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17 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
18 COUNTY OF SANTA CRUZ  
19 UNLIMITED JURISDICTION

20 JAMES RAYMOND FREY, individually and on  
21 behalf of the ESTATE OF SHIRLEE JEAN  
22 FREY, and DOES 1-20, inclusive,

23 Plaintiffs,

24 v.

25 SAFEWAY INC. and DOES 1-20, inclusive,

26 Defendants.

Case No.

**COMPLAINT FOR PERSONAL INJURIES  
AND WRONGFUL DEATH**

**JURY TRIAL DEMANDED**

27 COME NOW the plaintiffs, James Raymond Frey, individually, and on behalf of the Estate of  
28 Shirlee Jean Frey, his deceased wife, and DOES 1-20 inclusive, by and through attorneys of record, to  
now allege by way of this Complaint as follows:

**PARTIES**

1. The plaintiffs in this action are James Raymond Frey, who is 87 years old, and the

1 Estate of his deceased wife, Shirlee Jean Frey. James Frey is the qualified survivor of Shirlee Jean  
2 Frey. Longtime residents of California, James and Shirlee together raised two sons, Bradley and Todd.

3 2. The true names and capacities, whether individual, corporate, associate, partnership,  
4 joint venture, franchisee or otherwise of the plaintiffs DOES 1-20, inclusive, are unknown to the  
5 plaintiffs who therefore name the plaintiffs by such fictitious names. Plaintiffs pray leave to amend  
6 this Complaint to assert the true names and capacities of the plaintiffs when ascertained. Plaintiffs are  
7 informed and believe and thereupon allege that each of the fictitiously named plaintiff is entitled as a  
8 survivor, beneficiary, injured party, dependent or otherwise to recovery under all causes action pled in  
9 this Complaint.

10 3. Safeway Inc. ("Safeway") is a corporation organized and existing under the laws of the  
11 State of California, and with its principal executive offices located in Pleasanton, California. At all  
12 times relevant to this action, Safeway was registered to do business, and in fact did conduct business,  
13 in the State of California. More specifically, Safeway owned and operated a Safeway Supermarket in  
14 the Felton Fair Shopping Center, at 6255 Graham Hill Road, Felton, California, 95018.

15 4. The true names and capacities, whether individual, corporate, associate or otherwise, of  
16 the defendants named in this Complaint as DOES 1-20, inclusive, are unknown to the plaintiffs, who  
17 therefore sue said defendants by fictitious names. The plaintiffs will amend this complaint to show the  
18 true names and capacities of one or more of these DOE defendants when sufficient information has  
19 been ascertained.

20 5. The plaintiffs are informed and believe, and on that basis allege, that at all time  
21 mentioned in this Complaint, each of the DOE defendants were the agents or employees of any or all of  
22 the co-defendants, and were acting within the scope and course of their agency and employment, and  
23 with the permission and consent of the other co-defendants. Therefore, each of the DOE defendants are  
24 responsible in some manner for the events and happenings referred to in this Complaint, or that the  
25 DOE defendants otherwise proximately caused the acts, omissions or events alleged in this Complaint  
26 and are liable to the plaintiffs as a result.

27 **JURISDICTION AND VENUE**

28 6. This Court is vested with jurisdiction over the defendants, because Safeway and the

1 DOE defendants are corporations are doing business within the State of California, and the claims  
2 alleged in this Complaint arose from these in-state business activities.

3 7. The venue of this action is proper in Santa Cruz County, because the defendants  
4 transacted business in this county, the plaintiffs are residents of this county, and the injuries in question  
5 occurred in this county.

6 **FACTS**

7 8. According to the CDC, based on its ongoing investigation, as of December 18, 2014, a  
8 total of 28 people, in ten states, had been infected with a genetically indistinguishable strain of the  
9 bacteria *Listeria monocytogenes*—the outbreak strain. Confirmed cases of infections were located in  
10 states as follows: Arizona (4), California (1), Minnesota (4), Missouri (5), New Mexico (5), North  
11 Carolina (1), Texas (4), Utah (1), Washington (1) and Wisconsin (2). The CDC also reported that 26  
12 infected individuals had been hospitalized.

13 9. Among the 26 people hospitalized, five deaths have been reported, including the  
14 plaintiff, Shirlee Jean Frey. As of now, listeriosis—the name for the illness caused by a listeria  
15 infection—had contributed to at least four of these deaths. Nine illnesses were pregnancy-related,  
16 having occurred in a pregnant woman or her newborn infant. Three invasive illnesses (meningitis)  
17 were among otherwise healthy children aged 5–15 years.

