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Pasture to Package: Ensuring Food Safety Compliance and Animal Welfare Integrity in Grass-Fed Beef Production

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PASTURE TO PACKAGE: ENSURING FOOD SAFETY COMPLIANCE AND ANIMAL WELFARE INTEGRITY IN GRASS-FED BEEF PRODUCTION

Lauren Manning[†]

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I. INTRODUCTION

Consumer demand for grass-fed beef is on the rise, and some of the drivers of the grass-fed beef trend are consumer perceptions that, first, the practices of the grass-fed industry mean that the meat

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poses fewer health and safety risks than conventionally raised grain-fed beef, and second, the handling of the animals is more humane. However, the practices and processing methodologies of the grass-fed industry are not free from food safety and humane handling issues. In recent years, a pair of companies in the grass-fed beef industry, Rain Crow Ranch (RCR) and Fruitland American Meat (Fruitland), was cited for several violations of federal regulations. These incidents serve as reminders to the grass-fed industry that its products are subject to serious food safety and humane handling risks, just as conventional meat products are. The grass-fed meat industry can draw lessons from these case studies that will help the industry continue to grow and thrive.

II. CONSUMER DEMAND FOR GRASS-FED BEEF IS ON THE RISE

Over the past decade, the demand for grass-fed beef has grown at an annual rate of twenty-five to thirty percent.[1] During 2013, retail sales of grass-fed beef products exceeded 400 million dollars, representing a dramatic increase over the five million dollars of retail sales reported in 1998.[2] Other studies have shown that grass-fed beef purchases represent three to six percent of the total beef market share in a number of major U.S. markets.[3] Among the drivers for this increase are studies suggesting that, compared to conventionally raised grain-fed beef, grass-fed beef has fewer calories, less fat, and higher levels of so-called "healthy fats" like Omega-3 fatty acids.[4]

Some consumers may opt for grass-fed products based on a belief that the practices and processing methodologies used pose less of a health and safety risk compared to conventionally raised beef.[5] Yet, a recent study completed in collaboration between Purdue University and Zhejiang University, a Chinese university, concluded,

1. Steve Banker, *The Grass-Fed Beef Supply Chain*, FORBES (Jan. 29, 2016), http://www.forbes.com/sites/stevebanker/2016/01/29/the-grass-fed-beef-supply-chain/#5b5cdd76258a.

2. David Yeager, *Grass-Fed vs. Conventional Beef*, TODAY'S DIETICIAN, Nov. 2015, at 26.

3. Banker, *supra* note 1.

4. RICH PIROG, LEOPOLD CTR. FOR SUSTAINABLE AGRIC., CONSUMER PERCEPTIONS OF PASTURE-RAISED BEEF AND DAIRY PRODUCTS: AN INTERNET CONSUMER SURVEY 12 (2004), https://www.csuchico.edu/grassfedbeef/documents/Consumer%20Perceptions%20of%20pasture%20Iowa%20state%20marketing.pdf.

5. *See generally id.*

"there are no clear food safety advantages to grass-fed beef products over conventional beef products."[6] Some grass-fed products are marketed as posing less of a safety risk, noting that forage-based diets improve the microbial environment in the livestock's rumen, enhancing its ability to thwart off pathogens.[7] Other factors, however, may have a larger part to play in food safety for grass-fed products, including how and where the meat is processed and whether the livestock receive preventative or sub-therapeutic antibiotics.[8] But not everyone agrees with Purdue and Zhejiang's joint study.[9] While describing the report's conclusions as "intriguing," at least one expert raised concerns regarding whether the small sample sizes used to perform the study limit the validity of extrapolating its results across the entire beef industry.[10]

6. Jiayi Zhang et al., *Contamination Rates and Antimicrobial Resistance in Bacteria Isolated from "Grass-Fed" Labeled Beef Products*, 7 FOODBORNE PATHOGENS AND DISEASE 1331, 1331 (2010). Although the report concludes that there "are no clear food safety advantages to grass-fed beef," it did find a disparity in the rates of bacterial pathogens identified in conventional versus grass-fed meat. For example, Enterooccus species were isolated from 62% of the conventional samples and 44% of the grass-fed samples—a difference that did not reach significance. *Id.* However, the difference was greater for ground beef: 75% for conventional versus 41% for grass-fed. *Id.* at 1333. The report also noted that conventional beef showed a "higher resistance to several antibiotics" and was "more frequently resistant to daptomycin and linezolid." Michelle Greenhalgh, *Study: Grass-Fed Not Safer than Conventional Beef*, FOOD SAFETY NEWS (Aug. 17, 2010), http://www.foodsafetynews.com/2010/08/debate-conventional-v-grass-fed-beef/#.Vyi5OhUrKRs.

7. *See* Zhang et al., *supra* note 6; *cf.* Chris Kresser, *Why Grass-Fed Trumps Grain-Fed*, CHRIS KRESSER (Mar. 29, 2013), https://chriskresser.com/why-grass-fed-trumps-grain-fed/.

8. *See* Robert Roos, *Study Finds No Clear Safety Advantage for Grass-Fed Beef*, CTR. FOR INFECTIOUS DISEASE RES. AND POL'Y, UNIV. OF MINN. (July 20, 2010), http://www.cidrap.umn.edu/news-perspective/2010/07/study-finds-no-clear-safety-advantage-grass-fed-beef.

