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9 Attorneys for Plaintiff
10 *Roger Coffelt, Jr. and all those*
11 *similarly situated*

12 UNITED STATES DISTRICT COURT
13
14 CENTRAL DISTRICT OF CALIFORNIA

15 ROGER COFFELT, JR, individually and on
16 behalf of all those similarly situated,
17
18 Plaintiff,
19
20 vs.
21
22 THE KROGER CO., THE PICTSWEET
23 COMPANY, CRF FROZEN FOODS, LLC,
24 and DOES 1 through 25, inclusive,
25
26 Defendants.

27 Case No.:
28
29 CLASS ACTION COMPLAINT FOR
30 DAMAGES
31
32 1. BREACH OF IMPLIED
33 WARRANTY OF
34 MERCHANTABILITY
35
36 2. NEGLIGENCE
37
38 *Jury Trial Demanded*

39 Comes now Plaintiff ROGER COFFELT, JR, individually and on behalf of all those
40 similarly situated, who alleges and complains as follows on information and belief, and who
41 prays for relief from the court:

42 **I. PARTIES**

43 1. PLAINTIFFS ROGER COFFELT, JR., and those similarly situated were at all relevant
44 times adults who purchased frozen vegetables or fruits manufactured, distributed, and or
45 sold, by Defendants, DOES 1-25, and each of them. Unknown to PLAINTIFFS the
46 purchased vegetables were contaminated with bacteria, rendering the products
47 adulterated, unfit for consumption.
48

- 1 2. Defendants THE KROGER CO., THE PICTSWEET COMPANY, CRF FROZEN
- 2 FOODS, LLC, and DOES 1 through 25, inclusive (hereafter referred to as “Defendants”)
- 3 at all relevant times were engaged in a joint venture of manufacturing, distributing, and
- 4 selling to consumers various frozen foods, including but not limited to the subject
- 5 adulterated frozen vegetables and fruits purchased by ROGER COFFELT, JR. and those
- 6 similarly situated.
- 7 3. THE KROGER CO. is an Ohio corporation that operates thousands of grocery stores in
- 8 several states under various trade names, including but not limited to “RALPHS” in
- 9 Southern California within the Central District of the U.S. District Court of California.
- 10 4. THE KROGER CO. maintains a major distribution center of approximately 59 acers for
- 11 its California operations within the Central District of the U.S. District Court of
- 12 California, in the city of Compton.
- 13 5. THE PICTSWEET COMPANY is a Delaware corporation that has a principal place of
- 14 business in Tennessee. THE PICTSWEET COMPANY is a grower, packer, and
- 15 distributor of frozen vegetables, fruits, and vegetables with sauce blends for retail and
- 16 foodservice markets.
- 17 6. CRF FROZEN FOODS, LLC is a Washington State LLC, and is engaged in the package
- 18 and distribution of frozen vegetables and fruits.
- 19 7. The true names and capacities of Defendants sued herein as DOES 1 through 15,
- 20 inclusive, are currently unknown to Plaintiff, who therefore sues such Defendants by such
- 21 fictitious names. Each of the Defendants designated herein as a DOE is legally
- 22 responsible in some manner for the unlawful acts referred to herein. Plaintiff will seek
- 23 leave of Court to amend this Complaint to reflect the true names and capacities of the
- 24 Defendants designated herein as DOES when such identities become known.
- 25 8. Based upon information and belief, Plaintiff alleges that at all times mentioned herein,
- 26 each and every Defendant was acting as an agent and/or employee or joint venture of
- 27 each of the other Defendants, and at all times mentioned was acting within the course and
- 28 scope of said agency and/or employment and/or joint venture with the full knowledge,

1 permission, and consent of each of the other Defendants. In of addition, each of the acts
2 and/or omissions of each Defendant alleged herein were made known to, and ratified by,
3 each of the other Defendants.

4 **II. JURISDICTION AND VENUE**

5 9. The acts and omissions giving rise to this litigation occurred in the Central District of the
6 U.S. District Court of California, including but not limited to the sale of adulterated
7 frozen vegetables to ROGER COFFELT, JR.

8 10. At least one Defendant, THE KROGER CO., operates a substantial nerve center for its
9 operations in the city of Compton, which is located within the jurisdictional area of the
10 Central District of the U.S. District Court of California, specifically within Los Angeles
11 County. On information and belief, this distribution center in Compton would have been
12 the distribution point from which the adulterated frozen vegetables purchased by ROGER
13 COFFELT, JR. were processed by THE KROGER CO.

