

AMENDED / MODIFIÉ
Pursuant to / Conformément à
Rule 26.02 (B)
The Order of / L'ordonnance du
Dated / Fait le
Registrar / Greffier
Superior Court of Justice / Cour Supérieure de Justice

JAN 17/2020

Court File No.: CV-19-0062978600CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CLAIRE LINDHOUT AND BETTY ANN MARTIN

Plaintiffs

- and -

HILL'S PET NUTRITION CANADA INC. and HILL'S PET NUTRITION, INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFFS' CLAIM, and \$20,000 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400.00 for costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: October 24, 2019

Issued by J. KELCH
Local Registrar

Address of 393 University Avenue
court office Toronto ON
M5G 1E6

TO: **HILL'S PET NUTRITION CANADA INC.**
6521 Mississauga Road
Mississauga, ON L5N 1A6
Canada

AND TO: **HILL'S PET NUTRITION, INC.**
112 SW 7TH Street, Suite 3C,
Topeka, KS 66603
United States of America

CLAIM

A. DEFINITIONS

1. The capitalized terms used in the Statement of Claim have the meanings indicated below:

- (a) **"Class"** and **"Class members"** means any and all persons in Canada who purchased, or incurred damages by using, any of the **"Toxic Products"** manufactured, imported, produced, distributed, marketed and/or sold by Hill's Pet Nutrition Canada Inc. and/or Hill's Pet Nutrition, Inc., during the period between January 31, 2017 and the date of certification;
- (b) **"Hill's"** or the **"Defendants"** means Hill's Pet Nutrition Canada Inc. and Hill's Pet Nutrition, Inc., collectively;
- (c) **"Toxic Products"** means any and all of the following canned dog food products:
 - (i) Hill's Prescription Diet k/d with Lamb Canine 13oz (SKU number 2697, Date/Lot Code 102020T25);
 - (ii) Hill's Prescription Diet c/d Multicare Canine Chicken & Vegetable Stew 12.5oz (SKU number 3384, Date/Lot Codes 092020T29, 102020T10, 102020T25);
 - (iii) Hill's Prescription Diet c/d Multicare Canine Chicken & Vegetable Stew 5.5oz (SKU number 3388, Date/Lot Code 102020T18);
 - (iv) Hill's Prescription Diet i/d Canine Chicken & Vegetable Stew 12.5oz (SKU number 3389, Date/Lot Codes 092020T28, 102020T24, 102020T25, 102020T04, 102020T10, 102020T19, 102020T20, 102020T21);
 - (v) Hill's Prescription Diet i/d Low Fat Canine Rice, Vegetable & Chicken Stew 5.5oz (SKU number 3391, Date/Lot Code 092020T27);
 - (vi) Hill's Prescription Diet r/d Canine 12.3oz (SKU number 7014, Date/Lot Codes 092020T28, 102020T27, 102020T28);
 - (vii) Hill's Science Diet Adult Perfect Weight Chicken & Vegetable Entrée Dog Food 13oz (SKU number 2975, Date/Lot Code 092020T28);

- (viii) Hill's Science Diet Adult Beef & Barley Entrée Dog Food 13oz (SKU number 7039, Date/Lot Codes 092020T31, 102020T21);
- (ix) Hill's Science Diet Mature Adult Healthy Cuisine Chicken & Carrots Stew Dog Food 12.5oz (SKU number 10449, Date/Lot Codes 092020T28);
- (x) Hill's Science Diet Adult Healthy Cuisine Braised Beef, Carrots & Peas Stew Dog Food 12.5oz (SKU number 10451, Date/Lot Codes 102020T28);
- (xi) Hill's Prescription Diet i/d Canine Chicken & Vegetable Stew 5.5oz (SKU number 3390, Date/Lot Codes 102020T11, 112020T23, 122020T07);
- (xii) Hill's Prescription Diet g/d Canine 13oz (SKU number 7006, Date/Lot Codes 112020T19, 092020T22, 112020T20);
- (xiii) Hill's Prescription Diet i/d Canine 13oz (SKU number 7008, Date/Lot Codes 092020T21, 092020T30, 102020T07, 102020T11, 112020T22, 112020T23);
- (xiv) Hill's Prescription Diet j/d Canine 13oz (SKU number 7009, Date/Lot Codes 112020T20);
- (xv) Hill's Prescription Diet k/d Canine 13oz (SKU number 7010, Date/Lot Codes 102020T10, 102020T11);
- (xvi) Hill's Prescription Diet w/d Canine 13oz (SKU number 7017, Date/Lot Codes 102020T24, 102020T25, 112020T09, 112020T10, 092020T30, 102020T11, 102020T12);
- (xvii) Hill's Prescription Diet z/d Canine 13oz (SKU number 7018, Date/Lot Codes 102020T04, 112020T22);
- (xviii) Hill's Prescription Diet Metabolic + Mobility Canine Vegetable & Tuna Stew 12.5oz (SKU number 10086, Date/Lot Codes 102020T05, 102020T26);
- (xix) Hill's Prescription Diet w/d Canine Vegetable & Chicken Stew 12.5oz (SKU number 10129, Date/Lot Codes 112020T05, 112020T11, 102020T04, 102020T21);
- (xx) Hill's Prescription Diet i/d Low Fat Canine Rice, Vegetable & Chicken Stew 12.5oz (SKU number 10423, Date/Lot Codes 092020T27, 092020T28, 102020T17, 102020T19, 112020T04);

