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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

BETTE ONSAGER, as Personal Representative
Of the Estate of Jerome Onsager and personally,

Plaintiff,

Cause No. *CN-13-66-BU-DWM-JCL*

v.

FRONTERA PRODUCE LTD., a foreign
Corporation; PRIMUS GROUP, INC.,
a foreign corporation, d/b/a "Primus Labs";
WALMART STORES, INC., a foreign
corporation; JOHN DOES 1-10 and companies XYZ,

Defendants.

COMPLAINT FOR PERSONAL INJURIES
WRONGFUL DEATH AND DEMAND FOR JURY TRIAL

COMES NOW the Plaintiff above-named, by and through her attorneys of
record, Scott Anderson, and for her cause of action against the Defendants above-

1
2 named complains, alleges, and states as follows:

3 **I. PARTIES**

4 1. At all times relevant to this action, the Plaintiff Bette Onsager was a
5 resident of Gallatin County, Montana. Bette Onsager is the widowed spouse of
6 decedent, Jerome Onsager.

7
8 2. At all times relevant to this action, Frontera Produce Ltd. (Frontera),
9 was a manufacturer, distributor and seller of agricultural products in Montana,
10 including cantaloupe. Frontera is a Texas company with a principal place of
11 business located in Texas as well.

12
13 3. At all times relevant to this action, Primus Group, Inc. d/b/a "Primus
14 Labs" (Primus), was a corporation organized and existing under the laws of the
15 State of California, with its principal place of business in California as well. At all
16 times relevant to this action, Primus was a company that, among other things,
17 provided auditing services for agricultural and other businesses involved in the
18 manufacture and sale of food products, including in the State of Colorado. Primus
19 retained the services of certain subcontractors, including a Texas company called
20 Bio Food Safety, to provide auditing services, including the audit described in
21 more detail at paragraph 21.

22
23 4. The Defendant Wal-Mart Stores, Inc. ("Wal-Mart") is a foreign
24 corporation organized and existing under the laws of the State of Delaware that

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2 maintains and operates a retail store known as Wal-Mart, which stores sell various
3 food and other products. At all times relevant, Wal-Mart owned and operated Wal-
4 Mart Supercenter, store #2084, located at 1500 North 7th Avenue, Bozeman,
5 Montana. At all times relevant, Wal-Mart was a manufacturer, distributor and
6 seller of the food products that it sold at this location, including cantaloupe.
7

8
9 5. Upon information and belief, the Defendants John Does 1-10 are
10 entities that participated in the manufacture, distribution, and/or sale of the
11 contaminated food product that was the proximate cause of the Plaintiffs' injuries
12 and damages, and whose identities are not known to the Plaintiffs at this time. The
13 Plaintiffs will seek leave of the Court to amend this Complaint at such time that the
14 identities of these parties become known.
15

16
17 6. Plaintiff and Decedent at all times exercised reasonable care, and were
18 injured through no fault of their own. Therefore, Defendants are jointly and
19 severally liable for all damages.
20

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22 7. Any compensation to which Plaintiff is entitled may not be reduced
23 simply because Plaintiff may have been more susceptible to injury or illness.
24

25 **III. FACTS**

26 **The Outbreak**

27
28 8. On September 2, 2011, the Colorado Department of Public Health and
the Environment (CDPHE) announced that it was investigating an outbreak of

1
2 Listeriosis. On September 9, 2011, CDPHE announced that the likely source of
3 the *Listeria* outbreak was cantaloupe. On September 12, 2011 CDPHE announced
4 that the outbreak of *Listeria* was linked to cantaloupe from the Rocky Ford
5 (Colorado) growing region. It was subsequently determined that contaminated
6 cantaloupes were grown by Jensen Farms, a Colorado company, and distributed by
7 Defendant Frontera.
8

