Vitamin D, rendering the Products poisonous and extremely dangerous for consumption by canines.

¹ See <https://www.hillspet.com/productlist/jan-31-press-release>.

² *Id.*

³ See <https://www.hillspet.com/productlist>.

⁴ See <https://www.fda.gov/safety/recalls-market-withdrawals-safety-alerts/hills-pet-nutrition-additionally-expands-voluntary-recall-select-canned-dog-food-elevated-vitamin-d>.

8. Defendants recalled and continue to recall Products as a result of the health risks they pose to canines due to Vitamin D poisoning, which include “vomiting, loss of appetite, increased thirst, increased urination, excessive drooling, and weight loss. Vitamin D, when consumed at very high levels, can lead to serious health issues in dogs including renal dysfunction.”⁵

9. Despite Defendants’ various representations and warranties described herein in which they boast about the various health benefits of the Products and Defendants’ commitment to product safety, Defendants’ recall totals, *at minimum*, 13.5 million units that they allowed to enter the nationwide stream of commerce at the time of the initial press release on January 31, 2019.

10. Defendants knew or in the exercise of reasonable care should have known that the Products contained an excessive and dangerous amount of Vitamin D prior to January 31, 2019 because, among other things, Defendants affirmatively claim that their suppliers and raw material ingredient providers are subject to regular safety checks, quality assurance protocols, and claim that the various ingredients that are used to formulate the Products are inspected daily.⁶

11. Had Defendants adhered to these stringent protocols, they certainly would have learned that the Products contained dangerous and excessive levels of Vitamin D long before announcing the initial recall on January 31, 2019.

12. Alternatively, these stringent protocols could and/or would have prevented the recall from being expanded on March 20, 2019, again on May 20, 2019, and potentially again in

⁵ See Footnote 3.

⁶ See <https://www.hillspet.com/about-us/quality-and-safety>.

the future.

13. Defendants knew or in the exercise of reasonable care should have known prior to the initial January 31, 2019 recall that Vitamin D toxicity risks had increased across the industry because the FDA published a notice on December 3, 2018 advising consumers that several brands of dog food were contaminated and required recall due to containing dangerous and excessive levels of Vitamin D.⁷

14. Because Defendants' representations and warranties indicate that they knew or should have known in advance of the initial recall that its Products were dangerous for canine consumption, Defendants' recall was untimely and the unreasonable delay in warning consumers that their Products were dangerous for canines exacerbated consumers' risk of inadvertently exposing their dogs to poisonous Products.

15. As shown herein, Defendants are incapable of providing adequate notice to consumers, and therefore, canines are at immediate risk of harm if they eat any of the Defendants' products. Defendants have acknowledged that they have not determined the full extent of the contamination, and are wholly incapable of effectively determining which of its products are poisonous, despite continuing to make representations and warranties about the strict nature of their internal quality assurance procedures as described herein.

16. Consumers who have purchased and/or are continuing to purchase Defendants' products, including the varieties subject to the recall, have been provided insufficient information by Defendants to ascertain whether the products are safe for their dogs to consume and, therefore, are at immediate risk of harm.

⁷ See <https://www.fda.gov/animalveterinary/newsevents/ucm627485.htm>.

17. As such, to the extent Defendants later recall additional products, these later recalled products and the Products already recalled are unlawfully, falsely and misleadingly labeled, advertised, and promoted.

18. By purchasing the Products, Plaintiff and members of the proposed Class unknowingly fed their dogs poisonous dog food which caused them to suffer from Vitamin D poisoning.

19. Therefore, Defendants' Products do not conform to the express warranties Defendants make, are not merchantable as a dog food, were negligently designed, inspected, manufactured, distributed, and sold, and were unlawfully, falsely, and misleadingly labeled and advertised as being healthy, safe, and superior to other dog foods.

20. In addition to losing money as a direct and proximate result of paying for the dangerous and recalled Products, Plaintiff and Class members suffered damages as a result of paying for veterinary treatment, prescription medications, medical monitoring, property damage resulting from incontinence, vomiting, and/or diarrhea, and/or any other cognizable losses including work hours lost and, if euthanasia occurred, any and all cremation, burial and funeral costs.

PARTIES

Plaintiff DiCroce

21. Plaintiff Kristin DiCroce, who is a resident of Cohasset, Norfolk County, Massachusetts, purchased at least Defendants' Hill's Prescription Diet r/d Canine 12 x 12.3 oz. cans, Lot No. 7014 from authorized retailers such as www.Chevy.com between at least August 2018 and February 2019, and for several years prior, for her Beagle Moosie, pictured below:



22. Upon information and belief, the time frame in which Plaintiff purchased the products is contemporaneous with some of or the entire time period that the recalled Products were available to consumers.

23. Plaintiff was a loyal customer of Defendants for many years and believed that their Products were healthy and safe for Moosie based, in part, on Defendants' labeling, advertising, and other representations and warranties discussed herein.

