

HON. SUSAN O. MOLLWAY

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I

KUPALE OOKALA, INC., a Hawai‘i
non-profit corporation; CENTER FOR
FOOD SAFETY, a Washington, D.C.
non-profit corporation,

Plaintiffs,

v.

BIG ISLAND DAIRY, LLC, a Hawai‘i
limited liability company,

Defendant.

Civil No. 17-00305-SOM-BMK

**[PROPOSED] CONSENT
DECREE**

1 **WHEREAS**, Plaintiffs Kupale Ookala, Inc., and Center for Food Safety
2 (collectively, “Plaintiffs”) filed a Complaint in this Court seeking civil penalties, as
3 well as declaratory and injunctive relief, against Defendant Big Island Dairy, LLC
4 (“BID,” and collectively with Plaintiffs, the “Parties”) on June 28, 2017, alleging
5 violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (the “CWA” or the
6 “Act”);

7 **WHEREAS**, BID operates a dairy concentrated animal feeding operation or
8 “CAFO,” located near Mile Marker 30, Ookala, HI;

9 **WHEREAS**, CWA Section 301(a), 33 U.S.C. § 1311(a), prohibits the
10 unpermitted discharge of any pollutant to waters of the United States;

11 **WHEREAS**, Plaintiffs brought their action against BID for alleged CWA
12 violations for unpermitted discharges pursuant to Section 505 of the Act, 33 U.S.C.
13 § 1365;

14 **WHEREAS**, BID is ceasing its dairy operations at the dairy facility, is
15 winding up its affairs, and intends to ultimately dissolve as an LLC entity;

16 **WHEREAS**, BID is subject to regulation and oversight by the Hawaii
17 Department of Health (“HDOH”), which is the delegated agency for CWA
18 compliance in the State of Hawaii;

19 **WHEREAS**, BID will continue to be subject to HDOH inspection and
20 enforcement while BID is in the process of ceasing dairy operations;

1 **WHEREAS**, HDOH and BID intend to execute an Administrative Order on
2 Consent to resolve outstanding Notices of Violations and Orders issued by HDOH
3 and to ensure continued oversight of BID during its closure process;

4 **WHEREAS**, the Parties recognize that this Consent Decree is a settlement
5 of a contested matter;

6 **WHEREAS**, the objective of the Parties in entering this Consent Decree is
7 to resolve this litigation; and

8 **WHEREAS**, the Parties acknowledge that this Consent Decree has been
9 negotiated by the Parties in good faith and will avoid further litigation, and the
10 Court, in entering this Consent Decree, finds that this Decree is fair, reasonable,
11 and in the public interest.

12 **NOW, THEREFORE**, with the consent of the Parties,

13 **IT IS HEREBY ADJUDGED, ORDERED, AND DECREED** as follows:

14 **GENERAL PROVISIONS**

15 1. Jurisdiction and Venue. This Court has jurisdiction over the subject
16 matter of this action and the Parties pursuant to 28 U.S.C. § 1331 and 33 U.S.C. §
17 1365(a). Venue is proper in this judicial district pursuant to section 505(c) of the
18 Act, 33 U.S.C. § 1365(c), because the Complaint alleges that discharges in
19 violation of the Act occurred in this judicial district. BID does not challenge the
20 terms of this Consent Decree or this Court's jurisdiction to enter and enforce this
Consent Decree.

1 2. Retention of Jurisdiction. This Court shall retain jurisdiction for the
2 purposes of issuing such further orders and directions as may be necessary and
3 appropriate for the implementation or modification of this Consent Decree,
4 enforcing compliance with, or resolving disputes regarding the provisions of this
5 Consent Decree. The Parties agree that Magistrate Judge Barry M. Kurren shall
6 take jurisdiction over the decisions concerning implementation, modification, or
7 enforcement of this Consent Decree and such decision or action with respect to this
8 Consent Decree, if appealable, shall be directly appealable to the Ninth Circuit
9 Court of Appeals.

10 3. Reservation of Rights. The Parties reserve the right to enforce the
11 terms of this Consent Decree and to take any action authorized by federal or state
12 law not inconsistent with, or precluded by, this Consent Decree.

