

STATE OF NEW YORK  
SUPREME COURT COUNTY OF SENECA

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CHRISTOPHER WELCH,  
AND OTHERS SIMILARLY SITUATED,

Plaintiffs,

-vs-

JASCOR, INC. d/b/a McDONALD'S  
RESTAURANT  
2500 Mound Road  
Waterloo, New York 13165

Defendant.

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Plaintiffs designate Seneca County  
as the place of trial.

The basis of venue is Defendant's  
place of business.

**SUMMONS**

Index No.:

49796

SENECA COUNTY  
CLERK'S OFFICE

2015 NOV 18 PM 2:47

To the above-named Defendant:

**YOU ARE HEREBY SUMMONED** to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiffs' attorneys within twenty (20) days after the service of this summons, exclusive of the day of service (or within thirty (30) days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded herein.

Dated: November 18, 2015

UNDERBERG & KESSLER LLP

By: 

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**CLASS ACTION  
COMPLAINT**

Index No.: 49796

SENECA COUNTY  
CLERK'S OFFICE

2015 NOV 10 PM 2:47

**CLASS ACTION COMPLAINT FOR DAMAGES**

Named Plaintiff, Christopher Welch, on behalf of himself and all those similarly situated, by and through his counsel of record, Paul V. Nunes of Underberg and Kessler, LLP, and William D. Marler of Marler Clark, LLP., P.S, (pending admission *pro hac vice*) states, alleges upon information and belief as follows:

**I.**

**PARTIES**

1. Plaintiff, Christopher Welch, is a resident of Waterloo, New York. Mr. Welch purchased and consumed food and/or drink at McDonald's Restaurant, located at 2500 Mound Road, Waterloo, New York 13165 ("McDonald's"), on November 3, 2015 and November 7, 2015. The New York State Department of Health in conjunction with the Seneca County Health Department (Collectively "DOH") announced on November 13, 2015, that customers who had visited Defendant's restaurant between October 31, 2015

and November 8, 2015 have been exposed to the Hepatitis A Virus (“HAV”) through a McDonald’s infected employee. The DOH announced that persons who had consumed food or drink at Defendant’s restaurant were accordingly at risk for development of HAV infections. DOH Officials further urged that these persons contact their health care provider and be administered immune-globulin (“IG”) vaccine shots as soon as possible as a result of their potential Hepatitis A exposure. Following the warning, a large number of persons (estimated to be at least 1,000), including the named Plaintiff, obtained the recommended IG shots and blood test. The proposed class consists of all those persons who obtained the blood test and/or IG vaccinations, at a clinic or otherwise, following the DOH warning.

2. Defendant Jascor, Inc. d/b/a as McDonald’s Restaurant at all material times owned and/or operated McDonald’s Restaurant, located at 2500 Mound Road, Waterloo, New York 13165. Defendant at all times material hereto was carrying on in its ordinary course of business of the company, was in the business of the manufacture, distribution, preparation, service and/or sale of food to its store customers at that location, and as such was doing business in Waterloo, New York.

## II.

### JURISDICTION AND VENUE

3. This court is vested with original jurisdiction over Defendant because it was doing business within the State of New York, pursuant to New York CPLR §§ 301, *et seq.*

4. The venue of this action is proper in Seneca County, pursuant to New York CPLR § 503, as the events giving rise to the cause of action occurred in Waterloo, New York.

### III.

#### THE NATURE OF THE ACTION

5. This is a class action lawsuit brought on behalf of persons injured as a result of their potential exposure to Hepatitis A Virus ("HAV") between October 31, 2015 and November 8, 2015 at Defendant's restaurant. The exposure was caused by 1) exposure to a HAV infected employee of Defendant and/or 2) consumption of contaminated food and/or drink prepared by Defendant.

6. The Named Plaintiff and putative class Plaintiffs in this lawsuit are those persons who were required for public and personal safety reasons to obtain a blood test and/or vaccination with immune globulin (IG) because of this exposure.

### IV.

#### CLASS ACTION ALLEGATIONS

7. This action is brought as a class action, pursuant to New York CPLR §§ 901, *et seq.*, on behalf of all persons who were potentially exposed to HAV between October 31, 2015 and November 8, 2015, at Defendant's restaurant, and who, as a result of this potential exposure, were required to obtain a blood test and/or IG vaccination. Specifically, this class includes all persons who were possibly exposed to HAV as a direct and proximate result of: (1) their exposure to an HAV infected employee of the Defendant at the Defendant's restaurant and/or (2) their consumption of food that was manufactured and sold by Defendant at its restaurant.

8. Plaintiffs do not yet know the precise size of the class, because this information remains confidential, and within the exclusive control of the DOH and/or other applicable state and regional health departments and districts. However, Plaintiffs

understand and believe that an employee of the Defendant was ill with HAV, and prepared or served food to customers at McDonald's on several days. Therefore the potential class is numerous and is estimated to be at least 1,000.

