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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

MERRILL WEST BEHNKE and RYAN  
BROMS, husband and wife,

Plaintiffs,

vs.

FOREVER CHEESE, INC., a foreign  
corporation; and PETERSON, a Washington  
company,

Defendants.

**NO.** 12-2-30957-4 SEA

**COMPLAINT FOR PERSONAL  
INJURY DAMAGES**

Come now the Plaintiffs Merrill West Behnke and Ryan Broms, (“Plaintiffs”), through and by their attorneys Marler Clark, and for causes of action do hereby complain and allege as follows:

**I. PARTIES**

1. Plaintiffs Merrill West Behnke and Ryan Broms are residents of Seattle, King County, Washington.



1 investigate a multistate outbreak of *Listeria monocytogenes* infections (listeriosis). Joint  
2 investigation efforts indicate that ricotta salata cheese was the probable source.

3 7. As of September 21, 2012, a total of 15 persons infected with the outbreak strain  
4 of *Listeria monocytogenes* had been reported from 12 states and the District of Columbia.  
5 Illness onset dates ranged from March 28, 2012 to August 30, 2012. All 15 ill persons reported  
6 being hospitalized. Four of the illnesses were related to a pregnancy; two of these illnesses  
7 were diagnosed in newborns. The other 11 ill persons ranged in age from 30 years to 87 years,  
8 with a median age of 77 years, and 64% percent of them are female. No fetal losses had been  
9 reported. Three deaths had been reported. Listeriosis contributed to at least one of the deaths in  
10 Nebraska and New York, but did not contribute to the death in Minnesota.

11 8. Collaborative investigation efforts of local, state, and federal public health and  
12 regulatory agencies indicated that imported ricotta salata cheese was the likely source of this  
13 outbreak. FDA identified the outbreak strain of *Listeria monocytogenes* bacteria in a sample of  
14 uncut imported Marte brand Frescolina ricotta salata cheese distributed by defendant Forever  
15 Cheese, Inc.

16 9. On September 10, 2012, Forever Cheese, Inc. voluntarily recalled one lot of  
17 Marte brand Frescolina ricotta salata cheese due to *Listeria monocytogenes* contamination. On  
18 September 21, 2012, the U.S. Food and Drug Administration issued an expanded recall of all  
19 lots and production codes of Marte brand Frescolina ricotta salata cheese, and all cheese by the  
20 Italian cheese maker.



1 was in the intensive care unit, to find the right antibiotic treatment regimen to combat her  
2 Listeriosis illness. Before discharge, physicians inserted a peripherally inserted central catheter  
3 for the continuing administration of antibiotics post-discharge, and Ms. Behnke has been on  
4 antibiotics six times a day since her discharge on September 13, 2012.

5 15. Ms. Behnke's *Listeria*-positive serum result has been tested by public health  
6 authorities, who have determined that the strain of *Listeria monocytogenes* that infected Ms.  
7 Behnke is indistinguishable from the strain involved in the outbreak linked to defendants' cheese  
8 products.

9 16. As a result of the *Listeria*-induced illness, plaintiff has suffered severe injuries,  
10 severe emotional injuries, and substantial economic loss.

## 11 V. FIRST CLAIM FOR RELIEF

12 (Strict Product Liability)

13 17. At all times relevant to this action, the defendants were manufacturers, sellers and  
14 distributors of the *Listeria* contaminated cheese food product that caused the plaintiffs' injuries.

15 18. The *Listeria* contaminated cheese food product that the defendants manufactured,  
16 distributed, and sold was, at the time it left the control of the defendants, defective because it  
17 contained *Listeria*, a potentially lethal pathogen, and was thus in a condition not contemplated by  
18 the ultimate consumer.

19 19. The defective condition of the *Listeria* contaminated cheese that the defendants  
20 manufactured, distributed, and sold caused the cheese to be unreasonably dangerous, because the  
21

1 product posed a risk beyond that an ordinary consumer would not contemplate when purchasing  
2 the product.

3 20. The *Listeria* contaminated cheese that the defendants manufactured, distributed,  
4 and sold was delivered to the plaintiffs without any change in its defective condition. The  
5 adulterated cheese food product that the defendants manufactured, distributed, and sold was used  
6 in the manner expected and intended, and was consumed by the plaintiff, Ms. Behnke.

7 21. As a direct and proximate result of the defendants' manufacture, distribution and  
8 sale of *Listeria* contaminated cheese, Ms. Behnke was infected by *Listeria*, causing plaintiffs to  
9 suffer substantial economic damages. Plaintiffs are thus entitled to an award for lost medical and  
10 medically-related expenses, both past and future, in a final amount to be determined at trial.

11 22. As a further direct and proximate result of the defendants' manufacture,  
12 distribution and sale of *Listeria* contaminated cheese, the plaintiffs have suffered non-economic  
13 damages, including, but not limited to: damages for general pain and suffering; damages for loss  
14 of enjoyment of life, both past and future; emotional distress, and future emotional distress; lost  
15 familial consortium; and all other ordinary, incidental and consequential non-economic damages  
16 as would be anticipated to arise under the circumstances, and plaintiffs are thus entitled to an  
17 award of non-economic damages in a final amount to be determined at trial.

