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1 b. In violation of Section 1770(a)(5) of the CLRA, Defendants  
2 represented that its goods or services sponsorship, approval,  
3 characteristics, uses or benefits which they do not have.

4 43. Defendants engaged in these unfair or deceptive acts and practices with  
5 the intent that they result, and which did result, in the sale of dog and cat food to  
6 Plaintiff and the Class.

7 44. In engaging in unfair or deceptive conduct in violation of the CLRA,  
8 Defendants actively concealed and intentionally failed to disclose material facts  
9 about the characteristics of their dog and cat food, and further represented that such  
10 food was suitable for pet consumption.

11 45. As a result of Defendants' acts and practices as alleged in this  
12 Complaint, Plaintiff seeks an Order enjoining Defendants from continuing to  
13 engage in unlawful, unfair or fraudulent business practices, and any other act  
14 prohibited by law. Plaintiff has contemporaneous with this filing provided notice to  
15 Defendants, and will amend to add claims for damages under the CLRA if  
16 Defendants do not take appropriate corrective action.

17 **SECOND CLAIM FOR RELIEF**  
18 **[Negligence]**

19 46. Plaintiff hereby incorporates by reference each of the preceding  
20 allegations as though fully set forth herein. Plaintiff asserts this claim against each  
21 and every Defendant on behalf of herself and the Class.

22 47. Defendants owed a duty to Plaintiff and the Class to provide pet food  
23 safe and suitable for pet consumption.

24 48. Through their failure to exercise due care, Defendants were negligent in  
25 manufacturing, distributing, marketing and selling pet food to Plaintiff and the  
26 Class.

27 49. Defendants failed to implement adequate quality control and adequate  
28 testing of its pet food that they introduced into the stream of commerce for sale to  
Plaintiff and the Class and for consumption by their pets.

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1 50. Defendants knew, or should have known, that their pet food, as  
2 described above, presents an unreasonable and unacceptable risk of injury or death  
3 to pets, and would result in foreseeable and avoidable damage.

4 51. The losses and damages described herein were foreseeable and  
5 avoidable.

6 52. Defendants' negligence proximately caused the losses and damages to  
7 Plaintiff and the Class.

8 **THIRD CLAIM FOR RELIEF**  
9 **[Violation of the California Unfair Competition Law,**  
10 **Business & Professions Code §§ 17200, et seq.]**

11 53. Plaintiff hereby incorporates by reference each of the preceding  
12 allegations as though fully set forth herein. Plaintiff asserts this claim against each  
13 and every Defendant on behalf of herself and the Class.

14 54. Defendants' acts and practices, described herein, constitute unlawful,  
15 unfair or fraudulent business practices in violation of the Unfair Competition Law,  
16 Business & Professions Code sections 17200 et seq ("UCL").

17 55. The utility of Defendants' manufacturing, distribution, marketing and/or  
18 sale of contaminated dog and cat food is significantly outweighed by the gravity of  
19 the harm they impose on Plaintiff and the Class. Defendants' acts and practices are  
20 oppressive, unscrupulous or substantially injurious to consumers.

21 56. The above-described unfair, unlawful and fraudulent business practices  
22 conducted by Defendants present a threat and likelihood of harm and deception to  
23 members of the Class in that Defendants have systematically perpetrated and  
24 continue to perpetrate the unfair, unlawful and fraudulent conduct upon members of  
25 the public by engaging in the conduct described herein.

26 57. Plaintiff and the Class have suffered harm as a proximate result of the  
27 wrongful conduct of the Defendants alleged herein, and therefore bring this claim  
28 for relief for restitution and disgorgement. Plaintiff is a person who has suffered

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1 injury in fact and has lost money and property as a result of such unfair  
2 competition.

3 58. Pursuant to Business and Professions Code sections 17200 and 17203,  
4 Plaintiff, on behalf of herself and the Class, seeks an order of this Court: enjoining  
5 Defendants from continued manufacture, distribution, marketing and sale of "cuts  
6 and gravy" style dog and cat food in an unfair, unlawful and fraudulent manner, and  
7 an order enjoining Defendants from collecting money from the Class from the sale  
8 of pet food. Plaintiff further requests an order awarding Plaintiff and the Class  
9 restitution and disgorgement of profits acquired by Defendants by means of such  
10 unlawful acts and practices, so as to deter Defendants and to rectify Defendants'  
11 unfair and unlawful practices and to restore any and all monies to Plaintiff and the  
12 Class, which are still retained by Defendants, plus interest and attorneys' fees and  
13 costs pursuant to, *inter alia*, Code of Civil Procedure section 1021.5.

14 **FOURTH CLAIM FOR RELIEF**  
15 **[For Unjust Enrichment]**

16 59. Plaintiff hereby realleges and incorporates by reference all paragraphs  
17 previously alleged herein. Plaintiff asserts this claim against each and every  
18 Defendant on behalf of herself and the Class.

19 60. Defendants have received, and continue to receive, a benefit at the  
20 expense of Plaintiff and members of the Class. Defendants have knowledge of this  
21 benefit.

