

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

FILED  
UNITED STATES DISTRICT COURT  
DENVER, COLORADO  
12:10 pm, Sep 24, 2013  
JEFFREY P. COLWELL, CLERK

Criminal Case Number 13-mj-01138-MEH

UNITED STATES OF AMERICA )  
 )  
Plaintiff )  
 )  
v. )  
 )  
1. ERIC JENSEN, and )  
2. RYAN JENSEN, )  
 )  
Defendants. )

Filed Under Level 3 Restriction

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**404B NOTICE**

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The United States of America, by and through its undersigned Assistant United States Attorney for the District of Colorado, hereby files its Notice to Defendants of Rule 404(b) Evidence, as follows:

**I.  
PROCEDURAL BACKGROUND**

Contemporaneous to the filing of this notice, an Information was filed charging the above defendants with 6 counts of Adulteration of a Food in violation of 21 U.S.C. § 331(a) et seq.

**II.  
FACTUAL BASES**

1. The defendants were the primary principals in a farming operation known as Jensen Farms in Granada, Colorado. They were both in a position to, and had authority to, order regular and seasonal employees and workers to set up and maintain a conveyor system for the purpose of packing cantaloupes from the farm. As part of the business of Jensen Farms, a

partnership in which the two primary partners were the defendants, the defendants set up and maintained a processing center where cantaloupes from the field were transported along a conveyor system. The conveyor system was supposed to clean the cantaloupes, cool the fruit, and ultimately result in the packaging of the cantaloupes for further distribution throughout the United States. Thus, the defendants had the power and authority to maintain the packing equipment at Jensen Farms in such a way that the cantaloupes produced, packed and shipped from Jensen Farms would be washed with sufficient anti-bacterial solutions so that the fruit was not adulterated in the process.

2. On or about May 16, 2011, the defendants entered into an agreement with Pepper Equipment Company to furnish the Jensen Farms packing facility located in Granada, Colorado with conveyer system consisting of, in part, a fresh water sprayer, brushes and felt rollers originally designed for use in harvesting potatoes. Upon the request of the defendants, this conveyer system was modified by Pepper Equipment Company with a catch pan in which to outfit a “chlorine spray” that was never implemented by the defendants. The defendants were aware that cantaloupes could be contaminated with harmful bacterium, such as e-coli and salmonella, if not sufficiently washed. The chlorine spray, if used, would have reduced the risk of microbial contamination of the fruit.

3. On or about July 25, 2011, a food safety inspector subcontracted by Primus Labs and hired by Jensen Farms from a list of auditors and audit schemas supplied by Frontera Produce, conducted an audit of the Jensen Farms packing facility. The audit resulted in a “superior” score of 96%.

4. On or about July 25, 2011, Jensen Farms continued with an agreement with Frontera Produce to broker cantaloupes harvested from Jensen Farms under the brand name

“Frontera Fresh Cantaloupe.” Accordingly, Frontera Produce purchased, marketed and sold cantaloupes from Jensen Farms and arranged shipping directly from the Jensen Farms packing facility. At all times between June 2011 and September 2011, the defendants knew that the cantaloupes they caused to be delivered from their packing facility in Colorado would enter interstate commerce.

5. Beginning on or about July 29, 2011, various interstate trucking companies received pallets of cantaloupe adulterated with the bacterium *Listeria monocytogenes*<sup>1</sup> from the Jensen Farms packing facility and transported the adulterated cantaloupes to distribution centers in Denver, Colorado, for further delivery to places outside Colorado including Utah and Wyoming. This center subsequently distributed the adulterated Jensen Farms cantaloupe to stores located in Littleton, Denver, Colorado Springs, Thornton, Parker, Pueblo and Fruita, Colorado, thereby causing or contributing to the death of consumers. S.A.; H.B.; H.J.; M.J.; M.N.; S.O.; L.T.; B.M. and J.R.

