

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Veronica Friedman, Individually and as
Executor of the Estate of Richard Friedman,
Decedent,

Plaintiffs,

vs.

Vulto Creamery, LLC,
a New York corporation; and
JOHN DOES 1-3,

Defendants.

COMPLAINT
AND JURY DEMAND

Case No.: _____

COMES NOW the plaintiffs, Veronica Friedman, Individually and as Executor of the Estate of Richard Friedman, decedent, by and through her attorneys of record, Underberg & Kessler, LLP and Marler Clark, LLP PS, allege upon information and belief as follows:

PARTIES

1.1 The plaintiff Veronica Friedman is a resident of Westminster, Vermont. The plaintiff is the widow of the decedent Richard Friedman, who at the time of death resided in Putney, Vermont. Plaintiff is a citizen of the State of Vermont and the Executor of the Estate of Richard Friedman.

1.2 The defendant Vulto Creamery, LLC (“Vulto Creamery”), is a corporation organized and existing under the laws of the State of New York, with its principal place of business, on information and belief, in the State of New York. The defendant is, therefore, a citizen of the State of New York.

1.3 The defendants JOHN DOES 1-3, whose identities and citizenship are presently unknown, were involved in the manufacture, distribution, and/or sale of the product that caused decedent's death and plaintiff's associated injuries.

JURISDICTION AND VENUE

2.1 This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332(a) because the matter in controversy exceeds \$75,000.00, exclusive of costs, it is between citizens of different states, and because the defendant Vulto Creamery's is a New York corporation with a principal place of business in the State of New York.

2.2 Venue in the United States District Court of the Northern District of New York is proper pursuant to 28 U.S.C. § 1391(a)(2) because a substantial part of the events or omissions giving rise to the plaintiff's claims and causes action occurred in this judicial district, and because the defendant was subject to personal jurisdiction in this judicial district at the time of the commencement of the action.

GENERAL ALLEGATIONS

The Outbreak

3.1 The defendant Vulto Creamery is a producer of handcrafted, raw-milk cheeses, with its principal business location in Walton, New York.

3.2 On or about March 9, 2017, the Food and Drug Administration (FDA), after investigation with the Centers for Disease Control and Prevention (CDC) and state and local health officials, identified "Ouleout cheese" produced

by Vulto Creamery at its Walton, New York, business location, as the source of an outbreak of Listeriosis that has caused six people to become ill in four states, including in Vermont. Two of those ill people, including the decedent Richard Friedman, have died.

3.3 FDA, CDC, and state and local health officials have been investigating this outbreak since January 31, 2017.

3.4 After being informed of a positive test conducted on a retail sample of Ouleout cheese by the FDA, Vulto Creamery began contacting its customers to return Ouleout cheese on March 3, 2017, and on March 7 announced a recall of its Ouleout cheese along with its Miranda, Heinennellie, and Willowemoc cheeses.

3.5 On March 8, 2017, FDA received positive test results from the New York State Department of Agriculture and Markets confirming samples of Ouleout cheese that matched the genetic fingerprint of *Listeria monocytogenes* in the outbreak.

3.6 The CDC reports that six people infected with the outbreak strain of *Listeria monocytogenes* have been reported from Connecticut, Florida, New York and Vermont. Illnesses started on dates ranging from September 1, 2016, to January 22, 2017.

Richard Friedman's Listeria illness and wrongful death

3.7 In the weeks preceding onset of Richard Friedman's *Listeria* illness, he or his wife purchased cheese that was manufactured, supplied, packaged, distributed, and/or sold by defendants from a retail location. Decedent Richard

Friedman consumed the cheese in the days following its purchase. The cheese was contaminated by the bacteria *Listeria monocytogenes*.

3.8 Onset of Mr. Friedman's Listeriosis illness occurred on or about October 11, 2016. He was seen in the emergency department at Brattleboro Hospital on or about the same day. He was transferred to Dartmouth-Hitchcock Medical Center on October 12, 2016, where he would remain hospitalized for a week and a half. He was then transferred to Mt. Ascutney Rehab in Windsor Vermont until he suffered a massive stroke on October 31, 2016 and was air lifted back to Dartmouth-Hitchcock Medical Center where he died on November 2, 2016.

3.9 Mr. Friedman died as a result of a stroke caused by his Listeriosis infection linked to defendants' cheese.

3.10 Veronica Friedman was dependent upon her husband Richard Friedman. As a result of Mr. Friedman's wrongful death, Mrs. Friedman, as the surviving spouse of Mr. Friedman, has suffered loss of consortium, including, but not limited to, companionship, affection, support, services and society, as well as economic damages.

CAUSES OF ACTION

Strict Liability – Count I

4.1 At all times relevant hereto, the defendants were the manufacturers, suppliers, packagers, distributors and/or sellers of the adulterated food product, namely cheese, that is the subject of this action.

4.2 The adulterated food product that the defendants manufactured, supplied, packaged, distributed, and/or sold was, at the time it left the defendants' control, defective and unreasonably dangerous for its ordinary and expected use because it contained *Listeria*, a deadly pathogen.