18 **VI. SECOND CLAIM FOR RELIEF**

19 (Breach of Warranty)

20 23. The defendants are liable to the plaintiffs for breaching express and implied  
21 warranties that they made regarding the *Listeria* contaminated adulterated cheese product that

1 caused the plaintiffs' injuries. These express and implied warranties included the implied  
2 warranties of merchantability and/or fitness for a particular use. Specifically, the defendants  
3 expressly warranted, through their sale of the cheese product to the public and by the statements  
4 and conduct of their employees and agents, that the cheese product they sold and distributed was  
5 fit for human consumption and not otherwise adulterated or injurious to health.

6 24. The *Listeria* contaminated cheese that caused the plaintiffs' injuries would not  
7 pass without exception in the trade, and the sale of that contaminated cheese food product was  
8 therefore in breach of the implied warranty of merchantability.

9 25. The *Listeria* contaminated food that caused the plaintiffs' injuries was not fit for  
10 the uses and purposes intended, *i.e.* human consumption, and the sale of that contaminated  
11 cheese food product was therefore in breach of the implied warranty of fitness for its intended  
12 use.

13 26. As a direct and proximate result of the defendants' breach of express and implied  
14 warranties regarding the contaminated cheese product, Ms. Behnke was infected with *Listeria*,  
15 causing plaintiffs to suffer substantial economic damages. Plaintiffs are thus entitled to an award  
16 for lost medical and medically-related expenses, both past and future, in a final amount to be  
17 determined at trial.

18 27. As a further direct and proximate result of the defendants' breach of express and  
19 implied warranties regarding the contaminated cheese, the plaintiffs have suffered non-economic  
20 damages, including, but not limited to: damages for general pain and suffering; damages for loss  
21 of enjoyment of life, both past and future; emotional distress, and future emotional distress; lost

1 consortium; and all other ordinary, incidental and consequential non-economic damages as  
2 would be anticipated to arise under the circumstances, and plaintiffs are thus entitled to an award  
3 of non-economic damages in a final amount to be determined at trial.

#### 4 **VI. THIRD CLAIM FOR RELIEF**

5 (Personal Injury - Negligence)

6 28. The defendants owed to the plaintiffs a duty to use reasonable care in the  
7 manufacture, distribution, and sale of their cheese food product, the observance of which duty  
8 would have prevented or eliminated the risk that the defendants' food product would become  
9 contaminated with *Listeria* or any other dangerous pathogen. The defendants breached this duty  
10 by failing to exercise reasonable care in the manufacture, distribution and sale of the cheese  
11 product.

12 29. The defendants had a duty to properly supervise, train, and monitor their  
13 employees, and to ensure their employees' compliance with all applicable statutes, laws,  
14 regulations, or safety codes pertaining to the manufacture, distribution, storage, and sale of  
15 similar food products, but the defendants failed to do so. Defendants failed to properly  
16 supervise, train, and monitor their employees, and to ensure their employees' compliance with all  
17 applicable statutes, laws, regulations, or safety codes pertaining to the manufacture, distribution,  
18 storage, and sale of their cheese food product, and were therefore negligent.

19 30. The defendants had a duty to use ingredients, supplies, and other constituent  
20 materials that were reasonably safe, wholesome, free of defects, from reliable sources, and that  
21 otherwise complied with applicable federal, state, and local laws, ordinances, and regulations,



1 and that were clean, free from adulteration, and safe for human consumption, but the defendants  
2 failed to do so. Defendants failed to use ingredients, supplies, and other constituent materials  
3 that were reasonably safe, wholesome, free of defects, from reliable sources, and that otherwise  
4 complied with applicable federal, state, and local laws, ordinances, and regulations, and that  
5 were clean, free from adulteration, and safe for human consumption, in their manufacture,  
6 distribution and sale of the cheese food product, and were therefore negligent.

7 31. The defendants had a duty to comply with all applicable state and federal  
8 regulations intended to ensure the purity and safety of their food product, including the  
9 requirements of the Federal Food, Drug and Cosmetics Act (21 U.S.C. § 301 *et seq.*), and the  
10 Washington adulterated food statutes. The defendants failed to comply with the provisions of  
11 the health and safety acts identified above, by manufacturing, distributing and selling a cheese  
12 food product which was contaminated with *Listeria*, a deadly pathogen, and, as a result, were  
13 negligent *per se* in their manufacture, distribution, and sale of the adulterated food product.

14 32. The defendants had a duty to comply with all statutes, laws, regulations, or safety  
15 codes pertaining to the manufacture, distribution, storage, and sale of their food product, but  
16 failed to do so. Defendants failed to comply with statutes, laws, regulations and safety codes  
17 pertaining to the manufacture, distribution, storage and sale of cheese food products, and were  
18 therefore negligent. The plaintiffs were among the class of persons designed to be protected by  
19 these statutes, laws, regulations, safety codes or provision pertaining to the manufacture,  
20 distribution, storage, and sale of similar cheese food products.



