

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

KELLIE McCALL, a resident of Iowa,

Plaintiff,

v.

FRESH EXPRESS INCORPORATED, a
North Carolina corporation,

Defendant.

Case No. 5:18-cv-4069

COMPLAINT

COMES NOW the Plaintiff, Kellie McCall, 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, Kellie McCall, resides in Monona 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 2720 Iowa Ave, Onawa, 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, Western Division 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 395 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.

Kellie McCall's *Cyclospora* Infection

15. Kellie purchased and consumed a McDonald's salad on or about June 18, 2018, within 14 days of her onset of symptoms at the McDonald's located at 2720 Iowa Ave, Onawa,

Iowa. This salad, which had been manufactured and distributed by Fresh Express, was contaminated by *Cyclospora*, causing the infection and illness described below.

16. On June 26, 2018, Kellie became ill with diarrhea, stomach cramps, fever, and severe gas. Her symptoms became so severe that she was forced to wear Depends diapers.

17. On June 26, Kellie's symptoms became so severe that she required emergency medical attention from Burgess Hospital E.R.

18. Kellie received additional medical treatment at Family Medicine Clinic from June 26, 2018 to July 27, 2018.

19. Kellie had stool tests performed by Burgess Health Center. Kellie's stool tested positive for *Cyclospora*.

20. Kellie continues to suffer from fatigue and stomach cramps. She has also lost significant income due to her illness.

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 product, including the Plaintiff, to manufacture and distribute salad that was safe to eat, that was not adulterated with pathogens like *Cyclospora*, and that was not in violation of applicable food and safety regulations. The Defendant breached this duty.

30. 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.

31. 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 are 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.

32. 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*.

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.

35. Plaintiff is entitled to be fully compensated for her injuries and damage caused by Defendant's negligence.

COUNT III (Breach of Warranty)

36. 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.

37. 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.

38. 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.

39. 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 6th day of August 2018.

Respectfully submitted,

 /s\ Steven Wandro

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