

Case No. 41890-8-II

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WASHINGTON STATE COURT OF APPEALS, DIVISION II

Donald R. Earl
(Appellant/Plaintiff)

v.

Menu Foods Income Fund
The Kroger Company
(Respondents/Defendants)

APPELLANT'S BRIEF

Donald R. Earl (pro se)
3090 Discovery Road
Port Townsend, WA 98368
(360) 379-6604

Menu Foods - Plaintiff

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I. INTRODUCTION

1. The Appellant/Plaintiff, Donald R. Earl, hereby respectfully submits this Appellant's Brief for consideration on review by this honorable court.

II. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR

2. **Assignment of Error 1:** The trial court erred in entering the order of December 21, 2007 dismissing Mr. Earl's statutory, express and implied warranty claims against Menu Foods.

3. **Assignment of Error 2:** The order entered on February 15, 2008 (CP 271-276), which gave Menu Foods permission to destroy material evidence, without allowing Mr. Earl to obtain samples of the evidence, violated Mr. Earl's Article I, Section 3 right to due process under the Washington State Constitution.

4. **Assignment of Error 3:** In the order of February 15, 2008, which granted Menu Foods permission to destroy material evidence, the trial court usurped powers vested in the executive and legislative branches of government, in violation of the separation of powers doctrine.

5. **Assignment of Error 4:** In ordering Mr. Earl to pay sanctions for moving to vacate the February 15, 2008 order allowing Menu Foods to

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destroy evidence, the trial erred in both fact and law, and abused its discretion.

6. Assignment of Error 5: In failing to curb numerous and repetitive rule violations by opposing counsel through sanctions or censure the trial court violated Mr. Earl's rights to due process and equal protection pursuant to the Fourteenth Amendment of the United States Constitution and Article I, Section 21 and Article I, Section 3 of the Washington State Constitution.

7. Assignment of Error 6: In refusing to recuse himself from this case for cause shown, Judge Verser abused his discretion and violated Mr. Earl's Article I, Section 3 right to due process under the Washington State Constitution.

8. Assignment of Error 7: The trial court committed legal error in ruling a forensic testing laboratory is not a protected CR 26(b)(5&6) expert and abused its discretion in failing to sanction Menu Foods' counsel for ex parte communications with an expert witness Mr. Earl informed counsel would likely be retained in that capacity.

9. Assignment of Error 8: The trial court abused its discretion in ordering that all testing of pet food samples must be conducted in the presence of opposing party experts.

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10. **Assignment of Error 9:** The trial court committed legal error in ruling expert witnesses are exempt from the requirements of CR 56(e).

11. **Assignment of Error 10:** The trial court committed legal error in barring Mr. Earl from reading into the record excerpts from authenticated learned treatises.

12. **Assignment of Error 11:** In ruling on disputed questions of value and measure of value, the trial court committed legal error and violated Mr. Earl's Article I, section 21 right to have questions of value determined by a jury.

13. **Assignment of Error 12:** In barring Mr. Earl from presenting scientific and medical evidence in opposition to the summary judgment motion on the basis Mr. Earl is not an expert, the trial court committed legal error and violated Mr. Earl's right to equal protection, due process and trial by jury pursuant the Fourteenth Amendment of the United States Constitution and Article I, section 21 and Article I, section 3 of the Washington State Constitution.

14. **Assignment of Error 13:** The trial court committed legal error in ruling printouts of learned treatises, available from reliable sources maintained in Internet databases, the authenticity of which is not disputed by the Defendants, are inadmissible evidence.

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B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

15. Issues Pertaining to Assignments of Error 1: In the order of December 21, 2007 (CP 216-217), the trial court adopted Menu Foods' argument (CP 124-126) that contractual privity is required to maintain a Product Liability action against a manufacturer for breach of express and implied warranties. In answers to interrogatories, Menu Foods states it is the author of representations made to consumers on its product labels and all label representations are subject to Menu Foods' approval (CP 576-577, Appendix 1). In dismissing Mr. Earl's product liability claims for breach of express and implied warranties, did the trial court err in both fact and law?

16. Issues Pertaining to Assignments of Error 2: On February 8, 2008, Menu Foods filed a motion requesting the trial court grant permission for Menu Foods to destroy approximately 15 million containers of pet food relevant to this case (CP 139-260). No provisions were made to preserve any part of this body of evidence. Menu Foods neither claimed nor argued that allowing Mr. Earl to obtain samples of this evidence prior to its destruction would have created any undue burden. In granting the motion, did the trial court violate Mr. Earl's due process right to discovery pursuant to Article I, Section 3 of the Washington State Constitution?

17. Issues Pertaining to Assignments of Error 3: Pursuant to

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legislative acts under both Washington and Federal law, destruction of evidence is strictly prohibited. At the time Menu Foods moved for permission to destroy evidence, Menu Foods was the subject of both civil and criminal investigations by the U.S. Food and Drug Administration, as well as being the defendant in numerous civil actions, including the instant case. Authority to regulate destruction of evidence is vested in the legislative branch of government, and authority to enforce such laws is vested in the executive branch. In granting Menu Foods permission to destroy material evidence, did the trial court violate the separation of powers doctrine, usurping powers not vested in the judiciary?

18. Issues Pertaining to Assignments of Error 4: In the months following the trial court's granting of Menu Foods' motion to destroy evidence, evidence came to light showing counsel for Menu Foods engaged in numerous examples of fraud to obtain the order. No law or precedent provides a court with the authority to contravene criminal law prohibiting destruction of evidence. Did the trial court abuse its authority in sanctioning Mr. Earl for bringing a motion which was found to be brought in good faith, which was well grounded in fact and law, and was supported by substantial evidence?

19. Issues Pertaining to Assignments of Error 5: During the

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course of nearly 4 years of litigation the trial court has permitted opposing party citations to unpublished opinion in violation of GR 14.1, granted untimely filed motions, allowed abusive litigation to proceed unchecked, and permitted ex parte contact with experts. In failing to curb litigation abuse through enforcement of rule and law, does a trial court violate a parties rights to due process and equal protection pursuant to the Fourteenth Amendment of the United States Constitution and Article I, Section 21 and Article I, Section 3 of the Washington State Constitution?

20. Issues Pertaining to Assignments of Error 6: Mr. Earl moved for the removal of Judge Verser based on a demonstrated pattern of extreme prejudice. When a judge's lack of impartiality is a documented matter of record, does a failure to remove himself from a case violate the Article I, Section 3 right to due process of the Washington State Constitution and the Fourteenth Amendment right to equal protection under the law of the U.S. Constitution?

21. Issues Pertaining to Assignments of Error 7: In anticipation of litigation, Mr. Earl hired ExperTox, a forensic testing laboratory, to test samples of pet food he believed were contaminated with toxic substances. When tests showed the food contained toxic substances, Mr. Earl discussed hiring Dr. Lykissa of ExperTox with the lab and understood expert witness

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services would be available when needed. In electronic communications, Mr. Earl expressly informed counsel for Menu Foods that Dr. Lykissa should be considered a potential expert witness and that counsel should not engage in ex parte communications with ExperTox. Did the trial court commit legal error in failing to recognize Dr. Lykissa as a CR 26(b)(5) witness and abuse its discretion in failing to sanction opposing counsel for discovery violations?

22. Issues Pertaining to Assignments of Error 8: In response to requests for production and discovery orders, the parties exchanged samples of pet food for the purpose of testing, to ensure all parties had their own samples available to test. The court also placed a condition on testing that parties must arrange for opposing party experts to be present at non party laboratories to observe testing. Mr. Earl objected that the condition would place an impossible burden on arranging to test samples and that the condition would effectively preclude further testing. Did the trial court abuse its discretion in placing an unreasonable condition on testing of pet food samples?

23. Issues Pertaining to Assignments of Error 9: CR 56(e) requires that all documents referred to in an affidavit must be attached. Mr. Earl objected by motion to the failure of affiants to provide the documents

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described in affidavits, which the Court denied. As a matter of law, did the Court err in considering affidavits where the underlying documents referred to therein are omitted?

24. Issues Pertaining to Assignments of Error 10: ER 803(a)(18) provides for reading into the record statements contained in learned treatises once authenticity has been established. All learned treatises supplied by the Plaintiff were served on the Defendants pursuant to ER 904. The Defendants filed responses, which did not include any authenticity objections. The Defendants also filed learned treatises authenticated by the Defendant's expert, Dr. Hall. In ruling the Plaintiff could neither read into the record statements in learned treatises referred to by Dr. Hall, nor statements in learned treatises presented by the Plaintiff pursuant to ER 904, did the Court err as a matter of law?

25. Issues Pertaining to Assignments of Error 11: On April 10, 2009, the trial court ruled Mr. Earl would not be allowed to argue replacement cost as a measure of value for his cat Chuckles. On January 14, 2011, the trial court ruled Mr. Earl's damages would be limited to an alleged market value of \$100. In ruling on contested facts regarding value and measure of damages, did the Court violate Mr. Earl's Article I, section 21 right to have questions of value and measure of damages determined by

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a jury?

26. Issues Pertaining to Assignments of Error 12: In opposition to the summary judgment motion, Mr. Earl sought to introduce admissible scientific and medical evidence, none of which was dependent on any opinion held by Mr. Earl. The court ruled only an expert is allowed to introduce such evidence. In ruling Mr. Earl could not present admissible scientific and medical evidence in support of his causation claims, did the trial court commit legal error and violate Mr. Earl's right to equal protection, due process and trial by jury pursuant the Fourteenth Amendment of the United States Constitution and Article I, section 21 and Article I, section 3 of the Washington State Constitution?

27. Issues Pertaining to Assignments of Error 13: ER 1001(c) provides that documents stored on computers, which accurately reflect the data, are by definition original documents. In its ER 904 responses, Menu Foods does not dispute the authenticity of Mr. Earl's affidavit exhibits nor does it dispute they are published scientific journal articles pursuant to ER 901(b)(4). As a matter of law, did the trial court commit legal error in ruling that no document obtained on the Internet is admissible evidence and that Mr. Earl was barred from reading relevant excerpts into the record?

III. FACTS AND PROCEDURAL BACKGROUND

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28. In January of 2007 Mr. Earl's cat Chuckles died of a sudden and inexplicable onset of kidney failure after consuming pet foods manufactured by Menu Foods and market by Kroger under its brand "Pet Pride". On March 16, 2007, Menu Foods announced a recall of "cuts and gravy" style pet foods manufactured between December 2006 and March 2007 because the food was causing kidney failure in pets. Neither pet foods manufactured prior to that time, nor the "cake/loaf" style pet foods Mr. Earl fed his cat were included in the recall. On July 13, 2007, Mr. Earl filed a product liability action against Menu Foods and Kroger after ExperTox, a forensic toxicology laboratory, detected cyanuric acid and acetaminophen in samples of pet food (CP 1-21). Both substances are known to cause kidney failure. The only two lot dates Mr. Earl had available to test were manufactured two and eight months before the recall period.

29. Kroger answered the complaint. On October 1, 2007 Menu Foods filed a CR 12(b)(6) motion to dismiss the complaint (CP 22-33). The motion relied heavily on unpublished opinion, prohibited by GR 14.1. The primary basis of the motion was that Mr. Earl did not "plead a statutory product liability claim against Menu Foods, but instead pleads only common law claims, which are barred by the Act." (CP 26).

30. Nowhere in the complaint did Mr. Earl assert his product

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liability causes of action were based on the common law. The Washington Product Liability Act is cited as a basis of the action at paragraph 34 of the complaint (CP 8). The trial court granted the motion based on Menu Foods' arguments, ordering Mr. Earl would be allowed 10 days to file an amended complaint (CP 56-57). Mr. Earl timely filed a 13 page amended complaint with supporting exhibits (CP 59-102) in compliance with the trial court's oral instructions on October 16, 2007.

31. Mr. Earl filed a motion asking the trial court to amend dismissal of Mr. Earl's fraudulent concealment claim to without prejudice (CP 103-107), which the court denied in the order filed on November 9, 2007 (CP 111-112). The basis for the decision was that the claim was unnecessary, as relief was available under the Product Liability Act.

32. Mr. Earl filed a motion for default judgment on October 30, 2007 after both defendants failed to file a timely answer to the amended complaint (CP 108-110). The defendants filed an untimely request for a one week continuance, which the trial court granted over Mr. Earl's objections (11/9/07 RP 5-6) on the basis an answer would be filed within one week.

33. In lieu of filing an answer, Menu Foods filed a second CR 12(b)(6) motion to dismiss Mr. Earl's express and implied warranty claims,

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which the trial court had already ruled were allowed claims against Menu Foods. Both defendants also moved for an order that Mr. Earl be required to file a second amended complaint, alleging they could not understand the causes of action unless the complaint included a separate section for each defendant separately (CP 113-128). In response, Mr. Earl moved to strike the motions and for CR 11 sanctions (CP 143-151). Mr. Earl argued in part (CP 148) that Menu Foods' failure to object to express and implied warranty claims in its original CR 12(b)(6) motion exhausted its ability to relitigate those issues in subsequent motions.

34. As Mr. Earl believed both defendants mischaracterized the trial court's October 12, 2007 oral rulings in regard to amending the complaint, Mr. Earl obtained a transcript of the hearing, which was attached to his motion as exhibit A (CP 152-178).

35. Mr. Earl objected to Menu Foods' practice of citing unpublished opinion in violation of GR 14.1 in his reply brief filed on December 17, 2007 and to both defendants' repeated violations of court rules related to the untimely filing of documents (CP 209).

36. At the December 21, 2007 hearing the trial court declined to consider its prior oral rulings and reprimanded Mr. Earl for providing transcripts of the relevant hearings, stating, "It doesn't, it doesn't behoove

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you to give me the whole record of everything that was said. That written motion is what controls the written order, as does this written order." (12/21/07 RP 20).

37. Mr. Earl's amended complaint asserts at paragraph 53 that both defendants warranted the pet foods at issue in the case (CP 70). The Defendants' warranty statements are quoted in the complaint at paragraphs 32 and 33 (CP 65). In answers to interrogatories, Menu Foods admits to authoring and approving those written representations (CP 576-577, Appendix 1). Over Mr. Earl's arguments and objections, the trial court ruled, "Menu Foods didn't make the warranty." (12/21/07 RP 15).

38. In its oral rulings, the trial court ordered Mr. Earl to file a second amended complaint of not over 3 pages, and with a separate section for each defendant stating claims against each defendant, of not more than a half page each. In addition to Mr. Earl's recollection of the oral order, the clerk's minutes reflect the oral ruling stating "*Plaintiff to file a new complaint within 20 days (not to exceed 3 pages).*" (CP 221, Appendix 2). Counsel for Menu Foods is quoted on the record stating in regard to its proposed order, "*I understand that in this order is not some direction you gave him about length and specificity.*" Menu Foods argued Mr. Earl should not be allowed to see the order before it was signed. The trial court

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signed the order without allowing Mr. Earl to review it. (12/21/07 RP 19, Appendix 3).

39. Believing it would be impossible to compose a three page complaint that would survive subsequent motions to dismiss, Mr. Earl filed a notice of appeal on December 26, 2007 (CP 222-236). On subsequently obtaining a copy of the electronic record, Mr. Earl discovered the record had been subject to tampering, removing all references to the complaint page and claim limits ordered by the trial court. On or around January 9, 2008, Mr. Earl filed a criminal complaint against Judge Verser with the FBI, at its Seattle office's anticorruption division, regarding the apparent criminal tampering/alteration of public records.

