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THE HONORABLE RONALD B. LEIGHTON

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

NICOLE AND GUY MAEL, NADINE)	Case No. 3:17-cv-05469-RBL
VIGLIANO, BRITNEY MOREA, CAROL)	
CONWAY, ANGELA BERTUCCI, and)	
TINA WIEPERT, on behalf of themselves)	
and all others similarly situated,)	
)	SECOND AMENDED
)	COMPLAINT – CLASS ACTION
Plaintiffs,)	
)	
v.)	
)	<u>JURY TRIAL DEMANDED</u>
)	
EVANGER’S DOG AND CAT FOOD)	
CO., INC., NUTRIPACK, LLC, AGAINST)	
THE GRAIN PET FOODS, and SHER)	
SERVICES COMPANY INCORPORATED.)	
)	
Defendants.)	

1 Plaintiffs Nicole and Guy Mael (the “Maels”), Nadine Vigliano (“Vigliano”),
2 Carol Conway (“Conway”), Britney Morea (“Morea”), Angela Bertucci
3 (“Bertucci”) and Tina Wiefert (“Wiefert”) (collectively referred to herein as
4 “Plaintiffs”), by and through their undersigned attorneys, bring this action on behalf
5 of themselves and all others similarly situated, and the general public, based upon
6 personal knowledge as to themselves and their activities, and on information and
7 belief as to all other matters, against Defendants, Evanger’s Dog and Cat Food Co.,
8 Inc. (“Evanger’s Co.”), Nutripack, LLC (“Nutripack”), Against the Grain Pet Food
9 (“Against the Grain”), and Sher Services Company Incorporated (“Sher Services”)
10 (collectively referred to as “Defendants” or “Evanger’s”). Nutripack manufactures
11 pet foods for Evanger’s Co. and Against the Grain. Nutripack is a trust managed by
12 Sher Services. Defendants are all owned by the Sher family. Together, Defendants
13 produce high-end pet foods that are specifically marketed to label-conscious
14 consumers as “human grade,” but are not, and contrary to their labels, some
15 contained harmful ingredients that caused several of Plaintiffs’ pets to become sick
16 and caused one to die.

16 **JURISDICTION AND VENUE**

17 1. Diversity subject matter jurisdiction exists over this class action
18 pursuant to the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4
19 (2005), amending 28 U.S.C. § 1332, at new subsection (d), conferring federal
20 jurisdiction over class actions involving: (a) 100 or more members in the proposed
21 class; (b) where at least some members of the proposed class have different
22 citizenship from Defendants; and (c) where the claims of the proposed class
23 members exceed the sum or value of five million dollars (\$5,000,000) in the
24 aggregate. 28 U.S.C. §§ 1332(d)(2) and (6).

25 2. This District Court also has jurisdiction under 28 U.S. Code § 1331
26 because the action arises out of a federal law of the United States, 15 U.S.C. § 2301,
27
28

1 *et seq.*

2 3. While the exact number of members in each of the proposed classes is
3 unknown at this time, Plaintiffs have reason to believe that thousands of consumers
4 purchased Defendants' pet food throughout the United States, including in
5 Washington, during the relevant period. The number of class members could be
6 discerned from the records maintained by Defendants.

7 4. While the exact damages to Plaintiffs and the members of the classes
8 are unknown at this time, Plaintiffs reasonably believe that their claims exceed five
9 million dollars (\$5,000,000) in the aggregate.

10 5. Jurisdiction is also proper pursuant to 28 U.S.C. § 1367, which
11 provides, in relevant part, that: (a) "in any action of which the district courts have
12 original jurisdiction, the district courts shall have supplemental jurisdiction over all
13 other claims that are so related to claims in the action within such original
14 jurisdiction that they form part of the same case or controversy under Article III of
15 the United States Constitution . . . includ[ing] claims that involve the joinder . . . of
16 additional parties."

17 6. This Court has personal jurisdiction over Defendants because they have
18 purposefully availed themselves of the privilege of conducting business in the State
19 of Washington by selling their products to persons in Washington online and through
20 retailers, and a substantial number of the events giving rise to the claims alleged
21 herein took place in this District including the events giving rise to the recalls of
22 Defendants' products.

23 7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because
24 many of the acts and transactions giving rise to this action occurred in this District
25 and because Defendants:

26 a. have intentionally availed themselves of the laws and markets

1 within this District through the promotion, marketing,
2 distribution and sale of their products in this District;

3 b. do substantial business in this District, including selling their
4 products in this District; and

5 c. are subject to personal jurisdiction in this District.

6 8. Venue is proper in this Court as to the Plaintiffs and Plaintiffs' State-
7 law claims under the doctrine of pendant venue.

8 NATURE OF THE ACTION

9 9. Plaintiffs bring this class action to obtain damages and equitable relief
10 for themselves and all others similarly situated, in Washington, Illinois,
11 Pennsylvania, New Jersey, New York and nationwide, who purchased Defendants'
12 Pet Foods¹, which are advertised categorically as "People Food for Pets," "human
13 grade" and "USDA inspected meats." However, these pet food products are made at
14 Defendants' non-USDA inspected facilities that are *only* licensed to make *feed* for
15 animals – not products that are fit for human consumption - and are composed of
16 low quality, non-human grade ingredients. Plaintiffs and the class were injured by
17 overpaying for these products that were falsely advertised and misrepresented as
18 "human grade" when they were not.

19 10. Furthermore, many of the Pet Foods were deemed unsafe, adulterated

20 ¹ Defendants' meat-based products, including beef, chicken, turkey, duck and lamb
21 products, are advertised to be "People Food for Pets," "USDA inspected," "human
22 grade," and/or "organic," among other things. The term "Pet Foods" is defined
23 herein as any meat-based products (*i.e.* excluding seafood and vegetable-based
24 products) sold under the brand names "Evanger's" or "Against the Grain." *See*
25 *infra* ¶ 76, Exhibit G listing Pet Foods, ¶¶ 171-76. Since Defendants are not
26 licensed to make products fit for human consumption, none of these products were
27 produced in USDA-inspected facilities required for human grade products, and did
28 not contain human grade ingredients, all of these products were similarly
misabeled.

1 meats, not from animals that were identified on the labels, and some contained
2 *pentobarbital, a barbiturate used in the euthanizing of animals, the execution of*
3 *humans and in physician-assisted deaths.* Some of the Plaintiffs' use of these
4 products led to the sickness of several of their pets, and the death of one.

5 11. Defendants produce dog and cat food products in the United States that
6 they sell online to consumers and through a network of distributors to retailers.
7 Evanger's Pet Foods are aimed specifically at customers, like Plaintiffs, who want
8 premium, safe and healthy meals for their pets, and are willing to pay a hefty price
9 for them compared to other brands.

10 12. Evanger's touts that all of the Pet Foods are "premium," "human
11 grade," "People Food for Pets," "USDA inspected meats" that are "100% natural,
12 raw meats" and do not contain "soy, corn, wheat, artificial ingredients,
13 preservatives, harmful additives or by-products," and are healthy and safe to
14 customers and their pets. Evanger's claims to be a "5-star" rated Pet Food.

15 13. Evanger's has one of the few canneries in the country for pet foods, and
16 produces and packages both its own brand-named products as well as the Against
17 the Grain brand products. Evanger's also produces and packages pet foods for other
18 companies' brands, including Party Animal Pet Foods ("Party Animal").

19 14. Against the Grain pet foods produced at Evanger's and Nutripack's
20 manufacturing facility, also target customers, like Plaintiffs, who seek to purchase
21 products with high quality ingredients for their pets and are willing to pay a premium
22 price compared to other brands. Against the Grain states that it uses "safe," "human
23 grade," "highest quality," "fresh" ingredients. It also boasts that its products
24 are gluten-free and grain-free continues to state that they are "sourced from human
25 grade facilities" and composed of 100% specific meat.

26 15. On December 31, 2016, relying on Defendants' representations about
27

1 the Pet Foods, the Maels purchased Evanger's Hunk of Beef Au Jus ("Hunk of
2 Beef") and Against the Grain's Grain Free Pulled Beef with Gravy canned dog food
3 ("Pulled Beef") for their five dogs. Immediately, after consuming the Hunk of Beef,
4 all of the dogs became ill - acting listless and non-responsive. The Maels rushed
5 them to an emergency veterinarian. The next day, the Maels were forced to euthanize
6 their dog, Talula, as a result of her being poisoned by the Hunk of Beef. As a result
7 of consuming the Pet Foods, the Maels' four other dogs have had to undergo ongoing
8 veterinarian treatments and monitoring, including Tito, who was treated for seizures
9 for several months.

10 16. After Talula's death, the FDA began working with the Maels and the
11 retailer that sold the Pet Foods to them, and arranged for a necropsy on Talula's body
12 that found no abnormalities and for toxicology testing to be performed on both
13 Talula's body and the Pet Foods. The FDA toxicology testing found a large amount
14 of pentobarbital in Talula's stomach, and in the undigested Pet Food. The FDA then
15 directed testing of the remaining Hunk of Beef product and the unopened Hunk of
16 Beef and Pulled Beef products purchased by the Maels. This testing further
17 confirmed the contamination of pentobarbital in the products.

18 17. The FDA determined that Evanger's meat supplier, with which
19 Defendants claimed it had a forty-year relationship, had in fact provided a label on
20 its meat informing Evanger's that the meat was "***Inedible*** Hand Deboned Beef" and
21 "For Pet Food Use Only. ***Not Fit for Human Consumption.***" The FDA also found
22 that ***none*** of Evanger's beef suppliers are inspected by the United States Department
23 of Agriculture Food Safety and Inspection Services ("USDA-FSIS"), and that as a
24 result ***none*** of these meats were human grade as Evanger's advertised. The FDA was
25 unable to confirm that any of Evanger's suppliers were USDA-FSIS inspected or
26 human grade because Evanger's did not provide it with documentation when

1 requested.

2 18. The FDA also noted unsanitary conditions at Evanger's manufacturing
3 facilities, at both its Wheeling, Illinois and Markham, Illinois locations, that further
4 contaminated the Pet Foods produced there rendering them adulterated. Following
5 the FDA inspections, Evanger's closed its Wheeling facility in 2017.

6 19. The FDA and Evanger's own testing also found trace amounts of pork
7 and horse in its products that were labeled as "100% beef." In a follow-up warning
8 letter from the FDA at the end of June 2017 (the "Warning Letter"), the FDA
9 indicated that Evanger's has "not provide[d] documentation or other evidence to
10 FDA showing that the supplier in question is the only one who supplied the
11 contaminated raw materials that went into all your recalled products."

12 20. Under the Federal Food, Drug, and Cosmetic Act ("FDCA"), the FDA
13 is primarily responsible for making sure that food for both people and animals is
14 safe, properly manufactured, and properly labeled. The FDCA, 21 U.S.C. §
15 342(a)(1), prohibits foods that are adulterated due to poisonous substances;
16 preparation, packaging or holding under insanitary conditions causing
17 contamination; or products of a diseased animal or of an animal, which has died
18 otherwise than by slaughter. According to the FDA, pet food that is considered
19 "human grade" must only be composed of USDA-inspected meats from USDA-
20 inspected manufacturers. The FDA determined that the tested Hunk of Beef, Braised
21 Beef and Pulled Beef were adulterated with poisonous pentobarbital, and that
22 Defendants' manufacturing facilities for the Pet Foods were unsanitary further
23 adulterating the Pet Foods. The FDA also found that none of Evanger's beef
24 suppliers were USDA-inspected, nor human grade, and it could not confirm that any
25 of Evanger's suppliers for other ingredients were USDA-inspected or human grade.

26 21. The Association of American Feed Control Officials ("AAFCO") is a
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1 non-governmental organization that provides guidelines on pet food labeling and
2 advertising. According to AAFCO, in order to claim that a product is “human grade”
3 or “human quality,” all ingredients in the product must be human edible and the
4 product must be manufactured, packed and held in accordance with federal
5 regulations in 21 CFR 110, Current Good Manufacturing Practice in Manufacturing,
6 Packing, or Holding ***Human Food***. Defendants’ facilities are only licensed to make
7 feed for animals – products not fit for human consumption - and are not USDA-
8 inspected.

9 22. Defendants misrepresent the quality of the Pet Foods’ ingredients and
10 manufacturing. They falsely state that the Pet Foods are “People Food for Pets,” safe
11 and sourced from human-grade, USDA-inspected meats and facilities when in fact
12 they are not. These misrepresentations and omissions relating to the quality of the
13 meat, manufacturing and health risks ultimately led to a recall of certain products
14 beginning on February 3, 2017 (for certain Hunk of Beef lots); on February 13, 2017
15 (for certain Pulled Beef lots); and on March 3, 2017 for all lots of Evanger’s Hunk
16 of Beef, Pulled Beef and Braised Beef products from all suppliers.

17 23. Over an approximate one-year period, including in April 2016, Wiepert
18 purchased Evanger’s Hunk of Beef and Braised Beef for her dog. After consuming
19 Evanger’s Pet Foods, Wiepert’s dog, Rocket, was found to have elevated liver
20 enzymes and was placed on medication to lower them.

21 24. Prior to Evanger’s announced recall, but after the Pet Foods tested
22 positive for pentobarbital, Vigliano purchased Hunk of Beef and Braised Beef for
23 her dog, Lucy, on or about January 31, 2017. After consuming the Hunk of Beef,
24 Lucy became ill and stopped eating. Her veterinarian identified increased liver
25 enzymes and illness as a result of “chronic exposure to pentobarbital” in the Pet
26 Foods, and noted her “significant improvement” when she stopped eating the Pet
27

1 Foods.

2 25. Despite insisting that no other products were impacted by the recalls,
3 on April 13, 2017, three and a half months after Talula died, another dog became ill
4 after eating Party Animal pet food also manufactured by Evanger's. The Party
5 Animal products also tested positive for pentobarbital, and on April 17, 2017, Party
6 Animal publicly recalled its Cocolicious Beef & Turkey dog food and Cocolicious
7 Chicken & Beef dog food.

8 26. On December 18, 2016, and on February 14, 2017, before the recall of
9 Evanger's Hunk of Beef and Braised Beef and Party Animal's Cocolicious recall,
10 Morea purchased several of Defendants' Pet Foods for her dog, Nico, including but
11 not limited to, Evanger's Braised Beef and Hunk of Beef and Cocolicious Chicken
12 & Beef and 95% Beef. After eating Defendants' Pet Foods each time, Nico became
13 lethargic, would not eat, and experienced intestinal inflammation.

14 27. Bertucci purchased the Pet Foods, including Evanger's Braised Beef
15 and Against the Grain's Pulled Beef, for her dog, Jazzy, for years leading up to their
16 announced recalls in 2017. However, because Defendants did not disclose that they
17 also manufactured Party Animal's products, she was misled into continuing to
18 purchase Party Animal's Cocolicious products in 2017, until they were also recalled.

19 28. Evanger's continues to falsely advertise the Pet Foods as "People Food
20 for Pets" with "human grade" ingredients. On May 15, 2017, Plaintiff Conway
21 purchased a can of Evanger's "Super Premium" Duck & Sweet Potato ("Duck &
22 Sweet Potato") for her dog, Ruby. Like its other products, Evanger's falsely
23 represented that this product was "human-grade" and produced in USDA-inspected
24 facilities with USDA-inspected ingredients.

25 29. Following the recall of Party Animal's products, Party Animal sued
26 Defendants for damages based on the misrepresented meat that Evanger's sold to

1 Party Animal. Party Animal seeks damages relating, but not limited to, retailers that
2 are seeking refunds for its recalled and non-recalled products, and consumers who
3 are seeking payment of veterinarian bills for treatment of their pets caused by their
4 consumption of its products. The lawsuit also alleges that in February 2017, Party
5 Animal began receiving invoices from Nutripack instead of Evanger's Co. When it
6 inquired about this, an owner of Evanger's Co., Holly Sher, stated that the owners
7 of Evanger's were afraid of Evanger's Co. getting sued because of the recent recalls,
8 and they were taking money out of Evanger's Co. She also stated that they did not
9 want to receive any money into Evanger's Co. and would instead run all operations
10 under Nutripack.

11 30. Plaintiffs and the other members of the proposed classes have
12 purchased Defendants' Pet Foods, and relied on Defendants' misrepresentations
13 about their products' high quality as "People Food for Pets," human grade, USDA-
14 inspected ingredients, sourcing and manufacturing. Defendants omitted material
15 facts that they are not licensed as a human-grade, USDA facility; the ingredients in
16 their Pet Foods are not human grade, USDA-inspected; and the products carried
17 various health risks, including but not limited to the fact that they may contain
18 poisonous pentobarbital, were contaminated from the unsanitary manufacturing
19 facilities that impacted all Pet Foods made there, and were from animals that did not
20 die from slaughter.

21 31. The Pet Foods were falsely advertised, and some were unsafe for
22 animals to consume and should not have been sold under the law. Had Defendants
23 disclosed the true facts concerning these products, Plaintiffs would have been aware
24 of them, including but not limited to the potential harm and would not have
25 purchased Defendants' Pet Foods or not paid as much money for them. Defendants'
26 false and misleading advertising touting the purity and quality of their products

1 allowed Defendants to charge a higher price than they could have without these
2 representations.

3 32. In fact, the prices Defendants charge for their Pet Foods are among the
4 highest in the industry. For example, the price of Evanger's Hunk of Beef on its
5 website, which retailers sell for even more, is \$36.91 for a case of twelve 12 ounce
6 cans, or \$3.07 per can, and the price of Against the Grain's Pulled Beef is \$37.22 for
7 twelve 13 ounce cans, or \$3.10 a can. If Defendants were to now disclose the truth
8 about the ingredients, manufacturing and source of their products, Plaintiffs and the
9 classes would be in a position to make an informed decision as to whether to
10 purchase Defendants' Pet Foods at the price offered.

11 33. Plaintiffs bring this class action against Defendants, on behalf of
12 themselves, the proposed classes, and the general public, in order to: (a) halt the
13 dissemination of Defendants' deceptive advertising and marketing; (b) correct the
14 false and misleading perception Defendants have created in the minds of consumers
15 through their misrepresentations; and (c) secure redress for consumers who have
16 purchased one or more of Defendants' Pet Foods, including not only the cost of the
17 Pet Foods, but also any veterinarian costs related to the consumption of the Pet
18 Foods.

19 34. Plaintiffs, on behalf of themselves and the proposed classes, bring
20 claims against Defendants for violation of the federal Magnuson-Moss Warranty
21 Act; breach of express warranties and implied warranties of merchantability;
22 violation of the Washington Consumer Protection Act, the Illinois Consumer Fraud
23 and Deceptive Business Practices Act, the Pennsylvania Unfair Trade & Practices &
24 Consumer Protection Law, the New Jersey Consumer Fraud Act and the New York
25 General Business Law § 349; as well as negligence; product liability; and unjust
26 enrichment.

1 **PARTIES**

2 ***Plaintiffs***

3 35. Plaintiffs Nicole and Guy Mael are husband and wife, who reside in
4 Washougal, Washington and are citizens of Washington. They had five dogs, Talula,
5 Tank, Pedro, Tinkerbelle and Tito, until January 1, 2017, when Talula passed away
6 after eating Evanger's Hunk of Beef that was contaminated with pentobarbital.

7 36. During the relevant period, the Maels, while in the state of Washington,
8 were exposed to and saw Defendants' material, deceptive marketing claims and
9 packaging that misrepresented the quality and ingredients of their Pet Foods and
10 omissions that failed to disclose material facts about the meat used and the health
11 risks it carried to animals that consumed it. Before purchasing Defendants' Pet
12 Foods, the Maels reviewed the product labels and Defendants' websites and relied
13 on these in making their decision to purchase the Pet Foods. The Maels, relying on
14 Defendants' omissions and misleading marketing and labeling of their Pet Foods,
15 believed that Defendants' Pet Foods were premium, "human grade," "USDA
16 inspected meats" and did not carry any health risks to their pets. While in the State
17 of Washington, the Maels purchased Defendants' Pet Foods intermittently at a local
18 retailer, Healthier Choices, in Washougal, Washington, over a four year period,
19 including on December 31, 2016, when they purchased five cans of Evanger's Grain
20 Free Rabbit for dogs and cats at \$1.65 per can, three cans of Hunk of Beef at \$3.20
21 per can and three cans of Pulled Beef at \$3.60 per can. Exhibit A receipt from
22 purchase.

23 37. Plaintiff Nadine Vigliano resides in Worcester, Pennsylvania and is a
24 citizen of Pennsylvania. She has a dog, Lucy, who became ill after eating Evanger's
25 Hunk of Beef subject to recall, but before it was announced.

26 38. During the relevant period, Vigliano, while in the State of

1 Pennsylvania, was exposed to and saw Defendants' material, deceptive marketing
2 claims and packaging that misrepresented the quality and ingredients of their Pet
3 Foods and omissions that failed to disclose material facts about the meat used and
4 the health risks it carried to animals that consumed it. Before purchasing Defendants'
5 Pet Foods, she reviewed the product labels and Defendants' marketing and
6 advertising and relied on these in making her decision to purchase the Pet Foods.
7 Vigliano, relying on Defendants' omissions and misleading marketing and labeling
8 of their Pet Foods, believed that Defendants' Pet Foods were premium, "human
9 grade," "USDA inspected meats" and did not carry any health risks to her pet. While
10 in the State of Pennsylvania, Vigliano purchased Defendants' Pet Foods at a local
11 retailer, Concord Pet Foods & Supplies, in Chalfont, Pennsylvania, over several
12 months, including on January 31, 2017, when she purchased three cans of Evanger's
13 Hunk of Beef at \$3.15 per can and one can of Braised Beef at \$3.15 per can. Exhibit
14 B receipt from purchase.

15 39. Plaintiff Angela Bertucci resides in Peoria, Illinois, and is a citizen of
16 Illinois. She has a dog, Jazzy, to whom she fed Evanger's, Against the Grain and
17 Cocolicious products.

18 40. During the relevant period, Bertucci, while in the State of Illinois, was
19 exposed to and saw Defendants' material, deceptive marketing claims and packaging
20 that misrepresented the quality and ingredients of their Pet Foods and omissions that
21 failed to disclose material facts about the meat used and the health risks it carried to
22 animals that consumed it. Before purchasing Defendants' Pet Foods, she reviewed
23 the product labels and Defendants' websites and relied on these in making her
24 decision to purchase the Pet Foods. Bertucci, relying on Defendants' omissions and
25 misleading marketing and labeling of their Pet Foods, believed that Defendants' Pet
26 Foods were premium, "human grade," "USDA inspected meats" and did not carry

1 any health risks to her pets. While in the State of Illinois, she purchased Defendants'
2 Pet Foods through online through Chewy.com, directly from
3 againstthegrainpetfood.com, and also at local pet stores and a groomer in Peoria,
4 Illinois, over a two year period, including on December 18, 2016, when she
5 purchased a case of twelve 12 ounce cans of Evanger's Braised Beef at about \$3.23
6 per can or \$38.75 for the case from Chewy.com and a case of twelve 13 ounce cans
7 of Pulled Beef at about \$3.10 per can or \$37.22 for the case from
8 againstthegrainpetfood.com. She stopped purchasing Evanger's and Against the
9 Grain's Pet Foods after hearing about the events surrounding the recalls. Instead,
10 including for example, on January 9, 2017, she purchased a case of Party Animal's
11 Cocolicious Lamb and Wild Caught Salmon Recipe at about \$3.00 per can or \$35.99
12 for the case of twelve of 12.8 ounce cans, and Cocolicious 95% Organic Chicken for
13 about \$2.89 per a can or \$34.68 for the case of twelve 12.8 ounce cans from
14 Chewy.com. Exhibit C receipt from purchase.

15 41. Plaintiff Britney Morea resides in Hamilton, New Jersey, and is a
16 citizen of New Jersey. She has a dog, Nico, who became ill after consuming
17 Evanger's Pet Foods.

18 42. During the relevant period, Morea, while in the State of New Jersey,
19 was exposed to and saw Defendants' material, deceptive marketing claims and
20 packaging that misrepresented the quality and ingredients of their Pet Foods and
21 omissions that failed to disclose material facts about the meat used and the health
22 risks it carried to animals that consumed it. Before purchasing Defendants' Pet
23 Foods, Morea reviewed the product labels and Defendants' marketing and
24 advertising, and relied on these in making her decision to purchase the Pet Foods.
25 Morea, relying on Defendants' omissions and misleading marketing and labeling of
26 their Pet Foods, believed that Defendants' Pet Foods were premium, "human grade,"

1 “USDA inspected meats” and did not carry any health risks to her pet. While in the
2 State of New Jersey, on December 18, 2016, she purchased Defendants’ Pet Foods,
3 including one can of Evanger’s Hunk of Beef for \$2.59, one can of Evanger’s
4 Braised Beef for \$2.69, and one can of Cocolicious 95% Beef for \$2.59 at a local
5 retailer Bag of Bones, in Hamilton, New Jersey. On February 14, 2017, she also
6 purchased Defendants’ Pet Foods, including one can of Evanger’s Signature Turkey
7 Stew at \$2.39, one can of Evanger’s Chicken Casserole at \$2.79, two cans of Braised
8 Beef at \$2.69, one can of Evanger’s 100% Chicken at \$1.09, one can of Evanger’s
9 Roasted Chicken Drummet at \$2.29, and one can of Cocolicious Chicken & Beef at
10 \$2.59, at a local retailer, Bag of Bones, in Hamilton, New Jersey. Exhibit D receipts
11 from purchases.

12 43. Plaintiff Carol Conway resides in Bradley Beach, New Jersey and is a
13 citizen of New Jersey.

14 44. During the relevant period, Conway, while in the State of New Jersey,
15 was exposed to and saw Defendants’ material, deceptive marketing claims and
16 packaging that misrepresented the quality and ingredients of their Pet Foods and
17 omissions that failed to disclose material facts about the meat used and the health
18 risks it carried to animals that consumed it. Before purchasing Defendants’ Pet
19 Foods, Conway reviewed the product labels and Defendants’ marketing and
20 advertising, and relied on these in making her decision to purchase the Pet Foods.
21 Conway, relying on Defendants’ omissions and misleading marketing and labeling
22 of their Pet Foods, believed that Defendants’ Pet Foods were premium, “human
23 grade,” “USDA inspected meats” and did not carry any health risks to her pet. While
24 in the State of New Jersey, on May 15, 2017, she purchased Defendants’ Pet Foods,
25 including one can of Evanger’s Wild Salmon at \$2.78 and one can of Duck & Sweet
26 Potato at \$2.38, at a local retailer, Pet Supplies Plus, in Wall Township, New Jersey.

1 Exhibit E receipt from purchase.

2 45. Plaintiff Tina Wiepert resides in Hamburg, New York and is a citizen
3 of New York. She has a dog, Rocket, who became ill with elevated liver enzymes
4 and required medication after consuming Evanger's Hunk of Beef and Braised Beef.

5 46. During the relevant period, Wiepert, while in the State of New York,
6 was exposed to and saw Defendants' material, deceptive marketing claims and
7 packaging that misrepresented the quality and ingredients of their Pet Foods and
8 omissions that failed to disclose material facts about the meat used and the health
9 risks it carried to animals that consumed it. Before purchasing Defendants' Pet
10 Foods, Wiepert reviewed the product labels and Defendants' marketing and
11 advertising on Evanger's website and in retailers, and relied on these in making her
12 decision to purchase the Pet Foods. Wiepert, relying on Defendants' omissions and
13 misleading marketing and labeling of their Pet Foods, believed that Defendants' Pet
14 Foods were premium, "human grade," "USDA inspected meats" and did not carry
15 any health risks to her pet. While in the State of New York, she purchased
16 Defendants' Pet Foods intermittently over a year at local retailers, including one can
17 of Evanger's Hunk of Beef at \$2.99 and one can of Braised Beef at \$2.99 on April
18 5, 2016, and one can of Braised Beef at \$2.99 on June 15, 2016, at a local retailer,
19 The Animal Kingdom, in Orchard Park, New York. Exhibit F receipt from purchase.

