

EXHIBIT 26

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ROYAL CANIN USA, INC.

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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14

15 PET FOOD EXPRESS LTD.,

16 Plaintiff,

17 v.

18 ROYAL CANIN USA INC.,

19 Defendant.
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Case No. C09-01483 (MEJ)

**ANSWER AND COUNTERCLAIM OF
ROYAL CANIN USA INC.**

DEMAND FOR JURY TRIAL

21 ROYAL CANIN USA INC.

22 Counter-Claimant,
23

24 v.

25 PET FOOD EXPRESS LTD.,

26 Counter-Defendant.
27
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ANSWER

Defendant Royal Canin USA, Inc. (“RCUSA”), respectfully answers the Complaint of Plaintiff Pet Food Express, Ltd. (“PFE”), herein as follows:

First Affirmative Defense

The Complaint fails to state a claim for which relief can be granted.

Second Affirmative Defense

The alleged contract on the basis of which suit is brought, as construed by Plaintiff, is illegal and unenforceable under the laws of the State of California.

Third Affirmative Defense

In the alternative, if the contract is not unenforceable, then Plaintiff’s fundamental breach(es) of the contract entitled Defendant to consider it repudiated, and freed Defendant from any further obligations thereunder.

Fourth Affirmative Defense

Plaintiff is estopped from recovery by its own conduct.

Fifth Affirmative Defense

Plaintiff is barred from recovery by the doctrine of unclean hands.

In addition, Defendant RCUSA answers the individual paragraphs of the Complaint as follows:

1. This paragraph contains conclusions of law to which no answer is required; to the extent that an answer is required it is denied.
2. This paragraph contains conclusions of law to which no answer is required; to the extent that an answer is required it is denied.
3. Defendant is without knowledge sufficient to admit or deny the allegations of this paragraph.
4. Denied. It is averred affirmatively that Defendant is and has at all relevant times been a Delaware corporation with principal place of business in Missouri.
5. Admitted.
6. Admitted.

1 7. Denied.

2 8. It is admitted that, at a meeting on March 25, 2009, Defendant's General Manager Joe
3 Flanigan indicated that he would not pay PFE an amount that PFE claimed was owed. The remainder
4 of the paragraph is denied.

5 9. Denied.

6 10. Denied.

7 11. Defendant incorporates the answers to ¶¶ 1-10, *supra*, as if fully set forth herein.

8 12. Denied.

9 In answer to the Prayer for Relief, Defendant denies all allegations therein contained, and
10 avers that Plaintiff is not entitled to relief.

11 **COUNTERCLAIM**

12 **(For Declaratory Judgment and Restitution)**

13 Pursuant to Rule 13(a), Federal Rules of Civil Procedure, for its Counterclaim against
14 Counter-Defendant PFE, Counter-Claimant RCUSA respectfully represents to the Court as follows:

15 **Jurisdiction and Venue**

16 1. This Court has jurisdiction over the Counterclaim by virtue of 28 U.S.C. § 1332, in
17 that Counter-Claimant and Counter-Defendant are corporate citizens of different States, and the
18 amount in controversy exceeds \$75,000, exclusive of interest and costs.

19 2. This Court is the proper venue for this Action under 28 U.S.C. § 1391, in that
20 Counter-Defendant has its principal place of business in this judicial District, and a substantial
21 portion of the facts and circumstances giving rise to the claim occurred here.

22 **Parties**

23 3. Counter-Claimant RCUSA is a Delaware corporation, with its headquarters and
24 principal place of business in St. Charles, Missouri. RCUSA is a manufacturer and distributor of
25 premium petfood and petcare products. It is a member of the Royal Canin group of companies,
26 whose headquarters is in Aimargues, France.

27 4. Defendant PFE is a California corporation with headquarters in San Leandro,
28 California. PFE runs a chain of petfood retail outlets in northern California.

Facts

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2 5. In 2004, Counter-Claimant and Counter-Defendant signed a document styled
3 “Amended and Restated Retailer Agreement,” which is attached as Exhibit I to PFE’s Complaint
4 herein (“the 2004 Agreement”).

