

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

**JOHN McILVAIN, on behalf of himself  
and all others similarly situated,**

**Plaintiff,**

**v.**

**HILL’S PET NUTRITION, INC.,**

**Defendant.**

**CASE NO.:**

**CLASS ACTION COMPLAINT**

**DEMAND FOR JURY TRIAL**

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Plaintiff John McIlvain (“Plaintiff”), brings this action on behalf of himself and all others similarly situated against Hill’s Pet Nutrition, Inc. (“Defendant”) and alleges as follows:

**NATURE OF THE ACTION**

1. Defendant manufactures, sells, and distributes pet food for dogs under the “Science Diet” and “Prescription Diet” brands that it labels, advertises, and markets toward consumers as being safe and healthy for regular consumption by dogs, and specifically tailored for their unique health needs.

2. The products at issue in this action are certain sizes and varieties of Science Diet and Prescription Diet brands (collectively, the “Products”) subject to a January 31, 2019 recall which was later expanded on March 20, 2019.

3. Contrary to Defendant’s representations and warranties, it has manufactured, sold, and distributed Products that contain unreasonably dangerous levels of Vitamin D, which poses a substantial and unreasonable risk to dogs, including symptoms such as vomiting, loss of appetite,

increased thirst, increased urination, excessive drooling, and weight loss, and can lead to serious health issues in dogs including renal dysfunction.

4. As a result of Defendant's conduct described herein, many dog owners including Plaintiff and Class members, inclusive of Subclass as defined herein, were forced to watch helplessly as their dogs suffered from Vitamin D poisoning and its related symptoms due to consuming the Products. The dogs have required expensive veterinary treatment and prescription medications, and many of them have died, leading to additional damages incurred by their owners.

5. In addition to selling dangerous and contaminated Products, Defendant failed to timely issue a recall and failed to include all of the dangerous and contaminated Products in the initial January 31, 2019 recall, as shown by its subsequent expansion of the recall on March 20, 2019 to include additional Products.

6. Furthermore, Defendant knew or should have known prior to the January 31, 2019 recall that its Products contained dangerous levels of Vitamin D because (1) it claims to subject its suppliers and raw material providers with regular quality assurance and safety checks<sup>1</sup> and (2) Vitamin D toxicity was a well-known risk far earlier than the January 31, 2019 recall, as on December 3, 2018 several other brands of dog food were recalled as a result of containing dangerous levels of Vitamin D.<sup>2</sup>

7. As such, the lethal and hazardous nature of the Products was exacerbated by Defendant's excessive and unsubstantiated delay in warning consumers, including Plaintiff and Class members, that the Products were dangerous for consumption by dogs.

## **PARTIES**

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<sup>1</sup> See <https://www.hillspet.com/about-us/quality-and-safety>.

<sup>2</sup> See <https://www.fda.gov/animalveterinary/newsevents/ucm627485.htm>.

8. Plaintiff John McIlvain, a resident of Cranberry Township, Butler County, Pennsylvania, regularly purchased several of the Products from retailers in Butler County, Pennsylvania within the past three years, and also between August 2018 and April 2019. Plaintiff purchased the Products because he believed that they were at all times safe for consumption by his dog Reagan and contained ingredients that were tailored to his dog's specific health and dietary needs. Plaintiff's dog became ill on several occasions between October 2018 and April 2019, leading to veterinary visits, treatments and associated expenses. Plaintiff was unaware that the Products were the cause until shortly before filing this Complaint.

9. Defendant Hill's Pet Nutrition, Inc. is a Delaware corporation with its principal place of business at 400 SW 8<sup>th</sup> Avenue, Topeka, Kansas 66603. Defendant Hill's Pet Nutrition, Inc. manufactured, inspected, marketed and sold the Products.

10. Defendant manufactured, advertised, marketed, labeled, offered for sale, sold, and distributed pet food products to consumers, including Products, throughout the United States and New York using through thousands of pet supply retailers, veterinarians, and e-commerce retailers, claimed its Products are superior than other brands of dog food, and charged a premium price for them over other dog food brands.

