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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

FILED
U.S. DISTRICT COURT
INDIANAPOLIS DIVISION
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SOUTHERN DISTRICT
OF INDIANA
LARRA A. BRIGGS
CLERK

ELI LILLY AND COMPANY,

Plaintiff,

vs.

GRAHAM NELSON and ZOJA PTY LTD. d/b/a
PET SUPPLY INTERNATIONAL LTD. and PET
PRODUCTS NET,

Defendants.

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CIVIL ACTION NO. _____

COMPLAINT

Plaintiff Eli Lilly and Company alleges as follows:

PARTIES

1. Eli Lilly and Company ("Lilly") is an Indiana corporation with its principal place of business in Indianapolis, Indiana.
2. Defendant Zoja Pty Ltd. d/b/a Pet Supply International Ltd. and Pet Products Net ("Zoja") is a private company organized under the laws of Australia with its principal place of business in Australia.
3. Defendant Graham Nelson is a citizen of Australia, the principal of Zoja, and has directed and controlled the activities of Zoja complained of herein. (Collectively, Nelson and Zoja are referred to as "Defendants" herein.)
4. Defendants do business over the Internet, including at the website located at the domain name <bestvaluepetsupplies.com>.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. § 1338(a) and (b) because Lilly's claims arise under the Trademark Act of 1946, as amended, 15 U.S.C. §§ 1051 *et seq.* (the Lanham Act). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1332 because it is a civil action between a citizen of Indiana and citizens of a foreign state in which the amount in controversy exceeds seventy-five thousand dollars (\$75,000) exclusive of interests and costs.

6. This Court has personal jurisdiction over Defendants under the Indiana long-arm statute, Ind. Trial Rule 4.4(A), because (a) they have deliberately and intentionally directed their conduct at the State of Indiana, Lilly's corporate domicile, and (b) they are knowingly and willfully infringing Lilly's trademarks, which causes harm to Lilly in this state.

7. Alternatively, by expressly and specifically targeting United States pet owners without targeting residents of any particular state, Defendants have sufficient minimum contacts with the United States such that their participation in this action would not offend principles of Constitutional due process. Accordingly, this Court has personal jurisdiction over Defendants upon service pursuant to Federal Rule of Civil Procedure 4(k)(2).

8. Venue is proper in this district under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claims alleged herein occurred in this district, and under 28 U.S.C. § 1391(d) because Defendants are aliens.

FACTS

9. Lilly, through its Elanco Animal Health Division, is engaged in the manufacture, marketing, and sale of, among other things, pet medicines, including flea-control preparations and treatments for parasitic infestations.

LILLY'S ELANCO AND COMFORTIS BRANDED PRODUCTS

10. Since long prior to Defendants' acts complained of herein, Lilly has made continuous use of the name and house mark ELANCO (the "ELANCO name and mark") in connection with the manufacture, marketing, and sale of goods and services that support animal health, including use of ELANCO as the house mark for veterinary preparations and pet medicines.

11. Since long prior to Defendants' acts complained of herein, Lilly has made continuous use of the trademark COMFORTIS (the "COMFORTIS mark") in connection with the manufacture, marketing, and sale of flea-control preparations.

12. Lilly owns federal trademark registration number 3,370,168, issued on January 15, 2008, by the United States Patent and Trademark Office for the COMFORTIS mark used in connection with "veterinary preparations for use in the treatment of fleas on pets; veterinary preparations for use in the prevention of fleas on pets; [and] insecticides to prevent fleas on pets." Registration No. 3,370,168 constitutes *prima facie* evidence of Lilly's exclusive right to use the COMFORTIS mark for the goods covered by the registration, pursuant to 15 U.S.C. § 1057(b).

13. Lilly has sold tens of millions of dollars' worth of veterinary preparations, pet medicines and related goods and services under the ELANCO name and mark and the COMFORTIS mark throughout the United States and has expended significant amounts of money to advertise and promote the ELANCO name and mark and the COMFORTIS mark.

