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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CRUZ
UNLIMITED JURISDICTION

16 JAMES RAYMOND FREY, individually and on
17 behalf of the ESTATE OF SHIRLEE JEAN
18 FREY, and DOES 1-20, inclusive,

19 Plaintiffs,

20 v.

21 SAFEWAY INC., HAPPY APPLE COMPANY,
22 INC., BIDART BROTHERS APPLE PACKING
23 INC., and DOES 1-20, inclusive,

24 Defendants.

Case No. CV-180721

**FIRST AMENDED COMPLAINT
FOR PERSONAL INJURIES AND
WRONGFUL DEATH**

JURY TRIAL DEMANDED

25 COME NOW the plaintiffs, James Raymond Frey, individually, and on behalf of the Estate of
26 Shirlee Jean Frey, his deceased wife, and DOES 1-20 inclusive, by and through attorneys of record, to
27 now allege by way of this First Amended Complaint as follows:
28 ///

FILED
DEC 30 2014

ALEX CALVO, CLERK
BY REGINA TRINQUE
DEPUTY, SANTA CRUZ COUNTY

PARTIES

1. The plaintiffs in this action are James Raymond Frey, who is 87 years old, and the Estate of his deceased wife, Shirlee Jean Frey. James Frey is the qualified survivor of Shirlee Jean Frey. Longtime residents of California, James and Shirlee together raised two sons, Bradley and Todd.

2. The true names and capacities, whether individual, corporate, associate, partnership, joint venture, franchisee or otherwise of the plaintiffs DOES 1-20, inclusive, are unknown to the plaintiffs who therefore name the plaintiffs by such fictitious names. Plaintiffs pray leave to amend this Complaint to assert the true names and capacities of the plaintiffs when ascertained. Plaintiffs are informed and believe and thereupon allege that each of the fictitiously named plaintiff is entitled as a survivor, beneficiary, injured party, dependent or otherwise to recovery under all causes action pled in this Complaint.

3. Safeway Inc. ("Safeway") is a corporation organized and existing under the laws of the State of California, and with its principal executive offices located in Pleasanton, California. At all times relevant to this action, Safeway was registered to do business, and in fact did conduct business, in the State of California. More specifically, Safeway owned and operated a Safeway Supermarket in the Felton Fair Shopping Center, at 6255 Graham Hill Road, Felton, California, 95018.

4. Happy Apple Company ("Happy Apple") is a corporation organized and existing under the laws of the State of Missouri, and upon information and belief, with corporate headquarters located at 527 Commercial Drive, Union, Missouri, 63084. At all times relevant to this action, and according to its website, Happy Apple operated a factory at the same Missouri address as just stated, as well as a factory in California at 41899 Road 120, Orosi, California 93647. At all times relevant to this action, Happy Apple was registered to do business, and in fact did conduct business, in the State of California.

5. Upon information and belief, Bidart Brothers Apple Packing ("Bidart Brothers") is a corporation organized and existing under the laws of the State of California, with its principle place of business located at 5055 East Lerdo Highway, Shafter, California, 93263. At all times relevant to this action, Bidart Brothers was registered to do business, and in fact did conduct business, in the State of California.

6. The true names and capacities, whether individual, corporate, associate or otherwise, of

1 the defendants named in this Complaint as DOES 1-20, inclusive, are unknown to the plaintiffs, who
2 therefore sue said defendants by fictitious names. The plaintiffs will amend this complaint to show the
3 true names and capacities of one or more of these DOE defendants when sufficient information has
4 been ascertained.

5 7. The plaintiffs are informed and believe, and on that basis allege, that at all time
6 mentioned in this Complaint, each of the DOE defendants were the agents or employees of any or all of
7 the co-defendants, and were acting within the scope and course of their agency and employment, and
8 with the permission and consent of the other co-defendants. Therefore, each of the DOE defendants are
9 responsible in some manner for the events and happenings referred to in this Complaint, or that the
10 DOE defendants otherwise proximately caused the acts, omissions or events alleged in this Complaint
11 and are liable to the plaintiffs as a result.