22 61. Defendants have charged and collected from consumers, including  
23 Plaintiff and members of the Class, money for dog and cat food that endangers the  
24 lives of their pets. Defendants thus have received benefits that they have unjustly  
25 retained at the expense of Plaintiff and members of the Class.

26 62. As a direct and proximate result of Defendants' unlawful acts and  
27 conduct, Plaintiff and members of the Class were deprived of the use of their  
28 monies that was unlawfully charged and collected by Defendants, and are therefore

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1 entitled to restoration of their monies.

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**FIFTH CLAIM FOR RELIEF**  
**[Breach Of Express Warranty]**

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63. Plaintiff hereby realleges and incorporates by reference all paragraphs previously alleged herein. Plaintiff asserts this claim against each and every Defendant on behalf of herself and the Class.

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64. Defendants expressly warranted that their "cuts and gravy" style pet food was suitable and safe for pet consumption.

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65. Defendants also expressly warranted that "it manufacturer[s] the private-label wet pet-food industry's most comprehensive product program with the highest standards of quality."

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66. Plaintiff and the Class were induced by Defendants' marketing, advertising, promotion and labeling of the pet food as suitable "food" to rely upon such express warranty, and, in fact, relied upon the untrue warranty in purchasing the recalled pet food and feeding it to their pets.

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17

67. Plaintiff and the Class were damaged as a proximate result of Defendants' breach of their express warranty.

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**SIXTH CLAIM FOR RELIEF**  
**[Breach Of Implied Warranty]**

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68. Plaintiff hereby realleges and incorporates by reference all paragraphs previously alleged herein. Plaintiff asserts this claim against each and every Defendant on behalf of herself and the Class.

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69. Defendants are merchants under section 2-104 and 2-314 of the Uniform Commercial Code.

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70. Through their marketing, advertising, promotion and labeling of their "cuts and gravy" style pet food, Defendants impliedly warranted that such pet food was fit for the ordinary purpose for which it was intended, including to safely nourish pets with risk of illness or death, pursuant to section 2-314 of the Uniform

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1 Commercial Code.

2 71. Through their marketing, advertising, promotion and labeling,  
3 Defendants knew that Plaintiff and the Class would purchase their pet food for the  
4 ordinary purpose of providing nourishment to their pets.

5 72. Defendants manufactured, distributed, marketed, advertised, promoted  
6 and sold their pet food for the ordinary purpose for which it was purchased by  
7 Plaintiff and the Class.

8 73. Plaintiff and the Class relied upon Defendants' representations and  
9 warranties, and purchased and used Defendants' pet food for the ordinary purpose  
10 for which it was sold.

11 74. Defendants' pet food purchased by Plaintiff and the Class were unfit for  
12 their ordinary purpose when sold. Such food was sold while presenting a risk of  
13 risk of illness or death to pets. Defendants have accordingly breached the implied  
14 warranty of merchantability by selling such unfit pet food.

15 75. Plaintiff and the Class were damaged as a proximate result of  
16 Defendants' breach of warranty.

17 **PRAYER FOR RELIEF**

18 **WHEREFORE**, Plaintiff, on behalf of herself and all others similarly  
19 situated, prays for judgment against Defendants as follows:

- 20 1. For an order certifying the Class under Rule 23 of the Federal Rules of
- 21 Civil Procedure and appointing Plaintiff and her counsel of record to
- 22 represent the Class;
- 23 2. For restitution, disgorgement and/or other equitable relief as the Court
- 24 deems proper;
- 25 3. That pursuant to sections 17203 and 17204 of the Business and
- 26 Professions Code, Defendants be permanently enjoined from
- 27 performing or proposing to perform any of the aforementioned acts of
- 28 unfair, unlawful and fraudulent business practices;

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- 1 4. For compensatory damages sustained by Plaintiff and all others
- 2 similarly situated as a result of Defendants' unlawful acts and conduct;
- 3 5. For punitive damages pursuant to Civil Code § 1780(a)(4);
- 4 7. For a permanent injunction prohibiting Defendants from engaging in
- 5 the conduct and practices complained of herein;
- 6 8. For pre-judgment and post-judgment interest;
- 7 9. For reasonable attorneys' fees and costs of suit, including expert
- 8 witness fees; and
- 9 10. For such other and further relief as this Court may deem just and
- 10 proper.

**JURY DEMAND**

To the full extent available, Plaintiff demands a trial by jury.

