

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

**WILLIAM MADDEN and JAQUELINE
MADDEN, husband and wife,**

Plaintiffs

V.

No.

**FRONTERA PRODUCE LTD., a
foreign corporation; PRIMUS GROUP,
INC., d/b/a PRIMUS LABS, a foreign
corporation; CH ROBINSON
WORLDWIDE, INC., a foreign
corporation; FIRST WATCH
RESTAURANTS, INC., a foreign
corporation; and JOHN DOES 1-10,**

Defendants

COMPLAINT FOR PERSONAL INJURIES

COME NOW the Plaintiffs William Madden and Jaqueline Madden, by and through their attorneys of record, and for their causes of action against the defendants, allege and state as follows:

PLAINTIFFS

1. Plaintiffs William “Bernie” Madden and Jaqueline Madden reside in Shawnee Mission, Kansas, and are adults over the age of eighteen. At all times relevant, Plaintiffs were, and remain, husband and wife. At all times relevant, Plaintiff Jaqueline Madden provided all the services, love, affection, support, and companionship normally afforded by a wife to her husband.

DEFENDANTS

2. The 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, including cantaloupe, to customers across the country. Frontera's principal place of business is located in the State of Texas.

3. The 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 21.

4. The Defendant CH Robinson Worldwide, Inc. (CH Robinson), is a corporation organized and existing under the laws of the State of Delaware, and 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 defendant Jensen Farms, to customers in the Midwest, including to the Missouri company known as Liberty Fruit Company, Inc.

5. The Defendant First Watch Restaurants, Inc. (First Watch) is a corporation organized and existing under the laws of the State of Florida, with its principal office located in the State of Florida as well. At all times relevant hereto, First Watch owned and operated the First Watch restaurant located at 4117 West 83rd, Prairie Village, Kansas.

VENUE AND APPLICABLE LAW

6. Defendant First Watch owns and operates the First Watch Restaurant location at 4117 West 83rd, Prairie Village, Kansas, which is where Plaintiff Bernie Madden consumed the

processed cantaloupe pieces that caused his Listeriosis illness and Plaintiffs' related injuries and damages. Thus, venue and jurisdiction are proper pursuant to K.S.A. §§60-604 and/or 60-605.

7. First Watch purchased the contaminated cantaloupe, or cantaloupes, that caused Plaintiffs' injuries and damages from the Missouri company called Liberty Fruit Company, Inc., which is a major regional fruit wholesaler. Liberty Fruit Company received the contaminated cantaloupe, or cantaloupes, at its business location in Kansas City, Missouri, from Defendant CH Robinson. Therefore, the substantive law of the State of Missouri controls this action.

FACTS

The Outbreak

8. 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 the defendant, Jensen Farms, and distributed by Frontera.

9. A total of 147 persons infected with any of the five 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).

10. Among persons for whom information was available, reported illness onset ranged from July 31, 2011 through October 27, 2011. Ages ranged from <1 to 96 years, with a median age of 77 years. Most cases were 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.

11. 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.

12. 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 defendant 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.

13. Jensen Farms recalled its Rocky Ford-brand cantaloupes, on September 14 in response to the multi-state outbreak of listeriosis. Cantaloupes from other farms in Colorado, including farms in the Rocky Ford growing area, have not been linked to this outbreak.

The July 25, 2011 Audit of Jensen Farms

14. Prior to the outbreak described in paragraph 8 through 13, Jensen Farms or Frontera, or both of them, contracted with Defendant Primus to conduct an audit of Jensen Farms' ranchlands and packing house.

15. 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*.

16. Prior to the formation of the contract described at paragraph 14, 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.”

17. 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.

18. After the formation of the contract described at paragraph 14, 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.

19. 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, and Good Agricultural and Manufacturing Practices, and other

applicable standards of care incumbent on producers of agricultural products, including cantaloupes.

20. 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*.

21. 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 packing house a "superior" rating, and a score of 96%.

22. 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.

23. 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 five 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 five outbreak strains.

24. After isolating at least three of the five outbreak strains of *Listeria monocytogenes* from Jensen Farms' packing house 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.

25. 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 harborage 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.

26. 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:

- 26.1 Condensation from cooling systems draining directly onto the floor;
- 26.2 Poor drainage resulting in water pooling around the food processing equipment;
- 26.3 Inappropriate food processing equipment which was difficult to clean (i.e., *Listeria* found on the felt roller brushes);
- 26.4 No antimicrobial solution, such as chlorine, in the water used to wash the

cantaloupes; and

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

27. The audit conducted by Mr. Dilorio on or about July 25, 2011, on behalf of Defendant Primus, found many aspects of Jensen Farms' facility, equipment and procedures that the FDA heavily criticized to be in "total compliance."

28. Further, during the July 25, 2011 packing house audit conducted by Bio Food Safety, as agent for Primus, Mr. Dilorio failed to observe, or properly downscore or consider, multiple conditions or practices that were in violation of Primus's audit standards applicable to cantaloupe packing houses, 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 packing house.

