

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT

REGINA POWERS, individually, and
as Administratrix of the Estate of John
Powers,

Plaintiff,

v.

WHITTIER FARMS, INC.,

Defendant.

CIVIL ACTION
NO.

COMPLAINT AND JURY DEMAND

1. Plaintiff Regina Powers is the duly appointed Administratrix of the Estate of her late husband, John Powers, who died on January 3, 2008. At all times material hereto, Regina and John Powers were residents of Medway, Norfolk County, Commonwealth of Massachusetts.

2. Defendant, Whittier Farms Inc. (“Whittier Farms”), is a Massachusetts corporation with a principal place of business located in Sutton, Worcester County, Commonwealth of Massachusetts, and at all times material hereto was a manufacturer of dairy products.

3. The Court has jurisdiction over the defendant pursuant to Massachusetts General Laws, ch. 212 §4.

4. Venue is proper in Worcester County pursuant to ch. 223. §1 as Whittier Farms is located in and conducts business in Worcester County.

5. Listeriosis is a serious infection caused by eating food contaminated with the bacterium called *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.

6. 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.

7. 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.

8. On November 27, 2007, a health department officer in central Massachusetts contacted the Massachusetts Department of Public Health (MDPH) to report a *Listeria* infection in an 87 year old man, later identified as John Powers.

9. Pulsed-field gel electrophoresis (PFGE) performed on Mr. Powers' *Listeria monocytogenes* contaminated stool isolate produced a pattern indistinguishable from that of isolates from three other cases identified in residents of central Massachusetts in June, October, and early November 2007. PFGE is the process of identifying the DNA "fingerprint" from bacterial isolates. The PFGE pattern of the bacteria can then be compared and matched up to the PFGE pattern of the strain of infected persons who consumed the contaminated product.

10. Of the others infected with *Listeria monocytogenes* after consumption of the Whittier Farms' milk products, two male members of the outbreak, aside from Mr. Powers, died. A third member of the outbreak delivered a stillborn child as the result of her listeriosis.

11. MDPH, in collaboration with local public health officials, conducted an investigation, which implicated pasteurized, flavored and non-flavored, fluid milk produced by a local dairy as the source of the outbreak. The milk was later revealed to have been produced by Whittier Farms, Inc., a dairy located in Sutton, Massachusetts.

12. On December 17, 2007, coffee-flavored milk, produced by Whittier Farms retrieved from the Powers home tested positive for *Listeria*. On December 21, the organism from the December 17 sample was confirmed to be *Listeria monocytogenes* and was a PFGE match to the four clinical isolates from the other patients. On December 30, tests confirmed that *Listeria monocytogenes* with PFGE patterns identical to the outbreak strain was isolated from a sample of coffee-flavored milk ingested by Mr. Powers.

13. On January 2, 2008, after the closure of Whittier Farms and the recall of its dairy products, approximately 100 additional environmental and product samples were

collected from the dairy's processing facility and adjacent retail store. One environmental swab from a floor drain in the finished product area, one skim milk sample, and seven flavored milk samples tested positive for *Listeria monocytogenes* and matched the outbreak strain by PFGE analysis. Two additional environmental swabs and four additional samples of milk, both flavored and non-flavored, tested positive for seven distinct strains of *Listeria*, including three different *Listeria* species and three strains of *Listeria monocytogenes* with PFGE patterns that differed from those of the outbreak strain.

14. On November 20, 2007 John Powers consumed coffee flavored milk produced by Whittier Farms.

15. Mr. Powers fell ill on November 23, 2007, suffering from symptoms including nausea, vomiting, weakness, and fever. He was transported by ambulance to the hospital, and subsequently admitted.

16. At the hospital, Mr. Powers continued to suffer from fever, elevated white blood cell count, and loose bloody stools. On November 25, Mr. Powers had become shaky and began stuttering over words.

17. On November 26, Mr. Powers' blood culture tested positive for *Listeria monocytogenes*. Mr. Powers was diagnosed with *Listeria*-induced gastroenteritis with bacteremia.

18. Mr. Powers remained hospitalized throughout November, December, 2007 and into January 2008. On December 7, 2007 he was described by his physician as "extremely confused and delirious." He developed fluid on the lungs, and suffered from encephalopathy as well.

19. On December 10, 2007, Mr. Powers was transferred to a rehabilitation center for further treatment. He continued to suffer from decreased kidney function secondary to heart failure and volume overload, left ventricular thrombus, chronic anemia, and delirium, each of these conditions secondary to bacteremia. Mr. Powers was described as “very somnolent, arousable, oriented to name only, and fatigued.” Mr. Powers was prescribed a treatment plan that included physical and occupational therapy, therapeutic recreation, and neuropsychological services as needed.

20. On December 16, 2007, Mr. Powers developed a rapid heartbeat and difficulty breathing. Mr. Powers was transferred to the University of Massachusetts Medical Center for further treatment on December 18, 2007.

21. Mr. Powers began hemodialysis on December 19, 2007 for ongoing renal failure. At this time, Mr. Powers became increasingly confused and agitated, pulling at his IV, being uncooperative at times, and yelling. On the afternoon of December 19, 2007, he was reported as delirious, moaning, and not responding to questions.

22. Mr. Powers continued to undergo sporadic hemodialysis treatment throughout the remainder of December. He was diagnosed with meningoencephalitis secondary to “seeding of *Listeria* in the central nervous system.”

23. On January 1, 2008, Mr. Powers was found difficult to arouse and not following commands. He was described as non-verbal and “rigid.” His responsiveness continued to decline throughout the following day.

