SUPREME COURT
STATE OF NEW YORK COUNTY OF NEW YORK

JOHN LOOBY, on behalf of his minor daughter, M.L.,

Plaintiff,

vs.

DAILY HARVEST, INC., and SECOND BITE FOODS, INC., d/b/a "STONE GATE FOODS", AND JOHN DOE CORPORATIONS 1-5,

Defendants.

FIRST AMENDED COMPLAINT FOR DAMAGES AND JURY DEMAND

Index No.: 155840/2022

INTRODUCTION

Plaintiff John Looby, on behalf of his minor daughter M.L., by and through his attorneys, Heisman Nunes & Hull LLP and Marler Clark, LLP PS, alleges upon information and belief as follows:

PARTIES

1. The Plaintiff is a resident of Brewster, NY in the County of Putnam, and M.L. is therefore a citizen of the State of New York.

2. Plaintiff is the parent and legal guardian of M.L. who is under 18 years of age and thus a minor.

3. M.L. was harmed after breastfeeding from her mother who consumed an adulterated and/or contaminated food product, namely prepared "French Lentil + Leek Crumbles," distributed and sold by Defendant Daily Harvest, Inc.

4. Defendant Daily Harvest, Inc., (hereinafter "Defendant" or "Daily Harvest") is incorporated in the State of Delaware with headquarters and principal place of business located at 347 5th Avenue, Suite 1402, New York, NY 10016, in the County of New York, and is therefore a

citizen of both the State of Delaware and the State of New York and subject to the personal jurisdiction in this Court.

5. Defendant Daily Harvest manufactured, packaged, distributed, and/or sold an adulterated and/or contaminated food product, namely "French Lentil + Leek Crumbles," to M.L.'s mother. On information and belief, Daily Harvest also developed the recipe for "French Lentil + Leek Crumbles," the prepared food product that ultimately caused M.L.'s injuries as alleged in this complaint.

6. Defendant Second Bite Foods, Inc., d/b/a "Stone Gate Foods," (hereinafter "Second Bite") is incorporated in the State of Minnesota with its principal place of business located at 5365 Shore Trail, Prior Lake, MN 55372. Therefore, Defendant Second Bite is a citizen of the State of Minnesota.

7. Defendant Second Bite owns and operates a manufacturing facility located at 4218 Valley Industrial Blvd. S. in Shakopee, MN. At this place of business, always relevant, Second Bite manufactured frozen fruits, juices, vegetables, and specialty foods, including specialty foods and other foodstuffs for Defendant Daily Harvest. Second Bite manufactured, for Daily Harvest, the French Lentil + Leek Crumbles product that is the source of the subject outbreak and was the cause of Plaintiff's illness and injuries.

8. Defendant(s) John Doe Corporations 1-5, inclusive, whose identities are currently unknown, are manufacturers, distributors, importers, packagers, brokers, and/or growers of the "French Lentil + Leek Crumbles" product, and/or its constituent ingredients, that caused M.L.'s illness as well as the illnesses of other individuals sicked because of the subject outbreak. These defendants are in some manner responsible for the acts, occurrences, and transactions set forth herein, and/or are the partners and/or alter ego(s) of the Defendant(s) named herein, and therefore

are legally liable to M.L. Plaintiff will set forth the true names and capacities of the fictitiously named Doe Defendants together with appropriate specific charging allegations when ascertained.

JURISDICTION AND VENUE

9. This Court has jurisdiction over the subject matter of this action as M.L, a minor, is a citizen of the State of New York, and all named defendants are citizens of, or subject to the jurisdiction of the State of New York.

10. Specifically, with respect to Defendant Second Bite, on information and belief, this Defendant manufactured the contaminated food items that are the subject of this action, with knowledge that the products would be distributed into the interstate marketplace, including to consumers in the State of New York.

