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6 Attorneys for Plaintiff,
7 PARTY ANIMAL, INC.

8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

11 PARTY ANIMAL, INC.,
12 Plaintiff,

13 v.

14 EVANGER’S DOG AND CAT FOOD
15 CO., INC., an Illinois Corporation;
NUTRIPACK, LLC, an Illinois
16 Limited Liability Company; and DOES
1 through 100, inclusive,
17 Defendants.

) Case No.

) **COMPLAINT FOR:**

- 1. **Breach of Written Contract**
- 2. **Breach of Oral Contract**
- 3. **Breach of the Implied
Covenant of Good Faith and
Fair Dealing**
- 4. **Fraud**
- 5. **Negligent Misrepresentation**
- 6. **Breach of Implied Warranty
of Merchantability and Fitness
for a Particular Purpose**
- 7. **Breach of Express Warranties**
- 8. **Implied Indemnity**

) **DEMAND FOR JURY TRIAL**

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23 **COMPLAINT**

24 Party Animal Inc. (“Plaintiff”) complains and alleges as follows:

25 **PARTIES**

26 1. Plaintiff is incorporated under the laws of the State of California, with
27 its principal place of business in West Hollywood, California. Plaintiff supplies pet
28 food to retailers throughout the United States.

1 2. Defendant Evanger’s Dog and Cat Food Co., Inc. (“Evanger’s”) is
2 incorporated under the laws of the State of Illinois, with its principal place of
3 business in Wheeling, Illinois. Evanger’s is engaged in the business of
4 manufacturing and selling pet food under its own brand names, as well as
5 manufacturing pet food to specification for other companies, including Plaintiff.

6 3. Defendant Nutripack, LLC (“Nutripack”) is a limited liability company
7 organized and operating under the laws of the State of Illinois, with its principal
8 place of business in Markham, Illinois. Nutripack is engaged in the business of
9 manufacturing and selling pet food under its own brand names, as well as
10 manufacturing pet food to specification for other companies, including Plaintiff.

11 4. Plaintiff has had an ongoing business relationship with Evanger’s for
12 approximately ten (10) years. In February 2017, Plaintiff started receiving invoices
13 from Nutripack instead of Evanger’s. Plaintiff’s representative spoke to Holly Sher
14 (a representative of both Evanger’s and Nutripack) by phone in early April 2017 and
15 asked why the invoices recently changed to reflect Nutripack and to whom payment
16 should be made. Ms. Sher stated that they were afraid of getting sued because of the
17 recent recalls, and they were taking money out of Evanger’s. She also stated that
18 they did not want to receive any money into Evanger’s and would instead run all
19 operations under Nutripack.

20 5. Evanger’s and Nutripack are collectively referred to herein as
21 “Defendants.” At all times mentioned herein, each of the Defendants were the
22 agents, servants, alter egos, employees, employers, masters, principals and/or
23 associates of each other, and, as such, were acting within the time, place, purpose,
24 and scope of said agency, service, employment, partnership and/or association. In
25 addition, Defendants worked together to defund Evanger’s and move its assets into
26 Nutripack in an effort to avoid liability, as stated by Ms. Sher in April 2017.

27 6. The true names, identities, or capacities, whether individual, associate,
28 corporate, or otherwise, of defendants DOES 1 through 100, inclusive, and each

1 12. Plaintiff paid Defendants an agreed upon price for all of the pet food
2 products provided.

3 13. On or about April 13, 2017, a retailer in Texas notified Plaintiff that
4 their customer had presented samples of Plaintiff's 13-ounce-can of Cocolicious
5 Beef & Turkey dog food (Lot #0136E15204 04, best by July 2019) and 13-ounce-can
6 of Cocolicious Chicken & Beef dog food (Lot #0134E15 237 13, best by August
7 2019) to a testing lab, and that the results had tested positive for pentobarbital, a
8 barbiturate used for a variety of medical purposes, including in larger doses for
9 euthanizing of animals.

10 14. Plaintiff first saw the formal report from the lab regarding the
11 customer's samples on April 17, 2017.

12 15. Just over a month earlier, Plaintiff learned that Evanger's voluntarily
13 recalled certain pet food due to potential adulteration with pentobarbital. A true and
14 correct copy of the announcement from the website of the Food and Drug
15 Administration ("FDA") is attached hereto as **Exhibit A**.

16 16. Earlier in 2017, the FDA inspected Nutripack and found that its dog
17 food contained pentobarbital. A true and correct copy of the FDA's finding is
18 attached hereto as **Exhibit B**.

19 17. Contaminated pet food products from Defendants had already been
20 distributed to Plaintiff, which had in turn sold and distributed the contaminated pet
21 food products to Plaintiff's customers.