11  
12  
13 Dated: March 16, 2007

**WEXLER TORISEVA WALLACE LLP**

14  
15  
16 By 

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27 *Attorneys for Plaintiff and the Class*

## **Exhibit B**

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
KNOXVILLE DIVISION**

<b>LIZAJEAN HOLT,</b>	)	
	)	
<b>Individually, and on behalf of similarly situated persons,</b>	)	
	)	
<b>Plaintiff,</b>	)	No. _____
	)	
<b>v.</b>	)	<b>Class action</b>
	)	
<b>MENU FOODS, INC.,</b>	)	<b>JURY DEMAND</b>
	)	<b>CLASS ACTION</b>
<b>Defendant.</b>	)	

**CLASS ACTION COMPLAINT**

**I. Class Action**

1. Plaintiff, individually and as representative of a Class of similarly situated persons more defined below, brings suit against the named Defendant for offering for sale and **selling** to Plaintiff and Class members pet food and food products – “cut and gravy” pet products – formally **recalled** on March 16, 2007. Defendant is a corporation doing business and operating in the United States. Defendant recalled cat and dog food products that are sold under numerous brands by several national chain stores in Tennessee and other States in the United States. The pet food products were produced by Defendant(s), a private label manufacturer, labeled by the Defendant, and then distributed and ultimately sold to Plaintiff, Class Members, and others. Defendant issued or caused to be issued a press release announcing the recall, and the United States Food and Drug Administration issued a press release the same day. These pet food products were intended to be placed in the stream of commerce and distributed and offered for sale



and sold to Plaintiff and purchasers in Tennessee and the United States and fed to their pets, cats and dogs.

## **II. Jurisdiction and Venue**

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1332 and subsection (d), and the Class Action Fairness Act of 2005, Pub. L.109-2 (Feb. 18, 2005); and over supplemental state law claims pursuant to 28 U.S.C. §1367.

3. Venue is proper in this Court and judicial district pursuant to 28 U.S.C. §1391 and/or Pub. L.109-2 because a part or substantial part of the events or omissions giving rise to the claim occurred in this judicial district, or a substantial part of property that is the subject of the action is situated in this judicial district.

4. In this judicial district, Plaintiff purchased the recalled pet food product made by or for Defendant, and her pet ate or consumed it. Thousands of other consumers/customers – including Plaintiff and other Class Members – purchased the recalled or contaminated products in this judicial district from retailers that Defendant, its agents, affiliates, or others it or they controlled sold or made available to them. In turn, retailers or others sold these recalled products to the general public, including Plaintiff, Class members and other purchasers. These products were purchased for consumption by the pets of Plaintiff and the Class members. Defendant made or caused these products to be offered for sale and sold to the public, including Plaintiff.

5. Rule 23 of the Federal Rules of Civil Procedure applies to class actions as well.

## **III. Plaintiff**

6. At all times material hereto, Plaintiff Lizajean Holt was and is a citizen of the State of Tennessee and the United States and resides in Knox County, Tennessee.

**IV. Plaintiff's Purchase(s)/Defendant's Recall**

7. Plaintiff purchased recalled brands of Pet Pride and Iams pet food from a national chain grocery store, Kroger, operating in Knox County, Tennessee. Kroger, like other retailers, did not alter the product produced by the Defendant in any way prior to selling it to Tennessee consumers and other consumers throughout the United States.

8. Without knowing that Defendants would recall the product after it was offered for sale and sold to her, Plaintiff purchased and fed the product(s) to her cat, her pet. Her pet became lethargic and began drinking large amounts of water and Plaintiff discontinued feeding the Defendant's products to her cat prior to the recall notice. Plaintiff and thousands of other consumers will now face veterinary bills to have their pets evaluated for kidney damage.

9. Before her purchase, Defendant never warned Plaintiff that the pet food product that she purchased for feeding her pet may or would cause it have health problems or concerns or that she would have to take her pet to a veterinarian due to a health concern relating to or resulting from the tainted pet food.

10. On or on about March 16, 2007, Defendant issued a recall for certain pet food for cats and dogs that it manufactured in plants that it controlled, owned, operated, or managed in the United States.

11. Defendant's business consists substantially of providing private label pet foods at its plants or pet foods under other brands, not its own. In turn, Defendant's

products are sold under a variety of labels or brands listed on its website as of March 17, 2007 and set forth below.

12. The product that Plaintiff purchased at a Kroger in Knoxville was a product recalled by Defendant.

13. After Plaintiff purchased the pet food and fed it to her cat, she learned about the recall and the actual or potential problems and concerns from purchasing and feeding the product to her pet.

14. Plaintiff bought the product(s) for their intended purposes: to feed her pet.

15. Defendant placed these pet products in the stream of commerce in Tennessee and elsewhere expecting that consumers such as Plaintiffs, the Class members, and the general public would feed these products to their pets.

**V. Defendant, Its Business, and the Recall**

16. At all times material hereto, Defendant Menu Foods, Inc. was and is a New Jersey corporation with its principal place of business in the State of New Jersey, specifically located at 9130 Griffith Morgan Lane, Pennsauken NJ 08110. Defendant is ultimately owned or controlled by Menu Foods Income Group, an Ontario based legal entity. Some of Defendant's high managerial or officers or agents with substantial authority are also high managerial officers or agents of Menu Foods Income Group. Defendant may be served through the Secretary of State for Tennessee or as provided by law.

17. Defendant Menu Foods, Inc. owns, controls, is related to or an affiliate of a firm with plants where the pet food is manufactured or processed that are located in the United States. These plants are located in Emporia, Kansas and, Pennsauken, New