24. Plaintiff believed that Defendants' Products were superior to other brands of dog food and paid a price premium for them based, in part, on Defendants' labeling, advertising, and other representations and warranties which indicated that the Products were healthier than other brands of dog food and were manufactured pursuant to procedures that stressed consistent safety checks and assurance that each ingredient was responsibly sourced.

25. Specifically, Plaintiff paid roughly \$33.00-\$35.00 per case for the Hill's Prescription Diet r/d Canine 12 x 12.3 oz. cans and fed Moosie at least one can per day.

26. In or around September 2018, Plaintiff noticed that her dog began to suffer from symptoms of Vitamin D poisoning, including dehydration, lethargy, and excessive thirst.

27. In or around late February, 2019, Moosie fell incredibly ill and was admitted to the veterinarian with signs of severe dehydration and incontinence.

28. Test results indicated that Moosie's kidney levels were elevated.

29. After being discharged from the veterinarian, Moosie stopped consuming the products.

30. However, Moosie continued to exhibit severe health problems, including excessive vomiting and further incontinence.

31. As a result of Moosie's condition, Plaintiff was forced to take leave from her job as a registered nurse in order to give Moosie full time attention, as he could not be left alone.

32. Unfortunately, in or around the Easter 2019 holiday, Moosie died after suffering from seizures, which are also a symptom of Vitamin D poisoning.⁸

33. Plaintiff paid a premium price for Defendants' dog food over other brands. Had Plaintiff known that the products were poisonous and would cause her dog to suffer from severe symptoms of Vitamin D poisoning, ultimately leading to the dog passing away, her purchasing decisions would have been affected.

34. As a result of feeding Moosie the products, Plaintiff incurred damages and losses inclusive of the money she paid for the products, veterinary bills, and lost wages as a result of being forced to take leave from her job to take care of Moosie.

⁸ See <https://wagwalking.com/condition/vitamin-d-poisoning>.

35. Plaintiff became aware that the Products were the cause of her dog's health problems after being notified by www.Chewy.com of the expanded recall on March 20, 2019 which added the previously unlisted Hill's Prescription Diet r/d Canine 12 x 12.3 oz. cans purchased for Moosie. This notification came one month before Moosie passed away, long after he showed symptoms of Vitamin D poisoning, and long after Defendants knew or in the reasonable exercise of care should have known that its Products were contaminated.

36. On June 6, 2019, Plaintiff sent Defendants Colgate-Palmolive Company and Hill's Pet Nutrition, Inc. each a demand letter, pursuant to M.G.L. c.93A, setting forth these facts and making demand upon Defendants for relief for herself, and the proposed class,

37. Defendants received these demand letters on June 7, 2019, but made no reasonable offer of settlement to either Plaintiff or the Massachusetts Subclass.

Defendants

38. Defendant Colgate-Palmolive Company is a Delaware corporation with its principle place of business at 300 Park Avenue, New York, New York 10022. Colgate-Palmolive Company is the parent company of Hill's Pet Nutrition, Inc. and exercises control over Hill's Pet Nutrition, Inc. and derived profit from the sale of the Products. Specifically, Colgate-Palmolive Company's 2018 10-K filed states "Colgate, through its Hill's Pet Nutrition segment...is a world leader in specialty pet nutrition products for dogs and cats" and states "Pet Nutrition products include specialty pet nutrition products manufactured and marketed by Hill's Pet Nutrition." Furthermore, according to Colgate-Palmolive's 2018 10-K, "[n]et sales for Hill's Pet Nutrition were [\$2.388 billion] in 2018," which includes net sale proceeds from the Products.

39. Colgate-Palmolive Company also acknowledges that "[t]he vast majority of Colgate products are manufactured in Colgate-owned facilities. Colgate also has an extensive supply chain consisting of thousands of suppliers of raw and packing materials, manufacturing

operating supplies, capital equipment, and other goods and services.”⁹

40. Colgate also states that it manages all of its brands, including the Hill’s brands discussed herein, with “[i]ntegrated marketing communications” and holds its constituent entities responsible for adhering to a uniform code of conduct that governs, among other practices, “Advertising and Advertising Placement” and “Product Integrity.”¹⁰

41. Based on the foregoing, Colgate-Palmolive Company and Hill’s Pet Nutrition, Inc. jointly attempted to implement safeguards to ensure that the Products would be safe for dogs to consume and made with ingredients that adhered to strict quality assurance standards, and are jointly responsible for their formulation and inspection, along with their labeling, advertising, marketing, and promotion to consumers both nationwide and in Massachusetts.

42. Defendant Hill’s Pet Nutrition, Inc. is a Delaware corporation with its principal place of business at 400 SW 8th Avenue, Topeka, Kansas 66603.

43. Defendants are the manufacturer, distributor, and seller of the Products, and are jointly and severally liable and responsible for their formulation and inspection, along with their labeling, advertising, marketing, and promotion to consumers both nationwide and in Massachusetts.

