No.

IN THE

Supreme Court of the United States

ANASTASIA WULLSCHLEGER AND GERALDINE BREWER,
PETITIONERS

v.

ROYAL CANIN U.S.A., INC. AND NESTLE PURINA
PETCARE COMPANY

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Petitioners' class action complaint brought in state court seeking relief under Missouri law for respondents' marketing of fake prescription pet food products raised neither a substantial nor a disputed federal question. In ruling nonetheless that federal courts have subject-matter jurisdiction over this suit, did the court of appeals introduce chaos into this Court's coherent jurisprudence about when federal question jurisdiction will lie over state-law claims?

STATEMENT OF RELATED CASES

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The published Opinion of the United States Court of Appeals for the Eighth Circuit in *Anastasia Wullschleger et al. v. Royal Canin U.S.A., Inc. et al.*, C.A. No. 19-2645, decided March 13, 2020, and reported at 953 F.3d 519 (8th Cir. 2020), ruling that there was federal subject matter jurisdiction to hear petitioners' class action and vacating the decision of the federal district court for the Western District of Missouri to remand petitioners' civil action to the Circuit Court of Jackson County, Missouri, is set forth in the Appendix hereto (App. 1-7).

The unpublished and unreported Order of the federal district court for the Western District of Missouri in *Anastasia Wullschleger et al. v. Royal Canin U.S.A., Inc. et al.*, Civil Action No. 19-00235-CV-W-GAF, filed June 13, 2019, remanding petitioners' class action back to the Circuit Court of Jackson County, Missouri, is set forth in the Appendix hereto (App. 8-22).

The unpublished Order of the United States Court of Appeals for the Eighth Circuit in *Anastasia Wullschleger et al. v. Royal Canin U.S.A., Inc. et al.*, C.A. No. 19-2645, filed April 16, 2020, denying petitioners' timely filed petition for Panel rehearing or for rehearing *en banc*, is set forth in the Appendix hereto (App. 23).

Petitioners' civil complaint alleging a putative class action against respondents, filed in the Circuit Court of Jackson County, Missouri, on February 8, 2019, is set forth in the Appendix hereto (App. 24-85).

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit vacating the decision of the federal district court for the Western District of Missouri to remand petitioners' civil action to the Circuit Court of Jackson County, Missouri, was filed on March 13, 2020; and its further Order denying petitioners' timely filed petition for Panel rehearing or for rehearing *en banc* was filed and decided on April 16, 2020 (App. 1-7;23).

In addition, on March 19, 2020, in light of the ongoing public health emergency associated with the COVID-19 pandemic, this Court issued an Order extending the deadline for the filing any petition for writ of certiorari due on or after March 19, 2020, for 150 days from the date of the court of appeals' order denying a timely filed petition for rehearing.

This petition for writ of certiorari is filed within the time allowed by this Court's rules, 28 U.S.C. § 2101(c), and this Court's Order of March 19, 2020.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Article III, § 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties

made, or which shall be made, under their Authority....

28 U.S.C. § 1331 (Federal question jurisdiction):

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332 (c)(1) & (d)(2) (diversity of citizenship):

(c) For the purposes of this section and section 1441 of this title—
(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business....
....
(d)
....
(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—
(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

28 U.S.C. §§ 1441(a) & (b) (Removal of civil actions):

(a) Generally.—
Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Removal Based on Diversity of Citizenship.—
(1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.
(2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. §1446(a) (Procedure for removal of civil actions):

(a) Generally.—

A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

28 U.S.C. § 1453(b) (removal of class actions):

(b) In General.—
A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

21 U.S.C. § 321(g)(1) (Federal Food Drug and Cosmetic Act [FDCA]):

(g)
(1) The term "drug" means (A) articles recognized in the official United States Pharmacopoeia,[1] official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals;

Missouri Revised Statutes § 407.020.1:

> Unlawful practices, penalty--exceptions.
>
> 407.020. 1. The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri, is declared to be an unlawful practice....Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.

Missouri Revised Statutes §§ 416.031.1 & 416.031.2:

> Restraint of trade prohibited.
>
> 416.031. 1. Every contract, combination or conspiracy in restraint of trade or commerce in this state is unlawful.
> 2. It is unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade or commerce in this state.

STATEMENT

In June of 2015, petitioner Anastasia Wullschleger ("petitioner" or "Wullschleger") began purchasing for her dog prescription pet food marketed by respondent Royal Canin U.S.A., Inc. ("respondent" or "Royal Canin") at the recommendation of a veterinarian in her local PetSmart store. She continued to do so based upon the representations by both the veterinarian and PetSmart personnel that she could not buy this pet food without a prescription and a completed MedCard from the veterinarian (App. 59-60). In fact, Royal Canin's prescription pet food contains *no* drug, medicine or other ingredient that requires a prescription or regulatory approval.

Having been told that she needed a prescription to buy Royal Canin's dog food, Wullschleger believed that this product was intended to treat the specific health problems of her dog; that it contained medicine of some sort; that some kind of regulatory oversight was associated with its manufacture; and that her purchase of this prescription pet food was akin to her purchase of prescription drugs from a pharmacy. She also knew that this pet food was located in a section of the PetSmart store separate from non-prescription pet food; that this section contained an advisory to customers that a prescription and a MedCard were required for its purchase; and that it sold for a significantly higher price than non-prescription pet food (App. 59-62). Because of this prescription requirement, Wullschleger paid more for Royal Canin's prescription dog food than she would have paid in the absence of such a requirement (App. 62).

Beginning in 2009 and continuing until 2019, petitioner Geraldine Brewer ("petitioner" or "Brewer") at the recommendation of her veterinarian purchased for her cat prescription pet food marketed by respondent Nestle Purina Petcare Company ("respondent" or "Purina"). She continued to do so based upon representations by both her veterinarian and PetSmart personnel that she could not buy this specialized food without a prescription and a completed MedCard from the veterinarian. (App. 62-63). In fact, Purina's prescription cat food contains *no* drug, medicine or other ingredient that requires a prescription or regulatory approval.

Having been told that she needed a prescription to buy Purina's cat food, Brewer believed that this product was intended to treat the specific health problems of her cat; that it contained medicine of some sort; that some kind of regulatory oversight was associated with its manufacture; and that her purchase of this prescription pet food was akin to her purchase of prescription drugs from a pharmacy. She also knew that this pet food was located in a section of the PetSmart store separate from non-prescription pet food; that this section contained an advisory to customers that a prescription and a MedCard were required for its purchase; and that it sold for a significantly higher price than non-prescription pet food (App. 63-64). Because of this prescription requirement, Brewer paid more for Purina's prescription cat food than she would have paid without such a requirement (App. 64-65).

In both cases, Royal Canin and Purina ("respondents") marketed to petitioners their fake prescription pet food products in order to cause

Wullschleger and Brewer to purchase these products at a significantly higher price than non-prescription pet food (App. 25-29). Respondents *never* submitted any of their so-called "prescription" pet food products to the U.S. Food and Drug Administration ("FDA") for review and approval, as required for any prescription pet product, because, as respondents well knew, *none* of their products possessed medicinal or drug properties which would warrant oversight by the FDA (App. 26). Yet respondents' scheme misled petitioners as consumers into believing they were purchasing an actual prescription product, creating that experience by requiring a veterinarian's prescription for their purchase (App. 27-28).

Like most reasonable consumers, petitioners are less price sensitive when purchasing prescription products as opposed to over-the-counter ones. In this way, respondents' marketing caused petitioners to overpay for respondents' fake prescription products, depriving them of any meaningful consumer choice. In the absence of this unlawful scheme, petitioners likely would have purchased similar pet food but at a lower price (App. 40-41). Thus when they purchased respondents' prescription pet products, they were caused to pay an exorbitant, unwarranted price for them, thereby injuring them and causing them recoverable loss and damage (App. 43;64-65;76;78; 79) .

On February 8, 2019, petitioners brought this putative class action against respondents in the Circuit Court of Jackson County, Missouri, alleging the facts already recited above (App. 3;9). Their state-court "petition" identified both petitioners as citizens of Missouri and they brought this suit not only on their

own behalf but also on behalf of all other similarly situated Missouri citizens, i.e., those Missouri citizens to whom respondents marketed their fake prescription pet products scheme (App. 2; 9). As they claimed in the first paragraph of their petition, respondents conspired with other pet food manufacturers to "create[ ] and enforce[ ] upon retailers and consumers the mandatory use of a prescription, issued by a veterinarian, as a condition precedent to the purchase of [their]...dog and cat food" (App. 10).

Petitioners further alleged that respondents' insistence on a veterinarian-issued prescription as a condition precedent for the purchase of their pet food misled reasonable consumers like them to believe that this product had been tested and approved by the FDA, was subject to government inspection and oversight, and possessed medicinal and drug properties for which consumers are willing to pay a premium (*Id.*). That *none* of these things were true, petitioners claimed, renders respondents' prescription scheme fake, misleading, and contrary to law (*Id.*).

Petitioners alleged in seven counts that respondents violated the Missouri Merchandising Practices Act (Mo. Rev. Stat. § 407.020.1) ("MMPA"), which prohibits any "deception, fraud, false pretense, false promise, misrepresentation, [or] unfair practice...in connection with the sale or advertisement of any merchandise in trade or commerce..."; the Missouri Antitrust Law (Mo. Rev. Stat. §§ 416.031.1 & 416.031.2), which forbids any conspiracy to monopolize trade or commerce; and the Missouri law of unjust enrichment (App. 10-11).

After being served with the petition, Royal Canin with Purina's consent removed this case to the federal district court for the Western District of Missouri pursuant to 28 U.S.C. § 1453(b), resting their removal on federal-question jurisdiction under 28 U.S.C. § 1331, and diversity of citizenship under 28 U.S.C. § 1332(c)(1) (App. 3;9;12). On April 24, 2019, petitioners moved to remand the case back to the Circuit Court of Jackson County (App. 3;8). On June 13, 2019, the district court, Fenner, J., issued an Order granting petitioners' motion to remand to state court (App. 8-22).

The district judge noted that removal statutes are strictly construed with all doubts about federal jurisdiction resolved in favor of state jurisdiction over the controversy (App. 11-12). As for federal-question jurisdiction, the motion judge resorted to the well-pleaded complaint rule, i.e., that federal jurisdiction is established only if a federal question is presented on the face of a properly pleaded complaint (App. 12-13). Applying this Court's holding in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005), the district judge examined the complaint to determine if petitioners' state-law claims necessarily raised a substantial and actually disputed federal issue, which a federal forum "may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities" (App. 13 quoting *Grable*, *supra*).

The district court could find no such substantial federal issue on the face of petitioners' complaint (App.14-17). It read the allegations describing respondents' fake prescription requirement as

bottomed on petitioners' claim that none of respondents' pet food contained a drug or medicine warranting review or approval by the FDA; that neither Missouri law nor federal law therefore requires a prescription for such products; and that by nonetheless imposing a prescription requirement on their sale (at an exorbitant price), respondents have misrepresented to consumers like them that these products have been evaluated by the FDA as a drug or medicine that can be sold by prescription only (App. 13-15).

As Judge Fenner concluded, none of these allegations implicates the Federal Food, Drug and Cosmetics Act (21 U.S.C. §§ 301 *et seq.*) ("FDCA"), requires an interpretation of FDA regulations or invokes even FDA's Compliance Policy Guide ("CPG") (App. 13-14). Petitioners alleged instead a straightforward violation of state law, i.e., the MMPA, which prohibits any "deception, fraud, false pretense, false promise, misrepresentation, [or] unfair practice...in connection with the sale or advertisement of any merchandise in trade or commerce..." (App. 14-15). That is, petitioners' "theory----that these representations by respondents deceive consumers into believing th[eir] products comply with FDA regulations, amounts to an unlawful act in violation of the MMPA----requires only interpretations of the MMPA and not the FDCA or CPG" (App. 15).

Even if respondents, as alleged, failed to submit their pet food products to the FDA for its approval and thereby violated the FDCA as well as the CPG when they thereafter sold these pet products by prescription only, petitioners' theory of liability "does not depend on

an interpretation of federal law, but rather whether these actions resulted in unlawful practice that violated the MMPA" (*Id.*).

As for petitioners' state antitrust claims under Mo. Rev. Stat. § 416.031.2, the district judge ruled that they "do not ask a court to determine if [respondents] violated the FDCA or the CPG but rather ask a court to determine if [respondents] did, in fact, *agree* to impose a prescription requirement on their products despite not submitting them to the FDA for analysis and approval" (App. 16) (emphasis supplied). This theory of liability requires petitioners

> to prove that, through these actions, [respondents] engaged in monopolistic behavior, attempted to monopolize, or conspired to monopolize the prescription pet food market. As such, [petitioners'] antitrust claims do not depend on an interpretation of federal law for their resolution.

(*Id.*).

Finally, the district court determined that under Missouri's unjust enrichment law, all a judge or jury would evaluate is the monetary benefit reaped by respondents' as the result of their conduct in charging a premium price for their fake prescription pet food in the absence of approval by the FDA, *not* whether these actions violated the FDCA or the CPG themselves (App. 16-17). In short, it concluded that all of respondents' actions alleged by petitioners in their complaint can be evaluated by reference to state law

only and these state-law claims therefore did not implicate significant federal issues (App. 17).

Addressing federal jurisdiction based on diversity of citizenship, Judge Fenner ruled that respondents had not met their burden under the Class Action Fairness Act, 28 U.S.C. § 1332(c)(1) ("CAFA") (App. 17-21). Both Royal Canin and Purina are citizens of Missouri, as are petitioners, and there is no minimal diversity (*Id.*). Moreover, Royal Canin could not rely on its dual citizenship to create this minimal diversity (*Id.*). Because it lacked both subject-matter and diversity jurisdiction, the district court ordered the case be remanded to the Circuit Court of Jackson County, Missouri, for further proceedings (App. 21).

The court of appeals granted respondents' petition for appellate review under 28 U.S.C. § 1453(c)(1), limiting its examination to the issue of federal question jurisdiction (App. 3). On March 13, 2020, the Panel, speaking through Erickson, J., vacated the district judge's order and remanded the case to the federal district court (App. 1-7). According to the court of appeals, petitioners "rel[ied] explicitly on federal law throughout their pleadings," alleging that respondents' "conduct amounted to a joint and coordinated violation of the...FDCA and the FDA's regulatory guidance in the...CPG" (App. 3;4).

First, following *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804 (1986), which forecloses removal of state-law claims that merely include a violation of federal law as an element of the offense, the Panel ruled that petitioners' claim under the MMPA might not depend on federal law if respondents' failure

to submit its prescription pet food to the FDA for approval could be sufficient to prove deception under the MMPA (App. 4-5).

Second, however, it concluded that petitioners "elected to premise" their antitrust and unjust enrichment claims against respondents "on violations and interpretations of federal law;" and their "dependence on federal law permeates the allegations such that [these two claims] cannot be adjudicated without reliance on and explication of federal law" (App. 5-6). Thus it ruled that petitioners' complaint gives rise to federal question jurisdiction and their "isolated focus on their alleged state law claims is nothing more than an apparent veil to avoid federal jurisdiction" (App. 6). Moreover, it determined that petitioners' prayers for injunctive and declaratory relief in their complaint invoke federal jurisdiction because they necessarily require interpretation and application of federal law (*Id.*).

On April 16, 2020, the court of appeals denied petitioners' timely filed petition for Panel rehearing or for rehearing *en banc* (App. 23).

REASONS FOR GRANTING THE PETITION

By Ruling That Petitioners' Class Action Seeking To Hold Respondents Liable Under Missouri Law For Their Marketing Of Fake Prescription Pet Food Must Be Brought In Federal Court Instead Of Missouri Courts, The Court Of Appeals Has Introduced Chaos Into This Court's Coherent Jurisprudence About When Federal Question Jurisdiction Will Lie Over State-Law Claims.

None of petitioners' allegations about respondents' fake prescription pet food scheme implicates the FDCA, requires an interpretation of the FDA's regulations, or even invokes the FDA's Compliance Policy Guide so as to create a substantial or even disputed federal issue for resolution. Instead, petitioners' theories of liability are straightforward, i.e., that respondents violated the MMPA by deceiving consumers that their pet products complied with FDA regulations when they admittedly didn't; they violated Missouri antitrust law by agreeing among themselves and with others to use a prescription requirement on their pet products admittedly without seeking FDA approval; and in pursuing this scheme, they reaped a monetary benefit that can be measured and awarded under Missouri's unjust enrichment law.

While petitioners' theories of liability may require an interpretation of the MMPA, Missouri antitrust law, or Missouri's law of unjust enrichment to succeed, none requires as elements of its success the interpretation or violation of any federal law. That respondents *admittedly* failed to seek FDA approval of their fake prescription pet food is *not* an element of any

of petitioners' causes of action under Missouri law but merely an antecedent circumstance that led to respondents' later deceptive and monopolistic conduct under state law when they nonetheless marketed their products as having obtained that approval. Neither the FDCA nor the FDA has any causative nexus with respondents' actionable conduct under Missouri law; and nothing in petitioners' proof would call into question the interpretation or enforcement of this federal law.