13 4. Parties Bound. This Consent Decree shall be binding upon Plaintiffs,
14 BID, and their respective officers, agents, servants, employees, successors, and
15 assigns. However, nothing in this Consent Decree shall be construed as preventing
16 or prohibiting Plaintiffs from enforcing environmental laws against any future
17 owner and/or operator of a dairy CAFO or other agricultural operation upon the
18 land which BID, LLC used, owned, and/or leased from the State of Hawaii for its
19 dairy CAFO.

20 5. Counterparts. This Consent Decree may be signed in counterparts,
and such counterpart signature pages shall be given full force and effect.

1 6. Authorization. The undersigned representative for each Party certifies
2 and affirmatively represents that he/she is fully authorized by the Party whom
3 he/she represents to enter into the terms and conditions of this Consent Decree.

4 7. DOJ and EPA Review. The Parties recognize that, under 33. U.S.C. §
5 1365(c)(3), this Consent Decree can only be entered forty-five (45) days after the
6 Attorney General of the United States and the Administrator of the Environmental
7 Protection Agency receive a copy of this proposed Consent Decree. Within three
8 (3) business days of execution of this Consent Decree by all Parties, Plaintiffs shall
9 serve copies of the executed Consent Decree upon the Administrator of the United
10 States Environmental Protection Agency, the Attorney General, and the Regional
11 Administrator for EPA Region 9, and Plaintiffs shall provide notice to the Court of
12 the foregoing requirements, as required pursuant to 40 C.F.R. § 135.5.

13 8. Final Judgment. The Parties waive the right to appeal from entry of
14 this Consent Decree, and all prior orders of the Court. Upon approval and entry of
15 this Consent Decree by the Court, this Consent Decree shall constitute a final, non-
16 appealable judgment of the Court under Rules 54 and 58 of the Federal Rules of
17 Civil Procedure.

18 9. Effective Date. The effective date of this Consent Decree shall be the
19 date upon which the Court enters in the civil docket a copy of this Consent Decree,
20 signed by the Court.

1 10. Reliance on Counsel. Each Party acknowledges and represents that it
2 has relied on the legal advice of its attorneys, listed at the end of this Consent
3 Decree, who are the attorneys of each Party's choosing, and that the terms of this
4 Consent Decree have been completely explained to the Party by its attorney(s), and
5 that the terms are fully understood and voluntarily accepted.

6 11. Survival. In the event that any part of this Consent Decree is deemed
7 by a court of competent jurisdiction to be unlawful, void, or for any reason
8 unenforceable, and if that part is severable from the remainder of this Consent
9 Decree without frustrating its essential purpose, then the remaining parts of the
10 Consent Decree shall remain valid, binding, and enforceable.

11 12. Compliance. In operating its dairy facility, BID shall abide by this
12 Consent Decree.

13 **BID'S AGREEMENTS AND OBLIGATIONS CONCERNING HDOH**
14 **OVERSIGHT AND ADMINISTRATIVE ORDER ON CONSENT**

15 13. As described in the recitations *supra*, BID shall exercise its best
16 efforts to enter an Administrative Order on Consent ("AOC")¹ with HDOH that
17 resolves outstanding Notices of Violations and Orders concerning BID's
18 compliance with the CWA and Hawaii law and addresses BID's cessation of dairy

19 _____
20 ¹ The Parties acknowledge that there may be other orders issued or entered by HDOH that are not necessarily identified as an "Administrative Order on Consent" to resolve the NOVO. It is the explicit intent of the Parties that the provisions of Paragraph 13 be included in any such order, administrative or otherwise, issued by HDOH to BID to resolve the NOVO.

1 and milking operations. To that end, BID shall exercise all best efforts to include in
2 the AOC the following terms:

3 a. BID shall cease its operations as a CAFO, dairy producer, and dairy
4 processor:

5 i. Target date to terminate all operations: April 30, 2019,
6 however, presence of some young stock may continue into
7 May;

8 ii. Milking shall cease no later than February 28, 2019;

9 iii. BID may explore the possibility of selling its assets at the dairy
10 site to a buyer that may undertake dairying and milk processing
11 in accordance with its own permits and regulatory approvals.

