

FILED

IN THE CIRCUIT COURT OF GARLAND COUNTY, ARKANSAS 2013 CIVIL DIVISION 10 18

CIVIL DIVISION

JEANNIE EYKE  
GARLAND CO. CIRCUIT CLERK

DANNY HARDCASTLE and NICOLE  
HARDCASTLE, husband and wife

BY Jm PLAINTIFFS

VS.

NO. CV-2013- 605 III

DEFENDANTS

FRONTERA PRODUCE, LTD., a foreign  
corporation; PRIMUS GROUP, INC  
d/b/a PRIMUS LABS, a foreign  
corporation; ASSOCIATED WHOLESALE  
GROCERS, INC., a foreign corporation;  
CH ROBINSON WORLDWIDE, INC., a  
foreign corporation; HARPS FOOD  
STORES, INC., d/b/a "Price Cutter";  
and John Does 1-10

COMPLAINT

COME NOW the plaintiffs, Danny Hardcastle and Nicole Hardcastle, by and through their attorneys of record, BASSETT LAW FIRM LLP, and MARLER CLARK, LLP, PS, and allege as follows:

I. PARTIES

1.1 At all times relevant, Danny Hardcastle and Nicole Hardcastle were married, living in Percy, Garland County, Arkansas.

1.2 The separate defendant, Frontera Produce, Ltd. ("Frontera"), is a corporation organized and existing under the laws of the State of Texas. At all times relevant hereto, Frontera was a manufacturer, distributor, and seller of agricultural products to customers

nationally, including cantaloupes to separate defendant CH Robinson Worldwide, Inc. Frontera's principal place of business is also located in the State of Texas.

1.3 The separate defendant, Primus Group, Inc. d/b/a "Primus Labs" ("Primus"), is a corporation organized and existing under the laws of the State of California, with its principal place of business in California as well. At all times relevant to this Complaint, Primus was a company that, among other things, provided auditing services for agricultural and other businesses involved in the manufacture and sale of food products, including in the State of Colorado. Primus retained the services of certain subcontractors, including a Texas company called Bio Food Safety, to provide auditing services, including the audit described in more detail at paragraph 3.14.

1.4 The separate defendant, Associated Wholesale Grocers, Inc. ("AWG"), is a corporation organized and existing under the laws of the State of Kansas, with its principal place of business in Kansas as well. At all times relevant to this Complaint, AWG was a company that manufactured, distributed, and sold food products, including cantaloupes, to retail food stores in the State of Arkansas, including to separate defendant Harps Food Stores, Inc., d/b/a "Price Cutter".

1.5 The separate defendant, CH Robinson Worldwide, Inc. ("CH Robinson"), is a corporation organized and existing under the laws of the State of Delaware with its principal office located in the State of Minnesota. At all times relevant hereto, CH Robinson distributed and sold a wide variety of fresh produce products, including cantaloupes grown by Jensen Farms, to customers in the Midwest, including to separate defendant AWG.

1.6 The separate defendant, Harps Food Stores, Inc., d/b/a "Price Cutter" ("Price Cutter"), is a domestic corporation with its principle place of business in Springdale, Arkansas.

At all times relevant, separate defendant Harps Food Stores, Inc., d/b/a "Price Cutter" owned and operated the Price Cutter grocery store located at 2004 Albert Pike, Hot Springs, Arkansas, where it carried on in its ordinary course of business the manufacture and retail sale of food products, including the cantaloupe that was the cause of plaintiffs' illness and injuries.

1.7 Upon information and belief, Defendants John Does 1-10 are entities who participated in the manufacture, distribution, and/or sale of the contaminated food product that was the proximate cause of the plaintiffs' injuries, and whose identities are not known to the plaintiffs at this time. The plaintiffs will seek leave of the Court to amend this Complaint at such time that the identities of these parties become known.

## II. JURISDICTION AND VENUE

2.1 This court is vested with original jurisdiction over the defendants, pursuant to A.C.A. § 16-13-201, because the defendants are corporations doing business within the State of Arkansas.

2.2 The venue of this action is proper in Garland County, pursuant to A.C.A. § 16-55-213, because the defendants operate here, and Garland County is where a substantial portion of the events, acts, and omissions giving rise to this claim occurred. The defendants are thus deemed to be residents of Garland County for venue purposes. Further, this venue is proper, pursuant to A.C.A. § 16-55-213, because the plaintiffs have resided in Garland County during all of relevant events, acts, and omissions giving rise to this claim.

