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Attorneys for plaintiff

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

REBECCA BUSICO and CHRISTOPHER
BUSICO, individually and as the parents and
legal guardians of I.B., a minor,

Plaintiffs,

No.

v.

COMPLAINT

ANDREW AND WILLIAMSON SALES
CO. dba ANDREW & WILLIAMSON FRESH
PRODUCE INC.

Defendant.

COMES NOW the plaintiffs, REBECCA BUSICO and CHRISTOPHER BUSICO,
individually and as parents and legal guardians of I.B., a minor child, by and through their

attorneys of record and allege as follows:

I. PARTIES

1.1 The plaintiffs are residents of Tooele, Utah and so within the jurisdiction of this Court. The plaintiffs Rebecca and Christopher Busico are husband and wife, and also the parents of I.B. (age 8). The plaintiffs are citizens of the State of Utah.

1.2 The Defendant Andrew and Williamson Sales Co. dba Andrew & Williamson Fresh Produce, Inc., (hereinafter "A&W") is a California corporation with its principal place of business in California as well. A&W is, therefore, a foreign corporation and not a citizen of the State of Utah.

1.3 A&W imports, manufactures, distributes, and sells a variety of fresh produce products, including cucumbers. A&W imported, manufactured, distributed, and sold the cucumbers that the Centers for Disease Control and Prevention has determined to be the cause of an outbreak of at least 671 *Salmonella* Poona illnesses in 34 states, including 51 illnesses in the State of Utah alone. A&W's cucumbers caused the *Salmonella* Poona illnesses suffered by the plaintiffs, as set forth in more detail below.

II. JURISDICTION AND VENUE

2.1 This Court has jurisdiction over the subject matter of this action pursuant to 28 USC § 1332(a) because the matter in controversy exceeds \$75,000.00, exclusive of costs, it is between citizens of different states, and because the defendant has certain minimum contacts with the State of Utah such that the maintenance of the suit in this district does not offend traditional notions of fair play and substantial justice.

2.2 Venue in the United States District Court for the District of Utah is proper pursuant to 28 USC § 1391(a)(2) because a substantial part of the events or omissions giving rise to the plaintiffs' claims and causes of action occurred in this judicial district, and because the defendant was subject to personal jurisdiction in this judicial district at the time of the commencement of the action.

III. GENERAL ALLEGATIONS

The *Salmonella* Poona Outbreak

3.1 The CDC, multiple states, and the U.S. Food and Drug Administration (FDA) are investigating a multistate outbreak of *Salmonella* Poona infections linked to imported cucumbers grown and packed by Rancho Don Juanito in Mexico and distributed by Defendant A&W.

3.2 Public health investigators are using the PulseNet system to identify illnesses that may be part of this outbreak. CDC coordinates PulseNet, the national subtyping network of public health and food regulatory agency laboratories. DNA "fingerprinting" is performed on *Salmonella* bacteria isolated from ill people by using a technique called pulsed-field gel electrophoresis, or PFGE. PulseNet manages a national database of these DNA "fingerprints" to identify possible outbreaks. Three DNA "fingerprints" (outbreak strains) are included in this investigation.

3.3 As of September 29, 2015, a total of 671 people infected with the outbreak strains of *Salmonella* Poona have been reported from 34 states. The number of ill people reported from each state is as follows: Alabama (1), Alaska (13), Arizona (112), Arkansas (9),

California (164), Colorado (17), Hawaii (1), Idaho (22), Illinois (8), Indiana (2), Iowa (5), Kansas (2), Kentucky (1), Louisiana (5), Minnesota (34), Missouri (10), Montana (14), Nebraska (5), Nevada (13), New Mexico (30), New York (5), North Dakota (3), Ohio (2), Oklahoma (12), Oregon (19), Pennsylvania (2), South Carolina (9), South Dakota (1), Texas (33), Utah (51), Virginia (1), Washington (21), Wisconsin (38), and Wyoming (6).

