

Philip Gordon, ISBN 1996  
 Bruce S. Bistline, ISBN 1988  
 GORDON LAW OFFICES  
 623 West Hays Street  
 Boise, ID 83702  
 Telephone: 208/345/7100  
 Facsimile: 208/345-0050  
 pgordon@gordonlawoffices.com

Mick Hodges, ISBN 3831  
 HODGES LAW OFFICE, PLLC  
 163 2<sup>nd</sup> Ave. West  
 Twin Falls, Idaho 83303  
 Telephone: (208) 734-2011  
 Facsimile: (208) 734-2511  
 mick76hodges@aol.com

*Attorneys for Plaintiffs*

[additional counsel appear on signature page]

UNITED STATES DISTRICT COURT  
 DISTRICT OF IDAHO

LARRY KLIMES, PAUL LAVOIE and  
 RICHARD MUELLER individually and  
 on behalf of all others similarly situated,

Plaintiffs,

v.

MENU FOODS, a foreign corporation,

Defendant.

No.

CLASS ACTION COMPLAINT

COME NOW THE Plaintiffs, by and through undersigned Counsel, and hereby bring this civil action for damages on behalf of themselves and all others similarly situated against the above-named Defendant. Plaintiffs complain and allege as follows:

## I. NATURE OF ACTION

Plaintiffs bring this action as a Class Action under Rule 23 of the Federal Rules of Civil Procedure on behalf of all persons who purchased any dog or cat food that was produced by defendant Menu Foods and/or has had a dog or cat become ill or die as a result of eating the food.

The Defendant is a producer of, *inter alia*, dog and cat food. Menu Foods produces dog and cat food sold under familiar brand names such as Iams, Eukanuba and Science Diet. Menu Foods distributes its dog and cat food throughout the United States to retailers such as Wal-Mart, Kroger, Petco and Safeway.

Dog and cat food that the Defendant produced caused an unknown number of dogs and cats to become ill, and many of them to die.

To date, Menu Foods has recalled 50 brands of dog food and 40 brands of cat food that have sickened and killed dogs and cats. While all of the varieties of pet food which have already been recalled food are of the “cuts and gravy wet” style, Plaintiffs allege on information and belief that newly discovered evidence suggests that there may be one or more brands of dry food manufactured by this Defendant which may also contain substances which produce illness or death in dogs and cats.

As a result of the Defendant’s actions, Plaintiffs and other Class members have suffered economic damage.

## II. PARTIES

Plaintiff Larry Klimes has at all material times been a resident of Wendell, Idaho. Mr. Klimes was the owner of a dog that became ill and died after and as a direct cause of eating Defendant’s pet food.

Plaintiff Paul Lavoie has at all material times been a resident of Boise, Idaho.

Mr. Lavoie is the owner of a cat that became ill and required veterinary care after and as a direct cause of eating Defendant's pet food.

Plaintiff Richard Mueller has at all material times been a resident of Island Park, Idaho. Mr. Mueller is the owner of a dog that became ill and died after and as a direct cause of eating Defendant's pet food.

Defendant Menu Foods is, upon information and belief, a corporation organized under the laws of Canada that transacts business in the State of Idaho.

### **III. JURISDICTION AND VENUE**

Subject-matter jurisdiction is proper under 28 U.S.C. § 1332(a)(1) because the Plaintiffs and Defendant are citizens of different states and the amount in controversy exceeds \$75,000.00. This Court has supplemental jurisdiction over the state-law claims under 28 U.S.C. § 1367.

Venue is proper in this judicial district under 28 U.S.C. § 1391(a) because the Defendant systematically and continuously sold its product within this district and Defendant transacts business within this district.

### **IV. CLASS ACTION ALLEGATIONS**

Plaintiffs bring this suit as a class action under Rules 23(a), (b)(1), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure, on behalf of themselves and a Plaintiff Class (the "Class") composed of all persons who purchased any dog or cat food that was produced by the Defendant and/or has had a dog or cat become ill or die as a result of eating the food. Plaintiffs reserve the right to modify this class definition before moving for class certification.

The Class is ascertainable and there is a well-defined community of interest

among the members of the Class.