## III. GENERAL ALLEGATIONS

### The Outbreak

3.1 On September 2, 2011, the Colorado Department of Public Health and the Environment (CDPHE) announced that it was investigating an outbreak of Listeriosis. On

September 9, 2011, CDPHE announced that the likely source of the *Listeria* outbreak was cantaloupe. On September 12, 2011, CDPHE announced that the outbreak of *Listeria* was linked to cantaloupe from the Rocky Ford (Colorado) growing region. It was subsequently determined that contaminated cantaloupes were grown by Jensen Farms, a Colorado company, and distributed by separate defendant Frontera.

3.2 A total of 147 persons infected with any of the four outbreak-associated strains of *Listeria monocytogenes* were reported to CDC from 28 states. The number of infected persons identified in each state was as follows: Alabama (1), Arkansas (1), California (4), Colorado (40), Idaho (2), Illinois (4), Indiana (3), Iowa (1), Kansas (11), Louisiana (2), Maryland (1), Missouri (7), Montana (2), Nebraska (6), Nevada (1), New Mexico (15), New York (2), North Dakota (2), Oklahoma (12), Oregon (1), Pennsylvania (1), South Dakota (1), Texas (18), Utah (1), Virginia (1), West Virginia (1), Wisconsin (2), and Wyoming (4).

3.3 Among persons for whom information was available, reported illness onset ranged from July 31, 2011 through October 27, 2011. Ages ranged from less than 1 to 96 years, with a median age of 77 years. Most cases occurred in individuals over 60 years old. Fifty-eight percent of cases were female. Among the 144 ill persons with available information on whether they were hospitalized, 142 (99%) were hospitalized.

3.4 Thirty-three deaths were reported. Among persons who died, ages ranged from 48 to 96 years, with a median age of 82.5 years. In addition, one woman pregnant at the time of illness had a miscarriage. Seven of the illnesses were related to a pregnancy; three were diagnosed in newborns and four were diagnosed in pregnant women.

3.5 On or about September 19, 2011, the Food and Drug Administration announced that it found *Listeria monocytogenes* in samples of Jensen Farms' Rocky Ford-brand cantaloupe

taken from a Denver-area store and on samples taken from equipment and cantaloupe at the Jensen Farms' packing facility. Tests confirmed that the *Listeria monocytogenes* found in the samples matches one of the multiple different strains of *Listeria monocytogenes* associated with the multi-state outbreak of listeriosis.

3.6 Jensen Farms recalled its Rocky Ford-brand cantaloupes on September 14, 2011 in response to the multi-state outbreak of listeriosis.

#### The July 25, 2011 Audit of Jensen Farms

3.7 Prior to the outbreak described in paragraphs 3.1 through 3.6, Jensen Farms or Frontera, or both of them, contracted with separate defendant Primus to conduct an audit of Jensen Farms' ranchlands and packinghouse.

3.8 It was the intent of these contracting parties—i.e. Jensen Farms or Frontera, or both of them, and Primus—to ensure that the facilities, premises, and procedures used by Jensen Farms in the production of cantaloupes met or exceeded applicable standards of care related to the production of cantaloupe, including, but not limited to, good agricultural and manufacturing practices, industry standards, and relevant FDA industry guidance. It was further the intent of these contracting parties to ensure that the food products that Jensen Farms produced, and that Frontera distributed, would be of high quality for consumers, and would not be contaminated by potentially lethal pathogens, like *Listeria*.

3.9 Prior to the formation of the contract described at paragraph 3.7, Frontera represented to the public generally, and specifically to the retail sellers of its produce products, including cantaloupes, that its various products were "Primus Certified."

3.10 It was Frontera's intent and expectation that the representation set forth in the preceding paragraph would serve as an inducement for the purchase of its various products,

including cantaloupes, and that consumers, ultimate retailers, and itself would all benefit from Primus's audit and certification by having a high quality product.

3.11 After the formation of the contract described at paragraph 3.7, Primus selected and hired Bio Food Safety, a Texas-based auditing company, to conduct the audit of Jensen Farms. Bio Food Safety thereby became Primus's subcontractor, and agent, for the limited purpose of auditing Jensen Farms.

