

THE HONORABLE RICHARD A. JONES

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

BRADLEY SHAW, THOMAS MCCARTHY,  
MICHELLE M. CHEVALIER-FLICK, MARK SPIVEY,  
on behalf of themselves and all others similarly  
situated,

Plaintiffs,

vs.

SCHELL & KAMPETER, INC. d/b/a/ DIAMOND PET  
FOODS,

Defendant.

Case No. 2:20-cv-01620-RAJ

**FIRST AMENDED CLASS ACTION  
COMPLAINT**

DEMAND FOR JURY TRIAL

Plaintiffs Bradley Shaw, Thomas McCarthy, Michelle M. Chevalier-Flick, and Mark Spivey, (“Plaintiffs”), acting on behalf of themselves and all others similarly situated (“Class Members”), bring this action for damages and equitable relief against Schell & Kampeter, Inc. d/b/a Diamond Pet Foods (“Defendant”).

**I. NATURE OF THE CASE**

1. Pet owners take the health and well-being of their dogs seriously. Accordingly, when purchasing dog foods, an important consideration for many consumers, including Plaintiffs and Class Members, is the quality of the food that their dogs eat.

1           2.       As a result, these same consumers are willing to pay more for a premium dog  
2 food that excludes certain ingredients, which are cheaper ingredients that are often used as  
3 fillers. These undesired cheap ingredients are suspected to cause allergic reactions or lead to  
4 other health problems in dogs.

5           3.       For example, dogs can—and often do—have allergic reactions to certain foods,  
6 including those that contain grain.

7           4.       Although not every dog has an allergic reaction to these ingredients, consumers,  
8 such as Plaintiffs and Class Members, choose to pay premium prices for quality foods to reduce  
9 their veterinary bills down the line.

10          5.       Accordingly, Plaintiffs and consumers willingly pay a premium for limited  
11 ingredient pet foods such as Defendant's:

12           a.       Kirkland Nature's Domain "Turkey Meal & Sweet Potato Formula for  
13 Dogs";

14           b.       Kirkland Nature's Doman "Salmon Meal & Sweet Potato Formula for  
15 Dogs";

16           c.       Kirkland Nature's Domain Puppy "Chicken and Pea Formula"; and

17           d.       Taste of the Wild High Prairie Canine Recipe with Roasted Bison &  
18 Roasted Venison Dry Dog Food (collectively "Grain Free Products" or "Products")

19          6.       The Grain Free Products are sold in third-party retailers such as Petco, Amazon,  
20 and Costco.

21          7.       Defendant's Products purport to be "grain free" and formulated using specific,  
22 limited ingredients. In reality, however, they contain grain, wheat, and other unlisted  
23 ingredients.

24          8.       Defendant's omissions are material to consumers.

25          9.       Consumers, including Plaintiffs, specifically purchase such Grain Free Products  
26 because Defendant represents that its Products actually include only limited ingredients, are  
27 specifically formulated for the health needs of dogs, that the Grain Free Products meet

1 Defendant's own ingredient promises and warranties, and that the Grain Free Products adhere  
2 to Defendant's quality and manufacturing standards.

3 10. If Defendant disclosed the material facts concerning these products, including  
4 that the supposed "grain free" products contained wheat, grain, and other foods, consumers  
5 like Plaintiffs would not have purchased Defendant's pet foods or not have paid as much money  
6 for the Products.

7 **II. PARTIES**

8 11. Plaintiff Bradley Shaw is a citizen of Washington residing in Vancouver, Clark  
9 County.

10 12. Plaintiff Thomas McCarthy is a citizen of New York residing in Brewster, Putnam  
11 County.

12 13. Plaintiff Michelle M. Chevalier-Flick is a citizen of Ohio residing in Clermont  
13 County.

14 14. Plaintiff Mark Spivey is a citizen of California residing in Mission Viejo, Orange  
15 County.

16 15. Defendant Schell & Kampeter, Inc. d/b/a Diamond Pet Foods is a for-profit  
17 corporation, organized and existing under the laws of the State of Missouri. Defendant has a  
18 principal office in Meta, Missouri. Defendant designs, manufactures, and markets the Grain  
19 Free Products .

20 **III. JURISDICTION AND VENUE**

21 16. This Court has jurisdiction over this action under the Class Action Fairness Act  
22 ("CAFA"), 28 U.S.C. § 1332(d). There are at least 100 members in the proposed class, the  
23 aggregated claims of the individual class members exceed the sum or value of \$5,000,000.00  
24 exclusive of interest and costs, and some of the members of the proposed class are citizens of  
25 states different from the Defendant.

1 17. The Court may exercise subject matter jurisdiction over Diamond because it has  
2 sufficient minimum contacts with Washington to be subject to the Court’s personal jurisdiction.  
3 Diamond is registered to conduct business in Washington and intentionally avails itself of the  
4 markets within Washington through the promotion, sale, marketing, and distribution of the  
5 Grain Free Products and numerous other products.

6 18. Venue is proper in this District under 28 U.S.C. § 1391(b) because Plaintiff Shaw  
7 purchased the Grain Free Products in this District. Defendant transacts business in this District,  
8 and Plaintiff Shaw resides in this District.

#### 9 IV. FACTUAL ALLEGATIONS

##### 10 A. Plaintiff Bradley Shaw.

11 19. Plaintiff Shaw purchased the Grain Free Products quarterly in 2019 for his puppy.  
12 Specifically, Plaintiff Shaw purchased the Kirkland Nature’s Domain Puppy Chicken and Pea  
13 Formula.

14 20. Plaintiff Shaw most often purchased the Grain Free Products from Costco  
15 locations in Vancouver, Washington. Specifically, Plaintiff Shaw purchased the Grain Free  
16 Products at the E. Vancouver Costco Warehouse located at 6720 NE 84th Street, Vancouver,  
17 WA 98665.

18 21. Plaintiff Shaw reviewed the packaging of the Grain Free Products, including the  
19 claim that the food was “grain free,” when deciding which food to purchase.

20 22. Although the Grain Free Products were more expensive than other choices  
21 Plaintiff Shaw viewed, he chose to pay the premium price based upon the “limited ingredient”  
22 promises made by Defendant.

23 23. If Defendant had disclosed that these foods contain unlisted ingredients  
24 including wheat, Plaintiff Shaw would not have paid a premium price for the pet food.

25 24. Defendant’s factual representations about the ingredients in the Grain Free  
26 Products dog food were material to Plaintiff Shaw’s purchasing decision, including those  
27

1 representations on the product label. The representations all indicate that the Grain Free  
2 Products are “grain free.” The labels did not disclose the material facts that this dog food  
3 contains wheat.

4 25. Plaintiff Shaw quit purchasing the Grain Free Products after his puppy tragically  
5 passed away in late 2019.

6 26. Plaintiff Shaw did not receive the benefit of his bargain when he purchased the  
7 Grain Free Products because the products failed to disclose that they included ingredients that  
8 did not conform to the packaging representations and to the warranties made by Defendant.  
9 Had this information not been omitted, he would have either not purchased the Grain Free  
10 Products or would have paid less for them.

11 27. If Defendant would conform the Grain Free Products to the claims and promises  
12 made about ingredients on their packaging, Plaintiff Shaw would be willing and likely to  
13 purchase the Grain Free Products in the future if he were to get another dog.

14 **B. Plaintiff Thomas McCarthy.**

15 28. Plaintiff McCarthy purchased the Grain Free Products in 2018 and 2019 to feed  
16 to his dog. Specifically, Plaintiff McCarthy purchased the Kirkland Nature’s Domain Chicken and  
17 Pea Formula for Dogs.

18 29. Plaintiff McCarthy most often purchased the Grain Free Products from a local  
19 Costco Wholesale in Patterson, New York. Plaintiff McCarthy always purchased a 20-pound bag  
20 and purchased a bag once per month.

21 30. Plaintiff McCarthy reviewed the packaging of the Grain Free Products, including  
22 the claim that the food was “grain free,” when deciding which food to purchase.

23 31. Although the Grain Free Products were more expensive than other choices he  
24 viewed, he chose to pay the premium price based upon the “limited ingredient” promises made  
25 by Defendant.

