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11
12 **UNITED STATES DISTRICT COURT**
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

14 IN RE BIG HEART PET BRANDS
15 LITIGATION

16 _____
17 This Document Relates to:

18 ALL ACTIONS

Lead Case No. 4:18-cv-00861-JSW

(Consolidated with No. 4:18-cv-01465; 4:18-cv-01466; 4:18-cv-01099; 4:18-cv-01663; and 4:18-cv-02662)

JOINT CASE MANAGEMENT STATEMENT

Hon. Jeffrey S. White
Courtroom: 5, 2nd Floor

1 Pursuant to Federal Rule of Civil Procedure 26(f), Civil Local Rule 16-9, and the Standing
2 Order for All Judges of the Northern District, Plaintiffs Maclain Mullins, Thomas Roupe, Nancy
3 Sturm, Neil Sebastiano, Kathy Williamson, Mark Johnson, Norman Todd, Betty Christian, Aubrey
4 Thomas, Joyce Brown, Roberta Mayo, Jack Collins, Vivian Jilek, and Rosemarie Schirripa
5 (“Plaintiffs”), and Defendant Big Heart Pet Brands, Inc. (“Defendant”) (together, the “Parties”) jointly
6 submit this Joint Case Management Statement in advance of the Case Management Conference on
7 July 20, 2018.

8 I. JURISDICTION AND VENUE

9 The Parties agree that the Court has jurisdiction over this matter pursuant to 28 U.S.C.
10 § 1332(d)(2)(A). There are no issues regarding personal jurisdiction or venue. No Parties remain to
11 be served.

12 II. FACTS

13 PLAINTIFFS’ STATEMENT: Plaintiffs allege that Defendant was knowingly, recklessly
14 and/or negligently selling Contaminated Dog Foods containing pentobarbital, a substance largely used
15 to euthanize animals. After this contamination came to light through a report by an ABC news affiliate
16 in Washington, DC, Defendant was forced to recall 90 million cans of pet food spanning multiple
17 brands. In the interim, testing by the FDA confirmed the presence of pentobarbital in Defendant’s pet
18 foods and identified tallow as the source of the contamination. Defendant claims that the source of
19 the contaminated tallow is one supplier—JBS USA Holdings, Inc. (a subsidiary of JBS S.A.) and its
20 rendering facility MOPAC located in eastern Pennsylvania (collectively, “JBS”). JBS knowingly
21 works with meat by-product recycling, including animal byproducts not suitable for human
22 consumption.

23 Defendant has made numerous claims on its pet food labels and through advertising related to
24 the safety and nutritional value of its pet foods. It further promised to its consumers that all of its
25 products met USDA, AAFCO, and FDA standards. None of these representations notified consumers
26 that the pet foods might contain pentobarbital or that Defendant or its supplier utilized euthanized
27 animals as a protein or meat by-product source, nor did Defendant warn consumers of the risks that
28 consuming food adulterated with pentobarbital posed to pets. As a result of Defendant’s omissions

1 and misrepresentations, a reasonable consumer would have no reason to suspect the presence of
2 pentobarbital without conducting his or her own scientific tests, or reviewing third-party scientific
3 testing of these products. These omissions and representations caused consumers to purchase pet
4 foods that they would not have bought if the true quality and nature were disclosed prior to sale.

5 Plaintiffs have therefore brought this action individually and on behalf of all other similarly
6 situated consumers within the United States who purchased the Contaminated Dog Foods, in order to
7 cause the disclosure of the inclusion of pentobarbital and/or the utilization of euthanized animals as a
8 protein or meat by-product source in the Contaminated Dog Foods, to correct the false and misleading
9 perception Defendant has created in the minds of consumers that the Contaminated Dog Foods are
10 high quality, safe, and healthy, and to obtain redress for those who have purchased the Contaminated
11 Dog Foods.