40. On February 8, 2008 Menu Foods filed a motion asking the trial court to allow the total destruction of approximately 15 million containers of pet food evidence ("unorganized inventory") relevant to both the instant case and pending Federal investigations (CP 239-260). The motion was again supported by unpublished opinions prohibited by GR 14.1 (CP 237-238).

41. As the motion and attachments totaled approximately 500 pages, Mr. Earl timely filed a request for an automatic one week continuance, pursuant to LCR 7.5, to allow time for an adequate response

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(CP 269-270). At the hearing held on February 15, 2008, the trial court ruled Mr. Earl would be required to post a bond in the amount of \$42,000.00 before the court would grant a one week continuance (2/15/08 RP 13). On oral argument Mr. Earl explained how the "unorganized inventory" body of evidence was critical to the case and offered to expeditiously obtain samples at his own expense (2/15/08 RP 16-19). At no time has Menu Foods argued this would have created an undue burden. The trial court, over Mr. Earl's objections and offer to obtain samples at his own expense, granted Menu Foods permission to destroy all evidence relevant to the case which would potentially have shown endemic contamination of its pet food products and that chronic exposure to toxins in the food ultimately proved lethal to pet animals (CP 271-276). Mr. Earl has vigorously litigated the legality of an order permitting destruction of evidence at nearly every level of Washington and Federal courts. To date, no court has answered the issue of whether or not a court has the legal authority to authorize the destruction of evidence.

42. On August 11, 2008 Mr. Earl filed a motion to vacate the evidence destruction order pursuant to CR 60(b) (CP 277-294) with supporting documents showing counsel for Menu Foods engaged in misconduct and fraud in obtaining the order to destroy evidence. In

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conjunction with the motion, Mr. Earl also submitted a motion to allow discovery, which was conditioned on the trial court vacating the February 15, 2008 order at issue (CP 295-305).

43. The trial court denied the motion and subsequently ordered Mr. Earl to pay Menu Foods attorney fees in the amount of \$4,491.09 (CP 385). In this written order, Judge Verser characterizes Mr. Earl's action as *"the pursuit of imagined conspiracy theories"* and *"a crusade to attempt to punish Menu Foods for what he believes are unconscionable practices motivated by "corporate greed"."* (CP 384). Nothing in the record justifies the extreme prejudice demonstrated by these statements. At all times, Mr. Earl has carefully complied with rule and law. Every pleading, brief, motion and reply Mr. Earl has filed in this case is the result of careful due diligence, extensively supported by fact and law. Also at CP 384, the trial court states Mr. Earl's *"motion was not justified in any manner either factually or legally"*. Mr. Earl's CR 60 motion shows that: a) Menu Foods obtained the order in Federal District Court through the misrepresentation that there were no parties with an interest in testing unorganized inventory (CP 290-292, Appendix 4-5). b) Menu Foods misrepresented the urgency it cited as a basis for refusing Mr. Earl's request for an automatic one week continuance (CP 285-287, Appendix 6). c) That as soon as Menu Foods

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obtained the order from Federal Court, it immediately began leveraging that order to prevent discovery of unorganized inventory in all of the cases it told the Federal Court didn't exist (CP 351, Appendix 7). The motion was further supported by new evidence showing there is good cause to believe Menu Foods' products were endemically contaminated long before its official recall period through being intentionally spiked with cyanuric acid to falsify the apparent protein content (CP 294).

44. Mr. Earl moved for reconsideration of the order (CP 386-395). In the trial court's denial of the motion the court states, *"There is no risk that allowing destruction of the unorganized inventory would erroneously deprive Mr. Earl of any possible interest he would have in preservation of the inventory. His interests are duly protected by the Dr. McCabe sampling and retrieval program for the organized inventory."* (CP 397). The sampling plan referred to made no provision whatsoever to preserve any of the unrecalled pet food evidence relevant to this case ("unorganized inventory"), which is the sole reason Mr. Earl opposed its destruction without first allowing a bare minimum of discovery as allowed under CR 34(a)(2).

45. On March 13, 2009, Mr. Earl filed his second amended complaint (CP 398-407), which added a Consumer Protection Act cause of

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action to the original claims and also asserted a basis for replacement costs as a measure of damages. On March 9, 2009 Menu Foods again relied on unpublished opinion in violation of GR 14.1 (CP 408-419) in its third CR 12(b)(6) motion filed in this case (CP 420-434). On March 30, 2009 Mr. Earl again moved for sanctions to curb the repetitive rule violation (CP 435-439) and responded to the motion to dismiss (CP 440-448). On April 1, 2009 Kroger also filed a motion to dismiss (CP 449-451), to which Mr. Earl responded on April 6, 2009 (452-457). The essence of the Defendants' motions was that the trial court should, on a CR 12(b)(6), be able to limit the measure of Mr. Earl's damages, which Mr. Earl argued is a question of fact to be determined by a jury, which the court had no legal authority to determine on a CR 12(b)(6) motion.

46. Commissioner Bierbaum, Judge Verser's former law partner, heard the motions on April 10, 2009. At the hearing, in the case immediately preceding the instant case, in an apparent excited utterance, Commissioner Bierbaum stated she was deciding cases on the calendar according to Judge Verser's instructions. Mr. Earl referred to this statement at CP 524. On subsequently obtaining a copy of the electronic record, Mr. Earl discovered the portion of the record which should have contained the statement had been erased. The Commissioner Bierbaum denied Mr. Earl's

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motion for sanctions (CP 509-510) and granted the Defendants' motions to limit Mr. Earl's damages (CP 507-508).

47. On April 20, 2009 Mr. Earl filed a CR 60 motion to vacate the order dismissing Mr. Earl's damages on the basis the trial court lacked the legal authority to decide questions of fact related to damages and value (CP 513-520), which the court denied.

48. On June 29, 2009 Mr. Earl filed a motion to remove Judge Verser from the case for cause shown (CP 521-532), which the court denied on July 10, 2009 (CP 533). The motion was based on Judge Verser's repeated failures to curb rule violations and misconduct on the part of opposing counsel, a demonstrated double standard in the court's application of court rules and, documented instances of Judge Verser's open hostility to the case and disparaging remarks made to and about Mr. Earl in regard to his being self represented. Throughout the course of this lawsuit, Mr. Earl has at all times shown the court every courtesy and has not once asked the court for any special consideration because Mr. Earl is self represented.

49. After hearings on Mr. Earl's motion to produce discovery, Menu Foods filed a proposed order with the trial court which the court approved on March 8, 2010 (CP 686-688) over Mr. Earl's objections filed

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on February 25, 2010. Of primary concern was the court's ruling that any party seeking to conduct testing of pet food samples relevant to the case would be required to make arrangements with laboratories to allow the presence of opposing party experts. The condition effectively precluded any further testing as most commercial laboratories would object to the condition as being overly intrusive. However, this condition apparently only applied to Mr. Earl, and not to the Defendants. In contempt of the trial court's discovery order, to which Mr. Earl objected at CP 1186, Menu Foods conducted testing without making arrangements with Mr. Earl to have an expert present.

50. Mr. Earl worked extensively with ExperTox, a Deer Park, Texas forensic testing laboratory, in anticipation of litigation and had intended, pursuant to discussions with the lab (CP 701), to hire Dr. Lykissa of ExperTox as an expert witness in the case. Although Mr. Earl had not formally retained Dr. Lykissa in that capacity, Mr. Earl expressly informed counsel for Menu Foods that Dr. Lykissa would likely be retained as an expert and that Menu Foods should not engage in ex parte communications with him (CP 703-704).

51. Bradley Meissner, counsel for Menu Foods, proceeded to contact ExperTox ex parte (CP 705). For the three years prior to this ex

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parte communication, Mr. Earl enjoyed an excellent working relationship with ExperTox and spent thousands of dollars on tests related to this lawsuit and to a nonprofit effort managed by Mr. Earl. Since the ex parte communication, ExperTox has refused to test pet food for Mr. Earl and in fact will not communicate with Mr. Earl at all.

52. On May 12, 2010 Mr. Earl filed a motion for sanctions regarding Menu Foods' apparent tampering with Mr. Earl's key witness (CP 689-699), which the court denied on May 21, 2010 (CP 747) and again on June 17, 2010 subsequent to Mr. Earl's motion for reconsideration (CP 748-749). Menu Foods' response (CP 715-728) relied heavily on ad hominem attacks against Mr. Earl and citations to unpublished opinions prohibited under GR 14.1. Mr. Earl's reply (CP 735-746) shows, through specific citations to the record, that Mr. Earl claimed CR 26(b)(4&5) work product privilege regarding ExperTox in response to interrogatories (CP 736, Appendix 8). Counsel for Menu Foods is on record prior to the ex parte contact, adamantly opposing ExperTox providing any expert services for Mr. Earl (quoted at CP 736-737). At the May 21, 2010 hearing, after the trial court's decision was entered, counsel for Menu Foods admitted the Declaration of Dr. Lykissa was not representative of the ex parte communications that took place (5/21/10 RP 11, Appendix 9). With the

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defection of Dr. Lykissa, Menu Foods then argued on summary judgement that ExperTox evidence showing toxins in the subject matter pet foods should be excluded due to the unavailability of Dr. Lykissa to authenticate the lab results (1/14/11 RP 22, Appendix 10). The trial court ruled on January 14, 2011 that Mr. Earl's lack of an expert precluded Mr. Earl from introducing key evidence in opposition to summary judgment (1/14/11 RP 27-28).

53. On December 17, 2010 the Defendants' filed for summary judgment (CP 750-768). The essence of Menu Foods' arguments was that its expert claimed toxins found in the pet food were of insufficient quantity to be lethal and, that Mr. Earl's damages should be limited to \$100 based on the sale price of kittens at a Port Angeles pet shop.

54. In conjunction with its motion, Menu Foods also filed declarations of Meissner (CP 769-784), Poppenga (CP 785-808), Hall (CP 809-844), and VanCleave (CP 845-847).

55. Mr. Earl filed a declaration on December 27, 2010 (CP 848-1172) with copies of admissible evidence relevant to the lawsuit. Along with this declaration, Mr. Earl filed an ER 904 notice describing all documents attached to the declaration (CP 1173-1179). Defendants did not object to the authenticity of any document provided.

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56. On December 30, 2010 Mr. Earl filed a motion to strike defective affidavits of Meissner, Hall, Poppenga and VanCleave (CP 1180-1190). All of the affidavits referred to documents that were not attached as required pursuant to CR 56(e). Dr. Hall's affidavit contained numerous factual errors which are described in detail in the motion. Mr. Earl also filed a second declaration (CP 1191-1231) with copies of admissible evidence relevant to the lawsuit. Along with this declaration, Mr. Earl filed an ER 904 notice describing all documents attached to the declaration (CP 1233-1234). Defendants did not object to the authenticity of any document provided.

57. In denying Mr. Earl's motion to strike non complying affidavits, the court ruled as follows:

"With reference to the lack of all of the documents attached to Mr. Hall's, or Dr. I guess, declaration. There's no obligation for him to attach those, and so that is not a basis to exclude." (1/14/11 VRP 19)

58. In its order denying reconsideration, the trial court again asserted that experts are exempt from the requirements of CR 56(e), stating, "*The rule does not require that an expert witness attach every document the expert used in forming his opinion.*" (CP 1608). The trial court relied on a 4th Circuit case (CP 1608) that was based on an assumption litigants would be allowed an opportunity to depose experts prior to a summary judgment hearing, making it

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unnecessary to comply with the Federal equivalent of CR 56(e). Mr. Earl moved in writing for a continuance to allow time to depose witnesses (CP 1246). In the order denying Mr. Earl's motion for reconsideration, the trial court stated Mr. Earl failed to move for time to depose witnesses (CP 1609).

59. On January 3, 2011 Mr. Earl filed a third supplemented declaration (CP 1248-1295) with copies of admissible evidence relevant to the lawsuit. Along with this declaration, Mr. Earl filed an ER 904 notice describing all documents attached to the declaration (CP 1235-1236), and also filed his response and motion to continue (CP 1237-1247). Defendants did not object to the authenticity of any document provided.

60. In the Defendant's final reply brief (CP 1296-1311), filed 4 days prior to the summary judgment hearing, the Defendants' incorporated a motion to strike all of Mr. Earl's declarations. Under local rule 5.5(a), all motions must be filed 7 days prior to the hearing. Mr. Earl objected to the untimely motion in writing at CP 1510. The trial court granted the untimely filed motion as follows:

"the fact that you can pull up these records on the internet doesn't mean that they're admissible. It doesn't make the records admissible, and they're not.... they're not properly authenticated and they're not properly before me. Just because you can find them somewhere doesn't mean that they're admissible for purposes of summary judgment motions.... those won't be admitted." (1/14/11 VRP 27-28).

61. The Defendants' sought to limit Mr. Earl's damages to \$100 based

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on a market value theory related to a purported market for kittens. Mr. Earl's declaration explains why his six year old cat did not have a market value and cites intrinsic and/or replacement values for Chuckles (CP 853).

62. In denying Mr. Earl's motion for reconsideration, in regards to the trial court's refusal to consider learned treatises submitted pursuant to ER 904, the trial court relied on Mulligan v. Thompson, 110 Wn. App. 628 (2002), (CP 1609). In that case, the party failed to comply with the requirements of CR 56(e) by not attaching referenced documents to a declaration. In the instant case, all documents Mr. Earl submitted pursuant to ER 904 were attached to declarations, in full compliance with CR 56(e). Again, the Defendants did not object to the authenticity of any document provided.

63. Menu Foods filed a supplement to the Hall declaration (CP 1312-1499) on January 11, 2011 and served it on Mr. Earl after 5 PM the following day - two court days prior to the January 14, 2011 hearing. Mr. Earl objected to the late service and filing of the Hall declaration at CP 1510. The attachments, which neither the trial court nor Mr. Earl had time to review prior to the summary judgment hearing demonstrate the Hall declaration is based almost entirely on gross misstatements of fact and inaccurate representations of the science on which his opinions are allegedly based. The specific misrepresentations are described in detail at CP 1529-1536 (Appendix 11-18)

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of Mr. Earl's motion for reconsideration and at CP 1181-1186 of Mr. Earl's motion to strike affidavits. At the hearing held on January 14, 2011 the court ruled on the declaration as follows:

"I didn't look at the attachments to any of the late filed documents. I have not read the attachments to the late filed documents because they didn't have to be attached. But they did that in response to you, and they're entitled to respond to what you want, Mr. Earl. And so they provided that in response to it. But I didn't consider the, I didn't read, for instance, the emails or the things that were attached to the supplemental declaration. I didn't read the, all of the scientific material, material that was attached to this late filed Hall Declaration or the Popinjay [sic] or the-- all right. So I didn't consider the late filed because I don't think I need to." (1/14/11 VRP 21)

64. The Defendants' sought to limit Mr. Earl's damages to \$100 based on a market value theory. Mr. Earl's declaration explains why his cat did not have a market value and cites intrinsic and/or replacement values for Chuckles (CP 853). At page 36 of the 1/14/11 VRP, the trial court ruled that if the case were remanded for trial on appeal, the court would limit Mr. Earl's damages to \$100, barring Mr. Earl from presenting questions of value to a jury. The trial court recognized both that Mr. Earl, as Chuckles' owner, is competent to testify as to value and that settled law recognizes such competence. However, the court ruled, "I don't think that's the true statement of the law." (line 18). The ruling shows the trial court acted to settle disputed questions of fact, rather than allow the question to be presented to a jury.