11. On its website located at www.stonegate-foods.com, Defendant Second Bite, which does business under its federally registered trademark, STONE GATE FOODS, advertises itself as "the go-to co-packaging facility and private label manufacturer for top brands throughout the United States." Second Bite knew, at all relevant times, that Daily Harvest was an online, subscription-based food manufacturing and delivery service with a national customer/client base. Second Bite has been in business for approximately 41 years, and states on its website, identified above, that it has "had the privilege to serve the retail, food service and private label customers throughout the country" for the entirety of this period.

12. As a result of its above-described knowledge, its intentional provision of specialty food manufacturing services to customers across the country, and its knowledge that the products that it manufactured for Daily Harvest would be distributed in the interstate marketplace, including to consumers in the State of New York, Second Bite has sufficient "minimum

contacts" with the State of New York such that maintenance of this suit in this court is appropriate, fair, and just.

13. Further, as alleged in this complaint, Second Bite has committed a tortious act causing injury to a person within the State (namely the plaintiff) while, at all relevant times: (i) regularly doing or soliciting business, and/or engaging in a persistent course of conduct, and/or deriving substantial revenue from goods used or consumed, or services rendered in the State of New York (namely, for example, its business dealings with Daily Harvest); and (ii) expecting or reasonably expecting the act to have consequences in the State of New York and deriving substantial revenue from interstate or international commerce. Accordingly, this court has jurisdiction over Second Bite under New York Civil Practice Law and Rules Section 302.

14. Venue in the Supreme Court of the State of New York, County of New York, is proper pursuant to New York Civil Practice Law and Rules as Defendant Daily Harvest's principal place of business is located within the County of New York and because the named Defendants were all subject to the jurisdiction in this court at the time of the commencement of this action.

GENERAL ALLEGATIONS

The 2022 Outbreak Linked to Daily Harvest French Lentil + Leek Bowls

15. According to the U.S. Food and Drug Administration, on June 19, 2022, Defendant15Daily Harvest instituted a voluntary recall of approximately 28,000 units of French Lentil + Leek Crumbles produced between April 28 and June 17, 2022.

16. More than 470 instances of consumers experiencing illness or adverse reactions after consumption of the French Lentil + Leek Crumbles have been reported. The consumption of Defendants' products has caused an array of serious health complications, from gastrointestinal illness to liver and gallbladder dysfunction.

17. Daily Harvest has stated that the approximately 28,000 units of the product were distributed to customers in the United States through direct online sale and through retail sales at stores in Chicago and Los Angeles. Daily Harvest also provided samples to a small number of customers and social media influencers.

18. The French Lentil + Leek Crumbles was a frozen, pre-made product packaged in a 12 oz. white pouch with the Daily Harvest logo at the top, "CRUMBLES" printed immediately below, and "French Lentil + Leek" printed in bold.

19. All lots of the French Lentil + Leek Crumbles product were ultimately recalled by Defendant Daily Harvest.

Facts Relating to Defendant's Manufacture, Packaging, Distribution, and Sale of Contaminated, Defective Food Products that Caused Plaintiff's Injuries

20. On April 28, 2022, Daily Harvest announced the launch of the "Crumbles" product line, including the now-recalled French Lentil + Leek Crumbles.

21. Daily Harvest marketed these French Lentil + Leek Crumbles as a convenient, pre-made item that, after sauteing, can be added to other products, including those produced and marketed by the Daily Harvest, for a complete meal. Daily Harvest marketed the Crumbles as "planet-friendly to add more nourishing plant protein into" customers' diets.

22. Daily Harvest's promotional materials state (as quoted here) that a "team of chefs and nutritionists" created the French Lentil + Leek Crumbles recipe, and that the product was an "easy to prepare and ready in minutes" way to lower customers' carbon footprint, and potentially "help you live longer."

23. Daily Harvest claims to work directly with farmers to grow organic products and "increase biodiversity" while avoiding synthetic chemicals.