12 DEFENDANT'S STATEMENT: Plaintiffs seek to assert misrepresentation, false advertising,
13 and breach of warranty claims under various state laws on behalf of a putative nationwide class, as
14 well as several state subclasses, of consumers who purchased certain shipments of Defendant's *Gravy*
15 *Train* and *Kibbles 'n Bits* canned wet dog food products that were contaminated with very low levels
16 of pentobarbital.

17 Immediately upon learning of the contamination, Defendant, in cooperation with the FDA,
18 worked to recall the affected products and advise its retailers to remove these products from their
19 supply. Subsequent testing and investigation have confirmed that the source of the contamination was
20 animal fat, which makes up only one minor ingredient of the affected dog food. This animal fat was
21 sourced from cow, chicken, and pig, each of which are common protein sources used in pet food. Both
22 the FDA and veterinary specialists have confirmed that the low levels of pentobarbital present in the
23 recalled products is unlikely to pose a health risk to pets.

24 Defendant has made available a standing offer to allow consumers who purchased an affected
25 product to obtain a refund or replacement product. The offer to refund or replace the affected products
26 is an unconditional offer, available with or without receipt, for all who could be potential members of
27 the classes. Such refunds are being provided directly by Defendant to affected consumers at no cost
28 to the consumer. Moreover, any request from consumers that Defendant reimburse them for any

1 veterinary fees incurred due to related concerns of pet safety have been honored where the consumer
2 provided appropriate documentation of expenses.

3 **III. LEGAL ISSUES**

4 The Parties anticipate that the following legal issues will be in dispute:

- 5 • Whether Plaintiffs can maintain their claims on an individual or classwide basis where
6 Defendant has ceased selling the products at issue and offered a refund to Plaintiffs and
7 members of the putative classes;
- 8 • Whether Plaintiffs' allegations are sufficient to state a claim under Rule 12(b)(6);
- 9 • Whether Plaintiffs have met the heightened pleading requirements of Federal Rule of
10 Civil Procedure 9(b);
- 11 • Whether California's choice-of-law rules prohibit Plaintiffs from asserting state claims
12 on behalf of a putative nationwide class of consumers;
- 13 • Whether Plaintiffs have standing to bring claims related to products they did not
14 purchase;
- 15 • Whether Defendant had knowledge that its pet foods were adulterated with
16 pentobarbital;
- 17 • Whether Defendant fraudulently concealed from Plaintiffs and the putative class
18 members that its pet foods were adulterated with pentobarbital;
- 19 • Whether Defendant's advertising and/or labeling would mislead a reasonable
20 consumer;
- 21 • Whether Defendant violated various states' consumer protection laws;
- 22 • Whether Defendant breached any alleged express or implied warranty;
- 23 • Whether Defendant knowingly and/or recklessly utilized JBS as a supplier for
24 ingredients for its pet foods;
- 25 • Whether Defendant's conduct was negligent per se;
- 26 • Whether any class may be certified;
- 27 • Whether Plaintiffs and the members of the classes are entitled to actual, statutory, or
28 punitive damages; and

- Whether Plaintiffs and members of the classes are entitled to injunctive or declaratory relief.

IV. MOTIONS

Defendant will bring a motion to dismiss pursuant to Rules 9(b), 12(b)(1) and 12(b)(6).

In addition, the Parties anticipate that Plaintiff will file a motion for class certification. The Parties are hopeful that they will be able to resolve all their discovery disputes without the assistance of this Court, but disagreements about discovery are common in complex matters, and they may need to seek guidance on the scope or timing of that discovery. The Parties reserve their respective right to file other motions as appropriate, including a motion for summary judgment (or partial summary judgment), and pretrial motions, including motions in limine.

V. AMENDMENT OF PLEADINGS

Plaintiffs filed their Amended Consolidated Complaint on June 14, 2018. Dkt. No. 68. Defendant proposes a deadline of 60 days after the ruling on the motion to dismiss for any further amendments to the pleadings.

