

FILED
FEB 19 2010

IN THE CIRCUIT COURT OF CLINTON COUNTY, MISSOURI

MOLLY LIVINGSTON
Clerk of Clinton Co. Circuit Court

BEVERLY LONG, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 PRIME TANNING CORP., et al.,)
)
 Defendants.)

Case No. 09CN-CV00422

ANSWER OF DEFENDANT NATIONAL BEEF LEATHERS, LLC TO PLAINTIFFS' SECOND AMENDED PETITION FOR DAMAGES

Defendant, National Beef Leathers, LLC ("NBL"),¹ hereby answers Plaintiffs' Second Amended Petition For Damages ("Petition").

I. ADMISSIONS AND DENIALS

NBL hereby sets forth its admissions and denials to the allegations set forth in Plaintiffs' Petition, as follows:

As To The Parties

In response to the Parties section in Plaintiffs' Petition, NBL states:

1. NBL is without information or knowledge sufficient to enable it to form a belief as to the truth of the allegations contained in paragraph 1 thereof and therefore denies same.
2. NBL is without information or knowledge sufficient to enable it to form a belief as to the truth of the allegations contained in paragraph 2 thereof and therefore denies the same.
3. NBL is without information or knowledge sufficient to enable it to form a belief as to the truth of the allegations contained in paragraph 3 thereof and therefore denies the same.

¹ The caption of Plaintiffs' Petition incorrectly identifies NBL as "National Beef Leathers Co., LLC."

4. NBL is without information or knowledge sufficient to enable it to form a belief as to the truth of the allegations contained in paragraph 4 thereof and therefore denies same.

5. In response to paragraph 5, NBL admits that it is a Delaware LLC and that, as of March 9, 2009, its principal place of business is St. Joseph, Missouri.

6. NBL is without information or knowledge sufficient to enable it to form a belief as to the truth of the allegations contained in paragraph 6 thereof and therefore denies same.

7. NBL is without information or knowledge sufficient to enable it to form a belief as to the truth of the allegations contained in paragraph 7 thereof and therefore denies same.

8. NBL is without information or knowledge sufficient to enable it to form a belief as to the truth of the allegations contained in paragraph 8 thereof and therefore denies same.

As To Jurisdiction And Venue

In response to Jurisdiction And Venue section in Plaintiffs' Petition, NBL states:

9. NBL denies the allegations contained in paragraph 9 thereof.

10. NBL denies the allegations contained in paragraph 10 thereof.

As To The Facts

In response to The Facts section in Plaintiffs' Petition, NBL states:

11. NBL denies the allegations contained in paragraph 11 thereof.

12. NBL denies the allegations contained in paragraph 12 thereof.

13. NBL denies the allegations contained in paragraph 13 thereof.

14. In response to paragraph 14 thereof, NBL admits that hexavalent chromium in certain quantities and under certain conditions is a state- and federally-regulated material; and NBL denies the accuracy and truth of the broad, unqualified allegations contained in paragraph 14 thereof and all inferences suggested by those allegations.

15. NBL denies the allegations contained in paragraph 15 thereof.

16. NBL is without information or knowledge sufficient to enable it to form a belief as to the truth of the allegations contained in paragraph 16 thereof and therefore denies same.

17. NBL denies the allegations contained in paragraph 17 thereof.

18. NBL denies the allegations contained in paragraph 18 thereof.

19. NBL denies the allegations contained in paragraph 19 thereof.

20. NBL is without information or knowledge sufficient to enable it to form a belief as to the truth of the allegations contained in paragraph 20 thereof and therefore denies same.

21. NBL denies the allegations contained in paragraph 21 thereof.

22. NBL denies the allegations contained in paragraph 22 thereof.

23. NBL is without information or knowledge sufficient to enable it to form a belief as to the truth of the allegations contained in paragraph 23 thereof and therefore denies same.

