

No. 23-677

IN THE
Supreme Court of the United States

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

v.

ANASTASIA WULLSCHLEGER AND
GERALDINE BREWER,
Respondents.

**On Writ of Certiorari to the United States Court
of Appeals for the Eighth Circuit**

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: DECEMBER 19, 2023
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1796

ANASTASIA WULLSCHLEGER,
On behalf of themselves and all others
similarly situated and GERALDINE BREWER,
Appellants,

v.

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

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

ORDER

The parties are directed to file simultaneous letter briefs, limited to 4,000 words each, due on February 10, 2023, addressing the following questions:

(1) Is there still federal question jurisdiction in this case? Please be sure to address whether jurisdiction depends on “the face of the amended complaint,” *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 928–29 (8th Cir. 2005), or the facts that exist “at the time of removal,” *Quinn v. Ocwen Fed. Bank FSB*, 470 F.3d 1240, 1248 (8th Cir. 2006); *McLain v. Andersen Corp.*, 567 F.3d 956 (8th Cir. 2009).

(2) Is there supplemental jurisdiction in this case? Please be sure to discuss whether we can decide the issue ourselves without having the district court weigh in first.

January 26, 2023

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

/s/ Michael E. Gans

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

Case No. 4:19-cv-00235-CV-W-GAF

ANASTASIA WULLSCHLEGER and GERALDINE BREWER,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

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

Defendants.

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MOTION FOR DECLINATION
OF SUPPLEMENTAL JURISDICTION AND
REMAND TO STATE COURT

TO: THIS HONORABLE COURT, DEFENDANTS
ABOVE-NAMED, AND THEIR ATTORNEYS OF
RECORD:

Pursuant to 28 U.S.C. § 1367, Plaintiffs above-named, by and through their undersigned attorneys, on the basis of their Amended Complaint filed this day, hereby request this Court to exercise its discretion to decline supplemental jurisdiction of the claims in the Amended Complaint, and to remand this case to Missouri state court.

The grounds for this motion are as follows:

1. On February 8, 2019, Plaintiffs commenced this action in the Circuit Court for Jackson County, Missouri. The Plaintiffs' complaint alleged violations of the Missouri Antitrust Law, Mo. Rev. Stat., §§ 416.011 *et seq.*, the Missouri Merchandising Practices Act, Mo. Rev. Stat., §§ 407.010 *et seq.* ("MMPA"), and Missouri law of unjust enrichment.

2. After Defendants removed the case to this Court, the Court on June 13, 2019, granted a motion by Plaintiffs to remand the case to state court.

3. The Eighth Circuit Court of Appeals thereafter granted Defendants' petition for appellate review under 28 U.S.C. § 1453(c)(1), limiting its examination to the issue of federal question jurisdiction.

4. On March 13, 2020, the Eighth Circuit vacated this Court's remand order and remanded the case for further proceedings. *Wullschleger v. Royal Canin U.S.A., Inc.*, 953 F.3d 519 (8th Cir. 2020). The Eighth Circuit's opinion found that although the Plaintiffs' MMPA claims sounded entirely in Missouri law, the Missouri Antitrust Law and unjust enrichment claims arose under federal law, because "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." *Id.*, at 522. The Eighth Circuit also noted that the prayer for relief "invokes federal jurisdiction because it seeks injunctive and declaratory relief that necessarily requires the interpretation and application of federal law." *Id.*

5. Plaintiffs have now amended their complaint as a matter of right pursuant to Fed. R. Civ. 15(a)(1)(B). The Amended Complaint has deleted its Missouri Antitrust Act and unjust enrichment claims. It has added a claim for civil conspiracy under Missouri common law. The civil conspiracy claim includes none of the references to federal law appearing in the prior Missouri Antitrust Act and unjust enrichment claims. The Amended Complaint requests no relief under federal law. It thus contains no claims premised on violations of federal law, does not require proof of violations of federal law or interpretation of federal law, and arises entirely under Missouri state law.

6. The only basis for the retention of this action in federal court is supplemental jurisdiction under 28 U.S.C. § 1367. Under § 1367(c), the Court has broad discretion to decline supplemental jurisdiction and to remand this case to Missouri state court. *Elmore v. Harbor Freight Tools USA, Inc.*, 844 F.3d 764, 767 (8th Cir. 2016) (“A district court has broad discretion to decline to exercise supplemental jurisdiction over state law claims after all claims over which the district court had original jurisdiction have been dismissed.”); *Glorvigen v. Cirrus Design Corp.*, 581 F.3d 737, 743 (8th Cir. 2009) (“We review the district court’s decision not to exercise supplemental jurisdiction over the remaining state-law claims for an abuse of discretion.”); *Gibson v. Weber*, 433 F.3d 642, 647 (8th Cir. 2006) (“Congress unambiguously gave district courts discretion in 28 U.S.C. § 1367(c) to dismiss supplemental state law claims when all federal claims have been dismissed, and there is no basis to find an abuse of discretion here.”).

7. This is an appropriate situation for the Court’s exercise of its discretion to decline supplemental

jurisdiction and remand this case to Missouri state court. No proceedings have occurred in this case other than jurisdictional and removal motion practice. Other than these proceedings unrelated to the merits, this Court and the parties have done nothing further, and certainly nothing to engage in the merits of this case, substantive motion practice, or preparation for trial.

8. Plaintiffs therefore respectfully request this Court to decline supplemental jurisdiction and remand this case to its original state court in Missouri.

This motion is based on all of the files and proceedings herein. Plaintiffs submit supporting Suggestions herewith.

Dated: November 11, 2020.

RESPECTFULLY SUBMITTED,

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

Case No. 4:19-cv-00235-CV-W-GAF

ANASTASIA WULLSCHLEGER and
GERALDINE BREWER, on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

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

Defendants.

SUGGESTIONS IN SUPPORT OF MOTION
TO DECLINE JURISDICTION

Plaintiffs above-named, by and through their undersigned attorneys, submit these Suggestions in support of their motion, made pursuant to 28 U.S.C. § 1367(c), for this Court to exercise its discretion to decline supplemental jurisdiction and to remand this case to the Circuit Court for Jackson County, Missouri, where Plaintiffs originally filed this case on February 8, 2019. Plaintiffs' complaint (styled a Petition as per Missouri procedure) alleged violations of the Missouri Antitrust Law, Mo. Rev. Stat., §§ 416.011 *et seq.*, the Missouri Merchandising Practices Act, Mo. Rev. Stat., §§ 407.010 *et seq.* ("MMPA"), and Missouri law of unjust enrichment.

As this Court is well aware, Defendants above-named removed the case to this Court shortly after its filing. Defendants based their removal on both

purported diversity of citizenship and so-called “arising under” federal question jurisdiction. Plaintiffs then filed a motion to remand, which this Court granted on June 13, 2019, finding all claims alleged in the complaint to arise under Missouri state law, able to be decided without reference to federal law, and therefore not within federal court jurisdiction.

Defendants sought discretionary review by the Eighth Circuit, which granted review under 28 U.S.C. § 1453(c)(1), limiting its examination to the issue of federal question jurisdiction.

On March 13, 2020, the Eighth Circuit ruled in favor of Defendants and vacated this Court’s order of remand. *Wullschleger v. Royal Canin U.S.A., Inc.*, 953 F.3d 519 (8th Cir. 2020). The Eighth Circuit’s opinion found that although the Plaintiffs’ MMPA claims arose entirely under Missouri law, the Missouri Antitrust Law and unjust enrichment claims arose under federal law, because “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.” *Id.*, at 522. The Eighth Circuit also noted that the prayer for relief “invokes federal jurisdiction because it seeks injunctive and declaratory relief that necessarily requires the interpretation and application of federal law.” *Id.*

Plaintiffs have now filed an Amended Complaint, as permitted of right under Fed. R. Civ. P. 15(a)(1)(B), which allows amendment as a matter of course “if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b),

(e), or (f), whichever is earlier.” The complaint is undeniably a pleading to which a responsive pleading is required. Here, Defendants have served neither a responsive pleading, nor a motion under Rule 12. The only motion filed to date since removal to this Court has been Plaintiffs’ motion to remand.

In their Amended Complaint, Plaintiffs have generally left unchanged the allegations supporting their MMPA claims, inasmuch as the Eighth Circuit held that those claims did not create federal question jurisdiction. *Id.* That ruling is now the law of the case and not subject to challenge. *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1004 (8th Cir. 2010) (“The law of the case doctrine means ‘that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.’”), *citing and quoting from Gander Mountain Co. v. Cabela’s, Inc.*, 540 F.3d 827, 830 (8th Cir. 2008).