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

29.1 Jensen Farms' inability to control pests;

29.2 Jensen Farms' use of equipment that was inappropriate for the processing of cantaloupes;

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

29.4 Jensen Farms' failure to ensure the appropriate antimicrobial concentration in its wash water, which, as alleged at paragraph 26.4, did not contain any antimicrobial at all;

29.5 Jensen Farms' failure to have hot water available for purposes of

handwashing;

29.6 The design of Jensen Farms' packing house caused water to pool, creating a harborage site for bacteria;

29.7 Jensen Farms' failure to precool cantaloupes prior to processing.

30. 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 packing house to fail the July 25, 2011 audit.

31. In addition, Mr. Dilorio misrepresented the conditions and practices at Jensen Farms' packing house 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 packing house 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.

32. Had the Jensen Farms' packing house 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 packing house 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 packing house to fail the July 25 audit and (b) were proximate causes of the outbreak that is the subject of this action.

Listeriosis

33. 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.

34. 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.

35. 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.

Bernie Madden's Listeriosis illness

36. On August 24, 2011, Mr. Madden dined with a friend for breakfast at the First Watch restaurant in Prairie Village, Kansas, where he consumed pieces of cut cantaloupe.

37. This restaurant had received a shipment of whole cantaloupes on August 20, 2012, from Liberty Fruit Company, the Kansas City, Missouri fruit wholesaler. These

cantaloupes were contaminated by *Listeria monocytogenes*, and had been grown by Jensen Farms. Liberty Fruit Company had received the cantaloupes from Defendant CH Robinson, who, in turn, had received them from Defendant Frontera.

38. Mr. Madden experienced symptom onset, and was admitted to Shawnee Mission Medical Center, on September 2, 2011. His blood specimen collected that day tested positive for *Listeria monocytogenes* at the hospital laboratory. Test results were confirmed at the Kansas Department of Health and Environment (KDHE) Laboratories. Genetic testing conducted at the KDHE Laboratory showed that Mr. Madden's isolate was a genetic match to one of the Jensen Farms outbreak strains, GX6A16.0099/GX6A12.0001.

39. Mr. Madden suffered severe and permanent injury as a result of his listeriosis illness. He was hospitalized for nearly 4 months, and was finally discharged home on Christmas Eve 2011.

COUNT I
(Strict Liability Against Defendants Frontera, CH Robinson, and First Watch)

40. Plaintiff incorporates herein ¶¶ 1 through 39 above as though set forth in full.

41. The defendants Frontera, CH Robinson, and First Watch manufactured and sold the adulterated food that injured the Plaintiffs.

42. The defendants Frontera, CH Robinson, and First Watch manufactured food products, and in particular, cantaloupe for sale to the public.

43. Cantaloupe that is contaminated with *Listeria monocytogenes* is unsafe and thus defective when used in a reasonably foreseeable manner—*i.e.*, consuming it.

44. *Listeria monocytogenes*-contaminated cantaloupe is unfit for human consumption, and unreasonably dangerous to an extent beyond that contemplated by the ordinary consumer.

45. The cantaloupe that the Plaintiff Mr. Madden purchased and consumed from the defendants Frontera, CH Robinson, and First Watch was contaminated with *Listeria monocytogenes* and was therefore, as a result, defective and unreasonably dangerous.

46. The cantaloupe the Plaintiff Mr. Madden purchased and consumed was contaminated with *Listeria monocytogenes* when it left the defendant Frontera, CH Robinson, and First Watch's control.

47. The Plaintiff Mr. Madden's consumption of the contaminated cantaloupe caused him to become infected with *Listeria monocytogenes* and suffer injury and damages as a direct and proximate result.

48. The defendants Frontera, CH Robinson, and First Watch are strictly liable to the plaintiffs for all harm proximately caused by the manufacture and sale of an unsafe and defective cantaloupe.

49. As a direct and proximate result of defendants Frontera, CH Robinson, and First Watch's manufacture and sale of an unsafe and defective cantaloupe, Plaintiff Jacqueline Madden lost the care, comfort, guidance, support, counsel, love, affection, teaching, and consortium.

WHEREFORE, Plaintiffs respectfully request judgment against Defendants Frontera, CH Robinson, and First Watch, jointly and severally with defendant Primus, in an amount in excess of \$50,000, together with her costs incurred herein and for other and further relief that the court deems just and proper under the circumstances.

COUNT II
(Negligence Against Frontera, CH Robinson, and First Watch)

50. Plaintiffs incorporate herein ¶¶ 1 through 39 above as though set forth in full.

51. The defendants Frontera, CH Robinson, and First Watch designed, manufactured, distributed, and sold food products, including specifically cantaloupe, that were contaminated with *Listeria monocytogenes*, a deadly pathogen. The cantaloupe that the Plaintiff consumed was, as a result of contamination, unfit for human consumption, thus defective, and was not reasonably safe as designed, constructed, manufactured, and sold.

52. The defendants Frontera, CH Robinson, and First Watch owed a duty to all persons who consumed their products to manufacture and sell cantaloupe that were safe to eat, that were not adulterated with deadly pathogens, like *Listeria monocytogenes*, and that were not in violation of applicable food and safety regulations.

