

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

IDEXX LABORATORIES, INC.

and

IDEXX DISTRIBUTION, INC.

Plaintiffs,

v.

AUBURN, INC. d/b/a HAGAN'S PET
RESORT

Defendant

Case No.2:17-cv-00098-JDL

DEFENDANT'S ANSWER, DEFENSES AND COUNTERCLAIM

Defendant Auburn, Inc. d/b/a Hagan's Pet Resort ("Auburn"), by counsel, respectfully submits the following answer, defenses and counterclaim to the complaint by IDEXX Laboratories, Inc. and IDEXX Distribution, Inc. ("IDEXX").

PARTIES

COMPLAINT ¶ 1:

Plaintiff, IDEXX Laboratories, Inc. is a Delaware corporation registered to do business in the State of Maine with a principal place of business at One IDEXX Dr., Westbrook, Maine 04092. IDEXX Laboratories is a leader in diagnostics and information technology solutions for animal health and water and milk quality.

ANSWER:

Denied based on lack of sufficient knowledge and information to form a belief as to the truth of the allegations.

COMPLAINT ¶ 2:

Plaintiff, IDEXX Distribution, Inc. is a Massachusetts corporation registered to do business in the State of Maine with a principal place of business at One IDEXX Dr., Westbrook, Maine 04092. IDEXX Distribution is an affiliate of IDEXX Laboratories that operates some of its laboratory business.

ANSWER:

Denied based on lack of sufficient knowledge and information to form a belief as to the truth of the allegations.

COMPLAINT ¶ 3:

Defendant Auburn, Inc. d/b/a Hagan’s Pet Resort (“Pet Resort”) is a Florida corporation with a principal place of business at 7081 Prospect Road, Sarasota, Florida, 34243.

ANSWER:

Admitted.

JURISDICTION AND VENUE

COMPLAINT ¶ 4:

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) based on diversity of citizenship between Plaintiffs and Defendant. The amount in controversy, exclusive of interest and costs, exceeds \$75,000, as specified by 28 U.S.C. § 1332(a).

ANSWER:

Denied. By way of affirmative defense, Defendant further states that Plaintiffs have resorted to improper group pleading by impermissibly lumping themselves together as “IDEXX” without specifying which debts allegedly are owed to which company. Moreover, there obviously is no diversity or subject matter jurisdiction over the claim apparently made by IDEXX Laboratories for less than \$5,000 in lab testing fees. IDEXX Laboratories and IDEXX Distribution are separately incorporated companies and each of them lacks standing to sue for debts belonging to a separate and distinct corporation, even if it is an affiliate or subsidiary. Plaintiffs have committed misjoinder by improperly joining claims apparently owned by IDEXX Distribution under the 2015 Diagnostic Agreement with claims owned by IDEXX Laboratories under separate and distinct contracts.

COMPLAINT ¶ 5:

The Court has personal jurisdiction over Defendant and venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because Plaintiffs have a principal place of business in this District and a substantial part of the events giving rise to the claims set forth occurred within this District.

ANSWER:

Denied. By way of Affirmative Defense, Defendant further states that all negotiations and sales took place in the State of Florida, more specifically at the Defendant's place of business.

FACTAL BACKGROUND

COMPLAINT ¶ 6:

On or about September 1, 2015, IDEXX Distribution and Pet Resort entered into the "IDEXX Laboratory Diagnostic Agreement" (the "Agreement"), an agreement for in-house diagnostic products.

ANSWER:

Admitted only to the extent that the referenced document was signed. The referenced document is the best evidence of its own content. Otherwise, any remaining allegations are denied.

COMPLAINT ¶ 7:

In-house diagnostic products include product like rapid response urine and blood tests, to be used "in-house" by veterinary practices.

ANSWER:

Admitted.

