

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
AT INDEPENDENCE

MARY HARMON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No: 2016-CV17833
	)	
SCHELL & KAMPETER, INC., d/b/a	)	
Diamond Pet Foods and/or Taste of the Wild,	)	
	)	
Defendant.	)	

**DEFENDANT’S ANSWER TO CLASS ACTION PETITION**

Defendant Schell & Kampeter, Inc., d/b/a Diamond Pet Foods and/or Taste of the Wild (“Defendant”), by and through counsel, and in answer to the Class Action Petition, states as follows:

**Response to Alleged Nature of the Action**

1. Defendant denies the allegations in paragraph 1 of the Class Action Petition.
2. Defendant denies the allegations in paragraph 2 of the Class Action Petition.

**Response to Alleged Parties**

3. Defendant is without knowledge or sufficient information to admit or deny the allegations in paragraph 3 of the Class Action Petition and therefore denies the same.
4. Defendant is without knowledge or sufficient information to admit or deny the allegations in paragraph 4 of the Class Action Petition and therefore denies the same.
5. Defendant admits the allegations in paragraph 5 of the Class Action Petition.
6. In response to paragraph 6 of the Class Action Petition, Defendant admits the allegations in the first and second sentence, but the third sentence states legal conclusions to which no response is required. If a response is deemed necessary, Defendant states that it does not challenge personal jurisdiction in this case.

7. The allegations in paragraph 7 of the Class Action Petition state legal conclusions to which no response is required. If a response is deemed necessary, Defendant states that it denies that Plaintiffs were injured by Defendant's conduct and that it is without knowledge or sufficient information to admit or deny the remaining allegations in paragraph 7 of the Class Action Petition and therefore denies the same.

### **Response to Factual Allegations**

8. In response to paragraph 8 of the Class Action Petition, Defendant admits that it manufactures, markets, and sells the Taste of the Wild and the Prey Limited Ingredient brands and that the Class Action Petition alludes incompletely to various recipes within those brands. Defendant denies the remaining allegations in paragraph 8 of the Class Action Petition.

9. Defendant admits that Defendant has used in marketing the phrases quoted in paragraph 9 of the Class Action Petition and denies the remaining allegations in paragraph 9 of the Class Action Petition including the mischaracterization of those quotations which are incomplete and presented out of context.

10. Defendant admits that Defendant has used in marketing the phrases quoted in paragraph 10 of the Class Action Petition and denies the remaining allegations in paragraph 10 of the Class Action Petition including the mischaracterization of those quotations which are incomplete and presented out of context.

11. Defendant admits that Defendant has used in marketing the phrases quoted in paragraph 11 of the Class Action Petition and denies the remaining allegations in paragraph 11 of the Class Action Petition including the mischaracterization of those quotations which are incomplete and presented out of context.

12. Defendant admits that Defendant has used in marketing the phrases quoted in paragraph 12 of the Class Action Petition and denies the remaining allegations in paragraph 12 of the Class Action Petition including the mischaracterization of those quotations which are incomplete and presented out of context.

13. Defendant denies the allegations in paragraph 13 of the Class Action Petition including the alleged phrases which are misquoted, mischaracterized, and presented out of context.

14. Defendant denies the allegations in paragraph 14 of the Class Action Petition.

15. Defendant denies the allegations in paragraph 15 of the Class Action Petition.

16. Defendant denies the allegations in paragraph 16 of the Class Action Petition.

17. Defendant denies the allegations in paragraph 17 of the Class Action Petition.

18. Defendant admits the first sentence of paragraph 18 of the Class Action Petition. Defendant admits that it provides safer, better quality products that are safe, healthy, and high-quality, but Defendant denies the remaining allegations in paragraph 18 of the Class Action Petition.

19. Defendant denies the allegations in paragraph 19 of the Class Action Petition.

**Response to Class Action Allegations**

20. Paragraph 20 of the Class Action Petition states legal conclusions to which no response is required. If a response is deemed necessary, Defendant denies the allegations in paragraph 20 of the Class Action Petition.