65. From CP 1536 to CP 1457 (Appendix 19-29) of Mr. Earl's motion

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for reconsideration, Mr. Earl provides excerpts from learned treatises that under the rules of evidence are authentic and admissible evidence, which may be read into the record at trial. The trial court refused to consider any of this evidence (CP 1609). Mr. Earl did not seek to offer expert opinion testimony in opposition to summary judgment, but only to quote citations from published authorities which refute virtually every opinion expressed by Dr. Hall (1/14/11 RP 26, line 17). Mr. Earl stated, "*I'm not offering an opinion... all I want to do is point to the facts*".

66. At CP 1608 the trial court states it considered the entire record in the case in granting summary judgment. All issues presented for review in this appeal have been previously raised in the court below.

IV. ARGUMENT

(a) The trial court erred in entering the order of December 21, 2007 dismissing Mr. Earl's statutory, express and implied warranty claims against Menu Foods.

67. In *Bravo v. Dolsen Companies*, 125 Wn.2d 745 (1995), our Supreme Court ruled that dismissal under CR 12(b)(6) is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, that would entitle the plaintiff to relief.

68. Mr. Earl alleged in his complaint that the Defendants warrant the pet food and cited the specific representations on the label (CP 65,

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b) In authorizing the destruction of evidence, the trial court usurped powers not vested in the judiciary, violated Mr. Earl's right to due process and, under color of law wrongly sanctioned Mr. Earl for seeking to vacate the illegal order.

71. Judge Verser, the trial court judge in the instant case, came to this Court's attention in *State v. Tracer*, 155 Wn. App. 171 (2010), a case involving the separation of powers doctrine. There, this Court ruled: "an entity that acts in violation of the separation of powers doctrine acts without authority".

72. Destruction of evidence is a criminal act under RCW 9A.72.150. When, as is the circumstance in this case, the evidence is also material to Federal investigations; under 18 USC §1512 destroying evidence is a Federal felony, punishable by up to 20 years in prison. In *State v. Wadsworth*, 139 Wn. 2d 734 (2000), our Supreme Court ruled that authority to define crimes and set punishments rests firmly with the legislature. As the legislative branch has exclusive authority to define crimes, no court has the legal authority to grant litigants permission to engage in activities constituting criminal acts.

73. Furthermore, in *State v. Lewis*, 115 Wn. 2d 294 (1990), our Supreme Court ruled that under separation of powers principles, the decision to determine and file appropriate charges is vested in the prosecuting attorney as a member of the executive branch. In *State v.*

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Starrish, 86 Wn. 2d 200 (1975), our Supreme Court ruled trial courts do not have the authority to substitute their judgment for that of the prosecutor's. Not only did Judge Verser usurp powers vested in the legislature in authorizing destruction of evidence, Judge Verser usurped executive branch prosecutor and police powers as well. (Assignment of Error 3)

74. In *King v. Olympic Pipe Line*, 104 Wn. App. 338, (Wash. 2000), the court ruled: "*A plaintiffs Const. art. I, § 10 right of access to the courts... includes a right of discovery as implemented by the civil rules.*". CR 34(a)(2) specifically allows for entry on property to obtain samples, which Mr. Earl proposed to do at no cost or burden to Menu Foods. It is well settled law that discovery requests are to be liberally granted. Furthermore, in *IN RE Firestorm 1991*, 129 Wn. 2d 130 (1996), our Supreme Court ruled: "*The purpose of the discovery rules is to ensure trials are fair and the truth is not lost.*"

75. In the Federal product liability action, plaintiffs asked for and received 1.7 million containers of pet food on discovery, entirely at the expense of defendants. In the instant case, Mr. Earl asked to obtain up to 500 containers of pet food entirely at his own expense and was refused. That Mr. Earl should not only be refused discovery on an identical category

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of evidence, but sanctioned for the asking as well, defies logic and offends any reasonable person's sense of justice.

76. In the absence of the illegal order permitting all pet food evidence material to this case to be destroyed, there was no plausible or credible reason to refuse the request. It is discovery of a kind no prudent litigant would fail to request, and a request no reasonable person would expect to be denied. (Assignment of Error 2)

77. Mr. Earl moved to vacate the illegal order on August 11, 2008, for cause shown, based on evidence of opposing party misconduct and the court's lack of legal authority. At the same time, Mr. Earl filed a request for discovery conditioned on the order being vacated. In the trial court's written opinion (CP 382-385), which contains numerous factual errors, and expresses extreme bias against the case and Mr. Earl, Judge Verser nevertheless is forced to concede at CP 384 (Appendix 32) that Mr. Earl did not act in bad faith. The court's award of punitive sanctions against Mr. Earl for \$4,491.09 was based on discovery violations, where Mr. Earl's motion was based on vacating a void order. Even if sanctions were appropriate, which they are not, the legal authority to impose sanctions would have to come under CR 11 which requires a finding of bad faith, not CR 37, which at minimum would require the court to find discovery should

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be limited for one of the three reasons listed under CR 26 (b)(1), which it did not. (Assignment of Error 4)

c) In failing to enforce court rules to halt opposing party misconduct the trial court violated Mr. Earls rights under the Fourteenth Amendment of the United States Constitution and Article I, Section 21 and Article I, Section 3 of the Washington State Constitution.

78. To say this case has proceeded in a state of near anarchy is something of an understatement. Across the board, if rule, law or precedent favored Mr. Earl, it was utterly abandoned by the trial court. On the other hand, no matter how egregious the conduct of opposing counsel, or frivolous their motions and arguments, such conduct had the trial court's blessing at every turn. Our rules of court and related precedent serve an essential purpose. That purpose is to ensure a fair contest through due process. From repetitive GR 14.1 violations, to untimely filed motions, to discovery abuse, to frivolous motions, to ex parte contacts with persons designated as experts, not once did the trial court sanction or censure any rule violation by opposing counsel, no matter how blatant.

79. In *Carey v. Piphus*, 435 U.S. 247 (1978), the US Supreme Court ruled, "*Procedural due process rules are meant to protect persons... from the mistaken or unjustified deprivation of life, liberty, or property.*". In *Ritter v. Board of Commissioners*, 96 Wn. 2d 503 (1981), our own

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Supreme Court ruled, *"It is well settled that an administrative body must follow its own rules and regulations when it conducts a proceeding which can deprive an individual of some benefit or entitlement."* When a court fails to enforce any of the rules that define the process that is due, there is no due process. (Assignment of Error 5)

d) In refusing to recuse himself from this case for cause shown, Judge Verser abused his discretion and violated Mr. Earl's Article I, Section 3 right to due process under the Washington State Constitution.

80. On June 29, 2008 Mr. Earl filed a motion to remove Judge Verser from the case for cause shown. Details covering the extreme prejudice displayed by the court as of that date are included in the motion at CP 521-527. The motion was denied and Mr. Earl's well grounded concern it would be impossible to receive anything resembling due process and fair treatment is confirmed across the board in every decision entered in the case ever since.

81. In *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), the U.S. Supreme Court ruled that litigants are *"entitled to a neutral and detached judge"*.

82. In *State v. Tracer*, 155 Wn. App. 171 (2010), this Court removed Judge Verser from the case on remand. Mr. Earl asks for similar relief in the instant case.

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83. *State v. Perala*, 132 Wn. App. 98 (2006) provides excellent guidance on recusal motions. Recusal is based on the appearance of fairness doctrine and the reasonable person standard. No reasonable person could view the record in the instant case and believe Mr. Earl has received fair treatment, or ever can receive fair treatment, as long as Judge Verser is assigned to the case. (Assignment of Error 6)

e) The trial court committed legal error in ruling a forensic testing laboratory is not a protected CR 26(b)(5&6) expert and abused its discretion in failing to sanction Menu Foods' counsel for ex parte communications with an expert witness Mr. Earl informed counsel would likely be retained in that capacity.

84. *IN RE Firestorm 1991*, 129 Wn. 2d 130 (1996), the leading authority on prohibited ex parte contact with expert witnesses and expert consultants, our Supreme Court ruled: “*ex parte contact with an opposing party's expert witness is prohibited by CR 26*”, “*When faced with an expert employed by opposing counsel, who may or may not technically be employed by an opposing party, counsel should always comply with CR 26(b)(5)*”, and, “*counsel should not generally make the determination [of an expert's status] unilaterally*”.

85. The Firestorm court also ruled that the application of a court rule to particular facts is a question of law that is reviewed de novo.

86. The trial court stated, “*There's nothing in the rule that says you*

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can't talk to someone." (5/12/10 VRP 9). This view of the trial court is obvious legal error. The issue before the court was not "talking to someone". The issue was ex parte communications. CR 26(b)(5)(A)(ii) defines the only way opposing parties may "talk" to the other party's expert witnesses or expert consultants. The rule unconditionally requires that such "talks" be by deposition, which must be done in the presence of the opposing party. (Assignment of Error 7)

f) The trial court abused its discretion in ordering that all testing of pet food samples must be conducted in the presence of opposing party experts.

87. At CP 687, paragraph 4, the trial court placed a condition on any future pet food testing, requiring the party ordering the tests to arrange for opposing party experts to be present at the laboratory during testing. Menu Foods' argument in favor of this condition was based on precedent related to circumstances where destructive testing would completely consume the evidence being tested. Such circumstances do not apply to the instant case, as arrangements were made for all parties to have their own samples of pet food. No destructive testing conducted by any one party would deprive any other party of the opportunity to conduct testing on their own identical samples. Furthermore, laboratories are under no legal obligation to test samples if they object to this condition. If they refuse the

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condition, which is likely, the condition effectively bars developing the evidence for use at trial. The trial court abused its discretion on placing impossibly burdensome and unnecessary conditions on testing. A court's discretion is abused when no reasonable person would make the same decision, see: *Allard v. First Interstate Bank*, 112 Wn.2d 145 (1989) (Assignment of Error 8)

STANDARD OF REVIEW: An appellate court reviews a summary judgment de novo, *Marquis v. Spokane*, 130 Wn .2d 97 (1996). NOTE RE: CP 1529-1547 (Appendix pages 11-29)

88. In considering the following sections, Mr. Earl would respectfully request this Court take special care to read the facts section of Mr. Earl's motion for reconsideration (CP 1529-1547). The declarations filed in support and opposition to summary judgment contain hundreds of pages of published scientific literature. The facts section of the motion is the result of Mr. Earl's best effort to condense and excerpt that information to something close to the irreducible minimum. It is the type of information Mr. Earl would be allowed to read into the record at trial. It is inescapably dry reading at best, yet it is absolutely essential in allowing a disinterested observer to obtain a basic understanding of the fact that the toxins found in the pet food were the cause of Chuckles' death from kidney failure. (See: *Folsom v. Burger King*, 135 Wn. 2d 658 (1998): An appellate court

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reviewing a summary judgment may consider all of the evidence presented to the trial court, including evidence the trial court redacted from affidavits.)

g) The trial court committed legal error in ruling expert witnesses are exempt from the requirements of CR 56(e).

89. The plain language of CR 56(e) requires documents referred to in affidavits be attached to declarations at the time summary judgment motions are filed. This is the plain language of the rule and well settled Washington law. Washington does not recognize any exemption for experts. As demonstrated at CP 1529-1536, regarding documents not attached to the Dr. Hall declaration filed with the summary judgment motion, had those documents been served on Mr. Earl at the time the motion was served, as the rule requires, his response would have been strikingly different. The published journal articles Dr. Hall cites as a basis for his opinions directly contradict virtually every statement he makes. In fact, Dr. Hall would have been hard pressed to provide documents more in support of Mr. Earl's case for causation than if Dr. Hall had intentionally set out to do so. Assuming the Defendants were as aware of the contents of those documents, as they reasonably should be, the failure to attach those documents to Dr. Hall's affidavit cannot be construed as anything other than a willful, tactical nondisclosure. As a matter of law, Mr. Earl

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was entitled to review the documents that formed the basis for Dr. Hall's opinion, particularly in light of the fact Mr. Earl was not allowed the opportunity to depose Dr. Hall. In the trial court's considering the bare opinion of Dr. Hall, and giving it 100% weight, without allowing Mr. Earl a fair opportunity to carefully study the documents, or even allow time to depose Dr. Hall, the trial court utterly abandoned any semblance of due process.

90. In moving to strike non complying affidavits and in Mr. Earl's motion for reconsideration, and again here on appeal, Mr. Earl relies on the following cases:

91. In *Milligan v. Thompson*, 110 Wn. App. 628 (2002) the court ruled that to establish the foundation of an affidavit, the supporting documents must be attached.

92. In *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn. 2d 874 (1967) our Supreme Court ruled non compliant affidavits should be stricken on motion. The court provides a detailed analysis for the reasons behind language contained in the former rule, which is identical to the current CR 56(e). This analysis is provided in relevant part as follows:

93. "One of the reasons for the requirements of the rule is that an affidavit - not being subject to cross examination - is a poor substitute for a

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live witness-whose tone or inflection of voice, movement of head, hand or eye, and general conduct or demeanor are discernible and sometimes determinative - coupled with the proposition that the summary judgment procedure was not designed to deprive a litigant of a trial on disputed issues of fact. *Thus it is that affidavits submitted should comply with the requirements of the rule and conform, as nearly as possible, to what the affiant would be permitted to testify to in court.* Although the rule, in this respect, makes no distinction between affidavits of the moving and nonmoving party it is almost the universal practice - because of the drastic potentials of the motion - *to scrutinize with care and particularity the affidavits of the moving party* while indulging in some leniency with respect to the affidavits presented by the opposing party." (emphasis added)

94. In *Klossner v. San Juan County*, 93 Wn. 2d 42 (1980) our Supreme Court ruled in relevant part as follows: *"Affidavits or answers to interrogatories verified on belief only and not on personal knowledge do not comply with CR 56(e) and therefore fail to raise an issue as contemplated by the rule."*

95. In *Melville v. State*, 115 Wn. 2d 34 (1990), our Supreme Court ruled that a *"hearsay affidavit does not meet the requirement of CR 56(e).*

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The explicit, but plain standards of CR 56(e) must be complied with in summary judgment proceedings."

96. In *Marks v. Benson*, 62 Wn. App. 178 (1991), the court ruled in relevant part as follows: *"It is not enough that the affiant be "aware of" or be "familiar with" the matter; personal knowledge is required."* *"Unsupported conclusional statements and legal opinions cannot be considered in a summary judgment motion."*

97. In *Kohfeld v. United Pac. Ins. Co*, 85 Wn. App. 34 (1997), citing numerous authorities, the court ruled in relevant part as follows: *"It is within the province of the jury to accept or reject, in whole or in part, an expert's opinion"*

98. In *Grimwood v. Puget Sound*, 110 Wn.2d 355 (1988) our Supreme Court ruled in relevant part as follows: *"A fact is an event, an occurrence, or something that exists in reality. It is what took place, an act, an incident, a reality as distinguished from supposition or opinion. The facts required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature."*

99. In *State v. Tracer*, 155 Wn. App. 171 (2010), Judge Verser relied on an "expert" opinion that felony charges of vehicular assault should be dismissed because the accident was caused by a deputy sheriff's brother's

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car being hit by a meteor. The absurd consequences doctrine applies. If Judge Verser's approach to giving 100% weight to "expert" affidavits filed in pretrial motions, then any action, civil or criminal, could be defeated through nonobjective paid opinion, no matter how absurd, and no matter how likely a constitutionally enabled fact finding jury would reject the opinion. The overwhelming body of Washington state summary judgment case law, as shown above, demonstrates that the "light most favorable to the nonmoving party" standard precludes a court from considering opinion evidence against the nonmoving party, even if offered by a purported expert, on a summary judgment motion. The trial court is barred from settling disputed questions of fact. While expert opinion evidence is admissible at trial, it is within the jury's province to accord no weight whatsoever to such testimony. In a light most favorable, a court must give expert opinion testimony zero weight against the nonmoving party on summary judgment. Such opinion testimony cannot be considered to shift the burden of proof to the nonmoving party

100. In *Massey v. Tube Art Display*, 15 Wn. App. 782 (1976), the court ruled, "*It is axiomatic that if the evidence is... susceptible of more than one inference, then the question is one of fact for the jury.*"

101. To give paid for opinion evidence, in the form of non

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complying affidavits, case deciding weight on summary judgment against the nonmoving party, where the standard is a light most favorable, and in a situation where that opinion may be accorded zero weight at trial, is neither just nor in accord with well settled Washington law. (Assignment of Error 9)

h) The trial court committed legal error in barring Mr. Earl from reading into the record excerpts from authenticated learned treatises and violated Mr. Earl's right to due process.

