

|   |   |
|---|---|
| <p>DISTRICT COURT, COUNTY OF EL PASO , STATE OF COLORADO</p> <p><b>Court Address:</b> 270 South Tejon<br/>Colorado Springs, CO 80903</p>  |   |
| <p><b>Plaintiffs:</b> CHARLES PALMER and TAMMY PALMER, husband and wife</p> <p><b>Defendants:</b> FRESHPACK PRODUCE, INC; FRONTERA PRODUCE LTD., a foreign corporation; PRIMUS GROUP, INC d/b/a PRIMUS LABS, a foreign corporation; WALMART STORES, INC. a foreign corporation; and JOHN DOES 1-10</p> <p><b>Cross-Claim Plaintiff:</b> FRONTERA PRODUCE, LTD., a foreign corporation;</p> <p><b>Cross-Claim Defendants:</b> JENSEN FARMS, a trade name; PRIMUS GROUP, INC., d/b/a PRIMUS LABS, a foreign corporation; and BIO FOOD SAFETY, INC., a foreign corporation</p> | <p>▲COURT USE ONLY▲</p>                                       |
| <p><b>Attorneys for Plaintiffs:</b></p> <p>John Riley, Esq. No. 18962<br/>Montgomery Little &amp; Soran, P.C.<br/>5445 DTC Parkway, Suite 800<br/>Greenwood Village, Colorado 80111<br/><b>Telephone:</b> 303.773.8100<br/><b>Facsimile:</b> 303.220.0412<br/><b>Email:</b> <a href="mailto:jriley@montgomerylittle.com">jriley@montgomerylittle.com</a></p>  | <p><b>Case No.:</b> 2011CV5007</p> <p><b>Division:</b> 21</p> |
| <p><b>FOURTH AMENDED COMPLAINT</b></p>  |   |

COME NOW the Plaintiffs, by and through their attorneys of record, Montgomery Little & Soran, P.C., and Marler Clark, LLP, PS, to file this Fourth Amended Complaint and allege as follows:

## **PARTIES**

1. The Plaintiffs Charles Palmer and Tammy Palmer are husband and wife. They were married at the time of the incident, described below, that gave rise to the claims asserted in this Third Amended Complaint. At all times relevant hereto, the Palmers were residents of Colorado Springs, El Paso County, Colorado.

2. The Defendant Freshpack Produce, Inc., is a corporation organized and existing under the laws of the State of Colorado. At all times relevant to this Third Amended Complaint, Defendant Freshpack manufactured, distributed, and sold food products, including cantaloupes, to retail food stores in the State of Colorado.

3. 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 in Colorado, including cantaloupe. Frontera’s principal place of business is located in the State of Texas.

4. 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 22.

5. The Defendant Walmart Stores, Inc. (“Walmart”) is a foreign corporation organized and existing under the laws of the State of Delaware that maintains and operates a retail store known as Walmart, which sells various food and other products, located at 8250 Razorback Road, Colorado Springs, El Paso County, Colorado. At all times relevant hereto, Walmart was a manufacturer, distributor and seller of food products in Colorado, including cantaloupe.

6. Upon information and belief, the 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.

## **JURISDICTION AND VENUE**

7. This Court is vested with jurisdiction over the Defendants because the Defendants conduct business within the State of Colorado.

8. Pursuant to C.R.C.P. 98, venue of this action is proper in El Paso County, because the cause of action arose in this county and the Defendants transacted business here.

## **GENERAL ALLEGATIONS**

### **The Outbreak**

9. 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 Defendant Frontera.

10. 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).

11. 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.

12. 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.

13. 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.

14. 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**

15. Prior to the outbreak described in paragraphs 9 through 14, Jensen Farms or Frontera, or both of them, contracted with Defendant Primus to conduct an audit of Jensen Farms' ranchlands and packing house.

16. 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*.

17. Prior to the formation of the contract described at paragraph 15, 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.”

18. 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.

19. After the formation of the contract described at paragraph 15, 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.

20. 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.

21. 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*.

22. 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%.

23. 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.

24. 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.

25. 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.

26. 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 sites 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.

27. 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:

27.1 Condensation from cooling systems draining directly onto the floor;

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

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

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

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

28. 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."

29. 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.

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

30.1 Jensen Farms' inability to control pests;

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

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

30.4 Jensen Farms' failure to ensure the appropriate antimicrobial concentration in its wash water, which, as alleged at paragraph 27.4, did not contain any antimicrobial at all;

30.5 Jensen Farms' failure to have hot water available for purposes of handwashing;

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

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

31. 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.

32. 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.

33. 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**

34. 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.

35. 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.

36. 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.