21. Defendant admits that Plaintiffs purport to bring a class action, but Defendant denies the remaining allegations in paragraph 21 of the Class Action Petition including the assertion that the proposed class is certifiable.

- 22. Defendant denies the allegations in paragraph 22 of the Class Action Petition.
- 23. Defendant denies the allegations in paragraph 23 of the Class Action Petition.
- 24. Defendant denies the allegations in paragraph 24 of the Class Action Petition.
- 25. Defendant denies the allegations in paragraph 25 of the Class Action Petition.
- 26. Defendant denies the allegations in paragraph 26 of the Class Action Petition.
- 27. Defendant denies the allegations in paragraph 27 of the Class Action Petition.

**Response to Count I**  
**(Alleged Violation of the Missouri Merchandising Practices Act)**

28. Defendant incorporates by reference all responses and further and affirmative defenses to the Class Action Petition as though fully set forth herein in response to Count I.

29. Defendant admits that Plaintiffs purport to bring a class action, but Defendant denies the remaining allegations in paragraph 29 of the Class Action Petition including the assertion that the proposed class is certifiable.

30. Paragraph 30 of the Class Action Petition states legal conclusions to which no response is required. If a response is deemed necessary, then the allegations in paragraph 30 of the Class Action Petition are denied.

- 31. Defendant denies the allegations in paragraph 31 of the Class Action Petition.
- 32. Defendant denies the allegations in paragraph 32 of the Class Action Petition.
- 33. Defendant denies the allegations in paragraph 33 of the Class Action Petition.
- 34. Defendant denies the allegations in paragraph 34 of the Class Action Petition.
- 35. Defendant denies the allegations in paragraph 35 of the Class Action Petition.
- 36. Defendant denies the allegations in paragraph 36 of the Class Action Petition.
- 37. Defendant denies the allegations in paragraph 37 of the Class Action Petition.
- 38. Defendant denies the allegations in paragraph 38 of the Class Action Petition.

39. Defendant denies the allegations in paragraph 39 of the Class Action Petition.
40. Defendant denies the allegations in paragraph 40 of the Class Action Petition.
41. Defendant denies the allegations in paragraph 41 of the Class Action Petition.
42. Defendant denies the allegations in paragraph 42 of the Class Action Petition.
43. Defendant denies the allegations in paragraph 43 of the Class Action Petition.
44. Defendant denies the allegations in paragraph 44 of the Class Action Petition.
45. Defendant denies the allegations in paragraph 45 of the Class Action Petition.
46. Defendant denies the allegations in paragraph 46 of the Class Action Petition.
47. Defendant denies the allegations in paragraph 47 of the Class Action Petition.
48. Defendant denies the allegations in paragraph 48 of the Class Action Petition.
49. Defendant denies the allegations in paragraph 49 of the Class Action Petition.
50. Defendant denies the allegations in paragraph 50 of the Class Action Petition.

#### **Response to Prayer for Relief**

WHEREFORE, Defendant requests that Plaintiffs take naught by way of the Class Action Petition, that the Court enter judgment in favor of Defendant and against Plaintiffs including an award of costs and attorney fees to Defendant, and grant such further relief as the Court deems just and proper.

#### **FURTHER AND AFFIRMATIVE DEFENSES**

Defendant, without assuming any burden of proof that by law is not otherwise its responsibility, asserts the following defenses:

1. Defendant denies all allegations not expressly admitted.
2. The Class Action Petition fails in whole or in part to state a claim upon which relief can be granted for reasons including those set forth in Defendant's Motion to Dismiss.

3. Defendant denies the nature and extent of any injury or damage claimed in the Class Action Petition.

4. The Court lacks subject matter jurisdiction and/or statutory authority to proceed because Plaintiffs lack standing in that they have not suffered an injury in fact that is concrete and particularized to them and as to each product identified in the Class Action Petition.