VI. EVIDENCE PRESERVATION

The Parties certify they have reviewed the Guidelines Relating to the Discovery of Electronically Stored Information (“ESI Guidelines”) and confirm they have met and conferred pursuant to Fed. R. Civ. P. 26(f) regarding reasonable and proportionate steps taken to preserve evidence relevant to the issues reasonably evident in this action. *See* ESI Guidelines 2.01 and 2.02, and Checklist for ESI Meet and Confer. Moreover, the Parties have submitted, and the Court has approved, a Stipulated Order Regarding Discovery of Electronically Stored Information. Dkt. No. 71. The Parties will continue to discuss whether and to what extent any additional steps may be necessary to ensure the preservation of relevant evidence.

VII. DISCLOSURES

The Parties exchanged Fed. R. Civ. P. 26(a)(1) disclosures on May 22, 2018. The Parties stipulate that Fed. R. Civ. P. 37(c) sanctions will not be sought and should not be imposed if initial disclosures are supplemented in a timely fashion under Fed. R. Civ. P. 26(e).

VIII. DISCOVERY

Plaintiffs have served two sets of requests for production of documents on Defendant. Defendant served responses and objections to these document requests on June 7, 2018. The Parties are negotiating regarding search terms, custodians, and a relevant time period for document productions. Defendant is currently in the process of preparing rolling productions of documents in response to these requests starting the fourth week of July.

The Parties have submitted, and the Court has entered, a Stipulated Protective Order (Dkt. No. 72) and a Stipulated Order Regarding Discovery of Electronically Stored Information (Dkt. No. 71). The Parties' respective proposals regarding the timing of discovery are set forth below in Section XVII. To date, the Parties have not identified any discovery disputes.

IX. CLASS ACTIONS

PLAINTIFFS' POSITION: Plaintiffs believe that certification of a class and subclasses pursuant to Rule 23(b)(2) and/or 23(b)(3) is appropriate and necessary in this matter. Plaintiffs and the putative class members all purchased pet foods contaminated by the same ingredient with the same dangerous substance, pentobarbital. They were the victims of identical misrepresentations and omissions by Defendant, and based on the scope of the recall by Defendant, class members number in the thousands. Numerous issues of law and fact surrounding the contamination of Defendant's pet food and their subsequent misrepresentations and omissions are common to the putative class and subclasses, and Defendant's common course of conduct resulted in identical statutory violations in the relevant states. Individual questions, if any, are not prevalent in comparison to the numerous common questions that predominate this action.

DEFENDANT'S POSITION: Defendant does not believe any class should be certified in this case.

X. RELATED CASES

To date, six related cases have been consolidated under this lead action. The Parties are not currently aware of any additional related cases pending in this district or any other.

XI. RELIEF

PLAINTIFFS' STATEMENT: Plaintiffs seek the following injunctive, declaratory, and

1 monetary relief, individually and on behalf of the putative class and subclasses:

2 A. An order declaring this action to be a proper Class action, appointing Plaintiffs and
3 their counsel to represent the Classes, and requiring Defendant to bear the costs of Class notice;

4 B. An order enjoining Defendant from selling the Contaminated Dog Foods until
5 pentobarbital is removed;

6 C. An order requiring Defendant to engage in a corrective advertising campaign and
7 engage in any further necessary affirmative corrective action, such as recalling existing products;

8 D. An order awarding declaratory relief, and any further retrospective or prospective
9 injunctive relief permitted by law or equity, including enjoining Defendant from continuing the
10 unlawful practices alleged herein, and injunctive relief to remedy Defendant's past conduct;

11 E. An order requiring Defendant to pay restitution to restore all funds acquired by means
12 of any act or practice declared by this Court to be an unlawful, unfair, or fraudulent business act or
13 practice, untrue or misleading advertising, or a violation of California's Unfair Competition Law,
14 FAL, CLRA, or any state law violation alleged herein, plus pre- and post-judgment interest thereon;

15 F. An order requiring Defendant to disgorge or return all monies, revenues, and profits
16 obtained by means of any wrongful or unlawful act or practice;