14. As a result of Lilly's extensive sales, promotion, and advertising, the ELANCO name and mark and the COMFORTIS mark are each well known among U.S. consumers and represent extraordinarily valuable goodwill owned by Lilly.

15. In the United States, ELANCO and COMFORTIS branded pet medicines are available to pet owners only by prescription through veterinarians licensed in the pet owners' states.

16. Lilly offers these veterinarians information and training on the safe and appropriate use of these pet medicines.

17. Lilly advertises ELANCO and COMFORTIS branded pet medicines on the Internet, including at websites located at <comfortis.com> and <comfortis4dogs.com>, but it does not sell these pet medicines to U.S. consumers through the Internet.

18. An example of Lilly's ELANCO and COMFORTIS branded pet medicines offered and sold in the United States is depicted below:



19. Lilly also is engaged in the manufacture, marketing, and sale of flea-control preparations in foreign countries, including Australia and Europe.

20. Lilly tailors its ELANCO and COMFORTIS branded pet medicines to suit the requirements of specific geographic regions or countries to reflect the differences among these areas in language, climate, government regulations, units of measure, and local addresses and telephone numbers, among other things.

21. Lilly appoints distributors or agents for specific geographic regions or for specific countries, such as Australia, Europe and the United States, to maintain the quality associated with the ELANCO and COMFORTIS branded pet medicines within each particular region or country.

22. Under applicable laws, Lilly prohibits the sale of ELANCO and COMFORTIS branded pet medicines by such distributors or agents outside of their designated region or country.

23. ELANCO and COMFORTIS branded pet medicines sold in Australia and Europe are not authorized or intended for exportation out of Australia or Europe or for importation into, or sale or distribution in, the United States.

DEFENDANTS' UNAUTHORIZED MARKETING AND SALE OF EUROPEAN AND AUSTRALIAN VERSIONS OF ELANCO AND COMFORTIS BRANDED PET MEDICINES TO U.S. CUSTOMERS

24. Defendants advertise and sell Australian and European versions of pet medicines branded with ELANCO and COMFORTIS to consumers within the United States, including through their Internet website located at <bestvaluepetsupplies.com>. Prices on Defendants' website are listed in U.S. dollars.

25. The Australian and European ELANCO and COMFORTIS branded products sold by Defendants to consumers within the United States are materially different from authorized U.S. ELANCO and COMFORTIS branded pet medicines distributed and sold in the United States by Lilly. For example, unlike the U.S. version, the Australian and European versions:

- (a) violate the United States Food and Drug Administration (FDA) mandates because they are sold in packaging that has not been approved by the FDA;
- (b) violate FDA mandates because they do not include an FDA New Animal Drug Application (NADA) number;
- (c) violate FDA mandates because the Australian packaging states that it is “[f]or the control of flea allergy dermatitis,” a use that is not specifically approved by the FDA;
- (d) do not list an FDA New Drug Code (NDC) number on the blister packets;
- (e) do not state, “**APPROVED BY FDA**”;

- (f) do not require a prescription from a veterinarian and are sold to consumers without veterinary consultation;
- (g) do not display the following warning: "HUMAN WARNING: NOT FOR HUMAN USE";
- (h) do not contain the following cautionary statement: "CAUTION: Federal (USA) law restricts this drug to use by or on the order of a licensed veterinarian";
- (i) do not state: "For use in dogs and puppies 14 weeks of age and older" on the carton or individual blister packets on the Australian products;
- (j) do not contain a complete list of potential adverse reactions and side effects on the product insert of the Australian packaging;
- (k) do not bear a phone number "to report an adverse drug experience";
- (l) list contact information for poison control centers in Australia and New Zealand (Australian) and do not list information for poison control centers at all (European);
- (m) are not subject to Lilly's quality control procedures for shipment and storage;
- (n) do not bear a Data Matrix barcode, which gives Lilly the ability to track U.S. COMFORTIS products through supply chains and identify the products by lot in the event of a recall or tampering incident;
- (o) provide a different temperature storage range (Australian) or do not provide a temperature storage range at all (European);
- (p) come in various dosages that are based on the pet's weight in metric units (kg), rather than standard measurements (pounds);
- (q) provide a different address and contact information for Lilly, including directing consumers to different phone numbers for assistance and a different website, which does not provide information concerning certain clinical signs involving "concomitant extra-label use of ivermectin" (Australian) or do not provide a website or phone number for assistance at all (European);
- (r) do not include details of various research studies in the product insert;
- (s) do not reference a domain name address for a complete list of adverse reactions for spinosad (the generic name for COMFORTIS branded product) reported to the Center for Veterinary Medicine; and
- (t) use British spellings of certain words (e.g., "flavoured" and "centre" and "authorised").