#### **JURISDICTION AND VENUE**

11. This Court has jurisdiction over this action pursuant to pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), because there are 100 or more class members, the aggregate amount in controversy exceeds \$5,000,000, exclusive of interest, fees, and costs, and there is minimal diversity because Plaintiff and Defendant are citizens of different states.

12. The Court has personal jurisdiction over Defendant because it regularly conducts a substantial amount of business in this District, and intentionally and purposefully placed the

Products into the stream of commerce within the Western District of Pennsylvania and throughout the United States. Defendant's wrongful conduct, as alleged herein, was carried out in Pennsylvania and elsewhere throughout the United States.

13. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because Defendant transacts business and advertised in this District and has received substantial revenue and profits from the sale of the Products in this District, including from sales to Plaintiff and other Class members. Plaintiff's dog also consumed the Products and subsequently received veterinary care in this District. Therefore, a substantial part of the events and/or omissions giving rise to Plaintiff's claims occurred within this District.

#### **FACTS COMMON TO ALL CLASS MEMBERS**

##### ***Defendant's False and Misleading Misrepresentations and Warranties***

14. Defendant manufactures and sells pet food, including the Products, internationally, and is one of the largest pet food suppliers in the United States.

15. Defendant claims to "make nutrition a cornerstone of veterinary medicine"<sup>3</sup> and sells its Products through a nationwide distribution network of retail stores, veterinary clinics, and online retailers, including but not limited to Petco, PetSmart, Walmart, Amazon.com, and Chewy.com.

16. Defendant's Products are designed to address nutritional deficiencies and other health issues, and Defendant charges a premium price for its Products.

17. The Products encompass those included in Defendant's January 31, 2019 recall and subsequent March 20, 2019 expansion of that recall, which were published on both Defendant's

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<sup>3</sup> See <https://www.hillspet.com/about-us/our-company>.

website<sup>4</sup> and the U.S. Food and Drug Administration's ("FDA") website<sup>5</sup>, and include the following:

Product Name	SKU Number	Date Code / Lot Code
Hill's® Prescription Diet® k/d® Kidney Care with Lamb Canned Dog Food, 13oz, 12-pack	2697	102020T25
Hill's® Science Diet® Adult Perfect Weight Chicken & Vegetable Entrée dog food 12 x 12.8oz cans	2975	092020T28
Hill's® Prescription Diet® c/d® Multicare Urinary Care Chicken & Vegetable Stew Canned Dog Food, 5.5oz, 24-pack	3388	102020T18
Hill's® Prescription Diet® i/d® Low Fat Canine Rice, Vegetable & Chicken Stew 24 x 5.5oz cans	3391	092020T27
Hill's® Prescription Diet® r/d® Canine 12 x 12.3oz cans	7014	092020T28 102020T27 102020T28
Hill's® Science Diet® Adult Beef & Barley Entrée Canned Dog Food, 13oz, 12-pack	7039	092020T31 102020T21
Hill's® Science Diet® Adult 7+ Healthy Cuisine Roasted Chicken, Carrots & Spinach Stew dog food 12 x 12.5oz cans	10449	092020T28
Hill's® Science Diet® Healthy Cuisine Adult Braised Beef, Carrots & Peas Stew Canned Dog Food, 12.5oz, 12-pack	10451	102020T28
Hill's® Prescription Diet® c/d® Multicare Canine Chicken & Vegetable Stew 12.5oz	3384	092020T29 102020T10 102020T25
Hill's® Prescription Diet® i/d® Canine Chicken & Vegetable Stew 12.5oz	3389	092020T28 102020T24 102020T25 102020T04 102020T10 102020T19 102020T20
Hill's® Prescription Diet® i/d® Canine Chicken & Vegetable Stew 5.5oz	3390	102020T11 112020T23 122020T07
Hill's® Prescription Diet® z/d® Canine 5.5oz	5403	102020T17 112020T22
Hill's® Prescription Diet® g/d® Canine 13oz	7006	092020T22 112020T19 112020T20
Hill's® Prescription Diet® i/d® Canine 13oz	7008	092020T21 092020T30 102020T07 102020T11 112020T22 112020T23
Hill's® Prescription Diet® j/d® Canine 13oz	7009	112020T20
Hill's® Prescription Diet® k/d® Canine 13oz	7010	102020T10 102020T11