- (xxi) Hill's Prescription Diet Derm Defense Canine Chicken & Vegetable Stew 12.5oz (SKU number 10509, Date/Lot Codes 102020T05);
- (xxii) Hill's Science Diet Puppy Chicken & Barley Entrée 13oz (SKU number 7036, Date/Lot Codes 102020T12);
- (xxiii) Hill's Science Diet Adult Chicken & Barley Entrée Dog Food 13oz (SKU number 7037, Date/Lot Codes 092020T22, 102020T13, 102020T14, 112020T23, 112020T24);
- (xxiv) Hill's Science Diet Adult Turkey & Barley Dog Food 13oz (SKU number 7038, Date/Lot Codes 102020T06);
- (xxv) Hill's Science Diet Adult Chicken & Beef Entrée Dog Food 13oz (SKU number 7040, Date/Lot Codes 112020T10, 112020T11, 102020T13);
- (xxvi) Hill's Science Diet Adult Light with Liver Dog Food 13oz (SKU number 7048, Date/Lot Codes 112020T19);
- (xxvii) Hill's Science Diet Adult 7+ Chicken & Barley Entrée Dog Food 13oz (SKU number 7055, Date/Lot Codes 092020T31, 102020T13);
- (xxviii) Hill's Science Diet Adult 7+ Beef & Barley Entrée Dog Food 13oz (SKU number 7056, Date/Lot Codes 102020T28, 092020T31, 112020T20, 112020T24);
- (xxix) Hill's Science Diet Adult 7+ Healthy Cuisine Braised Beef, Carrots & Peas Stew dog food 12.5oz (SKU number 10452, Date/Lot Codes 102020T28, 102020T14, 102020T21);
- (xxx) Hill's Science Diet Adult 7+ Youthful Vitality Chicken & Vegetable Stew dog food 12.5oz (SKU number 10763, Date/Lot Codes 102020T04, 102020T05, 112020T11);
- (xxxi) Hill's Prescription Diet z/d Canine 5.5oz (SKU 5403, Date/Lot Code 102020T17, 112020T22);
- (xxxii) Hill's Science Diet Adult 7+ Small & Toy Breed Chicken & Barley Entrée Dog Food 5.8oz (SKU 4969, Date/Lot Code 102020T18); and
- (xxxiii) Hill's Science Diet Adult 7+ Turkey & Barley Entrée 13oz (SKU 7057, Date/Lot Code 112020T19).

B. RELIEF SOUGHT BY THE PLAINTIFFS

2. The Plaintiffs claims for:

- (a) an order certifying this action as a class proceeding and appointing them ~~her~~ as representative Plaintiffs for the Class Members;
- (b) a declaration that the Defendants owed a duty of care to the Plaintiffs and the Class Members with respect to research, development, manufacture, testing, distribution, marketing and sale of the Toxic Products;
- (c) a declaration that the Defendants breached their duties of care with respect to research, development, manufacture, testing, distribution, marketing and sale of the Toxic Products;
- (d) a declaration that the Defendants were negligent in their research, development, manufacture, testing, distribution, marketing and sale of the Toxic Products;
- (e) a declaration that each of the Defendants is vicariously liable for the acts and omissions of its officers, directors, agents, employees and representatives;
- (f) the right to elect to waive the tort of negligence;
- (g) a declaration that each of the Defendants breached the *Competition Act*, R.S.C. 1985, c. C-34;
- (h) a declaration that each of the Defendants breached: the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A, the *Consumer Protection Act*, R.S.A. 2000, c. C-26.3; the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2; *The Consumer Protection Act*, C.C.S.M., c. C200; the *Consumer Product Warranty and Liability Act*, S.N.B. 1978, c. C-18.1; the *Consumer Protection and Business Practices Act*, S.N.L. 2009, c. C-31.1; the *Consumer Protection Act*, R.S.N.W.T. 1988, c. C-17; the *Consumer Protection Act*, R.S.N.S. 1989, c. 92; the *Consumer Protection Act*, R.S.N.W.T. (Nu) 1988, c. C-17; the *Consumer Protection Act*, C.Q.L.R., c. P-40.1; *The Consumer Protection and Business Practices Act*, S.S. 2013, c. C-30.2; and the *Consumer Protection Act*, R.S.Y. 2002, c. 40;
- (i) pecuniary and special damages in the amount of \$10,000,000.00 for persons who suffered injuries and damages as a result of the Defendants' negligence and statutory breaches;

- (j) non-pecuniary damages in an amount to be assessed for each person who suffered damages as a result of the Defendants' negligence and statutory breaches;
- (k) punitive damages in the amount of \$1,000,000.00;
- (l) the costs of distributing all monies received to Class Members;
- (m) prejudgement and postjudgment interest;
- (n) costs on a substantial indemnity basis, plus applicable taxes; and
- (o) such further and other relief as this Honourable Court may deem just.

C. OVERVIEW

3. Hill's Pet Nutrition Canada Inc. and Hill's Pet Nutrition, Inc. (the "Defendants"), have sold a variety of contaminated and toxic dog food products to Canadian pet owners, whose pets have become ill and been killed as a result of ingesting them. Canadians have suffered pecuniary and non-pecuniary damages as a result of the illness and death of their cherished pets.