Instead, Plaintiffs have entirely eliminated their Missouri Antitrust Law and unjust enrichment claims, and thus all references to federal food and drug law that appeared in their original Complaint. In addition, Plaintiffs have deleted all references to federal food and drug law from their prayer for relief. Hence, there is no longer a basis to claim or find that Plaintiffs have “elected to premise ... non-MMPA claims on violations and interpretations of federal law,” or that the Amended Complaint “necessarily requires the interpretation and application of federal law.” *Wullschleger v. Royal Canin U.S.A., Inc.*, 953 F.3d at 522. Although Plaintiffs do not concede that these claims ever arose under federal law and thereby created federal question jurisdiction, Plaintiffs have now clearly abandoned and eliminated these claims.

The only addition Plaintiffs have made to their Amended Complaint is a claim for civil conspiracy under Missouri common law. This is not a separate cause of action under Missouri law, however, but only a basis for joint and several liability in the event that the jury finds that the Defendants have violated the MMPA through a conspiracy or concerted action. *Western Blue Print Company, LLC v. Roberts*, 367 S.W.3d 7, 22 (Mo. 2012) (“Although civil conspiracy has its own elements that must be proven, it is not a separate and distinct action. *Breeden v. Hueser*, 273 S.W.3d 1, 13 (Mo.App. W.D.2008). ‘[R]ather, it acts to hold the conspirators jointly and severally liable for the underlying act.’”); *Envirotech, Inc. v. Thomas*, 259 S.W.3d 577, 586 (Mo. App. E.D. 2008). The civil conspiracy claim contains no references to federal food and drug law. Amended Complaint, pp. 17-20, 33-34, ¶¶ 45-56, 95-97.

Because of Plaintiffs’ deletion of their Missouri Antitrust Law and unjust enrichment claims and the absence of references to federal law in their civil conspiracy claim and prayer for relief, the only remaining basis for federal court jurisdiction is supplemental jurisdiction under 28 U.S.C. § 1367. Section 1367(a) provides for federal jurisdiction of state law claims coupled with claims arising under federal law “of which the district courts have original jurisdiction,” provided such state law claims “form part of the same case or controversy under Article III of the United States Constitution..”

Section 1367(b), however, provides federal courts with discretion to decline such claims if “(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original

jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.”

The Court’s discretion to decline supplemental jurisdiction and remand to state court is broad. *Elmore v. Harbor Freight Tools USA, Inc.*, 844 F.3d 764, 767 (8th Cir. 2016) (“A district court has broad discretion to decline to exercise supplemental jurisdiction over state law claims after all claims over which the district court had original jurisdiction have been dismissed.”); *Glorvigen v. Cirrus Design Corp.*, 581 F.3d 737, 743 (8th Cir. 2009) (“We review the district court’s decision not to exercise supplemental jurisdiction over the remaining state-law claims for an abuse of discretion.”); *Gibson v. Weber*, 433 F.3d 642, 647 (8th Cir. 2006) (“Congress unambiguously gave district courts discretion in 28 U.S.C. § 1367(c) to dismiss supplemental state law claims when all federal claims have been dismissed, and there is no basis to find an abuse of discretion here.”). This Court so noted in *Campbell v. Anytime Labor-Kansas, LLC*, Case No. 16-00142-CV-W-GAF, 2016 WL 2743541 *5 (W.D. Mo. May 11, 2016, Fenner, J.) (“District courts have ‘broad discretion’ in exercising supplemental jurisdiction.”).

This case is appropriate for the exercise of this discretion to decline jurisdiction and remand. First, in its June 13, 2019, Order remanding this case, this Court found that Plaintiff’s Missouri Antitrust Law claims required no analysis of federal food and drug law for their resolution:

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.

Order, p. 9.

Although the Eighth Circuit disagreed because of the references to federal food and drug law, the Missouri Antitrust Law claim and those references are now gone. The same is true for Plaintiffs' unjust enrichment claims and references to federal law in the prayer for relief. Plaintiffs' deletion of the Missouri Antitrust Law claims and prayer for relief has in substance and effect resulted in the dismissal of any federal law claims to the extent they ever existed.

The dismissal of federal claims warrants this Court's declining supplemental jurisdiction and remanding this case to state court under Section 1367(b)(3). Similarly, Section 1367(b)(2) justifies declining supplemental jurisdiction in that the presence of state law claims "substantially predominates over the claim or claims over which the district court has original jurisdiction." The case also arguably "raises a novel or complex issue of State law" under Section 1367(b)(1) in that civil conspiracy is entirely a creation of Missouri common law, the intricacies of which are best left to Missouri state courts.

Finally, neither the parties nor the Court has invested substantial time in this case since its removal.

All that has occurred is motion practice regarding remand. There has been no discovery or other proceedings that have involved the merits or preparation for trial. After the Eighth Circuit's decision, the parties are back at square one, where they first started in this Court in early 2019. The Court now has before it no federal law claim and no appreciable record for any state law claim. These are "exceptional circumstances" that in themselves constitute "compelling reasons for declining jurisdiction" under Section 1367(b)(4).

Accordingly, on the basis of the foregoing arguments and authorities, Plaintiffs respectfully ask this Court to exercise its discretion to decline supplemental jurisdiction of the claims alleged in the Amended Complaint and remand this case to Jackson County Missouri District Court.

Dated: November 11, 2020.

RESPECTFULLY SUBMITTED,

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

Case No. 4:19-cv-00235-GAF

ANASTASIA WULLSCHLEGER and GERALDINE BREWER,
*on behalf of themselves and all others
similarly situated,*

Plaintiffs,

v.

ROYAL CANIN U.S.A., INC. and
NESTLÉ PURINA PETCARE COMPANY,

Defendants.

ORAL ARGUMENT REQUESTED

DEFENDANTS' SUGGESTIONS IN OPPOSITION
TO PLAINTIFFS' MOTION FOR DECLINATION
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December 9, 2020

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Defendants Nestlé Purina PetCare Company (“Purina”) and Royal Canin U.S.A., Inc. (“Royal Canin”) hereby oppose Plaintiffs’ Motion for Declination of Supplemental Jurisdiction and Remand to State Court (ECF No. 44). Federal jurisdiction still lies over Plaintiffs’ state-law claims and, even if the Court were to determine otherwise, there is no basis for the Court to decline to exercise supplemental jurisdiction.

I. INTRODUCTION

In a unanimous, published opinion, the Eighth Circuit held that federal jurisdiction lies over Plaintiffs’ state-law claims. *Wullschleger v. Royal Canin U.S.A., Inc.*, 953 F.3d 519 (8th Cir. 2020). Plaintiffs filed a petition for a writ of certiorari with the Supreme Court, which denied the petition. *See* No. 20-152, 592 U.S. ___, 208 L. Ed. 2d 229 (Oct. 19, 2020). Now, in another transparent attempt to avoid federal jurisdiction, Plaintiffs have filed an Amended Complaint that purportedly excises all of the bases for federal jurisdiction. It does not. Instead, the Amended Complaint retains the same substantial federal questions that the Eighth Circuit identified, as these federal questions are inherent in Plaintiffs’ claims.

Plaintiffs still assert the same Missouri Merchandising Practices Act (“MMPA”) claims, which — contrary to Plaintiffs’ argument — necessarily raise disputed, substantial federal issues. Additionally, merely by renaming antitrust-conspiracy claims as a “civil conspiracy” claim, Plaintiffs cannot avoid the Eighth Circuit’s determination that Plaintiffs’ conspiracy claims were a basis for federal jurisdiction. Plaintiffs’ original anti-trust conspiracy claims and their new civil conspiracy claim are premised on the same theory — namely, that Defendants’ supposed violations of federal law and regulations are proof that Defendants conspired. Nor

can Plaintiffs avoid federal jurisdiction by superficially excising the words “federal law” from their complaint and replacing them with the word “law.” Federal-question jurisdiction lies over Plaintiffs’ amended claims because the claims still necessarily raise disputed and substantial federal issues. *See Wullschleger*, 953 F.3d at 522.

In any event, even if the Court were to find that Plaintiffs’ claims no longer raise federal questions, the Court has supplemental jurisdiction under 28 U.S.C. § 1367 and, because Plaintiffs fail to satisfy any of the § 1367(c) factors, the Court may not decline to exercise supplemental jurisdiction. Indeed, the circumstances of this case weigh heavily in favor of the Court retaining jurisdiction. Specifically, in determining whether to decline to exercise supplemental jurisdiction, courts consider whether the proponent of a different forum is engaged in forum shopping. *Barondes v. Wolfe*, 184 F. Supp. 3d 741, 744-45 (W.D. Mo. 2016). Plaintiffs’ efforts to avoid federal court are now well documented. The Court should deny Plaintiffs’ latest attempt to manipulate and re-label their claims to try to avoid federal jurisdiction.