22 18. As a result of Defendants' delivery of adulterated pet food not fit for
23 pet/animal consumption, Plaintiff was forced to issue a recall, which was reported
24 widely by various news outlets:

25 <http://www.cnn.com/2017/04/28/health/dog-food-recall-trnd/>

26 <http://fortune.com/2017/04/26/dog-food-euthanasia-recall/>

27 [http://www.cbsnews.com/news/dog-food-recall-euthanasia-drug-](http://www.cbsnews.com/news/dog-food-recall-euthanasia-drug-contamination-party-animal/)
28 [contamination-party-animal/](http://www.cbsnews.com/news/dog-food-recall-euthanasia-drug-contamination-party-animal/)

1 [http://ktla.com/2017/04/28/california-based-company-recalls-dog-food-that-](http://ktla.com/2017/04/28/california-based-company-recalls-dog-food-that-may-contain-euthanasia-drug/)
2 [may-contain-euthanasia-drug/](http://ktla.com/2017/04/28/california-based-company-recalls-dog-food-that-may-contain-euthanasia-drug/)
3 [http://pets.webmd.com/dogs/news/20170428/dog-food-recalled-euthanasia-](http://pets.webmd.com/dogs/news/20170428/dog-food-recalled-euthanasia-drug)
4 [drug](http://pets.webmd.com/dogs/news/20170428/dog-food-recalled-euthanasia-drug)

5 **FIRST CAUSE OF ACTION**

6 **(Breach of Written Contract – Against Defendants and**
7 **DOES 1 through 100, inclusive)**

8 19. Plaintiff incorporates the foregoing paragraphs as if fully set forth
9 herein.

10 20. On or about July 27, 2015, Plaintiff entered into a written contract with
11 Defendants to purchase 394 cases of 13-ounce-cans of Cocolicious Beef & Turkey
12 dog food (Lot #0136E15204 04, best by July 2019). The cans were to be fit for
13 pet/animal consumption and unadulterated.

14 21. On or about August 27, 2015, Plaintiff entered into a written contract
15 with Defendants to purchase 389 cases of 13-ounce-cans of Cocolicious Chicken &
16 Beef dog food (Lot #0134E15 237 13, best by August 2019). The cans were to be fit
17 for pet/animal consumption and unadulterated.

18 22. On or about April 13, 2017, Plaintiff was informed that samples of these
19 products were sent to a lab, and that they tested positive for pentobarbital.

20 23. Plaintiff performed its part of the agreement by paying for the products.

21 24. Defendants breached their part of the agreement by supplying cans that
22 contained pentobarbital, which is neither fit for pet/animal consumption nor
23 unadulterated.

24 25. Plaintiff has suffered damage from Defendants' breach. Given that
25 Defendants shipped pet food that was contaminated with pentobarbital, Plaintiff has
26 been required to recall products manufactured by Defendants. In addition to the loss
27 relating to the products it cannot sell and costs associated with the recall, Plaintiff has
28 suffered extensive damage to its commercial reputation. This damage to its

1 reputation has led to a significant loss of retailers and consumers. Plaintiff's
2 monetary damages exceed \$20,000,000.

3 **SECOND CAUSE OF ACTION**

4 **(Breach of Oral Contract – Against Defendants and**
5 **DOES 1 through 100, inclusive)**

6 26. Plaintiff incorporates the foregoing paragraphs as if fully set forth
7 herein.

8 27. On or about July 27, 2015, Plaintiff entered into an oral contract with
9 Defendants to purchase unadulterated pet food fit for pet/animal consumption.

10 28. On or about August 27, 2015, Plaintiff entered into an oral contract with
11 Defendants to purchase unadulterated pet food fit for pet/animal consumption.

12 29. On or about April 13, 2017, Plaintiff was informed that samples of these
13 products were sent to a lab, and that they tested positive for pentobarbital.

14 30. Plaintiff performed its part of the agreement by paying for the products.

15 31. Defendants breached their part of the agreement by supplying cans that
16 contained pentobarbital, which is neither fit for pet/animal consumption nor
17 unadulterated.

18 32. Plaintiff has suffered damage from Defendants' breach. Given that
19 Defendants shipped pet food that was contaminated with pentobarbital, Plaintiff has
20 been required to recall products manufactured by Defendants. In addition to the loss
21 relating to the products it cannot sell and costs associated with the recall, Plaintiff has
22 suffered extensive damage to its commercial reputation. This damage to its
23 reputation has led to a significant loss of retailers and consumers. Plaintiff's
24 monetary damages exceed \$20,000,000.