COMPLAINT ¶ 8:

The Agreement provides that from September 1, 2015, through the Agreement's end date of August 31, 2021, in exchange for an award of 15,000 IDEXX "points" and a substantial discount off of list price, Pet Resort will purchase at least \$33,638 annually, \$2,803 monthly, (the "Annual Minimum Purchase Amount") of Qualifying Diagnostic Products consisting of certain in-house diagnostic products.

ANSWER:

Admitted only that the referenced document was signed. The referenced document is the best evidence of its own content. Otherwise, any remaining allegations are denied.

COMPLAINT 9:

The agreement provides that the Annual Minimum Purchase Amount “is calculated net of taxes, shipping, allowances, credits and discounts.”

ANSWER:

Admitted only that the referenced document was signed and is the best evidence of its own content. Otherwise, any remaining allegations are denied.

COMPLAINT ¶ 10:

Subject to terms and conditions, IDEXX “points” have a value equivalent of one IDEXX point to \$1.00 and can be used toward qualifying IDEXX products and services.

ANSWER:

Admitted only that the referenced document was signed and is the best evidence of its own content. Otherwise, any remaining allegations are denied.

COMPLAINT ¶ 11:

As of on or around June 2016, contrary to the Agreement, Pet Resort has stopped purchasing in-house consumable products from IDEXX and has failed to meet the purchase levels for Qualifying Diagnostic Products.

ANSWER:

Admitted only to the extent that Defendant stopped purchasing from IDEXX Distribution. Otherwise any remaining allegations are denied. By way of Affirmative Defense, Defendant further states that IDEXX sold Defendant faulty strips, putting the health and lives of our customers’ pets and our reputation for providing quality care at great risk. Due to the faulty testing strips and equipment, and due to IDEXX’s continued refusal to fix the machine and to replace the faulty strips, Defendant stopped using the defective IDEXX products.

COMPLAINT ¶ 12:

IDEXX's lost profits as a result of Pet Resort's breach are at least \$117,000 based on the Annual Minimum Purchase Amount over the remaining term.

ANSWER:

Denied. By way of Affirmative Defense, Defendant further states that Defendant's obligations were discharged by IDEXX's prior material breaches.

COMPLAINT ¶ 13:

Additionally, Pet Resort currently owes IDEXX for lab services already provided to Pet Resort for which Pet Resort has failed to pay.

ANSWER:

Denied. By way of Affirmative Defense, Defendant further states that Defendant's obligations were discharged by IDEXX's prior material breaches.

COUNT I – BREACH OF CONTRACT
LABORATORY DIAGNOSTIC AGREEMENT

COMPLAINT ¶ 14:

Plaintiff repeat and restate the allegations contained in paragraphs 1 through 13 of this Complaint as if set forth in full.

ANSWER:

Defendant incorporates by reference its answers to paragraphs 1 through 13 as if fully stated herein.

COMPLAINT ¶ 15:

IDEXX and Pet Resort entered into a binding, enforceable Laboratory Diagnostic Agreement by which IDEXX agreed to provide Pet Resort with upfront points and substantial discounts in exchange for Pet Resort purchasing in-house consumables at agreed-to levels for a period of six years.

ANSWER:

Denied.

COMPLAINT ¶ 16:

Pet Resort breached the Agreement by transferring its in-house diagnostic business from IDEXX, thereby failing to meet its minimum purchasing requirements for the term of the Agreement.

ANSWER:

Denied.

COMPLAINT ¶ 17:

Pet Resort further breached the Agreement by failing to remit payment to IDEXX for in-house consumable products already provided.

ANSWER:

Denied.

COMPLAINT ¶ 18:

As a result of Pet Resort's breach, IDEXX has suffered and continues to suffer substantial harm.

ANSWER:

Denied.

COMPLAINT ¶ 19:

All conditions precedent to the maintenance of this action have been met.

ANSWER:

Denied.

**COUNT II – BREACH OF CONTRACT
ADDITIONAL PRODUCTS AND SERVICES**

COMPLAINT ¶ 20:

Plaintiffs repeat and restate the allegations contained in paragraphs 1 through 19 of this Complaint as if set forth in full.