12 JURISDICTION AND VENUE

13 8. This Court is vested with jurisdiction over the defendants, because Safeway, Happy
14 Apple, Bidart Brothers, and the DOE defendants were, at all times relevant to this action, companies
15 doing business within the State of California, and the claims alleged in this Complaint arose from each
16 of their respective in-state business activities.

17 9. The venue of this action is proper in Santa Cruz County, because the defendants
18 transacted business in this county, the plaintiffs are residents of this county, and the injuries in question
19 occurred in this county.

20 FACTS

21 10. According to the CDC, based on its ongoing investigation, as of December 24, 2014, a
22 total of 31 people, in ten states and two provinces, had been infected with genetically indistinguishable
23 strains of the bacteria *Listeria monocytogenes*—the outbreak strain. Confirmed cases of infections were
24 located in states and provinces as follows: Arizona (4), California (1), Minnesota (4), Missouri (5),
25 New Mexico (5), North Carolina (1), Texas (4), Utah (1), Washington (1) Wisconsin (3), Ontario (1),
26 and Manitoba (1), Canada. The CDC also reported that 29 infected individuals had been hospitalized.

27 11. Among the 29 people hospitalized, five deaths have been reported, including the
28 plaintiff, Shirlee Jean Frey. As of now, listeriosis—the name for the illness caused by a listeria

1 infection—had contributed to at least four of these deaths. Nine illnesses were pregnancy-related,
2 having occurred in a pregnant woman or her newborn infant, while four illnesses were among
3 otherwise healthy children aged 5—15 years, including three invasive illnesses (meningitis).

4 12. On December 19, the CDC reported that, based on the information currently available to
5 it, commercially produced, prepackaged caramel apples were likely contaminated with *Listeria*. To
6 date, 15 (83%) of the 18 ill people that public health investigators have interviewed reported eating
7 commercially produced, prepackaged caramel apples before becoming ill.

8 13. On December 24, Happy Apple issued a voluntary recall of Happy Apple Brand caramel
9 apples with a best use-by-date between August 25th and November 23rd 2014, because, according to
10 the FDA, the caramel apples “have the potential to be contaminated with *Listeria monocytogenes*.”¹ In
11 the company's recall announcement, Happy Apple reported receiving notice from Bidart Brothers, an
12 apple supplier, that there may be a connection between the listeriosis outbreak and the apples supplied
13 to the Happy Apple Company's California facility.

14 14. Pacific Coast Fruit announced on its website that it was made aware that Bidart Brothers
15 was recalling apples sold to caramel coated candy apple because of potential contamination with
16 *Listeria*. Happy Apples purchased apples from Bidart Brothers, and Pacific Coast Fruit distributed
17 caramel apples made by Happy Apples to Pacific Coast Fruit customers. According to its website,
18 Pacific Coast Fruit Company is now in the process of contacting customers and recalling all Happy
19 Apple brand apples sold after September 22, 2014.²

20 15. Given the evidence linking the outbreak-related *Listeria* infections to the consumption
21 of contaminated caramel apples, manufactured by Happy Apple, and made with apples supplied by
22 Bidart Brothers, the CDC has recommended that consumers not eat any commercially produced,
23 prepackaged caramel apples, including plain caramel apples as well as those containing nuts, sprinkles,
24 chocolate, or other toppings, until more specific guidance can be provided.

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27 ¹ A copy of the recall notice that Happy Apple issued, as published on a FDA website, can be found online here:
<http://www.fda.gov/Safety/Recalls/ucm428106.htm> (last checked on December 29, 2014).

28 ² The website posting can be found here: <http://www.pcfruit.com/pc-recall/bidart-bros-caramel-apple-recall/> (last
checked on December 29, 2014).

LISTERIA

16. Listeria (pronounced liss-STEER-ē-uh) is a gram-positive rod-shaped bacterium that can grow under either anaerobic (without oxygen) or aerobic (with oxygen) conditions. Of the six species of Listeria, only *L. monocytogenes* (pronounced maw-NO-site-aw-JUH-nee-z) causes disease in humans. These bacteria multiply best at 86-98.6 degrees F (30-37 degrees C), but also multiply better than all other bacteria at refrigerator temperatures, something that allows temperature to be used as a means of differentiating Listeria from other contaminating bacteria.