24. NBL denies the allegations contained in paragraph 24 thereof.

25. NBL denies the allegations contained in paragraph 25 thereof.

26. NBL denies the allegations contained in paragraph 26 thereof.

27. NBL denies the allegations contained in paragraph 27 thereof.

As To Count I

In response to Count I (Negligence of Prime and National Beef) of Plaintiffs' Petition,

NBL states:

28. In response to paragraph 28 thereof, NBL realleges and adopts by reference its responses to paragraphs 1 through 27, inclusive, of Plaintiffs' Petition as if fully set forth herein.

29. NBL denies the allegations contained in paragraph 29, including subparts a.-h., thereof.

30. NBL denies the allegations contained in paragraph 30 thereof.

As to Count II

In response to Count II (Negligence of Wismo and Elementis) of Plaintiffs' Petition,

NBL states:

31-33. NBL makes no response to paragraphs 31-33 thereof, for the reason that none of the allegations contained therein are directed to NBL, and therefore no response to said allegations by NBL is required. To the extent that the Court determines that NBL is required to respond to said allegations: (a) in response to paragraph 31 thereof, NBL realleges and adopts by reference its responses to paragraphs 1 through 30, inclusive, of Plaintiffs' Petition as if fully set forth herein; and (b) NBL denies each and every allegation contained in paragraphs 32 and 33 of Plaintiffs' Petition.

As to Count III

In response to Count III (Negligence of Burns and McDonnell) of Plaintiffs' Petition,

NBL states:

34-36. NBL makes no response to paragraphs 34-36 thereof, for the reason that none of the allegations contained therein are directed to NBL, and therefore no response to said allegations by NBL is required. To the extent that the Court determines that NBL is required to respond to said allegations: (a) in response to paragraph 34 thereof, NBL realleges and adopts by reference its responses to paragraphs 1 through 33, inclusive, of Plaintiffs' Petition as if fully set forth herein; and (b) NBL denies each and every allegation contained in paragraphs 35 and 36 of Plaintiffs' Petition.

As to Count IV

In response to Count IV (Strict Liability Against Prime and National Beef) of Plaintiffs'

Petition, NBL states:

37. In response to paragraph 37 thereof, NBL realleges and adopts by reference its responses to paragraph 1 through 36, inclusive, of Plaintiffs' Petition as if fully set forth herein.

38. NBL denies the allegations contained in paragraph 38 thereof.

39. NBL denies the allegations contained in paragraph 39 thereof.

40. NBL denies the allegations contained in paragraph 40, including subparts a.-d., thereof.

41. NBL denies the allegations contained in paragraph 41 thereof.

42. NBL denies the allegations contained in paragraph 42 thereof.

II. AFFIRMATIVE DEFENSES

NBL hereby sets forth its affirmative defenses to Plaintiffs' Petition, as follows:

First Affirmative Defense: For further answer, and as an affirmative defense, NBL states that Clinton County is not the proper venue for this action.

Second Affirmative Defense: For further answer, and as an affirmative defense, NBL states that Plaintiffs have improperly joined their respective claims into this single action and that the Court cannot conduct a complete and just adjudication of this matter to the extent Plaintiffs have thus misjoined parties to this action.

Third Affirmative Defense: For further answer, and as an affirmative defense, NBL states that Plaintiffs have failed to state a claim against NBL upon which relief may be granted.

Fourth Affirmative Defense: For further answer, and as an affirmative defense, NBL states that Plaintiffs' claims against it are barred because Plaintiffs have failed to allege facts as to NBL with sufficient specificity to provide NBL sufficient information regarding the bases of Plaintiffs' claims against it for NBL to reasonably develop and present its defenses to those claims, in that Plaintiffs have failed to provide NBL reasonable notice of the time, place, nature, and manner of its allegedly wrongful conduct.

Fifth Affirmative Defense: For further answer, and as an affirmative defense, NBL states that Plaintiffs' claims against it are barred by the applicable statute(s) of limitations.

Sixth Affirmative Defense: For further answer, and as an affirmative defense, NBL states that Plaintiffs' claims are barred by the applicable statute(s) of repose as to the alleged product(s).

Seventh Affirmative Defense: For further answer, and as an affirmative defense, NBL states that Plaintiffs' claims against it are barred by the equitable doctrine of laches.