9
10 9. A total of 147 persons infected with any of the five outbreak-
11 associated strains of *Listeria monocytogenes* were reported to CDC from 28 states.
12 The number of infected persons identified in each state was as follows: Alabama
13 (1), Arkansas (1), California (4), Colorado (40), Idaho (2), Illinois (4), Indiana (3),
14 Iowa (1), Kansas (11), Louisiana (2), Maryland (1), Missouri (7), Montana (2),
15 Nebraska (6), Nevada (1), New Mexico (15), New York (2), North Dakota (2),
16 Oklahoma (12), Oregon (1), Pennsylvania (1), South Dakota (1), Texas (18), Utah
17 (1), Virginia (1), West Virginia (1), Wisconsin (2), and Wyoming (4).
18
19

20
21 10. Among persons for whom information was available, reported illness
22 onset ranged from July 31, 2011 through October 27, 2011. Ages ranged from <1
23 to 96 years, with a median age of 77 years. Most cases were over 60 years old.
24 Fifty-eight percent of cases were female. Among the 144 ill persons with available
25 information on whether they were hospitalized, 142 (99%) were hospitalized.
26
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1
2 11. Thirty three deaths were reported. Among persons who died, ages
3 ranged from 48 to 96 years, with a median age of 82.5 years. In addition, one
4 woman pregnant at the time of illness had a miscarriage. Seven of the illnesses
5 were related to a pregnancy; three were diagnosed in newborns and four were
6 diagnosed in pregnant women.
7

8 12. On or about September 19, 2011, the Food and Drug Administration
9 announced that it found *Listeria monocytogenes* in samples of Jensen Farms'
10 Rocky Ford-brand cantaloupe taken from a Denver-area store and on samples
11 taken from equipment and cantaloupe at the Jensen Farms' packing facility. Tests
12 confirmed that the *Listeria monocytogenes* found in the samples matches one of
13 the multiple different strains of *Listeria monocytogenes* associated with the multi-
14 state outbreak of listeriosis.
15
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17

18 13. Jensen Farms recalled its Rocky Ford-brand cantaloupes on
19 September 14, 2011 in response to the multi-state outbreak of listeriosis.
20

21 **The July 25, 2011 Audit of Jensen Farms**

22 14. Prior to the outbreak described in paragraphs 8 through 13, Jensen
23 Farms or Frontera, or both of them, contracted with Defendant Primus to conduct
24 an audit of Jensen Farms' ranchlands and packing house.
25

26 15. It was the intent of these contracting parties—i.e. Jensen Farms or
27 Frontera, or both of them, and Primus—to ensure that the facilities, premises, and
28

1
2 procedures used by Jensen Farms in the production of cantaloupes met or exceeded
3 applicable standards of care related to the production of cantaloupe, including, but
4 not limited to, good agricultural and manufacturing practices, industry standards,
5 and relevant FDA industry guidance. It was further the intent of these contracting
6 parties to ensure that the food products that Jensen Farms produced, and that
7 Frontera distributed, would be of high quality for consumers, and would not be
8 contaminated by potentially lethal pathogens, like *Listeria*.
9

10
11 16. Prior to the formation of the contract described at paragraph 14,
12 Frontera represented to the public generally, and specifically to the retail sellers of
13 its produce products, including cantaloupes, that its various products were “Primus
14 Certified.”
15

16
17 17. It was Frontera’s intent and expectation that the representation set
18 forth in the preceding paragraph would serve as an inducement for the purchase of
19 its various products, including cantaloupes, and that consumers, ultimate retailers,
20 and itself would all benefit from Primus’s audit and certification by having a high
21 quality product.
22

23
24 18. After the formation of the contract described at paragraph 14, Primus
25 selected and hired Bio Food Safety, a Texas-based auditing company, to conduct
26 the audit of Jensen Farms. Bio Food Safety thereby became Primus’s
27 subcontractor, and agent, for the limited purpose of auditing Jensen Farms.
28

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2 19. Defendant Primus held itself out as an expert in the field of food
3 safety, including specifically, though not exclusively, in the analysis and
4 assessment of food safety procedures, facility design and maintenance, and Good
5 Agricultural and Manufacturing Practices, and other applicable standards of care
6 incumbent on producers of agricultural products, including cantaloupes.
7

