

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

CHARLES LANCE HAYES, JR. and JUDE
THADDEUS HAYES, individually, and on behalf of
the ESTATE OF ELAINE FILMENT HAYES
BABCOCK, deceased,

Case No. 3:12-cv-00588-BAJ-RLB

Plaintiffs,

VS.

FRONTERA PRODUCE, LTD., a Texas corporation;
and PRIMUS GROUP INC., d/b/a “Primus Labs”, a
California corporation;

Defendants.

PLAINTIFFS’ UNOPPOSED MOTION FOR LEAVE TO SUPPLEMENT

COME NOW the plaintiffs, CHARLES LANCE HAYES, JR., and JUDE THADDEUS HAYES, individually, and on behalf of the ESTATE OF ELAINE FILMENT HAYES BABCOCK, deceased, (“Plaintiffs”), by and through their attorneys of record, Whaley Law Firm, and Marler Clark, LLP, PS, and pursuant to Local Rule 7.1, hereby moves the Court to enter an order granting Plaintiffs leave to supplement their Memorandum in Support of the Motion for Reconsideration [Dkt. No. 63]. In support of its Motion, Plaintiffs would show the Court as follows:

1. On August 8, 2013, Primus Group, Inc. filed a Motion to Dismiss Plaintiffs’ Complaint [Dkt. No. 32].
2. Plaintiffs’ Memorandum in Opposition to Primus Group, Inc.’s Motion to Dismiss [Dkt. 37] was filed on August 28, 2013.

3. Primus Group, Inc. filed its Reply Brief in Support of its Motion to Dismiss Plaintiffs' Complaint on September 18, 2013, [Dkt. No. 42].

4. Frontera Produce filed a Memorandum in Opposition to Motion to Dismiss for Failure to State a Claim on September 24, 2013 [Dkt. No. 44].

5. On October 1, 2013, Plaintiffs filed an Unopposed Motion for Leave to File a Sur-Reply Brief in Support of their Opposition to Defendant Primus Labs' Motion to Dismiss Plaintiffs' Complaint [Dkt. No. 45].

6. On January 29, 2014, Plaintiffs filed an Unopposed Motion for Leave to Supplement their Memorandum in Opposition to Primus Group, Inc.'s Motion to Dismiss [Dkt. No. 55].

7. On March 7, 2014, Plaintiffs filed a Second Unopposed Motion for Leave to Supplement their Memorandum in Opposition to Primus Group, Inc.'s Motion to Dismiss [Dkt. 57].

8. On March 24, 2014, the Court issued its order Granting Primus Group, Inc.'s Motion to Dismiss Plaintiffs' Complaint [Dkt. No. 60].

9. On April 21, 2014, Plaintiffs filed a motion and Memorandum in Support of its Motion for Reconsideration of the Court's March 24, 2014 order Granting Primus's Motion to Dismiss [Dkt. No. 63].

10. On May 30, 2014, Primus Group, Inc. filed its Opposition to Plaintiffs' Motion for Reconsideration [Dkt. No. 70].

11. The Court is currently considering Plaintiff's Motion for Reconsideration.

12. As the Court is aware, Plaintiffs and Primus Group, Inc. have litigated many similar motions in multiple states arising out of the same operative facts and the same Listeria

outbreak. In their briefing of Primus's Motion to Dismiss in this case, Plaintiffs and Primus Group, Inc., have each directed this Court's attention to different rulings from Courts nationally on these motions to dismiss.

13. Pending its decision on Plaintiffs' Motion for Reconsideration, Plaintiffs desire to give the Court a current summary of all rulings on Primus's motions to dismiss that have occurred since the date of the parties' last supplementation.

14. As Plaintiffs previously informed the Court, on February 28, 2014, a court in the US District Court of the Western District of Louisiana entered an Order Denying Primus Group, Inc.'s Motion to Dismiss in a case with facts, authorities, and arguments nearly identical to those raised in the case at hand. (*See* Order and Memorandum Ruling, Case No. 5:12-cv-02754-TS-MLH, attached as **Exhibit 1 to Dkt. No. 57**). Primus filed a Motion for Reconsideration of the ruling, and the Court in Case No. 5:12-cv-02754-TS-MLH recently issued an Order Denying Primus's Motion for Reconsideration, which Plaintiffs attach as **Exhibit 1**.