6. Beginning on or about July 29, 2011, a retailer doing business in interstate commerce received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* from the Jensen Farms packing facility and transported the cantaloupes in interstate commerce to its distribution center in Cheyenne, Wyoming. The distribution center subsequently distributed

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<sup>1</sup>*Listeria monocytogenes* is the causal agent for the disease listeriosis. Infection with *Listeria monocytogenes* causes a spectrum of illness, ranging from febrile gastroenteritis to invasive disease, including sepsis and meningoenzephalitis. Invasive listeriosis occurs predominantly in older adults and persons with impaired immune systems. Listeriosis in pregnant women is typically a mild “flu-like” illness, but can result in fetal death, premature labor or neonatal infection. The Centers for Disease Control and Prevention (CDC) reported in 1999 that, of all the foodborne pathogens tracked by the CDC, infection with *Listeria monocytogenes* had the second highest fatality rate (20%) and the highest hospitalization rate (90%0. See P.S. Mead et al. *Food-Related Illness and Death in the United States, Emerging Infectious Diseases*, 5(5).607.610 (1999).

the adulterated Jensen Farms cantaloupes to a store located in Cheyenne, Wyoming thereby causing or contributing to the death of consumer J.L.

7. Beginning on or about August 1, 2011, a retailer doing business in interstate commerce received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* from the Jensen Farms packing facility and transported the cantaloupes in interstate commerce to a distribution center in Corinne, Utah. The retailer in interstate commerce subsequently distributed the adulterated Jensen Farms cantaloupes to stores located in Idaho Falls, Idaho and Bozeman, Montana thereby causing or contributing to the death of consumers J.C and J.O.

8. Beginning on or about August 1, 2011, a retailer doing business in interstate commerce received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* from the Jensen Farms packing facility and transported the cantaloupes to a distribution center in Los Lunas, New Mexico. The retailer in interstate commerce subsequently distributed the adulterated Jensen Farms cantaloupes to stores located in Albuquerque, New Mexico; Hobbs, New Mexico; Gallup, New Mexico and Cortez, Colorado thereby causing or contributing to the death of consumers V.C.; R.G; P.R.; F.W.; J.M. and J.R.

9. Beginning on or about August 1, 2011, various interstate trucking companies received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* from the Jensen Farms packing facility and transported the cantaloupes to a distribution center in East Dallas, Texas. The retailer subsequently distributed the adulterated Jensen Farms cantaloupes to stores located in Dallas, Texas thereby causing or contributing to the death of consumer M.J.

10. Beginning on or about August 2, 2011, various interstate trucking companies received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* from the Jensen Farms packing facility and transported the cantaloupes to a distribution center in Houston,

Texas. The retailer subsequently distributed the cantaloupes to stores located in Houston, Texas, Bossier City, Louisiana and Beaumont, Texas, thereby causing or contributing to the death of consumers D.F. and F.G.

11. Beginning on or about August 3, 2011, various interstate trucking companies received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* from the Jensen Farms packing facility and transported the cantaloupes to a distribution center in Hutchinson, Kansas. The retailer subsequently distributed the adulterated Jensen Farms cantaloupes to stores located in Wichita, Kansas; Omaha, Nebraska; Manhattan, Kansas and Springfield, Missouri thereby causing or contributing to the death of consumers D.B; D.H.; D.W.; W.P.; J.K. and D.Y.

12. Beginning on or about August 3, 2011, a retailer doing business in interstate commerce received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* from the Jensen Farms packing facility and transported the cantaloupes in interstate commerce to a distribution center in North Platte, Nebraska. The retailer subsequently distributed the adulterated Jensen Farms cantaloupes to a store located in Chadron, Nebraska thereby causing or contributing to the death of consumer G.D.

13. Beginning on or about August 3, 2011, a retailer doing business in interstate commerce received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* from the Jensen Farms packing facility and transported the cantaloupes to a processing facility in Denver, Colorado. The retailer subsequently distributed the adulterated Jensen Farms cantaloupes to various grocery stores in Denver and Colorado Springs, Colorado, thereby causing or contributing to the death of consumers S.J.; M.H.; and J.D.

14. Beginning on or about August 4, 2011, various interstate trucking companies received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* from the Jensen Farms packing facility and transported the cantaloupes to a distribution center in Oklahoma City, Oklahoma. The retailer subsequently distributed the adulterated Jensen Farms cantaloupes to a grocery store located in Mustang, Oklahoma thereby causing or contributing to the death of consumer W.B.

15. Beginning on or about August 10, 2011, an interstate trucking company received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* from the Jensen Farms packing facility and transported the cantaloupes to Kansas City, Missouri. The adulterated cantaloupes were subsequently delivered to a company in Kansas City, Kansas for further distribution thereby causing or contributing to the death of consumer P.S.