24. Daily Harvest distributes and directly sells all of its products, including the French Lentil + Leek Crumbles, to customers through online sales, through its own standalone retail stores in Chicago and Los Angeles. Additionally, Daily Harvest provides samples to a small number of customers, including social media influencers, to increase visibility and, ultimately, sales of the products.

25. The French Lentil + Leek Crumbles that M.L.'s mother consumed was purchased through online subscription and delivered on May 19, 2022 and June 1, 2022. The product was contaminated and ultimately caused M.L.'s injuries by contaminating her mother's breastmilk which M.L. was fed.

26. The French Lentil + Leek Crumbles consumed by Plaintiff contained contaminated ingredients, manufactured, packaged, distributed and/or sold by the Defendants, including Defendants Daily Harvest and Second Bite.

27. The Defendants John Doe Corporations 1-5 are entities that (along with Defendants Daily Harvest and Second Bite) either manufactured and distributed the French Lentil + Leek Crumbles product, or manufactured, distributed, imported, packaged, brokered, or grew and harvested the contaminated ingredients used in the manufacture of the French Lentil + Leek Crumbles product that caused Plaintiff's illness and the subject outbreak.

M.L.'s illness

28. On May 19, 2022, Defendants' French Lentil + Leek Crumbles, purchased by M.L.'s mother, through online subscription from Daily Harvest, were delivered. M.L.'s mother, Katherine Looby, consumed the product on the May 23, 2022. The next day Katherine Looby began experiencing abdominal pain and gastrointestinal distress.

29. At the time, M.L. was a four-month-old infant being breast fed by her mother as M.L. did not take formula. On May 25, 2022 M.L. began exhibiting fussiness consistent with illness in infants. Throughout the day her symptoms progress to vomiting, diarrhea, holding her head while screaming, and dark urine.

30. On June 1, Defendant's French Lentil + Leek Crumbles were again delivered to M.L.'s mother, who consumed the product on June 6, 2022. Katherine Looby began to experience extreme abdominal pain and gastrointestinal distress. On June 7, 2022, Katherine Looby was ultimately hospitalized from June 8, 2022, to June 15, 2022.

31. M.L. also began to exhibit symptoms on June 7, 2022, and through the following days exhibited behaviors consistent with abdominal pain, headache, gastrointestinal distress, fever, and vomiting. Because Katherine Looby and her physicians did not know that Defendants' product was the cause of her illness and testing eliminated communicable diseases as the root cause, M.L. continued to breastfeed during Katherine's hospitalization on advice of her physicians.

32. M.L was seen by a physician on June 24, 2022, and blood tests were taken that showed elevated liver enzyme levels severe enough that M.L. was immediately taken to and admitted to MUSC hospital on the advice of her pediatrician on June 25, 2022.

33. M.L. was hospitalized from June 25, 2022, to June 26, 2022, when she was discharged with follow-up appointments with pediatric gastrointestinal and neurologic experts.

34. M.L. continues to have her liver levels monitored by physicians and is undergoing neurological and gastroenterology testing.

35. M.L. has sustained serious personal injuries; suffered, and will continue to suffer, significant pain and other physical discomfort; incurred, and will continue to incur, substantial medical expenses; and remains at risk for future health complications with significant damages.

CAUSES OF ACTION

Strict Liability – Count I

36. Plaintiff repeats and realleges all the above allegations contained in paragraphs 1 through 35.

37. At all times relevant hereto, the Defendants were the manufacturer, packager, distributor and/or seller of the contaminated food product that was purchased and consumed by Katherine Looby, causing M.L.'s injuries.

38. The contaminated food product that the Defendants manufactured, packaged, distributed, and/or sold was, at the time it left the Defendants' control, defective and unreasonably dangerous for its ordinary and expected use by the intended public, including Katherine Looby (a nursing mother), because Defendants' product was contaminated by a substance injurious to human health.

39. The contaminated food product that the Defendants manufactured, packaged, distributed, and/or sold was delivered to Katherine Looby without any change in its defective condition. The contaminated food product that the Defendants manufactured, packaged, distributed, and/or sold was consumed by Katherine Looby (a nursing mother) in the manner expected and intended, ultimately causing M.L.'s injuries.

