IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Number 13-mj-01138-MEH

UNITED STATES OF AMERICA

Plaintiff

v.

1. **ERIC JENSEN,**
2. RYAN JENSEN,

Defendants

RULE 11(c)(1)(A) and (B) PLEA AGREEMENT AND STATEMENT OF FACTS RELEVANT TO SENTENCING

The United States of America, by and through John F. Walsh, United States Attorney for the District of Colorado, and Jaime A. Pena, Assistant United States Attorney, and the defendant, Eric Jensen, personally and by counsel, Forrest Lewis, submit the following Plea Agreement and Statement of Facts Relevant to Sentencing pursuant to D.C.COLO.LCrR 11.1 and Fed. R. Crim. P. 11(c)(1)(A) and (B).

I. PLEA AGREEMENT

Defendant Eric Jensen agrees to plead guilty to Counts One through Six of the Information charging violations of Title 21, United States Code, Sections 331(a) and 333(a)(1) (Introduction of an Adulterated Food into Interstate Commerce); and Title 18, United States Code, Section 2 (Aiding and Abetting).

Court's Exhibit 1

(1) General Provisions

Should the defendant meet his obligations as set forth in this agreement, including (1) providing truthful testimony whenever requested by the Government, (2) participating in "victim meetings" in order to assist the victims in understanding the impact of his criminal conduct on them whenever requested by the Government, (3) assisting the Government and victims in determining the exact loss amounts attributable to each victim, and (4) assisting the Government in the recovery of assets subject to victim restitution, the Government will agree not to seek additional charges against this defendant. The Government, in its sole discretion, **may** make a sentencing recommendation at the time of sentencing, within the law and the factors outlined in 18 U.S.C. § 3553(a), to assist the Court in determining a just sentence.

(2) Appellate Waiver

The defendant is aware that 18 U.S.C. § 3742 affords a defendant the right to appeal the sentence imposed. Understanding this and in exchange for the concessions made by the Government in this agreement, the defendant knowingly and voluntarily waives the right to appeal any matter in connection with this prosecution, conviction, or sentence unless it meets one of the following three criteria: (1) the sentence imposed is above the maximum penalty provided in the statute of conviction, (2) the Court, after determining the otherwise applicable sentencing guideline range, either departs or varies upwardly, or (3) the Court determines that the offense level is greater than 9 and imposes a sentence based upon that offense level determination. Except as provided above, the defendant also knowingly and voluntarily waives the right to appeal the manner in which the sentence is determined on grounds set forth in 18 U.S.C. § 3742 or any ground whatever. The defendant also knowingly and voluntarily waives his right to challenge this prosecution, conviction, or sentence and/or the manner in which it was determined

in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255. This waiver provision, however, will not prevent the defendant from seeking relief otherwise available if: (1) there is an explicitly retroactive change in the applicable guidelines or sentencing statute, (2) there is a claim that the defendant was denied the effective assistance of counsel, or (3) there is a claim of prosecutorial misconduct. Additionally, if the Government appeals the sentence imposed by the Court, the defendant is released from this waiver provision.

II. ELEMENTS OF THE OFFENSE

The elements of Counts One through Six are as follows:

A. Introduction of an Adulterated Food into Interstate Commerce (21 U.S.C. § 331(a))[1]

First: The products in question, cantaloupes, are a food;[2]

Second: The cantaloupes were adulterated;[3] and

---

[1] Section 331 of Title 21 of the United States Code provides, in relevant part: "The following acts and the causing thereof are prohibited: (a) The introduction or delivery for introduction into interstate commerce of any food . . . that is adulterated . . ." This offense does not contain a *mens rea* element and is a strict liability offense. *See United States v. Park*, 421 U.S. 658, 673-674 (1975). 21 U.S.C. § 333 (a)(1). Moreover, the federal Food, Drug and Cosmetics Act ("FDCA") imposes misdemeanor criminal liability on individuals who have a "responsible share" in furthering the prohibited conduct, without regard to state of mind. *United States v. Dotterweich*, 320 U.S. 277, 286 (1943). "The Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct the violation complained of, and that he failed to do so." *Park*, 421 U.S. at 673-74.