14 11. Defendants have availed themselves of the laws and market of California to such a degree
15 as to subject them to personal jurisdiction. As for THE KROGER CO., general
16 jurisdiction exists because this defendant operates a major grocery chain, RALPHS,
17 throughout the Central District and operates stores under other brand names throughout
18 the State of California to such a degree that it is reasonable for THE KROGER CO. to be
19 expected to be hailed into California courts for any purpose. As for THE PICTSWEET
20 COMPANY and CRF FROZEN FOODS, LLC, each injected goods (frozen vegetables)
21 into the stream of commerce of California, including but not limited to the subject frozen
22 vegetables.

23 **III. GENERAL FACTUAL ALLEGATIONS**

24 12. At all relevant times, Plaintiffs and those similarly situated were retail consumers who
25 purchased frozen vegetables for household consumption from THE KROGER CO.
26 These vegetables were grown, manufactured/processed, packaged, and distributed by
27 THE PICTSWEET COMPANY, CRF FROZEN FOODS, LLC, THE KROGER CO.,
28 DOES 1-25, and each of them.

1 13. The subject vegetables purchased by Plaintiffs were adulterated with bacteria, including
2 *Listeria monocytogenes* (hereafter *Listeria*). *Listeria* is a dangerous bacteria that can
3 cause infection, illness, and death. Where *Listeria* infects the bloodstream, it kills
4 approximately 1 in 5 patients. Those with compromised immune systems, pregnant
5 women, newborns, and adulterary adults are at a higher risk of infection. *Listeria* is a
6 deleterious substance under the meaning of California Health and Safety Code §§110545,
7 110550, which define food as adulterated if it contains any deleterious substance that may
8 render it injurious to health if consumed.

9 14. The subject vegetables, which were distributed across California and the United States,
10 gave rise to a *Listeria* outbreak, which was investigated by health and safety officials,
11 including those at the U.S. Centers for Disease Control and Prevention (hereafter CDC)
12 and U.S. Food and Drug Administration (hereafter FDA).

13 15. CDC determined that a plant operated by CRF FROZEN FOODS was the likely source of
14 the illness.

15 16. FDA published a web page concerning the outbreak at
16 <http://www.fda.gov/Food/RecallsOutbreaksEmergencies/Outbreaks/ucm499157.htm>.

17 17. CDC published a web page concerning the outbreak at
18 <http://www.cdc.gov/listeria/outbreaks/frozen-vegetables-05-16/index.html>.

19 18. FDA published an inspection report at: [http://www.fda.gov/ucm/groups/fdagov-](http://www.fda.gov/ucm/groups/fdagov-public/@fdagov-afda-orgs/documents/document/ucm505545.pdf)
20 [public/@fdagov-afda-orgs/documents/document/ucm505545.pdf](http://www.fda.gov/ucm/groups/fdagov-public/@fdagov-afda-orgs/documents/document/ucm505545.pdf).

21 19. According to these U.S. Government reports: (1) the subject *Listeria* outbreak began in
22 2013, and caused at eight known hospitalizations; (2) epidemiologic and laboratory
23 evidence indicates that the outbreak originated with frozen vegetables produced by CRF
24 Forzen Foods in Pasco Washington, but which were sold under various brand names; (3)
25 CDC collaborated with state-level public health officials regarding the outbreak since
26 March or 2016; (4) due to the outbreak CRF Frozen Foods recalled all organic and
27 traditional frozen vegetable and fruit produces processed in its Pasco, WA facility since
28 May 1, 2015, implicating approximately 358 consumer products under 42 brand names;

1 (5) the health risk posed by the subject vegetables is substantial enough that “CDC
2 recommends that consumers do not eat, and restaurants and retailers do not serve or sell”
3 the subject frozen food products; (6) genetic analysis showed that the strains of *Listeria*
4 infections in patients were closely related to strains in contaminated corn, which per
5 FDA, “provides additional evidence that the people in this outbreak became ill from
6 eating frozen vegetables produced by CRF Frozen Foods;” (7) FDA advised retailers that
7 the proper response by retailers to the outbreak should include no longer serving or
8 selling the subject vegetables and fruits, discarding the same, sanitizing display cases and
9 refrigerators where such products were stored, cleaning hands with soap and water after
10 such sanitizing; (8) FDA cautioned that *Listeria* can grow on foods at refrigeration
11 temperatures; (9) FDA cautioned food distributors about prudent assessment of cross-
12 contamination of other food products by the subject vegetables and fruits; (10) FDA
13 advised consumers check their stored food for the subject vegetables and fruits, and to
14 return or discard such; (11) CRF Frozen Foods failed to comply with many safe food
15 handling requirements, including but not limited to maintaining processing equipment
16 that is both clean and easily maintained in an cleanable condition.