II. BACKGROUND

This putative class action is a near-duplicate of a pre-existing putative nationwide class action filed in the U.S. District Court for the Northern District of California, *Moore, et al. v. Mars Petcare US, Inc., et al.*, No. 3:16-CV-7001-MMC (N.D. Cal.), in which Defendants and their alleged co-conspirators in this action were also named as defendants. *See* Defs.’ Req. for Judicial Notice (“RJN”), Ex. 1 (Second Am. Compl., *Moore* (Aug. 10, 2017)). In the wake of the district court in *Moore* dismissing the plaintiffs’ claims, including MMPA claims, counsel undertook the strategy to file claims

involving the same defendants and the same allegations in various state courts to try to circumvent federal-court jurisdiction, in pursuit of a more favorable outcome. *See, e.g.*, RJN, Ex. 2 (Compl., *Kucharski-Berger v. Hill's Pet Nutrition, Inc.*, No. 19-cv-770 (Kan., Div. 4, Feb. 12, 2019)).¹

On February 8, 2019, Plaintiffs filed their original complaint in this case in Missouri state court. ECF No. 1-1 (“Complaint”). Plaintiffs alleged that they purchased Defendants’ prescription pet food, which is sold only to pet owners who first consult with their veterinarians and obtain a prescription authorizing the purchase. *Id.* ¶¶ 9-12, 14. Plaintiffs attempted to package their claims under six state-law causes of action: violation of the Missouri Antitrust Law (Counts I-II), violation of the MMPA (Counts III-IV), and common-law unjust enrichment (Counts V-VI). *Id.* ¶¶ 101-134.

Defendants removed this action to this Court under 28 U.S.C. § 1331 (federal-question jurisdiction) and § 1332(d) (diversity of citizenship under the Class Action Fairness Act). ECF No. 1. The Court subsequently granted Plaintiffs’ motion to remand. ECF No. 32. The Eighth Circuit granted Defendants’ petition for permission to appeal and, on March 13, 2020, reversed this Court’s remand order, holding this action arises under federal law. 953 F.3d at 522.

¹ Hill’s Pet Nutrition, Inc. chose not to remove the *Kucharski-Berger* case to federal court, and the state court subsequently granted Hill’s motion to dismiss the substantially similar complaint (which dismissal the plaintiffs have appealed). *See* RJN, Ex. 3. In *Moore*, the plaintiffs did not appeal the dismissal of their MMPA claims, and on July 28, 2020, the Ninth Circuit affirmed the district court’s dismissal of their antitrust conspiracy claims. *See Moore v. Mars Petcare US, Inc.*, No. 18-15026, 2020 U.S. App. LEXIS 23811, at *5 (9th Cir. July 28, 2020).

The Eighth Circuit found that “plaintiffs rely explicitly on federal law throughout their pleadings,” that “Plaintiffs’ dependence on federal law permeates the allegations,” and that Plaintiffs allege “violations of the [Federal Food, Drug & Cosmetic Act (“FDCA”)] throughout the complaint.” *Id.* at 521-22. Accordingly, the court held, “[t]he face of plaintiffs’ complaint gives rise to federal question jurisdiction.” *Id.* at 522. Specifically with respect to Plaintiffs’ antitrust conspiracy claims, the court held: “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.* The court also held that Plaintiffs’ prayer for relief — which requested a declaration that Defendants are violating federal law, and an injunction against such continuing alleged violations — created federal-question jurisdiction. *Id.* On October 19, 2020, the U.S. Supreme Court denied Plaintiffs’ petition for a writ of certiorari. *Wullschleger*, No. 20-152, 592 U.S. ___, 208 L. Ed. 2d 229.

On November 11, 2020, nearly two years after the case was originally filed, Plaintiffs filed simultaneously with their present Motion an amended complaint. ECF No. 43 (“Amended Complaint”). Plaintiffs’ Amended Complaint abandons their original claims under Missouri’s antitrust and unjust enrichment laws as well as Plaintiffs’ original request for declaratory and injunctive relief for supposed violations of federal law. Plaintiffs continue, however, to assert the same MMPA claims and have repackaged their antitrust conspiracy claims as a civil conspiracy claim. *See* Am. Compl. ¶¶ 74-88. Plaintiffs’ primary revision to their pleading was to remove the section that alleged the history of FDA’s publication of its regulatory guidance in the Compliance Policy Guide (“CPG”) and that detailed

Plaintiffs’ theory that Defendants violate both the FDCA and the CPG through their marketing and sale of prescription pet food. *See* Compl. ¶¶55-74. Plaintiffs also removed the word “federal” from all but one paragraph in their complaint.²

Plaintiffs continue to allege that prescription pet food does not contain a drug and that Royal Canin’s and Purina’s marketing and sale of prescription pet food is supposedly misleading because the companies were required to, but did not, submit their products to FDA for review, analysis, or approval. Am. Compl. ¶ 28. Relatedly, Plaintiffs allege: “There are significant barriers to entry in the Prescription Pet Food business, which [barriers] have *acted as an inducement to Defendants and their co-conspirators to enter into their civil conspiracy,*” including that “[t]he Prescription Pet Food business *requires . . . , for those competing ethically with a prescription Rx designation, submission to and compliance with FDA regulatory requirements and processes.*” *Id.* ¶ 27 (emphases added). The Amended Complaint also includes the following allegations:

29. 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 civil co-conspirators misrepresent Prescription Pet Food to be: (a) a substance medically necessary to health; (b) a

² *See, e.g.,* Am. Compl. ¶ 2 (“No ~~federal, state, or local~~ law requires a prescription . . . Prescription Pet Food contains no drug or other ingredient that requires ~~FDA~~ governmental approval or a prescription. The use by Royal Canin, Purina, and their civil co-conspirators of the prescription or Rx designation is thus false, misleading, and contrary to law.”), ¶ 28 (“~~Neither federal nor Missouri~~ No law requires that Prescription Pet Food be sold with a prescription from a veterinarian.”) (revisions and emphases added).

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. . . .

34. 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."). . . .

35. . . . Prescription Pet Food is not legally required or allowed to be sold by prescription

36. . . . [T]here 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, . . . neither the FDA nor any other governmental entity has undertaken any review or approval process, and . . . neither the FDA nor any other governmental entity has approved Prescription

Pet Food for treatment of any condition or illness.

Am. Compl. ¶¶ 29, 34-36. Plaintiffs also contend that a question of law and fact common to members of the putative class is “[w]hether Defendants and their civil 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 approval as a drug.” *Id.* ¶ 68(a).

III. THE COURT STILL HAS JURISDICTION OVER THIS ACTION AND MAY NOT AND SHOULD NOT DECLINE TO EXERCISE THAT JURISDICTION

A. The Court Has Federal-Question Jurisdiction Over This Action

The Eighth Circuit held that Plaintiffs’ allegations established federal-question jurisdiction under the test set forth by the Supreme Court: “[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.’” *Wullschleger*, 953 F.3d at 522 (quoting *Gunn v. Minton*, 568 U.S. 251, 258 (2013)). Because the claims in Plaintiffs’ Amended Complaint continue to raise substantial federal questions regarding federal food and drug law and Defendants’ compliance therewith, Plaintiffs’ amended claims give rise to federal subject-matter jurisdiction, and the Court need not consider Plaintiffs’ arguments regarding supplemental jurisdiction.

First, Plaintiffs, as they did in their original Complaint, continue to “rely explicitly on federal law” in their Amended Complaint. *Wullschleger*, 953 F.3d at 521.

The Amended Complaint remains replete with allegations that Defendants' prescription pet food is subject to federal food and drug law and FDA regulatory review and fails to comply therewith. *See, e.g.*, Am. Compl. ¶ 35 (alleging that "Prescription Pet Food is not legally required or *allowed* to be sold by prescription") (emphasis added); *id.* ¶ 34(a)-(b) (alleging Royal Canin and Purina violate federal law and regulations because their pet food "has not been subjected to the FDA process for evaluating the quality of drug ingredients and manufacturing processes" or "for evaluating the efficacy of claims and propriety of representations"); *id.* ¶ 32 (alleging Plaintiffs were misled because they "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," when that "governmental authority" allegedly has not and does not); *id.* ¶¶ 49, 56, 36 (alleging Plaintiffs were misled to believe the prescription pet food they purchased would "treat specific disease and health problems" of their pets, when "neither the FDA nor any other governmental entity has approved Prescription Pet Food for treatment of any condition or illness"); *id.* ¶ 34(e)-(f) (alleging Royal Canin's and Purina's pet food "does not contain any drug approved by the FDA" and "does not bear the mandatory legend borne by those items required by the FDA to be sold by prescription," *i.e.*, is misbranded in violation of federal law); *id.* ¶¶ 27-29; *id.* ¶ 68(a) (alleging "Defendants and their civil 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 approval as a drug"). Indeed, Plaintiffs suggested in their certiorari petition to the Supreme

Court that the Eighth Circuit found federal-question jurisdiction based solely on the allegation that Defendants were required but “failed to seek FDA approval” of their prescription pet food. RJN, Ex. 4 (Pet. for Writ of Cert., *Wullschleger*, No. 20-152 (U.S. Aug. 6, 2020)) at 16, 22; *see also id.* at 26-27. Those allegations remain in the Amended Complaint and give rise to federal-question jurisdiction. *E.g.*, Am. Compl. ¶ 34.