Eighth Affirmative Defense: For further answer, and as an affirmative defense, Plaintiffs' claims may be preempted in whole or in part by federal and/or state statutes and/or regulations.

Ninth Affirmative Defense: For further answer, and as an affirmative defense, NBL states that some or all of NBL's conduct complained of by Plaintiffs was in all relevant respects authorized by state and/or federal agencies in which regulatory authority over NBL's conduct complained of is vested.

Tenth Affirmative Defense: For further answer, and as an affirmative defense, NBL states that the "land applied fertilizer" at issue produced or supplied by NBL was at all relevant times licensed by the State of Missouri under the Missouri Fertilizer Law as a commercial fertilizer known as Organic Plus; and it is not a "Hazardous Substance," "Hazardous Waste," "Hazardous Chemical," "Toxic Substance," "Toxic Waste," "Toxic Chemical," or similar substance as defined by any federal or state law or regulation.

Eleventh Affirmative Defense: For further answer, and as an affirmative defense, NBL states that Plaintiffs' claims against it are barred by its compliance with the specifications

provided to it for any alleged product(s) produced, sold, or otherwise allegedly placed in the stream of commerce as alleged in Plaintiffs' Petition.

Twelfth Affirmative Defense: For further answer, and as an affirmative defense, NBL states that any alleged product(s) produced, sold, or otherwise allegedly placed in the stream of commerce as alleged in Plaintiffs' Petition was/were manufactured and sold in accordance with the state-of-the-art standards and in compliance with and in conformance to all applicable statutes, regulations, requirements, and mandates which govern the alleged product(s) at the time of their manufacture and sale, and NBL therefore denies that it is liable to Plaintiffs; and, further, with respect to any failure to warn claim, state-of-the-art is a complete defense as provided by R.S.Mo. § 537.764.

Thirteenth Affirmative Defense: For further answer, and as an affirmative defense, NBL states that if it is proven at the time of trial that any alleged product(s) produced, sold, or otherwise allegedly placed in the stream of commerce as alleged in Plaintiffs' Petition was/were used in the fashion alleged, all of which on information and belief is denied, then Plaintiff's claims are barred wholly or in part by R.S.Mo. § 537.765.

Fourteenth Affirmative Defense: For further answer, and as an affirmative defense, NBL states that Plaintiffs' claims against it are barred to the extent of any misuse of any alleged product(s) produced, sold, or otherwise allegedly placed in the stream of commerce as alleged in Plaintiffs' Petition.

Fifteenth Affirmative Defense: For further answer, and as an affirmative defense, NBL states that Plaintiffs' claims against it are barred to the extent of any material modification or alteration of any alleged product(s) produced, sold, or otherwise allegedly placed in the stream of commerce as alleged in Plaintiffs' Petition, so that any such alleged product(s) for which NBL

might be held legally accountable in which a Plaintiff or a Plaintiff's decedent used or was exposed to, if any, was/were not in the same condition as when sold, having been materially altered after the sale and prior to the use or exposure as alleged.

Sixteenth Affirmative Defense: For further answer, and as an affirmative defense, NBL states that if a Plaintiff or a Plaintiff's decedent was exposed to hexavalent chromium by reason of any alleged product(s) produced, supplied or otherwise allegedly placed in the stream of commerce by NBL, as alleged in Plaintiffs' Petition, which allegation NBL expressly denies, such exposure was de minimus and insufficient to establish with reasonable probability that any such alleged product(s) caused or was a significant contributing factor to the alleged injury, damage, or loss to Plaintiffs.

Seventeenth Affirmative Defense: For further answer, and as an affirmative defense, NBL states that if Plaintiffs have any product(s) liability claims against it, which is specifically denied, the same is barred or limited by some or all of the provisions of the Missouri Product Liability Act, R.S.Mo. § 537.760 et seq., including, but not limited to R.S.Mo. §§ 537.764 and 537.765.

