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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ORVILLE BERNACKI, individually, and as)	
personal representative of the Estate of GAIL)	
BERNCAKI, deceased, a Canadian citizen;)	NO.
)	
Plaintiff,)	COMPLAINT FOR DAMAGES
)	
v.)	Demand for Jury Trial
)	
TANIMURA & ANTLE FRESH FOODS, INC.,)	
a California corporation;)	
)	
Defendant.)	
_____)	

COMPLAINT FOR DAMAGES

COMES NOW the plaintiff, ORVILLE BERNACKI, individually, and as personal representative of the Estate of GAIL BERNCAKI, deceased, a Canadian citizen, by and through his attorneys of record, Fredrick L. Gordon and Richard R. Waite, GORDON & HOLMES, and William D. Marler, MARLER CLARK, and alleges as follows:

I. PARTIES

1. The plaintiff ORVILLE BERNACKI at all times relevant hereto was the spouse of Awigea Bernacki, also known as Gail Bernacki, deceased, and is the personal representative of the Estate of Gail Bernacki. At all times relevant hereto, Orville and Gail Bernacki were Canadian citizens, and residents of Calgary, Alberta, Canada; Orville Bernacki continue to be so at this time. Orville Bernacki pursues this action individually, and as the personal representative of the Estate of Gail Bernacki, on behalf of the Estate and on behalf of the three adult children of Orville and Gail Bernacki, Norman Bernacki, Ryan Bernacki, and Sharon Plum.

2. The defendant, TANIMURA & ANTLE FRESH FOODS, INC., (“Tanimura and Antle”), is a California corporation, organized under the laws of the state of California, and authorized to do business in the state of California, with its principal office located at 1 Harris Road, Salinas, CA, 93908.

3. At all times relevant hereto, Tanimura and Antle was a manufacturer and seller of various lettuce food products, which it knowingly sold to manufacturers and distributors for use and sale nationwide and internationally, including in the country of Canada. Tanimura and Antle was the manufacturer and seller of the allegedly contaminated lettuce product at issue in this action, which lettuce product was grown and packaged in California, and was shipped and distributed from California to manufacturers and distributors for its use and sale nationwide and internationally, including in the country of Canada.

II. JURISDICTION AND VENUE

4. 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 a state and citizens of a foreign state, and because the defendant Tanimura

and Antle has certain minimum contacts with the State of California such that the maintenance of the suit in this district does not offend traditional notions of fair play and substantial justice.

5. Venue in the United States District Court for the Northern District of California is proper pursuant to 28 USC § 1391(a)(1) because the defendant Tanimura and Antle resides in this judicial district, and a substantial part of the events or omissions giving rise to the plaintiff's claims and causes of action occurred in this judicial district—i.e., the manufacture of the food product that caused plaintiff's injuries. Additionally, the defendant Tanimura and Antle was subject to personal jurisdiction in this judicial district at the time of the commencement of the action.

III. GENERAL ALLEGATIONS

***E. coli* O157:H7**

6. *E. coli* O157:H7 was first recognized as a pathogen in 1982 during an investigation into an outbreak of hemorrhagic colitis associated with consumption of hamburgers from a fast food chain restaurant. *E. coli* O157:H7's ability to induce injury in humans is a result of its ability to produce numerous virulence factors, most notably Shiga-like toxins. Shiga toxin (Stx) has multiple variants (e.g. Stx1, Stx2, Stx2c), and acts like the plant toxin ricin by inhibiting protein synthesis in endothelial and other cells. Shiga toxin is one of the most potent toxins known. In addition to Shiga toxins, *E. coli* O157:H7 produces numerous other putative virulence factors including proteins, which aid in the attachment and colonization of the bacteria in the intestinal wall and which can lyse red blood cells and liberate iron to help support *E. coli* metabolism.

7. Although foods of a bovine origin are the most common cause of both outbreaks and sporadic cases of *E. coli* O157:H7 infections, outbreak of illnesses have been linked to a

wide variety of food items. Produce has, since at least 1991, been the source of substantial numbers of outbreak-related *E. coli* O157:H7 infections. Other unusual vehicles for *E. coli* O157:H7 outbreaks have included unpasteurized juices, yogurt, dried salami, mayonnaise, raw milk, game meats, sprouts, and raw cookie dough.

