

<p>DISTRICT COURT, COUNTY OF LARIMER , STATE OF COLORADO</p> <p>Court Address: 201 LaPorte Avenue Fort Collins, CO 80521</p>	
<p>Plaintiff: DIANA WEATHERRED, individually and as Personal Representative of the Estate of James Weatherred;</p> <p>Defendants: THE KROGER CO, d/b/a KING SOOPERS; FRESHPACK PRODUCE, INC.; FRONTERA PRODUCE LTD., a foreign corporation; PRIMUS GROUP, INC d/b/a PRIMUS LABS, a foreign corporation.</p>	<p>▲COURT USE ONLY▲</p>
<p>Attorneys for Plaintiff:</p> <p>Randall M. Willard Willard & Associates, P.C. 215 W. Oak Street, Suite 600 Fort Collins, CO 80521 Phone Number: (970) 224-5678 Fax Number: (970) 224-1199 Atty. Reg. #: 15679</p>	<p>Case No.: 13CV30958</p> <p>Division: 5A</p>
<p>COMPLAINT AND JURY DEMAND</p>	

COMES NOW the Plaintiff, by and through her attorneys of record, Randall R. Willard of Willard & Associates, P.C., and William D. Marler of Marler Clark, LLP, PS, (pending *pro hac vice* admission) and files this Complaint and alleges as follows:

PARTIES

1. The Plaintiff Diana Weatherred resides in Wellington, Larimer County, Colorado. The Plaintiff is the former wife of the Decedent, James Weatherred. At all times relevant to the allegations contained in this complaint, Diana and James Weatherred resided in Larimer County, Colorado.

2. The Defendant The Kroger Co. d/b/a King Soopers (Kroger) is a foreign corporation that owns and operates King Soopers retail grocery locations in the State of Colorado

and in other states. Kroger owned and operated the King Soopers retail grocery location that manufactured and sold the cantaloupe that caused the Plaintiff's injuries, as alleged in this complaint.

3. The Defendant Freshpack Produce, Inc. (Freshpack) is a Colorado company that sells and distributes fresh produce products, including cantaloupes, to retail grocery stores and other foodservice establishments. Freshpack distributed the cantaloupe that caused the Plaintiff's injuries, as alleged in this complaint, to Defendant Kroger.

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 to this Complaint, 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.

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

JURISDICTION AND VENUE

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

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

GENERAL ALLEGATIONS

The Outbreak

8. On September 2, 2011, the Colorado Department of Public Health and the Environment (CDPHE) announced that it was investigating an outbreak of Listeriosis. On September 9, 2011, CDPHE announced that the likely source of the *Listeria* outbreak was cantaloupe. On September 12, 2011 CDPHE announced that the outbreak of *Listeria* was linked to cantaloupe from the Rocky Ford (Colorado) growing region. It was subsequently determined that contaminated cantaloupes were grown by Jensen Farms, a Colorado company, and distributed by Frontera.

9. A total of 146 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 (1), Nebraska (6), Nevada (1), New Mexico (15), New York (2), North Dakota (2), Oklahoma (12), Oregon (1), Pennsylvania (1), South Dakota (1), Texas (18), Utah (1), Virginia (1), West Virginia (1), Wisconsin (2), and Wyoming (4).

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

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

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

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

The July 25, 2011 Audit of Jensen Farms

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

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

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

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

18. After the formation of the contract described at paragraph 14, Primus selected and hired Bio Food Safety to conduct the audit of Jensen Farms. Bio Food Safety thereby became Primus's subcontractor, and agent, for the limited purpose of auditing Jensen Farms.

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

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

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

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

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

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

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

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

Further, the packing facility floor where water pooled was directly under the packing facility equipment from which FDA collected environmental samples that tested positive for *Listeria monocytogenes* with PFGE pattern combinations that were indistinguishable from outbreak strains. The packing facility floor was constructed in a manner that was not easily cleanable. Specifically, the trench drain was not accessible for adequate cleaning. This may have served as a harborage site for *Listeria monocytogenes* and, therefore, is a factor that may have contributed to the introduction, growth, or spread of the pathogen.

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

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

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

c. **Postharvest Practices:** In addition, free moisture or increased water activity of the cantaloupe rind from postharvest washing procedures may have facilitated *Listeria*

monocytogenes survival and growth. After harvest, the cantaloupes were placed in cold storage. The cantaloupes were not pre-cooled to remove field heat before cold storage. Warm fruit with field heat potentially created conditions that would allow the formation of condensation, which is an environment ideal for *Listeria monocytogenes* growth.