9. *See, e.g.*, Cynthia Daley et al., *A Review of Fatty Acid Profiles and Antioxidant Content in Grass-Fed and Grain-Fed Beef*, 9 NUTRITION J. 1 (Mar. 10, 2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2846864/ (finding some health benefits to grass-fed beef).

10. *See, e.g.*, Greenhalgh, *supra* note 6 (quoting Scott J. Wells, Director of Education at the University of Minnesota's Center for Animal Health and Food Safety, who stated that "[c]ontamination of retail beef samples by certain bacterial pathogens is a complex process" and that "[i]t's not likely to be as simple as grass-fed vs. conventional fed").

III. RAIN CROW RANCH AND FRUITLAND AMERICAN MEAT

Located near Doniphan, Missouri, Rain Crow Ranch (RCR) produces grass-fed beef, heritage-breed pork, and pastured poultry and has been selling to consumers since 2000.[11] The business is family-owned and operated by Mark Whisnant and Dr. Patricia Whisnant, a veterinarian.[12] Dr. Whisnant is also a past President of the American Grassfed Association and continues to be involved with the organization.[13] Dr. Whisnant writes on her farm's website, "[g]rass fed beef as a product is the tip of an underlying mountain of strength and integrity rooted in family farms that put their hearts and hands into what they produce."[14] The business distributes its products through Whole Foods.[15]

RCR also owns and operates a meat processing plant under the name Fruitland American Meat (Fruitland), located in Jackson, Missouri, which processes roughly 200 animals per week.[16] After acquiring the processing plant, it "underwent an animal-friendly remodel which, according to RCR, was done by 'Dr. Temple Grandin's team.'"[17] On its website, RCR states: "[a]nimal welfare advocates favor grassfed beef because it allows for healthier animals raised with respect. Animals raised in a manner that provides the fulfillment of their natural behavioral and biological instincts—grazing and foraging on pasture."[18]

Fruitland's website states that "[h]ealth professionals recommend grass fed beef because it may reduce your risk of a

11. Mark Whisnant & Patricia Whisnant, *The Story of Whisnant Family Grass Farm*, AM. GRASS FED BEEF, http://www.americangrassfedbeef.com/natural-grass-farmers.asp (last visited Feb. 27, 2017).

12. *Id.*

13. *Officers & AGA Staff*, AM. GRASSFED ASS'N, http://www.americangrassfed.org/about-us/officers-aga-staff/ (last visited Feb. 27, 2017).

14. Whisnant & Whisnant, *supra* note 11.

15. *Fruitland American Meat*, WHOLE FOODS MKT., http://www.wholefoodsmarket.com/local-vendor/fruitland-american-meat (last visited Feb. 27, 2017); *see also,* Whisnant & Whisnant, *supra* note 11.

16. Whisnant & Whisnant, *supra* note 11; *Fruitland American Meat*, *supra* note 15.

17. *Wrongful Death Lawsuit Linked to Missouri Slaughter Plant Suspended by FSIS*, FOOD SAFETY NEWS (Aug. 18, 2015), http://www.foodsafetynews.com/2015/08/fsis-shuts-down-mo-slaughter-plant-until-humane-handling-violations-are-fixed/#.VyiWFhUrKRs [hereinafter *Wrongful Death*].

18. *Grass Fed Cattle*, RAIN CROW RANCH, http://raincrowranch.com/grass-fed-cattle/ (last visited Feb. 27, 2017).

number of diseases including diabetes, obesity, cardiovascular disease, and cancer."[19] RCR's website also notes that "[c]onsumers seek grassfed beef as an alternative to gigantic 'factory farms' and feedlots in industrial beef production where animals are fed low levels of antibiotics, hormones, an aberrant diet and chemicals to speed gain."[20]

A recent series of federal enforcement actions taken against RCR and Fruitland—and a lawsuit filed against both entities—demonstrate how grass-fed operators and producers must keep food safety concerns and good animal-handling practices a central concern for their operations.[21] Producers and consumers ought not to assume that alternative and non-conventional production methods are an absolute guarantee against contamination or a guarantee of compliance with animal welfare and handling requirements. Although the health benefits, environmental advantages, and animal welfare claims associated with grass-fed products have merit, producers of grass-fed products should not forget that they are subject to the same food safety and animal welfare laws as conventional producers.[22] Understanding these legal and regulatory standards and the consequences that can be imposed for violations is just as critical for grass-fed producers as it is for conventional producers. Additionally, the RCR and Fruitland story serves as an important reminder for producers who direct market grass-fed products to take special care in selecting a processor and distributor.

19. *Why Grass Fed Beef*, FRUITLAND AM. MEAT, http://www.fruitlandamericanmeat.com/why-grass-fed-beef.php (last visited Feb. 27, 2017).

20. *Grass Fed Cattle*, *supra* note 18.

21. *See, e.g.*, Erin Ragan, *Lawsuit Against Fruitland Slaughterhouse Set for Review*, SE. MISSOURIAN (July 31, 2015), http://www.semissourian.com/story/2217891.html (describing a lawsuit alleging that Fruitland allowed animal waste to contaminate a creek); *see also* Wes Cottrell, E. Coli *Leads to Wrongful Death Case*, COTTRELL L. OFF. (Sept. 15, 2015), http://www.cottrelllawoffice.com/e-coli-leads-to-wrongful-death-case/ (describing a case in which parents alleged that their son died after eating Fruitland's beef, which was tainted with *E. Coli*).