Second, Plaintiffs’ MMPA claims are, in Plaintiffs’ own words, “unchanged” from the Complaint. Pls.’ Suggestions in Supp. of Mot. to Decline Jurisdiction, ECF No. 45 (“Pls.’ Memo.”) at 2. Plaintiffs are therefore bound by their articulation at the Eighth Circuit of the basis for those claims — namely, that Plaintiffs base their MMPA claims on Defendants’ supposed violations of “the FDCA and the FDA’s Compliance Policy Guide,” and on Defendants’ alleged concealment that they “are actually selling adulterated, misbranded, and unsafe pet food *in violation of the FDCA and the MMPA.*” RJN, Ex. 5 (Pls.-Appellees’ Br., *Wullschleger, et al. v. Royal Canin U.S.A., Inc., et al.*, No. 19-2645 (8th Cir. Oct. 24, 2019)) at 3 (emphasis added).

Plaintiffs inaccurately state that the Eighth Circuit found that “Plaintiffs’ MMPA claims arose entirely under Missouri law.” Pls.’ Memo. at 2; *see id.* at 2-3. The Eighth Circuit’s observation that Plaintiffs’ MMPA claims “might not” depend on federal law, *Wullschleger*, 953 F.3d at 521, is far from a determination that the MMPA claims “did not create federal question jurisdiction,” Pls.’ Memo. at 2. To the contrary, the Eighth Circuit held that Plaintiffs’ dependence on federal law “permeate[d]” their Complaint, and that “federal question jurisdiction exists” over the action. *Wullschleger*, 953 F.3d at 522, 520.

Third, while Plaintiffs have repackaged their antitrust conspiracy claims as a civil conspiracy claim, the civil conspiracy claim relies on substantially the same allegations, which the Eighth Circuit held gave rise to federal-question jurisdiction. *See Wullschleger*, 953 F.3d at 521-22. For example, Plaintiffs alleged in the Complaint that Defendants must have conspired because their alleged noncompliance with the FDCA showed action “contrary to the independent economic self-interest of each of them.” Compl. ¶ 73. In the Amended Complaint, Plaintiffs allege that a barrier to entry that “acted as an inducement to Defendants and their co-conspirators to enter into their civil conspiracy” is that “[t]he Prescription Pet Food business *requires* . . . , for those competing ethically with a prescription Rx designation, submission to and compliance with FDA regulatory requirements and processes,” which Plaintiffs allege Defendants conspired not to do. Am. Compl. ¶ 27 (emphasis added); *see also id.* ¶¶ 44, 46 (alleging “Mars/Royal Canin” entered the conspiracy “contrary to its own independent economic interest”). This is the same alleged conspiratorial conduct that supported federal jurisdiction in the Eighth Circuit’s decision:

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. 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.” 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.

Wullschleger, 953 F.3d at 522 (internal citations omitted). Plaintiffs' new civil conspiracy claim is Plaintiffs' old antitrust conspiracy claim — with a different name. The Eighth Circuit's holding still applies, and this claim arises under federal law.

Plaintiffs appear to suggest that their civil conspiracy claim cannot give rise to federal-question jurisdiction because it is “not a separate cause of action under Missouri law, . . . but only a basis for joint and several liability.” Pls.' Memo. at 3. Plaintiffs are mistaken. The test is whether “a state-law *claim* necessarily raise[s] 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 Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005) (emphasis added). Because Plaintiffs' conspiracy claim is a “claim,” it can (and does) give rise to federal-question jurisdiction.

Federal-court jurisdiction cannot be defeated through superficial tweaks in an amended complaint, such as Plaintiffs' deletion of the word “federal.” *See supra*, page 4. The Eighth Circuit based its holding that federal law “permeate[d]” Plaintiffs' complaint on Plaintiffs' allegations that Defendants were “in violation of federal and state law.” *See Wullschleger*, 953 F.3d at 522 (quoting Compl. ¶¶ 63, 73). Revising the Complaint's references to violations of “federal law,” to violations of “law,” does nothing to change the fundamental theory of Plaintiffs' claims, which are grounded in and raise substantial federal questions. *See, e.g., Johnson v. UMB Bank, N.A.*, No. 10-00654-CV-W-GAF, 2010 U.S.

Dist. LEXIS 78835, at *6 (W.D. Mo. Aug. 5, 2010) (Fenner, J.) (finding federal jurisdiction over the plaintiff's state-law claims, even though the complaint made no mention of federal laws, because whether the activities of the defendant bank were wrongful depended on its compliance with federal banking laws and regulations).

Courts confronted with similar superficial changes in amended complaints have held that federal-question jurisdiction still exists. For example, in *Jarmuth v. Cox*, the plaintiff amended his complaint to avoid federal jurisdiction by “deleting his original references to federal law.” No. 1:07-CV-33, 2007 U.S. Dist. LEXIS 75732, at *6 (N.D. W. Va. Sept. 28, 2007). The court held that federal jurisdiction existed over those claims because they still “turn[ed] on substantial questions of federal law” and “hinge[d] on the correct application of federal law.” *Id.* at *6-8; *see also, e.g., Joffrion v. Excel Maint. Servs.*, No. 11-528-BAJ-CN, 2011 U.S. Dist. LEXIS 128584, at *6-9 (M.D. La. Sept. 19, 2011) (denying plaintiff's motion to remand and finding federal jurisdiction regardless of the plaintiff's deletion of reference to federal law), *adopted by* 2011 U.S. Dist. LEXIS 125727 (M.D. La. Oct. 31, 2011).

Because Plaintiffs' claims necessarily still rely on the same theories that gave rise to federal-question jurisdiction over the Complaint, the Court cannot accept Plaintiffs' invitation to error by declining jurisdiction over this case.

B. There Is No Basis for the Court to Decline to Exercise Supplemental Jurisdiction

Even if the Court were to find that Plaintiffs' amended claims do not raise substantial federal questions, no ground exists for the Court to decline to exercise sup-

plemental jurisdiction pursuant to 28 U.S.C. § 1367(c). As an initial matter, Plaintiffs misstate the law of supplemental jurisdiction when they allege that the “Court has jurisdiction of this Amended Complaint *to the extent* this Court wishes to exercise supplemental jurisdiction.” Am. Compl. ¶ 73 (emphasis added). To the contrary, Plaintiffs must first establish that grounds exist to decline to exercise jurisdiction pursuant to 28 U.S.C. § 1367(c), something they have failed to do. Therefore, even if Plaintiffs’ amended claims did not establish federal-question jurisdiction (which they do), the Court has supplemental jurisdiction over those claims. *See Ching v. Mitre Corp.*, 921 F.2d 11, 13 (1st Cir. 1990) (“An amendment to a complaint after removal designed to eliminate the federal claim will not defeat federal jurisdiction.”); *see also Quinn v. Ocwen Fed. Bank FSB*, 470 F.3d 1240, 1248 (8th Cir. 2006) (“[J]urisdiction is determined at the time of removal, even though subsequent events may remove from the case the facts on which jurisdiction was predicated.”). The only issue here is whether the Court may, and should, *decline to exercise* that jurisdiction.

The Court may do so only if it finds that one of the four circumstances in § 1367(c) exists. *Brown v. Mortg. Elec. Registration Sys.*, 738 F.3d 926, 933 (8th Cir. 2013) (“The district court is required to exercise supplemental jurisdiction . . . unless one of the enumerated circumstances giving the district court discretion to decline jurisdiction is present.”). Courts also consider judicial economy, convenience, fairness, comity, and whether the plaintiff is engaging in forum shopping in deciding whether to exercise such discretion. *See Barondes*, 184 F. Supp. 3d at 744-45.

This case presents none of the four circumstances in § 1367(c), and the discretionary factors — which Plaintiffs

neglect to address — weigh in favor of the Court retaining jurisdiction.

1. This Case Implicates None of the Four Conditions in 28 U.S.C. § 1367(c)

This action does not involve a novel or complex issue of state law. See 28 U.S.C. § 1367(c)(1). Plaintiffs contend this case “arguably” raises a novel or complex issue of state law because “civil conspiracy is entirely a creation of Missouri common law.” Pls.’ Memo. at 5. Section 1367(c)(1) applies to “cases in which state law in the area is unsettled, or the issue is one of first impression,” or “to avoid construction of a state constitutional provision.” 15A Moore’s Federal Practice – Civil § 106.64. Contrary to Plaintiffs’ argument, a state-law claim does not raise a novel or complex issue simply because the claim is a creation of state common law. Rather, courts routinely hold that state-law claims do not present novel or complex issues of state law where federal courts consistently adjudicate such claims. *See, e.g., Campbell v. Anytime Labor-Kansas, LLC*, No. 16-00142-CV-W-GAF, 2016 U.S. Dist. LEXIS 62053, at *15 (W.D. Mo. May 11, 2016) (Fenner, J.). Like the state-law claims at issue in *Campbell*, Missouri civil conspiracy claims are consistently adjudicated by Missouri federal courts. *See, e.g., Ice v. IB Prop. Holdings, LLC*, No. 09-3232-CV-S-GAF, 2010 U.S. Dist. LEXIS 47293, at *9 (W.D. Mo. May 13, 2010) (Fenner, J.) (granting summary judgment on civil conspiracy claim).