16. Beginning on or about August 14, 2011, an interstate trucking company received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* from the Jensen Farms packing facility and transported the cantaloupes to a company in Valparaiso, Indiana. That company subsequently distributed the adulterated cantaloupes to stores located in Elkhart, Indiana, thereby causing or contributing to the death of consumer D.D.

17. Beginning on or about August 15, 2011, various interstate trucking companies received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* from the Jensen Farms packing facility and transported the cantaloupes to a distribution center in Baton Rouge, Louisiana in a transaction brokered by another company. A retailer subsequently sold the adulterated Jensen Farms cantaloupes to a store located in Baton Rouge, Louisiana thereby causing or contributing to the death of consumer E.B.

18. Beginning on or about August 26, 2011, various interstate trucking companies received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* from the Jensen Farms packing facility and transported the cantaloupes to a company in Buffalo, New York. That company subsequently distributed the adulterated Jensen Farms cantaloupes thereby causing or contributing to the death of consumers L.L. and G.S.

19. On or about September 2, 2011, the Colorado Department of Public Health and Environment (CDPHE) notified the CDC and subsequently the U.S. Food and Drug Administration (FDA) of a significant increase from the average number of listeriosis cases reported in Colorado each month. Subsequent investigation by CDPHE determined that all patients infected with listeriosis reported eating cantaloupe prior to the onset of symptoms. The ensuing CDPHE and FDA investigation led investigators to perform an inspection of the Jensen Farms packing facility on September 10, 2011.

20. During the September 10, 2011 inspection, FDA sampled cantaloupes from cases on four pallets in the cold storage at the Jensen Farms packing facility. FDA conducted laboratory analyses, including pulsed-field gel electrophoresis (“PFGE”), on these samples. According to the CDC, PFGE is a reliable technique used by scientists to generate a DNA fingerprint for a bacterial isolate. Five of the ten cantaloupes FDA analyzed were positive for *Listeria monocytogenes*. The PFGE analysis determined that five of the ten cantaloupes analyzed from Jensen Farms matched strains of *Listeria monocytogenes* identified in all of the infected patients identified herein.

21. FDA also collected environmental swabs from various locations and surfaces throughout the Jensen Farms packing facility. FDA conducted laboratory analyses which determined that 13 of the 39 total environmental swabs were positive for outbreak strains of

*Listeria monocytogenes*. These positive swabs were taken from different locations throughout the washing and packing areas in the Jensen Farms packing facility, all of which were either food contact surfaces or areas adjacent to food contact surfaces.

22. Around September 14, 2011, the defendants attempted to voluntarily recall shipments of cantaloupes because they thought the shipments were potentially contaminated.

23. On October 18, 2011, FDA issued a warning letter to the defendants in which the FDA concluded the *“significant percentage of [environmental] swabs that tested positive for outbreak strains of Listeria monocytogenes demonstrates widespread contamination throughout your facility and indicates poor sanitary practices in the facility.”*

24. According to James R. Gorny, Ph.D., who at the time was Senior Advisor for Produce Safety, Center for Food Safety & Applied Nutrition at the FDA, Jensen Farms significantly deviated from industry standards by failing to use an anti-microbial, such as chlorine, in the packing of their cantaloupes during the summer of 2011. Dr. Gorny added that the conveyer used in the process spread contamination and essentially "inoculated" the cantaloupes with *Listeria monocytogenes*. Dr. Gorny opined that the Primus Labs subcontractor that conducted the pre-harvest inspection of Jensen Farms was seriously deficient in their inspection and findings.

25. The CDC has reported that a total of 147 people had outbreak-associated illnesses and were infected with any of the five outbreak-associated subtypes of *Listeria* tied to Jensen Farms. These persons lived in 28 states. The CDC has also reported a total of 33 deaths from outbreak-associated cases of listeriosis and one woman pregnant at the time of illness had a



miscarriage. Further, ten other deaths not attributed to listeriosis occurred among persons who had been infected with an outbreak-associated subtype.<sup>2</sup>