1           32.     If Defendant had disclosed that these foods contain unlisted ingredients  
2 including wheat, Plaintiff McCarthy would not have paid a premium price for the pet food.

3           33.     Defendant’s factual representations about the ingredients in the Grain Free  
4 Products dog food were material to Plaintiff McCarthy’s purchasing decision, including those  
5 representations on the product label. The representations all indicate that the Grain Free  
6 Products are Products and are “grain free.” The labels did not disclose the material facts that  
7 this dog food contains wheat.

8           34.     When Plaintiff McCarthy learned that Defendant mislabeled their products, he  
9 stopped purchasing the Grain Free Products.

10          35.     Plaintiff McCarthy did not receive the benefit of his bargain when he purchased  
11 the Grain Free Products because the products failed to disclose that they included ingredients  
12 that did not conform to the packaging representations and warranties made by Defendant. Had  
13 this information not been omitted, he would have either not purchased the Grain Free Products  
14 or would have paid less for it.

15 **C.     Plaintiff Michelle M. Chevalier-Flick**

16          36.     Plaintiff Chevalier-Flick loves her dogs. This means caring for them, spending  
17 time with them, and taking them to the vet for regular checkups, and irregular checkups. In  
18 2011, Plaintiff noticed a skin issue with Duke. They took him to the veterinarian, who  
19 prescribed over-the-counter antihistamines, and also suggested that Plaintiff switch Duke to a  
20 grain-free diet.

21          37.     Plaintiff was a member of Costco, whose brand name Kirkland has a very positive  
22 reputation. As a result, she decided to switch Duke to a grain-free diet, and to buy the dog food  
23 at Costco.

24          38.     Plaintiff reviewed the product packaging on the Natures Domain Salmon Meal  
25 and Sweet Potato Formula dog food sold by Costco as a private label. She noted that the  
26 product packaging states clearly as one of the top reasons to buy that it is grain-free.  
27

1 39. The grain-free food from Costco was more expensive on a price-per-pound than  
2 other options that were not grain-free. Nevertheless, Plaintiffs were willing to pay a premium  
3 based on the promise that the food was grain-free.

4 40. If Defendant had disclosed that the food was not grain-free, Plaintiff would not  
5 have purchased the product, or would not have been willing to pay a premium for the food.

6 41. The presence or absence of grain in the food, as promised on the packaging and  
7 labeling, was material to Plaintiff. The packaging and labeling asserts that the product is grain-  
8 free. The packaging and labeling did not disclose that the food contained wheat.

9 42. Despite the antihistamines, Duke's skin allergies have persisted resulting in hot  
10 spots. In August 2020, Plaintiff had to take Duke to the vet where he was prescribed an even  
11 stronger-dose antihistamine which he must now take daily for the rest of his life. Plaintiff  
12 reasonably believes Dukes allergic reactions have worsened over time due to his consumption  
13 of Nature's Domain pet food.

14 43. Plaintiff did not receive the benefit of their bargain when she purchased the  
15 Nature's Domain Salmon Meal and Sweet Potato Formula products because the products did  
16 not conform to the packaging representations and to the promises, affirmations, and  
17 warranties made by Costco. Had the packaging representations conformed to the reality of  
18 what was in the product, Plaintiff would have either not purchased or would not have paid a  
19 premium for the product.

20 **D. Plaintiff Mark Spivey.**

21 44. Plaintiff Mark Spivey is a resident and citizen of California who purchased Taste  
22 of the Wild High Prairie Canine Recipe with Roasted Bison & Roasted Venison Dry Dog Food on  
23 a monthly basis starting in 2014, and fed it to his dog Bodie.

24 45. Plaintiff Spivey provided record of purchasing a 30 lb. bag of Taste of the Wild  
25 High Prairie Canine Recipe with Roasted Bison & Roasted Venison Dry Dog Food from  
26 Chewy.com on March 9, 2019 for \$52.49. Plaintiff Spivey provided record of purchasing a 28 lb.  
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1 bag of Taste of the Wild High Prairie Canine Recipe with Roasted Bison & Roasted Venison Dry  
2 Dog Food from Chewy.com on April 4, 2019, and March 20, 2019, for \$48.99.

3 46. Prior to purchasing Taste of the Wild Dog Food, Plaintiff read Defendant’s  
4 representation that the product was “Grain Free” on the product’s packaging and website and  
5 specifically relied on this representation in deciding to purchase the Products.

6 47. Plaintiff Spivey's dog Bodie has allergies that the vet could not precisely  
7 diagnose. In order to figure out what Bodie was allergic to Plaintiff Spivey tried to eliminate  
8 grains from Bodie’s diet. Plaintiff researched the benefits of a grain-free diet and found that  
9 eliminating grains could help with allergy symptoms. Plaintiff Spivey stopped purchasing Taste  
10 of the Wild Dog Food in May, 2019 because Bodie's allergy symptoms did not improve.

11 48. Plaintiff Spivey did not receive the benefit of his bargain when he purchased the  
12 Grain Free Products because the products failed to disclose that they included ingredients that  
13 did not conform to the packaging representations and warranties made by Defendant. Had this  
14 information not been omitted, he would have either not purchased the Grain Free Products or  
15 would have paid less for it.

16 **E. Defendant’s Omissions and Material Misrepresentations.**

17 49. Pet foods vary in their quality of ingredients, formula, manufacturing processes,  
18 and inspection quality. Pet owners who purchase “grain free” and “limited ingredient” products  
19 pay a premium in order to alleviate their pets’ allergies or to provide various health benefits  
20 associated with a grain free or limited ingredient diet. Notably, food allergies are more common  
21 among certain dog breeds than others.

22 50. In addition, pet owners including the Plaintiffs and Class, are willing to pay a  
23 premium for dog food with premium ingredients and expect the products that are advertised in  
24 this manner to conform to the ingredients listed on the packaging.

25 51. If these products disclosed the truth—that they can contain grain (including  
26 wheat) or other ingredients that are different from or beyond those that are listed or  
27



1 represented—then these pet owners would no longer pay such a premium

2 52. Accordingly, Defendant’s omissions and misrepresentations regarding the  
3 ingredients in the Grain Free Products are material to consumers who purchase this product,  
4 passing over products that cost less but do not claim to be made from select, premium  
5 ingredients.

6 53. Defendant understands the importance of not having ingredients that cause  
7 allergic reactions or adverse reactions and of limiting the overall number of ingredients.  
8 Defendant unequivocally states on its website “Grain-free: This formula provides your special  
9 pet with optimal nutrition for overall good health.”<sup>1</sup>

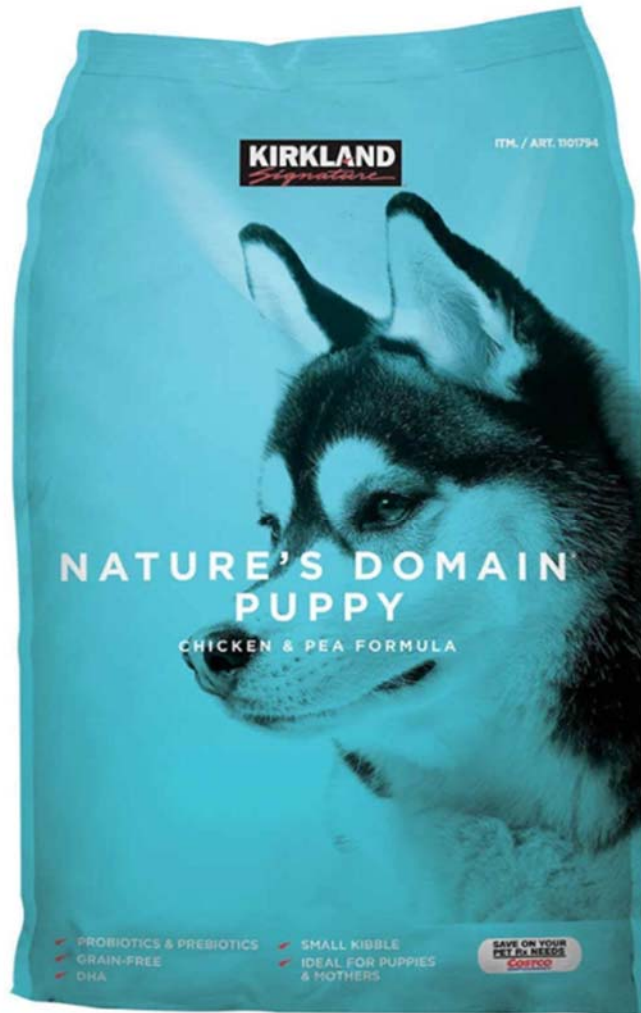
10 54. The front and back of the Grain Free Products dog food bags include numerous  
11 representations of the Defendant that are materially misleading and fail to disclose material  
12 information about the food products included within. Images of the front and back of the bags  
13 are reproduced below:

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27 <sup>1</sup><https://www.costco.com/kirkland-signature-nature%27s-domain-turkey-meal-and-sweet-potato-dog-food-35-lb..product.100343435.html> (last visited September, 15, 2020).

