

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	DATE FILED: May 2, 2014 3:19 PM FILING ID: 2B699735A31D8 CASE NUMBER: 2011CV1891 ▲ COURT USE ONLY ▲
IN RE PRODUCE LITIGATION	Case No. 11CV1891 12CV1196 (El Paso) Division: 22
<p style="text-align: center;">(12CV1196 EL PASO)</p> <p style="text-align: center;">THIRD AMENDED COMPLAINT (P-HAUSER)</p>	

COMES NOW the Plaintiff, by and through her attorneys of record, Montgomery Little & Soran, P.C., and Marler Clark, LLP, PS, to file this Third Amended Complaint and allege as follows:

PARTIES

1. The Plaintiff Patricia Hauser is the widow of the decedent, Michael Hauser. Patricia Hauser and Michael Hauser were, at all times relevant to this Complaint, married and residents of Monument, El Paso County, Colorado.

2. The Defendant Frontera Produce, Ltd. ("Frontera") is a corporation organized and existing under the laws of the State of Texas. At all times relevant hereto, Frontera was a manufacturer, distributor and seller of agricultural products in Colorado, including cantaloupe. Frontera's principal place of business is located in the State of Texas.

3. The Defendant Primus Group, Inc. d/b/a "Primus Labs" (Primus), is a corporation organized and existing under the laws of the State of California, with its principal place of business in California as well. At all times relevant to this Third Amended 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 19.

4. The Defendant Freshpack Produce, Inc., ("Freshpack"), 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.

5. The Defendant Sunflower Farmers Markets, LLC, ("Sunflower") is a foreign corporation organized and existing under the laws of the State of Colorado that maintains and operates a retail store known as Sunflower Farmers Markets, which sells various food and other products, located at 1730 Dublin Blvd., Colorado Springs, Colorado 80918. At all times relevant hereto, Sunflower 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 that 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 Third Amended 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-two 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 Defendant Jensen Farms's 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 packinghouse.

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' 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' 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 DiIorio 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. DiIorio, as employee and agent of Bio Food Safety, and as agent of Primus, gave the Jensen Farms packinghouse 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' packinghouse 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 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. DiIorio 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 packinghouse audit conducted by Bio Food Safety, as agent for Primus, Mr. DiIorio failed to observe, or properly down score or consider, multiple conditions or practices that were in violation of Primus’ audit standards applicable to cantaloupe packinghouses, 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. DiIorio ultimately gave to Jensen Farms’ packinghouse.

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 hand washing;

30.6 The design of Jensen Farms' packinghouse 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 packinghouse to fail the July 25, 2011 audit.

32. In addition, Mr. DiIorio misrepresented the conditions and practices at Jensen Farms' packinghouse 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. DiIorio made other material misrepresentations—including, but not limited to, statements about the suitability of equipment in place at the packinghouse 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. The 2011 auditor, Mr. DiIorio, failed to observe, or properly down score or consider, multiple conditions or practices that were in violation of Primus's own audit standards applicable to cantaloupe packing houses, industry standards, and relevant FDA industry guidance.

34. The 2011 auditor, Mr. DiIorio, following the audit, failed to discuss with Jensen Farms the multiple conditions or practices at the facility that were in violation of Primus's own audit standards applicable to cantaloupe packing houses, industry standards, and relevant FDA industry guidance.

35. The Primus audit failed to note, and to down-score, that the facility floor was constructed in a manner that was not easily cleanable, a factor that likely contributed to the introduction, growth, or spread of *Listeria monocytogenes*.

36. The Primus audit failed to note, and to down-score, that certain pieces of Jensen Farms equipment in the packinghouse were designed to process a different agricultural

commodity, *i.e.* potatoes, a factor that likely contributed to the introduction, growth, or spread of *Listeria monocytogenes*.

37. The Primus audit failed to note, and to down-score, that 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 appeared to be un-cleanable, and dirt and product buildup was visible. Corrosion was also visible. Further, because the equipment was 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.

38. The Primus audit failed to note, and to down-score, that Jensen Farms did not use an antimicrobial solution, such as chlorine, in the water used to wash cantaloupes, a factor that likely contributed to the introduction, growth, or spread of *Listeria monocytogenes*.

39. The Primus audit failed to note, and to down-score, that Jensen Farms did not properly sanitize its facilities and equipment, a factor that likely contributed to the introduction, growth, or spread of *Listeria monocytogenes*.