Hill's® Prescription Diet® w/d® Canine 13oz	7017	102020T24 102020T25 112020T09 112020T10 092020T30 102020T11 102020T12
Hill's® Prescription Diet® z/d® Canine 13oz	7018	102020T04 112020T22
Hill's® Prescription Diet® Metabolic + Mobility Canine Vegetable & Tuna Stew 12.5oz	10086	102020T05 102020T26
Hill's® Prescription Diet® w/d® Canine Vegetable & Chicken Stew 12.5oz	10129	112020T11 112020T05 102020T04 102020T21
Hill's® Prescription Diet® i/d® Low Fat Canine Rice, Vegetable & Chicken Stew 12.5oz	10423	092020T27 092020T28 092020T24 102020T17 102020T19 112020T04
Hill's® Prescription Diet® Derm Defense® Canine Chicken & Vegetable Stew 12.5oz	10509	102020T05
Hill's® Science Diet® Adult 7+ Small & Toy Breed Chicken & Barley Entrée Dog Food 5.8oz	4969	102020T18
Hill's® Science Diet® Puppy Chicken & Barley Entrée 13oz	7036	102020T12
Hill's® Science Diet® Adult Chicken & Barley Entrée Dog Food 13oz	7037	092020T22 102020T13 102020T14 112020T23 112020T24
Hill's® Science Diet® Adult Turkey & Barley Dog Food 13oz	7038	102020T06
Hill's® Science Diet® Adult Chicken & Beef Entrée Dog Food 13oz	7040	112020T10 112020T11 102020T13
Hill's® Science Diet® Adult Light with Liver Dog Food 13oz	7048	112020T19
Hill's® Science Diet® Adult 7+ Chicken & Barley Entrée Dog Food 13oz	7055	092020T31 102020T13
Hill's® Science Diet® Adult 7+ Beef & Barley Entrée Dog Food 13oz	7056	102020T28 092020T31 112020T20 112020T24
Hill's® Science Diet® Adult 7+ Turkey & Barley Entrée 13oz	7057	112020T19
Hill's® Science Diet® Adult 7+ Healthy Cuisine Braised Beef, Carrots & Peas Stew dog food 12.5oz	10452	102020T28 102020T14 102020T21
Hill's® Science Diet® Adult 7+ Youthful Vitality Chicken & Vegetable Stew dog food 12.5oz	10763	102020T04 102020T05 112020T11



18. As part of its pervasive labeling, advertising, and marketing campaign, Defendant represents that the Products provide “[n]utrition that can transform the lives of pets and comfort the pet parents and vets who care for them.”<sup>6</sup>

19. In order to justify pricing its Products at a premium over other brands, and to entice consumers into paying such prices, Defendant touts that “[w]e only accept ingredients from suppliers whose facilities meet stringent quality standards and who are approved by Hill's. Not only is each ingredient examined to ensure its safety, we also analyze each product's ingredient profile for essential nutrients to ensure your pet gets the stringent, precise formulation they need.”<sup>7</sup>

20. Defendant then goes a step further and states “We conduct annual quality systems audits for all manufacturing facilities to ensure we meet the high standards your pet deserves. We demand compliance with current Good Manufacturing Practices (cGMP) and Hill's high quality standards, so your pet's food is produced under clean and sanitary conditions.”<sup>8</sup>

21. Defendant then claims that “[w]e conduct final safety checks daily on every Hill's pet food product to help ensure the safety of your pet's food. Additionally, all finished products are physically inspected and tested for key nutrients prior to release to help ensure your pet gets a consistent products bag to bag.”<sup>9</sup>

22. Defendant states that its Products contain the “precise balance” of nutrients needed for a healthy dog: “Guided by science, we formulate our food with precise balance so your pet gets all the nutrients they need — and none they don't.”<sup>10</sup>

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<sup>6</sup> See <https://www.hillspet.com/dog-food>.

