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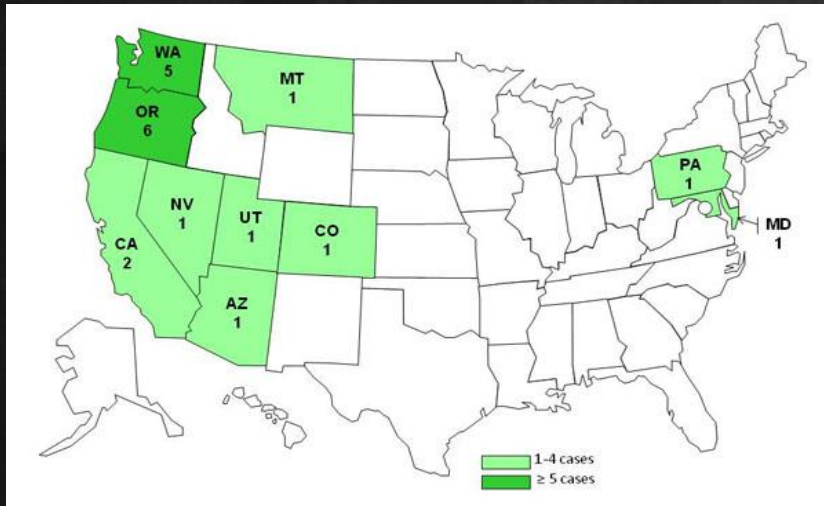
**MARLER CLARK**  
THE FOOD SAFETY LAW FIRM

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## PulseNet and OutbreakNet

*Liability of Public Agencies  
and their Employees in  
Foodborne Illness  
Investigations*

# Another Cantaloupe Story



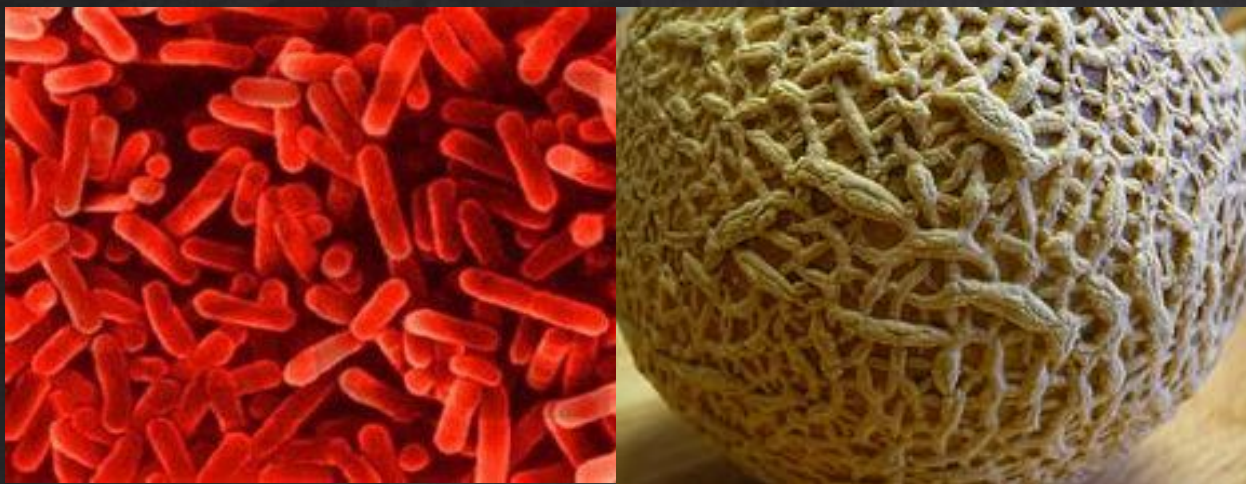
- Between February 1 and April 22, 2011, 20 people infected with the outbreak strain of [Salmonella Panama](#) were reported in Arizona, California, Colorado, Maryland, Montana, Nevada, Oregon, Pennsylvania, Utah and Washington.
- 12 of 16 ill people recalled eating cantaloupe in the week before illness. 11 of the 12 ill people ate cantaloupes purchased at eight different Costcos. Information gathered from membership cards determined that ill persons purchased cantaloupes sourced from Asuncion Mita, A Del Monte Fresh Produce supplier.

# The Del Monte Fresh Recall

- On March 22, 2011, Del Monte Fresh Produce voluntarily recalled 4,992 cartons of cantaloupes, each containing 4 plastic mesh sleeves with 3 cantaloupes per sleeve, because they have the potential to be contaminated with [Salmonella Panama](#). The cantaloupes were distributed through Costcos in Alaska, California, Colorado, Idaho, Montana, Oregon, and Washington.



# Have I heard this Story Before?

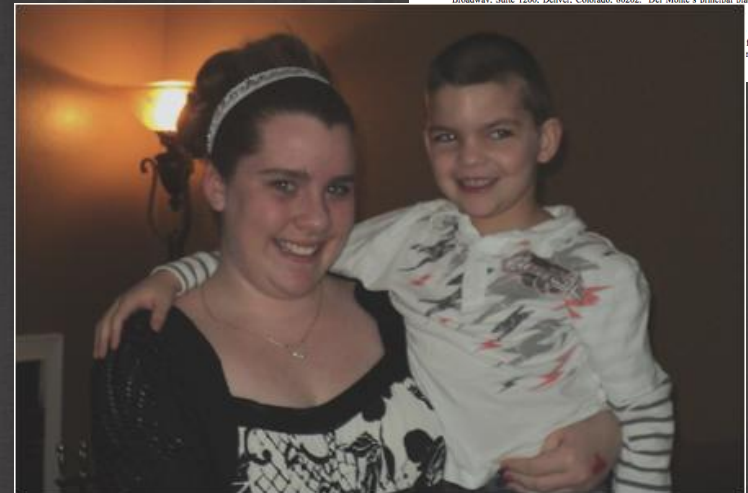


- This was the [third Salmonella related cantaloupe recall](#) Del Monte Fresh Produce has initiated in less than two years.
- In late 2009 the California State Department of Public Health warned consumers not to eat Del Monte cantaloupe due to [Salmonella](#) contamination and the company recalled 1,120 cartons of its product.
- In 2010, Michigan Department of Agriculture testing detected the presence of [Salmonella](#) on Del Monte Fresh Produce cantaloupe, and the company recalled 81 cartons of cantaloupe.