5 6. Among the provisions of the 2004 Agreement were the following:

6 6. Promotional Allowance. In consideration for PFE's undertakings, starting with
7 PFE's purchases of RCUSA's products in 2004, RCUSA shall grant PFE a promotional
8 allowance of Fifteen Percent (15%) of the net invoice amount of each invoice, as a deduction
9 against each invoice.

10 7. Termination. RCUSA shall have the right to terminate this Agreement on thirty
11 (30) days written notice at any time in the event (i) PFE fails to perform its duties and
12 obligations that materially effect sales in the Territory after RCUSA has given PFE 30 days
13 written notice to cure such failure and PFE fails to cure such default; (ii) PFE's purchases of
14 the Products in any calendar year do not exceed the purchases of the Products for the
15 preceding calendar year by at least \$1.00 based on RC's list chain pricing prior to the
16 Promotional Allowance deduction; (iii) the ownership of PFE is changed in a manner that will
17 result in an adverse effect on RCUSA's business within the Territory.

18 8. Market Development Allowance. So long as PFE is in compliance with its
19 duties and obligations, RCUSA shall pay PFE an annual market development allowance
20 funded by RCUSA each year in the amount of five percent (5%) of the aggregate annual
21 dollar volume of Products shipped by RCUSA into the Territory directly and of Products
22 shipped by RCUSA to distribution facilities outside the Territory where such Products are
23 sold at retail within the Territory, based upon RCUSA's wholesale price for the Products. The
24 Territory shall include any new county or counties in which PFE opens an Outlet before the
25 end of the applicable calendar year, so long as such Outlet is comprised of at least 2,000
26 square feet and is intended to operate as a permanent, as opposed to temporary or seasonal,
27 location. Such allowance, if any, shall be payable on or before March 15 of each year and
28 shall be accompanied by a written statement from RCUSA setting forth the calculations used
in making such payment.

 9. Confidentiality. PFE acknowledges and agrees that all data in this agreement
constitute RCUSA's "Confidential Information". As an inducement to RCUSA to enter into
and perform its obligations under this Agreement, PFE agrees to keep all of the Confidential
Information in the strictest confidence and shall not use or disclose to third parties any of the
Confidential Information, except as expressly authorized in the course of performing its duties
hereunder.

 7. The “promotional allowance” and “marketing development allowance” (“MDA”)
provisions of the 2004 Agreement were intended to be kept confidential, and were in fact not
disclosed to third parties until Counter-Defendant initiated this lawsuit. Neither the promotional
allowance nor the MDA was made available to other purchasers from Counter-Claimant on terms
equivalent to those set forth in the 2004 Agreement, including purchasers that compete with Pet Food
Express.

 8. Payments to Counter-Defendant reflecting the “promotional allowance” and the MDA

1 as defined in the 2004 Agreement were unearned in whole or in part. Indeed, under paragraph 8 of
2 the 2004 Agreement, Counter-Defendant is entitled to be paid the MDA calculated as 5% of the total
3 sales of RCUSA products to any and all retailers in the Territory.

4 9. Counter-Defendant's claimed entitlement to payment of the MDA under the 2004
5 Agreement is predicated on RCUSA's sales to two or more purchasers.

6 10. Counter-Claimant's sales to Counter-Defendant, and to one or more other purchasers
7 that compete with Counter-Defendant, are made in interstate commerce.

8 11. Since the inception of the 2004 Agreement, Counter-Claimant credited Counter-
9 Defendant with "promotional allowance" amounts, pursuant to the provisions of paragraph 6 of the
10 2004 Agreement, in the aggregate amount of \$1,406,118.57.

11 12. For each year between the inception of the 2004 Agreement and 2007, Counter-
12 Claimant credited Counter-Defendant with MDA amounts, pursuant to the provisions of paragraph 8
13 of the 2004 Agreement, in the aggregate amount of \$559,721.

