

<p>DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO</p> <p>Court Address: 7325 S. Potomac Street Centennial, CO 80112</p>	<p style="text-align: center;">▲COURT USE ONLY▲</p>
<p><b>Plaintiffs:</b> MARC and CANDACE THOMPSON, individually, and as Parents and Next Friends of NOAH THOMPSON, a minor</p> <p>v.</p> <p><b>Defendant:</b> PHO 75, INC., a Colorado corporation</p>	
<p><i>Attorneys for Plaintiffs Marc and Candace Thompson, individually, and as Parents and Next Friends of Noah Thompson:</i></p> <p>John R. Riley, #18962 Montgomery Little &amp; Soran, P.C. 5445 DTC Parkway, Suite 800 Greenwood Village, Colorado 80111 Telephone: 303.773.8100 Email: <a href="mailto:jriley@montgomerylittle.com">jriley@montgomerylittle.com</a></p>	<p><b>Case No.:</b></p> <p><b>Division:</b></p>
<p><b>COMPLAINT AND JURY DEMAND</b></p>	

COME NOW the Plaintiffs, MARC and CANDACE THOMPSON, individually, and as as Parents and Next Friends of NOAH THOMPSON, a minor, by and through their attorneys of record, Montgomery Little & Soran, P.C. and Marler Clark, LLP, PS, (pending *pro hac vice* admission) to file this Complaint and Jury Demand and allege as follows:

## **I. PARTIES**

1.1 The Plaintiffs, MARC and CANDACE THOMPSON, are husband and wife, as well as as Parents and Next Friends of their minor-child, NOAH THOMPSON, also a Plaintiff. The Plaintiffs were, at all times relevant to this Complaint, residents of Denver, Denver County, Colorado.

1.2 The Defendant, PHO 75, INC., is a corporation organized and existing under the laws of the State of Colorado. The Defendant's principal office is identified on the Colorado Secretary of State website as being located at 2050 S. Havana Street, Aurora, Colorado 80014.

## **II. JURISDICTION AND VENUE**

2.1 This Court is vested with jurisdiction over the Defendant pursuant to C.R.S. § 13-1-124(1)(a), because the defendant conducts business within the State of Colorado.

2.2 Pursuant to C.R.C.P. 98, venue of this action is proper in Arapahoe County, because the cause of action arose in this County and the Defendant transacted business here.

## **III. FACTUAL BACKGROUND**

### **The Pho 75 *E. coli* O157:H7 Outbreak**

3.1 Since May 24, 2016, four people are known to have become infected with the same, genetically indistinguishable strain of *E. coli* O157:H7 after eating at the Defendant's restaurant.

3.2 More *E. coli* O157:H7 infections could be unreported, according to health experts.

3.3 Health officials at the Tri-County Health Department shut down the Defendant's restaurant on Friday, June 10, 2016.

3.4 In recent years, the Defendant's restaurant was cited for many violations—most

for critical risks of food-borne illness.

3.5 According to the denverpost.com, “We completed several inspections over the last few years, and they had a number of critical violations, that were generally corrected [on site] or on follow-up [visits],” said Brian Hlavacek, director of environmental health at the Tri-County Health Department. “Then we’d make another routine visit, and you’d see the same patterns,” he said. “For two or three years, it’s been that pattern.”

3.6 The Tri-County Health Department is now working to determine the specific cause within the restaurant of the outbreak, e.g., a specific food item that was contaminated or an unsafe food handling practice that caused contamination. Health experts are asking anyone who ate at the Defendant’s restaurant from May 24 to June 10, 2016 to complete a confidential online survey.

3.7 The Tri-County Health Department is requiring that all of the Defendant’s staff to go through food safety training. The entire restaurant must also be cleaned before it can reopen.

### ***E. coli* O157:H7 Infection and Its Potentially Deadly Consequences**

3.8 *E. coli* O157:H7’s ability to induce injury in humans is a result of its ability to produce numerous virulence factors, most notably Shiga-toxins, one of the most potent toxins known. In addition to Shiga toxins, *E. coli* O157:H7 produces numerous other virulence factors, including proteins that aid in the attachment and colonization of the bacteria in the intestinal wall and that can destroy red blood cells.

3.9 According to a 2011 study, an estimated 93,094 illnesses are due to domestically acquired *E. coli* O157:H7 each year in the United States. Estimates of foodborne acquired O157:H7 cases result in 2,138 hospitalizations and 20 deaths annually. The colitis caused by *E.*

*coli* O157:H7 is characterized by severe abdominal cramps, diarrhea that typically turns bloody within twenty-four hours, and sometimes fevers. Infection can occur in people of all ages but is most common in children.

