

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

<p>DIANE BUEHLER, a resident of Iowa,</p> <p style="text-align:center">Plaintiff,</p> <p>v.</p> <p>FRESH EXPRESS INCORPORATED, a Delaware corporation,</p> <p style="text-align:center">Defendant.</p>	<p style="text-align:center">Case No. 1:18-cv-86</p> <p style="text-align:center">COMPLAINT</p>
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COMES NOW the Plaintiff, Diane Buehler, by and through her attorneys of record, Wandro and Associates, P.C., and Marler Clark, L.L.P., P.S., complaining of the Defendant, Fresh Express Incorporated, and alleges and states as follows:

PARTIES

1. At all times relevant to this action, the Plaintiff, Diane Buehler, resides in Black Hawk County, Iowa. The Plaintiff is a citizen of the State of Iowa.

2. At all times relevant to this action, the Defendant, Fresh Express Incorporated (hereinafter “Fresh Express”), is a Delaware corporation with its principal place of business located at 4757 The Grove Drive, Suite 260, Windermere, Florida. Fresh Express is a citizen of the States of Delaware and Florida. At all times relevant to this action, Fresh Express, was a manufacturer and distributor of salad mix to the McDonald’s located at 1709 LaPorte Rd., Waterloo, Iowa.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to 28 USC § 1332(a) because the matter in controversy exceeds \$75,000, exclusive of costs; it is between citizens of different states; and because Fresh Express has certain minimum contacts with the State of Iowa such that the maintenance of this suit in this district does not offend traditional notions of fair play and substantial justice.

4. Venue in the United States District Court for the Northern District of Iowa is proper pursuant to 28 USC § 1391(a)(1) and (2) because Fresh Express was subject to personal jurisdiction in this judicial district at the time of the commencement of the action, and because a substantial part of the events or omissions giving rise to the Plaintiff's claims and causes of action occurred in this judicial district.

FACTS

The Fresh Express *Cyclospora* Outbreak

5. The CDC reports that 476 people in 15 states have become ill. There have been 16 hospitalizations and no deaths. The FDA, CDC, along with state and local officials are investigating a multi-state outbreak of cyclosporiasis illnesses likely linked to salads from McDonald's restaurants. FDA, CDC, state, and local partners are currently investigating several *Cyclospora* illnesses associated with McDonald's locations in IA, IL, IN, KY, MI, MN, MO, NE, OH, SD, and WI.

6. The FDA instructed Fresh Express to determine whether potentially contaminated product may still be on the market. Fresh Express reported to the FDA that the romaine from the same lot as the positive sample was not packaged for direct retail sale by Fresh Express and had already expired. Fresh Express committed to using recall procedures to inform

those companies that received this romaine about the sample result. Fresh Express also reported that carrots used in the mix were only sent to McDonald's locations.

7. On July 26, 2018, the FDA completed final analysis of an unused package of Fresh Express salad mix containing romaine lettuce and carrots, which had been distributed to McDonald's. The analysis confirmed the presence of *Cyclospora* in that sample, though the expiration date for that product, July 19, had already passed. On July 27, the FDA informed Fresh Express of the results.

8. The investigation is ongoing, and the FDA is currently reviewing distribution and supplier information for romaine and carrots.

9. As of July 13, 2018, McDonald's decided to voluntarily stop selling salads at impacted restaurants in IL, IA, IN, WI, MI, OH, MN, NE, SD, MT, ND, KY, WV, and MO. The company has since reported that it has replaced the supplier of salads in those states.

What is *Cyclospora*?

10. *Cyclospora* is a parasite composed of one cell, too small to be seen without a microscope. The organism was previously thought to be a blue-green alga or a large form of cryptosporidium. *Cyclospora cayetanensis* is the only species of this organism found in humans. The first known human cases of illness caused by *Cyclospora* infection (that is, cyclosporiasis) were first discovered in 1977. An increase in the number of cases being reported began in the mid-1980s, in part due to the availability of better diagnostic techniques. Over 15,000 cases are estimated to occur in the United States each year. The first recorded *Cyclospora* outbreak in North America occurred in 1990 and was linked to contaminated water. Since then, several cyclosporiasis outbreaks have been reported in the U.S. and Canada, many associated with eating

fresh fruits or vegetables. In some developing countries, cyclosporiasis is common among the population and travelers to those areas have become infected as well.

11. *Cyclospora* is spread when people ingest water or food contaminated with infected stool. For example, exposure to contaminated water among farm workers may have been the original source of the parasite in raspberry-associated outbreaks in North America.

12. *Cyclospora* needs time (one to several weeks) after being passed in a bowel movement to become infectious. Therefore, it is unlikely that *Cyclospora* is passed directly from one person to another. It is not known whether or not animals can be infected and pass infection to people.