102. ER 705 provides in relevant part as follows, "*The expert may in any event be required to disclose the underlying facts or data on cross examination.*"

103. ER 803(18) provides as follows: "*To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.*" (emphasis added)

104. In *Wyman v. Wallace*, 94 Wn. 2d 99 (1980), our Supreme Court ruled in relevant part that "*a court can take notice of scholarly*

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works, scientific studies, and social facts". In other words, no expert is required, on either side of a controversy, for a litigant to introduce learned treatises at trial.

105. As demonstrated at CP 1527-1547 an abundance of admissible evidence is available to support Mr. Earl's causation claims. In a summary judgment motion, only a prima facie showing of authenticity is required and this can be satisfied if the proponent shows proof sufficient for a reasonable fact finder to find in favor thereof. *International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736 (2004). "Once a prima facie showing has been made, the evidence is admissible as far as Rule 901 is concerned." Tegland, 5C Wash.Prac. Evidence Law & Practice § 901.2 (5th ed.). If properly authenticated, "it is irrelevant whether the attorneys had personal knowledge of the proffered documents." *Id.*, at 746. ER 901 requires that a person with personal knowledge state that the document is what it purports to be. *Id.*; ER 901(b)(1)[*Testimony of Witness with Knowledge*]. ER 901(b)(4) provides that "[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" may authenticate a document. The 10 categories listed under ER 901(b) are "illustrations" and provided "not by way of limitation."

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106. Furthermore, Mr. Earl submitted all of these documents by both affidavit and by ER 904 notice. Opposing parties made no objection whatsoever as to the authenticity of any document submitted, nor was any objection made that learned treatises were other than "*established as a reliable authority*" on the subjects covered. Defendants' sole objection that these learned treatises are hearsay is fruitless as it is evidence specifically exempted by the hearsay rule once authenticated. These documents are already authenticated, admissible, and available for Mr. Earl's use at trial, which automatically makes them admissible for use in summary judgment. Barring Mr. Earl from reading relevant portions into the record on summary judgment was legal error. (Assignments of Error 10 and 12)

i) In ruling on disputed questions of value and measure of value, the trial court committed legal error and violated Mr. Earl's Article I, section 21 right to have questions of value determined by a jury.

107. As argued in both Mr. Earl's response to the summary judgment motion and motion for reconsideration, determination of value is a question of fact reserved to the jury. On summary judgment, courts are explicitly barred from settling contested questions of fact. In *Pearson v. Gray*, 90 Wn. App. 911 (1998), the court found that in "*ruling on a motion for summary judgment, the court's function is to determine whether a genuine issue of material fact exists, not to resolve any existing factual*

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issue."

108. It is well settled law that Mr. Earl, as Chuckles' owner, is competent to testify as to Chuckles' value. In *Port of Seattle v. Equitable Capital*, 127 Wn. 2d 202 (1996), our Supreme Court ruled in relevant part as follows: "*In this state the decisional law leaves no room for doubt that the owner may testify as to the value of his property because he is familiar enough with it to know its worth*" (internal brackets and quotation marks omitted)

109. In *Saddle Mountain Minerals, L.L.C. v. Joshi*, 152 Wn. 2d 242 (2004), our Supreme Court ruled: "*The question of... value is a question of fact determined by the jury.*"

110. Furthermore, not only are contested questions of value reserved to the jury, contested questions on the measure of damages are also reserved to the jury. In *Sofie v. Fibreboard Corp.*, 112 Wn. 2d 636 (1989), our Supreme Court ruled in relevant part as follows: "*At issue in the present case is whether the measure of damages is a question of fact within the jury's province. Our past decisions show that it is indeed... This evidence can only lead to the conclusion that our constitution, in article 1, section 21, protects the jury's role to determine damages*"

111. In *Hawkins v. Marshall*, 92 Wn. App. 38 (1998), the court

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ruled in relevant part as follows: *"Neither the trial court nor the appellate court should substitute its judgment for the jury's as to the amount of damages." "where the amount of damages is contested, instructing the jury how much it should award is improper."*

112. In *James v. Robeck*, 79 Wn. 2d 864 (1971), our Supreme Court ruled, *"To the jury is consigned under the constitution the ultimate power to weigh the evidence and determine the facts - and the amount of damages in a particular case is an ultimate fact."*

113. The trial court's decisions of April 10, 2009 and January 14, 2011 violated Mr. Earl's right to have questions of value and measure of damages determined by a jury. (Assignment of Error 11)

j) The trial court committed legal error in ruling printouts of learned treatises, available from reliable sources maintained in Internet databases, the authenticity of which is not disputed by the Defendants, are inadmissible evidence.

114. While it does not appear Washington courts have directly addressed the Internet as a source of evidence, many other courts have. In *U. S. v. Vela*, 673 F. 2d 86 (Fifth Circuit 1982), the court ruled, *"computer data compilations ... should be treated as any other record"*, and, *"computer evidence is not intrinsically unreliable"*. In *Hess v. Riedel-Hess*, 153 Ohio App.3d 337, 2003-Ohio-3912, in a decision regarding the admissibility of evidence obtained from Internet databases, the court ruled,

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"The exhibit was properly admitted pursuant to Evid.R. 803(17), which excludes from the hearsay rule "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." NADA guidelines in print form and on the Internet are highly reliable and used widely by the general public." In US v. Bonallo, 858 F. 2d 1427 (Ninth Circuit 1988) our own Ninth Circuit ruled, "the fact that it is possible to alter data contained in a computer is plainly insufficient to establish untrustworthiness".

115. Mr. Earl's primary sources of scientific research are databases maintained by the US National Library of Medicine at <http://www.nlm.nih.gov>, which include the "Hazardous Substances Data Bank" (HSDB), which is a compilation of excerpts from peer reviewed studies on the toxicity of a host of substances, and, "ToxNet", which is a massive database of published scientific and medical journal articles. Again, Mr. Earl would stress that all of these documents were provided pursuant to ER 904 notices and declarations, complete with website addresses, and that in the Defendants' responses to ER 904 notices, not a single objection has been made as to the authenticity of any document submitted by Mr. Earl. The documents are what they appear to be and fall

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within the standards of ER 901 on one or more provisions cited in the rule. The Defendants do not dispute the documents presented as scientific journal articles are, in fact, scientific journal articles.

116. Mr. Earl would further argue, as he did in the court below, that these kind of documents also fall within the meaning of ER 803(a)(17), in that they are, "Market Reports, Commercial Publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.", and therefore do not require introduction by experts as they are self authenticating from reliable sources.

117. ER 902(f) provides that newspapers and periodicals are self-authenticating. Premised on this standard is the notion that "[t]he likelihood of forgery or newspapers or periodicals is slight indeed. Hence no danger is apparent in receiving them." FRE 902(6) comment. Further, several courts have held that copies of web sites and web pages were authenticated under ER 901 by (a) accessing the web site using the domain address given and verifying that the web page existed at that location, and (b) viewing the documents in combination with circumstantial indicia of authenticity, such as dates and Web addresses appearing thereon, which would lead a reasonable juror to conclude that they were what the proponent said they

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were.

118. The fact is, no competent expert in any field would fail to make use of the Internet for research purposes and, the same documents on which experts -- including Dr. Hall -- rely are freely available to any interested person connected to the Internet. In this respect, the fact Dr. Hall relied upon specific cited treatises, which Mr. Earl also filed with the court, and obtained from the same sources, should render any objection to reading from those documents waived. (Assignment of Error 13)

V. COSTS

119. This is a case where if rule, law and proper procedure were followed, in the absence of abuse and misconduct, it would have gone to trial on the order of six months after it was filed. As things stand, the case is now 4 years old and Mr. Earl has been forced to incur extraordinary expenses he can ill afford to pay simply to oppose the inequity that is the defining characteristic of this case. Pursuant to RAP 18.1(b), Mr. Earl requests an award of fees and costs as allowed by law and court rules.

VI. CONCLUSION

120. For the above reasons, the Appellant, Donald R. Earl, respectfully requests the Court find the order of dismissal on summary judgment should be reversed, that Judge Verser should be removed from

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the case on remand, that the order dismissing Mr. Earl's express and implied warranty claims against Menu Foods be reversed, that orders limiting Mr. Earl's claims for value and measures of value be vacated, that the orders permitting destruction of evidence and awarding sanctions to Menu Foods should be vacated, that the order requiring opposing parties be present during testing be vacated, that orders denying Mr. Earl sanctions should be reversed, that further proceedings to determine appropriate sanctions should take place in the trial court to prevent opposing parties/counsel from benefiting from misconduct and, that Mr. Earl should be awarded costs and fees as allowed by law.

Dated July 7, 2011.
Respectfully submitted by:



Donald R. Earl (pro se)
3090 Discovery Road
Port Townsend, WA 98368
(360) 379-6604

Case No. 41890-8-II

WASHINGTON STATE COURT OF APPEALS
DIVISION II

DONALD R. EARL) Superior Court No. 07-2-00250-1
(Plaintiff/Appellant))
)
v.)
) CERTIFICATE OF MAILING RE:
Menu Foods Income Fund,)
The Kroger Co.) APPELLANT'S BRIEF, and,
(Defendants/Respondents)) REPORTS OF PROCEEDINGS

CERTIFICATE OF MAILING

I certify that on the 7th day of July, 2011 I placed by US Priority Certified mail, return receipt requested, a copy of "Appellant's Brief", and reports of proceedings for 02/15/2008, 04/10/2009, 05/01/2009, 05/21/2010, and 01/14/2011 addressed to:

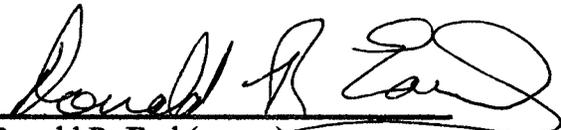
The Kroger Company Defendant's attorney of record, Charles Willmes, (mail receipt # 7009 0820 0001 0854 6086) at:

Merrick, Hofstedt & Lindsey
3101 Western Ave. #200
Seattle, WA 98121

And to: The Menu Foods Income Fund Defendant's attorney of record, Stellman Keehnel, (mail receipt # 7009 0820 0001 0854 6093) at:

DLA Piper
701 Fifth Avenue #7000
Seattle, WA 98104-7044

Dated: July 7, 2011
Respectfully submitted by:


 Donald R. Earl (pro se)
 3090 Discovery Road
 Port Townsend, WA 98368
 (360) 379-6604

APPENDIX

1 Subject to and without waiving the foregoing objections, Menu Foods states as follows
 2 with respect to the statements contained on the labels of the Pet Pride "Mixed Grill" and
 3 "Turkey & Giblets Dinner" products that Plaintiff alleges that he purchased: The labels for the
 4 Pet Pride "Mixed Grill" and "Turkey & Giblets Dinner" products that Plaintiff alleges that he
 5 purchased are designed by The Kroger Company and subject to review and approval by Menu
 6 Foods. Menu Foods supplies the information for the Feeding Instructions, the Nutritional
 7 Statement, the Ingredients, and the Guaranteed Analysis contained on the labels. Kroger
 8 provides the "Quality Guaranteed" statement on the labels.
 9

10 INTERROGATORY NO. 13 (Misidentified as Interrogatory No. 12):

11 The labels on "Pet Pride" canned pet food lists a toll free number for consumers with
 12 questions or concerns to call. Identify the person or entity to whom the number is listed, and
 13 state with particularity the type of information collected, what records are retained, and what
 14 policies and procedures are in place to handle consumer complaints.
 15

16 RESPONSE TO INTERROGATORY NO. 13:

17 Menu Foods objects to Plaintiff's Interrogatory No. 13 on the grounds that it is vague
 18 and ambiguous, that it seeks documents or information that are not in the possession, custody
 19 or control of Menu Foods, that it seeks documents or information that are neither relevant to the
 20 claims or defenses of any party to this lawsuit nor reasonably calculated to lead to the discovery
 21 of admissible evidence, and that it seeks documents or information containing confidential,
 22 proprietary, and other competitively sensitive business and commercial information.

23 Subject to and without waiving the foregoing objections, Menu Foods states that Kroger
 24 maintains the toll-free telephone number listed on the labels of the Pet Pride "Mixed Grill" and
 25 "Turkey & Giblets Dinner" products that Plaintiff alleges that he purchased.
 26

MENU FOODS' RESPONSES AND OBJECTIONS TO
 PLAINTIFF'S FIRST INTERROGATORIES AND
 SECOND REQUEST FOR PRODUCTION OF
 DOCUMENTS AND THINGS - 19
 Case No. 07-2-00250-1

DLA Piper LLP (US)
 701 Fifth Avenue, Suite 7000
 Seattle, WA 98104-7044 • Tel: 206.439.4800

PREPARED **
-21-07 08:14

JEFFERSON COUNTY SUPERIOR COURT
MOTION CALENDAR - CIVIL
FRIDAY, DECEMBER 21, 2007
JUDGE CRADDOCK VERSER

FILED
IN SUPERIOR COURT

90 DAYS PRIOR DATE SEPTEMBER 22, 2007
DEC 21 P 2:45

Jefferson County
Dek's Office 12:55-1:18

(75-07)

06-2-00332-1
JOHNSON, JAMES SCOTT ✓ Present
VS
OLDFORD, GARY L ET AL

✓ HARRIS, MALCOLM STEPHEN
BRYAN, PAUL WILLIAM
✓ SEAMAN, SHANE

MOTION FOR SUMMARY JUDGMENT

Mr. Seaman addresses court. Cross by Mr. Harris.
Rebuttal by Seaman. Court examination. Court
denies Motion for Summary Judgment. Order A&S
1:36:32-2:02:00

07-2-00250-1
EARL, DONALD R ✓ Present
VS
MENU, FOODS INCOME FUND ET AL

✓ WILLMES, CHARLES ALBERT
✓ KEEHNEL, STELLMAN

VARIOUS MOTIONS

Court denies motion to strike. Parties address
court. Court examination. Court denies Mr. Earls request
for sanctions. Plaintiff to file a new complaint within 20
dys (not to exceed 3 pages). Order granting Def. Menufoods & Order
granting Def. KROGER's MOTION A&S. 2:02:00-2:23:21

07-2-00577-0
QUINAULT INDIAN NATION ET AL
VS
SEA CREST LAND DEVELOPMNET CO IN
ET AL

✓ ALLSTON, KAREN
STACY, NAOMI
✓ ROBERTS, DAVID ALAN

PETITION FOR ENTRY OF TRIBAL COURT
ORDER

Ms Allston addresses court. Argument by Mr. Roberts. Rebuttal
by Ms Allston. Court to take under advisement.

1 whatever motions you want. But, you gotta do it--
2 I'm not going to grant it on an oral motion, okay?

3 MR. KEEHNEL: Your Honor, typically I would, um,
4 just go out in the hall and I would remind Mr. Earl
5 that I'd given him a proposed form of order some
6 weeks ago and ask him to sign that he'd seen it. The
7 last time I did that I was called certain bad names
8 by Mr. Earl.

