



No. S072079
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

VICKI JOEL

PLAINTIFF

AND:

MENU FOODS GENPAR LIMITED, MENU FOODS LIMITED PARTNERSHIP, MENU FOODS ACQUISITIONS INC., MENU FOODS LIMITED, MENU FOODS OPERATING LIMITED PARTNERSHIP, MENU FOODS HOLDINGS, INC., MENU FOODS, INC., MENU FOODS MIDWEST CORPORATION and MENUFOODS SOUTH DAKOTA INC.

DEFENDANTS

STATEMENT OF CLAIM

Brought pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

The Parties:

1. The Plaintiff, Vicki Joel, resides in the City of Maple Ridge, in the Province of British Columbia.
2. The Plaintiff brings this action on her own behalf and on behalf of persons resident in British Columbia who purchased dog or cat food manufactured by the Defendants between December 3, 2006 and March 6, 2007 and which was subject to the March 16, 2007 recall issued by Menu Foods Income Fund, as updated on various dates thereafter (the "Class").
3. The Defendants Menu Foods GenPar Limited, Menu Foods Limited Partnership, Menu Foods Acquisition Inc., Menu Foods Limited and Menu Foods Operating Limited Partnership are

companies incorporated pursuant to the laws of the Province of Ontario, with offices at 8 Falconer Drive, in Streetsville, Ontario.

4. The Defendants Menu Foods Holdings Inc., Menu Foods Midwest Corporation and Menu Foods South Dakota Inc., are companies incorporated pursuant to the laws of the State of Delaware, U.S.A., with offices at 8 Falconer Drive, in Streetsville, Ontario.

5. The Defendant Menu Foods, Inc. is a company incorporated pursuant to the laws of the State of New Jersey, U.S.A., with offices at 8 Falconer Drive, in Streetsville, Ontario.

6. At all material times:

- a) The shares of the Defendant Menu Foods Genpar Limited were owned by Menu Foods Operating Trust, whose shares were owned by Menu Foods Income Fund;
- b) The Defendant Menu Foods Genpar Limited and Menu Foods Operating Trust were partners in the Defendant Menu Foods Limited Partnership, a partnership;
- c) The Defendant Menu Foods Limited Partnership owned the shares of the Defendant Menu Foods Acquisition, Inc.;
- d) The Defendant Menu Foods Acquisition, Inc., owned the shares of the Defendant Menu Foods Limited;
- e) The Defendant Menu Foods Limited owned the shares of the Defendant Menu Foods Holdings, Inc.;
- f) The Defendant Menu Foods Holdings Inc. owned the shares of the Defendants Menu Foods, Inc., Menu Foods Midwest Corporation and Menu Foods South Dakota Inc.;
- and
- g) The Defendants Menu Foods Limited Partnership and Menu Foods Limited were partners in Menu Foods Operating Limited, a partnership.

7. The Defendants carry on business as manufacturers of dog or cat food. At all material times, the Defendants manufactured or sold in Canada cat or dog food under various name brands, including: America's Choice, Preferred Pets, Authority, Award, Best Choice, Big Bet, Bloom, Cadillac, Companion, Compliments, Demoulas Market Basket, Eukanuba, Food Lion, Foodtown, Giant Companion, Great Choice, Hannaford, Hill Country Fare, Hy-Vee, Iams, Laura Lynn, Lil' Red, Loving Meals, Meijer's Main Choice, Mighty Dog Pouch, Mixables, Nutriplan, Nutro Max, Nutro Max Gourmet Classics, Nutro Natural Choice, Nutro, Ol'Roy Canada, Ol'Roy US, Paws, Pet Essentials, Pet Pride – Good n Meaty, President's Choice, Price Chopper, Priority Priority, Publix, Roche Brothers, Save-A-Lot Choice Morsels, Save-A-Lot Special Blend, Schnucks, Science Diet Feline Savory Cuts Cans, Shep Dog, Sophistacat, Special Kitty Canada, Special Kitty US, Springfield Prize, Sprout, Stater Brothers, Stop & Shop Companion, Tops Companion, Wegmans, Wegmans Bruiser, Weis Total Pet, Western Family US, White Rose, Winn Dixie and Your Pet (collectively, the "Defendants' Pet Food").

The Contamination of the Defendant's Pet Food:

8. On March 16, 2007, the Defendants announced a North-American recall (the "Recall") of certain types or varieties of the Defendants' Pet Food manufactured between December 3, 2006 and March 7, 2007 (the "Recalled Pet Food").