ANSWER:

Defendant incorporates by reference its answers to paragraphs 1 – 19 as if fully set forth herein.

COMPLAINT ¶ 21:

During 2016, IDEXX and Pet Resort entered into binding and enforceable agreements when Pet Resort requested and IDEXX agreed to provide Pet Resort with certain additional products and services, including reference laboratory services.

ANSWER:

Denied.

COMPLAINT ¶ 22:

Pet Resort breached these agreements for additional products and services by failing to pay IDEXX in full.

ANSWER:

Denied.

COMPLAINT ¶ 23:

As a result of Pet Resort's breach, IDEXX has suffered and continues to suffer substantial harm.

ANSWER:

Denied.

COMPLAINT ¶ 24:

All conditions precedent to the maintenance of this action have been met.

ANSWER:

Denied.

COUNT III – PAYMENT ON ACCOUNT ANNEXED (16 M.R.S.A. § 355)

COMPLAINT ¶ 25:

Plaintiffs repeat and restate the allegations contained in paragraphs 1 through 24 of this Complaint as if set forth in full.

ANSWER:

Defendant incorporates by reference its answers to paragraphs 1 – 25 as if fully set forth herein.

COMPLAINT ¶ 26:

Plaintiffs have provided laboratory products and services to Pet Resort for which Pet Resort has failed to pay.

ANSWER:

Denied.

COMPLAINT ¶ 27:

As set forth in the attached declaration of Nathan Crooker, the current outstanding invoices total \$4,575.30.

ANSWER:

Denied.

COMPLAINT ¶ 28:

As further set forth in the Crooker declaration, this is a true statement of the indebtedness existing between IDEXX and Pet Resort for products and services provided to Pet Resort to date with all proper credits given. The prices charged therein are just and reasonable and were agreed to by the parties.

ANSWER:

Denied.

COUNT IV – UNJUST ENRICHMENT

COMPLAINT ¶ 29:

Plaintiffs repeat and restate the allegations contained in the paragraphs 1 through 28 of this Complaint as if set forth in full.

ANSWER:

Defendant incorporates by reference its answers to paragraphs 1 – 28 as if fully set forth herein.

COMPLAINT ¶ 30:

Plaintiffs conferred a value benefit on Pet resort by providing laboratory products and services to Pet Resort.

ANSWER:

Denied. By way of Affirmative Defense, Defendant further states that products supplied to Defendant were faulty and put the lives of customers' pets and the Defendant's reputation and customer relationships at great risk of misdiagnosis and incorrect treatment.

COMPLAINT ¶ 31:

Pet Resort realized the benefit of these laboratory products and services provided by IDEXX.

ANSWER:

Denied.

COMPLAINT ¶ 32:

Pet Resort been unjustly enriched to the detriment of IDEXX because it has realized the benefit of the laboratory products and services without providing payment for their value to IDEXX.

ANSWER:

Denied.

COMPLAINT ¶ 33:

Pet Resort's acceptance and retention of the value of these products and services without payment of their value to IDEXX is unjust and inequitable.

ANSWER:

Denied.

COUNT V – QUANTUM MERUIT

COMPLAINT ¶ 34:

Plaintiffs repeat and restate the allegations contained in paragraphs 1 through 33 of this Complaint as if set forth in full.

ANSWER:

Defendant incorporates by reference its answers to paragraphs 1 – 33 as if full set forth herein.

COMPLAINT ¶ 35:

IDEXX provided benefits to Pet Resort with Pet Resort's knowledge and consent when it provided Pet Resort with laboratory products and services.

ANSWER:

Denied. By way of Affirmative Defense, Defendant further states that lab testing equipment and test strips were faulty and required frequent retesting which resulted in delayed results, incorrect results, incorrect treatment and customer dissatisfaction. IDEXX knew their test materials and equipment were faulty and refused to remedy the errors after Defendant put IDEXX on notice.