3.4 Among people for whom information is available, illnesses started on dates ranging from July 3, 2015 to September 21, 2015. Ill people range in age from less than 1 year to 99, with a median age of 17. Fifty-one percent of ill people are children younger than 18 years. Fifty-four percent of ill people are female. Among 459 people with available information, 131 (29%) report being hospitalized. Three deaths have been reported from Arizona (1), California (1) and Texas (1).

3.5 On September 4, 2015, A&W voluntarily recalled all cucumbers sold under the “Limited Edition” brand label during the period from August 1, 2015 through September 3, 2015 because they may be contaminated with *Salmonella*. The type of cucumber is often referred to as a “slicer” or “American” cucumber. It is dark green in color and typical length is 7 to 10 inches. In retail locations it is typically sold in a bulk display without any individual packaging or plastic wrapping. Limited Edition cucumbers were distributed in the states of Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Montana, Nevada, New Jersey, New Mexico, Oklahoma, Oregon, South Carolina, Texas, and Utah and reached customers through retail, food service companies, wholesalers, and brokers. Further distribution to other states may have occurred.

Prior *Salmonella* Outbreaks Linked to Cucumbers

3.6 In 2014 a total of 275 cases were reported from 29 states and the District of Columbia. An additional 18 suspected cases not meeting the case definition were excluded from the analysis because they were found to be temporal outliers and unlikely to be related. Illness onset dates ranged from May 25 to September 29, 2014. Median age of patients was 42 years (range = <1–90 years); 66% (174 of 265) were female. Thirty-four percent (48 of 141) were hospitalized; one death was reported in an elderly man with bacteremia. A total of 101 patients were interviewed using the supplemental questionnaire about exposures in the week before illness onset. This questionnaire focused on leafy greens and tomatoes and contained smaller sections on fruit, vegetables, and seafood common to the Delmarva region.

3.7 In 2013 the CDC collaborated with public health officials in many states and the U.S. Food and Drug Administration (FDA) to investigate a multistate outbreak of *Salmonella* Saintpaul infections linked to imported cucumbers supplied by Daniel Cardenas Izabal and Miracle Greenhouse of Culiacán, Mexico and distributed by Tricar Sales, Inc. of Rio Rico, Arizona. A total of 84 persons infected with the outbreak strain of *Salmonella* Saintpaul were reported from 18 states. The number of ill persons identified in each state was as follows: Arizona (11), California (29), Colorado (2), Idaho (2), Illinois (3), Louisiana (1), Maryland (1), Massachusetts (1), Minnesota (9), Nevada (1), New Mexico (2), North Carolina (3), Ohio (3), Oregon (2), South Dakota (2), Texas (7), Virginia (3), and Wisconsin (2). Among persons for whom information was available, illness onset dates ranged from January 12, 2013 to April 28,

2013. Ill persons ranged in age from less than 1 year to 89 years, with a median age of 27 years. Sixty-two percent of ill persons were female. Among 60 persons with available information, 17 (28%) were hospitalized. No deaths were reported.

Salmonella

3.8 The term *Salmonella* refers to a group or family of bacteria that variously cause illness in humans. The taxonomy and nomenclature of *Salmonella* have changed over the years and are still evolving. Currently, the Centers for Disease Control and Prevention (CDC) recognizes two species, which are divided into seven subspecies. These subspecies are divided into over 50 serogroups based on somatic (O) antigens present. The most common *Salmonella* serogroups are A, B, C, D, E, F, and G. Serogroups are further divided into over 2,500 serotypes. *Salmonella* serotypes are typically identified through a series of tests of antigenic formulas listed in a document called the Kauffmann-White Scheme published by the World Health Organization Collaborating Centre for Reference and Research on *Salmonella*.

3.9 *Salmonella* is an enteric bacterium, which means that it lives in the intestinal tracts of humans and other animals, including birds. *Salmonella* bacteria are usually transmitted to humans by eating foods contaminated with animal feces or foods that have been handled by infected food service workers who have practiced poor personal hygiene. Contaminated foods usually look and smell normal. Contaminated foods are often of animal origin, such as beef, poultry, milk, or eggs, but all foods, including vegetables, may become contaminated. Many raw foods of animal origin are frequently contaminated, but thorough cooking kills *Salmonella*.