9. Because the Defendant's potentially contaminated food was distributed and sold in high volume, and over a number of days, affecting a large number of people, joinder is impracticable. In addition, joinder is impracticable because while it is known that a large number of people were injured, the DOH's epidemiological investigation is kept confidential, which does not allow the DOH to disclose the identity of any persons injured in the outbreak without an order from a court of appropriate jurisdiction.

10. There are numerous questions of law and fact that are common to the respective class members, including but not limited to:

- a. Whether Defendant breached express and implied warranties by its sale of food that was potentially contaminated with HAV;
- b. Whether Defendant was negligent in its manufacture and sale of food that was potentially contaminated with HAV;
- c. Whether Defendant was negligent in allowing one or more of its employees to work while infected with HAV;
- d. Whether Defendant was negligent in not requiring its food-service employees to obtain IG vaccinations;
- e. Whether Defendant is liable to all potentially exposed persons who obtained IG vaccinations to avoid infection.

11. Common questions of law and fact predominate over any questions affecting only individual class members.

12. Named Plaintiff's claims are typical of the claims available to all potentially exposed class members, each of whom was potentially exposed to either potentially contaminated foods or potentially infected persons. The damages and relief sought by the Named Plaintiff are also common to the exposed class and its members, because the nature and process of IG vaccination treatment, its costs, and additional consequential losses are also similar throughout the exposed class.

13. Named Plaintiff will fairly and adequately represent and protect the interests of the class. Named Plaintiff has no identifiable conflicts with any other potential class member.

14. Named Plaintiff has retained competent counsel, who are experienced in food-borne illness litigation, and who have extensive experience with class action litigation. Plaintiff's co-counsel – William D. Marler and the Seattle, Washington law firm of Marler Clark – was involved in the Jack-in-the-Box *E. coli* O157:H7 litigation during its entire five-years duration. That litigation included the Jack-in-the-Box class action lawsuit that was filed in Washington State Superior Court, and the consolidated federal court action (*In re Jack in the Box/Foodmaker Litigation*) that proceeded in United States District Court and involved over twenty (20) families with injured children. Marler Clark has represented 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 there. Marler Clark represented more than 1,500 individuals in a class action related to an HAV outbreak at the D'Angelo's store in Swansea, Massachusetts in 2001. In 2003, Marler Clark represented approximately 9,000 persons who received IG shots due to an

outbreak of HAV at a Chi-Chi's restaurant near Pittsburgh, Pennsylvania. Marler Clark also represented 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. Marler Clark also represented 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 restaurant in Boston, Massachusetts in 2004. Marler Clark also represented over 3,000 persons who received IG shots due to potential HAV exposure in January 2007, at a Houlihan's restaurant in Geneva, Illinois.

15. Plaintiffs' co-counsel, Paul V. Nunes and the Rochester-Buffalo law firm of Underberg & Kessler LLP have worked with William D. Marler and Marler Clark on numerous food borne illness and toxic cases throughout New York State including the Seneca Park Cryptosporidium outbreak class action (which affected over 4,000 persons), the New Hawaii Restaurant HAV outbreak class action (which affected over 3,000 persons) and claims against BJ's (*E. Coli* contaminated hamburger), Dole (*E. Coli* contaminated spinach) and the Brook Lea Country Club of Rochester, New York (*Salmonella* contaminated food which affected over 1,000 victims).

16. Plaintiffs are unaware of any possible difficulty in the management of this litigation that would prevent it from being maintained as a class action. The class action mechanism is superior to other alternatives, if any exist, for the fair and efficient adjudication of the controversy.

17. The identity of potential class members can be ascertained by providing reasonable notice to the potential class members, by publication in local newspapers and other similar media.

18. In the absence of a class action, individual litigation of these claims will be unreasonably expensive, in light of the probable damages that might be recovered, and will unreasonably burden the courts of this state, wasting important judicial resources.

19. In the absence of a class action, individual litigation will also waste money that would otherwise be available to compensate these persons who were potentially exposed to infected persons or food, and who accordingly needed vaccination.

20. In the absence of a class action, persons who might otherwise possess a remedy, and might otherwise be able to seek judicial relief, may be left without a reasonable means to obtain justice and full compensation for the injuries they sustained.

21. In the absence of a class action, and in the absence of prompt notification to all potential class members, any minor claims arising from this potential HAV outbreak may languish, and may do so without the statute of limitation beginning to run until each minor turns 18. As a result, litigation related to this potential outbreak could be in the courts, intermittently, and without coordination, for the next 20 years. In contrast, a class action lawsuit will allow for the efficient and expeditious adjudication of all such claims.

## V.

### **FIRST CAUSE OF ACTION**

(Breach of Warranties)

22. Plaintiffs repeat and reallege all prior paragraphs as if fully set forth herein.

23. At all material times, Defendant was and is the owner and/or operator of McDonald's Restaurant located in Waterloo, New York, the retail food establishment that manufactured, distributed, prepared, served and/or sold the potentially adulterated food that created the risk and injured the Plaintiffs. At all material times, Defendant was and is



the manufacturer, distributor, preparer, server and/or seller of the potentially adulterated food product, which food product reached its intended consumers without substantial change from the condition in which it was sold by Defendant.

