# **EXHIBIT 26**

Dockets.Justia.com

	Case3:09-cv-01483-MHP	Document20	Filed05/26/09	Page1 of 9		
1 2 3 4 5 6 7 8 9 0 1	Ian C. Ballon (CSB #141819) Cindy Hamilton (CSB #217951) GREENBERG TRAURIG LLP 1900 University Avenue, 5th Floor East Palo Alto, CA 94303 Tel.: (650) 328-8500 Email: ballon@gtlaw.com Steven M. Schneebaum Admitted <i>pro hac vice</i> GREENBERG TRAURIG LLP 2101 L Street, N.W. Washington, D.C. 20037 Tel.: (202) 530-8544 Email: schneebaums@gtlaw.com Attorneys for Defendant and Counte ROYAL CANIN USA, INC.	r-Claimant				
2	UNITED STATES DISTRICT COURT					
3	NORTHERN DISTRICT OF CALIFORNIA					
4						
5	PET FOOD EXPRESS LTD.,	0	Case No. C09-014	83 (MEJ)		
6	Plaintiff,		ANSWER AND O ROYAL CANIN	COUNTERCLAIM OF USA INC.		
7	V.		DEMAND FOR J	JURY TRIAL		
8	ROYAL CANIN USA INC.,					
9	Defendant.					
20						
1	ROYAL CANIN USA INC.					
2 23	Counter-Claimant,					
.5	V.					
25	PET FOOD EXPRESS LTD.,					
.5 26	Counter-Defendant.					
27						
28						
.0						
				ANSWER AND COUNTERCLAI CASE NO. C09-01483 (ME		
	371834589v1			× ×		

	Case3:09-cv-01483-MHP Document20 Filed05/26/09 Page2 of 9							
1	ANSWER							
2	Defendant Royal Canin USA, Inc. ("RCUSA"), respectfully answers the Complaint of							
3	Plaintiff Pet Food Express, Ltd. ("PFE"), herein as follows:							
4	First Affirmative Defense							
5	The Complaint fails to state a claim for which relief can be granted.							
6	Second Affirmative Defense							
7	The alleged contract on the basis of which suit is brought, as construed by Plaintiff, is illegal							
8	and unenforceable under the laws of the State of California.							
9	Third Affirmative Defense							
10	In the alternative, if the contract is not unenforceable, then Plaintiff's fundamental breach(es)							
11	of the contract entitled Defendant to consider it repudiated, and freed Defendant from any further							
12	obligations thereunder.							
13	Fourth Affirmative Defense							
14	Plaintiff is estopped from recovery by its own conduct.							
15	Fifth Affirmative Defense							
16	Plaintiff is barred from recovery by the doctrine of unclean hands.							
17	In addition, Defendant RCUSA answers the individual paragraphs of the Complaint as							
18	follows:							
19	1. This paragraph contains conclusions of law to which no answer is required; to the							
20	extent that an answer is required it is denied.							
21	2. This paragraph contains conclusions of law to which no answer is required; to the							
22	extent that an answer is required it is denied.							
23	3. Defendant is without knowledge sufficient to admit or deny the allegations of this							
24	paragraph.							
25	4. Denied. It is averred affirmatively that Defendant is and has at all relevant times been							
26	a Delaware corporation with principal place of business in Missouri.							
27	5. Admitted.							
28	6. Admitted.							