Membership in the Class is so numerous as to make it impractical to bring all Class members before the Court. The identity and exact number of Class members is unknown but is estimated to be at least in the hundreds, if not thousands considering the fact that Menu Foods has already identified 50 “wet” dog foods and 40 “wet” cat foods that may be causing harm to pets, and recently discovered evidence suggests that there may be one or more brands of dry food manufactured by this Defendant which may also contain substances which produce illness or death in dogs and cats. .

Plaintiffs’ claims are typical of those of other Class members, all of whom have suffered harm due to Defendant’s uniform course of conduct.

Plaintiffs are members of the Class.

There are numerous and substantial questions of law and fact common to all of the members of the Class that control this litigation and predominate over any questions affecting only individual members of the Class. The common issues include, but are not limited to, the following:

- (a) Was the Defendant’s dog and cat food materially defective, and unfit for use as dog or cat food?
- (b) Whether Defendant breached any contract, implied contract /or warranties related to the sale of the dog and cat food?
- (c) Did the Defendant’s dog and cat food cause Plaintiffs’ and other Class members’ pets to become ill and/or die?
- (d) Were Plaintiffs and other Class members damaged, and, if so, what is the proper measure thereof?
- (e) The appropriate form of injunctive, declaratory and other relief.

The prosecution of separate actions by members of the Class would create a risk of establishing incompatible standards of conduct for the Defendant – for example, one court might decide that the Defendant is obligated under the law to pay damages to Class members, and another might decide that the Defendant is not so obligated. Individual actions may, as a practical matter, be dispositive of the interests of the Class.

Plaintiffs will fairly and adequately protect the interests of the Class in that they have no interests that are antagonistic to other members of the Class and have retained counsel competent in the prosecution of class actions to represent themselves and the Class.

A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Given (i) the substantive complexity of this litigation; (ii) the size of individual Class members' claims; and (iii) the limited resources of the Class members, few, if any, Class members could afford to seek legal redress individually for the wrongs Defendant has committed against them.

Without a class action, the Class will continue to suffer damage, Defendant's violations of the law or laws will continue without remedy, and Defendant will continue to enjoy the fruits and proceeds of its unlawful misconduct.

This action will foster an orderly and expeditious administration of Class claims, economies of time, effort and expense, and uniformity of decision.

Inferences and presumptions of materiality and reliance are available to obtain class-wide determinations of those elements within the Class claims, as are accepted methodologies for class-wide proof of damages; alternatively, upon adjudication of Defendant's common liability, the Court can efficiently determine the claims of the individual Class members.

This action presents no difficulty that would impede the Court's management of it as a class action, and a class action is the best (if not the only) available means by which members of the Class can seek legal redress for the harm caused them by Defendant.

In the absence of a class action, Defendant would be unjustly enriched because it would be able to retain the benefits and fruits of its wrongful conduct.

The Claims in this case are also properly certifiable under applicable law.

## **V. STATEMENT OF FACTS**

Plaintiff Larry Klimes was the owner of a male dog named Joey.

Mr. Klimes purchased pouches of "wet food" manufactured by the Defendant for his dog's consumption.

Joey ate this food for some time before becoming ill.

Joey became extremely ill and died after consuming several portions of one of the Defendant's dog food products that has been identified as having been contaminated. He received veterinary treatment for the illness caused by this product, but, despite such care, he died.

Plaintiff Paul Lavoie was the owner of a male cat named Yoda.

Mr. Lavoie purchased pouches of "wet food" manufactured by the Defendant for his cat's consumption.

Yoda ate this food for some time before becoming ill.

Yoda became very ill after consuming several portions of one of the Defendant's cat food products that has been identified as having been contaminated. He received veterinary treatment for the illness caused by this product. Yoda survived, but, appears to have sustained permanent damage to his kidneys.

Plaintiff Richard Mueller was the owner of a male dog named Sammy.

Mr. Mueller purchased cans of “wet food” manufactured by the Defendant for his dog’s consumption.

Sammy ate this food for some time before becoming ill.

Sammy became extremely ill and died after consuming several portions of one of the Defendant’s dog food products that has been identified as having been contaminated. He received veterinary treatment for the illness caused by this product, but, despite such care, she died.