8 20. By auditing companies involved in the production and distribution of
9 food products, Primus intended to aid such companies in ensuring that the food
10 products produced were of high quality, were fit for human consumption, and were
11 not contaminated by a potentially lethal pathogen, like *Listeria*.
12

13 21. Bio Food Safety auditor James Dilorio conducted an audit at Jensen
14 Farms' ranchlands and packing facility on or about July 25, 2011, roughly one
15 week before the CDC identified the first victim of the cantaloupe *Listeria* outbreak.
16 Mr. Dilorio, as employee and agent of Bio Food Safety, and as agent of Primus,
17 gave the Jensen Farms packing house a "superior" rating, and a score of 96%.
18

19 22. On or about September 10, 2011, officials from both FDA and
20 Colorado, conducted an inspection at Jensen Farms during which FDA collected
21 multiple samples, including whole cantaloupes and environmental (non-product)
22 samples from within the facility, for purposes of laboratory testing.
23

24 23. Of the 39 environmental samples collected from within the facility, 13
25 were confirmed positive for *Listeria monocytogenes* with pulsed-field gel
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1
2 electrophoresis (PFGE) pattern combinations that were indistinguishable from at
3 least three of the five outbreak strains collected from outbreak cases. Cantaloupe
4 collected from the firm's cold storage during the inspection also tested positive for
5
6 *Listeria monocytogenes* with PFGE pattern combinations that were
7 indistinguishable from at least two of the five outbreak strains.

8
9 24. After isolating at least three of the five outbreak strains of *Listeria*
10 *monocytogenes* from Jensen Farms' packing house and whole cantaloupes
11 collected from cold storage, the FDA initiated an environmental assessment at
12 Jensen Farms, in which the FDA was assisted by Colorado state and local officials.

13
14 25. The environmental assessment at Jensen Farms occurred on
15 September 22-23, 2011. Findings from this assessment, set forth in the FDA's
16 report dated October 19, 2011, included, but were not limited to, the following:

17
18 a. **Facility Design:** Certain aspects of the packing facility, including the
19 location of a refrigeration unit drain line, allowed for water to pool on the
20 packing facility floor in areas adjacent to packing facility equipment. Wet
21 environments are known to be potential reservoirs for *Listeria*
22 *monocytogenes* and the pooling of water in close proximity to packing
23 equipment, including conveyors, may have extended and spread the
24 pathogen to food contact surfaces. Samples collected from areas where
25 pooled water had gathered tested positive for an outbreak strain of *Listeria*
26 *monocytogenes*. Therefore, this aspect of facility design is a factor that may
27 have contributed to the introduction, growth, or spread of *Listeria*
28 *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

1
2 samples that tested positive for *Listeria monocytogenes* with PFGE pattern
3 combinations that were indistinguishable from outbreak strains. The
4 packing facility floor was constructed in a manner that was not easily
5 cleanable. Specifically, the trench drain was not accessible for adequate
6 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.

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

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

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

27 **c. Postharvest Practices:** In addition, free moisture or increased water
28 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

1
2 condensation, which is an environment ideal for *Listeria monocytogenes*
3 growth.

4 The combined factors of the availability of nutrients on the cantaloupe rind,
5 increased rind water activity, and lack of pre-cooling before cold storage
6 may have provided ideal conditions for *Listeria monocytogenes* to grow and
7 out compete background microflora during cold storage. Samples of
8 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.