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

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

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

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

28. Further, during the July 25, 2011 packing house audit conducted by Bio Food Safety, as agent for Primus, Mr. Dilorio failed to observe, or properly downscore or consider, multiple conditions or practices that were in violation of Primus’s audit standards applicable to cantaloupe packing houses, industry standards, and applicable FDA industry guidance. The true and actual state of these conditions and practices was inconsistent and irreconcilable with the “superior” rating, and 96% score, that Mr. Dilorio ultimately gave to Jensen Farms packing house.

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

- 29.1 Jensen Farms' inability to control pests;
- 29.2 Jensen Farms' use of equipment that was inappropriate for the processing of cantaloupes;
- 29.3 Jensen Farms' failure to use an antimicrobial in its wash system, or in the solution used to sanitize processing equipment;
- 29.4 Jensen Farms' failure to ensure the appropriate antimicrobial concentration in its wash water, which, as alleged at paragraph 26.4, did not contain any antimicrobial at all;
- 29.5 Jensen Farms' failure to have hot water available for purposes of handwashing;
- 29.6 The design of Jensen Farms' packing house caused water to pool, creating a harborage site for bacteria;
- 29.7 Jensen Farms' failure to precool cantaloupes prior to processing.

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

31. In addition, Mr. Dilorio misrepresented the conditions and practices at Jensen Farms' packing house by giving it a "superior" rating and a score of 96%, despite the existence of conditions and practices that should have caused him to fail the facility. Mr. Dilorio made other material misrepresentations—including, but not limited to, statements about the suitability of equipment in place at the packing house for the processing of cantaloupes—all of which were relied on by Jensen Farms as justification for continuing to use, rather than changing or improving, the various conditions, practices, and equipment for its processing of cantaloupes.

32. Had the Jensen Farms packing house failed the July 25, 2011 audit, the cantaloupe that caused the Plaintiffs' Listeriosis illness would not have been distributed by Jensen Farms and Frontera. Further, had the Jensen Farms packing house failed the July 25, 2011 audit, production would not have continued without Jensen Farms first correcting the various conditions and practices that (a) should have caused the packing house to fail the July 25 audit and (b) were proximate causes of the outbreak that is the subject of this action.

Listeriosis

33. Listeriosis is a serious illness that is caused by eating food contaminated with the bacterium *Listeria monocytogenes*. Although there are other types of *Listeria*, most cases of listeriosis are caused by *Listeria monocytogenes*. *Listeria* is found in soil and water. Vegetables can become contaminated from the soil or from manure used as fertilizer. Animals can carry the bacterium without appearing ill and can contaminate foods of animal origin, such as meats and

dairy products. *Listeria* has been found in a variety of raw foods, such as uncooked meats and unpasteurized (raw) milk or foods made from unpasteurized milk. *Listeria* is killed by pasteurization and cooking; however, in certain ready-to-eat foods, like hot dogs and cold cuts from the deli counter, contamination may occur after cooking but before packaging.

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

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

Jim Weatherred's *Listeria* Illness

36. James ("Jim") Weatherred's medical history is significant for recurrent IgG kappa multiple myeloma.¹ Prior to Jim's Listeriosis illness, his cancer care was well-managed. He received an autologous stem cell transplant in July 2007. In the fall of 2011, he was recovering from chemotherapy for recurrent disease earlier in the year and was undergoing additional treatment. Despite having to deal with a chronic illness, Jim remained mobile, alert, and active. Mere weeks before his Listeriosis illness, he and Diana Weatherred went on a camping trip into the Colorado mountains, where they fished and hiked.

37. Jim and Diana Weatherred were occasional consumers of cantaloupes. As do many Coloradans, they particularly enjoy the summer season of Rocky Ford cantaloupes. Diana purchased contaminated Jensen Farms cantaloupes at a Kroger owned and operated King Soopers retail grocery store on August 11 and 21, 2011. The cantaloupes, which were contaminated by *Listeria monocytogenes* and caused Jim's Listeriosis illness, were distributed to Kroger by Defendant Freshpack.