### **Charles Palmer's *Listeria* Illness**

37. On or about August 17, 2011, the Plaintiffs purchased a whole cantaloupe at Defendant Wal-Mart's store located on Razorback Road, Colorado Springs, Colorado. The cantaloupe had been manufactured, distributed and sold by defendants Frontera, Freshpack and Walmart. In the several days following this purchase, Mr. Palmer sliced and consumed the cantaloupe.

38. Mr. Palmer fell ill on August 30, 2011. His condition quickly worsened, and by the morning of August 31, 2011, he became non-responsive. He was transported by ambulance to the hospital, where he remained for multiple weeks. Mr. Palmer ultimately tested positive for

*Listeria* matching one of the strains of *Listeria monocytogenes* involved in the above-described outbreak. He is counted as a confirmed case in the outbreak by Colorado health officials and the Centers for Disease Control and Prevention.

39. Mr. Palmer's *Listeria* infection resulted directly from his consumption of *Listeria*-contaminated cantaloupe manufactured, distributed and sold by Jensen Farms, Frontera, Freshpack, and Walmart.

## **FIRST CLAIM FOR RELIEF AGAINST FRONTERA, FRESHPACK, AND WALMART**

### **(Strict Product Liability)**

40. The Plaintiffs hereby incorporate paragraphs 1 through 39 by this reference as if each paragraph was set forth herein in its entirety.

41. The Defendants Frontera, Freshpack, and Walmart are product manufacturers and sellers within the meaning of the Colorado Product Liability Act, C.R.S. §13-21-401 *et seq.* The Defendants Jensen Farms, Frontera, Freshpack, and Walmart manufactured, distributed and sold the cantaloupe that was the source of the Plaintiff Charles Palmer's injuries. The *Listeria*-contaminated cantaloupe that was the source of the Plaintiff Charles Palmer's injuries was a product within the meaning of the Act.

42. The cantaloupe that was the source of the Plaintiff Charles Palmer's illness and injuries was defective, and was unreasonably dangerous to the consumer, because it was contaminated and adulterated with *Listeria*, a potentially deadly pathogen.

43. The cantaloupe that was the source of the Plaintiff Charles Palmer's illness and injuries reached the Plaintiffs without substantial change in the condition in which it was sold.

44. Frontera, Freshpack, and Walmart's defective, *Listeria*-contaminated cantaloupe caused the Plaintiff Charles Palmer's *Listeria* infection and related damages.

45. Frontera, Freshpack, and Walmart were the manufacturers, distributors and sellers of the defective *Listeria*-contaminated cantaloupe.

46. Frontera, Freshpack, and Walmart were engaged in the business of manufacturing, distributing and selling food products, including cantaloupe.

47. Because Frontera, Freshpack, and Walmart manufactured, distributed, and sold the food product that was the source of Charles Palmer's injuries and losses, which food was defective and not reasonably safe due to *Listeria* contamination, Frontera, Freshpack, and Walmart are strictly liable to the Plaintiffs for the harm proximately caused by their sale of defective food.

**SECOND CLAIM FOR RELIEF AGAINST FRONTERA, FRESHPACK,  
AND WALMART**

**(Breach of Warranties)**

48. The Plaintiffs hereby incorporate paragraphs 1 through 47 by this reference as if each paragraph was set forth herein in its entirety.

49. Frontera, Freshpack, and Walmart owed a duty to the Plaintiffs to manufacture and sell a food product that conformed to its express and implied warranties, including, but not limited to, the implied warranty of merchantability and the implied warranty of fitness for a particular use or purpose.

50. The cantaloupe manufactured and sold by Frontera, Freshpack, and Walmart was contaminated by the *Listeria* bacteria. Such contaminated food products would not pass without exception in the trade, and the sale of such food products was thus in breach of the implied warranty of merchantability.

51. The cantaloupe manufactured and sold by Frontera, Freshpack, and Walmart was contaminated by the *Listeria* bacteria, and was not fit for the uses and purposes intended by either the Plaintiffs or the Defendants, *i.e.*, human consumption. The sale was thus a breach of the implied warranty of fitness for its intended use.

52. Because Frontera, Freshpack, and Walmart manufactured and sold food that was in breach of their express and implied warranties, the Defendants are liable to the Plaintiffs for the harm proximately caused by their sale of contaminated food.

**THIRD CLAIM FOR RELIEF AGAINST FRONTERA, FRESHPACK,  
AND WALMART**

**(Negligence and Negligence *per se*)**

53. The Plaintiffs hereby incorporate paragraphs 1 through 52 by this reference as if each paragraph was set forth herein in its entirety.

54. Frontera, Freshpack, and Walmart negligently manufactured, distributed and sold a food product that was not reasonably safe.