Plaintiffs’ purported state-law claims do not substantially predominate over the claims over which the Court has original jurisdiction. See 28 U.S.C. § 1367(c)(2). Plaintiffs provide no analysis to support the proposition that any of their claims predominate over their claims that raise substantial federal questions. Pls.’ Memo. at 5. As explained above, Plaintiffs assert substantially

the same claims that still implicate the federal issues that the Eighth Circuit held confer federal jurisdiction. *See supra*, pages 5-8. Plaintiffs thus do not assert any state-law claims that substantially predominate over claims over which the Court has federal-question jurisdiction. Even if Plaintiffs' amended MMPA claims did not raise a substantial federal question (and they do), Plaintiffs' civil conspiracy claim in their Amended Complaint is merely a recycled and relabeled version of their antitrust conspiracy claims, which the Eighth Circuit clearly held raised substantial federal questions. *See supra*, pages 7-8. The conspiracy allegations relate only to Plaintiffs' civil conspiracy claim and permeate their entire Amended Complaint, starting with the first sentence ("in a civil conspiracy with other manufacturers of dog and cat food," Am. Compl. ¶ 1), and continuing throughout, including the section in which Plaintiffs specifically outline the alleged conspiracy, *id.* ¶¶ 39-47. Plaintiffs' conspiracy claim, just like the now-abandoned antitrust conspiracy claims, arises under federal law and predominates over their MMPA claims.

The Court did not dismiss any (let alone all) claims over which it has original jurisdiction. See 28 U.S.C. § 1367(c)(3). Section 1367(c)(3) applies only where "the district court has dismissed all claims over which it has original jurisdiction." Id. No such dismissal has taken place, and Plaintiffs' filing of an amended complaint does not change the analysis.

This case does not present an exceptional circumstance or compelling reason for declining jurisdiction. See 28 U.S.C. § 1367(c)(4). Plaintiffs claim that "neither the parties nor the Court has invested substantial time in this case since its removal." Pls.' Memo. at 6. They ignore the substantial proceedings that have taken place at all levels of the federal court system

since Defendants removed this case over 18 months ago, on March 26, 2019. *See* ECF No. 1. This Court and the parties have invested substantial time and resources in establishing the jurisdictional implications of Plaintiffs' allegations and theories of the case. The state court, by contrast, has no familiarity with this case. Remand would therefore render the federal courts' expenditure on, and deep understanding of, this case a wasted investment that the state court would be required to duplicate. *See* 15A Moore's Federal Practice – Civil § 106.66 (“If the district court has conducted significant proceedings so as to become familiar with the case, the parties, and the subject matter, then retention of jurisdiction is appropriate.”). Finally, declining jurisdiction under § 1367(c)(4) should be the exception, rather than the rule. *See Globe Indem. Co. v. Wrenn Ins. Agency*, 816 F. Supp. 1379, 1386 (W.D. Mo. 1993); 15A Moore's Federal Practice - Civil § 106.67. Plaintiffs have failed to establish this is such an exceptional circumstance.

Because “[n]one of the enumerated circumstances giving the district court discretion to decline jurisdiction is present,” the Court “is required to exercise supplemental jurisdiction,” and there is no discretion for the Court to exercise. *Brown*, 738 F.3d at 933.

2. Plaintiffs' Repeated Attempts to Avoid Federal Jurisdiction Weigh in Favor of the Court Retaining Supplemental Jurisdiction

Even if this Court had discretion to decline to exercise jurisdiction, Plaintiffs offer no basis for the Court to do so here. *See Int'l Ass'n of Firefighters, Local 2665 v. City of Ferguson*, 283 F.3d 969, 976 (8th Cir. 2002). As Plaintiffs' own case makes clear, “[s]upplemental jurisdiction ‘is a doctrine of discretion, not of plaintiff's

right.” *Campbell*, 2016 U.S. Dist. LEXIS 62053, at *14 (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966)). In determining whether to exercise discretion to decline supplemental jurisdiction, courts weigh the interests of judicial economy, convenience, fairness, and comity. *Barondes*, 184 F. Supp. 3d at 744 (citing *Gibbs*, 383 U.S. at 726). A district court “must also ‘consider whether the plaintiff has engaged in any manipulative tactics,’” and if so, the court may exercise jurisdiction to “guard against forum manipulation.” *Id.* at 744-45 (quoting *Carnegie Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988)). Plaintiffs do not address these factors, which militate in favor of denying their Motion.

Here, it would promote judicial economy, convenience, and fairness for this case to remain before this Court. These issues have been proceeding in federal courts *for years*. The *Moore* litigation was filed in federal court in December 2016. This case was removed to federal court in March 2019. The Court is familiar with Plaintiffs’ allegations and theories of the case. *See Levy v. TD Ameritrade*, No. 13-03061-CV-S-GAF, 2013 U.S. Dist. LEXIS 207048, at *5-7 (W.D. Mo. Aug. 1, 2013) (Fenner, J.) (retaining supplemental jurisdiction over state-law claims, finding “[b]ecause this Court is apprised of the parties’ legal issues and facts, it would also be fair and convenient for the action to be maintained in this Court”). Plaintiffs have identified no prejudice from this case remaining in federal court. Plaintiffs’ claims do not raise complex issues of state law and thus there are no comity issues counseling against retention of jurisdiction. *Compare Brown*, 738 F.3d at 933.

Most notably, Plaintiffs’ ongoing gymnastics with respect to constructing and characterizing their inherently federal claims constitutes improper forum

shopping, which undermines judicial economy and wastes litigants' resources — and counsels in favor of the Court retaining jurisdiction. In *Barondes*, for example, the court held that “dismissing all federal claims after removal to force remand is not a legitimate tactical decision; it is forum-shopping.” 184 F. Supp. 3d at 745-46 (declining to exercise supplemental jurisdiction only because of comity concerns); *see also*, e.g., *Moham v. Jones, Waechter, Poitevent, Carrere & Denegre, L.L.P.*, No. 00-0382, 2000 U.S. Dist. LEXIS 4348, at *5 (E.D. La. Mar. 28, 2000) (retaining supplemental jurisdiction because plaintiff “attempted to manipulate the forum by filing her Second Amended Complaint deleting the reference to federal law”).

Here, Plaintiffs filed an Amended Complaint in a blatant attempt to force a remand to state court (and only after their attempt to seek review of the Eighth Circuit's decision to avoid federal jurisdiction failed). This is just the latest forum-shopping tactic. After the California district court dismissed near-identical claims in *Moore*, Plaintiffs' counsel filed this case in Missouri state court, and the *Kucharski-Berger* case in Kansas state court, asserting substantially the same allegations and claims but characterizing them as state-law claims. *See, e.g.*, RJN, Ex. 1 (Second Am. Compl., *Moore*), ¶¶ 17, 132-38, 165-77; RJN, Ex. 2 (Compl., *Kucharski-Berger*), ¶¶ 1-2, 90, 91-113. While Plaintiffs' counsel now seek to downplay their reliance on federal law, in *Moore* they conceded their consumer-protection claims (including MMPA claims) turned on whether the prescription pet food was “misbrand[ed] under federal law” and misrepresented as “FDA regulated ‘prescription’ product[s].” RJN, Ex. 6 (Pl.'s Memo. in Opp'n to Def. Purina's Mot. to Dismiss Sixth Cause of Action, *Moore* (May 15, 2017)) at 1. Similarly, in *Kucharski-Berger*, Plaintiffs' counsel argued that

compliance with the FDCA is “at the heart” of the case, and defended their claims based on interpretations of the FDCA and the CPG. *See* RJN, Ex. 7 (Pl.’s Opp’n to Mot. to Dismiss, *Kucharski-Berger* (May 2, 2019)) at 1, 9-11. The Court should end Plaintiffs’ serial attempts to avoid federal court jurisdiction.

This case is leagues different from those cited by Plaintiffs for the proposition that the Court has “broad discretion” to remand under § 1367. *See* Pls.’ Memo. at 4. In none of those cases did the plaintiffs engage in the blatant forum-shopping and gamesmanship in which Plaintiffs have engaged here; rather, the court simply remanded state-law claims after *the court* — not the plaintiff — *dismissed* the federal claims. *See Elmore v. Harbor Freight Tools USA, Inc.*, 844 F.3d 764, 767 (8th Cir. 2016) (decision to remand based on fact that “district court [had] dismissed the claim over which it had original jurisdiction”); *Glorvigen v. Cirrus Design Corp.*, 581 F.3d 737, 749 (8th Cir. 2009) (same; no abuse of discretion where — unlike here — the federal court had “not addressed th[e] [remanded] state-law claims”); *Gibson v. Weber*, 433 F.3d 642, 647 (8th Cir. 2006) (district court remanded “remaining state malpractice claim after dismissing [plaintiff’s] federal claims”). And in *Campbell*, this Court exercised its discretion to *retain* the plaintiff’s remaining state-law claims because, like here, “federal courts consistently decide [such] claims” and the claims “d[id] not present novel or complex issues of state law warranting a refusal to accept supplemental jurisdiction.” 2016 U.S. Dist. LEXIS 62053, at *15-16.³

³ Remand would also be futile for Plaintiffs because judicial estoppel would preclude them from seeking discovery on, proffering evidence on, or otherwise arguing, supporting, or proving their claims with theories, arguments, or evidence that

IV. CONCLUSION

The Court should deny Plaintiffs' Motion.