THIRD CAUSE OF ACTION

(Breach of the Implied Covenant of Good Faith and Fair Dealing – Against Defendants and DOES 1 through 100, inclusive)

33. Plaintiff incorporates the foregoing paragraphs as if fully set forth herein.

34. Plaintiff and Defendants have had an ongoing business relationship for approximately ten (10) years.

35. On or about July 27, 2015, Plaintiff entered into a written contract with Defendants to purchase 394 cases of 13-ounce-cans of Cocolicious Beef & Turkey dog food (Lot #0136E15204 04, best by July 2019). The cans were to be fit for pet/animal consumption and unadulterated.

36. On or about August 27, 2015, Plaintiff entered into a written contract with Defendants to purchase 389 cases of 13-ounce-cans of Cocolicious Chicken & Beef dog food (Lot #0134E15 237 13, best by August 2019). The cans were to be fit for pet/animal consumption and unadulterated.

37. On or about April 13, 2017, Plaintiff was informed that samples of these products were sent to a lab, and that they tested positive for pentobarbital.

38. In every contract, there is an implied covenant of good faith and fair dealing. Defendants breached this covenant by producing products which were not fit for pet/animal consumption and adulterated.

39. Plaintiff has suffered damage from Defendants' breach. Given that Defendants shipped pet food that was contaminated with pentobarbital, Plaintiff has been required to recall products manufactured by Defendants. In addition to the loss relating to the products it cannot sell and costs associated with the recall, Plaintiff has suffered extensive damage to its commercial reputation. This damage to its reputation has led to a significant loss of retailers and consumers. Plaintiff's monetary damages exceed \$20,000,000.

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FOURTH CAUSE OF ACTION

**(Fraud – Against Defendants and
DOES 1 through 100, inclusive)**

40. Plaintiff incorporates the foregoing paragraphs as if fully set forth herein.

41. In July and August 2015, Defendants’ Office Manager, Cynthia Stoner, represented that the cases of 13-ounce-cans of Cocolicious Beef & Turkey dog food (Lot #0136E15204 04, best by July 2019) sold on or about July 27, 2015 and the cases of 13-ounce-cans of Cocolicious Chicken & Beef dog food (Lot #0134E15 237 13, best by August 2019) sold on or about August 27, 2015 were fit for pet/animal consumption and USDA certified organic by Oregon Tilth.

42. Since these products tested positive for pentobarbital, they were not fit for pet/animal consumption and the representation was false. Defendants knew the representation was false and intended to deceive Plaintiff. Plaintiff justifiably relied on the representation and purchased these products, believing them to be fit for pet/animal consumption.

43. Plaintiff has suffered damage from Defendants’ fraud. Given that Defendants shipped pet food that was contaminated with pentobarbital, Plaintiff has been required to recall products manufactured by Defendants. In addition to the loss relating to the products it cannot sell and costs associated with the recall, Plaintiff has suffered extensive damage to its commercial reputation. This damage to its reputation has led to a significant loss of retailers and consumers. Plaintiff’s monetary damages exceed \$20,000,000.

FIFTH CAUSE OF ACTION

**(Negligent Misrepresentation – Against Defendants and
DOES 1 through 100, inclusive)**

44. Plaintiff incorporates the foregoing paragraphs as if fully set forth herein.

1 45. In July and August 2015, Defendants' Office Manager, Cynthia Stoner,
2 represented that the cases of 13-ounce-cans of Cocolicious Beef & Turkey dog food
3 (Lot #0136E15204 04, best by July 2019) sold on or about July 27, 2015 and the
4 cases of 13-ounce-cans of Cocolicious Chicken & Beef dog food (Lot #0134E15 237
5 13, best by August 2019) sold on or about August 27, 2015 were fit for pet/animal
6 consumption and USDA certified organic by Oregon Tilth.

7 46. Defendants made such representations without reasonable grounds for
8 believing them to be true and with the intent to induce Plaintiff to purchase the
9 products. In reliance on Defendants' representation, Plaintiff purchased these
10 products. Since these products tested positive for pentobarbital, they were not fit for
11 pet/animal consumption and the representation was false.

12 47. Plaintiff has suffered damage from Defendants' misrepresentation.
13 Given that Defendants shipped pet food that was contaminated with pentobarbital,
14 Plaintiff has been required to recall products manufactured by Defendants. In
15 addition to the loss relating to the products it cannot sell and costs associated with the
16 recall, Plaintiff has suffered extensive damage to its commercial reputation. This
17 damage to its reputation has led to a significant loss of retailers and consumers.
18 Plaintiff's monetary damages exceed \$20,000,000.

19 **SIXTH CAUSE OF ACTION**

20 **(Breach of Implied Warranty of Merchantability and Fitness for a Particular**
21 **Purpose – Against Defendants and DOES 1 through 100, inclusive)**

22 48. Plaintiff incorporates the foregoing paragraphs as if fully set forth
23 herein.

24 49. Plaintiff has done business with Defendants for approximately ten (10)
25 years. Defendants know that Plaintiff is in the business of selling pet food.