4. The Toxic Products that Hill's sold contained poisonously high levels of vitamin D. For pets, vitamin D toxicity is an emergency that requires immediate medical treatment and hospitalization, both of which are expensive and laborious for pet owners.

5. As a result of their purchases of the Toxic Products, the Plaintiffs and Class have suffered and will suffer damages, including consequential and incidental damages, such as the loss and disability of their household pets; costs of purchasing the Toxic Products; costs of replacing the Toxic Products with a safe pet food (including sales tax or similar taxes); incidental transaction costs associated with purchasing safe, non-contaminated pet food and/or in securing a refund for the Products; and all costs associated with obtaining veterinary care for pets who ingested the defective Products, including in some instances, the cost of euthanizing their pets.

6. The Defendants knew or should have known about the risks of injury, illness, or death posed by the Toxic Products before the Plaintiffs and the Class purchased and/or fed their pets.

D. **THE PLAINTIFFS**

Claire Lindhout

7. The representative plaintiff is Claire Lindhout. She lives in Redcliffe, Alberta. Ms. Lindhout had a poodle named Timbit. Ms. Lindhout purchased Toxic Products manufactured and/or marketed by the Defendants. Ms. Lindhout fed Timbit the Toxic Products, because she was unaware that they were poisonous. Timbit was killed by the Defendants' Toxic Products.

8. Ms. Lindhout was not aware that the Toxic Products contained excessive levels of vitamin D at any time when she purchased them or fed them to Timbit. Ms. Lindhout relied on Hill's representations regarding the safety and fitness of the Toxic Products in deciding to feed them to Timbit. Ms. Lindhout would not have purchased or fed Timbit any of the Toxic Products had she known they contained excessive amounts of vitamin D.

9. On February 16, 2019, Timbit died as a result of consuming the Defendants' Toxic Products.

10. Ms. Lindhout was and remains extremely emotionally distressed by Timbit's suffering and passing.

Betty Ann Martin

11. The representative plaintiff Betty Ann Martin is a resident of Windsor, Ontario. Ms. Martin owned a Shih Tzu named Bailey, who was born on February 9, 2006. Up until the events described below, Bailey had suffered no ill health effects.

12. In or about February 2017, the Ms. Martin began to feed Bailey the Defendants' Toxic Products and did so consistently until Bailey's death as detailed below. On December 5, 2018, Ms. Martin purchased 8 cans of Science Diet Perfect Weight Chicken and Vegetable Entrée (the "Perfect Weight") from a PetValu pet store in Windsor, Ontario. At that time, she also bought 4 cans of Adult Chicken and Barley Entrée as PetValu did not have enough of the Perfect Weight in stock.

13. In late December 2018, in and around the Christmas holidays, Bailey began consuming the Toxic Product Perfect Weight purchased on December 5, 2018. Within approximately one week of eating the food purchased on December 5, 2018, Bailey began exhibiting alarming symptoms caused by the Toxic Products including, but not limited to, the following: vomiting, diarrhea, loss of balance, weakness, loss of appetite, lethargy, head bobbing/tremors, and uncontrolled movements.

14. As Bailey's symptoms worsened, in the early morning of January 2, 2019, Ms. Martin took Bailey to an emergency veterinarian clinic, St. Charles Veterinary Hospital, in Davenport, Florida. After numerous tests were conducted and multiple treatment options were administered, unfortunately, Bailey's condition rapidly deteriorated and Bailey was euthanized on January 2, 2019.

15. Ms. Martin was not aware that the Toxic Products contained excessive levels of vitamin D at any time when she purchased them or fed them to Bailey. Ms. Martin relied on Hill's representations regarding the safety and fitness of the Toxic Products in deciding to feed them to Bailey. Ms. Martin would not have purchased or fed Bailey any of the Toxic Products had she known they contained excessive amounts of vitamin D.

16. Ms. Martin was and remains extremely emotionally distressed by Bailey's suffering and passing.

E. THE DEFENDANTS

17. The Defendants are leading North American producers of pet food sold through e-commerce, retailers, veterinarians, and veterinary clinics nationwide. The Defendants develop, manufacture, market, distribute, and sell hundreds of thousands of containers of canned dog food every year.

18. The Defendant Hill's Pet Nutrition, Inc. is a Delaware corporation with its head office and principal place of business located at 400 SW, Topeka, Kansas 66603, United States of America. Hill's Pet Nutrition, Inc. carries on business throughout the United States and Canada. It manufactured all of the Toxic Products, which were imported into Canada and sold to the Plaintiffs and to Canadian Class members.

19. The Defendant Hill's Pet Nutrition Canada Inc. is an Ontario corporation with its head office and principal place of business at 6521 Mississauga Road, Mississauga, Ontario L5N 1A6, Canada. Hill's Pet Nutrition Canada Inc. carries on business throughout Canada. It imported, produced, marketed, distributed, and/or sold all of the Toxic Products to the Plaintiffs and Canadian Class members.

F. THE CLASS

20. The Class is made up of all persons in Canada who purchased, or incurred damages by using, any of the Toxic Products manufactured, imported, produced, distributed, marketed and/or sold by the Defendants, during the period between January 31, 2017 and the date of certification.