Eighteenth Affirmative Defense: For further answer, and as an affirmative defense, NBL states that Plaintiffs' claims against it are barred to the extent the alleged damages and injuries complained of were proximately caused by the acts and/or omissions of third parties that constitute a superseding cause of any and all such damages and claims.

Nineteenth Affirmative Defense: For further answer, and as an affirmative defense, NBL states that the Court cannot conduct a complete and just adjudication of this matter to the extent Plaintiffs have failed to join indispensable parties.

Twentieth Affirmative Defense: For further answer, and as an affirmative defense, NBL states that it is entitled to a complete set-off against the amount of any recovery that Plaintiffs may otherwise have against NBL with respect to their claims against it in the amount of either (1) the stipulated amount of all settlement agreements between all other alleged tortfeasors and Plaintiffs or any other person, or (2) the amount of consideration all other alleged tortfeasors paid to Plaintiffs or to any other person, for release or discharge, whichever is greater, as provided by R.S.Mo. § 537.060.

Twenty-First Affirmative Defense: For further answer, and as an affirmative defense, NBL states that it is entitled to a set-off from any recovery against it to the extent of any and all benefits paid or payable to, or on behalf of, Plaintiffs or any other person from any and all collateral sources.

Twenty-Second Affirmative Defense: For further answer, and as an affirmative defense, NBL states that if Plaintiffs sustained any injuries, damages, or losses as alleged, which is specifically denied, those damages were caused, in whole or in part, by the acts, omissions or faults of others for whom NBL is not responsible; accordingly, NBL is entitled to an assessment of the relative degree of fault of all such persons or entities as provided by R.S.Mo. § 537.067.

Twenty-Third Affirmative Defense: For further answer, and as an affirmative defense, NBL states that if it is proven at the time of trial that NBL is liable for damages to Plaintiffs, said liability is not sole but rather proportionate between or among NBL and one or more of the other Defendants, and, consequently, NBL is entitled to have its liability, if any, limited to its proximate share or, alternatively, is entitled to contribution and/or indemnity from such other Defendant or Defendants based on comparative fault and/or vicarious liability.

Twenty-Fourth Affirmative Defense: For further answer, and as an affirmative defense, NBL states that if Plaintiffs should hereafter have any judgment rendered in their favor for any alleged injuries, damages, and/or losses against any entity other than NBL, then NBL is entitled to a set-off in the amount of said judgment.

Twenty-Fifth Affirmative Defense: For further answer, and as an affirmative defense, NBL states that to the extent that Plaintiffs seek to impose joint and several liability upon NBL, any and all such claims are barred because the imposition of such liability would violate NBL's substantive and procedural rights provided and guaranteed it by the United States Constitution and the Missouri Constitution, including but not limited to the provisions of Article I, Bill of Rights, Sections 10, 19 and 21 of the Constitution of the State of Missouri of 1945 and of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Further, such damages are precluded because they would subject NBL to excessive fines and punishment and would be a violation of due process.

Further, recovery of such damages by Plaintiffs would deny NBL of property without due process of law in violation of Article I, Bill of Rights, Sections 10, 19 and 21 of the Constitution of the State of Missouri of 1945 and of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, because such recovery would allow an award that is grossly excessive or wholly disproportionate to the offense and obviously unreasonable and give the Defendant no notice of the consequences of its conduct.

Recovery of such damages by Plaintiffs deprives NBL of property without due process of law and further deprives NBL of the equal protection of the laws in violation of Defendant's rights under the Fifth and Fourteenth Amendments to the United States Constitution and of Article I, Bill of Rights, Sections 2 and 10 of the Constitution of the State of Missouri of 1945.

Twenty-Sixth Affirmative Defense: For further answer, and as an affirmative defense, NBL states that to the extent that Plaintiffs seek to impose joint and several liability upon NBL, such damages are precluded under R.S.Mo. § 537.067.1.