18 10. The CDC has further reported that, based on the information currently available to it,  
19 commercially produced, prepackaged caramel apples were likely contaminated with *Listeria*. To date,  
20 15 (83%) of the 18 ill people that public health investigators have interviewed reported eating  
21 commercially produced, prepackaged caramel apples before becoming ill.

22 11. At this time, no illnesses related to this outbreak have been linked to apples that are not  
23 caramel-coated and not prepackaged or to caramel candy. Although limited information is currently  
24 available about the specific brands of commercially produced, prepackaged caramel apples consumed,  
25 the finding that most of the ill people reported consuming these apples evidences that the outbreak-  
26 related *Listeria* infections are more probably than not related to commercially produced, prepackaged  
27 caramel apples. The CDC reports that investigators are rapidly working to determine specific brands or  
28 types of commercially produced, prepackaged caramel apples that may be linked to illnesses and to

1 identify the source of contamination.

2 12. Given the evidence linking the outbreak-related Listeria infections to the consumption  
3 of contaminated caramel apples, the CDC has recommended that consumers not eat any commercially  
4 produced, prepackaged caramel apples, including plain caramel apples as well as those containing nuts,  
5 sprinkles, chocolate, or other toppings, until more specific guidance can be provided. These products  
6 could have a shelf life of more than one month.

7 **LISTERIA**

8 13. Listeria (pronounced liss-STEER-ē-uh) is a gram-positive rod-shaped bacterium that  
9 can grow under either anaerobic (without oxygen) or aerobic (with oxygen) conditions. Of the six  
10 species of Listeria, only L. monocytogenes (pronounced maw-NO-site-aw-JUH-nee-z) causes disease in  
11 humans. These bacteria multiply best at 86-98.6 degrees F (30-37 degrees C), but also multiply better  
12 than all other bacteria at refrigerator temperatures, something that allows temperature to be used as a  
13 means of differentiating Listeria from other contaminating bacteria.

14 14. Called an “opportunistic pathogen,” Listeria is noted to cause an estimated 2,600 cases  
15 per year of severe invasive illness. Perhaps not surprisingly then, “foodborne illness caused by Listeria  
16 monocytogenes has raised significant public health concern in the United States, Europe, and other  
17 areas of the world.”

18 15. Listeria is an organism, which can cause serious and sometimes fatal infections in young  
19 children, frail or elderly people, and others with weakened immune systems. Although healthy  
20 individuals may suffer only short-term symptoms such as high fever, severe headache, stiffness,  
21 nausea, abdominal pain and diarrhea, Listeria infection can cause miscarriages and stillbirths among  
22 pregnant women.

23 16. A few days before Halloween 2014, the decedent, Shirlee Frey, went to the Safeway  
24 store in Felton, California and purchased, among other things, a commercially produced, prepackaged  
25 caramel apple. At some point after its purchase, the plaintiff consumed the caramel apple as intended  
26 by its manufacturer and seller.

27 17. In the week or so prior to November 6, the decedent Shirlee Frey began to feel ill. On  
28 November 6, due to weakness and instability related to her illness, Mrs. Frey fell and hit her head.

1 After evaluation in the emergency room, the decision was made to airlift Mrs. Frey to Stanford  
2 Hospital for surgery on what was thought to be a brain-bleed.

3 18. The surgery went well enough so that Mrs. Frey was discharged on November 14 and  
4 admitted for rehabilitative care at Pacific Coast Manor, which is located at 1935 Wharf Road, Capitola,  
5 California, 95010. Mrs. Frey appeared to be improving over the next ten days or so; however, her  
6 condition soon started to deteriorate. On Thanksgiving Day, November 27, 2014, Mrs. Frey could not  
7 be awakened. Consequently, the decision was made to readmit her to care at Stanford Hospital.

8 19. On December 2, 2014, the doctors at Stanford Hospital informed the family that Mrs.  
9 Frey was suffering from a listeria infection—listeriosis. She died that same day. Since the date of her  
10 tragic death, health department investigators have informed the family that Mrs. Frey had been infected  
11 with the outbreak strain and was thus a victim of the outbreak.

