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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

JEFFREY VERNON MERKEY and
MARGIT S. MULLER MERKEY,
individually and as the parent and
legal guardian of ALEXEJ MARTIN
MERKEY, a minor,

Plaintiffs,

vs.

DELTA AIRLINES, INC. A
Delaware Corporation; NATURAL
SELECTION FOODS, LLC, a
California corporation; and
NATURAL SELECTION FOODS
MANUFACTURING, LLC, a
California corporation,

NSF Defendants.

**NSF DEFENDANTS NATUAL
SELECTION FOODS, LLC AND
NATURAL SELECTION FOODS
MANUFACTURING, LLC'S
ANSWER AND AFFIRMATIVE
DEFENSES TO FIRST
AMENDED COMPLAINT**

Case No. 2:06CV00839

Judge Dale A. Kimball

Defendants, Natural Selection Foods, LLC and Natural Selection Foods Manufacturing, LLC (collectively, "NFS Defendants") answer to plaintiffs' Complaint on file herein and as to each numbered paragraph admit, deny and allege as follows:

I. PARTIES

1.1 In answer to paragraph 1.1, NSF Defendants have no information or belief sufficient to enable them to answer said allegation, as only plaintiffs possess information as to their purported residence, and on these grounds, NSF Defendants deny each and all of the allegations therein.

1.2 In answer to paragraph 1.2, Defendant Natural Selection Foods Manufacturing, LLC admits it is a California corporation with its principal place of business in the State of California. As to the remaining allegations in paragraph 1.3, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the remaining allegations therein.

1.3 In answer to paragraph 1.3, Defendant Natural Selection Foods, LLC admits that it is a California corporation with its principal place of business in the State of California. As to the remaining allegations in paragraph 1.2, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the remaining allegations therein.

1.4 In answer to paragraph 1.4, NSF Defendants have no information or belief sufficient to enable them to answer said allegation and on that basis deny each and all of the allegations therein.

II. JURISDICTION AND VENUE

2.1 In answer to paragraph 2.1, NSF Defendants have no information or belief sufficient to enable them to answer allegations of amount in controversy, as only plaintiffs possess information as to the purported amount in controversy in their suit, and on these grounds,

NSF Defendants deny each of the allegations relating to the amount in controversy. In answer to the remaining allegations of paragraph 2.1, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the remaining allegations therein.

2.2 In answer to paragraph 2.2, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

III. GENERAL ALLEGATIONS

The Outbreak

3.1 In answer to paragraph 3.1, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.2 In answer to paragraph 3.2, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.3 In answer to paragraph 3.3, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.4 In answer to paragraph 3.4, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

Hemolytic Uremic Syndrome and E. Coli

3.5 In answer to paragraph 3.5, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.6 In answer to paragraph 3.6, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.7 In answer to paragraph 3.7, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.8 In answer to paragraph 3.8, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.9 In answer to paragraph 3.9, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.10 In answer to paragraph 3.10, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.11 In answer to paragraph 3.11, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.12 In answer to paragraph 3.12, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.13 In answer to paragraph 3.13, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

E. Coli 0157:H7 Serotype and Shiga-Toxin Mode of Action

3.14 In answer to paragraph 3.14, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.15 In answer to paragraph 3.15, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.16 In answer to paragraph 3.16, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.17 In answer to paragraph 3.17, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.18 In answer to paragraph 3.18, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.19 In answer to paragraph 3.19, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.20 In answer to paragraph 3.20, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.21 In answer to paragraph 3.21, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.22 In answer to paragraph 3.22, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.23 In answer to paragraph 3.23, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.24 In answer to paragraph 3.24, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.25 In answer to paragraph 3.25, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.26 In answer to paragraph 3.26, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.27 In answer to paragraph 3.27, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.28 In answer to paragraph 3.28, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

Alexei Martin Merkey's Injuries

3.29 In answer to paragraph 3.29, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.30 In answer to paragraph 3.30, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.31 In answer to paragraph 3.31, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.32 In answer to paragraph 3.32, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.33 In answer to paragraph 3.33, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.34 In answer to paragraph 3.34, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.35 In answer to paragraph 3.35, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.36 In answer to paragraph 3.36, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.37 In answer to paragraph 3.37, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.38 In answer to paragraph 3.38, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.39 In answer to paragraph 3.39, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