3.12 Separate defendant Primus held itself out as an expert in the field of food safety, including specifically, though not exclusively, in the analysis and assessment of food safety procedures, facility design and maintenance, Good Agricultural and Manufacturing Practices, and other applicable standards of care incumbent on producers of agricultural products, including cantaloupes.

3.13 By auditing companies involved in the production and distribution of food products, Primus intended to aid such companies in ensuring that the food products produced were of high quality, were fit for human consumption, and were not contaminated by a potentially lethal pathogen, like *Listeria*.

3.14 Bio Food Safety auditor James Dilorio conducted an audit at Jensen Farms' ranchlands and packing facility on or about July 25, 2011, roughly one week before the CDC identified the first victim of the cantaloupe *Listeria* outbreak. Mr. Dilorio, as employee and agent of Bio Food Safety, and as agent of Primus, gave the Jensen Farms packinghouse a "superior" rating, and a score of 96%.

3.15 On or about September 10, 2011, officials from both FDA and Colorado conducted an inspection at Jensen Farms during which FDA collected multiple samples,

including whole cantaloupes and environmental (non-product) samples from within the facility, for purposes of laboratory testing.

3.16 Of the 39 environmental samples collected from within the facility, 13 were confirmed positive for *Listeria monocytogenes* with pulsed-field gel electrophoresis (PFGE) pattern combinations that were indistinguishable from at least three of the four outbreak strains collected from outbreak cases. Cantaloupe collected from the firm's cold storage during the inspection also tested positive for *Listeria monocytogenes* with PFGE pattern combinations that were indistinguishable from at least two of the four outbreak strains.

3.17 After isolating at least three of the four outbreak strains of *Listeria monocytogenes* from Jensen Farms' packinghouse and whole cantaloupes collected from cold storage, the FDA initiated an environmental assessment at Jensen Farms, in which the FDA was assisted by Colorado state and local officials.

3.18 The environmental assessment at Jensen Farms occurred on September 22-23, 2011. Findings from this assessment, set forth in the FDA's report dated October 19, 2011, included, but were not limited to, the following:

a. **Facility Design**: Certain aspects of the packing facility, including the location of a refrigeration unit drain line, allowed for water to pool on the packing facility floor in areas adjacent to packing facility equipment. Wet environments are known to be potential reservoirs for *Listeria monocytogenes* and the pooling of water in close proximity to packing equipment, including conveyors, may have extended and spread the pathogen to food contact surfaces. Samples collected from areas where pooled water had gathered tested positive for an outbreak strain of *Listeria monocytogenes*. Therefore, this aspect of facility design is a factor that may have contributed to the introduction, growth, or spread of *Listeria monocytogenes*. This pathogen is likely to establish niches and harborages in refrigeration units and other areas where water pools or accumulates.

Further, the packing facility floor where water pooled was directly under the packing facility equipment from which FDA collected environmental samples that tested positive for *Listeria monocytogenes* with PFGE pattern combinations that were indistinguishable from outbreak strains. The packing facility floor was

constructed in a manner that was not easily cleanable. Specifically, the trench drain was not accessible for adequate cleaning. This may have served as a harborage site for *Listeria monocytogenes* and, therefore, is a factor that may have contributed to the introduction, growth, or spread of the pathogen.

b. **Equipment Design:** FDA evaluated the design of the equipment used in the packing facility to identify factors that may have contributed to the growth or spread of *Listeria monocytogenes*. In July 2011, the firm purchased and installed equipment for its packing facility that had been previously used at a firm producing a different raw agricultural commodity.

The design of the packing facility equipment, including equipment used to wash and dry the cantaloupe, did not lend itself to be easily or routinely cleaned and sanitized. Several areas on both the washing and drying equipment appeared to be un-cleanable, and dirt and product buildup was visible on some areas of the equipment, even after it had been disassembled, cleaned, and sanitized. Corrosion was also visible on some parts of the equipment. Further, because the equipment is not easily cleanable and was previously used for handling another raw agricultural commodity with different washing and drying requirements, *Listeria monocytogenes* could have been introduced as a result of past use of the equipment.