20 47. Had Defendants disclosed the truth about their Pet Foods - that the
21 products were **not** premium, human grade nor sourced from USDA inspected meats,
22 and their health risks to animals that ate them, as was known to or should have been
23 known to Defendants - then Plaintiffs would have been aware of the true nature of
24 these products, and would not have paid the price that they paid for the Pet Foods,
25 or would not have purchased them at all. In the future, if Defendants were to disclose
26 that its Pet Foods are not high quality, not human grade and not from USDA

1 inspected meats, Plaintiffs would be in a position to make an informed decision as
2 to whether to purchase Defendants' products at the prices offered. Thus, as a result
3 of Defendants' material unfair and deceptive misrepresentations and omissions,
4 Plaintiffs suffered injury in fact and lost money, and most importantly in some
5 instances, lost their beloved companion animal.

6 48. Members of the putative classes reside in Washington, Pennsylvania,
7 Illinois, New Jersey and New York, and throughout other states in the United States.

8 ***Defendants***

9 49. Evanger's Co. is incorporated in Illinois, and until recently listed its
10 corporate headquarters at 211 Wheeling Road, Wheeling, Illinois 60090, which was
11 inspected by the FDA in 2017. In 2017, Evanger's closed its Wheeling location and
12 now lists its address at 2210 W. 162nd St., Markham, Illinois 60248-5604, where
13 Nutripack and Against the Grain are also located. Evanger's was started in 1935 by
14 Fred Evanger. It is currently owned and operated by the Sher family, who acquired
15 it in 2002, when they developed the purportedly "human-grade" products, and hand-
16 packed products line, that includes Hunk of Beef, Braised Beef and Pulled Beef. On
17 its registration with the State of Illinois, Holly Sher is listed as its agent and
18 President, and Chelsea Sher is listed as Secretary. Joel Sher represents himself as
19 Vice President, and Brett Sher is involved with its operations, shipping, receiving,
20 and consumer complaints. Evanger's had two canning and production facilities, one
21 in Wheeling, Illinois, which recently closed during 2017, and one it opened in 2014
22 in Markham, Illinois.² It holds three feed licenses with the Illinois Department of
23 Agriculture.³

24 _____
25 ² Evanger's Fact, Our Story, <http://www.evangersfacts.com/evangers-history/> (last
visited May 15, 2017).

26 ³ Evanger's holds three feed licenses (numbers 90719, 90802, 5736) for making
27 food for animals, products not fit for human consumption.

50. Nutripack, located in 2210 W. 162nd St., Markham, Illinois 60248-5604, is an Illinois limited liability company. Nutripack is managed by Sher Services, and Brett Sher is listed as its agent. Nutripack manufactures Evanger's Pet Foods. According to the lawsuit filed by Party Animal, Evanger's began invoicing Party Animal through Nutripack in February 2017, following the recall of the Pet Foods. Holly Sher, the President of Evanger's, indicated that the owners were defunding Evanger's and running its funds through Nutripack to avoid liability relating to the recalls. Nutripack holds two licenses to make feed for animals with the Illinois Department of Agriculture.⁴

51. Sher Services, located at 6542 N Navajo, Lincolnwood, Illinois 60712, is an Illinois corporation. It lists Joel Sher as its President and agent. It is listed as manager of Nutripack, but does not appear to have any other independent business.

52. Against the Grain, according to Joel Sher's representations to the FDA, is his sole proprietorship. It has not been registered with the Illinois Secretary of State. Chelsea and Brett Sher have also represented that they launched Against the Grain and that its products are made by Evanger's Co. and Nutripack.⁵ It holds a feed license with the Illinois Department of Agriculture and lists its address as 2210 W 162nd St., Markham, IL 60428 - the same one as Evanger's and Nutripack.⁶

<https://www2.illinois.gov/sites/agr/Consumers/Inspection/Documents/2017%20Feed%20Licensees.xlsx.pdf#search=Nutripack> (last visited Mar. 30, 2018).

⁴ Nutripack holds two feed licenses (numbers 8186, 9081) to make food for animals, products not fit for human consumption.

<https://www2.illinois.gov/sites/agr/Consumers/Inspection/Documents/2017%20Feed%20Licensees.xlsx.pdf#search=Nutripack> (last visited Mar. 30, 2018).

⁵ Siblings Launch Against the Grain Food, published Aug. 28, 2012, <http://www.petbusiness.com/August-2012/Siblings-Launch-Against-the-Grain-Food/> (last visited Mar. 30, 2018).

⁶ Against the Grain holds animal feed license, number 4044, products not fit for human consumption.

53. Defendants produce many different lines of pet food under the Evanger's and Against the Grain's brands. They sell products online and through retailers across the country. They also produce other companies' brands, including but not limited to Party Animal. Evanger's publicly stated on its website on January 4, 2017, that "Hunk of Beef is our #1 seller. Pets consume over one million cans of Hunk of Beef per year."⁷ Evanger's, Voluntary Recall, January 4, 2017, <http://evangersdogfood.com/news-events/pug-family-updates/> (last visited February 17, 2017) (since removed).

54. Plaintiffs allege, on information and belief, that at all times relevant herein, Defendants' agents, employees, representatives, executives, directors, partners, and/or subsidiaries were acting within the course and scope of such agency, employment, and representation, on behalf of Defendants.

FACTUAL ALLEGATIONS

I. BACKGROUND ON REGULATION AND LAWS GOVERNING THE PET FOOD INDUSTRY

55. The FDA and USDA are tasked with regulating pet foods, labels and manufacturing to keep humans and animals safe. The Federal Trade Commission ("FTC") also regulates advertising. The FDA regulates animal protein ingredient suppliers, which may also be subject to state jurisdiction. The USDA-FSIS regulates the slaughter of animals for *human consumption* – not the slaughter of animals for animal consumption - and provides grading and definition of various products including testing for speciation. In order for a product to be represented as "human

<https://www2.illinois.gov/sites/agr/Consumers/Inspection/Documents/2017%20Fed%20Licensees.xlsx.pdf#search=Evanger%27s> (last visited Mar. 30, 2018).

⁷ Evanger's, Voluntary Recall, January 4, 2017, <http://evangersdogfood.com/news-events/pug-family-updates/> (last visited February 17, 2017) (since removed).

grade,” it must be derived from USDA-FSIS inspected facilities and meats. The USDA - Animal and Plant Health Inspection Service (“APHIS”) provides a voluntary service to inspect and provide certification status to facilities according to standards established by the country where the facilities wish to export their products. APHIS does not have direct regulatory responsibility over pet food.⁸

56. State departments of agriculture license businesses for the production and distribution of commercial feed for animals, including pet food for dogs and cats. Pursuant to Illinois Commercial Feed Act of 1961, IL. Rev. Stat. 1991, Section 3(d), “commercial feed means all materials, including customer formula feeds, which are distributed for use as feed, or labeled with a guaranteed analysis for use as feed, or for mixing in feed for birds or animals *other than man*.” Evanger’s, Nutripack and Against the Grain have “Feed Licenses” issued by the Illinois Department of Agriculture for the production of commercial feed prepared and distributed for consumption by animals only, including dogs and cats, not for human consumption.⁹

57. AAFCO is a voluntary membership association of local, state and federal agencies charged by law to regulate the sale and distribution of animal feeds and animal drug remedies. AAFCO itself has no regulatory authority, but provides a forum for the membership and industry representation to create model guidelines

⁸ FDA, Questions and Answers: Evanger’s Dog and Cat Food (“FDA Q&A”), <https://www.fda.gov/AnimalVeterinary/SafetyHealth/ProductSafetyInformation/ucm544348.htm> (last visited April 27, 2017).

⁹ Evanger’s holds three feed license numbers 90719, 90802, 5736; Nutipack holds two feed license numbers 8186, 9081; and Against the Grain holds one 4044. They all list the same address for their licenses as 2210 W. 162nd St., Markham, IL 60248-5604. IL Dept. of Agric., Feed Licensees, <https://www2.illinois.gov/sites/agr/Consumers/Inspection/Documents/2017%20Feed%20Licensees.xlsx.pdf#search=Nutripack> (last visited Mar. 30, 2018).

1 for pet food to safeguard the health of animals and humans; ensure consumer
2 protection; and provide a level playing field of orderly commerce for the animal feed
3 industry.¹⁰

4 58. AAFCO warns that claims on animal foods should not be false or
5 misleading including that something is “human-grade” or “human-quality” that
6 implies it is “edible” for people. It further states, in pertinent part:

7 when one or more human edible ingredients are mixed with one or more non-
8 human edible ingredients, the edible ingredients become non-human edible.
9 To claim that a product composed of USDA inspected and passed chicken,
10 plus poultry meal, which is not human edible, plus other ingredients is made
11 with human-grade chicken is misleading without additional qualification and
12 disclaimers in the claim because the chicken is no longer edible. Thus, for all
13 practical purposes, the term “human grade” represents the product to be
14 human edible. For a product to be human edible, *all ingredients in the*
15 *product must be human edible and the product must be manufactured,*
16 *packed and held in accordance with federal regulations in 21 CFR 110,*
17 *Current Good Manufacturing Practice in Manufacturing, Packing, or*
18 *Holding Human Food*. If these conditions exist, then human-grade claims
19 may be made. If these conditions do not exist, then making an unqualified
20 claim about ingredients being human grade misbrands the product.¹¹

21 59. Under the FDCA, 21 U.S.C. § 342(a)(1), a “food,” which includes
22 human and pet food, is considered adulterated if it contains a poisonous or
23 deleterious substance; is contaminated by insanitary conditions; or is sourced from

24 ¹⁰ AAFCO, Home and Regulatory, <http://www.aafco.org/> (last visited April 27,
25 2017).

26 ¹¹ AAFCO, Pet Food Labeling, [http://petfood.aafco.org/Labeling-Labeling-](http://petfood.aafco.org/Labeling-Labeling-Requirements)
27 [Requirements](http://petfood.aafco.org/Labeling-Labeling-Requirements) (Mar. 30, 2018) (emphasis added).

1 an animal that did not die by slaughter. Food may also be deemed adulterated if
2 under § 342(b) it is substituted. This law is in place to protect people and their pets
3 from the risk from consuming poisonous, contaminated, euthanized, diseased or
4 decomposing animal tissues. Specifically, the law states, in pertinent part:

5 A food shall be deemed to be adulterated-

6 (a) Poisonous, insanitary, etc., ingredients

7 (1) If it bears or contains ***any poisonous or deleterious substance*** which
8 may render it injurious to health . . . (2)(A) if it bears or contains any
9 added poisonous or added deleterious substance . . . that is unsafe within
10 the meaning of section 346 of this title . . . (3) if it consists in whole or
11 in part of any filthy, putrid, or decomposed substance, or if it is
12 otherwise unfit for food; or (4) if it has been ***prepared, packed, or held***
13 ***under insanitary conditions whereby it may have become***
14 ***contaminated with filth***, or whereby it may have been rendered
15 injurious to health; or (5) if it is, in whole or in part, the product of a
16 diseased animal or of an ***animal which has died otherwise than by***
17 ***slaughter*** . . .

18 (b) Absence, substitution, or addition of constituents

19 (1) If any valuable constituent has been in whole or in part omitted or
20 abstracted therefrom; or (2) if any substance has been substituted
21 wholly or in part therefor; or (3) if damage or inferiority has been
22 concealed in any manner; or (4) if any substance has been added thereto
23 or mixed or packed therewith so as to increase its bulk or weight, or
24 reduce its quality or strength, or make it appear better or of greater value
25 than it is.

26 (Emphasis added).

27 SECOND AMENDED COMPLAINT CASE NO. 3:17-CV-05469-RBL

1 60. Under the FDCA, 21 U.S.C. § 343(b), a food is deemed misbranded if
2 it is offered for sale under the name of another food.

3 61. Despite laws governing pet foods and providing government oversight,
4 the FDA has stated that “[p]et food manufacturers are responsible for taking
5 appropriate steps to ensure that the food they produce is safe for consumption and
6 properly labeled” including verifying the identity and safety of the ingredients from
7 suppliers.¹² Because pet food companies are left to self-regulation, many often do
8 not follow laws and rarely face any repercussions until it is too late for some pets,
9 who have died or become sick as a result.

10 62. Many states have enacted their own regulations governing pet foods
11 that prohibit adulteration and misbranding, including Washington, Illinois,
12 Wisconsin, Pennsylvania, New Jersey and New York.¹³

13 63. Pet food manufacturers may fail to comply with state and federal laws
14 governing adulteration and misbranding in some of the following ways: (1)
15 producing pet foods that contain poisonous substances like pentobarbital used to
16 euthanize animals; (2) preparing, packaging and holding pet foods in unsanitary
17 facilities that contaminate them; (3) using non-slaughtered animals that may be
18 diseased, decomposed or euthanized; and (4) substituting other ingredients like
19 beef, horse or pig and selling them under a different name.

20 64. Many manufacturers, including Evanger’s, use meat from animals that

21
22 ¹² FDA Q&A, <https://www.fda.gov/AnimalVeterinary/SafetyHealth/ProductSafetyInformation/ucm544348.htm>.

23 ¹³ See, e.g., Wash. Rev. Code § 15.53.902 (adulteration) and §15.53.9022
24 (misbranding); 505 Ill. Comp. Stat. 30/3(s) (pet food), 30/7 (adulteration) and 30/8
25 (misbranding); WI Stat. § 94.72 (8) (adulteration and misbranding); 3 Pa. C. S. A.
26 §§ 5721 – 5737 (Ch. 72.11 (misrepresentations)); NJSA 4:4-20.1 *et seq.*, §§ 6
27 (misbranding) - 7 (adulteration); N.Y. Agric. & Mkts. Law §§ 131-133
28 (misbranding, adulteration and prohibited acts).

1 are **not** USDA-inspected, human-grade and have died by means other than
2 slaughter, in their pet foods, including animals that were euthanized using
3 pentobarbital. This practice has killed and sickened companion animals and put
4 other animals and humans' health and safety at risk.

5 **II. RECENT PET FOOD SCANDALS HAVE CAUSED CUSTOMERS**
6 **TO BECOME MORE INFORMED ABOUT THE PRODUCTS THEY**
7 **PURCHASE**

8 65. The lack of compliance with regulations has caused the industry to
9 come under fire in recent years following scandals that have had the result of
10 killing and sickening pets across the country and world.

11 66. In 2002, the FDA reported on its investigation into the presence of
12 pentobarbital in pet foods following reports from veterinarians that pentobarbital,
13 used as an anesthetizing agent for dogs and other animals, seemed to be losing its
14 effectiveness in dogs. The FDA stated that because pentobarbital is routinely used
15 to euthanize animals, the most likely way it could get into dog food would be in
16 rendered animal products. Rendered products come from a process that converts
17 animal tissues to feed ingredients, including tissues from animals that have been
18 euthanized, decomposed or were diseased. The FDA found that pentobarbital from
19 euthanized animals survives the rendering process and could be present in the
20 rendered feed ingredients used in pet food. The FDA's testing of dry dog food
21 confirmed some samples contained pentobarbital. The FDA concluded that
22 pentobarbital was entering pet foods from euthanized, rendered cattle or horses,
23 because of the lack of dog and cat DNA.¹⁴

24 ¹⁴ FDA, Food and Drug Administration/Center for Veterinary Medicine Report on
25 the Risk from Pentobarbital in Dog Food, February 28, 2002,
26 <https://www.fda.gov/aboutfda/centersoffices/officeoffoods/cvm/cvmfoiaelectronicreadingroom/ucm129131.htm> (last visited April 26, 2017).

1 67. Despite its findings, the FDA has not aggressively taken action under
2 FDCA, § 342 (a)(1) or (5), against the pet food companies that it found to have
3 used non-slaughtered animals and contain pentobarbital in their pet foods.
4 Therefore, manufacturers in the pet food industry, including Defendants, have
5 continued their illegal practice of using non-slaughtered animals that may contain
6 poisonous substances, like pentobarbital, in their pet foods.

7 68. In March 2007, another pet food scandal rattled consumers, when pet
8 food manufacturer Menu Foods alerted the FDA to animal deaths from its routine
9 taste trials, which was followed by numerous consumer and veterinarian reports of
10 many more pet deaths and sickness related to Menu Foods. These animals were
11 reported to have developed kidney failure after eating certain pet food produced at
12 Menu Foods' facilities.¹⁵

13 69. FDA laboratories found that melamine and melamine-related
14 compounds labeled as wheat gluten and rice protein concentrate had been imported
15 from China and used as ingredients in Menu Food's products. Cornell University
16 scientists also found melamine in the urine and kidneys of deceased cats that were
17 part of a taste-testing study conducted for Menu Foods. The combination of
18 melamine and cyanuric acid in pet foods form crystals in urine and kidney tissue,
19 which can lead to kidney failure and cause animal sickness and death. Over 150
20 brands of pet foods manufactured by Menu Foods were recalled and numerous
21 lawsuits were filed, including a class action that settled for tens of millions to
22 compensate pet owners for their veterinarian costs, pet loss and purchases. *Id.*

23 70. After being indicted on criminal charges for importing the
24

25 ¹⁵ FDA, Melamine Pet Food Recall-Frequently Asked Questions,
26 [https://www.fda.gov/animalveterinary/safetyhealth/recallswithdrawals/](https://www.fda.gov/animalveterinary/safetyhealth/recallswithdrawals/ucm129932.htm)
27 [ucm129932.htm](https://www.fda.gov/animalveterinary/safetyhealth/recallswithdrawals/ucm129932.htm) (last visited April 20, 2017).

1 contaminated pet-food ingredients used by Menu Foods that sickened and killed
2 thousands of family pets in 2007, the company responsible, ChemNutra, Inc. and its
3 owners, pled guilty and were sentenced to probation and a company fine of \$25,000,
4 after also agreeing to pay part of the class action settlement.¹⁶

5 71. Again, beginning in 2007, the FDA began repeatedly issuing alerts to
6 consumers about reports it had received concerning jerky treats that were made in
7 China causing illnesses involving 3,600 dogs and 10 cats in the U.S. and resulting
8 in approximately 580 deaths. However, after conducting more than 1,200 tests,
9 visiting jerky pet treat manufacturers in China, and collaborating with colleagues in
10 academia, industry, state labs and foreign governments, the FDA was unable to
11 determine the cause of the illnesses.¹⁷

12 72. In 2013, after a New York State lab reported finding evidence of up to
13 six drugs in certain jerky pet treats made in China, a number of jerky pet treat
14 products were removed from the market, and there was a corresponding decrease in
15 reports of jerky-suspected illnesses. *Id.*

16 73. In 2014, The Blue Buffalo Company Ltd. was sued by Nestle Purina
17 Petcare Company (“Nestle”) (*Nestle Purina Petcare Company v. The Blue Buffalo*
18 *Company Ltd.*, 4:14-cv-00859-RWS (E.D. Mo.)), for falsely stating that it did not
19 have any animal by-products in its pet food. When it was uncovered that Nestle was
20 correct and a supplier was providing meat by-product used in Blue Buffalo’s pet
21 food that was falsely labeled as otherwise, customers also sued in a class action, (*In*

22 ¹⁶ The VIN News Service, Sentences Handed Down in Pet Food Poisoning
23 Criminal Case, Feb. 9, 2010,
24 <http://news.vin.com/vinnews.aspx?articleId=14984> (last visited
April 21, 2017).

25 ¹⁷ FDA, Why Are Jerky Treats Making Pets Sick?
26 <https://www.fda.gov/ForConsumers/ConsumerUpdates/ucm371413.htm> (last
27 visited April 20, 2017).

1 *re Blue Buffalo Company, Ltd., Marketing and Sales Practices Litigation*, No. 14-
 2 md-02562-RWS (E.D. Mo. Dec. 21, 2015)), resulting in tens of millions in a
 3 settlement for customers mislead by the false advertising.

4 74. Blue Buffalo's supplier, Wilbur-Ellis and its employee, now face
 5 criminal charges in federal court and accusations of introducing adulterated food
 6 into interstate commerce, and misbranding its products by using too many lower-
 7 quality ingredients, such as chicken feathers, and not enough real chicken and other
 8 meat.¹⁸

9 **III. EVANGER'S MARKETS PET FOODS TO INGREDIENT-** 10 **CONSCIOUS CUSTOMERS**

11 75. In the wake of this uncertainty about the safety and labeling of pet food,
 12 consumers have increasingly become more aware and cautious about the products
 13 they purchase.

14 76. Recognizing the market for informed customers, who want to purchase
 15 products that come from the United States and are safe and contain high quality
 16 ingredients, Defendants have been capitalizing on these highly-publicized scandals
 17 by advertising and labeling their products to entice these customers, including
 18 Plaintiffs, to purchase the Pet Foods for their pets. Exhibit G, listing of Defendants'
 19 Pet Foods.

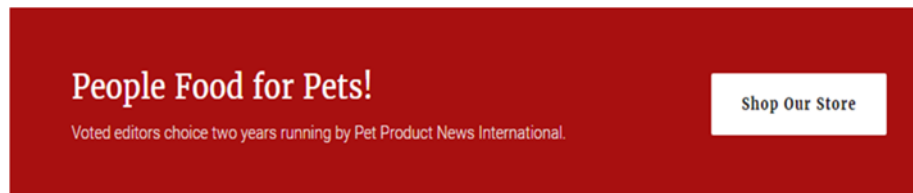
20 77. Evanger's has been an independent business for over 80 years, owned
 21 by the Sher family since 2002, with a self-proclaimed mission to develop "quality"
 22 products for companion pets. Evanger's specifically states that it "sell[s] *our*
 23 *products exclusively through independent neighborhood pet shops where quality*

24 ¹⁸ St. Louis Post Dispatch, *Pet Food Supplier Accused of Too Many Chicken*
 25 *Feathers, Not Enough Chicken*, March 7, 2017,
 26 [http://www.stltoday.com/business/local/pet-food-supplier-accused-of-too-many-](http://www.stltoday.com/business/local/pet-food-supplier-accused-of-too-many-chicken-feathers-not/article_b88af797-c3fe-56d1-a682-2c870a5669fb.html)
 27 [chicken-feathers-not/article_b88af797-c3fe-56d1-a682-2c870a5669fb.html](http://www.stltoday.com/business/local/pet-food-supplier-accused-of-too-many-chicken-feathers-not/article_b88af797-c3fe-56d1-a682-2c870a5669fb.html) (last
 28 visited April 20, 2017).

1 *and customer service are of the utmost importance.*”¹⁹ Plaintiffs purchased
2 Defendants’ Pet Foods at local pet stores and online through Chewy.com and
3 Defendants’ websites.

4 78. The publicity surrounding Menu Foods and similar scandals allowed
5 Defendants to capitalize on the opportunity to promote itself as a producer of
6 healthier, safe, alternative pet foods. Some small, independent pet food companies,
7 including Party Animal, in the wake of recalls, decided to partner with Evanger’s to
8 make their organic pet food. Shawna Abrams, one of the co-owners of Party Animal,
9 said at the time that “marketing our new food to retailers would have been a tougher
10 sell, but *with news of the recall [of Menu Foods’ pet food], suddenly everyone*
11 *wanted untainted, natural food like ours.*”²⁰

12 79. On the home page of its website, as recently as February 17, 2017,
13 Evanger’s prominently stated that “Healthy Food Makes Happy Pets,” “No
14 additives, artificial ingredients, or preservative,” “The Evanger’s Difference” is:



15
16
17
18 Evanger’s, Home, <https://evangersdogfood.com/> (last visited February 17, 2017). As
19 of the filing of this complaint, this language has been removed from the website.

20 80. However, Chewy.com, one of the largest online retailers of pet foods
21 similar to Amazon, continues to display a this advertisement on its website along
22 with its own video touting Evanger’s pet foods as “human grade”:

23
24 ¹⁹ Evanger’s, About Us, <https://evangersdogfood.com/about-us/> (last visited April 27, 2017).

25 ²⁰ Pet Product News, Business Builder: Private Labels Profit Potential, April 17,
26 2015 <http://www.petproductnews.com/April-2015/Business-BUILDER-Private-Labels-Profit-Potential/> (last visited April 25, 2017) (emphasis added).



People food for pets that's naturally the best

Evanger's

All Evanger's foods are made with completely human-grade, highly palatable and nutritious foods that will satisfy even the most finicky eater. With no soy, corn, wheat, artificial ingredients, harmful additives, preservatives or by-products, Evanger's canned meals make an excellent mixer to our dry foods.

Chewy.com, [https://www.chewy.com/evangers-grain-free-hand-packed-hunk/dp/ 32507](https://www.chewy.com/evangers-grain-free-hand-packed-hunk/dp/32507) (last visited Apr. 2, 2018)

81. In describing its products, Evanger's stated as recently as February 17, 2017, that it only uses quality, all-natural, "***human-grade USDA inspected meats***," stating, in pertinent part:

Evanger's utilizes ***human-grade USDA inspected meats*** to make highly palatable and nutritious foods that will satisfy even the most finicky eater. With no soy, corn, wheat, artificial ingredients, ***harmful additives***, preservatives or by-products, Evanger's canned meals make an excellent mixer to our dry foods. Not only do they offer your pet a variety in taste, our ***gourmet dinners*** offer the additional nutritional benefits your pet needs. Natural Vitamins and minerals are blended with the all-natural meats for ultimate nutrition that are completely balanced meals for all life stages, ages, and breeds.

Our ***Hand Packed Edition*** is a ***monumental improvement in canned dog and cat foods***. We have taken our ***extraordinary product and made it even better*** by filling each can individually with one pair of hands,

1 instead of machines. The benefit of this process is that you, the
 2 consumer, can actually *see the quality ingredients in its original form;*
 3 *whole, pure meats* and fresh vegetables without any additives or by
 4 products. Your pets will think they are being treated like kings and
 5 queens!

6 Since the 2003 addition of the Hand Packed foods, Evanger's family of
 7 foods has expanded to include the following groups of *exceptional*
 8 *foods and treats* . . .

9 Manufacturing Process

10 Evanger's cans are packed with *natural, raw ingredients in their own*
 11 *natural juices*. The ingredients are then cooked entirely inside the
 12 sealed can to lock in the nutrients and flavor of each variety. This
 13 process assures both *wholesome nutrition for long life and good*
 14 *health*, plus the great taste your dog and cat will love. Naturally the
 15 best!²¹

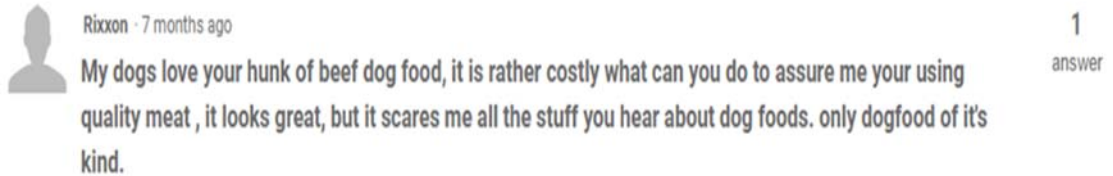
16 82. In order to attract other companies' brands to its manufacturing,
 17 Evanger's touts its use of "the highest quality of pet food available," and that "[b]y
 18 *working closely with local suppliers, we are able to keep raw material prices steady*
 19 *while delivering top quality products.*"²²

20 83. Evanger's corporate officer, Chelsea Sher, responded recently to a
 21 customer's question posted on the Hunk of Beef page that Evanger's quality is

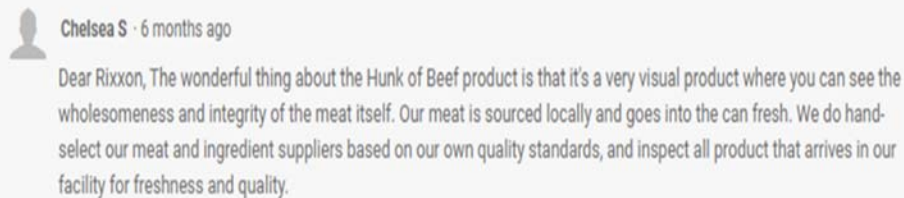
22 ²¹ Evanger's, About Our Products, [https://evangersdogfood.com/about-us/about-](https://evangersdogfood.com/about-us/about-our-products/)
 23 [our-products/](https://evangersdogfood.com/about-us/about-our-products/) (last visited February 17, 2017) (emphasis added). As of the filing of
 24 this second amended complaint, the words "human grade" and "USDA inspected"
 25 have been removed from this page, although Evanger's continued to maintain that
 its products were "*USDA inspected*" even after the filing of this lawsuit.

