

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

DEREK L. SMITH  
36205 MILES ROAD  
MORELAND HILLS, OHIO 44022,

~ and ~

REBECCA Y. SMITH  
36205 MILES ROAD  
MORELAND HILLS, OHIO 44022,

Plaintiffs,

~ vs ~

KALMBACH FEEDS, INC.  
7148 STATE HWY. 199  
N. UPPER SANDUSKY, OHIO 43351,

Also Serve:

KALMBACH FEEDS, INC.  
ATTN: MILTON P. KALMBACH  
In His Capacity As Statutory Agent  
7148 STATE HWY. 199  
N. UPPER SANDUSKY, OHIO 43351,

~ and ~

JOHN DOES 1 – 10  
c/o KALMBACH FEEDS, INC.  
7148 STATE HWY. 199  
N. UPPER SANDUSKY, OHIO 43351,

Defendants.

CASE NO.:

JUDGE:

COMPLAINT FOR NEGLIGENCE;  
NEGLIGENCE PER SE; STRICT  
LIABILITY; FRAUD; PRODUCT  
LIABILITY; AND, SPOILIATION  
OF EVIDENCE

(Jury Demand Endorsed Hereon)

NOW COME the Plaintiffs, Derek L. and Rebecca Y. Smith, by and through their undersigned counsel, and for their Complaint Against Kalmbach Feeds, Inc. (hereinafter "Kalmbach"), state as follows:

**PARTIES**

1. Plaintiffs bring this Complaint to recover damages arising from the defective design, manufacture, production, testing, sales and distribution of Kalmbach's "Tribute Equine Nutrition" line of equine nutritional products, which poisoned and killed many of Plaintiffs' valuable Percheron Draft Horses, and permanently damaged and diminished the value of Plaintiffs' valuable Percheron Draft Horses that were poisoned by, but not killed by Kalmbach's "Tribute Equine Nutrition" line of equine horse nutrition products.

2. Derek L. Smith and Rebecca Y. Smith are husband and wife, and reside at 36205 Miles Road, Moreland Hills, Ohio, Cuyahoga County, Ohio.

3. Kalmbach is an Ohio corporation for profit bearing Ohio Entity No. 64591, with its primary place of business at 7148 State Highway 199, North Upper Sandusky, Ohio 43351. Milton P. Kalmbach is being named only in his capacity as Statutory Agent.

4. John Doe Defendants 1 – 10 and officers, employees, and/or agents of Kalmbach whose identities are presently unknown to Plaintiffs, who have caused and/or participated in the causes of actions more fully set forth herein. Plaintiffs therefore reserve the right to amend this Complaint or seek leave to include additional claims once the identities of John Does 1 – 10 are discovered.

5. This Court has general and specific personal jurisdiction over Kalmbach, this Court has subject matter jurisdiction and venue is proper.

**INTRODUCTION**

6. At all relevant times, Derek and Rebecca Smith owned, bred and raised valuable Percheron Draft Horses at 36205 Miles Road, Moreland Hills, Ohio, Cuyahoga County, Ohio.

7. Kalmbach feeds holds itself out as a regional leader in animal nutrition, including particularly and without limitation equine nutrition. Kalmbach manufactures and markets a line of equine nutritional food products known as "Tribute Equine Nutrition". Kalmbach's "Tribute Equine Nutrition" line of products are available through authorized Kalmbach dealers, including in this case Chagrin Pet & Garden Supply, Inc. ("Chagrin Pet & Garden").

8. At all relevant times, Kalmbach falsely represented to its authorized dealers, including in this case Chagrin Pet & Garden, that Kalmbach's "Tribute Equine Nutrition", line of horse feed products was manufactured in a "closed" equine feed mill, and was "ionophore free". These false representations were materially important to all users of Kalmbach's "Tribute Equine Nutrition", line of horse feed products, as agricultural feeds for cattle, swine and poultry contain ionophores, which are deathly toxic and poisonous to horses.

9. Livestock feed containing ionophores are commonly referred to as "medicated feeds".

10. At all relevant times, Kalmbach would produce its "Tribute Equine Nutrition" line of product in/on/with the same equipment Kalmbach used at its plant in Upper Sandusky, Ohio to make "medicated feeds", a material fact that was expressly known to Kalmbach, and knowingly and maliciously concealed from Kalmbach's

authorized "Tribute Equine Nutrition" dealers and Kalmbach's end users including specifically the Smiths.

11. For example, the FDA found that on or about March 20, 2015, Kalmbach manufactured a medicated livestock feed on the exact same "Mixer Line" used to make "(Lot #71345), a non-medicated horse feed", which upon information and belief was Tribute Foal Foundation. See: FDA Form 483, attached hereto as Exhibit "A". Kalmbach has not denied this Exhibit "A" FDA Form 483 finding. See: Kalmbach's May 1, 2016 Response attached hereto as Exhibit "B".

12. Also at all relevant times, Kalmbach's "Tribute Equine Nutrition" line of products were not exclusively made at Kalmbach's "closed" and/or "ionophore free" facility in Upper Sandusky, Ohio, but were often manufactured by various contract feed mills, a material fact that was expressly known to Kalmbach, and knowingly and maliciously concealed from Kalmbach's authorized "Tribute Equine Nutrition" dealers and Kalmbach's end users including specifically the Smiths.

13. An integral part of the manufacturing process is extrusion (i.e. – pelletizing), and at all relevant times, Kalmbach had some of its "Tribute Equine Nutrition" horse feeds extruded by contract toll-mills, that also milled "medicated foods", a fact that was expressly known to Kalmbach, and knowingly and maliciously concealed from Kalmbach's authorized "Tribute Equine Nutrition" dealers and Kalmbach's end users including specifically, the Smiths.