22. *See, e.g.*, Julia Calderone, *You May Want to Think Twice Before Buying Expensive Grass-Fed Beef*, BUS. INSIDER (Mar. 25, 2016, 1:16 PM), http://www.businessinsider.com/grass-fed-claims-beef-bogus-usda-packaging-2016-2 ("All meat packages, grass-fed or not, must be approved by Food Safety and Inspection Service . . . .").

IV. FOOD SAFETY RECALLS AT RCR AND FRUITLAND

A. The Federal Meat Inspection Act

The U.S. Department of Agriculture's (USDA) authority to regulate meat and poultry is derived from the Federal Meat Inspection Act (FMIA).[23] The Food Safety and Inspection Service (FSIS) is the department within the USDA responsible for implementing and enforcing the FMIA.[24] As part of its authority and enforcement practices, FSIS assigns inspectors to meat and poultry slaughterhouses and processing plants that handle meat, poultry, and eggs.[25] Pursuant to the Agriculture Marketing Act, FSIS also performs voluntary inspections.[26]

The FMIA requires the USDA to inspect a wide variety of slaughtered and processed animals intended for human consumption—including cattle, sheep, goats, swine, horses, mules, and other equines.[27] Inspectors must be on site at the facility in order for any slaughtering and processing to take place, and no animal may be slaughtered until it has been inspected.[28] This procedure is referred to as continuous or one-hundred percent inspection.[29] The inspectors must examine each animal and its carcass to check for indications of disease, infection, contamination, or other concerns that may require the animal to be removed from production or the carcass to be marked as condemned.[30] The inspectors are also responsible for overseeing the facility's operation, sanitary

23. 21 U.S.C. §§ 601–95 (2012).

24. *About FSIS*, U. S. DEP'T OF AGRIC., https://www.fsis.usda.gov/wps/portal/informational/aboutfsis (last visited Feb. 27, 2017) ("The Food Safety and Inspection Service (FSIS) is the public health agency in the U.S. Department of Agriculture responsible for ensuring that the nation's commercial supply of meat, poultry, and egg products is safe, wholesome, and correctly labeled and packaged.").

25. *See* Hogan & Hartson, LLP, *A Guide to Federal Food Labeling Requirements for Meat, Poultry, and Egg Products*, U.S. DEP'T OF AGRIC. (Aug. 2007), http://www.fsis.usda.gov/shared/PDF/Labeling_Requirements_Guide.pdf.

26. *See Federal Grant of Inspection Guide*, FOOD SAFETY AND INSPECTION SERV., U.S. DEP'T. OF AGRIC., https://www.fsis.usda.gov/wps/portal/fsis/topics/inspection/apply-for-a-federal-grant-of-inspection (last visited Feb. 27, 2017).

27. Hogan & Hartson, *supra* note 25.

28. *See* GEOFFREY S. BECKER, CONG. RESEARCH SERV., RL32922, MEAT AND POULTRY INSPECTION: BACKGROUND AND SELECTED ISSUES 3 (2010).

29. *Id.*

30. *Id.*

conditions, recordkeeping, food safety plan, and packaging, as well as conducting periodic tests to check for pathogens and other adulterants.[31]

Over half of states have enacted their own meat and/or poultry inspection schemes.[32] FSIS is statutorily mandated to determine that these programs are at least equivalent to the federal mandates.[33] Products created under state inspection schemes can only be sold within that state.[34] In some cases, states have entered into agreements with FSIS that provide state inspectors authorization to carry out federal inspection functions.[35]

The inspectors are also tasked with identifying any carcasses or parts thereof that are or may be adulterated. Section 601(m) of the FMIA defines the circumstances under which a "carcass, part thereof, meat, or meat food product" is adulterated.[36] This includes, but is not limited to, circumstances where the item is prepared "under insanitary conditions" or is "poisonous or deleterious";

31. *Id.*

32. *States Operating Their Own MPI Programs*, FOOD SAFETY AND INSPECTION SERV., U.S. DEP'T OF AGRIC., http://www.fsis.usda.gov/wps/portal/fsis/topics/inspection/state-inspection-programs/state-inspection-and-cooperative-agreements/states-operating-their-own-mpi-programs (last modified Mar. 23, 2015).

33. 21 U.S.C. § 454(a)(1) (2012) (stating that the Secretary can develop programs with states that have mandatory poultry product inspection laws that "impose[] . . . inspection, reinspection and sanitation requirements that are *at least equal to* those under this chapter" (emphasis added)); *id.* § 661(a)(1) (stating that the Secretary can develop programs with states that have mandatory meat product inspection laws that "impose[] . . . inspection, reinspection and sanitation requirements that are *at least equal to* those under . . . this chapter" (emphasis added)); *see also* FOOD SAFETY INSPECTION SERV., U.S. DEP'T OF AGRIC., FSIS REVIEW OF STATE MEAT AND POULTRY INSPECTION PROGRAMS: FISCAL YEAR 2016 SUMMARY REPORT 1 (2016), http://www.fsis.usda.gov/wps/wcm/connect/ebbd45b9-d4cf-49c3-a171-47638179af4b/Review-of-State-Programs.pdf?MOD=AJPERES.