9 So, this time I'm going to-- I, I understand
10 that in this order is not some direction you gave
11 him about length and specificity. If you want that
12 we could interlineate that. But, this just gets the
13 basics done, and, if it's acceptable to the Court,
14 I'd like to get it entered today.

15 COURT: I'm going to give him twenty days,
16 because the holidays are here.

17 MR. KEEHNEL: That makes sense, Your Honor.

18 COURT: I didn't specifically move on your
19 motion for sanctions, Mr. Earl, but, I'll, I'll deny
20 your motions for sanctions, um, because the, the
21 motion, it's properly before the Court. The motion
22 they filed, given the, the nature of the Amended
23 Complaint that you drafted after the ruling that I
24 made on October 12th, which is expressed in a written
25 opinion.

dependent on the amount of product actually returned and certain other factors. Accordingly, actual amounts could differ from these estimates and the difference could be significant. Furthermore, even with the new credit facility the estimated product recall costs could, depending upon the time required to resume normalized shipping to customers, have a significant effect on the liquidity of the Fund.

The Fund may be required to expend significant amounts and devote considerable management time with regard to recall related matters. It is not possible to predict the amount of such expenses, the resolution of any claims or investigations, or the extent to which these items will be paid by insurance. If these costs, if any, plus the direct costs of the recall exceed available resources the Fund may need to obtain additional credit facilities.

The recall costs noted above include product collection, write-off and disposal costs of \$36,475, lost margin on returned product of \$2,885, \$2,400 to establish and operate a call center to respond to consumer concerns and \$240 in professional and associated fees necessary to manage through the difficult process. As at June 30, 2007, the Fund has incurred \$14,508 of actual recall costs and has accrued a further \$29,406 for costs not yet incurred in connection with the recall. These accruals have been reflected in various balance sheet accounts, as set out below:

	As at June 30, 2007
Accounts receivable	\$ 3,218
Inventory	12,050
Accrued liabilities	14,138
Total expenses accrued	29,406
Actual costs incurred	14,508
Total cost of recall	43,914

In addition, the Fund expects to incur a further \$1,086 of period expenses over the balance of 2007, bringing the total estimated cost of the recall to \$45,000.

Lawsuits have been initiated against the Fund and certain of its subsidiaries in the United States and Canada, which seek to recover damages on behalf of the named plaintiffs and a purported class of affected pet owners. Furthermore, the U.S. Food and Drug Administration is conducting an investigation of the situation. The offices of two United States Attorneys have informed Meru that it is the target of criminal investigations for possible violations of the U.S. Federal Food, Drug and Cosmetic Act. It is possible that additional actions or investigations may rise in the future. The Fund expects to expend significant amounts and to devote considerable management time to these matters. The Fund cannot predict the amount of such expenses, the resolution of any claims or investigations, or the extent to which these items will be paid by the Fund's insurers or whether the Fund will have sufficient resources to pay any of these claims. Accordingly, no amounts related to these actions have been accrued in these financial statements. Costs to the Fund are being expensed as incurred.

3. Changes in accounting policies

On January 1, 2007, the Fund adopted Canadian Institute of Chartered Accountants ("CICA") Handbook Section 1530, Comprehensive Income; Section 3855, Financial Instruments - Recognition and Measurement; Section 3861, Financial Instruments - Disclosure and Presentation; and Section 3865 - Hedges.

Section 1530 establishes standards for reporting and presenting comprehensive income, which is defined as the change in equity during a period from transactions and other events and circumstances from non-owner sources. Other comprehensive income refers to items recognized in comprehensive income that are excluded from net income calculated in accordance with generally accepted accounting principles.

Section 3855 prescribes when a financial asset or liability or non-financial derivative is to be recognized on the balance sheet and at what amount, requiring fair value or cost-based measures under different circumstances. Under Section 3855, financial instruments must be classified into one of three five categories: held-for-trading, held-to-maturity, loans and receivables, available-for-sale financial assets or other financial liabilities. All financial instruments, including derivatives, are measured at fair value except for loans and receivables, held to maturity investments and other financial liabilities, which are measured at amortized cost. Subsequent measurement and changes in fair value will depend on their initial classification, as follows: held-for-trading financial assets are measured at fair value and changes in fair value are recognized in net earnings; available-for-sale financial instruments are measured at fair value with changes in fair value recorded in other comprehensive income until the instrument is derecognized or impaired, at which time the amounts would be recorded in net earnings.

Section 3861 establishes standards for presentation of financial instruments and non-financial derivatives, and identifies the information that should be disclosed about them.

Section 3865 describes when and how hedge accounting can be applied as well as the disclosure requirements. Hedge accounting enables the recording of gains, losses, revenues and expenses from derivative financial instruments in the same period as for those related to the hedged item.

Under the new standards, policies followed for periods prior to the effective date generally are not changed and, therefore, the comparative figures have not been restated, except for the requirement in Section 1530 to include the currency translation adjustment as part of other comprehensive income, which is included in a separate statement in these consolidated financial statements.

Upon adoption of Section 3855, the Fund designated its cash as held-for-trading, which is measured at fair value. Accounts receivable are classified as loans and receivables, which are measured at amortized cost. Bank indebtedness, accounts payable and accrued liabilities and long-term debt are classified as other financial liabilities, which are recorded at amortized cost. Derivative instruments are recorded in the statement of operations at fair value except for contracts entered into for the purpose of the Fund's own usage requirements. The Fund uses interest rate swaps (the "swaps") to fix interest rates on a portion of its indebtedness. Previously the swaps were marked-to-market, and consequently are unaffected by this new standard. The Fund established January 1, 2005 as its transition date for the purpose of identifying embedded derivatives. Consequently, only contracts or financial instruments entered into or modified after the transition date were examined for embedded derivatives. As at June 30, 2007 and December 31, 2006 the Fund does not have any embedded derivatives.

There was no impact on the Fund as a result of adopting Section 3865.

4. Summary of significant accounting policies

a) Basis of presentation

The Fund prepares its consolidated financial statements in accordance with Canadian generally accepted accounting principles.

The consolidated financial statements include the accounts of the Fund and all of its subsidiaries. All inter-company transactions and accounts have been eliminated on consolidation.

Federal Register and relying on the FDA's statements in amicus briefs in determining that federal law preempted the state law claim).

Defendants ChemNutra, Del Monte and Menu Foods seek to follow the FDA's sound advice as much as possible to make the ongoing storage of the voluminous amount of product manageable. Plaintiffs' expert agrees with Dr. McCabe (McCabe Decl, ¶ 11; McCabe Depo., pp. 11, 14) that the amount of raw wheat gluten needed for his sampling plan (500 samples per batch of raw wheat gluten and per recipe of the Work-in-Progress Recipes) is a sufficient quantity for the testing needs of Plaintiffs and others. Wheat Gluten Agreement, §§ 2.J, 3.C; Work-in-Progress Agreement, §§ 2.H, 3.C. By adopting Dr. McCabe's sampling and retrieval plan, the Court will properly balance future testing needs with the FDA's findings. ChemNutra, Del Monte and Menu Foods are capable of storing a representative sample of the wheat gluten (but not all of it) to reduce the risks addressed by the FDA. See, e.g., Menu Foods Decl., ¶ 11. Thus, the requested protective order should be granted.

IV. THE COURT SHOULD GRANT DEFENDANTS' UNOPPOSED MOTION RELATING TO THE UNORGANIZED INVENTORY

In addition to seeking an Order limiting Defendants' retention of Organized Product, raw wheat gluten and the Work-in-Progress Recipes, Defendants move the Court for permission to dispose of the Unorganized Inventory. As a result of the haphazard manner in which the Unorganized Inventory was packaged and returned to Defendants by retailers, this material poses significant health and safety risks because some of the contents of the Unorganized Inventory are broken, highly susceptible to future damage, and/or infested or subject to future infestation issues. This Unorganized Inventory is of no discernable use to any party interested in future testing of the product. There is no complete inventory of the contents of the product, and

stored by Defendants. By executing his retrieval plans, Defendants will select and retain a statistically representative sample of recalled product that satisfies the future testing needs of Plaintiffs and other interested parties. The test results from such a sample will accurately determine the extent of contamination, if any, of the entire population of recalled pet food to a reasonable degree of statistical certainty.

For over one year, Defendants have stored and maintained over 3.4 million cases of recalled product in their warehouses. On December 18, 2007, this

Court agreed with Defendants and their expert that the continued storage of such enormous quantities of product is unnecessary, and concluded that Defendants may retain only 500 units (which are cans, pouches or bags) of the organized recalled pet food for each date of manufacture of a particular recipe of pet food (i.e., "SKU Date"). During the three months since the December 18 Order (Doc. No. 106), Dr. McCabe has developed detailed retrieval plans for each Defendant, instructing them on the specific method of retrieval of the 500 units for each SKU Date based on statistically sound retrieval methods.

This Court should permit Defendants to implement the retrieval plans recommended by Dr. McCabe. Dr. McCabe's retrieval plans are a statistically-acceptable means for Plaintiffs and other interested parties to obtain the necessary information about the extent of contamination, if any, of the

1 certain pet food products by Menu Foods and other pet food manufacturers and retailers.

2 3. As of December 2007, Menu Foods possessed approximately 647,917 cases of
3 unorganized product and material that was returned to Menu Foods from retailers in connection
4 with the March 2007 recall in an unorganized, haphazard manner and was not well packaged in
5 most instances (the "Unorganized Inventory"). The Unorganized Inventory comprised various
6 items, including recalled pet food, non-recalled pet food, pet food that was not manufactured by
7 Menu Foods, non-pet food items, and trash. The Unorganized Inventory was stored at certain
8 warehouses located in Kansas, New Jersey and Canada. Menu Foods' cost for storing the
9 Unorganized Inventory and other products and materials relating to the March 2007 voluntary
10 recall was approximately \$1,032,000 per year.

11 4. On December 18, 2007, the United States District Court for the District of New
12 Jersey issued an Order in the multidistrict litigation captioned *In re Pet Food Products Liability*
13 *Litigation*, No. 07-2867, MDL Docket No. 1850 (D.N.J.), which, among other things, permitted
14 Menu Foods to dispose of all of the Unorganized Inventory in its possession (the "MDL
15 Order").

16 5. After the entry of the MDL Order, Menu Foods immediately sought the entry of
17 substantively identical orders, either by consent or by contested motion, in all stand-alone cases
18 that were pending at the time of the MDL Order and in which Menu Foods was named as a
19 defendant. Menu Foods also sought the entry of a substantively identical order in the Canadian
20 courts.

21 6. In the majority of the stand-alone cases, Menu Foods obtained the consent of the
22 plaintiffs to the entry of orders that are substantively identical to the MDL Order. The
23 Canadian courts entered an order that is substantively identical to the MDL Order on January
24 23, 2008. Orders that are substantively identical to the MDL Order had been entered in all of
25 the stand-alone cases as of May 9, 2008.

26 7. This Court issued an order that is substantively identical to the MDL Order in

DECLARATION OF CHRISTOPHER J. MIFFLIN

DLA Piper US LLP
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Seattle, WA 98104-7044 * Tel: 206.839.4800

1
2 information was communicated to ExperTox. Subsequent communications between
3 the Plaintiff and representatives of ExperTox further demonstrate that ExperTox was
4 employed in an expert consultant capacity in the course of developing expert evidence
5 in this lawsuit.

6
7 In the Plaintiff's supplemented answers to interrogatories, served on Menu
8 Foods on January 27, 2010, the Plaintiff explicitly claims CR 26(b)(4&5) work
9 product privilege regarding ExperTox acting in an expert capacity for the Plaintiff.

10 The interrogatory and answer is as follows:

11 "INTERROGATORY 23: IDENTIFY and describe, in detail, all
12 COMMUNICATIONS between YOU and ExperTox or any other laboratory
13 relating to the food products referred to in Paragraphs 5, 6, and 14 of the
14 COMPLAINT, or any other food product which YOU claim was manufactured by
Menu Foods, including but not limited to "Special Kitty" cat food.

15 **SUPPLEMENTED ANSWER: To the extent not already provided to Menu**
16 **Foods, the only "communications" responsive to this interrogatory consist of**
17 **phone calls and email communications protected by the Work Product**
18 **Doctrine under CR 26(b)(4 &5). These communications consist exclusively of**
19 **"mental impressions, conclusions, opinions, or legal theories" specifically**
20 **protected by court rules. Menu Foods has not made the necessary showing**
21 **required to create an exception to privileged communications under the**
22 **Work Product Doctrine. Furthermore, the Plaintiff has already agreed to**
23 **supplement these interrogatories concerning discovery of expert witnesses at**
24 **such time as those experts are actually retained. The Plaintiff has no**
25 **obligation to respond to this interrogatory as stated."**

26 At page 18, line 18 of its motion filed January 20, 2010, Menu Foods states:

27 "Menu Foods has significant concerns about the ability of ExperTox to test the pet
28 food at issue in a scientifically valid manner that will yield reliable results,6 as well as
its ability to handle the pet food in a manner that prevents potential contamination,
and Menu Foods should therefore be permitted to examine the protocols and
procedures that ExperTox intends to employ before any samples are released to

1 COURT: A dispositive fact?

2 MR. EARL: Didn't-- yes. Didn't...

3 COURT: You're allowed to respond when I make a ruling?

4 MR. EARL: Well, when, when you make a conclusion of fact
5 that, that I haven't had a chance to, uh, respond to.

6 COURT: I asked you the question, what facts or opinions are
7 you saying was discovered? And your answer was none. You didn't
8 answer none, you answered by saying a bunch of other stuff, but
9 you didn't answer the question. There weren't any facts or
10 opinions discovered. You said gee, I don't know, because I wasn't
11 a part of the conversation. But, the conversation is set out in
12 declarations both by Mr. Meissner and the expert from ExperTox.
13 So, the motion for sanctions is denied. Next one is...

14 MR. MEISSNER: Your Honor?

15 COURT: Yes?

16 MR. MEISSNER: Your Honor, Brad Meissner from Menu Foods. I
17 just want to, uh, clarify a point just to make sure there's no
18 confusion on the record. Um, the, the declarations that were
19 submitted by myself and Dr. Lykissa, they do not contain a
20 representat-- or represent that they are the entire conversation
21 that I had with Dr. Lykissa. Um, so, you know, I don't want it on
22 record that I am representing to the Court that Dr. Lykissa did
23 not disclose any factual information to me.

24 COURT: Okay. All right. Next matter is.

25 MOTION CALENDAR CONTINUES

26

27

1 scientific article exhibits, if you'd like. And that will kind of
2 get us squared away with what's, what's before the Court properly
3 on the motion for summary judgment.

4 COURT: Okay.

5 MR. MEISSNER: First, on the expert tox reports, which Mr.
6 Earl relies on for his attempt to create a genuine issue of fact
7 on the question of whether there was a product defect here. By
8 contrast to what Dr. Popinjay did with the UC David test results,
9 which was authenticate them, lay a proper foundation for their
10 admission and for, you know, establishing that the method used to
11 test them was generally accepted in the scientific community, Mr.
12 Earl has tried to introduce expert tox results by just attaching
13 an unauthenticated report with no proper foundation to his own
14 declaration. It's not a proper form for submitting this on a
15 summary judgment motion. It hasn't, he hasn't established that
16 these results would be admissible at trial.