# I have seen this before – a few times

- On March 31, 2011 [Marler Clark](#) filed suit against Del Monte Fresh Produce on behalf of a Colorado family whose 12-year-old daughter was hospitalized after contracting a [Salmonella](#) infection from Del Monte brand cantaloupe purchased from Costco.
- The child ate Del Monte Fresh Produce cantaloupe in early March and began to experience gastrointestinal symptoms on March 4. The symptoms worsened until March 10, when the girl was admitted to a local hospital where she was diagnosed with a [Salmonella](#) infection in her blood. She was hospitalized for three days and incurred \$30,000 in medical expenses.

DISTRICT COURT, COUNTY OF ADAMS, STATE OF COLORADO 1100 Judicial Center Dr. Brighton, CO 80601.	FILED Document - District Court CO Adams County District Court 17b-20 2011-cv-03 Filed Date: Mar 31 2011 3:57PM MDT Transaction ID: 3679810
<b>Plaintiffs:</b> ROBERT LOPEZ and KELLI LOPEZ, Individually, and as Parents and Next Friends of S.W., a minor	▲COURT USE ONLY▲ Case No.: Courtroom:
<b>Defendants:</b> DEL MONTE FRESH PRODUCE N.A., INC. a foreign corporation; JOHN DOES 1-10.	
<b>Attorney for Plaintiffs:</b> John Riley, Esq. No. 18962 Montgomery Little & Soran, P.C. 5445 DTC Parkway, Suite 800 Greenwood Village, Colorado 80111 Telephone: 303.773.8100 Facsimile: 303.220.9412 Email: <a href="mailto:jriley@montgomerylittle.com">jriley@montgomerylittle.com</a>	
<b>COMPLAINT AND JURY DEMAND</b>	
COME NOW the Plaintiffs, by and through their attorneys, John Riley of Montgomery Little & Soran, P.C., and Bill Marler of Marler Clark, LLP, PS (admission pro hac vice pending), file this Complaint and Jury Demand and allege as follows:	
<b>PARTIES</b>	
1. The Plaintiffs Robert Lopez, Kelli Lopez and S.W. reside in Thornton, Colorado. Robert Lopez and Kelli Lopez are the parents of S.W., a minor.	
2. The Defendant Del Monte Fresh Produce N.A., Inc. (hereafter "Del Monte") is a foreign corporation organized and existing under the laws of the State of Florida. Del Monte is registered with the Colorado Secretary of State to do, and in fact does conduct, business in Colorado. Del Monte's registered agent in Colorado is The Corporation Company, 1675 Broadway, Suite 1200, Denver, Colorado. 80202. Del Monte's principal place of business is	
are entities who food product that not known to the	



# FDA Steps Up

- On July 15, 2011, the FDA issued [Import Alert #22-03](#), “Detention Without Physical Examination of Cantaloupes from Asuncion Mita, Guatemala.”
- A third-party audit conducted on behalf of Del Monte Fresh Produce itself found that a pipe containing raw sewage and wastewater emptied into an open ditch about 100 yards from the farm’s packinghouse.



# Del Monte Fresh Swings Back



- On August 24, 2011, Del Monte Fresh Produce filed suit against the FDA to seek an injunction that would lift an FDA rule restricting the importation of “wholesome” fresh cantaloupe.

*“Del Monte Fresh’s claims are based on the FDA’s (and several other state agency officials’) erroneous speculation, unsupported by scientific evidence, that cantaloupes previously imported by Del Monte Fresh from a Guatemalan farm and packing facility were contaminated with the pathogen [Salmonella](#). In fact, neither the FDA nor any state health agency in the U.S. has offered evidence or data to support the FDA action.”*

# Del Monte Fresh Swings a Bit Harder



- On August 29, 2011, Del Monte Fresh Produce filed a notice to sue Oregon Health Authority's Public Health Division and one of its officials.

*"This Notice to Sue alerts the Oregon Health Authority's Public Health Division of its conduct and misleading allegations regarding Del Montes Fresh's imported cantaloupes as the source of a [Salmonella](#) outbreak earlier this year despite the lack of sufficient factual basis."*



# Del Monte Fresh Swings and Misses



- On September 30, 2011 Del Monte Fresh Produce and FDA reached an “amicable resolution” and import alert was lifted.
- On March 16, 2012 Del Monte Fresh Produce withdrew its threat of a lawsuit against Oregon Public Health without comment.
- June 1, 2012 Del Monte Fresh Produce and Lopez family case settled for an undisclosed amount.

# Why did Del Monte Fresh Fold?

- It did not have the facts on its side.
- It did not have the law on its side.
- A lawsuit against an employee will generally fail:

*"the sole cause of action for any tort of officers, employees or agents of a public body acting within the scope of their employment or duties and eligible for representation and indemnification shall be an action against the public body only."*

- A lawsuit against a public body will also generally fail:

*"Every public body is immune from liability for any claim for injury to of death of any person or injury to property resulting from an act or omission of an officer, employee or agent of a public body when the claim against such officer, employee or agent is based upon the performance of or the failure to exercise or perform a discretionary function or duty."*

# Questions