Dated: December 9, 2020

Respectfully submitted,

/s/ Michael S. Hargens

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Defendants violated the FDCA or the CPG, did not comply with FDA guidance, or improperly failed to submit prescription pet food to FDA. If Plaintiffs were to do what they are estopped from doing, Defendants could once again remove this case to federal court. *See, e.g., Mitchell v. Reliance Health Care*, No. 3:19-cv-00370-LPR, 2020 U.S. Dist. LEXIS 156478, *17 n.72 (E.D. Ark. Aug. 28, 2020) (“[T]his action may be removed again if it becomes clear that Plaintiffs are asserting federal claims or relying on federal issues that Plaintiffs expressly disavowed during the remand hearing.”); *see id.* at *19-20.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Defendants' Suggestions in Opposition to Plaintiffs' Motion for Declination of Supplemental Jurisdiction and Remand to State Court was electronically forwarded this 9th day of December 2020, via the Court's CM/ECF system, to all counsel of record.

/s/ Michael S. Hargens

Attorney for Nestlé Purina PetCare Company

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

Case No. 4:19-cv-00235-CV-W-GAF

ANASTASIA WULLSCHLEGER and GERALDINE BREWER,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

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

Defendants.

REPLY SUGGESTIONS IN SUPPORT OF MOTION
TO DECLINE JURISDICTION

INTRODUCTION

Defendants assert on the first page of their Suggestions, “Now, in another transparent attempt to avoid federal jurisdiction, Plaintiffs have filed an Amended Complaint that purportedly excises all of the bases for federal jurisdiction.” Defs.’ Suggs. at 1, ECF No. 52. Plaintiffs consider this a compliment that they are being transparent in their efforts to return to Missouri State Court. Transparency is a good thing. Plaintiffs never want to mislead this Court regarding their intentions. Plaintiffs have never believed that this case belongs in federal court, or that federal jurisdiction is proper. This Court agreed with them in granting their motion to remand. Obviously, the Eighth Circuit did not. *Wullschleger v. Royal Canin U.S.A., Inc.*, 953 F.3d 519 (8th Cir. 2020).

THE AMENDED COMPLAINT CONTAINS
NO FEDERAL CLAIMS

On the same page, Defendants have overstated the Eighth Circuit's decision: "In a unanimous, published opinion, the Eighth Circuit held that federal jurisdiction lies over Plaintiffs' state-law claims." Defs.' Suggs. at 1. To the contrary, the Eighth Circuit held only, "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." *Wullschleger*, 953 F.3d at 522. Those claims are no longer included in the Amended Complaint. The Court made no such finding as to the Missouri Marketing Practices Act ("MMPA"). Instead, the Court said,

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).

Id. at 521.

Indeed, the MMPA claims can be decided without reference to federal law. The Amended Complaint alleges,

[b]y requiring a prescription from a veterinarian as a pre-condition to the purchase of their Prescription Pet Food, Mars/Royal Canin, Purina, and their civil coconspirators 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.

Am. Compl., ¶¶ 29, 62. These allegations, reduced to their simplest form, are merely that the Defendants are claiming they have sought and obtained FDA review and approval of their prescription pet food, when they have not in fact done so. This does not require looking at federal law. It is simply a Defendant's false assertion of having done something it has not done.

Moreover, it has become quite clear that Defendants' prescription pet food was never "a substance that has been evaluated by the FDA as a drug," or "a substance as to which the manufacturer's representations regarding intended uses and effects have been evaluated by the FDA." Defendants have asked this Court to take judicial notice of the Second Amended Complaint in *Moore, et al. v. Mars Petcare US, Inc., et al.*, No. 3:16-CV-7001-MMC (N.D. Cal. Aug. 10, 2017). It is only fair that this Court also take judicial notice of the Answers to the Second Amended Complaint from Defendant Royal Canin U.S.A., Inc., and two of its alleged co-conspirators. Royal Canin and its sister company, Mars Petcare US, Inc., answering together as the Mars Defendants, admit in paragraph 34 of their Answer "that Mars Defendants' therapeutic pet foods have not been submitted to the FDA's new animal drug approval procedures." Co-conspirator Hill's Pet Nutrition, Inc., admits in paragraph 54 of its Answer "that HILL'S PRESCRIPTION DIET has not been submitted to the

FDA's new animal drug approval procedures.”¹ It is thus clear that to the extent Defendants' representations caused purchasers to believe that Defendants' prescription pet food had been submitted to the FDA for review and approval, such representations were false. It is also clear that there is no need to resort to federal law to prove this.

As this Court correctly determined, Plaintiffs' MMPA claims do not arise under federal law. The Eighth Circuit did not decide otherwise.

The Defendants also incorrectly claim that Plaintiffs' new civil conspiracy claim arises under federal law because “Plaintiffs' original antitrust conspiracy claims and their new civil conspiracy claim are premised on the same theory — namely, that Defendants' supposed violations of federal law and regulations are proof that Defendants conspired.” Defs.' Suggs. at 1. This is untrue. Plaintiffs' abandoned antitrust claims included, first, violation of Mo. Stat. § 416.031.1, which provides, “Every contract, combination or conspiracy in restraint of trade or commerce in this state is unlawful.” The statute

closely parallels 15 U.S.C. § 1 of the Sherman Act. A party alleging a violation of 15 U.S.C. § 1 must allege that (1) defendants contracted, combined or conspired among each other; (2) the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets; (3) the objects of and the conduct pursuant to the contract or conspiracy were illegal; and (4) plaintiff was injured as a proximate result of the conspiracy.

¹ Purina is not at present a Defendant in the Moore case, and thus has not answered the Second Amended Complaint.

Johnston v. Norrell Health Care, Inc., 835 S.W.2d 565, 568 (Mo. App. 1992). The same decision also says: “To state a cause of action for civil conspiracy, a petition must allege that defendants conspired and agreed to commit an unlawful act and did in fact commit an unlawful act, in pursuit of the conspiracy, which resulted in damages to plaintiff.” *Id.* There is no need under a civil conspiracy claim to show “adverse, anticompetitive effects within relevant product and geographic markets.” The unlawful act of the conspirators referenced in the Amended Complaint is that

... Defendants and their co-conspirators, with the unlawful objective of deceiving pet owners in violation of the Missouri Marketing Practices Act, entered into a meeting of the minds to carry out this objectively [*sic*; should be “objective”] collectively, and made or caused to be made repeated unlawful and deceptive sales to pet owners, including Plaintiffs and Class Members, who were misled into believing that a prescription was legally required for Prescription Pet Food...

Am. Compl., ¶ 87. The civil conspiracy claim thus has nothing to do with Plaintiffs’ first abandoned state law antitrust claim. It is not identical, as Defendants claim.

Nor does the civil conspiracy claim have anything to do with Plaintiffs’ second abandoned Missouri antitrust law claim, conspiracy to monopolize in violation of Mo. Stat. § 416.031.2, which provides: “It is unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade or commerce in this state.” “This section is analogous to 15 U.S.C. § 2 of the Sherman Act. Under directive of § 416.141 RSMo 1978, we [Missouri courts] look to federal cases interpreting § 2.” *Defino v. Civic Ctr. Corp.*, 718 S.W.2d 505, 510 (Mo.

App. 1986). The elements of conspiracy to monopolize are conspiracy, specific intent to monopolize, and overt acts in furtherance of the conspiracy. *Baxley-DeLamar Monuments, Inc. v. Am. Cemetery Ass'n*, 843 F.2d 1154, 1157 (8th Cir. 1988). The civil conspiracy claim in the Amended Complaint alleges only a meeting of the minds for Defendants and their co-conspirators to market prescription pet food deceptively in violation of the MMPA.

Neither the MMPA claims nor the civil conspiracy claims require resort to federal law or its interpretation. They simply involve making pet owners believe Defendants have done something they have not in fact done—seeking and obtaining FDA review and approval for their prescription pet food—and doing this in concert with their co-conspirators.