COMPLAINT ¶ 36:

IDEXX reasonably expected to receive payment for these benefits.

ANSWER:

Denied.

COMPLAINT ¶ 37:

Pet Resort has failed and refused to render full payment for the benefits provided to it by IDEXX.

ANSWER:

Denied. By way of Affirmative Defense, Defendant further states that Defendant's obligations were discharged by IDEXX's prior material breaches.

COMPLAINT ¶ 38:

IDEXX has been damaged and continues to be damaged as a result of Pet Resort's failure to render full payment for the benefits provided by IDEXX.

ANSWER:

Denied.

COMPLAINT: PRAYER FOR RELIEF:

WHEREFORE, Plaintiffs IDEXX Laboratories, Inc. and IDEXX Distribution, Inc. request entry of judgment against Defendant Auburn, Inc. d/b/a Hagan's Pet Resort for all damages, costs, and attorney fees, and such other and further relief this Court deems just and reasonable.

ANSWER:

Admitted only that plaintiffs request the specified relief. Denied that plaintiffs are entitled to the requested relief or any other relief.

DEFENSES AND AFFIRMATIVE DEFENSES

1. **Lack of Personal Jurisdiction.** Defendant did not transact business in the Maine sufficient for courts located here to exercise personal jurisdiction over Defendant consistent with due process or traditional notions of fair play and substantial justice. The relevant contract negotiations and sales were transacted through IDEXX representatives in Florida, at Defendant's place of work.

2. **Improper Venue.** Venue is not proper over Auburn, Inc d/b/a Hagan's Pet Resort because at no time did Auburn conduct business in the state of Maine and venue is not otherwise proper over it in the District of Maine.

3. **Failure To State A Claim; Lack of Standing; Misjoinder and Lack of Subject Matter Jurisdiction.** Plaintiffs have resorted to improper group pleading by impermissibly lumping themselves together as "IDEXX" without specifying which debts allegedly are owed to which company. Moreover, there obviously is no diversity or subject matter jurisdiction over the claim apparently made by IDEXX Laboratories for less than \$5,000 in lab testing fees. IDEXX Laboratories and IDEXX Distribution are separately incorporated companies and each of them lacks standing to sue for debts belonging to separate and distinct corporations, even if they are affiliates

or subsidiaries. Plaintiffs have committed misjoinder by improperly joining claims owned by Distribution under the 2015 Diagnostic Agreement with claims owned by Laboratories under separate and distinct contracts.

4. **Prior Material Breach.** Plaintiffs committed prior material breaches of their agreements with Defendant by providing defective equipment and testing supplies which were defective, were not of good and merchantable quality, and were not fit for their intended purposes. The defective equipment and supplies provided were provided in breach of express and implied warranties, including the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

5. **Failure of Consideration.** There was a severe and material failure of consideration due to the severe material defects in the testing equipment and materials provided by IDEXX to Defendant, which IDEXX failed to replace with better functioning equipment and materials.

6. **Set-Off and Recoupment.** Defendant is entitled to set off against any debt due to IDEXX and to recoup from IDEXX the \$193,000 or more in damages that Defendant suffered from IDEXX providing defective diagnostic equipment and materials, as further set forth in Defense 7 and the Counterclaim asserted by Defendant.

7. **Fraud In The Inducement.** IDEXX fraudulently induced Defendant to sign the Order Agreement, the EMA and the Diagnostic Agreement by misrepresenting, concealing and failing to disclose material known defects and flaws in the IDEXX testing equipment and materials, which IDEXX knew had dangerous and excessive error rates.

8. **Illegal Tying Arrangement.** IDEXX is one of very few vendors of in-house veterinary diagnostic machines and equipment. IDEXX is believed to have market power in that market. By tying the purchases of equipment to the purchases of reagents, test strip and supplies,

IDEXX is engaged in an illegal tying arrangement in violation of Section One of the Sherman Act and Section 7 of the Clayton Act.