15. As Plaintiffs previously informed the Court, on January 23, 2014, the US District Court for the Western District of Oklahoma (Case No. 5:11-cv-01321-R) entered an Order Denying in part and Granting in part Primus Group, Inc.'s Motion to Dismiss, with similar facts, authorities, and arguments. Plaintiffs previously attached this Order as **Exhibit 1 to Dkt. No. 55**.

16. As Plaintiffs previously informed the Court, a Plaintiff in another case arising from the subject Listeria outbreak faced a Motion to Dismiss from Defendant Primus Group, Inc., again involving the same facts and many of the same authorities and arguments. The case was *Hauser v. Primus Labs, Inc., et al*, Case No. 2012CV1196. As Primus informed the Court, its motion to dismiss in the *Hauser* matter was originally granted, but Plaintiffs filed a Motion for Reconsideration, which they previously submitted to this Court as an Exhibit to Dkt. No. 50.

The Court in Hauser subsequently granted Plaintiff's Motion for Reconsideration, reinstating the *Hauser* plaintiff's case against Primus under Restatement 2d of Torts § 324A. *See* Hauser Order on Plaintiff's Motion for Reconsideration, attached as **Exhibit 2**.

17. Plaintiffs also submit the following Orders denying Primus Group, Inc.'s similar motions to dismiss:

a. *Braddock v. Primus, Group, Inc.*, United States District Court for the District of Nebraska, Case No. 8:13-cv-00258-LSC-FG3, attached as **Exhibit 3**;

b. *Drinkwalter v. Frontera Produce Ltd., et al.*, United States District Court for the District of Nebraska, Case No. 7:13-cv-05006-LSC-FG3, attached as **Exhibit 4**;

c. *Pumphrey v. Frontera Produce, Ltd., et al.*, United States District Court for the Western District of Missouri, Case No. 6:13-cv-03308-MDH, attached as **Exhibit 5**;

d. *Rutherford v. Frontera Produce Ltd., et al.*, Eighteenth Judicial District Court, Sedgwick County, Kansas, Case No. 13 CV 2492, attached as **Exhibit 6**;

e. *Underwood v. Jensen Farms, et al.*, United States District Court for the Eastern District of Oklahoma, Case No. 6:11-cv-00348-JHP, attached as **Exhibit 7**;

18. Finally, Plaintiffs submit for this Court's consideration the following Orders granting Primus Group, Inc.'s similar motions to dismiss:

a. *Corsi v. Jensen Farms, et al.*, United States District Court for the District of Wyoming, Case No. 2:12-cv-00052-SWS, attached as **Exhibit 8**;

b. *Lopez v. Frontera Produce Ltd., et al.*, Superior Court of California, County of San Bernardino, Rancho Cucamonga Division, Case No. CIVRS 1305356, attached as **Exhibit 9**;

19. Plaintiffs submit that the arguments and authorities outlined by the courts in the various orders attached as Exhibits provide additional support for their Motion for Reconsideration of this Court's Order Granting Primus's Motion to Dismiss.

20. Counsel for Plaintiffs have conferred with counsel for Defendant Primus Group, Inc., who does not oppose the relief requested herein.

Therefore, Plaintiffs request the Court enter an order granting its Motion to Supplement and accepting **Exhibits 1 through 9** as a supplement to Plaintiffs' Memorandum in Support of their Motion for Reconsideration [Dkt. No. 63].

Respectfully submitted,

/s/ William D. Marler

William D. Marler

Admitted Pro Hac Vice

MARLER CLARK, LLP

1301 2nd Avenue, Suite 2800

Seattle, WA 98101

T: 206-346-1888 / F: 206-346-1898

bmarler@marlerclark.com

/s/ John Randall Whaley

John Randall Whaley (LA #25930)

Whaley Law Firm

3112 Valley Creek Drive, Suite D

Baton Rouge, LA 70808

T: 225-302-8810 / F: 225-302-8814

jrwhaley@whaleylaw.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 9, 2014, a true and correct copy of the foregoing was electronically filed with the Clerk of Court of the United States District Court for the Middle District of Louisiana by using the CM/ECF System, which will send a notice of electronic filing.

/s/William D. Marler

William D. Marler