Because none of these claims implicates substantial or disputed federal law, the court of appeals decision to the contrary upends the careful and coherent jurisprudence this Court has developed over the years in order to determine when federal question jurisdiction will lie over state-law claims. The issue of whether federal subject matter jurisdiction exists to hear state suits such as this one challenging the marketing of fake prescription pet products has important, recurring nationwide consequences. This Court should grant certiorari to decide this important issue of federal question jurisdiction, reaffirm its coherent jurisprudence about when federal jurisdiction will lie over state-law claims such as this, and then apply that jurisprudence to conclude petitioners' class action against respondents should be remanded to the Missouri state courts for further proceedings.

The analysis of whether petitioners' claims belong in state or federal court begins with this Court's "well-pleaded complaint" rule that "as a practical matter, severely limits the number of cases in which state law 'creates the cause of action' that may be initiated in or removed to federal district court...."

Franchise Tax. Bd. of Cal. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 9-10 (1983). It provides that federal question jurisdiction under 28 U.S.C. § 1331 exists only when such a question is presented on the face of the plaintiff's properly pleaded complaint. *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998) (citation omitted). The rule "makes the plaintiff[s] the master of [their] claim" because in drafting the complaint, they may "avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 & n. 7 (1987). See also *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 809 n. 6 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has *not* advanced.") (emphasis supplied).

In their state court complaint, petitioners alleged that respondents marketed their fake prescription pet food so that consumers like them would pay significantly more than they would for non-prescription pet food. As part of their scheme, it was alleged that respondents knew that a prescription requirement fostered a reasonable belief by consumers that such products were intended to treat specific health problems of pets; that they contained medicine of some kind; that some sort of regulatory oversight by, for example, the FDA was involved; and that their purchase was akin to the purchase of prescription drugs from a pharmacy. Thus by requiring a veterinarian's prescription to buy this pet food, it was alleged that respondents misled petitioners into believing they were purchasing an actual prescription product when, in fact, they were not.

As petitioners alleged, respondents *never* submitted any of their so-called "prescription" pet food

products to the FDA for approval, as required for any prescription pet product, because, as respondents admit, *none of their products possess medicinal or drug properties that would trigger oversight by the FDA in the first place*. Yet they imposed this fake requirement of a prescription on their products to create the misleading impression for consumers that these products are subject to FDA oversight thereby justifying their significantly enhanced price. By pursuing this fake prescription scheme, petitioners alleged, respondents violated the MMPA, Missouri's consumer protection law, which proscribes any deceptive or unfair trade practices in the sale of merchandise like pet food. That a part of respondents' scheme involved their admittedly false insinuation that the FDA had approved these products does *not* require any interpretation of FDA regulations or invoke even the FDA's CPG.

Second, petitioners alleged that respondents conspired with other pet food manufacturers to "create[ ] and enforce[ ] upon retailers and consumers the mandatory use of a prescription, issued by a veterinarian, as a condition precedent to the purchase of [their]...dog and cat food"; and that this conduct violated Missouri Antitrust Law, which prohibits price-fixing and conspiracies to monopolize trade or commerce. Moreover, in this part of their complaint, petitioners anticipated that respondents would affirmatively defend against these allegations of conspiracy and price-fixing by claiming that the FDA and its CPG required each of them independently to impose a prescription for their product, giving each one of them an independent reason to employ this scheme, making their actions inconsistent with the kind of

collusive, concerted conduct that would support a violation of Missouri antitrust law.

Anticipating this affirmative defense, petitioners alleged in paragraphs 55-74 of their complaint that the 2012 version of the FDA's CPG determined that manufacturers of prescription pet food that had not been approved by the FDA were selling unsafe, adulterated and misbranded products in violation of the FDCA; and that despite this warning, respondents nonetheless agreed among themselves to continue to use the prescription requirement to market their pet food to consumers, violating the FDCA and CPG in the process, and engaging in the kind of collusive, concerted conduct which would support a violation of Missouri antitrust law (App. 46-59).

Notably, the court of appeals relied upon these precise paragraphs in petitioners' complaint to conclude that petitioners "elected to premise" their antitrust and unjust enrichment claims against respondents "on violations and interpretations of federal law"; and their "dependence on federal law permeates the allegations such that [these two claims] cannot be adjudicated without reliance on and explication of federal law" (App. 5-6). But all of these allegations about respondents' "joint and coordinated violation of the...FDCA and the FDA's regulatory guidance in the...CPG" were made in anticipation of respondents' affirmative defense of non-coordination and lack of agreement.

This Court has held that such allegations anticipating an affirmative defense based on federal law in a state-court complaint asserting purely state-law

claims *cannot* create federal question jurisdiction under 28 U.S.C. § 1331. *Caterpillar, Inc. v. Williams*, 482 U.S. at 393. As the Court wrote,

> the presence of a federal question...in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court....[A] *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If a defendant could do so, the plaintiff would be master of nothing.

Id. at 398-399 (emphasis in original) (footnote omitted). See *American Well Works Company v. Layne & Bowler Company*, 241 U.S. 257, 259 (1916) (Holmes, J.) (state court complaint alleging libel and slander concerning plaintiff's patented pump did not federalize the action; whether patent infringement occurred is "no part of the plaintiff's case"; order denying remand back to state court reversed).

Finally, relying upon Missouri's equitable law of unjust enrichment and the remedies it provides consumers, petitioners alleged that respondents' scheme caused them to purchase prescription pet products at an exorbitant price, thereby injuring them and causing recoverable loss and damage in an amount

to be determined by a jury. None of these allegations on their face invokes an interpretation of or an enforcement of any federal law.

Thus when the well-pleaded complaint rule is properly applied to petitioners' state-court complaint, its allegations assert purely state-law claims based upon Missouri's consumer protection laws, its antitrust law, and the equitable remedies the decisional law of Missouri provides litigants in cases of unjust enrichment. That respondents admittedly failed to seek FDA approval of their fake prescription pet food before marketing it to consumers is *not* an element of any of petitioners' causes of action but merely a circumstance that led to respondents' later deceptive and monopolistic conduct under state law when they nonetheless agreed to market their products without having obtained that approval.

To the extent that its allegations are "permeated" with references to the FDCA, the FDA, or the FDA's CPG, as the court of appeals observed, those references were made in anticipation of respondents' affirmative defense of non-coordination and lack of conspiracy, and under *Caterpillar* these allegations cannot themselves be the basis of federal question jurisdiction under 28 U.S.C. § 1331. This fundamental misreading of petitioners' complaint by the court of appeals in order to find federal question jurisdiction where there was none in the first place constitutes a clear disregard of this Court's holding in *Caterpillar* and, for this reason alone, its ruling is error.

The court of appeals' reasoning also upends this Court's careful and coherent jurisprudence developed

over the years to determine when federal question jurisdiction will lie over state-law claims. It begins with the fundamental premise that federal district courts are couts of limited jurisdiction and possess only the "power authorized by Constitution and statute" and "may not exercise jurisdiction absent a statutory basis ...." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005) (citations omitted). A federal court must presume that a case lies outside of its limited jurisdiction unless and until jurisdiction is shown to be proper. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). *Kokkenen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

In keeping with this limited jurisdiction, when removal from state court to federal court is sought, federal courts should strictly construe removal statutes such as 28 U.S.C. §§ 1441(a) & (b) with any doubts about the propriety of removal resolved *in favor of* state court jurisdiction and *against* removal to the federal forum. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941). A party seeking removal and opposing remand bears the burden of establishing federal subject matter jurisdiction by a preponderance of the evidence because, as this Court has emphasized, federal courts should be cautious in exercising jurisdiction of this kind which lies at "the outer reaches of § 1331." *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. at 810.

Indeed, the "mere presence of a federal issue in a state cause of action" is not enough to confer jurisdiction, *id.* at 813, because if it were, then innumerable claims traditionally heard in state court would be funneled to federal court instead, raising

"serious federal-state conflicts." *Franchise Tax. Bd. of Cal. v. Constr. Laborers Vacation Trust.*, 463 U.S. at 10. To avoid these conflicts and ensure that state-law claims only rarely give rise to § 1331 jurisdiction, courts must first consider whether "federal law creates a cause of action" or (2) "the plaintiff's right to relief necessarily depends on a resolution of a *substantial* question of federal law." *Franchise Tax. Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. at 27-28 (emphasis supplied). In fact, the "vast bulk of suits that arise under federal law" assert a claim or claims *created* by federal law. See *Gunn v. Minton*, 568 U.S. 251, 257 (2013) (citations omitted).

Addressing the first inquiry, the FDCA does *not* create or imply a private cause of action for individuals injured as a result of violations of the Act. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. at 806-807;810; *Wyeth v. Levine*, 555 U.S. 555, 574 (2009). This is an "important clue" suggesting a congressionally approved balance in federal-state relations that *disfavors* federal involvement. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 318 (2005). In fact, the absence of such a private right of action for violations of the FDCA "is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal question jurisdiction." *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. at 814 (footnote omitted).

The second inquiry regarding substantiality reflects the Court's observation in *Grable* that regardless of whether federal law creates a cause of action, "in certain cases federal-question jurisdiction

will lie over state-law claims that implicate significant federal issues." 545 U.S. at 312; 314. Under the test laid out in both *Grable, supra*, and *Gunn v. Minton*, 568 U.S. at 258, a state-created claim may arise under federal law for purposes of § 1331 "if a federal issue is: (1) necessarily raised; (2) actually disputed; (3) substantial; and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.* In this "special and small category" of cases that present a "nearly 'pure question of law,' one that could be settled once and for all and thereafter would govern numerous...cases," federal-question jurisdiction under § 1331 is established and removal from state court to federal court would be proper. *Id.* See *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699-700 (2006).

Petitioners' state-court complaint against respondents must have satisfied all four of these markers for finding federal-question jurisdiction under § 1331 and, in fact, it satisfied *none* of them. First, "a federal question is 'necessarily raised' for purposes of § 1331 only if it is a 'necessary element of one of the well-pleaded state claims.'" *Franchise Tax. Bd. of Cal. v. Constr. Laborers Vacation Trust.*, 463 U.S. at 13. It is not enough that—as here—"federal law becomes relevant only by way of a defense to an obligation created entirely by state law." *Id.* Instead, a plaintiff's right to relief for a given claim necessarily depends on a question of federal law only when *every* legal theory supporting the claim requires the resolution of a federal issue. *Flying Pigs, LLC v. RRAJ Franchising, LLC*, 757 F.3d 177, 182 (4th Cir. 2014). Here petitioners can clearly prevail on their state antitrust and unjust enrichment claims without evidence regarding the

FDCA or FDA. All they need show is deceit as part of a combination or agreement to enhance prices of respondents' prescription pet food. This requires no resolution of a federal issue.

Here petitioners' theories of liability may require an interpretation of the MMPA, Missouri antitrust law, or Missouri's law of unjust enrichment to succeed; but none requires as elements of its success the interpretation or violation of any federal law. Neither the FDCA nor the FDA has any causative nexus with respondents' actionable conduct under Missouri law; and nothing in petitioners' proof would call into question the interpretation or enforcement of this federal law. At most, the question of federal law here is only "lurking in the background" and so far removed from plain necessity as to be "unavailing to extinguish the jurisdiction of the state[]." *Franchise Tax. Bd. of Cal. v. Constr. Laborers Vacation Trust.*, 463 U.S. at 11-12 quoting *Gully v. First National Bank*, 299 U.S. 109, 117 (1936) (Cardoza, J.).

Second, respondents concede in their submissions incident to opposing removal back to state court that they never obtained FDA approval for their fake prescription pet products before marketing them to consumers. This arguably is the only federal issue in this controversy and it is not disputed.

Third, the asserted federal issue here is not substantial. Congress did not provide for any private right of action for violations of the FDCA, and it can therefore reasonably be inferred that it did not intend to displace the "widely available state rights of action [that] provided appropriate relief for injured

consumers" in the absence of any such federal right of action." *Wyeth v. Levine*, 555 U.S. at 574. In light of Congress' election to permit state-law rights of action to remain in place, there can be no cognizable "serious federal interest" in claiming the advantages thought to be inherent in a federal forum. *Id.*

Moreover, an issue of federal law is substantial when it is important to the federal system as a whole, not merely when it is "significant to the particular parties in the immediate suit." *Gunn v. Minton*, 568 U.S. at 260. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. at 314-315. A substantial federal issue is more likely to be present if a "pure issue of [federal] law" is dispositive of this case and "numerous other cases"; "fact-bound and situation-specific"disputes typically do not implicate substantial federal issues. *Empire Healthchoice Assurance,, Inc. v. McVeigh*, 547 U.S. at 700-701.

Here the federal issue petitioners describe in their complaint, i.e., respondents' admitted failure to obtain FDA approval of their fake prescription pet food, is unaccompanied by any private right of action to enforce provisions of the FDCA; there is no indication that respondents' violating this regulation is important to the federal system as a whole; it is not a pure issue of law that is dispositive of this case or other cases; and while regulatory compliance is a federal interest in the abstract, that alone is not enough to classify a federal issue as substantial. See *Gunn v. Minton*, 568 U.S. at 259-260.

Most important, even if respondents failed to submit their pet food products to the FDA for approval

and thereby violated the FDCA as well as the CPG when they thereafter sold these pet products by prescription only, petitioners' theory of liability does *not* depend on an interpretation of federal law, but rather whether these actions resulted in an unlawful practice that violated Missouri's consumer protection and antitrust law. The regulatory action petitioners describe in their complaint provides just the backdrop for their state-law claims, and the federal issue is therefore not substantial in the relevant sense. *Id.* at 260.

Fourth, because of the insubstantiality of the federal issue, permitting this case to go forward in state court would not in any sense disrupt the balance between state and federal courts. *Id.* at 263-264. *Grable*, 545 U.S. at 312-313;318-319. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. at 811-812. States have a special responsibility in enforcing their own consumer protection and antitrust laws; there is no indication that Congress, having made no provision for a federal cause of action under the FDCA, intended to bar state courts from hearing such cases simply because FDA oversight has been tangentially raised; and to conclude otherwise would federalize an entire category of cases that Congress has not federalized, disturbing the balance between federal and state judicial responsibilities.

In sum, then, the court of appeals:

> A. failed to apply *Caterpillar's* holding that allegations anticipating an affirmative defense based on federal law in a state-court complaint asserting purely state-law claims

cannot create federal question jurisdiction under 28 U.S.C. § 1331;

B. failed to acknowledge that the FDCA does *not* create or imply a private cause of action for its enforcement and that this omission"is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal question jurisdiction." *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. at 814; and

C. failed to apply any of the four conjunctive requirements of the *Grable-Gunn* test for determining whether federal-question jurisdiction will lie over state-law claims that implicate federal issues.

These serial failures by the court of appeals have introduced chaos into this Court's careful and coherent jurisprudence to determine when federal question jurisdiction will lie over state-law claims. This issue of whether federal subject matter jurisdiction will lie to hear state suits like this one challenging the marketing of fake prescription pet products has important, recurring nationwide consequences. This Court should grant certiorari to decide this important issue of federal question jurisdiction, reaffirm its coherent jurisprudence about when federal jurisdiction will lie over state-law claims, and then apply that jurisprudence to conclude petitioners' class action against respondents should be remanded to the Missouri state courts for further proceedings.

As the Court explained in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938), the Constitution

recognizes and preserves the autonomy and independence of the judicial departments of the States and any interference with either "is an invasion of the authority of the State and, to that extent, a denial of its independence." *Id.* See *Alden v. Maine*, 527 U.S. 706, 754 (1999) (our federal system bespeaks the fact that the various States are sovereign entities whose judicial independence must be respected by Article III courts). As the district court rightly observed, the federal courts are courts of limited jurisdiction. The decision here by the court of appeals undermines that principle to the detriment of the Missouri state courts.

CONCLUSION

For all of these reasons identified herein, this Court should grant a writ of certiorari to review the ruling of the United States Court of Appeals for the Eighth Circuit and to vacate and reverse that ruling, remanding the matter to the district court for the Western District of Missouri with directions that this case be further remanded to the Circuit Court of Jackson County, Missouri; or provide petitioners with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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953 F.3d 519
United States Court of Appeals, Eighth Circuit.

Anastasia WULLSCHLEGER; Geraldine Brewer
Plaintiffs - Appellees
v.
ROYAL CANIN U.S.A., INC.; Nestle Purina PetCare Company
Defendants - Appellants

No. 19-2645

Submitted: January 16, 2020
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Appeal from United States District Court for the Western District of Missouri - Kansas City

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Before LOKEN, BENTON, and ERICKSON, Circuit Judges.

Opinion

ERICKSON, Circuit Judge.

Plaintiffs Anastasia Wullschleger and Geraldine Brewer seek to represent a class of Missouri plaintiffs who purchased prescription pet foods at premium prices from Defendants Royal Canin U.S.A., Inc. and Nestle Purina PetCare Company. Plaintiffs allege they were deceived by defendants into believing the products were approved by the United States Food and Drug Administration (FDA). The district court entered an order remanding the action back to state court, finding it lacked subject matter jurisdiction. We granted the defendants' petition for review under 28 U.S.C. § 1453(c)(1), limiting review to the issue of federal question jurisdiction. Because we conclude that federal question jurisdiction exists, the district court's order is vacated and the case is remanded for further proceedings consistent with this opinion.