	Case3:09-cv-01483-MHP Document20 Filed05/26/09 Page3 of 9					
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 $\P\P$ 1-10, <i>supra</i> , 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	<u>Parties</u>					
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.					
	-2- ANSWED AND COUNTED OF AND					

Case3:09-cv-01483-MHP Document20 Filed05/26/09 Page4 of 9 1 Facts 5. In 2004, Counter-Claimant and Counter-Defendant signed a document styled 2 "Amended and Restated Retailer Agreement," which is attached as Exhibit I to PFE's Complaint 3 4 herein ("the 2004 Agreement"). Among the provisions of the 2004 Agreement were the following: 6. 5 Promotional Allowance. In consideration for PFE's undertakings, starting with 6 6 PFE's purchases of RCUSA's products in 2004, RCUSA shall grant PFE a promotional allowance of Fifteen Percent (15%) of the net invoice amount of each invoice, as a deduction 7 against each invoice. 8 Termination. RCUSA shall have the right to terminate this Agreement on thirty 7 (30) days written notice at any time in the event (i) PFE fails to perform its duties and 9 obligations that materially effect sales in the Territory after RCUSA has given PFE 30 days written notice to cure such failure and PFE fails to cure such default; (ii) PFE's purchases of the Products in any calendar year do not exceed the purchases of the Products for the 10 preceding calendar year by at least \$1.00 based on RC's list chain pricing prior to the Promotional Allowance deduction; (iii) the ownership of PFE is changed in a manner that will 11 result in an adverse effect on RCUSA's business within the Territory. 12 Market Development Allowance. So long as PFE is in compliance with its 8. duties and obligations, RCUSA shall pay PFE an annual market development allowance 13 funded by RCUSA each year in the amount of five percent (5%) of the aggregate annual dollar volume of Products shipped by RCUSA into the Territory directly and of Products 14 shipped by RCUSA to distribution facilities outside the Territory where such Products are sold at retail within the Territory, based upon RCUSA's wholesale price for the Products. The 15 Territory shall include any new county or counties in which PFE opens an Outlet before the end of the applicable calendar year, so long as such Outlet is comprised of at least 2,000 16 square feet and is intended to operate as a permanent, as opposed to temporary or seasonal, location. Such allowance, if any, shall be payable on or before March 15 of each year and 17 shall be accompanied by a written statement from RCUSA setting forth the calculations used in making such payment. 18 Confidentiality. PFE acknowledges and agrees that all data in this agreement constitute RCUSA's "Confidential Information". As an inducement to RCUSA to enter into 19 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 20 Confidential Information, except as expressly authorized in the course of performing its duties 21 hereunder. 7. The "promotional allowance" and "marketing development allowance" ("MDA") 22 provisions of the 2004 Agreement were intended to be kept confidential, and were in fact not 23 disclosed to third parties until Counter-Defendant initiated this lawsuit. Neither the promotional 24 allowance nor the MDA was made available to other purchasers from Counter-Claimant on terms 25 equivalent to those set forth in the 2004 Agreement, including purchasers that compete with Pet Food 26 Express. 27 8. Payments to Counter-Defendant reflecting the "promotional allowance" and the MDA 28

## Case3:09-cv-01483-MHP Document20 Filed05/26/09 Page5 of 9

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

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

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

11. Since the inception of the 2004 Agreement, Counter-Claimant credited Counter-Defendant with "promotional allowance" amounts, pursuant to the provisions of paragraph 6 of the2004 Agreement, in the aggregate amount of \$1,406,118.57.

