

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

Richard R. Waite, Esq. (SBN: 097942)  
Keeney Waite & Stevens  
125 North Acacia Avenue, Suite 101  
Solana Beach, CA 92075  
Telephone: 858.523.2133  
Facsimile: 858.523.2135  
Web Address: www.keenlaw.com

William D. Marler, Esq.  
MARLER CLARK, LLP, PS  
701 Fifth Avenue, Suite 6600  
Seattle, WA 98104  
Telephone: 206.346.1888  
Facsimile: 206.346.1898

Attorneys for: The Plaintiffs Herzog

**FILED**

**FEB 06 2008**

FRESNO COUNTY SUPERIOR COURT  
By \_\_\_\_\_  
SXG - DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF FRESNO

MELISSA HERZOG, individually and as )  
guardian ad litem for LAUREN HERZOG, )  
a minor, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
ORGANIC PASTURES DAIRY COMPANY, )  
L.L.C., a California corporation, CLARK'S )  
NUTRITIONAL CENTER, INC., a California )  
Corporation; and DOES 1-20, inclusive, )  
 )  
 )  
Defendants. )

CASE NUMBER **08CECG 00421**

AMS

**COMPLAINT FOR  
PERSONAL INJURIES  
(Strict Product Liability,  
Implied Warranty and Negligence)**

**JURY TRIAL DEMANDED**

This case has been assigned to  
Judge Alan M. Simpson for all purposes

The plaintiffs allege as follows:

1 **I. PARTIES**

2 1.1 The plaintiff MELISSA HERZOG and minor LAUREN HERZOG, are  
3 residents of Rancho Cucamonga, San Bernardino County, California. Plaintiff MELISSA  
4 HERZOG is the parent and legal guardian of LAUREN HERZOG, an 11 year old girl who  
5 resides with her. Plaintiff MELISSA HERZOG is the duly appointed Guardian ad Litem for  
6 LAUREN HERZOG in this suit.

7 1.2 The defendant ORGANIC PASTURES DAIRY COMPANY, L.L.C.,  
8 (hereinafter referred to as "Organic Pastures"), is a California limited liability company with  
9 its principal place of business located at 7221 South Jameson Avenue, Fresno, California. At  
10 all times relevant hereto, Organic Pastures manufactured and sold dairy products within the  
11 State of California.

12 1.3 The defendant Clark's Nutritional Center, Inc. (hereinafter "Clark's"), is a  
13 California Corporation with its principal place of business located at 4225 Market Street.,  
14 Riverside, California. At all times relevant hereto, Clark's sold retail goods, including Organic  
15 Pastures dairy products, within the State of California.

16 1.4 Plaintiff is ignorant of the true names and capacities of defendants sued herein  
17 as DOES 1 through 20, inclusive, and therefore sues these defendants by such fictitious names.  
18 Plaintiff will amend its complaint to allege their true names and capacities when ascertained.  
19 Plaintiff is informed and believes that each fictitiously named DOE defendant is the agent  
20 and/or employee of all other named defendants and in doing the acts herein alleged, were  
21 acting within the scope and course of this agency or employment.

22 ///

1 **II. JURISDICTION AND VENUE**

2 2.1 This Court is vested with jurisdiction over the defendants because the  
3 defendants reside, and purport to have their respective principal places of business located,  
4 within the State of California, and the events alleged herein occurred in the State of California.

5 2.2 Venue is proper in Fresno County because the defendant Organic Pastures  
6 purports to have its principal place of business in the County.

7 **III. RELEVANT FACTS**

8 3.1 E. coli O157:H7: *Escherichia coli* are the name of a common family of  
9 bacteria, most members of which do not cause human disease. *E. coli* O157:H7 is a specific  
10 member of this family that can cause bloody diarrhea (hemorrhagic colitis) in humans. After a  
11 susceptible individual ingests *E. coli* O157:H7, the bacteria attaches to the inside surface of the  
12 large intestine and initiates an inflammatory reaction of the intestine. The mean incubation  
13 period (time from ingestion to the onset of symptoms) of *E. coli* O157:H7 is estimated to be  
14 two to four days (range, 1-21 days). Typically, a patient with an acute *E. coli* O157:H7  
15 infection presents with abdominal cramps, bloody diarrhea, and vomiting. *E. coli* O157:H7  
16 can produce a wide spectrum of disease from mild, non-bloody diarrhea, to severe bloody  
17 diarrhea accompanied by excruciating abdominal pain to life-threatening complications.