26. Defendants advertise and promote Australian and European branded COMFORTIS products as identical to or interchangeable with U.S. products branded with the COMFORTIS mark.

27. Lilly does not authorize the sale of the Australian and European ELANCO and COMFORTIS branded products to customers in the United States.

28. An example of the Australian ELANCO and COMFORTIS branded products sold by Defendants is depicted below:

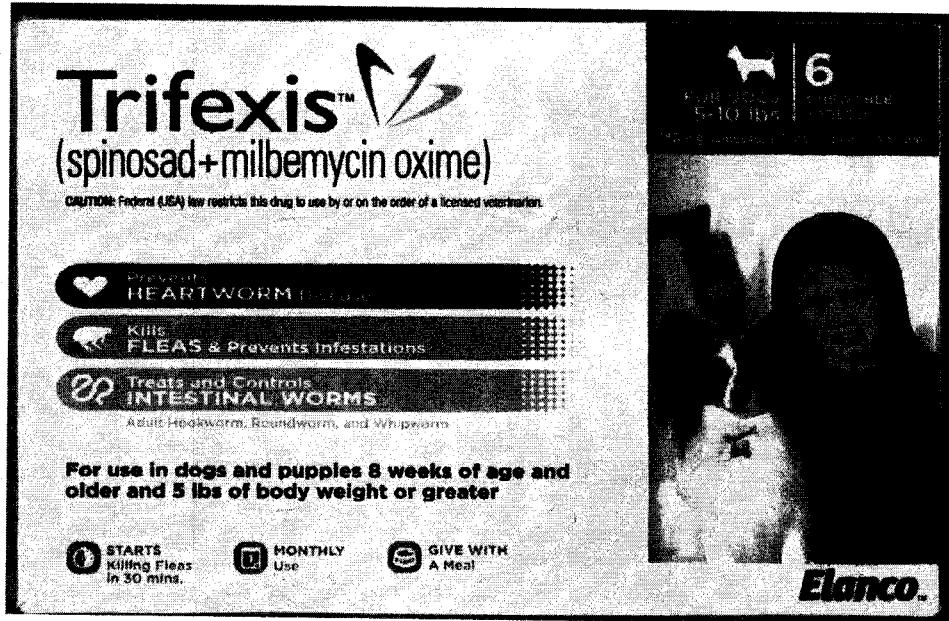


LILLY'S ELANCO BRANDED "TRIFEXIS" PRODUCTS

29. Since long prior to Defendants' acts complained of herein, Lilly has made continuous use of its ELANCO name and mark in connection with the manufacture, marketing, and sale of once-monthly pet medicines containing the active ingredients spinosad and milbemycin oxime.

30. In the United States, Lilly promotes and sells its ELANCO branded once-monthly spinosad and milbemycin oxime pet medicines as "Trifexis," which are available to pet owners only by prescription through veterinarians licensed in the pet owners' states.

31. Lilly promotes and sell its ELANCO branded "Trifexis" pet medicines in connection with a distinctive trade dress, an example of which is shown below:



32. This inherently distinctive and non-functional trade dress consists of the following elements:

- (a) a red, green, and yellow design on top of the front panel of the packaging;
- (b) red, green, and yellow horizontal bars on the left side of the front panel of the packaging. These bars are rounded on the left edges and portray small white circles on the right edges. The top-most bar portrays a picture of a heart, the middle bar portrays a picture of a flea, and the bottom bar portrays a picture of a worm; and
- (c) a photograph on the right side of the front panel of the packaging (collectively, the "Trade Dress").