26 ²² Evanger's, Private Label Services, [https://evangersdogfood.com/about-](https://evangersdogfood.com/about-us/private-label-services/)
 27 [us/private-label-services/](https://evangersdogfood.com/about-us/private-label-services/) (last visited April 27, 2017) (emphasis added).

assured by its hand-selection of meats and suppliers and inspections for freshness and quality:



Answer this Question



Evanger's, Hunk of Beef, <https://evangersdogfood.com/product/20109/> (last visited April 27, 2017).

84. Evanger's has close, long standing relationships with suppliers, some for over forty years, including one of the suppliers of its Hunk of Beef and Pulled Beef.²³

85. As recently as February 9, 2017, Evanger's touted that their "Grain Free Hand Packed" specialties, including Hunk of Beef, Braised Beef, and certain products composed of chicken including Chunky Chicken Casserole and Roasted Chicken Drummets, with "fresh, natural and superior ingredients (no by-products) ensure *quality on a human-grade level*." It states that its cooking process softens its recipes with bones making them "*edible, safe, wholesome* and highly digestible."²⁴

²³ Evanger's, Voluntary Recall, posted February 3, 2017, <https://evangersdogfood.com/news-events/pug-family-updates/> (last visited February 17, 2017) (since removed).

²⁴ Evanger's, Dog Food, Grain Free Hand Packed, <https://evangersdogfood.com/>

86. Evanger's touts that Hunk of Beef is its best seller, and that it sells more than one million cans of a year.²⁵ It labels Hunk of Beef as "100% beef" with a picture of a human steak dinner, and the statement "Foodies' Choice," a phrase typically used to describe people who only eat what they consider the best quality and tasting foods:



HUNK OF BEEF – PACKED BY HAND!



Premium tender 100% beef roast cooked
in its own juices serves up a meaty
supplement.

\$ 36.91

87. Evanger's also offered its Braised Beef as uncut pieces of meat in gravy, with a label that says "100% Beef Meat" and a picture of a human steak meal:



**BRAISED BEEF CHUNKS
WITH GRAVY PACKED BY
HAND!**

A hearty dinner of tender chunks of beef
with market fresh vegetables of peas and
carrots together with nutritious gravy.
Grain Free!

\$ 36.91

dog-food/grain-free-hand-packed/ (last visited February 9, 2017) (emphasis added). As of the date of this Amended Complaint, the words "human grade level" have been removed.

²⁵ Evanger's, Voluntary Recall, posted January 4, 2017, <http://evangersdogfood.com/news-events/pug-family-updates/> (last visited February 17, 2017) (since removed).

88. Evanger's website has a video of Defendants' corporate officer, Chelsea Sher, touting its "people food for pets," in which she eats some Hunk of Beef to show that it is edible by people²⁶:

Chelsea Sher Eats Evanger's Dog Food



89. In addition to its Hand Packed lines, Evanger's also carries an organic line of Pet Foods, which it has touted as "***Organic People Food for Pets.***" The line is purportedly certified by the organic certification group Oregon Tilth for its "handling" process but not its foods, which permits non-organic products on the same line as organic products if there are sufficient measures and procedures in place, including cleaning and sanitation, to protect organic product from contamination or commingling of any non-organic material. Undisclosed to customers, the "organic" certification for pet foods is not the same as that for "organic people foods" although Defendants conflate them to make customers believe they are buying "organic people food"²⁷:

²⁶ Evanger's, News & Events, Chelsea Sher Eats Evanger's Dog Food, Published on YouTube August 25, 2015, <https://evangersdogfood.com/news-events/recent-press/> and <https://youtu.be/RQekr7QtSiI> (last visited Mar. 30, 2018).

²⁷ Oregon Tilth, Processing and Handling FAQ, <https://tilth.org/app/uploads/2014/12/BrandsMarketersManufacturersFAQ.pdf> (last visited May 2, 2017).

Organic People Food for Pets!



100% ORGANIC COOKED CHICKEN



ORGANIC TURKEY WITH POTATO & CARROTS DINNER

Evanger's, Organics, <https://evangersdogfood.com/dog-food/evangers-organics/> (last visited Sept. 20, 2017) (now removed). As recently as February 17, 2017, Evanger's touted the phrase "*Organic People Food for Pets*," which it has now changed to "Organic Food *for Dogs*."

90. Evanger's provided display materials to retailers to place in their stores next to Defendants' products, without specifying the products to which they apply, which advertise Evanger's as "Green," "USDA Organic" - subject to the same requirements as human food and "Oregon Tilth" certified. These representations entice customers to purchase them believing they are purchasing as Evanger's represents "organic people food" for their pets:



1 91. During 2017, after the FDA cited numerous unsanitary conditions at
 2 Defendants' Wheeling facility and adulteration of the products that prompted the
 3 Recalls, Defendants moved their operations from Wheeling to their Markham
 4 facility. Evanger's did not disclose that the organic certification for handling with
 5 Oregon Tilth was tied to the Wheeling facility only and was surrendered on August
 6 16, 2017.²⁸ However, Evanger's continues to state on its website that it sells organic
 7 products certified by Oregon Tilth, which are "temporarily out of stock."²⁹

8 92. Evanger's offers other "all-natural, meat-based" pet foods for dogs, cats
 9 and ferrets with "no by-products, additives or preservatives" that it also advertises
 10 as "human grade" and "People Food for Pets." In addition to its Grain Free Hand
 11 Packed and Organics lines, Evanger's offers Classic Line, Dry Foods, Grain Free
 12 Game Meats, Nothing but Natural – "made of 100% whole muscle meat," Signature
 13 Series, Super Premium – that are touted as "completely balanced, highly nutritious,
 14 great tasting, innovative meals" and "holistic," Jerky Treats, Freeze Dried Treats and
 15 Ferret food.³⁰

16 93. Evanger's Super Premium brand that it also advertises as "human
 17 grade" "People Food for Pets" includes its Duck & Sweet Potato Dinner for Dogs.
 18 It touts that "[d]electable duck and farm-sourced sweet potatoes are a gourmet dinner
 19 and a wonderful source of fiber," are "[s]oothing for sensitive stomachs" and provide
 20

21 ²⁸ Letter from Evanger's attorney dated October 20, 2017, [http://truthaboutpetfood.](http://truthaboutpetfood.com/wp-content/uploads/2017/10/Evangerslawyerletter.pdf)
 22 [com/wp-content/uploads/2017/10/Evangerslawyerletter.pdf](http://truthaboutpetfood.com/wp-content/uploads/2017/10/Evangerslawyerletter.pdf) (last visited Mar. 30,
 23 2018); Oregon Tilth, Evanger's, <https://tilth.org/tilth-producer/evangers-dog-cat-food-co-inc/>
 (last visited Apr. 1, 2018).

24 ²⁹ Evanger's, Organics, <https://evangersdogfood.com/product/50113/> (last visited
 25 Mar. 30, 2018).

26 ³⁰ Evanger's, About Us, Product Guide, [https://evangersdogfood.com/about-](https://evangersdogfood.com/about-us/product-guide/)
 27 [us/product-guide/](https://evangersdogfood.com/about-us/product-guide/) (last visited May 2, 2017).

1 “[e]asy digestability for optimal canine health.”³¹



8

9 94. Evanger’s states that is “100% committed to the safety of its

10 products.”³²

11 95. Similar to Evanger’s, Against the Grain also touts “carefully selected,”

12 “highest quality,” “human grade,” “meat-based” Pet Foods:

13 85% Meat. 0% Grain.

14 Because dogs and cats are primarily carnivores, we have designed all of our

15 formulations to include at least 85% meat. But not only do we make *meat-*

16 *dominant foods, but our proteins are all of high quality, and only sourced*

17 *from human grade facilities*. They never contain growth hormones and are

18 anti-biotic free. To show you how proud we are of *our carefully selected*

19 *ingredients*, we do not make a traditional, loaf-style food. Instead, we hand

20 fill all of our canned foods so that *you can see the quality of our hand pulled*

21 *meats* and fresh caught fish right when you open a can of Against the Grain

22 pet foods, *instead of “mystery meat.”*

23 Our Mission.

24 ³¹ Evanger’s, Products, Duck & Sweet Potato, [https://evangersdogfood.com/](https://evangersdogfood.com/product/20102/)

25 product/20102/ (last visited Sept. 8, 2017).

26 ³² Evanger’s, News, Voluntary Recall, [https://evangersdogfood.com/news-](https://evangersdogfood.com/news-events/updates/)

27 events/updates/ (last visited April 27, 2017).

Our mission is to *improve the health and quality of life of our companion pets* through the development of the *safest*, most nutritious, and palatable pet products available. We believe that our *high quality products* should not only sustain our companion pets, but our emphasis on palatability also increases their enjoyment of life—like you and I.

All That.

Instead of conforming to all other pet food companies’ traditions of making foods, who use a top-down approach when creating pet food, Against the Grain started with a bottom-up approach. We first asked, “What is the best pet food that can be made, then how do we make it.” The end result offers the smartest choice for a *healthy* and happy pet. All of foods are *minimally processed at our own factories*, and all processing methods are designed to ensure that the integrity of the proteins, vitamins, and natural enzymes are maintained.

Against the Grain *uses all fresh ingredients*, and has designed all foods to be grain-free and gluten-free. We NEVER use corn, wheat, or soy. We have taken steps to use sustainable and green resources; our fresh-caught fish-based cat canned foods are dolphin-safe and turtle-safe. Our meat products are all GMO and anti-biotic free. Finally, we use the maximum amount of recyclable materials in our retail packaging, and use strictly skylights in our manufacturing plant.³³

96. In describing why it started Against the Grain, Defendants state that they wanted to make Pet Foods that were “second to none” with its number one

³³ Against the Grain, About the Food, <http://www.againstthegrainpetfood.com/about-the-food/> (last visited May 2, 2017) (emphasis added). As of the time of the filing of this Second Amended Complaint, the “human grade” representation was removed, however it was on the website as recently as October 2017.

criteria being “SAFETY.” It boasts that unlike other brands, it owns its manufacturing facility and produces its own products that gives it accessibility and the ability to create unique and innovative products.³⁴

97. Against the Grain brand had three lines of Pet Foods: Super Food, Pulled Meat Dog Food and Canned Cat Food and recently started a new one “Nothing Else.” As recently as October 2017, it stated that its Canned Cat Food was:



Against the Grain, Canned Cat Food, http://www.againstthegrainpet_food.com/human-quality-cat-food/ (last visited October 1, 2017) (now removed).

98. As recently as February 17, 2017, Against the Grain stated that its Pulled Meat Dog Foods, including Pulled Beef and Pulled Chicken, were “*human grade*”:



Against the Grain, Pulled Meat Dog Foods, <http://www.againstthegrainpetfood.com/pulled-meat-dog-food/> (last visited Feb. 17, 2017). As of the filing of this lawsuit, the words “human grade” have been removed for both chicken and beef products.

99. Evanger’s also manufactures pet foods for Party Animal, which makes

³⁴ Against the Grain, About Us, <http://www.againstthegrainpetfood.com/about-us/> (last May 2, 2017) (capitalization in original).

1 similar representations about its organic pet food, including that it uses the “best”
 2 and “healthiest” ingredients in its products.³⁵

3 100. On its website, Party Animal details the USDA’s National Organic
 4 Program which requires that, in pertinent part:

5 organic ingredients are free of pesticides, synthetic fertilizers, antibiotics,
 6 growth hormones, GMO’s (genetically modified organisms), by-products,
 7 artificial colors, flavors and preservatives. Organic livestock may not be given
 8 antibiotics, growth hormones or any animal-byproducts. They can only be fed
 9 organic feed and must have access to the outdoors. All certified USDA
 10 organic pet products must *meet the same USDA requirements as human*
 11 *food*.

12 * * * *

13 A complete breakdown of our formula, including *sources of each ingredient*
 14 is required as part of the organic certifying agency’s review and approval
 15 process. This independent third-party review and approval process is unique
 16 in pet food/treats.

17 *Id.* (emphasis added).

18 101. Party Animal also states that some of its products are labeled certified
 19 by Oregon Tilth, which “inspects [its] production facility and reviews each
 20 ingredient used in our organic formulas . . . including sources of each ingredient is
 21 required as part of the agency’s review and approval process to certify that the
 22 federal organic standards are met.” *Id.*

23 102. Party Animal’s Cocolicious line states that its products are USDA
 24 organic certified, including its beef and contain “no junk or weird stuff,” including

25
 26 ³⁵ Party Animal, Our Story and FAQ, <http://partyanimalpetfood.com/> (last visited
 27 May 3, 2017).

Cocolicious Organic Beef & Turkey dog food and Cocolicious Organic Chicken & Beef:



Party Animal, Cocolicious Organic Beef & Turkey, <http://partyanimalpetfood.com/?portfolio=cocolicious-organic-beef-turkey> (last visited May 3, 2017).



Party Animal, Cocolicious Organic Chicken & Beef, <http://partyanimalpetfood.com/?portfolio=cocolicious-organic-chicken-beef> (last visited May 3, 2017).

III. EVANGER'S HISTORY WITH REGULATORS

103. Since 2002, when the Shers purchased Evanger's, the company has been plagued by issues with regulators relating to its manufacturing facilities and products.

104. On April 24, 2008, the FDA issued an order requiring Evanger's to obtain an emergency permit from the agency before its canned pet food products

1 could enter interstate commerce, after an inspection found “significant deviations
2 from prescribed documentation of processes, equipment, and recordkeeping” in its
3 canned food production. The FDA indicated that these problems “could result in
4 under-processed pet foods, which can allow the survival and growth of Clostridium
5 botulinum (C. botulinum), a bacterium that causes botulism in some animals as well
6 as in humans.”³⁶

7 105. The FDA initially approved a temporary emergency permit, based on a
8 finding that Evanger’s had taken corrective actions to address these issues.
9 However, shortly thereafter, in June 2009, the FDA revoked the permit after FDA
10 inspections of Evanger’s pet food manufacturing facilities determined that
11 Evanger’s was not operating in compliance with the permit’s mandatory
12 requirements and conditions.³⁷

13 106. In May 2011, the FDA revisited Evanger’s. This time the FDA issued
14 a warning letter to Evanger’s, finding that its Lamb and Rice and Grain Free Duck
15 Pet Foods were adulterated and misbranded in violation of federal law because they
16 did not contain any lamb or duck, respectively. The FDA also stated that Evanger’s
17 failed to provide processing and production records upon written demand as
18 required.³⁸

19 ³⁶ FDA, FDA Orders Pet Food Maker to Obtain Emergency Operating Permit,
20 dated April 24, 2008, [https://wayback.archive-
21 it.org/7993/20170114031812/http://www.fda.gov/NewsEvents/Newsroom/PressAn-
nouncements/2008/ucm116886.htm](https://wayback.archive-it.org/7993/20170114031812/http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2008/ucm116886.htm) (last visited May 15, 2017).

22 ³⁷ North Carolina Academy of Small Animal Medicine, Recalls, FDA Suspends
23 Temporary Emergency Permit of Pet Food Maker, dated June 12, 2009,
24 <http://www.ncasam.org/educator/article/349/> (last visited May 15, 2017).

25 ³⁸ FDA, Evanger's Dog & Cat Food Company, Inc. 5/5/11, dated May 5, 2011,
26 [https://wayback.archive-it.org/7993/20170112193647/http://www.fda.gov/ICECI/
27 /EnforcementActions/WarningLetters/2011/ucm255000.htm](https://wayback.archive-it.org/7993/20170112193647/http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2011/ucm255000.htm) (last visited May 15,
28 2017).

1 107. According the FDA's Establishment Inspection Report's (the "EIR")
2 History of Evanger's, on May 27, 2015, an inspection by the Illinois Department of
3 Agriculture noted unsanitary conditions, including but not limited to observing birds,
4 flies and maggots in Evanger's production area and in outgoing material. The
5 inspector also indicated that Evanger's had a lack of production records detailing a
6 history of product production and distribution and was not recording actual weights
7 of its products, only theoretical ones. In its follow up inspection on January 27, 2016,
8 Evanger's was observed to not be in active production at that time.

9
10 **IV. DEFENDANTS' PET FOOD POISONS PLAINTIFFS' PETS AND**
11 **ONE PET DIES**

12 108. Relying on Defendants' marketing and advertising of its products, the
13 Maels purchased Defendants' Pet Foods for four years as a treat for their five dogs.
14 On New Year's Eve, December 31, 2016, Plaintiff Nicole Mael purchased several
15 of Evanger's products at her local pet food store, Healthier Choices, including cans
16 of Hunk of Beef and Pulled Beef.

17 109. Immediately after their five dogs consumed the Hunk of Beef, they
18 began acting intoxicated and non-responsive - suffering from acute neurological
19 symptoms. The Maels rushed them to an emergency vet. However, one of their dogs,
20 Talula was forced to be euthanized as a result of poisoning from the Hunk of Beef
21 the next day, January 1, 2017. The other four have undergone continued veterinary
22 care, including Tito, who was on seizure medication for months.³⁹

23 110. After Talula's death, the Maels, working with the FDA, requested that

24 ³⁹ FDA, CVM Updates, FDA Cautions Pet Owners and Caretakers Not to Feed
25 Certain Evanger's or Against the Grain Canned Pet Foods Due to Adulteration
26 with Pentobarbital ("FDA Caution"), posted February 17, 2017
27 [https://www.fda.gov/AnimalVeterinary/NewsEvents/CVMUpdates/ucm](https://www.fda.gov/AnimalVeterinary/NewsEvents/CVMUpdates/ucm542265.htm)
28 542265.htm (last visited May 9, 2017).

1 a necropsy be performed on Talula's body to determine the cause of death. The
2 necropsy was performed at Oregon State University Veterinary Diagnostic
3 Laboratory ("OSU"), on January 3, 2017. The FDA EIR stated that the OSU
4 examination found no abnormalities. The necropsy found "partially digested
5 kibble," and it could not rule out neurotoxicosis until the stomach contents and
6 remaining can of Hunk of Beef were tested. Exhibit H, OSU, Case Summary at 1.

7 111. On January 3, 2017, after Talula's death and neurotoxicosis not being
8 ruled out in the necropsy, while awaiting further testing results of Talula's stomach
9 and the Pet Foods, Plaintiff Nicole Mael emailed Brett Sher at Evanger's, and
10 included the FDA in the communication, to provide notice of the issue as follows:

11 I wanted to contact you and let you know my 5 dogs became ill after eating
12 Evangers hunk of Beef with A Jus. The lot number is 181 6E O6HB 13 exp
13 June 2020. Please, please recall this food so no other person goes through
14 what I am going through. Nikki Mael

15 112. The FDA directed that further testing of the animal's stomach contents
16 and the remaining un-opened cans of Hunk of Beef be performed at Michigan State
17 University, Diagnostic Center for Population and Animal Health ("MSU"). On
18 January 17, 2017, MSU clinical toxicologist John P. Buchweitz performed the
19 testing, and confirmed that both the Hunk of Beef dog food and Talula's stomach
20 contents tested positive for "large quantity chromatographically" of pentobarbital.
21 On January 23, 2017, Dr. Buchweitz notified OSU and Plaintiffs of the results. He
22 requested that the Maels send the opened can of the Hunk of Beef for testing. Exhibit
23 H, MSU, Toxicology at 1-2.

24 113. On January 26, 2017, the FDA notified the Maels that the opened and
25 unopened Hunk of Beef dog food also tested positive for an "abundant amount" of
26 pentobarbital. *See* Exhibit H, OSU, Case Summary at 2 and MSU, Toxicology at 1.

1 114. The FDA testing confirmed that Talula's stomach contents, an open
2 can of Hunk of Beef fed to the Maels' pets, and unopened cans of Against the
3 Grain and Hunk of Beef purchased by the Maels and from the retailer, Healthier
4 Choices, where the Maels purchased their pet food, ***all*** contained pentobarbital.⁴⁰

5 115. As of the filing of this second amended complaint, the Maels have
6 expended over \$6,000.00 on veterinary care relating to their pets eating Hunk of
7 Beef, including but not limited to emergency hospitalization in attempts to save their
8 pets' lives, ongoing monitoring and medications.

9 116. In addition to the estimated thousands of dollars that the Maels have
10 spent purchasing Evanger's Pet Foods over the last four years, they have spent an
11 average of \$100 a week on making their own food for their pets to ensure that it is
12 healthy and safe.

13 **V. FDA'S INVESTIGATION CONFIRMS PENTOBARBITAL IN**
14 **EVANGER'S PET FOODS AND LEADS TO PRODUCT RECALLS**

15 117. In addition to the aforementioned testing involving Talula and
16 Plaintiffs' can of Hunk of Beef, the FDA performed additional testing of
17 Defendants' Pet Foods and investigated Defendants' facilities. The testing and
18 investigations further confirmed the adulteration of Evanger's Pet Foods and
19 misrepresentations to customers.

20 118. On January 10, 2017, the FDA began inspections of Evanger's
21

22 ⁴⁰ FDA Caution, [https://www.fda.gov/AnimalVeterinary/NewsEvents/CVM](https://www.fda.gov/AnimalVeterinary/NewsEvents/CVMUpdates/ucm542265.htm)
23 Updates/ucm542265.htm (last visited April 25, 2017); Exhibit C, OSU report at 2
24 (Addendum 1/23/17 "Testing of the feed and stomach contents has found
25 pentobarbital") and MSU report at 1 (feed and stomach contents "positive" for
26 "pentobarbital (euthanasia agent –large quantity chromatographically) "If this
27 sample came directly from a can, this is an urgent matter and needs to be reported
28 to the FDA Feed Safety Portal.")

1 production facilities. During this inspection, it collected and tested two cans of
2 Against the Grain's Pulled Beef that also tested positive for pentobarbital.⁴¹

3 119. In its review of Defendants' records, the FDA found the bill of lading
4 of Evanger's meat supplier, Bailey Farms, stating it was "Inedible Hand Deboned
5 Beef" "FOR PET FOOD USE ONLY. NOT FIT FOR HUMAN CONSUMPTION."
6 The FDA determined that the supplier "does *not* have a grant of inspection [or
7 inspection mark] from the United States Department of Agriculture's Food Safety
8 Inspection Service" and "would *not* be considered human grade." The FDA also
9 indicated that the supplier's export certification under APHIS was not active or
10 valid. "The FDA's preliminary assessment indicates that *none* of [Evanger's beef]
11 suppliers are USDA-FSIS registered facilities."⁴²

12 120. The FDA published its observations in a "Form 483", which "noted
13 numerous significant concerns with conditions" from its inspection of Evanger's
14 facilities in Wheeling, Illinois, and Nutripack, LLC in Markham, Illinois.⁴³

15 121. The inspection report for Defendants' Wheeling facility revealed that
16 cans of Hunk of Beef and Pulled Beef from that facility tested positive for
17 pentobarbital. It also noted condensation dripping into its cans of Pet Foods,
18 including Hunk of Beef. It described pools of water, peeling paint, mold, and live
19 fly-like insect where Pet Food was exposed. It also noted an open sanitary sewer
20 within 25 feet of food storage and processing. The FDA noted a lack of refrigerated
21 storage facilities or other means of controlling the temperature of exposed raw meat

22 _____
23 ⁴¹ FDA Q&A, <https://www.fda.gov/AnimalVeterinary/SafetyHealth/ProductSafetyInformation/ucm544348.htm> (last visited May 9, 2017).

24 ⁴² *Id.* (emphasis added).

25 ⁴³ FDA Cautions, <https://www.fda.gov/AnimalVeterinary/NewsEvents/CVMUpdates/ucm542265.htm>; Exhibit D, Form 483 FDA Inspections of Evanger's
26 facilities.

1 that were instead stored at ambient temperature. The FDA also noted “frozen ice
2 containing a blood-like substance across the floors of the three trailers, and also on
3 the ground immediately outside of two of the trailer doors.” Exhibit I, Wheeling
4 facility Form 483.

5 122. According the EIR, some of the observations in 2017 were similar to
6 those observed during the inspection on May 27, 2015, a full two years earlier. The
7 EIR also indicated that Defendants refused to allow pictures and sign requested
8 affidavits and did not provide requested documentation, including relating to
9 information on their suppliers and whether they were USDA-FSIS, human grade as
10 represented. The EIR noted that Defendants only produced an expired USDA-
11 APHIS placard to support their claim that their meat was USDA-inspected, which it
12 did not because the USDA-APHIS placard only indicated that the raw meat could
13 not be exported. It did not demonstrate that it was fit for human consumption or
14 USDA-FSIS inspected.

15 123. The EIR stated that following the FDA inspections of the Wheeling
16 facility noting unsanitary conditions, Evanger’s planned to move out of the
17 Wheeling facility to Markham, which occurred during 2017.

18 124. The inspection report for Evanger’s Markham facility likewise
19 indicated that Pulled Beef tested positive for pentobarbital. It also stated that this
20 facility’s Pet Foods are adulterated where they were prepared, packed, or held under
21 insanitary conditions that may have contaminated them or made them unhealthy.
22 The FDA noted that, on four different dates, condensation was dripping throughout
23 the processing and storage facility and into open cans of Pet Food, and that the floor
24 was damaged in a manner that caused pools of water to form. The report stated that
25 frozen and raw meats were prepared for processing while having direct contact with
26 insanitary, bare, paint peeling and unprotected concrete flooring. The report noted

1 that employees were cutting raw chicken parts on untreated wooden building
2 construction lumber. The report observed birds feeding on spilled pet food, resting
3 in rafters and flying throughout the warehouse. Exhibit I, Markham facility Form
4 483.

5 125. The FDA confirmed at the time that it had received ten complaints,
6 which it was continuing to follow up on, regarding Evanger's products, including
7 five suggesting pentobarbital poisoning involving Hunk of Beef *and Braised Beef*.⁴⁴

8 126. USDA-FSIS also tested Hunk of Beef products, and found the meat was
9 bovine (beef) with "trace amounts" of pork and equine.⁴⁵

10 127. The FDA encourages facilities to initiate a voluntary recall and to
11 update the product involved in the recall as more information becomes available. It
12 also states that "it is *not* acceptable to use animals euthanized with a chemical
13 substance in pet or other animal foods" and that there is *no* acceptable level of
14 pentobarbital in pet food. It also noted that due to the irregular distribution of meat
15 from various animals in the "chunk of beef" products, that "if even one can tests
16 positive for pentobarbital, we have to consider the possibility that some, but not
17 necessarily all other cans in that lot will also test positive."⁴⁶

18 128. On February 3, 2017, following discussion with the FDA, Evanger's
19 initiated a voluntary recall of certain lots of Hunk of Beef: 1816E03HB,
20 1816E04HB, 1816E06HB, 1816E07HB and 1816E13HB with an expiration date of
21 June 2020. The lots were distributed to fifteen states, Washington, California,

22 _____
23 ⁴⁴ FDA Q&A, <https://www.fda.gov/AnimalVeterinary/SafetyHealth/ProductSafetyInformation/ucm544348.htm>.

24 ⁴⁵ FDA Caution, <https://www.fda.gov/AnimalVeterinary/NewsEvents/CVMUpdates/ucm542265.htm>.

25 ⁴⁶ FDA Q&A, <https://www.fda.gov/AnimalVeterinary/SafetyHealth/ProductSafetyInformation/ucm544348.htm> (emphasis added).

1 Minnesota, Illinois, Indiana, Michigan, Wisconsin, Ohio, Pennsylvania, New York,
2 Massachusetts, Maryland, South Carolina, Georgia and Florida.⁴⁷

3 129. On February 9, 2017, after the FDA's test of two cans of Against the
4 Grain's Pulled Beef were positive for pentobarbital from the same Evanger's facility,
5 and after discussions with the FDA, Evanger's initiated a voluntary recall of Pulled
6 Beef lot 2415E01ATB12, with an expiration date of December 2019, manufactured
7 and distributed in December 2015 to Washington and Maryland, which it announced
8 publicly on February 13, 2017.⁴⁸

9 130. On February 14, 2017, the FDA concluded that it was unable to
10 determine from Evanger's available records whether any of Evanger's other
11 products, or any products Evanger's makes for other companies, contained the beef
12 that went into the recalled products.⁴⁹

13 131. On February 20, 2017, Evanger's notified the FDA that it planned to
14 recall *all* "chunk of beef" products.