14. At all relevant times, the Smiths' local horse feed supplier Chagrin Pet & Garden stated, on numerous occasions, that Kalmbach's "Tribute Equine Nutrition" horse feeds, is a premium horse feed, and warranted and represented on Kalmbach's

behalf that the "Tribute Equine Nutrition" horse feeds were made in a "closed" and "ionophore free" equine feed facility in Upper Sandusky, Ohio.

15. Kalmbach's representations about its "Tribute Equine Nutrition" – that it was manufactured in a "closed" and "ionophore free" equine feed mill in Upper Sandusky, Ohio – were false when made by Kalmbach; Kalmbach had express knowledge of the falsity of those statements; Kalmbach maliciously concealed the truth regarding the probability of ionophore contamination in its "Tribute Equine Nutrition" line of horse feeds from Kalmbach's authorized dealers and from Kalmbach's end users; and, Kalmbach made these materially false representations with the specific intent of having its authorized dealers and end users justifiably rely on those materially false statements.

16. The Smiths justifiably relied on the representations made by Kalmbach's authorized dealer Chagrin Pet & Garden, that the ionophore free "Tribute Equine Nutrition" horse feeds were manufactured in a "closed" and "ionophore free" equine feed mill in Upper Sandusky, Ohio.

17. Thereafter, and abruptly and without explanation, during and around July of 2015 through November of 2015 and up until the present, the Smiths' horses became critically ill, and began exhibiting symptoms consistent with ionophore contamination and poisoning.

18. Many of the Smiths horses began to die violent deaths from ionophore poisoning and toxicity. Other horses became and remain extremely ill, with greatly diminished value.

19. The Smiths reported these tragic events to both Chagrin Pet & Garden, and to Kalmbach. In response to these reports, Kalmbach continued to assure the Smiths that their horses' illnesses and deaths could not and were not associated with or attributable to Kalmbach's "Tribute Equine Nutrition" line of horse feed. These Kalmbach statements to the Smiths were knowingly and falsely made by Kalmbach, and Kalmbach maliciously concealed the truth from the Smiths, that Kalmbach's "Tribute Equine Nutrition" horse feed lines were manufactured in/on/with the exact same equipment that Kalmbach used to manufacture medicated feeds at its plant in Upper Sandusky, Ohio, and also contract-milled elsewhere by contract feed mills that manufacture medicated feed.

20. On or around August 28, 2016, without any notice or advance warning, Doug Southerland, a duly authorized Kalmbach representative arrived at the Smiths' horse farm located at 36205 Miles Road, Moreland Hills, Ohio, Cuyahoga County, Ohio, and took samples of all of the Smiths' Kalmbach "Tribute Equine Nutrition" horse feed from the Smiths' horse farm, as well as samples of various hays also located at the Smiths' horse farm. As will be more fully set forth herein, Kalmbach has intentionally and maliciously spoliated this material, crucial and essential evidence.

**COUNT ONE – NEGLIGENCE**

21. Plaintiffs incorporate by reference as if fully set forth herein all allegations contained in Paragraphs 1 through 20 above, and further allege as follows:

22. At all relevant times, Kalmbach had a duty to design, manufacture, formulate and test its "Tribune Equine Nutrition" line of horse feeds, to be "ionophore

free”, as Kalmbach has express knowledge that ionophores are deathly toxic and poisonous to horses.

23. During and around July of 2015, the Smiths' valuable Percheron Draft Horses and other horses, became violently ill, many of which violently died, and many of which have become weak and permanently damaged and injured and of greatly diminished value, all while being fed Kalmbach's "Tribute Equine Nutrition" line of horse feeds.

24. It was foreseeable to Kalmbach, that ionophore contamination in Kalmbach's "Tribute Equine Nutrition" line of horse feeds, would result in death, damage and diminution in value to horses that were fed Kalmbach's ionophore contaminated "Tribute Equine Nutrition", as at all relevant times Kalmbach had express knowledge that its "Tribute Equine Nutrition" line of horse feed was not ionophore free.

25. The Smiths' horse deaths and permanently damaged animals that were directly and proximately caused by ionophore poisoning from Kalmbach's "Tribute Equine Nutrition" line of horse feeds include:

- \* the July 3, 2015 death of Licorice, a Shetland Pony;
- \* the same week the Smiths' English Lop Doe Rabbit Jemimah Puddleduck died of ionophore poisoning;
- \* within the week of Licorice's death, four of the Smiths other horses began showing symptoms consistent with ionophore poisoning. These horses are:
  - \*\* the Smiths' Pony Peppermint and a thoroughbred Galvin Kilian became acutely ill from ionophore poisoning, and remain acutely ill, permanently damaged and of greatly diminished value from ionophore poisoning;

\*\* also that week, the Smiths' Futurity Champion Percheron Draft Horse Elkview Tammy became acutely ill from ionophore poisoning, and remains acutely ill, permanently damaged and of greatly diminished value from ionophore poisoning;

\*\* also that week, Elkview Tammy's three month old filly, became acutely ill from ionophore poisoning, was hospitalized for five days in veterinary ICU from ionophore poisoning, and remains acutely ill, permanently damaged and of greatly diminished value from ionophore poisoning;

\* During and around Labor Day of 2015, the Smiths' valuable Draft Horse mare Camlyn's four month old colt, died in utero, requiring veterinary intervention to abort and remove the dead colt in utero;

\* In November of 2015, the Smiths' valuable Percheron Draft Horse mare Camlyn died from ionophore poisoning; and,

\* soon thereafter another one of the Smiths' valuable Percheron Draft Horses mare Tequila died from ionophore poisoning.

