

DISTRICT COURT, COUNTY OF EL PASO , STATE OF COLORADO	
Plaintiffs: CHARLES PALMER and TAMMY PALMER, husband and wife Defendants: JENSEN FARMS INC., a domestic corporation; WAL-MART STORES, INC. a foreign corporation; and JOHN DOES 1-10.	▲ COURT USE ONLY ▲
Attorney for Plaintiffs: John Riley, Esq. No. 18962 Montgomery Little & Soran, P.C. 5445 DTC Parkway, Suite 800 Greenwood Village, Colorado 80111 Telephone: 303.773.8100 Facsimile: 303.220.0412 Email: jriley@montgomerylittle.com	Case No.: Courtroom:
COMPLAINT	

COME NOW the Plaintiffs, by and through their attorneys of record, Montgomery Little & Soran, P.C., and Marler Clark, LLP, PS (pending admission pro hac vice), to file this Complaint and allege as follows:

PARTIES

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

2. The Defendant Jensen Farms Inc., (“Jensen Farms”) is a domestic corporation organized and existing under the laws of the State of Colorado and doing business in Colorado. At all times relevant hereto, upon information and belief, Jensen Farms was a manufacturer,

distributor and seller of agricultural products in Colorado, including cantaloupe. Jensen Farms' principal place of business is located at 920 Lane St, Fort Morgan, Colorado 80701.

3. The Defendant Wal-Mart Stores, Inc. ("Wal-Mart") is a foreign corporation organized and existing under the laws of the State of Delaware that maintains and operates a store known as Wal-Mart retail facility located at 8250 Razorback Road, Colorado Springs, El Paso County, Colorado.

4. Upon information and belief, the Defendants John Does 1-10 are entities who participated in the manufacture, distribution, and/or sale of the contaminated food product that was the proximate cause of the Plaintiffs' injuries, and whose identities are not known to the Plaintiff at this time. The Plaintiff will seek leave of the Court to amend this Complaint at such time that the identities of these parties become known.

JURISDICTION AND VENUE

5. This Court is vested with jurisdiction over the Defendants because the Defendants conduct business within the State of Colorado, as authorized.

6. 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

7. 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.

8. 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.

9. 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.

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

Charles Palmer's *Listeria* Illness

11. On or about August 17, 2011, the plaintiffs purchased a whole cantaloupe at the Wal-Mart store located on Razorback Road, Colorado Springs, Colorado. The cantaloupe had been manufactured, distributed, and sold by Jensen Farms, Inc.. In the several days following this purchase, Mr. Palmer sliced and consumed the cantaloupe.

12. Mr. Palmer fell ill on August 30, 2011. His condition quickly worsened, and by the morning of August 31, 2011, he became non-responsive. He was transported by ambulance to the hospital, where he remains at the time of filing. Mr. Palmer has tested positive for *Listeria*.

13. Mr. Palmer's listeria infection resulted directly from his consumption of *Listeria*-contaminated cantaloupe manufactured, distributed and sold by Jensen Farms, Inc. and Wal-Mart.

14. As of the date of filing of this complaint, the number of confirmed cases in the *Listeria monocytogenes* outbreak caused by contaminated cantaloupes is at least 15 people from four states, including Colorado, Nebraska, Oklahoma, and Texas. All 15 confirmed cases have been hospitalized, and at least 1 person has died. Listeriosis illnesses in several other states are currently being investigated by state and local health departments to determine if these illnesses are part of this outbreak.

FIRST CLAIM FOR RELIEF **(Strict Product Liability)**

15. The Plaintiffs hereby incorporate paragraphs 1 through 14 by this reference as if each paragraph was set forth herein in its entirety.

16. The Defendants are product manufacturers and sellers within the meaning of the Colorado Product Liability Act, C.R.S. §§13-21-401 *et seq.* The Defendants manufactured, distributed and/or sold the food that was the source of the Plaintiff's injuries. The *Listeria*-contaminated food that was the source of the Plaintiff's injuries was a product within the meaning of the Act.

17. The Defendants' food product that was the source of the Plaintiffs' illness and injuries was defective, and was unreasonably dangerous to the consumer, because it was contaminated and adulterated with *Listeria*, a potentially deadly pathogen.

18. The food product manufactured and distributed by the Defendants reached the Plaintiffs without substantial change in the condition in which it was sold.

19. The Defendants' defective *Listeria* contaminated food product caused the Plaintiff Charles Palmer's *Listeria* infection and related damages.

20. The Defendants were the sellers of the defective *Listeria*-contaminated food product.

21. The Defendants were engaged in the business of selling food products.

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

SECOND CLAIM FOR RELIEF
(Breach of Warranties)

23. The Plaintiffs hereby incorporate paragraphs 1 through 22 by this reference as if each paragraph was set forth herein in its entirety.

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

25. The food product manufactured and sold by the Defendants 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.

26. The food product manufactured and sold by the Defendants 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.

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

THIRD CLAIM FOR RELIEF
(Negligence and Negligence *per se*)

28. The Plaintiffs hereby incorporate paragraphs 1 through 27 by this reference as if each paragraph was set forth herein in its entirety.

29. The Defendants negligently manufactured, distributed and sold a food product that was not reasonably safe.

30. The Defendants 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.

31. The Defendants 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.

32. In the manufacture and production of their finished product, the Defendants 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.

33. The Plaintiffs are among the class of persons designed to be protected by the statutory and regulatory provisions pertaining to the Defendants’ manufacture, distribution, storage, labeling, and sale of their food.

34. As a result of the Defendants’ negligence, and as a result of the Defendants’ violation of statutes designed to protect the Plaintiffs from contaminated foods, the Defendants are liable to the plaintiffs for Charles Palmer’s *Listeria* illness and for the Plaintiffs injuries and losses.

FOURTH CLAIM FOR RELIEF

(Loss of Consortium—Plaintiff Tammy Palmer only)

35. The Plaintiffs hereby incorporate paragraphs 1 through 34 by this reference as if each paragraph was set forth herein in its entirety.

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

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

DAMAGES

38. The Plaintiffs hereby incorporate paragraphs 1 through 37 by this reference as if each paragraph was set forth herein in its entirety.

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

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs pray:

A. That the Court award the Plaintiffs judgment against the Defendants in such sums as shall be determined to fully and fairly compensate the Plaintiffs for all general, special, incidental and consequential damages incurred, or to be incurred, by the Plaintiffs as the direct and proximate result of the acts and omissions of the Defendants;

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

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

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

DATED: September 14, 2011

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