1 Kirkland Nature's Domain Puppy Chicken & Pea Formula<sup>2</sup>

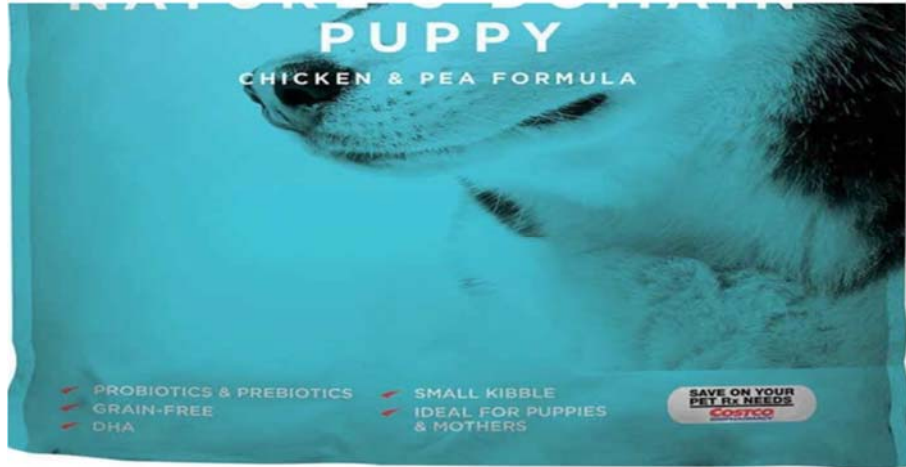
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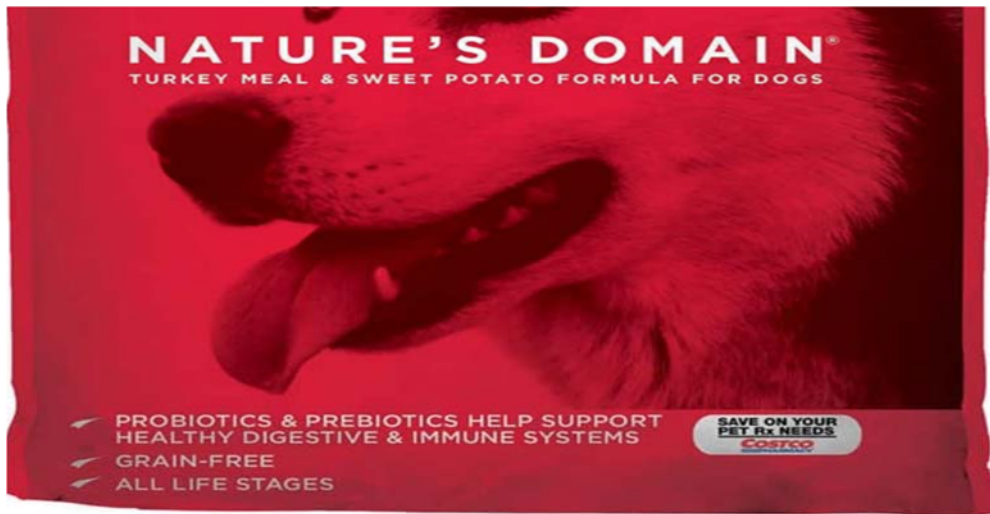
24 <sup>2</sup><https://www.amazon.com/Kirkland-Signature-Natures-Formula-Chicken/dp/B07PS9LWG8> (last visited September 15, 2020).

25 <sup>3</sup>[https://www.ebay.com/itm/193642527519?chn=ps&norover=1&mkevt=1&mkrid=711-117182-372900&mkcid=2&itemid=193642527519&targetid=935083617787&device=c&mktype=&googleloc=9061285&poi=&campaignid=10877432047&mkgroupid=112821775411&rlsarget=pla-935083617787&abclid=9300402&merchantid=6296724&gclid=CjwKCAjwzIH7BRABEiwAoDxxTn1cxzA2lvsyRMvIS69I3D90NydTtLlKaSbWmN1U9hTklgaW9yuO1xoCenEQAvD\\_BwE](https://www.ebay.com/itm/193642527519?chn=ps&norover=1&mkevt=1&mkrid=711-117182-372900&mkcid=2&itemid=193642527519&targetid=935083617787&device=c&mktype=&googleloc=9061285&poi=&campaignid=10877432047&mkgroupid=112821775411&rlsarget=pla-935083617787&abclid=9300402&merchantid=6296724&gclid=CjwKCAjwzIH7BRABEiwAoDxxTn1cxzA2lvsyRMvIS69I3D90NydTtLlKaSbWmN1U9hTklgaW9yuO1xoCenEQAvD_BwE).

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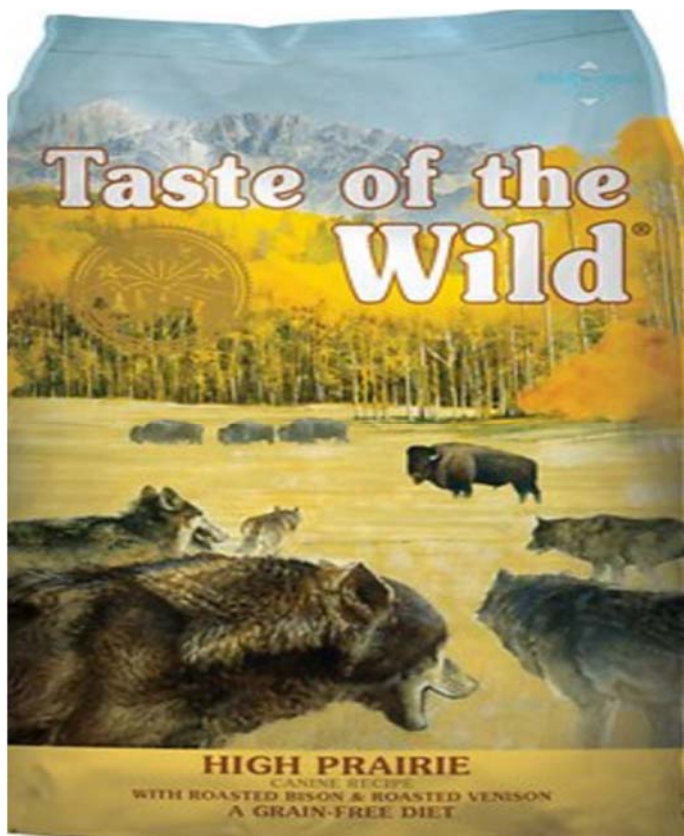


Kirkland Nature's Domain Turkey Meal & Sweet Potato Formula for Dogs<sup>4</sup>



<sup>4</sup><https://www.amazon.com/Kirklands-Signature-NatureS-Domain-Turkey/dp/B00SWJD5QC> (last visited September 15, 2020).

1 Taste of the Wild High Prairie Canine Recipe with Roasted Bison & Roasted Venison Dry  
2 Dog Food<sup>5</sup>



16 55. The representations that the Grain Free Products are “Grain Free” or “Grain Free  
17 Recipe” is (was) on the front of every bag. Further, the ingredients are listed on the back of the  
18 bag.