The design of the packing facility equipment, especially that it was not easily amenable to cleaning and sanitizing and that it contained visible product buildup, is a factor that likely contributed to the introduction, growth, or spread of *Listeria monocytogenes*. Cantaloupe that is washed, dried, and packed on unsanitary food contact surfaces could be contaminated with *Listeria monocytogenes* or could collect nutrients for *Listeria monocytogenes* growth on the cantaloupe rind.

c. **Postharvest Practices:** In addition, free moisture or increased water activity of the cantaloupe rind from postharvest washing procedures may have facilitated *Listeria monocytogenes* survival and growth. After harvest, the cantaloupes were placed in cold storage. The cantaloupes were not pre-cooled to remove field heat before cold storage. Warm fruit with field heat potentially created conditions that would allow the formation of condensation, which is an environment ideal for *Listeria monocytogenes* growth.

The combined factors of the availability of nutrients on the cantaloupe rind, increased rind water activity, and lack of pre-cooling before cold storage may have provided ideal conditions for *Listeria monocytogenes* to grow and out compete background microflora during cold storage. Samples of cantaloupe collected from refrigerated cold storage tested positive for *Listeria monocytogenes* with PFGE pattern combinations that were indistinguishable from two of the four outbreak strains.



3.19 In October and December 2011, FDA officials participated in briefings with the House Committee on Energy and Commerce that were held to further investigate the likely causes of the *Listeria* outbreak that is the subject of this action. At these briefings, FDA officials cited multiple failures at Jensen Farms, which, according to a report issued by the Committee, “reflected a general lack of awareness of food safety principles.” Those failures included:

3.19.1 Condensation from cooling systems draining directly onto the floor;

3.19.2 Poor drainage resulting in water pooling around the food processing equipment;

3.19.3 Inappropriate food processing equipment which was difficult to clean (i.e., *Listeria* found on the felt roller brushes);

3.19.4 No antimicrobial solution, such as chlorine, in the water used to wash the cantaloupes; and

3.19.5 No equipment to remove field heat from the cantaloupes before they were placed into cold storage.

3.20 The audit conducted by Mr. Dilorio on or about July 25, 2011, on behalf of separate defendant Primus, found many aspects of Jensen Farms’ facility, equipment and procedures that the FDA heavily criticized to be in “total compliance.”

3.21 Further, during the July 25, 2011 packinghouse audit conducted by Bio Food Safety, as agent for Primus, Mr. Dilorio failed to observe, properly down score, or consider multiple conditions or practices that were in violation of Primus’s audit standards applicable to cantaloupe packinghouses, industry standards, and applicable FDA industry guidance. The true and actual state of these conditions and practices was inconsistent and irreconcilable with the

“superior” rating, and 96% score, that Mr. Dilorio ultimately gave to Jensen Farms’ packinghouse.

3.22 These conditions or practices included, but were not limited to:

3.22.1 Jensen Farms’ inability to control pests;

3.22.2 Jensen Farms’ use of equipment that was inappropriate for the processing of cantaloupes;

3.22.3 Jensen Farms’ failure to use an antimicrobial in its wash system, or in the solution used to sanitize processing equipment;

3.22.4 Jensen Farms’ failure to ensure the appropriate antimicrobial concentration in its wash water, which, as alleged at paragraph 3.19.4, did not contain any antimicrobial at all;

3.22.5 Jensen Farms’ failure to have hot water available for purposes of handwashing;

3.22.6 The design of Jensen Farms’ packinghouse caused water to pool, creating a harborage site for bacteria; and

3.22.7 Jensen Farms’ failure to precool cantaloupes prior to processing.

3.23 Many of the conditions and practices cited in the preceding paragraph, and others, should have caused Jensen Farms to receive a score that would have caused its packinghouse to fail the July 25, 2011 audit.

3.24 In addition, Mr. Dilorio misrepresented the conditions and practices at Jensen Farms’ packinghouse by giving it a “superior” rating and a score of 96%, despite the existence of conditions and practices that should have caused him to fail the facility. Mr. Dilorio made other material misrepresentations—including, but not limited to, statements about the suitability of

equipment in place at the packinghouse for the processing of cantaloupes—all of which were relied on by Jensen Farms as justification for continuing to use, rather than changing or improving, the various conditions, practices, and equipment for its processing of cantaloupes.

3.25 Had the Jensen Farms' packinghouse failed the July 25, 2011 audit, the cantaloupe that caused the plaintiffs' Listeriosis illness would not have been distributed by Jensen Farms and Frontera. Further, had the Jensen Farms packinghouse failed the July 25, 2011 audit, production would not have continued without Jensen Farms first correcting the various conditions and practices that: (a) should have caused the packinghouse to fail the July 25 audit; and (b) were proximate causes of the outbreak and resulting injuries and illnesses that are the subject of this action.