16 ⁴⁷ FDA, Recalls, Market Withdrawals, & Safety Alerts, Evanger's Voluntarily
17 Recalls Hunk of Beef Because of Pentobarbital Exposure in one Batch of Food,
18 February 3, 2017 ("Hunk of Beef Recall Feb. 3, 2017"), <https://www.fda.gov/Safety/Recalls/ucm539900.htm> (last visited May 11, 2017); FDA Caution,
19 <https://www.fda.gov/AnimalVeterinary/NewsEvents/CVMUpdates/ucm542265.htm>.

20 ⁴⁸ FDA Caution, posted February 17, 2017, [https://www.fda.gov/Animal](https://www.fda.gov/AnimalVeterinary/NewsEvents/CVMUpdates/ucm542265.htm)
21 [Veterinary/NewsEvents/CVM Updates/ucm542265.htm](https://www.fda.gov/AnimalVeterinary/NewsEvents/CVMUpdates/ucm542265.htm); FDA, Recalls, Market
22 Withdrawals, & Safety Alerts, Against the Grain Pet Food Voluntarily Recalls One
23 Lot of Pulled Beef Due to Potential Adulteration with Pentobarbital, February 14,
24 2017 ("Pulled Beef Recall Feb. 14, 2017"), [https://www.fda.gov/Safety/Recalls/](https://www.fda.gov/Safety/Recalls/ucm541692.htm)
25 [ucm541692.htm](https://www.fda.gov/Safety/Recalls/ucm541692.htm) (last visited May 11, 2017); Against the Grain, Voluntary Recall,
http://www.againstthegrainpetfood.com/about_us/voluntary-recall/ (last visited
May 11, 2017).

26 ⁴⁹ FDA Q&A, [https://www.fda.gov/AnimalVeterinary/SafetyHealth/ProductSafety](https://www.fda.gov/AnimalVeterinary/SafetyHealth/ProductSafetyInformation/ucm544348.htm)
27 [Information/ucm544348.htm](https://www.fda.gov/AnimalVeterinary/SafetyHealth/ProductSafetyInformation/ucm544348.htm).

1 132. On February 27, 2017, the FDA became aware that Evanger's was
2 notifying distributors and retailers of a new recall for its ***Braised Beef***, bar code
3 20107, without explanation, as well as ***expanding the prior recall*** of Hunk of Beef,
4 bar code 20109, and Pulled Beef, bar code 80001, manufactured from December
5 2015 to January 2017, with expiration dates December 2019 to January 2021.⁵⁰

6 133. The EIR indicates that Evanger's did not identify raw ingredient
7 suppliers in finished products and could not determine that Bailey Farms was the
8 sole supplier of the meat in the recalled products. The recall therefore purportedly
9 included all "chunk of beef" products regardless of the ingredient supplier. The EIR
10 indicated that one "chunk of beef" product, Beef Tips with Gravy for Cats, was not
11 included in the recalls.

12 134. Upon information and belief, Evanger's has not provided customers
13 who purchased its Pet Foods with a refund based upon the value of the products
14 purchased and not returned.

15 135. Upon information and belief, some retailers were not reimbursed or
16 refunded for the recalled products that were returned by customers, or for Evanger's
17 other products that retailers were not able to or did not want to sell following the
18 recall. Some retailers have also suffered damage to their reputations with customers
19 from the recall and lost sales as a result.

20 136. On April 17, 2017, ***nearly four months*** after Plaintiffs' dogs were
21 poisoned by Evanger's Pet Foods, Party Animal initiated a recall of its products that
22

23 ⁵⁰ FDA Caution, updated March 2, 2017, [https://www.fda.gov/AnimalVeterinary/](https://www.fda.gov/AnimalVeterinary/NewsEvents/CVMUpdates/ucm542265.htm)
24 [NewsEvents/CVM Updates/ucm542265.htm](https://www.fda.gov/AnimalVeterinary/NewsEvents/CVMUpdates/ucm542265.htm); FDA, Recalls, Market Withdrawals,
25 & Safety Alerts, Evanger's Pet Food and Against the Grain Voluntarily Recalls
26 Additional Products Out of Abundance of Caution due to Potential Adulteration
27 with Pentobarbital, March 3, 2017 ("Expanded Recall Mar. 3, 2017"),
28 <http://www.fda.gov/Safety/Recalls/ucm544972.htm> (last visited May 11, 2017).

1 had been manufactured by Evanger's. After a dog became sick from eating Party
 2 Animal's products, and testing from Texas A&M confirmed that Cocolicious Beef
 3 & Turkey dog food (Lot #0134E15204 04, best by July 2019) and Cocolicious
 4 Chicken & Beef dog food (Lot #0134E15237 13, best by August 2019)
 5 ("Cocolicious Beef Products") contained pentobarbital, Party Animal initiated its
 6 recall. Party Animal indicated that it is working with distributors and retailers to
 7 determine if any additional beef-flavored products remain on shelves. It also stated
 8 that it is having "extensive discussions" with Evanger's regarding the cause of the
 9 contamination of its pet food and re-examining its manufacturing processes.⁵¹

10 137. On June 29, 2017, the FDA issued a Warning Letter to Evanger's
 11 detailing violations that are "*symptomatic of serious problems in your firm's*
 12 *manufacturing and quality assurance systems.*" The FDA gave Evanger's fifteen
 13 days to respond with its steps taken to correct the identified violations and warned
 14 that "[f]ailure to implement lasting corrective actions may result in FDA taking
 15 regulatory action, such as seizure or injunction, without further notice."⁵²

16 138. In the Warning Letter, the FDA provided further results of its sampling
 17 of the Pet Foods that found pentobarbital thereby rendering them adulterated in
 18 violation of the FDCA, in the following lots:

19 (1) Evanger's Braised Beef Chunks, lot code 2016E08BBW11 Best
 20 Aug 2020.

21 (2) Evanger's Hunk of Beef Au Jus, lot code 1816E14HBC18 Best

22 ⁵¹ FDA, Recalls, Market Withdrawals, & Safety Alerts, Party Animal Recalls Dog
 23 Food Due to Potential Presence of Pentobarbital, Posted April 25, 2017 ("Party
 24 Animal Recall"), <https://www.fda.gov/Safety/Recalls/ucm554771.htm> (last visited
 May 11, 2017).

25 ⁵² FDA, Evanger's Dog & Cat Food Co 6/29/17, [https://www.fda.gov/iceci/](https://www.fda.gov/iceci/enforcementactions/warningletters/2017/ucm565516.htm)
 26 [enforcementactions/warningletters/2017/ucm565516.htm](https://www.fda.gov/iceci/enforcementactions/warningletters/2017/ucm565516.htm) (last visited Sept. 3,
 27 2017) (emphasis added).

1 June 2020.

2 (3) Evanger's Hunk of Beef Au Jus, lot code 1816E02HB12 Best
3 June 2020.

4 (4) Evanger's Hunk of Beef Au Jus, lot code 1316E23HB09 Best
5 Jan 2020.

6 (5) Evanger's Hunk of Beef Au Jus, lot code 1816E03HB17 Best
7 June 2020.⁵³

8 139. The FDA acknowledged Evanger's action of conducting a recall for all
9 of its whole beef chunk meat products manufactured between December 2015 and
10 January 2017. It also noted the FDA's receipt and review of Evanger's
11 correspondence dated 2/4/2017, 2/21/2017, 4/4/2017, and 5/23/2017, regarding
12 Evanger's purported corrective actions, and responded as follows:

13 (a) In your firm's correspondence dated 5/18/17, it was stated that
14 the contamination was isolated to a specific supplier of beef material and you
15 discontinued doing business with the supplier. However, ***you did not provide***
16 ***documentation or other evidence to FDA showing that the supplier in***
17 ***question is the only one who supplied the contaminated raw materials that***
18 ***went into all your recalled products.*** As such, FDA is unable to evaluate the
19 adequacy of this response.

20 (b) In your firm's correspondence dated 5/18/17, it was stated that if
21 any amount of pentobarbital were to be found in any of your ground loaf
22 products, it would be in an amount that a laboratory would deem as being
23 within the possibility of error and well within the range that FDA had
24 previously deemed not be a health or safety concern in pet foods. ***FDA does***
25 ***not agree with your assessment that the process of grinding will dilute any***

26 ⁵³ *Id.*

1 *pentobarbital present in the loaf products to non-detectable or safe levels.*
2 *The agency notes that there is no tolerance level for pentobarbital in pet*
3 *food.*

4 (c) In your firm's correspondence dated 5/18/17, it was stated that
5 your corrective action includes conducting random pentobarbital tests of
6 finished products prior to shipment into the market to ensure that the raw
7 materials are unadulterated. FDA has concerns about using random finished
8 product testing as evidence that all lots of your finished products are
9 unadulterated. *The samples collected by FDA during this investigation*
10 *demonstrate that pentobarbital contamination is not homogeneous*
11 *throughout all units in a lot. Therefore, random testing of finished product*
12 *may not be representative of all units of your products. Furthermore,*
13 *finished product testing cannot mitigate the risk of pentobarbital in your*
14 *raw material.*

15 (d) In your firm's correspondence dated 5/18/17, it was indicated
16 that all current and new suppliers must provide Evanger's with letters of
17 guarantee for their products. FDA has concerns that relying solely on a quality
18 guarantee may not ensure the safety of the source material used in the
19 production of your finished pet food. *You should consider conducting site*
20 *audits and/or a review of your supplier's procedures to verify that the*
21 *supplier has in fact implemented proper controls to prevent the use of*
22 *contaminated source material as indicated in their letter of guarantee.*

23 (e) In your firm's correspondence dated 4/4/17, it was requested to
24 donate the recalled product to an animal shelter. FDA does not agree that
25 analyzing individual units from recalled lots and finding those units negative
26 for pentobarbital contamination provides sufficient assurance that the

1 remaining units are not adulterated. As can be observed in the samples
 2 collected by FDA, the pentobarbital contamination is not homogeneous
 3 throughout all units in a lot. Therefore, *FDA does not find it acceptable to*
 4 *donate any recalled products and instead recommends destruction of all*
 5 *remaining units.*

6 (f) During the inspection, *your firm could not provide assurances*
 7 *from your suppliers that your raw materials had not been associated with*
 8 *the use of pentobarbital.*

9 (g) In addition, your firm could not provide documentation showing
 10 the internal traceability of raw materials from receipt throughout the
 11 manufacturing process and into the finished product. Therefore, *your firm*
 12 *could not definitively determine whether any of your other products*
 13 *contained the beef that went into the recalled products and has no*
 14 *assurances that the pentobarbital contamination could be traced to a single*
 15 *supplier.*⁵⁴

16 17 **VI. EVANGER'S PET FOODS ARE DECEPTIVELY AND FALSELY** 18 **LABELED**

19 **A. Evanger's Denials Further Misrepresent the Pet Foods**

20 140. On January 4, 2017, while Plaintiffs were working with the FDA to test
 21 certain of the Pet Foods and Talula's stomach contents, Evanger's posted on its
 22 website that the lot #1816E06HB13 went to only one distributor in Washington.
 23 Even though it later recalled all its lots of Hunk of Beef as well as Braised Beef and
 24 Pulled Beef, Evanger's stated that no other flavors of the Pet Foods were affected,
 25 and that all other products "are entirely safe to feed your and our own pets."

26 ⁵⁴ *Id.*

1 Evanger's also maintained that every batch of its Pet Foods "is reviewed by a
2 graduate from the FDA Better Processing School" and is cooked in compliance with
3 "Evanger's FDA Scheduled File Process." Evanger's was also quick to cast blame
4 on the Maels without explanation or evidence, stating "we have nothing to show that
5 there is any issue with the food such as a veterinary report. We believe that *other*
6 *factors are involved* that we are not aware of at this time, but will come to light when
7 we are able to have a dialogue with [the Maels]. . . . we anticipate at the conclusion
8 of our investigation the test results will come back negative for any pathogens or
9 toxins."⁵⁵

10 141. On January 16, 2017, six days after the FDA began inspecting
11 Evanger's facilities and testing unopened cans of Pet Foods that it found adulterated,
12 Evanger's posted on their websites that its four preliminary tests all came back
13 negative, and they expected its final results to be the same. Again, without
14 explanation, Evanger's pointed fingers at the Maels stating that it has been "unable
15 to find any connection between the alleged incident and our foods, nor is there any
16 veterinary or medical evidence to support the claims of responsibility."⁵⁶

17 142. On January 23, 2017, at the same time that the FDA tests confirmed
18 that Talula's stomach contents and Hunk of Beef had tested positive for
19 pentobarbital (*see* Exhibit H), Evanger's again stated that its testing for commercial
20 sterility came back "sterile," meaning it contained no pathogens or harmful bacteria.
21 Evanger's thanked "everyone who waited for all the test results before drawing any
22 conclusions," and again falsely claimed that it is a "5-star pet food that not only
23 improves your pet's health, but overall well-being and longevity through clean,

24 ⁵⁵ Evanger's, News-Events, Voluntary Recall ("Voluntary Recall on Website"),
25 posted Jan. 4, 2017, [https://evangersdogfood.com/news-events/pug-family-](https://evangersdogfood.com/news-events/pug-family-updates/)
26 [updates/](https://evangersdogfood.com/news-events/pug-family-updates/) (last visited Feb. 17, 2017) (emphasis added) (since removed).

1 healthy food.”⁵⁷

2 143. On January 30, 2017, despite the FDA’s ongoing testing that confirmed
3 pentobarbital in the Pet Foods and investigation of Evanger’s facilities at that time,
4 Evanger’s stated that it will not “respond to any *unverifiable reports or*
5 *unsubstantiated rumors that are intended to deceive the public*” relating to the FDA
6 or Evanger’s Pet Foods. It falsely stated that the FDA has not completed any
7 additional tests and “as far as Evanger’s is aware and, we believe, the FDA is aware,
8 *none of our foods have been reported to contain pentobarbital* or any other
9 contaminant.”⁵⁸

10 144. However, because Evanger’s continued to misrepresent the Pet Foods
11 to customers and did not promptly recall them after they tested positive for
12 pentobarbital, Vigliano continued to purchase cans of Hunk of Beef and Braised
13 Beef at this time, including but not limited to on January 31, 2016. After Vigliano
14 fed a can of Hunk of Beef, with lot number 1816E07HBW that was later recalled, to
15 her dog, Lucy, Lucy immediately became ill and was required to undergo an
16 abdominal ultrasound on February 8, 2017, due to her elevated liver enzymes and
17 sickness. The veterinarian’s report issued after her visit on March 24, 2017, stated
18 that Lucy experienced lethargy, hyporexia, vomiting and increased liver enzymes
19 from “chronic exposure to pentobarbital in the recalled [Pet Foods].” The report
20 noted that Lucy recovered after a few days of not eating the Pet Foods, and by June
21 26, 2017, the veterinarian reported that her liver enzymes were back to baseline
22 “indicating full recovery from her exposure to pentobarbital in the winter.” Vigliano
23 was forced to spend over \$1,000 on veterinarian bills relating to Lucy eating the
24 contaminated Pet Foods.

25 _____
26 ⁵⁷ *Id.*, posted Jan. 23, 2017.

27 ⁵⁸ *Id.*, posted Jan. 30, 2017 (emphasis added).

1 145. Prior to the recalls on December 18, 2016 and again on February 14,
2 2017, Morea bought Defendant's Pet Foods, including but not limited to Hunk of
3 Beef and Braised Beef and Cocolicious 95% Beef and Chicken & Beef, for her dog,
4 Nico. After eating the Pet Foods, Nico became lethargic and would not eat. After
5 several visits and tests, he was found by veterinarians to have intestinal inflammation
6 and gastroenteritis. Morea has been forced to spend over \$2,000 on veterinarian bills
7 relating to Nico eating the Pet Foods. Following the announcement of the recalls,
8 Morea notified Defendants of Nico's experience with the Pet Foods.

9 146. For over a year prior to the recall, Wiepert intermittently purchased
10 Evanger's Hunk of Beef and Braised Beef for her dog, Rocket. After Rocket had
11 consumed cans of Hunk of Beef and Braised Beef purchased in April 2016, a
12 veterinarian found in May 2016 that he, like Lucy, had elevated liver enzymes and
13 placed him on medicine to lower them, which he has continued for several months.
14 Wiepert has been forced to spend hundreds of dollars on veterinarian bills for
15 treatment and testing of Rocket.

16 147. In its February 3, 2017 recall notice, a month after Plaintiffs notified it
17 of the issue, Evanger's stated that the recall only affects 5 lots of food, "which [are]
18 specifically used for the Hunk of Beef product and *no other products*." The recall
19 notice also stated, in pertinent part:

20 All Evanger's suppliers of meat products are *USDA approved*. The beef
21 supplier provides us with beef chunks from cows that are slaughtered in a
22 *USDA facility*. . . Because we source from suppliers of meat products that are
23 *USDA approved*, and no other products have had any reported problems, we
24 are not extending the recall to other supplier lots.⁵⁹

25
26 ⁵⁹ Hunk of Beef Recall Feb. 3, 2017, [https://www.fda/Safety/Recalls/ucm539900](https://www.fda/Safety/Recalls/ucm539900.htm).
27 htm (emphasis added).

1 148. Also on February 3, 2017, Evanger's stated on its website that it had
 2 terminated its relationship with its meat supplier of over forty years, and that the
 3 supplier's meat was ***not used in any other products***. Evanger's stated that it did not
 4 know about pentobarbital in its products, or test for it previously, because Evanger's
 5 does not have any rendered materials in its supply chain, which includes products
 6 from animals that have died by means other than slaughter, and further stated that
 7 "[a]ll of our raw materials are sourced from ***USDA-inspected facilities***, and many of
 8 them are suppliers with whom we have had long-standing relationships."⁶⁰

9 149. On February 13, 2017, however, Evanger's recalled yet another
 10 product, one lot of Against the Grain Pulled Beef. Evanger's again stated that the
 11 recall "affects ***no other lot numbers***, and no other flavors" and reiterated that it
 12 makes "products that are of the best quality available for pets."⁶¹

13 150. On February 17, 2017, the FDA publicly corrected Evanger's
 14 misrepresentations that its beef comes from a "USDA approved" supplier. The FDA
 15 confirmed that the bill of lading ***that the meat supplier provided to Evanger's***
 16 indicated that its beef was "***inedible hand deboned beef***" and "***not fit for human***
 17 ***consumption.***" The FDA stated that the supplier does not have a USDA grant of
 18 inspection nor a USDA inspection mark, and that the meat is not human grade. The
 19 FDA again stated that ***only*** USDA-FSIS regulates the slaughter of animals for human
 20 consumption, and USDA-FSIS did not inspect Evanger's meat supplier. It also stated
 21 that testing by USDA-FSIS found that Evanger's Hunk of Beef, labeled as "100%
 22 beef," contained trace amounts of pork and equine as well as beef.⁶²

23 _____
 24 ⁶⁰ Voluntary Recall on Website, posted Feb. 3, 2017, <https://evangersdogfood.com/news-events/pug-family-updates/> (emphasis added).

25 ⁶¹ Against the Grain, Voluntary Recall, http://www.againstthegrainpetfood.com/about_us/voluntary-recall/ (emphasis added).

26 ⁶² FDA Caution, <https://www.fda.gov/AnimalVeterinary/NewsEvents/CVM>
 27 SECOND AMENDED COMPLAINT CASE NO. 3:17-CV-05469-RBL

1 151. The FDA also reiterated in a “Q&A” about Evanger’s that *none* of
2 Evanger’s suppliers are USDA-FSIS registered facilities.⁶³

3 152. Despite the FDA’s findings and public statements, and even after this
4 lawsuit was filed, Evanger’s continued to make false representations on its website
5 including, in the first sentence about its Pet Foods, that “Evanger’s utilizes *USDA*
6 *inspected meats* to make highly palatable and nutritious foods that will satisfy even
7 the most finicky eater.”⁶⁴

8 153. As recently as October 2017, the Against the Grain website misled
9 customers that its Pet Foods are “only sourced from *human grade facilities*” and
10 that its cat food is “human quality.”⁶⁵

11 154. On March 3, 2017, after insisting that no other lots or products were
12 affected by its recalls, and two months after the Maels first notified Evanger’s of the
13 facts described above, Evanger’s announced that it was expanding its recall to *all*
14 lots of Hunk of Beef and Pulled Beef. Evanger’s also announced, without
15 explanation, that it was initiating a new recall of all Evanger’s Braised Beef pet food
16 manufactured between December 2015 and January 2017, with expiration dates of
17 December 2019 through January 2021. Evanger’s stated that the “recall affects only
18 Hand Packed Beef Products.”⁶⁶

19 _____
20 Updates/ucm5 42265.htm.

21 ⁶³ FDA Q&A, [https://www.fda.gov/AnimalVeterinary/SafetyHealth/ProductSafety](https://www.fda.gov/AnimalVeterinary/SafetyHealth/ProductSafetyInformation/ucm544348.htm)
22 [Information/ucm544348.htm](https://www.fda.gov/AnimalVeterinary/SafetyHealth/ProductSafetyInformation/ucm544348.htm).

23 ⁶⁴ Evanger’s, About Our Products, <https://evangersdogfood.com/about-us/about-our-products/>
(emphasis added) (now removed).

24 ⁶⁵ Against the Grain, About the Food, <http://www.againstthegrainpetfood.com/about-the-food/> and Cat Food, [http://www.againstthegrainpetfood.com/human-](http://www.againstthegrainpetfood.com/human-quality-cat-food/)
25 [quality-cat-food/](http://www.againstthegrainpetfood.com/human-quality-cat-food/) (emphasis added) (last visited Sept. 3, 2017) (now removed).

26 ⁶⁶ Expanded Recall Mar. 3, 2017, [https://www.fda.gov/Safety/Recalls/ucm544972.](https://www.fda.gov/Safety/Recalls/ucm544972.htm)
27 [htm](https://www.fda.gov/Safety/Recalls/ucm544972.htm).

1 155. Even after the expanded recall that Defendants stated did not affect any
2 other products, on April 17, 2017, another pet food manufactured by Evanger's,
3 Party Animal's Cocolicious Beef Products, sickened a dog and tested positive for
4 pentobarbital. Party Animal subsequently recalled its Cocolicious Beef Products.

5 156. Bertucci was misled by Defendants to purchase its Pet Foods,
6 specifically Evanger's Braised Beef and Against the Grain Pulled Beef, relying on
7 Defendants' false representations for about two years. Following the announced
8 recall of Evanger's and Against the Grain's Pet Foods, Bertucci was further misled
9 into purchasing Party Animal's Cocolicious products because Evanger's did not
10 disclose that Evanger's was the manufacturer of Party Animal's products that were
11 later also recalled.

12 157. Conway was also misled to purchase Evanger's Pet Foods on May 15,
13 2017, because the Duck & Sweet Potato product she purchased was also mislabeled
14 as "human-grade" and USDA inspected.

15 158. On May 5, 2017, Party Animal sued Evanger's and Nutripack for
16 damages relating to Party Animal's recall of its products. (*Party Animal, Inc. v.*
17 *Evanger's Dog and Cat Food Co., Inc., Nutripack, LLC, Does 1-100*, No. 2:17-cv-
18 03422-PSG-FFM (C.D. Cal.)) ("Party Animal Lawsuit"). In the lawsuit, Party
19 Animal alleges that its damages include but are not limited to retailers demanding
20 refunds for recalled and non-recalled products and consumers seeking payment of
21 veterinarian bills for treatment after their pets consumed Party Animal's products.

22 159. The Party Animal Lawsuit also alleges that, in order to avoid liability
23 relating to the recalls, Defendants defunded Evanger's corporation and moved their
24 assets to Nutripack. Defendants then allegedly invoiced Party Animal through
25 Nutripack, instead of Evanger's as they had done for the last decade, beginning in
26 February 2017. In a phone call between Party Animal and Holly Sher, an owner of

1 both Evanger's and Nutripack, in April 2017, Sher allegedly stated that "they were
2 afraid of getting sued because of the recent recalls, and they were taking money out
3 of Evanger's. She also stated that they did not want to receive any money into
4 Evanger's and would instead run all operations under Nutripack."

5 160. Evanger's has not made any public comment about Party Animal, and
6 has not disclosed the other companies for whom Evanger's manufactures pet foods.

7
8 **B. Evanger's Admits to Misrepresentations of the Pet Foods in Lawsuit**
9 **Against Its Meat Supplier**

10 161. Despite its history of run-ins with FDA and other lawsuits, instead of
11 owning up to its misleading advertising of its Pet Foods that poisoned and put at risk
12 animals that consumed its products, Evanger's continues to deflect its responsibility
13 by blaming others for its recalls.

14 162. On April 25, 2017, Evanger's filed a lawsuit seeking multi-millions in
15 damages against Bailey Farms, LLC ("Bailey"), its hand-selected, meat supplier for
16 **over 40 years**, located at 549 Karem Drive, Marshall, Wisconsin, in the Circuit Court
17 of Cook County, Illinois (Case No. 2017-L-004153). Evanger's alleges that Bailey
18 sold it meat that tested positive for pentobarbital, including the shipments that were
19 used in cans of the Pet Foods that the Maels purchased on December 31, 2016 that
20 poisoned their dogs, including Talula, who died as a result.⁶⁷

21 163. In the lawsuit, Evanger's admits that on June 2, 2016, it received 42,340
22 pounds of "Inedible Hand Deboned Beef" "For Pet Food Use Only. Not Fit for
23 Human Consumption" from Bailey for an invoice price of \$15,789.30. Evanger's
24 used this meat that was not certified or inspected for human food by the USDA to
25

26 ⁶⁷ The lawsuit is referred to herein as the "Bailey Lawsuit" and the paragraphs in
27 that lawsuit's complaint are cited to herein as "Compl. ¶."

1 make 50,000 cans of Hunk of Beef, including lot #1816EO6HB13 from which the
2 Maels purchased three cans that were fed to their dogs and caused the dogs' illnesses.
3 Exhibit J, Bailey's Bill of Lading and Invoice to Evanger's for meat used in Hunk
4 of Beef (Compl. ¶¶ 7-12 submitted as Exhibits 1 and 2).

5 164. Evanger's included in its complaint against Bailey the FDA testing
6 results for Hunk of Beef cans from lot #1816EO6HB13, showing that the products
7 tested positive for pentobarbital and phenytoin, an anti-seizure medication. Exhibit
8 K, FDA testing results Hunk of Beef (Compl. ¶ 15, submitted as Exhibit 3).

9 165. Evanger's also admits in the lawsuit that on November 16, 2015, it
10 received 43,120 pounds of "Inedible Hand Deboned Beef" "For Pet Food Use Only.
11 Not Fit for Human Consumption" from Bailey for an invoice price of \$15,653.20.
12 Evanger's used this meat that was not certified or inspected for human food by the
13 USDA, to produce cans of Against the Grain Hand Pulled Beef, including lot
14 #2415E01ATB12 from which the Maels purchased three cans. Exhibit L, Bailey's
15 Bill of Lading and Invoice to Evanger's for meat used in Pulled Beef (Compl. ¶¶ 43-
16 45, submitted as Exhibit 5 and 6).

17 166. Evanger's also included in its complaint the FDA testing results for
18 Pulled Beef cans from lot #2415E01ATB12, showing that these products also tested
19 positive for pentobarbital and phenytoin. Exhibit M, FDA testing results Pulled Beef
20 (Compl. ¶ 45, submitted as Exhibit 7).

21 167. Evanger's further states in its complaint that "it would be highly
22 unlikely that pentobarbital would be administered to a cow; cows are not generally
23 euthanized." Evanger's also alleges that its own testing found that Hunk of Beef
24 from lot #1816EO6HB13, which it labels "100% beef," was not entirely beef, and
25 instead also found the presence of *horse* DNA. Exhibit N, DNA testing of Hunk of
26 Beef (Compl. ¶ 17, submitted as Exhibit 4).