18 3.2 About five to ten percent of individuals infected with *E. coli* O157:H7 develop  
19 hemolytic uremic syndrome (HUS). HUS was first described in 1955, and today is recognized  
20 as the most common cause of kidney failure in children. HUS is believed to develop when the  
21 toxin from the bacteria, known as Shiga-like toxin (SLT), enters the circulation through the  
22 inflamed bowel wall. Some organs seem more susceptible, perhaps due to the presence of

1 increased numbers of receptors, and include the kidney, pancreas, and brain. By definition,  
2 when fully expressed, HUS presents with the triad of hemolytic anemia (destruction of red  
3 blood cells), thrombocytopenia (low platelet count), and acute renal failure (loss of the filter  
4 function of the kidney). The most important aspect of the treatment of patients with HUS  
5 remains excellent supportive care, which includes: close observation in a tertiary-care pediatric  
6 facility; meticulous attention to fluid, electrolyte, and metabolic balance; optimal nutrition; and  
7 careful blood pressure control. Blood transfusions may be necessary several times during the  
8 course of the active stage. Dialysis or interventional therapy, such as plasma exchange  
9 (plasmapheresis), may be necessary for patients at risk for a bad outcome. There is no known  
10 therapy to halt the progression of HUS. The active stage of the disease usually lasts one to two  
11 weeks during which a variety of complications are possible. HUS is a frightening condition  
12 that even in the best American centers has a mortality rate of about five percent. Among  
13 survivors, about five percent will eventually develop end stage renal disease (ESRD) with a  
14 resulting need for dialysis or even transplantation.

15       3.3     The Outbreak: On September 18, 2006, the California Department of Health  
16 Services (CDHS) was notified of two patients hospitalized with HUS. One of these patients  
17 had a culture confirmed *E. coli* O157:H7 infection. Both patients had consumed milk  
18 manufactured and sold by the defendant in the week prior to onset of illness. Four additional  
19 cases of *E. coli* O157:H7 infection in children that had consumed the defendant's milk or  
20 colostrum were identified in the following three weeks. Each of the case patients' *E. coli*  
21 O157:H7 isolates were genetically indistinguishable. The genetic fingerprint of the *E. coli*  
22 O157:H7 shared by the five case patients was new and different from all other patterns in the

1 national database operated by the Center for Disease Control (CDC). The CDHS and the  
2 California Department of Food and Agriculture (CDFA) conducted an environmental  
3 investigation of the outbreak. The investigation revealed the defendant's dairy products from  
4 store shelves to contain unusually high aerobic plate counts. Investigation of the defendant's  
5 dairy identified cows that tested positive for *E. coli* O157:H7, although the strain differed from  
6 the outbreak strain. CDHS concluded that the likely source of the *E. coli* O157:H7 infections  
7 was the defendant's dairy products.

8       3.4     Plaintiff Lauren Herzog's Illness: During the first days of September, 2006,  
9 Lauren Herzog consumed Organic Pastures Raw Milk, purchased at Clark's in Rancho  
10 Mirage, California. On or about September 6, 2006, Lauren Herzog developed a  
11 gastrointestinal illness. Symptoms included nausea, vomiting, bloody diarrhea and abdominal  
12 cramping. Lauren Herzog's condition worsened, and she eventually developed HUS. Lauren  
13 Herzog tested positive for *E. coli* O157:H7. The strain of *E. coli* O157:H7 that sickened  
14 Lauren Herzog was genetically indistinguishable from the strain associated with the Organic  
15 Pastures outbreak described above.