8. According to a recent study, an estimated 93,094 illnesses are due to domestically acquired *E. coli* O157:H7 each year in the United States. Estimates of foodborne acquired O157:H7 cases result in 2,138 hospitalizations and 20 deaths annually. The colitis caused by *E. coli* O157:H7 is characterized by severe abdominal cramps, diarrhea that typically turns bloody within twenty-four (24) hours, and sometimes fevers. The incubation period—which is to say the time from exposure to the onset of symptoms—in outbreaks is usually reported as three (3) to four (4) days, but may be as short as one (1) day or as long as ten (10) days. Infection can occur in people of all ages but is most common in children. The duration of an uncomplicated illness can range from one (1) to twelve (12) days. In reported outbreaks, the rate of death is 0-2%, with rates running as high as 16-35% in outbreaks involving the elderly, like those have occurred at nursing homes.

9. What makes *E. coli* O157:H7 remarkably dangerous is its very low infectious dose, and how relatively difficult it is to kill these bacteria. Unlike *Salmonella*, for example, which usually requires something approximating an “egregious food handling error, *E. coli* O157:H7 in ground beef that is only slightly undercooked can result in infection,” as few as twenty (20) organisms may be sufficient to infect a person and, as a result, possibly kill them. And unlike generic *E. coli*, the O157:H7 serotype multiplies at temperatures up to 44°F, survives freezing and thawing, is heat resistant, grows at temperatures up to 111°F, resists drying, and can survive exposure to acidic environments.

10. *E. coli* outbreaks associated with lettuce, specifically the “pre-washed” and “ready-to-eat” varieties, are by no means a new phenomenon. Here is a sample of related *E. coli* outbreaks based on information gathered by the Center for Science in the Public Interest, Kansas State University and the Centers for Disease Control and Prevention:

Date	Vehicle	Etiology	Confirmed Cases	States/Provinces
July 1995	Lettuce (leafy green; red; romaine)	<i>E. coli</i> O157:H7	74	1:MT
Sept. 1995	Lettuce (romaine)	<i>E. coli</i> O157:H7	20	1:ID
Sept. 1995	Lettuce (iceberg)	<i>E. coli</i> O157:H7	30	1:ME
Oct. 1995	Lettuce (iceberg; unconfirmed)	<i>E. coli</i> O157:H7	11	1:OH
May-June 1996	Lettuce (mesclun; red leaf)	<i>E. coli</i> O157:H7	61	3:CT, IL, NY
May 1998	Salad	<i>E. coli</i> O157:H7	2	1:CA
Feb.-Mar. 1999	Lettuce (iceberg)	<i>E. coli</i> O157:H7	72	1:NE
Oct. 1999	Salad	<i>E. coli</i> O157:H7	92	3:OR, PA, OH
Oct. 2000	Lettuce	<i>E. coli</i> O157:H7	6	1:IN
Nov. 2001	Lettuce	<i>E. coli</i> O157:H7	20	1:TX
July-Aug. 2002	Lettuce (romaine)	<i>E. coli</i> O157:H7	29	2:WA, ID
Nov. 2002	Lettuce	<i>E. coli</i> O157:H7	13	1:IL

Date	Vehicle	Etiology	Confirmed Cases	States/Provinces
Dec. 2002	Lettuce	<i>E. coli</i> O157:H7	3	1:MN
Oct. 2003- May 2004	Lettuce (mixed salad)	<i>E. coli</i> O157:H7	57	1:CA
Apr. 2004	Spinach	<i>E. coli</i> O157:H7	16	1:CA
Nov. 2004	Lettuce	<i>E. coli</i> O157:H7	6	1:NJ
Sept. 2005	Lettuce (romaine)	<i>E. coli</i> O157:H7	32	3:MN, WI, OR
Sept. 2006	Spinach (baby)	<i>E. coli</i> O157:H7 and other serotypes	205	Multistate and Canada
Nov./Dec. 2006	Lettuce	<i>E. coli</i> O157:H7	71	NY, NJ, PA, DE
Nov./Dec. 2006	Lettuce	<i>E. coli</i> O157:H7	81	IA, MN, WI
July 2007	Lettuce	<i>E. coli</i> O157:H7	26	1:AL
May 2008	Romaine	<i>E. coli</i> O157:H7	9	WA
Oct. 2008	Lettuce	<i>E. coli</i> O157:H7	59	Multistate and Canada
Nov. 2008	Lettuce	<i>E. coli</i> O157:H7	130	Canada
April 2010	Romaine	<i>E. coli</i> O145	33	MI, NY, OH, PA, TN