34. *State Inspection Programs,* FOOD SAFETY AND INSPECTION SERV., U.S. DEP'T OF AGRIC., http://www.fsis.usda.gov/wps/portal/fsis/topics/inspection/state-inspection-programs (last modified Feb. 12, 2016) ("[P]roduct produced under State Inspection is limited to intrastate commerce, unless a state opts into an additional cooperative program, the Cooperative Interstate Shipment Program.").

35. 9 C.F.R. § 321.2 (2016) ("Under the 'Talmadge-Aiken Act' of September 28, 1962 (7 U.S.C. § 450), the Administrator is authorized to utilize employees and facilities of any State in carrying out Federal functions under the Federal Meat Inspection Act. A cooperative program for this purpose is called a Federal-State program.").

36. 21 U.S.C. § 601(m) (2012) (providing the full definition of the term "adulterated" and potential applications of the term).

"filthy, putrid, or decomposed"; or "unsound, unhealthful, unwholesome, or otherwise unfit for human food."[37]

According to the USDA, most foodborne pathogens are not classified as adulterants.[38] In the wake of Jack in the Box restaurant's *E. coli* outbreak in 1993, the USDA declared "raw ground beef that is contaminated with *E. coli* O157:H7 to be adulterated within the meaning of the Federal Meat Inspection Act."[39] The agency has also classified a number of other *E. coli* serogroups as adulterants, including O26, O103, O45, O111, O121, and O145.[40]

B. The June 2014 Recall for Incomplete Processing

On June 11, 2014, Fruitland American Meat recalled roughly 4012 pounds of meat "because the dorsal root ganglia may not have been completely removed," in violation of USDA regulations requiring its removal in cattle aged thirty months or older.[41] According to the recall announcement, "[t]he problem was discovered by FSIS during a review of company slaughter logs" and "may have occurred as a result of the way some company employees were recording information and determining the age of various cattle."[42] Removal of the dorsal root ganglia, which is part of the nervous system located in the vertebral column, is required because these tissues may contain the pathogen of Bovine Spongiform Encephalopathy, commonly known as "mad cow disease."[43] FSIS categorizes the tissue as a Specified Risk Material.[44] At the time the

37. *Id.*

38. Letter from Daniel Engeljohn, Assistant Adm'r, U.S. Dep't of Agric., Office of Policy and Program Dev., to Sarah Klein, Staff Attorney, Food Safety Program, and Caroline Smith DeWaal, Ctr. for Sci. in the Pub. Interest 1–2 (July 31, 2014), https://www.fsis.usda.gov/wps/wcm/connect/73037007-59d6-4b47-87b7-2748edaa1d3e/FSIS-response-CSPI-073114.pdf?MOD=AJPERES.

39. Helena Bottemiller, *Looking Back: The Story Behind Banning* E. Coli *O157:H7*, FOOD SAFETY NEWS (Sept. 14, 2011), http://www.foodsafetynews.com/2011/09/looking-back-in-time-the-story-behind-banning-ecoli-o157h7/#.Vy9ebhUrKRs.

40. *USDA Takes New Steps to Fight* E. Coli*, Protect the Food Supply*, U.S. DEP'T OF AGRIC. (Sept. 13, 2011), http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2011/09/0400.xml.

41. *Beef Recalled by Missouri Firm for Potential Incomplete Processing*, FOOD SAFETY NEWS (June 12, 2014), http://www.foodsafetynews.com/2014/06/beef-recalled-by-missouri-firm-for-potential-incomplete-processing/#.WHwKt7YrLVo.

42. *Id.*

43. *Id.*

44. *Id.*

recall notice was issued, FSIS and Fruitland had not received any reports indicating adverse reactions resulting from consumption of potentially affected products.[45] On August 18, 2015, *Food Safety News* reported that no illnesses had been linked to the 2014 recall involving the incomplete processing of the beef carcasses.[46]

C. The August 2014 Recall for E. Coli *Contamination*

On August 15, 2014, Whole Foods initiated a recall of 368 pounds of ground beef products that "may [have] be[en] contaminated with *E. coli* O157:H7."[47] In the statement announcing the recall, FSIS advised:

> While the onset of illnesses was in June, on August 13, 2014, additional laboratory results provided linkages between the 3 [Massachusetts] case-patients and ground beef purchased from Whole Foods. Traceback investigation indicated that all 3 case-patients consumed ground beef purchased from 2 Whole Foods Market prior to illness onset.[48]

In response to this statement, *Food Safety News* raised questions regarding, among other topics, "[w]hy that time lag occurred between the reported illnesses and the additional lab tests."[49]

D. The Lawsuit

In December 2014, Andrew and Melissa Kaye filed a lawsuit against RCR and Whole Foods claiming that the RCR brand beef they purchased at the retailer's South Weymouth, Massachusetts, location contained *E. coli* bacteria that infected their eight-year-old son, Joshua, and eventually led to his death.[50] The family reportedly

45. *Id.*

46. *Wrongful Death*, *supra* note 17.