[2] The FDCA defines "food" as "articles used for food . . . for man or other animals . . . ." 21 U.S.C. § 321(f). A court may properly take judicial notice that an article is food where it is common knowledge that the article is used for food. *United States v. O.F. Bayer & Co.*, 188 F.2d 555, 557 (2d Cir. 1951); *United States v. H.B. Gregory Co.*, 502 F.2d 700, 704 (7th Cir. 1974); *United States v. Blue Ribbon Smoked Fish, Inc.*, 179 F. Supp. 2d 30, 42 (E.D.N.Y. 2001). In this case, it is indisputable that the cantaloupes are used as food, and thus, judicial notice of the status of these articles as food under the FDCA is entirely proper.

[3] Food is adulterated under 21 U.S.C. § 342(a)(1) "if it bears or contains any poisonous or deleterious substance which may render it injurious to health . . . ." A food containing a pathogenic microorganism such as L. monocytogenes is adulterated within the meaning of § 342(a)(1) "if there is any possibility that the food will be injurious." *United States v. An Article of Food Consisting of Cartons of Swordfish*, 395 F. Supp. 1184, 1185 (S.D.N.Y. 1975) (citing *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 411 (1914)); *see also Blue Ribbon*, 179 F. Supp. 2d. at 48 ("Because L. monocytogenes is a poisonous or deleterious substance that may render Blue Ribbon's fish products injurious to the health of significant populations of consumers, such products are adulterated within the meaning of Section 342(a)(1) of the FDCA.")

The FDCA also deems adulterated any food that has been "prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to

Third: The defendant caused the cantaloupes to be introduced or delivered for introduction into interstate commerce.[4]

B. Aiding and Abetting (18 U.S.C. § 2)

First: Someone else committed the charged crime, and,

Second: The defendant intentionally associated himself in some way with the crime and intentionally participated in it as he would in something he wished to bring about. This means that the Government must prove that the defendant consciously shared the other person's knowledge of the underlying criminal act and intended to help him.

III. STATUTORY PENALTIES

The maximum statutory penalty for the violations of Title 21 U.S.C. § 331(a) (Introduction of an Adulterated Food into Interstate Commerce), on each count,[5] is a term of

---

health." 21 U.S.C. § 342(a)(4). This section focuses solely on the conditions under which food is prepared, packed, or held. The Government needs to prove only that the food was held under conditions that created a reasonable possibility that the food would be rendered injurious to health. *United States v. International Exterminator Corp.*, 294 F.2d 270, 271 (5th Cir. 1961). Proof of actual contamination or injury is not required. *United States v. Gel Spice Co.*, 601 F. Supp. 1205, 1211 (E.D.N.Y. 1984), *aff'd*, 773 F.2d 427, 429 (1985), *cert. denied*, 474 U.S. 1060 (1986); *see also United States v. King's Trading, Inc.*, 724 F.2d 631, 632 (8th Cir. 1983); *Berger v. United States*, 200 F.2d 818, 821 (8th Cir. 1952); *United States v. 1,200 Cans . . . Pasteurized Whole Eggs, Etc.*, 339 F. Supp. 131, 140-41 (N.D. Ga. 1972).

[4] The final element necessary to prove a violation of 21 U.S.C. § 331(a) is interstate commerce. Specifically, Section 331(a) prohibits, among other things, the "introduction or delivery for introduction" of an adulterated food into interstate commerce. *See United States v. Sanders*, 196 F.2d 895, 898 (10th Cir. 1952)("To be guilty of violating[21 U.S.C. § 331(a)], it was not necessary that appellee be engaged in interstate commerce with respect to a misbranded drug. It was sufficient if he was engaged in delivering such a drug for introduction into interstate commerce."). The FDCA defines interstate commerce as "commerce between any state . . . and any place outside thereof. . . ." 21 U.S.C. § 321(b). Further, pursuant to 21 U.S.C. § 379a, "...any action to enforce the requirements of this Act respecting a...food...the connection with interstate commerce required for jurisdiction in such an action shall be presumed to exist."

[5] The Court may impose concurrent or consecutive sentences after considering the factors in 18 U.S.C. § 3553(a). *See* 18 U.S.C. § 3584 (a) and (b).

imprisonment of not more than 1 year, not more than a $250,000 fine,[6] or both; 1 year supervised release;[7] and a $25 special assessment fee.

The Court will impose a separate sentence on each count of conviction and may, to the extent permitted by law, impose such sentences either concurrently with or consecutively to each other. If probation or supervised release is imposed, a violation of any condition of probation or supervised release may result in a separate prison sentence and additional supervision.