16       3.5     Lauren Herzog was hospitalized from September 8, through October 18, 2006.  
17 While hospitalized, Lauren Herzog suffered life-threatening injuries that have left her  
18 permanently injured. As the result of her HUS, Lauren Herzog suffered acute renal failure and  
19 required dialysis daily over approximately a two week period. She was also treated for high  
20 blood pressure. Medical expenses for Lauren Herzog's hospitalization exceeded \$250,000.00.  
21 Currently, Lauren Herzog is receiving ongoing treatment of the injuries she suffered as a result  
22 of her *E. coli* O157:H7 infection and HUS.

1 **IV. FIRST CAUSE OF ACTION**

2 **(Strict Liability)**

3 4.1 The plaintiffs incorporate paragraphs 1.1 through 3.5 of this Complaint as if  
4 each paragraph was set forth herein in its entirety.

5 4.2 The defendants are product manufacturers and sellers of the *E. coli* O157:H7 -  
6 contaminated dairy products that injured the plaintiffs.

7 4.3 The defendants owed a duty to the plaintiffs to manufacture and sell a product  
8 that was reasonably safe in construction and that did not materially deviate from applicable  
9 design specifications or otherwise deviate in some material way from otherwise identical units  
10 in the food products manufactured by the defendants.

11 4.4 The food that injured the plaintiffs, manufactured and sold by the defendants,  
12 was not reasonably safe in construction, and did not conform to the defendants' implied  
13 warranties, because it was contaminated and adulterated with, among other things, *E. coli*  
14 O157:H7.

15 4.5 Because the food manufactured and sold by the defendants that Lauren Herzog  
16 consumed was not reasonably safe in construction and did not conform to the implied  
17 warranties of the defendants, the defendants are strictly liable for the personal and economic  
18 injuries suffered by the plaintiffs as a result of Lauren Herzog's consumption of contaminated  
19 food.

20 4.6 As a direct and proximate cause of the manufacture, processing, and sale of the  
21 contaminated food products of the defendants, and the consumption thereof by Lauren Herzog,  
22 the plaintiffs have suffered general and special, incidental and consequential damages, which

1 damages shall be fully proven at the appropriate time, including, but not limited to, damages  
2 for loss of enjoyment of life, both past and future; medical and medical related expenses, both  
3 past and future; travel and travel-related expenses, past and future; emotional distress, and  
4 future emotional distress; pharmaceutical expenses, past and future; lost wages, past and  
5 future; lost earning capacity, past and future, and other ordinary, incidental and consequential  
6 damages as would be anticipated to arise under the circumstances.

7 **V. SECOND CAUSE OF ACTION**

8 **(Negligence)**

9 5.1 The plaintiffs incorporate paragraphs 1.1 through 4.6 of this Complaint as if  
10 each paragraph was set forth herein in its entirety.

11 5.2 The defendants manufactured, distributed, and sold a product that was not  
12 reasonably safe as designed or manufactured.

13 5.3 The defendants were negligent in manufacturing, distributing, and selling a  
14 product that was not reasonably safe because adequate warnings or instructions were not  
15 provided, including but not limited to the warning that their product may contain *E. coli*  
16 O157:H7, and thus should not be given to, or eaten by humans.

17 5.4 The defendants had a duty to comply with all statutory and regulatory  
18 provisions that pertained or applied to the manufacture, distribution, storage, labeling, and sale  
19 of their food products, including, but not limited to, the Federal Food, Drug, and Cosmetics  
20 Act, and its California State equivalent, which ban the manufacture, sale, and distribution of  
21 any "adulterated" food.

22 ///







1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

Dated this 5 day of February, 2008.

KEENEY WAITE & STEVENS

By:   
Richard R. Waite, SBN # 097942  
125 North Acacia Avenue, Suite 101  
Solana Beach, CA 92075  
858.523.2133  
Attorneys for Plaintiffs

MARLER CLARK, LLP, PS

By:   
William D. Marler, WSBA # 17233  
701 Fifth Avenue, Suite 6600  
Seattle, WA 98104  
206.346.1888  
Attorneys for Plaintiffs