17 20. The subject frozen vegetables and fruits were not fit for human consumption due to the
18 actual and potential risk of *Listeria* contamination.

19 21. It is not reasonable for a seller of frozen vegetables or fruits to sell such products that are
20 actually contaminated with *Listeria*.

21 22. It is not reasonable for a seller of frozen vegetables or fruits to sell such products that
22 have a substantial risk of contamination with *Listeria*.

23 23. The subject frozen vegetables and fruits were not of the same quality as those generally
24 acceptable in the trade, as reflected by the reaction of CDC, FDA, and other
25 governmental bodies, the recall, and ordinary consumer expectations.

26 24. The subject frozen vegetables and fruits were not fit for the ordinary purposes for which
27 such goods are used, namely for wholesome nutritious dietary consumption.

28 25. On information and belief, the subject frozen vegetables and fruits were not adequately

1 packaged and labeled to alert consumers to heightened risk of adulteration.

2 26. On information and belief, the subject frozen vegetables and fruits were not adequately
3 packaged and labeled to alert consumers to reflect actual and implied promises and facts
4 on the packaging with respect to the wholesome healthfulness of the products.

5 27. ROGER COFFELT, JR. purchased frozen vegetables within the class of the subject
6 frozen vegetables and fruits. Specifically, he purchased frozen peas from RALPHS,
7 which was operated by THE KROGER CO. On information and belief, the peas he
8 purchased were produced, packaged, and distributed by THE KROGER CO., THE
9 PICTSWEET COMPANY, CRF FROZEN FOODS, LLC, DOES 1-25, and each of them.
10 Proof of purchase is, on information and belief, reflected in: (a) the RALPHS club card
11 transaction history for ROGER COFFELT, JR., and (b) the business records of
12 Defendants, who contacted ROGER COFFELT, JR. to inquire as to whether his family
13 suffered any related illness related to the, such contact being made on account of his
14 RALPHS club card transaction history.

15 28. ROGER COFFELT, JR. cooked and served the above adulterated frozen vegetables,
16 which caused illness to and *Listeria* infection of his family members.

17 **IV. CLASS ACTION ALLEGATIONS**

18 29. Plaintiff ROBGER COFFELT, JR. brings this matter as a class action, identifying the
19 following class definition:

20 The class in this matter consists of all purchasers of frozen vegetables or fruits
21 sold, packaged, or distributed by THE KROGER CO., THE PICTSWEET
22 COMPANY, CRF FROZEN FOODS, LLC, and/or DOES 1 through 25 in the
23 time period of January 1, 2013 to June 1, 2016 which were recalled by THE
24 KROGER CO., THE PICTSWEET COMPANY, CRF FROZEN FOODS, LLC,
25 and DOES 1 through 25 due to actual or potential *Listeria* adulteration. The class
26 does not include personal injury claims, and asserts only economic damages
27 directly related to the purchase of the subject products. Persons asserting personal
28 injury claims or damages are excluded from the class.

1 30. Plaintiffs reserve the right to amend the complaint to amend the class definition or define
2 or alter sub-classes.

3 31. Ascertainability: A well-defined community of interest in this litigation and proposed
4 class is ascertainable, pursuant to Code of Civil Procedure § 382. The members of the
5 class and sub-classes may be determined by a number of methods, including but not
6 limited to reference to THE KROGER CO.'s club card data, which includes contact
7 information for consumers who purchased such goods, as well as financial records of
8 THE KROGER CO. which, on information and belief, contains debit, credit, or other
9 payment card information coupled with transaction history data that allows identification
10 of affected consumers. In addition, sales and distribution data allows for the
11 ascertainment of the overall number of transactions involving the subject products,
12 allowing for cy pres management of any class members who cannot be identified by other
13 measures. A cy pres award related to foodborne illness prevention or education may be
14 appropriate as to those class members whose specific identity many not be determined.

15 32. Numerosity: Defendants operate a large-scale food distribution system with millions of
16 customers. The recall affected 42 different brand names and hundreds of adulterated
17 food products for consumer use at home. Government instructions to consumers to
18 discard their food items purchased over a multiple year purchase period gives rise to
19 millions of putative class members. It is not practicable for such claims to be processed
20 by the courts individually.

