

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT

Cody Werkmeister, individually, and on )  
behalf of all those similarly situated, )

Plaintiffs, )

v. )

HARDEE'S FOOD SYSTEMS, LLC )  
f/k/a HARDEE'S FOOD SYSTEMS, )  
INC., )

Defendant. )

**2015-CP-42-** 3982  
2015-CP-\_\_\_\_\_

COMPLAINT  
(JURY TRIAL DEMANDED)

FILED  
SPARTANBURG COUNTY  
2015 SEP 23 AM 11:08  
M. HOPE BLACKLEY

**CLASS ACTION COMPLAINT FOR DAMAGES**

The plaintiff, Cody Werkmeister, individually, and on behalf of all persons similarly situated, by and through his counsel of record, Brett Dressler, Esq. of Sellers Ayers Dortch Lyons Attorneys at Law and William D. Marler, Esq., of Marler Clark, LLP, PS (pending admission *pro hac vice*), states, alleges, and complains as follows:

**I. PARTIES**

1. The plaintiff, Cody Werkmeister, is, and at all times material to this action, was, a resident of Spartanburg County, South Carolina. On or about September 8, 2015, the plaintiff visited the defendant's restaurant where he purchased food and dined.

2. The defendant, HARDEE'S FOOD SYSTEMS, LLC f/k/a HARDEE'S FOOD SYSTEMS, INC., (hereinafter "defendant") is a Delaware corporation with its principal place of business in Missouri. The defendant, at all times material to this action, was carrying on in the ordinary course of business of the corporation the manufacture, preparation, service, and sale of food to its store customers at the Hardee's restaurants at 12209 Greenville Hwy, Lyman, South

Carolina and at 1397 E. Main St., Duncan, South Carolina and, as such, was doing business in Spartanburg County, South Carolina. (hereinafter “the defendant’s restaurants”).

## II. JURISDICTION AND VENUE

3. This court is vested with jurisdiction over the defendant because at all times material to this action, the defendant was a corporation doing business within Spartanburg County, State of South Carolina, and the claims alleged in this Complaint arose from the defendant’s in-state business activities.

4. The venue of this action is proper in Spartanburg County because the defendant transacted business and maintained a place of business in this county and because the causes of action arose in this county.

## III. THE NATURE OF THE ACTION

5. **A Public Health Alert:** After the South Carolina Department of Health and Environment (SCDHE) was notified on September 17, 2015 of an individual employed by and working at the defendant’s restaurants, who had tested positive for hepatitis A, and who had worked at the defendant’s restaurants during his hepatitis A infection, department leadership decided to alert the public about the health risks posed by exposure to hepatitis A. Specifically, Dr. Anna-Kathryn Rey, M.D. medical consultant in DHEC’s Bureau of Disease Control, recommended that customers and staff who ate food at the defendant’s restaurants during the “Exposure Periods,”—that is, between September 4 and September 15 at the Lyman-area restaurant and between September 4 and September 13 at the Duncan-area restaurant—should receive post-exposure treatment for hepatitis A.

6. Post-exposure treatment is recommended for individuals if it can be administered less than two weeks from their date of consuming anything from the restaurant with the last date

being September 15. It is “important to get treatment as soon as possible to prevent the virus from developing into hepatitis A infection,” stated Dr. Rey.

7. **Providing Emergency Preventive-Care:** Customers and staff who ate at the Lyman-area or Duncan-area restaurants during the Exposure Periods were encouraged to come to DHEC’s Spartanburg County Health Department or Greenville County Health Department for post-exposure treatment on September 19 or 20 between 1:00 and 5:00 P.M. or on September 21 between 8:30 and 5:00 P.M. The Spartanburg and Greenville county health departments will be offering post-exposure treatments again on Tuesday, September 22 between 8:30 A.M. and 5:00 P.M. As a result of the weekend clinics, 2,379 individuals have received post-exposure treatment for hepatitis A.

8. Cody Werkmeister received the hepatitis A vaccine on September 21, 2015 at the CDHE Spartanburg location.

#### IV. CLASS ACTION ALLEGATIONS

9. This is a class action lawsuit brought pursuant to South Carolina Rule of Civil Procedure 23(a) on behalf of all persons who were exposed to the hepatitis A virus (HAV) at the defendant’s restaurants during the Exposure Periods by the fact of an infected employee working there and preparing food. The named parties and class-members were required for public health and personal safety reasons to obtain an HAV vaccination or an IG shot (with some persons also getting an HAV blood test) because of their HAV-exposure at the defendant’s restaurant. All such persons took immediate preventative action at the recommendation of public health authorities or other health professionals, and, as a result, did not subsequently develop HAV infections.