I. Background

Defendants Royal Canin U.S.A., Inc. and Nestle Purina PetCare Company manufacture prescription pet foods that require the purchaser to consult with a veterinarian and obtain a prescription before purchase. According to the defendants, prescription pet foods are therapeutic formulas for specific health issues, and they may not be tolerated by all pets. However, the defendants have not submitted these pet foods for

evaluation by the FDA, and a prescription is not required by law.

On February 8, 2019, plaintiffs filed this putative class action in Jackson County, Missouri. Plaintiffs alleged that defendants' conduct amounted to a joint and coordinated violation of the Food Drug and Cosmetic Act (FDCA) and the FDA's regulatory guidance in the Compliance Policy Guide (CPG). The complaint asserts only state law claims, including violations of the Missouri Merchandising Practices Act (MMPA), Missouri antitrust laws, and Missouri unjust enrichment law. Plaintiffs' prayer for relief includes claims for money damages, and declaratory and injunctive *521 relief requiring that defendants comply with relevant state and federal laws.

Defendants removed the case to federal court, asserting federal jurisdiction under 28 U.S.C. § 1332(d) based on the diversity provisions of the Class Action Fairness Act of 2005 and federal question jurisdiction under 28 U.S.C. § 1331. The district court granted plaintiffs' motion to remand, finding no basis for federal jurisdiction. Defendants appealed to our court for review under 28 U.S.C. § 1453(c)(1). We accepted the appeal solely to consider the issue of federal question jurisdiction.

II. Discussion

We review a district court's order of remand for lack of subject matter jurisdiction de novo. Bell v. Hershey Co., 557 F.3d 953, 956 (8th Cir. 2009). Federal courts have original jurisdiction over all civil actions "arising under" federal law. 28 U.S.C. § 1331. "[F]ederal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded

complaint. The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (internal citations omitted).

In the case before us, plaintiffs rely explicitly on federal law throughout their pleadings. Notwithstanding their explicit reliance on federal law, plaintiffs contend that remand is proper under the Supreme Court's decision in Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986). The plaintiffs in Merrell Dow alleged claims for negligence and fraud relating to the drug Bendectin, and also alleged the drug was misbranded under the FDCA. In affirming the remand order, the Supreme Court emphasized Congress's refusal to create a federal private right of action for FDCA claims and highlighted the Sixth Circuit's explanation that federal question jurisdiction exists "only if plaintiffs' right to relief depended necessarily on a substantial question of federal law." Id. at 807, 106 S.Ct. 3229 (quoting Thompson v. Merrell Dow Pharm., Inc., 766 F.2d 1005, 1006 (6th Cir. 1985)) (emphasis in original). In other words, "the presence of a claimed violation of [federal law] as an element of a state cause of action" is insufficient on its own to confer federal jurisdiction. Id. at 814, 106 S.Ct. 3229.

Merrell Dow forecloses the removal of state law claims that merely include a violation of federal law as an element of the offense, without other reliance on federal law. Resolution of the MMPA claims in this case might not depend on federal law if the defendants' failure to submit the prescription pet food for FDA review arguably could be sufficient to prove deception under the MMPA. See Mo. Ann. Stat. § 407.025.1; Sitzer

v. Nat'l Ass'n of Realtors, Case No. 4:19-cv-0032-SRB, 2019 WL 5381984, at *7 (W.D. Mo. Oct. 16, 2019) (reciting the elements of an MMPA claim). That said, plaintiffs' MMPA claims do not stand alone, and Merrell Dow read as a whole did not "overturn[ ] decades of precedent." Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 317, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005). When determining whether a case "arises under" federal law, resolution depends on whether a federal forum may entertain a state law claim implicating a disputed and substantial federal issue "without disturbing any congressionally approved balance of federal and state judicial responsibilities." Id. at 314, 125 S.Ct. 2363.

The complaint in this case consists of more than the MMPA claims. It included *522 allegations brought under Missouri antitrust and unjust enrichment laws. Plaintiffs elected to premise these non-MMPA claims on violations and interpretations of federal law. The complaint included no fewer than 20 paragraphs recounting the defendants' specific and coordinated conduct that plaintiffs contend occurred during the five years preceding the filing of the complaint. Compl. ¶¶ 55–74. As evidence of coordination and conspiracy, plaintiffs explicitly claim that defendants violated the FDCA, were non-compliant with FDA guidance, and that their refusal to submit the prescription pet food to FDA review was improper. Id. According to the plaintiffs' complaint, when confronted with a choice to continue non-compliance or submit to FDA review, the defendants "decided jointly" to continue their conspiracy and market the prescription pet food "in violation of federal and state law." Id. at ¶¶ 63, 73. Plaintiffs' dependence on federal law permeates the allegations such that the antitrust and unjust

enrichment claims cannot be adjudicated without reliance on and explication of federal law.

Moreover, plaintiffs' prayer for relief invokes federal jurisdiction because it seeks injunctive and declaratory relief that necessarily requires the interpretation and application of federal law. After alleging violations of the FDCA throughout the complaint, plaintiffs request judgment: (1) "[f]inding, adjudging, and decreeing" that defendants have violated federal law; (2) enjoining defendants from engaging in further violations of federal law; and (3) estopping defendants from denying that prescription pet food is a "drug" and "enjoining Defendants to comply with all federal and Missouri provisions applicable to the manufacture of such drugs. ..." Compl. ¶¶ 136–138; see also 21 U.S.C. § 321(g)(1) (FDCA defining "drug"). The face of plaintiffs' complaint gives rise to federal question jurisdiction and plaintiffs' isolated focus on their alleged state law claims is nothing more than an apparent veil to avoid federal jurisdiction.

Based on the allegations in the complaint and relief sought, we find a federal issue surrounding the state law claims is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." Gunn v. Minton, 568 U.S. 251, 258, 133 S.Ct. 1059, 185 L.Ed.2d 72 (2013). When all four of these requirements are met, federal jurisdiction is proper. Id.

III. Conclusion

The district court's order of remand is vacated. We remand the case to the district court for further proceedings consistent with this opinion.

Footnotes

*Judge Grasz did not participate in the consideration or decision of this matter.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

ANASTASIA WULLSCHLEGER and GERALDINE BREWER, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	Case No. 19-00235-CV-W-GAF
v.	)	
ROYAL CANIN USA, INC. and NESTLE PURINA PETCARE COMPANY,	)	
Defendants.	)	

ORDER

Now before the Court is Plaintiffs' Anastasia Wullschleger and Geraldine Brewer (collectively "Plaintiffs") Motion to Remand. (Doc. # 26). Defendants Royal Canin USA, Inc. ("Royal Canin") and Nestle Purina PetCare Company ("Purina") (collectively 'Defendants") oppose. (Doc. # 29). For the reasons provided below, Plaintiffs' Motion is GRANTED.[1]

[1] Also before the Court is Royal Canin's Motion to Join Mars

DISCUSSION

I. BACKGROUND

On February 8, 2019, Plaintiffs commenced this action by filing a putative class-action petition ("Petition") in the Circuit Court of Jackson County, Missouri, Case No. 1616-CV03690, against Purina and Royal Canin. (Doc. # 1, ¶ 1). Plaintiffs served Purina with a summons and copy of the Petition on February 25, 2019. (Doc. # 1, ¶ 2). Purina timely filed its notice of removal on March 26, 2019. (Doc. # 1-2); *see* 28 U.S.C. § 1446(b) (requiring the filing of notice of removal within 30 days).[2]

Plaintiffs Wullschleger and Brewer are both citizens of Missouri. (Petition, beginning on p. 5 of Doc. # 1-1, ¶¶ 9-10). Additionally, the proposed classes are all defined to contain "Missouri citizens." (*Id.* at ¶¶ 90-92). Royal Canin is a Delaware Corporation with its principal place of business in Missouri. (*Id.* at ¶ 11).

Petcare as a Required Party (Doc. # 23), and Purina's Motion to Join the Joinder Motion. (Doc. # 27). Additionally, the parties filed a Joint Motion for Extension of Time for Rule 26(f) Conference and to File a Discovery Plan/Proposed Scheduling Order. (Doc. # 25). Because the Court finds itself without jurisdiction for the reasons provided below, it cannot rule on these Motions.

[2] Under 28 U.S.C. § 1453(b), a class action "may be removed by any defendant without the consent of all defendants." As such, Royal Canin properly removed the case without needing the consent of Purina. Purina's counsel has signed the brief filed in opposition to remand submitted to this Court along with Royal Canin's counsel. (*See* Doc. # 29). As such, the Court finds that Purina did consent to removal and seeks federal jurisdiction over this case.

Purina is a Missouri corporation with its principal place of business in Missouri. (*Id.* at ¶ 12).

The Petition alleges that Defendants conspired with other pet food manufacturers to create and enforce upon retailers and consumers the mandatory use of a prescription, issued by a veterinarian, as a condition precedent to the purchase of certain dog and cat food. (*Id.* at ¶ 1). The Petition alleges that no federal, state, or local law requires a prescription for the sale of prescription pet food and that the products contain no drug or other ingredient that requires the United States Food and Drug Administration's ("FDA") approval or prescription. (*Id.* at ¶ 2). The Petition further alleges that this self-created requirement for a veterinarian-issued prescription to purchase prescription pet food misleads reasonable consumers to believe that such food has been tested and approved by the FDA, has been subject to government inspection and oversight, and has medicinal and drug properties for which consumers are willing to pay a premium. (*Id.* at ¶ 1). The Petition alleges that Defendants, along with other pet-food manufacturers, have further conspired with pet- food retailers and veterinary clinics to communicate the false and misleading message to consumers "through a widespread, sophisticated, and coordinated scheme, premised on the requirement for a prescription written by a veterinarian for the purchase of Prescription Pet Food." (*Id.* at ¶ 3).

The Petition brings six class-action claims against Defendants. (*Id.* at ¶¶ 101-134). Count I is a claim for a violation of Missouri Antitrust Law §

416.031.1 against Defendants. (*Id.* ¶¶ 101- 106). Count II is brought against Defendants for violation of Missouri Antitrust Law § 416.031.2. (*Id.* at ¶¶ 107-112). Count III is brought by Wullschleger against Royal Canin alleging a violation of the Missouri Merchandising Practices Act ("MMPA") § 407.020, *et seq.* (*Id.* at ¶¶ 113-118). Count IV is brought by Brewer against Purina for violations of the MMPA. (*Id.* at ¶¶ 119-124). Count V and Count VI are both claims of unjust enrichment brought against Royal Canin and Purina by Wullschleger and Brewer, respectively. (*Id.* at ¶¶ 125-129, 130-134).

II. LEGAL STANDARD

Federal courts are courts of limited jurisdiction. *Ark. Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 816 (8th Cir. 2009). A federal district court may exercise removal jurisdiction only where the court would have had original jurisdiction had the action initially been filed there. *Krispin v. May Dep't Stores Co.*, 218 F.3d 919, 922 (8th Cir. 2000) (citing 28 U.S.C. § 1441(b)). "The basic statutory grants of federal-court subject-matter jurisdiction are contained in 28 U.S.C. §§ 1331 [federal-question jurisdiction] and 1332 [diversity jurisdiction]." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513 (2006).

Removal statutes are strictly construed, and any doubts about the correctness of removal are resolved in favor of state court jurisdiction. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *In re*

Bus. Men's Assurance Co. of Am., 992 F.2d 181, 183 (8th Cir. 1993). A party seeking removal and opposing remand carries the burden of establishing federal subject- matter jurisdiction by a preponderance of the evidence. *In re Prempro Prods. Liab. Litig.*, 591 F.3d 613, 620 (8th Cir. 2010). A court must resolve all doubts about federal jurisdiction in favor of remand to state court. *Id.*

III. ANALYSIS

Defendants sought removal to this Court first on the basis that this Court has federal-question jurisdiction pursuant to 28 U.S.C. § 1331. (Doc. # 1, pp. 3-6). Defendants also removed the case claiming this Court has diversity jurisdiction to hear the case pursuant to the Class Action Fairness Act ("CAFA"), codified at 28 U.S.C. § 1332(c)(1). (*Id.* at pp. 6-11). The Court will address each of these assertions in turn.

A. 28 U.S.C. § 1331: Federal Question Jurisdiction

"Removal based on federal question jurisdiction is governed by the well pleaded complaint rule: jurisdiction is established only if a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 559 F.3d 772, 779 (8th Cir. 2009). A plaintiff "'may avoid federal jurisdiction by exclusive

reliance on state law.'" *Cent. Iowa Power v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 912 (8th Cir. 2009) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). "Defendants may not 'inject a federal question into an otherwise state-law claim and thereby transform the action into one arising under federal law.'" *Baker v. Martin Marietta Materials, Inc.*, 745 F.3d 919, 924 (8th Cir. 2014) (quoting *Gore v. Trans World Airlines*, 210 F.3d 944, 948 (8th Cir. 2000)).

"[I]n certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). "There is no single, precise, all-embracing test for jurisdiction over federal issues embedded in state-law claims between nondiverse parties." *Cent. Iowa Power*, 561 F.3d at 912 (quotations omitted). "Instead, the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons*, 545 U.S. at 314.

Defendants assert that federal-question jurisdiction exists in this case because the resolution of Plaintiffs' claims implicate the Federal Food Drug and Cosmetics Act ("FDCA") and the FDA's Compliance Policy Guide ("CPG"). (Doc. # 29, pp. 8-11). Plaintiffs assert that their claims are not dependent on the interpretation of federal regulatory schemes but are

constructed solely on the interpretation of Missouri law. The Court agrees with Plaintiffs.

First, "[t]he MMPA prohibits 'deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce' by defining such activity as an unlawful practice." *Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 81 (Mo. Ct. App. 2011) (quoting Mo. Rev. Stat. § 407.020.1). Actual damages may be recovered by "[a]ny person who purchases ... merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property ... as a result of [an unlawful practice.]" Mo. Rev. Stat. § 407.025.1.

Here, Plaintiffs allege that Defendants and their co-conspirators mislead customers to believe that the prescription pet foods at issue have been tested and approved by the FDA, have been subject to government inspection and oversight, and have medicinal and drug properties, for which consumers are willing to pay a premium. (Petition, ¶ 1). Plaintiffs also state: "Neither federal nor Missouri law requires that Prescription Pet Food be sold with a prescription from a veterinarian. None of the Prescription Pet Food purchased by the Plaintiffs contains a drug, and none has been submitted to the FDA for its review, analysis, or approval. The same is true for all Prescription Pet Food." (*Id.* at ¶ 34). Plaintiffs then allege that by imposing the prescription requirement on prescription

pet food, Defendants have misrepresented that it is a product that is a drug or medicine that has been evaluated by the FDA as a drug that is legally required to be sold by prescription. (*Id.* at ¶ 35). Contrary to Defendants' assertions, these allegations do not require an interpretation of the FDA's regulations. Rather, the Plaintiffs' theory—that these representations deceive consumers into believing the products comply with FDA regulations, amounts to an unlawful act in violation of the MMPA--requires only interpretations of the MMPA and not the FDCA or CPG.

Based upon Plaintiffs' theory of their claims, no analysis of the FDCA or the CPG is necessary. Plaintiffs allege that Defendants imposed a prescription requirement for the prescription drug food. (*Id.* at ¶ 1). Plaintiffs further allege that Defendants did not submit the foods at issue to the FDA for analysis or approval. (*Id.* at ¶ 40). Plaintiffs allege that the failure to submit any foods for analysis or approval is a violation of the FDCA and the CPG when those products are sold as prescription pet foods. (*Id.* at ¶ 58). Plaintiffs' ability to prevail on this theory does not depend on an interpretation of federal law, but rather whether these actions resulted in unlawful practice that violated the MMPA. *See Schuchmann v. Air Servs. Heating & Air Conditioning, Inc.*, 199 S.W.3d 228, 233 (Mo. Ct. App. 2006) (explaining that "the MMPA supplements the definition of *common law* fraud") (emphasis added). Therefore, Plaintiffs' MMPA claims do not raise a substantial issue of federal law.

Regarding Plaintiffs' antitrust claims, Mo. Rev. Stat. § 416.031.2 provides: "It is unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade or commerce in this state." Plaintiffs do not ask a court to determine if the Defendants violated the FDCA or the CPG but rather ask a court to determine if the Defendants did, in fact, agree to impose a prescription requirement on their products despite not submitting them to the FDA for analysis or approval. The necessary inquiry requires Plaintiffs to prove that, through these actions, Defendants engaged in monopolistic behavior, attempted to monopolize, or conspired to monopolize the prescription pet food market. As such, Plaintiffs' antitrust claims do not depend on an interpretation of federal law for their resolution.

Lastly, a state court would not need to engage in an analysis of federal law to resolve Plaintiffs' unjust enrichment claims. "To establish the elements of an unjust enrichment claim, the plaintiff must prove that (1) he conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted and retained the benefit under inequitable and/or unjust circumstances." *Howard v. Turnbull*, 316 S.W.3d 431, 436 (Mo. Ct. App. 2010). As discussed above, the act of charging a premium for prescription pet food in the absence of FDA analysis and approval is what a court or fact-finder would evaluate to determine if Defendants retained a benefit under inequitable or unjust circumstances, not whether these actions violated the FDCA or the CPG. As such,

Plaintiffs' ability to succeed on their unjust-enrichment claims do not depend on the resolution of federal law.