17 He hasn't come forward with any declaration from ExperTox to
18 authenticate them or to show what method of testing they used,
19 whether that method is, in fact, generally accepted in the
20 scientific community. There's nothing in the record that would,
21 would basically allow these test results into evidence in their
22 current form. In addition, Mr. Earl talks about reliability. His
23 opposition to the summary judgment motion is actually based on
24 undermining the reliability of these ExperTox results. He claims
25 they're inaccurate. So, you know, to say that they can come into
26 evidence on summary judgment simply because he attaches them to

27

1 need for the Court to do so. The Court barred the Plaintiff from reading into the record any
2 published journal facts supporting his claims. The Court indicated it had read very little of the
3 Plaintiff's affidavits. The Court entered judgment in favor of Menu Foods and further ordered
4 the value of the Plaintiff's cat would be limited to \$100 regardless of the decision, after ruling
5 competent testimony by the Plaintiff, as the owner, should be rejected. The Court ruled
6 documents obtained from the Internet are not admissible evidence. The Court did not consider
7 the Plaintiff's conditional motion to allow time to depose affiants.

8
9 **b) Dr. Hall's declaration and supplement.**

10
11 At page 2 of Exhibit B, paragraph 9, Dr. Hall states: "*Mr. Earl has indicated that two*
12 *other cats being fed the same four foods were not reportedly ill, other than having need for*
13 *dental care.*" At page 4 of Exhibit B, paragraph 2, Dr. Hall states: "*Lack of testing in the dry*
14 *foods prevents ruling them out as causative agents.*" At page 4 of Exhibit B, paragraph 4, Dr.
15 Hall states: "*Lack of any clinical effects in the two remaining cats that were eating the same*
16 *foods diminishes the possibility of the food being causative in the disease and death of*
17 *Chuckles.*"

18
19 Dr. Hall has asserted he made these conclusions based on the Plaintiff's answers to
20 interrogatories. In relevant part, the Plaintiff answered Interrogatory 14 as follows: "*Monster*
21 *and Buzzer refused to eat the pet food identified in paragraphs 5, 6, and 14.*"

22
23 The fact is that as Monster and Buzzer were only eating the dry food at the time, and
24 for a significant period following Chuckles' death, their continued good health rules out the
25 dry food as a causative agent. (See also: Plaintiff's affidavit filed on December 27, 2010)

26
27 At page 2 of Exhibit B, paragraph 14, Dr. Hall states: "*Mr. Earl has indicated that two*
28 *"Experimental control samples" labeled "Acetaminophen Pet Food" and Cyamuric Acid Pet*

1 *Food" were tested by ExperTox Inc. The samples were reported to be spiked with an un-*
2 *described amount of acetaminophen or cyanuric acid. Mr. Earl has indicated that both tested*
3 *positive for acetaminophen, but both were negative for both cyanuric acid and melamine."*

4
5 The fact is the Plaintiff previously disclosed to Defendants that both control samples
6 were fortified with 500 ppm acetaminophen and one of the two was fortified with 1%
7 cyanuric acid. The results demonstrate ExperTox is able to accurately detect acetaminophen,
8 but the reported levels may be more than 50 times lower than the original amount. Dr. Hall's
9 assumptions regarding toxicity are based on two fallacies. 1. Dr. Hall fails to recognize the
10 evidence indicates acetaminophen was originally present at a level in excess of 10 ppm. 2. His
11 calculations are based on single acute dose toxicity, not chronic exposure to the food, which
12 was known to be on the market for at least 8 months.

13
14 The Plaintiff's answers, which Dr. Hall claims to have read, specifically address the
15 issues of chronic toxicity. Interrogatory 28 reads as follows: *"State all facts upon which YOU*
16 *base YOUR allegation in Paragraph 6 of the COMPLAINT that "Asymptomatic damage may*
17 *have been present as a result of consumption of the Defendants' adulterated pet food*
18 *purchased prior to that date."*

19
20 The Plaintiff answered, *"The Plaintiff has conducted exhaustive research on the toxins*
21 *identified as being present in samples of Menu Foods products. All information on which the*
22 *Plaintiff relies, with the exception of lab reports already provided, is in the public domain and*
23 *readily available to Menu Foods through its own reasonable due diligence. Publicly available*
24 *information includes published studies related to cumulative, asymptomatic kidney damage*
25 *associated with chronic exposure to the identified toxins."*

26
27
28 At page 2 of Exhibit B, paragraph 2, Dr. Hall states: *"Cats can efficiently and*

1 *effectively eliminate acetaminophen at low doses by this non-toxic sulfation pathway. Only at*
2 *high doses, after depletion of sulfation path way capabilities, [does] this result in toxic*
3 *metabolites and poisoning."*

4
5 Dr. Hall's claim is directly refuted by the journal articles he, himself, cites as
6 references to support his opinions. Dr. Hall includes in his supplemental declaration at Exhibit
7 I, a journal article titled: "*Toxicity of over-the-counter drugs*" by Karyn Bischoff. The article
8 reads in relevant part as follows starting at page 363 of the study:

9
10 *"Unexpected circumstances may arise, making it difficult to properly assess the*
11 *history. One such example concerns severe clinical signs prompting euthanasia in a kitten.*
12 *It was later discovered that the feline in question had been allowed to play with an empty*
13 *acetaminophen container (Allen, 2003)." (emphasis added)*

14
15 And, at page 364 of the above study: "*Acetaminophen toxicosis is most commonly*
16 *reported in cats (Rumbeiha et al., 1995). Clinical acetaminophen toxicosis is usually*
17 *associated with a single exposure, though adverse effects as a result of multiple dosing have*
18 *been reported (Hjelle and Grauer, 1986; Villar et al, 1998).... One report documents severe*
19 *poisoning in a kitten that had played with an empty acetaminophen container (Allen,*
20 *2003).... Individual differences in sensitivity to acetaminophen are reported within species*
21 *(Webb et al., 2003), but the use of acetaminophen is always contraindicated in cats due to*
22 *their sensitivity to this drug (Jones et al., 1992; Villar et al., 1998; Wallace et al., 2002;*
23 *Roder, 2005a). Clinical signs of acetaminophen toxicosis in cats, including death, have been*
24 *reported at doses of 10 mg/kg (Aronson and Drobotz, 1996)" (emphasis added)*

25
26
27 And at page 366 of the above study: "*Anorexia is reported in 35% of cats presenting*
28 *for acetaminophen exposure, as is vomiting."* Both of these symptoms are documented in

1 Chuckles' veterinary records.

2 It should also be noted that the references section of Dr. Hall's Exhibit I at page 389
3 includes, "*The diagnosis of acetaminophen toxicosis in a cat*", by Allen AL. This is the
4 article included as Item 2 from Exhibit A of the Plaintiff's Declaration, which states at page
5 510 of the study, "*There is no safe dose of acetaminophen for cats*", and also provides more
6 detail on the ultra low dose exposure received by the referenced kitten, which indicates a dose
7 of less than one milligram, as described in sections below.
8

9 At page 4 of Dr. Hall's declaration, he states: "*In addition, because very low doses of
10 acetaminophen and cyanuric acid are rapidly and efficiently eliminated from cats' bodies,
11 very low doses of acetaminophen and cyanuric acid would not build up in a cat's system and
12 would therefore not present a risk of chronic poisoning.*"
13

14 In Dr. Hall's Exhibit L, "*Acetaminophen-induced toxicosis in dogs and cats*", page 744
15 of the exhibit directly refutes Dr. Hall and reads in pertinent part as follows: "*The inability of
16 cats to glucuronidate acetaminophen also may have implications in situations in which low
17 doses of acetaminophen are administered over several days.*" (emphasis added)
18

19 Again, it should be noted that document footnotes in journal articles presented by Dr.
20 Hall, in several instances, refer to documents included in the Plaintiff's affidavits. In this
21 instance, the article footnote 2 refers to "*The toxicity and biotransformation of single doses of
22 acetaminophen in dogs and cats*", which is the first item in the Plaintiff's Exhibit A.
23

24 At page 389 of Dr. Hall's supplemented affidavit, Exhibit O, "*Small Animal
25 Toxicology*", the article reads in relevant part as follows: "*Compared to dogs, cats are
26 extremely sensitive to the toxic effects of acetaminophen and can develop clinical signs of
27 toxicity with dosages in the range of 50 to 100 mg/kg. Toxicosis has been occasionally
28*

1 *observed with dosages as low as 10 mg/kg. In cats that have received subtoxic doses of*
2 *acetaminophen, subsequent doses can prove rapidly fatal.* (emphasis added)

3
4 Dr. Hall's exhibit K, "*A Review of Toxicology Studies on Cyanurate and its*
5 *Chlorinated Derivatives*" shows that cyanuric acid alone is nephrotoxic (toxic to kidneys) and
6 causes renal (kidney) damage. Page 292 of the report reads in relevant part as follows:

7 "*Tissues identified as target organs for cyanurate-induced toxicity were examined from*
8 *animals administered lower doses of sodium cyanurate. Treatment-related mortality was*
9 *observed in some (13/100) high-dose male animals that died on test during the first 12 months*
10 *of the study....These changes included hyperplasia, bleeding, and inflammation*
11 *of the bladder epithelium, dilated and inflamed ureters, and renal tubular nephrosis. Slight*
12 *tubular nephrosis was also observed in a few high-dose females during the first 12 months.*
13 *These animals did not exhibit bladder calculi.*" (emphasis added)

14
15 At page 3 of Dr. Hall's Exhibit B, at paragraph 9, Dr. Hall states, "*In cats, specifically,*
16 *concentrations of up to 1% in the diet of either melamine or cyanuric acid alone caused no*
17 *renal effects (Puschner et al., 2007).*

18
19 The journal article cited by Dr. Hall is Exhibit M of his supplemental affidavit,
20 "*Assessment of melamine and cyanuric acid toxicity in cats*", which is also the first item in
21 the Plaintiff's declaration at Exhibit C.

22
23 Page 619 of the article reads in relevant part, "*In addition, the kidney of the cat*
24 *receiving cyanuric acid alone (part 3 of study) contained 22 mg/g of cyanuric acid*", and, at
25 page 622, "*It has also been hypothesized that renal damage occurs secondary to an*
26 *inflammatory response caused by the crystals.*" (emphasis added) It should also be noted this
27 was a very short term study of only 10 days.
28

1 Chuckles' veterinary records show high levels of leukocytes in her urine, which are
2 white blood cells produced as an inflammatory response. Footnote 3 in this article is
3 *"Outbreaks of renal failure associated with melamine and cyanuric acid in dogs*
4 *and cats in 2004 and 2007."*, which is item 2 in Plaintiff's Exhibit F, and, footnote 5,
5 *"Chemical, bacteriological, and toxicological properties of cyanuric acid and chlorinated*
6 *isocyanurates as applied to swimming pool disinfection"* is item 1 in the Plaintiff's Exhibit F.
7 Plaintiff's Exhibit F, item 1, recognized as an authority by Dr. Hall's own exhibits, describes
8 the results of a 6 month study on cyanuric acid at very low doses as follows: *"Oral daily*
9 *administration of 30 mg of cyanuric acid per kg of body weight to guinea pigs and rats for 6*
10 *months caused dystrophic changes in their kidneys"* (emphasis added)
11

12
13 At subparagraphs c and d, at page 4 of Exhibit B of Dr. Hall's affidavit, Dr. Hall
14 states: *"c. The calculated maximal exposure is more than a hundred fold less than the toxic*
15 *dose in cats after maximal calculated potential exposure to which Chuckles could have been*
16 *subjected. (See scientific facts #7 and 10 above) d. Even though there is scientific evidence of*
17 *toxic effects of high dose chronic cyanuric acid exposure in rodents (bladder irritation and*
18 *urinary stones), there is no scientific evidence that very low exposure poses any chronic risks*
19 *of renal failure."*
20

21
22 Based on assumptions made by Dr. Hall, and corrected for Chuckles' actual body
23 weight, Chuckles was exposed to 4 mg kg/bw (milligrams per kilogram of body weight) of
24 cyanuric acid, only 7.5 fold less than studies showing renal damage in rodents, not 100. This
25 was also greater than the Low Observed Effects Level (LOEL) of 3 mg/kg bw in the study.
26

27 At page 4 of Dr. Hall's Exhibit B, subparagraph 3(c), Dr. Hall states: *"The renal*
28 *failure could have been of an acute or chronic nature, but only an evaluation of the kidney*

1 *tissues can differentiate these conditions."*

2 The Plaintiff's veterinarian, Dr. Frank, positively diagnosed Chuckles' condition as
3 CRF (chronic renal failure) (see: page 1 vet records at Plaintiff's first affidavit at Exhibit B).

4
5 Dr. Hall's supplemental affidavit Exhibit N at pages 1217-1217, "*Evaluation of the*
6 *renal effects of experimental feeding of melamine and cyanuric acid to fish and pigs*", settles
7 the question raised at hearing regarding the acceptability of LC/MS (Liquid chromatography-
8 mass spectrometry) used by UC Davis, and the GC/MS (Gas chromatography-mass
9 spectrometry) method use by ExperTox. In relevant part, this exhibit demonstrates the
10 GC/MS method used by ExperTox is the one approved by the FDA for detection of cyanuric
11 acid as follows: "*When melamine and the s-triazines were identified as possible causative*
12 *agents, the FDA immediately began to develop chemical methods to detect melamine-related*
13 *s-triazine compounds in the ingredients of food for humans and other animals. A method*
14 *involving gas chromatography in combination with mass spectrometry was developed jointly*
15 *by several FDA laboratories to analyze flour, wheat gluten, and other food ingredients for*
16 *adulterants.*" (emphasis added)

17
18
19 **Summary of Facts Contained in Dr. Hall's Supplemented Affidavit:**

- 20
21 1. No amount of acetaminophen is safe for cats.
- 22 2. Minute traces of acetaminophen in an empty acetaminophen bottle were
23 found to be sufficiently lethal to kill a cat.
- 24 3. Repeat exposure to very low doses of acetaminophen is lethal to cats within
25 a few days.
- 26 4. Acetaminophen causes kidney damage.
- 27 5. Repeat exposure to very low doses of cyanuric acid causes kidney damage.
- 28

1 6. Cyanuric acid crystals cause an inflammatory immune response in kidneys.

2 7. Any individual cat may be far more sensitive to acetaminophen toxicity than
3 is typical even among cats.

4 8. The testing method used by UC Davis is not the one approved by the FDA
5 for detection of cyanuric acid in pet food.

6
7 **c) Admissible evidence presented in Plaintiff's affidavits.**

8 **i. Declaration of Donald R. Earl filed December 27, 2010**

9 **Item 2 of Exhibit A is, "*The diagnosis of acetaminophen toxicosis in a cat*". The**
10 **article reads in relevant part at page 509 as follows:**

11 **"A 6- to 8-week-old kitten was submitted to the diagnostic laboratory of the**
12 **Western College of Veterinary Medicine to determine the cause of its clinical signs. It**
13 **had been presented to the submitting veterinarian in a state of collapse and coma. The**
14 **veterinarian also noted very severe edema of the head. The kitten was euthanized.**

15 **At necropsy, the kitten's head was swollen due to marked edema within the**
16 **subcutis, including the conjunctiva. The edema extended along the fascial planes of**
17 **the neck into the thorax. About 3 mL of dark brown, translucent urine remained in the**
18 **bladder (Figure 1). The differential diagnoses for the pigmenturia included**
19 **myoglobinuria, hemoglobinuria, methemoglobinuria, and, possibly, hematuria. The**
20 **color of the urine was most consistent with methemoglobinuria and suggested that the**
21 **kitten had experienced methemoglobin formation and hemolysis. The most likely**
22 **cause of methemoglobinemia and hemolysis in cats is exposure to a strong oxidative**
23 **agent.**

24 **Subcutaneous edema of the head and methemoglobinuria are suggestive of**
25 **acetaminophen toxicity in cats. Therefore, the submitting veterinarian was queried**
26 **about the possibility of the cat having come in contact with acetaminophen, and the**
27 **urine was submitted to the medical laboratory of Royal University Hospital,**
28 **Saskatoon, to determine the concentration of acetaminophen.**

The submitting veterinarian was adamant that he had not administered
 acetaminophen to the kitten. The kitten's owners had not noticed monitory signs of
 illness and, therefore, had no motivation or opportunity to give the kitten any drugs.
 However, the urine was found to contain 3820 mmol/L of acetaminophen. When
 informed of this, the owners recalled giving the kitten an empty bottle that had
 contained acetaminophen tablets to play with on the day that the kitten had become
 moribund."