Medical Complications of Salmonellosis

3.10 The term reactive arthritis refers to an inflammation of one or more joints, following an infection localized at another site distant from the affected joints. The predominant site of the infection is the gastrointestinal tract. Several bacteria, including *Salmonella*, induce septic arthritis. The resulting joint pain and inflammation can resolve completely over time or permanent joint damage can occur.

3.11 The reactive arthritis associated with Reiter's may develop after a person eats food that has been tainted with bacteria. In a small number of persons, the joint inflammation is accompanied by conjunctivitis (inflammation of the eyes), and uveitis (painful urination). *Id.* This triad of symptoms is called Reiter's Syndrome. Reiter's syndrome, a form of reactive arthritis, is an uncommon but debilitating syndrome caused by gastrointestinal or genitourinary infections. The most common gastrointestinal bacteria involved are *Salmonella*, *Campylobacter*, *Yersinia*, and *Shigella*. A triad of arthritis, conjunctivitis, and urethritis characterizes Reiter's syndrome, although not all three symptoms occur in all affected individuals.

3.12 *Salmonella* is also a cause of a condition called post infectious irritable bowel syndrome (IBS), which is a chronic disorder characterized by alternating bouts of constipation and diarrhea, both of which are generally accompanied by abdominal cramping and pain. In one recent study, over one-third of IBS sufferers had had IBS for more than ten years, with their symptoms remaining fairly constant over time. IBS sufferers typically experienced symptoms for an average of 8.1 days per month.

The Plaintiffs' Illnesses

3.13 During the several days before August 16, 2015, I.B.'s grandmother purchased cucumbers on at least one occasion from a grocery store in Utah. One or more of these retail grocery locations in had received and sold contaminated cucumbers distributed by the defendant.

3.14 I.B. consumed the contaminated cucumbers on August 16. Symptoms began on or about August 21, 2015, and included a headache, nausea, vomiting, and fatigue.

3.15 The next day, while the family was at a baseball game in Salt Lake City, I.B. developed a fever as well. Late that evening, I.B. began vomiting profusely and began to suffer repeated bouts of diarrhea as well.

3.16 In the early morning hours of August 23, Rebecca Busico took her daughter to an urgent care clinic for medical attention. She was treated and released the same day.

3.17 I.B.'s symptoms continued over the next several days. On Tuesday, August 25, I.B.'s bouts of diarrhea became bloody. On Wednesday evening, I.B. saw her pediatrician, who sent her to the emergency department at Mountain West Medical Center. At the ER, a stool sample was secured for testing. I.B. underwent testing and was administered various medications before being transferred to Primary Children's Hospital.

3.18 I.B. was admitted to Primary Children's Hospital in Salt Lake City at approximately 2 AM on Thursday, August 27. I.B. was admitted to a private isolated room due to her likely infectious condition. She continued to suffer from fevers, severe headaches, bloody diarrhea, and other related symptoms.

3.19 I.B. remained hospitalized until Friday, August 28. By this point, I.B.'s diarrhea had slowed significantly.

3.20 On Saturday, I.B. was seen by her pediatrician again, who advised her parents to keep track of her temperature, fluid intake, food intake, and urine output. The pediatrician also ordered urine testing, which ultimately showed that I.B. had also developed a urinary tract infection.

3.21 I.B. continued to suffer from fevers and other symptoms for several days. She also suffered significant discomfort associated with her urinary tract infection. I.B. missed the first week of school and, as a result, had to be placed in lower level courses to begin the year.

3.22 Mr. and Mrs. Busico learned that I.B. had tested positive for Salmonella the day after she left Children's hospital. They were informed that the State health department was in possession of I.B.'s stool sample, doing further diagnostic testing on the sample. Later in September 2015, Mr. and Mrs. Busico learned that their daughter's Salmonella infection was connected to the Defendant's cucumbers.