17. Called an "opportunistic pathogen," Listeria is noted to cause an estimated 2,600 cases per year of severe invasive illness. Perhaps not surprisingly then, "foodborne illness caused by Listeria monocytogenes has raised significant public health concern in the United States, Europe, and other areas of the world."

18. Listeria is an organism, which can cause serious and sometimes fatal infections in young children, frail or elderly people, and others with weakened immune systems. Although healthy individuals may suffer only short-term symptoms such as high fever, severe headache, stiffness, nausea, abdominal pain and diarrhea, Listeria infection can cause miscarriages and stillbirths among pregnant women.

19. A few days before Halloween 2014, the decedent, Shirlee Frey, went to the Safeway store in Felton, California and purchased, among other things, a commercially produced, prepackaged caramel apple sold under the Happy Apple brand name. At some point after its purchase, the plaintiff consumed the caramel apple as intended by the defendants.

20. In the week or so prior to November 6, the decedent Shirlee Frey began to feel ill. On November 6, due to weakness and instability related to her illness, Mrs. Frey fell and hit her head. After evaluation in the emergency room, the decision was made to airlift Mrs. Frey to Stanford Hospital for surgery on what was thought to be a brain-bleed.

21. The surgery went well enough so that Mrs. Frey was discharged on November 14 and admitted for rehabilitative care at Pacific Coast Manor, which is located at 1935 Wharf Road, Capitola, California, 95010. Mrs. Frey appeared to be improving over the next ten days or so; however, her condition soon started to deteriorate. On Thanksgiving Day, November 27, 2014, Mrs. Frey could not

1 be awakened. Consequently, the decision was made to readmit her to care at Stanford Hospital.

2 22. On December 2, 2014, the doctors at Stanford Hospital informed the family that Mrs.
3 Frey was suffering from a listeria infection—listeriosis. She died that same day. Since the date of her
4 tragic death, health department investigators have informed the family that Mrs. Frey had been infected
5 with the outbreak strain and was thus a victim of the outbreak.

6 **FIRST CAUSE OF ACTION**
7 **STRICT LIABILITY CLAIM**

8 **(Violation of Federal Food Drug and Cosmetic Act, 21 U.S.C. § 342(a), and California's Sherman
9 Food, Drug, and Cosmetic Laws, California Health and Safety Code § 109875, *et seq.*)**

10 23. By this reference, Paragraphs 1 through 22 of this Complaint are fully incorporated as if
11 each and every one of these paragraphs was set forth here in its entirety.

12 24. The defendants Safeway, Happy Apple, Bidart Brothers, and the DOE defendants, each
13 of which is in the business of manufacturing or selling food products or food ingredients, are in the
14 chain of distribution for the subject product—that is, the commercially produced, prepackaged caramel
15 apples that the CDC and other public health investigators have linked to Listeria outbreak from which
16 the claims set forth here arise. As a result of being in the chain of distribution for the subject products,
17 Happy Apple caramel apples and the apples used to manufacture the same, the defendants are each
18 participants in the enterprise responsible for placing the subject product in the stream of commerce
19 and, thus, subject to strict liability under the laws of California.

20 25. The caramel apple that the decedent purchased and consumed was a ready-to-eat
21 product, intended for consumption without further preparation, cooking, or other step that might
22 eliminate the presence of Listeria or other pathogens. Similarly, the apples used to manufacture the
23 caramel apples was supplied for the particular purpose of being used as part of a ready-to-eat product,
24 intended for consumption without further preparation, cooking, or other step that might eliminate the
25 presence of Listeria or other pathogens

26 26. A ready-to-eat product contaminated with Listeria is adulterated within the meaning of
27 Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 342(a), and implementing regulations. *See* 21
28 C.F.R. §109.3(c) and (d). In addition, a ready-to-eat product contaminated with Listeria is defective,
unreasonably dangerous, and not fit for human consumption. The subject product was adulterated, as

1 well as being defective, unreasonably dangerous, and not fit for human consumption.

