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8 **IN THE UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF WISCONSIN**  
10 **MILWAUKEE DIVISION**

11 RYAN NUTHALS AND MELISSA  
12 NUTHALS, husband and wife, individually and  
13 as parents of S.G.N., a minor

14 Plaintiffs,

15 v.

16 FRESH EXPRESS INCORPORATED, a  
17 California corporation,

18 Defendant.

CASE NO. 1:19-cv-01886

**COMPLAINT FOR DAMAGES**

**DEMAND FOR JURY TRIAL**

19 COME NOW the Plaintiffs, as set forth in the caption above, by and through their  
20 attorneys of record, Denis W. Stearns, and the law firm of Marler Clark, L.L.P., P.S., to allege and  
21 complain as follows:

22 **I. THE PARTIES**

23 1.1 At all times relevant to this action, the Plaintiffs, Ryan and Melissa Nuthals and  
24 S.G.N. (“Plaintiffs”), were domiciled in Brown County, Wisconsin, where they reside and intend  
25 to live long term. Accordingly, the Plaintiffs were and are citizens of the State of Wisconsin.

26 1.2 At all times relevant to this complaint, the Defendant Fresh Express Incorporated  
27 (“Defendant”) is and was a Delaware corporation with its principal place of business located in

1 Salinas, California. Defendant is therefore a citizen of the States of Delaware and California.

2 Defendant does business in the State of Wisconsin, based on its continuous and systematic  
3 affiliations there, and purposely avails itself of the protections and benefits of Wisconsin law.

## 4 II. JURISDICTION AND VENUE

5 2.1 This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332. The  
6 amount in controversy exceeds \$75,000 exclusive of interests and costs, and this is an action by  
7 plaintiffs who are citizens of Wisconsin against a defendant that, based on its State of  
8 Incorporation and the location of its principal place of business, is a citizen of Delaware and  
9 California.  
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11 2.2 Venue in this judicial district is proper pursuant to 28 U.S.C. § 1391(a)(2) because  
12 a substantial part of the events or omissions giving rise to the claim asserted here occurred in this  
13 judicial district, and because the defendant was subject to personal jurisdiction in this judicial  
14 district at the time of the commencement of the action.

## 15 III. GENERAL ALLEGATIONS

### 16 **The 2019 Fresh Express Romaine Lettuce *E. coli* Outbreak**

17 3.1 The Wisconsin Department of Health Services (DHS) is working with local  
18 health departments, the Wisconsin Department of Agriculture, Trade, and Consumer Protection  
19 (DATCP), the Centers for Disease Control and Prevention (CDC), and the U.S. Food and Drug  
20 Administration (FDA) to investigate a multistate outbreak of *E. coli* O157:H7 infections linked to  
21 romaine lettuce.  
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23 3.2 As of December 19, 2019, the CDC reports that 138 people in 25 states are  
24 infected with the outbreak strain of STEC. There have been 72 people hospitalized and 13 cases  
25 of hemolytic uremic syndrome (HUS), a type of kidney failure. No deaths have been reported.  
26

1 3.3 As of December 19, 2019, Wisconsin has 33 confirmed cases linked to this  
2 outbreak. Of these, 14 people have been hospitalized and 2 have developed HUS.

3 3.4 Epidemiologic, laboratory, and traceback evidence collected so far shows that  
4 romaine lettuce from the Salinas, California, growing region is a likely source of this outbreak.

5 3.5 On November 21, 2019, a list of salad products were recalled after laboratory  
6 testing found the same strain of *E. coli* that was making people sick in Maryland in romaine  
7 lettuce harvested from the Salinas, California growing region.

8 3.6 On December 6, 2019, Wisconsin health officials found *E. coli* O157 in an  
9 unopened bag of chopped Fresh Express® brand Leafy Green Romaine salad from Salinas,  
10 California that was collected from an ill person's home. On December 13, 2019, specialized  
11 laboratory testing called whole genome sequencing showed that the *E. coli* O157 strain found in  
12 the romaine matches the outbreak strain of *E. coli* that has made people sick in Wisconsin and  
13 other states.

14 3.7 The investigation is ongoing to determine the source of contamination and if  
15 additional products are linked to illness.