19 56. Wheat is (was) not listed as an ingredient on the Grain Free Products’ ingredient  
20 list on the back of the bag or anywhere else on the products’ bags.

21 57. All of the Defendant’ representations regarding the ingredients in the Grain Free  
22 Products, and the safety of the Grain Free Products for dogs that may be sensitive or allergic to  
23 grains, are false.

24 58. In fact, the Grain Free Products contain significant amounts grain. Plaintiffs’  
25 independent analysis of the ingredients of the Grain Free Products found that the Grain Free  
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27 <sup>5</sup> See *Taste of the Wild High Prairie Grain-Free Dry Dog Food*, CHEWY,  
<https://www.chewy.com/taste-wild-high-prairie-grain-free/dp/181320> (last visited Feb. 6, 2020).

1 Products contain material amounts of grain using the industry standard Q-PCR method of DNA  
2 testing. By any scientific standard, the grain found within the Grain Free Products is greater  
3 than trace. The inclusion of grain in a product labeled as “grain free” is material to Plaintiffs, the  
4 Class, and to reasonable consumers.

5 **F. Defendant’s Omissions and Misrepresentations are Material to Reasonable**  
6 **Consumers.**

7 59. Although pet foods vary in the quality of ingredients, formula, manufacturing  
8 processes, and inspection quality, dog owners often choose to purchase products that have  
9 limited ingredients—such as grain free —because certain dog breeds have allergies associated  
10 with dog foods that contain these ingredients or because the owners understand that certain  
11 ingredients help—or hamper—their pets’ health, weight, and overall well-being.

12 60. When pet owners buy limited ingredient dog food, they usually do so to prevent  
13 a health issue or address a nutritional deficiency that their dog may be experiencing. And  
14 consumers generally must pay a premium price for these specialized pet food formulations.

15 61. Accordingly, Plaintiffs and Class Members purchased the Grain Free Products  
16 spending additional money for the premium food and the Products’ corresponding promises  
17 rather than cheaper alternatives that do not eliminate grain.

18 62. Defendant’ misrepresentations and omissions about the formulation of the Grain  
19 Free Products drive consumers’ purchases.

20 **V. CLASS ACTION ALLEGATIONS**

21 **A. Class Definitions.**

22 63. Plaintiffs bring this action on behalf of themselves and the members of the  
23 following Nationwide Class (the Class):

24 All persons residing in the United States and its territories who,  
25 from November 3, 2016 to the present, purchased the Grain Free  
26 Products primarily for personal, family, or household purposes, and  
27 not for resale.

1           64.     In addition, or alternatively, Plaintiff Bradley Shaw brings this action on behalf of  
2 himself and the members of the following subclass (“Washington Subclass”):

3                     All persons residing in Washington who, from November 3, 2016 to  
4 the present, purchased the Grain Free Products primarily for  
personal, family, or household purposes, and not for resale.

5           65.     In addition, or alternatively, Plaintiff Thomas McCarthy brings this action on  
6 behalf of himself and the members of the following subclass (“New York Subclass”):

7                     All persons residing in New York who, from November 3, 2016 to  
8 the present, purchased the Grain Free Products primarily for  
personal, family, or household purposes, and not for resale.

9           66.     Alternatively, Plaintiff Mark Spivey brings this action on behalf of himself and the  
10 members of the following subclass (“California Subclass”):

11                    All persons residing in California who, from November 3, 2016 to  
12 the present, purchased the Grain Free Products primarily for  
13 personal, family, or household purposes, and not for resale.

14           67.     Alternatively, Plaintiff Michelle M. Chevalier-Flick brings this action on behalf of  
15 herself and the members of the following subclass (“Ohio Subclass”):

16                    All persons residing in Ohio who, from November 3, 2016 to the  
17 present, purchased the Grain Free Products primarily for  
personal, family, or household purposes, and not for resale.

18           68.     Specifically excluded from this definition are: (1) Defendant and any entity in  
19 which any Defendant has a controlling interest, and its legal representatives, officers, directors,  
20 employees, assigns and successors; (2) the Judge to whom this case is assigned and any  
21 member of the Judge’s staff or immediate family; and (3) Class Counsel.

22           69.     Plaintiffs reserve the right to amend the Class definition and Subclass definitions  
23 as necessary.

24           70.     As used herein, “Class Members” shall mean and refer to the members of the  
25 Nationwide Class and any of the Subclasses, including Plaintiffs.

1           71. Plaintiffs seek only damages and equitable relief on behalf of themselves and the  
2 Class Members. Plaintiffs disclaim any intent or right to seek any recovery in this action for  
3 personal injuries, wrongful death, or emotional distress suffered by Plaintiffs and/or the Class  
4 Members.

5           72. Numerosity: Although the exact number of Class Members is uncertain and can  
6 only be ascertained through appropriate discovery, the number is great enough such that  
7 joinder is impracticable. The disposition of the claims of these Class Members in a single action  
8 will provide substantial benefits to all parties and to the Court.

9           73. Typicality: The claims of the representative Plaintiffs are typical in that Plaintiffs,  
10 like all Class Members, purchased the Grain Free Products that were manufactured and  
11 distributed by Defendant. Plaintiffs, like all Class Members, have been damaged by Defendant'  
12 misconduct in that, *inter alia*, they have incurred or will continue to incur damage due to  
13 purchasing a product at a premium price that contained ingredients (grain) that Defendant  
14 omitted from the Grain Free Products. Furthermore, the factual bases of Defendant's  
15 misconduct are common to all Class Members and represent a common thread of fraudulent,  
16 deliberate, and negligent misconduct resulting in injury to all Class Members.

17           74. Commonality: There are numerous questions of law and fact common to  
18 Plaintiffs and Class Members that predominate over any individual questions. These common  
19 legal and factual issues include the following:

- 20           a. Whether the Grain Free Products contain grain;
- 21           b. Whether Defendant failed to disclose that their products are not grain  
22 free;
- 23           c. Whether Defendant's omissions are material to a reasonable consumer;
- 24           d. Whether Defendant expressly warranted that the Grain Free Products  
25 would conform to the representations made on their packaging that the  
26 Grain Free Products are grain free;
- 27           e. Whether Defendant impliedly warranted that the Grain Free Products  
would conform to the representations that they are limited ingredient  
products that would pass without objection in the trade under this



1 description and are fit for the ordinary purposes for which such goods are  
2 sold;

3 f. Whether Defendant breached their warranties by making the  
4 representations above;

5 g. Whether Defendant were unjustly enriched by making the  
6 representations and omissions above;

7 h. Whether Defendant' actions as described above violated state consumer  
8 protection laws as alleged herein;

9 i. Whether Defendant should be required to make restitution, disgorge  
10 profits, reimburse losses, pay damages, and pay treble damages as a  
11 result of the above-described practices.

12 75. Adequate Representation: Plaintiffs will fairly and adequately protect the  
13 interests of Class Members. Plaintiffs have retained attorneys experienced in the prosecution of  
14 class actions, including consumer and product defect class actions, and Plaintiffs intend to  
15 prosecute this action vigorously.

16 76. Predominance and Superiority: Plaintiffs and Class Members have all suffered  
17 and will continue to suffer harm and damages as a result of Defendant's unlawful and wrongful  
18 conduct. A class action is superior to other available methods for the fair and efficient  
19 adjudication of the controversy. Absent a class action, Class Members would likely find the cost  
20 of litigating their claims prohibitively high and would therefore have no effective remedy at law.  
21 Because of the relatively small size of Class Members' individual claims, it is likely that few Class  
22 Members could afford to seek legal redress for Defendant' misconduct. Absent a class action,  
23 Class Members will continue to incur damages, and Defendant's misconduct will continue  
24 without remedy. Class treatment of common questions of law and fact would also be a superior  
25 method to multiple individual actions or piecemeal litigation in that class treatment will  
26 conserve the resources of the courts and the litigants and will promote consistency and  
27 efficiency of adjudication.

77. Defendant has acted or refused to act on grounds generally applicable to the  
Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with

1 respect to the Class as a whole.