38. On or about August 29, 2011, after several days of extreme fatigue, Jim Weatherred became markedly confused, and at times almost unresponsive, in addition to other

¹ Myeloma is a cancer of the plasma cells and as such directly impacts the immune system. Different types of myeloma are classified by the type of immunoglobulin produced by the abnormal plasma cells. Immunoglobulins (Ig) are made up of 2 components: light chains and heavy chains and further classified by the type of light (kappa or lambda) or heavy (alpha [IgA], gamma [IgG], mu [IgM], delta [IgD], and epsilon [IgE]) chains. The most common monoclonal protein in myeloma is the IgG type. When the abnormal M protein is identified in myeloma, it is most often an IgG kappa type. However, any other combination is possible.

symptoms of illness. He was hospitalized at St. Luke's Medical Center in Denver, Colorado, the same day. It was initially thought that Jim's symptoms represented relapsing multiple myeloma.

39. Jim's altered mentation raised the concern, however, that he had central nervous system (CNS) involvement with relapsing multiple myeloma. On September 1, 2011, a PICC line was placed to accommodate his long-term chemotherapy for the multiple myeloma, as well as fluids and any other medications he might require. The next day, the St. Luke's laboratory reported that the blood cultures from the date of admission were positive for *Listeria monocytogenes*. Appropriate antibiotic treatment was initiated.

40. The Public Health Laboratory at the Colorado Department of Public Health and Environment (CDPHE) conducted a Pulsed Field Gel Electrophoresis (PFGE) of the *Listeria* isolate cultured from Jim's blood (CDPHE Specimen ID Number HUM-2011025927). Results showed that Jim was infected with CDPHE strain "06-J/06-J," which is a strain associated with illness in the Jensen Farms outbreak.

41. On or about September 5, 2011, Jim underwent an abdominal and pelvic CT scan, which revealed markedly decreased aeration of the lungs with scattered ground glass infiltrate, with associated pleural fluid and atelectasis. It also identified ascites, and free fluid was noted along the upper abdomen, and more moderate free fluid in the pelvis. There was wall thickening along the antral portion of the stomach and proximal duodenum, raising suspicion for possible inflammation. Jim also underwent a brain CT, showing evidence of multiple myeloma but also areas of bacterial or viral cerebritis and progressive multifocal leukoencephalopathy.

42. Jim was discharged from St. Luke's on September 14, 2011, with prescription for continuing antibiotic treatment at home. He began, however, to experience great pain in his abdomen and back, and was hospitalized again on September 17, 2011, at Poudre Valley Hospital. A CT scan of his abdomen and pelvis showed free air, consistent with a perforated viscus.

43. Later that same day, Jim was taken to the operating room at Poudre Valley Hospital for acute surgical abdomen with perforated viscus. The operative findings were consistent with the preoperative diagnosis, noting bilious fluid and debris in the abdomen, which appeared to be centered mostly in the pelvis. There was no obvious perforation anywhere, but the sigmoid did have evidence of diverticula and there were areas of thickening. The peritoneal contents showed inflammatory changes that included multiple loops of small bowel, terminal ileum, cecum and omentum. Jim tolerated the procedure and was returned to postoperative recovery in stable condition.

44. Jim would remain at Poudre Valley Hospital until the end of September 2011. On September 20, 2011, a chest x-ray showed possible pleural effusions but no frank congestive heart failure. A repeat chest x-ray the next day showed improved lung volume with reduced bibasilar lung atelectasis and patchy infiltrates in the right upper, left mid and lower lung zone.

45. On September 22, 2011, a cranial MRI was done with and without contrast medium, which showed acute hypertensive encephalopathy, which is sometimes seen with drug

toxicity, particularly chemotherapy, and in the appropriate clinical setting with uremic encephalopathy. There was no hemorrhage or other acute process seen on this exam. A chest x-ray earlier in the day showed no significant effusions. Chest x-rays were repeated on September 23 and 24, 2011, with continued improvement and a repositioning of the PICC line that had become necessary.

46. Jim was finally discharged on September 30, 2011. His discharge diagnoses included peritonitis secondary to sigmoid colon perforation, history of multiple myeloma, status post bone marrow transplant, and current treatment for *Listeria* infection. Before discharge, the enterostomal therapist worked closely with Jim in preparation for dealing with his stoma. He was to follow-up with his oncologist in Denver, as well as a local urologist in collaboration with infectious disease. Home health care was planned and set up for him, and the PICC line was left in place, with skilled nursing to provide wound VAC care. He was provided prescriptions for Dilaudid, Augmentin, Flagyl, pyridium and oxybutynin.