33. Lilly has sold millions of dollars' worth of ELANCO branded once-monthly spinosad and milbemycin oxime pet medicines throughout the United States and has expended

significant amounts of money to advertise and promote pet medicines under the ELANCO name and mark and Trade Dress to U.S. customers in connection with these pet medicines.

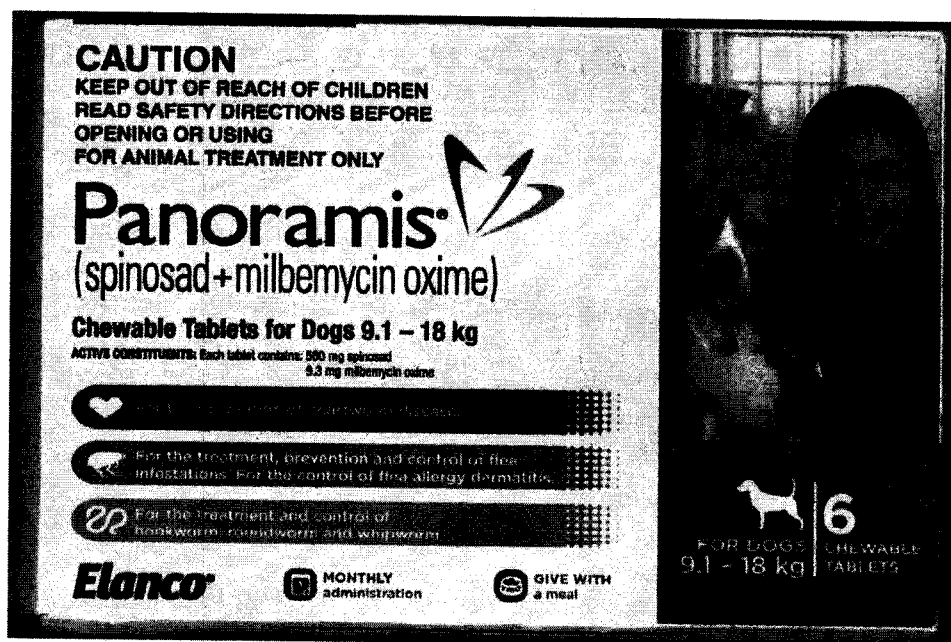
34. As a result of these extensive sales, promotional efforts and advertising, the Trade Dress has acquired a distinctiveness and secondary meaning, and has come to represent an extraordinarily valuable goodwill that Lilly owns.

**DEFENDANTS' UNAUTHORIZED MARKETING AND SALE OF ELANCO BRANDED
"PANORAMIS" PRODUCTS TO U.S. CUSTOMERS**

35. In Australia, Lilly promotes and sells, under the Trade Dress, its ELANCO branded once-monthly spinosad and milbemycin oxime pet medicines as "Panoramis," which is available to pet owners in Australia without a veterinarian's prescription.

36. Defendants advertise and sell ELANCO branded "Panoramis" once-monthly spinosad and milbemycin oxime pet medicines within the United States, including through their Internet website located at <bestvaluepetsupplies.com>.

37. An example of the ELANCO branded "Panoramis" pet medicines sold by Defendants is depicted below:



38. On Defendants' website identified herein, Defendants state that they offer "Panoramis aka Trifexis" or "Panoramis Chewable Tablets (also known as Trifexis)." Prices on Defendants' website are listed in U.S. dollars. Lilly's ELANCO name and mark is displayed in connection with these pet medicines on Defendants' website.

39. Defendants are not licensed or otherwise authorized to use Lilly's ELANCO name and mark and Trade Dress in connection with the sale of once-monthly spinosad and milbemycin oxime pet medicines to customers outside of Australia, including those in the United States.

