

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BUTTE DIVISION

BETTE ONSAGER, as Personal  
Representative Of the Estate of  
Jerome Onsager, and personal,

Plaintiff,

Case No. 2:13-cv-00066-DWM-JCL

v.

FRONTERA PRODUCE LTD., a foreign  
corporation; PRIMUS GROUP, INC.,  
a foreign corporation, d/b/a "Primus Labs";  
WALMART STORES, INC., a foreign  
corporation; JOHN DOES 1-10 and  
companies XYZ,

Defendants.

**FIRST AMENDED COMPLAINT FOR PERSONAL INJURIES,  
WRONGFUL DEATH AND DEMAND FOR JURY TRIAL**

COMES NOW the Plaintiff above-named, by and through her attorneys of record, Scott Anderson and William D. Marler, and for her cause of action against the Defendants above-named complains, alleges, and states as follows:

**I. PARTIES**

1. At all times relevant to this action, the Plaintiff Bette Onsager was a resident of Gallatin County, Montana. Bette Onsager is the widowed spouse of decedent, Jerome Onsager. Bette Onsager is a Citizen of the State of Montana.

2. At all times relevant to this action, Frontera Produce Ltd. (Frontera), was a manufacturer, distributor and seller of agricultural products in Montana, including cantaloupe.

Frontera is a Texas company with a principal place of business located in Texas as well. Frontera is, therefore, a Citizen of 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. Primus is a citizen of the State of California. At all times relevant to this Complaint, Primus was a company that, among other things, provided auditing services to agricultural and other businesses involved in the manufacture and sale of food products. Primus provides these auditing services to clients both nationally and internationally. In fact, Primus calls itself “a global leader in food safety,” with offices in at least three states and multiple countries around the world. 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 43.

4. 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 retail store known as Wal-Mart, which stores sell various food and other products. Wal-Mart’s principal place of business is located in Arkansas. Wal-Mart is thus a Citizen of the States of Delaware and Arkansas, but not Montana. At all times relevant, Wal-Mart owned and operated Wal-Mart Supercenter, store #2084, located at 1500 North 7<sup>th</sup> Avenue, Bozeman, Montana. At all times relevant, Wal-Mart was a manufacturer, distributor and seller of the food products that it sold at this location, including cantaloupe.

5. 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 Plaintiffs’ injuries and damages, and whose identities are not

known to the Plaintiffs at this time. The Plaintiffs will seek leave of the Court to amend this Complaint at such time that the identities of these parties become known.

6. Plaintiff and Decedent at all times exercised reasonable care, and were injured through no fault of their own. Therefore, Defendants are jointly and severally liable for all damages.

7. Any compensation to which Plaintiff is entitled may not be reduced simply because Plaintiff may have been more susceptible to injury or illness.

### **III. FACTS**

#### **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 Defendant Frontera.

9. 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).

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, 2011 in response to the multi-state outbreak of listeriosis.

**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 Defendant Primus to conduct an audit of Jensen Farms' ranchlands and packing house.

15. Defendant Frontera has been in existence since 1993, as a manufacturer and distributor of fresh produce products, including cantaloupes, to customers nationally. At the time

of the subject outbreak, Frontera had a long-standing business relationship with Defendant Primus, who it frequently recommended as a third-party food safety auditor when distributing products for which major retailers required a food safety audit.

16. With regard to Jensen Farms cantaloupes, Defendant Frontera was the primary distributor of these products, distributing almost 100% of Jensen Farms entire cantaloupe output during the growing season, including in 2011. Frontera required that Jensen Farms undergo and pass a third-party food safety audit before it would distribute Jensen Farms cantaloupes to the many retailers and customers nationally with whom it had contracted to provide Jensen Farms cantaloupes.

17. Due to its history in the industry, knowledge of the prevailing system of third-party audits then in effect, and its long-standing business relationship with Defendant Primus, Defendant Frontera knew that the food safety auditing services offered by Primus and its subcontractors, including Bio Food Safety, were not adequate to assure the auditee's compliance with various standards applicable to the production of fresh produce products, including Good Manufacturing Practices, industry standards, and relevant FDA Guidance. Defendant Frontera knew that the sub-standard audit services offered by Primus were designed, in part, to make sure that the auditee passed the audit so that the produce products Frontera was contractually obligated to distribute to various major retailers and other customers would be brought to market, rather than being prohibited from distribution by a failing audit score. Despite this knowledge, Defendant Frontera recommended and encouraged Jensen Farms to retain Primus as its third-party food safety auditor.

