

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MISSOURI

PAUL F. SCHWARZ, Personal Representative )  
of the Estate of Paul A. Schwarz, )

Plaintiff, )

v. )

NO. 11-CV-04280-FJG

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. )

**THIRD AMENDED COMPLAINT**

COMES NOW the plaintiff above-named, by and through his attorneys of record, Aleshire Robb, P.C. and Marler Clark, L.L.P., P.S., and for his third amended complaint against the defendants above-named, complains, alleges, and states as follows:

**I. PARTIES**

1. At all times relevant hereto, the plaintiff Paul A. Schwarz., was a resident of Kansas City, Jackson County, Missouri. Plaintiff Paul F. Schwarz is the adult son of the decedent, Paul F. Schwarz.

2. Decedent was married to Rosellen Schwarz and they were residents of Kansas City, Jackson County, Missouri.

3. The decedent and Rosellen Schwarz have five adult children, all of whom survived the decedent: plaintiff Paul F. Schwarz, James Schwarz, Gregory Schwarz, Mary Gray,

and Janice Willis.

4. 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 Missouri, including cantaloupe. Frontera’s principal place of business is located in the State of Texas. The defendant Frontera is a citizen of Texas, and not a citizen of Missouri.

5. 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 24.

6. 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 Jensen Farms, to customers in the Midwest

7. 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 83<sup>rd</sup>, Prairie Village, Kansas.

8. 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 Plaintiff's injuries, and whose identities are not known to the Plaintiff at this time. The Plaintiff will seek leave of the Court to amend this Complaint at such time that the identities of these parties become known.

## **II. JURISDICTION AND VENUE**

9. This Court has jurisdiction over the subject matter of this action pursuant to 28 USC § 1332(a) because the matter in controversy exceeds \$75,000.00, exclusive of costs, it is between citizens of different states, and because the defendants each have certain minimum contacts with the State of Missouri such that the maintenance of the suit in this district does not offend traditional notions of fair play and substantial justice.

10. Venue in the United States District Court for the District of Missouri is proper pursuant to 28 USC § 1391(a)(2) because a substantial part of the events or omissions giving rise to the plaintiff's claims and causes of action occurred in this judicial district, and because the defendants were subject to personal jurisdiction in this judicial district at the time of the commencement of the action.

## **III. FACTS**

### **The Outbreak**

11. 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 and distributed by defendant Frontera.

12. 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).

13. 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.

14. 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.

15. 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.

16. 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**

17. Prior to the outbreak described in paragraph 11 through 16, Jensen Farms or Frontera, or both of them, contracted with Defendant Primus to conduct an audit of Jensen Farms' ranchlands and packing house.

18. 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*.

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

20. 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.

21. After the formation of the contract described at paragraph 17, 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.

22. 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.

23. 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*.

24. 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%.

25. 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.

26. 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.

27. 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.

28. 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.

29. 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:

29.1 Condensation from cooling systems draining directly onto the floor;

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

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

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

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

30. 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."

31. 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.

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

32.1 Jensen Farms' inability to control pests;

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

32.3 Jensen Farms' failure to use an antimicrobial in its wash system, or in the

solution used to sanitize processing equipment;

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

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

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

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

33. 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.

34. 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.

35. 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**

36. 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.

37. 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.

38. 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.

### **Paul A. Schwarz's Listeria Infection and Death**

39. On several occasions in the weeks before onset of his Listeriosis illness, the decedent Mr. Schwarz consumed cut cantaloupe as a part of a meal at the defendant First Watch's restaurant located at 4117 W. 83<sup>rd</sup> Street, Prairie Village, Kansas. On at least one of these occasions, the cantaloupe that the decedent ate was contaminated by *Listeria monocytogenes*. The contaminated cantaloupe had been grown, produced, and distributed by the defendants Frontera, Heimos Produce, CH Robinson, and Liberty Fruit.

40. Mr. Schwarz fell ill on or about September 15, 2011. He was treated at the hospital late on September 15, 2011 for abdominal pain, and released.

41. Mr. Schwarz subsequently developed increasing weakness, until it reached the point that he could no longer move his legs. On September 18, 2011, he was taken by ambulance to the hospital and admitted. While in the hospital, Mr. Schwarz tested positive for *Listeria*.

42. As a result of his listeriosis illness, Mr. Schwarz remained hospitalized, and ultimately in hospice care, until the day of his death, which occurred on the evening of December 18, 2011.

43. Mr. Schwarz's *Listeria* infection and related injuries, and ultimately his death, were directly and proximately caused by his consumption of contaminated cantaloupe manufactured and distributed by Jensen Farms and Frontera Produce. Prior to his death, Mr. Schwarz and the plaintiffs Paul F. Schwarz and Rosellen Schwarz were informed by public health officials his *Listeria* infection was associated with the multi-state outbreak linked to cantaloupes manufactured, distributed, and sold by Jensen Farms and Frontera Produce.

