

DISTRICT COURT
PROWERS COUNTY, COLORADO

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301 S. Main Street, Suite 300
Lamar, Colorado 81052

JENSEN FARMS, a Colorado partnership,

Plaintiff,

v.

PRIMUS GROUP, INC., a California
corporation d/b/a PRIMUSLABS,

Defendant.

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Attorney for Plaintiff:

Forrest W. Lewis, #5817
FORREST W. LEWIS, P.C.
1600 Broadway, Suite 1525
Denver, Colorado 80202
Telephone: (303) 830-2190
Email: flewispc@aol.com

Case No.

Division

COMPLAINT

Plaintiff, Jensen Farms, by and through its counsel, hereby asserts the following against Primus Group, Inc., d/b/a PrimusLabs.

GENERAL ALLEGATIONS

1. Jensen Farms (“Jensen”) is a Colorado partnership with its principal place of business in Prowers County, Colorado.
2. Primus Group, Inc., is a California corporation doing business as PrimusLabs (“Primus”). At all times relevant to Jensen’s claims Primus was conducting business in Colorado.
3. The acts and omissions of Primus which support Jensen’s claims occurred in Prowers County, Colorado.

4. Primus represents itself as “a global leader in food safety.” It claims to provide “internationally recognized audits” and “expert education and training programs.” Primus claims to “develop customized programs based on [the customer’s] unique demands and requirements.”

5. Primus held itself out to be an expert in the field of food safety, including the analysis and assessment of food safety procedures and other applicable standards of care concerning the production of agricultural products.

6. Frontera Produce, Ltd. (“Frontera”), a distributor of Jensen cantaloupes, required that the Jensen cantaloupes Jensen sold to Frontera be “Primus Certified”.

7. Prior to the subject *Listeria* outbreak, Jensen contracted with Primus to conduct an audit of Jensen’s ranchlands and packing house. The purpose of the audit performed by BFS, on behalf of Primus, was to ensure that the cantaloupes produced by Jensen were of high quality, fit for human consumption, free from contaminants, and in compliance with the appropriate standards of care concerning the production of cantaloupes, including, but not limited to, good agricultural and manufacturing practices, industry standards, and relevant FDA industry guidance. The purpose of the audit performed by BFS, on behalf of Primus, was also to ensure that the cantaloupes produced by Jensen were in compliance with the requirements of “Primus Certified” products.

8. Primus hired Bio Food Safety (“BFS”), an auditing company based out of Texas, to conduct the audit of Jensen’s ranch land and packing facility. BFS at all times relevant hereto was acting as a subcontractor and agent of Primus, and on behalf of Primus. Primus knew, or should have known, that BFS was an improper entity for that work, work which involved the risk of harm to others.

9. On or about July 25, 2011, James Dilorio, in his capacity as an auditor and employee of BFS, and acting as agent for Primus, conducted an audit of Jensen’s ranch land and packing facility. Mr. Dilorio, acting on behalf of Primus, gave Jensen a score of 96% and a “superior” rating at the conclusion of the audit.

10. Primus, through BFS, had audited Jensen’s cantaloupe operations in 2010. During that audit, the president of BFS expressed concerns that the hydrocooler used in processing was a “hot spot” for contamination because of its use of recirculating chlorinated water.

11. Prior to the 2011 audit, Jensen installed new processing equipment which washed the cantaloupes with city water and a system of brushes. The hydrocooler was taken out of the system. The only chlorination was in the city water used to wash the cantaloupes.

12. The new system was in place during the 2011 audit and Primus’ auditor observed it. Since the 2011 auditor was not the 2010 auditor, Eric Jensen specifically described the changes in the system from the prior audit, including the removal of the hydrocooler with its

recirculating chlorinated water. The 2011 auditor noted the changes in his report.

13. The 2011 auditor did not question the removal of the hydrocooler, nor the new washer/dryer system. He did not advise Jensen that their new processing system was below industry standards and practice, or deficient in any way.

14. The 2011 auditor did not warn Jensen that the new system created a hazard or a risk of contamination. He did not discuss FDA guidelines with Jensen.

15. The 2011 auditor, Mr. Dilorio, failed to observe, or properly downscore or consider, multiple conditions or practices that were in violation of Primus's own audit standards applicable to cantaloupe packing houses, industry standards, and relevant FDA industry guidance.