IV. STIPULATION OF FACTS

1. The parties agree that there is a factual basis for the guilty pleas that the defendant will tender. That basis is set forth below. Because the Court must, as part of its sentencing methodology, compute the advisory guideline range for the offenses of conviction, consider relevant conduct, and consider the factors set forth in 18 U.S.C. § 3553, additional facts may be included below which are pertinent to those considerations and computations. To the extent the parties disagree about the facts set forth below, the stipulation of facts identifies which facts are known to be in dispute at the time of the plea agreement.

2. This stipulation of facts does not preclude either party from hereafter presenting the Court with additional facts which do not contradict facts to which the parties have stipulated and which are relevant to the Court's guideline computation, to other 18 U.S.C. § 3553 factors, or to the Court's overall sentencing decision.

3. The parties agree that pursuant to 18 USC 3663(a)(3) and Section V(H) below, the defendant will pay restitution, jointly and severally with his co-defendant, as ordered by the Court to any victim of the offenses to which the defendant is pleading guilty and any other

[6] 18 U.S.C. § 3571(b)(4)

persons directly and proximately harmed as a result of the introduction into interstate commerce of adulterated food by the defendant. The parties agree that the Court may consider all relevant conduct, whether charged or not, in determining the victims and assessing restitution. The parties also agree and understand that the Court may, in its discretion, make this restitution obligation a part of any term of probation or supervised release, if applicable.

4. The parties agree that the date on which conduct relevant to the offense (U.S.S.G. § 1B1.3) began is in or about June 2011 and continued until in or about September 2011. The parties agree that the Government's evidence would be as follows:

5. The defendants, Eric Jensen and Ryan Jensen, 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. The defendants had the responsibility and authority to maintain a clean and sanitary packing facility, which included maintaining 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.

---

[7] 18 USC 3583(b)(3)

6. 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 a 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". Despite the modifications to the catch pan by Pepper Equipment Company, the defendants never set up the chlorine spray. 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.

7. On or about July 25, 2011, a food safety inspector acting on behalf of Primus Labs, a company 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%.

8. 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.

9. Beginning on or about July 29, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the

bacterium *Listeria monocytogenes*[8] (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the adulterated cantaloupes to a distribution center in Denver, Colorado, for further delivery to places outside Colorado including Utah and Wyoming. This center subsequently distributed the adulterated Jensen Farms cantaloupes 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.

10. Beginning on or about July 29, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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 the adulterated Jensen Farms cantaloupes to a store located in Sheridan, Wyoming thereby causing or contributing to the death of consumer J.L.

11. Beginning on or about August 1, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the

---

[8] *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 meningoencephalitis. 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%). *See P.S. Mead et al. Food-Related Illness and Death in the United States, Emerging Infectious Diseases, 5(5).607.610 (1999).*

bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

12. Beginning on or about August 1, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

13. Beginning on or about August 1, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

14. Beginning on or about August 2, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

15. Beginning on or about August 3, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

16. Beginning on or about August 3, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

17. Beginning on or about August 3, 2011, a company doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the cantaloupes to a processing facility in Denver, Colorado. The company 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.

18. Beginning on or about August 4, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

19. Beginning on or about August 10, 2011, a company, or its agents or representatives, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

20. Beginning on or about August 14, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

21. Beginning on or about August 15, 2011, a company, or its agents or representatives, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the cantaloupes to a distribution center in Baton Rouge, Louisiana. The adulterated Jensen Farms cantaloupes were subsequently sold to a store located in Baton Rouge, Louisiana thereby causing or contributing to the death of consumer E.B.

22. Beginning on or about August 26, 2011, a company, or its agents or representatives, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

23. 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.

24. 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.

25. 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.

26. Around September 14, 2011, the defendants attempted to voluntarily recall shipments of cantaloupes.

27. 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."

28. 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 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 representative that conducted the pre-harvest inspection of Jensen Farms was seriously deficient in their inspection and findings.

29. 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 specifically attributed to listeriosis occurred among persons who had been infected with an outbreak-associated subtype.[9]

V. ADVISORY GUIDELINE COMPUTATION AND 3553 ADVISEMENT

The parties understand that the imposition of a sentence in this matter is governed by 18 U.S.C. § 3553. One of those factors is the sentencing range computed by the Court under advisory guidelines issued by the United States Sentencing Commission. In order to aid the Court in this regard, the parties set forth below their estimate of the advisory guideline range

[9] 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

called for by the United States Sentencing Guidelines. To the extent the parties disagree about the guideline computations, the recitation below identifies the matters which are in dispute.