44. Defendants sold the Products to consumers throughout the United States and Massachusetts, through a network of storefront retailers, veterinary clinics, and several online retailers and, as described herein, labeled, advertised, represented and warranted that their Products are superior than other brands of dog food and charged a premium price for them.

⁹ See Colgate Corporate Social Responsibility and Sustainability Report 2017 at https://www.colgatepalmolive.com/content/dam/cp-sites/corporate/corporate/en_us/corp/locale-assets/pdf/Colgate_CorporateSocialResponsibility_SustainabilityReport_2017.pdf, at pages 9, 13 and 16

¹⁰ *Id.*

JURISDICTION AND VENUE

45. The District of Kansas is a proper venue for this action pursuant to 28 U.S.C. § 1332(d) because there are more than 100 class members and the aggregate amount in controversy exceeds \$5,000,000.00, exclusive of interest, fees, and costs, and at least one member of the proposed Class is a citizen of a state different from Defendants.

46. The Court can exercise supplemental jurisdiction over the various state law claims under 28 U.S.C. § 1367.

47. The Court can exercise personal jurisdiction over Defendants because they have regular and systematic contacts with the state of Kansas, in which they do business and place their Products in the stream of commerce.

48. This Court is a proper venue for this action, pursuant to 28 U.S.C. § 1391(b)(1), because at least Defendant Hill's Pet Nutrition, Inc.'s principle place of business is in this District and it is subject to personal jurisdiction here.

FACTUAL ALLEGATIONS COMMON TO THE CLASS

The Product Recall

49. On January 31, 2019, Defendants notified consumers that, due to an alleged "supplier error," they were recalling at least 13.5 million cans of Products that were distributed for sale nationwide, including in Massachusetts, which contained dangerous amounts of Vitamin D.¹¹

50. Unfortunately, and despite claiming that they "identified and isolated the error [to] prevent this from happening again," requiring "our supplier to implement additional quality testing prior to release of ingredients to Hill's," and "adding our own further testing of incoming

¹¹ See <https://www.hillspet.com/productlist/faq>.

ingredients,”¹² Defendants later expanded that recall on March 20, 2019 to include additional Products¹³ and again on May 20, 2019 to include an additional lot code.¹⁴

51. The recall notice stated “Q: Why is Vitamin D toxic when ingested in excessive amounts? A: If Vitamin D intake greatly exceeds the body's needs, it is stored and when consumed in excessive amounts over a period of time, can result in excess absorption of calcium from the skeleton and food. This may lead to the clinical signs such as vomiting, loss of appetite, increased thirst, increased urination, excessive drooling, weight loss and joint issues. Prolonged and high exposure can potentially lead to calcification of soft tissues such as kidneys and resolving on renal dysfunction.”¹⁵

52. Defendants failed to warn Plaintiff or consumers in general about the risk of seizures associated with Vitamin D poisoning despite this being a common side effect.¹⁶

Defendants’ False and Misleading Warranties and Representations

53. Defendants designed, inspected, manufactured, distributed, labeled, advertised, and sold the Products to consumers all over the United States and in Massachusetts.

54. As part of their labeling and advertising campaign that, through various representations and warranties, emphasizes that the Products are safe for canine consumption and are inspected daily, Defendants claim to “make nutrition a cornerstone of veterinary medicine”¹⁷

¹² See <https://www.fda.gov/safety/recalls-market-withdrawals-safety-alerts/hills-pet-nutrition-voluntarily-recalls-select-canned-dog-food-excessive-vitamin-d>.

¹³ See <https://www.hillspet.com/productlist>.

¹⁴ See <https://www.fda.gov/animal-veterinary/news-events/fda-alerts-pet-owners-and-veterinarians-about-potentially-toxic-levels-vitamin-d-33-varieties-hills>.

¹⁵ See Footnote 11.

¹⁶ See https://www.petmd.com/dog/conditions/toxicity/c_dg_vitamin_d_toxicity.

¹⁷ See <https://www.hillspet.com/about-us/our-company>.

and sell their Products through a nationwide network of store retailers, veterinary clinics, and online retailers. Some of Defendants' retailers include, but are not limited to, PetSmart, Petco, Amazon, Chewy, and Walmart.

55. Defendants are able to and have charged a premium price for their Products based on their labeling, advertising, representations and warranties because these positive statements are intended to convince consumers that the Products are better than other brands of dog food, in that they are not only safer, but are able to meet the unique nutritional needs of different breeds and ages of dogs.

56. The Products at issue herein include at least those listed in Defendants' January 31, 2019 recall and subsequent March 20, 2019 and May 20, 2019 recall expansions, which were published on both Hill's Pet Nutrition, Inc.'s website¹⁸ and the U.S. Food and Drug Administration's ("FDA") website¹⁹:

¹⁸ See <https://www.hillspet.com/productlist>.