26 50. Defendants were aware that the products they manufactured for Plaintiff
27 must be fit for Plaintiff's purpose of supplying them for ultimate consumption by
28 pets/animals.

1 51. Defendants breached the implied warranties of merchantability and
2 fitness for a particular purpose. Because the pet food products that were supplied to
3 Plaintiffs in approximately July and August 2015 were contaminated with
4 pentobarbital, they were neither merchantable nor fit for the known and intended
5 purpose of being consumed by pets/animals. The pet food was not suitable for
6 animal consumption.

7 52. Plaintiff has suffered damage from Defendants' breach. Given that
8 Defendants shipped pet food that was contaminated with pentobarbital, Plaintiff has
9 been required to recall products manufactured by Defendants. In addition to the loss
10 relating to the products it cannot sell and costs associated with the recall, Plaintiff has
11 suffered extensive damage to its commercial reputation. This damage to its
12 reputation has led to a significant loss of retailers and consumers. Plaintiff's
13 monetary damages exceed \$20,000,000.

14 **SEVENTH CAUSE OF ACTION**

15 **(Breach of Express Warranties – Against Defendants and**
16 **DOES 1 through 100, inclusive)**

17 53. Plaintiff incorporates the foregoing paragraphs as if fully set forth
18 herein.

19 54. Defendants expressly warranted that the cases of 13-ounce-cans of
20 Cocolicious Beef & Turkey dog food (Lot #0136E15204 04, best by July 2019) sold
21 on or about July 27, 2015 were fit for pet/animal consumption.

22 55. Defendants expressly warranted that the cases of 13-ounce-cans of
23 Cocolicious Chicken & Beef dog food (Lot #0134E15 237 13, best by August 2019)
24 sold on or about August 27, 2015 were fit for pet/animal consumption.

25 56. Plaintiff purchased these products from Defendants because they were
26 represented to be fit for pet/animal consumption.

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1 57. The express warranties were breached. Since these products tested
2 positive for pentobarbital, they were not fit for pet/animal consumption and the
3 description was false.

4 58. Plaintiff has suffered damage from Defendants' breach. Given that
5 Defendants shipped pet food that was contaminated with pentobarbital, Plaintiff has
6 been required to recall products manufactured by Defendants. In addition to the loss
7 relating to the products it cannot sell and costs associated with the recall, Plaintiff has
8 suffered extensive damage to its commercial reputation. This damage to its
9 reputation has led to a significant loss of retailers and consumers. Plaintiff's
10 monetary damages exceed \$20,000,000.

11 **EIGHTH CAUSE OF ACTION**

12 **(Implied Indemnity – Against Defendants and**
13 **DOES 1 through 100, inclusive)**

14 59. Plaintiff incorporates the foregoing paragraphs as if fully set forth
15 herein.

16 60. On or about April 13, 2017, a retailer in Texas notified Plaintiff that
17 their customer had presented samples of Plaintiff's 13-ounce-can of Cocolicious
18 Beef & Turkey dog food (Lot #0136E15204 04, best by July 2019) and 13-ounce-can
19 of Cocolicious Chicken & Beef dog food (Lot #0134E15 237 13, best by August
20 2019) to a testing lab, and that the results had tested positive for pentobarbital.

21 61. Given that Defendants shipped pet food that was contaminated with
22 pentobarbital, Plaintiff has been required to recall products received from
23 Defendants. Plaintiff has been notified by retailers that they want refunds for both
24 recalled and non-recalled products. Plaintiff has also been notified by consumers
25 that they want Plaintiff to pay for their veterinarian bills.

26 62. Plaintiff is entitled to be indemnified by Defendants, and each of them,
27 for any liability that Plaintiff incurs as a result of the contamination, including, but
28 not limited to, the costs associated with the recall, any settlement amounts,

1 judgments, attorneys' fees, costs of suits, and such other and further relief as this
2 Court may deem appropriate.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiff prays for judgment against Defendants, and each of
5 them, as follows:

- 6 1. For damages according to proof;
- 7 2. For punitive damages in an amount to be determined at trial;
- 8 3. For pre- and post-judgment interest;
- 9 4. For costs of suit herein incurred;
- 10 5. For reasonable attorneys' fees; and,
- 11 6. For such other and further relief as the Court deems just and proper.

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13 Dated: May 5, 2017

BORDIN MARTORELL LLP

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15 By: /s/ Eduardo Martorell

16 Eduardo Martorell
17 Megan Atkinson
18 Attorneys for Plaintiff
19 PARTY ANIMAL, INC.
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DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial on all issues triable of right by jury.

Dated: May 5, 2017

BORDIN MARTORELL LLP

By: /s/ Eduardo Martorell

Eduardo Martorell
Megan Atkinson
Attorneys for Plaintiff
PARTY ANIMAL, INC.