47. *Massachusetts Firm Recalls Ground Beef Products Due to Possible* E. Coli *O157:H7 Contamination*, U.S. DEP'T OF AGRIC. (Aug. 15, 2014), http://www.fsis.usda.gov/wps/portal/fsis/topics/recalls-and-public-health-alerts/recall-case-archive/archive/2014/recall-053-2014-release.

48. *Id.*

49. Cathy Siegner, *Ground Beef Linked to* E. Coli *Recalled From Two Whole Foods Market Stores in Massachusetts*, FOOD SAFETY NEWS (Aug. 15, 2014), http://www.foodsafetynews.com/2014/08/ma-whole-foods-markets-recall-ground-beef-linked-to-e-coli-cases/#.VyiZrxUrKRt.

50. Complaint at ¶¶ 1, 22, 27, 34, Kaye v. Rain Crow Ranch, LLC, No. 1:14-cv-14408 (D. Mass Dec. 15, 2014); *see also* Lane Lambert, *Beef Ranch in Braintree Family*

prepared and consumed the meat as grilled hamburgers, and Joshua got sick a few days later on June 25, 2014.[51] The strain of *E. coli* that infected Joshua was O157:H7—an identical match to the Whole Foods Market outbreak strain.[52] Two other individuals were allegedly sickened as a result of consuming RCR's beef products.[53] To date, RCR and Whole Foods have denied liability for Joshua's death.[54]

As part of the lawsuit, the plaintiffs allege that the defendants, including RCR, Fruitland, and Whole Foods, "have represented that the grass-fed beef products that they make and sell are 'a much safer, better product,' and 'better for the health and safety of the consumer.'"[55] Plaintiffs allege that they purchased the ground beef product at Whole Foods "based on the belief that it was of a superior quality and safety relative to other ground beef available."[56] They have asserted causes of action for breach of implied warranty, negligence, gross negligence, negligent infliction of emotional distress, conscious pain and suffering, wrongful death, and other claims brought under Massachusetts statutes.[57] The plaintiffs are seeking punitive damages as well as compensatory damages from RCR, Fruitland, and Whole Foods.[58]

Whole Foods has filed a cross-claim against RCR and Fruitland claiming that the agreement the parties executed for the sale of RCR's meat to Whole Foods contains an indemnification clause requiring RCR and Fruitland "to indemnify, hold harmless, defend, and release Whole Foods against any and all 'Losses'" as defined in the agreement.[59]

Death Lawsuit Hit by New Federal Action, PATRIOT LEDGER (last modified Aug. 17, 2015, 6:27 PM), http://www.patriotledger.com/article/20150817/NEWS/150816997.

51. Lambert, *supra* note 50.

52. Complaint, *supra* note 50, at ¶ 35.

53. *Wrongful Death*, *supra* note 17.

54. *Id.*

55. Complaint, *supra* note 50, at ¶ 29.

56. *Id.* at ¶ 30.

57. *Id.* at ¶¶ 39–74.

58. *Id.* at ¶ 74.

59. Defendant Whole Foods Mkt. Grp., Inc.'s First Amended Answer to Plaintiff's Complaint for Damages and Jury Demand with Crossclaims at ¶¶ 10, 17, Kaye v. Rain Crow Ranch, LLC, No. 1:14-cv-14408 (D. Mass. Jan. 26, 2016). As of March 31, 2017, these lawsuits are still pending.

E. What the Grass-Fed Beef Industry Can Learn About Food Safety Risks from This Example

As this situation demonstrates, it is possible for grass-fed beef to be contaminated with *E. coli* O157:H7. Although the producers may have taken due care in maintaining a clean environment for their cattle, once the livestock are delivered to Fruitland, the producers no longer have control over the safety measures that are, or are not, implemented.[60] Producers should be prudent when selecting a processing plant by speaking with the plant management and staff, setting up a tour, and conducting research about prior incidents and recalls.[61] If possible, the producer should arrange to be present during the slaughter and processing of an animal to observe how the processor handles the operation from the time the animal is brought to the kill floor to the final packaging of the sub-primal cuts.[62]

The lawsuit also raises unique issues about whether statements made regarding the quality and safety of grass-fed beef can be used against a producer in any lawsuit arising from an outbreak associated with the producer's beef products.[63] Grass-fed producers should think carefully about the language and assertions made in marketing materials. In the RCR lawsuit, the plaintiffs make particular mention of the statements made on the defendant's website claiming that defendant's beef grass-fed products are "much safer, better product[s]."[64] Cautious producers may want to shy away from making claims suggesting that grass-fed beef is inherently safer than conventionally produced beef.

Finally, producers and processors who enter into purchase agreements with retailers need to carefully examine the terms in the

60. *See generally Beef Safety Today*, CATTLEMEN'S BEEF BOARD & NAT'L CATTLEMEN'S BEEF ASS'N, http://www.explorebeef.org/cmdocs/explorebeef/beefsafetytoday916.pdf (last visited Feb. 27 2017) (discussing the importance of following safety procedures at every step of the production process: from farms, to processing plants, to restaurants/stores, to kitchens).

61. *See, e.g.*, Sandra Kay Miller, *Choosing/Finding a Meat Processor*, ON PASTURE (Jan. 6, 2014), http://onpasture.com/2014/01/06/choosingfinding-a-meat-processor/ (providing suggestions and tips for choosing a good meat processor).

62. *See Beef Safety Today*, *supra* note 60 (showing the importance of taking safety measures throughout the processing and cooking process).

63. *See* April L. Farris, *The "Natural" Aversion: The FDA's Reluctance to Define a Leading Food-Industry Marketing Claim, and the Pressing Need for a Workable Rule*, 65 FOOD & DRUG L.J. 403 (2010) (discussing the liability associated with using the term "natural" in product labeling).

64. Complaint, *supra* note 50, at ¶ 29.

agreement governing liability and indemnification in the event of an illness or death associated with the products.[65] The prevalence of terms allocating liability in retail distribution agreements provides an additional incentive for producers to ensure that the processor is complying with all food safety regulations and using best practices in the slaughter, break-down, and packaging of the producer's meat.[66] Even though the producer is mostly powerless over the slaughtering process once he or she delivers the livestock to the processor, the producer may find him- or herself on the hook if the retailer is sued over injuries associated with the meat products.[67] The bottom line is: a producer should be sure to read the terms of any processing, distributing, wholesale, or retail agreements and understand how liability is allocated.

V. ANIMAL WELFARE AND HUMANE SLAUGHTER VIOLATIONS AT FRUITLAND

A. The Humane Methods of Livestock Slaughter Act

The Humane Methods of Livestock Slaughter Act (HMSA) states:

> The Congress finds that the use of humane methods in the slaughter of livestock prevents needless suffering; results in safer and better working conditions for persons engaged in the slaughtering industry; brings about improvement of products and economies in slaughtering operations; and produces other benefits for producers, processors, and consumers which tend to expedite an orderly flow of livestock and livestock products in interstate and foreign commerce.[68]

65. S*ee, e.g.*, Kriefall v. Sizzler USA Franchise, Inc., 816 N.W.2d 853, 869–70 (Wis. 2012) ("Excel was obligated to honor its duty to defend upon E & B's tender of a claim against it for acts or omissions that were arguably within the purview of the Hold Harmless Agreement.").

66. *See, e.g.*, *id.*

67. Robert C. Brown, *The Liability of Retail Dealers for Defective Food Products*, 23 MINN. L. REV. 585, 596–610 (1939) (discussing situations in which producer may be liable for the retailer, e.g., "[t]o be sure, the prevailing, and of late years almost unanimous, authority permits [suits against a producer] where the producer is clearly guilty of negligence").

68. 7 U.S.C. § 1901 (2012).

Pursuant to the HMSA, livestock may only be slaughtered using the humane methods described in the Act.[69] Section 1902 of the Act details the methods of slaughtering that are deemed appropriate and humane.[70] Livestock, including cattle, must be "rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut."[71]

FSIS promulgated the Rules of Practice, which details the instances where it may take enforcement actions against producers and processors for violations of the HMSA or other applicable statutes and regulations.[72] The enforcement actions available to FSIS include, but are not limited to, withholding actions, suspending establishments with or without prior notice, and filing complaints to withdraw grants of federal inspection.[73]

B. The December 2014 Incident

On December 30, 2014, an FSIS inspector observed and heard a stun gun used in an attempt to render a cow unconscious at the Fruitland plant.[74] The first attempt was unsuccessful, and the animal remained standing.[75] The inspector observed the employee make a second attempt, which was also unsuccessful.[76] The animal remained

69. *Id.* § 1902 (stating that "[n]o method of slaughtering or handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane").

70. *Id.*

71. *Id.* § 1902(a). Subdivision (b) provides the requirements for slaughtering livestock and other animals in accordance with religious practices. *See id.* § 1902(b).

72. FSIS Rules of Practice, 9 C.F.R. § 500 (2013); *see also* FOOD SAFETY AND INSPECTION SERV., U.S. DEP'T OF AGRIC., INSPECTION METHODS TRAINING: RULES OF PRACTICE 2 (2013), https://www.fsis.usda.gov/wps/wcm/connect/54090f67-81ac-4198-b4a4-cbd5be09c918/3_IM_ROP.pdf?MOD=AJPERES (explaining the "range of enforcement actions that FSIS uses").

73. 9 C.F.R. § 500; *see also* FOOD SAFETY AND INSPECTION SERV., *supra* note 72, at 2.

74. Lambert, *supra* note 50; Letter from Paul A. Kiecker, Dist. Manager, U.S. Dep't of Agric., Paul A. Kiecker, to Gary Whisnant, Plant Owner, Fruitland Am. Meats (Dec. 30, 2014) (on file with author).

