

ATTORNEY # 19046

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

EVANGER'S DOG & CAT FOOD CO., INC.)
an Illinois corporation,)
)
 Plaintiff,)
)
 v.)
)
BAILEY FARMS, LLC, a Wisconsin limited)
liability company,)
)
 Defendant.)

COMPLAINT

COMES NOW before this Honorable Court the plaintiff, **EVANGER'S DOG & CAT FOOD COMPANY, INC.** ("Evanger's"), by its attorney, Gregory A. Bedell of Knabe, Kroning & Bedell, and for its Complaint against **BAILEY FARMS, LLC.** (hereinafter "Bailey"), states as follows:

PARTIES, JURISDICTION AND VENUE

1. Evanger's is an Illinois corporation in good standing having its principal place of business in Wheeling, Illinois. Evanger's is engaged in the business of manufacturing and selling dog and cat food under the Evanger's brand names, as well as manufacturing to specification pet foods for other pet food companies.
2. Bailey is a limited liability company organized and operating under the laws of the State of Wisconsin; its principle place of business is 549 Karem Drive, Marshall, Wisconsin. Evanger's is informed and believes that Bailey purchases animals, including cows and horses, which it processes for the purpose of selling the animal meat to retail and commercial customers.
3. This Court has jurisdiction over the parties, pursuant to Section 2-209(a) and (b)

of the Illinois Code of Civil Procedure (735 ILCS 5/2-209(a) and (b)), as Bailey regularly and repeatedly sells its products within the State of Illinois, including to Evanger's, and is, therefore, doing business in the State of Illinois. In addition, Bailey has committed tortious acts within the State of Illinois, as set forth below.

4. Venue is proper in the Circuit Court of Cook County, Illinois, as at least some part of the acts from which the claims in this suit arose occurred in Cook County, Illinois.

FACTS COMMON TO ALL COUNTS

5. Evanger's developed in 2005 a dog food product called "Hunk of Beef." A product Evanger's believes to be a first of its kind, Evanger's uses large pieces of beef, which Evanger's then hand cuts in its plant to dog edible sizes, and places them, again by hand, into cans. To this, Evanger's adds only water. The finished product is cooked hunks of beef "au jus."

6. Hunk of Beef became Evanger's best selling product, accounting for a significant portion of its revenues over the last 12 years.

7. Bailey supplied beef to Evanger's for its Hunk of Beef. Joel Sher ("Sher"), vice president of Evanger's, would place orders by telephone, from time to time, with Greg Sheil of Bailey, as Evanger's needed beef.

8. In late May, 2016, Sher placed a verbal order for beef with Bailey. On June 2, 2016, Bailey delivered via common carrier, CH Robinson, 42,340 pounds of "Inedible Hand Deboned Beef." "Inedible" indicates only that the beef was not for human consumption; meat for human consumption must be processed in a facility that is certified and inspected for human food by the United States Department of Agriculture. The designation does not preclude other uses, such as pet foods, or otherwise connote the beef is not wholesome and nutritious for dogs and

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cats. If it were not wholesome and nutritious, federal and state law and regulations would prohibit sale for use in pet foods. A copy of the Bill of Lading for this shipment is attached hereto as Exhibit 1 and by this reference is incorporated herein.

9. The following day, June 3, 2016, Bailey invoiced Evanger's \$15,789.30 for 42,340 pounds of "Frozen Inedible Hand Deboned Beef." A copy of this Invoice is attached hereto as Exhibit 2 and by this reference is incorporated herein. (This shipment hereinafter referred to as the "June 2016 Shipment.")

10. After delivery, Evanger's immediately began using the Bailey beef in production. After thawing, Evanger's cut the slabs of meat into sizes manageable for the "hand packing" line, where the meat was hand cut into chucks and placed in cans.

11. From the June 2016 Shipment, Evanger's produced approximately 50,000 cans of Hunk of Beef. One of the lots produced, #1816E06HB13, was sold and delivered to a distributor in Washington State.