12 **FIRST CAUSE OF ACTION**  
13 **STRICT LIABILITY CLAIM**

14 **(Violation of Federal Food Drug and Cosmetic Act, 21 U.S.C. § 342(a), and California's Sherman  
15 Food, Drug, and Cosmetic Laws, California Health and Safety Code § 109875, et seq.)**

16 20. By this reference, Paragraphs 1 through 19 of this Complaint are fully incorporated as if  
17 each and every one of these paragraphs was set forth here in its entirety.

18 21. The defendant Safeway and the DOE defendants, each of which is in the business of  
19 manufacturing and selling food products, are in the chain of distribution for the subject product—that  
20 is, the commercially produced, prepackaged caramel apples that the CDC and other public health  
21 investigators have linked to Listeria outbreak from which the claims set forth here arise. As a result of  
22 being in the chain of distribution for the subject product, the defendant Safeway and DOE defendants  
23 are each participants in the enterprise responsible for placing the subject product in the stream of  
24 commerce and, thus, subject to strict liability under the laws of California.

25 22. The subject product that the decedent consumed was a ready-to-eat product, intended  
26 for consumption without further preparation, cooking, or other step that might eliminate the presence  
27 of Listeria or other pathogens.

28 23. A ready-to-eat product contaminated with Listeria is adulterated within the meaning of  
Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 342(a), and implementing regulations. See 21

1 C.F.R. §109.3(c) and (d). In addition, a ready-to-eat product contaminated with Listeria is defective,  
2 unreasonably dangerous, and not fit for human consumption. The subject product was adulterated, as  
3 well as being defective, unreasonably dangerous, and not fit for human consumption.

4 24. The subject product was expected by Safeway and the DOE defendants to reach all  
5 consumers, and to be consumed by them, without any substantial change, and the subject product did in  
6 fact did reach the decedent Shirlee Frey without any substantial change in the product.

7 25. The decedent Shirlee Frey consumed the subject product, having received the same  
8 without any substantial change occurring, and she consumed the product in the manner expected and  
9 intended, including when they consumed it.

10 26. The decedent Shirlee Frey was infected with Listeria as a result of consuming the  
11 defective and unreasonably dangerous subject product. Furthermore, Mrs. Frey suffered severe,  
12 continuing, and ultimately fatal injuries, as alleged above, as a direct and proximate result of the  
13 consumption of the subject product. Accordingly, the defendant Safeway and DOE defendants are each  
14 strictly liable to the plaintiffs for all damages proximately caused by the sale of a defective and  
15 unreasonably dangerous food product.

16 **SECOND CAUSE OF ACTION**  
17 **BREACH OF IMPLIED WARRANTY CLAIM**

18 27. By this reference, Paragraphs 1 through 26 of this Complaint are fully incorporated as if  
19 each and every one of these paragraphs was set forth here in its entirety.

20 28. The defendant Safeway and DOE defendants impliedly warranted that the subject food  
21 products were of merchantable quality, and thus were safe and fit for human consumption. The  
22 decedent Shirlee Frey purchased and consumed the subject product, and reasonably relied upon the  
23 skill and judgment of defendants as to whether the products were of merchantable quality and fit for  
24 human consumption.

25 29. The defendants breached these implied warranties in that subject products were  
26 contaminated with Listeria. As a direct, legal and proximate result of the breach of implied warranties,  
27 the plaintiffs suffered and may continue to suffer injury, harm, special damages and economic loss.

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**THIRD CAUSE OF ACTION**  
**NEGLIGENCE & NEGLIGENCE PER SE CLAIMS**

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3       30. By this reference, Paragraphs 1 through 29 of this complaint are fully incorporated as if  
4 each and every one of these paragraphs was set forth here in its entirety.

5       31. The defendant Safeway and DOE defendants were negligent in the manufacture, sale, or  
6 distribution of the subject product, thus causing the subject outbreak, and thus also causing the  
7 plaintiff's injury and death.

8       32. More specifically, the defendant Safeway and DOE defendants each owed a duty to  
9 properly supervise, train, and monitor employees, or the employees of their agents or subcontractors, in  
10 the preparation of the product or product-ingredients it sold, doing so to ensure compliance with the  
11 each defendant's own specifications and performance standards, as well as to ensure compliance with  
12 all applicable health regulations, including the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §  
13 342(a), implementing regulations, 21 C.F.R. §109.3(c) and (d), FDA Good Manufacturing Practices  
14 regulations, 21 C.F.R. Part 110, Subparts (A)-(G). The defendants violated one or more of the safety  
15 requirement that the law imposes and, as a result, breached duties owed to the plaintiffs, and injuring  
16 the plaintiffs as a direct and proximate result of such breaches.