2 **COUNT 1**

3 **BREACH OF EXPRESS WARRANTY**

4 78. Plaintiffs brings this count on behalf of themselves and the Class, and  
5 alternatively, the Subclasses, and repeats and re-alleges all previous paragraphs, as if fully  
6 included herein.

7 79. Defendant marketed, sold, and/or distributed the Grain Free Products, and  
8 Plaintiffs and Class Members purchased the Grain Free Products.

9 80. Defendant represented in their marketing, advertising, and promotion of the  
10 Grain Free Products that their product was “Grain Free.” Defendant made these  
11 representations to induce Plaintiffs and Class Members to purchase the Grain Free Products,  
12 which did in fact induce Plaintiffs and other Class Members to purchase this product.

13 81. Consumers like Plaintiffs and Class Members that pay a premium for Limited  
14 Ingredient dog foods base their purchasing decision on what the marketing, advertising, and  
15 promotion says about the ingredients in the dog food.

16 82. Accordingly, Defendant’ representations that the Grain Free Products are grain  
17 free became part of the basis of the bargain between Defendant and Plaintiffs and other Class  
18 Members.

19 83. The Grain Free Products did not conform to Defendant’ representations and  
20 warranties regarding “Grain Free” because at all relevant times the bags of the Grain Free  
21 Products contained these ingredients.

22 84. As a direct and proximate result of Defendant’ breaches of their express  
23 warranties and their failure to conform to the Grain Free Products’ express representations,  
24 Plaintiffs and members of the Class have been damaged. Plaintiffs and Class Members have  
25 suffered damages in that they did not receive the product they specifically paid for and that  
26 Defendant warranted it to be. In addition, Plaintiffs and Class Members paid a premium for a  
27 product that did not conform to the Defendant’ warranties.

1 85. As of the date of this filing, Plaintiffs mailed a letter to Defendant outlining  
2 Defendant's conduct that is a breach of its express warranties regarding the Grain Free  
3 Products as described throughout this complaint.

4 **COUNT 2**

5 **BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY**

6 86. Plaintiffs bring this count on behalf of themselves and the Class, and  
7 alternatively, the Subclasses, and repeat and re-allege all previous paragraphs, as if fully  
8 included herein.

9 87. Defendant marketed, sold, and/or distributed the Grain Free Products, and  
10 Plaintiffs and other Class Members purchased the Grain Free Products.

11 88. Plaintiffs bring this claim for breach of the Uniform Commercial Code's implied  
12 warranty of merchantability on behalf of themselves and other consumers who purchased the  
13 Grain Free Products as a limited ingredient dog food product for their pets.

14 89. The Defendant is a merchant as defined by applicable UCC provisions.

15 90. The Defendant has breached the implied warranties of merchantability that they  
16 made to Plaintiffs and the prospective class. For example, Defendant impliedly warranted that  
17 the Grain Free Products were free from defects, that they were merchantable, and that they  
18 were fit for the ordinary purpose for which limited ingredient dog foods are used.

19 91. When sold by Defendant, the Grain Free Products were not merchantable, were  
20 not grain free, were not of adequate quality within that description, were not fit for the  
21 ordinary purposes for which such goods are used, and did not conform to the promises or  
22 affirmations of fact made on the container or label.

23 92. On or about September 28, 2020, Plaintiffs gave notice to Defendant that the  
24 product was not fit for such purpose and/or was not otherwise merchantable as set forth  
25 above.

26 93. As a direct result of the Grain Free Products being unfit for their intended  
27 purpose as a grain free dog food and/or otherwise not merchantable, Plaintiffs and class

1 members were damaged and are entitled to remedies.

2 94. Because of the defects in the Grain Free Products product as described herein,  
3 the value of the Grain Free Products as warranted is greater than actual value of the Grain Free  
4 Products. Plaintiffs would not have purchased the Grain Free Products on the same terms, had  
5 they known that the Grain Free Products in fact contained grain. Plaintiffs paid a price premium  
6 for the Grain Free Products based on Defendant' misrepresentations. Damages, which may be  
7 measured pursuant to the damages provisions of Article 2 of the UCC, are warranted to  
8 Plaintiffs and members of the proposed Class.

9 95. As a direct and proximate result of Defendant' breach of the warranties of  
10 merchantability, Plaintiffs and the other class members have been damaged in an amount to be  
11 proven at trial.

12 **COUNT 3**

13 **UNJUST ENRICHMENT<sup>6</sup>**

14 96. Plaintiffs bring this count on behalf of themselves and the Class, and  
15 alternatively, the Subclasses, and repeat and re-allege all previous paragraphs, as if fully  
16 included herein.

17 97. Plaintiffs conferred benefits on Defendant by purchasing the Grain Free Products  
18 at a premium price.

19 98. Defendant had knowledge of their receipt of such benefits.

20 99. Defendant has been unjustly enriched in retaining the revenues derived from  
21 Plaintiffs and Class Members' purchases of the Grain Free Products.

22 100. Defendant retaining these moneys under these circumstances is unjust and  
23 inequitable because Defendant falsely and misleadingly represented that Grain Free Products  
24 are "Grain Free" when, in fact, the Grain Free Products contain grain.

25  
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27 

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<sup>6</sup> This count is pled in the alternative to the breach of contract claims.

1 101. Defendant' misrepresentations have injured Plaintiffs and Class Members  
2 because they would not have purchased (or would not have paid a price premium) for the Grain  
3 Free Products had they known the true facts regarding the Grain Free Products' ingredients.

4 102. Because it is unjust and inequitable for Defendant to retain such non-gratuitous  
5 benefits conferred on them by Plaintiff and Class Members, Defendant must pay restitution to  
6 Plaintiffs and Class Members, as ordered by the Court.

7 **COUNT 4**

8 **VIOLATIONS OF THE WASHINGTON CONSUMER PROTECTION ACT**

9 **(Wash. Rev. Code Ann. §§ 19.86.010, et seq.)**

10 **Non-Per Se Unfair Business Practices**

11 103. Plaintiff Shaw brings this Count individually and on behalf of the members of the  
12 Washington Subclass against Defendant and repeats and re-alleges all previous paragraphs, as if  
13 fully included herein.

14 104. As a company, Defendant is a "person[]" within the meaning of the WCPA, Wash.  
15 Rev. Code § 19.86010(1), and conducts "trade" and "commerce" within the meaning of the  
16 Washington Consumer Protection Act, Wash. Rev. Code § 19.86.010(2).

17 105. Plaintiff Shaw and the Washington Subclass members are "persons" within the  
18 meaning of the WCPA, Wash. Rev. Code § 19.86.010(1).

19 106. The conduct described throughout this Complaint is unfair within the meaning of  
20 the Washington Consumer Protection Act, RCW 19.86.010, et seq. and includes the following:

21 a. Omitting the material information that the Grain Free Products contain  
22 grain, which if known would have caused Plaintiff Shaw and others in the market for limited  
23 ingredient foods not to purchase these foods;

24 b. Describing, promising and affirming on their containers and labels that  
25 the Grain Free Products are "grain free" when they contain grain.

26 107. Defendant engaged in these unfair acts or practices in the conduct of their  
27 business.

1           108. The acts and practices described above are unfair because these acts or practices  
2 (1) have caused substantial financial injury to Plaintiff Shaw and the Washington Subclass  
3 members; (2) are not outweighed by any countervailing benefits to consumers or competitors;  
4 and (3) are not reasonably avoidable by consumers.

5           109. Defendant's unfair acts and practices impact the public interest. Defendant  
6 committed the acts and practices in the course of their everyday business; the acts and  
7 practices are part of a pattern or generalized course of business; Defendant committed the acts  
8 and practices repeatedly and continually both before and after Plaintiff Shaw and Washington  
9 Subclass members' purchased the pet foods; there is a real and substantial potential for  
10 repetition of Defendant's conduct; and many customers are affected or likely to be affected.

11           110. Plaintiff Shaw and members of the Washington Subclass were injured because:  
12 (a) they would not have purchased the Grain Free Products, or would not have purchased the  
13 Grain Free Products on the same terms, had they known that the Grain Free Products in fact  
14 contained grain; (b) they paid a price premium for the Grain Free Products based on  
15 Defendant's false and misleading statements; and (c) the Grain Free Products did not have the  
16 characteristics and benefits promised because they contained grain.