12 b. BID shall, in an orderly manner:

13 i. Reduce and eliminate the number of animals in confinement;

14 ii. Maintain adequate staff to oversee dairy operations, including
15 waste and nutrient management consistent with BID's draft
16 Comprehensive Nutrient Management Plan (CNMP), dated
17 June 25, 2018 (or as later superseded);

18 iii. Clean the confinement and waste treatment facilities, and
19 consult with the HDOH throughout the process, and

20 iv. Provide HDOH and Plaintiffs progress reports as BID
completes the cattle removal and facilities clean-up activities in

1 subparagraphs d. and e. of this Paragraph, to be provided by the
2 10th of each month with respect to the activities taken during the
3 prior calendar month (said reports to include land application
4 records for all nutrient applications during the prior calendar
5 month).

6 c. Timelines. The timelines for cattle removal and facilities clean-up in
7 subparagraphs d. and e. of this Paragraph may be accelerated if
8 business plans allow. These timelines may be exceeded if
9 environmental conditions or animal welfare needs dictate.

10 d. Cattle Removal Schedule: Confined animals not to exceed the
11 following numbers:

- 12 i. Nov. 2018: 750 mature cows, 700 young stock.
- 13 ii. Dec. 2018: 725 mature cows, 675 young stock.
- 14 iii. Feb. 2019: 725 mature cows, 600 young stock.
- 15 iv. Mar. 2019: 500 mature cows, 600 young stock.
- 16 v. Apr. 2019: 0 mature cows, 400 young stock.
- 17 vi. May 2019: 0 mature cows, 0 young stock.

18 e. Facilities Clean-up Schedule:

- 19 i. Dec. 2018: Upper heifer pens scraped, washed, and flushed.

20 Transfer pipes to lagoons double flushed with clean water, and
 inlets thereafter capped.

- 1 ii. Mar. 2019: Upper free stall pens scraped, washed, and flushed.
2 Transfer pipes to lagoons double flushed with clean water, and
3 inlets thereafter capped.
- 4 iii. Apr. 2019: Lower free stall pens scraped, washed, and flushed.
5 Transfer pipes to lagoons double flushed with clean water, and
6 inlets thereafter capped.
- 7 iv. May 2019: Old free stall pens scraped, washed, and flushed.
8 Transfer pipes to lagoons double flushed with clean water, and
9 inlets thereafter capped. In addition, the composter and pads
10 around the composter, waste transfer pits, and separator cells
11 shall be scraped, washed with a high volume-low pressure
12 system, and scrubbed. All wastewater from cleaning activities
13 shall be collected and transferred to the lagoons. Feed areas
14 shall also be cleared of feed, swept, and washed, and all
15 wastewater from cleaning activities shall be collected and
16 transferred to the lagoons.
- 17 v. June 2019: Upper and lower lagoons agitated and cleared of
18 solid and liquid manure, the contents thereof being
19 agronomically land applied pursuant to revised draft CNMP
20 dated June 25, 2018. Both lagoons shall then be refilled with
 clean water, agitated, re-washed, and emptied again, the

1 contents thereof being agronomically land applied pursuant to
2 the revised draft CNMP dated June 25, 2018.

3 f. HDOH Inspection and Enforcement:

- 4 i. BID shall immediately report to HDOH any pollutant
5 discharge, as defined by the Clean Water Act, from its CAFO
6 facilities and activities to regulated waters, namely Kaula,
7 Alaialoa and Kaohaoha Gulches.
- 8 ii. HDOH shall further have all inspection, investigative, and
9 enforcement powers as allowed by applicable law.

10 g. Penalties:

- 11 i. Penalty Payments. Due to the potential insolvency of BID and
12 the winding down of BID's milking and dairying operations,
13 the Parties have agreed to defer all civil penalty claims and
14 payments to the HDOH administrative process. No civil
15 penalties will be assessed or paid in the resolution of this
16 litigation. Presently, HDOH has collected a civil penalty of
17 \$25,000 from BID, and has also assessed an additional civil
18 penalty of up to \$91,000, which shall be resolved through the
19 AOC.
- 20 ii. Stipulated Administrative Penalties. The AOC shall include a
schedule for assessment of stipulated administrative penalties

1 payable in the event BID violates the AOC or violates the CWA
2 during the period of December 1, 2018 through the date of
3 entry of the anticipated AOC.