¹⁹ See <https://www.fda.gov/Safety/Recalls/ucm634087.htm>.

Product Name	SKU Number	Date Code / Lot Code
Hill's® Prescription Diet® k/d® Kidney Care with Lamb Canned Dog Food, 13oz, 12-pack	2697	102020T25
Hill's® Science Diet® Adult Perfect Weight Chicken & Vegetable Entrée dog food 12 x 12.8oz cans	2975	092020T28
Hill's® Prescription Diet® c/d® Multicare Urinary Care Chicken & Vegetable Stew Canned Dog Food, 5.5oz, 24-pack	3388	102020T18
Hill's® Prescription Diet® i/d® Low Fat Canine Rice, Vegetable & Chicken Stew 24 x 5.5oz cans	3391	092020T27
Hill's® Prescription Diet® r/d® Canine 12 x 12.3oz cans	7014	092020T28 102020T27 102020T28
Hill's® Science Diet® Adult Beef & Barley Entrée Canned Dog Food, 13oz, 12-pack	7039	092020T31 102020T21
Hill's® Science Diet® Adult 7+ Healthy Cuisine Roasted Chicken, Carrots & Spinach Stew dog food 12 x 12.5oz cans	10449	092020T28
Hill's® Science Diet® Healthy Cuisine Adult Braised Beef, Carrots & Peas Stew Canned Dog Food, 12.5oz, 12-pack	10451	102020T28
Hill's® Prescription Diet® c/d® Multicare Canine Chicken & Vegetable Stew 12.5oz	3384	092020T29 102020T10 102020T25
Hill's® Prescription Diet® i/d® Canine Chicken & Vegetable Stew 12.5oz	3389	092020T28 102020T24 102020T25 102020T04 102020T10 102020T19 102020T20
Hill's® Prescription Diet® i/d® Canine Chicken & Vegetable Stew 5.5oz	3390	102020T11 112020T23 122020T07
Hill's® Prescription Diet® z/d® Canine 5.5oz	5403	102020T17 112020T22
Hill's® Prescription Diet® g/d® Canine 13oz	7006	092020T22 112020T19 112020T20
Hill's® Prescription Diet® i/d® Canine 13oz	7008	092020T21 092020T30 102020T07 102020T11 112020T22 112020T23
Hill's® Prescription Diet® j/d® Canine 13oz	7009	112020T20
Hill's® Prescription Diet® k/d® Canine 13oz	7010	102020T10 102020T11

Hill's® Prescription Diet® w/d® Canine 13oz	7017	102020T24 102020T25 112020T09 112020T10 092020T30 102020T11 102020T12
Hill's® Prescription Diet® z/d® Canine 13oz	7018	102020T04 112020T22
Hill's® Prescription Diet® Metabolic + Mobility Canine Vegetable & Tuna Stew 12.5oz	10086	102020T05 102020T26
Hill's® Prescription Diet® w/d® Canine Vegetable & Chicken Stew 12.5oz	10129	112020T11 112020T05 102020T04 102020T21
Hill's® Prescription Diet® i/d® Low Fat Canine Rice, Vegetable & Chicken Stew 12.5oz	10423	092020T27 092020T28 092020T24 102020T17 102020T19 112020T04
Hill's® Prescription Diet® Derm Defense® Canine Chicken & Vegetable Stew 12.5oz	10509	102020T05
Hill's® Science Diet® Adult 7+ Small & Toy Breed Chicken & Barley Entrée Dog Food 5.8oz	4969	102020T18
Hill's® Science Diet® Puppy Chicken & Barley Entrée 13oz	7036	102020T12
Hill's® Science Diet® Adult Chicken & Barley Entrée Dog Food 13oz	7037	092020T22 102020T13 102020T14 112020T23 112020T24
Hill's® Science Diet® Adult Turkey & Barley Dog Food 13oz	7038	102020T06
Hill's® Science Diet® Adult Chicken & Beef Entrée Dog Food 13oz	7040	112020T10 112020T11 102020T13
Hill's® Science Diet® Adult Light with Liver Dog Food 13oz	7048	112020T19
Hill's® Science Diet® Adult 7+ Chicken & Barley Entrée Dog Food 13oz	7055	092020T31 102020T13
Hill's® Science Diet® Adult 7+ Beef & Barley Entrée Dog Food 13oz	7056	102020T28 092020T31 112020T20 112020T24
Hill's® Science Diet® Adult 7+ Turkey & Barley Entrée 13oz	7057	112020T19
Hill's® Science Diet® Adult 7+ Healthy Cuisine Braised Beef, Carrots & Peas Stew dog food 12.5oz	10452	102020T28 102020T14 102020T21
Hill's® Science Diet® Adult 7+ Youthful Vitality Chicken & Vegetable Stew dog food 12.5oz	10763	102020T04 102020T05 112020T11

57. On information and belief, and as a result of Defendants' continuous recall of additional Products, Defendants likely have not determined the full extent of the Vitamin D contamination in their products. Therefore, Plaintiff reserves the right to amend this Class Action Complaint to include additional products, as Defendants may expand the recall to include products that have not been discovered and/or disclosed that contain toxic amounts of Vitamin D and/or other nutrients that, when consumed in large doses, can lead to sickness or death in household pets.