Date	Vehicle	Etiology	Confirmed Cases	States/Provinces
Oct. 2011	Romaine	<i>E. coli</i> O157:H7	60	Multistate

Tanimura & Antle Outbreak

11. In August 2012, the Canadian Food Inspection Agency (CFIA) isolated *E. coli* O157:H7 in a sample of defendant Tanimura & Antle romaine lettuce collected on August 8, 2012. This finding prompted CFIA to issue a “Health Hazard Alert” notice on August 17, 2012 warning the public to not consume Tanimura & Antle brand romaine lettuce, UPC 0 27918 20314 9. The alert was expanded to include additional distribution information on August 20, 2012. The U.S. Food and Drug Administration (USDA) posted a notice that on August 19 Tanimura & Antle was recalling “Wrapped Single Head Romaine.” Genetic testing by Pulsed Field Gel Electrophoresis (PFGE) identified the strain of *E. coli* O157 found in the Tanimura & Antle sample as “ECXA1.1775/ECBN1.0012.” This was a rare strain, not seen in Canada since 2009. The CFIA announcement noted that there had been “no reported illnesses associated with consumption of this product.” Unfortunately, this assessment would prove to be tragically incorrect. Two Canadians—a person in Ontario and a person in Alberta were identified as being infected with strain ECXA1.1775/ECBN1.0012. Plaintiff Gail Bernacki was the Alberta resident identified as being a genetic match to the *E. coli* O157 strain found in Tanimura & Antle romaine lettuce.

Plaintiff Gail Bernacki’s Injuries

12. Mrs. Bernacki and her husband of 57 years, Mr. Orville Bernacki, lived independently in the family home in Calgary, Canada, for 46 years. In late August, 2012, Mrs.

Bernacki consumed a Tanimura & Antle lettuce product, which had been grown and processed by defendant in California, and which was contaminated with *E. coli* O157:H7.

13. On August 25, 2012, after a week of Mrs. Bernacki feeling weak, nauseated, and then noting blood in her stool, her husband became alarmed at her condition and called EMS in the late afternoon. She was taken by ambulance to Rockyview General Hospital in Calgary, Canada.

14. On August 26, 2012, Mrs. Bernacki's stool culture came back positive for *E. coli* O157:H7, and the Health Department was notified. Subsequently, it was determined that the *E. coli* O157:H7 strain which infected Mrs. Bernacki was the same rare strain of *E. coli* O157:H7 associated with the Tanimura & Antle lettuce recall.

15. During her August 25, 2012 admission it was determined she had severe colitis (inflammation of colon) based on her bleeding and a limited colonoscopy. Her colitis and gastrointestinal bleeding resulted from infection with *E. coli* O157: H7. Her infection resulted in worsening of her appetite and abdominal discomfort that persisted for the remainder of her life.

16. Over the next couple of weeks, Mrs. Bernacki remained hospitalized but stable. She continued to await the GARP program. On September 15, 2012, she was transferred to that unit. Over the next few weeks, Mrs. Bernacki remained hospitalized in the GARP unit and was stable. She began going home on day passes with her husband at the end of September.

17. In January, 2013, Mrs. Bernacki was diagnosed with congestive heart failure and failure to thrive. She was admitted to hospital for medical care. On January 16, 2013, a nursing assistant found Mrs. Bernacki unresponsive at 5:30 AM. She passed away on January 16, 2013, with family present.

18. Mrs. Gail Bernacki developed colitis due to infection with *E. coli* 0157: H7. She did not subsequently return to her baseline functional status despite an extensive rehabilitation hospitalization and considerable suffering, and passed away after a series of admissions for severe constipation, congestive heart failure and myocardial infarctions. Her original *E. coli* 0157: H7 infection contributed to, and was a proximate cause of, her accelerated functional decline and eventual demise.

IV. CAUSES OF ACTION

Strict Liability—Count I

19. The defendant Tanimura & Antle was at all times relevant hereto the manufacturer and seller of the adulterated lettuce food product that is the subject of the action.

20. The adulterated lettuce food product that defendant Tanimura & Antle manufactured, distributed, and/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 *E. coli* O157: H7, a deadly pathogen.