9 26. In October and December 2011, FDA officials participated in
10 briefings with the House Committee on Energy and Commerce that were held to
11 further investigate the likely causes of the *Listeria* outbreak that is the subject of
12 this action. At these briefings, FDA officials cited multiple failures at Jensen
13 Farms, which, according to a report issued by the Committee, “reflected a general
14 lack of awareness of food safety principles.” Those failures included:
15
16

17 26.1 Condensation from cooling systems draining directly onto the
18 floor;

19 26.2 Poor drainage resulting in water pooling around the food
20 processing equipment;

21 26.3 Inappropriate food processing equipment which was difficult to
22 clean (i.e., *Listeria* found on the felt roller brushes);

23 26.4 No antimicrobial solution, such as chlorine, in the water used to
24 wash the cantaloupes; and

25 26.5 No equipment to remove field heat from the cantaloupes before
26 they were placed into cold storage.
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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;

1
2 29.5 Jensen Farms' failure to have hot water available for purposes
3 of handwashing;

4 29.6 The design of Jensen Farms' packing house caused water to
5 pool, creating a harborage site for bacteria;

6 29.7 Jensen Farms' failure to precool cantaloupes prior to
7 processing.

8 30. Many of the conditions and practices cited in the preceding paragraph,
9 and others, should have caused Jensen Farms to receive a score that would have
10 caused its packing house to fail the July 25, 2011 audit.
11

12 31. In addition, Mr. Dilorio misrepresented the conditions and practices at
13 Jensen Farms' packing house by giving it a "superior" rating and a score of 96%,
14 despite the existence of conditions and practices that should have caused him to
15 fail the facility. Mr. Dilorio made other material misrepresentations—including,
16 but not limited to, statements about the suitability of equipment in place at the
17 packing house for the processing of cantaloupes—all of which were relied on by
18 Jensen Farms as justification for continuing to use, rather than changing or
19 improving, the various conditions, practices, and equipment for its processing of
20 cantaloupes.
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24 32. Had the Jensen Farms' packing house failed the July 25, 2011 audit,
25 the cantaloupe that caused the Plaintiffs' Listeriosis illness would not have been
26 distributed by Jensen Farms and Frontera. Further, had the Jensen Farms packing
27

1
2 house failed the July 25, 2011 audit, production would not have continued without
3 Jensen Farms first correcting the various conditions and practices that (a) should
4 have caused the packing house to fail the July 25 audit and (b) were proximate
5 causes of the outbreak that is the subject of this action.
6

7 **Listeriosis**

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9 33. Listeriosis is a serious illness that is caused by eating food
10 contaminated with the bacterium *Listeria monocytogenes*. Although there are other
11 types of *Listeria*, most cases of listeriosis are caused by *Listeria monocytogenes*.
12 *Listeria* is found in soil and water. Vegetables can become contaminated from the
13 soil or from manure used as fertilizer. Animals can carry the bacterium without
14 appearing ill and can contaminate foods of animal origin, such as meats and dairy
15 products. *Listeria* has been found in a variety of raw foods, such as uncooked
16 meats and unpasteurized (raw) milk or foods made from unpasteurized milk.
17 *Listeria* is killed by pasteurization and cooking; however, in certain ready-to-eat
18 foods, like hot dogs and cold cuts from the deli counter, contamination may occur
19 after cooking but before packaging.
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23 34. Although healthy persons may consume contaminated foods without
24 becoming ill, those at increased risk for infection may become ill with listeriosis
25 after eating food contaminated with even a few bacteria.
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2 35. A person with listeriosis may develop fever, muscle aches, and
3 sometimes gastrointestinal symptoms such as nausea or diarrhea. If infection
4 spreads to the nervous system, symptoms such as headache, stiff neck, confusion,
5 loss of balance, or convulsions can occur. In immune-deficient individuals, *Listeria*
6 can invade the central nervous system, causing meningitis and/or encephalitis
7 (brain infection). Infected pregnant women ordinarily experience only a mild, flu-
8 like illness; however, infection during pregnancy can lead to miscarriage, infection
9 of the newborn or even stillbirth. The most recent data suggest that about 2,500
10 illnesses and 500 deaths are attributed to listeriosis in the United States annually.
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14 **Jerome Onsager's Listeriosis Illness and Death**

15 36. Before his Listeriosis illness, the decedent Jerome Onsager was a 75-
16 year-old resident of Bozeman, Montana.
17