COUNTERCLAIM

1. Auburn, Inc. (“Pet Resort”) is a Florida Corporation with its principal place of business in Florida.

2. Plaintiff, IDEXX Distribution, Inc. (“IDEXX”), reports that it is a Massachusetts corporation registered to do business in the State of Maine with a principal place of business at One IDEXX Dr., Westbrook, Maine 04092.

3. Diversity and Supplemental Jurisdiction exist over this Counterclaim because IDEXX and Pet Resort are citizens and residents of different States or Commonwealths.

4. Personal jurisdiction and venue are proper in this court over IDEXX because IDEXX filed its Complaint here.

COUNT I: BREACH OF CONTRACT AND EXPRESS WARRANTIES

5. Pet Resort incorporates by reference all prior paragraphs of its Counterclaim.

6. Shortly before the parties’ January 2014 Order agreement and Extended Maintenance Agreement (“EMA”), and shortly before the parties’ Diagnostic Agreement was signed in 2015, IDEXX through a sales representative named Matthew intentionally and knowingly misrepresented and warranted to Pet Resort, through Dr. Brode and Dr. Huber, that the IDEXX diagnostic system and equipment were extremely accurate and reliable and more accurate and reliable than competing systems on the market. These warranties and representations were false and were knowingly false. They were made for the purpose of fraudulently inducing Pet Resort to enter into the Order agreement, EMA with and Diagnostic Agreement with IDEXX. Pet Resort relied on these warranties and representations in purchasing the equipment and supplies from IDEXX and in entering into the Order agreement, EMA and Diagnostic Agreement with IDEXX.

7. The diagnostic equipment sold by IDEXX to Pet Resort worked (if at all) for two months before excessive and dangerous error rates and severe diagnostic errors were discovered. IDEXX eventually replaced the initial equipment, but the replacement machine also rapidly began to commit excessive, dangerous, frequent and severe diagnostic errors. These errors threatened the lives and health of the pets of Pet Resort's customers, and they diminished Pet Resort's previously sterling reputation. As a result, Pet Resort lost many valuable customers and relationships. The error rate and failure rate of the IDEXX equipment and system were much higher than those of competing systems and equipment.

8. For example, the IDEXX equipment frequently reported false positives for excessive and dangerous levels of creatine, which indicated that the pets at issue had severe liver or kidney malfunctions and should be put down. Upon re-testing some of the same animals and samples with IDEXX outside services or other outside testing services, the IDEXX-provided in-house testing equipment and products were found to be wildly inaccurate, sparing the lives of some of the affected pets and sparing some of their owners a great deal of misery.

9. IDEXX breached the express warranties in the Order agreement, the EMA and the Diagnostic Agreement by not using commercially reasonable good faith efforts to correct software errors and by not repairing or replacing defective equipment and materials with functional, non-defective equipment and materials. The IDEXX equipment, system and materials never substantially conformed with the IDEXX specifications nor with the intended functionality for the diagnostic equipment and system.

10. IDEXX breached the Order agreement, the EMA and the Diagnostic Agreement by not providing the customer support that had been promised and was required. "Michael," the IDEXX customer service and support representative assigned to Pet Resort, failed or refused over 90 percent of the time to show up for and provide support and service calls needed by Pet Resort to

address the constant and excessive errors perpetrated by the IDEXX equipment, system and materials.

11. The IDEXX equipment and system provided to Pet Resort was never able to link up with and communicate data or functions to or from the IDEXX Cornerstone software system which was part of the promised and represented functionality and specifications.

12. To mitigate the damages from the frequent and severe errors with the IDEXX testing equipment and products (including test strips with excessive or otherwise bad glue), Pet Resort spent approximately \$120,000 purchasing outside testing services to perform tests which the IDEXX equipment should have been able to perform accurately and reliably but was not in fact able to perform accurately and reliably.