21. The adulterated lettuce food product that the defendant Tanimura & Antle manufactured, distributed, and/or sold was delivered to the plaintiff Gail Bernacki without any change in its defective condition. The adulterated lettuce food product that the defendant manufactured, distributed, and/or sold was used in the manner expected and intended, and was consumed by the plaintiff Gail Bernacki

22. The defendant Tanimura & Antle owed a duty of care to the plaintiff Gail Bernacki to design, manufacture, and/or sell food that was not adulterated, that was fit for human consumption, that was reasonably safe in construction, and that was free of pathogenic bacteria

or other substances injurious to human health. The defendant Tanimura & Antle breached this duty.

23. The defendant Tanimura & Antle owed a duty of care to the plaintiff to design, prepare, serve, and sell food that was fit for human consumption, and that was safe to the extent contemplated by a reasonable consumer. The defendant Tanimura & Antle breached this duty.

24. The plaintiff has suffered injury and damages as a direct and proximate result of the defective and unreasonably dangerous condition of the adulterated lettuce food product that the defendant Tanimura & Antle manufactured, distributed, and/or sold.

Breach of Warranty—Count II

25. The defendant Tanimura & Antle is liable to the plaintiff for breaching express and implied warranties it made regarding the adulterated lettuce product that the plaintiff purchased. These express and implied warranties included the implied warranties of merchantability and/or fitness for a particular use. Specifically, the defendant Tanimura & Antle expressly warranted, through its sale of lettuce to the public and by the statements and conduct of its employees and agents, that the lettuce it prepared and sold was fit for human consumption and not otherwise adulterated or injurious to health.

26. The plaintiff alleges that the *E. coli* O157: H7-contaminated lettuce that defendant Tanimura & Antle sold to the plaintiff would not pass without exception in the trade and was therefore in breach of the implied warranty of merchantability.

27. The plaintiff alleges that the *E. coli* O157: H7-contaminated lettuce that the defendant Tanimura & Antle sold to the plaintiff was not fit for the uses and purposes intended, *i.e.* human consumption, and that this product was therefore in breach of the implied warranty of fitness for its intended use.

28. As a direct and proximate cause of the defendant Tanimura & Antle's breach of warranties, as set forth above, the plaintiff sustained injuries and damages in an amount to be determined at trial.

Negligence—Count III

29. The defendant Tanimura & Antle owed a duty to the plaintiff to use reasonable care in its manufacture, distribution, and sale of its lettuce food product, which duty would have prevented or eliminated the risk that the Tanimura & Antle's lettuce would become contaminated with *E. coli* O157: H7 or any other dangerous pathogen. The defendant Tanimura & Antle breached this duty.

30. The defendant Tanimura & Antle 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. The plaintiff is 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.

31. The defendant Tanimura & Antle had a duty to properly supervise, train, and monitor its respective employees, and to ensure its compliance with all applicable statutes, laws, regulations, or safety codes pertaining to the manufacture, distribution, storage, and sale of similar food products, but it failed to do so and was therefore negligent.

32. The defendant Tanimura & Antle 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 it failed to do so and was therefore negligent.

33. As a direct and proximate result of the defendant Tanimura & Antle's acts of negligence, the plaintiff sustained injuries and damages in an amount to be determined at trial.

Negligence Per Se—Count IV

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

35. The defendant Tanimura & Antle 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 *E. coli* O157: H7, a deadly pathogen.

36. As a direct and proximate result of conduct by the defendant Tanimura & Antle that was negligent *per se*, the plaintiff sustained injury and damages in an amount to be determined at trial.

V. PRAYER FOR RELIEF

WHEREFORE, the plaintiff prays:

- (a) That the plaintiff be granted a judgment against the defendant Tanimura & Antle for monetary damages as to all counts in an amount deemed appropriate by the Court to fully compensate the plaintiff for the damages they have all suffered and will continue to suffer;
- (b) That the plaintiff be granted a trial by jury;
- (c) That the court award the plaintiff the opportunity to amend or modify the provisions of this complaint as necessary or appropriate after additional or further discovery is completed in this matter, and after all appropriate parties have been served; and

(d) That the plaintiff be awarded such other and further relief as would be equitable and just under the circumstances.

JURY DEMAND

The plaintiff hereby demands a jury trial.

GORDON & HOLMES

By: _____

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