1 168. In its claims of fraud relating to Bailey’s APHIS certification,
 2 Evanger’s alleges that each bill of lading, invoice, and pallet of beef that Bailey
 3 shipped to Evanger’s, contained a tag with Bailey’s “APHIS certificate number ‘WI-
 4 BLO-0004’” that had been expired for years. Evanger’s stated that they relied upon
 5 these representations when Evanger’s stated to customers that their products came
 6 from USDA-inspected facilities, even though Evanger’s *continued to make these*
 7 *statements on their website following the filing of this lawsuit and does so now on*
 8 *Chewy.com*. Compl. ¶ 58-62, 66-68.

9 169. As the FDA confirmed and stated in its press releases, however, *none*
 10 of Evanger’s beef suppliers were inspected by USDA-FSIS, which is the only entity
 11 that regulates the slaughter of animals for human consumption and speciation. Only
 12 meat from a USDA-FSIS facility would be appropriate for Evanger’s to represent as
 13 “human grade, USDA-inspected” meats, and Evanger’s products were never
 14 certified as such and their facilities are only licensed to make feed for animals, not
 15 fit for human consumption. Further, APHIS only provides a certifications for
 16 exporting and does not inspect facilities to determine if the food is safe and fit for
 17 human consumption.⁶⁸

18 170. In addition to Bailey’s pet food company, which provides both
 19 commercial and retail pet food,⁶⁹ Bailey also operates, at the same location, a stock
 20 removal company that “picks up *fresh, down and dead cows, horses and calves*” for
 21 use in pet food:
 22
 23
 24

25 ⁶⁸ FDA, Q&A, (last visited May 2, 2017).

26 ⁶⁹ Bailey Farms, LLC, <http://www.baileyfarmspets.com/index.php> (last visited
 27 May 2, 2017).



Bailey Farms Stock Removal, <http://baileyfarmsstockremoval.com/> (last visited May 2, 2017).

171. Evanger's misrepresented, and continues to misrepresent to customers, that its Pet Foods are "premium," "human grade," "100% beef or other identified meat" from "USDA-inspected, human grade facilities," and "People Food for Pets," when in fact they are not. Evanger's even uses terminology reserved for top human cuisine, like "foodies' choice," to describe its Pet Foods and convince customers that their products are top human grade. Customers, including Plaintiffs, relied on these false representations that the Pet Foods were "human grade," "USDA inspected," "People Food for Pets," when they purchased Evanger's products and paid a price significantly higher than competing products. In reality, Evanger's Pet Foods were not "People Food for Pets," "human grade," "USDA inspected," and some were adulterated and therefore should not have been sold and as a result put consumers' pets at risk of being poisoned. The Pet Foods are misrepresented, misbranded and some were adulterated, in violation of state and federal law, because they are not from USDA-inspected, human-grade facilities, and in fact Defendants are only

1 licensed to make feed for animals, not fit for human consumption; some are made
2 up of animals that died by means other than slaughter; some contained poisonous
3 pentobarbital; and were made at Defendants' unsanitary facilities that further
4 contaminated some of them.

5 172. Evanger's Pet Foods labeled as "USDA-Organic" and "Oregon Tilth
6 certified" misled customers by indicating that the products are made of high quality,
7 USDA-inspected, human grade organic ingredients and are made in clean and
8 sanitary facilities. However, the FDA's inspections confirmed that Defendants'
9 facilities are unsanitary exposing its Pet Foods to contamination and health risks,
10 and that the Pet Foods are not sourced from USDA-inspected suppliers and are not
11 human grade or made at a human grade licensed facility. Evanger's meat suppliers
12 use animals that have died by means other than slaughter, rendering those products
13 unsafe, unhealthy, adulterated and misbranded in violation of state and federal law
14 and not compliant with USDA organic standards. Evanger's no longer holds an
15 organic certification from Oregon Tilth for its handling since it moved from its
16 Wheeling facility. However, it continues to list organic products on its website that
17 are "temporarily out of stock."

18 173. Defendants carried out a consistent and widespread campaign of
19 deceptively promoting the Pet Foods as "People Food for Pets," "human grade,"
20 "USDA-inspected," "safe," and even consisting of organic (human grade) meat
21 ingredients. Their core marketing statements make these claims despite only being
22 licensed to make feed for animals, not fit for human consumption, being subject to
23 recalls, FDA inspections and public statements that prove otherwise. In addition to
24 being misrepresented to customers, because some of the Pet Foods are illegally
25 misbranded and adulterated, they were unfit and unsafe for sale.

26 174. Defendants advertised their meat-based Pet Foods, including beef,

1 chicken, turkey, duck, and lamb products, as “People Food for Pets,” “USDA-
2 inspected, human grade.” Plaintiffs purchased Evanger’s and Against the Grain’s
3 products, including but not limited to Hunk of Beef, Braised Beef, Pulled Beef and
4 Duck & Sweet Potato, based on Defendants’ misrepresentations. Plaintiffs Maels,
5 Bertucci, Wiepert, Morea, Conway and Vigliano were all damaged when they
6 overpaid for the Pet Foods that were falsely advertised. Plaintiffs Maels, Wiepert,
7 Morea and Vigliano endured additional damage as a result of the misrepresented Pet
8 Foods when their pets became ill with symptoms consistent with pentobarbital
9 poisoning after eating Defendants’ Pet Foods that were recalled and found to be
10 adulterated.

11 175. Following the recall and the filing of this lawsuit, Defendants corrected
12 some of the Pet Foods’ misrepresentations including but not limited to:

- 13 • Evanger’s removed the misstatement “People Food for Pets” on its
14 home page.
- 15 • It removed from the description “About Our Products” the false
16 statement that they are “human-grade USDA inspected meats.”
- 17 • Evanger’s “Grain Free Hand Packed” line, including Hunk of Beef,
18 Braised Beef and chicken products, are no longer advertised as “quality
19 on a human-grade level.”
- 20 • Evanger’s Organics line, including chicken and turkey pet foods, are no
21 longer advertised as “Organic People Food for Pets.”
- 22 • Against the Grain’s “Pulled Meats” dog foods, including chicken and
23 beef, are no longer advertised as “human grade.”
- 24 • Against the Grain removed “human quality” from the description of its
25 Cat Food.

- Against the Grain removed “human grade” from the description of its facility.

176. In light of these circumstances - based on Plaintiffs’ experiences, the FDA investigations, and Defendants’ corrective disclosures, Pet Foods are defined herein to include any of Defendants’ meat-based products that were falsely represented to consumers as “People Food for Pets,” “human grade,” and “USDA inspected.”

177. Defendants’ misrepresentations have occurred in at least three forms, all of which constitute “advertising.” These include: (i) product packaging, (ii) materials and information provided to stores that carry Evanger’s Pet Foods, and (iii) Evanger’s online advertising including but not limited to social media and websites, which they use to sell their Pet Foods to the public, both consumers and retailers. Defendants’ pervasive advertising message misrepresents the quality of the Pet Foods and the health risks associated with their consumption.

178. Defendants know that they are only licensed to make feed for animals, not products fit for human consumption, and they received ingredients labeled as “inedible” and “not fit for human consumption” from suppliers that were not USDA-FSIS inspected. Despite this, Evanger’s used these ingredients in their Pet Foods that they falsely advertised as “People Food for Pets” and “USDA-inspected, human grade” quality.

179. FDA testing confirms that the Pet Foods were not human quality, USDA inspected meats, or even pure beef where represented as such. Instead, the Pet Foods were manufactured from meat provided by a non-USDA meat supplier that hauls dead cows, horses and calves that did not die by slaughter; contained poisonous pentobarbital from euthanized animals; and were produced at Defendants’ unsanitary, non-USDA inspected facilities licensed only to make feed for animals,

1 not products for human consumption, that misrepresented the Pet Foods, and
 2 contaminated some of them making them adulterated under the law, unfit for sale
 3 and unsafe for pets to eat and people to handle.

4 180. Defendants' pattern of deceptive marketing continues today, including
 5 false, misleading and deceptive statements relating to "People Food for Pets,"
 6 "human grade" ingredients from "USDA inspected facilities." Defendants' current
 7 advertising conveys the impression that the products are of high quality and safe for
 8 companion animals to consume when they are not.

9 **CLASS ACTION ALLEGATIONS**

10 181. Plaintiffs bring this action as a class action pursuant to Rule 23(a) and
 11 (b)(2) and/or (b)(3) of the Federal Rules of Civil Procedure ("Rule") for the purpose
 12 of asserting the claims alleged in this Complaint on a common basis. Plaintiffs bring
 13 this action on behalf of themselves and all members of the following class comprised
 14 of:

15 All persons, exclusive of Defendants and their employees, who
 16 purchased in the United States, one or more of Defendants' Pet Foods
 17 from June 2013 to the present (the "Nationwide Class").

18 182. Plaintiffs bring this action on behalf of themselves and all members of
 19 the following subclasses comprised of:

- 20 a) All persons, exclusive of Defendants and their employees, who
- 21 purchased in the State of Washington one or more of Defendants' Pet
- 22 Foods from June 2013 to the present (the "Washington Subclass");
- 23 b) All persons, exclusive of Defendants and their employees, who
- 24 purchased in the State of Illinois one or more of Defendants' Pet Foods
- 25 from June 2013 to the present (the "Illinois Subclass");

- 1 c) All persons, exclusive of Defendants and their employees, who
- 2 purchased in the State of Pennsylvania one or more of Defendants' Pet
- 3 Foods from June 2013 to the present (the "Pennsylvania Subclass");
- 4 d) All persons, exclusive of Defendants and their employees, who
- 5 purchased in the State of New Jersey one or more of Defendants' Pet
- 6 Foods from June 2013 to the present (the "New Jersey Subclass");
- 7 e) All persons, exclusive of Defendants and their employees, who
- 8 purchased in the State of New York one or more of Defendants' Pet
- 9 Food from June 2013 to the presents (the "New York Subclass").

10 Collectively the Washington, Illinois, Pennsylvania, New Jersey and New
 11 York Subclasses are referred to herein as the "Subclasses."

12 183. The Nationwide Class and the Subclasses are collectively referred to
 13 herein as the "Classes."

14 184. Plaintiffs reserve the right to modify or amend the definitions of the
 15 Classes after they have had an opportunity to conduct discovery.

16 185. Claims I is brought by Plaintiffs on behalf of themselves and the
 17 Nationwide Class, and in the alternative, on behalf of the Subclasses. Claims II-VIII
 18 are brought by Plaintiffs Nicole and Guy Mael on behalf of themselves and the
 19 Washington Subclass. Claims IX-XIII are brought by Plaintiffs on behalf of
 20 themselves and the Nationwide Class, and in the alternative, are brought on behalf
 21 of Plaintiff Bertucci and the Illinois Subclass. Claims XIV-XVIII are brought on
 22 behalf of Plaintiff Vigliano and the Pennsylvania Subclass. Claims XIX-XXIII are
 23 brought on behalf of Plaintiffs Morea and Conway and the New Jersey Subclass.
 24 Claims XXIV-XXVIII are brought on behalf of Plaintiff Wiepert and the New York
 25 Subclass.

26 186. **Numerosity. Rule 23(a)(1).** The members of the Classes are so

1 numerous that their individual joinder is impracticable. Plaintiffs are informed and
2 believe that the proposed Classes contain at least thousands of purchasers of
3 Defendants' Pet Foods who have been damaged by Defendants' conduct as alleged
4 herein. The number of Class members is unknown to Plaintiffs but could be
5 discerned from the records maintained by Defendants.

6 187. *Existence of Common Questions of Law and Fact. Rule 23(a)(2).*

7 This action involves common questions of law and fact, which include, but are not
8 limited to, the following:

- 9 a. Whether the statements made by Defendants as part of its
10 advertising for its Pet Foods discussed herein are true, or are
11 reasonably likely to deceive, given the misrepresentation of
12 material fact described above;
- 13 b. Whether Defendants has violated their implied warranties
14 relating to the Pet Foods under the Magnuson-Moss Warranty
15 Act, 15 U.S.C. § 2301, et seq.;
- 16 c. Whether Defendants has breached their express warranties to
17 customers relating to the Pet Foods under Washington, Illinois,
18 Pennsylvania, New Jersey and New York law;
- 19 d. Whether Defendants breach their implied warranties of
20 merchantability regarding the Pet Foods to customers under
21 Washington, Illinois, Pennsylvania, New Jersey and New York
22 law;
- 23 e. Whether Defendants' conduct described herein constitutes an
24 unfair and/or deceptive act or practice in violation of
25 Washington, Illinois, Pennsylvania, New Jersey and New York
26 law;

- 1 f. Whether Defendants were negligent in their actions under
- 2 Washington, Illinois, Pennsylvania, New Jersey and New York
- 3 law;
- 4 g. Whether Defendants are subject to strict products liability under
- 5 Washington, Illinois, Pennsylvania, New Jersey and New York
- 6 law;
- 7 h. Whether Defendants were unjustly enriched under Washington,
- 8 Illinois, Pennsylvania, New Jersey and New York law;
- 9 i. Whether Plaintiffs and the other members of Classes are entitled
- 10 to damages; and
- 11 j. Whether Plaintiffs and the Classes are entitled to injunctive
- 12 relief, restitution or other equitable relief and/or other relief as
- 13 may be proper.

14 188. **Typicality. Rule 23(a)(3).** All members of the Classes have been
 15 subject to and affected by the same conduct and omissions by Defendants. The
 16 claims alleged herein are based on the same violations by Defendants that harmed
 17 Plaintiffs and members of the Classes. By purchasing Evanger's Pet Foods during
 18 the relevant time period, all members of the Classes were subjected to the same
 19 wrongful conduct. Plaintiffs' claims are typical of the Classes' claims and do not
 20 conflict with the interests of any other members of the Classes. Defendants'
 21 unlawful, unfair, deceptive, and/or fraudulent actions concern the same business
 22 practices described herein irrespective of where they occurred or were experienced.

23 189. **Adequacy. Rule 23(a)(4).** Plaintiffs will fairly and adequately protect
 24 the interests of the members of the Classes. Plaintiffs have retained counsel
 25 experienced in complex consumer class action litigation, and Plaintiffs intend to
 26 prosecute this action vigorously. Plaintiffs have no adverse or antagonistic interests

1 to those of the Classes.

2 190. ***Injunctive and Declaratory Relief. Rule 23(b)(2).*** Defendants'
3 actions regarding the deceptions and misrepresentations regarding Evanger's Pet
4 Foods are uniform as to members of the Classes. Defendants have acted or refused
5 to act on grounds that apply generally to the Classes, so that final injunctive relief as
6 requested herein is appropriate respecting the Classes as a whole.

7 191. ***Predominance and Superiority of Class Action. Rule 23(b)(3).***
8 Questions of law or fact common to the Classes predominate over any questions
9 affecting only individual members, and a class action is superior to other methods
10 for the fast and efficient adjudication of this controversy, for at least the following
11 reasons:

- 12 a. Absent a class action, members of the Classes as a practical
13 matter will be unable to obtain redress, Defendants' violations of
14 their legal obligations will continue without remedy, additional
15 consumers will be harmed, and Defendants will continue to
16 retain their ill-gotten gains;
- 17 b. It would be a substantial hardship for most individual members
18 of the Classes if they were forced to prosecute individual actions;
- 19 c. When the liability of Defendants has been adjudicated, the Court
20 will be able to determine the claims of all members of the
21 Classes;
- 22 d. A class action will permit an orderly and expeditious
23 administration of the claims of each member of the Classes and
24 foster economies of time, effort, and expense;
- 25 e. A class action regarding the issues in this case does not create
26 any problems of manageability; and

f. Defendants have acted on grounds generally applicable to the members of the Classes, making class-wide monetary relief appropriate.

192. Plaintiffs do not contemplate class notice if the Classes are certified under Rule 23(b)(2), which does not require notice, and notice to the putative Classes may be accomplished through publication, signs or placards at the point-of-sale, or other forms of distribution, if necessary; if the Classes are certified under Rule 23(b)(3); or if the Court otherwise determines class notice is required. Plaintiffs will, if notice is so required, confer with Defendants and seek to present the Court with a stipulation and proposed order on the details of a class notice program.

COUNT I

Violation of the Magnuson-Moss Warranty Act,

15 U.S.C. § 2301, et seq.

(On Behalf of Plaintiffs and the Nationwide Class, and Alternatively the Subclasses)

193. Plaintiffs repeat and reallege the allegations contained in the paragraphs above, as if fully set forth herein.

194. Plaintiffs bring this claim on behalf of themselves and the Nationwide Class and in the alternative the Subclasses.

195. At all times relevant hereto, the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et seq. (the “MMWA”) was in full force and effect.

196. Evanger’s Pet Foods are consumer products as defined in 15 U.S.C. § 2301(1).

197. Defendants are suppliers and a warrantors as defined in 15 U.S.C. § 2301(4) and (5).

198. Plaintiffs and members of the Classes are “consumers” as defined in 15

1 U.S.C. § 2301(3). They are consumers because they are persons who bought the Pet
2 Foods and are entitled under applicable state law to enforce against the warrantor
3 the obligations of its implied warranty.

4 199. Pursuant to 15 U.S.C. § 2310(e), Plaintiffs and the members of the
5 Nationwide Class are entitled to bring this class action and are not required to give
6 Defendants notice and an opportunity to cure until such time as the Court determines
7 the representative capacity of Plaintiffs pursuant to Rule 23 of the Federal Rules of
8 Civil Procedure. However, Plaintiffs already gave the required notice on behalf of
9 themselves and the Classes by email dated January 3, 2017 as well as at other dates
10 when they contacted Defendants.

11 200. In connection with the sale of the Pet Foods, Evanger's gave an implied
12 warranty as defined in 15 U.S.C. § 2301(7); namely, the implied warranty of
13 merchantability. As a part of the implied warranty of merchantability, Evanger's
14 warranted that the Pet Foods: (a) were fit for its ordinary purpose as safe dog food,
15 (b) would pass without objection in the trade under its contract description as dog
16 food, (c) were adequately contained, packaged and labeled as the agreements
17 required, and (d) conformed to the promises and affirmations of fact set forth on its
18 container and label.

19 201. Evanger's is liable to Plaintiffs and the Nationwide Class pursuant to
20 15 U.S.C. § 2310(d)(1), because it breached the implied warranty of merchantability.

21 202. Evanger's initially breached the implied warranty of merchantability as
22 to Plaintiffs and the members of the Nationwide Class because the Pet Foods were
23 not fit for the ordinary purposes for which they are used—a safe and healthy dog
24 food represented as containing “People Food for Pets,” “USDA-inspected, human
25 grade” ingredients. Specifically, Evanger's Pet Foods were made at a non-USDA
26 inspected facilities only licensed to make feed for animals, not for human

1 consumptions, and contained non-USDA inspected and non-human grade
2 ingredients, some of which were adulterated and not 100% beef as advertised, which
3 made them unfit for their ordinary purpose of providing safe, healthy, human grade
4 pet food. In fact, Evanger's has caused injury and death to animals, who have
5 consumed the Pet Foods.

6 203. Evanger's further breached its implied warranty of merchantability to
7 Plaintiffs and members of the Nationwide Class because some of the Pet Foods were
8 adulterated in violation of federal and state law. Among other things, certain of the
9 Pet Foods tested positive for the presence of poisonous pentobarbital, the FDA found
10 the facilities that manufactured the Pet Foods were in unsanitary conditions that
11 contaminated them, and contained animals that did not die by slaughter.

12 204. Evanger's further breached its implied warranty of merchantability to
13 Plaintiffs and members of the Nationwide Class because the Pet Foods were
14 misbranded in violation of federal and state law. For example, instead of containing
15 100% beef or other identified meat and USDA-inspected, human grade meat, they
16 contained meat from horses and pigs that were not USDA inspected, human grade
17 and were made at facilities only licensed to make feed for animals not products fit
18 for human consumption.

19 205. Evanger's further breached its implied warranty of merchantability to
20 Plaintiffs and members of the Nationwide Class because the Pet Foods were not
21 adequately contained, packaged, and labeled. The directions and labeling that
22 accompanied the Pet Foods did not warn Plaintiffs and the Nationwide Class that
23 they were not human grade as advertised and therefore carried health risks to their
24 pets, who consumed them, and that the Pet Foods were not comprised and produced
25 as described.

26 206. Evanger's finally breached its implied warranty of merchantability to

1 Plaintiffs and members of the Nationwide Class because the Pet Foods did not
2 conform to the promises and affirmations of fact set forth on its container and label,
3 as described above. Specifically, the Pet Foods did not constitute safe, healthy food
4 that was from a USDA inspected, human grade facility or ingredients.

5 207. Pursuant to 15 U.S.C. § 2310(d)(1), Plaintiffs and members of the
6 Nationwide Class are entitled to recover the following damages proximately caused
7 to them by Evanger's breach of the implied warranty of merchantability: (1) the
8 difference in value between the Pet Foods as warranted (the full purchase price) and
9 the Pet Foods as actually delivered (\$0.00) because the Pet Food were falsely
10 advertised as "People Food for Pets" and "human grade, USDA inspected" and some
11 should not have been sold since they were adulterated and misbranded, and
12 consumers would not have purchased them; (2) the veterinarian bills caused by
13 consumption of the Pet Foods; (3) for those whose pets died from eating the Pet
14 Foods, the market value of the animals; and (4) for those whose pets died from eating
15 the Pet Foods, the cost of disposing of the remains.

16 208. In addition, pursuant to 15 U.S.C. § 2310(d)(2), Plaintiffs and members
17 of the Nationwide Class are entitled to recover a sum equal to the aggregate amount
18 of costs and expenses (including attorneys' fees based on actual time expended)
19 determined by the Court to have been reasonably incurred by Plaintiffs and the
20 members of the Nationwide Class in connection with the commencement and
21 prosecution of this action.

22 **COUNT II**

23 **Breach of Express Warranty**

24 **Wash. Rev. Code § 62A.2-313**

25 **(On Behalf of Plaintiffs Nicole and Guy Mael and the Washington Subclass)**

26 209. Plaintiffs repeat and reallege the allegations contained in the paragraphs

27 SECOND AMENDED COMPLAINT CASE NO. 3:17-CV-05469-RBL

1 above, as if fully set forth herein.

2 210. Plaintiffs Nicole and Guy Mael bring this claim on behalf of themselves
3 and the Washington Subclass.

4 211. Evanger's constitutes both a "merchant" and a "seller," as those terms
5 are defined in Wash. Rev. Code §§ 62A.2-104 and 62A.2-103, in connection with
6 sale of its Pet Foods to the Maels and the Washington Subclass.

7 212. The Maels and the members of the Washington Subclass constitute
8 "buyers," as that term is defined in Wash. Rev. Code § 62A.2-103.

9 213. The Pet Foods, themselves, constitute "goods," as that term is defined
10 in Wash. Rev. Code § 62A.2-105.

11 214. The statements on Evanger's advertising of the Pet Foods created
12 express warranties, including that Evanger's was "People Food for Pets," 100% beef
13 or other identified meat, USDA inspected, human grade, and were healthy and safe
14 for consumption by pets, under both common law and Wash. Rev. Code § 62A.2-
15 313. Said statements include, but are not limited to, Pet Foods being "People food
16 for Pets," "100% beef" or other identified meat, "safe" and "healthy" labeling;
17 advertising it as "USDA-inspected" and "human grade."

18 215. The statements regarding Evanger's described in detail above
19 constituted descriptions, affirmations of fact and promises relating to the Pet Foods
20 that became part of the basis for the bargain between customers and Evanger's for
21 the purchase of the Pet Foods. They created express warranties that the Pet Foods
22 would conform to Evanger's descriptions, affirmations of fact and promises.

23 216. The Pet Foods were not 100% beef or other identified meat, were not
24 USDA-inspected nor human grade, were not safe or healthy for pets to consume, and
25 caused some pets to become ill and/or die. The unsafe nature of the Pet Foods
26 constituted a breach of these express warranties. Defendants knew that their Pet

1 Foods were not fit for human consumption, not USDA-FSIS inspected, and were
2 made in an unsanitary facility only licensed to make feed for animals that
3 contaminated them.

4 217. The Maels and members of the Washington Subclass were injured as a
5 proximate result of Evanger's aforementioned breaches as follows: (a) in the amount
6 of the difference in value between the value of the Pet Food as warranted (their full
7 purchase prices) and the Pet Food as actually delivered (\$0) based on their false
8 advertising and since the Pet Foods should not have been sold if they were
9 adulterated and misbranded and customers would not have paid anything for them
10 had they known); (b) the veterinarian bills incurred as a result of their pets
11 consuming the Pet Foods; (c) for those whose pets died from consuming the Pet
12 Foods, the market value of those animals; and (d) for those whose animals died from
13 consuming the Pet Foods, the cost of disposing of their remains.

14 218. Within a reasonable time after their discovery of Evanger's breaches,
15 the Maels gave notice of the breaches of the express warranties on behalf of
16 themselves and the Classes. Alternatively, this pleading constitutes a sufficient
17 notice of Evanger's breaches of the express warranties. Alternatively, it was not
18 necessary for Plaintiffs and the Washington Subclass members to give Defendants
19 notice of its breaches of the express warranties as to them because they already had
20 actual notice of those breaches.

21 **COUNT III**

22 **Breach of the Implied Warranty of Merchantability**

23 **Wash. Rev. Code § 62A.2-314**

24 **(On Behalf of Plaintiffs Nicole and Guy Mael and the Washington Subclass)**

25 219. Plaintiffs repeat and reallege the allegations contained in the paragraphs
26 above, as if fully set forth herein.

1 220. Plaintiffs Nicole and Guy Mael bring this claim on behalf of themselves
2 and the Washington Subclass.

3 221. Evanger's is a "seller" and "merchant" as to the Pet Foods within the
4 meaning of Wash. Rev. Code §§ 62A.2-103 and 62A.2-104.

5 222. Evanger's designed, manufactured and sold the Pet Foods, which
6 constitute "goods" within the meaning of Wash. Rev. Code § 62A.2-105.

7 223. The Maels and members of the Washington Subclass constitute
8 "buyers" within the meaning of Wash. Rev. Code § 62A.2-103.

9 224. Under Wash. Rev. Code § 62A.2-314, Evanger's impliedly warranted
10 that the Pet Foods were merchantable, including that they: (a) were fit for their
11 ordinary purposes as "People Food for Pets," "100% beef" or other identified meat,
12 "USDA inspected, human grade," safe and healthy pet food, (b) could pass without
13 objection in the trade under its contract description as pet food, (c) were adequately
14 contained, packaged, and labeled as the agreements required, and (d) conformed to
15 the descriptions, promises and affirmations of fact set forth on its advertising,
16 container and labels.

17 225. The Pet Foods were sold in sealed packaging, and the identified issues
18 existed when they left Evanger's control, including Evanger's knowledge that the
19 Pet Foods were not fit for human consumption, were not USDA-FSIS inspected and
20 were made in an unsanitary facility only licensed to make feed for animals that may
21 have contaminated them.

22 226. When Evanger's designed, manufactured, distributed and sold the Pet
23 Foods, it knew the purpose for which they were intended; *i.e.*, that they would be
24 consumed by pets.

25 227. Evanger's initially breached the implied warranty of merchantability as
26 to the Maels and members of the Washington Subclass because the Pet Foods were

1 not fit for the ordinary purposes for which they were used—a safe, healthy and
2 human grade pet food. Specifically, some of Evanger’s Pet Foods were adulterated
3 because they contained poisonous pentobarbital, were made in an unsanitary facility
4 only licensed to make pet feed that may have contaminated them, and were made up
5 of animals that did not die by slaughter, all of which are not approved for use in food
6 and made them unfit for their ordinary purpose of providing safe, healthy and human
7 grade pet food. The Pet Foods were also misbranded, which is prohibited under the
8 law because instead of being made with 100% beef or other identified meat that is
9 USDA inspected and human grade as Evanger’s advertised, they were made up of
10 non-USDA, non-human grade meat that was not 100% beef from a facility only
11 licensed to make feed for animals not fit for human consumption. The Pet Foods
12 have caused injury and death to animals, who have consumed the Pet Foods.