13. The IDEXX equipment, system and products were so defective, dangerous and inaccurate, that they were of no value or of negative value to Pet Resort. Pet Resort is entitled to a refund of the approximately \$33,000 that it paid IDEXX for the equipment and system due to the substantial and material if not complete failure of consideration and of the \$40,000 that Pet Resort spent on related supplies such defective test strips.

14. All relevant times, before and after the Order agreement, the EMA and the Diagnostic Agreement were signed, IDEXX had actual knowledge that the equipment and products it was selling were severely, frequently, and excessively inaccurate, and therefore endangered the lives, health and safety of the pets of purchasers' customers. IDEXX also knew that the equipment and software did not perform to, and could not be made to conform to, the intended specifications and functions.

15. Any repair and replacement warranties, damages limitations, warranty disclaimers, or other limitations of remedy are unconscionable and violate public policy because IDEXX had actual knowledge that the products it was selling were severely, frequently, and excessively

inaccurate, and that they therefore endangered the lives, health and safety of the pets of purchasers' customers, but IDEXX intentionally and knowingly misrepresented the accuracy and reliability of its equipment, system and materials.

WHEREFORE, Pet Resort requests that the Court enter judgment in favor of Pet Resorts and against IDEXX Distribution in the amount of \$193,000 for breach of contract and breach of express warranty, plus attorneys' fees and costs pursuant to Page 3 Paragraph 8 of the Diagnostic Agreement and the terms and conditions of the Order agreement and the EMA, plus pre-judgment and post-judgment interest at the statutory rate.

COUNT II: FRAUD

16. Pet Resort incorporates by reference all prior paragraphs of its Counterclaim.

17. Shortly before the parties' January 2014 Order agreement and Extended Maintenance Agreement ("EMA"), and shortly before the parties' Diagnostic Agreement was signed in 2015, IDEXX through a sales representative named Matthew intentionally and knowingly misrepresented and warranted to Pet Resort, through Dr. Brode and Dr. Huber, that the IDEXX diagnostic system and equipment were extremely accurate and reliable and more accurate and reliable than competing systems on the market. These representations were false and were knowingly false. They were made for the purpose of fraudulently inducing Pet Resort to enter into the Order agreement, the EMA and the Diagnostic Agreement with IDEXX. Pet Resort reasonably relied on these representations in purchasing the equipment and supplies from IDEXX and in entering into the Order agreement, the EMA and the Diagnostic Agreement with IDEXX.

18. The diagnostic equipment sold by IDEXX to Pet Resort in 2014 worked (if at all) for two months before excessive and dangerous error rates and severe diagnostic errors were discovered. IDEXX eventually replaced the initial equipment, but the replacement equipment also rapidly began to commit excessive, dangerous, frequent and severe diagnostic errors. These errors

threatened the lives and health of the pets of Pet Resort's customers, and they diminished Pet Resort's previously sterling reputation. As a result, Pet Resort lost many valuable customers and relationships. The error rate and failure rate of the IDEXX equipment and system were much higher than those of competing systems and equipment.

19. For example, the IDEXX equipment frequently reported false positives for excessive and dangerous levels of creatine, which indicated that the pets at issue had severe liver or kidney malfunctions and should be put down. Upon re-testing some of the same animals and samples with IDEXX outside services or other outside testing services, the IDEXX-provided in-house testing equipment and products were found to be wildly inaccurate, sparing the lives of some of the affected pets and sparing some of their owners a great deal of misery.

20. The IDEXX equipment, system and materials never substantially conformed with the IDEXX specifications nor with the intended functionality for the diagnostic equipment and system. IDEXX knew that they would not conform but falsely promised that they did and would conform without the intention to perform that promise.

21. The IDEXX equipment and system provided to Pet Resort was never able to link up with and communicate data or functions to or from the IDEXX Cornerstone software system with was part of the promised and represented functionality and specifications.