40. The Primus audit failed to note, and to down-score, that Jensen Farms did not have adequate and appropriate food safety policies and procedures, a factor that likely contributed to the introduction, growth, or spread of *Listeria monocytogenes*.

41. The Primus audit failed to note, and to down-score, that Jensen Farms did not maintain the required food safety program records, documenting the implementation of its food safety program, a factor that likely contributed to the introduction, growth, or spread of *Listeria monocytogenes*.

42. The Primus audit failed to note that on July 25, 2011, the day of the audit, the Jensen Farms' packinghouse was not operating in its normal fashion. The Jensen Farms harvest did not start until a few days later, and at the time of the audit the packinghouse was not operating in its usual fashion, *i.e.*, it was not processing melons. Pursuant to its own guidelines, the audit was to be immediately terminated at that time, as a valid assessment could not be made at that time.

43. Primus at all material times hereto had detailed criteria, standards and requirements which had to be met by its third-party auditors. Primus negligently failed to ensure that Bio-Food Safety, at the time of the Jensen Farms 2011 audit, met those necessary criteria, standards and requirements as regards to Bio-Food Safety's preparation of the audit.

44. Primus at all material times hereto also had detailed criteria and standards by which to review and assess the quality of the audits provided by its third-party auditors. Primus negligently failed to ensure that Bio-Food Safety's 2011 Jensen Farms' audit performance criteria and standards met Primus' own criteria and standards for its third-party auditors.

45. Had Mr. DiIorio properly terminated the 2011 audit, due to the fact that the facility was not operating normally at the time of the audit, Jensen Farms would not have received a passing audit score.

46. Had Mr. DiIorio properly “down-scored” or properly considered the deficient facility conditions or practices, standing alone or in combination, Jensen Farms would have received a failing audit score.

47. Had Jensen Farms not received a passing audit score, it would not have received a passing Primus Audit Certificate, and its melon products would not have qualified as having been “Primus Certified”.

48. Had the Jensen Farms melon products not qualified as “Primus Certified”, those melons would not have been purchased by Frontera.

49. Had Jensen Farms received a failing audit score, its melons would not have been certified by Primus as “Primus Certified”, and Frontera would not have purchased the melons from Jensen Farms.

50. Had Frontera not purchased the melons from Jensen Farms, neither Frontera nor Jensen Farms would have distributed the Primus Certified melons to retailers across the country and eventually to the respective customers of those retailers.

51. Mr. DiIorio, by improperly giving the Jensen facilities and procedures a “superior” rating in his audit, erroneously represented to Jensen that his auditing services were provided with professional expertise and knowledge in the field of food safety, including with the proper analysis and assessment of food safety procedures and other applicable standards of care concerning the production of agricultural products.

52. Mr. DiIorio, by improperly giving the Jensen facilities and procedures a “superior” rating in his audit, erroneously represented to Jensen that Jensen Farms’ packinghouse facilities, premises, and food safety procedures met or exceeded the applicable good agricultural and manufacturing practices, industry standards, and relevant FDA industry guidance standards of care incumbent upon Jensen Farms as a manufacturer of cantaloupes for human consumption

53. Mr. DiIorio, by improperly giving the Jensen facilities and procedures a “superior” rating in his audit, erroneously represented to Jensen that during the audit he had interpreted the Primus guidelines with food safety and risk minimization being the key concerns.

54. Mr. DiIorio, by improperly giving the Jensen facilities and procedures a “superior” rating in his audit, erroneously represented to Jensen and to others that the Jensen cantaloupes had been processed in facilities and with food safety procedures that met or exceeded the applicable good agricultural and manufacturing practices, industry standards, and relevant FDA industry guidance standards, and that thus the melons met the standards required to be “Primus Certified”.

55. Mr. DiIorio, by improperly giving the Jensen facilities and procedures a “superior” rating in his audit, negligently gave Jensen false information, on which Jensen reasonably relied in Jensen’s evaluation of the safety and quality of its facilities and procedures and cantaloupes. Jensen Farms reasonably relied on the representation that its facilities and food safety procedures met or exceeded the applicable good agricultural and manufacturing practices, industry standards, and relevant FDA industry guidance standards.

56. Jensen Farms reasonably relied on the representation that its facilities and food safety procedures met or exceeded the applicable good agricultural and manufacturing practices, industry standards, and relevant FDA industry guidance standards, and thus failed to take any actions to correct the food safety deficiencies in its facilities, equipment and policies and procedures it was not aware of.