18 37. In the weeks preceding the onset of his Listeriosis illness, Mr.
19 Onsager consumed a portion of at least one cantaloupe manufactured, distributed,
20 and sold by Defendants Frontera and Wal-Mart. The cantaloupe was purchased at
21 the Wal-Mart Supercenter, store #2084, located at 1500 North 7th Avenue,
22 Bozeman, Montana. This cantaloupe had been grown by Jensen Farms, and was
23 contaminated by *Listeria monocytogenes*.
24

25
26 38. Onset of symptoms related to Mr. Onsager's Listeriosis illness
27 occurred during the first week of September 2011. On September 6, 2011, Mr.
28

1
2 Onsager fell, became disoriented, and was having trouble functioning. His wife
3 summoned help from neighbors and was able to deliver him to the emergency
4 department at Bozeman Deaconess Hospital.

5
6 39. Mr. Onsager thereafter remained hospitalized, at various medical
7 centers, until January 21, 2012, the date of his death. Mr. Onsager died as a direct
8 and proximate result of his infection by *Listeria monocytogenes*.

9
10 **IV. CAUSE OF ACTION AGAINST FRONTERA**
11 **AND WALMART: STRICT LIABILITY**

12 40. Plaintiff realleges and incorporates each and every allegation
13 contained in paragraphs 1 through 39, above, as though set forth fully herein.

14 41. The Defendants Frontera and Wal-Mart manufactured and sold the
15 adulterated food that caused decedent's Listeriosis illness and death.

16
17 42. The Defendants Frontera and Wal-Mart manufactured and sold food
18 products—in particular, cantaloupe—for sale to the public.

19
20 43. Cantaloupe that is contaminated with *Listeria monocytogenes* is
21 unreasonably dangerous, and therefore defective, when used in an intended and
22 reasonably foreseeable manner—*i.e.*, consumption by human beings.

23
24 44. The cantaloupe that the decedent consumed from the Defendants
25 Frontera and Wal-Mart was contaminated with *Listeria monocytogenes* and was, as
26 a result, defective and unreasonably dangerous.

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2 45. The cantaloupe that the decedent consumed was contaminated with
3 *Listeria monocytogenes* when it left the control of Frontera and Wal-Mart.

4
5 46. The decedent's consumption of the contaminated cantaloupe caused
6 him to become infected with *Listeria monocytogenes* and suffer injury and death as
7 a direct and proximate result.

8
9 47. Defendants Frontera and Wal-Mart are strictly liable to the Plaintiff
10 for the harm proximately caused by the manufacture and sale of an unsafe and
11 defective cantaloupe.

12
13 **V. CAUSE OF ACTION AGAINST FRONTERA**
AND WALMART: NEGLIGENCE and NEGLIGENCE PER SE

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15 48. Plaintiff realleges and incorporates each and every allegation
16 contained in paragraphs 1 through 47, above, as though set forth fully herein.

17
18 49. Frontera and Wal-Mart designed, manufactured, distributed, and sold
19 cantaloupes that were contaminated with *Listeria monocytogenes*, a deadly
20 pathogen.

21
22 50. Frontera and Wal-Mart owed a duty to all persons who consumed
23 their products, including the decedent, to manufacture and sell cantaloupes that
24 were safe to eat, that were not adulterated with deadly pathogens, like *Listeria*
25 *monocytogenes*, and that were not in violation of applicable food and safety
26 regulations.
27

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2 51. Frontera and Wal-Mart owed a duty to all persons who consumed its
3 products, including the decedent, to ensure that any representations regarding the
4 certifications its products had undergone prior to distribution and sale were made
5 with reasonable care. With respect to the representation that its products were
6 “Primus Certified,” described at paragraph 16, Frontera and Wal-Mart owed a duty
7 to all persons who consumed its products, including the decedent, to conduct
8 reasonable investigation into the competence and reliability of the subcontractors
9 retained by Primus.
10
11