9. The Recall was announced after several animals had become ill or died after ingesting the Defendants' Pet Food.

10. Between December 2006 and January 12, 2007, the Plaintiff purchased and fed to her cat "Jessica Marie" Priority cat food which she purchased at a British Columbia retailer. Priority cat food is one of varieties of the Recalled Pet Food. Although Jessica Marie was healthy at the time she first ingested the Recalled Pet Food, she became sick after consuming same and died on January 12, 2007.

Duties of Care Owed by the Defendants to the Plaintiff and the Class:

11. As manufacturers of pet food which was ultimately destined for resale to the Plaintiff and to the Class, and consumption by their dogs and cats, the Defendants owed to the Plaintiff and the Class the following duties of care:

- a) to ensure that the Defendants' Pet Food was manufactured using only ingredients that were proven safe for consumption by dogs or cats;
- b) to ensure that the ingredients utilized in the manufacture of the Defendant's Pet Food corresponded with their description and were fit for consumption by dogs or cats;
- c) to ensure that the Defendants' Pet Food was manufactured with ingredients that were free of contaminants or any substances that could be harmful to dogs or cats;
- d) to ensure that the Defendants' Pet Food was safe for consumption by dogs and cats;
- e) to ensure that the Defendants' Pet Food was free of contaminants or any substances that could be harmful to dogs or cats;
- f) to warn the Plaintiff and the Class of the presence of contaminants or substances that could be harmful to dogs or cats once they became aware (or through reasonable due diligence, could have become aware) of its existence; and
- g) to take immediate steps to remove from the market the Defendant's Pet Food once they became aware (or through reasonable due diligence, could have become aware) of the presence of contaminants or substances that could be harmful to dogs or cats.

Negligence of the Defendants:

12. The defendants breached their duty of care to the Plaintiff and to the Class by negligently manufacturing, testing and selling the Defendant's Pet Food. Particulars of the Defendants' negligence include the following:

- a) Failing to develop or implement, or alternatively, adequately develop or implement

reasonable quality control measures to ensure that the ingredients utilized in the manufacture of the Defendant's Pet Food corresponded with their description, were free of any contaminants or substances that could be harmful to dogs or cats and were safe for consumption by dogs or cats;

- b) Failing to develop or implement, or alternatively, adequately develop or implement reasonable measures to ensure that the Defendants' Pet Food was free of any contaminants or substances that could be harmful to dogs or cats;
- c) Failing to develop or implement, or alternatively, adequately develop or implement testing procedures to ensure proper and prompt notice of the ingress in the Defendant's Pet Food of any contaminants or substances that could harmful to dogs or cats;
- d) Failing to take immediate steps to remove the Defendant's Pet Food from the market once they became aware (or through reasonable diligence, could have become aware) of the presence of contaminants or substances that could be harmful to dogs or cats;
- e) Allowing the Class to continue to feed the Defendants' Pet Food to their dogs and cats after they were aware (or through reasonable diligence, could have become aware) of the presence of contaminants or substances that could be harmful to dogs or cats;
- f) Accepting the risk of the presence of contaminants or substances that could be harmful to dogs or cats in the manufacture of the Defendant's Pet Food;
- g) Failing to devise and implement, or alternatively, adequately devise and implement procedures to ensure that complaints in relation to the Defendants' Pet Food were recorded and transmitted to alert the Defendants to the potential presence of any contaminants or substances that could be harmful to dogs or cats in the Defendants' Pet Food;
- h) Failing to take immediate action upon receiving reports of concerns in relation to the Defendants' Pet Food;

- i) Failing to employ good manufacturing practices in the manufacture of the Defendant's Pet Food;
- j) Failing to take immediate steps to modify its manufacturing practices once it became aware of the potential presence of contaminants or substances that could be harmful to dogs or cats in the Defendants' Pet Food;
- k) Failing to accurately, candidly, promptly and truthfully disclose the potential presence of contaminants or substances that could be harmful to dogs or cats in the Defendants' Pet Food; and
- l) Such further and other particulars as may be provided prior to the trial of this action.

Business Practices and Consumer Protection Act:

13. The Plaintiff and the other Class members are consumers within the meaning of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (the "BPCPA").

14. The purchases of the Defendants' Pet Food by the Plaintiff and the other Class members are consumer transactions within the meaning of the BPCPA.