17           111. As a result, Plaintiff Shaw and the Washington Subclass have been damaged in  
18 an amount to be proven at trial, but not less than either the purchase price of the Grain Free  
19 Products or, alternatively, the difference in value between the Grain Free Products as  
20 advertised and the Grain Free Products as actually sold.

21           112. As a direct and proximate result of Defendant's unfair acts or practices, Plaintiff  
22 Shaw and the Washington Subclass members suffered injury in fact and lost money because  
23 they paid more for the Grain Free Products than they would have had they known the truth  
24 about the product.

25           113. On behalf of himself and other members of the Washington Subclass, Plaintiff  
26 Shaw seeks to enjoin Defendant's unlawful acts and practices described herein, to recover their  
27 actual damages or five hundred dollars, whichever is greater, three times actual damages, and

1 reasonable attorneys' fees.

2 **COUNT 5**

3 **VIOLATIONS OF THE WASHINGTON CONSUMER PROTECTION ACT**

4 **(Wash. Rev. Code Ann. §§ 19.86.010, et seq.)**

5 **Non-Per Se Deceptive Business Practices**

6 114. Plaintiff Shaw brings this Count individually and on behalf of the members of the  
7 Washington Subclass against Defendant and repeats and re-alleges all previous paragraphs, as if  
8 fully included herein.

9 115. As alleged above, Plaintiff Shaw, Washington Subclass members, and Defendant  
10 are "persons" within the meaning of the WCPA and Defendant's business constitutes "trade" or  
11 "commerce" under the WCPA.

12 116. In addition to being unfair to consumers, Defendant's practices were also  
13 deceptive.

14 117. Defendant engaged in deceptive acts or practices within the meaning of the  
15 Washington Consumer Protection Act, RCW 19.86.010, *et seq.* by the conduct described in this  
16 complaint, including:

17 a. Omitting the material information that the Grain Free Products contain  
18 grain, which if known would have caused Plaintiff Shaw and others in the market for grain free  
19 foods not to purchase these foods;

20 b. Describing, promising and affirming on their containers and labels that  
21 the Grain Free Products are "grain free" when they contain grain.

22 118. Defendant directed these representations to consumers through their product  
23 labels and advertising.

24 119. The information that Defendant concealed and misrepresented about these pet  
25 foods was material in that a reasonable consumer would not have paid a premium for grain  
26 free food if he or she had known that the food contained grain and/or other unlisted  
27 ingredients.

1           120. Defendant's misrepresentations are likely to mislead a reasonable consumer  
2 acting reasonably under the circumstances.

3           121. Defendant's deceptive acts and practices impact the public interest. Defendant  
4 committed the acts and practices in the course of their everyday business; the acts and  
5 practices are part of a pattern or generalized course of business; Defendant committed the acts  
6 and practices repeatedly and continually both before and after Plaintiff Shaw and Washington  
7 Subclass members' purchase of the pet foods; there is a real and substantial potential for  
8 repetition of Defendant's conduct; and many customers are affected or likely to be affected.

9           122. Plaintiff Shaw and members of the Washington Subclass were injured because:  
10 (a) they would not have purchased the Grain Free Products, or would not have purchased the  
11 Grain Free Products on the same terms, had they known that the Grain Free Products in fact  
12 contained grain; (b) they paid a price premium for the Grain Free Products based on  
13 Defendant's false and misleading statements; and (c) the Grain Free Products did not have the  
14 characteristics and benefits promised because they contained grain.

15           123. As a result, Plaintiff Shaw and the Washington Subclass have been damaged in  
16 an amount to be proven at trial, but not less than either the purchase price of the Grain Free  
17 Products or, alternatively, the difference in value between the Grain Free Products as  
18 advertised and the Grain Free Products as actually sold.

19           124. As a direct and proximate result of Defendant's unfair acts or practices, Plaintiff  
20 Shaw and the Washington Subclass members suffered injury in fact and lost money because  
21 they paid more for the Grain Free Products than they would have had they known the truth  
22 about the product.

23           125. On behalf of himself and other members of the Washington Subclass, Plaintiff  
24 Shaw seeks to enjoin Defendant's unlawful acts and practices described herein, to recover their  
25 actual damages or five hundred dollars, whichever is greater, three times actual damages, and  
26 reasonable attorneys' fees.

27



COUNT 6

**VIOLATION OF THE NEW YORK DECEPTIVE TRADE PRACTICES ACT**  
**(New York Gen. Bus. Law § 349)**

1  
2  
3 126. Plaintiff McCarthy asserts this Count on behalf of himself and the New York  
4 Subclass and repeats and re-alleges all previous paragraphs, as if fully included herein.

5 127. By the acts and conduct alleged herein, Defendant committed unfair or  
6 deceptive acts and practices by misrepresenting that the Grain Free Products were “Grain Free”  
7 when, in fact, the Grain Free Products contained grain.

8 128. Defendant’s business practice of marketing, advertising, and promoting their  
9 Grain Free Products in a misleading, inaccurate, and deceptive manner constitutes  
10 unconscionable commercial practices, deception, and misrepresentation and, accordingly,  
11 constitutes multiple, separate violations of Section 349 of the New York General Business Law.

12 129. In marketing, advertising, and promoting the Grain Free Products to consumers,  
13 including Plaintiff McCarthy and members of the New York Subclass, Defendant materially  
14 misrepresented and omitted key aspects regarding the Grain Free Products throughout the  
15 United States, including the State of New York.

16 130. The foregoing deceptive acts and practices were directed at consumers.

17 131. The foregoing deceptive acts and practices are misleading in a material way  
18 because they fundamentally misrepresent the characteristics, ingredients, benefits, quality, and  
19 nature of the Grain Free Products to induce consumers to purchase the same, and/or to pay a  
20 premium for the product.

21 132. Defendant’s unconscionable commercial practices, false promises,  
22 misrepresentations, and omissions set forth in this Complaint are material in that they relate to  
23 matters which reasonable persons, including Plaintiff McCarthy and members of the New York  
24 Subclass, would attach importance to in making their purchasing decisions or conducting  
25 themselves regarding the purchase of the Grain Free Products.  
26  
27

1 133. Plaintiff McCarthy and members of the New York Subclass were injured because:  
2 (a) they would not have purchased the Grain Free Products, or would not have purchased the  
3 Grain Free Products on the same terms, had they known that the Grain Free Products in fact  
4 contained grain; (b) they paid a price premium for the Grain Free Products based on Defendant'  
5 false and misleading statements; and (c) the Grain Free Products did not have the  
6 characteristics and benefits promised because they contained grain. As a result, Plaintiff  
7 McCarthy and the New York Subclass have been damaged in an amount to be proven at trial,  
8 but not less than either the purchase price of the Grain Free Products or, alternatively, the  
9 difference in value between the Grain Free Products as advertised and the Grain Free Products  
10 as actually sold.

11 134. On behalf of himself and other members of the New York Subclass, Plaintiff  
12 McCarthy seeks to enjoin the unlawful acts and practices described herein, to recover his actual  
13 damages or fifty dollars, whichever is greater, three times actual damages, and reasonable  
14 attorneys' fees.

15 **COUNT 7**

16 **VIOLATION OF NEW YORK GEN. BUS. LAW § 350**

17 135. Plaintiff McCarthy brings this Count individually and on behalf of the members of  
18 the New York Subclass against Defendant and repeats and re-alleges all previous paragraphs, as  
19 if fully included herein.

20 136. Based on the foregoing, Defendant have engaged in consumer-oriented conduct  
21 that is deceptive or misleading in a material way and which constitutes false advertising in  
22 violation of Section 350 of the New York General Business Law.

23 137. Defendant's false, misleading, and deceptive statements and representations of  
24 fact include, but are not limited to, the representations that the Grain Free Products were  
25 "Grain Free." Defendant also directed these representations to consumers through packaging,  
26 labels and other advertising.  
27

1           138. Defendant's false, misleading, and deceptive statements and representations of  
2 fact, including but not limited to the representations the Grain Free Products were "Grain  
3 Free," were and are likely to mislead a reasonable consumer acting reasonably under the  
4 circumstances.