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19 **Prior Outbreaks Linked to Lettuce and Other Leafy Greens**

20 3.8 *E. coli* O157:H7 outbreaks associated with lettuce and other leafy greens are by no  
21 means a new phenomenon. Outlined below is a list of *E. coli* outbreaks involving contaminated  
22 lettuce or leafy greens in the past decade:

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Date	Vehicle	Etiology	Confirmed Cases	States/Provinces
Sept. 2009	Lettuce: Romaine or Iceberg	<i>E. coli</i> O157:H7	29	Multistate

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<b>Date</b>	<b>Vehicle</b>	<b>Etiology</b>	<b>Confirmed Cases</b>	<b>States/Provinces</b>
Sept. 2009	Lettuce	<i>E. coli</i> O157:H7	10	Multistate
April 2010	Romaine	<i>E. coli</i> O145	33	5:MI, NY, OH, PA, TN
Oct. 2011	Romaine	<i>E. coli</i> O157:H7	60	Multistate
April 2012	Romaine	<i>E. coli</i> O157:H7	28	1:CA Canada
June 2012	Romaine	<i>E. coli</i> O157:H7	52	Multistate
Sept. 2012	Romaine	<i>E. coli</i> O157:H7	9	1:PA
Oct. 2012	Spinach and Spring Mix Blend	<i>E. coli</i> O157:H7	33	Multistate
Apr. 2013	Leafy Greens	<i>E. coli</i> O157:H7	14	Multistate
Aug. 2013	Leafy Greens	<i>E. coli</i> O157:H7	15	1:PA
Oct. 2013	Ready-To-Eat Salads	<i>E. coli</i> O157:H7	33	Multistate
Apr. 2014	Romaine	<i>E. coli</i> O126	4	1:MN
Apr. 2015	Leafy Greens	<i>E. coli</i> O145	7	3:MD, SC, VA
June 2016	Mesclun Mix	<i>E. coli</i> O157:H7	11	3:IL, MI, WI

Date	Vehicle	Etiology	Confirmed Cases	States/Provinces
Nov. 2017	Leafy Greens	<i>E. coli</i> O157:H7	67	Multistate and Canada
Mar. 2018	Romaine	<i>E. coli</i> O157:H7	219	Multistate and Canada
Nov. 2018	Romaine	<i>E. coli</i> O157:H7	88	Multistate and Canada
Sept. 2019	Romaine	<i>E. coli</i> O157:H7	23	Multistate
Nov. 2019	Romaine	<i>E. coli</i> O157:H7	104	Multistate and Canada

### The *E. coli* O157:H7 bacteria

3.9 *Escherichia coli* are the name of a common family of bacteria, most members of which do not cause human disease. *E. coli* O157:H7 is a specific member of this family that can cause bloody diarrhea (hemorrhagic colitis) in humans. In the years since *E. coli* O157:H7 was first identified as a cause of diarrhea, this bacterium has established a reputation as a significant public health hazard.

3.10 *E. coli* O157:H7 lives in the intestines of cattle and other ruminants. *E. coli* O157:H7 is also notable among pathogenic bacteria for its extremely low infectious dose—that is, the number of bacteria necessary to induce infection in a person. While for most pathogenic bacteria it takes literally millions of bacterial colonies to cause illness, it is now known that fewer than 50 *E. coli* O157:H7 bacteria can cause illness in a child. The practical import is that even a microscopic amount of exposure can trigger a devastating infection.

1           3.11     The most severe cases of the *E. coli* O157:H7 infection occur in young children and  
2 in the elderly, presumably because the immune systems in those age populations are the most  
3 vulnerable. After a susceptible individual ingests *E. coli* O157:H7, the bacteria attach to the inside  
4 surface of the large intestine and initiates an inflammatory reaction of the intestine. What ultimately  
5 results is the painful bloody diarrhea and abdominal cramps characteristic of the intestinal illness.

6           3.12     The mean incubation period (time from ingestion to the onset of symptoms) of *E.*  
7 *coli* O157:H7 is estimated to be two to four days (range, 1-21 days). Typically, a patient with an  
8 acute *E. coli* O157:H7 infection presents with abdominal cramps, bloody diarrhea, and vomiting.  
9 The duration of diarrhea in children with *E. coli* O157:H7 infections are significantly longer than  
10 that of adults.