26. During these unpleasant events from July 3, 2015 through November, 2015, while the Smiths' valuable Percheron Draft Horses and other livestock were dying from ionophore poisoning, Kalmbach was concealing evidence and was fabricating evidence, in an attempt to avoid liability for killing the Smiths' valuable Percheron Draft Horses and other livestock, from Kalmbach's ionophore contaminated "Tribute Equine Nutrition" line of horse feeds.

27. Not satisfied with Kalmbach's materially false explanations regarding the Smiths' dead horses and damaged horses, the Smiths obtained their own scientific

testing, that revealed Kalmbach's "Tribute Equine Nutrition" line of horse feed was indeed contaminated by ionophores known as "monensin" and "lasalocid". Monensin and lasalocid are ionophores known to be deathly toxic and poisonous to horses.

28. Neither monensin nor lasalocid were listed as an ingredient on the feedbag tags containing the ionophore contaminated Kalmbach's "Tribute Equine Nutrition" line of horse feeds.

29. Plaintiffs were unaware until Plaintiffs performed their own testing on Kalmbach's "Tribute Equine Nutrition" line of horse feeds of the presence of monensin and lasalocid in the toxic and deathly poisonous Kalmbach's "Tribute Equine Nutrition" line of horse feeds, that the Smiths' valuable Percheron Draft Horses and other livestock were exposed to.

30. The Smiths' valuable Percheron Draft Horses that have died are irreplaceable because of their unique genetic bloodlines and pedigrees. The Smiths' valuable Percheron Draft Horses and other livestock that did not die from ionophore poisoning have been permanently damaged, injured and greatly diminished in value.

31. Kalmbach has a legal duty to manufacture, distribute and sell equine nutritional horse feeds which are not harmful to horses, which did not contain ionophores, and which conformed to Kalmbach's "guaranteed analysis" of the ingredients of "Tribute Equine Nutrition" line of horse feeds.

32. Defendant Kalmbach negligently designed, manufactured, produced, tested, inspected, marketed, promoted, distributed, and sold toxic ionophore contaminated horse feed to Plaintiffs and others similarly situated to Plaintiffs.

33. As a direct and proximate result of Defendant Kalmbach's negligence, Plaintiffs have sustained damages from the deaths of their valuable Percheron Draft Horses and other livestock, which exceed \$25,000.00, in an amount to be proven at trial no less than \$200,000.00.

34. As a further direct and proximate result of Defendant Kalmbach's negligence, Plaintiffs have sustained damages from the permanent injury and damage to other valuable Percheron Draft Horses and livestock exposed to ionophores in Kalmbach's "Tribute Equine Nutrition" line of horse feeds, that have been greatly diminished in value, in an amount which exceeds \$25,000.00, the exact amount to be proven at trial being no less than \$200,000.00.

35. As a further direct and proximate result of Defendant Kalmbach's negligence, Plaintiffs have incurred necessary veterinary emergency medical expenses and necessary subsequent veterinary medical expenses, for necessary veterinary care and treatment, and with reasonable veterinary certainty Plaintiffs will continue to incur additional veterinary medical expenses into the indefinite future.

36. Because Kalmbach's actions and omissions were contrary to law, was unconscionably reckless, demonstrated malice and egregious fraud and was done with a conscious disregard for the rights and safety of Plaintiffs and Plaintiffs' personal property, the Plaintiffs are entitled to an award of punitive damages at the highest rate allowed by law.

**COUNT TWO – NEGLIGENCE PER SE**

37. Plaintiffs incorporate by reference as if fully set forth herein all allegations contained in Paragraphs 1 through 36 above, and further allege as follows:

38. Defendant Kalmbach manufactured, produced and sold toxic, ionophore contaminated "Tribute Equine Nutrition" line of horse feeds in violation of Ohio Revised Code §§ 923.43, 923.48, 923.49 and Ohio Administrative Code 901-57-01, *et seq.*, concerning adulterated and/or misbranded commercial horse feed.

39. Kalmbach also manufactured, produced and sold toxic, ionophore contaminated "Tribute Equine Nutrition" horse feed in violation of FDA regulations.

40. Kalmbach's violation of Ohio statutes and FDA regulations constitutes negligence *per se*.

41. As a direct and proximate result of Defendant Kalmbach's negligence *per se*, Plaintiffs have sustained damages from the deaths of their valuable Percheron Draft Horses and other livestock, which exceed \$25,000.00, in an amount to be proven at trial no less than \$200,000.00.

42. As a further direct and proximate result of Defendant Kalmbach's negligence *per se*, Plaintiffs have sustained damages from the permanent injury and damage to other valuable Percheron Draft Horses and livestock exposed to ionophores in Kalmbach's "Tribute Equine Nutrition" line of horse feeds, that have been greatly diminished in value, in an amount which exceeds \$25,000.00, the exact amount to be proven at trial being no less than \$200,000.00.

43. As a further direct and proximate result of Defendant Kalmbach's negligence *per se*, Plaintiffs have incurred necessary veterinary emergency medical expenses and necessary subsequent veterinary medical expenses, for necessary veterinary care and treatment, and with reasonable veterinary certainty Plaintiffs will continue to incur additional veterinary medical expenses into the indefinite future.

44. Because Kalmbach's actions and omissions were contrary to law, was unconscionably reckless, demonstrated malice and egregious fraud and was done with a conscious disregard for the rights and safety of Plaintiffs and Plaintiffs' personal property, the Plaintiffs are entitled to an award of punitive damages at the highest rate allowed by law.