A. The base guideline provision applicable to these types of offenses is U.S.S.G. § 2N2.1 which applies to violations of statutes or regulations dealing with any food. U.S.S.G. § 2N2.1 provides for a base offense level of 6. Therefore, the base offense level is 6.

B. If the offenses of conviction involve the "...permanent, life-threatening, or serious bodily injury of more than one victim..." Chapter Three Part D relating to multiple counts is applicable. Pursuant to Chapter 3, § 3D1.4, an additional 5 level increase is appropriate because the counts relate to separate instances and victims. Therefore the base offense level becomes 11.

C. Pursuant to U.S.S.G. § 3E1.1(a), defendant has clearly demonstrated acceptance of responsibility. A two-level downward adjustment results in an offense level of 9.

D. The parties understand that the defendant's criminal history computation is tentative. The criminal history category ("CHC") is determined by the Court based on the defendant's prior convictions. Based on information currently available to the parties, it is estimated that the defendant's criminal history category would be I.

E. The advisory Guideline range resulting from the estimated offense level of 9, and the tentative CHC of I, is 4 to 10 months. However, in order to be as accurate as possible, with the CHC undetermined at this time, the estimated offense level could conceivably result in a range from 4 months (bottom of Category I with a base offense level of 9) to 27 months (top of Category VI with a base offense level of 9). The cumulative guideline range would not exceed, in any case, the cumulative statutory maximums applicable to the counts of conviction.

---

and symptoms of infection begin.

F. Pursuant to U.S.S.G. § 5E1.2(c)(3) and Title 18, United States Code, section 3571, assuming an offense level of 9, the fine range for this offense is $1000.00 to $250,000.00 plus applicable interest and penalties.

G. Pursuant to 18 U.S.C. § 3583(b)(3), the Court may impose a term of supervised release of up to one year.

H. Restitution is discretionary pursuant to the Victim Witness Protection Act 18 U.S.C. § 3663. *United States v. Guthrie*, 64 F.3d 1510, 1514 (10th Cir. 1995); USSG § 5E1.1. This Court has full discretion whether to impose an order of restitution, taking into consideration: (1) the victims' losses as a result of the offense, (2) the defendant's financial resources, and (3) any other factors the Court deems appropriate. 18 U.S.C. §§ 3556, 3663(a)(3), 3664, and U.S.S.G. § 5E1.1.

I. Pursuant to 18 U.S.C. § 3561(c)(2) , the Court may sentence this defendant to a term of up to 5 years probation, and may impose conditions it deems appropriate after applying the factors in 18 U.S.C. § 3553(a).

J. The Court may impose concurrent or consecutive sentences after considering the factors in 18 U.S.C. § 3553(a). *See* 18 U.S.C. § 3584 (a) and (b).

The parties understand that although the Court will consider the parties' estimate, the Court must make its own determination of the guideline range. In doing so, the Court is not bound by the position of any party.

No estimate by the parties regarding the guideline range precludes either party from asking the Court, within the overall context of the guidelines, to depart from that range at sentencing if that party believes that a departure is specifically authorized by the guidelines or that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not

adequately taken into consideration by the United States Sentencing Commission in formulating the advisory guidelines. Similarly, no estimate by the parties regarding the guideline range precludes either party from asking the Court to vary entirely from the advisory guidelines and to impose a non-guideline sentence based on other 18 U.S.C. §3553 factors.

The parties understand that the Court is free, upon consideration and proper application of all 18 U.S.C. § 3553 factors, to impose that reasonable sentence which it deems appropriate in the exercise of its discretion and that such sentence may be less than that called for by the advisory guidelines (in length or form), within the advisory guideline range, or above the advisory guideline range up to and including imprisonment for the statutory maximum term, regardless of any computation or position of any party on any 18 U.S.C. § 3553 factor.

VI. ENTIRE AGREEMENT

This document states the parties' entire agreement. There are no other promises, agreements (or "side agreements"), terms, conditions, understandings, or assurances, express or implied. In entering this agreement, neither the Government nor the defendant has relied, or is relying, on any terms, promises, conditions, or assurances not expressly stated in this agreement.