17 G. An order requiring Defendant to pay all actual and statutory damages permitted under
18 the relevant states' consumer protection laws;

19 H. An order requiring Defendant to pay punitive damages on any count so allowable; and

20 I. An order awarding attorneys' fees and costs to Plaintiffs, the Class, and the Subclasses.

21 DEFENDANT'S STATEMENT: Defendant seeks dismissal of Plaintiffs' Consolidated
22 Amended Complaint with prejudice.

23 **XII. SETTLEMENT AND ADR**

24 There have been no formal ADR efforts to date, but the parties have met and conferred pursuant
25 to ADR Local Rule 3-5. The Parties are scheduled to participate in an ADR phone conference with
26 the ADR court staff on July 18, 2018.

27 **XIII. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

28 On February 16, 2018, Defendant filed a declination to proceeding before a Magistrate Judge

1 for all purposes. Dkt. No. 12.

2 **XIV. OTHER REFERENCES**

3 At this time, the Parties do not believe that this case is suitable for MDL treatment, or reference
4 to binding arbitration or a special master. Defendant reserves the right to refer this case to the Judicial
5 Panel on Multidistrict Litigation if it becomes appropriate to do so at a future date.

6 **XV. NARROWING OF ISSUES**

7 At this time, the Parties have not identified any issues that can be narrowed by agreement or
8 motion.

9 **XVI. EXPEDITED SCHEDULE**

10 The Parties do not believe that the Expedited Trial Procedure of General Order No. 64
11 Attachment A is appropriate for this case.

12 **XVII. SCHEDULING**

13 The Parties propose the following schedule:

Event	Deadline
Defendant to File Motion to Dismiss	8/28/2018 (per Stipulation and Order, Dkt. No. 78)
Plaintiffs to File Opposition to Motion to Dismiss	10/12/2018 (per Stipulation and Order, Dkt. No. 78)
Defendant to File Reply to Motion to Dismiss	10/26/2018 (per Stipulation and Order, Dkt. No. 78)
Hearing on Defendant's Motion to Dismiss	11/16/2018 (per Stipulation and Order, Dkt. No. 78)
Amend Pleadings, Add Parties, Claims or Defenses	60 Days After Ruling on Motion to Dismiss Filed
Fact Discovery Cutoff	6/28/2019
Plaintiffs' Expert Report	7/31/2019
Defendant's Expert Report	8/30/2019
Expert Deposition and Discovery Cutoff	9/30/2019
Class Certification Opening Brief	10/7/2019
Opposition to Motion for Class Certification	11/18/2019
Reply in Support of Motion for Class Certification	12/22/2019
Class Certification Hearing	1/24/2020

1	Opening Summary Judgment Motions	1/31/2020
2	Summary Judgment Oppositions	3/16/2020
3	Summary Judgment Replies	4/6/2020
4	Summary Judgment Hearing	5/1/2020
5	Pretrial Conference	8/14/2020
6	Trial	8/31/2020

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8 **XVIII. TRIAL**

9 Plaintiffs have demanded a jury trial. The Parties believe it is premature to estimate the length
10 of the trial at this time.

11 **XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES**

12 Each party in the case has filed the Certification of Interested Entities or Persons pursuant to
13 Local Rule 3-15.

14 **XX. PROFESSIONAL CONDUCT**

15 All attorneys of record for the Parties have reviewed the Guidelines for Professional Conduct
16 for the Northern District of California.

17 **XXI. OTHER**

18 There are no further matters at this time.

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1 Dated: July 13, 2018

WINSTON & STRAWN LLP

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20 Dated: July 13, 2018

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28 **ATTESTATION PURSUANT TO LOCAL RULE 5-1**

Pursuant to Local Rule 5-1(i)(3), regarding signatures, I attest under penalty of perjury that the concurrence in the filing of this document has been obtained from its signatories.

Dated: July 13, 2018

/s/ Rebecca A. Peterson