

THE HONORABLE BENJAMIN H. SETTLE

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NICOLE AND GUY MAEL, NADINE
VIGLIANO, BRITNEY MOREA,
CAROL CONWAY, ANGELA
BERTUCCI, and TINA WIEPERT, on
behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

EVANGER’S DOG AND CAT FOOD
CO., INC., NUTRIPACK, LLC,
AGAINST THE GRAIN PET FOODS,
and SHER SERVICES COMPANY
INCORPORATED,

Defendants.

NO. 3:17-cv-05469-RBL

DECLARATION OF GREGORY A.
BEDELL IN SUPPORT OF
DEFENDANTS’ RESPONSE TO
PLAINTIFFS’ MOTION TO ENFORCE
SETTLEMENT AGREEMENT

I, GREGORY A. BEDELL, declare as follows:

1. I am an attorney licensed to practice law in the State of Illinois since May 1985. I am also admitted in the State of New York, the United States District Court for the Northern District of Illinois, the United States Appellate Court for the Seventh Circuit and the United States Supreme Court; I have also appeared in numerous courts *pro hac vice*

1 including the United States District Court for the District of Arizona, United States District
2 Court for the Northern District of Indiana, and United States District Court for the Central
3 District of California. I graduated from law school in August 1984.

4 2. I am one of the attorneys for the Defendants in this case and have personal
5 knowledge of the matters set forth herein.

6 3. I was counsel of record for the Evanger's Dog & Cat Food Co., Inc.
7 ("Evanger's") in the matter of *Evanger's v. Bailey Farms, LLC*, 17 L 004153, Circuit Court
8 of Cook County, Illinois. Evanger's brought this suit because beef supplier Bailey Farms,
9 LLC ("Bailey Farms"), delivered to Evanger's pentobarbital contaminated horsemeat
10 instead of the beef meat it ordered. The contaminated horsemeat wound up in certain
11 identified lots of Evanger's "hand packed" products "*Evanger's Hunk of Beef, Evanger's*
12 *Braised Beef Chunks, and Against the Grain Pulled Beef;*" Evanger's then recalled these
13 products in February, 2027. In light of these facts, Evanger's suit against Bailey Farms
14 included consumer fraud, fraud, negligence, and breach of contract claims. This case
15 ultimately settled, Bailey Farms having ceased doing business.

16 4. The Settlement Agreement in this case, Dkt 116-1, included a term under
17 which Evanger's and co-defendant Nutripack, LLC ("Nutripack" and collectively the
18 "Respondents") would submit the Hand Packed Product to pentobarbital testing for two
19 years on a quarterly basis; the term required the testing done by "an independent third party"
20 and that the Hand Packed Products to be tested would be randomly selected from the stream
21 of commerce by the independent third party. *See*, Settlement Agreement §2.1(e), a copy of
22 which is attached as **Exhibit 1**.

23 5. To perform the test, Plaintiffs' counsel recommended IEH Laboratories &
24 Consulting Group, based in Lake Forest Park, Washington ("IEH"). In November, 2020,
25 IEH submitted a proposal to Plaintiffs' counsel that included both the random acquisition of
26 samples of the Hand Packed Products and their subsequent testing for pentobarbital.

1 However, IEH did not provide with the proposal its “Standard Terms & Conditions”
2 referenced and incorporated into the proposal. By email dated January 12, 2021,
3 Respondents’ counsel requested IEH provide these terms for evaluation. I did not receive
4 this part of the proposal until, after repeated requests, February 12, 2021.

5 6. IEH’s proposal and Terms & Conditions contained several provisions with
6 which the Respondents did not agree; the most serious among these was IEH’s boilerplate
7 limitation of liability clause; IEH disclaimed all warranties and liability for lost profit and
8 other consequential damages, and limited recovery to the amounts the Respondents paid for
9 IEH’s services. Given the gravity of an error (of which Evanger’s was a victim previously
10 with its vendor Bailey Farms, LLC), the Respondents could not agree to this limitation and
11 I so advised IEH’s in-house counsel. After negotiation over this provision, IEH refused to
12 remove it. I then, on March 11, 2021, terminated discussion with IEH.

13 7. Given the number of months that had elapsed since entry of the final order in
14 this case (Dkt 138 entered June 12, 2019), I became concerned that Respondents did not
15 have a testing program in place as required by Section 2.1(e). I then took steps to engage an
16 appropriate lab and, on March 12, 2012, I contacted Texas A&M University’s Veterinary
17 Medical Diagnostic Laboratory (“TVMDL”). After a few phone calls and follow-up emails,
18 the Respondents engaged TVMDL on March 22, 2021. A copy of the engagement letter that
19 sets for the testing program (the “Testing Program”) is attached hereto as **Exhibit 2**.
20 Coincidentally, a few hours after I had contacted TVMDL on March 12, 2021, I received an
21 email from Jessica Sleater, one of Plaintiffs’ counsel, in which she stated: “We can reach out
22 to Texas A&M since your clients previously used it and agreed to their terms and conditions.
23 We will find out if they would be able to accommodate the random testing.”