17       33. The defendant Safeway and DOE defendants each additionally owed a duty to comply  
18 with statutory and regulatory provisions that pertained or applied to either the import, manufacture,  
19 distribution, storage, or sale of their product or product-ingredients, including, but not limited to, the  
20 Federal Food, Drug, and Cosmetics Act, § 402(a), as codified at 21 U.S.C. § 342(a), which bans the  
21 manufacture, sale and distribution of any "adulterated" food, and California's Sherman Food, Drug,  
22 and Cosmetic Act, CA Health & Safety Code § 110545, which imposes an identical ban on such  
23 adulteration.

24       34. Under both federal and applicable state law, food is adulterated if it contains a  
25 "poisonous or deleterious substance, which may render it injurious to health." Listeria is such a  
26 substance. Thus, by either manufacture, distribution, storage, or sale of the subject product or the  
27 subject product's ingredients, the defendants breached their statutory and regulatory duties, and the  
28 plaintiffs were each injured as a direct and proximate result of such breaches.

1 35. The defendants' negligent acts and omissions included, but were not limited to:

2 (a) Failure to prevent the contamination of the product or product-ingredients by  
3 Listeria, including the failure to implement or non-negligently perform inspection and monitoring of  
4 the product or product-ingredients such that its adulterated condition would be discovered prior to its  
5 sale or distribution to the public for human consumption.

6 (b) Failure to properly supervise, train, and monitor their employees, or the  
7 employees of their agents or subcontractors, on how to ensure the manufacture, distribution or sale of  
8 food product free of adulteration by potentially lethal pathogens.

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

12 37. The plaintiffs were in the class of persons intended to be protected by these statutes and  
13 regulations, and were injured as the direct and proximate result of the defendants' violation of  
14 applicable federal, state and local food safety regulations.

15 38. The defendants breached the aforementioned duties as alleged above, which breach  
16 constituted the proximate cause of injury to the plaintiffs.

17 **FOURTH CAUSE OF ACTION**  
18 **SURVIVAL ACTION**  
19 **(C.C.P. Section 377.30, et seq.)**

20 39. By this reference, Paragraphs 1 through 38 of this complaint are fully incorporated as if  
21 each and every one of these paragraphs was set forth here in its entirety.

22 40. As a further legal result of the acts, omissions and conduct of defendants Safeway Inc.,  
23 and Does 1-20, inclusive, and each of them, as aforesaid, the decedent and plaintiff Shirlee Jean Frey  
24 incurred medical expenses prior to her death for medical treatment and related expenses to her damage  
25 in an amount to be proven at time of trial.

26 **DAMAGES**

27 41. The plaintiffs have suffered general and special, incidental and consequential damages,  
28 including loss of consortium, as the direct and proximate result of the acts and omissions of the



1 defendants, which damages shall be fully proven at the time of trial, including, but not limited to,  
2 damages for loss of enjoyment of life, both past and future; medical and medical related expenses, both  
3 past and future; wage and economic loss, past and future; emotional distress, and future emotional  
4 distress; medical and pharmaceutical expenses, past and future; and other ordinary, incidental and  
5 consequential damages as would be anticipated to arise under the circumstances.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, plaintiffs pray as follows:

8 (1) That the court award plaintiffs judgment against the defendants, jointly and severally, in  
9 such sums as shall be determined to fully and fairly compensate plaintiffs for all general, special,  
10 incidental and consequential damages incurred, or to be incurred, by plaintiffs as the direct and  
11 proximate result of the acts and omissions of the defendant;

12 (2) That the court award plaintiffs their costs, disbursements and reasonable attorneys' fees  
13 incurred;

14 (3) That the court award plaintiffs the opportunity to amend or modify the provisions of this  
15 complaint as necessary or appropriate after additional or further discovery is completed in this matter,  
16 and after all appropriate parties have been served;

17 (4) That the court awards such other and further relief as it deems necessary and proper in  
18 the circumstances; and

19 (5) Exemplary damages pursuant to survival action.

20 **JURY TRIAL DEMANDED**

21 Dated: December 22, 2014

22 Respectfully submitted,  
23 **RAINS LUCIA STERN, PC**

24 By: Harry S. Stern  
25 Attorneys for Plaintiffs

26 Respectfully submitted,  
27 **MARLER CLARK, LLP PS**

28 By: William D. Marler (pro hac vice pending)  
Attorneys for Plaintiffs