47. On November 4, 2011, Jim was re-admitted to St. Luke's Medical Center for evaluation of severe nausea, vomiting, anorexia, cachexia, and malnutrition. He had lost about 45 pounds since the surgery at Poudre Valley Hospital. He had had great difficulty eating food and in particular swallowing food. It was not clear whether it is due to actual dysphagia or nausea. He had also been falling at home and his cognition had been altered, to the point that he would become confused about simple work tasks. Due to poor oral intake, he was started on IV fluids and potassium. He was admitted for a thorough evaluation by nutrition, speech and swallow, gastroenterology, and infectious disease. Total parenteral nutrition (TPN) was started.

48. On November 7, Jim underwent a gastroenterology consultation. He was scheduled for a modified barium swallow to help delineate whether there was any structural abnormality. The gastroenterologist was concerned that the cause of oropharyngeal dysphagia could be related to his xerostomia (dry mouth) and suggested the use of artificial saliva. He felt it was remotely possible that he had an additional bowel infection such as CMV (cytomegalovirus). He felt they might want consider diagnostic upper endoscopy at some point.

49. Jim underwent an esophagogastroduodenoscopy (EGD) on November 8, 2011, to obtain biopsy specimens. The exam revealed esophagitis, and multiple biopsies were taken to rule out CMV or HSV, although the findings were more consistent with reflux esophagitis. Gastritis was found in the antrum and a hiatus hernia in the cardia. The duodenum looked normal. Jim also underwent a bone marrow biopsy on November 11, 2011, which showed persistent plasma cell dyscrasia.

50. Jim remained in the hospital until November 16, 2011, when he was discharged back home. The EGD biopsies had come back negative for CMV, HSV, and graft-versus-host disease, but the biopsy of the esophagus showed acute inflammation, ulceration, and granulation tissue. There were no viral cytopathic changes identified. Over the hospitalization, Jim's appetite slowly improved, and TPN was able to be discontinued on November 15, 2011. During his hospital stay, Jim had also developed significant peripheral neuropathy, which was treated with gabapentin with improvement of symptoms.

51. Jim eventually began chemotherapy treatment for his multiple myeloma again, but the treatment was delayed due to the severe Listeriosis infection and related medical problems. The delay in treatment allowed for further increase in the bulk of his myeloma disease, and allowed for the development of resistance as well.

52. Jim died on or about December 7, 2012. The Plaintiff Diana Weatherred was appointed Personal Representative of the Estate of James Weatherred on or about March 29, 2013.

FIRST CLAIM FOR RELIEF AGAINST FRONTERA, FRESHPACK AND KROGER
(Strict Product Liability)

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

54. The Defendants Frontera, Freshpack and Kroger are product manufacturers and sellers within the meaning of the Colorado Product Liability Act, C.R.S. §13-21-401 *et seq.* The Defendants Frontera, Freshpack and Kroger manufactured, distributed and/or sold the food product—a contaminated cantaloupe—that was the source of Jim Weatherred’s Listeriosis infection and related illness, and the Plaintiffs’ injuries, damages, and losses. The *Listeria*-contaminated cantaloupe that was the source of the Plaintiffs’ injuries, damages, and losses was a product within the meaning of the Act.

55. Frontera, Freshpack and Kroger’s contaminated cantaloupe that was the source of Jim Weatherred’s Listeriosis infection and related illness, and the Plaintiffs’ injuries, damages and losses, was defective, and was unreasonably dangerous to the consumer, because it was contaminated and adulterated with *Listeria*, a potentially deadly pathogen.

56. The contaminated cantaloupe manufactured and distributed by Frontera, Freshpack and Kroger reached Jim Weatherred without substantial change in the condition in which it was sold.

57. Frontera, Freshpack and Kroger’s defective, *Listeria*-contaminated cantaloupe caused Jim Weatherred’s Listeriosis infection and related illness.

58. Frontera, Freshpack and Kroger were the sellers of the defective *Listeria*-contaminated cantaloupe that caused Jim Weatherred’s Listeriosis infection and related illness.

59. Frontera, Freshpack and Kroger were engaged in the business of selling cantaloupes for human consumption.

60. Because Frontera, Freshpack and Kroger manufactured and sold the contaminated cantaloupe that was the source of the Plaintiffs’ injuries, damages and losses, which food was defective and not reasonably safe due to *Listeria* contamination, Frontera, Freshpack and Kroger are strictly liable to the Plaintiff for the harm proximately caused by their sale of a defective food product.