3.10 *E. coli* O157:H7 infections can lead to a severe, life-threatening complication called hemolytic uremic syndrome (HUS). HUS accounts for the majority of the acute deaths and chronic injuries caused by the bacteria. HUS occurs in 2-7% of victims, primarily children, with onset five to ten days after diarrhea begins. It is the most common cause of renal failure in children. Approximately half of the children who suffer HUS require dialysis, and at least 5% of those who survive have long term renal impairment. An estimated 20-25% of HUS patients develop central nervous system complications, including lethargy, apnea, coma, seizures, stroke, and hemiparesis. Serious injury to the pancreas, resulting in death or the development of diabetes, can also occur. There is no cure for HUS.

### **Noah Thompson's Life-Threatening *E. coli* O157:H7 Infection**

3.11 On May 24, 2016, the Plaintiffs, Marc, Candace, and Noah Thompson, dined at the Defendant's restaurant at 2050 S. Havana Street, Aurora, Colorado 80014.

3.12 Just days after eating at the Defendant's restaurant, both Marc and Candace experienced gastrointestinal distress that included diarrhea. Fortunately, their symptoms quickly resolved, albeit after enduring substantial pain and suffering.

3.13 Just days after his parents had mostly recovered, on May 29, 2016, Noah developed nausea, vomiting, severe stomach cramping, diarrhea that would turn bloody, fatigue and headache. He also began to run a fever of 102°F.

3.14 Throughout the day, Noah's symptoms worsened. Between alternating bouts of vomiting and bloody diarrhea, Noah progressively became more physically and mentally fatigued.

3.15 Eventually, Noah required emergency transportation by Sky Ridge Hospital Transport to the Sky Ridge Hospital Emergency Room.

3.16 At Sky Ridge Hospital, a stool sample was obtained from Noah for laboratory testing. He was also treated for dehydration before being released.

3.17 Once home, Noah continued to be plagued by his symptoms. He sought additional medical treatment at Lone Tree Pediatrics on May 31, 2016.

3.18 After doctors determined that Noah's kidneys had started to fail, he was transferred from Lone Tree Pediatrics and admitted to the intensive care unit at Sky Ridge Pediatric Hospital that same day.

3.19 The stool sample that Noah submitted for laboratory-testing days earlier was found to be positive for *E. coli* O157:H7. This positive test result was reported to the Tri-County Health Department.

3.20 Not long after his admission, Noah developed life threatening HUS that forced him to receive life-saving dialysis treatment at Rocky Mountain Pediatric Kidney Center.

3.21 Today, Noah remains hospitalized and continues to undergo dialysis treatments. He also continues to suffer from severe stomach pain and vomiting.

3.22 Marc and Candace have been contacted several times by Carey Brown of the Colorado Department of Public Health and Environment. Their conversations have revolved around what Marc, Candace, and Noah had eaten in the days prior to onset of Noah's *E. coli*

O157:H7 infection. When Marc and Candace noted that they had eaten at Pho 75, they were made aware that the restaurant would be closed.

3.23 Noah's *E. coli* O157:H7 infection and development of HUS has caused Marc and Candace Thompson much stress, anxiety, and fear.

3.24 Marc was required to take time off of work to drive to and from the hospital several times a day, with fuel costs adding to their financial stress. Marc and Candace also had to schedule a babysitter for their other children, and were forced to eat in the hospital cafeteria or eat out because they had no time to prepare breakfast, lunch, or dinner at home.

3.25 Since Noah's illness, Marc's blood pressure has been high, and he has had a hard time focusing on anything but making sure that Noah is comfortable and okay.

3.26 According to [thedenverpost.com](http://thedenverpost.com), this whole experience has been "awful. It's really scared us and made us think twice about what we're eating, after watching him go downhill and going downhill with him," said Marc.

#### **IV. FIRST CLAIM FOR RELIEF – STRICT LIABILITY**

4.1 The Plaintiffs incorporate paragraphs 2.1 through 3.26 of this Complaint as if each paragraph were set forth here in its entirety.

4.2 The Defendant, PHO 75, INC., is a product manufacturer within the meaning of the Colorado Product Liability Act. C.R.S.A. §§ 13-21-401(1). The Defendant PHO 75, INC., manufactured the food product that injured the Plaintiffs by, among other things, assembling, fabricating, constructing, and otherwise preparing the food product and its component parts.

4.3 The food product that the defendant PHO 75, INC. manufactured was defective, and not reasonably safe in construction, because the food product, and one or more of its ingredients, was contaminated with *E. coli* O157:H7, a deadly pathogen.

4.4 The food product that the Defendant PHO 75, INC. manufactured was not safe to the extent reasonably contemplated or expected by a consumer, because it was contaminated with *E. coli* O157:H7.

4.5 Because the food product consumed by Plaintiffs was defective, and not reasonably safe in construction, the Defendant, PHO 75, INC., is strictly liable to the Plaintiffs for the harm proximately caused by the manufacture and sale of the defective food product.

#### **V. SECOND CLAIM FOR RELIEF - NEGLIGENCE**

5.1 The Plaintiffs incorporate paragraphs 2.1 through 4.5 of this Complaint as if each paragraph were set forth herein in its entirety.