18. Defendant Primus is the nation's largest third-party food safety auditing firm. Primus conducts approximately 15,000 audits per year, primarily involving fresh produce

facilities, for over 3,000 clients worldwide. In 2008, 98.1% of Primus's audits resulted in a passing score. In 2009, 97.5% of Primus's audits resulted in a passing score. And in 2010, 98.7% of Primus's audits resulted in a passing score.

19. In statements made to the U.S. House of Representatives Committee on Energy and Commerce, during its investigation into the circumstances of the subject outbreak, Frontera representatives Will Steele (CEO) and Amy Gates (Executive Vice President) indicated that there is "no industry standard for validation points" after an audit (statement by Amy Gates), and that "this is the industry standard. I've always believed there's got to be more validation points. This case clearly demonstrates that" (statements by Will Steele).

20. Employees of Defendant Frontera, including Mr. Steele and Ms. Gates, had visited Jensen Farms on many occasions over the course of Frontera's relationship with Jensen Farms and its predecessor Two Good Farms. Prior to the subject outbreak, Mr. Steele had visited Jensen Farms and/or Two Good Farms on six separate occasions in six years. And Ms. Gates visited Jensen Farms in the days before the July 25, 2011 Primus audit. The purpose of all of these visits was, in part, to assess Jensen Farms' facilities and operation for its suitability for the production of cantaloupes that Frontera was contractually obligated to distribute to major retailers and other customers nationally.

21. 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.

22. At all material times, on its website, Primus represented itself to be “a global leader in food safety,” and to have been servicing the fresh produce industry for more than two decades. Primus also stated on its website that, “In today’s marketplace, food safety verification and confidence are critical.” Primus further stated on its web site that, “When food safety counts, look to PrimusLabs.” The PrimusLabs logo on its audit Certificate states, “PrimusLabs when food safety counts.”

23. 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*.

24. 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, relevant FDA industry guidance, and Primus’s own audit standards and scoring guidelines. 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*. Finally, it was the intent of these contracting parties that the audit would also determine whether Jensen Farms cantaloupes were produced under conditions that met or exceeded the appropriate standards of care to be certified as “Primus Certified” products.

25. 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.” This “Primus certification,” which meant that Jensen Farms had to successfully pass a Primus audit of its ranchlands and packinghouse, was required before Frontera would distribute and sell Jensen Farms cantaloupes.

26. 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.

27. After the formation of the contract described at paragraph 14, 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’s subcontractor, and agent, for the limited purpose of auditing Jensen Farms.

28. In June 2010, Jensen Farms utilized directions, information and materials provided by Primus to create the Jensen Farms Food Safety Manual for Packinghouse Operation, Hazard Control Plan, Good Manufacturing Practices, and Sanitation Standard Operating Procedures. These food safety documents, as stated by Primus, were “developed for JENSEN FARMS through PrimusLabs.com.” Jensen Farms reasonably relied on the directions, information and materials provided by Primus through its website to create its food safety documents.

29. Defendant Primus had previously engaged the subcontractor Bio Food Safety to conduct an audit of Jensen Farms ranchlands and packing house. These audits occurred in 2010 and prior years.



30. In August 2010, Jerry Walzel, the President of Bio Food Safety, on behalf of, and as agent of, Primus, audited the Jensen Farms packing facility. One food safety precaution that Jensen Farms had in place at the time of the 2010 audit was to use an antimicrobial solution, such as chlorine, in the cantaloupe wash water. The front page of the August 2010 audit stated, “[t]his facility packs fresh cantaloupes from their own fields into cartons. The melons are washed and then run through a hydrocooler which has chlorine added to the water. Once the product is dried and packed into cartons it is placed into coolers.”