In short, references to federal law in the Complaint do not, by their presence alone, mean that an interpretation of federal law is necessary to resolve the case. Rather, the actions alleged by Plaintiffs can be evaluated with reference only to state law. Therefore, the Court finds that Plaintiffs' state-law claims do not necessarily implicate significant federal issues. *See Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minn. LLC*, 843 F.3d 325, 329 (8th Cir. 2016) ("Federal question jurisdiction exists if ... the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."). Accordingly, the Court lacks federal-question jurisdiction in this case.

B. 28 U.S.C. § 1332 Diversity Jurisdiction

CAFA amended the diversity statute to extend jurisdiction of federal courts from class actions between "citizens of different States" to those which "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. §§ 1332(a)(1), (d)(2)(A). CAFA is codified, in part, at 28 U.S.C. § 1332, the statutory provision that grants federal courts original jurisdiction on the basis of diversity of citizenship. The traditional grant of diversity jurisdiction provides that all plaintiffs must be citizens of States different from all defendants. 28 U.S.C. § 1332(a)(1). Under CAFA, "federal courts have jurisdiction over class actions in which the amount in

controversy exceeds $5,000,000 in the aggregate; there is minimal (as opposed to complete) diversity among the parties, i.e., any class member and any defendant are citizens of different states; and there are at least 100 members in the class." *Westerfield v. Indep. Processing, LLC*, 621 F.3d 819, 822 (8th Cir. 2010) (citing 28 U.S.C. § 1332(d)). CAFA leaves unaltered the general rule that the removing defendant bears the burden of establishing federal court jurisdiction. *Id.*; 28 U.S.C. 1441(a).

Defendants assert that minimal diversity is satisfied in this case as at least one member of the putative class is a citizen of only Missouri[3] and that Royal Canin is a citizen of both Delaware, its state of incorporation, and Missouri, its principal place of business. (Doc. # 29, p. 9).[4] Defendants argue that Royal Canin is a citizen of either Delaware or Missouri for the purposes of CAFA's minimal-diversity requirement. (*Id.*). This argument requires the Court to determine if CAFA grants jurisdiction over a class action brought

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[3] Both named Plaintiffs are citizens of Missouri. (Petition, ¶¶ 9-10). Additionally, the proposed classes are all defined to contain "Missouri citizens." (*Id.* at ¶¶ 90-92). Therefore, all Plaintiffs are, for the purposes of determining jurisdiction, citizens of Missouri.

[4] Purina is a Missouri corporation with its principal place of business in St. Louis, Missouri. (Doc. # 1-1, ¶ 12). As such, Purina is a citizen of Missouri by virtue of both its State of incorporation and its State where its principal place of business lies. 28 U.S.C. 1332(a)(1). Both the named Plaintiffs and the proposed class are citizens of Missouri. (Doc. # 1-1, ¶¶ 9-10, 90-92). As such, Purina is not minimally diverse from the Plaintiffs and cannot support a finding of diversity jurisdiction pursuant to CAFA.

by a group of Missouri citizens against a corporation that is a citizen of both Missouri and Delaware.

The statutory provision defining the citizenship of a corporation, found in the same statute as CAFA, 28 U.S.C. § 1332, provides that a corporation is a citizen of the State in which it is incorporated and the State of its principal place of business. 28 U.S.C. § 1332(c)(1). Corporations have always been deemed to be citizens of both States for diversity purpose. The statute's "use of the conjunctive gives dual, not alternative, citizenship to a corporation whose principal place of business is in a State different from the State where it is incorporated." *Johnson v. Advance Am.*, 549 F.3d 932, 935 (4th Cir. 2008). Therefore, for the purposes of diversity jurisdiction, Royal Canin is a citizen of both Delaware, its State of incorporation, and Missouri, the State of its principal place of business.

While neither the Supreme Court, nor the Eighth Circuit, has addressed the issue of dual citizenship as it applies to CAFA, every court of appeal that has considered the issue has reached the same conclusion. *See Roberts v. Mars Petcare US, Inc.*, 874 F.3d 953, 956-57 (6th Cir. 2017); *Life of the S. Ins. Co. v. Carzell*, 851 F.3d 1341, 1344-46 (11th Cir. 2017); *Johnson*, 549 F.3d at 935-36; *see also In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 564 F.3d 75, 78 n.2 (1st Cir. 2009) (expressing skepticism in the argument that dual citizenship of a corporation can satisfy minimal diversity when citizenship of one State is shared with another party). Additionally, this Court has previously rejected the argument that dual

citizenship entitles a corporate defendant to rely on its Delaware citizenship to establish minimal diversity under CAFA. *See Sundy v. Renewable Envtl. Sols., LLC*, No. 07-5069-CV-SW-ODS, 2007 WL 2994348, at *3 n.4 (W.D. Mo. Oct. 10, 2007) ("The court does not agree with Defendant's suggestion that minimal diversity exists unless a member of the class is a citizen of *both* Missouri *and* Delaware.") (emphasis in original). These considerations support the conclusion that Royal Canin is not minimally diverse from Plaintiffs.

Defendants also assert that Mars Petcare, a citizen of Delaware and Tennessee–a party Defendants assert is a required party-defendant under Rule 19(a)–is a basis to establish minimal diversity. (Doc. # 29, pp. 17-18). "But even after CAFA, plaintiffs remain the masters of their claims and can choose whom they want to sue." *Roberts*, 874 F.3d at 958 (citing *Caterpillar*, 482 U.S. 386). First, Rule 19 pertains to joinder, not subject-matter jurisdiction. *See* Fed. R. Civ. P. 19; Fed R. Civ. P. 82. Additionally, for jurisdictional purposes, the Court's inquiry is limited to examining the case as of the time it was filed in state court. *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593 (2013). As such, if the Court were to evaluate Defendants' Motion to Join Mars Petcare and proceed to consider its citizenship to determine jurisdiction, it would be an impermissible exercise of federal judicial power in the absence of jurisdiction. *See Roberts*, 875 F.3d at 958. Because Plaintiffs, as the master of their Complaint, did not elect to sue Mars Petcare, the Court cannot consider its citizenship, but can only evaluate the citizenship of the two named Defendants. Therefore, the Court rejects

Defendants argument that Mars Petcare's citizenship can be used to establish minimal diversity as required by CAFA.

Defendants have not met their burden of establishing this Court's jurisdiction under CAFA. Defendants, both as citizens of Missouri, are not minimally diverse from Plaintiffs, also citizens of Missouri. Royal Canin cannot rely on its dual citizenship to create minimal diversity. Mars Petcare cannot be considered by the Court when determining if it has jurisdiction as it was not named as a Defendant when Plaintiffs filed suit. Because minimal diversity does not exist, the Court cannot exercise jurisdiction granted to it by CAFA over this case.

CONCLUSION

Defendants have not met their burden of establishing this Court's jurisdiction. The Court does not have federal-question jurisdiction because Plaintiffs' state-law claims do not necessarily implicate substantial federal issues. The Court does not have diversity jurisdiction pursuant to CAFA because there is not minimal diversity between the parties. Therefore, Plaintiffs' Motion to Remand is GRANTED. Accordingly, it is

ORDERED that this case be remanded to the Circuit Court of Jackson County Missouri.

IT IS SO ORDERED.

s/ Gary A. Fenner

GARY A. FENNER, JUDGE

UNITED STATES DISTRICT COURT

DATED: June 13, 2019

April 16, 2020

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 19-2645

Anastasia Wullschleger and Geraldine Brewer
Appellees

v.

Royal Canin U.S.A., Inc. and Nestle Purina Petcare Company Appellants

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Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:19-cv-00235-GAF)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Grasz did not participate in the consideration or decision of this matter.

Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

ANASTASIA WULLSCHLEGER,
704 W. Gregory
Kansas City, MO 64114

and

GERALDINE BREWER,
4615 Whisper Lake Dr., Apt. 5
Florissant, MO 63033

On behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

ROYAL CANIN U.S.A., INC.,
Serve at:
STL Agent Services, Inc.
100 South Fourth Street, Suite 1000
St. Louis, MO 63102

Case No. _____

Div. _____

JURY TRIAL DEMANDED

and

NESTLE PURINA PETCARE COMPANY,
Serve at:
C.T. Corporation System
120 South Central Avenue
Clayton, MO 63105

Defendants.

PETITION

COME NOW plaintiffs Anastasia Wullschleger and Geraldine Brewer, individually and on behalf of all other Missouri citizens similarly situated, and for their causes of action against Defendants, Royal Canin U.S.A., Inc. and Nestle Purina Petcare Company, demanding trial by jury of all issues so triable, state and allege as follows:

I. GENERAL OVERVIEW

1. As further detailed hereinafter, Defendants Royal Canin U.S.A., Inc. ("Royal Canin") and Nestle Purina Petcare Company ("Purina"), in concert, combination, and conspiracy with other manufacturers of dog and cat food, including Mars Petcare US, Inc. ("Mars") and Hill's Pet Nutrition, Inc. ("Hill's") (collectively "the manufacturing conspirators"), have created and enforced upon retailers and consumers the mandatory use of a

prescription, issued by a veterinarian, as a condition precedent to the purchase of certain dog and cat food ("Prescription Pet Food"). This self-created requirement for a veterinarian-issued prescription as a condition precedent to purchase Prescription Pet Food misleads reasonable consumers, including Plaintiffs, to believe that such food has been tested and approved by the United States Food & Drug Administration ("FDA"), has been subject to government inspection and oversight, and has medicinal and drug properties, for which consumers are willing to pay a premium. As further detailed herein, none of this is true.

2. No federal, state, or local law requires a prescription for the sale of Prescription Pet Food. Prescription Pet Food has not been reviewed, tested, or approved by the FDA. Prescription Pet Food contains no drug or other ingredient that requires FDA approval or a prescription. Yet, Royal Canin, Purina, and their co-conspirators make disease treatment claims in their marketing and packaging for Prescription Pet Food, which require product review and approval by the FDA under the United States Food, Drug, and Cosmetic Act ("FD&C Act"). Royal Canin, Purina, and their co-conspirators have not sought or obtained such FDA review and approval. The use by Royal Can in, Purina, and their co-conspirators of the prescription or Rx designation is thus false, misleading, and contrary to law.

3. Defendants Royal Canin and Purina, together with Mars and Hill's, have further combined and conspired with pet food retailers and veterinary clinics, including PetSmart, Inc. ("PetSmart"); Medical Management International, Inc. d/b/a Banfield Pet Hospital ("Banfield"); BluePearl Vet, LLC ("Blue Pearl"); and VCA Inc. ("VCA") (collectively "the retail

conspirators"), to communicate this false and misleading message to consumers in a wide spread, sophisticated, and coordinated scheme, premised on the requirement for a prescription written by a veterinarian for purchase of Prescription Pet Food. This requirement for a prescription is communicated to consumers in a variety of ways, including messages on packaging, in-store displays, websites, and oral and written instructions to and from veterinarians. The false and misleading nature of the communications is exactly the same for each Prescription Pet Food for which a prescription is required by the manufacturing conspirators and for which a prescription is not actually required by law.

4. Royal Canin, Purina, and the other manufacturing conspirators make other, non-prescription dog and cat food with similar ingredients and claims as those made for Prescription Pet Food, but sell their Prescription Pet Food at substantially higher prices as a result of the false prescription requirement. Reasonable consumers, including plaintiffs, would not pay the significantly higher prices charged for Prescription Pet Food if it were not for the false and misleading message that the coordinated prescription scheme communicates.

5. For example, Royal Canin produces a Prescription Pet Food product called "Royal Canin Veterinary Diet Gastrointestinal Puppy dry" dog food that sells for $4.60 per pound, and another substantially similar non-prescription product called "Royal Canin Medium Puppy dry" dog food that sells for $2.09 per pound. The two products make essentially the same health claims and have an 89 percent overlap in ingredients. The non-overlapping ingredients are not

drugs and are not sufficient to justify one product's being sold by prescription for a significantly higher price. Given the overlap in ingredients, and the absence of any drug or other ingredient required to be sold by prescription in the Prescription Pet Food product, the only meaningful distinction between the two products that is apparent to Plaintiffs and those similarly situated is the prescription requirement. The price differential is therefore based largely, if not entirety, on the prescription requirement imposed by Royal Canin, Purina, and the other companies in the combination.

6. Prescription Pet Food contains no drug or other ingredient not also common in non-prescription pet food. Royal Canin, Purina, and their co-conspirators impose and enforce the prescription requirement to prey on the known propensities of consumers to love their pets and trust their vets.

7. By participating in this deceptive scheme and combination, Royal Canin and Purina have violated the Missouri Antitrust Law, Mo. Rev. Stat.,§§ 416.011 *et seq.*, the Missouri Merchandising Practices Act, Mo. Rev. Stat.,§§ 407.010 *et seq.*, and Missouri taw of unjust enrichment, all as more fully alleged hereafter.

8. Retail consumers, including Plaintiffs, have overpaid and made purchases they otherwise would not have made in the absence of the abuse and manipulation of the prescription requirement by defendants and their co-conspirators. Plaintiffs bring this class action for violation of the Missouri Antitrust Law, Mo. Rev. Stat.,§§ 416.011 *et seq.*, the Missouri Merchandising Practices Act, Mo. Rev. Stat., §§ 407.010 *et seq.*, and Missouri law of unjust enrichment, on behalf of themselves and all those similarly situated Missouri citizens who directly or indirectly, for personal, family, or household purposes, have purchased Prescription

Pet Food in Missouri manufactured and sold by Royal Can in, Purina, or any other ·member of the combination and conspiracy described herein, and seek redress from Royal Canin and Purina in the form of damages, trebled as required by law, restitution, injunctive relief, attorney fees, and all other relief this Court deems just and proper.

II. PARTIES

9. Plaintiff Anastasia Wullschleger is a resident of Jackson County in the State of Missouri and the owner of a dog named Clinton. Her veterinarian at Banfield prescribed Royal Canin Prescription Pet Food for treatment of her dog. She purchased the Royal Canin Prescription Pet Food at PetSmart in Jackson County in the State of Missouri.

10. Plaintiff Geraldine Brewer is a resident of St. Louis County in the State of Missouri and the owner of a cat named Sassie. Her veterinarians first at O'Fallon Veterinary Medical Center in O'Fallon, Missouri, and then at Florissant Animal Hospital in Florissant, Missouri, prescribed Purina Prescription Pet Food for treatment of her cat. She purchased the Purina Prescription Pet Food at these locations and also at PetSmart in Florissant.

11. Defendant Royal Canin is a Delaware corporation with a principal place of business at 500 Fountain Lakes Blvd., Suite 100, Saint Charles, Missouri 63301. It is in the business of manufacturing, producing, marketing, advertising, distributing, and selling dog and cat food under various labels.

12. Defendant Purina is a Missouri corporation with a principal place of business in St.

Louis, Missouri. Purina is in the business of manufacturing, producing, marketing, advertising, distributing, and selling dog and cat food under various brands or labels, including, but not limited to, Prescription Pet Food sold as "Purina Pro Plan Veterinary Diets." On the packaging of its Prescription Pet Food, Purina prominently displays the prescription sign "Rx." Purina is a member of the Nestle Group of companies under the ownership of Nestle S.A. In 2015, Purina was the second largest seller of Prescription Pet Food in the United States and the second largest seller of pet food in the world, with more than $11 billion in worldwide sales.

III. NON-PARTY CO-CONSPIRATORS

13. The firms identified in this section of the Petition are non-party co-conspirators with Royal Canin and Purina in the conduct described in this Petition. Plaintiffs have not named these co-conspirators as defendants and seek no relief from them in this action. This is not intended to be an exhaustive list of co-conspirators.

14. Mars is a Delaware corporation with a principal place of business in Franklin, Tennessee. Mars is in the business of manufacturing, producing, marketing, advertising, distributing, and/or selling dog and cat food under various brands or labels. Until January 1, 2017, at which time Mars ceased selling lams Prescription Pet Food, Mars manufactured, produced, marketed, advertised, distributed, and sold lams Prescription Pet Food. Royal Canin is a subsidiary or affiliate of Mars, and Mars' website indicates Royal Canin and lams to be two of its five billion-dollar brands (another is Banfield Pet Hospital). Some combination of

Royal Canin and Mars manufactures, produces, markets, advertises, distributes, and sells Prescription Pet Food sold as Royal Canin "Veterinary Diet." Hereinafter, "Mars/Royal Canin" describes Mars and Royal Canin collectively. In 2015, Mars was the largest seller of Prescription Pet Food in the United States and the largest seller of pet food in the world, with more than $17 billion in worldwide sales.

15. PetSmart is a Delaware corporation with a principal place of business in Phoenix, Arizona. It is a national pet superstore chain founded in 1986 and the largest pet goods retailer in the United States and North America. PetSmart sells both non-prescription pet food and Prescription Pet Food. Approximately 900 of PetSmart's approximately 1,145 nationwide stores include an onsite "Banfield Pet Hospital," which is owned by Mars. There are at least 31 PetSmarts in Missouri, and 18 of these 31 PetSmarts include an onsite Banfield Pet Hospital. Through these locations, PetSmart sells Prescription Pet Food through a process by which Banfield Pet Hospital acts as the gatekeeper. As a precondition to purchasing Prescription Pet Food at PetSmart, all consumers must first obtain a "MedCard" showing the "Rx," "Rx Date," and "Rx #" from the onsite Banfield Pet Hospital, even if they present with a prescription from a third-party veterinarian. Thus Mars, through Banfield Pet Hospital, controls PetSmart's sale of Prescription Pet Food. PetSmart's websites will also not allow a customer to purchase Prescription Pet Food without a prescription from a veterinarian.