<sup>7</sup> <https://www.hillspet.com/about-us/quality-and-safety>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See <https://www.hillspet.com/about-us/nutritional-philosophy>.

23. In generally describing their Products, Defendant claims a “commitment to quality” with more than 220 veterinarians, food scientists, technicians, and PhD nutritionists developing their pet foods.<sup>11</sup>

24. Defendant claims that the Prescription Diet brand is made in an alliance with veterinarians which emphasizes a “unique position to find a solution” to dietary and health issues that dogs may face.<sup>12</sup>

25. Defendant also claims on its labels that the Prescription Diet brand provides “CLINICAL NUTRITION” or “THERAPEUTIC DOG NUTRITION” and is designed to address specific health conditions, including but not limited to kidney care, metabolic care, digestive care, skin/food sensitivities, urinary care, joint care, and aging.

26. Defendant claims that the Science Diet brand will “[f]eed your dog’s best life with biology-based nutrition” and that “we make our foods using only high-quality ingredients.”<sup>13</sup>

27. Furthermore, Defendant claims on its labels that the Science Diet brand is “VETERINARIAN RECOMMENDED.”

28. Defendant also issues a “100% Satisfaction” guarantee with every purchase or else offer a refund.

29. As shown herein and demonstrated by the recall of at least 675,000 (at least 13.5 million cans) of Products, resulting in Plaintiff and Class members’ dogs becoming sick or dying due to Vitamin D poisoning, Defendant’s aforementioned representations and warranties about the quality of its Products, the reliability of its ingredients and suppliers, and its allegedly stringent quality assurance and safety protocols are false and misleading.

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<sup>11</sup> *Id.*

<sup>12</sup> See <https://www.hillspet.com/prescription-diet/dog-food>.

<sup>13</sup> See <https://www.hillspet.com/science-diet/dog-food>.



***Defendant's Recall***

30. On January 31, 2019 Defendant announced in a press release that it was recalling certain of its Hill's Science Diet and Hill's Prescription Diet brand products due to a "supplier error," which indicated that consumption of the products could be dangerous to canines due to elevated levels of Vitamin D, and later expanded that recall on March 20, 2019 to include additional products.<sup>14</sup>

31. Defendant claimed "While vitamin D is an essential nutrient for dogs, ingestion of elevated levels can lead to potential health issues depending on the level of vitamin D and the length of exposure, and dogs may exhibit symptoms such as vomiting, loss of appetite, increased thirst, increased urination, excessive drooling, and weight loss. When consumed at very high levels, vitamin D can in rare cases lead to potentially life threatening health issues in dogs, including renal dysfunction."<sup>15</sup>

***Defendant's Price Premium***

32. Defendant charged a premium for its Products because it knew that the representations and warranties it made to consumers about the specialized health and nutritional benefits of the Products were important to consumers, and that such representations and warranties would induce consumers to pay a higher price for the Products over other brands of dog food.

33. Specifically, consumers are willing to pay a premium for Defendant's Products because Defendant represents and warrants that they are specifically formulated for the particular health needs of dogs and meet certain ingredient supply, quality, testing and oversight, and manufacturing standards.

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<sup>14</sup> See <https://www.hillspet.com/productlist>.