31. After the August 2010 audit was completed, Jensen Farms informed Mr. Walzel, who was acting on behalf of Primus, that Jensen Farms desired to improve its processes for the production of cantaloupes. Mr. Walzel indicated that they should consider new equipment to replace the hydrocooler the farm used to process cantaloupe. Mr. Walzel stated that the hydrocooler, with its recirculating water, was a potential food safety “hotspot,” and advised them to consider alternate equipment. Based on Mr. Walzel’s representation, and on input from a local equipment broker, Jensen Farms purchased and retrofitted cleaning equipment previously used to process potatoes, and discontinued using the hydrocooler. Jensen Farms reasonably relied on the recommendation of Primus, through its auditor Bio-Food Safety, and changed from the hydrocooler to the new food processing equipment in an attempt to strengthen its food safety efforts.

32. Prior to the 2011 audit, Jensen Farms installed the new processing equipment, which washed the cantaloupes using a system of brushes and city water. No chlorine or any other antimicrobial was added to the wash system. The hydrocooler, which had utilized water with added chlorine, had been taken out of the wash system prior to the 2011 audit.

33. Prior to the 2011 audit, Primus was aware that if its audit of Jensen Farms was completed successfully, with a sufficiently high point score, then Primus would issue Jensen Farms a Primus Audit Certificate, stating the audit's passing score. Primus was aware that the Jensen Farms facility had to have a passing Primus Audit Certificate in order for Jensen Farms to sell its cantaloupes to Frontera.

34. As part of its 2011 contract to audit Jensen Farms, Primus agreed, pursuant to its own guidelines, to assess and determine if 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.

35. As part of its 2011 contract to audit Jensen Farms, Primus agreed, pursuant to its own guidelines, that its auditors should interpret its audit guidelines with food safety and risk minimization being the key concerns.

36. As part of its 2011 contract to audit Jensen Farms, Primus agreed, pursuant to its own guidelines, that its auditors should consider that where laws, commodity specific guidelines and/or best practices recommendations existed and were derived from a reputable source, those practices and parameters should be followed.

37. As part of its 2011 contract with Jensen Farms, Primus agreed, pursuant to its own guidelines, that the Jensen Farms audit "question and conformance have to be looked at individually and scored according to the severity of the deficiency, the number of deficiencies and the associated risks." Generally, the auditor was to utilize four separate conformance categories, with related relative scoring levels and points: full conformance; minor deficiency; major deficiency; and non-conformance.

38. The Primus Point Assignment Guidelines for the Jensen Farms audit contained a section captioned "Good Manufacturing Practices (The Facility Tour)". That section contained questions regarding, amongst other issues, general food safety, operational practices, equipment, equipment cleaning, and general cleaning practices and procedures observed during the tour of the facility. The auditor was to utilize four separate conformance categories in assessing compliance with the audit guidelines, with related relative scoring levels and points: full conformance; minor deficiency; major deficiency; and non-conformance.

39. The Primus Point Assignment Guidelines for the Jensen Farms audit contained a section captioned "Food Safety File." That section contained questions regarding, amongst other issues, general food safety file requirements, self-inspection records, maintenance and sanitation records, and microbial testing records. The auditor was to utilize four separate conformance categories in assessing compliance with the related audit guidelines, with related relative scoring levels and points: full conformance; minor deficiency; major deficiency; and non-conformance.

40. As part of its 2011 contract to audit Jensen Farms, Primus had the unilateral capability to determine whether the Jensen Farms facility failed to meet critical food safety requirements, and if so it would then automatically fail the facility's audit. Primus would then immediately inform Jensen Farms of the automatic failure.

41. As part of its 2011 contract to audit Jensen Farms, the auditor was to discuss with Jensen Farms the auditor's findings, including any potential deficiencies to be corrected by Jensen Farms.

42. As part of its 2011 contract to audit Jensen Farms, one of Primus's requirements was that the Jensen Farms facility be engaged in whatever functions would usually occur at the facility on a normal day of operation, and that a normal complement of personnel be on site, at

the time the audit was to be conducted, in order for the auditor to obtain a valid assessment. If the facility was not running product in a normal way, the audit would have to be terminated, according to Primus's audit guidelines.

43. 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 packing house a "superior" rating, and a score of 96%. At the time of the audit, Jensen Farms was not operational and was not processing cantaloupes.

44. The refurbished potato washing system, which had replaced the hydrocooler, was in place during the 2011 audit and Mr. DiIorio observed it. Eric Jensen, one of the principals at Jensen Farms, specifically described to Mr. DiIorio the changes in the system from the prior audit, including the removal of the hydrocooler with its recirculating chlorinated water. Mr. DiIorio noted the changes in his report. He did not question the removal of the hydrocooler, or the suitability of the new washer/dryer system for the safe production of cantaloupes. He did not advise Jensen Farms that its new wash system was below industry standards and practice, or deficient in any way. He did not warn Jensen Farms that the new system created a hazard or a risk of contamination. Finally, he did not discuss FDA guidelines with Jensen Farms.

