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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

LAVINIA KELLY,

Plaintiff,

v.

VALLEY OAK FOOD AND FUEL
COMPANY, DOES 1 through 10 and ROE
Corporations 1 through 10, Inclusive,,

Defendants.

CASE NO.

UNLIMITED JURISDICTION

PLAINTIFF'S COMPLAINT FOR DAMAGES

1st Cause of Action: Negligence

2nd Cause of Action: Strict Product Liability

3rd Cause of Action: Negligence Per Se

**4th Cause of Action: Breach of Implied
Warranty**

DEMAND FOR JURY TRIAL

INTRODUCTION

COMES NOW the Plaintiff, LAVINIA KELLY, by and through her counsel of record, THE QUIRK LAW FIRM and MARLER CLARK, and alleges and complains as follows by way of this Complaint.

1. The entirety of this Complaint is pled upon information and belief. Each allegation is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

2. The Plaintiff purchased and consumed tortilla chips with nacho cheese sauce at the Defendant, VALLEY OAK FOOD AND FUEL COMPANY, store at 14165 River Rd, Walnut Grove, California 95690 on or about Friday, April 21, 2017.

3. After consuming the chips and cheese, the Plaintiff became sick on or about April 22, 2017. Subsequently, the Plaintiff tested positive for the *Clostridium Botulinum* bacteria.

4. The Plaintiff has gone on to experience significant health problems as a result of her *Clostridium Botulinum* bacteria infection.

PARTIES

5. At the time of the subject incident giving rise to this claim, the Plaintiff lived in the City of Sacramento, in the County of Sacramento, California.

6. The Defendant VALLEY OAK FOOD AND FUEL COMPANY is a California company with its principal place of business located at 14165 River Road, Walnut Grove, California 95690. At all times relevant to this action, Defendant manufactured and sold food items, including tortilla chips and nacho cheese sauce, within the State of California.

7. The Defendants DOES 1-10 and Roe Corporations 1-10 are entities, the identity of whom is presently unknown, that manufactured, distributed, and sold the food products that were the cause of Plaintiff's illness and injuries.

FACTUAL ALLEGATIONS

Botulism Outbreak:

8. In collaboration with California Department of Public Health and Sacramento County Department of Environmental Management, Sacramento County Public Health has been conducting an

investigation to determine possible causes of illness in five patients recently hospitalized with foodborne botulism; an additional patient with suspected foodborne botulism is currently under investigation.

9. Based on epidemiologic data, the source of the cluster of five illnesses appears to be prepared food, particularly nacho cheese sauce, from the Defendant's store in Walnut Grove. The sale of prepared food at this location was halted on May 5, 2017 by Sacramento County Department of Environmental Management.

Botulism:

10. Botulism is a rare but potentially life-threatening bacterial illness. *Clostridium Botulinum* bacteria grows on food and produces toxins that, when ingested, cause paralysis. Botulism poisoning is extremely rare, but so dangerous that each case is considered a public health emergency. Studies have shown that there is a 35 to 65 percent chance of death for patients who are not treated immediately and effectively with botulism antitoxin.

11. Botulism neurotoxins prevent neurotransmitters from functioning properly. This means that they inhibit motor control. As botulism progresses, the patient experiences paralysis from top to bottom, starting with the eyes and face and moving to the throat, chest, and extremities. When paralysis reaches the chest, death from inability to breathe results unless the patient is ventilated. Symptoms of botulism generally appear 12 to 72 hours after eating contaminated food. With treatment, illness lasts from 1 to 10 days. Full recovery from botulism poisoning can take weeks to months. Some people never fully recover.

12. In general, symptoms of botulism poisoning include the following: Nausea; Vomiting; Fatigue; Dizziness; Double vision; Dry skin, mouth and throat; Drooping eyelids; Difficulty

swallowing; Slurred speech; Muscle Weakness; Body Aches; Paralysis; Lack of fever.