F. HILL'S TOXIC PRODUCTS

21. The Toxic Products developed, manufactured, tested, marketed, distributed, and sold by the Defendants had excessively high levels of vitamin D within them, levels that are dangerous for dogs.

22. While vitamin D is an essential nutrient in a dog's diet, excessive amounts of vitamin D causes dogs pain, severe vomiting, diarrhea, loss of appetite, increased thirst, increased urination, excessive drooling, cardiac abnormalities, seizures and weight loss. It also results in kidney problems, heart disease, other health issues, and ultimately death.

23. All the Toxic Products at issue in this action are products in either the line of "Hill's Prescription Diet" or the line of "Hill's Science Diet" dog foods (collectively referred to hereinafter as the "Specialty lines"). The Defendants' represented products in these lines as being specially formulated for the health needs of certain dogs. In order to better sell the Specialty lines, and to entice veterinarians to prescribe them, Hill's marketed the Specialty lines as particularly nutritious, and formulated for dogs with specific needs or illnesses, such as: age-specific dietary needs, breed-specific dietary needs, digestive issues, heart issues, liver issues, or kidney issues. Hill's continuously represented to the Plaintiffs and Class that the Toxic Products to be medicinal, medical

grade, clinically prescribed, and/or professionally guaranteed to treat specific dogs. For example, labels such as, but not limited to, "clinical nutrition" were placed on Hill's Toxic Products.

24. Rather than qualifying these statements, the Defendants represented to the Plaintiffs and Class that their other misrepresentations as to the benefits, health and safety of their Toxic Products were absolutely guaranteed. For example, all of Hill's Toxic Products were labelled with statements such as, but not limited to, "100% guaranteed or your money back".

25. Hill's made such representations despite legislation and industry standards prohibiting them from doing so. Labelling of products in the Canadian pet industry is regulated by statutes like the *Competition Act*, R.S.C. 1985, c. C-34 and the *Consumer Packaging and Labelling Act*, R.S.C. 1985, c. C-38, which prohibit false representations to consumers. It is also regulated by the 2001 *Guide for the Labelling and Advertising of Pet Foods* (the "Guidelines"), published by the Working Group on the Labelling and advertising of pet food in Canada, and commissioned and endorsed by the Canadian Competition Bureau. The Guidelines have several labelling stipulations for the types of representations that can and must be made on pet food products. For example, section 5.4 of the Guidelines requires any product that is intended to be used under the supervision of a veterinarian to include the following label: "Use only as directed by your veterinarian". Such a label did not visibly appear on the Toxic Products.

26. Since at least 2005, scientific studies have linked vitamin D toxicity and hypercalcaemia in dogs to excessive amounts of vitamin D in their commercial diet.¹ Similar vitamin D toxicity and hypercalcaemia in cats has also been linked to commercial cat food.²

¹ See e.g.: R.J. Mellanby, "Hypercalcaemia in two dogs caused by excessive dietary supplementation of vitamin D" (July 2005) 46:7 *J Small Animal Practice* 334; J.S. Messinger et. al. "Ionized Hypercalcemia in Dogs: A Retrospective Study of 109 Cases (1998-2003)" (2009) 23 *J Vet Intern Med* 514.

² See e.g.: A. Wehner et. al., "Vitamin D intoxication caused by ingestion of commercial cat food in three kittens" (2013), 15:8 *Journal of Feline Medicine and Surgery* 730; V.J. Crossley et. al., "Vitamin D toxicity of dietary origin in cats fed a natural complementary kitten food" (December 2017) 3:2 *Journal of Feline Medicine and Surgery Open Reports* 1.

27. In 2006, the National Research Council of the National Academies included safe upper limits to vitamin recommendations in its *Nutrient Requirements of Dogs and Cats*. In or around 2007, the Association of American Feed Control Officials' ("AAFCO") Canine Nutrition Expert Subcommittee decreased the maximum recommended vitamin D concentration in pet foods, in consideration of the safe upper limits set by the National Research Council.

28. Most recently, the 2014 AAFCO "Dog and Cat Food Nutrient Profiles" recommended a maximum of 3000 IU of vitamin D per kilogram of dry matter dog food, and a maximum of 750 IU per 1000 kilocalories of dog food generally.

29. At some time prior to December 3, 2018, the U.S. Food & Drug Administration (the "FDA") had received industry reports of vitamin D toxicity in certain dog foods, from a common supplier that the Defendants also used. On December 3, 2018, the FDA issued a public alert of potentially toxic levels of vitamin D in several dry pet foods, and a list of recalled products from other manufacturers.

30. It was not until January 31, 2019 that Hill's took steps to address the dangers in its Toxic Products, which had already resulted in injuries and deaths to pets around the country. Hill's first announced that it was recalling 25 different products and 54 different lot numbers of dog food in the United States, and 22 different products and 50 different lot numbers of dog food in Canada. On March 20, 2019, Hill's added 8 additional products and 31 additional lot numbers of dog food to both lists. On May 15, 2019, Hill's announced 1 additional lot number for one of the listed products was also being recalled.