3.40 In answer to paragraph 3.40, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

IV. CAUSES OF ACTION

Strict Liability—Count I

4.1 In answer to paragraph 4.1, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

4.2 In answer to paragraph 4.2, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

4.3 In answer to paragraph 4.3, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

4.4 In answer to paragraph 4.4, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

4.5 In answer to paragraph 4.5, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

4.6 In answer to paragraph 4.6, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

Breach of Warranty—Count II

4.7 In answer to paragraph 4.7, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

4.8 In answer to paragraph 4.8, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

4.9 In answer to paragraph 4.9, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

4.10 In answer to paragraph 4.10, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

4.11 In answer to paragraph 4.11, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

Negligence—Count III

4.12 In answer to paragraph 4.12, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

4.13 In answer to paragraph 4.13, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

4.14 In answer to paragraph 4.14, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

4.15 In answer to paragraph 4.15, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

4.16 In answer to paragraph 4.16, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

Negligence Per Se—Count IV

4.17 In answer to paragraph 4.17, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

4.18 In answer to paragraph 4.18, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

4.19 In answer to paragraph 4.19, NSF Defendants do not have sufficient information or belief to either admit or deny the allegations and on that basis, deny each and all of the allegations therein.

Intentional Infliction of Emotional Distress—Count V

4.20 In answer to paragraph 4.20, NSF Defendants deny each and all of the allegations therein.

4.21 In answer to paragraph 4.20, NSF Defendants deny each and all of the allegations therein.

4.22 In answer to paragraph 4.20, NSF Defendants deny each and all of the allegations therein.

DAMAGES

NSF Defendants do not have sufficient information or belief to either admit or deny the damages allegations and on that basis, deny each and all of the allegations therein.

AFFIRMATIVE DEFENSES

GENERAL DENIAL

To the extent not already specifically addressed above, NSF Defendants deny each and every allegation directed toward them, demanding strict proof thereof. As and for affirmative defenses and pursuant to the Rules of Civil Procedure which obligate the NSF Defendants to preserve affirmative defenses, NSF Defendants allege, upon information and belief as follows:

FIRST AFFIRMATIVE DEFENSE

It was the actions of others than these NSF Defendants that solely caused, or substantially caused, plaintiffs' injuries.

SECOND AFFIRMATIVE DEFENSE

The product complained of was manufactured in accordance with generally recognized, and prevailing, standards at the time of its manufacture.

THIRD AFFIRMATIVE DEFENSE

The product complained of was in a reasonably safe condition when it left the possession and control of Defendant.

FOURTH AFFIRMATIVE DEFENSE

At the time of manufacture of the product complained of there was no alternative production practice available that would not have compromised the product's usefulness.

FIFTH AFFIRMATIVE DEFENSE

The injury complained of is the result of an inherent characteristic of packaged and processed food items and cannot be eliminated without compromising its usefulness thus precluding liability.

SIXTH AFFIRMATIVE DEFENSE

Any claim of design defect by plaintiffs has been federally preempted by the Consumer Product Safety Act, 15 U.S.C. § 2705 *et seq.*

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' complaint fails to state in whole or in part a claim upon which relief may be granted against NSF Defendants.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' injuries or damages, if any, were caused in whole or in part by the acts or omissions of others over whom NSF Defendants had no control or right of control, whether individual, corporate, or otherwise, whether named or unnamed in the complaint, and for whose conduct NSF Defendants are not responsible.

NINTH AFFIRMATIVE DEFENSE

Plaintiffs' injuries or damages, if any, were caused by intervening or superseding acts, events, factors, occurrences, or pre-existing conditions or exposures, which were in no way caused by NSF Defendants and for which NSF Defendants are not liable.

TENTH AFFIRMATIVE DEFENSE

At all times material hereto, NSF Defendants' products and practices conformed to the state of the art and complied with all governmental and industry regulations and standards.

ELEVENTH AFFIRMATIVE DEFENSE

NSF Defendants made no warranties, expressed or implied, that were relied upon by plaintiffs.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiffs' warranty-based claims against NSF Defendants are barred by plaintiffs' failure to give proper or timely notice.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims against NSF Defendants are barred or must be reduced to the extent plaintiffs failed to mitigate any alleged damages or by the doctrine of avoidable consequences.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiffs have unreasonably delayed the commencement of this action to the prejudice of Answering NSF Defendants. Therefore, the complaint, and each and every cause of action alleged therein is barred, in whole or in part, by the doctrine of laches.