Date: 10/22/13

Eric Jensen
Defendant

Date: 10/22/13

Forrest Lewis
Attorney for Defendant

Date: 10/22/13

Jaime A. Pena
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Number 13-mj-01138-MEH

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

RULE 11(c)(1)(A) and (B) PLEA AGREEMENT AND STATEMENT OF FACTS RELEVANT TO SENTENCING

The United States of America, by and through John F. Walsh, United States Attorney for the District of Colorado, and Jaime A. Pena, Assistant United States Attorney, and the defendant, Ryan Jensen, personally and by counsel, Richard Banta, submit the following Plea Agreement and Statement of Facts Relevant to Sentencing pursuant to D.C.COLO.LCrR 11.1 and Fed. R. Crim. P. 11(c)(1)(A) and (B).

I. PLEA AGREEMENT

Defendant Ryan Jensen agrees to plead guilty to Counts One through Six of the Information charging violations of Title 21, United States Code, Sections 331(a) and 333(a)(1) (Introduction of an Adulterated Food into Interstate Commerce); and Title 18, United States Code, Section 2 (Aiding and Abetting).

(1) General Provisions

Should the defendant meet his obligations as set forth in this agreement, including (1) providing truthful testimony whenever requested by the Government, (2) participating in "victim meetings" in order to assist the victims in understanding the impact of his criminal conduct on them whenever requested by the Government, (3) assisting the Government and victims in determining the exact loss amounts attributable to each victim, and (4) assisting the Government in the recovery of assets subject to victim restitution, the Government will agree not to seek additional charges against this defendant. The Government, in its sole discretion, may make a sentencing recommendation at the time of sentencing, within the law and the factors outlined in 18 U.S.C. § 3553(a), to assist the Court in determining a just sentence.

(2) Appellate Waiver

The defendant is aware that 18 U.S.C. § 3742 affords a defendant the right to appeal the sentence imposed. Understanding this and in exchange for the concessions made by the Government in this agreement, the defendant knowingly and voluntarily waives the right to appeal any matter in connection with this prosecution, conviction, or sentence unless it meets one of the following three criteria: (1) the sentence imposed is above the maximum penalty provided in the statute of conviction, (2) the Court, after determining the otherwise applicable sentencing guideline range, either departs or varies upwardly, or (3) the Court determines that the offense level is greater than 9 and imposes a sentence based upon that offense level determination. Except as provided above, the defendant also knowingly and voluntarily waives the right to appeal the manner in which the sentence is determined on grounds set forth in 18 U.S.C. § 3742 or any ground whatever. The defendant also knowingly and voluntarily waives his right to challenge this prosecution, conviction, or sentence and/or the manner in which it was determined

in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255. This waiver provision, however, will not prevent the defendant from seeking relief otherwise available if: (1) there is an explicitly retroactive change in the applicable guidelines or sentencing statute, (2) there is a claim that the defendant was denied the effective assistance of counsel, or (3) there is a claim of prosecutorial misconduct. Additionally, if the Government appeals the sentence imposed by the Court, the defendant is released from this waiver provision.

II. ELEMENTS OF THE OFFENSE

The elements of Counts One through Six are as follows:

A. Introduction of an Adulterated Food into Interstate Commerce (21 U.S.C. § 331(a))[1]

First: The products in question, cantaloupes, are a food;[2]

Second: The cantaloupes were adulterated;[3] and

---

[1] Section 331 of Title 21 of the United States Code provides, in relevant part: "The following acts and the causing thereof are prohibited: (a) The introduction or delivery for introduction into interstate commerce of any food . . . that is adulterated . . ." This offense does not contain a *mens rea* element and is a strict liability offense. *See United States v. Park*, 421 U.S. 658, 673-674 (1975). 21 U.S.C. § 333 (a)(1). Moreover, the federal Food, Drug and Cosmetics Act ("FDCA") imposes misdemeanor criminal liability on individuals who have a "responsible share" in furthering the prohibited conduct, without regard to state of mind. *United States v. Dotterweich*, 320 U.S. 277, 286 (1943). "The Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct the violation complained of, and that he failed to do so." *Park*, 421 U.S. at 673-74.