16. Mr. Delorio, by improperly giving the Jensen facilities and procedures a "superior" rating in his audit, erroneously represented to Jensen that his auditing services were provided with professional expertise and knowledge in the field of food safety, including with the proper analysis and assessment of food safety procedures and other applicable standards of care concerning the production of agricultural products.

17. Mr. Delorio, by improperly giving the Jensen facilities and procedures a "superior" rating in his audit, also erroneously represented to Jensen and to others that the Jensen cantaloupes processed therein met the standards required to be "Primus Certified".

18. Mr. Delorio, by improperly giving the Jensen facilities and procedures a "superior" rating in his audit, negligently gave Jensen false information, on which Jensen reasonably relied in Jensen's evaluation of the safety and quality of its facilities and procedures and cantaloupes.

19. Jensen reasonably relied on the "superior" rating of the BFS audit as regards the quality and safety of its facilities and procedures and cantaloupes. Following the July 25, 2011 audit, and in reliance upon the positive findings of that audit, Jensen sold cantaloupe to Frontera, which was distributed and sold by Frontera as "Primus Certified".

20. Had the Jensen packing house failed the July 25, 2011 audit, and had its cantaloupes not been "Primus Certified", those cantaloupes would not have been sold by Jensen and distributed by Frontera as "Primus Certified".

21. In September 2011, government agencies began investigating illnesses and deaths of many people in several states who had eaten cantaloupes possibly contaminated with Listeria.

22. On or about September 14, 2011, Jensen began efforts to voluntarily recall its product. Jensen had no evidence or reason to believe it had shipped contaminated fruit at that time, but chose to act as cautiously and responsibly as possible.

23. After weeks of testing and investigation, government agencies concluded that contaminated cantaloupes had been shipped from Jensen. Jensen received an FDA warning letter dated October 18, 2011, in which test results were conveyed to them confirming *Listeria* contamination in the cantaloupe processing system.

24. The FDA identified potential causes of the contamination as the design of the conveyer system and the removal of the hydrocooler, conditions observed by Primus during its audit and passed as safe.

25. According to James R. Gorny, Ph.D., at the time a Senior Advisor for Produce Safety, Center for Food Safety & Applied Nutrition at the FDA, Jensen 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 that the defendants used to process and pack the cantaloupes 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, and provided a "superior" score of 96% for the audit upon which Jensen Farms relied, was seriously deficient in its inspection and findings.

FIRST CLAIM FOR RELIEF - Negligence

26. Plaintiff hereby incorporates by reference all of the allegations contained in Paragraphs 1 through 25 above, as more fully set forth herein.

27. Primus, as principal in the agency relationship between itself and BFS, is bound by, and liable for, the acts and omissions of BFS and its employees.

28. Primus owed a duty to Jensen to act with reasonable care in inspecting, evaluating, and scoring Jensen with regard to the audit conducted.

29. Primus owed a duty to Jensen to advise Jensen of any conditions which it felt were not in compliance with industry standards.

30. Primus owed a duty to Jensen to advise Jensen of any conditions which might create a risk of adulterated food being shipped by Jensen.

31. Primus owed a duty to Jensen to evaluate and advise Jensen regarding any changes in the processing system from the prior (2010) audit conducted by Jensen.

32. The audit conducted by Primus on July 25, 2011 through BFS was not done with reasonable care, and constituted a breach of the duty that Primus owed to Jensen. Primus' negligence included, without limitation, the following:

- a. Failure to properly score the audit to alert Jensen to deficiencies which could have been corrected;
- b. Failing to provide a reasonable audit form and scoring system which considered industry standards and best practices even where no specific FDA requirement applied;
- c. Failing to discuss possible hazards from the new system and the removal of the chlorinated wash;
- d. Failing to identify cleaning issues with the new conveyer and suggest procedures tailored to that specific equipment; and
- e. Failing to adequately train and supervise the person conducting the audit.

33. The negligence of Primus caused damages and losses to Jensen.

34. The negligence of Primus caused Jensen to close all operations and lose a substantial amount of income from the 2011 season.

35. Jensen's relationship with its buyers and its reputation in the business were irreparably destroyed. Jensen, a fourth generation family farm, is no longer a viable entity.

36. Jensen was the subject of massive civil litigation, incurring costs and attorney fees. Jensen may be subject to future litigation and judgments.

37. Jensen employees, Eric and Ryan Jensen, were charged with federal criminal offenses.

38. Jensen suffered loss of income and revenue, past and future; incurred significant attorney fees and court costs; and is subject to future civil judgments and possible restitution orders in the criminal matter against Eric and Ryan Jensen.