<sup>15</sup> *Id.*

34. Defendant's price premium is demonstrated below<sup>16</sup>:

Brand	Quantity	Price	Unit Price
Hill's Pres. Diet i/d Canine Chicken & Vegetable Stew 12.5 oz.	12 cans	\$39.99	\$3.33 per can \$0.27 per ounce
Hill's Pres. Diet w/d Canine Vegetable & Chicken Stew 12.5 oz.	12 cans	\$38.99	\$3.25 per can \$0.26 per ounce
Hill's Science Diet Adult Chicken & Barley Entrée Dog Food 13 oz.	12 cans	\$22.20	\$1.85 per can \$0.14 per ounce
Hill's Science Diet Adult 7+ Beef & Barley Entrée Dog Food 13 oz.	12 cans	\$22.20	\$1.85 per can \$0.14 per ounce
Purina ONE SmartBlend Classic Ground Beef and Brown Rice Adult 13 oz.	12 cans	\$12.67	\$1.06 per can \$0.08 per ounce
Iams ProActive Health Adult Chicken and Whole Grain Rice Pate 13 oz.	12 cans	\$16.80	\$1.40 per can \$0.11 per ounce
Nature's Recipe Easy-to-Digest Chicken, Rice & Barley Recipe Cuts in Gravy Stew 13.2 oz.	12 cans	\$13.99	\$1.17 per can \$0.09 per ounce
Purina Dog Chow High Protein Chicken Classic Ground Canned Dog Food 13 oz.	12 cans	\$12.60	\$1.05 per can \$0.08 per ounce

35. The fact that the Products contained dangerous levels of Vitamin D which endangered the health of dogs and ultimately led to Plaintiff's and Class members' dogs becoming sick or deceased shows that the Products were either diminished in value or had no value for their intended purpose as a dog food.

<sup>16</sup> Pricing information obtained from <https://www.chewy.com>.

36. As a direct and proximate result of Defendant's deceptive conduct, derogation from its duty to provide safe and healthy dog food to its customers, breach of warranties, unfair practices, and other conduct described herein, Plaintiff and Class members suffered actual damages and/or economic losses, including the cost of the Products, incursion of veterinary bills, prescription costs and, for those whose dogs perished, disposal expenses and/or funeral and burial costs.

**PLAINTIFF'S EXPERIENCE WITH THE PRODUCTS**

37. Plaintiff is the owner of Reagan.

38. Plaintiff purchased at least Defendant's Prescription Diet i/d Digestive Care Chicken & Vegetable Stew canned dog food 12.5 oz. 12-pack and Prescription Diet i/d Low Fat Digestive Care Rice, Vegetable & Chicken Stew Canned Dog Food, 12.5 oz, 12-pack within the past year.

39. Plaintiff paid a premium for these Products because Reagan is diabetic and Plaintiff believed that Defendant's Products would be a healthier alternative for him than other dog foods based on Defendant's labeling, advertising, and marketing representations and warranties described herein.

40. In or around July 2018, Plaintiff began feeding the Products to Reagan after unsuccessfully attempting to place him on a raw food diet.

41. Upon feeding Reagan the Products, he began to present symptoms of Vitamin D poisoning, including weight loss, dehydration, lethargy, and excessive urination.

42. Visits to his veterinarian revealed that Reagan's kidney numbers were irregular and that despite originally being a healthy 40 lbs., he had shrunk to a mere 28 lbs. and could not consistently put on weight.

43. On or about October 26, 2018, Reagan was admitted to the veterinarian for severe dehydration and weight loss and underwent in-patient treatment until he was released on October 29, 2019, resulting in a veterinary bill for \$4,084.91.

44. Reagan was subsequently re-admitted on or about November 1, 2018 after he began to suffer from similar symptoms, and again underwent in-patient treatment until he was released on November 3, 2019, resulting in a veterinary bill for \$2,651.44.

45. After Reagan's most recent visit to the veterinarian, he has stopped eating the Products, resulting in immediate subsidence of his symptoms of Vitamin D toxicity.

46. However, to date, Reagan has still not reached his normal weight of 40 lbs.

#### **CLASS ACTION ALLEGATIONS**

47. Plaintiff seeks certification of classes under Fed.R.Civ.P. 23 on behalf of himself and on behalf of all other persons who purchased from retailers nationwide and in the State of Pennsylvania Defendant's Products (herein throughout, the "Classes"). Excluded from the Classes are Defendant, any entity in which Defendant has a controlling interest, and its legal representatives, officers, directors, employees, assigns and successors; persons and entities that purchased the Products at resale; the Judge(s) to whom this case is assigned and any member(s) of the Judge's staff or immediate family; and Class Counsel.