### Listeriosis

3.26 Listeriosis is a serious illness that is caused by eating food contaminated with the bacterium *Listeria monocytogenes*. Although there are other types of *Listeria*, most cases of listeriosis are caused by *Listeria monocytogenes*. *Listeria* is found in soil and water. Vegetables can become contaminated from the soil or from manure used as fertilizer. Animals can carry the bacterium without appearing ill and can contaminate foods of animal origin, such as meats and dairy products. *Listeria* has been found in a variety of raw foods, such as uncooked meats and unpasteurized (raw) milk or foods made from unpasteurized milk. *Listeria* is killed by pasteurization and cooking; however, in certain ready-to-eat foods, like hot dogs and cold cuts from the deli counter, contamination may occur after cooking but before packaging.

3.27 Although healthy persons may consume contaminated foods without becoming ill, those at increased risk for infection may become ill with listeriosis after eating food contaminated with even a few bacteria.

3.28 A person with listeriosis may develop fever, muscle aches, and sometimes gastrointestinal symptoms such as nausea or diarrhea. If infection spreads to the nervous system, symptoms such as headache, stiff neck, confusion, loss of balance, or convulsions can occur. In immune-deficient individuals, *Listeria* can invade the central nervous system, causing meningitis and/or encephalitis (brain infection). Infected pregnant women ordinarily experience only a mild, flu-like illness; however, infection during pregnancy can lead to miscarriage, infection of the newborn, or even stillbirth. The most recent data suggest that about 2,500 illnesses and 500 deaths are attributed to listeriosis in the United States annually.

#### Danny Hardcastle's *Listeria* Infection and Illness

3.29 In August 2011, Danny Hardcastle consumed a cantaloupe purchased by his mother-in-law, Celia Wildroot, at the separate defendant Price Cutter's store located at 2004 Albert Pike, Hot Springs, Arkansas. The cantaloupe, which was contaminated by *Listeria monocytogenes*, was grown by Jensen Farms.

3.30 Separate defendant Price Cutter had received the contaminated Jensen Farms' cantaloupe in a shipment from separate defendant AWG's Springfield, Missouri facility.

3.31 Separate defendant AWG received the contaminated cantaloupe in a shipment from separate defendant CH Robinson.

3.32 Separate defendant CH Robinson received the contaminated cantaloupe in a shipment from separate defendant Frontera.

3.33 On or about September 10, 2011, Danny Hardcastle experienced the onset of symptoms related to his *Listeria* infection, which he acquired from the contaminated cantaloupe described at paragraph 3.29. He first sought medical care at Mercy Medical Clinic on September 12, 2011, at which point his physician collected blood samples for testing.

3.34 The laboratory at St. Joseph's Mercy Health Center cultured *Listeria monocytogenes* in Danny Hardcastle's blood specimen. Test results were confirmed by the Arkansas Department of Health (ADH) Public Health Labs. The state laboratory conducted Pulsed Field Gel Electrophoresis (PFGE) on isolates cultured from Mr. Hardcastle's blood specimen (ADH Lab ID # 12000316). The strain of *Listeria monocytogenes* that caused Mr. Hardcastle to become ill was a genetic match to one of the Jensen Farms outbreak strains, GX6A16.0001/GX6A12.0001.

3.35 Danny Hardcastle was hospitalized from September 13, 2011 through September 17, 2011, for treatment of severe Listeriosis illness and related complications. After discharge from the hospital, Mr. Hardcastle continued to be extremely ill, because the *Listeria* infection had significantly exacerbated his pre-existing ulcerative colitis condition. Mr. Hardcastle continues to suffer from the effects of his Listeriosis illness.

#### IV. CAUSES OF ACTION

##### Strict Liability against Frontera, AWG, CH Robinson, and Price Cutter—Count I

4.1 At all times relevant hereto, separate defendants Frontera, AWG, CH Robinson, and Price Cutter were manufacturers, distributors, and/or sellers of the adulterated food product that is the subject of this action.

4.2 The adulterated food product that separate defendants Frontera, AWG, CH Robinson, and Price Cutter manufactured, distributed, and/or sold was, at the time it left the control of each of these separate defendants, defective and unreasonably dangerous for its ordinary and expected use because it contained *Listeria*, a deadly pathogen.