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10. Even more specifically, this class includes all persons who were exposed to HAV as a direct and proximate result of: (1) exposure to an HAV-infected employee of the defendant at the defendant's restaurants; (2) consumption of food that was manufactured and sold by the defendant at the defendant's restaurants during the Exposure Periods; and (3) who obtained an HAV vaccination, an IG shot, or HAV blood test because of their HAV-exposure, and who, as a result, did not subsequently develop HAV infections.

11. The plaintiffs do understand and believe that an employee of the defendant, who was infected with HAV, prepared or served food on numerous days and occasions to customers other than the plaintiffs named here, and during the time-period alleged. Although the plaintiffs do not yet know the precise size of the class, because this information remains confidential and within the exclusive control of the applicable state and regional health departments and districts, the plaintiffs believe that the number of potential class members may exceed 3,000.

12. The defendant's food, which was prepared by an employee infected with HAV, and which was adulterated, unsafe, and defective as a result, was distributed and sold in high volume, during the Exposure Periods, to an uncertain number of guests and patrons, making this class so numerous that joinder of all members in this case is impracticable. The Spartanburg Country Health Department and Greenville County Health Department can, however, transmit notice of this class action to each known potential class member, once the respective individual class is certified. Such notifications have been used successfully in prior HAV class actions for which counsel of record have obtained certification and settlement.

13. In addition to numerosity, there are significant questions of law or fact that are common to the class, including but not limited to:

- (a) Whether food prepared by or with a food service employee infected with HAV is adulterated, safe to eat, defective, or otherwise prohibited from sale and distribution under the laws of South Carolina;
- (b) Whether the defendant is strictly liable for the sale of food prepared by or with a food service employee infected with HAV;
- (c) Whether the defendant was negligent in allowing one or more of its employees to work while infected with HAV;
- (d) Whether the defendant was negligent in not requiring its food-service employees to obtain HAV immunizations;
- (e) Whether the defendant was negligent in failing to properly supervise, train, and monitor its employees who were engaged in the manufacture, preparation, and delivery of the food product that the defendant sold to its patrons;
- (f) Whether the defendant was negligent in its manufacture and sale of HAV-contaminated food under the South Carolina Defective Products Act and similar statutes;
- (g) Whether the plaintiffs are among the class of persons designed to be protected by the statutory and regulatory provisions of the South Carolina Defective Products Act, South Carolina Retail Food Establishments Regulations 62-25, and similar statutes;
- (h) Whether the defendant was negligent in failing to notify its patrons in a timely matter that one or more of its employees worked while infected with HAV;
- (i) Whether the defendant breached its duty to prevent the contamination of food, drink, and the premises at its restaurant with HAV;
- (j) Whether the defendant breached its duty to the plaintiffs to manufacture a product that was reasonably safe in construction, that did not materially deviate from applicable

DEPARTMENT OF  
 STATE RECORDS & ARCHIVES  
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design specifications, and that did not deviate materially from identical units in the defendant's product line;

(k) Whether the defendant manufactured, distributed, and sold a food product that was adulterated, not fit for human consumption, in a defective condition unreasonably dangerous to the plaintiffs, and not reasonably safe as designed, manufactured, or sold;

(l) Whether the defendant breached its duty to exercise reasonable care in the preparation and sale of food products;

(m) Whether the defendant breached its duty to the plaintiffs to promulgate, enforce and abide by work rules, protocols and policies regarding ill employees involved in the handling, preparation, service, and sale of food to the public;

(n) Whether the defendant is liable for damages to all potentially exposed persons who obtained vaccinations to avoid HAV infections.

14. The claims of the representative parties are typical of the claims of the potential class members, each of whom meet the class definition as set forth above. The damages and relief sought by the representative parties are also typical to the class and its members, because of the essential identity of the nature and process of treatment, its costs, and physical and emotional consequences amongst the class representatives and the class members.

15. The named representative has common interests with the members of the class, will vigorously prosecute the interests of the class through qualified counsel, and does not have identifiable conflicts with any other potential class member and, thus, the named representative will fairly and adequately represent and protect the interests of the whole class.