31. To date, Hill's has had to recall 33 different Toxic Products in the United States, and 30 Toxic Products in Canada.

F. THE DEFENDANTS' NEGLIGENCE

32. The Defendants were in a special manufacturer-consumer or supplier-consumer relationship of proximity to the Plaintiffs and Class. The Defendants owed a duty of care to the Plaintiffs and the Class.

33. For a discoverable period of time before the first recall of its Toxic Products, the Defendants knew of, or ought to have known of, the risks of vitamin D toxicity in their dog food products. The Defendants knew of, or ought to have known of, research and scientific studies linking vitamin D toxicity to canned pet foods.

34. Knowledge and information concerning the potential contamination and risks associated with the Toxic Products were in the exclusive possession of the Defendants and their dealers and agents, including subcontractors and suppliers, and that information was not shared with the public or Class Members at any time.

35. The Defendants' standard of care was at all material times informed by industry standards, as evident in materials such as, but not limited to: the 2006 *Nutrient Requirements of Dogs and Cats*' safe upper vitamin limit recommendations; the 2007 Canine Nutrition Expert Subcommittee maximum vitamin D concentration recommendations, the 2014 AAFCO "Dog and Cat Food Nutrient Profiles" recommended maximums, "Good Manufacturing Practices (GMP) Guidelines" published by Health Canada, and reports by the FDA.

36. The standard of care expected in the circumstances required the Defendants to, among other things:

- (a) have in place appropriate standards of conduct, policies and procedures to adequately, properly and effectively manufacture, research, and test the Toxic Products;
- (b) take reasonable steps to follow its standards of conduct, policies and procedures to adequately, properly and effectively manufacture, research, and test the Toxic Products;
- (c) adequately, properly and effectively research and test the Toxic Products;
- (d) properly, adequately, and effectively supervise its employees, consultants, veterinarians, nutritionists and food scientists with respect to their work on the Toxic Products;
- (e) properly, adequately, and effectively warn the Plaintiffs, Class, distributors, veterinarians and general public of the potential risks associated with the Toxic Products;

- (f) ensure that the Plaintiffs, Class, distributors, veterinarians and the general public were kept fully and completely informed of all risks associated with the Toxic Products, including their toxic levels of vitamin D;
- (g) ensure that the Toxic Products were labelled, marketed, distributed and sold for their intended or reasonably foreseeable use;
- (h) ensure that the Toxic Products were labelled, marketed, distributed and sold with adequate warnings as to the potential toxicity of the Toxic Products;
- (i) provide clear and proper instructions to the Plaintiffs, Class, and veterinarians, including precautions to be taken, so as to avoid injury from the Toxic Products;
- (j) monitor, investigate, evaluate and follow-up on reports of toxicity in the Toxic Products and similar pet food products;
- (k) refrain from asserting false statements or omitting material facts regarding the safety and benefits of the Toxic Products; and
- (l) refrain from misstating research findings regarding the risks and benefits of the Toxic Products.

37. The risks of excessive levels of vitamin D in the Toxic Products were foreseeable. The harm that vitamin D could cause to dogs, and the Plaintiffs and Class as their owners, was also foreseeable.

38. At all material times, the reasonably prudent manufacturer and importer of dog food products knew, or ought to have known, that excessive vitamin D in a dog's commercial diet can cause vitamin D toxicity and other health issues, and that steps were required in order to prevent, mitigate, and address those risks.

39. The Defendants breached the standard of care required of them in, but not limited to, the following respects:

- (a) failing to have in place appropriate standards of conduct, policies and procedures to adequately, properly and effectively manufacture, research, and test the Toxic Products;
- (b) failing to take reasonable steps to follow its standards of conduct, policies and procedures to adequately, properly and effectively manufacture, research, and test the Toxic Products;

- (c) failing to adequately, properly and effectively research and test the Toxic Products;
- (d) failing to properly, adequately, and effectively supervise its employees, consultants, veterinarians, nutritionists and food scientists with respect to their work on the Toxic Products;
- (e) failing to properly, adequately, and effectively warn the Plaintiffs, Class, distributors, veterinarians and general public of the potential risks associated with the Toxic Products;
- (f) failing to ensure that the Plaintiffs, Class, distributors, veterinarians and the general public were kept fully and completely informed of all risks associated with the Toxic Products, including their toxic levels of vitamin D;
- (g) failing to ensure that the Toxic Products were labelled, marketed, distributed and sold for their intended or reasonably foreseeable use;
- (h) failing to ensure that the Toxic Products were labelled, marketed, distributed and sold with adequate warnings as to the potential toxicity of the Toxic Products;
- (i) failing to provide clear and proper instructions to the Plaintiffs, Class, and veterinarians, including precautions to be taken, so as to avoid injury from the Toxic Products;
- (j) failing to monitor, investigate, evaluate and follow-up on reports of toxicity in the Toxic Products and similar pet food products;
- (k) failing to refrain from asserting false statements or omitting material facts regarding the safety and benefits of the Toxic Products; and
- (l) failing to refrain from misstating research findings regarding the risks and benefits of the Toxic Products.

40. Not only did Hill's breach the standard of care in its the research, development, manufacturing, testing, distribution, sale and marketing of the Toxic Products, but it also delayed in issuing a recall and in including all contaminated food within the scope of that recall once it knew the products were likely contaminated: by at least December 3, 2018.