16. Since at least May 31, 2017, PetSmart has also owned the online pet-retailer Chewy.com. On July 26, 2017, PetSmart moved all of the content from its pet360.com website to Chewy.com, and redirected a

number of its websites to Chewy.com. Since at least 2014, PetSmart-controlled websites have accounted for more than 40 percent of all pet-related website traffic. With PetSmart's acquisition of Chewy.com, that share has greatly increased. Through its websites, PetSmart sells Prescription Pet Food only to customers who present proof of a prescription from a veterinarian. In its brick and mortar stores, PetSmart displays Prescription Pet Food in a special section separate and distinct from the areas in which it sells non-prescription pet food and prominently displays signs telling customers that "Prescription Diets Require a MedCard for Purchase." PetSmart, in its stores and websites, sells non-prescription foods manufactured by many manufacturers. The only Prescription Pet Food sold by PetSmart in retail locations is that made by Mars/Royal Canin, Purina, and Hill's. Online, prior to 2018, PetSmart sold only Mars/Royal Canin, Purina, and Hill's Prescription Pet Food. In 2018, however, as a result of litigation, PetSmart and Mars/Royal Canin, Purina, and Hill's permitted two smaller competitors for the first time to sell their Prescription Pet Food through Chewy.com.

17. Banfield is a Delaware corporation with a principal place of business at 8000 NE Tillamook, Portland; Oregon 97213. It is a member of the Mars corporate family of companies. It is the largest veterinary chain in the United States, operating veterinary clinics at approximately 900 PetSmart locations, and at dozens of stand-alone locations, and employing approximately 3,200 veterinarians. There are some 44 veterinarians employed by Banfield in Missouri, some 38 of which are in Banfield Pet Hospitals in Missouri PetSmarts. Banfield prescribes and sells Prescription Pet Food manufactured by

Mars/Royal Canin, Purina, and Hill's, and no other Prescription Pet Food. Banfield has a contractual relationship with PetSmart to put veterinary hospitals in PetSmart stores throughout the United States. From 1994 through at least the first half of 2015, PetSmart owned approximately 21 percent of Banfield, or a holding company that owned Banfield, and Mars owned the remaining approximately 79 percent. Sometime after June of 2015, Mars, or its parent company, acquired I 00 percent of Banfield. The relationship among PetSmart, Mars, and Banfield originated in 1994 when both PetSmart and Mars invested in Banfield, and PetSmart and Banfield entered into a strategic partnership agreement.

18. Blue Pearl is a Florida corporation with a principal place of business at 3000 Busch Lake Boulevard, Tampa, Florida 33614. 1t is a member of the Mars corporate family of companies. 1t is the largest chain of animal specialty and emergency care clinics in the United States, with approximately 50 locations and 600 veterinarians. There are at least three (3) Blue Pearl locations in Missouri, employing some 21 veterinarians. Blue Pearl prescribes and sells Prescription Pet Food of Mars/Royal Canin, Purina, and Hill's, and no other Prescription Pet Food. Mars, or its parent company, owns approximately 90 percent of Blue Pearl, which it acquired in 2015.

19. VCA is a Delaware corporation with its principal place of business at 12401 West Olympic Boulevard, Los Angeles, California 90064. It is a member of the Mars corporate family of companies. VCA owns or controls approximately 800 veterinary locations employing more than 4,700 veterinarians. There are least four (4) VCA locations in Missouri,

employing some 11 veterinarians. VCA was acquired by Mars on September 12, 2017. On information and belief, VCA sells or prescribes Prescription Pet Food manufactured by Mars/Royal Canin, Purina, and Hill's and no other Prescription Pet Food.

20. Through its ownership of Banfield, Blue Pearl, and VCA, Mars employs 17 percent of the companion animal veterinarians in the United States through more than 1,700 locations employing approximately 8,500 veterinarians.

21. Mars/Royal Canin, Purina, and Hill's collectively have a market share of at least 95 percent in the United States market for Prescription Pet Food. These entities likewise collectively have a market share of the Prescription Pet Food market in Missouri of a comparable percentage.

IV. CONDUCT GIVING RISE TO VIOLATIONS OF LAW

A. The Prescription Pet Food Market

22. Manufacturing, producing, marketing, advertising, distributing, and selling Prescription Pet Food is an approximately $2 billion per year industry in the United States. Worldwide, the top 40 pet food companies had total revenue of $46 billion in 2015. Of that, Mars/Royal Can in, Purina, and Hill's had combined revenues of $30 billion, for a 65 percent worldwide market share. The market for pet food in the United States was half of that, $23 billion, and Mars/Royal Canin, Purina, and Hill's had a combined market share in excess of 50%.

23. Hill's began limited sales in the 1960s of its "Prescription Diet" through veterinarians and in the

late 1980s first began supplying veterinarians with prescription pads as part of its marketing effort. The Prescription Pet Food market in the United States, and in Missouri, is the creation of Mars/Royal Canin, Purina, and Hill's and the retail conspirators named above, and did not exist to any significant extent until 2005, when Hill's, Mars/Royal Canin, PetSmart, and Banfield formed the combination and conspiracy described hereafter, which Purina subsequently joined, as did Blue Pearl and VCA upon their acquisition by Mars, if not before.

24. Since 2005, Prescription Pet Food has been a distinct market, or a distinct sub- market of the dog and cat food market in the United States, and in Missouri. The market for Prescription Pet Food is characterized by specialized vendors and sales channels, distinct and different pricing, and different customers from the general pet food market. Specifically, Prescription Pet Food is sold only through prescribing veterinarians and retailers honoring and filling such veterinary prescriptions; prices are substantially higher for Prescription Pet Food than for non-prescription pet food by reason of the prescription requirement; and Prescription Pet Food is marketed and sold only to pet owners who have obtained a veterinarian's prescription for Prescription Pet Food.

25. Mars/Royal Canin manufactures and markets its Prescription Pet Food in packaging labeled "Veterinary Diet." Purina manufactures and markets its Prescription Pet Food in packaging labeled "Pro Plan Veterinary Diets," in which the Rx prescription symbol appears by extending the bottom of the second "r" in "veterinary" to intersect with tail of the "y." Hill's manufactures and markets its Prescription Pet Food in packaging labeled "Prescription Diet." At

PetSmart's website, the Prescription Pet Food of Mars/Royal Canin, Purina, and Hill's is displayed with an Rx symbol beside it as follows:

RX INFO REQUIRED

26. On the Chewy.com website, which PetSmart has owned since May 31, 2017, the Prescription Pet Food of Mars/Royal Can in, Purina, and Hill's is also displayed with an Rx symbol beside the words, "This prescription item requires vet approval." As explained in the website's "Questions & Answers" section, "[a]t checkout you'll be prompted for vet information. Once your order is placed, our Prescription Team will reach out to your vet by phone or fax. To expedite the process, you may email a photo of the prescription to us at rx@chewy.com or fax it... [and] we don't need to reach out to the veterinarian if you have the written prescription."

27. PetSmart sells Prescription Pet Food only in its brick and mortar stores housing a Banfield veterinary clinic, and displays Prescription Pet Food in a section separate and distinct from where it displays non-prescription pet food, in a special aisle immediately adjacent to the Banfield clinic, and with prominent signs stating "Prescription Diets Require a MedCard for Purchase. See a Banfield associate for details." In order to purchase Prescription Pet Food at a brick and mortar PetSmart, a consumer must first obtain a MedCard from Banfield. The card includes entries for the "Rx" food, the "Rx Date," and the "Rx #."

28. There are significant barriers to entry in the Prescription Pet Food market, which require substantial research and development expertise and investment, the ability to reach veterinary clinics

through a separate sales force and distribution network, and, for those competing ethically with a prescription Rx designation, submission to and compliance with FDA regulatory requirements and processes. Divisions of larger companies, Mars/Royal Canin, Purina, and Hill's dominate the Prescription Pet Food market by reason of substantial investments in their Prescription Pet Food products and their close relationships with veterinarians, veterinary clinics, and veterinary schools. In addition, these companies have a significantly larger number of veterinary sales representatives and greater financial resources than actual and potential new entrants.

29. The Prescription Pet Food market requires successful distribution arrangements with national pet superstore chains, such as PetSmart, Chewy, and Petco, which collectively sell roughly 60 percent or more of branded (non-private label) pet food and a higher share of Prescription Pet Food, as well as alliances with major veterinary chains, such as Banfield, Blue Pearl, and VCA. Petco sells Prescription Pet Food only on its website, and first began selling Prescription Pet Food around November 2016. Such alliances with pet superstore and veterinary chains are necessary because the pet food retail and veterinary markets are otherwise highly fragmented and dispersed, consisting of thousands of small stores and clinics, rendering distribution costs for Prescription Pet Food prohibitively expensive in the absence of alliances with pet superstore retailers and major veterinary chains.

30. As noted, continuously from 2005 through the present, Mars/Royal Canin, Purina, and Hill's collectively have had a combined share of the

Prescription Pet Food market in excess of95 percent, at times approaching or equaling 100 percent. For the five years next preceding the filing of this lawsuit, Mars/Royal Canin, Purina and Hill's collectively had a combined market share of the Missouri Prescription Pet Food market of at least 95 percent.

31. Today, there are only three other companies, small relatively recent entrants, attempting to compete with Mars/Royal Canin, Purina, and Hill's in the Prescription Pet Food market in the United States, and in Missouri:

(a) Blue Buffalo Company, based in Wilton, Connecticut, which markets a line of Natural Veterinary Diet—Rx dog and cat food, in addition to lines of non-prescription BLUE dog and cat food;

(b) Diamond Pet Foods, based in Meta, Missouri, which markets Diamond Rx Renal Formula pet food, in addition to lines of non-prescription dog and cat food; and

(c) Darwin's Natural Pet Products, based in Tukwila, Washington, which markets Intelligent Design Prescription Meals, in addition to lines of non-prescription dog and cat food.

Blue Buffalo and Diamond sell their Prescription Pet Food through veterinarians only, and cannot obtain distribution through PetSmart brick and mortar stores and, until 2018, its web sites, although PetSmart and its web sites stock and sell their non-prescription pet food. As noted, only after being sued, PetSmart and Mars/Royal Can in, Purina, and Hill's for the first time, in 2018, permitted Blue Buffalo and Diamond to sell

their Prescription Pet Food through Chewy.com. Darwin's sells its Prescription Pet Food pet food directly from Missouri once a customer obtains a prescription from a veterinarian. Before 2018, unlike Mars/Royal Can in, Purina, and Hill's, none of the three smaller competitors were able to sell Prescription Pet Food through PetSmart, its websites, or Banfield. Plaintiffs are informed and believe that agreements between and among Mars/Royal Canin, Purina, Hill's, PetSmart, and Banfield prohibit and restrict PetSmart and Banfield from stocking and selling Prescription Pet Food made by these small and other competitors.

32. The past, present, and future ownership, operation, and control of veterinary clinics and hospitals by PetSmart and Mars have created significant barriers to entry in the Prescription Pet Food market in the United States, and in Missouri, for actual and potential competitors by effectively foreclosing distribution outlets necessary for sellers of competing Prescription Pet Food, who cannot effectively reach customers without distribution through PetSmart and the veterinary chains owned by Mars because of the prohibitive expense in selling only to the thousands of individual and small group veterinary practices.

33. As majority shareholder and now sole owner of Banfield, Mars/Royal Canin has possessed and exercised the power to determine the manufacturers whose Prescription Pet Food is prescribed and sold through Banfield and PetSmart, as well as through Blue Pearl and VCA. Mars/Royal Canin has exercised that power to allow only prescribing and sale of Prescription Pet Food manufactured by Purina, Hill's, and itself.

B. The False, Deceptive, and Misleading Prescription Requirement

34. Neither federal nor Missouri law requires that Prescription Pet Food be sold with a prescription from a veterinarian. None of the Prescription Pet Food purchased by the Plaintiffs contains a drug, and none has been submitted to the FDA for its review, analysis, or approval. The same is true for all Prescription Pet Food.

35. By requiring a prescription from a veterinarian as a pre-condition to the purchase of their Prescription Pet Food, Mars/Royal Canin, Purina, and their co-conspirators misrepresent Prescription Pet Food to be: (a) a substance medically necessary to health; (b) a drug, medicine, or other controlled ingredient; (c) a substance that has been evaluated by the FDA as a drug; (d) a substance as to which the manufacturer's representations regarding intended uses and effects have been evaluated by the FDA; and (e) a substance legally required to be sold by prescription. Prescription Pet Food is none of these.

36. Most pet owners experience the heartfelt concern that accompanies trips to the veterinarian, as well as the willingness to follow doctor's orders to their fullest extent. Plaintiffs are reasonable consumers who expect that pet food that requires a prescription from a veterinarian as a condition of purchase has been submitted to and approved by the FDA for the particular purposes and conditions for which it has been prescribed and that the product carries with it all of the testing, analysis, safety assurances, and efficacy that any product submitted to and approved by the FDA would have. Accordingly, reasonable consumers, including Plaintiffs, are willing to pay a premium for

Prescription Pet Food.

37. To obtain Prescription Pet Food, customers must either (a) buy it directly from the veterinarian who prescribes it, or (b) take the prescription to a business that sells Prescription Pet Food, such as Banfield, Blue Pearl, VCA, a PetSmart store with Banfield on-site, or a PetSmart web site. In this way, Mars/Royal Canin, Purina, and their co-conspirators control the sale of Prescription Pet Food at retail to those with a prescription from a veterinarian so as to create for the consumer the experience of buying a drug and give the reasonable but false and misleading impression of a government tested and approved product warranting a premium price.

38. Plaintiffs, as reasonable retail consumers, (a) understand the requirement for a prescription to mean that a governmental authority has sanctioned and controls the use and distribution of the product and has provided its required oversight and review; (b) associate prescription fulfillment with following doctor's orders; and (c) experience the prescribing and purchase of Prescription Pet Food in the exact same manner as an actual prescription drug for a dog or cat.

39. Plaintiffs, as reasonable consumers, humanize their pets. In marketing and selling Prescription Pet Food, Mars/Royal Canin, Purina, and their co-conspirators take advantage of and betray vulnerable pet owners concerned about the health of the family pet, and prey on the known propensities of Plaintiffs and others similarly situated to treat their pets as family.

40. Prescription Pet Food:

(a) has not been subjected to the FDA process for evaluating the quality of drug ingredients and manufacturing processes;
(b) has not been subjected to the FDA process for evaluating the efficacy of claims and propriety of representations;
(c) does not contain any ingredient listed as a drug in the FDA's "Green Book," a publication listing all approved animal drugs;
(d) does not appear as a drug in the Green Book;
(e) does not contain any drug approved by the FDA; and
(f) does not bear the mandatory legend borne by those items required by the FDA to be sold by prescription (i.e., "Caution: Federal law restricts this drug to use by or on the order of a veterinarian.").

41. Mars/Royal Canin, Purina, and their co-conspirators have at all times known that Prescription Pet Food is not legally required or allowed to be sold by prescription, that representing expressly or implicitly that a prescription is legally required is false, and that all of them know this.

42. Mars/Royal Canin, Purina, and their co-conspirators have at all times also known that there is no medicine, drug, or other ingredient in Prescription Pet Food required by law to be submitted to or approved by the FDA or another governmental entity, that neither the FDA nor any other governmental entity has undertaken any review or approval process, and that neither the FDA nor any other governmental entity has approved Prescription Pet Food for treatment of any condition or illness.

43. Mars/Royal Canin, Purina, and their co-conspirators impose the condition precedent of a prescription from a veterinarian, and such condition precedent is an integral step in the marketing, sale, and purchase of Prescription Pet Food.

44. The intended purpose and effect of the prescription requirement has been to enable Mars/Royal Canin, Purina, and their co-conspirators to market and sell Prescription Pet Food at excessive, inflated prices above the price of non-prescription pet food making substantially similar treatment claims. The supra-competitive price premium for Prescription Pet Food is not cost-justified and is the intended result of the false, deceptive, and misleading prescription requirement imposed by Mars/Royal Canin, Purina, and their co-conspirators.

C. The Combination and Conspiracy

I. Formation

45. In 1994, PetSmart, Mars, and Banfield entered into a combination to transfer ownership and control of Banfield to PetSmart and Mars and execute a contract for a strategic partnership among themselves locating Banfield pet hospitals in PetSmart stores.

46. At that time, Prescription Pet Food was not a significant factor or a recognized sub-market in the United States pet food market. Hill's was the primary seller of pet food through veterinarians and was using the term "Prescription Diet."

47. By 2004, however, this had changed, with Hill's becoming a significant player in the sale of pet

food for which an actual prescription was required, although no prescription was legally required. Mars/Royal Canin, as the market leader confronted with a growing threat from Hill's, faced the choice of competing with Hill's non-prescription pet food, or colluding with Hill's in the fraudulent sale of Prescription Pet Food at unjustified enhanced prices. It chose the latter course, developing and introducing its own Veterinary Diet line of Prescription Pet Food.