**COUNT THREE – STRICT LIABILITY**

45. Plaintiffs incorporate by reference as if fully set forth herein all allegations contained in Paragraphs 1 through 44 above, and further allege as follows:

46. The injuries and damages to Plaintiffs' valuable Percheron Draft Horses injuries and damages were proximately caused by the defective manufacture, production, distribution and sale of Kalmbach's ionophore contaminated "Tribute Equine Nutrition" line of horse feeds, which rendered it unreasonably dangerous to Plaintiffs and Plaintiffs' personal property. Therefore, the Defendant is strictly liable to Plaintiffs.

47. Plaintiffs made no changes, additions, deletions or other modifications to Kalmbach's ionophore contaminated "Tribute Equine Nutrition" line of horse feeds between the time of Defendant's manufacture, distribution and sale of its ionophore contaminated "Tribute Equine Nutrition" line of horse feeds, and Plaintiffs' use of that ionophore contaminated horse feed.

48. As a direct and proximate result of Defendant Kalmbach's defective manufacture of its ionophore contaminated "Tribute Equine Nutrition" line of horse feeds, Plaintiffs have sustained damages from the deaths of their valuable Percheron Draft Horses and other livestock, which exceed \$25,000.00, in an amount to be proven at trial no less than \$200,000.00.

49. As a further direct and proximate result of Defendant Kalmbach's defective manufacture of its ionophore contaminated "Tribute Equine Nutrition" line of horse feeds, Plaintiffs have sustained damages from the permanent injury and damage to other valuable Percheron Draft Horses and livestock exposed to ionophores in Kalmbach's "Tribute Equine Nutrition" line of horse feeds, that have been greatly diminished in value, in an amount which exceeds \$25,000.00, the exact amount to be proven at trial being no less than \$200,000.00.

50. As a further direct and proximate result of Defendant Kalmbach's defective manufacture of its ionophore contaminated "Tribute Equine Nutrition" line of horse feeds, Plaintiffs have incurred necessary veterinary emergency medical expenses and necessary subsequent veterinary medical expenses, for necessary veterinary care and treatment, and with reasonable veterinary certainty Plaintiffs will continue to incur additional veterinary medical expenses into the indefinite future.

51. Because Kalmbach's actions and omissions were contrary to law, was unconscionably reckless, demonstrated malice and egregious fraud and was done with a conscious disregard for the rights and safety of Plaintiffs and Plaintiffs' personal property, the Plaintiffs are entitled to an award of punitive damages at the highest rate allowed by law.

#### **COUNT FOUR – FRAUD**

52. Plaintiffs incorporate by reference as if fully set forth herein all allegations contained in Paragraphs 1 through 51 above, and further allege as follows:

53. Affixed by Kalmbach to each of Kalmbach's ionophore contaminated "Tribute Essential K" feedbags containing the ionophore contaminated horse feed was a

tag that contained a "Guaranteed Analysis", setting forth the "Tribute Essential K" feed content substantially similar to the following:

**TRIBUTE ESSENTIAL K®  
(928EK)**

**Guaranteed Analysis:**

Crude Protein (Min.).....	28.0%	Cobalt (Co) (Min.) .....	4 ppm
Crude Fat (Min.) .....	6.0%	Iodine (I) (Max.) .....	4 ppm
Crude Fiber (Max.) .....	6.5%	Thiamine (Min.) .....	30 mg/lb.
Calcium (Ca) (Min.) .....	2.5%	Vitamin C (Min.) .....	80 mg/lb.
Calcium (Ca) (Max.) .....	3.5%	Vitamin A (Min.) .....	30,000 IU/lb.
Phosphorus (P) (Min.) .....	1.5%	Vitamin D (Min.) .....	2,500 IU/lb.
Lysine (Min.) .....	2.2%	Vitamin E (Min.) .....	500 IU/lb.
Methionine (Min.) .....	0.6%	Biotin (Min.) .....	2.4 mg/lb.
Methionine + Cystine (Min.) .....	1.0%	Riboflavin (Min.) .....	8.5 mg/lb.
Threonine (Min.) .....	1.2%	Omega 6 fatty acids .....	3.0%
Salt (NaCl) (Min.) .....	1.0%	Omega 3 fatty acids .....	0.4%
Salt (NaCl) (Max.) .....	1.5%	Saccharomyces cerevisiae (Min.) .....	3.5 x 10 <sup>8</sup> CFU/lb.
Copper (Cu) (Min.) .....	200 ppm	Direct-Fed Microorganisms (Min.) .....	5.2 x 10 <sup>8</sup> CFU/lb.
Zinc (Zn) (Min.).....	400 ppm	(Saccharomyces cerevisiae, Lactobacillus acidophilus, Bacillus subtilis, Bacillus licheniformis, Bacillus coagulans, Enterococcus faecium, Bifidobacterium thermophilum, and Bifidobacterium longum)	
Selenium (Se) (Min.) .....	1.5 ppm	Cellulase (Aspergillus Oryzae) (Min.) .....	9.6 Enzyme Units
Potassium (K) (Min.) .....	1.5%	Protease (Aspergillus Oryzae) (Min.) .....	12 Enzyme Units
Magnesium (Mg) (Min.) .....	0.4%	Lipase (Aspergillus Oryzae) (Min.) .....	3.6 Enzyme Units
Manganese (Mn) (Min.) .....	240 ppm	Hemicellulase (Aspergillus Niger) (Min.) .....	10.8 Enzyme Units
Iron (Fe) (Min.) .....	900 ppm	Phytase (Trichoderma reesei) (Min.) .....	55 FTU/lb.

\*An Enzyme Unit is defined as milligrams of substrate liberated/minute/lb. of feed.

\*A Phytase Unit (FTU) is defined as the quantity of enzyme which liberates one micromole of inorganic phosphate per minute from sodium phytate at 37°C, 5.5 pH.