12. On or around January 2, 2017, Evanger's became aware of a family in Washington State whose four pug breed dogs became ill after being fed Evanger's Hunk of Beef; one of these dogs died. Through its investigation, Evanger's determined that the lot number of the Hunk of Beef product fed to these dogs was #1816E06HB13. Evanger's located the store that sold these can and had that store send several cans to an independent laboratory for testing. The lab tested the product for microbial and viral contaminants but found no such contamination.

13. On or about January 28, 2017, Evanger's learned that the owner of the pugs had the remains of a Hunk of Beef can fed to the pug, as well as some stomach content of the pugs, sent to a lab at Michigan State University ("MSU"). The MSU lab found a high concentration of the barbiturate pentobarbital in both the remnants in the Hunk of Beef can and the dogs' stomach

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contents.

14. Immediately thereafter, Evanger's had another can from the lot purchased by the Washington State family sent to the independent lab to test for the presence of pentobarbital; the FDA also obtained cans of Hunk of Beef from that lot and performed its own testing.

15. The FDA lab found pentobarbital in the meat. A copy of these test results is attached hereto as Exhibit 3 and by this reference is incorporated herein.

16. Evanger's is informed and believes that pentobarbital is a controlled substance, access to which is restrict to licensed professionals, such as veterinarians. Evanger's is also informed and believes that pentobarbital is administered to euthanize certain animals.

17. After receiving the test results, Evanger's began an investigation to determine how the pentobarbital contaminated meat came to be in its beef product. Evanger's was informed and believed that it would be highly unlikely that pentobarbital would be administered to a cow; cows are not generally euthanized. In light of this, and in furtherance of its investigation, Evanger's requested that Genetic ID NA, Inc. perform a DNA test on the contents of a can from lot #1816E06HB13 to determine the type of animal from which the meat came.

The lab reported the presence of not only bovine – cow – DNA, but also horse DNA. A copy of the test result showing the existence of horse DNA in the can of Hunk of Beef is attached hereto as Exhibit 4 and by this reference incorporated herein.

COUNT I: BREACH OF CONTRACT – 2016 SHIPMENT

18. As and for paragraph 18 of Count I, Evanger's incorporates paragraphs 1 through 17 as if fully set forth herein.

19. In late may of 2016, Evanger's and Bailey entered into an oral contract pursuant to which Evanger's ordered 42,340 pounds of "hand deboned beef." Bailey represented that it

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shipped to Evanger's 42,340 pounds of "hand deboned beef;" and Bailey also invoiced Evanger's for 42,340 pounds of "hand deboned beef."

20. The independent lab test showed that the meat Bailey sent to Evanger's was not all beef, as ordered, but also horsemeat. In addition, Evanger's ordered beef that is of the quality to include in pet food.

21. By shipping horsemeat and meat contaminated with pentobarbital to Evanger's, when Evanger's ordered only pet food quality beef, Bailey breached its oral contract with Evanger's.

22. Evanger's has suffered damage from Bailey's breach. Because Bailey shipped horsemeat that was contaminated with pentobarbital, Evanger's has been required to recall products it made with any meat Bailey provided. In addition to the loss relating to the unsalable product and the cost of recall, Evanger's has suffered extensive damage to its commercial reputation because its product contained horsemeat instead of beef and that horsemeat was contaminated with pentobarbital. This reputation damage has led to a significant loss of retail stores that will sell any of Evanger's products.

Wherefore, Evanger's prays this honorable Court enter judgment in its favor, and against Bailey, including the following relief:

- a. Award Evanger's damages in the amount to be proven at trial;
- b. Award Evanger's its costs; and
- c. Award such other and further relief as this honorable court deems just.

COUNT II: BREACH OF IMPLIED WARRANTIES – 2016 SHIPMENT

23. As and for paragraph 23 of Count II, Evanger's incorporates paragraphs 1 through 17 as if fully set forth herein.

24. Bailey has done business with Evanger's for many years; Bailey knows that

Evanger's is in the highly regulated business of manufacturing and selling pet food.