FIFTEENTH AFFIRMATIVE DEFENSE

NSF Defendants allege that plaintiffs have waived and are estopped and barred from alleging the matters set forth in the complaint.

SIXTEENTH AFFIRMATIVE DEFENSE

NSF Defendants allege that any alleged representations made by NSF Defendants which formed the basis of plaintiffs' complaint herein, were true and honest at the time made. Said representations were made, if any there were, without knowledge of any falsity, and were not made with the intent to deceive the plaintiffs; plaintiffs are therefore barred from recovery herein.

SEVENTEENTH AFFIRMATIVE DEFENSE

NSF Defendants allege that plaintiffs have failed to join necessary parties herein, in being any other persons or entities liable or responsible for the matters alleged in the complaint and any other persons or entities liable or responsible as assignees or subrogees.

EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' complaint is barred by the doctrines of contributory negligence and/or assumption of the risk.

NINETEENTH AFFIRMATIVE DEFENSE

NSF Defendants owed no duty to plaintiffs.

TWENTIETH AFFIRMATIVE DEFENSE

NSF Defendants had no duty to warn about possible dangers, if any, in using its products which were not known at the time of manufacture and distribution for sale of the products.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Plaintiffs' recovery, if any, from NSF Defendants should be reduced by the comparative negligence, fault, responsibility, or causation attributable to each party, person or entity in accordance with Utah Code Annotated § 78-27-37-3.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Plaintiffs' alleged damages were the result of pre-existing conditions which were unrelated to any conduct of, or product placed in the stream of commerce by NSF Defendants.

TWENTY-THIRD AFFIRMATIVE DEFENSE

Plaintiffs' alleged damages were the result of an idiosyncratic reaction which NSF Defendants could not reasonably foresee.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred, in whole or in part, because NSF Defendants complied with all applicable statutes and with the requirements and regulations of the Food and Drug Administration.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' claims against NSF Defendants are barred under Section 4 *et seq.* of the *Restatements (Third) of Torts: Products Liability*.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

Plaintiffs' breach of warranty claims are barred by the Uniform Commercial Code as enacted in Utah.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

NSF Defendants expressly deny that any third party engaging in the acts alleged by plaintiffs was acting as NSF Defendants' agent or servant, at the instruction of NSF Defendants or within the NSF Defendants' control. Therefore, plaintiffs' claims, to the extent they seek recovery for the acts or omissions of such third parties, are barred in whole or in part as a matter of law.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' product liability claims are barred by the Utah Products Liability Act, Utah Code Annotated § 78-15-1 *et. seq.*

TWENTY-NINTH AFFIRMATIVE DEFENSE

NSF Defendants hereby give notice that they intend to rely upon any other defenses that may become available or apparent during the proceedings in this matter and hereby reserves their right to amend its Answer and to assert any such defenses.

JURY DEMAND

NSF Defendants, by and through counsel, herein demand a trial by jury of the issues triable of and by a jury in this action.

WHEREFORE, having fully answered, NSF Defendants Natural Selection Foods, LLC, and Natural Selection Foods Manufacturing, LLC pray for judgment as follows:

1. That plaintiffs' Complaint be dismissed with prejudice;
2. That plaintiffs take nothing by their Complaint;
3. For reasonable attorneys' fees and costs of suit incurred herein; and
4. For such other and further relief as the court deems just and proper.

RESPECTFULLY SUBMITTED this 27th day of March, 2007.

SNOW, CHRISTENSEN & MARTINEAU

/s/ Camille N. Johnson

Camille N. Johnson

Derek J. Williams

Attorneys for NSF Defendants

10 Exchange Place, Eleventh Floor

Post Office Box 45000

Salt Lake City, Utah 84145

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **ANSWER AND AFFIRMATIVE DEFENSES TO FIRST AMENDED COMPLAINT** was served electronically and by mail, first-class postage prepaid, on the 27th day of March, 2007, addressed to the following:

Randall K. Spencer
FILLMORE SPENCER LLC
3301 North university Ave.
Provo, UT 84604

Attorneys for Plaintiff

/s/ Camille N. Johnson