13 228. Evanger’s further breached its implied warranty of merchantability to
14 the Maels and members of the Washington Subclass because the Pet Foods would
15 not pass without objection in the trade under its contract description as human grade,
16 USDA inspected pet food because they were misrepresented, and some were
17 adulterated and misbranded, which is prohibited under state and federal law.

18 229. Evanger’s further breached its implied warranty of merchantability to
19 the Maels and members of the Washington Subclass because the Pet Foods were not
20 adequately contained, packaged, and labeled. The directions and labeling that
21 accompanied the Pet Foods did not warn or disclose to the Maels and members of
22 the Washington Subclass of the dangers of feeding Pet Foods to their pets, and that
23 the Pet Foods were not as described.

24 230. Evanger’s finally breached its implied warranty of merchantability to
25 the Maels and members of the Washington Subclass because the Pet Foods did not
26 conform to the descriptions, promises and affirmations of fact set forth on their

1 container and label, as described above. Specifically, they did not constitute “People
2 Food for Pets,” “100% beef,” “USDA-inspected, human grade” ingredients, healthy
3 and safe food for pets.

4 231. The Maels and members of the Washington Subclass were injured as a
5 proximate result of Evanger’s aforementioned breaches as follows: (a) in the amount
6 of the difference in value between the value of the Pet Foods as warranted (their full
7 purchase prices) and the Pet Foods as actually delivered (\$0) since they were
8 misrepresented and some should not have been sold because of their adulteration
9 and misbranding, and consumers would not have paid anything for them had they
10 known; (b) the veterinarian bills incurred as a result of their pets consuming the Pet
11 Foods; (c) for those whose pets died from consuming the Pet Foods, the market value
12 of those animals; (d) for those whose animals died from consuming the Pet Foods,
13 the cost of disposing of their remains; and (e) other economic losses, including the
14 increased risk of health problems in their pets.

15 232. Within a reasonable time after their discovery of Evanger’s breaches,
16 the Maels gave notice of the breaches of the implied warranty of merchantability on
17 behalf of themselves and the Washington Subclass. Alternatively, this pleading
18 constitutes a sufficient notice of Evanger’s breaches of the implied warranty of
19 merchantability. Alternatively, it was not necessary for the Maels to give Evanger’s
20 notice of its breaches of the implied warranty of merchantability as to them and the
21 Washington Subclass because Evanger’s had actual notice of such breaches.

COUNT IV

Violation of the Washington Consumer Protection Act

Wash. Rev. Code § 19.86.010, *et seq.*

Non-Per Se Unfair Business Practices

(On Behalf of Plaintiff Nicole and Guy Mael and the Washington Subclass)

233. Plaintiffs repeat and reallege the allegations contained in the paragraphs above, as if fully set forth herein.

234. Plaintiffs Nicole and Guy Mael bring this claim on behalf of themselves and the Washington Subclass.

235. The Washington Consumer Protection Act (“WCPA”) declares unlawful (i) an unfair or deceptive act or practice, (ii) occurring in trade or commerce, (iii) with a public interest impact, and (iv) which causes injury to Plaintiffs.

236. Evanger’s is a “person” within the meaning of the WCPA, Wash. Rev. Code § 19.86.010(1), and conducts “trade” and “commerce” within the meaning of the Washington Consumer Protection Act, Wash. Rev. Code § 19.86.010(2).

237. The Maels and the Washington Subclass members are “persons” within the meaning of the WCPA, Wash. Rev. Code § 19.86.010(1).

238. As the purpose of the WCPA is “to protect the public and foster fair and honest competition,” the act should be “liberally construed” to serve its beneficial purposes. Wash. Rev. Code § 19.86.920.

239. In the context of the WCPA, pleading and proof of an unfair act or practice under Wash. Rev. Code § 19.86.020 bears little resemblance to pleading and proof of common law fraud. It can be predicated on an act or practice so designated by statute; an act or practice that has the capacity to deceive substantial portions of the public; or an unfair act or practice not regulated by statute but in violation of the

1 public interest. An act or practice can be unfair without being deceptive and still
2 violate the WCPA.

3 240. At all relevant times, Evanger's engaged in unfair acts or practices in
4 the conduct of its business by describing, promising and affirming on its container
5 and label that its Pet Foods are "People Food for Pets," "100% beef" or other
6 identified meat, "USDA inspected, human grade," healthy and safe when they were
7 not as found and publicly denounced by the FDA. In fact, they were misrepresented
8 and some were adulterated and misbranded as prohibited under the law, and were
9 unsafe for animals to eat because they contained poisonous pentobarbital, were
10 contaminated by unsanitary facilities only licensed to make feed for animals and
11 were made up of animals that did not die from slaughter. Evanger's further engaged
12 in unfair acts or practices in the conduct of its business when it did not provide a
13 refund to customers, who purchased the Pet Foods based on Evanger's false
14 representations and did not return them.

15 241. At all relevant times, Evanger's further engaged in unfair acts and
16 practices when it failed to disclose material information about the Pet Foods
17 including that their facilities are not human grade, USDA-inspected and their further
18 misrepresentations of quality, related health risks, adulteration and misbranding.
19 Evanger's has failed to provide adequate warnings or notices of health risks from
20 the Pet Food and does not disclose that they are unfit to be sold and to be consumed
21 by animals.

22 242. Evanger's admitted in its own lawsuit against its supplier that the bill
23 of lading on the meat it purchased and received, and used in its Pet Food, stated that
24 the meat was "inedible" and "not fit for human consumption," and was not USDA-
25 FSIS inspected. Defendants' facilities are also not licensed to make food for human
26 consumption and are not USDA inspected. Instead, the Pet Foods were

1 misrepresented and some were adulterated and misbranded, should have not been
2 sold, and were unsafe for animals to consume.

3 243. Evanger's stated in the recall in February and March 2017 that no other
4 pet foods were impacted, however, a month later, another pet food that it
5 manufacturers for Party Animal also tested positive for pentobarbital and sickened
6 another animal leading to another recall. Evanger's was also aware that its facilities
7 were unsanitary and could contaminate its Pet Foods as the FDA found.

8 244. Evanger's concealed and misrepresented this information about the Pet
9 Foods to the Maels and the Washington Subclass members, which is material in that
10 a reasonable consumer would not have purchased the Pet Foods and subjected
11 himself, herself or their pets to injury had he or she known these facts.

12 245. Evanger's conducted its acts and practices described herein in the
13 course of trade or commerce.

14 246. Defendants' unfair acts and practices impact the public interest.
15 Defendants committed the acts and practices in the course of its everyday business;
16 the acts and practices are part of a pattern or generalized course of business;
17 Defendants committed the acts and practices repeatedly and continually both before
18 and after Plaintiffs' purchase of the Pet Foods; there is a real and substantial potential
19 for repetition of Defendants' conduct; and many customers are affected or likely to
20 be affected.

21 247. The acts and practices described above are unfair because these acts or
22 practices (1) have caused substantial financial injury to the Maels and the
23 Washington Subclass members; (2) are not outweighed by any countervailing
24 benefits to consumers or competitors; and (3) are not reasonably avoidable by
25 consumers.

26 248. Evanger's unfair practices have occurred in its trade or business and

1 were and are capable of injuring a substantial portion of the public. As such,
2 Evanger's general course of conduct as alleged herein is injurious to the public
3 interest, and the acts complained of herein are ongoing and/or have a substantial
4 likelihood of being repeated.

5 249. As a direct and proximate result of Evanger's unfair acts or practices,
6 the Maels and the Washington Subclass members suffered injury in fact and lost
7 money.

8 250. The Maels and the Washington Subclass are therefore entitled to:

9 1) an order enjoining the conduct complained herein;

10 2) actual damages to the Maels and the Washington Subclass equal to: (a) the
11 amount the Maels and the Washington Subclass paid for the Pet Foods: the
12 difference in value between the value of the Pet Foods as represented (the full
13 purchase prices) and the value of the Pet Foods as actually accepted and
14 delivered (\$0) since it was misrepresented and some should not have been
15 sold because of its adulteration and misbranding, and consumers would not
16 have paid anything for it had they known; (b) their veterinarian bills incurred
17 as a result of their pets consuming the Pet Foods; (c) for those whose pets died
18 from eating the Pet Foods, the market value of their animals; and (d) for those
19 whose animals died from eating the Pet Foods, the cost of disposing of their
20 remains;

21 3) treble damages pursuant to Wash. Rev. Code § 19.86.090;

22 4) costs of suit, including a reasonable attorney's fee; and

23 such further relief as the Court may deem proper.

24 251. The Maels and the Washington Subclass are also entitled to equitable
25 relief as the Court deems appropriate, including, but not limited to, disgorgement,
26 for the benefit of the Subclass members, or all or part of the ill-gotten profits

1 Evanger's received from the sale of its Pet Food.

2 **COUNT V**

3 **Violation of the Washington Consumer Protection Act**

4 **Wash. Rev. Code § 19.86.010, et seq.**

5 **Non-Per Se Deceptive Business Practices**

6 **(On Behalf of Plaintiffs Nicole and Guy Mael and the Washington Subclass)**

7 252. Plaintiffs repeat and reallege the allegations contained in the paragraphs
8 above, as if fully set forth herein.

9 253. Plaintiffs Nicole and Guy Mael bring this claim on behalf of themselves
10 and the Washington Subclass.

11 254. The Washington Consumer Protection Act ("WCPA") declares
12 unlawful (i) an unfair or deceptive act or practice, (ii) occurring in trade or
13 commerce, (iii) with a public interest impact, and (iv) which causes injury to
14 Plaintiffs.

15 255. Evanger's is a "person" within the meaning of the WCPA, Wash. Rev.
16 Code § 19.86.010(1), and conducts "trade" and "commerce" within the meaning of
17 the Washington Consumer Protection Act, Wash. Rev. Code § 19.86.010(2).

18 256. The Maels and the Washington Subclass members are "persons" within
19 the meaning of the WCPA, Wash. Rev. Code § 19.86.010(1).

20 257. As the purpose of the WCPA is "to protect the public and foster fair
21 and honest competition," the act should be "liberally construed" to serve its
22 beneficial purposes. Wash. Rev. Code § 19.86.920.

23 258. At all relevant times, Evanger's engaged in deceptive acts or practices
24 in the conduct of its business by describing, promising and affirming on its container
25 and label that its Pet Foods are "People Food for Pets," "100% beef" or other
26 identified meat, "USDA inspected, human grade," healthy and safe when they were

1 not. In fact, they were misrepresented and some were adulterated and misbranded as
2 prohibited under the law, and were unsafe for animals to eat because they contained
3 poisonous pentobarbital.

4 259. At all relevant times, Evanger's engaged in deceptive acts or practices
5 by failing to disclose the quality of its Pet Foods and without providing adequate
6 warning or notice of their related health risks.

7 260. Evanger's further engaged in deceptive acts or practices in the conduct
8 of its business when it did not provide a refund to customers, who purchased the Pet
9 Foods and did not return them based on Evanger's omissions and false
10 representations.

11 261. Evanger's misrepresented that its Pet Foods are "People Food for Pets,"
12 from USDA inspected suppliers and human grade when they are not, as determined
13 and publicly stated by the FDA.

14 262. At all relevant times, Evanger's engaged in deceptive acts or practices
15 in the conduct of its business by describing, promising and affirming on its container
16 and label that the Pet Foods were "People Food for Pets," "100% beef" or other
17 identified meat, "USDA inspected, human grade," healthy and safe for pets to
18 consume, when in fact it knew or had reason to know that they were not. In fact,
19 Evanger's is only licensed to make feed for animals not for human consumption.
20 Defendants admitted in their own lawsuit against its supplier that the bill of lading
21 on the meat it purchased and received, and which Evanger's used in its Pet Food,
22 stated that the meat was "inedible" and "not fit for human consumption," and was
23 not USDA-FSIS inspected. Instead, the Pet Foods were misrepresented, adulterated
24 and misbranded, should have not been sold, and were unsafe for animals to consume.

25 263. Evanger's further engages in deceptive acts or practices in the conduct
26 of its business as it continues to misrepresent that its Pet Foods are "People Food for
27

1 Pets,” “100% beef” or other identified meat, “USDA inspected” and “human grade”
2 after the FDA found and publicly stated that none of its suppliers are USDA
3 inspected and are not human grade, Defendants are only licensed to make feed for
4 animals, not for human consumption, and their Pet Foods are not 100% beef or other
5 identified meat.

6 264. Evanger’s stated in its recall in February and March 2017 that no other
7 pet foods were impacted, however, a month later, another pet food that it
8 manufacturers for Party Animal also tested positive for pentobarbital and sickened
9 another animal leading to another recall.

10 265. Evanger’s was also aware that its facilities licensed only to make feed
11 for animals were unsanitary and could contaminate its Pet Foods as regulators found
12 during 2017 and earlier inspections.

13 266. Evanger’s concealed and misrepresented this information about its Pet
14 Foods to Plaintiffs and the Washington Subclass members, which is material in that
15 a reasonable consumer would not have purchased the Pet Foods and subjected
16 himself or herself to injury had he or she known these facts.

17 267. Evanger’s conducted its acts and practices described herein in the
18 course of trade or commerce.

19 268. Defendants’ deceptive acts and practices impact the public interest.
20 Defendants committed the acts and practices in the course of its everyday business;
21 the acts and practices are part of a pattern or generalized course of business;
22 Defendants committed the acts and practices repeatedly and continually both before
23 and after the Maels’ purchase of the Pet Foods; there is a real and substantial
24 potential for repetition of Defendants’ conduct; and many customers are affected or
25 likely to be affected.

26 269. The acts and practices described above are deceptive because these acts

1 or practices (1) have caused substantial financial injury to the Maels and the
2 Washington Subclass members; (2) are not outweighed by any countervailing
3 benefits to consumers or competitors; and (3) are not reasonably avoidable by
4 consumers.

5 270. Evanger's deceptive practices have occurred in its trade or business and
6 were and are capable of injuring a substantial portion of the public. As such,
7 Evanger's general course of conduct as alleged herein is injurious to the public
8 interest, and the acts complained of herein are ongoing and/or have a substantial
9 likelihood of being repeated.

10 271. As a direct and proximate result of Evanger's deceptive acts or
11 practices, the Maels and the Washington Subclass members suffered injury in fact
12 and lost money.

13 272. The Maels and the Washington Subclass are therefore entitled to:

14 1) an order enjoining the conduct complained herein;

15 2) actual damages to the Maels and the Washington Subclass equal to: (a) the
16 amount the Maels and the Washington Subclass paid for the worthless Pet
17 Foods: the difference in value between the value of the Pet Foods as
18 represented (the full purchase prices) and the value of the Pet Foods as
19 actually accepted and delivered (\$0) since it was misrepresented and some
20 should not have been sold because of its adulteration and misbranding, and
21 consumers would not have paid anything for it had they known; (b) their
22 veterinarian bills incurred as a result of their pets consuming the Pet Foods;
23 (c) for those whose pets died from eating the Pet Foods, the market value of
24 their animals; and (d) for those whose animals died from eating the Pet Foods,
25 the cost of disposing of their remains;

26 3) treble damages pursuant to Wash. Rev. Code § 19.86.090;

27 SECOND AMENDED COMPLAINT CASE NO. 3:17-CV-05469-RBL
28

1 4) costs of suit, including a reasonable attorney's fee; and
2 such further relief as the Court may deem proper.

3 273. The Maels and the Washington Subclass are also entitled to equitable
4 relief as the Court deems appropriate, including, but not limited to, disgorgement,
5 for the benefit of the Subclass members, or all or part of the ill-gotten profits
6 Evanger's received from the sale of its Pet Food.

7 **COUNT VI**

8 **Negligence - Washington Product Liability Act**

9 **Wash. Rev. Code § 7.72.030(1)**

10 **(On Behalf of Plaintiffs Nicole and Guy Mael and the Washington**
11 **Subclass)**

12 274. Plaintiffs repeat and reallege the allegations contained in the paragraphs
13 above, as if fully set forth herein.

14 275. Plaintiffs Nicole and Guy Mael bring this claim on behalf of themselves
15 and the Washington Subclass.

16 276. Evanger's owed a duty of reasonable care to the Maels and the members
17 of the Washington Subclass to provide Pet Foods that were safe for consumption by
18 animals.

19 277. Evanger's breached this duty by selling Pet Foods that were
20 misrepresented and some were adulterated because they contained poisonous
21 pentobarbital; were made in an unsanitary facility that contaminated them; were
22 made up of animals that did not die by slaughter; were misbranded because they did
23 not contain USDA inspected, human grade meat and were not 100% beef or other
24 identified meat; and did not adequately warn Plaintiffs and the members of the
25 Washington Subclass of the Pet Foods' dangers on its packaging.

26 278. Such conduct by Evanger's was negligent because it did not reflect the
27

1 level of care that an ordinarily prudent and reasonable person in Evanger's place
2 would have given under the same or similar circumstances.

3 279. Evanger's should have known that the Pet Foods posed a risk of harm
4 to dogs; that purchasers of the Pet Foods, including the Maels and the members of
5 the Washington Subclass, would not recognize the risk and that the risk was
6 misrepresented to them; and that consumption of the Pet Foods by pets would
7 foreseeably result in their injury and possibly death. Such injury and death to the
8 animals constituted property damage to the Maels and the members of the
9 Washington Subclass beyond, and in addition to, their damage from purchasing the
10 harmful Pet Foods.

11 280. As a proximate result of Evanger's negligent acts alleged herein, the
12 Maels and the members of the Washington Subclass suffered injury to property,
13 specifically the illness and deaths of their pets, and the expenses incurred therewith.

14 **COUNT VII**

15 **Strict Products Liability**

16 **Wash. Rev. Code § 7.72.030(2)**

17 **(On Behalf of Plaintiffs Nicole and Guy Mael and the Washington Subclass)**

18 281. Plaintiffs repeat and reallege the allegations contained in the paragraphs
19 above, as if fully set forth herein.

20 282. Plaintiffs Nicole and Guy Mael bring this claim on behalf of themselves
21 and the Washington Subclass.

22 283. Evanger's designed, manufactured, distributed and sold the Pet Foods,
23 which were misrepresented and some were adulterated because they contained
24 poisonous pentobarbital, were made in unsanitary facilities that contaminated them,
25 and were made of animals that did not die from slaughter. The Pet Foods were
26 misbranded because they were not made of 100% beef or other identified meat and

1 USDA inspected, human grade meat or facilities. The misrepresented, adulterated
2 and misbranded Pet Foods and their potential health risks, at all times material
3 hereto, would not reasonably have been expected by consumers, and constituted an
4 unreasonably dangerous defect and/or condition.

5 284. The Pet Foods were unreasonably dangerous because of defects in
6 marketing, design and manufacturing, which reasonable consumers would not have
7 expected.

8 285. There was a defect in the marketing of the Pet Foods, which made the
9 Pet Foods unreasonably dangerous, because Evanger's failed to warn the Maels and
10 the members of the Washington Subclass, on its advertising, packaging or otherwise,
11 of the potential harm to their pets from consuming the Pet Foods, which warning
12 reasonable consumers would have expected.

13 286. The Pet Foods were defectively designed because they were
14 misrepresented, adulterated and misbranded in a manner that made them unsafe. The
15 Pet Foods were made at a facility only licensed to make feed for animals and
16 contained substitute ingredients – ingredients other than those that Evanger's
17 advertised as in its Pet Foods – and failed to include ingredients that could have been
18 used to meet the same needs and not be unsafe or unreasonably expensive. Evanger's
19 had the ability to eliminate the unsafe character of the Pet Foods without seriously
20 impairing their usefulness or significantly increasing their costs. It was not
21 anticipated that purchasers of the Pet Foods would be aware of the dangers inherent
22 in the use of the products, and the expectation of ordinary consumers was that the
23 Pet Foods manufactured by Evanger's would be safe for dogs.

24 287. Alternatively, the Pet Foods were defectively manufactured because
25 they were misrepresented, adulterated and misbranded in a manner that caused them
26 to be harmful and deadly to animals, and that deviated in terms of quality from the

1 specifications in a manner that rendered them unreasonably dangerous and not
2 within the expectations of reasonable consumers.

3 288. These unreasonably dangerous defects in the marketing, design and
4 manufacture of the Pet Foods existed at the time the Pet Foods left Evanger's control.

5 289. The Pet Foods came in sealed packages, and did not change from the
6 time they left Evanger's possession, through the time they arrived in stores to be sold
7 to consumers, and the time when consumers bought and took possession of them.

8 290. The unreasonably dangerous defects and/or conditions of the Pet Foods
9 proximately caused injury and death to dogs, and related expenses, constituting
10 property damage to the Maels and the members of the Washington Subclass beyond,
11 and in addition to, their damages from purchasing the harmful Pet Foods.

12 291. Accordingly, Evanger's is strictly liable for these damages caused to
13 the Maels and the members of the Washington Subclass by its unreasonably
14 dangerous product.

15 **COUNT VIII**

16 **Unjust Enrichment Under Washington Law**

17 **(On Behalf of Plaintiffs Nicole and Guy Mael and the Washington Subclass)**

18 292. Plaintiffs repeat and reallege the allegations contained in the paragraphs
19 above, as if fully set forth herein.

20 293. Plaintiffs Nicole and Guy Mael bring this claim on behalf of themselves
21 and the Washington Subclass.

22 294. The Maels and the members of the Washington Subclass, at their
23 expense, purchased the Pet Foods, which was misrepresented, defective, not
24 merchantable, and unreasonably dangerous and therefore had no value to them.

25 295. The Maels and the members of the Washington Subclass purchased the
26 Pet Foods designed, manufactured and marketed by Evanger's in various retail

1 stores. Evanger's knowingly received and retained a benefit from the Maels and the
 2 Washington Subclass members, namely the gross revenues resulting from their
 3 purchases. Evanger's is not justified in retaining these revenues because of the
 4 diminished value, inherent defects, adulterated state, misbranded content and general
 5 lack of merchantability of the Pet Foods.

6 296. Principles of fairness and equity demand that Evanger's disgorge the
 7 above-referenced revenues to the Maels and the Washington Subclass members.

8 **COUNT IX**

9 **Violation of the Illinois Consumer Fraud and**

10 **Deceptive Business Practices Act**

11 **815 Ill. Comp. Stat. 505/1, et seq.**

12 **(On Behalf of Plaintiffs and the Nationwide Class, and**

13 **in the Alternative, on behalf of Plaintiff Angela Bertucci the Illinois Subclass)**

14 297. Plaintiffs repeat and reallege the allegations contained in the paragraphs
 15 above, as if fully set forth herein.

16 298. Plaintiffs bring this claim on behalf of themselves and the Nationwide
 17 Class, and in the alternative, this claim is brought on behalf of Plaintiff
 18 Angela Bertucci and the Illinois Subclass.

19 299. This cause of action is brought pursuant the Illinois Consumer Fraud
 20 and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1 et seq. ("ICFA").

21 300. The acts and omissions, specifically including Evanger's
 22 misrepresentations that the Pet Foods were "People Food for Pets," USDA inspected
 23 and of human grade quality including 100% beef, and Evanger's omitting that the
 24 Pet Foods were from facilities only licensed to make feed for animals, not products
 25 that are fit for human consumption, adulterated and misbranded and contained
 26 poisonous pentobarbital and failing to provide adequate warning or notice of their

1 health risks, occurred in the conduct of trade or commerce as that term is used
2 therein.

3 301. Section 2 of ICFA prohibits unfair or deceptive acts or practices used
4 or employed in the conduct of any trade or commerce, as well as deceptive acts or
5 practices which are committed in the course of trade or commerce and with the intent
6 that others rely upon them. 815 ILCS 505/2.

7 302. Section 2 of the ICFA provides, in full:
8 Unfair methods of competition and unfair or deceptive acts or practices,
9 including but not limited to the use or employment of any deception, fraud,
10 false pretense, false promise, misrepresentation or the concealment,
11 suppression or omission of any material fact, with intent that others rely upon
12 the concealment, suppression or omission of such material fact, or the use or
13 employment of any practice described in Section 2 of the "Uniform Deceptive
14 Trade Practices Act," approved August 5, 1965, in the conduct of any trade or
15 commerce are hereby declared unlawful whether any person has in fact been
16 misled, deceived or damaged thereby. In construing this section, consideration
17 shall be given to the interpretations of the Federal Trade Commission and the
18 federal courts relating to Section 5(a) of the Federal Trade Commission Act."
19 815 ILCS 505/2.

20 303. Evanger's acts, misrepresentations and omissions are by their very
21 nature unfair, deceptive and unlawful within the meaning of the ICFA.

22 304. Evanger's has disseminated, or caused to be disseminated, advertising,
23 labeling, packaging, marketing, and promotion of the Pet Foods that is deceptive and
24 otherwise violates the ICFA, because at all times material hereto, the advertising,
25 labeling, packaging, marketing and promotion of the Pet Foods included false and/or
26 misleading statements or misrepresentations concerning the quality of the Pet Foods,

1 including that they were “People Food for Pets,” USDA inspected and contained
2 human grade including 100% beef, and/or because Evanger’s failed to disclose
3 and/or concealed or omitted material facts, including without limitation, known
4 defects and risks concerning the quality of the Pet Foods and the healthiness of the
5 Pet Foods, including that they were adulterated and misbranded and unsafe for pets
6 to consume.

7 305. In making and disseminating the misrepresentations and omissions
8 alleged herein, Evanger’s intended to deceive reasonable consumers, including
9 Plaintiffs and the Nationwide Class.

10 306. Evanger’s made and disseminated the representations and omissions
11 alleged herein in the course of conduct involving trade and commerce.

12 307. The utility, if any, of Evanger’s practices related to the advertising,
13 labeling, packaging, marketing, promotion and selling of Pet Foods, while making
14 affirmative misrepresentations and without properly disclosing the Pet Foods’ true
15 nature and/or characteristics, is negligible, when weighed against the harm to the
16 general public, Plaintiffs and the Nationwide Class.

17 308. The harmful impact upon members of the general public targeted by
18 such practices, including Plaintiffs and the members of the Nationwide Class, who
19 purchased and used the Pet Foods, outweighs any reasons or justifications by
20 Evanger’s for the unfair and deceptive business practices Evanger’s employed to sell
21 the Pet Foods described herein.

22 309. Evanger’s had an improper motive (to place profit ahead of accurate
23 marketing) in its practices related to the advertising, labeling, packaging, marketing,
24 promotion and selling of the Pet Foods.

25 310. The use of such unfair and deceptive business acts and practices was
26 and is under the sole control of Evanger’s, and was deceptively hidden from

1 Plaintiffs and the members of the Nationwide Class, and the general public, in
 2 Evanger's advertising, labeling, packaging, marketing, promotion and selling of the
 3 Pet Foods in a deceptive effort to put profit over accurate marketing. These deceptive
 4 acts and practices had a capacity, tendency, and/or likelihood to deceive or confuse
 5 reasonable consumers into believing that the Pet Foods were "People Food for Pets,"
 6 USDA inspected, human grade, 100% beef or other identified meat, healthy, free of
 7 harmful toxic substances, and were otherwise safe.

8 311. As a direct and proximate result of Evanger's deceptive and unfair
 9 conduct and/or violations of the ICFA, Plaintiffs and the members of the Nationwide
 10 Class have suffered and continue to suffer damages, including without limitation the
 11 following:

- 12 a) The difference in value between the full purchase price of the Pet Foods
 13 and the actual value of the Pet Foods (which actual value is \$0 because the
 14 Pet Foods should not have been sold since they were misrepresented and some
 15 were adulterated and misbranded, and consumers would not have paid
 16 anything for them had they known) - *i.e.*, the full purchase prices of the Pet
 17 Foods;
- 18 b) All veterinary bills incurred as a result of illness, injury or death caused by
 19 consuming the Pet Foods;
- 20 c) All bills incurred for the disposition of the remains of dogs killed by the Pet
 21 Foods; and
- 22 d) The market value of the dogs killed as a result of ingesting the Pet Foods.

23 312. Illinois also provides protection to purchasers of animal food from
 24 unfair and deceptive practices. 505 ILCS 30/7 (Adulteration), 505 ILCS 30/8
 25 (Misbranding), and 505 ILCS 30/11.1 (Prohibited Acts).