45. 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.

46. 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.

47. As part of the investigation, investigators from the FDA and Colorado Department of Public Health and Environment also tested Jensen Farms cantaloupes that had been secured from the store shelves of grocery retailers. Testing showed that 17 of 18 cantaloupes from retail grocery stores were positive for one or more of the outbreak strains of *Listeria monocytogenes*. The markedly higher rate of positive samples from retail stores than from cantaloupes secured at Jensen Farms' facilities showed that the cantaloupes were distributed under conditions that allowed the *Listeria* contamination to proliferate.

48. 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, the FDA initiated an environmental assessment at Jensen Farms, in which the FDA was assisted by Colorado state and local officials.

49. 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.

50. 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:

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

51. 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.”

52. Further, during the July 25, 2011 packing house audit conducted by Bio Food Safety, as agent for Primus, Mr. DiIorio 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. DiIorio ultimately gave to Jensen Farms packing house.

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

53.1 Jensen Farms' inability to control pests;

53.2 Jensen Farms' use of equipment that was inappropriate for the processing of cantaloupes;

53.3 Jensen Farms' failure to use an antimicrobial in its wash system, or in the solution used to sanitize processing equipment;

53.4 Jensen Farms' failure to ensure the appropriate antimicrobial concentration in its wash water, which, as alleged at paragraph 43.4, did not contain any antimicrobial at all;

53.5 Jensen Farms' failure to have hot water available for purposes of handwashing;

53.6 The design of Jensen Farms' packing house caused water to pool, creating a harborage site for bacteria;

53.7 Jensen Farms' failure to precool cantaloupes prior to processing.

54. 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.

55. According to James R. Gorny, Ph.D., at the time a Senior Advisor for Produce Safety, Center for Food Safety & Applied Nutrition at the FDA, Jensen deviated from industry



standards by failing to use an anti-microbial, such as chlorine, in the packing of their cantaloupes during the summer of 2011. Dr. Gorny added that the conveyer that the defendants used to process and pack the cantaloupes spread contamination and essentially "inoculated" the cantaloupes with *Listeria monocytogenes*. Dr. Gorny opined that the Primus Labs subcontractor that conducted the pre-harvest inspection of Jensen Farms, and provided a "superior" score of 96% for the audit upon which Jensen Farms relied, was seriously deficient in its inspection and findings.

56. Further, Mr. DiIorio failed to:

56.1 consider and down-score Jensen Farms for the fact 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*

56.2 consider and downscore Jensen Farms for the fact 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*

56.3 consider and downscore Jensen Farms for the fact 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 uncleanable, 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

56.4 consider and downscore Jensen Farms for the fact 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*

56.5 consider and downscore Jensen Farms for the fact 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*

56.6 consider and downscore Jensen Farms for the fact 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*

56.7 consider and downscore Jensen Farms for the fact 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*

56.8 consider and downscore or fail Jensen Farms for the fact 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 was not possible.

57. Primus at all material times hereto had detailed criteria, standards and requirements that 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.

58. 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.

59. 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.

60. 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.

61. Had Jensen Farms not received a passing audit score, it would not have received a passing Primus Audit Certificate, and its cantaloupe products would not have qualified as having been "Primus Certified."

62. Had the Jensen Farms cantaloupe products not qualified as "Primus Certified," those cantaloupes would not have been distributed by Frontera.

63. Had Frontera not purchased and distributed the cantaloupes from Jensen Farms, retailers across the country, and eventually the respective customers of those retailers, would not have received and ultimately consumed the contaminated Jensen Farms cantaloupes.

64. By improperly giving the Jensen facilities and procedures a "superior" rating in his audit, Mr. DiIorio 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.

65. By improperly giving the Jensen facilities and procedures a “superior” rating in his audit, Mr. DiIorio erroneously represented to Jensen Farms that its 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

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

67. By improperly giving the Jensen facilities and procedures a “superior” rating in his audit, Mr. DiIorio erroneously represented to Jensen Farms and to others that the Jensen Farms 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.”