22. To mitigate the damages from the frequent and severe errors with the IDEXX testing equipment, system and products (including test strips with excessive or otherwise bad glue), Pet Resort spent approximately \$120,000 purchasing outside testing services to perform tests which the IDEXX equipment should have been able to perform accurately and reliably.

23. The IDEXX equipment and products were so defective, dangerous and inaccurate, that they were of no value or of negative value to Pet Resort. Pet Resort is entitled to a refund of the approximately \$33,000 that it paid IDEXX for the equipment and system due to the substantial

and material if not complete failure of consideration and of the approximately \$40,000 that Pet Resort spent on related supplies such as defective test strips.

24. All relevant times, before and after the Order agreement, the EMA and the Diagnostic Agreement were signed, IDEXX had actual knowledge that the equipment and products it was selling were severely, frequently, and excessively inaccurate, and therefore endangered the lives, health and safety of the pets of purchasers' customers. IDEXX also knew that the equipment and software did not perform to, and could not be made to conform to, the intended and represented specifications and functions.

25. Any repair and replacement warranties, damages limitations, warranty disclaimers, or other limitations of remedy are unconscionable and violate public policy because IDEXX had actual knowledge that the products it was selling were severely, frequently, and excessively inaccurate, and that they therefore endangered the lives, health and safety of the pets of purchasers' customers, but IDEXX intentionally and knowingly misrepresented the accuracy and reliability of its equipment, system and materials. They also should be rescinded with the Order agreement, the EMA and the Diagnostic Agreement due to fraud by IDEXX.

26. Pet Resort has tendered or returned the remaining IDEXX equipment and supplies obtained pursuant to the Order agreement, the EMA and the Diagnostic Agreement.

WHEREFORE, Pet Resort requests that the Court enter judgment in favor of Pet Resorts and against IDEXX Distribution in the amount of \$193,000 for fraud, plus attorneys' fees and costs pursuant to Page 3 Paragraph 8 of the Diagnostic Agreement and the terms and conditions of the Order Agreement and the EMA, plus pre-judgment and post-judgment interest at the statutory rate, and that the Court rescind and cancel for fraud the EMA, the Order agreement and the Diagnostic Agreement.

**COUNT III: BREACH OF IMPLIED WARRANTIES UNDER COMMON LAW
AND MAINE'S UNIFORM COMMERCIAL CODE**

27. Pet Resort incorporates by reference all prior paragraphs of its Counterclaim.

28. The diagnostic equipment and system sold by IDEXX to Pet Resort worked (if at all) for two months before excessive and dangerous error rates and severe diagnostic errors were discovered. Pet Resort notified IDEXX within a reasonable time of the defectiveness and IDEXX failed to take effective remedial action. IDEXX eventually replaced the initial equipment, but the replacement machine also rapidly began to commit excessive, dangerous, frequent and severe diagnostic errors. These errors threatened the lives and health of the pets of Pet Resort's customers, and they diminished Pet Resort's previously sterling reputation. As a result, Pet Resort lost many valuable customers and relationships.

29. For example, the IDEXX equipment frequently reported false positives for excessive and dangerous levels of creatine, which indicated that the pets at issue had severe liver or kidney malfunctions and should be put down. Upon re-testing some of the same animals and samples with IDEXX outside services or other outside testing services, the IDEXX-provided in-house testing equipment and products were found to be wildly inaccurate, sparing the lives of some of the affected pets and sparing some of their owners a great deal of misery.

30. To mitigate the damages from the frequent and severe errors with the IDEXX testing equipment, system and products (including test strips with excessive or otherwise bad glue), Pet Resort spent approximately \$120,000 purchasing outside testing services to perform tests which the IDEXX equipment should have been able to perform accurately and reliably.

31. The IDEXX equipment, system and products were so defective, dangerous and inaccurate, that they were of no value or of negative value to Pet Resort. Pet Resort is entitled to a refund of the approximately \$33,000 that it paid IDEXX for the equipment and approximately

\$40,000 in related supplies that it paid to due to the substantial and material if not complete failure of consideration.