This feed contains a dry source of cellulase that breaks down cellulose, a dry source of protease that hydrolyzes proteins and increases the digestibility of protein in soybean meal based diets, a dry source of lipase that hydrolyzes triglycerides, a dry source of hemicellulase that breaks down hemicellulose, and a dry source of phytase which hydrolyzes phytate and increases the digestibility of phytin-bound phosphorus.

a. Also affixed by Kalmbach to each of Kalmbach's ionophore contaminated "Tribute Foal Foundation" feedbags containing the ionophore contaminated horse feed was a tag that contained a "Guaranteed Analysis", setting forth the Tribute Foal Foundation feed content, substantially similar to the following:

**TRIBUTE® FOAL FOUNDATION  
(918FOAL)**

**Guaranteed Analysis:**

Crude Protein (Min.) .....	18.0%	Manganese (Mn) (Min.) .....	100 ppm
Lysine (Min.) .....	1.5%	Cobalt (Co) (Min.) .....	4 ppm
Methionine (Min.) .....	0.4%	Iron (Fe) (Min.) .....	300 ppm
Methionine + Cystine (Min.) .....	0.7%	Iodine (I) (Max.) .....	4 ppm

Threonine (Min.).....	1.0%	Salt (NaCl) (Min.) .....	1.2%
Crude Fat (Min.).....	6.0%	Salt (NaCl) (Max.) .....	1.7%
Crude Fiber (Max.).....	5.0%	Vitamin A (Min.).....	4,000 IU/lb.
Calcium (Ca) (Min.) .....	1.0%	Vitamin D (Min.) .....	400 IU/lb.
Calcium (Ca) (Max.) .....	1.5%	Vitamin E (Min.) .....	300 IU/lb.
Phosphorus (P) (Min.) .....	0.8%	Vitamin C (Min.) .....	300 mg/lb.
Copper (Cu) (Min.) .....	100 ppm	Biotin (Min.) .....	1 mg/lb.
Zinc (Zn) (Min.) .....	150 ppm	Thiamine (Min.) .....	30 mg/lb.
Selenium (Se) (Min.) .....	0.3 ppm	Riboflavin (Min.).....	7 mg/lb.
Potassium (K) (Min.) .....	1.5%	Omega 6 fatty acids.....	2.8%
Magnesium (Mg) (Min.) .....	0.5%	Omega 3 fatty acids.....	0.3%

54. Kalmbach made a “guarantee” as to the contents of the “Tribute Equine Nutrition” line of horse feeds, specifically in this case its “Tribute Essential K” and its “Tribute Foal Foundation”.

55. Kalmbach’s representations and its “guarantee” as to the content of the “Tribute Equine Nutrition” line of horse feeds were material to Plaintiffs’ decision to purchase Kalmbach’s “Tribute Equine Nutrition” line of horse feeds and unknowingly feed that toxic and ionophore contaminated horse feed to Plaintiffs’ valuable Percheron Draft Horses and other livestock.

56. Kalmbach materially concealed facts from Plaintiffs, expressly known to Kalmbach, including without limitation that Kalmbach’s “Tribute Equine Nutrition” line of horse feeds was not manufactured exclusively in a “closed” and “ionophore free” equine feed mill in Upper Sandusky, Ohio, when in fact much of Kalmbach’s “Tribute Equine Nutrition” line of horse feeds was manufactured in/on/with the exact same equipment that Kalmbach used to manufacture medicated feeds at its plant in Upper Sandusky, Ohio and also at contract feed mills that manufacture medicated feed.

57. Defendant’s representations contained on the feedbag tags under “Guaranteed Analysis” was material to Plaintiffs’ decision to purchase Kalmbach “Tribute Equine Nutrition” line of horse feeds and to feed that material to Plaintiffs’ valuable Percheron Draft Horses and other live stock.

58. Kalmbach expressly directed its authorized dealers, including in this case Chagrin Pet & Garden, to represent on behalf of Kalmbach that Kalmbach's "Tribute Equine Nutrition" line of horse feeds was exclusively manufactured in a "closed" and "ionophore free" feed mill in Upper Sandusky, Ohio. At all relevant times Kalmbach had express knowledge that it was directing its authorized distributors, in this case Chagrin Pet & Garden, to make statements that Kalmbach expressly knew were false. It was Kalmbach's specific intent to have its authorized dealers' customers justifiably rely upon those knowingly false statements, which falsity Kalmbach concealed from its distributions and Kalmbach's end users.

59. Defendant's representations as to the content of Kalmbach's "Tribute Equine Nutrition" line of horse feeds, including particularly by and through Kalmbach's "Guaranteed Analysis" contained on the feedbag tags were made falsely, with Kalmbach's knowledge of its falsity, and with such utter disregard and recklessness as to whether Kalmbach's "Guaranteed Analysis" was true or false that Kalmbach's fraudulent and malicious knowledge should be inferred upon and attributed to Kalmbach.

60. Defendant's directing its authorized dealers, including specifically in this case Chagrin Pet & Garden, to represent Kalmbach's "Tribute Equine Nutrition" line of horse feeds were exclusively made in a "closed" and "ionophore free" facility in Upper Sandusky, Ohio, were falsely made by Kalmbach, with Kalmbach's knowledge of the falsity, and with such utter disregard and recklessness as to whether Kalmbach's direction to its distributors to make those knowingly false and fraudulent representations was so reckless that malice should be inferred upon and attributed to Kalmbach.

61. Kalmbach's "Guaranteed Analysis" was made falsely by Kalmbach, with knowledge of its falsity, or with such utter disregard and recklessness as to whether Kalmbach's "Guaranteed Analysis" was true or false, with the specific intent of misleading Plaintiffs into justifiably relying upon the fraudulent and maliciously false "Guaranteed Analysis".