53. The defendants Frontera, CH Robinson, and First Watch owed a duty to all persons who consumed their products a duty to maintain their premises in a sanitary and safe condition so that the cantaloupe they manufactured and sold would not be contaminated with a deadly pathogen, like *Listeria monocytogenes*.

54. The defendants Frontera, CH Robinson, and First Watch breached the duties owed to their customers by committing the following acts and omissions of negligence:

54.1 Failed to adequately maintain or monitor the sanitary conditions of their products, premises, and employees;

54.2 Failed to properly operate their facilities in a safe, clean, and sanitary manner;

54.3 Failed to apply their food safety policies and procedures to ensure the safety and sanitary conditions of their food products, premises, and employees;

54.4 Failed to prevent the transmission of *Listeria monocytogenes* to consumers of their cantaloupe;

54.5 Failed to properly train their employees and agents how to prevent the transmission of *Listeria monocytogenes* on their premises, or in their food products;

54.6 Failed to properly supervise their employees and agents to prevent the transmission of *Listeria monocytogenes* on their premises, or in their food products.

55. The defendants Frontera, CH Robinson, and First Watch had a duty to comply with all statutory and regulatory provisions that pertained or applied to the manufacture, distribution, storage, labeling, and sale of their food products.

56. The defendants Frontera, CH Robinson, and First Watch owed a duty to the decedent to use reasonable care in the manufacture, distribution, and sale of their food products, to prevent contamination with *Listeria monocytogenes*. These defendants breached this duty.

57. As a direct and proximate result of defendants Frontera, CH Robinson, and First Watch's acts and omissions of negligence, Plaintiff Jacqueline Madden lost the care, comfort, guidance, support, counsel, love, affection, teaching, and consortium.

58. The plaintiffs' injuries and damages proximately and directly resulted from the defendant Frontera, CH Robinson, and First Watch's negligence.

WHEREFORE, Plaintiffs respectfully requests judgment against defendants Frontera, CH Robinson, and First Watch, jointly and severally with defendant Primus, in an amount in excess of \$50,000, together with their costs incurred herein and for other and further relief that the court deems just and proper under the circumstances.

COUNT III

(Breach of Warranty against Defendants Frontera, CH Robinson, and First Watch)

59. Plaintiff incorporates herein ¶¶ 1 through 39 above as though set forth in full.

60. By offering cantaloupe for sale to the general public, the defendants Frontera, CH Robinson, and First Watch impliedly warranted that such cantaloupe was safe to eat, that it was not adulterated with a deadly pathogen, and that the cantaloupe had been safely prepared under sanitary conditions.

61. The defendants Frontera, CH Robinson, and First Watch breached the implied warranties with regard to the food they manufactured and sold to the Plaintiff.

62. As a direct and proximate result of defendants Frontera, CH Robinson, and First Watch's breaches of warranty, Plaintiff Jacqueline Madden lost the care, comfort, guidance, support, counsel, love, affection, teaching, and consortium.

63. The plaintiffs' injuries proximately and directly resulted from the defendant Frontera, CH Robinson, and First Watch's breach of implied warranties, and the plaintiffs are thus entitled to recover for all actual, consequential, and incidental damages that flow directly and in a foreseeable fashion from these breaches.

WHEREFORE, Plaintiffs respectfully request judgment against Defendants Frontera, CH Robinson, and First Watch, jointly and severally with defendant Primus, in an amount in excess of \$50,000, together with their costs incurred herein and for other and further relief that the court deems just and proper under the circumstances.

COUNT IV

(Negligence against Primus)

64. Plaintiff incorporates herein ¶¶ 1 through 39 above as though set forth in full.

65. Defendant Primus and the Texas company Bio Food Safety, as contractor and sub-contractor respectively for the purposes of auditing Jensen Farms ranchlands and packing

house, 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.

66. 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 Plaintiff, to act with reasonable care in the selection, approval, and monitoring of subcontractors. Primus breached this duty.

67. At all times relevant to the allegations set forth in this complaint, James Dilorio was acting within the course and scope of his duties as an agent of Bio Food Safety and Primus.

68. 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 27 through 32.

69. 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's Listeriosis infection and related illness, and the Plaintiffs' associated injuries and damages.

70. As a direct and proximate result of Defendant Primus's acts and omissions of negligence, Plaintiff Jacqueline Madden lost the care, comfort, guidance, support, counsel, love, affection, teaching, and consortium.

71. 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

various acts and omissions of negligence that constituted a proximate cause of the plaintiff's Listeriosis illness, Defendant Primus is liable to the Plaintiffs for the Plaintiffs' injuries, damages and losses.

WHEREFORE, Plaintiffs respectfully request judgment against Defendant Primus, jointly and severally with Defendants Frontera, CH Robinson, and First Watch, in an amount in excess of \$50,000, together with their costs incurred herein and for other and further relief that the court deems just and proper under the circumstances.

DATED: August 8, 2013

KENNER SCHMITT NYGAARD, LLC

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