57. Jensen Farms reasonably relied on the representation that its facilities and food safety procedures met or exceeded the applicable good agricultural and manufacturing practices, industry standards, and relevant FDA industry guidance standards, and thus sold to Frontera its melons as “Primus Certified”.

Listeriosis

58. 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.

59. 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.

60. 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.

Michael Hauser's *Listeria* Illness and Resulting Death

61. Dr. Michael Hauser was a 69-year-old retired podiatrist who, in August 2011, was recovering from treatment for multiple myeloma, including stem cell treatments and chemotherapy. At the end of that month, he was enjoying a respite from treatment, spending time with his wife and family, when he became gravely ill following the ingestion of cantaloupe his wife had purchased on August 17, 2011, at Defendant Sunflower's retail grocery located at 1730 Dublin Blvd., Colorado Springs, Colorado. The cantaloupe was grown, produced, and distributed by the Jensen Farms and Defendants Frontera, Freshpack, and Sunflower.

62. Onset of Dr. Hauser's Listeriosis illness occurred in the late evening and early morning hours of September 10 and 11, 2011, with the development of a severe headache. He became ill very rapidly, with fever and altered mental status, as well as neck pain, nausea, and vomiting.

63. Dr. Hauser was rushed to the emergency room at the University of Colorado Hospital, arriving just before 3 p.m. on September 11, 2011. Almost immediately after arrival at the ER, Dr. Hauser went into a grand mal seizure. Doctors suspected encephalitis or meningitis, and blood tests were done that were positive for one of the strains of *Listeria monocytogenes* later determined to have been associated with the cantaloupe *Listeria* outbreak described above.

64. By the end of the day on September 11, 2011, Dr. Hauser was transferred to the intensive care unit in the hospital. On September 12, 2011, Dr. Hauser's temperature in the ICU had risen to 40.8°C (105.4°F), he was nonresponsive verbally, and demonstrated no eye opening even with painful stimulation. He was diagnosed with bacterial meningitis, and sepsis, with central nervous system dysfunction. He remained largely nonresponsive, and was intubated and placed on a ventilator.

65. Dr. Hauser's condition was essentially unchanged through his discharge from the University of Colorado Hospital on September 29, 2011. Dr. Hauser was transferred to a second facility, Select Specialty Hospital, for continued care. At this time, Dr. Hauser had shown some improvement in mental condition, as indicated by the opening of his eyes to voices, but he remained unable to follow commands.

66. Dr. Hauser continued to experience modest improvements while at Select Specialty Hospital. On October 28, 2011, Dr. Hauser underwent the surgical placement of a shunt for post-meningitis hydrocephalus.

67. Dr. Hauser was discharged from Select Specialty Hospital on February 7, 2012. The cost of his medical care was \$1,416,801.48.

68. On February 21, 2012, Dr. Hauser died as a direct and proximate result of the *Listeria* infection he contracted through consumption of a *Listeria*-contaminated cantaloupe, and as a direct and proximate result of the acts and omissions of the Defendants.

**FIRST CLAIM FOR RELIEF AGAINST FRONTERA, FRESHPACK
AND SUNFLOWER**

(Strict Product Liability)

69. The Plaintiff hereby incorporates paragraphs 1 through 68 by this reference as if each paragraph was set forth herein in its entirety.

70. The Defendants Frontera, Freshpack and Sunflower 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 Sunflower manufactured, distributed and sold the food product—a contaminated cantaloupe—that was the source of the decedent's death, and the Plaintiff's injuries, damages, and losses. The *Listeria*-contaminated cantaloupe that was the source of the Plaintiff's injuries, damages, and losses was a product within the meaning of the Act.

71. The cantaloupe that was the source the decedent's death, and the Plaintiff's 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.

72. The contaminated cantaloupe that was the source the decedent's death, and the Plaintiff's injuries, damages and losses, reached the decedent without substantial change in the condition in which it was sold.

73. Frontera, Freshpack and Sunflower's defective, *Listeria*-contaminated cantaloupe caused the decedent's injuries and death.

74. Frontera, Freshpack and Sunflower were the manufacturers, distributors and sellers of the defective *Listeria*-contaminated cantaloupe that caused the decedent's injuries and death.

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

76. Because Frontera, Freshpack and Sunflower manufactured, distributed, and sold the food product that was the source of the Plaintiff's injuries, damages and losses, which food was defective and not reasonably safe due to *Listeria* contamination, Frontera, Freshpack and Sunflower 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 SUNFLOWER**

(Breach of Warranties)

77. The Plaintiff hereby incorporates paragraphs 1 through 76 by this reference as if each paragraph was set forth herein in its entirety.