4.3 The adulterated food product that separate defendants Frontera, AWG, CH Robinson, and Price Cutter manufactured, distributed, and/or sold was delivered to plaintiff

Danny Hardcastle without any change in its defective condition. The adulterated food product that separate defendants Frontera, AWG, CH Robinson, and Price Cutter manufactured, distributed, and/or sold was used in the manner expected and intended, and was consumed by plaintiff Danny Hardcastle.

4.4 Separate defendants Frontera, AWG, CH Robinson, and Price Cutter owed a duty to plaintiffs to design, manufacture, and/or sell food that was not adulterated, that was fit for human consumption, that was reasonably safe in construction, and that was free of pathogenic bacteria or other substances injurious to human health. Each of these defendants breached this duty.

4.5 Separate defendants Frontera, AWG, CH Robinson, and Price Cutter owed a duty to the plaintiffs to design, prepare, serve, and sell food that was fit for human consumption, and that was safe to the extent contemplated by a reasonable consumer. Each of these defendants breached this duty.

4.6 Plaintiffs suffered injury and damages as a direct and proximate result of the defective and unreasonably dangerous condition of the adulterated food product that separate defendants Frontera, AWG, CH Robinson, and Price Cutter manufactured, distributed, and/or sold.

**Breach of Warranty against Frontera, AWG, CH Robinson, and Price Cutter—Count II**

4.7 Separate defendants Frontera, AWG, CH Robinson, and Price Cutter are liable to the plaintiffs for breaching express and implied warranties that they made regarding the adulterated product that caused plaintiffs' illness and injuries. These express and implied warranties included the implied warranties of merchantability and/or fitness for a particular use. Specifically, separate defendants Frontera, AWG, CH Robinson, and Price Cutter expressly

warranted, through their sale of food to the public and by the statements and conduct of their employees and agents, that the food they prepared and/or sold was fit for human consumption and not otherwise adulterated or injurious to health.

4.8 Plaintiffs allege that the *Listeria*-contaminated food that separate defendants Frontera, AWG, CH Robinson, and Price Cutter sold to Celia Wildroot would not pass without exception in the trade and was therefore in breach of the implied warranty of merchantability.

4.9 Plaintiffs allege that the *Listeria*-contaminated food that separate defendants Frontera, AWG, CH Robinson, and Price Cutter sold to Celia Wildroot was not fit for the uses and purposes intended, *i.e.* human consumption, and that this product was therefore in breach of the implied warranty of fitness for its intended use.

4.10 As a direct and proximate result of separate defendants Frontera, AWG, CH Robinson, and Price Cutter's breach of warranties, as set forth above, the plaintiffs sustained injuries and damages in an amount to be determined at trial.

#### **Negligence against Frontera, AWG, CH Robinson, and Price Cutter—Count III**

4.11 Separate defendants Frontera, AWG, CH Robinson, and Price Cutter owed to the plaintiffs a duty to use reasonable care in the manufacture, distribution, and sale of their food product, the observance of which duty would have prevented or eliminated the risk that their food product would be contaminated with *Listeria* or any other dangerous pathogen at the time the plaintiff Danny Hardcastle consumed it. Each of these defendants breached this duty.

4.12 Separate defendants Frontera, AWG, CH Robinson, and Price Cutter had a duty to comply with all statutes, laws, regulations, and safety codes pertaining to the manufacture, distribution, storage, and sale of their food product, but failed to do so, and were therefore negligent. The plaintiffs are among the class of persons designed to be protected by these

statutes, laws, regulations, safety codes, and provisions pertaining to the manufacture, distribution, storage, and sale of similar food products.

4.13 Separate defendants Frontera, AWG, CH Robinson, and Price Cutter had a duty to properly supervise, train, and monitor their employees, and to ensure their respective employees' compliance with all applicable statutes, laws, regulations, and safety codes pertaining to the manufacture, distribution, storage, and sale of similar food products, but failed to do so and were therefore negligent.

4.14 Separate defendants Frontera, AWG, CH Robinson, and Price Cutter had a duty to use ingredients, supplies and other constituent materials that were reasonably safe, wholesome, free of defects, and that otherwise complied with applicable federal, state, and local laws, ordinances, and regulations, and that were clean, free from adulteration, and safe for human consumption, but failed to do so and were therefore negligent.

4.15 As a direct and proximate result of separate defendants Frontera, AWG, CH Robinson, and Price Cutter's acts and omissions of negligence, the plaintiffs sustained injuries and damages in an amount to be determined at trial.