24. On January 3, Mr. Powers’ oxygen saturation level decreased and his blood pressure was abnormally low. Mr. Powers died on January 3, 2008 as the result of a *Listeria monocytogenes* infection that resulted from his consumption of Whittier Farms milk.

Count I

Breach of Warranty

25. Plaintiff repeats and incorporates by reference herein paragraphs 1 through 24.

26. The defendant manufactured and sold the contaminated food that created the risk and caused the injuries and death of John Powers. The defendant's contaminated food product reached its intended consumers without substantial change from the condition in which it was sold by the defendant.

27. The defendant is subject to liability to the plaintiff for its breach of express and implied warranties made to its consumers, including the implied warranties of merchantability and of fitness for a particular use within the scope of Massachusetts General Laws Chapter 106, §2-314. Specifically, the defendant expressly warranted, through its sale of food to the public, and by the statements and conduct of its employees and agents, that the food it prepared and sold to the public was fit for human consumption, and not otherwise adulterated or injurious to health.

28. The plaintiff alleges that the food sold by the defendant and consumed by John Powers which was contaminated with *Listeria monocytogenes* and related filth and adulteration, would not pass without exception in the trade, and was thus in breach of the implied warranty of merchantability.

29. The plaintiff further alleges that the contaminated food sold by the defendant and consumed by John Powers was not fit for the uses and purposes intended by the defendant, *i.e.*, human consumption, and that this product was therefore in breach of the implied warranty of fitness for its intended use.

30. The defendant owed a duty to their consumers and to John Powers and the plaintiff to manufacture and sell only food that was not adulterated, was fit for human consumption, was reasonably safe in construction, and was free of *Listeria monocytogenes* or other substances injurious to human health. The defendant breached this duty.

31. The defendant owed a duty to its consumers and to John Powers and the plaintiff to prepare, serve, and sell food that was fit for human consumption, and that was safe to the extent contemplated by a reasonable and ordinary consumer. The defendant breached this duty.

32. The defendant's breach of express and implied warranties was the proximate cause of the death of John Powers.

Count II

Wrongful Death

33. Plaintiff repeats and incorporates by reference herein paragraphs 1 through 32.

34. The defendant manufactured, distributed, and sold food product that was adulterated, not fit for human consumption, and not reasonably safe as designed, manufactured, and sold.

35. The defendant was negligent in the manufacture, distribution, and sale of food products adulterated with *Listeria monocytogenes*, not fit for human consumption, and sold and distributed without adequate warnings or instructions.

36. The defendant failed to properly supervise, train, and monitor its employees engaged in the manufacture, preparation, and delivery of the food products sold to consumers and consumed by John Powers, and failed to comply with applicable operating standards and comply with all applicable health regulations.

37. The acts and omissions of the defendant caused the wrongful death of John Powers in violation of Massachusetts General Laws ch. 229 § 2 *et. seq.*

38. The defendant's wrongful actions resulted in hospital, medical, funeral, and burial costs, and deprived the statutory wrongful death beneficiaries of John Powers of his services, protection, care, assistance, society, companionship, comfort, guidance, counsel and advice.

Count III

Conscious Pain and Suffering

39. Plaintiff repeats and incorporates by reference herein paragraphs 1 through 38.

40. The wrongful acts of the defendant, as stated above, caused John Powers to endure substantial conscious pain and suffering prior to his death, for which his estate is entitled to be compensated.

Count IV

Punitive Damages

41. Plaintiff repeats and incorporates by reference herein paragraphs 1 through 40.

42. The plaintiff is entitled to an award of punitive damages pursuant to Massachusetts General Laws chapter 229 section 2(3) because John Powers' death was caused by the malicious, willful, wanton, or reckless conduct of the defendant and/or by the gross negligence of the defendant. The defendant knowingly operated a milk production facility without the proper and necessary safeguards against contamination of the product. The defendant's production facility did not have an environmental monitoring program for *Listeria monocytogenes*. Investigation of the outbreak revealed numerous positive samples for multiple strains of *Listeria* at the facility. *Listeria* was located by health officials in a

floor drain in the finished product area; one skim milk sample; and seven flavored milk samples. In all, seven distinct strains of Listeria were located. In response to conditions found at the dairy, the Massachusetts Food Protection Program asked the dairy to close and cease operations. The outbreak sickened a number of individuals, and caused the death of three individuals, and the stillbirth of another. The illnesses and deaths linked to the defendant's contaminated product occurred over a lengthy period of time, evidencing a pattern and practice of failure, recklessness, and gross negligence.

Count V

Violation of Massachusetts General Laws chapter 93A section 9

43. Plaintiff repeats and incorporates by reference herein paragraphs 1 through 42.

44. The wrongful acts of the defendant, including its breaches of warranty, constitute a violation of Massachusetts General Laws chapter 93A section 9.

45. The plaintiff has made a written demand for relief pursuant to Massachusetts General Laws chapter 93A section 9(3) and the defendant has failed to make a timely and adequate response, thereby entitling the plaintiff to judgment on this Court and for all damages authorized by statute.

WHEREFORE, Plaintiff asks that judgment enter in her favor and against the defendant on each count of this Complaint, and that the Court award her sufficient damages to compensate her and the Estate for the loss and damages incurred, for all damages allowable pursuant to Massachusetts General Laws ch. 229 §2 et. seq. for an award of punitive damages on Count IV of the Complaint, and with respect to Massachusetts General Laws ch. 93A §9 et. seq. for said amount to be doubled or trebled, plus costs and reasonable

attorneys' fees, and for interest, and such other and further relief as this Court deems meet and just.

Plaintiff demands a trial by jury on all issues raised in this Complaint.

The Plaintiff,
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Administratrix of the Estate of John Powers,
By her attorneys,

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DATED: