

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

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File No. 62-CX-07-2605

- Gearin, K.

Vistar Corporation,  
d/b/a Roma of Minnesota,

Plaintiff,

and

Eldon J. Hill; Denise F. Atkinson; James A. Atkinson;  
Freeborn County Taco, Inc., d/b/a Taco John's of Albert Lea,  
Minnesota; Mower County Taco, Inc., d/b/a Taco John's  
of Austin, Minnesota; Scott B. Dominiack; Debbie S. Dominiack;  
CMT, Inc., d/b/a Taco John's of Cedar Falls, Iowa; and  
Northern States Foods, Inc., d/b/a/ Taco John's of Waterloo, Iowa,

Intervenors,

**ORDER**

vs.

Bix Produce Company, LLC;  
Homeland Central Insurance Company,  
d/b/a Hawkeye-Security Insurance Company,

Defendants,

and

Bix Produce Company, LLC,

Defendant and Third-party Plaintiff,

vs.

Pacific International Marketing, Pacific Marketing Company,  
Dynasty Farms, a Division of Pacific International Marketing,  
Way Farms, Inc., and Wegis Ranch, a partnership,

Third-Party Defendants.

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The above-entitled matter came on for hearing before the undersigned on June 10th, 2008 pursuant to motions by various parties for summary judgment.

Appearing on behalf of the Plaintiff was Sarah L. Brew. The Intervenors were represented by Robert E. Kuderer. William M. Bradt appeared representing the Defendants. Appeared representing the Third-Party Defendants were Stephen R. Tillitt, Pacific International Marketing and Dynasty Farms; Lawrence J. Skoglund, Pacific Marketing Company; and Michael S. Kreidler, Way Farms, Inc., and Wegis Ranch, a partnership.

Based upon all the files, records, and proceedings herein, the Court makes the following Order:

1. Plaintiff Vistar Corporation's, d/b/a Roma of Minnesota, motion for summary judgment is granted.
2. Defendant Homeland Central Insurance Company's, d/b/a Hawkeye-Security Insurance Company, motion for dismissal of the direct action against it by the Intervenors is granted.
3. Pacific International Marketing's motion for summary judgment is granted.
4. Pacific Marketing Company's motion for summary judgment is denied.
5. Dynasty Farms', a division of Pacific International Marketing, motion for summary judgment is granted.
6. Way Farms, Inc., and Wegis Ranch's, a partnership, motion for summary judgment based on lack of jurisdiction is granted.
7. Intervenors' motion to amend their complaint to add a claim for economic loss is granted except as to the claims on behalf of C&M Enterprises.
8. The following Memorandum is incorporated into and made a part of this Order.

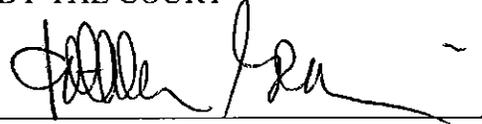
9. All other motions are denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED:

9-9-08

BY THE COURT



Kathleen Gearin  
District Court Chief Judge

### MEMORANDUM

This case arises out of an outbreak of E. coli 0157:H7 that occurred at four Taco John's restaurants in northern Iowa and southern Minnesota in December of 2006. The source of the outbreak was shredded lettuce delivered to these restaurants by Vistar. All of the parties agree that the source of the E. coli outbreak was the lettuce. The parties also agree that the contaminated lettuce was purchased from Vistar who, in turn, purchased it from Bix. Bix both processed the lettuce (chopped it up) and packaged the lettuce.

The Taco John's restaurants that used the contaminated lettuce and served it to their customers spent over \$1,000,000 to resolve the customers' claims. They also incurred some significant legal fees as a result of the contaminated product. The restaurants have settled with each of the known and represented Claimants. The restaurants seek to add a claim in an amended complaint for lost sales revenue.

The restaurants have tendered their customers' claims to Vistar, Bix, and Bix's insurer for both defense and indemnity. There was a Continuing Guaranty and Indemnity Agreement entered into between Bix and Vistar on May 17<sup>th</sup>, 2004. This agreement places on Bix the

responsibility to ... “indemnify and hold harmless the Buyer and its customers from any claim, demand, loss, damage, liability, cost and expense, directly or indirectly, arising out of, or in connection with, or resulting from, the willful or negligent acts or omissions of the seller... relating to the manufacture, sale, use or consumption of any article of food... sold by the Seller... to the buyer.” Vistar claims in its summary judgment motion that this Continuing Guaranty and Indemnity Agreement means that Bix and its insurer is also responsible for any claims against it. Based on this claim Vistar is requesting summary judgment regarding the restaurants assertion that Vistar should be responsible as well as Bix for their defense and indemnity.