In March 2007, Menu Foods recalled 50 brands of cuts and gravy wet-style dog food and 40 brands of cuts and gravy wet-style cat food that had caused dogs and pets to become ill. One common symptom in the sick animals was kidney failure.

The wet dog food that Joey consumed shortly before becoming ill and dying is one of the brands that Menu Foods recalled.

The wet cat food that Yoda consumed shortly before becoming ill is also one of the brands that Menu Foods recalled.

The wet dog food that Sammy consumed shortly before becoming ill and dying is one of the brands that Menu Foods recalled.

As a result of Defendant’s acts and omissions Plaintiffs and other Class members have suffered economic damage.

## **VI. BREACH OF CONTRACT**

Plaintiffs reallege all prior allegations as though fully stated herein.

Plaintiffs and Class members purchased pet food produced by the Defendant based on the understanding that the food was safe for their pets to consume.

The pet food produced by the Defendant was not safe for pets to consume and

caused dogs and cats to become ill and, in some cases led to their deaths. The unsafe nature of the pet food constituted a breach of contract.

As a result of the breach Plaintiffs and Class members suffered damages that may fairly and reasonably be considered as arising naturally from the breach or may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it.

#### **VII. UNJUST ENRICHMENT**

Plaintiffs reallege all prior allegations as though fully stated herein.

Defendant was and continues to be unjustly enriched at the expense of Plaintiffs and other Class members.

Defendant should be required to disgorge this unjust enrichment.

#### **VIII. UNLAWFUL, DECEPTIVE AND UNFAIR BUSINESS PRACTICES**

Plaintiffs reallege all prior allegations as though fully stated herein.

Defendant's sale of tainted pet food constitutes an unlawful, deceptive and unfair business act within the meaning of the Idaho Consumer Protection Act, IC 48-601 *et seq.*, and similar statutory enactments of other states (including consumer protection and consumer sales practice acts).

Defendant's sale of hazardous pet food has the capacity to deceive a substantial portion of the public and to affect the public interest.

As a result of Defendant's unfair or deceptive acts or practices, Plaintiffs and other Class members suffered injuries in an amount to be proven at trial.



## **IX. BREACH OF WARRANTIES**

Plaintiffs reallege all prior allegations as though fully stated herein.

Cat food and dog food produced by Menu Foods are “goods” within the meaning of Uniform Commercial Code Article 2.

Defendant’s conduct as described herein constitutes breach of an implied or express warranty of affirmation.

Defendant’s conduct as described herein constitutes breach of an implied warranty of merchantability.

Defendant’s conduct as described herein constitutes breach of an implied warranty of fitness for a particular purpose.

As a proximate result of the aforementioned wrongful conduct and breach, Plaintiffs and other Class members have suffered damages in an amount to be proven at trial. Defendant had actual or constructive notice of such damages.

## **X. PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs and Class members request that the Court enter an order of judgment against Defendant including the following:

Certification of the action as a class action under Rule 23(b)(1) - (3) of the Federal Rules of Civil Procedure with respect to the claims for damages, and appointment of Plaintiffs as Class Representative and their counsel of record as Class Counsel;

Actual damages (including all general, special, incidental, and consequential damages), statutory damages (including treble damages), punitive damages (as allowed by the law(s) of the states having a legally sufficient connection with Defendant and its acts or omissions) and such other relief as provided by the statutes cited herein;

Prejudgment and post-judgment interest on such monetary relief;

Equitable relief in the form of restitution and/or disgorgement of all unlawful or illegal profits received by Defendant as a result of the unfair, unlawful and/or deceptive conduct alleged herein;

Other appropriate injunctive relief;

The costs of bringing this suit, including reasonable attorneys' fees; and

Such other relief as this Court may deem just, equitable and proper.

**JURY DEMAND**

Plaintiffs demand trial by jury on all triable issues.

DATED this 30th day of March, 2007.

\_\_\_\_\_/s/\_\_\_\_\_  
Philip Gordon  
Gordon Law Offices

HAGENS BERMAN SOBOL SHAPIRO, LLP  
Steve W. Berman, WSBA #12536  
1301 Fifth Avenue, Suite 2900  
Seattle, Washington 98101  
Telephone: (206) 623-7292  
E-mail: [steve@hbsslw.com](mailto:steve@hbsslw.com)

*Attorneys for Plaintiffs*