13. *Cyclospora* infects the small intestine (bowel) and usually causes watery diarrhea, bloating, increased gas, stomach cramps, and loss of appetite, nausea, low-grade fever, and fatigue. In some cases, vomiting, explosive diarrhea, muscle aches, and substantial weight loss can occur. Some people who are infected with *Cyclospora* do not have any symptoms. Symptoms generally appear about a week after infection. If not treated, the illness may last from a few days up to six weeks. Symptoms may also recur one or more times. In addition, people who have previously been infected with *Cyclospora* can become infected again.

14. *Cyclospora* has been associated with a variety of chronic complications such as Guillain-Barre syndrome, reactive arthritis or Reiter's syndrome, biliary disease, and acalculous cholecystitis. Since *Cyclospora* infections tend to respond to the appropriate treatment, complications are more likely to occur in individuals who are not treated or not treated promptly. Extraintestinal infection also appears to occur more commonly in individuals with a compromised immune system.

Diane Buehler's *Cyclospora* Infection

15. Diane purchased and consumed a McDonald's Southwest salad within 14 days of her onset of symptoms at the McDonald's located at 1709 LaPorte Rd., Waterloo, Iowa.

16. On July 1, 2018, Diane became ill with vomiting, diarrhea, stomach cramps, and fever.

17. Diane's nausea and severe diarrhea continued for eleven days. Diane's illness became so severe that on July 11, she contacted her family physician. Her family physician directed her to visit Covenant Emergency Room. Diane was admitted into Covenant Medical Center, where a stool sample was collected for testing. She remained hospitalized overnight and was discharged to the home on July 12.

18. On July 14, Diane continued to suffer from nausea and diarrhea. Due to the severity of her symptoms, Diane returned to the Covenant Medical Center Emergency Room. Diane received additional medical care on July 18 and 19. On July 20, Diane was treated by a gastroenterologist for a stomach exam and coloscopy.

19. The Black Hawk County Health Department contacted Diane on July 21 and informed her of her likely connection to the recognized *Cyclospora* outbreak.

20. Due to Diane's *Cyclospora* illness and 25-day period of severe diarrhea, Diane lost 17 pounds. Additionally, during those 25 days, Diane missed 7 of her grandson's baseball games; 15 aqua aerobics classes; 3 scheduled sacristan duties; 4 Sundays of hosting brunch which she does every Sunday; her reunion luncheon scheduled for July 17th; her Fourth of July family celebration; and 18 Cubs games including the All-Star game.

COUNT I (Strict Product Liability)

21. The Plaintiff incorporates the preceding paragraphs of this Complaint, by this reference, as if each of these paragraphs were set forth here in its entirety.

22. The Defendant manufactured, distributed, and delivered the adulterated salad product to McDonald's that injured the Plaintiff.

23. The Defendant manufactured a food product, including salad, for sale to the public.

24. Food that is contaminated by *Cyclospora* is unsafe when put to the use reasonably foreseeable considering the nature of the product. Namely, *Cyclospora*-contaminated food is unfit for human consumption.

25. The salad that the Plaintiff purchased and consumed was contaminated with *Cyclospora* when it left the control of the Defendant. The Plaintiff's consumption of the contaminated food caused her to become infected by *Cyclospora* and to suffer injuries as a direct and proximate result of that consumption.

26. The Defendant is strictly liable to the Plaintiff for the harm proximately caused by the manufacture and distribution of an unsafe and defective food product.

COUNT II (Negligence)

27. The Plaintiff incorporates the preceding paragraphs of this Complaint, by this reference, as if each of these paragraphs were set forth here in its entirety.

28. The Defendant designed, manufactured, and distributed, salad that was contaminated with *Cyclospora*, a pathogen.

29. The Defendant owed a duty to all persons who purchased and consumed its products, including the Plaintiff, to ensure that any representations regarding the certifications of

its products had undergone prior to distribution and sale were made with reasonable care. The Defendant breached this duty.

30. The Defendant had a duty to comply with all statutes, laws, regulations, or safety codes pertaining to the manufacture, distribution and storage of its food products, but failed to do so, and were therefore negligent. The Plaintiff was among the class of persons designed to be protected by these statutes, laws, regulations, safety codes or provision pertaining to the manufacture distribution, storage, and sale of similar food products.

31. The Defendant breached the duties owed to the ultimate consumers of the salad by committing the following acts and omissions of negligence:

- a. Failed to adequately maintain or monitor the sanitary conditions of their products, premises, equipment and employees, and the products, premises, equipment and employees of other entities in the supply chain of the subject salad;
- b. Failed to properly operate their facilities and equipment in a safe, clean, and sanitary manner;
- c. Failed to apply their food safety policies and procedures to ensure the safety and sanitary conditions of their food products, premises, and employees;
- d. Failed to apply food safety policies and procedures that met industry standards for the safe and sanitary production of food products, and the safety and sanitary condition of their premises and employees;
- e. Failed to prevent the transmission of *Cyclospora* to consumers of their salad mix;
- f. Failed to properly train their employees and agents how to prevent the transmission of *Cyclospora* on their premises, from their facilities or equipment, or in their food products;
- g. Failed to test their salad mix for microbial pathogens, like *Cyclospora*.