13. The majority of botulism patients never fully recover their pre-illness health. After three months to a year of recovery, persisting side-effects are most likely permanent. These long-term effects most often include fatigue, weakness, dizziness, dry mouth, and difficulty performing strenuous tasks. Patients also report a generally less happy and peaceful psychological state than before their illness.

14. If a patient displays symptoms of botulism, a doctor will most likely take a blood, stool, or gastric secretion sample. The most common test for botulism is injecting the patient's blood into a mouse to see whether the mouse displays signs of botulism, since other testing methods take up to a week.

15. If found early, botulism can be treated with an antitoxin that blocks circulation of the toxin in the bloodstream. This prevents the patient's case from worsening, but recovery still takes several weeks.

Lavinia Kelly's Illness

16. Lavinia Kelly is the mother of three children and common law wife of Ricardo "Ricky" Torres. Lavinia consumed tortilla chips with nacho cheese sauce on or about Friday, April 21, 2017 at the Defendant VALLEY OAK FOOD AND FUEL COMPANY'S store located at 14165 River Rd, Walnut Grove, California 95690.

17. On or about April 22, Lavinia began to feel ill. Symptoms included double vision and an unsteady gait. She received medical attention at Sutter Medical Center emergency department and was discharged afterward.

18. On or about Sunday, April 23, Lavinia began to experience difficulty speaking, and her breathing became labored. Ricky Torres rushed Lavinia back to Sutter Medical Center, where she was

admitted to the hospital and given supplemental oxygen to help her breathe. Shortly afterward, she was placed on mechanical ventilation.

19. Lavinia Kelly was admitted to the intensive care unit shortly after admission to the hospital at Sutter Medical Center. She has remained in intensive care ever since, unable to move much, speak, breathe on her own, or open her eyes. Family members must pull her eyelids up to enable her to see at all.

20. Lavinia Kelly experiences significant pain all over her body constantly. She is receiving methadone and Neurontin for pain control.

21. Lavinia Kelly's medical condition is poor, and her prognosis uncertain.

FIRST CAUSE OF ACTION
NEGLIGENCE

22. By this reference, paragraphs 1 through 21 of this Complaint are fully incorporated as if each and every one of these paragraphs was set forth here in its entirety.

23. The Defendants were negligent in manufacturing, distributing and selling food products that were not reasonably safe because adequate warnings or instructions were not provided, including but not limited to the warning that the food product may contain *Clostridium Botulinum* bacteria, and thus should not be given to, or consumed by, people.

24. The Defendants had a duty to comply with all statutory and regulatory provisions that pertained or applied to the manufacture, distribution, storage, labeling, and sale of food products, including, but not limited to, California's Sherman Food, Drug and Cosmetic Laws and the California Health and Safety Code, which bans the manufacture, sale and distribution of any "adulterated" food. The Defendants failed to do so. The Plaintiff was among the class of persons designed to be protected by the statutory and regulatory provisions pertaining to the Defendants' manufacture, distribution,

storage, labeling and sale of food.

25. The Defendants had a duty to use supplies and/or raw materials in producing food products which were in compliance with applicable federal, state, and local laws, ordinances and regulations, which were from safe and reliable sources, which were clean, wholesome and free from spoilage and adulteration, and which were safe for human consumption, but failed to do so. The Defendants also had a duty to consumers of products to produce products using reasonable care, but breached this duty as well.

26. The Defendants were negligent in the selection of the material and ingredient suppliers, or other subcontractors, and failed to adequately supervise them, or provide them with adequate standards in writing, and as a result, purchased and used products contaminated with *Clostridium Botulinum* bacteria.

27. More specifically, the Defendants owed a duty to properly supervise, train, and monitor their employees, or the employees of their agents or subcontractors, in the preparation of the products it sold, doing so to ensure compliance with the Defendants' own specifications and performance standards, as well as to ensure compliance with all applicable health regulations, including the FDA's Good Manufacturing Practices regulations, 21 C.F.R. Part 110, Subparts (A)-(G). The Defendants, breached all of these duties, and the Plaintiff was injured as a direct and proximate result of such breaches.