[2] The FDCA defines "food" as "articles used for food . . . for man or other animals . . . ." 21 U.S.C. § 321(f). A court may properly take judicial notice that an article is food where it is common knowledge that the article is used for food. *United States v. O.F. Bayer & Co.*, 188 F.2d 555, 557 (2d Cir. 1951); *United States v. H.B. Gregory Co.*, 502 F.2d 700, 704 (7th Cir. 1974); *United States v. Blue Ribbon Smoked Fish, Inc.*, 179 F. Supp. 2d 30, 42 (E.D.N.Y. 2001). In this case, it is indisputable that the cantaloupes are used as food, and thus, judicial notice of the status of these articles as food under the FDCA is entirely proper.

[3] Food is adulterated under 21 U.S.C. § 342(a)(1) "if it bears or contains any poisonous or deleterious substance which may render it injurious to health . . . ." A food containing a pathogenic microorganism such as L. monocytogenes is adulterated within the meaning of § 342(a)(1) "if there is any possibility that the food will be injurious." *United States v. An Article of Food Consisting of Cartons of Swordfish*, 395 F. Supp. 1184, 1185 (S.D.N.Y. 1975) (citing *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 411 (1914)); *see also Blue Ribbon*, 179 F. Supp. 2d. at 48 ("Because L. monocytogenes is a poisonous or deleterious substance that may render Blue Ribbon's fish products injurious to the health of significant populations of consumers, such products are adulterated within the meaning of Section 342(a)(1) of the FDCA.")

The FDCA also deems adulterated any food that has been "prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to

Third: The defendant caused the cantaloupes to be introduced or delivered for introduction into interstate commerce.[4]

B. Aiding and Abetting (18 U.S.C. § 2)

First: Someone else committed the charged crime, and,

Second: The defendant intentionally associated himself in some way with the crime and intentionally participated in it as he would in something he wished to bring about. This means that the Government must prove that the defendant consciously shared the other person's knowledge of the underlying criminal act and intended to help him.

III. STATUTORY PENALTIES

The maximum statutory penalty for the violations of Title 21 U.S.C. § 331(a) (Introduction of an Adulterated Food into Interstate Commerce), on each count,[5] is a term of

---

health." 21 U.S.C. § 342(a)(4). This section focuses solely on the conditions under which food is prepared, packed, or held. The Government needs to prove only that the food was held under conditions that created a reasonable possibility that the food would be rendered injurious to health. *United States v. International Exterminator Corp.*, 294 F.2d 270, 271 (5th Cir. 1961). Proof of actual contamination or injury is not required. *United States v. Gel Spice Co.*, 601 F. Supp. 1205, 1211 (E.D.N.Y. 1984), *aff'd*, 773 F.2d 427, 429 (1985), *cert. denied*, 474 U.S. 1060 (1986); *see also United States v. King's Trading, Inc.*, 724 F.2d 631, 632 (8th Cir. 1983); *Berger v. United States*, 200 F.2d 818, 821 (8th Cir. 1952); *United States v. 1,200 Cans . . . Pasteurized Whole Eggs, Etc.*, 339 F. Supp. 131, 140-41 (N.D. Ga. 1972).

[4] The final element necessary to prove a violation of 21 U.S.C. § 331(a) is interstate commerce. Specifically, Section 331(a) prohibits, among other things, the "introduction or delivery for introduction" of an adulterated food into interstate commerce. *See United States v. Sanders*, 196 F.2d 895, 898 (10th Cir. 1952)("To be guilty of violating[21 U.S.C. § 331(a)], it was not necessary that appellee be engaged in interstate commerce with respect to a misbranded drug. It was sufficient if he was engaged in delivering such a drug for introduction into interstate commerce."). The FDCA defines interstate commerce as "commerce between any state . . . and any place outside thereof. . . ." 21 U.S.C. § 321(b). Further, pursuant to 21 U.S.C. § 379a, "...any action to enforce the requirements of this Act respecting a...food...the connection with interstate commerce required for jurisdiction in such an action shall be presumed to exist."

[5] The Court may impose concurrent or consecutive sentences after considering the factors in 18 U.S.C. § 3553(a). *See* 18 U.S.C. § 3584 (a) and (b).

imprisonment of not more than 1 year, not more than a $250,000 fine,[6] or both; 1 year supervised release;[7] and a $25 special assessment fee.

The Court will impose a separate sentence on each count of conviction and may, to the extent permitted by law, impose such sentences either concurrently with or consecutively to each other. If probation or supervised release is imposed, a violation of any condition of probation or supervised release may result in a separate prison sentence and additional supervision.