58. As shown in the graphic above, the Products include dog foods that are part of Defendants' Science Diet and Prescription Diet brands.

59. Defendants' recall directly contradicts all of the various representations and warranties that they make about the Products, which place a clear emphasis on Defendants' commitment to providing consumers with products that are healthy and safe for canine consumption, and with particular emphasis on their strict adherence to good manufacturing practices that involve stringent testing and inspection procedures.

60. Defendants emphasize that they work with veterinarians to develop a "unique position to find a solution" to the various dietary and health issues that dogs commonly encounter for their Prescription Diet products.²⁰

61. To reinforce their representations and warranties that the Prescription Diet Products are formulated for specific canine health concerns, Defendants claim on their labels that they provide "CLINICAL NUTRITION" or "THERAPEUTIC DOG NUTRITION" and are designed to address health conditions including but not limited to kidney care, metabolic care, digestive care, skin/food sensitivities, urinary care, joint care, and aging as shown by example below:

²⁰ See <https://www.hillspet.com/prescription-diet/dog-food>.



62. Defendants represent and warrant that Science Diet products will “[f]eed your dog’s best life with biology-based nutrition” and that “we make our foods using only high-quality ingredients.”²¹

63. Defendants market their Science Diet products as superior to other dog foods by claiming on their labels that they are “VETERINARIAN RECOMMENDED” as shown by example below:

²¹ See <https://www.hillspet.com/science-diet/dog-food>.



64. As demonstrated by Defendants' recall of at least 13.5 million units of food, which when consumed by dogs resulted in them suffering from Vitamin D poisoning and its related adverse symptoms, Defendants' labeling, advertising, and other representations and warranties about the quality of their Products, including the safety and inspection procedures allegedly utilized to ensure that individual ingredients are safely sourced from reliable suppliers and subject to regular quality assurance checks, are false and misleading.

65. As part of Defendants' labeling and advertising campaign, they represent and warrant that the Products provide "[n]utrition that can transform the lives of pets and comfort the

pet parents and vets who care for them.”²²

66. In order to charge a premium price for their Products, Defendants state that “[w]e only accept ingredients from suppliers whose facilities meet stringent quality standards and who are approved by Hill's. Not only is each ingredient examined to ensure its safety, we also analyze each product's ingredient profile for essential nutrients to ensure your pet gets the stringent, precise formulation they need.”²³

67. To further convince consumers that the Products are superior to other brands of dog food and safe for consumption by canines, Defendants represent and warrant that “[w]e conduct final safety checks daily on every Hill's pet food product to help ensure the safety of your pet's food. Additionally, all finished products are physically inspected and tested for key nutrients prior to release to help ensure your pet gets a consistent products bag to bag.”²⁴

68. Defendants also represent and warrant that “[w]e conduct annual quality systems audits for all manufacturing facilities to ensure we meet the high standards your pet deserves. We demand compliance with current Good Manufacturing Practices (cGMP) and Hill's high quality standards, so your pet's food is produced under clean and sanitary conditions.”²⁵

69. In generally describing their Products, Defendants make a “commitment to quality” with more than 220 veterinarians, food scientists, technicians, and PhD nutritionists working together to develop products that are safe, nutritious, and superior to other brands.²⁶

²² See <https://www.hillspet.com/dog-food>.

²³ <https://www.hillspet.com/about-us/quality-and-safety>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See <https://www.hillspet.com/about-us/nutritional-philosophy>.

70. Defendants further represent and warrant that their Products contain the “precise balance” of nutrients needed for a healthy dog: “Guided by science, we formulate our food with precise balance so your pet gets all the nutrients they need — and none they don’t.”²⁷

71. However, the Products clearly do not contain a “precise balance” of nutrients, since they contain toxic levels of Vitamin D.

Price Premium for the Products

72. Defendants charged a price premium for their Products because Defendants knew or in the reasonable exercise of care should have known that the aforementioned representations and warranties, among other affirmative statements about the quality of their Products, would cause consumers to pay more for the Products, as health and safety benefits are important factors that consumers consider when selecting a dog food.

73. Because health and safety concerns play a critical role in consumers’ purchasing decisions, consumers will pay a premium price for Defendants’ Products based on their aforementioned labeling, advertising, representations and warranties, including but not limited to those affirming that the Products are healthy, safe, inspected daily, subject to good manufacturing procedures, are made from ingredients sourced from reliable suppliers, and are generally superior to other brands of dog food.