Twenty-Seventh Affirmative Defense: For further answer, and as an affirmative defense, NBL states that Plaintiffs' claims against NBL apparently seeking punitive damages violate the substantive and procedural rights provided and guaranteed NBL by the United States Constitution and the Missouri Constitution. Plaintiffs' claims seeking punitive damages violate NBL's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. In addition, Plaintiffs' claims for punitive damages violate Article I, Sections 2, 8, 10, 13, 14, 18(a), 19 and 21 of the Missouri Constitution in the following respects:

(a) The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 10, of the Missouri Constitution are violated, because the jury or fact finder has total discretionary powers to award punitive damages, and adequate, objective legal standards do not exist to guide and limit the jury's or fact finder's discretion, thus allowing an award of punitive damages to be irrational, arbitrary, and capricious and based on vague, unpredictable, conflicting, and purely subjective standards;

(b) The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 10, of the Missouri Constitution are violated because the vague and inconsistent legal standards for the imposition of punitive damages deprive NBL of sufficient notice of the type of conduct and mental state upon which an award of punitive damages could result from NBL's alleged misconduct;

(c) The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 10, of the Missouri Constitution are violated, because the guidelines, standards, procedures, and instructions for the imposition of punitive damages are ambiguous, indefinite, vague, uncertain, conflicting, purely subjective, and fundamentally unfair;

(d) The Due Process and Equal Protections Clauses of the Fifth and Fourteenth Amendments to the United States Constitution are violated because no objective limitations are established concerning the amount or severity of the punitive damages;

(e) Article I, Section 21, of the Missouri Constitution is violated, because punitive damages constitute penal damages and amount to an unconstitutional criminal and excessive fine or punishment in a civil proceeding;

(f) The Fifth and Sixth Amendments to the United States Constitution and Article I, Sections 18(a) and (19), of the Missouri Constitution are violated, because NBL cannot exercise all of the constitutional and statutory rights that must be accorded to a party that is subject to the imposition of criminal penalty in the form of punitive damages;

(g) The Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2, of the Missouri Constitution are violated, because punitive damages discriminate against NBL on the basis of wealth, in that greater punitive damage awards for the identical conduct may be awarded against some Defendants who have more economic wealth than other Defendants;

(h) The Fifth Amendment to the United States Constitution and Article I, Section 8, of the Missouri Constitution are violated, because the imposition of punitive damages

on NBL is based on vague, conflicting, uncertain, and purely subjective standards, without adequate notice to NBL, create a chilling effect on speech and expression;

(i) The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, and 14, of the Missouri Constitution are violated, because the imposition of punitive damages impairs NBL's right of access to the courts to adjudicate civil disputes.

Twenty-Eighth Affirmative Defense: For further answer, and as an affirmative defense, NBL states that Plaintiffs' claims against NBL apparently seeking punitive damages are barred because an award of punitive damages against NBL would contravene the public policy of the State of Missouri.

Twenty-Ninth Affirmative Defense: For further answer, and as an affirmative defense, NBL states that R.S.Mo. §§ 537.067, and 537.765 are unconstitutional to the extent these statutes are applied to the facts of this case.

Thirtieth Affirmative Defense: For further answer, and as an affirmative defense, NBL hereby incorporates by reference all other affirmative defenses raised by any other Defendant in this action.

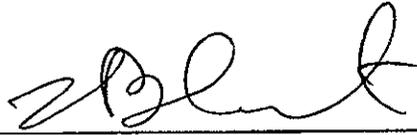
Thirty-First Affirmative Defense: For further answer, and as an affirmative defense, NBL states it reserves the right to assert any and all affirmative defenses that may be determined to exist through the course of discovery.

III. REQUEST FOR RELIEF

For the reasons stated above, NBL respectfully requests the Court to deny Plaintiffs any relief with respect to their claims against NBL; to award NBL its costs incurred in defending against the claims asserted against it by Plaintiffs; and to award it all further appropriate relief.

Date: February 18th, 2010

Respectfully submitted,



| | |
|--------------------|--------|
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing **ANSWER OF DEFENDANT NATIONAL BEEF LEATHERS, LLC TO PLAINTIFFS' SECOND AMENDED PETITION FOR DAMAGES** have been deposited in the U.S. Mail, first class postage prepaid, this 18th day of February, 2010, to the following:

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