62. Kalmbach's direction to its authorized distributors, to represent Kalmbach's "Tribute Equine Nutrition" line of horse feeds was exclusively made in a "closed" facility and "ionophore free" facility, was falsely made by Kalmbach, with knowledge of its falsity, with such utter disregard and recklessness as to whether Kalmbach's authorized distributor representations were true or false; and, were made with the specific intent of misleading end users including specifically in this case the Smiths, into justifiably relying upon the fraudulent and maliciously false authorized dealer statements.

63. Plaintiffs justifiably relied upon Kalmbach's knowingly and maliciously false "Guaranteed Analysis", and Plaintiff's justifiably relied upon Kalmbach's concealment of the truth. Plaintiffs also justifiably relied upon Kalmbach's authorized dealer's false and fraudulent statements and representations.

64. As a direct and proximate result of Defendant Kalmbach's fraud, Plaintiffs have sustained damages from the deaths of their valuable Percheron Draft Horses and other livestock, which exceed \$25,000.00, in an amount to be proven at trial no less than \$200,000.00.

65. As a further direct and proximate result of Kalmbach's fraud, Plaintiffs have sustained damages from the permanent injury and damage to other valuable

Percheron Draft Horses and livestock exposed to ionophores in Kalmbach's "Tribute Equine Nutrition" line of horse feeds, that have been greatly diminished in value, in an amount which exceeds \$25,000.00, the exact amount to be proven at trial being no less than \$200,000.00.

66. As a further direct and proximate result of Defendant Kalmbach's fraud, Plaintiffs have incurred necessary veterinary emergency medical expenses and necessary subsequent veterinary medical expenses, for necessary veterinary care and treatment, and with reasonable veterinary certainty Plaintiffs will continue to incur additional veterinary medical expenses into the indefinite future.

67. Because Kalmbach's actions and omissions were contrary to law, was unconscionably reckless, demonstrated malice and egregious fraud and was done with a conscious disregard for the rights and safety of Plaintiffs and Plaintiffs' personal property, the Plaintiffs are entitled to an award of punitive damages at the highest rate allowed by law.

#### **COUNT FIVE – PRODUCT LIABILITY**

68. Plaintiffs incorporate by reference as if fully set forth herein all allegations contained in Paragraphs 1 through 67 above, and further allege as follows:

69. At all relevant times, Kalmbach expressly warranted and impliedly warranted that its "Tribute Equine Nutrition" line of horse feeds was safe for horses, was exclusively made in a "closed" and "ionophore free" equine feed mill in Upper Sandusky, Ohio, and was fit for the particular purpose of providing safe nutrition to horses.

70. Kalmbach manufactured, distributed and sold its "Tribute Equine Nutrition" line of horse feeds in a defective condition unreasonably dangerous to the user or consumer, in this case the Smiths, and to Smiths' property.

71. Kalmbach is engaged in the business of designing, manufacturing, distributing and selling equine horse feeds, and sells a line of horse feeds known as "Tribute Equine Nutrition". Kalmbach expected that its "Tribute Equine Nutrition" line of horse feeds would reach users and consumers such as the Smiths, without substantial change in the condition in which it was manufactured, distributed and sold.

72. Kalmbach's "Tribute Equine Nutrition" line of horse feeds did in fact reach the Smiths as the user and consumer of Kalmbach's "Tribute Equine Nutrition" line of horse feeds, without any change in the condition which it was designed, manufactured, distributed and sold.

73. In fact, the Kalmbach "Tribute Equine Nutrition" line of horse feeds that made it to the Smiths' horse farm was defective, specifically contaminated by the ionophores monensin and lasalocid, at the time it left Kalmbach's control.

74. At no time did Kalmbach limit its implied warranty of particular fitness that its "Tribute Equine Nutrition" line of horse feeds was safe for horses, and was ionophore free. Any limitation attempted by Kalmbach is unconscionable and against public policy, further contrary to Ohio statutory law and FDA regulations.

75. As a direct and proximate result of Defendant Kalmbach's breach of warranties, Plaintiffs have sustained damages from the deaths of their valuable Percheron Draft Horses and other livestock, which exceed \$25,000.00, in an amount to be proven at trial no less than \$200,000.00.

76. As a further direct and proximate result of Kalmbach's breach of warranties, Plaintiffs have sustained damages from the permanent injury and damage to other valuable Percheron Draft Horses and livestock exposed to ionophores in Kalmbach's "Tribute Equine Nutrition" line of horse feeds, that have been greatly diminished in value, in an amount which exceeds \$25,000.00, the exact amount to be proven at trial being no less than \$200,000.00.

77. As a further direct and proximate result of Defendant Kalmbach's breach of warranties, Plaintiffs have incurred necessary veterinary emergency medical expenses and necessary subsequent veterinary medical expenses, for necessary veterinary care and treatment, and with reasonable veterinary certainty Plaintiffs will continue to incur additional veterinary medical expenses into the indefinite future.

78. Because Kalmbach's actions and omissions were contrary to law, was unconscionably reckless, demonstrated malice and egregious fraud and was done with a conscious disregard for the rights and safety of Plaintiffs and Plaintiffs' personal property, the Plaintiffs are entitled to an award of punitive damages at the highest rate allowed by law.

#### **COUNT SIX – SPOILIATION OF EVIDENCE**

79. Plaintiffs incorporate by reference as if fully set forth herein all allegations contained in Paragraphs 1 through 78 above, and further allege as follows:

80. On or around August 28, 2016, without notice or advance warning, Doug Southerland, a duly authorized Kalmbach representative arrived at the Smiths' horse farm located at 36205 Miles Road, Moreland Hills, Ohio, and took samples of all of the

Smiths' Kalmbach "Tribute Equine Nutrition" line of horse feeds from the Smiths' horse farm, as well as samples of various hays also located at the Smiths' horse farm.