25. Bailey was aware that ingredients used in the production of pet food must be wholesome; pentobarbital contaminated meat is not wholesome but is considered adulterated.

26. Bailey was aware that ingredients used in the production of pet food must also be fit for Evanger's purpose – using the meat for canned pet food.

27. Only meat that was delivered by Bailey in the June 2016 Shipment was used in Lot Number 1816E06HB13, the lot of Hunk of Beef product that was contaminated by pentobarbital.

28. Because the meat delivered by Bailey was contaminated, it was neither merchantable nor fit for the known and intended purpose for which it would be used.

29. Bailey has breached the implied warranties of merchantability and fitness for particular purpose.

30. Evanger's has suffered damage from Bailey's breach. Because Bailey shipped horsemeat that was contaminated with pentobarbital, Evanger's has been required to recall products it made with any meat Bailey provided. In addition to the loss relating to the unsalable product and the cost of recall, Evanger's has suffered extensive damage to its commercial reputation because its product contained horsemeat instead of beef and that horsemeat was contaminated with pentobarbital. This reputation damage has led to a significant loss of retail stores that will sell any of Evanger's products.

Wherefore, Evanger's prays this honorable Court enter judgment in its favor, and against Bailey, including the following relief:

- a. Award Evanger's damages in the amount to be proven at trial;
- b. Award Evanger's its costs; and
- c. Award such other and further relief as this honorable court deems just.

COUNT III: FRAUD – HORSEMEAT – 2016 SHIPMENT

31. As and for paragraph 31 of Count III, Evanger's incorporates paragraphs 1 through 17 as if fully set forth herein.

32. Bailey represented to Evanger's that it sold and delivered "hand deboned beef."

33. Bailey was aware that Evanger's used Bailey's meat in its beef products and, therefore, Bailey intended that Evanger's rely on the representation that the meat delivered on June 3, 2016 was beef.

34. Bailey's knew when it shipped the meat to Evanger's on June 3, 2016, that it contained horsemeat; its representation that the June 2016 Shipment was beef misrepresented what it sold and delivered to Evanger's.

35. Evanger's relied on Bailey's misrepresentation and unknowingly used the horsemeat in the production of its beef product.

36. Evanger's has been damaged by Bailey's misrepresentation. Because Bailey shipped horsemeat that was contaminated with pentobarbital, Evanger's has been required to recall all products it made with any meat Bailey provided. In addition to the loss relating to the unsalable product and the cost of recall, Evanger's has suffered extensive damage to its commercial reputation because its product contained horsemeat instead of beef and that horsemeat was contaminated with pentobarbital. This reputation damage has led to a significant loss of retail stores that will sell any of Evanger's products.

Wherefore, Evanger's prays this honorable Court enter judgment in its favor, and against Bailey, including the following relief:

- a. Award Evanger's damages in the amount to be proven at trial;
- b. Award Evanger's punitive damages in the amount of \$5,000,000.00
- b. Award Evanger's its attorney's fees and costs; and
- c. Award such other and further relief as this honorable court deems just.

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COUNT IV: CONSUMER FRAUD – HORSEMEAT – 2016 SHIPMENT

37. As and for paragraph 37 of Count IV, Evanger's incorporates paragraphs 1 through 18 and paragraphs 32 through 34 as if fully set forth herein.

38. Bailey's delivery of horsemeat when Evanger's ordered beef was a deceptive act; Bailey compounded the deception by claiming on its bill of lading that it in fact shipped Evanger's beef; Bailey continued the deception when the invoice Bailey sent to Evanger's sought payment for beef.

39. Bailey intended that Evanger's rely on this deception; had Evanger's known that Bailey delivered horsemeat, Evanger's would have rejected the shipment because the meat was purchased specifically for the Hunk of Beef product.