26 313. A commercial feed is adulterated if it "bears or contains any poisonous
 27

1 or deleterious substance which may render it injurious to health;" 505 ILCS 30/7,
2 and a commercial feed is misbranded if its "labeling is false or misleading in any
3 particular." 505 ILCS 30/8. Illinois law also prohibits the "manufacture or
4 distribution of any commercial feed that is adulterated or misbranded." 505 ILCS
5 30/11.1.

6 314. The Pet Foods are misrepresented to be "People Food for Pets," 100%
7 beef or other identified meat, USDA inspected and human grade, which they are not.
8 Instead they contain poisonous pentobarbital, are made in an unsanitary facility only
9 licensed to make feed for animals that may have caused contamination, and contain
10 the remains of animals that did not die by slaughter and were not all beef or other
11 identified meat. Because of this, the Pet Foods injured Plaintiffs' pets and those of
12 the members of Nationwide Class, and the composition or quality of the Pet Foods
13 falls below what is purported or represented by its label.

14 315. Plaintiffs and the other members of Nationwide Class further seek to
15 enjoin such unlawful deceptive acts and practices as described above. Each of the
16 Nationwide Class members will be irreparably harmed unless the unlawful actions
17 of Evanger's are enjoined, in that Evanger's will continue to falsely and
18 misleadingly market and advertise and represent on its packaging the healthy nature
19 of the Pet Foods and that they are USDA inspected when they are not.

20 316. Towards that end, Plaintiffs and Nationwide Class request an order
21 granting them injunctive relief requiring removal of the unsafe products from retail
22 outlets, prohibiting false statements, requiring corrective disclosures and/or
23 disclaimers on the labeling and advertising of the Pet Foods, and/or the removal of
24 the harmful ingredients.

25 317. Absent injunctive relief, Evanger's will continue to manufacture and
26 sell misrepresented, deceptive and unsafe Pet Foods without disclosing to consumers

1 their true quality and risk of harmful effects.

2 318. In this regard, Evanger's has violated, and continues to violate, the
3 Illinois Consumer Fraud and Deceptive Business Practices Act, which makes unfair
4 or deceptive acts or practices used or employed in the conduct of any trade or
5 commerce unlawful. As a direct and proximate result of Evanger's violation of the
6 Illinois Consumer Fraud and Deceptive Business Practices Act as described above,
7 Plaintiffs and the members of the Nationwide Class have suffered damages, as set
8 forth above.

9 319. Evanger's affirmative misrepresentations, as well as its wrongful
10 warranty practices, were disseminated and directed from its headquarters in
11 Wheeling, Illinois. Evanger's manufactures its Pet Foods at its facilities in Wheeling
12 and Markham, Illinois. Therefore, based upon the choice-of-law rules applied in this
13 District, Plaintiffs preliminarily identify the substantive laws of Illinois as the most
14 likely to apply to Nationwide Class as alleged in this claim.

15 **COUNT X**

16 **Breach of Express Warranty**

17 **(On Behalf of Plaintiffs and the Nationwide Class, and**
18 **in the Alternative, on behalf of Plaintiff Angela Bertucci and the Illinois**
19 **Subclass)**

20 320. Plaintiffs repeat and reallege the allegations contained in the paragraphs
21 above, as if fully set forth herein.

22 321. Plaintiffs bring this claim on behalf of themselves and the Nationwide
23 Class, and in the alternative, this claim is brought on behalf of Plaintiff Angela
24 Bertucci and the Illinois Subclass.

25 322. Evanger's constitutes a "merchant" and a "seller" in connection with its
26 sales of the Pet Foods, as those terms are defined in the Illinois Uniform Commercial

1 Code.

2 323. Plaintiffs and the members of the Nationwide Class constitute “buyers”
3 in connection with their purchases of the Pet Food from Evanger’s, as that term is
4 defined in the Illinois Uniform Commercial Code.

5 324. The Pet Food constitutes “goods,” as that term is defined in the Illinois
6 Uniform Commercial Code.

7 325. By affirmations of fact, promises and descriptions made on the Pet
8 Foods’ packaging, Evanger’s provided Plaintiffs and the other members of the
9 Nationwide Class with written express warranties before or at the time of purchase,
10 including the following:

- 11 a) The Pet Foods were “People Food for Pets;”
- 12 b) The Pet Foods were from a human grade, USDA facility;
- 13 c) The Pet Foods were made of 100% beef or other identified meat;
- 14 d) The Pet Foods were made of USDA-inspected meats;
- 15 e) The Pet Foods were human grade quality meats;
- 16 f) The Pet Foods were safe and healthy for pets to eat.

17 326. These affirmations of facts and promises made by Evanger’s to
18 Plaintiffs and the Nationwide Class related to Pet Foods and became part of the bases
19 of the bargains between them and Evanger’s, and thereby created express warranties
20 that the Pet Foods would conform to those affirmations and promises. Furthermore,
21 the aforementioned descriptions of the Pet Foods were part of the bases of the
22 bargains for the purchases of Pet Foods between Evanger’s on the one hand and
23 Plaintiffs and other Nationwide Class members on the other. The descriptions
24 created an express warranty that the goods would conform to those descriptions. As
25 previously noted, Evanger’s misrepresented the nature of the Pet Foods, since the
26 Pet Foods were not 100% beef or other identified meat and were not USDA-

1 inspected, human quality meats or from facilities that are licensed to make human
2 food. Instead, the Pet Foods were misrepresented and some were adulterated because
3 they contained poisonous pentobarbital, were made in an unsanitary facility only
4 licensed to make feed for animals that may have contaminated them, were not made
5 from animals that died by slaughter, and were misbranded. The Pet Foods did not
6 conform to the affirmations, promises and descriptions previously mentioned,
7 resulting in breaches of the Pet Foods' express warranties.

8 327. The Pet Foods were marketed directly to consumers by Evanger's,
9 came in sealed packages, and did not change from the time they left Evanger's
10 possession until they were purchased by consumers in stores.

11 328. Plaintiffs have complied with all conditions precedent to filing this
12 breach of warranty claim, including providing notice of the breach of warranty to
13 Evanger's on behalf of themselves and the Nationwide Class, prior to filing this
14 action.

15 329. Alternatively, the filing of this Complaint provides sufficient notice of
16 breach to Evanger's on behalf of Plaintiffs and the Nationwide Class.

17 330. Alternatively, notice need not have been given to Evanger's because
18 Evanger's had actual notice of its breaches of warranty as to Plaintiffs and the
19 Nationwide Class.

20 331. As a proximate result of Evanger's breach of express warranties,
21 Plaintiffs and the members of the Nationwide Class have suffered actual damages
22 as follows:

- 23 (a) The difference in value between the full purchase price of the Pet Foods
24 and the actual value of the Pet Foods (which actual value is \$0 because the
25 Pet Foods should not have been sold since they were misrepresented and some
26 were adulterated and misbranded, and consumers would not have paid

1 anything for them had they known) - *i.e.*, the full purchase prices of the Pet
2 Foods;

3 (b) the veterinarian bills incurred as a result of consumption of the Pet Foods;

4 (c) the market value of the animals killed by consumption of Pet Foods; and

5 (d) the cost of disposing of the remains of the animals killed by consumption
6 of Pet Foods.

7 332. Plaintiffs and members of the Nationwide Class cannot return Pet
8 Foods to Evanger's for repair as the subject defect is irreparable.

9 333. Evanger's affirmative misrepresentations, as well as its wrongful
10 warranty practices, were disseminated and directed from its headquarters in
11 Wheeling, Illinois. Evanger's manufactures its Pet Foods at its own facilities in
12 Wheeling and Markham, Illinois. Therefore, based upon the choice-of-law rules
13 applied in this District, Plaintiffs preliminarily identify the substantive laws of
14 Illinois as the most likely to apply to Nationwide Class as alleged in this claim.

15 **COUNT XI**

16 **Negligence Under Illinois Law**

17 **(On Behalf of Plaintiffs and the Nationwide Class, and**
18 **in the Alternative, on Behalf of Plaintiff Angela Bertucci and the Illinois**
19 **Subclass)**

20 334. Plaintiffs repeat and reallege the allegations contained in the paragraphs
21 above, as if fully set forth herein.

22 335. Plaintiffs bring this claim on behalf of themselves and the Nationwide
23 Class and in the alternative, Plaintiff Angela Bertucci brings this claim on behalf of
24 herself and the Illinois Subclass.

25 336. Evanger's owed a duty of care to Plaintiffs and the Nationwide Class
26 to provide pet food that was unadulterated, not misbranded or misrepresented, safe

1 for consumption by dogs, and free from toxins with harmful effects.

2 337. Evanger's breached this duty by selling Pet Foods, which were
3 misbranded, adulterated, and not safe, because they contained pentobarbital, were
4 made in an unsanitary facility only licensed to make feed for animals that may have
5 contaminated them, and were composed of animals that did not die from slaughter.

6 338. The Pet Foods were sold without adequate quality control and testing;
7 without using proper manufacturing and production practices; without properly
8 investigating reports of pet deaths and illnesses following consumption of the Pet
9 Foods; and without adequately warning Plaintiffs and the Nationwide Class of the
10 dangers as part of the Pet Foods's packaging or disclosing that the Pet foods were
11 not USDA-inspected, were composed of animals that did not die from slaughter, and
12 were not human quality.

13 339. Such conduct by Evanger's was negligent in that Evanger's failed to
14 act as an ordinarily prudent and reasonable person would have acted under the same
15 or similar circumstances.

16 340. Evanger's should have known that Pet Foods posed a risk of harm to
17 animals; that purchasers of Pet Foods, including Plaintiffs and the Nationwide Class,
18 would not recognize the risk and were instead purchasing this product based on
19 Defendants' misrepresentations that the Pet Foods were of a certain quality and
20 would not carry these risks; and that consumption of Pet Foods by animals would
21 foreseeably result in injury and death to those dogs, constituting property damage to
22 Plaintiffs and the Nationwide Class beyond and in addition to the damages from
23 purchasing the harmful Pet Foods.

24 341. As a proximate result of Evanger's negligent acts alleged herein,
25 Plaintiffs and the Nationwide Class suffered injury to property, specifically in the
26 illness and deaths of their animals and the expenses incurred therewith.

342. Evanger's affirmative misrepresentations, as well as its wrongful warranty practices, were disseminated and directed from its headquarters in Wheeling, Illinois. Evanger's manufactures its Pet Foods at its facilities in Wheeling and Markham, Illinois. Therefore, based upon the choice-of-law rules applied in this District, Plaintiffs preliminarily identify the substantive laws of Illinois as the most likely to apply to Nationwide Class as alleged in this claim.

COUNT XII

Products Liability Under Illinois Law

**(On Behalf of Plaintiffs and the Nationwide Class, and
in the Alternative, on Behalf of Plaintiff Angela Bertucci and the Illinois
Subclass)**

343. Plaintiffs repeat and reallege the allegations contained in the paragraphs above, as if fully set forth herein.

344. Plaintiffs bring this claim on behalf of themselves and the Nationwide Class, and in the alternative, Plaintiff Angela Bertucci and the Illinois Subclass.

345. Evanger's designed, manufactured and sold Pet Foods, which were unsafe because they were misbranded and adulterated, and this misbranding and adulteration caused the Pet Foods to contain poisonous pentobarbital, to be contaminated by the unsanitary facility where they were made, and to be manufactured from animals that did not die from slaughter.

346. The adulteration and misbranding that made the consumption of the Pet Foods risky to the health of animals was, at all times material hereto, an unreasonably dangerous defect and/or condition. The failure of Evanger's to warn on its package of the dangerousness of the Pet Foods also constituted an unreasonably dangerous defect and/or condition.

347. These unreasonably dangerous defects and/or conditions existed at the

1 time the Pet Foods left Evanger's control.

2 348. The Pet Foods came in sealed packages, and they and their packaging
3 did not change from the time they left Evanger's possession through the time they
4 arrived in stores to be sold to consumers and consumers purchased and took
5 possession of them.

6 349. The unreasonably dangerous defects and/or conditions of the Pet Foods
7 proximately caused injury and death to animals, constituting property damage to
8 Plaintiffs and the Nationwide Class beyond and in addition to the damages from
9 purchasing the harmful Pet Foods.

10 350. Accordingly, Evanger's is strictly liable for the damages caused to
11 Plaintiffs and the Nationwide Class, by the unreasonably dangerous Pet Foods,
12 specifically the illness and deaths of their animals and the expenses incurred
13 therewith.

14 351. Evanger's affirmative misrepresentations, as well as its wrongful
15 warranty practices, were disseminated and directed from its headquarters in
16 Wheeling, Illinois. Evanger's manufactures its Pet Foods at its facilities in Wheeling
17 and Markham, Illinois. Therefore, based upon the choice-of-law rules applied in this
18 District, Plaintiffs preliminarily identify the substantive laws of Illinois as the most
19 likely to apply to Nationwide Class as alleged in this claim.

20 **COUNT XIII**

21 **Unjust Enrichment Under Illinois Law**

22 **(On Behalf of Plaintiffs and the Nationwide Class, and**
23 **in the Alternative on Behalf of Plaintiff Angela Bertucci and the Illinois**
24 **Subclass)**

25 352. Plaintiffs repeat and reallege the allegations contained in the paragraphs
26 above, as if fully set forth herein.

27 **SECOND AMENDED COMPLAINT CASE NO. 3:17-CV-05469-RBL**

1 Pennsylvania Subclass.

2 361. This cause of action is brought pursuant the Pennsylvania Unfair Trade
3 Practices & Consumer Protection Law, 73 P.S. § 201-1, *et seq.*

4 362. Plaintiff Vigliano and the Pennsylvania Subclass members were
5 “persons” within the meaning of 73 P.S. § 201-2(3).

6 363. Evanger’s conduct, as alleged herein, constituted unfair and deceptive
7 acts or practices or unfair methods of competition in trade or commerce (within the
8 meaning of 73 P.S. § 201-2(4)), in violation of 73 P.S. § 201-3, and regulations
9 promulgated thereunder, including the following types of conduct specified in 73
10 P.S. § 201-2:

- 11 a) Representing that goods or services have characteristics or ingredients
12 that they do not have (73 P.S. § 201-2(vi));
- 13 b) Representing that goods are of a particular standard, quality or grade, if
14 they are of another (73 P.S. § 201-2(vii));
- 15 c) Advertising goods or services with intent not to sell them as advertised
16 (73 P.S. § 201-2(ix));
- 17 d) Failing to comply with the terms of a written guaranty or warranty
18 given to the buyer at, prior to or after a contract for the purchase of goods or
19 services is made (73 P.S. § 201-2(xiv));
- 20 e) Engaging in fraudulent or deceptive conduct that creates a likelihood of
21 confusion or misunderstanding (73 P.S. § 201-2(xxi)).

22 364. Defendants’ unfair and deceptive acts and practices (including conduct
23 prohibited by the provisions cited in subparagraphs (a) through (e) above), as alleged
24 in greater detail herein, include, but are not limited to: (a) their false and misleading
25 statements, representations, and depictions in the labeling, packaging, marketing,
26 promotion and advertising for the Pet Foods as “People Food for Pets,” USDA-

1 inspected and of human grade quality including 100% beef or identified meat, (b)
2 the fact that contrary to these representations the Pet Foods were misrepresented,
3 adulterated, misbranded, contained poisonous pentobarbital and failed to provide
4 adequate warning or notice of their health risks because of this; and (c) that because
5 of these misrepresentations and omissions Vigliano and the Pennsylvania Subclass
6 suffered damages.

7 365. As a result of Evanger's unfair and deceptive acts and practices,
8 Vigliano and the Pennsylvania Subclass have suffered ascertainable losses of money
9 and property within the meaning of 73 P.S. § 201-9.2, which they seek to recover,
10 consisting of at least the following:

- 11 a) The difference in value between the full purchase price of the Pet Foods
12 and the actual value of the Pet Foods (which actual value is \$0 because the
13 Pet Foods should not have been sold since they were misrepresented,
14 adulterated and misbranded, and consumers would not have paid anything for
15 them had they known) - i.e., the full purchase prices of the Pet Foods;
16 b) All veterinary bills incurred as a result of illness, injury or death caused by
17 consuming the Pet Foods;
18 c) All bills incurred for the disposition of the remains of dogs killed by the Pet
19 Foods; and
20 d) The market value of the dogs killed as a result of ingesting the Pet Foods.

21 366. Vigliano and Pennsylvania Subclass members are entitled to recover
22 these actual damages and statutory damages of \$100, whichever is greater, plus
23 multiple damages.

24 **COUNT XV**

25 **Breach of Express Warranty 13 Pa. C.S.A. § 2313**

26 **(On Behalf of Plaintiff Nadine Vigliano and the Pennsylvania Subclass)**

27 SECOND AMENDED COMPLAINT CASE NO. 3:17-CV-05469-RBL

1 367. Plaintiffs repeat and reallege the allegations contained in the paragraphs
2 above, as if fully set forth herein.

3 368. Plaintiff Nadine Vigliano brings this claim on behalf of herself and the
4 Pennsylvania Subclass.

5 369. Defendants constitutes a “merchant” and a “seller” in connection with
6 their sales of the Pet Foods to Vigliano and the Pennsylvania Subclass as those terms
7 are defined in the Pennsylvania Code. Vigliano and the Pennsylvania Subclass
8 constituted “buyers” as that term is defined in the Pennsylvania Code. The Pet Foods
9 constituted “goods” as that term is defined in the Pennsylvania Code.

10 370. Under section 2-313 of title 13 of the Pennsylvania Consolidated
11 Statutes, the statements on Evanger’s affirmations of fact, promises and descriptions
12 made on the Pet Foods’ packaging and advertising, which Evanger’s provided to
13 Plaintiff Vigliano and the other members of the Pennsylvania Subclass created
14 written express warranties before or at the time of purchase, including the following:

- 15 • The Pet Foods were “People Food for Pets;”
- 16 • The Pet Foods were made at a human grade facility;
- 17 • The Pet Foods were made of 100% beef or other identified meat;
- 18 • The Pet Foods were made of USDA-inspected meats and facilities;
- 19 • The Pet Foods were human grade quality meats;
- 20 • The Pet Foods were safe and healthy for pets to eat.

21 371. These affirmations of facts and promises made by Evanger’s to Plaintiff
22 Vigliano and the other members of the Pennsylvania Subclass related to Pet Foods
23 and became part of the bases of the bargains for the purchase of the Pet Foods
24 between them and Evanger’s, and thereby created express warranties that the Pet
25 Foods would conform to those affirmations and promises.

26 372. Furthermore, the aforementioned descriptions of the Pet Foods were

1 part of the bases of the bargains for the purchases of Pet Foods between Evanger's
2 on the one hand and Plaintiff Vigliano and the other members of the Pennsylvania
3 Subclass on the other. The descriptions created an express warranty that the goods
4 would conform to those descriptions.

5 373. As previously noted, Evanger's misrepresented the nature of the Pet
6 Foods, since the Pet Foods were not 100% beef or other identified meat and were
7 not USDA-inspected, human quality meats nor from a human grade facility. Instead,
8 the Pet Foods were adulterated because they contained poisonous pentobarbital,
9 were made in an unsanitary facilities only licensed to make feed for animals – not
10 products that are fit for human consumption – that may have contaminated them,
11 were not made from animals that died by slaughter, and were misbranded and
12 misrepresented. The Pet Foods did not conform to the affirmations, promises and
13 descriptions previously mentioned, resulting in breaches of the Pet Foods' express
14 warranties.

15 374. Plaintiffs Vigliano complied with all conditions precedent to filing this
16 breach of warranty claim, including providing notice of the breach of warranty to
17 Evanger's on behalf of themselves and the Pennsylvania Subclass, prior to filing this
18 action. Alternatively, the filing of this Second Amended Complaint provides
19 sufficient notice of breach to Evanger's on behalf of Plaintiffs and the Pennsylvania
20 Subclass. Alternatively, notice need not have been given to Evanger's because
21 Evanger's had actual notice of its breaches of warranty as to Plaintiff and the
22 Pennsylvania Subclass.

23 375. As a direct and proximate result of Evanger's breach of express
24 warranties, Plaintiff Vigliano and the members of the Pennsylvania Subclass have
25 suffered actual damages as follows:

26 (a) The difference in value between the full purchase price of the Pet Foods

1 and the actual value of the Pet Foods (which actual value is \$0 because the
 2 Pet Foods should not have been sold since they were misrepresented and some
 3 were adulterated and misbranded, and consumers would not have paid
 4 anything for them had they known) - i.e., the full purchase prices of the Pet
 5 Foods;

6 (b) the veterinarian bills incurred as a result of consumption of the Pet Foods;

7 (c) the market value of the animals killed by consumption of Pet Foods; and

8 (d) the cost of disposing of the remains of the animals killed by consumption
 9 of Pet Foods.

10 376. Plaintiff Vigliano and the Pennsylvania Subclass demand judgment
 11 against Defendants for damages, as set forth above, plus interest, costs and such
 12 additional relief as the Court may deem appropriate or to which Plaintiff Vigliano
 13 and the Pennsylvania Subclass may be entitled.

14 **COUNT XVI**

15 **Negligence Under Pennsylvania Law**

16 **(On Behalf of Plaintiff Nadine Vigliano and the Pennsylvania Subclass)**

17 377. Plaintiffs repeat and reallege the allegations contained in the paragraphs
 18 above, as if fully set forth herein.

19 378. Plaintiff Nadine Vigliano brings this claim on behalf of herself and the
 20 Pennsylvania Subclass.

21 379. Evanger's owed a duty of care to Plaintiff Vigliano and the other
 22 members of the Pennsylvania Subclass to provide pet food that was unadulterated,
 23 not misbranded or misrepresented, safe for consumption by dogs, and free from
 24 toxins with harmful effects.

25 380. Evanger's breached this duty by selling Pet Foods, which were
 26 misrepresented, misbranded, adulterated, and not safe, because they contained

1 pentobarbital, were made in an unsanitary facility that contaminated them, and were
2 composed of animals that did not die from slaughter.

3 381. The Pet Foods were sold without adequate quality control and testing;
4 without using proper manufacturing and production practices; without properly
5 investigating reports of pet deaths and illnesses following consumption of the Pet
6 Foods; and without adequately warning Plaintiff Vigliano and the other members of
7 the Pennsylvania Subclass of the dangers as part of the Pet Foods's packaging or
8 disclosing that the Pet foods were not USDA-inspected, were composed of animals
9 that did not die from slaughter, and were not human quality.

10 382. Such conduct by Evanger's was negligent in that Evanger's failed to
11 act as an ordinarily prudent and reasonable person would have acted under the same
12 or similar circumstances.

13 383. Evanger's should have known that Pet Foods posed a risk of harm to
14 animals; that purchasers of Pet Foods, including Plaintiff Vigliano and the other
15 members of the Pennsylvania Subclass, would not recognize the risk and were
16 instead purchasing this product based on Defendants' misrepresentations that the Pet
17 Foods were of a certain quality and would not carry these risks; and that consumption
18 of Pet Foods by animals would foreseeably result in injury and death to those dogs,
19 constituting property damage to Plaintiff Vigliano and the other members of the
20 Pennsylvania Subclass beyond and in addition to the damages from purchasing the
21 harmful Pet Foods.

22 384. As a proximate result of Evanger's negligent acts alleged herein,
23 Plaintiff Vigliano and the other members of the Pennsylvania Subclass suffered
24 injury to property, specifically in the illness and deaths of their animals and the
25 expenses incurred therewith.

26 **COUNT XVII**

27 SECOND AMENDED COMPLAINT CASE NO. 3:17-CV-05469-RBL

Strict Products Liability Under Pennsylvania Law

(On Behalf of Plaintiff Nadine Vigliano and the Pennsylvania Subclass)

385. Plaintiffs repeat and reallege the allegations contained in the paragraphs above, as if fully set forth herein.

386. Plaintiff Vigliano brings this claim on behalf of herself and the Pennsylvania Subclass.

387. Evanger's designed, manufactured and sold Pet Foods, which were unsafe because they were misbranded and adulterated, and this misbranding and adulteration caused the Pet Foods to contain poisonous pentobarbital, to be contaminated by the unsanitary facility where they were made, and to be manufactured from animals that did not die from slaughter.

388. The adulteration and misbranding that made the consumption of the Pet Foods risky to the health of animals was, at all times material hereto, an unreasonably dangerous defect and/or condition. The failure of Evanger's to warn on its package of the dangerousness of the Pet Foods also constituted an unreasonably dangerous defect and/or condition.

389. These unreasonably dangerous defects and/or conditions existed at the time the Pet Foods left Evanger's control.

390. The Pet Foods came in sealed packages, and they and their packaging did not change from the time they left Evanger's possession through the time they arrived in stores to be sold to consumers and consumers purchased and took possession of them.

391. The unreasonably dangerous defects and/or conditions of the Pet Foods proximately caused injury and death to animals, constituting property damage to Plaintiff Vigliano and the other members of the Pennsylvania Subclass beyond and in addition to the damages from purchasing the harmful Pet Foods.

COUNT XIX

Violation of the New Jersey Consumer Fraud Act

N.J. Stat. Ann. § 56:8-19

**(On Behalf of Plaintiffs Britney Morea and Carol Conway
and the New Jersey Subclass)**

399. Plaintiffs repeat and reallege the allegations contained in the paragraphs above, as if fully set forth herein.

400. Plaintiffs Britney Morea and Carol Conway brings this claim on behalf of themselves and the New Jersey Subclass.

401. The Pet Foods, which were designed, manufactured, advertised, marketed and sold by Evanger's are considered "merchandise" within the meaning of the New Jersey Consumer Fraud Act. Plaintiffs Morea and Conway and the New Jersey Subclass members are "persons" and "consumers" with the meaning of the New Jersey Consumer Fraud Act.

402. Evanger's affirmatively misrepresented the Pet Foods to consumers. These misrepresentations include, but are not limited to: (a) its false and misleading statements, representations, and depictions in its labeling, packaging, marketing, promotion and advertising for the Pet Foods as "People Food for Pets," USDA-inspected and human grade and are 100% beef or identified meat, (b) the fact that contrary to these representations that its Pet Foods were misrepresented, adulterated, misbranded, contained poisonous pentobarbital and failed to provide adequate warning or notice of their health risks because of this; and (c) that because of these misrepresentations and omissions Plaintiffs Morea and Conway and the New Jersey Subclass suffered damages.

403. Evanger's claims therefore were false, misleading and/or deceptive.

404. Evanger's affirmative misrepresentations and material omissions

1 constituted an unconscionable commercial practice, deception, fraud, false promise,
2 and/or misrepresentation as to the nature of the goods, in violation of the New Jersey
3 Consumer Fraud Act.

4 405. As a result of Evanger's misrepresentations and material omissions,
5 Plaintiffs Morea and Conway and the New Jersey Subclass have suffered
6 ascertainable losses of money and property, which they seek to recover consisting
7 of at least the following:

8 a) The difference in value between the full purchase price of the Pet Foods
9 and the actual value of the Pet Foods (which actual value is \$0 because the
10 Pet Foods should not have been sold since they were misrepresented,
11 adulterated and misbranded, and consumers would not have paid anything for
12 them had they known) - i.e., the full purchase prices of the Pet Foods;

13 b) All veterinary bills incurred as a result of illness, injury or death caused by
14 consuming the Pet Foods;

15 c) All bills incurred for the disposition of the remains of animals killed by the
16 Pet Foods; and

17 d) The market value of the animals killed as a result of ingesting the Pet Foods.

18 406. Plaintiffs Morea and Conway and other New Jersey Subclass members
19 demand judgment pursuant to N.J.S.A. § 56:8-19 against Defendants for their
20 ascertainable damages, statutory remedies made available under the Act, injunctive
21 relief requiring Evanger's to recall all Pet Foods and to stop selling the Pet Foods
22 until the problems with their safety has been remedied.

23 407. New Jersey law also provides protection to purchasers of animal food
24 from unfair, deceptive and unconscionable practices. A pet food is adulterated if it
25 "bears or contains any poisonous or deleterious substance which may render it
26 injurious to health;" N.J.S.A. § 4:4-20.7. A pet food is misbranded if its "labeling is

1 false or misleading in any particular.” N.J.S.A. § 4:4-20.6. New Jersey law prohibits
2 the “manufacture or distribution of any [pet food] that is adulterated or misbranded.”
3 N.J.S.A. § 4:4-20.8.