IV. STIPULATION OF FACTS

1. The parties agree that there is a factual basis for the guilty pleas that the defendant will tender. That basis is set forth below. Because the Court must, as part of its sentencing methodology, compute the advisory guideline range for the offenses of conviction, consider relevant conduct, and consider the factors set forth in 18 U.S.C. § 3553, additional facts may be included below which are pertinent to those considerations and computations. To the extent the parties disagree about the facts set forth below, the stipulation of facts identifies which facts are known to be in dispute at the time of the plea agreement.

2. This stipulation of facts does not preclude either party from hereafter presenting the Court with additional facts which do not contradict facts to which the parties have stipulated and which are relevant to the Court's guideline computation, to other 18 U.S.C. § 3553 factors, or to the Court's overall sentencing decision.

3. The parties agree that pursuant to 18 USC 3663(a)(3) and Section V(H) below, the defendant will pay restitution, jointly and severally with his co-defendant, as ordered by the Court to any victim of the offenses to which the defendant is pleading guilty and any other

[6] 18 U.S.C. § 3571(b)(4)

persons directly and proximately harmed as a result of the introduction into interstate commerce of adulterated food by the defendant. The parties agree that the Court may consider all relevant conduct, whether charged or not, in determining the victims and assessing restitution. The parties also agree and understand that the Court may, in its discretion, make this restitution obligation a part of any term of probation or supervised release, if applicable.

4. The parties agree that the date on which conduct relevant to the offense (U.S.S.G. § 1B1.3) began is in or about June 2011 and continued until in or about September 2011. The parties agree that the Government's evidence would be as follows:

5. The defendants, Eric Jensen and Ryan Jensen, 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. The defendants had the responsibility and authority to maintain a clean and sanitary packing facility, which included maintaining 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.

---

[7] 18 USC 3583(b)(3)

6. 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 a 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". Despite the modifications to the catch pan by Pepper Equipment Company, the defendants never set up the chlorine spray. 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.

7. On or about July 25, 2011, a food safety inspector acting on behalf of Primus Labs, a company 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%.

8. 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.

9. Beginning on or about July 29, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the

bacterium *Listeria monocytogenes*[8] (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the adulterated cantaloupes to a distribution center in Denver, Colorado, for further delivery to places outside Colorado including Utah and Wyoming. This center subsequently distributed the adulterated Jensen Farms cantaloupes 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.

10. Beginning on or about July 29, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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 the adulterated Jensen Farms cantaloupes to a store located in Sheridan, Wyoming thereby causing or contributing to the death of consumer J.L.

11. Beginning on or about August 1, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the

---

[8] *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 meningoencephalitis. 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%). *See P.S. Mead et al. Food-Related Illness and Death in the United States, Emerging Infectious Diseases, 5(5).607.610 (1999).*

bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

12. Beginning on or about August 1, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

13. Beginning on or about August 1, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

14. Beginning on or about August 2, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

15. Beginning on or about August 3, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

16. Beginning on or about August 3, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

17. Beginning on or about August 3, 2011, a company doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the cantaloupes to a processing facility in Denver, Colorado. The company 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.

18. Beginning on or about August 4, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

19. Beginning on or about August 10, 2011, a company, or its agents or representatives, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

20. Beginning on or about August 14, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

21. Beginning on or about August 15, 2011, a company, or its agents or representatives, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the cantaloupes to a distribution center in Baton Rouge, Louisiana. The adulterated Jensen Farms cantaloupes were subsequently sold to a store located in Baton Rouge, Louisiana thereby causing or contributing to the death of consumer E.B.

22. Beginning on or about August 26, 2011, a company, or its agents or representatives, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) 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.

23. 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.

24. 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.

25. 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.

26. Around September 14, 2011, the defendants attempted to voluntarily recall shipments of cantaloupes.

27. 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."

28. 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 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 representative that conducted the pre-harvest inspection of Jensen Farms was seriously deficient in their inspection and findings.

29. 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 specifically attributed to listeriosis occurred among persons who had been infected with an outbreak-associated subtype.[9]

V. ADVISORY GUIDELINE COMPUTATION AND 3553 ADVISEMENT

The parties understand that the imposition of a sentence in this matter is governed by 18 U.S.C. § 3553. One of those factors is the sentencing range computed by the Court under advisory guidelines issued by the United States Sentencing Commission. In order to aid the Court in this regard, the parties set forth below their estimate of the advisory guideline range

[9] 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

called for by the United States Sentencing Guidelines. To the extent the parties disagree about the guideline computations, the recitation below identifies the matters which are in dispute.