32. The Defendant had a duty to comply with all statutory and regulatory provisions that pertained or applied to the manufacture, distribution, and storage of their food products. The Defendant breached this duty.

33. The Defendant owed a duty to the Plaintiff to use reasonable care in the manufacture and distribution of their food products, to prevent contamination with *Cyclospora*. The Defendant breached this duty.

34. The Plaintiff's injuries proximately and directly resulted from the negligence of the Defendant, and from the Defendant's violations of statutes, laws, regulations, and safety codes pertaining to the manufacture and distribution of food.

COUNT III (Breach of Warranty)

35. The Plaintiff incorporates the preceding paragraphs of this Complaint, by this reference, as if each of these paragraphs were set forth here in its entirety.

36. By offering salad for sale to the public, the Defendant impliedly warranted that such salad was safe to eat, that it was not adulterated with pathogens, and that the salad had been safely prepared under sanitary conditions.

37. The Defendant breached the implied warranties about the food they manufactured and distributed to McDonald's which was ultimately consumed by the Plaintiff causing the Plaintiff's injuries and losses.

38. The Plaintiff's injuries proximately and directly resulted from the Defendant's breach of implied warranties, and the Plaintiff is thus entitled to recover for all actual, consequential, and incidental damages that flow directly and in a foreseeable fashion from these breaches.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays as follows:

1. That the Court award the Plaintiff judgment against Defendant for damages.

2. That the Court award all such other 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 Defendant.

3. That the Court award the Plaintiff her costs, disbursements, and reasonable attorneys' fees incurred.

4. 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,

5. That the Court award such other and further relief as it deems necessary and proper in the circumstances.

JURY TRIAL DEMAND

The Plaintiff demands trial by jury on all issues raised herein.

Dated this 22nd day of August 2018.

Respectfully submitted,

\s\ Steven Wandro
Steven Wandro AT0008177
Ben Arato AT0010863
WANDRO & ASSOCIATES, P.C.
2501 Grand Avenue Ste. B
Des Moines, Iowa 50312
Telephone:515/281-1475
Facsimile:515/281-1474
swandro@2501grand.com
barato@2501grand.com

\s\ William D. Marler

William D. Marler, WSBA #17233

Pro hac Vice Pending

MARLER CLARK, LLP PS

1012 1st Avenue, 5th Floor

Seattle, Washington 98104

Telephone: 206-346-1888

Facsimile: 206/346-1898

bmarler@marlerclark.com

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS DIANE BUEHLER, a resident of Iowa (b) County of Residence of First Listed Plaintiff Black Hawk <i>(EXCEPT IN U.S. PLAINTIFF CASES)</i> (c) Attorneys (Firm Name, Address, and Telephone Number) Steven P. Wandro, Ben Arato Wandro & Associates, P.C., 2501 Grand Avenue, Des Moines, Iowa 50312; 515/281-1475	DEFENDANTS FRESH EXPRESS INCORPORATED, a Delaware corporation County of Residence of First Listed Defendant _____ <i>(IN U.S. PLAINTIFF CASES ONLY)</i> NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED. Attorneys (If Known) _____
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II. BASIS OF JURISDICTION <i>(Place an "X" in One Box Only)</i> <input type="checkbox"/> 1 U.S. Government Plaintiff <input type="checkbox"/> 2 U.S. Government Defendant <input type="checkbox"/> 3 Federal Question <i>(U.S. Government Not a Party)</i> <input type="checkbox"/> 4 Diversity <i>(Indicate Citizenship of Parties in Item III)</i>	III. CITIZENSHIP OF PRINCIPAL PARTIES <i>(Place an "X" in One Box for Plaintiff and One Box for Defendant)</i> <i>(For Diversity Cases Only)</i> <table border="1"> <tr> <td></td> <td>PTF</td> <td>DEF</td> <td></td> <td>PTF</td> <td>DEF</td> </tr> <tr> <td>Citizen of This State</td> <td><input type="checkbox"/> 1</td> <td><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td><input type="checkbox"/> 4</td> <td><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="checkbox"/> 2</td> <td><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td><input type="checkbox"/> 5</td> <td><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="checkbox"/> 3</td> <td><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td><input type="checkbox"/> 6</td> <td><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6																				

IV. NATURE OF SUIT <i>(Place an "X" in One Box Only)</i>					Click here for: Nature of Suit Code Descriptions.
CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input checked="" type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS			
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN *(Place an "X" in One Box Only)*

1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from Another District *(specify)*
 6 Multidistrict Litigation - Transfer
 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity):*
 28 USC § 1332(a)

Brief description of cause:
 Food illness caused by Cyclospora

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ _____ CHECK YES only if demanded in complaint:
 JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY *(See instructions).*

JUDGE _____ DOCKET NUMBER _____

DATE 08/22/2018 SIGNATURE OF ATTORNEY OF RECORD /s/ Steven P. Wandro

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____