14 13. In early 2009, Counter-Defendant demanded that Counter-Claimant remit the MDA
15 payment for 2008, which RCUSA refused to pay on the grounds that it was discriminatory as
16 between Pet Food Express and other customers that compete with Pet Food Express.

17 14. On March 26, 2009, PFE filed suit against RCUSA in Superior Court for Alameda
18 County, Case No. RG09443440. The complaint claimed that RCUSA had not only breached but
19 terminated and repudiated the 2004 Agreement, and sought damages of \$300,000.

20 15. The State court complaint indicated that a copy of the contract – that is to say, the
21 2004 Agreement – was attached.

22 16. On April 6, 2009, PFE filed its Complaint in the instant case in this Court. The
23 Complaint is essentially identical to the one filed less than two weeks earlier in State Court, raising
24 the same claims and seeking essentially the same relief (damages of "at least \$320,000"). Again, the
25 Complaint had a copy of the 2004 Agreement attached.

26 17. On April 17, 2009, Defendant removed the State case to this Court, where it was
27 assigned Case No. 3:09-CV-01704-MEJ. The two cases were, at Defendant's instance, "related."
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1 competition” within the meaning of California Business and Professions Code, § 17045.

2 25. By virtue of its inconsistency with California Business and Professions Code, § 17045,
3 according to California Business and Professions Code, § 17051, the 2004 Agreement “is an illegal
4 contract and no recovery thereon shall be had.”

5 26. In addition, the promotional allowance and the MDA constitute “unlawful, unfair or
6 fraudulent business act[s] or practice[s] within California Business and Professions Code, § 17200,
7 and enforcement of the 2004 Agreement would be contrary to the public policy of this State.

8 27. Counter-Defendant solicited the aforesaid violations of the California Business and
9 Professions Code, in violation of § 17047 of that Code, which prohibits retailers from soliciting
10 payments in violation of § 17045.

11 Wherefore, Counter-Claimant RCUSA seeks a declaratory judgment that the 2004 Agreement
12 is unenforceable under the laws and public policy of the State of California.

13 **Count II: Declaratory Judgment**

14 28. Counter-Claimant RCUSA repeats and realleges ¶¶ 1-19, *supra*, as if fully set forth
15 herein.

16 29. To the extent that the promotional allowance and the MDA were earned, the 2004
17 Agreement, as construed by Counter-Defendant, would require Counter-Claimant to pay Pet Food
18 Express consideration that was not made available “on proportionally equal terms to all other
19 customers competing in the distribution” of Counter-Claimant’s products, in violation of section 2(d)
20 of the Robinson-Patman Act, 15 U.S.C. § 13(d).

21 30. To the extent that any portions of the promotional allowance and the MDA were not
22 earned, the 2004 Agreement, as construed by Counter-Defendant, would give rise to price
23 discrimination in favor of Pet Food Express, in violation of section 2(a) of the Robinson-Patman Act,
24 15 U.S.C. § 13(a). The knowing inducement or receipt of a prohibited discrimination in price
25 constitutes a violation by Counter-Defendant of section 2(f) of the Robinson-Patman Act, 15 U.S.C. §
26 13(f).

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1 3. DECLARE that the 2004 Agreement, and in particular its “promotional allowance”
2 and “market development allowance” provisions are unenforceable under the Robinson-Patman Act,
3 15 U.S.C. § 13 *et seq.*;

4 4. ORDER that the 2004 Agreement is rescinded;

5 5. ORDER that Counter-Defendant restore to Counter-Claimant the sums credited and
6 paid pursuant to the 2004 Agreement, aggregating no less than \$1,965,840;

7 6. AWARD Counter-Claimant its costs of suit herein, including reasonable attorneys
8 fees; and

9 7. GRANT such other relief as to the Court shall seem just and equitable.

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11 DATED: May 26, 2009

Respectfully submitted,

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13 _____ /s/

Cindy Hamilton
Attorneys for Defendant and Counter-Claimant
ROYAL CANIN USA, INC.