5. The Court lacks subject matter jurisdiction and/or statutory authority to proceed pursuant to the primary jurisdiction doctrine and/or the Class Action Petition is preempted in whole or in part because the allegations including those regarding the FDA demand administrative knowledge and expertise to determine technical, intricate fact questions, uniformity is important to the regulatory scheme, and the relief sought in the Class Action Petition would conflict, frustrate, or otherwise stand as an obstacle to the accomplishment of the FDA's objectives. *See, e.g.*, 21 CFR Ch. 1.

6. The Class Action Petition fails to plead fraud with particularity as required by Missouri Rule 55.15.

7. The claims in the Class Action Petition are barred in whole or in part by the statutes of limitations including under Mo. Rev. Stat. § 516.120.

8. The claims in the Class Action Petition are barred by doctrines of waiver, estoppel, laches, unclean hands, and/or ratification through the purchase and use of Defendant's products despite knowledge of alleged risks and by other actions inconsistent with the Class Action Petition's allegations.

9. The damages alleged in the Class Action Petition fail to demonstrate any ascertainable loss, or, alternatively, are subject to setoff and related doctrines to account for the benefit and value received from any of Defendant's products.

10. Plaintiffs and the persons they purport to represent failed to mitigate their damages in ways including failing to exercise due diligence in the reading of labels and marketing materials and FDA notices and in other ways that may be learned during the course of discovery.

11. The claims of Plaintiffs and the persons they purport to represent are barred to the extent Defendant's products were not used in the manner intended.

12. The Class Action Petition's claims for punitive damages are grossly out of proportion to the severity of Defendant's alleged conduct, bear no rational relationship to the claimed damages, and are thus and otherwise unconstitutional in that they deny Defendant due process of law and equal protection of the laws, and violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, and applicable provisions of the Missouri Constitution.

13. The Class Action Petition's claims for punitive damages are barred by and violate the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, § 10 of the Missouri Constitution because the procedures for assessing punitive damages, facially and as applied to the facts of this case, violate constitutional due process requirements.

14. Defendant invokes all applicable statutory limitations on damages including those set forth in Mo. Rev. Stat. § 516.265.

15. Defendant's actions were lawful, reasonable, and made in good-faith compliance with applicable provisions of law, rules and regulations.

16. The Class Action Petition relies on statements of opinion and puffery which are not actionable.

17. Any alleged misrepresentations or omissions were not material.
18. Defendant made all required disclosures.
19. Any alleged representations were not false, deceptive, or misleading to a reasonable consumer.
20. The claims in the Class Action Petition fail to demonstrate that Defendant was aware of any defect, should have known of any defect, or that Defendant purposefully omitted any fact of a defect from any representation.
21. The claims in the Class Action Petition are barred in whole or in part by Defendant's free speech guarantees of the First Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.
22. The duties proposed in the Class Action Petition would impose impossible and/or unreasonable burdens.
23. Plaintiffs and/or other individuals allegedly similarly situated may not bring the action as set forth in the Class Action Petition as a class action pursuant to Missouri Supreme Court Rule 52.08 or Mo. Rev. Stat. § 407.025 because those requirements have not been satisfied.
24. The Class Action Petition's proposed class fails to meet the prerequisites for class treatment, is not ascertainable and is unsuitable for certification, and the class allegations should be stricken and/or dismissed.
25. Plaintiffs are not appropriate representative of the proposed class in that they cannot fairly and adequately protect the interests of those persons Plaintiffs seek to represent.
26. The types of claims that Plaintiffs seek to bring as a class action are matters on which individual issues predominate and are not appropriate for class treatment.



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on February 26, 2021, I electronically filed the foregoing with the clerk of the court by using the Missouri eFiling system which will send a notice of electronic filing to all counsel of record.

/s/ Tyson H. Ketchum  
*Attorney for Defendant*