2 27. The subject product was expected by the defendants to reach all consumers, and to be
3 consumed by them, without any substantial change, and the subject product did in fact did reach the
4 decedent Shirlee Frey without any substantial change in the product.

5 28. The decedent Shirlee Frey consumed the subject product, having received the same
6 without any substantial change occurring, and she consumed the product in the manner expected and
7 intended, including when she consumed it.

8 29. The decedent Shirlee Frey was infected with Listeria as a result of consuming the
9 defective and unreasonably dangerous subject product. Furthermore, Mrs. Frey suffered severe,
10 continuing, and ultimately fatal injuries, as alleged above, as a direct and proximate result of the
11 consumption of the subject product. Accordingly, the defendants are each strictly liable to the plaintiffs
12 for all damages proximately caused by the manufacture and sale of a defective and unreasonably
13 dangerous food product or food product ingredient.

14 **SECOND CAUSE OF ACTION**
15 **BREACH OF IMPLIED WARRANTY CLAIM**

16 30. By this reference, Paragraphs 1 through 29 of this Complaint are fully incorporated as if
17 each and every one of these paragraphs was set forth here in its entirety.

18 31. The defendants impliedly warranted that the subject food products were of merchantable
19 quality, and thus were safe and fit for human consumption. The decedent Shirlee Frey purchased and
20 consumed the subject product, and reasonably relied upon the skill and judgment of defendants as to
21 whether the products were of merchantable quality and fit for human consumption.

22 32. The defendants breached these implied warranties in that subject products were
23 contaminated with Listeria. As a direct, legal and proximate result of the breach of implied warranties,
24 the plaintiffs suffered and may continue to suffer injury, harm, special damages and economic loss.

25 **THIRD CAUSE OF ACTION**
26 **NEGLIGENCE & NEGLIGENCE PER SE CLAIMS**

27 33. By this reference, Paragraphs 1 through 32 of this complaint are fully incorporated as if
28 each and every one of these paragraphs was set forth here in its entirety.

1 34. The defendants were negligent in the manufacture, sale, or distribution of the subject
2 products, thus causing the subject outbreak, and thus also causing the plaintiff's injury and death.

3 35. More specifically, the defendants each owed a duty to properly supervise, train, and
4 monitor employees, or the employees of their agents or subcontractors, in the preparation of the
5 product or product-ingredients it sold, doing so to ensure compliance with the each defendant's own
6 specifications and performance standards, as well as to ensure compliance with all applicable health
7 regulations, including the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 342(a), implementing
8 regulations, 21 C.F.R. §109.3(c) and (d), FDA Good Manufacturing Practices regulations, 21 C.F.R.
9 Part 110, Subparts (A)-(G). The defendants violated one or more of the safety requirement that the law
10 imposes and, as a result, breached duties owed to the plaintiffs, and injuring the plaintiffs as a direct
11 and proximate result of such breaches.

12 36. The defendants each additionally owed a duty to comply with statutory and regulatory
13 provisions that pertained or applied to either the import, manufacture, distribution, storage, or sale of
14 their product or product-ingredients, including, but not limited to, the Federal Food, Drug, and
15 Cosmetics Act, § 402(a), as codified at 21 U.S.C. § 342(a), which bans the manufacture, sale and
16 distribution of any "adulterated" food, and California's Sherman Food, Drug, and Cosmetic Act, CA
17 Health & Safety Code § 110545, which imposes an identical ban on such adulteration.

18 37. Under both federal and applicable state law, food is adulterated if it contains a
19 "poisonous or deleterious substance, which may render it injurious to health." Listeria is such a
20 substance. Thus, by either manufacture, distribution, storage, or sale of the subject product or the
21 subject product's ingredients, the defendants breached their statutory and regulatory duties, and the
22 plaintiffs were each injured as a direct and proximate result of such breaches.