4 408. Evanger’s Pet Foods are misbranded because they are falsely and
5 misleadingly advertised as “People Food for Pets,” “USDA-inspected” and “human
6 grade” when they are not, including but not limited to the fact that Evanger’s is only
7 licensed to make feed for animals – not fit for human consumption. Furthermore, the
8 Pet Foods are adulterated because they are composed of animals that did not die
9 from slaughter and contained poisonous pentobarbital. The Pet Foods were sold in
10 violation of New Jersey law because they were misrepresented, adulterated and
11 misbranded. Evanger’s conduct, as described herein violated New Jersey law,
12 N.J.S.A. § 4:4-20.6-8, designed to protect consumers like Plaintiffs Morea and
13 Conway and the members of the New Jersey Subclass, forms an alternative basis for
14 their New Jersey Consumer Fraud Act claim.

15 409. Plaintiffs Morea and Conway and the New Jersey Subclass further seek
16 to enjoin such unlawful deceptive acts and practices as described above. Each of the
17 New Jersey Subclass members will be irreparably harmed unless the unlawful
18 actions of Evanger’s are enjoined, in that Evanger’s will continue to falsely and
19 misleadingly market, advertise and represent on its packaging that the Pet Foods are
20 “People Food for Pets” of a “human-grade,” “USDA-inspected” quality, which is
21 safe and healthy for animals to consume. Toward that end, Plaintiffs Morea and
22 Conway and the New Jersey Subclass request an order granting them injunctive
23 relief requiring removal of the unsafe Pet Foods from retail outlets and online,
24 corrective disclosures and/or disclaimers on the labeling and advertising of the Pet
25 Foods and/or removal of the harmful ingredients before sales resume.

26 410. Absent injunctive relief, Evanger’s will continue to manufacture and

1 sell unsafe and misrepresented Pet Foods without adequate warnings to consumers
2 of their health risks.

3 411. In this regard, Evanger's has violated, and continues to violate, the New
4 Jersey Consumer Fraud Act, which makes deception, fraud, false promise, and/or
5 misrepresentation of goods unlawful. As a direct and proximate result of Evanger's
6 violation of the New Jersey Consumer Fraud Act, as described above, Plaintiffs
7 Morea and Conway and the members of the New Jersey Subclass have suffered
8 damages, as set forth above.

9 **COUNT XX**

10 **Breach of Express Warranty N.J.S.A. § 12A:2-313**

11 **(On Behalf of Plaintiffs Britney Morea and Carol Conway**
12 **and the New Jersey Subclass)**

13 412. Plaintiffs repeat and reallege the allegations contained in the paragraphs
14 above, as if fully set forth herein.

15 413. Plaintiffs Britney Morea and Carol Conway brings this claim on behalf
16 of themselves and the New Jersey Subclass.

17 414. Defendants constitutes a "merchant" and a "seller" in connection with
18 their sales of the Pet Foods to Plaintiffs Morea and Conway and the New Jersey
19 Subclass as those terms are defined in the New Jersey Uniform Commercial Code.
20 Plaintiffs Morea and Conway and the New Jersey Subclass constituted "buyers" as
21 that term is defined in the New Jersey Code. The Pet Foods constituted "goods" as
22 that term is defined in the New Jersey Code.

23 415. Under section 2-313 of title 12A of the New Jersey Revised Statutes,
24 the statements on Evanger's affirmations of fact, promises and descriptions made on
25 the Pet Foods' packaging and advertising, which Evanger's provided to Plaintiffs
26 Morea and Conway and the New Jersey Subclass created written express warranties

1 before or at the time of purchase, including the following:

- 2 • The Pet Foods were “People Food for Pets;”
- 3 • The Pet Foods were made at a human grade facilities;
- 4 • The Pet Foods were made of 100% beef or other identified meat;
- 5 • The Pet Foods were made of USDA-inspected meats;
- 6 • The Pet Foods were human grade quality meats;
- 7 • The Pet Foods were safe and healthy for pets to eat.

8 416. These affirmations of facts and promises made by Evanger’s to
9 Plaintiffs Morea and Conway and the New Jersey Subclass related to Pet Foods and
10 became part of the bases of the bargains for the purchase of the Pet Foods between
11 them and Evanger’s, and thereby created express warranties that the Pet Foods
12 would conform to those affirmations and promises.

13 417. Furthermore, the aforementioned descriptions of the Pet Foods were
14 part of the bases of the bargains for the purchases of Pet Foods between Evanger’s
15 on the one hand and Plaintiffs Morea and Conway and the New Jersey Subclass on
16 the other. The descriptions created an express warranty that the goods would
17 conform to those descriptions.

18 418. As previously noted, Evanger’s misrepresented the nature of the Pet
19 Foods, since the Pet Foods were not “People Food for Pets,” 100% beef or other
20 identified meat, not USDA-inspected, human quality meats nor safe and healthy.
21 Instead, the Pet Foods were adulterated because they contained poisonous
22 pentobarbital, were made in an unsanitary facility only licensed to make feed for
23 animals that may have contaminated them, were not made from animals that died by
24 slaughter, and were misrepresented and misbranded. The Pet Foods did not conform
25 to the affirmations, promises and descriptions previously mentioned, resulting in
26 breaches of the Pet Foods’ express warranties.

1 419. Plaintiffs Morea and Conway complied with all conditions precedent to
2 filing this breach of warranty claim, including providing notice of the breach of
3 warranty to Evanger's on behalf of themselves and the New Jersey Subclass, prior
4 to filing this action. Alternatively, the filing of this Amended Complaint provides
5 sufficient notice of breach to Evanger's on behalf of Plaintiffs Morea and Conway
6 and the New Jersey Subclass. Alternatively, notice need not have been given to
7 Evanger's because Evanger's had actual notice of its breaches of warranty as to
8 Plaintiffs Morea and Conway and the New Jersey Subclass.

9 420. As a direct and proximate result of Evanger's breach of express
10 warranties, Plaintiffs Morea and Conway and the New Jersey Subclass have suffered
11 actual damages as follows:

- 12 (a) The difference in value between the full purchase price of the Pet Foods
13 and the actual value of the Pet Foods (which actual value is \$0 because the
14 Pet Foods should not have been sold since they were misrepresented,
15 adulterated and misbranded, and consumers would not have paid anything for
16 them had they known) - i.e., the full purchase prices of the Pet Foods;
17 (b) the veterinarian bills incurred as a result of consumption of the Pet Foods;
18 (c) the market value of the animals killed by consumption of Pet Foods; and
19 (d) the cost of disposing of the remains of the animals killed by consumption
20 of Pet Foods.

21 421. Plaintiffs Morea and Conway and the New Jersey Subclass demand
22 judgment against Defendants for damages, as set forth above, plus interest, costs and
23 such additional relief as the Court may deem appropriate or to which Plaintiffs
24 Morea and Conway and the New Jersey Subclass may be entitled.

COUNT XXI

Negligence Under New Jersey Law

**(On Behalf of Plaintiffs Britney Morea and Carol Conway
and the New Jersey Subclass)**

422. Plaintiffs repeat and reallege the allegations contained in the paragraphs above, as if fully set forth herein.

423. Plaintiffs Britney Morea and Carol Conway brings this claim on behalf of themselves and the New Jersey Subclass.

424. Evanger's owed a duty of reasonable care to Plaintiffs Morea and Conway and the other members of the New Jersey Subclass to provide pet food that was unadulterated, not misbranded or misrepresented, safe for consumption by animals, and free from toxins with harmful effects.

425. Evanger's breached this duty by selling Pet Foods, which were misrepresented, misbranded, adulterated, and not safe, because they contained pentobarbital, were made in an unsanitary facility that contaminated them, and were composed of animals that did not die from slaughter.

426. The Pet Foods were sold without adequate quality control and testing; without using proper manufacturing and production practices; without properly investigating reports of pet deaths and illnesses following consumption of the Pet Foods; and without adequately warning Plaintiffs Morea and Conway and the other members of the New Jersey Subclass of the dangers as part of the Pet Foods's packaging or disclosing that the Pet foods were not USDA-inspected, were composed of animals that did not die from slaughter, and were not human quality.

427. Such conduct by Evanger's was negligent because it did not reflect the level of care that an ordinary person in Evanger's place would have given.

428. Evanger's should have known that Pet Foods posed a risk of harm to

1 animals; that purchasers of Pet Foods, including Plaintiffs Morea and Conway and
2 the other members of the New Jersey Subclass, would not recognize the risk and
3 were instead purchasing this product based on Defendants' misrepresentations that
4 the Pet Foods were of a certain quality and would not carry these risks; and that
5 consumption of Pet Foods by animals would foreseeably result in injury and death
6 to those animals, constituting property damage to Plaintiffs Morea and Conway and
7 the other members of the New Jersey Subclass beyond and in addition to the
8 damages from purchasing the Pet Foods.

9 429. As a proximate result of Evanger's negligent acts alleged herein,
10 Plaintiffs Morea and Conway and the other members of the New Jersey Subclass
11 suffered injury to property, specifically in the illness and deaths of their animals and
12 the expenses incurred therewith.

13 **COUNT XXII**

14 **Products Liability N.J. Stat. Ann. § 2A:58C-2**

15 **(On Behalf of Plaintiffs Britney Morea and Carol Conway**
16 **and the New Jersey Subclass)**

17 430. Plaintiffs repeat and reallege the allegations contained in the paragraphs
18 above, as if fully set forth herein.

19 431. Plaintiffs Britney Morea and Carol Conway brings this claim on behalf
20 of themselves and New Jersey Subclass.

21 432. Evanger's designed, manufactured and sold Pet Foods, which were
22 unsafe because they were misbranded and adulterated, and this misbranding and
23 adulteration caused the Pet Foods to contain poisonous pentobarbital, to be
24 contaminated by the unsanitary facility where they were made, and to be
25 manufactured from animals that did not die from slaughter.

26 433. The Pet Foods were not reasonably fit, suitable or safe for their intended
27

1 purpose because they contained toxins and was otherwise designed and/or
2 manufactured in a defective manner and failed to contain adequate warnings.

3 434. The adulteration and misbranding that made the consumption of the Pet
4 Foods risky to the health of animals was, at all times material hereto, an
5 unreasonably dangerous defect and/or condition. The failure of Evanger's to warn
6 on its package of the dangerousness of the Pet Foods also constituted an
7 unreasonably dangerous defect and/or condition.

8 435. These unreasonably dangerous defects and/or conditions existed at the
9 time the Pet Foods left Evanger's control.

10 436. The Pet Foods came in sealed packages, and they and their packaging
11 did not change from the time they left Evanger's possession through the time they
12 arrived in stores to be sold to consumers and consumers purchased and took
13 possession of them.

14 437. The unreasonably dangerous defects and/or conditions of the Pet Foods
15 proximately caused injury and death to animals, constituting property damage to
16 Plaintiffs Morea and Conway and the New Jersey Subclass beyond and in addition
17 to the damages from purchasing the mislabeled and worthless Pet Foods.

18 438. Accordingly, Evanger's is strictly liable for the damages caused to
19 Plaintiffs Morea and Conway and the New Jersey Subclass, by the unreasonably
20 dangerous Pet Foods, specifically the illness and deaths of their animals and the
21 expenses incurred therewith.

COUNT XXIII

Unjust Enrichment Under New Jersey Law

**(On Behalf of Plaintiffs Britney Morea and Carol Conway
and the New Jersey Subclass)**

439. Plaintiffs repeat and reallege the allegations contained in the paragraphs above, as if fully set forth herein.

440. Plaintiffs Britney Morea and Carol Conway bring this claim on behalf of themselves and the New Jersey Subclass.

441. Plaintiffs Morea and Conway and the New Jersey Subclass conferred a benefit on Evanger's by purchasing Pet Foods—namely the gross revenues Evanger's derived from such sales.

442. Defendants accepted and retained the benefit in the amount of the gross revenues they received from sales of Pet Foods to Plaintiffs Morea and Conway and the New Jersey Subclass.

443. Defendants have thereby profited under circumstances which would make it unjust and inequitable for them to be permitted to retain the benefit.

444. Plaintiffs Morea and Conway and the New Jersey Subclass are entitled to restitution of the entire amount Defendants received from their sales of the Pet Foods to them.

COUNT XXIV

Violation of the New York General Business Law ("GBL") § 349

Deceptive Acts and Practices Unlawful

(On Behalf of Plaintiff Tina Wiepert and the New York Subclass)

445. Plaintiffs repeat and reallege the allegations contained in the paragraphs above, as if fully set forth herein.

446. Plaintiff Tina Wiepert brings this claim on behalf of herself and the

1 New York Subclass.

2 447. Plaintiff Tina Wiepert and the New York Subclass are consumers who
3 purchased the Pet Foods that were designed, manufactured, advertised, marketed and
4 sold by Evanger's. They bring this claim pursuant to the N.Y. GBL § 349.

5 448. Evanger's engaged in deceptive practices in the sale of the Pet Foods
6 to consumers including, but are not limited to: (a) making false and misleading
7 statements, representations, and depictions in its labeling, packaging, marketing,
8 promotion and advertising for the Pet Foods as "People Food for Pets," USDA-
9 inspected and human grade, 100% beef or identified meat and as safe and healthy
10 for animals to consume and (b) failing to disclose that instead the Pet Foods were
11 adulterated, misbranded, contained poisonous pentobarbital and failed to provide
12 adequate warning or notice of their health risks because of this.

13 449. Such actions and failures to act have caused direct, foreseeable and
14 proximate damages to Plaintiff Wiepert and the New York Subclass, which they seek
15 to recover consisting of at least the following:

- 16 a) The difference in value between the full purchase price of the Pet Foods
17 and the actual value of the Pet Foods (which actual value is \$0 because the
18 Pet Foods should not have been sold since they were misrepresented and some
19 were adulterated and misbranded, and consumers would not have paid
20 anything for them had they known) - *i.e.*, the full purchase prices of the Pet
21 Foods;
22 b) All veterinary bills incurred as a result of illness, injury or death caused by
23 consuming the Pet Foods;
24 c) All bills incurred for the disposition of the remains of dogs killed by the Pet
25 Foods; and
26 d) The market value of the dogs killed as a result of ingesting the Pet Foods.

27 SECOND AMENDED COMPLAINT CASE NO. 3:17-CV-05469-RBL

1 450. New York law also provides protection to purchasers of animal food
2 from unfair, deceptive and unconscionable practices. A pet food is adulterated if it
3 “bears or contains any poisonous or deleterious substance which may render it
4 injurious to health.” N.Y. Agric. & Mkts. Law § 132. A pet food is misbranded if its
5 “labeling is false or misleading in any particular.” N.Y. Agric. & Mkts. Law § 131.
6 New York law prohibits the “manufacture or distribution of any [pet food] that is
7 adulterated or misbranded.” N.Y. Agric. & Mkts. Law § 133.

8 451. Evanger’s Pet Foods are misbranded because they are falsely and
9 misleadingly advertised as “People Food for Pets,” “USDA-inspected” and “human
10 grade” when they are not. Furthermore, the Pet Foods are adulterated because they
11 are composed of animals that did not die from slaughter and contained poisonous
12 pentobarbital. The Pet Foods were sold in violation of New York law because they
13 were adulterated and misbranded. Evanger’s conduct, as described herein violated
14 New York law, N.Y. Agric. & Mkts. Law §§ 131-133, designed to protect
15 consumers like Plaintiff Wiepert and the members of the New York Subclass, forms
16 an alternative basis for their GBL § 349 claim.

17 452. Plaintiff Wiepert and the New York Subclass further seek to enjoin such
18 unlawful deceptive acts and practices as described above. Each of the New York
19 Subclass members will be irreparably harmed unless the unlawful actions of
20 Evanger’s are enjoined, in that Evanger’s will continue to falsely and misleadingly
21 market, advertise and represent on its packaging that the Pet Foods are “People Food
22 for Pets,” of a “human-grade,” “USDA-inspected” quality, which is safe and healthy
23 for animals to consume. Toward that end, Plaintiff Wiepert and the New York
24 Subclass request an order granting them injunctive relief requiring removal of the
25 unsafe Pet Foods from retail outlets and online, corrective disclosures and/or
26 disclaimers on the labeling and advertising of the Pet Foods and/or removal of the

1 harmful ingredients before sales resume.

2 453. Absent injunctive relief, Evanger's will continue to manufacture and
3 sell unsafe and misrepresented Pet Foods without adequate warnings to consumers
4 of their health risks.

5 454. In this regard, Evanger's has violated, and continues to violate NY GBL
6 § 349, which makes deceptive acts and practices unlawful. As a direct and proximate
7 result of Evanger's violation of NY GBL § 349, as described above, Plaintiff Wiepert
8 and the members of the New York Subclass have suffered damages, as set forth
9 above.

10 **COUNT XXV**

11 **Breach of Express Warranty Under New York Law**

12 **(On Behalf of Plaintiff Tina Wiepert and the New York Subclass)**

13 455. Plaintiffs repeat and reallege the allegations contained in the paragraphs
14 above, as if fully set forth herein.

15 456. Plaintiff Tina Wiepert brings this claim on behalf of herself and the
16 New York Subclass.

17 457. Defendants constitutes a "merchant" and a "seller" in connection with
18 their sales of the Pet Foods to Wiepert and the New York Subclass as those terms
19 are defined in the New York Uniform Commercial Code. Conway and the New York
20 Subclass constituted "buyers" as that term is defined in the New York Commercial
21 Code. The Pet Foods constituted "goods" as that term is defined in the New York
22 Commercial Code.

23 458. Under section 2-313 of the Uniform Commercial Code, the statements
24 on Evanger's affirmations of fact, promises and descriptions made on the Pet Foods'
25 packaging and advertising, which Evanger's provided to Wiepert and the New York
26 Subclass created written express warranties before or at the time of purchase,

1 including the following:

- 2 • The Pet Foods are “People Food for Pets;”
- 3 • The Pet Foods are made at a human grade facilities;
- 4 • The Pet Foods were made of 100% beef or other identified meat;
- 5 • The Pet Foods were made of USDA-inspected meats;
- 6 • The Pet Foods were human grade quality meats;
- 7 • The Pet Foods were safe and healthy for pets to eat.

8 459. These affirmations of facts and promises made by Evanger’s to Wiepert
9 and the New York Subclass related to Pet Foods and became part of the bases of the
10 bargains for the purchase of the Pet Foods between them and Evanger’s, and thereby
11 created express warranties that the Pet Foods would conform to those affirmations
12 and promises.

13 460. Furthermore, the aforementioned descriptions of the Pet Foods were
14 part of the bases of the bargains for the purchases of Pet Foods between Evanger’s
15 on the one hand and Wiepert and the New York Subclass on the other. The
16 descriptions created an express warranty that the goods would conform to those
17 descriptions.

18 461. As previously noted, Evanger’s misrepresented the nature of the Pet
19 Foods, since the Pet Foods were not “People Food for Pets,” 100% beef or other
20 identified meat, not USDA-inspected, human quality meats nor safe and healthy.
21 Instead, the Pet Foods were adulterated because they contained poisonous
22 pentobarbital, were made in an unsanitary facility only licensed to make feed for
23 animals that may have contaminated them, were not made from animals that died by
24 slaughter, and were misbranded. The Pet Foods did not conform to the affirmations,
25 promises and descriptions previously mentioned, resulting in breaches of the Pet
26 Foods’ express warranties.

1 462. Plaintiff Wiepert complied with all conditions precedent to filing this
2 breach of warranty claim, including providing notice of the breach of warranty to
3 Evanger's on behalf of herself and the New York Subclass, prior to filing this action.
4 Alternatively, the filing of this Amended Complaint provides sufficient notice of
5 breach to Evanger's on behalf of Plaintiff Wiepert and the New York Subclass.
6 Alternatively, notice need not have been given to Evanger's because Evanger's had
7 actual notice of its breaches of warranty as to Plaintiff Wiepert and the New York
8 Subclass.

9 463. As a direct and proximate result of Evanger's breach of express
10 warranties, Plaintiff Wiepert and the New York Subclass have suffered actual
11 damages as follows:

- 12 (a) The difference in value between the full purchase price of the Pet Foods
13 and the actual value of the Pet Foods (which actual value is \$0 because the
14 Pet Foods should not have been sold since they were misrepresented,
15 adulterated and misbranded, and consumers would not have paid anything for
16 them had they known) - i.e., the full purchase prices of the Pet Foods;
17 (b) the veterinarian bills incurred as a result of consumption of the Pet Foods;
18 (c) the market value of the animals killed by consumption of Pet Foods; and
19 (d) the cost of disposing of the remains of the animals killed by consumption
20 of Pet Foods.

21 464. Plaintiff Wiepert and the New York Subclass demand judgment against
22 Defendants for damages, as set forth above, plus interest, costs and such additional
23 relief as the Court may deem appropriate or to which Plaintiff Wiepert and the New
24 York Subclass may be entitled.

COUNT XXVI

Negligence Under New York Law

(On Behalf of Plaintiff Tina Wiepert and the New York Subclass)

465. Plaintiffs repeat and reallege the allegations contained in the paragraphs above, as if fully set forth herein.

466. Plaintiff Tina Wiepert brings this claim on behalf of herself and the New York Subclass.

467. Evanger's owed a duty of reasonable care to Plaintiff Tina Wiepert and the other members of the New York Subclass to provide pet food that was unadulterated, not misbranded, safe for consumption by animals, and free from toxins with harmful effects.

468. Evanger's breached this duty by selling Pet Foods, which were misbranded, adulterated, and not safe, because they contained pentobarbital, were made in an unsanitary facility that is only licensed to make feed for animals - not fit for human consumption - and that may have contaminated them, and were composed of animals that did not die from slaughter.

469. The Pet Foods were sold without adequate quality control and testing; without using proper manufacturing and production practices; without properly investigating reports of pet deaths and illnesses following consumption of the Pet Foods; and without adequately warning Plaintiff Wiepert and the other members of the New York Subclass of the dangers as part of the Pet Foods's packaging or disclosing that the Pet foods were not USDA-inspected, were composed of animals that did not die from slaughter, and were not human quality.

470. Such conduct by Evanger's was negligent because it did not reflect the level of care that an ordinary person in Evanger's place would have given.

471. Evanger's should have known that Pet Foods posed a risk of harm to

1 animals; that purchasers of Pet Foods, including Plaintiff Wiepert and the other
2 members of the New York Subclass, would not recognize the risk and were instead
3 purchasing this product based on Defendants' misrepresentations that the Pet Foods
4 were of a certain quality and would not carry these risks; and that consumption of
5 Pet Foods by animals would foreseeably result in injury and death to those animals,
6 constituting property damage to Plaintiff Wiepert and the other members of the New
7 York Subclass beyond and in addition to the damages from purchasing the worthless
8 Pet Foods.

9 472. As a proximate result of Evanger's negligent acts alleged herein,
10 Plaintiff Wiepert and the other members of the New York Subclass suffered injury
11 to property, specifically in the illness and deaths of their animals and the expenses
12 incurred therewith.

13 **COUNT XXVII**

14 **Strict Products Liability Under New York Law**

15 **(On Behalf of Plaintiff Tina Wiepert and the New York Subclass)**

16 473. Plaintiffs repeat and reallege the allegations contained in the paragraphs
17 above, as if fully set forth herein.

18 474. Plaintiff Tina Wiepert brings this claim on behalf of herself and New
19 York Subclass.

20 475. Evanger's designed, manufactured and sold Pet Foods, which were
21 unsafe because they were misbranded and adulterated, and this misbranding and
22 adulteration caused the Pet Foods to contain poisonous pentobarbital, to be
23 contaminated by the unsanitary facility where they were made, and to be
24 manufactured from animals that did not die from slaughter.

25 476. The Pet Foods were not reasonably fit, suitable or safe for its intended
26 purpose because it contained toxins and was otherwise designed and/or

1 manufactured in a defective manner and failed to contain adequate warnings.

2 477. The adulteration and misbranding that made the consumption of the Pet
3 Foods risky to the health of animals was, at all times material hereto, an
4 unreasonably dangerous defect and/or condition. The failure of Evanger's to warn
5 on its package of the dangerousness of the Pet Foods also constituted an
6 unreasonably dangerous defect and/or condition.

7 478. These unreasonably dangerous defects and/or conditions existed at the
8 time the Pet Foods left Evanger's control.

9 479. The Pet Foods came in sealed packages, and they and their packaging
10 did not change from the time they left Evanger's possession through the time they
11 arrived in stores to be sold to consumers and consumers purchased and took
12 possession of them.

13 480. The unreasonably dangerous defects and/or conditions of the Pet Foods
14 proximately caused injury and death to animals, constituting property damage to
15 Plaintiff Wiepert and the New York Subclass beyond and in addition to the damages
16 from purchasing the worthless Pet Foods.

17 481. Accordingly, Evanger's is strictly liable for the damages caused to
18 Plaintiff Wiepert and the New York Subclass, by the unreasonably dangerous Pet
19 Foods, specifically the illness and deaths of their animals and the expenses incurred
20 therewith.

21 **COUNT XXVIII**

22 **Unjust Enrichment Under New York Law**

23 **(On Behalf of Plaintiff Tina Wiepert and the New York Subclass)**

24 482. Plaintiffs repeat and reallege the allegations contained in the paragraphs
25 above, as if fully set forth herein.

26 483. Plaintiff Tina Wiepert brings this claim on behalf of herself and the

27 **SECOND AMENDED COMPLAINT CASE NO. 3:17-CV-05469-RBL**

1 New York Subclass.

2 484. As a result of Evanger's deceptive, fraudulent and misleading labeling,
3 advertising, marketing and sale of the Pet Foods, Plaintiff Wiepert and the New York
4 Subclass conferred a benefit on Evanger's by purchasing Pet Foods—namely the
5 gross revenues Evanger's derived from such sales.

6 485. Defendants accepted and retained the benefit in the amount of the gross
7 revenues they received from sales of Pet Foods to Plaintiff Wiepert and the New
8 York Subclass.

9 486. Defendants have thereby profited under circumstances which would
10 make it unjust and inequitable for them to be permitted to retain the benefit.

11 487. Plaintiff Wiepert and the New York Subclass are entitled to restitution
12 of the entire amount Defendants received from their sales of the Pet Foods to them.

13 **PRAYER FOR RELIEF**

14 Wherefore, Plaintiffs, on behalf of themselves, all others similarly situated,
15 and the general public, pray for a judgment:

- 16 a. Certifying each of the Classes as requested herein, appointing Plaintiffs
17 as class representatives for the Class and respective Subclass;
- 18 b. Providing restitution to Plaintiffs and the Class for any wrongful act or
19 practice under each cause of action where such relief is permitted;
- 20 c. Enjoining Defendants from continuing the unlawful practices as set
21 forth herein, including advertising, marketing or selling its products
22 that may be misrepresented, adulterated and misbranded, and
23 specifically falsely stating that they are "People Food for Pets," USDA-
24 inspected, human-grade, 100% beef or other identified meat and
25 directing Defendants to engage in corrective action, or providing other
26 injunctive or equitable relief;

- d. Paying veterinary costs and costs for pet care caused by an animal's consumption of the Pet Foods, including medical monitoring;
- e. For pets that died as a result of eating the Pet Foods, payment of the value of the animal and any costs associated with their deaths;
- f. Awarding damages for the value of the Pet Foods based on what was paid versus what they are worth, including treble and punitive damages, to prevent and deter Defendants from future unlawful conduct;
- g. Awarding all equitable remedies available and other applicable law;
- h. Awarding attorneys' fees and costs;
- i. Awarding pre-judgment and post-judgment interest at the legal rate; and
- j. Providing such further relief as may be just and proper.

DEMAND FOR JURY TRIAL

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

DATED: April 3, 2018

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CERTIFICATE OF SERVICE

I, Jennifer Rust Murray, hereby certify that on April 3, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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SECOND AMENDED COMPLAINT CASE NO. 3:17-CV-05469-RBL

1 DATED this 3rd day of April, 2018.

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