28. Under applicable state law, food is adulterated if it contains a "poisonous or deleterious substance which may render it injurious to health." *Clostridium Botulinum* bacteria is such a substance. Thus, by either manufacture, distribution, storage, or sale of the subject product or the subject product's ingredients, the Defendants breached their statutory and regulatory duties, and the Plaintiff was injured as a direct and proximate result of such breaches.

29. The Defendants breached the aforementioned duties as alleged above, which breaches constituted the proximate cause of injury to the Plaintiff.

30. As a result of the Defendants' negligence, the Plaintiff suffered severe and permanent personal injuries, as well as economic loss.

31. The Plaintiff suffered general and special, incidental and consequential damages, as the direct and proximate result of the acts and/or omissions of the Defendants as set forth above, which damages shall be fully proven at the time of trial, including, but not limited to, damages for loss of enjoyment of life, both past and future; medical and medical related expenses, both past and future; wage and economic loss, past and future; emotional distress, and future emotional distress; medical and pharmaceutical expenses, past and future; and other ordinary, incidental and consequential damages as would be anticipated to arise under the circumstances.

SECOND CAUSE OF ACTION

STRICT LIABILITY CLAIM – Violation of California's Sherman Food, Drug, and Cosmetic Laws, California Health and Safety Code § 109875, et seq.

32. By this reference, paragraphs 1 through 31 of this Complaint are fully incorporated as if each and every one of these paragraphs was set forth here in its entirety.

33. The Defendants are in the business of manufacturing and selling food, including the *Clostridium Botulinum* bacteria contaminated product that is at issue herein.

34. The Defendants manufactured and sold tortilla chips with nacho cheese sauce that were defective at the time that those food products left Defendants' control in that the food was contaminated with *Clostridium Botulinum* bacteria, which rendered it adulterated, unwholesome and injurious to health and unfit for human consumption. This defective condition created an unreasonable

risk to people such as the Plaintiff.

35. The Defendants sold tortilla chips with nacho cheese sauce used by the Plaintiff knowing the product would be used by the Plaintiff without inspection for defects.

36. It was reasonably foreseeable to the Defendants that the contaminated tortilla chips with nacho cheese sauce, when put to its reasonably foreseeable use, would expose people such as the Plaintiff to harm.

37. The Defendants distributed and sold tortilla chips with nacho cheese sauce that were adulterated and contaminated with *Clostridium Botulinum* bacteria, by which the food products were rendered adulterated, unwholesome and injurious to health, in violation of California's Sherman Food, Drug and Cosmetic Laws, California Health and Safety Code sections 109875, et seq. and particularly section 110620, and similar federal health and safety standards and regulations.

38. The Plaintiff utilized the contaminated food products as anticipated by the Defendant when she consumed it. As a proximate cause of the Plaintiff's use of the product in a fashion anticipated by the Defendants, the Plaintiff suffered injury and damages as described herein. The Plaintiff was injured by consumption of tortilla chips with nacho cheese sauce, which was adulterated, contaminated, unwholesome, injurious to her health and unfit for human consumption.

39. The Plaintiff has suffered general and special, incidental and consequential damages, as the direct and proximate result of the acts and/or omissions of the Defendants as set forth above, which damages shall be fully proven at the time of trial, including, but not limited to, damages for loss of enjoyment of life, both past and future; medical and medical related expenses, both past and future; wage and economic loss, past and future; emotional distress, and future emotional distress; medical and pharmaceutical expenses, past and future; and other ordinary, incidental and consequential damages as would be anticipated to arise under the circumstances.

THIRD CAUSE OF ACTION

NEGLIGENCE PER SE – Violation of California’s Sherman Food, Drug, and Cosmetic Laws, California Health and Safety Code § 109875, et seq.

40. By this reference, paragraphs 1 through 39 of this Complaint are fully incorporated as if each and every one of these paragraphs was set forth here in its entirety.

41. The Defendants were negligent in manufacturing, distributing and selling food products that were not reasonably safe because adequate warnings or instructions were not provided, including but not limited to, the warning that the food product may contain *Clostridium Botulinum* bacteria and thus, should not be given to, or eaten by, people.