21 33. Commonality: Questions of law and fact of the class predominate over any individual
22 concerns of class members. Such common issues include but are not limited to:

- 23 a. Gathering admissible evidence confirming the findings of governmental
24 investigations, including but not limited to FDA and CDC reports.
25 b. Establishing with admissible evidence the nature and extent of the listeria
26 contamination.
27 c. Evaluating whether and to what degree Defendants had actual knowledge or
28 knowing disregard for safety hazards such that an award of punitive damages may

1 or may not be appropriate. (Plaintiffs note the fact that the unsafe packing
2 conditions at CRF Frozen Foods appear to have been ongoing and unremediated
3 for as long as three years, and possibly longer.)

4 d. Establishing the elements of liability for breach of the implied warranty of
5 merchantability, including but not limited to acceptable quality and contamination
6 levels generally acceptable in the trade, fitness for ordinary use, and adequacy of
7 packaging with respect to infection/illness risks.

8 e. Establishing the standards of care and any breach of those standards with respect
9 to Defendant’s preparation, packaging, distribution, inspection, and sale of the
10 subject food products.

11 f. Establishing the apportionment of responsibility between Defendants in a
12 negligence analysis.

13 34. Typicality: The claims of the named Plaintiff are typical of the claims of the class
14 members. The named plaintiff purchased frozen peas sold by Defendants, and used those
15 peas to feed his family, who became ill. Plaintiff does not assert personal injury claims in
16 this matter, but instead asserts economic damages claims, which are common to the class.

17 35. Adequacy: Named class representative has each agreed to serve as representatives of all
18 similarly situated persons to raise common claims. He understands that he owes a
19 fiduciary obligation to work with competent counsel and take actions to promote,
20 advance and prevail on the claims being made, not just individually, but for the collective
21 group of employees as a whole. Plaintiff will fairly and adequately represent and protect
22 the interests of the members of the Class. Plaintiff has agreed to represent the proposed
23 class and act as a fiduciary for their interests in addition to his own. Plaintiff is aggrieved
24 in a similar manner as the proposed classes and subclasses. Counsel who represent
25 Plaintiff are competent and experienced, and readily able to successfully prosecute this
26 class action, and have further arranged for association-in of preeminent national class
27 counsel in this matter following filing of the Complaint.

28 36. Superiority: A class action is superior to other available means for the fair and efficient

1 adjudication of this controversy. Individual joinder of all class members is not
2 practicable, and questions of law and fact common to the class predominate over
3 questions affecting only individual class members. Each class member has been damaged
4 and is entitled to recovery by reason Defendants’ unlawful behavior. A class action will
5 allow those similarly situated to litigate their claims in the most efficient and economical
6 manner for the parties and the judicial system. Plaintiffs are unaware of any difficulties
7 that are likely to be encountered in the management of this action that would preclude its
8 maintenance as a class action.

9 **V. FIRST CAUSE OF ACTION: BREACH OF THE IMPLIED WARRANTY OF**
10 **MERCHANTABILITY**
11 **BY ALL PLAINTIFFS AGAINST ALL DEFENDANTS**

- 12 37. All prior paragraphs are incorporated by reference as though stated fully here.
- 13 38. The Warranty of Merchantability is implied in every sale of consumer goods, unless
14 disclaimed in clear language meeting statutory requirement for such disclaimer. This
15 warranty is implied in California via the Commercial Code (e.g. Cal. Com. Code §2607)
16 and the Civil Code (e.g. Cal. Civ. Code §§ 1791-17953.4). Similar obligations are
17 imposed in other states pursuant to their adoption of the Uniform Commercial Code and
18 consumer warranty law, whether by statute or common law.
- 19 39. Each sale of the subject vegetables and fruit that were actually or potentially adulterated
20 by *Listeria* violated the Warranty of Merchantability because: (a) the adulteration
21 rendered the product of a lower quality as those similar products acceptable in the trade;
22 (b) the adulteration rendered the product as unfit for the ordinary purposes for which this
23 type of good is used; (c) on information and belief, the products were not adequately
24 packaged and labeled so as to address the risk of *Listeria* adulteration; (d) on information
25 and belief, the products did not measure up to the actual or implied promises or facts of
26 health and wholesomeness stated on the containers or labels of the products.
- 27 40. With respect to Commercial Code violations, Plaintiffs note that Plaintiff, including but
28 not limited to ROGER COFFELT, JR., took reasonable steps to notify Defendants within

1 a reasonable time that the products did not have the quality that a buyer would reasonably
2 expect, and had conversations with Defendants' agents via telephone about the fact that
3 the product was unacceptable and caused harm to his family members. (Defendants'
4 agents were persons who contacted Plaintiff using THE KROGER CO.'s internal data to
5 inform COFFELT of the adulteration and to determine whether he objected to or had
6 deleterious effects because of the adulteration.) Such communication took place at least
7 one month prior to filing of the Complaint in this matter. (Plaintiffs note that notification
8 requirements apply only to Commercial Code remedies, and not to Civil Code Claims
9 also plead here. *See*, California Civil Jury Instruction No. 3210, Directions for Use.)