78. Frontera, Freshpack and Sunflower 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.

79. The cantaloupe manufactured and sold by Frontera, Freshpack and Sunflower that caused the decedent's death 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.

80. The cantaloupe manufactured and sold by Frontera, Freshpack and Sunflower that caused the decedent's death was contaminated with the *Listeria* bacteria, and was not fit for the uses and purposes intended by either the Plaintiff or the Defendants, i.e., human consumption. The sale was thus a breach of the implied warranty of fitness for its intended use.

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

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

(Negligence and Negligence *per se*)

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

83. Frontera, Freshpack and Sunflower designed, manufactured, distributed, and sold cantaloupes that were contaminated with *Listeria monocytogenes*, a deadly pathogen.

84. Frontera, Freshpack and Sunflower owed a duty to all persons who consumed their products, including the decedent, 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.

85. Frontera, Freshpack and Sunflower owed a duty to all persons who consumed their products, including the decedent, to ensure that any representations regarding the certifications their products had undergone prior to distribution and sale were made with reasonable care. Frontera, Freshpack and Sunflower breached this duty by failing to monitor or otherwise assess the adequacy of the Primus audit on July 25, 2011, or to take any steps or actions whatsoever to determine whether the conditions under which Jensen Farms cantaloupes were being produced were in keeping with their specifications for cantaloupe products. Frontera, Freshpack and Sunflower also breached this duty by recommending Primus as the third-party auditor for Jensen Farms, despite having knowledge that Primus's audit scheme was designed and intended to ensure that production

and distribution would continue rather than vigorously and properly auditing the conditions and practices at Jensen Farms.

86. Frontera, Freshpack and Sunflower breached the duties owed to the ultimate consumers of their cantaloupe products by committing the following acts and omissions of negligence:

86.1 Failed to adequately maintain or monitor the sanitary conditions of its products, premises, equipment and employees;

86.2 Failed to properly operate its facilities and equipment in a safe, clean, and sanitary manner;

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

86.4 Failed to apply food safety policies and procedures that met industry standards for the safe and sanitary production of food products, and the safety and sanitary condition of its premises and employees;

86.5 Failed to prevent the transmission of *Listeria monocytogenes* to consumers of its cantaloupe;

86.7 Failed to properly train its employees and agents how to prevent the transmission of *Listeria monocytogenes* on its premises, from its facility or equipment, or in its food products;

86.8 Failed to properly supervise its employees and agents to prevent the transmission of *Listeria monocytogenes* on its premises, from its facility or equipment, or in its food products.

86.9 Failed to require microbiological testing or sampling of its food products at any stage of the production or distribution process; failure to require microbiological testing or sampling of the facility and environment in which the food products were produced;

86.10 Failed to include in its specifications for Jensen Farms cantaloupes adequate process controls—including the requirement that an anti-microbial be utilized in the wash system for cantaloupes, which are a recognized vector for the transmission of bacterial pathogens—to ensure that the products being produced for distribution by it did not present a microbial hazard to consumers;

86.11 Failed to require that Jensen Farms have in place and effect during all phases of production an adequate HACCP program, or other comparable food safety

policies and procedures, to ensure that the products being produced for distribution by them did not present a microbial hazard to consumers;

86.12 Failed to take reasonable steps and measures to monitor Jensen Farms compliance with the food safety protocols that Jensen Farms did have in place, or to otherwise assure that the cantaloupes they had contracted to purchase, distribute, and sell met either its own specifications for cantaloupes or Jensen Farms' food safety protocols;

86.13 Failed to take reasonable steps and measures to assure the maintenance of the cold chain during distribution, holding, and display of the subject cantaloupes;

86.14 Failed to wash the subject cantaloupe using an anti-microbial prior to sale or further distribution, despite having knowledge that cantaloupes are a known vector for transmission of bacterial diseases to human consumers; and

86.15 Failed to take any actions, steps, or measures whatsoever to ready the subject cantaloupes for sale to consumers, and ensure that the subject cantaloupes did not present a microbial hazard to human consumers.

87. Frontera, Freshpack and Sunflower had a duty to comply with all statutes, laws, regulations, or safety codes pertaining to the manufacture, distribution, storage, and sale of their food product, but failed to do so, and were therefore negligent. The decedent was among the class of persons designed to be protected by these statutes, laws, regulations, safety codes or provision pertaining to the manufacture, distribution, storage, and sale of similar food products.