48. Plaintiff brings this action on behalf of the following proposed Classes:

a. Nationwide Class: All persons in the United States who purchased the Products.

b. Pennsylvania Subclass: All persons in Pennsylvania who purchased the Products.

49. **Numerosity:** Defendant has manufactured and sold the Products to tens of thousands of consumers. As of the date of filing, Defendant has recalled at least 675,000 cases—or 13.5 million cans—of Products. Members of the Classes are thus too numerous to join in a

single action. Moreover, members of the Classes may be identified through retailer sales records, veterinary practice sales records, and self-identification processes, and may then be notified of the pendency of this action by mail or electronic mail (which can be supplemented by published notice if deemed necessary or appropriate by the Court).

50. **Commonality and Predominance:** Common questions of law and fact exist as to all proposed members of the Class and predominate over questions affecting only individual members of the Class. These common questions include:

- a. Whether the Products contained dangerous levels of Vitamin D;
- b. Whether Defendant's labeling, advertising, and marketing statements are false or misleading;
- c. Whether Defendant breached any express warranties;
- d. Whether Defendant breached any implied warranties;
- e. Whether the Products were either diminished in value had no value as a dog food;
- f. Whether Defendant owed a duty of care to Plaintiff and Class members;
- g. Whether Defendant breached that duty of care;
- h. Whether Defendant was unjustly enriched as a result Plaintiff and Class members purchasing the Products;
- i. Whether Plaintiff and Class members have sustained damages as a result of the alleged conduct and, if so, the appropriate measure of such damages;
- j. Whether Defendant's conduct violated various state consumer protection statutes;  
and
- k. Whether Plaintiff and Class members are entitled to punitive damages and, if so, in what amount.

51. **Typicality:** Plaintiff's claims are typical of the claims of the proposed Classes. Plaintiff and the members of the proposed Classes all purchased the Products, giving rise to substantially the same claims.

52. **Adequacy:** Plaintiff is an adequate representative of the proposed Classes because his interests do not conflict with the interests of the members of the Classes he seeks to represent. Plaintiff has retained counsel competent and experienced in complex class action litigation, and will prosecute this action vigorously on class members' behalf.

53. **Superiority:** A class action is superior to other available means for the fair and efficient adjudication of this dispute. The injury suffered by each Class member, while meaningful on an individual basis, is not great enough to make the prosecution of individual actions economically feasible. Even if members themselves could afford such individualized litigation, the court system could not. In addition to the burden and expense of managing many actions arising from this issue, individualized litigation presents a potential for inconsistent or contradictory judgments. Individualized litigation increases the delay and expense to all parties and the court system presented by the legal and factual issues of the case. By contrast, a class action presents far fewer management difficulties and provides the benefits of a single adjudication, economies of scale, and comprehensive supervision by a single court.

54. In the alternative, the proposed Classes may be certified because: (1) The prosecution of separate actions by the individual members of the proposed Classes would create a risk of inconsistent adjudications, which could establish incompatible standards of conduct for Defendant; (2) The prosecution of individual actions could result in adjudications, which, as a practical matter, would be dispositive of the interests of non-party Class members or which would substantially impair their ability to protect their interests; and (3) Defendant has acted or refused

to act on grounds generally applicable to the proposed Classes, thereby making appropriate final relief with respect to the members of the proposed Classes as a whole.

55. Defendant benefitted from the sale of the Products to Plaintiff and Class members in a determinable amount.

## **COUNT I**

### **Violation of Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Cons. Stat. §§ 201-2 and 201-3, et seq.**

56. Plaintiff, individually and on behalf of the Pennsylvania Subclass, repeats and realleges all previous paragraphs as if fully set forth herein.

57. Defendant is a “person,” as meant by 73 Pa. Cons. Stat. § 201-2(2).

58. Plaintiff and Pennsylvania Subclass members purchased goods and services in “trade” and “commerce,” as meant by 73 Pa. Cons. Stat. § 201-2(3), primarily for personal, family, and/or household purposes.