48. In March of2005, Mars/Royal Canin, Hill's, PetSmart, and Banfield entered into a combination and conspiracy to sell Prescription Pet Food, pursuant to which they agreed:

> (a) to restrict the retail sale of their Prescription Pet Food to pet owners who had obtained and presented a prescription;
> (b) to require that retail sellers enforce their prescription and presentation requirement; and
> (c) to restrict retail sellers to those who agreed to enforce the prescription requirement, all with the purpose and effect of raising, fixing, stabilizing, and pegging prices of Prescription Pet Food.

49. In furtherance of the combination and conspiracy, Hill's entered into a "merchandising agreement" with PetSmart and Banfield, which Mars and PetSmart owned, to sell Hill's Prescription Pet Food in all PetSmart stores with an on-site Banfield pet hospital.

50. At that time, PetSmart and Banfield were selling Mars/Royal Canin Prescription Pet Food, and Mars had the power to exclude Prescription Pet Food

competitors from Banfield and PetSmart by reason of its majority ownership of Banfield. Nonetheless, contrary to its independent economic interest, Mars/Royal Canin agreed to allow its Prescription Pet Food competitor, Hill's, into Banfield and PetSmart in furtherance of their combination and conspiracy. PetSmart and Banfield have sold Hill's and Mars/Royal Canin Prescription Pet Food continuously since 2005 through the present day.

51. Once Hill's, Mars/Royal Can in, PetSmart, and Banfield formed their combination and conspiracy in 2005, Purina faced the same choice Mars/Royal Canin had faced: compete or collude. Like Mars/Royal Canin, it chose to collude and joined the combination and conspiracy.

52. Similarly, Mars/Royal Canin faced the same choice: whether to exercise its power to exclude its Prescription Pet Food competitor, Purina, from Banfield and PetSmart. Again, contrary to its independent economic interest, Mars/Royal Canin allowed Purina to begin selling Prescription Pet Food through Banfield and PetSmart in approximately 2006 and to join the existing combination and conspiracy in the misleading and deceptive sale of Prescription Pet Food with the purpose and effect of raising, fixing, stabilizing, and pegging Prescription Pet Food prices. PetSmart and Banfield have sold Purina Prescription Pet Food continuously since 2005 through the present day.

53. Although Mars/Royal Canin, Purina, and Hill's have continuously sold Prescription Pet Food through Banfield and Pet Smart in furtherance of their combination and conspiracy, Mars/Royal Can in, Purina, and their co-conspirators have prevented their smaller

Prescription Pet Food competitors from doing so. In furtherance of their combination and conspiracy, Mars/Royal Can in, Purina, and their co-conspirators agreed that Banfield and PetSmart would not stock, offer, or sell Blue Buffalo Natural Veterinary Diet dog and cat food, Darwin's Intelligent Design Prescription Meals, or Diamond Care Rx Renal Formula, the prescription dog and cat foods of their other competitors. Prescription Pet Food of these smaller competitors was also not available on the PetSmart-controlled websites until 2018, when Blue Buffalo and Diamond were allowed to sell their Prescription Pet Food on Chewy.com. PetSmart, PetSmart.com, and Chewy.com, have, however, carried the non-prescription dog and cat food of Blue Buffalo Company and Diamond.

54. As a result of their combination, Mars/Royal Canin, Purina, and their co-conspirators created a separate and distinct market for Prescription Pet Food, which had not previously existed, which enabled them to sell Prescription Pet Food at anticompetitive, enhanced prices, and which they have dominated.

2. Perpetuation

55. In September of 2012, the FDA published for comments a Draft Compliance Policy Guide ("Draft CPG"), "LABELING AND MARKETING OF NUTRITIONAL PRODUCTS INTENDED FOR USE TO DIAGNOSE, CURE, MITIGATE, TREAT, OR PREVENT DISEASES IN DOGS AND CATS."

56. The Draft CPG expressly stated at the outset, 'This draft Compliance Policy Guide, when

finalized, will represent the Food and Drug Administration's (FDA's) current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public."

57. The Draft CPG was intended for guidance of FDA staff in deciding whether to institute enforcement actions against violations of the FD&C Act and related statutes by manufacturers of dog and cat food products "identified on their labels or in labeling as being intended for use to diagnose, cure, mitigate, treat, or prevent diseases." Such products included the Prescription Pet Food of Mars/Royal Can in, Purina, and Hill's. For example:

> (a) Mars' Royal Canin Prescription Pet Food labels stated that they were for issues including "Renal Health," "Gastrointestinal and Dermatological Health," "Struvite Dissolution," "Digestive Health," "Protect[ing] Healthy Skin & Coat," "minimiz[ing] glucose fluctuations," "Cardiac Health," "Calorie Control," and others. Further, each Royal Canin Prescription Pet Food stated on its package that Royal Canin had the knowledge to "formulate the optimal diet for your [pet's] special needs."
>
> (b) Mars' lams Prescription Pet Food labels stated that they were for issues including "Glucose and Weight Control," "Management of Skin & Coat and Gastrointestinal Health," "Nutritional Management of Joint and Senior Health," "Nutritional Management of Kidney Health," "Help[ing] your pet safely reach and maintain her ideal weight," and others. Further, each lams Prescription Pet Food stated on its

package that it was "prescribed and sold by veterinarians" and "[a]uthorized by prescription and sold only through veterinarians."

(c) Purina Prescription Pet Food labels stated that they were for issues including "promot[ing] a urinary environment unfavorable to the development of both struvite and calcium oxiate cystals," "significantly reduc[ing] build-up of tartar," "support[ing] intestinal health," "maintain[ing] lean body mass," and others. Further, each Purina Prescription Pet Food package was branded with an "Rx" symbol and the Rod of Asclepius (the snake wrapped around the rod, a universal symbol of medicine) and stated that "our goal is to help your pet lead an active, healthy lifestyle."

(d) Hill's Prescription Pet Food labels stated that they were for issues including "weight management," "digestive care," "food sensitivities," "urinary care," "kidney care," "dental care," "aging care," "glucose management," "heart care," "joint care," "liver care," "skin sensitivity," "thyroid care," "urgent care," and others. Further, each Hill's Prescription Pet Food package stated it was a "Prescription Diet," represented that the contents were "Clinical Nutrition," bore an image of a stethoscope, and explained "How this product will help your pet."

58. The Draft CPG concluded that such products met the definition of drugs and food under the FD&C Act. Therefore, if such products, including the Prescription Pet Food of Mars/Royal Canin, Purina,

and Hill's, did not have an approved New Animal Drug Application or meet other FD&C Act requirements, they were "unsafe," "adulterated," "misbranded," illegal, and subject to enforcement actions by the FDA.

59. All of the Prescription Pet Food of Mars/Royal Canin, Purina, and Hill's lacked an approved New Animal Drug Application or met other FD&C Act requirements, and therefore all of their Prescription Pet Food was "unsafe," "adulterated," and "misbranded" in violation of the FD&C Act.

60. The term "prescription" did not appear in the Draft CPG, which did not recommend, suggest, or approve of the use of a prescription requirement in the marketing or sale of offending products, including Prescription Pet Food. Nor did the term "authorize" appear in the draft CPG.

61. At the time of the Draft CPG, both the pet food industry and the veterinary profession widely held the view that use of a prescription requirement was improper and misleading for products not subjected to FDA review and approval. In a filed comment on the Draft CPG, the American Feed Industry Association, representing "more than 550 domestic and international companies and state, regional and national associations," recommended "that pet food products subject to this CPG should be regulated in a manner similar to human medical foods, as veterinary medical foods." According to the FDA, "The labeling of medical foods may not bear the symbol 'Rx only'," because "medical foods are not required by federal law to be dispensed by prescription," and "[t]herefore, the use of the symbol 'Rx only' in the labeling of a medical food would misbrand a medical food under section 403(a)(1) of the FD&C Act because it would be a false and misleading statement about that

product." Another filed comment from the American Veterinary Medical Association ("AVMA"), known as "the recognized national voice for the veterinary profession," representing 83 percent of all U.S. veterinarians, recommended that because Prescription Pet Food had "not been evaluated by FDA for safety, efficacy, or nutritional adequacy,... all pet food products with implied or explicit health or drug claims [should] include a prominent statement on the label that these claims have not been evaluated by the FDA."

62. Despite these FD&C Act violations by Mars/Royal Canin, Purina, and Hill's, the Draft CPG stated that FDA staff had discretion to withhold enforcement against offending products provided such products met each of nine requirements. Conditions 1 and 5-7 were: (1) "The product is made available to the public only through licensed veterinarians or through retail or internet sales to individuals purchasing the product under the direction of a veterinarian."; (5) "The product does not include indications for a disease claim (e.g., obesity, renal failure) on the label."; (6) "Distribution of labeling and promotional materials with any disease claims for the product is limited so that it is provided only to veterinary professionals."; and (7) "Electronic resources for the dissemination of labeling information and promotional materials are secured so that they are available only to veterinary professionals."

63. Mars/Royal Canin, Purina, and Hill's were clearly not in compliance with conditions 5, 6, and 7 of the Draft CPG, in that their Prescription Pet Food included indications for disease claims (*e.g.*, obesity, kidney problems) on the labels (condition 5); their labeling and distribution of promotional materials with disease claims were not limited to veterinary

professionals (condition 6), but went to consumers generally; and their electronic dissemination of labeling and promotional materials with disease claims was not secured so as to be available only to veterinary professionals (condition 7), but was directed to consumers on the internet.

64. Specifically:

(a) For its Royal Canin and lams Prescription Pet Food, Mars made advertising and marketing representations directly to consumers that its Prescription Pet Food is a prescription product intended to address disease. In addition to its labeling claims, Mars' Royal Canin web. site stated, "Our Veterinary-Exclusive diets support a wide range of health issues such as: Urinary Health, Skin and Food Allergies, Diabetes, Digestive Support, Liver Health, Joint Support, Illness and Surgery Recovery Support, Renal Health, Weight Management, and Cardiac Health."

(b) For its "Pro Plan Veterinary Diets," Purina made advertising and marketing representations directly to consumers that its Prescription Pet Food was a prescription product intended to address disease. In addition to labeling claims, the Purina website extolled the benefits of Purina's Prescription Pet Foods and told consumers to "[a]sk your veterinarian if Purina Pro Plan Veterinarian Diets cat foods and dog foods can help manage your pet's health." The web site stated, "Purina Pro Plan Veterinary Diets dog and cat foods deliver nutrition with a purpose. Available only from your veterinarian, they play an important role in nutritionally

> managing dogs and cats with certain conditions. Each formula has been developed with specific nutrients to support pets with health issues."
>
> (c) In its "Prescription Diet" line, Hill's made advertising and marketing representations directly to consumers that its Prescription Pet Food is a prescription product intended to address disease. In addition to its labeling claims, above, Hill's website explained the benefits of its Prescription Pet Food, and let consumers search products by pet "conditions" (such as "weight management," "digestive care," "food sensitivities," "urinary care," "kidney care," "dental care," "aging care," "glucose management," "heart care," "joint care," "liver care," etc.). The web site also stated: "Select dog or cat and discover the benefits of Hill's® Prescription Diet® therapeutic pet foods — formulated for most of your pet's life care needs...No matter what health issues your dog is facing, our alliance with veterinarians puts us in a unique position to find a solution. Ask your vet how the Prescription Diet® dog foods can help his weight, mobility, kidney, digestive, urinary and skin and coat health."

65. In view of the Draft CPG and their non compliance with the FD&C Act, Mars/Royal Canin, Purina, and Hill's were confronted with the choice of whether to continue marketing their Prescription Pet Food in violation of federal and state law, or to eliminate the prescription requirement and otherwise comply with law. They decided jointly at that time, in the Fall of 2012, to continue their combination and

conspiracy marketing Prescription Pet Food exactly as they had been doing, and they have continued to do so through the present.

66. In response to the Draft CPG and the FDA's request for comments, Mars/Royal Canin, Purina, and Hill's met under and exploited the cover of their trade association, the Pet Food Institute ("PFI"), to deal with the threat posed by the Draft CPG to their Prescription Pet Food business. At the time of the Draft CPG, Mars/Royal Canin, Purina, and Hill's were all represented on the PFI Board of Directors by their top executives. Hill's was represented on the PFI Board of Directors by its President, U.S., Kostas Kontopanos. On the Board of Directors and the PFI Executive Committee were Purina's President, Americas, Joe Sivewright, and Mars' General Manager, Chris Hamilton. Mr. Sivewright was also Vice-Chairman of PFI's Board. Royal Canin was represented by Randy King, Global Head of Safety and Regulatory of P&G Pet Care. In addition, representatives of Purina and Mars chaired the PFI's two standing committees, Public Affairs (Purina) and Regulatory Affairs (Mars), which was involved in responding to the FDA's request for comments.

67. Under the auspices of the PFI, from September to early November, 2012, Mars/Royal Canin, Purina, and Hill's met and discussed how their existing combination and conspiracy to market and sell Prescription Pet Food could be preserved and continue without change or interruption.

68. On November 8, 2012, at the instance of Mars/Royal Can in, Purina, and Hill's, the PFI wrote the FDA in defense of their Prescription Pet Food marketing practices. The letter stated that although

pet food making therapeutic claims "are not drugs" and "no drug registration or drug listing should be required," such products should nevertheless "only be available to the public through licensed veterinarians with whom the purchaser has a valid Veterinary-Client-Patient Relationship."

69. As of that time, Mars/Royal Can in, Purina, and Hill's jointly agreed that they would continue their combination and conspiracy to engage in deceptive marketing and sale of Prescription Pet Food with the purpose and effect of charging supra-competitive prices, notwithstanding their violations of the FD&C Act. They further agreed that all would construe the Draft CPG to require them to use a prescription requirement, and to contend that their use of the prescription requirement was a good faith effort to comply with the Draft CPG, notwithstanding their clear violations of its conditions. They decided jointly at that time to continue their combination marketing Prescription Pet Food exactly as they had been doing and have continued to do so through the present.

70. In April, 2016, the FDA published the CPG as Sec. 690.150 Labeling and Marketing of Dog and Cat Food Diets Intended to Diagnose, Cure, Mitigate, Treat, or Prevent Diseases (the "Published CPG"). The Published CPG was substantially identical to the Draft CPG with only minor changes, the most significant of which was expansion of the required conditions for exercise of enforcement discretion from 9 to 11. In the Published CPG, what had been conditions 5-7 became conditions 3-5, respectively. The Published CPG contained the same disclaimer that "It does· not establish any rights for any person and is not binding on FDA or the public." Similarly, it found that therapeutic pet food making disease claims, as did the

Prescription Pet Food of Mars/Royal Canin, Purina, and Hill's, was unsafe, adulterated, and misbranded in the absence of compliance with the FD&C Act. Like the Draft CPG, the Published CPG did not use the word "prescription," the word "authorization," or any derivative of "prescription" or "authorization."

71. Despite the publication of the CPG, Mars/Royal Canin, Purina, and their co-conspirators have complied with neither the FD&C Act nor the conditions for the exercise of enforcement discretion set forth in the CPG. They have at all times in the five years next prior to the filing of this Petition continued to manufacture, market, and sell Prescription Pet Food as part and in furtherance of their contract, combination, and conspiracy to deceive consumers with the purpose and effect of raising, fixing, stabilizing, and pegging prices.

72. Additionally, in the five years next preceding the filing of this Petition, Mars/Royal Canin, Purina and Hills' have failed to comply with certain manufacturing requirements as follows:

> a) The FDA wrote in the CPG that "under the FD&C Act, dog and cat food products that are intended to treat or prevent disease and to provide nutrients in support of the animal's daily nutrient needs can be regulated as drugs (section 201(g) of the FD&C Act [21 U.S.C. 321(g)]), foods (section 201(f) of the FD&C Act [21 U.S.C. 321(f)]), or both."
>
> b) Mars/Royal Canin, Purina, and each other non-party co-conspirator represent on the labels and packaging of the Prescription Pet Food that their products are intended to treat, prevent,

and/or mitigate diseases. See, e.g., ¶¶ 57, 64. Further, Mars/Royal Canin and Purina all manufacture, ship, mail, and/or deliver their Prescription Pet Food products to, from, or within the State of Missouri. See, e.g., ¶¶ 11, 12.

c) Missouri defines a "Legend drug" as "[a]ny drug or biological product... that is restricted to use or dispensed by practitioner only." Mo. Rev. Stat.§ 338.330(2)(a)(c).

d) Prescription Pet Food is dispensed by practitioners only, through and because of the Defendant manufacturer co-conspirators' prescription requirement, and thus such Prescription Pet Food is a "drug" and a "legend drug" under Missouri law. See Mo. Rev. Stat. §338.330.

e) All manufacturers of "drugs" must register and list those drugs with the FDA, regardless of whether those drugs are approved or index listed. 21 U.S. C. § 360. Failure to register as a manufacturer and list such drugs makes the drugs misbranded under the FD&C Act. 21 U.S.C. § 352(o); See also CPG at 4. The FDA provides an electronic database of all registered manufacturers and of all drugs listed under section 510 on its website at https://www.accessdata.fda.gov/scripts/cder/drls/default.cfm and https://www.fda.gov/Forlndustry/DataStandards/StructuredProductLabeling/ucm191015.htm, respectively.

f) Because these products can be regulated as drugs and meet the statutory definitions of drugs, certain statutory and regulatory

requirements apply to the manufacturing of the Prescription Pet Food at issue herein under Missouri state law, including, but not limited to, licensing and/or registration requirements, facility specifications and product processing requirements, record keeping requirements, and facility inspections. See, e.g., Mo. Rev. Stat. § 338.210 *et seq.*, 20 C.S.R. § 2220-5.020.[1] These requirements differ depending on whether or not the manufacturing occurs in the state or outside of the state, but in either situation, the manufacturer must be licensed or registered with the State of Missouri. Missouri also provides an electronic database of licensed and registered entities on its website at https://renew.pr.mo.gov/pharmacy-licensee-search.asp.

g) According to the FDA website, neither Mars/Royal Canin nor Purina is registered with the FDA as a manufacturer of animal drugs or has listed any drugs on the Electronic Animal Drug Product Listing Directory in connection with any Prescription Pet Food.[2]

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[1] These requirements are detailed and further explained by the Missouri Board of Pharmacy in the "Missouri Drug Distributor Compliance Guide" dated February 2012 and available on the Missouri Board of Pharmacy website at https://pr.mo.gov/pharmacists-drug-distributors.asp.