Notes: Based on Dr. Hall's references to acetaminophen half life in cats, the figure of

1 3820 mmol/L (millionths of a mole per liter) cited above indicates the single lethal dose of
2 acetaminophen received by the kitten was on the close order of less than one milligram.

3 Calculation: 1 mole of acetaminophen = 151 grams. 1 micromole = 1/1,000,000 mole.
4
5 1 liter = 1000 milliliter. Therefore 3820 x 1 micromole per liter = .58 grams = 580 milligrams
6 per liter = .58 milligrams per milliliter. If half the actual dose is quickly eliminated in urine, as
7 stated by Dr. Hall, the actual dose in relation to milliliters of urine is 1.16 milligrams. A small
8 adult cat's bladder capacity is 1.8 milliliters (see iv. Exhibit E below), which would constitute
9 a substantial over estimate of a 2 milligram dose as compared to the bladder capacity of a
10 kitten.
11

12 **Item 3 of Exhibit A is, "Analgesic Nephropathy (Painkillers and the Kidneys), a self**
13 **authenticating brochure published by the US Department of Health and Human Services. In**
14 **relevant part the document states on the first page: "A second form of kidney damage, called**
15 **analgesic nephropathy is a chronic kidney disease that over years gradually leads to**
16 **irreversible kidney failure... Recent studies have suggested that longstanding daily use of**
17 **analgesics such as acetaminophen or ibuprofen may also increase the risk of chronic kidney**
18 **damage".**

19
20 **Item 4 of Exhibit A is, "Acetaminophen (Tylenol) Poisoning: Acute and Chronic".**
21
22 **The article is published by the Life Extension Foundation's "Life Extension Magazine", which**
23 **has been publishing scientific research for 30 years. On page 1, the article states in relevant**
24 **part: "acetaminophen (sold under Tylenol and other brand names) has dangerous side effects**
25 **that most people are not aware of. Many people either use this class of drug chronically or**
26 **take higher-than-recommended doses, not realizing that they are causing liver, and kidney**
27 **damage."**
28

1 **Item 6 of Exhibit A is, "Risk of kidney failure associated with the use of**
2 *acetaminophen, aspirin, and nonsteroidal antiinflammatory drugs"*, which states in relevant
3 part: *"moderate (105 to 365 pills per year... Both heavy average intake (more than 1 pill per*
4 *day) and medium-to-high cumulative intake (1000 or more pills in a lifetime) of*
5 *acetaminophen appeared to double the odds of ESRD."*

7 Notes: "ESRD" = "End Stage Renal Disease". Converting the data translates to 1.4
8 mg/kg bw (milligrams per kilogram of body weight) for a 70 kg person assuming 350 mg per
9 tablet. As previously pled and supported by authorities, the authenticity of which is not
10 disputed by the Defendants, humans are at least 15 times less sensitive to the effects of
11 acetaminophen than cats.
12

13 **Exhibit B, "Chuckles' veterinary records", show:**

- 14 1. High levels of leukocytes and protein in the urine.
- 15 2. The presence of renal epithelial cells in the urine.
- 16 3. The presence of granular/hyaline casts in the urine.
- 17 4. High levels of BUN (blood urea nitrogen) and CREA (creatinine) in the
18 blood.
- 19 5. Low levels of HCT (hemocrit) and HGB (hemoglobin) in the blood.
- 20 6. Urine PH was low.
- 21 7. The veterinarian diagnosed Chuckles' as anemic, anorexic (muscle wasting)
22 and suffering from chronic renal failure with a poor prognosis.

23 **Item 1 of Exhibit D is, "Unmasking the toxic culprit(s) in pet-food", which reads in**
24 relevant part as follows:
25

26 "Cyanuric acid is structurally related to melamine. It is sometimes used as a stabilizer
27 in outdoor swimming pools and hot tubs to minimize the decomposition of
28

1 hypochlorous acid by light. Unfortunately, a paucity of data is available about the
2 toxicity of cyanuric acid in mammals. Sodium cyanurate fed subchronically to mice
3 and rats caused uroliths, indicating poor solubility. The evidence suggests that a
4 combination of chemicals (melamine, cyanuric acid, possibly others) formed
5 insoluble crystals in the kidneys of these unfortunate pets, with subsequent physical
6 damage to the renal tubules."

7 **Item 2 of Exhibit D is, "Identification and Characterization of Toxicity of**
8 ***Contaminants in Pet Food Leading to an Outbreak of Renal Toxicity in Cats and Dogs***",
9 which reads in relevant part at the indicated pages as follows:

10 Page 251: "Crystals from contaminated gluten produced comparable spectra. These
11 results establish the causal link between the contaminated gluten and the adverse
12 effects and provide a mechanistic explanation for how two apparently innocuous
13 compounds could have adverse effects in combination, that is, by forming an insoluble
14 precipitate in renal tubules leading to progressive tubular blockage and degeneration."

15 Page 260: "one might expect ammeline to substitute for melamine if cyanuric acid
16 were present in excess. *It may also be possible for endogenous molecules with*
17 *similar chemical structure, such as uric acid, to bind in such a crystalline lattice...* It
18 is also possible that the compounds interfere with uric acid metabolism, which may
19 precipitate in the tubules, providing a seed for melamine and cyanuric acid
20 precipitation. Ammelide, ammeline, and cyanuric acid are inhibitors of hepatic uric
21 acid oxidase (Fridovich, 1965), an effect that would increase circulating uric acid
22 levels." (emphasis added)

23 **Item 1 of Exhibit E is, "Urinary Excretion of Endogenous Nitrogen Metabolites in**
24 ***Adult Domestic Cats Using a Protein-Free Diet and the Regression Technique***", which reads
25 in relevant part at page 263 as follows: "*The endogenous urinary total and urea nitrogen*
26 *excretion of adult domestic cats is higher than values for other mammals such as humans,*
27 *dogs, rats and pigs.*"

28 Note: This shows the highly concentrated nature of urine in cats makes them far more
susceptible to crystal formation in the kidneys.

Item 4 of Exhibit E is, "Composition and Concentrative Properties of Human Urine".
At page 7 the article reads in relevant part as follows: "*Usually, in the case of urine, low pH is*

1 *caused by unbuffered organic acids"*

2 Notes: Chuckles' veterinary records show a low pH.

3 **Item 2 of Exhibit F is, "Outbreaks of renal failure associated with melamine and**
4 ***cyanuric acid in dogs and cats in 2004 and 2007"*, which reads in relevant part at the pages**
5 **indicated below as follows:**
6

7 **Page 527: "The inflammation surrounding crystal-containing tubules was more**
8 **prominent than in acute MARF and consisted of moderate numbers of lymphocytes,**
9 **plasma cells, and macrophages, with only rare neutrophils (Fig. 2F). Larger crystals**
10 **were more common in the medulla of these chronic cases, and some of these foci**
11 **exhibited tubular rupture (Fig. 2D, 2F). These liberated interstitial crystals were**
12 **surrounded by macrophages, multinucleated giant cells, and fibrous connective tissue.**
13 **Large aggregates of crystals were often present in the papilla and were present as**
14 **grossly visible renoliths in some animals. Chronic renal lesions in the 2007 outbreak**
15 **were seen in animals that presented at least 4 weeks after the March 16, 2007, pet food**
16 **recall (Table 1). Similarly, the dogs from the 2004 Korean outbreak with identical**
17 **chronic MARF lesions"**

18 **Page 529: "In this study, there was an apparent species difference in the occurrence of**
19 **MARF, with more cats (n 5 10) than dogs (n 5 4) presented for necropsy in 2007. The**
20 **reason for this apparent increased susceptibility in cats compared with dogs is**
21 **undetermined, although physiologic differences in tubular function between cats and**
22 **dogs could be associated with an increased sensitivity to MARF in cats.... The addition**
23 **of melamine, cyanuric acid, or both to enhance apparent protein content of vegetable**
24 **concentrates is reportedly commonplace in some regions."**

25 Notes: Chuckles' urine tested showed elevated lymphocytes.

26 **Item 3 of Exhibit F is "Isocyanuric Acid CAS no: 108-80-5", which reads in relevant**
27 **part at the pages indicated below as follows:**

28 **Page 229: "Isocyanuric acid induced toxic effects at 600 mg/kg in both sexes.**
29 **Excretion of reddish urine was evident. In addition, depression of body weight gain**
30 **was observed in males. Urinalyses of males revealed appearance of crystals, which is**
31 **considered this chemical precipitated from urine, and increases of erythrocytes and**
32 **leukocytes. In hematological examination of males, significant decreases in**
33 **erythrocyte counts, hemoglobin concentrations and hematocrit values were observed.**
34 **In blood chemical examination of males, increases in urea nitrogen and creatinine"**

35 **Page 233: "Several subchronic oral toxicity studies demonstrated renal damages, such**
36 **as dilatation of the renal tubules, necrosis or hyperplasia of the tubular epithelium,**

1 increased basophilic tubules, neutrophilic infiltration, mineralization and fibrosis.
2 These changes were probably caused by crystal of this chemical in renal tubules. The
3 mechanism of this renal toxicity is supported by the toxicokinetics studies in animals
4 and humans, showing that this chemical is quickly absorbed and excreted to urine
5 within a few hours as an unchanged form."

6 Notes: "Isocyanuric acid" is synonymous with "cyanuric acid". Chuckles urine and
7 blood tests showed elevated leukocytes, the presence of crystals, low hemoglobin, low
8 hematocrit, high urea nitrogen and high creatinine, in addition to observed anorexia, all of
9 which are noted above.

10 **Item 1 of Exhibit G is, "Certified Laboratory Test Results", which show as follows:**

- 11 1. Cyanuric acid detected in Menu Foods' pet food at 90.72 ppm.
- 12 2. Acetaminophen detected in Menu Foods' pet food at 0.2 ppm
- 13 3. Acetaminophen under detected in control samples, fortified to 500 ppm
14 acetaminophen, by a factor of 52 and 33.
- 15 4. The control samples were tested within 2 weeks of mixing.
- 16 5. Menu Foods pet food was tested approximately 6 months after being fed to
17 Chuckles.
- 18 6. The under detection of known amounts of acetaminophen infers degradation
19 to other compounds.
- 20 7. Assuming the original acetaminophen content in Menu Foods' pet food did
21 not degrade more than at the rate of the control samples, the original content was 10.4
22 ppm at an under detection factor of 52 (actual amount likely higher as a result of high
23 heat processing and time to testing).
- 24 8. Converting number 7 above translates to a dose of 1.6 mg per day (higher
25 than that known to have killed a kitten), or .46 mg/kg of body weight (actual exposure
26
27
28

1 likely higher).

2 **ii. Declaration of Donald R. Earl filed December 30, 2010**

3 **Exhibit C is, "*Stability of Paracetamol in Packaged Tablet formulations*", which**
4
5 reads in relevant part at page 39 as follows:

6 "Paracetamol is affected by moisture and the major route of degradation is its
7 hydrolysis to 4-aminophenol and acetic acid (Cannors et al., 1986). In order to confirm
8 the degradation of paracetamol in tablets stored under various conditions of
9 temperature and humidity, it was necessary to check the presence of 4-aminophenol in
10 the samples. Therefore, the methanolic extracts of tablets were subjected to TLC using
11 solvent systems S1 and S2 and 4-aminophenol was detected in all the samples (A-E) at
12 the end of the storage period."

13 **Notes: Page 40 of the study is a chart showing the rate of acetaminophen degradation**
14 **increases with temperature. The temperature in the six month study ranged between 25C and**
15 **45C (77F and 113F). At 113F over 22% of acetaminophen degraded in six months.**

16 **"Paracetamol" is synonymous with "acetaminophen". Low acid canning processes used in pet**
17 **food manufacture reach 250F.**

18 **Exhibit D is, "*Kidney Lesions Induced in Rats by P-aminophenol*", which reads in**
19 **relevant part at the pages indicated below as follows:**

20 **Page 162: "Summary: Necrosis of the terminal third of the proximal convoluted tubule**
21 **develops in rats after a single intravenous injection of p-aminophenol hydrochloride.**
22 **As the tubules regenerate a chronic inflammatory reaction occurs in the interstitial**
23 **tissue, and this reaction extends beyond the original zone of injury. These findings are**
24 **additional evidence that some aromatic compounds are selectively nephrotic and**
25 **may be particularly relevant to the problem of renal damage associated with heavy and**
26 **prolonged doses of analgesics."**

27 **Page 163: "protein is present in tubules of both cortex and outer medulla...**
28 **inflammatory cells are present... This distinctive zonal renal lesion has been produced**
in rats by a single intravenous dose of p-aminophenol hydrochloride, a compound
closely related to phenacetin. The proximal convoluted tubules are selectively
affected, and the localization of the lesion to the inner cortex suggests that the damage
is largely confined to the terminal third (Rodin and Crowson, 1962). The character of
the lesion and the rate at which it develops indicate that this is a nephrotoxic and not
an ischaemic effect (Oliver, MacDowell, and Tracy, 1951). A similar lesion, with a

1 different topography in the renal cortex, is produced by phenylhydroxylamine. Both
2 these renal lesions, like the lethal effects of the compounds (Lester, Greenberg, and
3 Shukovsky, 1944), seem not to be related to methaemoglobinaemia."

4 Notes: "P-aminophenol" is synonymous with "para-aminophenol", "4-aminophenol"
5 and is sometimes abbreviated as "PAP". Chuckles' veterinary records show an inflammatory
6 response (leukocytes) and high protein levels.

7 **Exhibit E is, "Cisplatin, Gentamicin, and p-Aminophenol Induce Markers of**
8 ***Endoplasmic Reticulum Stress in the Rat Kidneys***", which reads in relevant part at page 348 as
9 follows: "*Some scattered tubules contained proteinaceous casts. The PAP-treated rats had*
10 *extensive coagulative necrosis of tubular epithelium in the inner cortical region at 6- and 24-*
11 *h postadministration. Additionally, the lumina of many tubules in*
12 *other areas, were filled with proteinaceous casts"*

13 Notes: Chuckles' urine tests showed the presence of granular/hyaline casts, which are
14 "proteinaceous casts". Renal epithelial cells (epithelium) were detected in Chuckles' urine.
15

16 **Exhibit F is, "Metabolism of Para-aminophenol by rat Hepatocytes"**, which reads in
17 relevant part at page 886 as follows:
18

19 "In conclusion, we found that hepatocytes rapidly metabolized PAP to two major
20 products, PAP-GSH and PAP-NACys. Cytochrome P450-dependent oxidation of PAP
21 was not apparent because a suicide substrate inhibitor of cytochromes P450, ABT,
22 failed to alter the metabolic profile. Quantitatively, PAP-GSH are formed in sufficient
23 amounts to account for the nephrotoxicity of PAP. PAP-GSHs accounted for about
24 50% of PAP initially present in our incubation medium and PAP-GSHs are at least
25 equitoxic, if not more toxic, than PAP itself. Even at relatively high concentrations
(2.3 mM), PAP was not cytotoxic to hepatocytes, possibly due to the rapid and
efficient metabolism. These studies lend credence to the idea that PAP-GSHs are
nephrotoxic."