SECOND CLAIM FOR RELIEF – Breach of Contract

39. Plaintiff hereby incorporates by reference all of the allegations contained in Paragraphs 1 through 38 above, as more fully set forth herein.

40. Primus, as principal in the agency relationship between itself and BFS, is bound by, and liable for, the acts and omissions of BFS and its employees.

41. Pursuant to its contract with Jensen, Primus owed a duty to Jensen to act with reasonable care in inspecting, evaluating, and scoring Jensen with regard to the audit conducted.

42. Pursuant to its contract with Jensen, Primus owed a duty to Jensen to advise Jensen of any conditions which it felt were not in compliance with industry standards.

43. Pursuant to its contract with Jensen Primus owed a duty to Jensen to advise Jensen of any conditions which might create a risk of adulterated food being shipped by Jensen.

44. Pursuant to its contract with Jensen Primus owed a duty to Jensen to evaluate and advise Jensen regarding any changes in the processing system from the prior (2010) audit conducted by Jensen.

45. The audit conducted by Primus on July 25, 2011 through BFS was not done with reasonable care, and constituted a breach of the contractual duties that Primus owed to Jensen. Primus' breach of its contractual duties to Jensen included, without limitation, the following:

- a. Failure to properly score the audit to alert Jensen to deficiencies which could have been corrected;
- b. Failing to provide a reasonable audit form and scoring system which considered industry standards and best practices even where no specific FDA requirement applied;
- c. Failing to discuss possible hazards from the new system and the removal of the chlorinated wash;
- d. Failing to identify cleaning issues with the new conveyer and suggest procedures tailored to that specific equipment; and
- e. Failing to adequately train and supervise the person conducting the audit.

46. The breach by Primus of its contractual duties to Jensen caused damages and losses to Jensen.

47. The breach by Primus of its contractual duties to Jensen caused Jensen to close all operations and lose a substantial amount of income from the 2011 season.

48. Due to the breach by Primus of its contractual duties to Jensen, Jensen's relationship with its buyers and its reputation in the business were irreparably destroyed. Jensen, a fourth generation family farm, is no longer a viable entity.

49. Due to the breach by Primus of its contractual duties to Jensen, Jensen was the subject of massive civil litigation, incurring costs and attorney fees. Jensen may be subject to future litigation and judgments.

50. Due to the breach by Primus of its contractual duties to Jensen, Jensen employees, Eric and Ryan Jensen, were charged with federal criminal offenses.

51. Due to the breach by Primus of its contractual duties to Jensen, Jensen suffered loss of income and revenue, past and future; incurred significant attorney fees and court costs; and is subject to future civil judgments and possible restitution orders in the criminal matter against Eric and Ryan Jensen.

THIRD CLAIM FOR RELIEF – Negligent Hire

52. Plaintiff hereby incorporates by reference all of the allegations contained in Paragraphs 1 through 51 above, as more fully set forth herein.

53. Pursuant to its contract with Jensen, Primus owed a duty to Jensen to act with reasonable care in inspecting, evaluating, and scoring Jensen with regard to the audit conducted.

54. Primus was negligent in its selection, approval, and monitoring of BFS as its agent for the Jensen July 25, 2011 audit, work that if performed improperly created a risk of adulterated food being shipped by Jensen and consequent harm to others.

55. BFS, acting as Primus' agent, was negligent in its selection, approval, and monitoring of Mr. Delorio as its agent for the Jensen July 25, 2011 audit, work that if performed improperly created a risk of adulterated food being shipped by Jensen and consequent harm to others.

56. The audit conducted by Primus on July 25, 2011, through BFS and Mr. Delorio, was not done with reasonable care, and constituted a breach of the duty that Primus owed to Jensen to ensure that BFS' work, that if performed improperly created a risk of adulterated food being shipped by Jensen and consequent harm to others, be performed with reasonable care.

57. The breach by Primus of its duties to Jensen by its negligent hire of BFS caused damages and losses to Jensen, as described above.

FOURTH CLAIM FOR RELIEF – Negligent Misrepresentation

58. Plaintiff hereby incorporates by reference all of the allegations contained in Paragraphs 1 through 57 above, as more fully set forth herein.

59. The audit conducted by Primus on July 25, 2011 through BFS was not done with reasonable care, and constituted a breach of the duties that Primus owed to Jensen. Primus' breach of its duties to Jensen included its negligent giving of false information to Jensen. By providing that false information to Jensen, Primus should have expected to create a risk of adulterated food being shipped by Jensen and consequent harm to others.