40. The ELANCO branded "Panoramis" pet medicines sold by Defendants to consumers within the United States are materially different from Lilly's ELANCO branded "Trifexis" pet medicines distributed and sold in the United States. For example, unlike the authorized "Trifexis" product, the Australian "Panoramis" product:

- (a) violates the United States Food and Drug Administration (FDA) mandates because it is sold in packaging that has not been approved by the FDA;
- (b) violates FDA mandates because it does not include an FDA New Animal Drug Application (NADA) number;
- (c) violates FDA mandates because the packaging states that it is "[f]or the control of flea allergy dermatitis," a use that is not specifically approved by the FDA;
- (d) does not list an FDA New Drug Code (NDC) number on the external packaging;
- (e) does not require a prescription from a veterinarian and is sold to consumers without veterinary consultation, in violation of FDA mandates;
- (f) does not contain the following cautionary statement: "CAUTION: Federal (USA) law restricts this drug to use by or on the order of a licensed veterinarian";
- (g) does not state, "APPROVED BY FDA";
- (h) does not display the following warning: "NOT FOR HUMAN USE"; (i) does not contain age restrictions on individual blister packets;
- (j) does not contain a complete list of potential adverse reactions and side effects;

- (k) does not bear a phone number “to report a suspected adverse drug reaction”;
- (l) lists contact information for poison control centers in Australia;
- (m) is not subject to Lilly’s quality control procedures for shipment and storage;
- (n) does not bear a Data Matrix barcode, which gives Lilly the ability to track the ELANCO branded Trifexis products through supply chains and identify the products by lot in the event of a recall or tampering incident;
- (o) provides a different temperature storage range;
- (p) comes in various dosages that are based on the pet’s weight in metric units (kg), rather than standard measurements (pounds);
- (q) provides a different address and contact information for Lilly, including directing consumers to different phone numbers for assistance;
- (r) contains different limitations-of-liability provisions; and
- (s) uses British spellings of certain words (e.g., “diarrhoea”).

DEFENDANTS' WILLEFUL INFRINGEMENT

41. On October 2, 2012, Lilly's counsel sent a letter to Defendants. The letter requested that Defendants immediately and permanently cease and desist from selling, shipping, or distributing unauthorized ELANCO and COMFORTIS branded products (i.e., products meant for sale in Australia) to customers in the United States through all of the websites owned and operated by him and his company.

42. On November 12, 2012, counsel for Lilly spoke to Defendant Nelson, who claimed he no longer owned the <bestvaluepetsupplies.com> website or business.

43. However, in July 2013, Lilly confirmed that Nelson does in fact still own <bestvaluepetsupplies.com>. Thus, despite Lilly’s written objection, Defendants have not stopped offering Australian and European products branded with ELANCO and COMFORTIS for sale into the United States, nor have they stopped engaging in advertising and promotion that suggests Australian and European branded COMFORTIS products are identical to or

interchangeable with U.S. products branded with the COMFORTIS mark, or that ELANCO branded "Panoramis" products are identical to or interchangeable with ELANCO branded "Trifexis" products.

**FIRST CLAIM FOR RELIEF
(TRADEMARK INFRINGEMENT IN VIOLATION OF
SECTION 32 OF THE LANHAM ACT)**

44. Lilly re-alleges paragraphs 1-28 and 41-43, as if fully set forth herein.

45. Defendants' acts have caused and are likely to cause confusion, mistake or deception as to the source of origin, sponsorship, or approval of the pet medicines Defendants are promoting and selling under the COMFORTIS mark in that consumers and others in the United States are likely to believe that Lilly authorizes Defendants' marketing, distribution and sale of these pet medicines in the United States, or that Defendants are otherwise associated with or related to Lilly.

46. On information and belief, Defendants' acts have injured or are likely to injure Lilly's image and reputation with consumers in the United States by creating confusion about, and dissatisfaction with, Lilly's COMFORTIS products.