5           139. Defendant's false, misleading, and deceptive statements and representations of  
6 fact, including but not limited to the representations that the Grain Free Products are "Grain  
7 Free" have resulted in consumer injury or harm to the public interest.

8           140. Plaintiff McCarthy and members of the New York Subclass were injured because:  
9 (a) they would not have purchased the Grain Free Products, or would not have purchased the  
10 Grain Free Products on the same terms, had they known that the Grain Free Products in fact  
11 contained grain; (b) they paid a price premium for the Grain Free Products based on  
12 Defendant's false and misleading statements; and (c) the Grain Free Products did not have the  
13 characteristics and benefits promised because they contained grain.

14           141. As a result, Plaintiff McCarthy and the New York Subclass have been damaged in  
15 an amount to be proven at trial, but not less than either the purchase price of the Grain Free  
16 Products or, alternatively, the difference in value between the Grain Free Products as  
17 advertised and the Grain Free Products as actually sold.

18           142. As a result of Defendant's false, misleading, and deceptive statements and  
19 representations of fact, including but not limited to the representations that the Grain Free  
20 Products were "Grain Free," Plaintiff McCarthy and members of the New York Subclass have  
21 suffered and continue to suffer economic injury.

22           143. Plaintiff McCarthy and members of the New York Subclass suffered an  
23 ascertainable loss caused by Defendant's misrepresentations because they paid more for the  
24 Grain Free Products than they would have had they known the truth about the product.

25           144. On behalf of himself and other members of the New York Subclass, Plaintiff  
26 McCarthy seeks to enjoin Defendant's unlawful acts and practices described herein, to recover  
27 their actual damages or five hundred dollars, whichever is greater, three times actual damages,

1 and reasonable attorneys' fees.

2 **COUNT 8**

3 **Violation Of California Unfair Competition Law**  
4 **(Cal. Bus. & Prof. Code §§ 17200, *et seq.*)**

5 145. Plaintiff Spivey brings this Count on behalf of himself and the California Subclass  
6 against Defendant and repeats and re-alleges all previous paragraphs, as if fully included herein.

7 146. Defendant is subject to the Unfair Competition Law ("UCL"), Business &  
8 Professions Code §§ 17200, *et seq.* The UCL provides, in pertinent part: "Unfair competition  
9 shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive,  
10 untrue or misleading advertising ...."

11 147. Defendant also violated the "unlawful" prong of the UCL by violating California's  
12 False Advertising Law ("FAL") as described in Count 9, below.

13 148. Defendant violated the "unlawful" prong of the UCL by violating California's  
14 Consumers Legal Remedies Act ("CLRA") as described in Count 10 below.

15 149. Defendant's conduct, described herein, violated the "unfair" prong of the UCL  
16 because Defendant's conduct was immoral, unethical, unscrupulous, or substantially injurious  
17 to consumers and the utility of their conduct, if any, does not outweigh the gravity of the harm  
18 to their victims.

19 150. Defendant's conduct with respect to the labeling, advertising, and sale of the  
20 Products was and is also unfair because it violates public policy as declared by specific  
21 constitutional, statutory or regulatory provisions, including but not limited to the applicable  
22 sections of: the CLRA and the FAL.

23 151. Defendant's conduct with respect to the labeling, advertising, and sale of the  
24 Products was and is unfair because the consumer injury was substantial, not outweighed by  
25 benefits to consumers or competition, and not one consumers themselves could reasonably  
26 have avoided.

1 152. Defendant’s conduct, described herein, violated the “fraudulent” prong of the  
2 UCL.

3 153. A statement or practice is “fraudulent” under the UCL if it is likely to mislead or  
4 deceive the public, applying an objective reasonable consumer test. As set forth herein,  
5 Defendant’s claims relating grain content stated on the Products’ labeling are false and likely to  
6 mislead or deceive the public.

7 154. Defendant profited from its sale of the falsely, deceptively, and unlawfully  
8 advertised and packaged the Grain Free Products to unwary consumers.

9 155. Defendant’s conduct caused and continues to cause substantial injury to Plaintiff  
10 and the other Class Members. Plaintiff has suffered injury in fact as a result of Defendant’s  
11 unlawful conduct.

12 156. In accordance with Bus. & Prof. Code § 17203, Plaintiffs seek an order enjoining  
13 Defendant from continuing to conduct business through unlawful, unfair, and/or fraudulent  
14 acts and practices, and to commence a corrective advertising campaign.

15 157. Plaintiff and the California Subclass also seek an order for and restitution of all  
16 monies from the sale of the Grain Free Products, which were unjustly acquired through acts of  
17 unlawful competition.

18 **COUNT 9**

19 **California False Advertising Law**  
20 **(Cal. Bus. & Prof. Code § 17500)**

21 158. Plaintiff Spivey brings this Count on behalf of himself and the California Subclass  
22 against Defendant and repeats and re-alleges all previous paragraphs, as if fully included herein

23 159. The FAL provides that “[i]t is unlawful for any person, firm, corporation or  
24 association, or any employee thereof with intent directly or indirectly to dispose of real or  
25 personal property or to perform services” to disseminate any statement “which is untrue or  
26 misleading, and which is known, or which by the exercise of reasonable care should be known,  
27 to be untrue or misleading.” Cal. Bus. & Prof. Code § 17500.

1 160. It is also unlawful under the FAL to disseminate statements concerning property  
2 or services that are “untrue or misleading, and which is known, or which by the exercise of  
3 reasonable care should be known, to be untrue or misleading.” *Id.*

4 161. As alleged herein, the advertisements, labeling, policies, acts, and practices of  
5 Defendant relating to its dog food misled consumers acting reasonably regarding Defendant’s  
6 representations about ingredient supply, product manufacturing, and oversight, as stated  
7 above.

8 162. Plaintiffs suffered injuries in fact as a result of Defendant’s actions as set forth  
9 herein because they purchased the Defendant’s food in reliance on Defendant’s false and  
10 misleading labeling claims concerning, among other things, the products’ quality, ingredient  
11 supply, and product manufacturing and oversight, as stated above.

12 163. Defendant’s business practices as alleged herein constitute deceptive, untrue,  
13 and misleading advertising pursuant to the FAL because Defendant has advertised the Products  
14 in a manner that is untrue and misleading, which Defendant knew or reasonably should have  
15 known, and omitted material information from its advertising.

16 164. Defendant profited from its sale of the falsely and deceptively advertised dog  
17 food to unwary consumers.

18 165. As a result, Plaintiff and the California Subclass are entitled to injunctive and  
19 equitable relief, restitution, and an order for the disgorgement of the funds by which Defendant  
20 was unjustly enriched.

21 **Count 10**

22 **California Consumer Legal Remedies Act**  
23 **(Cal. Civ. Code § 1750, et seq.)**

24 166. Plaintiff Spivey brings this Count on behalf of himself and the California Subclass  
25 against Defendant and repeats and re-alleges all previous paragraphs, as if fully included herein.

26 167. Defendant’s false and misleading labeling and other policies, acts, and practices  
27 were designed to, and did, induce the purchase and use of the Grain Free Products for

1 personal, family, or household purposes by Plaintiff and Class Members, and violated and  
2 continues to violate the following sections of the CLRA:

3 a. § 1770(a)(5): representing that goods have characteristics, uses, or  
4 benefits which they do not have;

5 b. § 1770(a)(7): representing that goods are of a particular standard, quality, or  
6 grade if they are of another;

7 c. § 1770(a)(9): advertising goods with intent not to sell them as advertised;

8 d. § 1770(a)(14): Representing that a transaction confers or involves rights,  
9 remedies, or obligations that it does not have or involve, or that are prohibited by law; and

10 e. § 1770(a)(16): representing the subject of a transaction has been supplied in  
11 accordance with a previous representation when it has not.

12 168. Defendant profited from the sale of the falsely, deceptively, and unlawfully  
13 advertised Products to unwary consumers.