60. Jensen reasonably relied on Primus' false information in Jensen's evaluation of the safety and quality of its facilities and procedures and cantaloupes.

61. Following the July 25, 2011 audit, and Jensen's reliance upon the false information supplied by Primus, Jensen sold cantaloupe to Frontera, which was distributed and sold by Frontera as "Primus Certified". Had the Jensen packing house failed the July 25, 2011 audit, and had those cantaloupes not been "Primus Certified", those cantaloupes would not have been sold by Jensen and distributed by Frontera.

62. The breach by Primus of its duties to Jensen by its negligent giving of false information to Jensen caused adulterated food to be shipped by Jensen and consequent harm to others, causing damages and losses to Jensen, as described above.

FIFTH CLAIM FOR RELIEF – Unfair and Deceptive Trade Practices

63. Plaintiff hereby incorporates by reference all of the allegations contained in Paragraphs 1 through 62 above, as more fully set forth herein.

64. At all times material hereto, Primus was a "person" as defined at Subsection 6-1-105(1) of the Colorado Consumer Protection Act ("Act").

65. At all times material hereto, Jensen was an actual consumer of Primus' services, and Jensen suffered damages as a result of the deceptive trade practices of Primus alleged herein.

66. The audit conducted by Primus on July 25, 2011 through BFS was not done with reasonable care, and constituted a breach of the duties that Primus owed to Jensen. Primus' breach of its duties to Jensen included the erroneous representation to Jensen, by improperly giving the Jensen facilities and procedures a "superior" rating in the audit, that its auditing services were provided with professional expertise and knowledge in the field of food safety, including the proper analysis and assessment of food safety procedures and other applicable standards of care concerning the production of agricultural products.

67. The audit conducted by Primus on July 25, 2011 through BFS was not done with reasonable care, and constituted a breach of the duties that Primus owed to Jensen. Primus' breach of its duties to Jensen included the erroneous representation to Jensen and others, by improperly giving the Jensen facilities and procedures a "superior" rating in the audit that the Jensen cantaloupes processed therein met the standards required to be "Primus Certified".

68. Pursuant to Subsection 6-1-105(3) of the Act, the deceptive trade practices complained of herein are in addition to, and do not limit, the types of Jensen's other claims actionable at common law or under Colorado statutes.

69. The deceptive trade practices complained of herein directly involved the general public, and significantly impacted the public, by creating a risk of adulterated food being shipped by Jensen, and by causing consequent harm to members of the public.

70. Primus acquired substantial monies as a result of engaging in the above described deceptive trade practices.

71. As a direct and proximate result of the above described deceptive trade practices, Jensen has suffered, and will continue to, suffer injuries, damages, expenses, and losses, as described above, which will be proven at trial.

72. Pursuant to Section 6-11-113, Jensen is entitled to recover all actual damages, and related attorney fees.

73. Pursuant to Section 6-11-113, Jensen is also entitled to recover an amount equal to three times the amount of its actual damages sustained to redress Primus' bad faith conduct, as defined by the Act to include fraudulent, willful, knowing, or intentional conduct that caused the damages as complained of herein.

DAMAGES

74. Jensen hereby incorporates paragraphs 1 through 73 by this reference as if each paragraph was set forth herein in its entirety.

75. Jensen has sustained significant damages, as described above, as the direct and proximate result of the acts and omissions of the Defendant, which damages shall be fully proven at the time of trial.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays:

A. That the Court award Jensen judgment against the Defendant in such sums as shall be determined to fully and fairly compensate Jensen for all damages incurred, or to be incurred, by Jensen as the direct and proximate result of the acts and omissions of the Defendant;

B. That the Court award Jensen its costs, including experts fees, and reasonable attorneys' fees incurred, and prejudgment interest at the statutory rate;

C. That the Court award Jensen its treble damages; and

D. That the Court award Jensen such other and further relief as it deems necessary and proper in the circumstances.

PLAINTIFF REQUESTS A JURY TRIAL OF SIX

DATED: The 15th day of October, 2013.

Plaintiff's Address:

Jensen Farms
28948 County Road 30.5
Holly, Colorado 81047

Respectfully submitted,

FORREST W. LEWIS, P.C.

***The original signature of Forrest W. Lewis is
on file at the law office of Forrest W. Lewis, P.C.***
Forrest W. Lewis, #5817