32. IDEXX expressly represented that the equipment and products it was selling were accurate and reliable and were fit for the intended purpose of being used in a veterinary clinic to diagnose and guide the treatment of customers' beloved sick pets. IDEXX knew that Pet Resorts was relying on IDEXX's superior skill and knowledge as to the suitability and fitness of products to serve the needs of Pet Resorts. IDEXX knew that Pet Resort was going to use the purchased equipment and supplies for that purpose when it signed the contracts and sold the equipment and supplies to Pet Resort. In fact, the diagnostic equipment and products sold by Distribution were not fit for that intended purpose but were severely, frequently, and excessively inaccurate.

33. The diagnostic equipment and products sold by IDEXX to Pet Resort were not of a good and merchantable quality. Rather, they were severely, frequently, and excessively inaccurate, and therefore endangered the lives, health and safety of the pets of Pet Resort's customers.

34. All relevant times, before and after the Agreement was signed, IDEXX had actual knowledge that the equipment and products it was selling were severely, frequently, and excessively inaccurate, and therefore endangered the lives, health and safety of the pets of purchasers' customers.

35. Any repair and replacement warranties, damages limitations, warranty disclaimers, or other limitations of remedy are unconscionable and violate public policy because IDEXX had actual knowledge that the products it was selling were severely, frequently, and excessively inaccurate, and that they therefore endangered the lives, health and safety of the pets of purchasers' customers. Additionally, IDEXX is not permitted to disclaim implied warranties after having made express contrary warranties.

WHEREFORE, Pet Resort requests that the Court enter judgment in favor of Pet Resorts and against IDEXX Distribution in the amount of \$193,000 for breach of implied warranties, plus attorneys' fees and costs pursuant to Page 3 Paragraph 8 of the Agreement and pursuant to the terms and conditions of the EMA and Order agreement, and/or as permitted by law, plus pre-judgment and post-judgment interest at the statutory rate.

**COUNT IV: RESCISSION DUE TO FRAUD, MATERIAL
BREACH AND FAILURE OF CONSIDERATION**

36. Pet Resort incorporates by reference all prior allegations of its Counterclaim as though fully set forth herein.

37. The IDEXX equipment and products were so defective, dangerous and inaccurate, that they were of no value or of negative value to Pet Resort. Pet Resort is entitled to a refund of the approximately \$33,000 that it paid IDEXX for the equipment due to the substantial and material if not complete failure of consideration, and also due to the fraud and breaches of warranty perpetrated by IDEXX.

38. Pet Resort is entitled to rescind and cancel the Order agreement, the EMA and the Diagnostic Agreement for fraud, for material breach and for substantial failure of consideration, and to recover the approximately \$33,000 purchase price paid, plus the \$120,000 in outside service fees and approximately \$40,000 in funds paid for defective ancillary products and testing supplies.

39. Pet Resort has tendered or returned the remaining IDEXX equipment and supplies obtained pursuant to the Order agreement, the EMA and the Diagnostic Agreement.

WHEREFORE, Pet Resort requests that the Court enter judgment in favor of Pet Resorts and against IDEXX Distribution in the amount of \$193,000 for fraud, failure of consideration and prior material breach, plus attorneys' fees and costs pursuant to Page 3 Paragraph 8 of the Agreement and pursuant to the Order Agreement and EMA terms and conditions, plus pre-judgment and post-judgment interest at the statutory rate.

Dated: April 21, 2017

Respectfully submitted,

AUBURN, INC. d/b/a HAGAN'S PET RESORT,

By its attorneys,

/s/ Frederick B. Finberg

Frederick B. Finberg, Esquire (local counsel)

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CERTIFICATE OF SERVICE

I, Frederick B. Finberg, hereby certify that on April 21, 2017, I filed the foregoing via the Court's CM/ECF system, which will automatically send a notice of filing to counsel of record.

/s/ Frederick B. Finberg