14 169. Defendant's wrongful business practices constituted a course of conduct in  
15 violation of the CLRA.

16 170. Pursuant to the provisions of Cal. Civ. Code § 1782(a), Plaintiff sent a letter to  
17 Defendant, which Defendant received on August 19, 2019 with notice of Defendant's alleged  
18 violations of the CLRA, demanding that Defendant correct such violations, and providing it with  
19 the opportunity to correct its business practices.

20 171. Plaintiffs received a response to their letter from Defendant on August 28, 2019,  
21 in which its chief legal counsel stated that Defendant denies that the Grain Free Products  
22 "contains meaningful quantities of any of the alleged ingredients" and asserted that Defendant  
23 does "not put anything in the food that is not identified on the label." Further, its legal counsel  
24 responded that Defendant "cannot, and will not, accede to [Plaintiffs] demands."

25 172. Pursuant to California Civil Code § 1780, Plaintiffs seek monetary relief, including  
26 restitution and actual damages, injunctive relief, their reasonable attorney fees and costs, and  
27 any other relief that the Court deems proper.

1 **Count 11**

2 **Violation of Ohio's Consumer Sales Protection Act**  
3 **(Ohio Revised Code § 1345.01 et seq)**

4 173. Plaintiff Chevalier-Flick brings this Count on behalf of herself and the Ohio  
5 Subclass against Defendant and repeats and re-alleges all previous paragraphs, as if fully  
6 included herein.

7 174. Defendant is a supplier within the definition of the Ohio Consumer Sales  
8 Practices Act, R.C. 1345.01 et seq. ("CSPA"), as it supplied the Nature's Domain pet food  
9 Plaintiff and the members of the Class purchased for household use.

10 175. Plaintiff's and the Class's purchases of the Nature's Domain pet food were  
11 consumer transactions as that term is defined in the CSPA because Plaintiff and the Class  
12 purchased the pet food for household use.

13 176. Plaintiff and the members of the Class are consumers as defined in the CSPA  
14 because they engaged in a consumer transaction when purchasing the Nature's Domain pet  
15 food.

16 177. Defendant's acts as described throughout the Complaint, including its misleading  
17 grain-free statements on packaging, on point-of-sale materials, and on its website, constitute  
18 unfair, deceptive, and unconscionable acts and practices in violation of the CSPA.

19 178. For example, the CSPA notes that it is deceptive for Defendant to state that the  
20 Nature's Domain pet food products "ha[ve] sponsorship, approval, performance characteristics,  
21 accessories, uses, or benefits that [they] do not have," that the Nature's Domain pet food  
22 products have "been supplied in accordance with a previous representation, if [they have] not,"  
23 or that "a consumer transaction involves or does not involve a warranty, a disclaimer of  
24 warranties or other rights, remedies, or obligations if the representation is false." R.C.  
25 1345.02(B)(1), (5), and (10).

26 179. But for Defendant's misleading statements about the Nature's Domain pet  
27 foods being grain-free, Plaintiff and the Class would not have purchased the pet food products,



1 or would have paid substantially less for the pet food product.

2 180. Whether a pet food product is grain-free is material to Plaintiff, the Class, and  
3 reasonable consumers, and is designed to affect consumer decisions and conduct.

4 181. Defendant understood and intended that the representations about the Nature's  
5 Domain pet food products being grain-free would influence consumer behavior.

6 182. Defendant understands it has an obligation to ensure the honesty of all  
7 promotions and avoid misleading the public regarding its Nature's Domain pet food.

8 183. Defendant's acts and practices offend public policy as established by statute.

9 184. Defendant's acts and practices are immoral, unethical, oppressive, and  
10 unscrupulous.

11 185. Defendant's conduct substantially injured Plaintiff and the Class, as they and  
12 other consumers would not have purchased, or would have only purchased at a much lower  
13 price, the Nature's Domain pet food that was not actually grain-free.

14 186. Defendant was on notice before the filing of this Lawsuit that its conduct in  
15 misleading consumers about whether the Nature's Domain pet food was grain-free was a  
16 violation of the CSPA. *Lyons v. Brown*, Hamilton C.P. No. A-742156, Ohio Attorney General  
17 Public Inspection File ("PIF") No. 10000304 (Nov. 5, 1979); 332 N.E.2d 380, 384 (1974)  
18 (concluding that defendant violated the CSPA by misleading consumers about the quality of  
19 products); *Cartwright v. Beverly Hills Floors, Inc.*, 7th Dist. Mahoning No. 11 MA 109, PIF No.  
20 10003088 (June 6, 2013); 2013-Ohio-2266, at ¶ 17 (when manufacturer "knowingly commits a  
21 breach, the breach is likely also an unfair and deceptive act."); *Tinta v. Community Builders of*  
22 *Toledo*, Lucas C.P. No. 86-3926, PIF No. 10001155 (Aug. 24, 1987) (Supplier violates CSPA when  
23 it advertises and sells products as having certain material qualities or characteristics when it  
24 knows or should know the products do not have those certain material qualities or  
25 characteristics).

26 187. Defendant was also on notice before the filing of this suit that its conduct in  
27 misleading consumers about the pet foods' characteristics was a violation of the CSPA because

1 the actions taken by Defendant are “an act or practice declared to be deceptive or  
2 unconscionable by rule adopted under division (B)(2) of section 1345.05 of the [Ohio] Revised  
3 code before the consumer transaction on which [this] action is based.” R.C. 1345.09(B).  
4 Specifically, Ohio Administrative Code § 109:4-3-03(B)(1) states: “It shall be a deceptive and  
5 unfair act or practice for a supplier to make an offer of sale of any goods or services when such  
6 offer is not a bona fide effort to sell such goods or services. An offer is not bona fide if:  
7 (1) A supplier uses a statement or illustration or makes a representation in any advertisement  
8 which would create in the mind of a reasonable consumer, a false impression as to the grade,  
9 quality, quantity, make, model, year, price, value, size, color, utility, origin or any other material  
10 aspect of the offered goods or services in such a manner that, upon subsequent disclosure or  
11 discovery of the facts, the consumer may be induced to purchase goods or services other than  
12 those offered.”

13 188. In addition, Ohio Administrative Code § 109:4-3-02(A)(1) states: “It is a deceptive  
14 act or practice in connection with a consumer transaction for a supplier, in the sale or offering  
15 for sale of goods or services, to make any offer in written or printed advertising or promotional  
16 literature without stating clearly and conspicuously in close proximity to the words stating the  
17 offer any material exclusions, reservations, limitations, modifications, or conditions. Disclosure  
18 shall be easily legible to anyone reading the advertising or promotional literature and shall be  
19 sufficiently specific so as to leave no reasonable probability that the terms of the offer might be  
20 misunderstood.”

21 189. Plaintiff and the Class are entitled to recover damages and other appropriate  
22 relief.

## 23 VI. RELIEF DEMANDED

24 WHEREFORE, Plaintiffs, individually and on behalf of a Class and Subclasses of all others  
25 similarly situated, seek a judgment against Defendant, as follows:

26 A. For an order certifying the Class under Rule 23 of the Federal Rules of Civil  
27 Procedure and naming Plaintiffs as Class representatives and Plaintiffs’ attorneys as Class

1 Counsel;

2 B. For an order declaring that Defendant' conduct violates the statutes referenced  
3 herein;

4 C. For an order finding in favor of Plaintiffs and the Class on all counts asserted  
5 herein;

6 D. For compensatory, statutory, and punitive damages, as applicable, in amounts to  
7 be determined by the Court and/or jury;

8 E. For prejudgment interest on all amounts awarded;

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

10 G. For injunctive relief as pleaded or as the Court may deem proper; and

11 H. For an order awarding Plaintiffs and the Class their reasonable attorneys' fees,  
12 expenses and costs incurred in bringing this lawsuit.

13 **VII. JURY TRIAL DEMANDED**

14 Plaintiffs demand a trial by jury on all claims so triable.

15 RESPECTFULLY SUBMITTED AND DATED this 8<sup>th</sup> day of March, 2021.

16 TERRELL MARSHALL LAW GROUP PLLC

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