I. THE DEFENDANTS' NEGLIGENT MISREPRESENTATIONS

41. The Defendants were in a special manufacturer-consumer or supplier-consumer relationship of proximity to the Plaintiffs and Class. The Defendants owed the Plaintiffs and Class a duty of care with respect to their representations.

42. Hill's made multiple untrue, inaccurate and/or misleading representations that the Toxic Products were safe and healthy for dogs, nutritionally balanced, and scientifically tested to ensure quality.

43. The misrepresentations publicly made by the Defendants' include, but are not limited to, the following examples:

- (a) Hill's represented that, or omitted material facts regarding that, the Toxic Products were safe, healthy, or beneficial for dogs;
- (b) Hill's marketed all its pet foods as containing an adequate balance, "proper balance", "precise balance" or "precise blend" of nutrients for the needs of pets, with "none they don't need";³
- (c) Hill's claimed that it adequately and properly tested its products, employed veterinarians, nutritionists and food scientists, and that it was guided by "evidence-based research";⁴ and

³ See e.g.: Hill's, "Our Nutritional Philosophy" (accessed October 23, 2019), online: <<https://www.hillspet.ca/en-ca/about-us/nutritional-philosophy>>; Wayback Machine: Hill's, "Our Nutritional Philosophy" (accessed: January 3, 2019), online: <<https://web.archive.org/web/20190103144659/https://www.hillspet.ca/en-ca/about-us/nutritional-philosophy>>; Wayback Machine: Hill's, "Nutritional Philosophy" (accessed August 18, 2018), online: <<https://web.archive.org/web/20180818110814/https://www.hillspet.com/about-us/nutritional-philosophy>>; Wayback Machine: Hill's, "Nutritional Philosophy" (accessed December 5, 2017), online: <<https://web.archive.org/web/20171205201043/http://www.hillspet.ca/en-ca/about-us/nutritional-philosophy>>; Wayback Machine: Hill's, "Nutritional Philosophy" (accessed June 6, 2017), online: <<https://web.archive.org/web/20170606055616/http://www.hillspet.ca/en-ca/about-us/nutritional-philosophy>>; Wayback Machine: Hill's, "Nutritional Philosophy" (accessed January 10, 2017), online: <<https://web.archive.org/web/20170110162049/http://www.hillspet.ca:80/en-ca/about-us/nutritional-philosophy>>.

⁴ See e.g.: Hill's, "Our Nutritional Philosophy" (accessed October 23, 2019), online: <<https://www.hillspet.ca/en-ca/about-us/nutritional-philosophy>>; Wayback Machine: Hill's (accessed January 19, 2019) <<https://web.archive.org/web/20190119195145/https://www.hillspet.ca/en-ca>>; Wayback Machine: Hill's (accessed November 12, 2018), online: <<https://web.archive.org/web/20181112035333/https://www.hillspet.ca/en-ca>>; Wayback Machine: Hill's (accessed August 19, 2018), online: <<https://web.archive.org/web/20180819155608/https://www.hillspet.ca/en-ca>>; Wayback Machine: Hill's, "Quality and Safety" (accessed December 7, 2017), online: <<https://web.archive.org/web/20171207045745/http://www.hillspet.ca/en-ca/about-us/quality-and-safety>>;

- (d) Hill's claimed it used safe and tested ingredients, "from the most trusted sources" and from suppliers who "meet stringent quality standards".⁵

44. Contrary to Hill's representations, the Toxic Products were not as they were represented, in *inter alia*, the following ways:

- (a) the Toxic Products were not safe, healthy, or beneficial for the pets of the Plaintiffs and Class;
- (b) the Toxic Products did not contain an adequate, proper or precise balance of nutrients within them – they in fact had excessively dangerous amounts of the nutrient vitamin D;
- (c) the Toxic Products were not adequately and properly tested or researched to discover their risks; and
- (d) the Toxic Products were contaminated with excessive or improper ingredients.

45. At all material times, the Defendants knew, or ought to have known, that the above representations in regards to the benefits, health and safety of its Toxic Products were false, or were reckless as to whether these representations were true or false. Furthermore, the Defendants guaranteed their untrue, inaccurate and misleading statements by making "100% guarantees" that they were true.

46. Hill's was negligent in making these representations while omitting adequate qualifications or warnings to the Plaintiffs and Class. At all material times, the Defendants knew of, or ought to have known of, the risks of vitamin D toxicity in their dog food products, and the dangerous effects of vitamin D toxicity in dogs. The risks of excessive levels of vitamin D in the Toxic Products were foreseeable. The harm that

Wayback Machine: Hill's, "Quality and Safety" (accessed June 6, 2017), online: <<https://web.archive.org/web/20170606012103/http://www.hillspet.ca/en/ca/about-us/quality-and-safety>>.