24 8. I was aware that TVMDL does not have a field staff or nationwide network
25 on which it could call to obtain random samples of the Hand Packed Products. To overcome
26 this limitation, and to avoid even the appearance of “gaming the system,” I that suggested

1 that TVMDL use Amazon’s network of nationwide retailers who use Amazon as a sales
2 channel. As a result, the Respondents *could not know* from whom the Hand Pack Products
3 to be tested would be purchased. Rather than just Chewy.com and Amazon, TVMDL could,
4 in its sole discretion, purchase from hundreds of nationwide retailers at a time of its choosing.

5 9. Since the Respondents engaged TVMDL, the laboratory has independently
6 obtained samples of the Hand Packed Products and subjected them to testing; I am informed
7 and believe that the Respondents have paid whatever charges TVMDL has invoiced. The
8 first quarterly test report, which showed all samples tested negative for pentobarbital, is
9 attached to this Declaration as **Exhibit 3**.

10 10. In my initial discussions with Dr. Travis Mays, a supervisor at TVMDL, I
11 explained the testing program was part of a class action settlement arising from pentobarbital
12 tainted dog food; I conveyed that Respondents wanted to assure that the Hand Packed
13 Products would not present a risk of harm to the consuming public. In this context, I advised
14 him of the findings of the *Report on the Risk from Pentobarbital in Dog Food*, dated
15 February 22, 2002 (hereinafter the “FDA Risk Report”), that indicated CVM scientists were
16 able to determine that the no-observable-effect level for pentobarbital was 50 micrograms
17 of pentobarbital per day. A copy of the FDA Risk Report is attached hereto as **Exhibit 4**.

18 11. I then inquired of Dr. Mays as to what testing level of detection (“LOD”)
19 would be needed to identify products at this threshold; Dr. Mays responded that an LOD of
20 50 parts per billion (“ppb”) was the corresponding testing threshold to catch harmful
21 products based on the FDA Risk Report. Thus, based on the FDA Risk Report and the
22 TVMDL’s guidance, the Testing Program undertaken pursuant to Section 2.1(e) of the
23 Settlement Agreement implemented the LOD of 50 ppb.

24 12. Respondents were also aware of the various studies that documented the
25 existence of pentobarbital in the environment. Among these are:

26 a. a 2002 study by the U.S. Geological Survey of the United States Department

1 of the Interior, USGS “*Pharmaceuticals, Hormones, and Other Organic Wastewater*
2 *Contaminants in U.S. Streams*,” USGS Fact Sheet FS-027-02, June, 2002, a copy of which
3 is attached hereto as **Exhibit 5**;

4 b. “*Drugs in the Water*,” Harvard Health Letter, Harvard Medical School,
5 Published June, 2011, www.health.harvard.edu/newsletter_article/drugs-in-the-water (last
6 accessed March 1, 2021), a copy of which is attached hereto was **Exhibit 6**;

7 c. a study published in the journal “Ground Water,” Vol. 31, No. 5 September-
8 October, 1993, a copy of which is attached hereto was **Exhibit 7**; and

9 d. “*Stability of Pentobarbital in Soil*,” Journal of Environmental Science and
10 Health, Part B, Vo. 53, No. 3, 207-213 (2018), a copy of the full article is attached hereto as
11 **Exhibit 8**.

12 13. In light of the above, in evaluating the parameters of the Testing Program that
13 would detect harmful levels of pentobarbital, yet exclude harmless trace amounts of the
14 substance that was beyond their control - even employing “current good manufacturing
15 practice” – I discussed with Dr. Mays the risk of environmental factors and the LOD at which
16 testing would result “positive” for presence of such environmentally present (as opposed to
17 tallow/euthanized ingredient born) pentobarbital. Dr. Mays indicated to me that testing at
18 an LOD of 2 ppb would pose a risk that such environmentally present pentobarbital would
19 yield a positive test result.

20 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE
21 UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.

22 **EXECUTED** at Chicago, Illinois, this 23rd day of April, 2021.

23 KNABE & BEDELL

24 s/ Gregory A. Bedell

25 Gregory A. Bedell, Ill. #6189762 (*Pro Hac Vice*)

26 *Attorney for Defendants*

33 North Dearborn St. 10th Floor, Chicago, IL 60602

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the date signed below, I electronically filed the foregoing, **DECLARATION OF GREGORY A. BEDELL IN SUPPORT OF DEFENDANTS’ RESPONSE TO PLAINTIFFS’ MOTION TO ENFORCE SETTLEMENT AGREEMENT**, with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

<p><i>Counsel for Plaintiffs</i> Ms. Beth E. Terrell/Ms. Jennifer Rust Murray Terrell Marshall Law Group, PLLC 936 N 34th St., Ste. 300 Seattle, WA 98103-8869 bterrell@terrellmarshall.com jmurray@terrellmurray.com</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight <input type="checkbox"/> Hand <input checked="" type="checkbox"/> E-mail/E- Delivery Service <input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger</p>
<p><i>Pro Hac Vice Counsel for Plaintiffs</i> Ms. Jessica J. Sleater Andersen Sleater Sianni, LLC 1250 Broadway, 27th Floor New York, NY 10001 Jessica@andersensleater.com</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight <input type="checkbox"/> Hand <input checked="" type="checkbox"/> E-mail/E- Delivery Service <input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger</p>

Signed this 26th day of April, 2021, at Tacoma, Washington.

s/ Beth Barker
 Beth Barker, Legal Assistant