68. By improperly giving the Jensen facilities and procedures a “superior” rating in his audit, Mr. DiIorio negligently gave Jensen farms false information, on which Jensen Farms reasonably relied in its 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.

69. 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.

70. 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**

71. 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.

72. 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.

73. 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.

**Jerome Onsager's Listeriosis Illness and Death**

74. Before his Listeriosis illness, the decedent Jerome Onsager was a 75-year-old resident of Bozeman, Montana.

75. In the weeks preceding the onset of his Listeriosis illness, Mr. Onsager consumed a portion of at least one cantaloupe manufactured, distributed, and sold by Defendants Frontera and Wal-Mart. The cantaloupe was purchased at the Wal-Mart Supercenter, store #2084, located at 1500 North 7<sup>th</sup> Avenue, Bozeman, Montana. This cantaloupe had been grown by Jensen Farms, and was contaminated by *Listeria monocytogenes*.

76. Onset of symptoms related to Mr. Onsager's Listeriosis illness occurred during the first week of September 2011. On September 6, 2011, Mr. Onsager fell, became disoriented, and was having trouble functioning. His wife summoned help from neighbors and was able to deliver him to the emergency department at Bozeman Deaconess Hospital.

77. Mr. Onsager thereafter remained hospitalized, at various medical centers, until January 21, 2012, the date of his death. Mr. Onsager died as a direct and proximate result of his infection by *Listeria monocytogenes*.

**IV. CAUSE OF ACTION AGAINST FRONTERA  
AND WALMART: STRICT LIABILITY**

78. Plaintiff realleges and incorporates each and every allegation contained in paragraphs 1 through 77, above, as though set forth fully herein.

79. The Defendants Frontera and Wal-Mart manufactured and sold the adulterated

food that caused decedent's Listeriosis illness and death.

80. The Defendants Frontera and Wal-Mart manufactured and sold food products—in particular, cantaloupe—for sale to the public. Frontera and Walmart exercised significant control over the production of Jensen Farms cantaloupes by requiring that those cantaloupes be produced according to their specifications, and that the production of those cantaloupes be consistent with FDA guidance and regulations for the production of cantaloupes, industry standards, and good manufacturing practices, and that the production of the cantaloupes be preceded by a third-party audit of the conditions and food safety practices at Jensen Farms.

81. Cantaloupe that is contaminated with *Listeria monocytogenes* is unreasonably dangerous, and therefore defective, when used in an intended and reasonably foreseeable manner—*i.e.*, consumption by human beings.

82. The cantaloupe that the decedent consumed from the Defendants Frontera and Wal-Mart was contaminated with *Listeria monocytogenes* and was, as a result, defective and unreasonably dangerous.

83. The cantaloupe that the decedent consumed was contaminated with *Listeria monocytogenes* when it left the control of Frontera and Wal-Mart.

84. The decedent's consumption of the contaminated cantaloupe caused him to become infected with *Listeria monocytogenes* and suffer injury and death as a direct and proximate result.

85. Defendants Frontera and Wal-Mart are strictly liable to the Plaintiff for the harm proximately caused by the manufacture and sale of an unsafe and defective cantaloupe.

**V. CAUSE OF ACTION AGAINST FRONTERA  
AND WALMART: NEGLIGENCE and NEGLIGENCE PER SE**

86. Plaintiff realleges and incorporates each and every allegation contained in



paragraphs 1 through 85, above, as though set forth fully herein.

87. Frontera and Wal-Mart designed, manufactured, distributed, and sold cantaloupes that were contaminated with *Listeria monocytogenes*, a deadly pathogen.

88. Frontera and Wal-Mart owed a duty to all persons who consumed their products, including the decedent, to manufacture and sell cantaloupes 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.

89. Frontera and Walmart 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 and Walmart 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 and Walmart 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.

90. Frontera and Wal-Mart owed a duty to the plaintiffs and decedent 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.

91. Frontera and Wal-Mart owed a duty to all persons who consumed their cantaloupes to maintain their premises in a sanitary and safe condition so that the cantaloupes they manufactured and sold would not be contaminated with a deadly pathogen, like *Listeria monocytogenes*.

92. Frontera and Walmart breached the duties owed to the ultimate consumers of their cantaloupe products by committing the following acts and omissions of negligence:

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

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

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

92.4 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;

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

92.6 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;

92.7 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.