81. From that point forward, Kalmbach was in exclusive care, custody and control of those horse feed samples and hay samples.

82. Kalmbach had express knowledge that the samples taken on August 28, 2016 were relevant, material and crucial evidence regarding the Plaintiffs' claims set forth herein.

83. Kalmbach either failed to take reasonable steps necessary to protect the integrity and chain of custody of the August 26, 2016 samples and/or has willfully concealed and/or destroyed the August 28, 2016 samples in a designed and concerted effort to disrupt the Plaintiffs' ability to prosecute their claims set forth in this Complaint.

84. Additionally, FDA regulations require animal feed sample retention and records retention. Any spoliation of those FDA required animal feed sample retention and records retention may disrupt Plaintiffs' ability to prosecute the claims set forth in this Complaint.

85. As a direct and proximate result of Kalmbach's willful destructive spoliation of relevant, crucial and material evidence – the August 28, 2016 samples and perhaps FDA required feed sample retention and record retention – Plaintiffs have suffered damages, equal to those damages Plaintiffs are seeking in the various claims set forth in this Complaint.

86. Because Kalmbach's spoliation of evidence material and crucial to Plaintiffs' claims set forth in this Complaint arises to actions and omissions contrary to law, demonstrates malice and egregious fraud, was done intentionally, maliciously

and/or with reckless disregard for the rights of Plaintiffs, Plaintiffs are entitled to an award of punitive damages at the highest rate allowed by law, against those individuals who spoliated evidence.

**WHEREFORE**, Plaintiffs demand judgment as follows:

1. On Count One, for a damage award in excess of \$25,000.00, the exact amount to be proven at trial, along with an award of punitive damages at the highest rate allowed by law, along with pre and post judgment interest at the highest rate allowed by law, including an award of Plaintiffs' attorney fees and litigation costs and expenses;

2. On Count Two for a damage award in excess of \$25,000.00, the exact amount to be proven at trial, along with an award of punitive damages at the highest rate allowed by law, along with pre and post judgment interest at the highest rate allowed by law, including an award of Plaintiffs' attorney fees and litigation costs and expenses;

3. On Count Three, for a damage award in excess of \$25,000.00, the exact amount to be proven at trial, along with an award of punitive damages at the highest rate allowed by law, along with pre and post judgment interest at the highest rate allowed by law, including an award of Plaintiffs' attorney fees and litigation costs and expenses;

4. On Count Four, for a damage award in excess of \$25,000.00, the exact amount to be proven at trial, along with an award of punitive damages at the highest rate allowed by law, along with pre and post judgment interest at the highest rate

allowed by law, including an award of Plaintiffs' attorney fees and litigation costs and expenses;

5. On Count Five, for a damage award in excess of \$25,000.00, the exact amount to be proven at trial, along with an award of punitive damages at the highest rate allowed by law, along with pre and post judgment interest at the highest rate allowed by law, including an award of Plaintiffs' attorney fees and litigation costs and expenses;

6. On Count Six, for damages in excess of \$25,000.00, the exact amount to be proven at trial, along with an award of punitive damages at the highest rate allowed by law, along with pre and post judgment interest at the highest rate allowed by law, including an award of Plaintiffs' attorney fees and litigation costs and expenses; and,

7. For such other relief as this Honorable Court deems just and equitable.

**JURY DEMAND**

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

Respectfully submitted,

\_\_\_\_\_  
/s/ - Mitchell J. Yelsky

**YELSKY & LONARDO**

**BY: MITCHELL J. YELSKY**

Ohio Reg. No.: 0039295

Suite 450 Lakeside Place

323 Lakeside Avenue, West

Cleveland, Ohio 44113

(216) 781-2550 – Telephone

(216) 781-6688 – Facsimile

[mjy@yelskylonardo.com](mailto:mjy@yelskylonardo.com) – Email

Counsel for **PLAINTIFFS**

**DEREK L. AND REBECCA Y. SMITH**

DEPARTMENT OF HEALTH AND HUMAN SERVICES FOOD AND DRUG ADMINISTRATION					
DISTRICT ADDRESS AND PHONE NUMBER 6751 Steger Drive Cincinnati, OH 45237-3097 (513) 679-2700 Fax: (513) 679-2772	DATE(S) OF INSPECTION 2/24/2016-4/15/2016* FEI NUMBER 1520209				
NAME AND TITLE OF INDIVIDUAL TO WHOM REPORT ISSUED Frederick S. Coutinho , Quality and Safety Manager					
FIRM NAME Kalmbach Feeds Inc	STREET ADDRESS 7148 State Highway 199				
CITY, STATE, ZIP CODE, COUNTRY Upper Sandusky, OH 43351-9346	TYPE ESTABLISHMENT INSPECTED Manufacturer				
<p>This document lists observations made by the FDA representative(s) during the inspection of your facility. They are inspectional observations, and do not represent a final Agency determination regarding your compliance. If you have an objection regarding an observation, or have implemented, or plan to implement, corrective action in response to an observation, you may discuss the objection or action with the FDA representative(s) during the inspection or submit this information to FDA at the address above. If you have any questions, please contact FDA at the phone number and address above.</p>					
<p>DURING AN INSPECTION OF YOUR FIRM WE OBSERVED:</p> <p><b>OBSERVATION 1</b></p> <p>Adequate procedures are not established and used for all equipment used in the production and distribution of medicated feeds to avoid unsafe contamination of medicated and nonmedicated feeds.</p> <p>Specifically,</p> <p>Your firm has not established an adequate system for cleaning, sequencing or flushing equipment (including the hand-add hopper, the mixer, the pellet mill and common bins) used in the manufacturing and storage of both medicated and non-medicated feeds for multiple species of animals, as evidence by the following:</p> <p>A.) On or about 02/15/2015, you manufactured (b) (4) (Lot# 68649) on Mixer Line [redacted] at the Upper Plant, a medicated chicken feed containing (b) (4), immediately prior to the manufacture of (b) (4) (Lot# PN 70070), a non-medicated swine feed. Your records do not document that a flush or a clean of the mixer was conducted in between these two batch runs.</p> <p>B.) On or about 03/20/2015, you manufactured BG50L2BC (Lot# 78740001) on Mixer Line [redacted] at the Upper Plant, a medicated feed containing (b) (4) and (b) (4) immediately prior to (b) (4) (Lot #71345), a non-medicated horse feed. Your records do not document that a flush or a clean of the mixer was conducted in between these two batch runs.</p> <p>C.) On or about 04/17/2015, you held 216FOCP (b) (4) (Lot# PN 72390), a medicated swine feed containing (b) (4) in Bin [redacted] of the Upper Plant, immediately prior to holding (b) (4) (Lot# 72400), a non-medicated rabbit feed. You reported</p>					
SEE REVERSE OF THIS PAGE	<table border="1"> <tr> <td>EMPLOYEE(S) SIGNATURE Christopher D Snyder, Investigator Amy L Mccarthy, Investigator</td> <td>DATE ISSUED 4/15/2016</td> </tr> <tr> <td> <input checked="" type="checkbox"/> Christopher D Snyder Investigator Signed by Christopher D Snyder -S                 </td> <td></td> </tr> </table>	EMPLOYEE(S) SIGNATURE Christopher D Snyder, Investigator Amy L Mccarthy, Investigator	DATE ISSUED 4/15/2016	<input checked="" type="checkbox"/> Christopher D Snyder Investigator Signed by Christopher D Snyder -S	
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FORM FDA 483 (09/08)	PREVIOUS EDITION OBSOLETE				
INSPECTIONAL OBSERVATIONS					
PAGE 1 OF 2 PAGES					

DEPARTMENT OF HEALTH AND HUMAN SERVICES FOOD AND DRUG ADMINISTRATION			
DISTRICT ADDRESS AND PHONE NUMBER 6751 Steger Drive Cincinnati, OH 45237-3097 (513) 679-2700 Fax: (513) 679-2772		DATE(S) OF INSPECTION 2/24/2016-4/15/2016*	
		FEI NUMBER 1520209	
NAME AND TITLE OF INDIVIDUAL TO WHOM REPORT ISSUED Frederick S. Coutinho , Quality and Safety Manager			
FIRM NAME Kalmbach Feeds Inc		STREET ADDRESS 7148 State Highway 199	
CITY, STATE, ZIP CODE, COUNTRY Upper Sandusky, OH 43351-9346		TYPE ESTABLISHMENT INSPECTED Manufacturer	
these bins are not flushed or cleaned out between these batches.			
<p><b>*DATES OF INSPECTION</b>                  2/24/2016(Wed),2/25/2016(Thu),3/01/2016(Tue),3/22/2016(Tue),3/23/2016(Wed),3/28/2016(Mon),4/13/2016(Wed),4/15/2016(Fri)</p>			
SEE REVERSE OF THIS PAGE	EMPLOYEE(S) SIGNATURE Christopher D Snyder, Investigator Amy L Mccarthy, Investigator		DATE ISSUED 4/15/2016
			4/15/2016 <input checked="" type="checkbox"/> Christopher D Snyder Investigator <small>Signed by Christopher D Snyder -d</small>
FORM FDA 483 (09/08)	PREVIOUS EDITION OBSOLETE	INSPECTIONAL OBSERVATIONS	PAGE 2 OF 2 PAGES

**KALMBACH FEEDS, INC.**

7148 State Hwy 199, Upper Sandusky, OH 43351

PHONE: 419-294-3838 FAX: 419-294-4350 www.kalmbachfeeds.com

May 1, 2016

Attn: Mr. Steven Barber  
DHHS District Office Director  
6751 Steger Drive  
Cincinnati, OH 45237

Dear Mr. Barber,

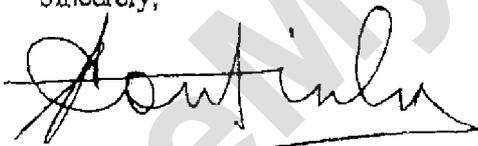
I am writing to inform you of the actions we have taken to improve our processes related to the observations that were documented on a FORM 483 by FDA Investigators Mr. Snyder and Ms. McCarthy on April 15, 2016.

In April of 2015 we found out that the auto-flushing at the end of medicated feeds was not being recorded in our electronic batching records. We immediately investigated the issue and worked with the supplier of the automation system to make changes to ensure that the auto-flush was working properly and being recorded in the electronic batch records. The final portion of the changes were completed during the week of May 18, 2015 when the technician from the automation company was onsite to implement and validate the changes.

In order to improve the effectiveness of the air blow-off between batches in the hand-add hopper, we have thoroughly cleaned the hopper to remove all buildup and prevent the potential of any residue hanging-up on the walls of the hopper between batches. Furthermore, we have implemented a periodic inspection and cleaning procedure to monitor, maintain and document the cleanliness of the hopper.

In addition to cleaning and flushing, we will continue to use sequencing of feeds through the rest of our process according to our internal sequencing chart that has been developed using the Feed Additive Compendium to ensure feed safety.

Sincerely,



Fred Coutinho  
Quality and Safety Manager



**EXHIBIT "B"**

Delivering Value through Teamwork...Always!!