16. The plaintiffs have retained competent counsel, who are experienced in foodborne illness litigation, have extensive experience with class action litigation, and are experienced trial

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attorneys who have tried numerous complex trials to verdict. The plaintiffs' co-counsel—William D. Marler of the Seattle, Washington-based law firm Marler Clark—has represented thousands of individuals in class action lawsuits related to HAV, including:

(a) More than 1,500 individuals in a class action related to a previous HAV outbreak at the D'Angelo's in Swansea, Massachusetts in 2001;

(b) Approximately 1,300 persons as part of a class action on behalf of persons who received IG shots due to an HAV outbreak in June and July 2000 in Spokane, Washington, which was associated with food served at a Carl's Jr. fast-food restaurant;

(c) Approximately 9,000 persons who received IG shots due to an outbreak of HAV at a Chi-Chi's restaurant near Pittsburgh, Pennsylvania in 2003;

(d) Approximately 3,800 persons as part of a class action on behalf of persons who received IG shots due to an HAV exposure in June 2004 at a Friendly's restaurant in Arlington, Massachusetts;

(e) Approximately 850 persons as part of a class action on behalf of persons who received IG shots due to an HAV exposure at a Quizno's in Boston, Massachusetts in 2004;

(f) Over 3,000 persons who received IG shots due to potential HAV exposure in January 2007 at a Houlihan's restaurant in Geneva, Illinois;

(g) More than 5,000 persons who were required to get vaccinations against HAV following exposure at a McDonald's restaurant in Milan, Illinois in 2009;

(h) Approximately 3000 claimants who dined at The Olive Garden Italian Restaurant in Fayetteville, North Carolina who thereby were required to get vaccinations against HAV following their potential exposure to hepatitis A.

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(i) All persons who consumed food and drink at a McDonald's Restaurant in Northport, Alabama on March 14, 2012 or on March 16, 2012, and who thereby were required to get vaccinations against HAV following their potential exposure to HAV; and

(j) More than 700 claimants who consumed food or drink purchased at a Papa John's restaurant in Charlotte, North Carolina in March and April 2014, and who thereby were required to get vaccinations against HAV following their potential exposure to hepatitis A;

(k) Approximately 2,400 persons who received HAV vaccines in 2014 due to exposure at a Charlotte, North Carolina Papa Johns; and

(l) Presently Marler Clark is class counsel for nationwide putative HAV class involving as many as 25,000 claimants.

17. The amount in controversy exceeds one hundred dollars for each member of the proposed class.

**V. FIRST CAUSE OF ACTION**

**(Strict Product Liability)**

18. The defendant is the owner and operator of the retail food establishment that manufactured and sold to its customers, food that was prepared by an HAV-infected employee, and which was adulterated, unsafe, and in a defective condition unreasonably dangerous to the user or consumer as a result.

19. The defendant is the seller of the food product that injured the plaintiffs under the South Carolina Products Act ("Act") S.C. Stat. Ann. §§ 15-73-10 *et al*, and similar statutes. The contaminated food product that the defendant prepared and sold, and that the plaintiffs consumed, was a product within the meaning of the Act and similar statutes. The defendant, at

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CLERK OF SUPERIOR COURT



all times material to this action, has been engaged in the business of selling food products to persons such as the plaintiffs.

20. The plaintiffs allege that the food product that the defendant manufactured and sold, and that the plaintiffs consumed, was in a defective condition unreasonably dangerous to the plaintiffs at the time that it left the defendant's hands because it was prepared by an HAV-infected employee and, thus, was adulterated, unsafe, and defective as a result. See South Carolina Retail Food Establishments Regulation 3-101.11.

21. Because the food that the defendant manufactured and sold and that was later consumed by the plaintiffs was adulterated, not reasonably safe in construction, not fit for human consumption, and lacked adequate warnings, the defendant is liable to the plaintiffs for the harm proximately caused to the plaintiffs by their manufacture and sale of HAV-contaminated food that was adulterated, unsafe, and defective as a result.

## VI. SECOND CAUSE OF ACTION

### (Negligence and Negligence Per Se)

22. The defendant manufactured, distributed, and sold a food product that was potentially adulterated, that was not fit for human consumption, and that was not reasonably safe as designed, manufactured, or sold.