92.8 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;

92.9 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;

92.10 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;

92.11 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;

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

92.13 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

92.14 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.

93. Frontera and Wal-Mart 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.

94. Frontera and Wal-Mart 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*. The Defendants breached this duty.

95. The Plaintiff's injuries and damages proximately and directly resulted from the negligence of the Defendants Frontera and Wal-Mart, and from those Defendants' violations of statutes, laws, regulations, and safety codes pertaining to the manufacture, distribution, storage, and sale of food.

**VI. CAUSE OF ACTION AGAINST FRONTERA  
AND WALMART: BREACH OF WARRANTY**

96. Plaintiff realleges and incorporates each and every allegation contained in paragraphs 1 through 95, above, as though set forth fully herein.

97. By offering cantaloupe for sale to the general public, Frontera and Wal-Mart expressly and impliedly warranted that such cantaloupe was safe to eat, that it was not adulterated with a deadly pathogen, and that the cantaloupe had been safely prepared under sanitary conditions.

98. Frontera and Wal-Mart breached these warranties with regard to the food and drink they manufactured and sold to the decedent.

99. The Plaintiff's injuries proximately and directly resulted from Defendant Frontera and Walmart's breach of warranties, and the Plaintiff is thus entitled to recover for all actual, consequential, and incidental damages that flow directly and in a foreseeable fashion from these breaches.

**VII: CAUSE OF ACTION AGAINST PRIMUS: NEGLIGENCE**

100. Plaintiff realleges and incorporates each and every allegation contained in paragraphs 1 through 99, above, as though set forth fully herein.

101. Defendant Primus, as principal in the agency relationship between itself and Bio Food Safety, the auditor that conducted the audit of Jensen Farms ranchlands and packing house described previously, is bound by, and liable for, the acts and omissions of negligence of Bio Food Safety and its employees.

102. 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.

103. Primus owed a duty to Plaintiffs to act with reasonable care in inspecting, evaluating, and scoring Jensen Farms with regard to the audit it conducted; to provide accurate information regarding the Jensen Farms food safety policies and procedures; to advise Jensen Farms of any conditions that it observed or believed were not in compliance with regulatory and industry standards, and good manufacturing practices; to advise Jensen Farms of any conditions that might create a risk of adulterated food being shipped by Jensen Farms; to evaluate and advise Jensen Farms regarding any changes in the processing system from the prior (2010) audit conducted by Jensen Farms. Primus breached these duties.

104. The audit done by James DiIorio 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. 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 above, as well as the following:

104.1 Failure to terminate the audit, once it was determined that the packinghouse was not operating in normal processing fashion;

104.2 Failure to properly score the audit to alert Jensen Farms to deficiencies which could have been corrected;

104.3 Failing to provide a reasonable audit form and scoring system which considered industry standards and best practices even where no specific FDA requirement applied;

104.4 Failing to discuss possible hazards from the new system and the removal of the chlorinated wash;

104.5 Failing to identify cleaning issues with the new conveyer and suggest procedures tailored to that specific equipment; and

104.6 Failure to properly discuss with Jensen the deficiencies which could have been corrected.

105. 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 Listeriosis illness and death.

106. 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, and because Primus committed acts and omissions of negligence that constituted a proximate cause of the Plaintiff's injuries and damages, Defendant Primus is liable for all of the Plaintiff's injuries, damages and losses.

### **VIII. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**

107. Plaintiff realleges and incorporates each and every allegation contained in paragraphs 1 through 106, above, as though set forth fully herein.

108. Plaintiff observed and assisted her husband, the Decedent, when he suddenly became ill after consuming the tainted cantaloupe.

109. Plaintiff and her family endured an approximately 4 month ordeal during which the Decedent was transferred between medical facilities no less than 6 times for major, and in some cases life-preserving, medical treatment, including many tests and procedures related to his neurological functioning.

110. Plaintiff and her family watched the Decedent slowly waste away as his medical team did everything they could for him, and eventually he died during one of multiple stays in the intensive care unit.

111. Plaintiff and her family observed this entire, difficult sequence of events from the onset of illness to Decedent's death over 4 months later.

112. Plaintiff and her family are entitled to recover for the emotional torment that they suffered as a result of Defendant's negligence.