4 14. Penalty Allocation: All civil penalties collected by HDOH as
5 provided in this subparagraph g. are intended by the Parties to be paid to an
6 appropriate Supplemental Environmental Project or Environmentally Beneficial
7 Project, completed in accordance with applicable HDOH rules for the benefit of
8 the Ookala community. The Plaintiffs shall work with HDOH to determine any
9 appropriate project or projects for the funds. Plaintiffs shall not oppose terms
10 identified in the AOC that substantially conform to the provisions of Paragraph 13,
11 inclusive of all subparagraphs, *supra*. However, nothing in this Paragraph shall be
12 construed as prohibiting Plaintiffs from providing comments to HDOH about the
13 terms of the AOC.

14 15. Plaintiffs shall promptly report to BID and HDOH any actual or
15 suspected pollutant discharges to regulated waters, including any discharges
16 observed as part of site monitoring set forth in Paragraph 21 herein. The Parties
17 hereby agree that HDOH shall be permitted to investigate any such reported
18 discharge, and shall have exclusive jurisdiction as to an appropriate penalty,
19 remedy, enforcement, and the like. Plaintiffs shall not seek the assessment of
20 additional civil penalties against BID, except as provided by Paragraph 14. HDOH
shall be solely responsible for any further assessment of civil penalties for past or

1 future discharges or other violations of the CWA or Hawaii environmental laws by
2 BID.

3 **RELEASE OF CLAIMS & COVENANT NOT TO SUE**

4 16. Plaintiffs hereby provide a full and general release of all claims,
5 known and unknown, against BID (inclusive of its agents, owners, managers,
6 employees, insurers, and the like), based in whole or in part on facts now existing,
7 known or unknown, patent or latent.

8 17. BID hereby provides a full and general release of all claims, known
9 and unknown, against Plaintiffs (inclusive of Plaintiffs' members, principals,
10 agents, officers, employees, and the like), based in whole or in part on facts now
11 existing, known or unknown, patent or latent.

12 18. Plaintiffs covenant not to: (a) sue or otherwise commence or continue
13 any citizen suit or other civil or administrative action against BID (inclusive of its
14 agents, owners, managers, employees, insurers, and the like) in relation, in whole
15 or in part, to past conduct, acts, and omissions of BID (inclusive of its agents,
16 owners, managers, employees, insurers, and the like); (b) file or initiate any new
17 complaints, lawsuits, or the like in any forum against BID, it being the intent of the
18 Parties that regulation of, and enforcement against, BID under the CWA and
19 Hawaii environmental laws will be exclusively in the discretion of HDOH until
20 such time that BID fully ceases its operations at the dairy site and dissolves as a
business entity, as anticipated pursuant to the forthcoming AOC.

1 19. Notwithstanding the provisions of Paragraphs 16 & 18, Plaintiffs may
2 provide complaints to HDOH about suspected discharges, may conduct monitoring
3 as outlined *infra*, and may provide comments to HDOH on issues related to
4 ongoing HDOH inspection, compliance, and enforcement activity, including but
5 not limited to the provisions and implementation of the AOC.

6 20. The releases and covenants contained in Paragraphs 16 & 18 shall not
7 be construed as preventing or prohibiting Plaintiffs from enforcing environmental
8 laws against any future owner and/or operator of a dairy CAFO or other operation
9 using or sited upon the land which BID used, owned, and/or leased from the State
10 of Hawaii for its dairy CAFO.

11 **MONITORING AND ENFORCEMENT**

12 21. Plaintiffs' designee shall have site access per the current site access
13 stipulation filed with the Court (ECF No. 87), provided that:

14 a. Inspections shall be limited to twice per week, for no more than three
15 hours each visit. One inspection shall be at a scheduled day and time
16 each week. The other inspection may be at any time upon notice of
17 reasonable suspicion of a discharge event per the terms of the existing
18 stipulation;

19 b. Plaintiffs' designee reports to BID the specific facts which warrant the
20 aforementioned reasonable suspicion of a discharge event (facts such
as manure smelling water in the gulches); and

1 c. All costs and expenses of the inspections shall be borne by the
2 Plaintiffs and their respective designee.