59. Defendant engaged in unfair methods of competition and unfair or deceptive acts or practices in the conduct of its trade and commerce in violation of 73 Pa. Cons. Stat. § 201-3, including the following: representing that its goods and services have characteristics, uses, benefits, and qualities they do not have (73 Pa. Cons. Stat. § 201-2(4)(v)); representing that its goods and services are of a particular standard or quality if they are another (73 Pa. Cons. Stat. § 201-2(v)(vii)); and advertising its goods and services with intent not to sell them as advertised (73 Pa. Cons. Stat. § 201-2(4)(ix)).

60. Defendant’s representations and omissions were material because they were likely to deceive reasonable consumers.

61. As a direct and proximate result of Defendant’s deceptive acts and practices, Plaintiff and the Pennsylvania Subclass have suffered and will continue to suffer injury,



ascertainable losses of money or property, and monetary and non-monetary damages, including from not receiving the benefit of their bargain in purchasing the Products.

62. Plaintiff and the Pennsylvania Subclass seek all monetary and non-monetary relief allowed by law, including actual damages or statutory damages of \$100 (whichever is greater), treble damages, attorneys' fees and costs, and any additional relief this Court deems necessary or proper.

## **COUNT II**

### **Breach of Express Warranty**

63. Plaintiff, individually and on behalf of the Classes, repeats and realleges all previous paragraphs as if fully set forth herein.

64. Defendant sold and Plaintiff and Class members purchased Defendant's Products.

65. Defendant represented and warranted in its labeling, marketing, advertising, and promotion of the Products that they were safe and healthy for consumption by dogs and were subject to regular quality assurance and safety reviews.

66. Defendant's Products did not conform to its representations and warranties because they contained dangerous levels of Vitamin D which is harmful to dogs and led to severe health symptoms and, in some cases, death.

67. As a direct and proximate result of Defendant's breaches of its express warranties and the Products' failure to conform to such warranties, Plaintiff and Class members have been damaged in that they did not receive the Products as specifically warranted and/or paid a premium price for Products when their value was diminished, they had no value for their intended purpose, and incurred veterinary costs, prescription costs, and other related expenses.

## **COUNT III**

### **Breach of Implied Warranty**

68. Plaintiff, individually and on behalf of the Classes, repeats and realleges all previous paragraphs as if fully set forth herein.

69. Defendant sold and Plaintiff and Class members purchased Defendant's Products.

70. At the time Defendant manufactured, advertised, marketed, sold, and distributed the Products, Defendant impliedly warranted that the Products were of merchantable quality and safe and fit for Plaintiff and Class members to use as a dog food.

71. Plaintiff and Class members believed that the Products were of merchantable quality and safe and fit for their intended use as a dog food.

72. Plaintiff and Class members could not have known about the risks associated with the Products until after their dogs exhibited symptoms of Vitamin D poisoning.

73. Neither Plaintiff nor Class members altered the Defendant's Products after purchasing them and used them as instructed.

74. Defendant's Products were not merchantable, did not pass without objection in the trade under the label description, were not of fair average quality within that description, were not fit for the ordinary and intended purpose for which such goods are used (as a dog food), and did not conform to the promises or affirmations of fact made on the label, advertising, marketing, and other representations and warranties because they contained dangerous levels of Vitamin D.

75. As a direct and proximate result of Defendant's breaches of its implied warranties and the Products' failure to conform to such warranties, Plaintiff and Class members have been damaged in that they did not receive the Products as warranted and/or paid a premium price for Products when their value was diminished, they had no value for their intended purpose, and incurred veterinary costs, prescription costs, and other related expenses.

**COUNT IV**

**Negligence**

76. Plaintiff, individually and on behalf of the Classes, repeats and realleges all previous paragraphs as if fully set forth herein.

77. Defendant claims it implements regular quality assurance and safety protocols to with the purpose of making sure that its Products are safe for dogs to consume.

78. Defendant owed a duty to Plaintiff and Class members to label, advertise, market, manufacture, distribute, and sell products that are safe and fit dogs to consume.

79. Defendant failed to exercise due care, and was negligent in the formulation, manufacture, distribution, inspecting, labeling, advertising, marketing, warranting, and sale of the Products to Plaintiff and Class members.