75. Letter from Paul A. Kiecker, *supra* note 74.

76. *Id.*

standing and bleeding from its nostrils.[77] The inspector then notified the plant manager, who rendered the animal unconscious.[78]

C. The July 2015 Suspensions

On July 21, 2015, an FSIS Consumer Safety Inspector initiated a suspension of the Fruitland plant following what he described as "an act of egregious inhumane handling of livestock."[79] The report indicated that the inspector heard a captive bolt gun discharge but did not hear the animal drop.[80] The employee loaded the stun gun again, and the inspector heard a second discharge but still did not hear the animal drop.[81] The inspector reported hearing the animal vocalize three times at this juncture.[82] Next, the kill floor supervisor instructed the employee to obtain a rifle from a nearby room.[83] The inspector indicated that it took thirty seconds to obtain the rifle and effectively stun the animal.[84] The inspector applied a "U.S. Rejected" tag to the animal.[85] He visually located three holes on the animal's head.[86]

That same day, FSIS sent a letter to Peter Whisnant suspending the facility based on Fruitland's alleged "failure to prevent inhumane handling and slaughtering of livestock."[87] The Whisnants responded the following day, on July 22, 2015, providing FSIS with an action plan to address the deficiencies.[88] On July 24, 2015, FSIS provided an abeyance for the suspension, pending FSIS's verification that the action plan was implemented.[89]

On July 29, 2015, a manager at the Fruitland facility operated the mechanism in the facility used to stun the livestock, also referred

77. *Id.*
78. *Id.*
79. Letter from Paul A. Kiecker, Dist. Manager, U.S. Dep't of Agric., to Gary Whisnant, Plant Owner, Fruitland Am. Meats (July 21, 2015) (on file with author).
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. Letter from Paul A. Kiecker, Dist. Manager, U.S. Dep't of Agric., to Gary Whisnant, Plant Owner, Fruitland Am. Meats (July 29, 2015) (on file with author) (summarizing the actions taken by both parties).
88. *Id.*
89. *Id.*

to as a "knock box," at the plant.[90] According to the inspector's report, the following series of events transpired:

> The rifle discharged and the animal vocalized (not a dying moan) one time. The rifle was reloaded and the animal shot again and it vocalized again (not a dying moan). The rifle was reloaded and discharged a third time and I heard the animal fall with no vocalization. It took approximately 30–45 seconds for all 3 shots to be discharged. An examination of the head revealed 3 holes, 2 of which were misplaced. A US reject tag # 39324465 was placed on the knock box and [REDACTED] was notified slaughter would be suspended until a determination could be made.[91]

According to FSIS, taking three shots to stun an animal is considered needless animal suffering.[92] FSIS informed Dr. Whisnant that it was reinstating a suspension of the Fruitland facility based on an alleged "failure to prevent inhumane handling and slaughter of livestock at [the] facility."[93] The letter referenced the series of events stemming from the July 21, 2015, suspension.[94]

In responding to inquiries about the incident, Dr. Whisnant informed a media outlet that modifications at the plant were being made.[95] She added, "We think these changes will more efficiently take care of our loyal St. Louis customers whose support has sustained our farm. Hopefully after last week and this week there will be no shortages in the product we supply."[96] She also noted that the "quality and integrity" of their products would not change despite the facilities overhaul and described the relationship between RCR and the USDA as "very contentious."[97] Additionally, Mr. Whisnant stated that complying with the regulations and verifications during

90. *Id.*
91. *Id.*
92. *See id.*
93. *Id.*
94. *See* Letter from Paul A. Kiecker, *supra* note 79.
95. *See* Ian Froeb, *Rain Crow Ranch Temporarily Shuts Down Processing Plant*, ST. LOUIS POST-DISPATCH (Aug. 14, 2015), http://www.stltoday.com/entertainment/dining/rain-crow-ranch-temporarily-shuts-down-processing-plant/article_49b50f63-74fc-506f-b7ea-e2d41ba40258.html (stating that Dr. Whisnant acknowledged the temporary closure "to restructure and remodel").
96. *Id.*
97. *Id.*

the two-year period leading up to the plant closure increased the business's expenses and the stress of processing.[98]

According to a *Food Safety News* report from August 2015, "no illnesses were associated with" the plant suspensions.[99]

D. What the Grass-Fed Beef Industry Can Learn About Humane Handling Risks from This Example

Countless livestock producers take great pride and care in overseeing the health and welfare of their livestock.[100] For a producer, ensuring that his or her animals receive a quick and painless death during the slaughtering process is a key concern.[101] Producers should take care in selecting a processing plant and ensure that the plant operators conduct slaughtering and processing in an appropriate, consistent, and legal manner.[102] Ideally, a producer will have an opportunity to visit, tour, and observe the slaughtering process at a plant before choosing the facility to slaughter his or her livestock. The producer should ask the plant manager about its animal welfare practices and whether it has ever been subject to any enforcement actions or warnings.

The Fruitland humane handling violations also serve as important reminders for processing plants, primarily when it comes to ensuring that employees are well trained in the appropriate

98. *See id.*

99. *Wrongful Death*, *supra* note 17.

100. *See* BEEF QUALITY ASSURANCE, CATTLE CARE & HANDLING GUIDELINES 2 (2015), http://www.bqa.org/Media/BQA/Docs/cchg2015_final.pdf ("Beef cattle producers take pride in their responsibility to provide proper care to cattle."); *see also* NEB. BEEF QUALITY ASSURANCE PROGRAM, THE CATTLE INDUSTRY'S GUIDELINES FOR THE CARE AND HANDLING OF CATTLE 4 (2006), http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1007&context=nbqa (discussing the various systems in place to ensure healthy livestock and the need for keeping livestock healthy).

101. *See The Cattle Industry's Guidelines for the Care and Handling of Cattle*, *supra* note 100, at 16 (noting the need for humane euthanasia and describing the reasons and methods to be used by producers); *see also* 7 U.S.C. § 1901 (2012) ("Congress finds that the use of humane methods in the slaughter of livestock prevents needless suffering . . . . It is therefore declared to be the policy of the United States that the slaughtering of livestock . . . shall be carried out only by humane methods."); *id.* § 1902 (listing methods of killing livestock that are found to be humane, emphasizing rapidness and effectiveness).