12 52. Frontera and Wal-Mart owed a duty to the plaintiffs and decedent to
13 comply with all statutes, laws, regulations, or safety codes pertaining to the
14 manufacture, distribution, storage, and sale of their food product, but failed to do
15 so, and were therefore negligent. The decedent was among the class of persons
16 designed to be protected by these statutes, laws, regulations, safety codes or
17 provision pertaining to the manufacture, distribution, storage, and sale of similar
18 food products.
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22 53. Frontera and Wal-Mart owed a duty to all persons who consumed
23 their cantaloupes to maintain their premises in a sanitary and safe condition so that
24 the cantaloupes they manufactured and sold would not be contaminated with a
25 deadly pathogen, like *Listeria monocytogenes*.
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2 54. Frontera and Wal-Mart breached the duties owed to the ultimate
3 consumers of their cantaloupe products by committing the following acts and
4 omissions of negligence:
5

6 54.1 Failed to adequately maintain or monitor the sanitary conditions
7 of their products, premises, equipment and employees;

8 54.2 Failed to properly operate their facilities and equipment in a
9 safe, clean, and sanitary manner;

10 54.3 Failed to apply their food safety policies and procedures to
11 ensure the safety and sanitary conditions of their food products, premises,
12 and employees;

13 54.4 Failed to apply food safety policies and procedures that met
14 industry standards for the safe and sanitary production of food products, and
15 the safety and sanitary condition of their premises and employees;

16 54.5 Failed to prevent the transmission of *Listeria monocytogenes* to
17 consumers of their cantaloupe;

18 54.6 Failed to properly train their employees and agents how to
19 prevent the transmission of *Listeria monocytogenes* on their premises, from
20 their facility or equipment, or in their food products;

21 54.7 Failed to properly supervise their employees and agents to
22 prevent the transmission of *Listeria monocytogenes* on their premises, from
23 their facility or equipment, or in their food products;

24 54.8 Failed to test their cantaloupes for microbial pathogens, like
25 *Listeria monocytogenes*.

26 55. Frontera and Wal-Mart had a duty to comply with all statutory and
27 regulatory provisions that pertained or applied to the manufacture, distribution,
28 storage, labeling, and sale of their food products.

1
2 56. Frontera and Wal-Mart owed a duty to the decedent to use reasonable
3 care in the manufacture, distribution, and sale of their food products, to prevent
4 contamination with *Listeria monocytogenes*. The Defendants breached this duty.
5

6 57. The Plaintiff's injuries and damages proximately and directly resulted
7 from the negligence of the Defendants Frontera and Wal-Mart, and from those
8 Defendants' violations of statutes, laws, regulations, and safety codes pertaining to
9 the manufacture, distribution, storage, and sale of food.
10

11 **VI. CAUSE OF ACTION AGAINST FRONTERA**
12 **AND WALMART: BREACH OF WARRANTY**

13 58. Plaintiff realleges and incorporates each and every allegation
14 contained in paragraphs 1 through 57, above, as though set forth fully herein.
15

16 59. By offering cantaloupe for sale to the general public, Frontera and
17 Wal-Mart expressly and impliedly warranted that such cantaloupe was safe to eat,
18 that it was not adulterated with a deadly pathogen, and that the cantaloupe had
19 been safely prepared under sanitary conditions.
20

21 60. Frontera and Wal-Mart breached these warranties with regard to the
22 food and drink they manufactured and sold to the decedent.
23

24 61. The Plaintiff's injuries proximately and directly resulted from
25 Defendant Frontera and Walmart's breach of warranties, and the Plaintiff is thus
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1
2 entitled to recover for all actual, consequential, and incidental damages that flow
3 directly and in a foreseeable fashion from these breaches.

4 **VII: CAUSE OF ACTION AGAINST PRIMUS: NEGLIGENCE**

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6 62. Plaintiff realleges and incorporates each and every allegation
7 contained in paragraphs 1 through 61, above, as though set forth fully herein.