11           3.13     *E. coli* O157:H7 can produce a wide spectrum of disease from mild, non-bloody  
12 diarrhea, to severe bloody diarrhea accompanied by excruciating abdominal pain to life-threatening  
13 complications. In most infected individuals, the intestinal illness lasts about a week and resolves  
14 without any long-term effects. Antibiotics do not appear to aid in combating these infections, and  
15 recent medical studies suggest that antibiotics are contraindicated for their risk of provoking more  
16 serious complications. Apart from good supportive care, which should include close attention to  
17 hydration and nutrition, there is no specific therapy.

18           3.14     About 10% of individuals with *E. coli* O157:H7 infections (mostly young children)  
19 go on to develop hemolytic uremic syndrome (HUS), a severe, potentially life-threatening  
20 complication. The essence of the syndrome is described by its three central features: destruction  
21 of red blood cells, destruction of platelets (those blood cells responsible for clotting), and acute  
22 renal failure due to the formation of micro-thrombi that occlude microscopic blood vessels that  
23 make up the filtering units within the kidneys.  
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1           3.15     There is no known therapy to halt the progression of HUS. The active stage of the  
2 disease usually lasts one to two weeks, during which a variety of complications are possible. HUS  
3 is a frightening illness that even in the best American medical facilities has a mortality rate of about  
4 5%. The majority of HUS patients require transfusion of blood products and develop  
5 complications common to the critically ill.

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7           **S.G.N.'s *E. coli* O157 Infection**

8           3.16     On November 10, 2019, Plaintiffs purchased a bag of Fresh Express Leafy Green  
9 Romaine Salad from the Festival Foods location at 2348 Lineville Road, Suamico, Wisconsin  
10 54313. The romaine lettuce product was contaminated with *E. coli* O157.

11           3.17     S.G.N. consumed some of this romaine lettuce product.

12           3.18     On November 15, 2019, S.G.N. developed symptoms consistent with an *E. coli*  
13 O157 infection, including severe diarrhea and abdominal pain.

14           3.19     Plaintiffs sought medical care for S.G.N. on November 19 when her diarrhea  
15 became bloody at Bellin West DePere. They sought medical attention again on November 25,  
16 and S.G.N. was admitted to Bellin Hospital on November 26.

17           3.20     While hospitalized, S.G.N. developed and was diagnosed with HUS.

18           3.21     S.G.N. remained hospitalized until December 4, 2019. She continues to recover  
19 from her HUS and has ongoing doctor appointments to monitor her kidney function.  
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21                                 **IV.     CAUSES OF ACTION**

22   **Strict Liability—Count I**

23           4.1     At all times relevant to this action, the Defendant was the manufacturer and seller  
24 of an adulterated salad product that, as a result of its defective and unsafe condition, having been  
25 contaminated with *E. coli* O157 at the time of sale, caused injury to S.G.N.  
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1           4.2     The adulterated salad product that the Defendant manufactured and sold was, at  
2 the time it left the Defendant’s control, defective and unreasonably dangerous for its ordinary  
3 and expected use because of its contamination with *E. coli* O157.

4           4.3     The adulterated salad product that the Defendant manufactured and sold was  
5 sold to the Plaintiffs without any change in its defective condition.

6           4.4     The adulterated salad product that the Defendant manufactured and sold was  
7 used in the manner expected and intended—that is, consumed by S.G.N.

8           4.5     S.G.N. suffered injury and damages as a direct and proximate result of the  
9 defective and unreasonably dangerous condition of the adulterated salad product that the  
10 Defendant manufactured and sold.

11 **Negligence & Negligence Per Se—Count II**

12           4.6     The Plaintiffs incorporate the preceding paragraphs of this Complaint, by this  
13 reference, as if each of these paragraphs were set forth here in its entirety.

14           4.7     The Defendant designed, manufactured, and distributed the salad product that  
15 was contaminated with *E. coli* O157, a deadly pathogen.

16           4.8     The Defendant owed a duty to all persons who purchased and consumed its salad  
17 product, including the Plaintiffs, to manufacture and distribute salad products that were safe to  
18 eat, that were not adulterated with deadly pathogens, like *E. coli* O157, and that were not in  
19 violation of applicable food and safety regulations. The Defendant breached these duties.