74. Defendants’ price premium is shown below²⁸:

²⁷ *Id.*

²⁸ Pricing information obtained from <https://www.chewy.com>.

Brand	Quantity	Price	Unit Price
Hill's Pres. Diet i/d Canine Chicken & Vegetable Stew 12.5 oz.	12 cans	\$39.99	\$3.33 per can \$0.27 per ounce
Hill's Pres. Diet w/d Canine Vegetable & Chicken Stew 12.5 oz.	12 cans	\$38.99	\$3.25 per can \$0.26 per ounce
Hill's Science Diet Adult Chicken & Barley Entrée Dog Food 13 oz.	12 cans	\$22.20	\$1.85 per can \$0.14 per ounce
Hill's Science Diet Adult 7+ Beef & Barley Entrée Dog Food 13 oz.	12 cans	\$22.20	\$1.85 per can \$0.14 per ounce
Purina ONE SmartBlend Classic Ground Beef and Brown Rice Adult 13 oz.	12 cans	\$12.67	\$1.06 per can \$0.08 per ounce
Iams ProActive Health Adult Chicken and Whole Grain Rice Pate 13 oz.	12 cans	\$16.80	\$1.40 per can \$0.11 per ounce
Nature's Recipe Easy-to-Digest Chicken, Rice & Barley Recipe Cuts in Gravy Stew 13.2 oz.	12 cans	\$13.99	\$1.17 per can \$0.09 per ounce
Purina Dog Chow High Protein Chicken Classic Ground Canned Dog Food 13 oz.	12 cans	\$12.60	\$1.05 per can \$0.08 per ounce

75. Because the Products contain lethal dangerous levels of Vitamin D and endangered the health and safety of dogs, which caused Plaintiff's and members of the Class' dogs to become sick or die, Defendants' Products are substantially diminished in value at the point of sale or earlier and/or are worthless as a dog food, which is their intended purpose, and the various representations and warranties described herein are false and misleading.

76. As a direct and proximate result of Defendants' false and misleading labeling, advertising, warranties and representations, negligence in adhering to their duty to sell a safe and healthy dog food as they expressly and/or implicitly promised, breach of express and implied warranties, unfair practices, and other unlawful conduct detailed herein, Plaintiff and members of the Class incurred actual damages and other economic losses, including but not limited to the

monies lost as a result of paying for the Products, medical and prescription expenses, medical monitoring, and/or any other cognizable damages such as damage to property caused by dogs who suffered from incontinence, vomiting and/or other physical symptoms of Vitamin D poisoning, and any lost wages resulting from work hours lost due to caring for sick animals, and any other damages to be proven at trial.

CLASS ACTION ALLEGATIONS

77. Pursuant to Fed. R. Civ. P. 23, Plaintiff, on behalf of herself and all other persons who purchased Defendants' Products nationwide and in the Commonwealth of Massachusetts, hereby seeks certification of a proposed nationwide class of consumers and a subclass of Massachusetts consumers (the "Class").

78. Excluded from the proposed Class are Defendants, any entity in which Defendants have a controlling interest including any upstream or downstream affiliates, Defendants' legal counsel, officers, directors, employees, assigns and successors; any persons and entities that purchased the Products at resale; the Judge(s) to whom this matter is assigned and any member(s) of the Judge's staff or immediate family; and Class Counsel.

79. Plaintiff brings this action on behalf of the following proposed Class and Subclass:

- a. Nationwide Class: All persons in the United States who purchased the Products.
- b. Massachusetts Subclass: All persons in Massachusetts who purchased the Products.

80. **Numerosity:** Defendants distributed the Products to retailers throughout the United States and also sold them directly to consumers through storefront and online retailers. Defendants have recalled at least 13.5 million units of Products and continue to recall additional Products. Therefore, it is impracticable to join all members of the Class in a single action.

Members of the Class may be identified through sales records from authorized retailers, veterinary prescription and sales records, and self-identification processes. Notification of the proposed Class can be effectuated by mail or E-mail, and/or by publication in print and/or online.

81. ***Commonality and Predominance:*** Common questions of law and fact exist as to all proposed members of the Class and predominate over questions that only affect individual members of the Class. These common questions of law and fact include, but are not limited to and subject to amendment:

- a. Whether the Products contained toxic amounts of Vitamin D;
- b. Whether Defendants' labeling, advertising, warranties and representations are false or misleading;
- c. Whether Defendants breached any express warranties;
- d. Whether Defendants breached any implied warranties, including but not limited to the implied warranty of merchantability;
- e. Whether the Products were either diminished in value or had no value as a dog food as a result of containing toxic levels of Vitamin D;
- f. Whether Defendants owed a duty of care to Plaintiff and members of the Class;
- g. Whether Defendants breached that duty of care;
- h. Whether Plaintiff and members of the Class have sustained damages as a result of the conduct alleged herein and the appropriate measure of such damages;
- i. Whether Defendants were unjustly enriched as a result of Plaintiff and members of the Class purchasing the Products;
- j. Whether Defendants' conduct violated the consumer protection statutes of various states; and,

- k. Whether Plaintiff and members of the Class are entitled to punitive damages and/or other damages that the Court deems cognizable.