8
9 63. Defendant Primus, as principal in the agency relationship between
10 itself and Bio Food Safety, the auditor that conducted the audit of Jensen Farms
11 ranchlands and packing house described at paragraph 21, is bound by, and liable
12 for, the acts and omissions of negligence of Bio Food Safety and its employees.

13
14 64. As the primary contractor for the Jensen Farms audit in July 2011,
15 Primus owed a duty to those people that it knew, or had reason to know, would be
16 the ultimate consumers of Jensen Farms products, including the decedent, to act
17 with reasonable care in the selection, approval, and monitoring of subcontractors.
18 Primus breached this duty.

19
20 65. The audit done by James Dilorio on July 25, 2011 was not done with
21 reasonable care, and constituted a breach of the duty of reasonable care that Primus
22 owed to the consumers of Jensen Farms/Frontera cantaloupes. Mr. Dilorio's
23 various acts and omissions of negligence in the conduct of the audit include
24 specifically, but not exclusively, his failures to identify that the equipment and
25 facility design and maintenance generally posed an unreasonable risk of harm to
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2 consumers of the facility's cantaloupes because the equipment and facility design
3 and maintenance encouraged bacterial growth and proliferation, and ultimately
4 contamination of cantaloupes, and other failures described at paragraphs 27 – 32.
5

6 66. Mr. Dilorio's various acts and omissions of negligence, in conjunction
7 with the negligence of Primus in selecting, approving, and monitoring Bio Food
8 Safety as auditor of Jensen Farms' facility, and with Bio Food Safety's negligence
9 in hiring, training, and supervising Mr. Dilorio as auditor, constituted a proximate
10 cause of the decedent's Listeriosis illness and death.
11

12 67. Because Bio Food Safety was an agent of Primus for purposes of Mr.
13 Dilorio's negligently conducted audit of Jensen Farms on July 25, 2011, and
14 because Primus committed acts and omissions of negligence that constituted a
15 proximate cause of the Plaintiff's injuries and damages, Defendant Primus is liable
16 for all of the Plaintiff's injuries, damages and losses.
17
18

19 **VIII. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**

20 68. Plaintiff realleges and incorporates each and every allegation
21 contained in paragraphs 1 through 67, above, as though set forth fully herein.
22

23 69. Plaintiff observed and assisted her husband, the Decedent, when he
24 suddenly became ill after consuming the tainted cantaloupe.
25

26 70. Plaintiff and her family endured an approximately 4 month ordeal
27 during which the Decedent was transferred between medical facilities no less than
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2 6 times for major, and in some cases life-preserving, medical treatment, including
3 many tests and procedures related to his neurological functioning.

4
5 71. Plaintiff and her family watched the Decedent slowly waste away as
6 his medical team did everything they could for him, and eventually he died during
7 one of multiple stays in the intensive care unit.

8
9 72. Plaintiff and her family observed this entire, difficult sequence of
10 events from the onset of illness to Decedent's death over 4 months later.

11
12 73. Plaintiff and her family are entitled to recover for the emotional
13 torment that they suffered as a result of Defendant's negligence.

14
15 74. Plaintiff and her family's mental distress includes mental and
16 emotional suffering and distress such as mental anguish, nervous shock, and the
17 like; and it includes all highly unpleasant mental reactions, such as fright, horror,
18 grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry
19 and nausea.

20
21 75. Plaintiff's wife and family members suffered serious or severe
22 emotional distress.

23
24 76. The serious or severe emotional distress was a reasonably foreseeable
25 consequence of the Defendants' acts and omissions of negligence.

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2 77. Plaintiff and her family members are entitled to compensation for this
3 horrible and shocking series of events leading to the death of their family member
4 over a period of approximately 4 months.
5

6 **IX. SURVIVORS ACTION**

7 78. Plaintiff realleges and incorporates each and every allegation
8 contained in paragraphs 1 through 77, above, as though set forth fully herein.
9

10 79. Through the estate a survival action exists when injuries and the death
11 of one person are caused by the wrongful act or neglect of another.