⁵ See e.g.: Hill's, "Quality Statement" (accessed October 23, 2019), online: <<https://www.hillspet.ca/en-ca/prescription-diet/dog-food>>; Wayback Machine: Hill's, "Quality and Safety" (accessed January 30, 2019), online: <<https://web.archive.org/web/20190130072526/https://www.hillspet.ca/en-ca/about-us/quality-and-safety>>; Wayback Machine: Hill's, "Quality and Safety" (accessed August 18, 2018), online: <<https://web.archive.org/web/20180818111831/https://www.hillspet.com/about-us/quality-and-safety>>; Wayback Machine: Hill's, "Quality and Safety" (accessed December 7, 2017), online: <<https://web.archive.org/web/20171207045745/http://www.hillspet.ca/en/ca/about-us/quality-and-safety>>; Wayback Machine: Hill's, "Quality and Safety" (accessed June 6, 2017), online: <<https://web.archive.org/web/20170606012103/http://www.hillspet.ca/en/ca/about-us/quality-and-safety>>.

vitamin D could cause to dogs and the Plaintiffs and Class as their owners was also foreseeable. At all material times, the reasonably prudent manufacturer and importer of dog food products knew, or ought to have known, that excessive vitamin D in a dog's commercial diet can cause vitamin D toxicity and other health issues and that consumers ought to be warned of and protected from these risks.

47. The Defendants' standard of care with respect to representations relating to the Toxic Products was informed by statutes and standards developed by governmental and non-governmental organizations, such as, but not limited to: the *Consumer Packaging and Labelling Act*, R.S.C. 1985, c. C-38, and the 2001 *Guide for the Labelling and Advertising of Pet Foods*.

48. The standard of care expected in the circumstances required the Defendants to, among other things:

- (a) have in place appropriate standards of conduct, policies and procedures to adequately, properly and effectively market and represent the Toxic Products;
- (b) take reasonable steps to follow its standards of conduct, policies and procedures to adequately, properly and effectively market and represent the Toxic Products;
- (c) properly, adequately, and effectively supervise its employees, consultants, veterinarians, nutritionists and food scientists with respect to their representations in relating to the Toxic Products;
- (d) properly, adequately, and effectively warn the Plaintiffs, Class, distributors, veterinarians and general public of the potential risks associated with the Toxic Products;
- (e) ensure that the Plaintiffs, Class, distributors, veterinarians and the general public were kept fully and completely informed of all risks associated with the Toxic Products, including their toxic levels of vitamin D;
- (f) ensure that the Toxic Products were labelled, marketed, distributed and sold for their intended or reasonably foreseeable use;
- (g) ensure that the Toxic Products were labelled, marketed, distributed and sold with adequate warnings as to the potential toxicity of the Toxic Products;

- (h) provide clear and proper instructions to the Plaintiffs, Class, and veterinarians, including precautions to be taken, so as to avoid injury from the Toxic Products;
- (i) refrain from asserting false statements or omitting material facts regarding the safety and benefits of the Toxic Products; and
- (j) refrain from misstating research findings regarding the risks and benefits of the Toxic Products.

49. The Defendants breached their standard of care in making representations that amounted to, *inter alia*, the following:

- (a) failing have in place appropriate standards of conduct, policies and procedures to adequately, properly and effectively market and represent the Toxic Products;
- (b) failing to take reasonable steps to follow its standards of conduct, policies and procedures to properly, adequately, and effectively supervise its employees, consultants, veterinarians, nutritionists and food scientists with respect to their representations in relating to the Toxic Products;
- (c) failing to properly, adequately, and effectively warn the Plaintiffs, Class, distributors, veterinarians and general public of the potential risks associated with the Toxic Products;
- (d) failing to ensure that the Plaintiffs, Class, distributors, veterinarians and the general public were kept fully and completely informed of all risks associated with the Toxic Products, including their toxic levels of vitamin D;
- (e) failing to ensure that the Toxic Products were labelled, marketed, distributed and sold for their intended or reasonably foreseeable use;
- (f) failing ensure that the Toxic Products were labelled, marketed, distributed and sold with adequate warnings as to the potential toxicity of the Toxic Products;
- (g) failing provide clear and proper instructions to the Plaintiffs, Class, and veterinarians, including precautions to be taken, so as to avoid injury from the Toxic Products;
- (h) failing to refrain from asserting false statements or omitting material facts regarding the safety and benefits of the Toxic Products; and
- (i) failing to refrain from misstating research findings regarding the risks and benefits of the Toxic Products.

50. The Plaintiffs and Class reasonably relied on the Defendants' misrepresentations and guarantees, and suffered as a result of them.

51. As their pets suffered injuries, hospitalization, and sometimes death, and the Plaintiffs and Class suffered both financially and emotionally.

I. THE DEFENDANTS' BREACH OF CONTRACT

52. At all relevant times, Hill's was in the business of manufacturing, testing, marketing, distributing and selling pet food. All the Toxic Products were pet food. By buying the Toxic Products, the Plaintiffs and Class implied to Hill's that they were purchasing them for the particular purpose of consumption by their pets.

53. In purchasing the Toxic Products from Hill's, the Plaintiffs and Class entered into a contract of sale with the Defendants.

54. The Defendants provided the Plaintiffs and Class with an express condition that the Toxic Products would be fit for consumption by specific types of dogs.

55. There was also a statutorily implied condition in the contract of sale that the goods are reasonably fit for consumption by pets, pursuant to s. 15 of the *Sale of Goods Act*, R.S.O. 1990, c. S.1, and similar legislation in other provinces.

56. By distributing products that caused vitamin D toxicity, and were therefore not fit for consumption by dogs, the Defendants breached this condition and breached the contract of sale with the Plaintiffs and Class.