### **III. GOVERNMENT'S NOTICE TO THE DEFENDANTS OF RULE 404(b) EVIDENCE**

The government intends to introduce 404(b) evidence, evidence of other crimes wrongs or acts, relative to additional instances where victims were harmed by the same or similar instances of adulteration of cantaloupes by the defendants while they managed and worked at Jensen Farms in Granada, Colorado between June 2011 and September 2011, in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident. The general nature of the evidence relates to individuals who (1) died from complications of listeriosis, (2) were hospitalized or received medical treatment for listeriosis, (3) had recently consumed cantaloupes associated with Jensen Farms, and/or (4) the strain of listeriosis with which they were infected matched strains found at Jensen Farms in September 2011. As to each individual identified, the medical records are available pursuant to the Court's Protective Order, at the United States Attorney's office, and such evidence corresponds to the following events:

<b>No.</b>	<b>"ON OR ABOUT" DATE</b>	<b>Victim (Initials)</b>	<b>CONSUMER PRODUCT</b>	<b>LOCATION OF INFECTION OR INJURY</b>
1	9/3/2011	Unidentified Female	Cantaloupe	AL
2	9/10/2011	D.H.	Cantaloupe	AR
3	9/24/2011	E.G.	Cantaloupe	CA
4	10/27/2011	N.K.	Cantaloupe	CA
5	8/25/2011	Baby Girl	Cantaloupe	CA
6	8/25/2011	L.R.	Cantaloupe	CA
7	9/22/2011	B.B.	Cantaloupe	CO

<sup>2</sup> According to the Mayo Clinic, symptoms of Listeriosis may begin a few days after consumption of contaminated food, but it may take as long as two months before the first signs and symptoms of infection begin.

8	9/7/2011	R.B.	Cantaloupe	CO
9	10/26/2011	M.B.	Cantaloupe	CO
10	10/22/2011	R.D.	Cantaloupe	CO
11	8/22/2011	R.D.	Cantaloupe	CO
12	9/27/2011	N.D.	Cantaloupe	CO
13	9/10/2011	T.F.	Cantaloupe	CO
14	8/23/2011	R.G.	Cantaloupe	CO
15	8/29/2011	L.H.	Cantaloupe	CO
16	9/27/2011	B.H.	Cantaloupe	CO
17	9/22/2011	H.J.	Cantaloupe	CO
18	9/15/2011	I.K.	Cantaloupe	CO
19	9/5/2011	M.L.	Cantaloupe	CO
20	8/28/2011	I.M.	Cantaloupe	CO
21	9/10/2011	D.M.	Cantaloupe	CO
22	8/15/2011	M.M.	Cantaloupe	CO
23	8/23/2011	M.M.	Cantaloupe	CO
24	9/12/2011	D.N.	Cantaloupe	CO
25	8/31/2011	C.P.	Cantaloupe	CO
26	10/12/2011	M.S.	Cantaloupe	CO
27	8/24/2011	E.S.	Cantaloupe	CO
28	8/23/2011	H.S.	Cantaloupe	CO
29	9/8/2011	M.T.	Cantaloupe	CO
30	8/23/2011	H.T.	Cantaloupe	CO
31	9/4/2011	F.T.	Cantaloupe	CO
32	9/15/2011	R.W.	Cantaloupe	CO
33	8/26/2011	J.W.	Cantaloupe	CO
34	9/14/2011	M.W.	Cantaloupe	CO
35	9/25/2011	K.R.	Cantaloupe	IA
36	9/10/2011	P.A.	Cantaloupe	ID
37	9/24/2011	C.L.	Cantaloupe	ID
38	10/18/2011	J.R.	Cantaloupe	IL
39	9/7/2011	D.S.	Cantaloupe	IL
40	9/24/2011	D.S.	Cantaloupe	IL
41	9/24/2011	M.V.	Cantaloupe	IL
42	8/21/2011	L.B.	Cantaloupe	IN
43	9/7/2011	D.D.	Cantaloupe	IN
44	10/2/2011	Baby Girl	Cantaloupe	IN
45	7/31/2011	J.H.	Cantaloupe	KS
46	9/1/2011	W.M.	Cantaloupe	KS