44. As a direct and proximate result of Paul A. Schwarz's death, Plaintiffs are entitled

to recover pecuniary losses suffered by reason of death including medical and funeral expenses, the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training and support of decedent Paul A. Schwarz. In addition, they are entitled to an award of damages for the sufferance of Paul A. Schwarz between September 15, 2011 and his death on December 18, 2011.

**IV. CAUSE OF ACTION FOR WRONGFUL DEATH:  
STRICT LIABILITY AGAINST DEFENDANTS FRONTERA,  
CH ROBINSON, AND FIRST WATCH**

45. The defendants Frontera, CH Robinson, and First Watch manufactured and sold the adulterated food that injured the decedent, and ultimately caused his death.

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

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

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

49. The cantaloupe that the decedent 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.

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

51. The decedent's consumption of the contaminated cantaloupe caused him to become infected with *Listeria monocytogenes* and suffer injury and death as a direct and

proximate result.

52. 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, including the listeriosis illness and death of the decedent.

**V. CAUSE OF ACTION FOR WRONGFUL DEATH:  
NEGLIGENCE AGAINST DEFENDANTS FRONTERA,  
CH ROBINSON, AND FIRST WATCH**

53. 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 decedent consumed was, as a result of contamination, unfit for human consumption, thus defective, and was not reasonably safe as designed, constructed, manufactured, and sold.

54. 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.

55. 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*.

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

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

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

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

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

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

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

57. 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.

58. 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.

59. The plaintiffs' injuries and damages, including the listeriosis illness and death of Paul A. Schwarz, proximately and directly resulted from the defendant Jensen Farms, Frontera, Heimos Produce, CH Robinson, Liberty Fruit, and First Watch's negligence.

**VI. CAUSE OF ACTION FOR WRONGFUL DEATH:  
BREACH OF WARRANTY AGAINST DEFENDANTS FRONTERA,  
CH ROBINSON, AND FIRST WATCH**

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 and drink they manufactured and sold to the decedent.

62. The plaintiff's injuries, including the listeriosis illness and death of the decedent, 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.

**VII. CAUSE OF ACTION FOR WRONGFUL DEATH:  
NEGLIGENCE AGAINST PRIMUS**

63. 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.

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. 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.

66. 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 30 through 35.

67. 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.

68. 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 decedent's Listeriosis illness and death, Defendant Primus is liable to the Plaintiffs for the Plaintiffs' injuries, damages and losses.

### **VIII. DAMAGES**

69. As a direct and proximate result of the defendants' acts and omissions, individually or in combination, the plaintiff has been damaged and is entitled to funeral expenses and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training and support of the decedent.

70. As a further direct and proximate result of the defendants' acts and omissions,

individually or in combination, the decedent underwent continuous medical care from the onset of his listeriosis illness from September 15, 2011 until his death on December 18, 2011. Plaintiffs are therefore entitled to recover for the medical expenses incurred by, and pain and suffering endured by the decedent during the time from the beginning of his illness on September 15, 2011 until his death on December 18, 2011, pursuant to Section 537.090 et seq.

71. As a further direct and proximate result of Defendants Primus', C.H. Robinson's and First Watch's conscious disregard for the rights and safety of consumers, including the decedent, plaintiff is entitled to an additional award of aggravating circumstances damages in an amount sufficient to punish Defendants Primus, C.H. Robinson and First Watch and deter others from like conduct.

#### **VIII. PRAYER FOR RELIEF**

WHEREFORE, the plaintiff prays as follows:

(1) That the court award the plaintiff judgment against defendants for damages in an amount in excess of \$75,000.

(2) That the court additionally 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 plaintiff as the direct and proximate result of the acts and omissions of the defendants, including, among other things, funeral expenses, a reasonable amount for the pain and suffering endured by the decedent from September 15, 2011 until his death on December 18, 2011, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training and support of the decedent;

(3) That the court additionally award plaintiff aggravating circumstances damages

against Defendants Primus, C.H. Robinson and First Watch in an amount sufficient to punish said defendants and deter others from like conduct;

(4) That the court award the plaintiffs the opportunity to amend or modify the provisions of this complaint as necessary or appropriate after additional or further discovery is completed in this matter, and after all appropriate parties have been served; and

(5) That the court award such other and further relief as it deems necessary and proper in the circumstances.

DATED this \_\_\_\_ day of August, 2013.

Respectfully submitted,

ALESHIRE ROBB, P.C.

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AND

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