88. Frontera, Freshpack and Sunflower owed a duty to all persons who consumed their cantaloupes 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*.

89. Frontera, Freshpack and Sunflower breached the duties owed to the ultimate consumers of their cantaloupe products by committing the following acts and omissions of negligence:

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

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

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

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

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

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

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

89.8 Failed to test their cantaloupes for microbial pathogens, like *Listeria monocytogenes*.

90. Frontera, Freshpack and Sunflower 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.

91. Frontera, Freshpack and Sunflower 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.

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

93. Frontera, Freshpack and Sunflower 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.

94. Frontera, Freshpack and Sunflower 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.

95. In the manufacture and production of their finished product, the Defendants Frontera, Freshpack and Sunflower owed to the Plaintiffs 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.

96. The Plaintiffs are among the class of persons designed to be protected by the statutory and regulatory provisions pertaining to the Defendants Frontera, Freshpack and Sunflower's manufacture, distribution, storage, labeling, and sale of food.

97. As a result of the negligent acts and omissions of Defendants Frontera, Freshpack and Sunflower, and as a result of their violation of statutes designed to protect the Plaintiffs from contaminated foods, these Defendants are liable to the Plaintiffs for Decedent's *Listeria* illness and death and for the Plaintiffs' injuries and losses.

98. The Plaintiff's injuries proximately and directly resulted from the negligence of the Defendants Frontera, Freshpack and Sunflower, and from these Defendants' violations of statutes, laws, regulations, and safety codes pertaining to the manufacture, distribution, storage, and sale of food.

FOURTH CLAIM FOR RELIEF

(Negligence, against Defendant Primus Only)

99. The Plaintiff incorporates paragraphs 1 through 98 by this reference as if each paragraph was set forth herein in its entirety.

100. Defendant Primus and Bio Food Safety, as contractor and sub-contractor respectively for the purposes of auditing Jensen Farms' ranchlands and packinghouse, 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.

101. 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.

102. As auditor of Jensen Farms ranchlands and packinghouse, the latter of which was known to be a facility for the production of cantaloupes for human consumption, Bio Food Safety owed a duty to the ultimate consumers of Jensen Farms' products, including the decedent, to exercise reasonable care in the conduct of the audit and in the making of representations about the suitability of Jensen Farms' practices and equipment for the safe production of cantaloupes. Bio Food Safety breached this duty.

103. The audit done by James DiIorio on July 25, 2011 was not done with reasonable care, and constituted a breach of Bio Food Safety's duty of reasonable care owed to the consumers of Jensen Farms/Frontera cantaloupes. Mr. DiIorio'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 29 through 34.

104. Mr. DiIorio'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. DiIorio as auditor, constituted a proximate cause of the decedent's *Listeria* illness and death, and the Plaintiff's associated legal injuries and damages.

105. Because Bio Food Safety is liable for the acts and omissions of negligence of its employees, and because Bio Food Safety was an agent of Primus for purposes of Mr. DiIorio's negligently conducted audit of Jensen Farms on July 25, 2011, Defendant Primus is liable to the Plaintiff for the decedent's *Listeria* illness and death, and for the Plaintiff's injuries, damages and losses.

FIFTH CLAIM FOR RELIEF, AGAINST ALL DEFENDANTS

(Loss of Consortium – Plaintiff Patricia Hauser)

106. The Plaintiff hereby incorporates paragraphs 1 through 105 by this reference as if each paragraph was set forth herein in its entirety.

107. Plaintiff Patricia Hauser was, at the time that Michael Hauser was injured and eventually died, as described above, by the Defendants' tortious conduct, married to Michael Hauser.

108. As a result of Defendants' tortious conduct, as described in the First, Second, Third, Fourth, and Fifth Claims for Relief, the Plaintiff Patricia Hauser 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 Patricia Hauser suffered these losses as a direct and proximate result of the tortious injury to her husband, Michael Hauser.

DAMAGES

109. The Plaintiff hereby incorporates paragraphs 1 through 105 by this reference as if each paragraph was set forth herein in its entirety.

110. 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.

PLAINTIFF HEREBY DEMANDS TRIAL TO A JURY OF SIX PERSONS ON ALL ISSUES SO TRIABLE.

DATED: May 2, 2014

MONTGOMERY LITTLE & SORAN, PC

/s/ John R. Riley

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2014, a true and correct copy of the foregoing **THIRD AMENDED COMPLAINT (P-HAUSER)** was filed and served via ICCES on all parties of record.

s/ Kellie O'Farrell