40. Bailey's deception occurred in the course commerce and constitutes a violation of the Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1, *et seq.*

41. Evanger's has been damaged by Bailey's deceptive acts. Because Bailey shipped horsemeat that was contaminated with pentobarbital, Evanger's has been required to recall all products it made with any meat Bailey provided. In addition to the loss relating to the unsalable product and the cost of recall, Evanger's has suffered extensive damage to its commercial reputation because its product contained horsemeat instead of beef and that horsemeat was contaminated with pentobarbital. This reputation damage has led to a significant loss of retail stores that will sell any of Evanger's products.

Wherefore, Evanger's prays this honorable Court enter judgment in its favor, and against Bailey, including the following relief:

- a. Award Evanger's damages in the amount to be proven at trial;
- b. Award Evanger's punitive damages in the amount of \$5,000,000.00
- b. Award Evanger's its attorney's fees and costs pursuant to statute; and
- c. Award such other and further relief as this honorable court deems just.

COUNT V: BREACH OF CONTRACT – 2015 SHIPMENT

42. As and for paragraph 42 of Count V, Evanger’s incorporates paragraphs 1 through 17 as if fully set forth herein.

43. In November of 2015, Evanger’s and Bailey entered into an oral contract pursuant to which Evanger’s ordered 43,120 pounds of “hand deboned beef.” Bailey represented that it shipped to Evanger’s 43,120 pounds of “hand deboned beef;” and Bailey also invoiced Evanger’s for 43,120 pounds of “hand deboned beef.” Evanger’s received this shipment from Bailey on November 16, 2015 (hereinafter the “November 2015 Shipment”). A copy of the Bill of Lading and Invoice for the November 2015 Shipment are attached hereto as Exhibit 5 and Exhibit 6 and by this reference are incorporated herein.

44. Evanger’s then used the meat from the November 2015 Shipment in manufacturing “Against the Grain Hand Pulled Beef;” one of the lots from this production was Lot #2415E01ATB12.

45. The Washington State family whose pugs became ill had also purchased Against the Grain Hand Pulled Beef. The family sent a can of this product, which came from Lot #2415E01ATB12, to the FDA. The FDA tested this product and pentobarbital was detected. A copy of the test results are attached hereto as Exhibit 7 and by this reference is incorporated herein.

46. By shipping meat contaminated with pentobarbital to Evanger’s, when Evanger’s ordered unadulterated pet food quality beef, Bailey breached its oral contract with Evanger’s.

47. Evanger’s has suffered damage from Bailey’s breach.

Wherefore, Evanger’s prays this honorable Court enter judgment in its favor, and against Bailey, including the following relief:

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- a. Award Evanger's damages in the amount to be proven at trial;
- b. Award Evanger's its costs; and
- c. Award such other and further relief as this honorable court deems just.

COUNT VI: BREACH OF IMPLIED WARRANTIES – 2015 SHIPMENT

48. As and for paragraph 48 of Count VI, Evanger's incorporates paragraphs 1 through 17 and 44 to 45 as if fully set forth herein.

49. Bailey has done business with Evanger's for many years; Bailey knows that Evanger's is in the highly regulated business of manufacturing and selling pet food.

50. Bailey was aware that ingredients used in the production of pet food must be wholesome; pentobarbital contaminated meat it not wholesome but is considered adulterated.

51. Bailey was aware that ingredients used in the production of pet food must also be fit for Evanger's purpose – using the meat for canned pet food.

52. Only meat that was delivered by Bailey on November 16, 2015, was used in Lot #2415E01ATB12, the lot of product that was contaminated by pentobarbital.

53. Because the meat delivered by Bailey was contaminated, it was neither merchantable nor fit for the known and intended purpose for which it would be used.

54. Bailey has breached the implied warranties of merchantability and fitness for particular purpose.

55. Evanger's has suffered damage from Bailey's breach.

Wherefore, Evanger's prays this honorable Court enter judgment in its favor, and against Bailey, including the following relief:

- a. Award Evanger's damages in the amount to be proven at trial;
- b. Award Evanger's its costs; and
- c. Award such other and further relief as this honorable court deems just.