55. Frontera, Freshpack, and Walmart were negligent in manufacturing, distributing and selling a product that was not reasonably safe because adequate warnings or instructions were not provided, including, but not limited to, the warning that their product may contain *Listeria*, and thus should not be given to, or eaten by, people.

56. Frontera, Freshpack, and Walmart 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, including, but not limited to, the Federal Food, Drug, and

Cosmetics Act, which bans the manufacture, sale and distribution of any “adulterated” food, but failed to do so.

57. Frontera, Freshpack, and Walmart owed to the Plaintiffs a duty to source cantaloupes from suppliers whom they knew were using supplies and raw materials that were in compliance with applicable federal, state, and local laws, ordinances and regulations, but failed to do so.

58. Frontera, Freshpack, and Walmart owed to the Plaintiffs a duty to source cantaloupes from suppliers whom they knew were using good agriculture and manufacturing practices, but failed to do so.

59. Frontera, Freshpack, and Walmart owed to the Plaintiffs a duty to source cantaloupes that were clean, wholesome, free from spoilage and adulteration, and safe for human consumption, but failed to do so.

60. The Plaintiffs are among the class of persons designed to be protected by the statutory and regulatory provisions pertaining to Jensen Farms, Frontera, Freshpack, and Walmart’s manufacture, distribution, storage, labeling, and sale of their food.

61. As a result of Frontera, Freshpack, and Walmart’s negligence, and as a result of these defendants’ violation of statutes designed to protect the Plaintiffs from contaminated foods, Frontera, Freshpack, and Walmart are liable to the Plaintiffs for Charles Palmer’s *Listeria* illness and for the Plaintiffs’ injuries and losses.

#### **FOURTH CLAIM FOR RELIEF AGAINST PRIMUS**

##### **(Negligence)**

62. Plaintiffs reallege and incorporate each and every allegation contained in paragraphs 1 through 61, above, as though set forth fully herein.

63. Defendant Primus and 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.

64. 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.

65. 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 28 through 33.

66. 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.

67. 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, Defendant Primus is liable to the Plaintiffs for the Plaintiffs' injuries, damages and losses.

#### **FIFTH CLAIM FOR RELIEF, AGAINST ALL DEFENDANTS**

##### **(Loss of Consortium – Plaintiff Tammy Palmer only)**

68. The Plaintiffs hereby incorporate paragraphs 1 through 67 by this reference as if each paragraph was set forth herein in its entirety.

69. Plaintiff Tammy Palmer was, at the time that Charles Palmer was injured, as described above, by the Defendants' tortious conduct, married to Plaintiff Charles Palmer.

70. As a result of Defendants' tortious conduct, as described in the First, Second, Third, Fourth, and Fifth Claims for Relief, the Plaintiff Tammy Palmer suffered a loss of her rights of consortium, including, but not limited to, loss of affection, society, companionship, and aid and comfort of her injured spouse, as well as other economic damages. The Plaintiff Tammy Palmer suffered these losses as a direct and proximate result of the tortious injury to her husband, Plaintiff Charles Palmer.

#### **DAMAGES**

71. The Plaintiffs hereby incorporate paragraphs 1 through 70 by this reference as if each paragraph was set forth herein in its entirety.

72. The Plaintiffs have suffered general and special, incidental and consequential damages as the direct and proximate result of the acts and omissions of the Defendants, which damages shall be fully proven at the time of trial. Such damages include, but not limited to, 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 and future emotional distress; pharmaceutical expenses, past and future; wage loss; loss of consortium; and other ordinary, incidental and consequential damages as would be anticipated to arise under the circumstances.

**PRAYER FOR RELIEF**

WHEREFORE, the Plaintiffs pray:

A. That the Court award the Plaintiffs judgment against the Defendants in such sums as shall be determined to fully and fairly compensate the Plaintiffs 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;

B. That the Court award the Plaintiffs their costs, including experts fees, and reasonable attorneys' fees incurred;

C. That the Court award such other and further relief as it deems necessary and proper in the circumstances.

**PLAINTIFFS HEREBY DEMAND TRIAL TO A JURY OF SIX PERSONS ON ALL ISSUES SO TRIABLE.**

DATED: August 7, 2013

MONTGOMERY LITTLE & SORAN, PC

*/s/ John R. Riley*

---

John Riley, Esq. No. 18962  
Montgomery Little & Soran, PC  
5445 DTC Parkway, Suite 800  
Greenwood Village, Colorado 80111  
[jriley@montgomerylittle.com](mailto:jriley@montgomerylittle.com)

And

William D. Marler, Esq.  
(Admitted Pro Hac Vice)  
Marler Clark, LLP, PS  
1301 Second Ave, Suite 2800

---

Seattle, WA 98101  
[bmarler@marlerclark.com](mailto:bmarler@marlerclark.com)