IV. CAUSES OF ACTION

Strict Liability—Count I

4.1 At all times relevant hereto, the defendant manufactured and sold the adulterated food product that is the subject of the action.

4.2 The adulterated food product that the defendant manufactured, distributed, or sold was, at the time it left the defendant's control, defective and unreasonably dangerous for its ordinary and expected use because it contained *Salmonella* Poona, a harmful pathogen.

4.3 The adulterated food product that the defendant manufactured, distributed, or sold reached the plaintiffs without any change in its defective condition. The adulterated food product that the defendant manufactured, distributed, or sold was used in the manner expected and intended, and was consumed by plaintiffs.

4.4 Plaintiffs suffered injury and damages as a direct and proximate result of the defective and unreasonably dangerous condition of the adulterated food product that the defendant manufactured, distributed, or sold.

Negligence—Count II

4.5 The defendant owed to the plaintiffs a duty to use reasonable care in the manufacture, distribution, and sale of its food product, the observance of which duty would have prevented or eliminated the risk that the defendant's food products would become contaminated by *Salmonella* or any other dangerous pathogen. The defendant breached this duty.

4.6 The defendant had a duty to comply with all statutes, laws, regulations, or safety codes pertaining to the manufacture, distribution, storage, and sale of its food product, but failed to do so, and was therefore negligent.

4.7 The plaintiffs are among the class of persons designed to be protected by these statutes, laws, regulations, safety codes or provision pertaining to the manufacture, distribution, storage, and sale of similar food products.

4.8 The defendant had a duty to properly supervise, train, and monitor its employees, and to ensure its employees' compliance with all applicable statutes, laws,

regulations, or safety codes pertaining to the manufacture, distribution, storage, and sale of similar food products, but the defendant failed to do so and was therefore negligent.

4.9 The defendant had a duty to use ingredients, supplies, and other constituent materials that were reasonably safe, wholesome, free of defects, and that otherwise complied with applicable federal, state, and local laws, ordinances, and regulations, and that were clean, free from adulteration, and safe for human consumption, but the defendant failed to do so and was therefore negligent.

4.10 As a direct and proximate result of the defendant's acts and omissions of negligence, the plaintiffs sustained injuries and damages in an amount to be proven at trial.

Negligence Per Se—Count III

4.11 The defendant had a duty to comply with all applicable state and federal regulations intended to ensure the purity and safety of its food product, including the requirements of the Federal Food, Drug and Cosmetics Act (21 U.S.C. § 301 *et seq*).

4.12 The defendant failed to comply with the provisions of the health and safety acts identified above, and, as a result, was negligent *per se* in its manufacture, distribution, and sale of food adulterated with *Salmonella*, a harmful pathogen.

4.13 As a direct and proximate result of conduct by the defendant that was negligent *per se*, the plaintiffs sustained damages in an amount to be proven at trial.

DAMAGES

4.14 The plaintiffs have suffered general, special, incidental, and consequential damages as the direct and proximate result of the acts and omissions of the defendant, in an

amount that shall be fully proven at the time of trial. These damages include, but are not limited to: damages for general pain and suffering; damages for loss of enjoyment of life, both past and future; medical and medical related expenses, both past and future; travel and travel-related expenses, past and future; emotional distress, past and future; pharmaceutical expenses, past and future; and all other ordinary, incidental, or consequential damages that would or could be reasonably anticipated to arise under the circumstances.

JURY DEMAND

The plaintiffs hereby demand a jury trial.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs pray for judgment against the defendant as follows:

- A. Ordering compensation for all general, special, incidental, and consequential damages suffered by the plaintiffs as a result of the defendant's conduct;
- B. Awarding plaintiffs their reasonable attorneys fees and costs, to the fullest extent allowed by law; and
- C. Awarding plaintiffs statutory pre- and post-judgement interest;
- D. Granting all such additional and/or further relief as this Court deems just and equitable.

DATED: October 5, 2015.

THE FAERBER LAW FIRM, P.C.

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MARLER CLARK, LLP, PS

/s/ William D. Marler

*(signed by Filing Attorney with permission of
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/s/ Jared Faerber

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