42. The Defendants owed a duty to comply with statutory and regulatory provisions that pertained or applied to either the import, manufacture, distribution, storage, or sale of the product or product-ingredients, including, but not limited to, California’s Sherman Food, Drug, and Cosmetic Act, CA Health & Safety Code §110545, which bans the manufacture, sale and distribution of any “adulterated” food. The Federal Food, Drug, and Cosmetics Act, §402(a), as codified at 21 U.S.C. §342(a) also provides the standard for the manufacture, sale and distribution of any “adulterated” food.

43. Under applicable state law, food is adulterated if it contains a “poisonous or deleterious substance, which may render it injurious to health.” *Clostridium Botulinum* bacteria is such a substance. Thus, by either manufacture, distribution, storage, or sale of the subject product, The Defendants breached statutory and regulatory duties, and the Plaintiff was injured as a direct and proximate result of such breaches.

44. The Defendants’ negligent act and omissions included, but were not limited to:

(a) Failure to prevent the contamination of the product by *Clostridium Botulinum* bacteria, including the failure to implement or non-negligently perform inspection and

monitoring of the product such that its adulterated condition would be discovered prior to its sale or distribution to the public for human consumption.

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

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

46. The Plaintiff was in the class of persons intended to be protected by these statutes and regulations, and was injured as the direct and proximate result of the Defendants' violation of applicable state and local food safety regulations.

47. The Defendants breached the aforementioned duties as alleged above, which breach constituted the proximate cause of injury to the Plaintiff.

48. The Plaintiff has suffered general and special, incidental and consequential damages, as the direct and proximate result of the acts and/or omissions of the Defendants as set forth above, which damages shall be fully proven at the time of trial, including, but not limited to, damages for loss of enjoyment of life, both past and future; medical and medical related expenses, both past and future; wage and economic loss, past and future; emotional distress, and future emotional distress; medical and pharmaceutical expenses, past and future; and other ordinary, incidental and consequential damages as would be anticipated to arise under the circumstances.

FOURTH CAUSE OF ACTION

BREACH OF IMPLIED WARRANTY

49. By this reference, paragraphs 1 through 48 of this Complaint are fully incorporated as if

each and every one of these paragraphs was set forth here in its entirety.

50. The Defendants impliedly warranted that the contaminated product was of merchantable quality, and was safe and fit for human consumption. The Plaintiff purchased and consumed the tortilla chips with nacho cheese sauce, and reasonably relied upon the skill and judgment of the Defendants as to whether the products were of merchantable quality and fit for human consumption.

51. The Defendants breached these implied warranties in that the Defendants' food products were contaminated with *Clostridium Botulinum* bacteria. As a direct, legal and proximate result of the breach of implied warranties, the Plaintiff suffered and may continue to suffer injury, harm, special damages and economic loss.

52. The Plaintiff suffered general and special, incidental and consequential damages, as the direct and proximate result of the acts and/or omissions of the Defendants as set forth above, which damages shall be fully proven at the time of trial, including, but not limited to, damages for loss of enjoyment of life, both past and future; medical and medical related expenses, both past and future; wage and economic loss, past and future; emotional distress, and future emotional distress; medical and pharmaceutical expenses, past and future; and other ordinary, incidental and consequential damages as would be anticipated to arise under the circumstances.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays as follows:

- (1) That the court award the Plaintiff judgment against the Defendants, jointly and severally, in such sums as shall be determined to fully and fairly compensate the Plaintiff for all general, special, incidental and consequential damages incurred, or to be incurred, by the Plaintiff as the direct and proximate result of the acts and omissions of the Defendants;
- (2) That the court award the Plaintiff costs, disbursements and reasonable attorneys' fees

incurred;

(3) That the court award the Plaintiff 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 awards such other and further relief as it deems necessary and proper in the circumstances.

DEMAND FOR JURY TRIAL

As to the matters complained of herein against the Defendant the Plaintiff demands a trial by jury.

Dated: May __, 2017

Respectfully submitted,

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Dated: May __, 2017

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