3 22. The parties acknowledge that BID will continue to be subject to
4 HDOH inspection and enforcement while it is in the process of ceasing dairy
5 operations. Plaintiffs will promptly notify BID of any actual or suspected pollutant
6 discharges to regulated waters to provide BID an opportunity to investigate the
7 discharge. HDOH shall be solely responsible for enforcement related to alleged
8 pollutant discharges from BID's operations. The Plaintiffs shall not initiate any
9 citizen suit, EPA complaint or other action or proceeding for investigation or
10 enforcement related to alleged pollutant discharges from BID's operations. The
11 foregoing shall not be construed to prohibit the reporting of any discharge event to
12 HDOH or reports pursuant to Paragraphs 15 and 19 or commenting pursuant to
13 Paragraph 14 of this Consent Decree.

14 **LIMITATION OF BIG GUN USE**

15 23. Unless otherwise agreed with the Plaintiffs, BID shall not use the "Big
16 Gun" sprinkler to apply liquid manure, wastewater, and/or nutrients to fields and
17 pastures downgradient of the CAFO production area (the milk parlor and free stall
18 barns), until such time as there are no animals in confinement and the lagoons have
19 been emptied of all wastes the first time, as contemplated in Paragraph 13(d)(v).

20 24. In the event Plaintiffs do agree to the use of the Big Gun for
applications to a downgradient field(s), as contemplated in Paragraph 23, BID shall

1 provide adequate notice and opportunity for Plaintiffs' representative to be present
2 at any and all times that the Big Gun is operating on such down-gradient field(s).

3 **ATTORNEYS' FEES AND COSTS**

4 25. BID shall pay Plaintiffs' attorneys' fees and costs, which are a
5 substantial compromise of the total fees and costs incurred by Plaintiffs in the
6 amount of \$450,000. Costs alone, including expert fees, exceeded \$250,000.
7 Plaintiffs acknowledge that on December 11, 2018, Plaintiffs received from BID
8 \$200,000 as partial payment of this total amount. BID shall deliver to Plaintiffs
9 the remainder of this total amount within sixty (60) calendar days of approval and
10 entry of this Consent Decree by the Court. The payment of the remainder is subject
11 to separate personal guarantees by the managers (Steven Whitesides and Derek
12 Whitesides, father and son) of BID, LLC.

13 **DISPUTE RESOLUTION**

14 26. The Dispute Resolution procedures of this section shall be the
15 exclusive mechanism for the Parties to raise and resolve disputes arising under or
16 with respect to this Consent Decree ("Covered Dispute").

17 27. A Covered Dispute shall be considered to have arisen when one Party
18 sends the other Part(ies) a written Notice of Dispute.

19 28. Any Covered Dispute shall, in the first instance, be the subject of
20 informal negotiations between the Parties in an attempt to resolve the dispute in
good faith and in an expeditious manner. The Parties shall have thirty (30) days

1 following receipt of a Notice of Dispute to reach agreement, unless otherwise
2 agreed.

3 29. If the Parties cannot reach agreement on the dispute during the 30-day
4 period provided under Paragraph 28, the Parties shall jointly file a motion with the
5 Court requesting resolution of the Covered Dispute. The Parties shall append to
6 that motion written statements not to exceed ten (10) double-spaced pages
7 (excluding attachments or exhibits) setting forth their respective proposed
8 resolutions of the dispute. All disputes shall be resolved by Judge Kurren in
9 accordance with Paragraph 2 of this Consent Decree.

10 30. The Parties shall comply with any written agreement reached as a
11 result of informal negotiations conducted during the 30-day period provided for by
12 Paragraph 28, including any extension of time to comply with a schedule or
13 deadline required by this Consent Decree, so long as the agreement does not
14 constitute a material change to any terms of this Consent Decree.