82. ***Adequacy:*** Plaintiff is an adequate representative of the proposed Class because her interests do not conflict with the interests of any of the class members that she seeks to represent. Plaintiff has retained attorneys who are knowledgeable and experienced in handling complex and class action litigation who will pursue this case vigorously on behalf of Plaintiff and members of the Class.

83. ***Superiority:***

- a. A class action is superior to other available means for the fair and efficient resolution or adjudication of this matter. Each member of the Class' injuries, while individually significant, are not large enough to economically or judicially justify the pursuit of individual actions in a manner that is at all feasible. Even if members of the Class could afford to undergo individualized litigation, the judicial system could not afford such piecemeal litigation.
- b. In addition to the burdens and expenses incident to the management of numerous actions that, as here, arise from materially similar legal and factual questions, individualized litigation may and will likely result in inconsistent judgments. Individualized litigation will also increase the delay and expense to all parties and the judicial system, while the class action mechanism risks far fewer management difficulties and provides the benefits of a single adjudication, economy of scale, and supervision by a single court.

84. ***Typicality:*** Plaintiff's claims are typical of the claims of the proposed Class. Plaintiff and the members of the proposed Class all purchased the Products, giving rise to materially similar claims.

85. In the alternative, the proposed Class may be certified because:

- a. The prosecution of separate actions by the individual members of the proposed Class would create a risk of inconsistent adjudications, which could establish incompatible standards of conduct for Defendants;
- b. The prosecution of individual actions could result in adjudications, which, as a practical matter, would be dispositive of the interests of non-party Class members or which would substantially impair their ability to protect their interests; and
- c. Defendants have acted or refused to act on grounds generally applicable to the proposed Class, thereby making appropriate final relief with respect to the members of the proposed Class as a whole.

86. Defendants benefitted from the sale of the Products to Plaintiff and members of the Class in a determinable amount.

COUNT I

Breach of Express Warranty

87. Plaintiff, individually and on behalf of the Class, incorporates and restates the previous paragraphs as if fully set forth herein.

88. Defendants sold and Plaintiff and members of the Class purchased Defendants' Products, which they represented and warranted in their labeling, advertising, and other forms of promotion to consumers nationwide that they were healthy, safe for consumption by dogs, and subjected to daily inspections for ingredient safety, as shown herein.

89. Defendants' Products did not conform to the various representations and warranties detailed herein because they contained excessive levels of Vitamin D which rendered the Products dangerous for canine consumption and ultimately led to Plaintiff's and members of the Class' dogs suffering from severe health conditions and, in some cases including Plaintiff's

dog, death.

90. As a direct and proximate result of Defendants' breaches of the express warranties described herein and the Products' failure to conform to these express warranties, Plaintiff and members of the Class have been and continue to be damaged as they did not receive the Products as they were expressly warranted and/or paid a premium price for Products when they had a diminished or no value for their intended purpose as a dog food, and incurred other cognizable to be proven at trial.

COUNT II

Breach of Implied Warranty

91. Plaintiff, individually and on behalf of the Class, incorporates and restates the previous paragraphs as if fully set forth herein.

92. Defendants sold and Plaintiff and members of the Class purchased Defendants' Products.

93. At the time Defendants formulated, manufactured, advertised, sold, and distributed the Products, Defendants impliedly warranted to Plaintiff and members of the Class that the Products were of merchantable quality and safe and fit for their purpose as a dog food.

94. Plaintiff and members of the Class believed that the Products were of merchantable quality and fit for their intended use as a dog food.

95. Neither Plaintiff nor members of the Class altered the Defendants' Products after purchasing them and used them as instructed.

96. Plaintiff and members of the Class could not have known about the risks associated with the Products until after their dogs exhibited symptoms of Vitamin D toxicity.

97. Defendants' Products were not merchantable quality, did not pass without objection in the trade under the label description, were not of fair average quality within that description, were not fit for the ordinary and intended purpose as a dog food, and did not conform to the promises or affirmations of fact Defendants made on their labels, advertising, and other representations and warranties because they contained toxic levels of Vitamin D.

98. As a direct and proximate result of Defendants' breaches of their implied warranties and the Products' failure to conform to such warranties, Plaintiff and members of the Class have been and continue to be damaged in that, *inter alia*, they did not receive dog food that was of merchantable quality and/or paid a premium price for Products when they had a diminished or nonexistent value for their intended purpose as a dog food, and incurred other cognizable losses to be proven at trial.

COUNT III

Negligence

99. Plaintiff, individually and on behalf of the Class, incorporates and restates the previous paragraphs as if fully set forth herein.