[2] One listing does appear on the FDA's website for "Nestle Purina Petcare Com any" with a Clinton, Iowa address under the "Business Operations" listing of "Manufacture". This listing, however, does not appear to be in connection with the Prescription Pet Food manufactured by Purina at issue in this case inasmuch as the only corresponding drug listing on the Electronic Animal Drug Product Listing Directory is with regard to "Purina Pro Plan Focus Hairball Remedy", which is not a Prescription Pet Food.

h) According to the Missouri Board of Pharmacy website, neither Mars/Royal Canin nor Purina has a current license or registration as a wholesale drug distributor with the Board of Pharmacy.

i) Based upon the foregoing, neither Mars/Royal Canin nor Purina has complied with the relevant licensing or registration requirements of the Missouri statutes and regulations or with the registration and listing requirements of the FD&C Act, and each is therefore in violation of those statutes and regulations.

73. The decision to continue their Prescription Pet Food combination and conspiracy as they had been doing in violation of federal and state law was a decision made collectively by Mars/Royal Canin, Purina, and their co-conspirators, in that such a decision was contrary to the independent economic self-interest of each of them without agreement with the others, but rational if made collectively to continue their successful combination. The conduct of Mars/Royal Canin, Purina, and each other co-conspirator in violating the FD&C Act and various federal and state deceptive trade practice and consumer protection laws all by itself exposed each to multiple risks, including (1) potential solicitation of FDA enforcement action by a competitor or consumer; (2) suit by another conspirator for deceptive marketing practices in violation of the Lanham· Act, 15 U.S.C. § 1125(a); (3) advertising to consumers exposing the sham selling of Prescription Pet Food and consequent loss of sales and consumer good will; and (4) suit by consumers on learning of the deception. Any of these risks could result in public exposure and the irrecoverable loss of

consumer trust and goodwill, inasmuch as the deceptive use of the prescription requirement depended for its success on the unquestioning faith of vulnerable pet owners in the apparently disinterested advice and recommendations of their veterinarians. 1 f, however, all conspirators, as the dominant sellers of Prescription Pet Food, agreed jointly to continue selling Prescription Pet Food as they had been, these risks would be substantially mitigated because of their combined resources and collective market power.

74. Once the Draft CPG was issued, it is further implausible that Mars/Royal Canin, Purina, and Hill's would have each independently concluded that the Draft CPG suggested, recommended, or authorized the use of a prescription requirement in the marketing and sale of Prescription Pet Food, or that the Draft CPG suggested, recommended, or authorized their making disease claims on labeling or promotional materials provided to consumers, whether in print or on websites. It is further implausible that each would have independently decided to engage in a course of conduct in violation of the Draft CPG and the FD&C Act in exactly the same manner, as in fact occurred. That all three manufacturers decided to violate the Draft CPG and FD&C Act in the same way is explicable only as the result of a collective decision or agreement.

V. INJURY TO PLAINTIFFS

75. Plaintiff Wullschleger began purchasing Royal Canin Veterinary Diet Hypoallergenic HP Adult dry Prescription Pet Food for her dog Clinton from PetSmart in approximately June, 2015, at the recommendation of a veterinarian at Banfield in her

local PetSmart, and has continued to do so at the recommendations of other Banfield veterinarians at the location. She was told then and has continued to be told by veterinarians at Banfield and sales people at PetSmart that she cannot buy this Prescription Pet Food product without a prescription and a completed MedCard from Banfield.

76. When Plaintiff Wullschleger was told that she needed a prescription for the Royal Canin dog food she understood and believed that the Prescription Pet Food was intended to treat specific disease and health problems of her dog; that it contained medicine of some sort; that there had been some type of regulatory oversight in its manufacture; and that her purchasing the Prescription Pet Food was substantially similar to the purchase of prescription drugs from a pharmacy such as CVS. She also observed that the Prescription Pet Food was shelved in a section of the PetSmart store separate and distinct from the sections containing non-prescription pet food, and that signs in the Prescription Pet Food section advised that a prescription and MedCard from Banfield were required to purchase Prescription Pet Food.

77. Royal Canin Veterinary Diet Hypoallergenic HP Adult dog food makes claims on its packaging including:

- Supports skin and digestive health in dogs with food sensitivity
- Helps maintain skin and coat health
- Supports the skin's natural barrier
- Helps maintain digestive health
- 100% Complete and Balanced Nutrition Canine Hydrolyzed Protein Adult HP is a highly

palatable, highly digestible, complete and balanced hydrolyzed protein diet
- The diet is specifically formulated for use as short-term elimination feeding and as long-term nutrition for dogs with food sensitivities.
- Specific nutrient blend to help regulate intestinal transit and to help support the digestive flora
- Optimal amounts of B vitamins and amino acids help maintain the skin's natural barrier effect
- Long chain omega omega-3 fatty acids that promote a healthy skin and coat
- Hydrolyzed soy protein, composed of low molecular-weight peptides, is highly digestible and supports gastrointestinal and dermatological health

78. Royal Canin also manufactures and markets non-prescription foods that make similar claims. By way of example, Royal Canin manufactures and markets non-prescription Royal Canin Maxi Sensitive Digestion dry dog food, which states on its packaging that it is for "Sensitive Digestion" and makes claims on its packaging including:

- "Helps support digestive health with high quality protein sources and maintain oligosaccharides. This formula helps promote a balanced intestinal flora and maintain stool quality."
- "This formula contains nutrients that help support healthy skin and coat."
- "L.I.P.: protein selected for its very high digestibility."
- "100% COMPLETE AND BALANCED

NUTRITION MAXI SENSITIVE DIGESTION Size Health Nutrition is formulated to meet the nutritional levels established by the AAFCO (Association of American Feed Control Officials) Dog Food Nutrient Profiles for maintenance."

- "Helps support large breed dogs' healthy bones and joints"

79. There are 42 total ingredients in Royal Canin Veterinary Diet HP dog food. Thirty-four of these ingredients are also in Royal Canin Maxi Sensitive Digestion dry dog food, which has 51 total ingredients, for an overlap of more than 66 percent. The non-overlapping ingredients are not drugs and are not sufficient to justify one product being sold by prescription for a significantly higher price.

80. Despite these similarities, Royal Canin Veterinary Diet HP dog food currently sells for $3.83 per pound and Royal Canin Maxi Sensitive Digestion dry dog food for $1.92 per pound at PetSmart.

81. As a result of the false and fraudulent prescription requirement and the combination and conspiracy of Royal Canin, Purina, and their co-conspirators, Plaintiff Wullschleger paid more for Prescription Pet Food than she would have paid in the absence of the requirement, or would never have purchased Prescription Pet Food.

82. On the recommendation of her veterinarians, Plaintiff Brewer has purchased Purina Pro Plan Veterinary Diets UR St/Ox Urinary Formula Dry Prescription Pet Food for her cat Sassie from O'Fallon Veterinary Medical Center, Florissant Animal Hospital, and PetSmart beginning in 2009 and

continuing through the present. She was told then and has continued to be told by veterinarians and sales people at PetSmart that she cannot buy this Prescription Pet Food without a prescription and a completed MedCard from Banfield. She was told that Purina Pro Plan Veterinary Diets UR St/Ox Urinary Formula Dry Prescription Pet Food was a specialized pet food that could only be purchased with a prescription.

83. When Plaintiff Brewer was told that she needed a prescription for the Purina cat food, she understood and believed that the Prescription Pet Food was intended to treat specific disease and health problems of her cat; that it contained medicine of some sort; that there had been some type of regulatory oversight in its manufacture; and that her purchasing the Prescription Pet Food was substantially similar to the purchase of prescription drugs from a pharmacy such as CVS. She also observed that the Prescription Pet Food was shelved in a section of the PetSmart store separate and distinct from the sections containing non-prescription pet food, and that signs in the Prescription Pet Food section advised that a prescription and MedCard from Banfield were required to purchase Prescription Pet Food.

84. Purina Pro Plan Veterinary Diets UR St/Ox Urinary Formula Dry Prescription Pet Food makes claims on its packaging, including:

- Promotes increased urine flow to dilute the urine
- Helps dissolve struvite stones
- Helps reduce the risk of both struvite and calcium oxalate stone recurrence
- Promotes a urinary environment unfavorable to

the development of struvite and calcium oxalate crystals

85. Purina also makes non-prescription Purina Pro Plan Focus Adult Urinary Tract Health Formula Dry Cat Food, which makes claims on its packaging, including:

- Helps maintain urinary tract health by reducing urinary pH and providing low dietary magnesium
- Purina studies show: Diets that include acidifying ingredients promote a low urine pH while supporting cats' health
- pH Benefit: This formula effectively promotes a LOW URJNE pH, which helps maintain a HEALTHY URINARY TRACT

86. There are 35 total ingredients in Purina Pro Plan Veterinary Diets UR St/Ox Urinary Formula Dry Cat Food. Twenty-eight of these ingredients are also in Purina Pro Plan Focus Adult Urinary Tract Health Formula Dry Cat Food, which has 38 total ingredients, for an overlap of 74 percent. The non-overlapping ingredients are not drugs and are not sufficient to justify one product being sold by prescription for a significantly higher price.

87. Despite these similarities, Purina Pro Plan Veterinary Diets UR St/Ox Urinary Formula Dry Cat Food currently sells for $4.03 per pound and Purina Pro Plan Focus Adult Urinary Tract Health Formula Dry Cat Food for $2.31 per pound at PetSmart.

88. As a result of the false and fraudulent prescription requirement and the combination and

conspiracy of Royal Can in, Purina, and their co-conspirators, Plaintiff Brewer paid more for Prescription Pet Food than she would have paid in the absence of the requirement, or would never have purchased Prescription Pet Food.

89. Plaintiffs Wullschleger and Brewer, who are currently feeding their pets Prescription Pet Food, are reluctant to change their pets' diet abruptly and may again purchase Prescription Pet Food if their pets reacted well to it in the past, or if their veterinarians prescribe a new Prescription Pet Food. It is therefore essential to the fairness of the transaction not only for Plaintiffs, but for all Class Members, that Defendants' violations of law be enjoined. The veterinarians and store personnel with whom Plaintiffs and Class members interface with in purchasing Prescription Pet Food will generally not be in a position to confirm that the Prescription Pet Food at issue is not (a) a substance medically necessary to health; (b) a drug, medicine, or other controlled ingredient; (c) a substance that has been evaluated by FDA as a drug; (d) a substance as to which the manufacturer's representations regarding intended uses and effects have been evaluated by the FDA; or (e) a substance legally required to be sold by prescription. The Defendants themselves must therefore be enjoined to stop their violations at the source, before they filter down to the consumer level and vitiate the actual purchase transactions.

VI. CLASS ACTION ALLEGATIONS

90. For purposes of their claims under the Missouri Antitrust Law, Mo. Rev. Stat. §§ 416.011 *et seq.*, Plaintiffs seek to represent a class consisting of

and defined as all Missouri citizens who purchased Prescription Pet Food in Missouri for personal, family, or household purposes directly or indirectly from Royal Canin, Purina, or any of their co-conspirators during the five years next prior to the filing of this lawsuit ("the Missouri Antitrust Class").

91. For purposes of her claims under the Missouri Merchandising Practices Act, Mo. Rev. Stat.,§§ 407.010 *et seq.*, and Missouri law of unjust enrichment, Plaintiff Wullschleger seeks to represent a class consisting of and defined as all Missouri citizens who purchased in Missouri Royal Canin Prescription Pet Food for personal, family, or household purposes during the five years next prior to the filing of this lawsuit ("the Missouri Royal Canin Class").

92. For purposes of her claims under the Missouri Merchandising Practices Act, Mo. Rev. Stat., §§ 407.010 *et seq.*, and Missouri law of unjust enrichment, Plaintiff Brewer seeks to represent a class consisting of and defined as all Missouri citizens who purchased in Missouri Purina Prescription Pet Food for personal, family, or household purposes during the five years next prior to the filing of this lawsuit ("the Missouri Purina Class").

93. Plaintiffs' claims are typical of the respective classes they seek to represent in that all class members in each class are Missouri citizens who purchased Prescription Pet Food in Missouri from Defendants and their co-conspirators because it was prescribed for their pets by a veterinarian pursuant to the prescription requirement imposed by Defendants and their co-conspirators, and, as reasonable consumers, all class members utilized the prescription to purchase that pet food based upon the misrepresentations communicated by the prescription,

as alleged hereinabove. Regardless of any differences in the products purchased, all class members purchased Prescription Pet Food in reliance on and because of the same combination and conspiracy, misrepresentation, and unfair and deceptive practice imposed by Defendants and their co-conspirators—the false prescription requirement—and paid an unjustified price premium, in the absence of which they would not have purchased the Prescription Pet Food, or would have paid a lower price.

94. Members of each of the Classes are so numerous that joinder of all members is impracticable. While the exact number of Class Members for each Class is currently unknown, and can only be ascertained through appropriate discovery, the members of the Classes are likely to number at least in the thousands, and the disposition of the Class Members' claims in a single action will provide substantial benefits to all parties and to the Court. Class Members are readily identifiable from information and records in the possession, custody, or control of Defendants, retailers of Prescription Pet Food, veterinarians, and the Class Members.

95. Common questions of law and fact exist as to all members of the Classes, and predominate over any questions solely affecting individual members of each Class. Questions of law and fact common to the Classes include, but are not limited to, the following:

a. Whether Defendants and their co-conspirators have imposed a "prescription" requirement on Prescription Pet Food they manufacture, market, and sell, notwithstanding that Prescription Pet Food is not a drug and has not been subjected to FDA review or clearance as a drug;

b. Whether the prescription requirement and Defendants' related representations and omissions materially misrepresent that Prescription Pet Food contains some substance medically necessary to health;

c. Whether the prescription requirement and Defendants' related representations and omissions materially misrepresent that Prescription Pet Food contains some sort of drug, medicine, or other controlled ingredient;

d. Whether the prescription requirement and Defendants' related representations and omissions materially misrepresent that the statements regarding the intended uses and effects of Prescription Pet Food have been evaluated by the FDA;

e. Whether the prescription requirement and Defendants' related representations and omissions materially misrepresent that Prescription Pet Food requires a prescription under federal or state law;

f. Whether the prescription requirement and Defendants' related representations and omissions materially misrepresent that Prescription Pet Food is so materially different from non-prescription pet food that paying a price premium is warranted;

g. Whether Prescription Pet Food is misbranded;

h. Whether Plaintiffs and Class Members are entitled to a declaratory judgment;

i. Whether Plaintiffs and Class Members are entitled to equitable relief, including, but not limited to, a preliminary or permanent injunction;

j. Whether Plaintiffs and Class Members are entitled to restitution or disgorgement and the amount;

k. Whether Plaintiffs and Class Members

are entitled to punitive or exemplary damages and the amount;

l. Whether Defendants should be required to make restitution, disgorge profit, reimburse losses, pay damages, or pay treble damages as a result of the above-described practices;

m. Whether Defendants and their co-conspirators have combined and conspired to misrepresent Prescription Pet Food as part and in furtherance of a combination and conspiracy to fix, raise, stabilize, or peg prices of Prescription Pet Food;

n. Whether Defendants and their co-conspirators have conspired to monopolize the market for Prescription Pet Food in the United States and/or the State of Missouri;

o. Whether the combination and conspiracy of Defendants and their co-conspirators to fix, raise, stabilize, or peg the prices of Prescription Pet Food has caused injury to the business or property of Plaintiffs and the Class Members;

p. The amount of the overcharge and damage paid as a result of the combination and conspiracy to fix, raise, stabilize, or peg the prices of Prescription Pet Food, or the Defendants' deceptive trade practices;

q. Whether Defendants' actions as described above violate the Missouri Antitrust Law, Mo. Rev. Stat., §§ 416.011 *et seq.;* and

r. Whether Defendants' actions as described above violate the Missouri Merchandising Practices Act, Mo. Rev. Stat., §§ 407.010 *et seq.*

96. The claims of Plaintiffs are typical of the claims of Class members because Plaintiffs and each

member of the Classes purchased Prescription Pet Food, and suffered a monetary loss as a result of that purchase. Further, the factual bases of Defendants' conduct are common to Plaintiffs and the members of each Class and represent a common thread of misconduct resulting in an injury common to all Class members.