24. Defendant is subject to liability to Plaintiffs for its breach of express and implied warranties made to its patrons with respect to the food product sold to those patrons, including the implied warranties of merchantability and of fitness for a particular use. Specifically, Defendant expressly warranted, through its distribution and sale of food to the public, and by the statements and conduct of its employees and agents, that the food it manufactured, distributed, prepared, served and/or sold to its patrons was fit for human consumption, and not otherwise potentially adulterated or injurious to health.

25. Plaintiffs allege that the food sold by Defendant and consumed by its patrons, which was potentially contaminated with HAV and related filth and adulteration, would not pass without exception in the trade, and was thus in breach of the implied warranty of merchantability.

26. Plaintiffs further allege that the potentially contaminated food manufactured, distributed, prepared, served and/or sold by Defendant and consumed by its patrons was not fit for the uses and purposes intended by either the patrons or Defendant, *i.e.*, human consumption, and that this product was therefore in breach of the implied warranty of fitness for its intended use.

27. Defendant owed a duty to its patrons and to Plaintiffs to manufacture, distribute, prepare, serve and/or sell only food that was not potentially adulterated, was fit for human consumption, was reasonably safe in construction, and was free of potential

pathogenic viruses or other substances injurious to human health. Defendant breached this duty.

28. Defendant owed a duty to its patrons and to Plaintiffs to manufacture, distribute, prepare, serve and/or sell food that was fit for human consumption, and that was safe to the extent contemplated by a reasonable and ordinary consumer. Defendant breached this duty.

29. Plaintiffs are all persons who reasonably sought blood tests and/or IG vaccination protection from HAV after exposure to food, manufactured, distributed and/or sold by Defendant, and are thus all persons who Defendant might reasonably have expected to use, consume or be affected by its potentially contaminated food products.

30. Because the food that its patrons purchased and consumed was potentially adulterated, not fit for human consumption, not reasonably safe in design and construction, lacked adequate warnings and instructions, and was unsafe to an extent beyond that contemplated by the ordinary consumer, Defendant breached both express and implied warranties, and is liable to Plaintiffs affected thereby for the harm proximately caused to Plaintiffs by its manufacture, distribution and/or sale of potentially contaminated and adulterated food products.

## VI.

### **SECOND CAUSE OF ACTION**

(Negligence)

31. Plaintiffs repeat and reallege all prior paragraphs as if fully set forth herein.

32. Defendant manufactured, distributed, prepared, served and/or sold a food product that was potentially adulterated, not fit for human consumption, and that was not reasonably safe as designed, manufactured, or sold.

33. Defendant was negligent in the manufacture, distribution, preparation, service and/or sale of a food product that was potentially adulterated with HAV, not fit for human consumption, and not reasonably safe because adequate warnings or instructions were not provided.

34. 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 Defendant's operating standards and to ensure compliance with all applicable health regulations. Defendant failed to properly supervise, train, and/or monitor its employees engaged in the manufacture, distribution, preparation, service, sale and/or delivery of the food product Defendant sold to its patrons, and thus breached that duty.

35. Defendant owed the Plaintiffs the duty to exercise reasonable care in the manufacture, distribution, preparation, service and/or sale of its food products, as it was reasonably foreseeable that the Defendant's manufacture and sale of food products potentially contaminated with HAV would cause injury and harm to all persons potentially exposed to HAV. Defendant has breached that duty, and thereby caused injury to these Plaintiffs.

36. Defendant was negligent in failing to require its employees to obtain HAV immunizations, and in allowing one or more employees to work while infected with HAV.

37. Defendant's negligent acts and omissions have caused Plaintiffs physical injury, emotional distress, reasonable fear of injuries and harm, and related general and special damages.

## VII.

### DAMAGES

38. Named Plaintiff, and all those similarly situated, *i.e.* the class of persons who were potentially exposed to HAV between October 31, 2015 and November 8, 2015 at Defendant's restaurant, and who, as a result of this potential exposure, were required to obtain a blood test and/or IG vaccination, have suffered general and special, incidental and consequential damages as the direct and proximate result of the acts and omissions of Defendant, which damages shall be fully proven at the time of trial. These damages include, but are not limited to: damages for 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 ordinary, incidental and consequential damages as would be anticipated to arise under the circumstances.

### PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1) That the court award Named Plaintiff, on behalf of himself and all those similarly situated, judgment against 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 Defendant;

2) That the court award Named Plaintiff, and all those similarly situated, their respective costs, disbursements and reasonable attorneys' fees incurred;

3) That the court award Named Plaintiff, and all those similarly situated, 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; and

4) That the court award such other and further relief as it deems necessary and equitable in the circumstances.

Dated: November 18, 2015

UNDERBERG & KESSLER LLP

By: 

Paul V. Nunes, Esq.

*Attorneys for Plaintiffs*

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