J. THE DEFENDANTS' WARRANTY

57. In purchasing the Toxic Products from Hill's, the Plaintiffs and Class entered into a contract of sale with the Defendants.

58. The Defendants provided the Plaintiffs and Class with express and implied warranties and representations, such as those outlined above, that the Toxic Products would be fit for consumption by specific types of dogs.

59. By distributing products that caused vitamin D toxicity, and were therefore not fit for consumption by dogs, the Defendants breached these warranties.

J. THE DEFENDANTS' STATUTORY BREACHES

60. The Defendants owe statutory duties to the Plaintiffs and Class under the *Competition Act*, R.S.C. 1985, c. C-34 and *Consumer Protection Act, 2002*, c. 30, Sched. A.

61. The Defendants engaged in an unfair practice, contrary to s. 14 of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A, in representing that the Toxic Products were safe, healthy, and/or beneficial for dogs, when they were actually contaminated and deadly.

62. The Defendants also committed an unlawful act in breach of s. 52 of the *Competition Act*, R.S.C. 1985, c. C-34 in representing that the Toxic Products were safe, healthy, and/or beneficial for dogs when they were actually contaminated and deadly.

63. The Plaintiffs and Class suffered damages as a result of the Defendants' unlawful statutory breaches of and seek those damages, as well as their costs of investigation, pursuant to s. 36 of the *Competition Act*, as well as rescission of their contracts for sale of the Toxic Products, and damages, pursuant to s. 18 of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A.

IV. UNJUST ENRICHMENT AND WAIVER OF TORT

64. Further, and in the alternative, the Plaintiffs waives any tort pleaded above, and pleads that they and the Class are entitled to claim and recover based on equitable and restitutionary principles.

65. As an expected and intended result of their unlawful conduct, the Defendants have profited and benefited from sales of the Toxic Products, which would not have been made but for the unlawful conduct.

66. The Plaintiffs and Class would not have purchased the Toxic Products had they known of the excessive levels of vitamin D within them.

67. By illegally and deceptively manufacturing, marketing, distributing, and selling the Toxic Products directly, through their control of third parties, and by acting in concert with third parties, the Defendants have been unjustly enriched by the receipt of the revenue from the sale of the Toxic Products.

68. The Defendants must disgorge their unjustly acquired profits and other monetary benefits resulting from their unlawful conduct and provide restitution to the Plaintiffs and the Class.

I. REMEDIES SOUGHT

i. Damages

69. As a result of the Defendants' common law tortious conduct and statutory breaches, the Plaintiffs and Class have suffered and will continue to suffer damages including, but not limited to,

- (a) cost of product purchase and replacement;
- (b) pet treatment expenses,
- (c) veterinary and medical expenses,
- (d) damages for emotional distress and mental anguish, and
- (e) damages for pain and suffering.

70. The Plaintiffs and Class have suffered injuries which are permanent and lasting in nature, including emotional distress and diminished enjoyment of life.

ii. Punitive Damages

71. The Plaintiffs claims punitive damages in the sum of \$1,000,000.00 as a result of the egregious, outrageous and unlawful conduct of the Defendants in disregarding the health of consumers' pets, and consumers' well-being.

72. In particular, the Defendants' conduct in continuing to manufacture, distribute, sell and market the Toxic Products after obtaining knowledge of their toxicity some time prior to December 4, 2018 shows complete indifference to or a conscious disregard for

the safety of Class members' pets and the well-being of Class members', justifying an award of additional damages in a sum which will serve to deter the Defendants from similar conduct in the future.

K. STATUTES RELIED UPON

73. The Plaintiffs rely upon the following statutes:

- a) *Class Proceedings Act, 1992*, S.O. 1992, c. 6;
- b) *Courts of Justice Act*, R.S.O. 1990, c. C.43;
- c) *Negligence Act*, R.S.O. 1990, c. N.1;
- d) *Competition Act*, R.S.C. 1985, c. C-34;
- e) *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A;
- f) *Consumer Protection Act*, R.S.A. 2000, c. C-26.3;
- g) *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2;
- h) *The Consumer Protection Act*, C.C.S.M., c. C200;
- i) *Consumer Product Warranty and Liability Act*, S.N.B. 1978, c. C-18.1;
- j) *Consumer Protection and Business Practices Act*, S.N.L. 2009, c. C-31.1;
- k) *Consumer Protection Act*, R.S.N.W.T. 1988, c. C-17;
- l) *Consumer Protection Act*, R.S.N.S. 1989, c. 92;
- m) *Consumer Protection Act*, R.S.N.W.T. (Nu) 1988, c. C-17;
- n) *Consumer Protection Act*, C.Q.L.R., c. P-40.1;
- o) *The Consumer Protection and Business Practices Act*, S.S. 2013, c. C-30.2;
- p) *Consumer Protection Act*, R.S.Y. 2002, c. 40;
- q) *Sale of Goods Act*, R.S.O. 1990, c. S.1; and
- r) *Consumer Packaging and Labelling Act*, R.S.C. 1985, c. C-38.

74. The Plaintiffs and Class request that this action be tried in Toronto, ON.

October 24, 2019

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Court File No.: CV-19-0062978600CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

AMENDED STATEMENT OF CLAIM

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