80. Defendant failed to implement adequate quality assurance and safety inspection procedures to test the Products for dangerous levels of Vitamin D, resulting in such Products entering the stream of commerce for sale to Plaintiff and Class members and for consumption by their dogs.

81. Defendant knew or should have known that its Products posed an unreasonable and unacceptable risk of injury or death to Plaintiff's and Class members' dogs, and that its actions or omissions would result in damages that were both foreseeable and could have been avoided.

82. As a direct and proximate result of Defendant's breaches of its duties, Plaintiff and Class members have been damaged and suffered ascertainable losses including payment for unreasonably dangerous Products, payment of veterinary costs, prescription costs, and other related expenses and losses.

**COUNT V**

**Unjust Enrichment**

83. Plaintiff, individually and on behalf of the Classes, repeats and realleges all previous paragraphs as if fully set forth herein.

84. Plaintiff conferred benefits on Defendant by purchasing the Products at a premium price.

85. Defendant has knowledge of and enjoyed such benefits.

86. Defendant has been unjustly enriched in retaining the revenues derived from Plaintiff's and Class members' purchases of the Products. Retention of those monies under these circumstances is unjust and inequitable as a result of Defendant's false and misleading representations and warranties described herein because the Products contained dangerous levels of Vitamin D that are harmful to dogs, which caused Plaintiff and Class members to suffer injuries and losses because they would not have purchased the Products otherwise.

87. Defendant should be required to return to Plaintiff and Class members the amount they paid to purchase the Products or else be unjustly enriched.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seeks the following relief:

A. An order certifying the Nationwide Class and Pennsylvania Subclass under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiff as representative of the Class and Subclass and Plaintiff's attorneys as Class Counsel to represent the Class and Subclass members;

B. For compensatory, statutory, and punitive damages in amounts to be determined by the Court and/or jury;

C. For prejudgment and postjudgment interest on all amounts awarded

- D. For an order of restitution and all other forms of equitable monetary relief;
- E. For an order awarding Plaintiff and the Classes their reasonable attorneys' fees and expenses and costs of suit;
- F. For any further relief the Court may deem necessary or appropriate.

**DEMAND FOR JURY TRIAL**

Plaintiff demands a trial by jury on all claims so triable.

Date: April 26, 2019

**Morrow & Artim, PC**

By: /s/Clayton S. Morrow  
Clay Morrow, Esq. (PA Attorney I.D. 53521)

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Counsel for Plaintiff and the Proposed Classes

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

JOHN McILVAIN,

(b) County of Residence of First Listed Plaintiff Allegheny County (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Clayton S. Morrow / Morrow & Artim, PC 304 Ross Street, 7th Floor Pittsburgh, PA 15219 (412) 209-0656

DEFENDANTS

HILL'S PET NUTRITION, INC.

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
1 1
2 2
3 3
4 4
5 5
6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Real Estate, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation - Transfer
8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. Section 1332(d)(2)

Brief description of cause: Consumer Fraud for Mislabeling / Selling Hazardous Dog Food

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ 5,000,000.00 CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 04/26/2019 SIGNATURE OF ATTORNEY OF RECORD /s/Clayton S. Morrow

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE



## INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

### Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.  
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.  
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.  
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.  
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.  
 Original Proceedings. (1) Cases which originate in the United States district courts.  
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.  
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.  
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.  
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.  
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.  
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket. **PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.  
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.  
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.



AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Pennsylvania

JOHN McILVAIN,

Plaintiff(s)

v.

HILL'S PET NUTRITION, INC.

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

Hill's Pet Nutrition, Inc.
400 SW 8th Avenue
Topeka, Kansas 66603

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Clayton S. Morrow
Morrow & Artim, PC
304 Ross Street, 7th Floor
Pittsburgh, PA 15219

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_ .

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_ , and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* \_\_\_\_\_ , who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the summons unexecuted because \_\_\_\_\_ ; or

Other *(specify)*:

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00 \_\_\_\_\_ .

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

**Print**

**Save As...**

**Reset**