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

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

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

15. The State court complaint indicated that a copy of the contract – that is to say, the2004 Agreement – was attached.

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

28

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1	18.	18. On May 5, 2009, counsel for RCUSA wrote to counsel for PFE, declaring that				
2	Counter-Defendant had violated the confidentiality provisions of the 2004 Agreement, and asserting					
3	the right, in view of the fundamental breach, to deem the 2004 Agreement repudiated. In the					
4	alternative, counsel informed PFE that a unilateral change in procedures regarding store visits					
5	adopted and announced by Counter-Defendant on March 30, 2009, also constituted a breach of the					
6	2004 Agreement, and that RCUSA would invoke its right to terminate the 2004 Agreement if the					
7	breach was not cured in 30 days.					
8	19. As of the date of filing of this Counterclaim, PFE's breaches of the 2004 Agreement					
9	have not been rectified.					
10	Count I: Declaratory Judgment					
11	20.	Counter-Claimant RCUSA repeats and realleges ¶¶ 1-19, supra, as if fully set forth				
12	herein.					
13	21.	The 2004 Agreement, and in particular the "Promotional Allowance" and "Market				
14	Development Allowance" provisions thereof as construed by Counter-Defendant, are unenforceable					
15	under California law. Specifically, both provisions violate the California Business and Professions					
16	Code, § 17045, which declares that					
17	The secret payment or allowance of rebates, refunds, commissions, or					
18		unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and				
19		conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful.				
20		anowance tends to destroy competition, is unrawful.				
21	22.	Both the promotional allowance and the MDA are "secret payment[s] or allowance of				
22	rebates, refunds, commissions, in the form of money," or are "unearned discounts," in whole or in					
23	part, within the meaning of California Business and Professions Code, § 17045.					
24	23.	Both the promotional allowance and the MDA constitute "secretly extending to certain				
25	purchasers special services or privileges not extended to all purchasers purchasing upon like terms					
26	and conditions," within the meaning of California Business and Professions Code, § 17045.					
27	24.	Both the promotional allowance and the MDA give Counter-Defendant a competitive				
28	advantage ov	er its competitors, to the detriment of such competitors, thereby "tending to destroy				
		- 5 - ANSWER AND COUNTERCLAIM				

## Case3:09-cv-01483-MHP Document20 Filed05/26/09 Page7 of 9

competition" within the meaning of California Business and Professions Code, § 17045.

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

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

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

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

#### **Count II: Declaratory Judgment**

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

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

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

27 ///

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

28 ///

Wherefore, Counter-Claimant seeks a declaratory judgment that the 2004 Agreement is unenforceable under the laws of the United States, to wit, the Robinson-Patman Act, 15 U.S.C. § 13 *et seq.* 

#### **Count III: Rescission and Restitution**

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

32. In the years since the inception of the 2004 Agreement, Counter-Claimant has credited to Counter-Defendant a total of no less than \$1,406,119 in discounts pursuant to the "promotional allowance," and has paid to Counter-Claimant a total of no less than \$559,721 reflecting the MDA, for a total of \$1,965,840.

33. Payment of the "promotional allowance" and MDA is impermissible under California law, and it is contrary to public policy to permit Counter-Defendant to retain a benefit obtained through an unenforceable contract. Counter-Defendant's solicitation, inducement, or receipt of such payments and discounts is specifically prohibited by the California Business and Professions Code and the Robinson-Patman Act.

34. On information and belief, Counter-Claimant alleges that PFE has used the "promotional allowance" credits and the MDA payments to generate windfall profits to which it is not entitled.

Wherefore, this Court should order the rescission of the 2004 Agreement, and the disgorgement and restitution by PFE of the profits it has made by virtue of payments unenforceable under California and federal law.

**Prayer for Relief** 

For all of the foregoing reasons, Counter-Claimant Royal Canin USA, Inc., respectfully prays that this Honorable Court:

1.

ASSUME jurisdiction over this matter;

DECLARE that the 2004 Agreement, and in particular its "promotional allowance"
 and "market development allowance" provisions are unenforceable under California Business and
 Professions Code §§ 17045 and 17200, as well as under the public policy of this State;

25

	Case	3:09-cv-01483-MHP	Document20	Filed05/26/09	Page9 of 9			
1	3.	DECLARE that the 2	004 Agreement, a	and in particular i	ts "promotional allowance"			
2	and "market of	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	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 re	elief as to the Cou	urt shall seem just	t and equitable.			
10								
11	DATED: May	26, 2009	Respectf	ully submitted,				
12								
13			Cindy H					
14			Attorney ROYAL	s for Defendant a CANIN USA, IN	and Counter-Claimant			
15								
16								
17								
18								
19								
20								
21								
22								
23								
24								
25								
26								
27								
28								
			0					
	371834589v1		- 8 -		ANSWER AND COUNTERCLAIM CASE NO. C09-01483 (MEJ)			