12 80. The Personal Representative hereby asserts said claim.

13 81. This claim is separate and additional to the claim for Decedent's
14 wrongful death claim.
15

16 82. On behalf of the estate, Plaintiff shall be entitled to the present value
17 of the decedent's reasonable earnings during his or her life expectancy, medical
18 and funeral expenses, pain and suffering, and other special damages.
19

20 **X. LOSS OF CONSORTIUM**

21 83. Plaintiff realleges and incorporates each and every allegation
22 contained in paragraphs 1 through 82, above, as though set forth fully herein.
23

24 84. Plaintiff is entitled to and hereby claims loss of consortium from
25 Defendants.
26

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2 85. Loss of consortium includes loss of comfort and society and the
3 reasonable value of the contributions in money that the decedent would reasonably
4 have provided for the support, education, training and care of the heirs during life
5 expectancies of decedent and survivors.
6

7 86. During the 4 month period described above where Decedent was ill
8 and dying, and receiving medical treatment at multiple medical centers, the
9 Plaintiff, in addition to suffering severe emotional distress, lost the comfort and
10 society of her husband.
11

12 87. During the time that has passed since Decedent's death in January
13 2012, and every day for the rest of her life, Plaintiff has experienced and will
14 continue to experience the loss of comfort and society of her husband.
15

16 **XI. DECLARATORY JUDGMENT**
17

18 88. Plaintiffs reallege and incorporate each and every allegation contained
19 in paragraphs 1 through 87, above, as though set forth fully herein.
20

21 89. Plaintiff, pursuant to Sec. 27-8-201, MCA *et. seq.*, and Rule 57
22 M.R.Civ.P, brings this action for declaratory judgment for the Court to declare
23 that Defendants shall pay for Plaintiff's medical expenses, loss earnings and any
24 and all damages that are not reasonably in dispute.
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26 90. Based upon the evidence in this case no reasonable juror would
27 believe that Defendants,' all or one of them, are not responsible for the
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aforementioned damages.

91. Plaintiff further requests attorneys' fees and costs.

XII. DAMAGES

92. Plaintiffs reallege and incorporate each and every allegation contained in paragraphs 1 through 91, above, as though set forth fully herein.

93. As the direct and proximate result of the Defendants' acts and omissions, the Plaintiff suffered ordinary, incidental, and consequential damages as would be anticipated to arise under the circumstances, which shall be fully proven at the time of trial.

VIII. PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays as follows:

(1) That the Court award the Plaintiff judgment against Defendants for damages.

(2) That the Court award all such other sums as shall be determined to fully and fairly compensate the Plaintiff for all general, special, incidental and consequential damages incurred, or to be incurred, by the Plaintiffs as the direct and proximate result of the acts and omissions of the Defendants;

(3) That the Court award damages for loss of consortium and survivorship;

(4) That the Court awarded damages for negligent infliction of severe

1
2 emotional distress;

3 (5) The Court award attorneys' fees for failure to advance pay medical
4 bills and loss earnings as required by Montana Law and Declaratory Judgment Act;

5
6 (6) That the Court award damages for actual malice;

7 (7) That the Court award the Plaintiff her costs, disbursements and
8 reasonable attorneys' fees incurred, and costs in this matter.

9
10 (8) That the Court award the Plaintiff the opportunity to amend or modify
11 the provisions of this Complaint as necessary or appropriate after additional or
12 further discovery is completed in this matter, and after all appropriate parties have
13 been served;

14
15 (9) That should the case proceed to trial, a jury of 12 is hereby requested;

16 (10) That the Court award costs as a matter of right to the prevailing party
17 in this action;

18
19 (11) That the Court awards such other and further relief as it deems
20 necessary and proper in the circumstances.

21
22 **JURY DEMAND**

23 **Plaintiff hereby demands a jury trial on all claims triable by right.**

24 DATED this 30th day of August, 2013.

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