None of the cases on which Defendants rely supports Defendants' claim that anything in the Amended Complaint arises under federal law. *Johnson v. UMB Bank, N.A.*, No. 10-00654-CV-W-GAF, 2010 WL 3119419, *2 and n.2 (W.D. Mo. Aug. 5, 2010), required the Court to interpret and apply federal banking laws and regulations concerning overdrafts for the plaintiff to recover, as well as potential federal preemption. *Jarmuth v. Cox*, 1:07-CV-33, 2007, 2007 WL 2892957, *2 (N.D. W.Va. Sept. 28, 2007), required interpretation of the Federal Employees Compensation Act for three of the plaintiff's four claims. In *Joffrion v. Excel Maint. Servs.*, No. 11-528-BAJ-CN, 2011 WL 5190524, *2 (M.D. La. Sept. 20, 2011), the plaintiff's claim for overtime pay was available only under the Fair Labor Standards Act. This case requires no interpretation or application of federal law, inasmuch as Defendants have admitted they never submitted their prescription

pet food for FDA review and approval, although they were misleading pet owners into thinking they had.

THE COURT SHOULD EXERCISE ITS
DISCRETION TO DECLINE JURISDICTION

Defendants do not dispute that the decision to exercise or decline supplemental jurisdiction is within this Court's exercise of discretion. They contend, however, that 28 U.S.C. § 1367(c)(3) allows this Court to decline supplemental jurisdiction only where it has dismissed all claims over which it has original jurisdiction, not where Plaintiffs have voluntarily amended their complaint to drop such claims. Defs.' Suggs. at 11. This is a distinction without a difference and is unsupported in the case law. Certainly, Defendants cite no case law where a court must retain supplemental jurisdiction when the plaintiff dismisses claims by amendment instead of a court order granting a defense motion to dismiss.

A plaintiff's voluntary amendment dropping federal claims is sufficient to permit declining federal jurisdiction and remanding to state court. *Shelley v. City of Headland*, No. 1:09-CV-509-WKW (WO), 2009 WL 217898, *2-3 (M.D. Ala. July 21, 2009) (case remanded pursuant to § 1367(c)(3) after plaintiff amends of right to eliminate federal claims); see also *Frye v. Speedway Chevrolet-Cadillac, Inc.*, No. 07-0032-W-FJG, 2007 WL 9718253, *1 (W.D. Mo. Mar. 13, 2007) (plaintiff permitted to amend to drop federal claim; case remanded); *Cooper v. Weinberg Dodge, Inc.*, No. 09-0256-CV-W-FJG, 2009 WL 1657439, *2 (W.D. Mo. June 10, 2009) (same); *Savinovich v. Subaru of Am., Inc.*, No. 2:19-CV-07587-ODW (same), 2020 WL 20881, *1-2 (C.D. Cal. Jan. 30, 2020) (same); *Tenn. v. 777 N. White Station Rd.*, 937 F. Supp. 1296, 1299-1300 (W.D. Tenn. 1996) (same); *Harris v. Cereb*, No. 3:95CV63-B-A, 1995 WL

1945538 (N.D. Miss. Aug. 22, 1995) (same). The only difference between this case and *Frye, Cooper, Savinovich, Tennessee, and Cereb* is that Plaintiffs here had an amendment of right and no need to move for leave of court to amend. The law is overwhelmingly against Defendants' assertion the §1367(c)(3) does not allow the Court to decline supplemental jurisdiction in this case.

Defendants further make the circular argument that "Plaintiffs' purported state-law claims do not substantially predominate over the claims over which the Court has original jurisdiction," because "Plaintiffs assert substantially the same claims that still implicate the federal issues that the Eighth Circuit held confer federal jurisdiction." Defs.' Suggs. at 11. In other words, Defendants claim that Plaintiffs' state law MMPA claims don't predominate over the dropped federal claims because the state law claims are really federal claims. As shown, however, the only claims the Eighth Circuit held to confer federal jurisdiction are the dismissed state antitrust and unjust enrichment claims.

Defendants also challenge Plaintiffs' assertion the parties and Court have not invested substantial time in this case since its removal. Defs.' Suggs. at 11. Certainly, there have been proceedings in the Eighth Circuit and a petition to the Supreme Court. None of these proceedings, however, have done anything to advance the merits of this lawsuit, nor has anything other than the motion to remand occurred in this Court. This Court's involvement has been limited to the motion to remand, with no consideration of the merits. The case is not even at issue yet, as Defendants have neither answered nor moved in response to the original or amended complaint. In this Court, this case is in its infancy. Given its inchoate status, remand is fully justified.

At page 13 of their Suggestions, Defendants accuse the Plaintiffs of forum shopping and efforts to “manipulate the forum.” As noted, Plaintiffs make no secret of their desire and efforts to return to Missouri state court where this action started. Even if Plaintiffs were engaging in forum manipulation, which they are not, it is not a basis to deny remand, and is not necessarily considered bad in some courts. One of the two cases cited by Defendants, *Barondes v. Wolfe*, 184 F. Supp. 3d 741, 746 (W.D. Mo. 2016), was in fact remanded to state court after removal and the plaintiff’s filing an amended complaint eliminating federal claims. Although the Court deplored what it called forum manipulation, it found that this was outweighed by other factors. *Id.* As to the alleged evils of forum manipulation, the Court “recognize[d]... that reasonable jurists disagree on this issue.”

Indeed, they do. *Enochs v. Lampasas Cnty.*, 641 F.3d 155, 160 (5th Cir. 2011) (“On the issue of forum manipulation, which is the only issue that even arguably favored the retention of jurisdiction, Enochs’s motion to amend his complaint to delete the federal claims is not a particularly egregious form of forum manipulation, ***if it is manipulation at all.***”) (emphasis added); *Brewster v. Nationstar Mortg., LLC*, No. 3:13-CV-2807-M, 2013 WL 6501261, *8 (N.D. Tex. Dec. 10, 2013); *Colorado Civil Rights Comm’n v. 1950 Logan Condominiums Condominium Ass’n*, No. 13-cv-02583-PAB-MJW, 2013 WL 6858821, *2-3 (D. Col. Dec. 30, 2013) (“The Tenth Circuit has not addressed whether the amendment of a complaint dismissing federal claims constitutes impermissible forum manipulation. However, other courts are generally unwilling to find that a plaintiff’s deletion of federal claims, by itself, is improper.”).

CONCLUSION

Based on the foregoing arguments and authorities, and those in Plaintiffs original Suggestions, Plaintiffs respectfully request this Court to exercise its discretion to decline supplemental jurisdiction and remand this case to Missouri State Court.

Dated: December 22, 2020.

RESPECTFULLY SUBMITTED,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2020, I served this document on all counsel of record through the Court's electronic filing system.

/s/ James P. Frickleton

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

1916-CV03690

Case No. _____

Div. _____

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

and

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

Defendants.

JURY TRIAL DEMANDED

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 Canin, 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 entirely, 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 law 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 Canin, 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 Iams Prescription Pet Food, Mars manufactured, produced, marketed, advertised, distributed, and sold Iams Prescription Pet Food. Royal Canin is a subsidiary or affiliate of Mars, and Mars' website indicates Royal Canin and Iams 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 100 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. It is a member of the Mars corporate family of companies. It 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 I 2401 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 Canin, 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 Canin, 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 of 95 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 Canin, 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 Canin, 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

1. 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 of 2005, 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 Canin, 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 PetSmart in furtherance of their combination and conspiracy, Mars/Royal Canin, 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 Canin, 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 Canin, 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’ Iams 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 Iams 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 crystals,” “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 I 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 Iams 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 Canin, 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 Canin, 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/ForIndustry/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

¹These 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>.

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

- 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

² One listing does appear on the FDA's website for "Nestle Purina Petcare Company" 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.

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. If, 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 URINE 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 Canin, 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 profits, 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 are 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 law 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 attorneys 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 all amounts recovered; and

145. Awarding all 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,

BARTIMUS FRICKLETON ROBERTSON
RADER, P.C.

BY /s/ James P. Frickleton

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ATTORNEYS FOR PLAINTIFF'S

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

Case No. 4:19-cv-00235-CV-W-GAF

ANASTASIA WULLSCHLEGER and GERALDINE BREWER,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

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

Defendants.

JURY TRIAL DEMANDED

AMENDED COMPLAINT

Plaintiffs above named, by and through their undersigned attorneys, demanding trial by jury of all claims properly triable thereby, for their Complaint against Defendants above-named, complain 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 a civil 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 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 governmental approval or a prescription. The use by Royal Canin, Purina, and their civil 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 civilly 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 widespread, 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 entirely, on the prescription requirement imposed by Royal Canin, Purina, and the other manufacturing conspirators.

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, Royal Canin and Purina have violated the Missouri Merchandising Practices Act, Mo. Rev. Stat., §§ 407.010 *et seq.*

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 Merchandising Practices Act, Mo. Rev. Stat., §§ 407.010 *et seq.*, 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 Canin, Purina, or any other member of the conspiracy described herein, and seek redress from Royal Canin and Purina in the form of damages, injunctive relief, attorney fees, and all other relief this Court deems just and proper.