40. The Defendants owed a duty of care to the public, including M.L., to manufacture, package, distribute and/or sell food that was not contaminated, and that was free of pathogenic bacteria or other substances injurious to human health. The Defendants breached this duty.

41. The Defendants owed a duty of care to the public, including M.L., to manufacture, 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.

42. As a direct and proximate result of the defective and unreasonably dangerous condition of the contaminated food product that the Defendants manufactured, packaged, distributed and/or sold, as set forth above, M.L. sustained injuries and damages in an amount to be determined at trial.

Breach of Warranty – Count II

43. Plaintiff repeats and realleges all the above allegations contained in paragraphs 1 through 42.

44. The Defendants are liable to the Plaintiff for breaching express and implied warranties that they made regarding its food product that Katherine Looby (a nursing mother) purchased and consumed, which contaminated the breastmilk consumed by M.L. 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 it manufactured, packaged, distributed and/or sold was fit for human consumption and not otherwise adulterated, contaminated or injurious to health.

45. The contaminated food that the Defendants sold, and Katherine Looby consumed, causing M.L.'s illness, would not pass without exception in the trade and was therefore in breach of the implied warranty of merchantability.

46. The contaminated food sold to Katherine Looby was not fit for the uses and purposes intended, *i.e.,* human consumption; thus, the sale of this product constituted a breach of the implied warranty of fitness for its intended use.

47. As a direct and proximate cause of the Defendants' breach of warranties, as set forth above, M.L. sustained injuries and damages in an amount to be determined at trial.

Negligence – Count III

48. Plaintiff repeats and realleges all the above allegations contained in paragraphs 1 through 47.

49. Defendants owed to M.L. a duty to use reasonable care in the manufacture, packaging, distribution, and/or sale of their food product, the observance of which duty would have prevented or eliminated the risk that Defendants' food product would become contaminated with any dangerous pathogen. Defendants, however, breached this duty and were therefore negligent.

50. 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 its food product, but failed to do so, and were therefore negligent. M.L. was among the class of persons designed to be protected by these statutes, laws, regulations, safety codes and provisions pertaining to the manufacture, packaging, distribution, and sale of similar food products. Defendants, however, breached this duty and were therefore negligent.

51. 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, packaging, and sale of similar food products. Defendants, however, breached this duty and were therefore negligent.

52. 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. Defendants, however, breached this duty and were therefore negligent.

53. As a direct and proximate result of Defendants' negligence as described above, M.L. sustained injuries and damages in an amount to be determined at trial.

Negligence *Per Se* – Count IV

54. Plaintiff repeats and realleges all the above allegations contained in paragraphs 1 through 53.

55. 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 New York State's Agriculture and Markets Law and the Federal Food, Drug and Cosmetics Act (21 U.S.C. § 301, *et seq.*).

56. In breach of this duty, Defendants failed to comply with the provisions of the health and safety acts identified above, and, as a result, were negligent *per se* in its manufacture, distribution, packaging and/or sale of adulterated food.

57. As a direct and proximate result of conduct by Defendants that was negligent *per se*, M.L. sustained injuries and damages in an amount to be determined at trial.

DAMAGES

58. M.L. suffered general, special, incidental, and consequential damages as the direct and proximate result of the acts and omissions of Defendants, in an amount that shall be fully proven at the time of trial. These damages include but are not limited to past and future pain and suffering, past and future damages for loss of enjoyment of life, past and future emotional distress, past and future medical and related expenses, including pharmaceutical expenses, travel and travel-

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

JURY DEMAND

59. Plaintiff hereby demands a jury trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against the Defendants as follows:

A. Ordering compensation for all general, special, incidental, and consequential damages suffered by M.L. because of Defendants' conduct.

B. Awarding Plaintiff 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: July 15, 2022
Rochester, New York

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