97. Plaintiffs are adequate representatives of the respective Classes because their interests do not conflict with the interests of the Class Members Plaintiffs seek to represent, Plaintiffs have retained competent counsel experienced in prosecuting class actions, and Plaintiffs intend to prosecute this action vigorously. The interests of Class Members will be fairly and adequately protected by Plaintiffs and their counsel.

98. Class certification and class-wide litigation and relief are appropriate because a class action is superior to all other available methods for the fair and efficient adjudication of this controversy. Liability, injury, and damages can be proved on a class-wide basis. Joinder of all members is impracticable. Furthermore, the damages suffered by the individual members of the Classes may be so small that the expense and burden of individual litigation make it impossible for most members of the Classes individually to redress the wrongs done to them. Absent a class action, Class Members' damages will go uncompensated, and Defendants' misconduct will continue without remedy. Class treatment of common questions of law and fact will also be superior to multiple individual actions or piecemeal litigation in that class treatment will conserve the resources of the courts and the litigants, and will promote consistency and efficiency of adjudication.

99. Defendants have acted in a uniform manner with respect to the Plaintiffs and Class Members of each Class. Class-wide declaratory, equitable, and injunctive relief is appropriate because Defendants have acted on grounds that apply generally to the Classes, and inconsistent adjudications with respect to Defendants' liability would establish incompatible standards and substantially impair or impede the ability of Class Members to protect their interests. Class-wide relief assures fair, consistent, and equitable treatment and protection of all Class Members, and uniformity and consistency in Defendants' discharge of their duties to perform corrective action regarding Prescription Pet Food.

VII. JURISDICTION

100. This Court has jurisdiction of this action pursuant to the Missouri Antitrust Law, Mo. Rev. Stat.,§ 416.121, and the Missouri Merchandising Practices Act, Mo. Rev. Stat., § 407.025.

CAUSES OF ACTION

COUNT I

VIOLATION OF MISSOURI ANTITRUST LAW§ 416.031.1

(Royal Canin, Purina)

101. Plaintiffs, on behalf of themselves and the Missouri Antitrust Class, hereby re-allege and incorporate by reference the allegations in the

preceding paragraphs as if set forth in full herein.

102. Continuously during the five years next prior to the filing of this Petition, Defendants and their co-conspirators have entered into a contract, combination, or conspiracy in restraint of trade or commerce in Missouri to fix, raise, stabilize, and peg prices for Prescription Pet Food by agreeing, combining, and conspiring to misrepresent and market and sell Prescription Pet Food through a knowingly deceptive, misleading, and self-imposed prescription requirement having no legal basis or mandate.

103. Defendants' combination and conspiracy is per se unlawful under the Missouri Antitrust Law, Mo. Rev. Stat., § 416.031.1. Alternatively, Defendants' combination and conspiracy has unreasonably restrained trade and commerce in the market for Prescription Pet Food in the state of Missouri in violation of the Missouri Antitrust Law, Mo. Rev.-Stat., § 416.031.1.

104. Defendants' combination and conspiracy has led to anticompetitive effects, including unjustifiably increased prices for Prescription Pet Food, and otherwise caused injury to consumers and competition in the market for Prescription Pet Food in the state of Missouri, in that Plaintiffs and the Missouri Antitrust Class have paid more for Prescription Pet Food than they would have otherwise paid in the absence of Defendants' violation, and have thereby been injured in their business and property.

105. Plaintiffs and the Missouri Antitrust Class will continue to suffer injury and other damage unless Defendants are enjoined from continuing to engage in their combination and conspiracy, and are thereby entitled to injunctive relief pursuant to the

Missouri Antitrust Law, Mo. Rev. Stat., § 416.071.

106. Plaintiffs and the Missouri Antitrust Class are entitled to all damages proximately caused by Defendants' violation of the Missouri Antitrust Law, including the unjustified price premium paid by them for Prescription Pet Food, and are entitled to three-fold such damages as they show themselves to have sustained and the jury shall find, together with injunctive relief, and their cost of suit, including a reasonable attorney's fee, pursuant to the Missouri Antitrust Law, Mo. Rev. Stat.,§ 416.121.

COUNT II

VIOLATION OF MISSOURI ANTITRUST LAW§ 416.031.2

(Royal Canin, Purina)

107. Plaintiffs, on behalf of themselves and the Missouri Antitrust Class, hereby re-allege and incorporate by reference the allegations in the preceding paragraphs as if set forth in full herein.

108. Continuously during the five years next prior to the filing of this Petition, Defendants and their co-conspirators, with the specific intent to obtain a monopoly, have entered into a conspiracy to monopolize the market for Prescription Pet Food in the State of Missouri, and have committed overt acts in furtherance thereof, including agreeing, combining, and conspiring to misrepresent and market and sell Prescription Pet Food through a knowingly deceptive, misleading, and self-imposed prescription requirement having no legal basis or mandate, and by agreeing, combining, and

conspiring to limit and preclude non-conspiring competing manufacturers of Prescription Pet Food from access to major channels of distribution, including their co-conspirator retailers and veterinary clinics.

109. Defendants' conspiracy to monopolize the market for Prescription Pet Food in the State of Missouri is unlawful under the Missouri Antitrust Law, Mo. Rev. Stat., § 416.031.2.

110. Defendants' conspiracy to monopolize the Prescription Pet Food market in the State of Missouri has led to anticompetitive effects, including unjustifiably increased prices for Prescription Pet Food, and otherwise caused injury to consumers and competition in the market for Prescription Pet Food in the State of Missouri, in that Plaintiffs and the Missouri Antitrust Class have paid more for Prescription Pet Food than they would have otherwise paid in the absence of Defendants' violation, and have thereby been injured in their business and property.

111. Plaintiffs and the Missouri Antitrust Class will continue to suffer injury and other damage unless Defendants re enjoined from continuing to engage in their conspiracy to monopolize, and are thereby entitled to injunctive relief pursuant to the Missouri Antitrust Law, Mo. Rev. Stat., § 416.071.

112. Plaintiffs and the Missouri Antitrust Class are entitled to all damages proximately caused by Defendants' violation of the Missouri Antitrust Law, including the unjustified price premium paid by them for Prescription Pet Food, and are entitled to three-fold such damages as they show themselves to have sustained and the jury shall find, together with injunctive relief, and their cost of suit, including a reasonable attorney's fee, pursuant to the Missouri

Antitrust Law, Mo. Rev. Stat., § 416.121.

COUNT III

VIOLATION OF MISSOURI MERCHANDISING PRACTICES ACT § 407.020, *et seq.*

(Royal Canin)

113. Plaintiff Wullschleger, on behalf of herself and the Missouri Royal Canin Class, hereby re-alleges and incorporates by reference the allegations in the preceding paragraphs as if set forth in full herein.

114. Continuously during the five years next prior to the filing of this Petition, Royal Canin has engaged in the act, use, and employment of deception, fraud, false pretense, false promise, misrepresentation, unfair practice, and the concealment, suppression, or omission of any material fact in connection with the sale and advertisement of Royal Canin Prescription Pet Food in trade or commerce in the state of Missouri by misrepresenting and marketing and selling Prescription Pet Food through a knowingly deceptive, misleading, and self-imposed prescription requirement having no legal basis or mandate.

115. The conduct of Royal Canin in the act, use, and employment of deception, fraud, false pretense, false promise, misrepresentation, unfair practice, and the concealment, suppression, or omission of any material fact in connection with the sale and advertisement of Prescription Pet Food in trade or commerce in the state of Missouri is unlawful under the Missouri Merchandising Practices Act, Mo. Rev. Stat.,§ 407.020 *et seq.*

116. The violation of the Missouri Merchandising Practices Act, Mo. Rev. Stat., § 407.020, by Royal Canin has caused Plaintiff Wullschleger and the Missouri Royal Canin Class to suffer an ascertainable loss of money or property, real or personal, as a result of the use or employment by Royal Canin of a method, act, or practice declared unlawful by section 407.020, in that Plaintiff Wullschleger and the Missouri Royal Canin Class have paid more for Prescription Pet Food than they would have otherwise paid in the absence of Defendant's violation, and have thereby been injured in their persons and property.

117. Plaintiff Wullschleger and the Missouri Royal Canin Class will continue to suffer injury and other damage unless Defendant Royal Canin is enjoined from continuing to engage in violations of Missouri Merchandising Practices Act, Mo. Rev. Stat., § 407.020, and are thereby entitled to injunctive relief pursuant to the Missouri Merchandising Practices Act, Mo. Rev. Stat., § 407.025.

118. Plaintiff Wullschleger and the Missouri Royal Canin/Purina Class are entitled to all actual damages proximately caused by said Defendant's violation of the Missouri Merchandising Practices Act, Mo. Rev. Stat.,§ 407.020, including the unjustified price premium paid by them for Prescription Pet Food, and are entitled to punitive damages, together with injunctive relief, and attorney's fees, pursuant to the Missouri Merchandising Practices Act, Mo. Rev. Stat.,§ 407.025.

COUNT IV

VIOLATION OF MISSOURI MERCHANDISING

PRACTICES ACT § 407.020, *et seq.*

(Purina)

119. Plaintiff Brewer, on behalf of herself and the Missouri Purina Class, hereby re-alleges and incorporates by reference the allegations in the preceding paragraphs as if set forth in full herein.

120. Continuously during the five years next prior to the filing of this Petition, Purina has engaged in the act, use, and employment of deception, fraud, false pretense, false promise, misrepresentation, unfair practice, and the concealment, suppression, or omission of any material fact in connection with the sale and advertisement of Prescription Pet Food in trade or commerce in the state of Missouri by misrepresenting and marketing and selling Prescription Pet Food through a knowingly deceptive, misleading, and self-imposed prescription requirement having no legal basis or mandate.

121. The conduct of Purina in the act, use, and employment of deception, fraud, false pretense, false promise, misrepresentation, unfair practice, and the concealment, suppression, or omission of any material fact in connection with the sale and advertisement of Prescription Pet Food in trade or commerce in the state of Missouri is unlawful under the Missouri Merchandising Practices Act, Mo. Rev. Stat., § 407.020 *et seq.*

122. The violation of the Missouri Merchandising Practices Act, Mo. Rev. Stat., § 407.020 by Purina has caused Plaintiff Brewer and the Missouri Purina Class to suffer an ascertainable loss of money or property, real or personal, as a result of the use or

employment by Purina of a method, act, or practice declared unlawful by section 407.020, in that Plaintiff Brewer and the Missouri Purina Class have paid more for Prescription Pet Food than they would have otherwise paid in the absence of Purina's violation, and have thereby been injured in their persons and property.

123. Plaintiff Brewer and the Missouri Purina Class will continue to suffer injury and other damage unless Purina is enjoined from continuing to engage in violations of Missouri Merchandising Practices Act, Mo. Rev. Stat.,§ 407.020, and are thereby entitled to injunctive relief pursuant to the Missouri Merchandising Practices Act, Mo. Rev. Stat., § 407.025.

124. Plaintiff Brewer and the Missouri Purina Class are entitled to all actual damages proximately caused by Purina's violation of the Missouri Merchandising Practices Act, Mo. Rev. Stat., § 407.020, including the unjustified price premium paid by them for Prescription Pet Food, and are entitled to punitive damages, together with injunctive relief, and attorney's fees, pursuant to the Missouri Merchandising Practices Act, Mo. Rev. Stat.,§ 407.025.

COUNT V

UNJUST ENRICHMENT

(Royal Canin)

125. Plaintiff Wullschleger, on behalf of herself and the Missouri Royal Canin Class, hereby re-alleges and incorporates by reference the allegations in the preceding paragraphs as if set forth in full herein.

126. Continuously during the five years next prior to the filing of this Petition, Royal Canin has been unjustly enriched in violation of the common law of the state of Missouri by misrepresenting and marketing and selling Prescription Pet Food through a knowingly deceptive, misleading, and self-imposed prescription requirement having no legal basis or mandate, pursuant to which Royal Canin induced Plaintiff Wullschleger and the Missouri Royal Canin Class to confer a benefit on Royal Canin by paying an unwarranted price premium for Prescription Pet Food. Royal Canin was aware of and willfully induced Plaintiff Wullschleger and the Missouri Royal Canin to confer such benefit, which Royal Canin has inequitably kept for itself.

127. The violation of the Missouri common law of unjust enrichment by Royal Canin has caused Plaintiff Wullschleger and the Missouri Royal Canin Class to suffer an ascertainable loss of money or property, real or personal, as a result of the use the false and fraudulent prescription requirement by Royal Canin, in that Plaintiff Wullschleger and the Missouri Royal Canin Class have paid more for Prescription Pet Food than they would have otherwise paid in the absence of said Defendant's violation, and have thereby been injured in their persons and property.

128. Plaintiff Wullschleger and the Missouri Royal Canin Class will continue to suffer injury and other damage unless Royal Canin is enjoined from continuing to engage in violations of Missouri common law of unjust enrichment, and are thereby entitled to injunctive relief.

129. Plaintiff Wullschleger and the Missouri Royal Canin Class are entitled to all actual damages proximately caused by Royal Canin's violation of Missouri common law of unjust enrichment, including

disgorgement and restitution of the price premium they have paid for Prescription Pet Food, together with their costs and such other relief as may be appropriate.

COUNT VI

UNJUST ENRICHMENT

(Purina)

130. Plaintiff Brewer, on behalf of herself and the Missouri Purina Class, hereby re-alleges and incorporates by reference the allegations in the preceding paragraphs as if set forth in full herein.

131. Continuously during the five years next prior to the filing of this Petition, Purina has been unjustly enriched in violation of the common law of the state of Missouri by misrepresenting and marketing and selling Prescription Pet Food through a knowingly deceptive, misleading, and self-imposed prescription requirement having no legal basis or mandate, pursuant to which it induced Plaintiff Brewer and the Missouri Purina Class to confer a benefit on it by paying an unwarranted price premium for Prescription Pet Food. Purina was aware of and willfully induced Plaintiff Brewer and the Missouri ·Purina Class to confer such benefit, which Purina has inequitably kept for itself.

132. The violation of the Missouri common Jaw of unjust enrichment by Purina has caused Plaintiff Brewer and the Missouri Purina Class to suffer an ascertainable loss of money or property, real or personal, as a result of the use the false and fraudulent prescription requirement by Purina, in that Plaintiff Brewer and the Missouri Purina Class have paid more

for Prescription Pet Food than they would have otherwise paid in the absence of Purina's violation, and have thereby been injured in their persons and property.

133. Plaintiff Brewer and the Missouri Purina Class will continue to suffer injury and other damage unless Purina is enjoined from continuing to engage in violations of Missouri common law of unjust enrichment, and are thereby entitled to injunctive relief.

134. Plaintiff Brewer and the Missouri Purina Class are entitled to all actual damages proximately caused by Purina's violation of Missouri common law of unjust enrichment, including disgorgement and restitution of the price premium they have paid for Prescription Pet Food, together with their costs and such other relief as may be appropriate.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of all others similarly situated, request the Court to enter Orders and Judgment against Defendants as follows:

135. Certifying the Missouri Antitrust Class, the Missouri Royal Canin, and the Missouri Purina Class, or such other alternative classes as the Court shall determine, under Missouri Rule of Civil Procedure 52.08 and Missouri Statutes§ 407.025.3, and naming the Plaintiffs as representatives of the respective Classes, and Plaintiffs' attorneys as Class Counsel to represent the Class Members;

136. Finding, adjudging, and decreeing that Defendants have engaged in the violations of law

alleged in this Petition;

137. Enjoining Defendants from engaging in further such violations of law as the jury shall find and the Court shall adjudge and decree;

138. Estopping Defendants from denying Prescription Pet Food is a "drug" and enjoining Defendants to comply with all federal and Missouri provisions applicable to the manufacture of such drugs, or alternatively, enjoining Defendants from making the disease treatment claims on the packaging of Prescription Pet Food;

139. Declaring that Defendants are financially responsible for notifying all Class Members about the true nature of Prescription Pet Food;

140. Awarding to Plaintiffs and the Classes such damages as the jury shall find for the violations alleged;

141. Awarding to Plaintiffs and the Missouri Antitrust Class three-fold such damages as they show themselves to have sustained and the jury shall find, together with injunctive relief, and their cost of suit, including a reasonable attorney's fee, pursuant to the Missouri Antitrust Law§ 416.121;

142. Awarding to Plaintiff Wullschleger and the Missouri Royal Canin Class, and to Plaintiff Brewer and the Missouri Purina Class, punitive damages, together with injunctive relief, and attorney's fees, pursuant to the Missouri Merchandising Practices Act, Mo. Rev. Stat.,§ 407.025.1;

143. Finding, declaring, and decreeing that Defendants must disgorge, for the benefit of Plaintiffs and Class Members, all or part of the ill-gotten profits received from the sale of Prescription Pet Food in violation of Missouri common law of unjust enrichment;

144. Awarding prejudgment interest on a11 amounts recovered; and

145. Awarding a11 such other and further relief to which Plaintiff and the Classes are entitled.

JURY TRIAL DEMAND

146. Plaintiffs demand a trial by jury on all issues so triable.

Respectfully submitted,

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