II. PARTIES

9. Plaintiff Stacey 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 at 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 CIVIL CO-CONSPIRATORS

13. The firms identified in this section of the Complaint are non-party civil co-conspirators with Royal Canin and Purina in the conduct described in this Complaint. Plaintiffs have not named these civil co-conspirators as defendants and seek no relief from them in this

action. This is not intended to be an exhaustive list of civil 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 Iams Prescription Pet Food, Mars manufactured, produced, marketed, advertised, distributed, and sold Iams Prescription Pet Food. Royal Canin is a subsidiary or affiliate of Mars, and Mars' website indicates Royal Canin and Iams 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 PetSmart stores. 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 100 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 Blvd., Tampa, Florida 33614. It is a member of the Mars corporate family of companies. It 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. Prescription Pet Food

22. Manufacturing, producing, marketing, advertising, distributing, and selling Prescription Pet Food is an

approximately \$2 billion per year industry in the United States.

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 civil conspiracy described hereafter, which Purina subsequently joined, as did Blue Pearl and VCA upon their acquisition by Mars, if not before.

24. 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

25. At the time of the filing of this lawsuit, the Chewy.com website, which PetSmart has owned since May 31, 2017, displayed the Prescription Pet Food of Mars/Royal Canin, Purina, and Hill's 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."

26. 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 #."

27. There are significant barriers to entry in the Prescription Pet Food business, which have acted as an inducement to Defendants and their co-conspirators to enter into their civil conspiracy. Defendants and the manufacturing co-conspirators control in excess of 95 percent of Prescription Pet Food sales, which deters smaller competitors from challenging them. The Prescription Pet Food business requires 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. Mars/Royal Canin, Purina, and Hill's dominate the business 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. The business also requires 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. Defendants and the manufacturing conspirators have all of these alliances, which 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 these alliances.

B. The False, Deceptive, and Misleading
Prescription Requirement

28. No 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.

29. 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 civil 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.

30. 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.

31. 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 civil 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.

32. 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.

33. 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.

34. 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.").

35. Mars/Royal Canin, Purina, and their civil 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.

36. Mars/Royal Canin, Purina, and their civil 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.

37. Mars/Royal Canin, Purina, and their civil 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.

38. The intended purpose and effect of the prescription requirement has been to enable Mars/Royal Canin, Purina, and their civil 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 civil co-conspirators.

C. The Civil Conspiracy

39. In 1994, PetSmart, Mars, and Banfield entered into a combination to transfer ownership and control of Banfield to PetSmart and Mars, and executed a

contract for a strategic partnership among themselves locating Banfield pet hospitals in PetSmart stores.

40. 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."

41. 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 with Mars/Royal Canin's non-prescription pet food, or conspiring 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.

42. In March of 2005, Mars/Royal Canin, Hill's, PetSmart, and Banfield entered into a civil 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 from a veterinarian;
- (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 deceiving consumers into paying enhanced, unjustified, noncompetitive prices for Prescription Pet Food.

43. In furtherance of the civil 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.

44. At that time, PetSmart and Banfield were selling Mars/Royal Canin Prescription Pet Food, and Mars was able to exclude Prescription Pet Food competitors from Banfield and PetSmart by reason of its majority ownership of Banfield. Nonetheless, contrary to its own independent economic interest, Mars/Royal Canin agreed to allow its Prescription Pet Food competitor, Hill's, into Banfield and PetSmart in furtherance of their civil conspiracy. PetSmart and Banfield have sold Hill's and Mars/Royal Canin Prescription Pet Food at enhanced non-competitive prices continuously since 2005 through the present day.

45. Once Hill's, Mars/Royal Canin, PetSmart, and Banfield formed their civil conspiracy in 2005, Purina faced the same choice Mars/Royal Canin had faced: compete or conspire. Like Mars/Royal Canin, it chose to join the civil conspiracy.

46. Similarly, Mars/Royal Canin faced the same choice: whether to exercise its ability to exclude its Prescription Pet Food competitor, Purina, from Banfield and PetSmart. Again, contrary to its own 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 civil conspiracy in the misleading and deceptive sale of Prescription Pet Food with the purpose and effect of misleading consumers into paying enhanced, unjustified, noncompetitive prices for Prescription Pet Food. PetSmart and Banfield have sold Purina Prescription Pet Food at enhanced, unjustified, non-

competitive prices continuously since 2005 through the present day.

47. Mars/Royal Canin, Purina, and Hill's have continuously sold Prescription Pet Food through Banfield and PetSmart in furtherance of their civil conspiracy through the present day.

V. INJURY TO PLAINTIFFS

48. 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 without a prescription and a completed MedCard from Banfield.

49. 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.

50. 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.

51. 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”

52. 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.

53. 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.

54. As a result of the false and misleading 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.

55. 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 salespeople 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.

56. 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.

57. 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.

58. 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 URINE pH, which helps maintain a HEALTHY URINARY TRACT

59. 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.

60. 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.

61. As a result of the false and misleading prescription requirement and the civil combination and conspiracy of Royal Canin, 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.

62. 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 in purchasing Prescription Pet Food are generally not 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 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; 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

63. For purposes of her claims under the Missouri Merchandising Practices Act, Mo. Rev. Stat., §§ 407.010 *et seq.*, 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”).

64. For purposes of her claims under the Missouri Merchandising Practices Act, Mo. Rev. Stat., §§ 407.010 *et seq.*, 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”).

65. For purposes of their civil conspiracy claims, which seek to establish joint and several liability against Defendants Royal Canin and Purina, Plaintiffs Wullschleger and Brewer seek to represent a class consisting of and defined as all Missouri citizens who purchased, for personal, family, or household purposes during the five years next prior to the filing of this lawsuit, Prescription Pet Food manufactured or sold by any Defendant or co-conspirator (“the Civil Conspiracy Class”).

66. 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 civil co-conspirators because it was prescribed for their pets by a veterinarian pursuant to the prescription requirement imposed by Defendants and their civil 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 civil conspiracy, misrepresentation, and unfair and deceptive practice imposed by Defendants and their civil 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.

67. 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, Missouri retailers of Prescription Pet Food, Missouri veterinarians prescribing Prescription Pet Food, and the Class Members.

68. 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 civil 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 approval as a drug;

b. Whether the prescription requirement and related representations and omissions by Defendants and their co-conspirators materially misrepresent that Prescription

Pet Food contains some substance medically necessary to animal health;

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

d. Whether the prescription requirement and related representations and omissions by Defendants and their co-conspirators materially misrepresent that Prescription Pet Food requires a prescription by law;

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

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

69. 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.

70. 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.

71. 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, as 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.

72. 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

73. This Court has jurisdiction of this Amended Complaint to the extent this Court wishes to exercise supplemental jurisdiction pursuant to 28 U.S.C. §1367.

CAUSES OF ACTION

COUNT I

VIOLATION OF MISSOURI MERCHANDISING
PRACTICES ACT § 407.020, *et seq.*
(Royal Canin)

74. 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.

75. Continuously during the five next prior to the filing of this Amended Complaint, 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 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.

76. 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 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.

77. 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.

78. 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.

79. 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 IIVIOLATION OF MISSOURI MERCHANDISING
PRACTICES ACT § 407.020, *et seq.*
(Purina)

80. 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.

81. Continuously during the five next prior to the filing of this Amended Complaint, 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 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.

82. 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 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.*

83. 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.

84. 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.

85. 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 III

CONSPIRACY: JOINT AND SEVERAL LIABILITY (Royal Canin; Purina)

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

87. Continuously during the five next prior to the filing of this Complaint, Defendants and their co-conspirators, with the unlawful objective of deceiving pet owners in violation of the Missouri Marketing Practices Act, entered into a meeting of the minds to carry out this objectively collectively, and made or

caused to be made repeated unlawful and deceptive sales to pet owners, including Plaintiffs and Class Members, who were misled into believing that a prescription was legally required for Prescription Pet Food, and were thereby injured and damaged by paying unjustified exorbitant prices for Prescription Pet Food.

88. By reason of Defendants' civil conspiracy, Defendants are thereby jointly and severally liable for all damages sustained by the Missouri Civil Conspiracy Class for Prescription Pet Food purchases made in Missouri of Prescription Pet Food manufactured or sold by Defendants and their co-conspirators.

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:

A. Certifying the Missouri Royal Canin Class, the Missouri Purina Class, and the Missouri Civil Conspiracy 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;

B. Finding, adjudging, and decreeing that Defendants have engaged in the violations of Missouri law alleged in this Petition;

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

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

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

F. 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;

G. Awarding interest on all amounts recovered as provided by Missouri law; and

H. Awarding all such other and further relief to which Plaintiff and the Classes are entitled.

JURY TRIAL DEMAND

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

Dated: November 11, 2020.

RESPECTFULLY SUBMITTED,

BY: /s /James P. Frickleton

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was sent via the court's electronic filing system this 11th day of November, 2020 to:

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