5.2 The Defendant, PHO 75, INC., owed the Plaintiffs a duty to exercise reasonable care in the manufacture of food products intended for human consumption.

5.3 The Defendant, PHO 75, INC., owed the Plaintiffs a duty to manufacture a food product that was reasonably safe in construction, that was safe to the extent reasonably contemplated by a consumer, and that was fit for human consumption.

5.4 The Defendant, PHO 75, INC., owed the Plaintiffs a duty to manufacture a food product that was in compliance with the Colorado Retail Food Establishment Rules and Regulations, 6 CCR 1010-2, et seq.

5.5 The Defendant, PHO 75, INC., owed a duty to exercise reasonable care in the selection and supervision of suppliers, employees, agents, and subcontractors, to prevent the risk that the food product would become contaminated with *E. coli* O157:H7.

5.6 By manufacturing, distributing, and selling a food product contaminated with *E. coli* O157:H7, the Defendant, PHO 75, INC., breached the duties it owed to the Plaintiffs, and the Plaintiffs were harmed as a direct and proximate result of the breaches.

## **VI. THIRD CLAIM FOR RELIEF – NEGLIGENCE PER SE**

6.1 The Plaintiffs incorporate paragraphs 2.1 through 5.6 of this Complaint as if each paragraph were set forth herein in its entirety.

6.2 The Defendant, PHO 75, INC., owed a duty to properly supervise, train, and monitor its employees, or the employees of their agents or subcontractors, in the preparation of the food product or the food product's ingredients it sold, in order to ensure compliance with the Defendant's own specifications and performance standards, as well as to ensure compliance with all applicable health regulations, including the Colorado Retail Food Establishment Rules and Regulations, 6 CCR 1010-2. The Defendant breached several of these duties, and the Plaintiffs were injured as a direct and proximate result of such breaches.

6.3 The Defendant, PHO 75, INC., additionally owed a duty to comply with statutory and regulatory provisions that pertained or applied to either the manufacture, distribution, storage, or sale of their food product or the food product's ingredients, including, but not limited to, the Colorado Pure Food and Drug Law, C.R.S. § 25-5-401, et seq., which bans the "manufacture, sale, or delivery or the holding or offering for sale of any food" that is "adulterated."

6.4 Under applicable state law, food is adulterated if “it bears or contains any poisonous or deleterious substance which may render it injurious to health[.]” *E. coli* O157:H7 is such a substance. Thus, by its manufacture and sale of the subject food product or the subject food product’s ingredients, the Defendant breached its statutory and regulatory duties, and the Plaintiffs were each injured as a direct and proximate result of such breaches.

6.5 The state food safety regulations applicable here, and as set forth above, establish a positive and definitive standard of care in the import, manufacture, distribution or sale of food, and the violation of these regulations constitutes negligence *per se*.

6.6 The Plaintiffs were in the class of persons intended to be protected by these statutes and regulations, and were injured as the direct and proximate result of the Defendant’s violation of applicable federal, state and local food safety regulations.

6.7 The Defendant, PHO 75, INC., breached the aforementioned duties, as alleged above, which breach constituted the proximate cause of injury to the Plaintiffs.

## **VII. DAMAGES**

7.1 The Plaintiffs incorporate paragraphs 2.1 through 6.7 of this Complaint as if each paragraph were set forth herein in its entirety.

7.2 The Plaintiffs have suffered damages as the direct result of the tortious and unlawful acts and omissions of Defendant, PHO 75, INC., including, without limitation, past and future damages for the loss of enjoyment of life, pain and suffering, mental anxiety and distress, past and future economic loss, past and future damages for medical-related expenses, permanent physical injury, and any damages for which the law provides relief.

7.3 The Plaintiffs have also suffered special, incidental, and consequential damages as the direct and proximate result of the unlawful acts and omissions of the Defendant, PHO 75, INC., including, without limitation, past and future damages for medical-related expenses, travel-related expenses, and any damages for which the law provides relief. It is believed that, after a reasonable opportunity for further investigation or discovery, there will be found evidence that Defendant PHO 75, INC.'s willful and wanton acts included, but were not limited to: the knowing failure to manufacture food products in a manner that would eliminate or reduce foodborne pathogens, including *E. coli* O157:H7.

#### **VIII. REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs demand:

- (1) That the Court award Plaintiffs judgment against Defendant, PHO 75, INC., for all general, special, incidental and consequential damages incurred, or to be incurred;
- (2) That the Court award Plaintiffs their costs, disbursements and reasonable attorneys' fees incurred; and
- (3) That the Court award such other and further relief as it deems necessary and proper.

#### **PLAINTIFFS DEMAND A TRIAL TO A JURY**

DATED: June 16, 2016

**MONTGOMERY LITTLE & SORAN, P.C.**

*s/ John R. Riley*

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