47. On information and belief, Defendants' acts have injured or are likely to injure Lilly's reputation, business, and relations with veterinarians and their clients in the United States by causing customer dissatisfaction, a diminution of the value of the goodwill associated with the COMFORTIS mark, and a loss of sales.

48. Defendants' sale in the United States of pet medicines under the COMFORTIS mark is a deliberate, intentional and willful attempt to injure Lilly's business; to trade on Lilly's business reputation; to improperly benefit from Lilly's advertising expenditures in the United States; to confuse or deceive consumers; and to interfere with Lilly's business relationships with its veterinarians and clients in the United States.

49. Defendants' acts constitute an infringement of Lilly's federally registered COMFORTIS mark in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1114.

50. Defendants' acts greatly and irreparably damage Lilly and will continue to so damage Lilly unless restrained by this Court; wherefore, Lilly is without an adequate remedy at law.

**SECOND CLAIM FOR RELIEF
(UNFAIR COMPETITION IN VIOLATION OF
SECTION 43(a) OF THE LANHAM ACT)**

51. Lilly re-alleges paragraphs 1-11, 13-43, as if fully set forth herein.

52. Defendants' acts have caused and are likely to cause confusion, mistake or deception as to the source of origin, sponsorship, or approval of any of the aforesaid pet medicines Defendants are promoting and selling under the ELANCO name and mark, the Trade Dress, and the COMFORTIS mark in that consumers and others in the United States are likely to believe that Lilly authorizes Defendants' marketing, distribution and sale of these pet medicines in the United States or that Defendants are otherwise associated with or related to Lilly.

53. On information and belief, Defendants' acts have injured or are likely to injure Lilly's image and reputation with consumers in the United States by creating confusion about, and dissatisfaction with, Lilly's ELANCO business and products and the COMFORTIS products.

54. On information and belief, Defendants' acts have injured or are likely to injure Lilly's reputation, business, and relations with veterinarians and their clients in the United States by causing customer dissatisfaction, a diminution of the value of the goodwill associated with the ELANCO name and mark, the Trade Dress, and the COMFORTIS mark, and a loss of sales.

55. Defendants' sale in the United States of pet medicines under the ELANCO name and mark, the Trade Dress, and the COMFORTIS mark meant for sale in Australia and Europe is a deliberate, intentional and willful attempt to injure Lilly's business; to trade on Lilly's business

reputation; to improperly benefit from Lilly's advertising expenditures in the United States; to confuse or deceive consumers; and to interfere with Lilly's business relationships with its veterinarians and clients in the United States.

56. Defendants' aforesaid advertising, promotion, sale, and distribution of pet medicines meant for Australia and Europe under the ELANCO name and mark, the Trade Dress, and the COMFORTIS mark to consumers in the United States constitutes unfair competition in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

57. Defendants' acts greatly and irreparably damage Lilly and will continue to so damage Lilly unless restrained by this Court; wherefore, Lilly is without an adequate remedy at law.

**THIRD CLAIM FOR RELIEF
(FALSE ADVERTISING IN VIOLATION
OF SECTION 43(a) OF THE LANHAM ACT)**

58. Lilly re-alleges paragraphs 1-11 and 13-43, as if fully set forth herein.

59. By stating they offer "Panoramis aka Trifexis" or "Panoramis Chewable Tablets (also known as Trifexis)" on the <bestvaluepetsupplies.com> website, Defendants are making statements that are misleading to potential purchasers because they imply that "Panoramis" and "Trifexis" products are the same product.

60. By stating they offer "Panoramis aka Trifexis" or "Panoramis Chewable Tablets (also known as Trifexis)," Defendants misrepresent the nature, characteristics, qualities, and geographic origin of the products they offer for sale.

61. These statements of fact are misleading in that they are likely to deceive a substantial segment of potential purchasers of pet medicines in the United States.

62. These statements are material in that they are likely to influence the purchasing decisions of potential purchasers of pet medicines in the United States.