Bix also served and filed third-party complaints against the California suppliers of the lettuce. These third-party complaints include a claim against Wegis Ranch, the central California site where the lettuce was actually grown. It also seeks indemnification from Pacific Marketing Company, the company to whom Wegis directly sold the lettuce; Pacific International Marketing, the company to whom Pacific Marketing Company sold the lettuce; and Produce Alliance, the company to whom Pacific International Marketing sold the product. Produce Alliance then operated as a broker for Pacific International Marketing and sold the lettuce to Bix.

The file is so large and the pleadings so confusing that the Court wants to make sure that Homeland Central Insurance Company, d/b/a Hawkeye-Security Insurance Company, has been completely dismissed as a direct defendant. Hawkeye is the insurance company for Bix Produce Company and because of that is liable to the policy limits for any verdicts that are returned against Bix in this case. The Court is aware that Vistar has already agreed to a stipulation dismissing this Defendant as a direct party regarding its claims.

The Court has granted Vistar's summary judgment motion for two reasons. Vistar is the classic passive seller in the chain of distribution. It purchased and delivered sealed packages to the Taco John's restaurants. As a matter of law, Vistar is not a manufacturer. There has been no evidence submitted that Vistar made any expressed warranties regarding the packages of lettuce that had been prepared by Bix. Any implied warranty claims against Vistar would have merged into the strict liability cause of action and are, therefore, subject to the bar on actions against non-manufacturers contained in *Minn Stat. § 544.41. In re: Shigellosis litigation, 647 N.W. 2d 1 (Minn. Ct. App. 2002)*. That is one reason why summary judgment has been granted.

The other reason why this Court granted Vistar's summary judgment motion has to do with the Continuing Guaranty and Indemnity Agreement entered into between Vistar and Bix. Bix has \$2,000,000 in direct coverage and \$10,000,000 in excess coverage insurance that would cover the claims made against it and Vistar. The language of the agreement is clear, inclusive, and unequivocal. Vistar's tender of the claims against it to Bix should be honored.

Bix has moved the Court to rule as a matter of law that it was not a manufacturer of the lettuce. While their argument is not without merit, this Court does not believe that it can rule as a matter of law that Bix is not a manufacturer. Bix received the lettuce heads from Pacific International Marketing. After receiving the lettuce heads, Bix inspected, cored, shredded into one-eighth inch strips, washed, spun-dry, placed in five-pound plastic bags, loaded four bags to a box, passed through a metal detector, refrigerated until shipped, sold and delivered the lettuce to Vistar. The Court believes that this presents a material issue of fact as to whether Bix falls within the provisions of Minn Stat. 544.41 Subd. 3 (a) which states in part: "... the Defendant has exercised some significant control over the design or manufacture of the product, or has

provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury...”.

The Court has also denied Pacific Marketing Company’s motion for summary judgment because it does not believe that it can rule as a matter of law that that company is only “a marketer and seller” and not a manufacturer. While Wegis Ranch had the responsibility to grow the lettuce in the field, it was PMC’s responsibility to harvest, cool, ship, take the lettuce out of the field, and make the lettuce ready for introduction into the stream of commerce. Arguably, both Wegis Ranch and PMC could be found to be manufacturers. The Court has granted Pacific International Marketing’s motion for summary judgment. PMC took the steps necessary for the lettuce to actually enter the market. PIM did not except for passively selling it to Bix.

The statements in the affidavits submitted in support of Wegis Ranch’s motion to dismiss for lack of jurisdiction have not been meaningfully challenged by any of the other parties. There is nothing to indicate that the Ranch has even minimal contacts with the State of Minnesota. Therefore, its motion for dismissal has been granted even though it is clear that Wegis Ranch is where the lettuce was grown and its defective irrigation system is the source of the E. coli in this case.

Even though the amended complaint sought to be filed by the Intervenors seeking damages for economic loss has been submitted late in this case, the Court believes it is in the interest of justice to allow the amendment. It recognizes that in doing so the scheduling order will need to be amended to allow complete discovery on this issue. The parties will have to seek amendments of the scheduling order before Judge Johnson as he has now been assigned to these cases. The motion to amend has not been granted completely. The amendment will be allowed

only as to the locations where the contaminated lettuce was actually served. It is not granted as to any economic losses allegedly sustained by C&M Enterprises.

KG

A handwritten signature in black ink, appearing to be the initials 'KG' with a stylized flourish.