23 38. The defendants' negligent acts and omissions included, but were not limited to:

24 (a) Failure to prevent the contamination of the product or product-ingredients by
25 Listeria, including the failure to implement or non-negligently perform inspection and monitoring of
26 the product or product-ingredients such that its adulterated condition would be discovered prior to its
27 sale or distribution to the public for human consumption.

28 (b) Failure to properly supervise, train, and monitor their employees, or the

1 employees of their agents or subcontractors, on how to ensure the manufacture, distribution or sale of
2 food product free of adulteration by potentially lethal pathogens.

3 39. The federal and state food safety regulations applicable here, and as set forth above,
4 establish a positive and definite standard of care in the import, manufacture, distribution or sale of
5 food, and the violation of these regulations constitutes negligence *per se*.

6 40. The plaintiffs were in the class of persons intended to be protected by these statutes and
7 regulations, and were injured as the direct and proximate result of the defendants' violation of
8 applicable federal, state and local food safety regulations.

9 41. The defendants breached the aforementioned duties as alleged above, which breach
10 constituted the proximate cause of injury to the plaintiffs.

11 **FOURTH CAUSE OF ACTION**
12 **SURVIVAL ACTION**
13 **(C.C.P. Section 377.30, *et seq.*)**

14 42. By this reference, Paragraphs 1 through 41 of this complaint are fully incorporated as if
15 each and every one of these paragraphs was set forth here in its entirety.

16 43. As a further legal result of the acts, omissions and conduct of defendants, inclusive, and
17 each of them, as alleged above, the decedent and plaintiff Shirlee Jean Frey incurred medical expenses
18 prior to her death for medical treatment and related expenses to her damage in an amount to be proven
19 at time of trial.

20 **DAMAGES**

21 44. The plaintiffs have suffered general and special, incidental and consequential damages,
22 including loss of consortium, as the direct and proximate result of the acts and omissions of the
23 defendants, which damages shall be fully proven at the time of trial, including, but not limited to,
24 damages for loss of enjoyment of life, both past and future; medical and medical related expenses, both
25 past and future; wage and economic loss, past and future; emotional distress, and future emotional
26 distress; medical and pharmaceutical expenses, past and future; and other ordinary, incidental and
27 consequential damages as would be anticipated to arise under the circumstances.

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3 **PRAYER FOR RELIEF**

4 WHEREFORE, plaintiffs pray as follows:

5 (1) That the court award plaintiffs judgment against the defendants, jointly and severally, in
6 such sums as shall be determined to fully and fairly compensate plaintiffs for all general, special,
7 incidental and consequential damages incurred, or to be incurred, by plaintiffs as the direct and
8 proximate result of the acts and omissions of the defendant;

9 (2) That the court award plaintiffs their costs, disbursements and reasonable attorneys' fees
10 incurred;

11 (3) That the court award plaintiffs the opportunity to amend or modify the provisions of this
12 complaint as necessary or appropriate after additional or further discovery is completed in this matter,
13 and after all appropriate parties have been served;

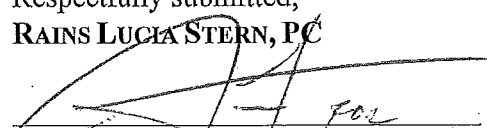
14 (4) That the court awards such other and further relief as it deems necessary and proper in
15 the circumstances; and

16 (5) Exemplary damages pursuant to survival action.

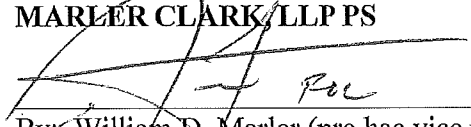
17 **JURY TRIAL DEMANDED**

18 Dated: December 29, 2014

19 Respectfully submitted,
20 **RAINS LUCIA STERN, PC**

21 
22 By: Harry S. Stern
23 Attorneys for Plaintiffs

24 Respectfully submitted,
25 **MARLER CLARK, LLP PS**

26 
27 By: William D. Marler (pro hac vice pending)
28 Attorneys for Plaintiffs