113. Plaintiff and her family's mental distress includes mental and emotional suffering and distress such as mental anguish, nervous shock, and the like; and it includes all highly

unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea.

114. Plaintiff's wife and family members suffered serious or severe emotional distress.

115. The serious or severe emotional distress was a reasonably foreseeable consequence of the Defendants' acts and omissions of negligence.

116. Plaintiff and her family members are entitled to compensation for this horrible and shocking series of events leading to the death of their family member over a period of approximately 4 months.

#### **IX. SURVIVORS ACTION**

117. Plaintiff realleges and incorporates each and every allegation contained in paragraphs 1 through 116, above, as though set forth fully herein.

118. Through the estate a survival action exists when injuries and the death of one person are caused by the wrongful act or neglect of another.

119. The Personal Representative hereby asserts said claim.

120. This claim is separate and additional to the claim for Decedent's wrongful death claim.

121. On behalf of the estate, Plaintiff shall be entitled to the present value of the decedent's reasonable earnings during his or her life expectancy, medical and funeral expenses, pain and suffering, and other special damages.

#### **X. LOSS OF CONSORTIUM**

122. Plaintiff realleges and incorporates each and every allegation contained in paragraphs 1 through 121, above, as though set forth fully herein.

123. Plaintiff is entitled to and hereby claims loss of consortium from Defendants.

124. Loss of consortium includes loss of comfort and society and the reasonable value of the contributions in money that the decedent would reasonably have provided for the support, education, training and care of the heirs during life expectancies of decedent and survivors.

125. During the 4 month period described above where Decedent was ill and dying, and receiving medical treatment at multiple medical centers, the Plaintiff, in addition to suffering severe emotional distress, lost the comfort and society of her husband.

126. During the time that has passed since Decedent's death in January 2012, and every day for the rest of her life, Plaintiff has experienced and will continue to experience the loss of comfort and society of her husband.

#### **XI. DECLARATORY JUDGMENT**

127. Plaintiffs reallege and incorporate each and every allegation contained in paragraphs 1 through 126, above, as though set forth fully herein.

128. Plaintiff, pursuant to Sec. 27-8-201, MCA *et. seq.*, and Rule 57 M.R.Civ.P, brings this action for declaratory judgment for the Court to declare that Defendants shall pay for Plaintiff's medical expenses, loss earnings and any and all damages that are not reasonably in dispute.

129. Based upon the evidence in this case no reasonable juror would believe that Defendants,' all or one of them, are not responsible for the aforementioned damages.

130. Plaintiff further requests attorneys' fees and costs.

#### **XII. DAMAGES**

131. Plaintiffs reallege and incorporate each and every allegation contained in paragraphs 1 through 130, above, as though set forth fully herein.

132. As the direct and proximate result of the Defendants' acts and omissions, the



Plaintiff suffered ordinary, incidental, and consequential damages as would be anticipated to arise under the circumstances, which shall be fully proven at the time of trial.

**VIII. PRAYER FOR RELIEF**

WHEREFORE, the Plaintiff prays as follows:

- (1) That the Court award the Plaintiff judgment against Defendants for damages.
- (2) That the Court award all such other 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 Plaintiffs as the direct and proximate result of the acts and omissions of the Defendants;
- (3) That the Court award damages for loss of consortium and survivorship;
- (4) That the Court awarded damages for negligent infliction of severe emotional distress;
- (5) The Court award attorneys' fees for failure to advance pay medical bills and loss earnings as required by Montana Law and Declaratory Judgment Act;
- (6) That the Court award damages for actual malice;
- (7) That the Court award the Plaintiff her costs, disbursements and reasonable attorneys' fees incurred, and costs in this matter.
- (8) That the Court award the Plaintiff the opportunity to amend or modify the provisions of this Complaint as necessary or appropriate after additional or further discovery is completed in this matter, and after all appropriate parties have been served;
- (9) That should the case proceed to trial, a jury of 12 is hereby requested;
- (10) That the Court award costs as a matter of right to the prevailing party in this action; and

(11) That the Court awards such other and further relief as it deems necessary and proper in the circumstances.

**JURY DEMAND**

**Plaintiff hereby demands a jury trial on all claims triable by right.**

DATED this 3<sup>rd</sup> day of February, 2014.

/s/ Scott L. Anderson

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