15. The Defendants are suppliers to the consumer transactions within the meaning of the BPCPA.

16. The Defendants have engaged in deceptive practices within the meaning of s. 3 of the BPCPA as follows:

- a) Representing that the Recalled Food was fit for consumption by dogs or cats when it contained contaminants or other substances that are harmful to dogs or cats;

- b) Failing to disclose the potential presence of contaminants or other substances that are harmful to dogs or cats in the Recalled Food once they knew or ought to have known that such contamination had occurred;

(Collectively, the “Deceptive Acts or Practices”.)

Damages:

Compensatory Damages

17. As a result of the Defendants’ negligence, breach of statutory duties and failure to disclose and recall as pleaded above, the Plaintiff and the other members of the Class have suffered loss and damage and have incurred damages, the particulars of which include:

- a) Pain and suffering as a result of observing their dogs or cats’ deteriorating health following consumption of the Recalled Food, and in some cases, their death;
- b) Pain and suffering as a result of learning that the food which they were selecting to feed their dogs or cats has caused their dogs or cats to suffer and, in some cases, to die;
- c) the costs incurred to diagnose and treat the injuries sustained by their dogs or cats following consumption of the Recalled Food;
- d) the costs incurred in connection with the burial or cremation of dogs or cats who perished after consuming the Recalled Food;
- e) the costs of the Recalled Food, whether consumed or not, and the costs of purchasing pet food to replace the wasted Recalled Food; and
- f) such further and other particulars as may be provided prior to the trial of this action.

Punitive, Exemplary and Aggravated Damages:

18. The conduct of the Defendants in accepting the risk that the Defendants’ Pet Food could contain contaminants or substances that are harmful to dogs or cats, causing pain, suffering and in some cases death of dogs or cats and exposing the Class members to considerable pain,

suffering, loss and expense was highhanded and demonstrates an indifference to the consumers of their products such that it offends the moral standards of the community and warrants the condemnation of the court.

Waiver of Tort

19. In the alternative, the Plaintiff and the other Class members plead the doctrine of waiver of tort and, due to the negligence and failure to warn of the Defendants, are entitled to a restitutionary award of the benefits which accrued to the Defendants as a result of their negligence and/or failure to warn.

20. The benefits which accrued to the defendants as a result of their negligence and/or failure to warn include:

- a) the saving of costs of an earlier recall of the Recalled Food;
- b) the saving of costs of implementing the measures outlined in paragraph 12 of this Statement of Claim; and
- c) revenues from the sale of pet food to the Class to replace the Recalled Food following the Recall.

21. The benefits which accrued to the Defendants as a result of their negligence and/or failure to warn were unjust in the circumstances and there is no juristic reason for them.

Legislation:

22. In addition to the *BPCPA*, the plaintiff pleads and relies upon the *Class Proceedings Act, R.S.B.C. 1996, c. 50* and the *Negligence Act, R.S.B.C. 1996, c. 333*, as amended from time to time.

Liability of the Defendants:

23. The Plaintiff pleads that, by virtue of the acts and omissions particularized above, the Defendants are liable in damages to her and to the Class members and that each Defendant is responsible for the acts and omissions of the other Defendants for the following reasons:

- a) each was the agent of the other;
- b) each company' business was structured and operated so that it was inextricably interwoven with the business of the other;
- c) each company entered into a common advertising and business plan to manufacture, distribute and sell the Defendants' Pet Food;
- d) each Defendant owed a duty of care to the other and to each Class member by virtue of the common business plan to manufacture, distribute, and sell the Defendants' Pet Food; and
- e) the Defendants intended that their businesses be run as one global business organization.

WHEREFORE the Plaintiff claims, on her own behalf and on behalf of the Class members:

- a) General damages;
- b) Special damages;
- c) further or alternatively:
 - i) a declaration that the benefits which accrued to the Defendants as a result of their negligence and failure to warn unjustly enriched the Defendants;
 - ii) an accounting of the benefits which accrued to the defendants as a result of their negligence and/or failure to warn;
 - iii) a declaration that the defendants hold in trust for the Class the benefits which accrued to the defendants as a result of their negligence and/or failure to warn;
 - iv) disgorgement of the benefits which accrued to the defendants as a result of their negligence and/or failure to warn;

- d) damages pursuant to ss. 171 of the *BPCA*;
- e) exemplary, punitive and aggravated damages;
- f) interest pursuant to the *Court Order Interest Act* (British Columbia); and
- g) such further relief as this Honourable Court may deem just.

Place of trial: Vancouver, British Columbia

Dated: March 28, 2007



Luciana P. Brasil, Branch MacMaster
Counsel for the Plaintiff