A. The base guideline provision applicable to these types of offenses is U.S.S.G. § 2N2.1 which applies to violations of statutes or regulations dealing with any food. U.S.S.G. § 2N2.1 provides for a base offense level of 6. Therefore, the base offense level is 6.

B. If the offenses of conviction involve the "...permanent, life-threatening, or serious bodily injury of more than one victim..." Chapter Three Part D relating to multiple counts is applicable. Pursuant to Chapter 3, § 3D1.4, an additional 5 level increase is appropriate because the counts relate to separate instances and victims. Therefore the base offense level becomes 11.

C. Pursuant to U.S.S.G. § 3E1.1(a), defendant has clearly demonstrated acceptance of responsibility. A two-level downward adjustment results in an offense level of 9.

D. The parties understand that the defendant's criminal history computation is tentative. The criminal history category ("CHC") is determined by the Court based on the defendant's prior convictions. Based on information currently available to the parties, it is estimated that the defendant's criminal history category would be I.

E. The advisory Guideline range resulting from the estimated offense level of 9, and the tentative CHC of I, is 4 to 10 months. However, in order to be as accurate as possible, with the CHC undetermined at this time, the estimated offense level could conceivably result in a range from 4 months (bottom of Category I with a base offense level of 9) to 27 months (top of Category VI with a base offense level of 9). The cumulative guideline range would not exceed, in any case, the cumulative statutory maximums applicable to the counts of conviction.

---

and symptoms of infection begin.

F. Pursuant to U.S.S.G. § 5E1.2(c)(3) and Title 18, United States Code, section 3571, assuming an offense level of 9, the fine range for this offense is $1000.00 to $250,000.00 plus applicable interest and penalties.

G. Pursuant to 18 U.S.C. § 3583(b)(3), the Court may impose a term of supervised release of up to one year.

H. Restitution is discretionary pursuant to the Victim Witness Protection Act 18 U.S.C. § 3663. *United States v. Guthrie*, 64 F.3d 1510, 1514 (10th Cir. 1995); USSG § 5E1.1. This Court has full discretion whether to impose an order of restitution, taking into consideration: (1) the victims' losses as a result of the offense, (2) the defendant's financial resources, and (3) any other factors the Court deems appropriate. 18 U.S.C. §§ 3556, 3663(a)(3), 3664, and U.S.S.G. § 5E1.1.

I. Pursuant to 18 U.S.C. § 3561(c)(2) , the Court may sentence this defendant to a term of up to 5 years probation, and may impose conditions it deems appropriate after applying the factors in 18 U.S.C. § 3553(a).

J. The Court may impose concurrent or consecutive sentences after considering the factors in 18 U.S.C. § 3553(a). *See* 18 U.S.C. § 3584 (a) and (b).

The parties understand that although the Court will consider the parties' estimate, the Court must make its own determination of the guideline range. In doing so, the Court is not bound by the position of any party.

No estimate by the parties regarding the guideline range precludes either party from asking the Court, within the overall context of the guidelines, to depart from that range at sentencing if that party believes that a departure is specifically authorized by the guidelines or that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not

adequately taken into consideration by the United States Sentencing Commission in formulating the advisory guidelines. Similarly, no estimate by the parties regarding the guideline range precludes either party from asking the Court to vary entirely from the advisory guidelines and to impose a non-guideline sentence based on other 18 U.S.C. §3553 factors.

The parties understand that the Court is free, upon consideration and proper application of all 18 U.S.C. § 3553 factors, to impose that reasonable sentence which it deems appropriate in the exercise of its discretion and that such sentence may be less than that called for by the advisory guidelines (in length or form), within the advisory guideline range, or above the advisory guideline range up to and including imprisonment for the statutory maximum term, regardless of any computation or position of any party on any 18 U.S.C. § 3553 factor.

VI. ENTIRE AGREEMENT

This document states the parties' entire agreement. There are no other promises, agreements (or "side agreements"), terms, conditions, understandings, or assurances, express or implied. In entering this agreement, neither the Government nor the defendant has relied, or is relying, on any terms, promises, conditions, or assurances not expressly stated in this agreement.

Date: 10/22/13

Ryan Jensen
Defendant

Date: 10/22/13

Richard Banta
Attorney for Defendant

Date: 10/22/13

Jaime A. Pena
Assistant U.S. Attorney