COUNT VII: FRAUD – APHIS CERTIFICATION

56. As and for paragraph 56 of Count VII, Evanger's incorporates paragraphs 1 through 17 as if fully set forth herein.

57. Evanger's makes every effort to obtain the best quality ingredients for all its products. Certifications from the United States Department of Agriculture ("USDA") provide a reliable indication that the facility and product have met certain standards. Among the certification is one from "APHIS," the Animal and Plant Health Inspection Services of the USDA.

58. Bailey represented to Evanger's that its plant was APHIS certified; when Bailey delivered its beef to Evanger's, each pallets on which Bailey shipped the beef had a tag that contained Bailey's APHIS certificate number "WI.-BLO-0004." This same designation "APHIS # WI.-BLO-0004" was included on bills of lading and invoices Bailey sent to Evanger's.

59. After Evanger's learned of the pentobarbital contamination in Bailey's meat, Evanger's learned that Bailey's APHIS certification had expired a number of years ago. Despite having expired, Bailey's continued to place the APHIS tag on pallets it delivered and include the APHIS number on its bills of lading and invoices.

60. By continuing to represent the it was APHIS certified when in fact it wasn't, Bailey intended that Evanger's, and other consumers, rely on belief that the USDA was performing the necessary inspections of Bailey's facility to maintain this certification.

61. Bailey's deception occurred in the course commerce.

62. Evanger's relied on Bailey's misrepresentation when it stated to its customers that meat for its products came from USDA inspected facilities.

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63. Evanger's has been damaged by Bailey's deceptive acts. Evanger's has suffered extensive damage to its commercial reputation because Bailey's product was not from an USDA APHIS inspected facility.

Wherefore, Evanger's prays this honorable Court enter judgment in its favor including the following relief:

- a. Award Evanger's damages in the amount to be proven at trial;
- b. Award Evanger's punitive damages in the amount of \$5,000,000.00
- c. Award Evanger's its attorney's fees and costs; and
- d. Award such other and further relief as this honorable court deems just.

COUNT VIII: CONSUMER FRAUD – APHIS CERTIFICATION

64. As and for paragraph 64 of Count VIII, Evanger's incorporates paragraphs 1 through 17 as if fully set forth herein.

65. Evanger's makes every effort to obtain the best quality ingredients for all its products. Certifications from the United States Department of Agriculture ("USDA") provide an indication that the facility and product have met certain standards. Among the certification is one from "APHIS," the Animal and Plant Health Inspection Services of the USDA.

66. Bailey represented to Evanger's that its plant was APHIS certified; when Bailey delivered its beef to Evanger's, each pallets on which Bailey shipped the beef had a tag that contained Bailey's APHIS certificate number "WI.-BLO-0004." This same designation "APHIS # WI.-BLO-0004" was included on bills of lading and invoices Bailey sent to Evanger's.

67. After Evanger's learned of the pentobarbital contamination in Bailey's meat, Evanger's learned that Bailey's APHIS certification had expired a number of years ago. Despite having expired, Bailey's continued to place the APHIS tag on pallets it delivered and include the APHIS number on its bills of lading and invoices.

68. By continuing to represent the it was APHIS certified when in fact it wasn't,

Bailey intended that Evanger's, and other consumers, rely on belief that the USDA was performing the necessary inspections of Bailey's facility to maintain this certification.

69. Bailey's deception occurred in the course commerce and constitutes a violation of the Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1, *et seq.*

70. Evanger's has been damaged by Bailey's deceptive acts. Evanger's has suffered extensive damage to its commercial reputation because Bailey's product was not from an USDA APHIS inspected facility.

Wherefore, Evanger's prays this honorable Court enter judgment in its favor including the following relief:

- a. Award Evanger's damages in the amount to be proven at trial;
- b. Award Evanger's punitive damages in the amount of \$5,000,000.00
- c. Award Evanger's its attorney's fees and costs pursuant to statute; and
- d. Award such other and further relief as this honorable court deems just.

EVANGER'S DOG AND CAT FOOD CO., INC.

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