23. The defendant was negligent in manufacturing, distributing, and selling a food product that was adulterated with HAV, not fit for human consumption, and not unreasonably dangerous because it was contaminated with HAV.

24. The defendant had a duty to properly supervise, train, and monitor its employees, or the employees of its agents or subcontractors engaged in the preparation of its food products, to ensure compliance with the defendant's operating standards and to ensure compliance with all

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applicable health regulations as required by the South Carolina Retail Food Establishments Regulation 2-201.11 and 2-201.12.

25. The defendant failed to properly supervise, train, and monitor its employees engaged in the manufacture, preparation, and delivery of the food product that the defendant sold to its patrons as required by the South Carolina Retail Food Establishments Regulation 2-201.11 and 2-201.12 and, thus, breached that duty.

26. The defendant owed a duty to the plaintiffs to comply with all statutory and regulatory provisions that pertained or applied to the manufacture, distribution, storage, labeling, and sale of its food products, including The South Carolina Retail Food Establishments Regulation 61-25, and all other applicable local, state, and federal health and safety regulations.

27. The defendant, by its manufacture, distribution, storage, labeling, and sale of adulterated, unsafe, and unhealthy food products to the plaintiffs, breached that duty.

28. The defendant owed the plaintiffs the duty to exercise reasonable care in the preparation and sale its food products, as it was reasonably foreseeable that the defendant's manufacture and sale of food products contaminated with HAV would cause injury to and harm all persons potentially exposed to HAV.

29. The defendant, by preparing and selling food that was contaminated with HAV, breached that duty, and thereby caused the plaintiffs' injuries.

30. The plaintiffs, as customers and patrons of the defendant, were the defendant's business invitees and, are therefore, are among the class of persons designed to be protected by the statutory and regulatory provisions pertaining to the manufacture, distribution, storage, labeling, and sale of food by the defendant.

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31. The defendant was negligent in producing and selling a food product contaminated with HAV, and in allowing one or more of its employees to have direct and/or indirect contact with customers and the food to be served to customers. The defendant's negligent acts and omissions included, but were not limited to:

- (a) Failure to require that their employees be vaccinated against HAV;
- (b) Failure to prevent one or more employees from working while infected with HAV;
- (c) Failure to notify their patrons and the public in a timely manner that one or more of their employees worked while infected with HAV;
- (d) Failure to prevent the contamination of food, drink, and the premises at their restaurant with HAV; and
- (e) Failure to promulgate, enforce and abide by work rules, protocols and policies regarding ill employees involved in the handling, preparation, service and sale of food to the public.

32. The defendant breached the aforementioned duties as alleged in this Complaint, and the plaintiffs were injured as a proximate result.

## VII. DAMAGES

33. The named parties, and all those similarly situated, *i.e.* those persons who fit the class definition, have suffered general and special damages as the direct and proximate result of the acts and omissions of the defendant, which damages shall be fully proven at the time of trial. These damages are common among the representative parties and putative class members and include: wage loss; medical and medical-related expenses; travel and travel-related expenses; emotional distress; fear of harm and humiliation; physical pain; physical injury; and all other

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ordinary, incidental, and consequential damages as would be anticipated to arise under the circumstances.

**PRAYER FOR RELIEF**

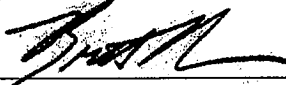
WHEREFORE, the plaintiffs and all those similarly situated pray for the following relief:

- (1) For a trial by jury;
- (2) That the plaintiffs recover judgment for damages, on behalf of themselves and all those similarly situated, against the defendant for such sums as shall be determined to fully and fairly compensate them for all general, special, incidental, and consequential damages respectively incurred by them as the direct and proximate result of the acts and omissions of the defendant;
- (3) That the court awards the named parties, and all those similarly situated their respective costs, disbursements and reasonable attorneys' fees incurred;
- (4) That the court award the named parties, and all those similarly situated, the opportunity to amend or modify the provisions of this petition as necessary or appropriate after additional or further discovery is completed in this matter, and after all appropriate parties have been served; and
- (5) That the court awards the named parties, and all those similarly situated such other and further relief as it deems necessary and equitable in the circumstances.

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THIS the 23<sup>rd</sup> day of September 2015.

**SELLERS AYERS DORTCH LYONS**

  
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