15 NOTICES

16 31. Unless otherwise specified herein, any notification, submission,
17 statement of position, or communication required by this Consent Decree shall be
18 made electronically, unless otherwise requested, and addressed as follows:

19 As to Plaintiffs: Charles M. Tebbutt, charlie@tebbuttlaw.com

20 Parker Jones, parker@tebbuttlaw.com

As to BID: Daniel V. Steenson, dan@sawtoothlaw.com

David P. Claiborne, david@sawtoothlaw.com

32. Any Party may, by written notice to all other Parties, change its designated notice recipient or notice address provided above.

33. Notices submitted pursuant to this section shall be deemed submitted upon electronic transmission, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

MODIFICATION

34. Integration. This Consent Decree contains the entire agreement of the Parties and shall not be modified by any prior oral or written agreement, representation, or understanding. Any non-material modification of this Consent Decree after entry may be made without approval of the Court but must be in writing and approved by the Parties.

35. Any material modification to any term of this Consent Decree shall be effective only upon approval by the Court.

TERMINATION

36. This Consent Decree shall terminate upon complete satisfaction of all of the following terms:

- a. BID ceases all milking and dairy operations at the dairy facility; and
- b. BID completes all requirements and obligations under this Consent Decree, including but not limited to the obligations contained in Paragraphs 21 and 23-24; and


c. BID provides written notice to Plaintiffs that it has satisfied its requirements and obligations under this Consent Decree.

37. Should Plaintiffs disagree with BID’s notification under Paragraph 36 c., Plaintiffs may invoke Dispute Resolution within ten (10) calendar days of receipt of the certification.

38. Following the notification that BID has completed all work required under the Consent Decree, either Party, or the Parties jointly, may move this Court to terminate this Consent Decree.

WE HEREBY CONSENT TO ENTRY OF THIS CONSENT DECREE:

Plaintiff Kupale Ookala:

By:  _____

Plaintiff Center for Food Safety:

By: _____

Defendant Big Island Dairy, LLC:

By: _____

Steven Whitesides

Derek Whitesides

c. BID provides written notice to Plaintiffs that it has satisfied its requirements and obligations under this Consent Decree.

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Plaintiff Kupale Ookala:

By: _____

Plaintiff Center for Food Safety:

By:  _____

Defendant Big Island Dairy, LLC:

By: _____

Steven Whitesides

Derek Whitesides

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2 requirements and obligations under this Consent Decree.

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5 receipt of the certification.

6 38. Following the notification that BID has completed all work required
7 under the Consent Decree, either Party, or the Parties jointly, may move this Court
8 to terminate this Consent Decree.

9 WE HEREBY CONSENT TO ENTRY OF THIS CONSENT DECREE:

10 Plaintiff Kupale Ookala:

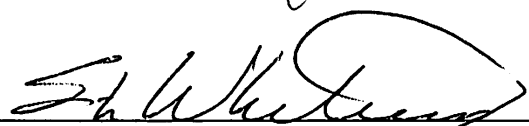
11 By: _____
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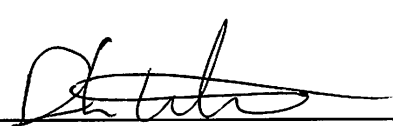
13 Plaintiff Center for Food Safety:

14 By: _____
15

16 Defendant Big Island Dairy, LLC:

17 By:  _____
18

19 
20 Steven Whitesides


Derek Whitesides

1 IT IS SO ORDERED THIS _____ DAY OF _____,
2019.

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HON. SUSAN O. MOLLWAY
United States District Judge

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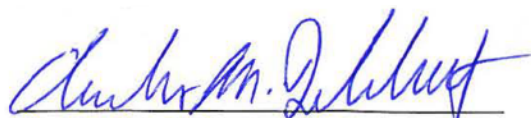
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RESPECTFULLY SUBMITTED THIS 8th DAY OF January, 2019.



Charles M. Tebbutt, *pro hac vice*
Sarah A. Matsumoto, *pro hac vice*
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*Attorneys for Plaintiffs Kupale Ookala
and Center for Food Safety*

SAWTOOTH LAW OFFICES, PLLC

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by: _____
Daniel V. Steenson, *pro hac vice*
David P. Claiborne, *pro hac vice*
Attorneys for Defendant