26 **iii. Declaration of Donald R. Earl filed on January 3, 2011**

27 **Exhibit A is, "SCCP/0867/05 - Scientific Committee on Consumer Products - Opinion**
28 ***on para-Aminophenol***", which reads in relevant part at page 36 as follows:

1
2 "Japanese quail received a single intraperitoneal injection of 1, 5, 10, 25, or 50 mg/kg
3 PAP dissolved in water. The highest observed concentration of methemoglobin (9%)
4 was observed after administration of 50 mg/kg PAP; no PAP was detectable in the
5 blood after 30 minutes. Ref.: C3 Several studies have examined the formation of
6 methemoglobin after administration of PAP. A median lethal dose value of 470 mg/kg
7 was obtained in a subcutaneous study in mice. A subcutaneous dose of 37 mg/kg PAP
8 caused severe clinical signs and methemoglobinemia in cats, with death occurring
9 within 30 minutes. The same dose caused similar observations in dogs, but no death;
10 in rabbits, this dose produced no methemoglobin formation. In a separate study in cats,
11 subcutaneous administration of 6 mg/kg induced a level of 37.5% methemoglobin in
12 the blood 3.5 hours after exposure."

13
14 Note: This shows cats are even more sensitive to toxicity of the natural degradation
15 produces of acetaminophen than they are to the parent compound.

16
17 **iv. Declaration of Donald R. Earl filed on January 24, 2011**

18
19 **Exhibit A is "*Benzocaine-Induced Methemoglobinemia Based on the Mayo Clinic***
20 ***Experience From 28 478 Transesophageal Echocardiograms*"**, which reads in relevant part at
21 page 1979 as follows: "*Despite a methemoglobin level of 36%, the diagnosis was initially*
22 *unrecognized, and the patient was managed with supportive care only. Methemoglobinemia*
23 *resolved overnight, and the patient made a full recovery.*"

24
25 **Exhibit B is, "*Methemoglobinemia (West J Med 2001;175:193-196)*"**, which reads in
26 relevant part at the pages indicated below as follows:

27
28 Page 194: "The most common cause of methemoglobinemia, as in this clinical case, is
ingestion of or exposure of skin or mucous membranes to oxidizing agents...
Methemoglobinemia has been reported... in association with renal tubular acidosis."

Page 195: "Methemoglobinemia may be acute or chronic. The physiologic level of
methemoglobin in the blood is 0% to 2%.² Methemoglobin concentrations of 10% to
20% are tolerated well, but levels above this are often associated with symptoms.
Levels above 70% may cause death. Symptoms also depend on the rapidity of its
formation. Many patients with lifelong methemoglobinemia are asymptomatic, but
patients exposed to drugs and toxins who abruptly develop the same levels of
methemoglobinemia may be severely symptomatic."

Exhibit C is the abstract from, "*The Effects of Consecutive Day Propofol Anesthesia*

1
2 on *Feline Red Blood Cells*", which reads in relevant part as follows: *"This study investigated*
3 *the potential for multiple exposures of propofol to induce oxidative injury, in the form of*
4 *Heinz body production, to feline red blood cells... All clinical signs resolved without*
5 *treatment 24 to 48 hours after discontinuing propofol anesthesia."*

6
7 Notes: The issue has been raised that Chuckles' blood work did not indicate
8 methemoglobinemia or Heinz bodies, which are often observed as symptoms of acute
9 acetaminophen or 4-aminophenol poisoning. Chuckles had stopped eating approximately 6-7
10 days prior to the blood tests. The above exhibits show methemoglobinemia or Heinz bodies, if
11 present would have resolved prior to testing, or may not have been present in a sub lethal
12 dose chronic poisoning event.

13
14 Exhibit D is, *"Principles of Thermal Processing"*, which reads in relevant part at page
15 46 as follows:

16 "A typical D-value for *C. botulinum* spore destruction in many foods is ~0.2 minutes
17 at 250°F; therefore, a 12D destruction would be ~2.4 (=12 x 0.2) minutes at 250°F. (A
18 value of 3 minutes is sometimes used to incorporate a margin of safety.) However in
19 some products, the components of a food (or ingredients in a formulated food) can
20 have adverse or beneficial effects on the thermal destruction of spores and will impact
21 the D-values. For example, if 3 minutes at 250°F is needed to ensure public health at
22 pH of 6.0, 2.0 minutes may be sufficient if the food is acidified to pH 5.3."

23 Note: Temperatures in the 250F range are typical of the low acid canning process
24 used in canned pet foods.

25 Exhibit E is, *"Inhibition of Bladder Activity by 5-Hydroxytryptamine I Serotonin*
26 *Receptor Agonists in Cats with Chronic Spinal Cord Injury"*, which reads in relevant part at
27 page 1267 as follows: *"The bladder capacity varied from 1.8 to 7.1 ml in intact cats"*

28 Notes: Provided as a reference for bladder capacity of adults cats regarding
calculations related to the 3820 mmol/L acetaminophen figure cited in *"The diagnosis of*

1
2 *acetaminophen toxicosis in a cat"*

3 **SUMMARY OF ALL FACTS SUPPORTED BY SUBSTANTIAL EVIDENCE**

4 1. The amount of acetaminophen originally present in subject matter pet food
5 was at least 10.4 ppm.

6 2. In the presence of heat and moisture, acetaminophen naturally degrades to 4-
7 aminophenol, a highly potent nephrotoxin to which cats are especially sensitive. The
8 rate of degradation increases with heat.

9 3. High temperature processing of pet food of approximately 75% moisture, in
10 the 250F range, would cause any acetaminophen present to convert to 4-aminophenol
11 and the degradation process would be continuous over time in storage at room
12 temperature.

13 4. Acetaminophen may be acutely toxic to cats in a single dose on the close
14 order of 1 mg or less, as well as to chronic exposure to very low doses over several
15 days. Any individual cat may be particularly susceptible to very low dose exposure.

16 5. Clinical signs of methemoglobinemia and Heinz body formation would have
17 resolved between the time Chuckles stopped being able to eat the subject matter food
18 and the time urine and blood tests were conducted.

19 6. Chronic exposure to very low doses of cyanuric acid causes kidney damage.

20 7. Chuckles' clinical symptoms identically match symptoms associated with
21 toxins shown to be present in the subject matter pet foods and their metabolites.

22 8. Chuckles had no prior history of kidney disease. Chuckles was vaccinated
23 for common feline illness and subsequently tested negative for such illnesses.

24 9. All of the Plaintiff's pets were kept indoor only and had no access to plants,
25
26
27
28

1 medicines, household products or any other potentially disease carrying animals.

2
3 10. The Plaintiff's other two cats, Chuckles' littermates, refused to eat the
4 subject matter pet foods and suffered no ill effects from the dry pet foods they ate.

5 11. Causation is self evident in light of the facts and no alternate causal
6 explanation exists.
7

8 4. LEGAL AUTHORITY

9 The Plaintiff timely files this motion for reconsideration pursuant to CR 59(b) and
10 seeks reconsideration of the following orders: Jan. 14, 2011 order granting summary
11 judgment dismissal and Jan. 14, 2011 order denying plaintiff's motion to strike Jan. 14, 2011
12 order denying plaintiff's motion to continue on the following bases: CR 59(a)(1, 3, 7, 8 & 9),
13 which state:
14

15 "(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of
16 the court, or abuse of discretion, by which such party was prevented from having a fair
17 trial.

18 (3) Accident or surprise which ordinary prudence could not have guarded against;
19 (7) That there is no evidence or reasonable inference from the evidence to justify the
20 verdict or the decision, or that it is contrary to law;
21 (8) Error in law occurring at the trial and objected to at the time by the party making
22 the application; or
23 (9) That substantial justice has not been done."

24 5. ARGUMENT

25 a) The Internet as a source of evidence.

26 A brief reminder of the history of the Internet, particularly as it applies to the instant
27 case may be in order. The Internet originated as a US government endeavor, the purpose of
28 which was to store and disseminate "learned treatises". The original networks linked
universities and government agencies to facilitate new research based on prior knowledge.
That the Internet's evolution has resulted in the dissemination of more frivolous works does

1 500,000 consumer complaints related to its adulterated pet food. It is unknown how many
2 of these consumers reported a suspected problem with the pet food to the Defendants,
3 Menu Foods and Kroger, prior to the March 16, 2007 recall.
4

5 32. The products described in Paragraph 12 warrant:

6 "NUTRITION STATEMENT: FEEDING TESTS USING AAPFO PROCEDURES
7 SUBSTANTIATE THAT PET PRIDE ("TURKEY & GIBLETS DINNER" or "MIXED
8 GRILL") FOR CATS & KITTENS PROVIDES COMPLETE AND BALANCED
9 NUTRITION FOR GROWTH AND MAINTENANCE"

9 33. The products described in Paragraph 12 carry a statement of:

10 "QUALITY GUARANTEED If you are not completely satisfied with this product, return
11 it for a refund or replacement. Comments or Questions? 800-697-2448 or
12 www.interamericanproducts.com"

13 34. At all times during the over 6 years of Plaintiff's ownership of "Chuckles", the
14 Plaintiff kept "Chuckles" as an indoor only pet. At no time during that ownership
15 was "Chuckles" exposed to household items such as cleaning products, medications,
16 plants or any other substance potentially harmful to pet animals.

17 5. STATUTORY BASIS OF COMPLAINT

18 35. The Plaintiff asserts product liability claims under the provisions of RCW
19 7.72.010 (4), which defines product liability claims as:
20

21 "'Product liability claim" includes any claim or action brought for harm caused by the
22 manufacture, production, making, construction, fabrication, design, formula, preparation,
23 assembly, installation, testing, warnings, instructions, marketing, packaging, storage or
24 labeling of the relevant product. It includes, but is not limited to, any claim or action
25 previously based on: Strict liability in tort; negligence; breach of express or implied
26 warranty; breach of, or failure to, discharge a duty to warn or instruct, whether negligent
27 or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or
28 innocent; or other claim or action previously based on any other substantive legal theory
except fraud, intentionally caused harm or a claim or action under the consumer protection
act, chapter 19.86 RCW."

36. The Plaintiff asserts the manufacturer, Menu Foods, is liable to the Plaintiff, as

1 Subject to and without waiving the foregoing objections, Menu Foods states as follows
2 with respect to the statements contained on the labels of the Pet Pride "Mixed Grill" and
3 "Turkey & Giblets Dinner" products that Plaintiff alleges that he purchased: The labels for the
4 Pet Pride "Mixed Grill" and "Turkey & Giblets Dinner" products that Plaintiff alleges that he
5 purchased are designed by The Kroger Company and subject to review and approval by Menu
6 Foods. Menu Foods supplies the information for the Feeding Instructions, the Nutritional
7 Statement, the Ingredients, and the Guaranteed Analysis contained on the labels. Kroger
8 provides the "Quality Guaranteed" statement on the labels.

9
10 INTERROGATORY NO. 13 (Misidentified as Interrogatory No. 12):

11 The labels on "Pet Pride" canned pet food lists a toll free number for consumers with
12 questions or concerns to call. Identify the person or entity to whom the number is listed, and
13 state with particularity the type of information collected, what records are retained, and what
14 policies and procedures are in place to handle consumer complaints.

15
16 RESPONSE TO INTERROGATORY NO. 13:

17 Menu Foods objects to Plaintiff's Interrogatory No. 13 on the grounds that it is vague
18 and ambiguous, that it seeks documents or information that are not in the possession, custody
19 or control of Menu Foods, that it seeks documents or information that are neither relevant to the
20 claims or defenses of any party to this lawsuit nor reasonably calculated to lead to the discovery
21 of admissible evidence, and that it seeks documents or information containing confidential,
22 proprietary, and other competitively sensitive business and commercial information.
23 Subject to and without waiving the foregoing objections, Menu Foods states that Kroger
24 maintains the toll-free telephone number listed on the labels of the Pet Pride "Mixed Grill" and
25 "Turkey & Giblets Dinner" products that Plaintiff alleges that he purchased.

26
MENU FOODS' RESPONSES AND OBJECTIONS TO
PLAINTIFF'S FIRST INTERROGATORIES AND
SECOND REQUEST FOR PRODUCTION OF
DOCUMENTS AND THINGS - 19

D.L.A. Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 • Tel: 206.839.4800
Case No. 07-2-00250-1

1 motion to sample the unorganized inventory obtained as a result of
2 defendant's recall. Mr. Earl did not prior to the February 15, 2008 hearing
3 show how any samples of this unorganized inventory would possibly be
4 relevant to his case. He has acknowledged that his case does not involve
5 recalled pet food and alleges that his pet cat died as a result of pet food
6 that was manufactured prior to the recalled pet food. [Amended Complaint,
7 CP 33]. Mr. Earl has his own samples of the cat food from the time his cat
8 consumed the food. Menu Foods has samples of pet food inventory from the
9 time that Mr. Earl's cat consumed the allegedly adulterated cat food, and
10 from the previous year. Nevertheless, without providing any concrete
11 evidence or rational argument, Mr. Earl stubbornly and eloquently continues
12 to assert that the mass of unorganized pet food which has been destroyed by
13 Menu Foods was somehow "key evidence" [CP 140, p2. Line 14] relevant and
14 necessary to prove the cause of his beloved cat's death. It is not.
15

16 The award of attorneys' fees in this matter is not as asserted by
17 Mr. Earl "Sanctions as revenge for exercising the right to due process...".
18 "Due Process" as it relates to discovery in a civil case insures that
19 process to which a litigant is legally and by right actually "due". It is
20 not a "magic phrase" to allow a party to pursue irrelevant matters at the
21 expense of another party, to pursue imagined conspiracy theories or to
22 explore every conceivable aspect of the life (or in this case "business") of
23 a party. The award of attorneys' fees in this case is not based on a
24 finding that Mr. Earl consciously attempted to force Menu Foods to incur
25 attorneys fees. To the contrary the court believes Mr. Earl in good faith
26 believes he is somehow entitled to that which he requests. He is not. The
27 award of attorneys' fees is mandated by CR 37(a) (4) as his motion was not
28 justified in any manner either factually or legally. The award is designed
29 only to reimburse defendant for having to go to extraordinary lengths to
30 respond to totally unnecessary and irrelevant discovery motions which **have**
31 **been decided adversely to Mr. Earl by this court, the federal courts, and**
32 **all of the appellate courts in the State of Washington.**
33

34 Mr. Earl should not mistake his complaint for damages arising from the
35 death of his beloved cat as a license to embark on a crusade to attempt to
36 punish Menu Foods for what he believes are unconscionable practices
37 motivated by "corporate greed". Even if he could prove such a theory to the
38 court or to a jury there are no exemplary or punitive damages available in
39 this forum. There is no cause of action for the wrongful death of a
40 companion animal in Washington. In this regard the recent case of Sherman
41 v. Kissinger, filed September 29, 2008, Div. I, no: 60137-7-I, may be of
42 interest.

43 AMOUNT OF ATTORNEYS FEES

44
45 When calculating the appropriate attorney fee, Washington courts use
46 the lodestar method. Brand v. Dept. of Labor & Industries, 139 Wn. 2d 659,
47 666, 989 P.2d 1111 (1999). Under this method the court multiplies the
48
49

50
CRADDOCK D. VERSER
JUDGE

Jefferson County Superior Court
P.O. Box 1220
Port Townsend, WA 98368