10 41. Plaintiffs seek recovery of damages, including the rights of replacement or
11 reimbursement, cancellation of the sale, double-damage penalties for willful violations
12 (for the applicable period of time pursuant to the statute of limitations).

13 42. Plaintiffs seek attorney fees and costs pursuant to statute. (*See*, Civil Code § 1794.)

14 **VI. SECOND CAUSE OF ACTION: NEGLIGENCE**

15 **BY ALL PLAINTIFFS AGAINST ALL DEFENDANTS**

16 43. All prior paragraphs are incorporated by reference as though stated fully here.

17 44. Defendants, and each of them, owed a duty Plaintiffs, and each of them to provide the
18 products Defendants injected into commerce and/or sold in a condition that was
19 compliant with all laws and suitable and safe for human consumption. Defendants, and
20 each of them, assumed this duty by engaging in the business of selling food for human
21 consumption.

22 45. On information and belief: Defendants, and each of them, breached this duty. As for
23 CRF FROZEN FOODS and DOES 1-10, such breaches of duty include but are not
24 limited to maintaining their food production and packing facilities a condition that was
25 unsanitary and difficult to render unsanitary, negligent inspection and testing programs,
26 negligent labeling as to infection/illness risk, and the shipping of adulterated food into the
27 stream of commerce. As for all other Defendants such breaches include CRF FROZEN
28 FOODS' breaches of such nondelegable duties, as well as the sale and distribution of

1 adulterated food, negligent supervision and retention of supplier and distributors,
2 negligent inspection and food handling, and negligent labeling with respect to
3 infection/consumer risks.

4 46. As a direct and proximate result, Plaintiffs suffered injury and attendant economic
5 damages as alleged herein. (As noted, the class definition does not include personal
6 injury claims and this Complaint expressly excludes personal injury claims in such
7 fashion that this Complaint should not be used to argue that any plaintiff in a separate
8 personal injury matter has resolved his or her claims for injury through this suit.)

9 47. Plaintiffs seek economic damages for reimbursement or replacement of the subject
10 products and incidental costs related to same.

11 48. Plaintiffs seek punitive damages because Defendant's behavior complained of herein
12 was, on information and belief, malicious. In keeping with California law, malice as used
13 here means the Defendants' conduct was despicable and was done with a willful and
14 knowing disregard of the rights or safety of others. CRF FROZEN FOODS was at all
15 relevant times a licensed food producer subject to state and federal regulations which it
16 knew were in place to protect the public from foodborne illness. Nonetheless, CRF kept
17 its facilities in plainly unhygienic states, which included taped-together parts, foreign
18 objects such as a shovel in the production line, and other hazards. Such conditions
19 existed for at least some two to three years from 2013-2016 during the period of the
20 *Listeria* outbreak tracked by CDC. Keeping production facilities in such repair plainly
21 exposes the public to danger of substantial infection, eliminates or substantially reduces
22 the benefit of the bargain in related food purchases, and reduces the actual and public
23 perception of a safe food supply system. Such conduct places company profit through
24 reduced maintenance and operation costs over public safety, and justifies an award of
25 punitive damages. (*See*, California Civil Jury Instruction No. 3940.)

26 49. Due to the public benefit conferred by such relief, Plaintiffs and those similarly situated
27 seek attorney fees pursuant to Code of Civil Procedure § 1021.5.
28

IX. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays judgment against Defendants, DOES 1 to 25, and each of them, as hereinafter follows:

1. For economic damages according to proof as to all causes of action;
2. For statutory penalties according to proof at to the first cause of action;
3. For punitive damages according to proof as to the second cause of action
4. For attorney’s fees as permitted by statute as to all causes of action;
5. For costs of suit as to all causes of action;
6. For such other and further relief, including any appropriate interest, as the court

deems proper.

For the purposes of due process and default judgment, Plaintiffs set forth a prayer of not more than \$30,000,000 (Thirty Million US Dollars) understanding this amount be arrived at purely for reservation of rights for these purposes and is subject to change, including increase, during litigation of this matter. Such damages pled are exclusive of costs and attorney fees.

Dated: July 6, 2016

CLAYEO C. ARNOLD, APC

By: /s/ Joshua H. Watson
Clayeo C. Arnold
Joshua H. Watson