#### Negligence against Primus—Count IV

4.16 Separate defendant Primus and the Texas company Bio Food Safety, as contractor and sub-contractor respectively for the purposes of auditing Jensen Farms' ranchlands and packinghouse, entered into an agency relationship by which Primus is bound by, and liable for, the acts and omissions of negligence of Bio Food Safety and its employees.

4.17 As the primary contractor for the Jensen Farms audit in July 2011, Primus owed a duty to those people that it knew, or had reason to know, would be the ultimate consumers of



Jensen Farms products, including the plaintiffs, to act with reasonable care in the selection, approval, and monitoring of subcontractors. Primus breached this duty.

4.18 The audit done by James Dilorio on July 25, 2011 was not done with reasonable care, and constituted a breach of the duty of reasonable care that Primus owed to the consumers of Jensen Farms/Frontera cantaloupes. Mr. Dilorio's various acts and omissions of negligence in the conduct of the audit include specifically, but not exclusively, those acts and omissions set forth at paragraphs 3.20 through 3.25.

4.19 Mr. Dilorio and Bio Food Safety knew, or ought to have known, in light of the surrounding circumstances, that Mr. Dilorio's acts and omissions (including those set forth at paragraphs 3.20 through 3.25) would naturally and probably result in injury or damages to consumers such as Danny and Nicole Hardcastle, yet Bio Food Safety allowed Mr. Dilorio to continue his course of conduct in reckless disregard of these consequences.

4.20 Mr. Dilorio's various acts and omissions of negligence, in conjunction with the negligence of Primus in selecting, approving, and monitoring Bio Food Safety as auditor of Jensen Farms' facility, and with Bio Food Safety's negligence in hiring, training, and supervising Mr. Dilorio as auditor, constituted a proximate cause of the plaintiff Danny Hardcastle's Listeriosis infection and related illness, and the plaintiffs' associated injuries and damages.

4.21 Because Bio Food Safety was an agent of Primus for purposes of Mr. Dilorio's negligently conducted audit of Jensen Farms on July 25, 2011, and because Primus committed negligent acts and omissions that were a proximate cause of the plaintiff Danny Hardcastle's Listeriosis illness, separate defendant Primus is liable to the plaintiffs for their injuries, damages and losses.

## V. DAMAGES

5.1 The plaintiffs have suffered general, special, incidental, and consequential damages as the direct and proximate result of the acts and omissions of each of the defendants, in an amount that shall be fully proven at the time of trial. These damages include, but are not limited to: damages for general pain and suffering; damages for loss of enjoyment of life, both past and future; medical and medical related expenses, both past and future; travel and travel-related expenses, past and future; emotional distress, past and future; pharmaceutical expenses, past and future; and all other ordinary, incidental, or consequential damages that would or could be reasonably anticipated to arise under the circumstances.

5.2 The plaintiff Nicole Hardcastle is additionally entitled to recover damages for the loss of spousal consortium that resulted from her individual injuries caused by each of the defendants' wrongful conduct.

5.3 In addition to compensatory damages for the actual injuries and losses that the plaintiffs have sustained, plaintiffs are entitled to recover punitive damages from separate defendant, Primus. Primus knew, or ought to have known, in the light of the surrounding circumstances, that its conduct would naturally and probably result in injuries and damages, yet Primus, through its agent Bio Food Safety, continued such conduct in reckless disregard of the consequences to Danny and Nicole Hardcastle and others. The plaintiffs are seeking these punitive damages in order to punish and deter Primus, and other similarly situated entities, from engaging in conduct that is in reckless disregard of the health and safety of consumers.

## VI. JURY DEMAND

6.1 The plaintiffs hereby demand a jury trial.

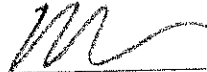
## VII. PRAYER FOR RELIEF

WHEREFORE, the plaintiffs pray for judgment against the defendants as follows:

- A. Ordering compensation for all general, special, incidental, and consequential damages suffered by the plaintiffs as a result of the defendants' conduct;
- B. Assessing punitive damages against separate defendant Primus;
- C. Awarding plaintiffs their reasonable attorneys' fees and costs, to the fullest extent allowed by law; and
- D. Granting all such additional and/or further relief as this Court deems just and equitable.

DATED: August 2, 2013.

Respectfully submitted,



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