102. *See generally* 9 C.F.R. § 500.2 (2016) (explaining that FSIS can take regulatory control action for any processing plant action that it finds insanitary, that adulterates the product, or that involves inhumane handling).

slaughter of livestock. A plant suspension can create a multitude of problems and cost the plant a substantial amount of money.[103] Beyond these disincentives, processing plants want to ensure that the livestock are killed in a humane, efficient, and painless manner that is in accordance with the law.[104] Processing plants should routinely refresh employees' training regarding appropriate slaughtering and enact sufficient mechanisms to ensure that humane slaughter is achieved consistently at the plant.[105]

Although the Fruitland examples involve the stunning of an animal, humane handling extends to many other aspects of a processing plant's functions.[106] Humane handling during transportation, off-loading, and exposure to weather are all considerations that producers and processors should examine, for a variety of reasons.[107] If, for example, the animals must be delivered to the plant overnight, the producer and processor should ensure that the animals are kept in an appropriate area until slaughtering

103. *See generally* Lillian Schrock, *USDA Suspends Operations at Bartels Packing in Lane County, Citing Inhumane Slaughtering*, REGISTER-GUARD (Nov. 4, 2016), http://registerguard.com/rg/news/local/34953288-75/usda-suspends-operations-at-bartels-packing-in-lane-county-citing-inhumane-slaughtering.html.csp (demonstrating that a suspension can put over fifty people's employment on hold and require implementation of new methods of slaughter); *see also Humane Handling Enforcement Actions*, U.S. DEP'T OF AGRIC., http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/regulatory-enforcement/humane-handling-enforcement-actions/humane-handling-enforcement-actions (last updated Feb. 2, 2017) (noting a growing list of suspension actions taken against processing plants for violating humane handling regulations).

104. *See* 7 U.S.C. §§ 1901–02.

105. *See* Jesse Osborne, *Food Safety Update: Employee Training*, FOOD MANUFACTURING (Dec. 2, 2015), http://www.foodmanufacturing.com/article/2015/12/food-safety-update-employee-training (explaining the effects of employee training at processing plants and providing statistics that demonstrate the benefits).

106. *See, e.g.*, FSIS Directive 6900.2, Humane Handling and Slaughter of Livestock (U.S.D.A. 2011) (showing an example of the many areas of processing requiring humane handling).

107. *See* Keith E. Belk et al., *The Relationship Between Good Handling / Stunning and Meat Quality in Beef, Pork, and Lamb* (Feb. 21–22, 2002) (citing A.L. Schaefer et al., *The Use of Electrolyte Solutions for Reducing Transport Stress*, 75 J. ANIMAL SCI. 258–65 (1997)), http://www.grandin.com/meat/hand.stun.relate.quality.html ("The transport and handling procedures imposed on beef cattle during the normal course of marketing can be a significant stressor with factors like time off feed, water deprivation, mixing and the resulting behavioral problems, transport movement, unfamiliar noise, and inclement weather are often present and collectively result in live weight and carcass losses as well as degraded meat quality.").

and provided with access to water and feed if they are going to be kept on the premises for an extended period of time. Additionally, the manner in which the animals are handled as they are brought to the kill floor can not only give rise to humane handling violations but also affect the quality of the meat.[108] Animals subjected to stress before slaughter can yield dark cutting meat, giving the flesh a dark red or maroon tinge that consumers tend to disfavor.[109]

VI. CONCLUSION

The food safety and humane handling events involving RCR and Fruitland serve as important reminders for grass-fed industry professionals to ensure that both issues receive appropriate and continuing consideration in their companies' operations. Producers and processors can avoid these types of events, which are undoubtedly difficult and trying for all parties involved, if producers take an active approach in selecting processing plants. In addition, processing plants should implement appropriate food safety and humane handling programs. Lastly, all parties should regularly review and refresh their understanding of what is required under federal and state law.

Although the benefits of grass-fed meat production are many-fold—including environmental regeneration, improved living conditions for livestock, and an enhanced nutritional profile for the meat—these benefits do not exempt grass-fed products from the same food safety risks and humane handling considerations that apply to conventional meat products. Taking a proactive approach to food safety and humane handling across the grass-fed production scheme—from pasture to package—will promote the growth and longevity of the grass-fed meat industry.

108. *See* Jeff Savell, *Dark-Cutting Beef*, MEAT SCI. (Jan. 22, 2013), http://meat.tamu.edu/2013/01/22/dark-cutting-beef/.

109. *See id.* Stress from "transportation, rough handling, changing weather conditions such as cold fronts, or anything that causes the animal to draw on its glycogen reserves before slaughter" can lead to dark-cutting beef. *Id.* If the glycogen is depleted before slaughter, there will be a "limited amount of glycogen available to be converted to lactic acid" causing the muscle pH to be higher than normal, which causes the meat to take on a darker hue. *Id.* Although there is no difference in palatability between regular meat and dark-cutting meat, consumers typically prefer to purchase meat with a light-red, pinkish hue. *Id.*

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