100. As described throughout, Defendants claim to regularly inspect their Products and ingredients and also claim to have implemented regular quality assurance and safety protocols intended to ensure that their dog food is healthy, safe for canine consumption, and contains safe ingredients from reliable suppliers that will not harm dogs.

101. As a major pet food manufacturer, Defendants owed a duty to Plaintiff and members of the Class to formulate, manufacture, label, advertise, market, distribute, and sell products that are safe and fit for canine consumption.

102. Defendants failed to exercise due care, and were negligent in the formulation, manufacture, labeling, advertising, marketing, distribution, and sale of the Products to Plaintiff

and members of the Class.

103. Despite claiming to do so and being on notice of systematic Vitamin D contamination in other brands of dog food, Defendants failed to implement adequate inspection protocols to test the Products for toxic levels of Vitamin D, resulting in such Products entering the stream of commerce for sale to Plaintiff and members of the Class.

104. Defendants failed to implement adequate inspection protocols to test the Products for toxic levels of Vitamin D even after assuring consumers that they had done so, resulting in the recall to be expanded to include additional Products.

105. Defendants knew or in the exercise of reasonable care should have known that their Products posed an unreasonable and unacceptable risk of injury or death to Plaintiff's and members of the Class' dogs, and that their actions and/or omissions would foreseeably result in damages that could have been avoided.

106. As a direct and proximate result of Defendants' breaches of their duty of care, Plaintiff and members of the Class have been damaged and suffered ascertainable losses including payment for dangerous and defective Products and other cognizable losses to be proven at trial.

COUNT IV

Unjust Enrichment

107. Plaintiff, individually and on behalf of the Class, incorporates and restates the previous paragraphs as if fully set forth herein.

108. Plaintiff conferred benefits on Defendants by purchasing the Products at a premium price and Defendants had knowledge of and enjoyed such benefits.

109. Defendants have been unjustly enriched in retaining monies derived from Plaintiff's and members of the Class' purchases of the Products. It would be unjust and

inequitable for Defendants to retain those monies under these circumstances as a result of Defendants' false and misleading labeling, advertising, representations and warranties described throughout because the Products contained toxic levels of Vitamin D that are harmful to dogs, which caused Plaintiff and members of the Class to suffer injuries and losses because they would not have purchased the Products otherwise or their purchasing decisions would have been otherwise affected.

110. Defendants should be required to return to Plaintiff and members of the Class the amount they paid to purchase the Products or else be unjustly enriched.

COUNT V

Violation of the Massachusetts Consumer Protection Act (M.G.L. c. 93A, § 1, *et seq.*)

111. Plaintiff, individually and on behalf of the Massachusetts Subclass, incorporates and restates the previous paragraphs as if fully set forth herein.

112. At all times material hereto Defendants were engaged in trade and commerce.

113. On or about June 6, 2019, and more than 30 days prior to filing this Complaint, Plaintiff made a proper written demand for relief upon each of the Defendants under M.G.L. c. 93A on behalf of Plaintiff and the Class.

114. Defendants made no reasonable offer of settlement to either Plaintiff or the Massachusetts Subclass.

115. Defendant's acts and practices as set forth herein constitute unfair methods of competition and unfair and deceptive practices in the conduct of its business in violation of M.G.L., c. 93A, Sections 2 and 9.

116. These violations of M.G.L. c. 93A include, without limitation, Defendants' breach of their express and implied warranties; falsely and misleadingly labeling and advertising the Products, with regard to product contents, as well as safety and inspection procedures; and

purposefully concealing, failing to disclose, and misstating the health hazards and risks associated with the Products.

117. Defendants' violations of M.G.L. c. 93A were willful and knowing.

118. Plaintiff and the Massachusetts Subclass have suffered damages as a result of Defendants' unfair or deceptive acts, and are entitled to equitable relief, treble damages, attorneys' fees, and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of herself and the proposed Class, seeks the following relief:

A. An order certifying the Nationwide Class and Massachusetts Subclass under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiff as representative of the Nationwide Class and Massachusetts Subclass and Plaintiff's attorneys as Class Counsel;

B. For an order of restitution and all other forms of equitable monetary relief;

C. For an order awarding Plaintiff and the Class' reasonable attorneys' fees, expenses, and costs of suit;

D. For an order requiring Defendants to identify all Products that contain toxic levels of Vitamin D through strict testing procedures and, pending results of these tests, ensure all such Products are removed from the stream of commerce as soon as possible;

E. For compensatory, statutory, and punitive damages in amounts to be determined by the Court and/or jury;

F. For prejudgment and post-judgment statutory interest on all awarded amounts;

G. For a declaration that Defendants' conduct is in violation of the statutes forming the basis of statutory violations described herein;

H. For any further relief the Court may deem appropriate or necessary.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all claims that are triable.

DATED: July 9, 2019

Respectfully Submitted,

Kristen DiCroce, et al.,

/s/Dustin L. Van Dyk

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Dated: July 9, 2019