63. Defendants have caused these statements to enter interstate commerce.

64. Lilly has been injured or is likely to be injured as a result of Defendants' misleading statements through diversion of sales to Defendants or by a loss of goodwill associated with Lilly's products.

65. Defendants' misleading statements constitute false advertising and false representation of material facts in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

66. Defendants' acts greatly and irreparably injure Lilly and will continue to so injure Lilly unless restrained by this Court; wherefore, Lilly is without an adequate remedy at law.

FOURTH CLAIM FOR RELIEF
(UNFAIR COMPETITION IN VIOLATION OF INDIANA COMMON LAW)

67. Lilly re-alleges paragraphs 1-43, as if fully set forth herein.

68. Defendants' continued sale of ELANCO and COMFORTIS branded Australian and European pet medicine is a willful, deliberate attempt to trade on Lilly's goodwill in the ELANCO name and mark, the Trade Dress, and the COMFORTIS mark with full knowledge of Lilly's prior rights in the ELANCO name and mark, the Trade Dress, and the COMFORTIS mark and with conscious disregard that Defendants' actions are likely to cause confusion, mistake, or deception and injure Lilly's reputation, business, and relations with veterinarians and their clients in the United States by causing customer dissatisfaction, a diminution of the value of the goodwill associated with the ELANCO name and mark, the Trade Dress, and the COMFORTIS mark, and a loss of sales.

69. Defendants' acts constitute unfair competition in violation of the common law of the State of Indiana.

70. Defendants' acts constitute an infringement of Lilly's rights in the ELANCO name and mark and the COMFORTIS mark in violation of the common law of Indiana.

71. Defendants' acts greatly and irreparably injure Lilly and will continue to so injure Lilly unless restrained by this Court; wherefore, Lilly is without an adequate remedy at law.

WHEREFORE, Lilly prays that:

1. Defendants, their officers, agents, servants, employees, and attorneys, their successors and assigns, and all others in active concert or participation with them, be enjoined and restrained during the pendency of this action, and permanently thereafter, from importing into the United States, exporting to the United States, and dealing, marketing, selling, or distributing in the United States pet medicines or flea control preparations bearing, or promoted in connection with, Lilly's ELANCO name and mark, the COMFORTIS mark, or the Trade Dress;

2. Defendants, and all others holding by, through, or under them, be required, jointly and severally, to:

- (a) account for and pay over to Lilly all profits derived by them from their acts of trademark infringement, false advertising, and unfair competition in accordance with 15 U.S.C. § 1117(a), and Lilly asks that these profits awarded be trebled in accordance with 15 U.S.C. § 1117(a);
- (b) pay to Lilly treble the amount of all damages incurred by Lilly by reason of Defendants' acts of trademark infringement, false advertising, and unfair competition in accordance with 15 U.S.C. § 1117(a);
- (c) pay Lilly punitive damages in accordance with Indiana law;
- (d) pay Lilly the costs of this action, together with reasonable attorneys' fees and disbursements, in accordance with 15 U.S.C. § 1117(a);

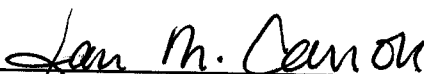
- (e) send a letter by FedEx, the contents of which shall be approved by Lilly, to all of their customers in the United States who have purchased ELANCO and COMFORTIS branded products from or through their <bestvaluepetsupplies.com> website or any other website owned, operated or assisted by Defendants, stating that these ELANCO and COMFORTIS branded products must not be used and should be returned to them, at their expense, for a full refund; and
- (f) file with the Court and serve on Lilly an affidavit setting forth in detail the manner and form in which they have complied with the terms of the injunction, in accordance with 15 U.S.C. § 1116.

3. Lilly have such other damages, judgment, pre- and post-judgment interest, costs of suit, and such other and further relief as this Court deems just and equitable in the circumstances.

Respectfully submitted,

Dated: November 12, 2013

By:



Jan M. Carroll
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204-3535
jan.carroll@btlaw.com
(317) 236-1313

Attorney for Eli Lilly and Company