20           4.9     The Defendant owed a duty to all persons who purchased and consumed its salad  
21 products, including the Plaintiffs, to ensure that any representations regarding the certifications  
22 of its products had undergone prior to distribution and sale were made with reasonable care and  
23 were true, accurate, and not misleading. The Defendant breached these duties.

24           4.10    The Defendant had a duty to comply with all statutes, laws, regulations, or safety  
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1 codes pertaining to the manufacture, distribution and storage of its salad products, but failed to  
2 do so, and were therefore negligent. S.G.N. was among the class of persons designed to be  
3 protected by these statutes, laws, regulations, safety codes or provision pertaining to the  
4 manufacture distribution, storage, and sale of similar salad products.

5 4.11 The Defendant breached the duties owed to the ultimate consumers of the salad  
6 product by committing the following acts and omissions of negligence:

7 4.11.1 Failed to adequately maintain or monitor the sanitary conditions of their  
8 products, premises, equipment, and employees, and the products,  
9 premises, equipment and employees of other entities in the supply chain  
10 of the ingredients and packaging for the subject salad product;

11 4.11.2 Failed to apply their food safety policies and procedures to ensure the  
12 safety and sanitary conditions of their salad products, premises, and  
13 employees, with such failure falling short of what applicable food safety  
14 and quality laws and regulations required;

15 4.11.3 Failed to apply food safety policies and procedures that met industry  
16 standards for the safe and sanitary production of salad products, and the  
17 safety and sanitary condition of their premises and employees;

18 4.11.4 Failed to take the steps necessary to prevent the foreseeable transmission  
19 of *E. coli* O157 to consumers of their salad products;

20 4.11.5 Failed to properly train their employees and agents how to prevent the  
21 transmission of *E. coli* O157 on their premises, from their facilities or  
22 equipment, or in their salad products;

23 4.11.6 Failed to test their salad products for microbial pathogens, like *E. coli*  
24 O157.

25 4.12 The Defendant had a duty to comply with all statutory and regulatory  
26 provisions that pertained or applied to the manufacture, distribution, and storage of their salad  
products. The Defendant breached this duty.

4.13 The Defendant owed a duty to the Plaintiffs to use reasonable care in the  
manufacture and distribution of their salad products, to prevent contamination with *E. coli* O157.  
The Defendant breached this duty.

1           4.14   S.G.N.'s injuries proximately and directly resulted from the negligence of the  
2 Defendant, and from the Defendant's violations of statutes, laws, regulations, and safety codes  
3 pertaining to the manufacture and distribution of food.

4   **V.     DAMAGES**

5           5.1     For purposes of pleading damages, the Plaintiffs incorporate all of the above-  
6 stated allegations as if fully set forth here.

7           5.2     The Plaintiffs suffered general, special, incidental, and consequential damages as a  
8 direct and proximate result of the acts and omissions of the Defendant, as set forth above, in an  
9 amount that shall be fully proven at the time of trial. Such damages include, but are not limited  
10 to: past and future damages for pain and suffering, loss of enjoyment of life, mental distress, and  
11 fear of future illness and death; past and future medical expenses and other costs or related out-  
12 of-pocket expenses; lost wages and earning-capacity, past and future; loss of consortium; and any  
13 other damages that are reasonably anticipated to arise under the circumstances.  
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15   **JURY DEMAND**

16           The Plaintiffs hereby demand a jury trial.

17   **A.     PRAYER FOR RELIEF**

18           WHEREFORE, the Plaintiffs pray for judgment against the Defendant as follows:

19           A.     Ordering compensation for all general, special, incidental, and consequential  
20 damages suffered by the Plaintiffs as a result of the Defendant's conduct;

21           B.     Awarding Plaintiffs their reasonable attorney fees and costs, to the fullest extent  
22 allowed by law; and

23           C.     Granting all such additional or further relief as this Court deems just and  
24 equitable under the circumstances.  
25  
26

DATED this 23<sup>rd</sup> day of December, 2019.

**ON BEHALF OF THE PLAINTIFF:**

\s\ Denis W. Stearns  
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