47	8/28/2011	H.M.	Cantaloupe	KS
48	8/14/2011	P.O.	Cantaloupe	KS
49	9/9/2011	C.R.	Cantaloupe	KS
50	8/31/2011	T.T.	Cantaloupe	KS
51	9/24/2011	A.V.	Cantaloupe	KS
52	9/27/2011	G.W.	Cantaloupe	KS
53	9/14/2011	F.G.	Cantaloupe	LA
54	8/29/2011	C.W.	Cantaloupe	MD
55	9/26/2011	B.C.	Cantaloupe	MO
56	9/17/2011	R.D.	Cantaloupe	MO
57	10/4/2011	D.E.	Cantaloupe	MO
58	8/28/2011	C.H.	Cantaloupe	MO
59	9/13/2011	P.S.	Cantaloupe	MO
60	8/25/2011	H.F.	Cantaloupe	MT
61	9/2/2011	A.K.	Cantaloupe	ND
62	10/14/2011	Unidentified Female	Cantaloupe	ND
63	8/15/2011	G.E.	Cantaloupe	NE
64	9/12/2011	D.H.	Cantaloupe	NE
65	8/29/2011	K.M.	Cantaloupe	NE
66	9/10/2011	A.R.	Cantaloupe	NE
67	9/28/2011	K.B.	Cantaloupe	NM
68	9/5/2011	E.E.	Cantaloupe	NM
69	9/7/2011	O.G.	Cantaloupe	NM
70	8/25/2011	L.M.	Cantaloupe	NM
71	9/7/2011	E.M.	Cantaloupe	NM
72	10/12/2011	C.R.	Cantaloupe	NM
73	8/20/2011	G.R.	Cantaloupe	NM
74	9/3/2011	H.S.	Cantaloupe	NM
75	8/22/2011	M.S.	Cantaloupe	NM
76	8/23/2011	N.V.	Cantaloupe	NM
77	10/11/2011	F.K.	Cantaloupe	NV
78	9/4/2011	Unidentified Male	Cantaloupe	OK
79	9/12/2011	R.C.	Cantaloupe	OK
80	10/27/2011	L.C.	Cantaloupe	OK
81	8/30/2011	A.F.	Cantaloupe	OK
82	8/1/2011	C.F.	Cantaloupe	OK
83	9/10/2011	D.H.	Cantaloupe	OK
84	9/8/2011	R.B.	Cantaloupe	OK
85	9/15/2011	R.J.	Cantaloupe	OK

86	9/1/2011	A.M.	Cantaloupe	OK
87	8/30/2011	R.R.	Cantaloupe	OK
88	9/4/2011	W.T.	Cantaloupe	OK
89	9/14/2011	N.L.	Cantaloupe	OR
90	9/8/2011	Unidentified Female	Cantaloupe	PA
91	9/13/2011	C.W.	Cantaloupe	SD
92	9/5/2011	W.B.	Cantaloupe	TX
93	8/28/2011	G.C.	Cantaloupe	TX
94	8/20/2011	M.C.	Cantaloupe	TX
95	9/12/2011	R.C.	Cantaloupe	TX
96	8/18/2011	D.F.	Cantaloupe	TX
97	8/20/2011	J.G.	Cantaloupe	TX
98	8/29/2011	E.G.	Cantaloupe	TX
99	9/13/2011	E.G.	Cantaloupe	TX
100	9/13/2011	D.I.	Cantaloupe	TX
101	8/30/2011	B.L.	Cantaloupe	TX
102	8/26/2011	C.L.	Cantaloupe	TX
103	9/6/2011	E.M.	Cantaloupe	TX
104	9/2/2011	D.M.	Cantaloupe	TX
105	9/14/2011	M.N.	Cantaloupe	TX
106	9/6/2011	H.P.	Cantaloupe	TX
107	9/28/2011	M.S.	Cantaloupe	TX
108	9/1/2011	M.T.	Cantaloupe	TX
109	8/17/2011	M.V.	Cantaloupe	TX
110	10/21/2011	D.M.	Cantaloupe	UT
111	8/24/2011	K.S.	Cantaloupe	VA
112	8/23/2011	G.H.	Cantaloupe	WI
113	8/10/2011	Unidentified Female	Cantaloupe	WI
114	8/1/2011	E.S.	Cantaloupe	WV
115	8/31/2011	G.M.	Cantaloupe	WY
116	9/4/2011	G.S.	Cantaloupe	WY

Because not all testing has been completed, and not all the potential victims have been identified, the government reserves the right to supplement this notice prior to trial.

WHEREFORE, the government gives notice of intent to introduce the above “bad acts” in its case in chief for the purposes specifically stated.

Respectfully submitted this 24th day of September, 2013.

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