4.3 The adulterated food product that the defendants manufactured, supplied, packaged, distributed, and/or sold was delivered to the plaintiffs without any change in its defective condition. The adulterated food product that the defendants manufactured, supplied, packaged, distributed, and/or sold was used in the manner expected and intended, and was consumed by the plaintiff decedent.

4.4 The defendants owed a duty of care to the plaintiffs to manufacture, supply, package, distribute and/or sell food that was not adulterated, that was fit for human consumption, that was reasonably safe in construction, and that was free of pathogenic bacteria or other substances injurious to human health. The defendants breached this duty.

4.5 The defendants owed a duty of care to the plaintiffs to manufacture, supply, package, distribute and/or sell food that was fit for human consumption, and that was safe to consume to the extent contemplated by a reasonable consumer. The defendants breached this duty.

4.6 Plaintiffs suffered injury, death and damages as a direct and proximate result of the defective and unreasonably dangerous condition of the adulterated food product that the defendants manufactured, supplied, packaged, distributed and/or sold.

Breach of Warranty – Count II

4.7 The defendants are liable to the plaintiffs for breaching express and implied warranties that they made regarding the adulterated product that plaintiffs purchased. These express and implied warranties include the implied warranties of merchantability and/or fitness for a particular use. Specifically, the defendants expressly warranted, through their sale of food to the public and by the statements and conduct of their employees and agents, that the food they prepared and sold was fit for human consumption and not otherwise adulterated or injurious to health.

4.8 The contaminated food that the defendants sold to plaintiffs would not pass without exception in the trade and was therefore in breach of the implied warranty of merchantability.

4.9 The contaminated food sold to plaintiffs was not fit for the uses and purposes intended, *i.e.*, human consumption; this product was therefore in breach of the implied warranty of fitness for its intended use.

4.10 As a direct and proximate cause of the defendants' breach of warranties, as set forth above, the plaintiffs sustained injuries, death and damages in an amount to be determined at trial.

Negligence – Count III

4.11 The defendants owed to the plaintiffs a duty to use reasonable care in the manufacture, supply, packaging, distribution and sale of their food product, which duty would have prevented or eliminated the risk that the defendants' food

products would become contaminated with *Listeria* or any other dangerous pathogen. The defendants breached this duty.

4.12 The defendants had a duty to comply with all federal, state and local statutes, laws, regulations, safety codes and provisions pertaining to the manufacture, distribution, storage, and sale of their food product, but failed to do so, and were therefore negligent. The plaintiffs were among the class of persons designed to be protected by these statutes, laws, regulations, safety codes and provisions pertaining to the manufacture, distribution, storage, and sale of similar food products.

4.13 The defendants had a duty to properly supervise, train and monitor their respective employees, and to ensure that their respective employees complied with all applicable statutes, laws, regulations, safety codes and provisions pertaining to the manufacture, distribution, storage, and sale of similar food products. The defendants, however, failed to do so and were therefore negligent.

4.14 The defendants had a duty to use ingredients, supplies, and other constituent materials that were reasonably safe, wholesome and free of defects, and that otherwise complied with applicable federal, state, and local laws, ordinances, regulations, codes and provisions and that were clean, free from adulteration, and safe for human consumption, but the defendants failed to do so and were therefore negligent.

4.15 As a direct and proximate result of the defendants' negligence, the plaintiffs sustained injuries, death and damages in an amount to be determined at trial.

Negligence Per Se – Count IV

4.16 The defendants had a duty to comply with all applicable state and federal regulations intended to ensure the purity and safety of their food product, including the requirements of the Federal Food, Drug and Cosmetics Act (21 U.S.C. § 301, *et seq.*).

4.17 The defendants failed to comply with the provisions of the health and safety acts identified above, and, as a result, were negligent *per se* in their manufacture, distribution, and sale of food adulterated with *Listeria*, a deadly pathogen.

4.18 As a direct and proximate result of conduct by the defendants that was negligent *per se*, the plaintiffs sustained injury, death and damages in an amount to be determined at trial.

DAMAGES

5.1 The plaintiffs have suffered general, special, incidental, and consequential damages as the direct and proximate result of the acts and omissions of the defendants, in an amount that shall be fully proven at the time of trial. These damages include, but are not limited to: damages for wrongful death, loss of consortium, general pain and suffering, damages for loss of enjoyment of life, both past and future, medical and related expenses, travel and travel-related expenses, emotional distress, past and future, pharmaceutical

expenses, past and future, lost wages, and all other ordinary, incidental, or consequential damages that would or could be reasonably anticipated to arise under the circumstances.

JURY DEMAND

6.1 The plaintiffs hereby demand a jury trial.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs pray for judgment against the defendants as follows:

A. Ordering compensation for all general, special, incidental, and consequential damages suffered by the plaintiffs as a result of the defendants' conduct;

B. Awarding plaintiffs costs and expenses, including reasonable attorneys' fees to the fullest extent allowed by law; and

C. Granting all such additional and/or further relief as this Court deems just and equitable.

DATED: March __, 2017
Rochester, New York

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