SECOND CLAIM FOR RELIEF AGAINST FRONTERA, FRESHPACK, AND KROGER
(Breach of Warranties)

61. The Plaintiffs hereby incorporate paragraphs 1 through 60 by this reference as if each paragraph was set forth herein in its entirety.

62. Frontera, Freshpack and Kroger owed a duty to the Decedent to manufacture and sell a food product—i.e. cantaloupe—that conformed to their 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.

63. The cantaloupe manufactured and sold by Frontera, Freshpack and Kroger that caused Jim Weatherred’s Listeriosis infection was contaminated with 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.

64. The cantaloupe manufactured and sold by Frontera, Freshpack and Kroger that caused Jim Weatherred’s Listeriosis infection was contaminated with 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.

65. Because Frontera, Freshpack and Kroger manufactured and sold a cantaloupe, the condition of which breached their express and implied warranties, Frontera, Freshpack and Kroger are liable to the Plaintiff for the harm proximately caused by their sale of contaminated food.

THIRD CLAIM FOR RELIEF AGAINST FRONTERA, FRESHPACK, AND KROGER
(Negligence and Negligence *per se*)

66. The Plaintiffs hereby incorporate paragraphs 1 through 65 by this reference as if each paragraph was set forth herein in its entirety.

67. Frontera, Freshpack and Kroger negligently manufactured, distributed and sold a food product—i.e. cantaloupe—that was not reasonably safe.

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

69. Frontera, Freshpack and Kroger 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.

70. In the manufacture and production of their finished product, Frontera, Freshpack and Kroger owed to the Decedent a duty to use supplies and raw materials that were in compliance with applicable federal, state, and local laws, ordinances and regulations; that were from safe and reliable sources; and that were clean, wholesome, free from spoilage and adulteration, and safe for human consumption, but failed to do so.

71. The Decedent was among the class of persons designed to be protected by the statutory and regulatory provisions pertaining to Frontera, Freshpack and Kroger's manufacture, distribution, storage, labeling, and sale of food.

72. As a result of Frontera, Freshpack and Kroger's negligence, and as a result of Frontera, Freshpack and Kroger's violation of statutes designed to protect the Decedent from contaminated foods, Frontera, Freshpack and Kroger are liable to the Plaintiff for the Plaintiff's injuries, damages and losses.

FOURTH CLAIM FOR RELIEF
(Negligence, against Defendant Primus Only)

73. Plaintiff realleges and incorporates each and every allegation contained in paragraphs 1 through 72, above, as though set forth fully herein.

74. 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.

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

76. The audit done by James Dilorio on July 25, 2011 was not done with reasonable care, and constituted a breach of the duty of reasonable care that Primus owed to the consumers of Jensen Farms/Frontera cantaloupes. Mr. Dilorio's various acts and omissions of negligence in the conduct of the audit include specifically, but not exclusively, those acts and omissions set forth at paragraphs 27 through 32.

77. 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 Jim Weatherred's Listeriosis infection, and the Plaintiffs' associated injuries and damages.

78. 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

acts and omissions of negligence that constituted a proximate cause of the Plaintiffs' injuries and damages, Defendant Primus is liable to the Plaintiff for his injuries, damages and losses.

FIFTH CLAIM FOR RELIEF
(Loss of Consortium, against all Defendants)

79. The Plaintiff hereby incorporates paragraphs 1 through 78 by this reference as if each paragraph was set forth herein in its entirety.

80. Plaintiff was, at the time that Jim Weatherred was sickened as described above by the Defendants' tortious conduct, married to Jim Weatherred.

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

DAMAGES

82. The Plaintiff hereby incorporates paragraphs 1 through 81 by this reference as if each paragraph was set forth herein in its entirety.

83. The Plaintiff has 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 all damages recoverable pursuant to C.R.S. §13-21-203 and C.R.S. §13-20-101, including, but not limited to damages for medical and medical related expenses; funeral expenses; and grief, loss of companionship, impairment of the quality of life, pain and suffering and emotional distress; and other ordinary, incidental and consequential damages as would be anticipated to arise under the circumstances.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays:

A. That the Court award the Plaintiff judgment against the Defendants in such 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;

B. That the Court award the Plaintiff her 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.

DATED: August 8, 2013

WILLARD & ASSOCIATES, P.C.

/s/ Randall M. Willard

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