IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SAMANTHA KIKER, on behalf of herself and others similarly situated; YLEELA ROGERS, on behalf of Herself and others similarly situated; and JILLIAN ONSTAD, on behalf of herself and others similarly situated,	)	CIVIL ACTION FILE NO.
Plaintiffs,	)	_____
v.	)	[Removal from Superior Court of Fulton County, Civil Action File No. 2016-CV-279710]
TROPICAL SMOOTHIE CAFÉ, LLC,	)	
Defendant.	)	

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453, Defendant Tropical Smoothie Café, LLC ("TSC") hereby removes this action from the Superior Court of Fulton County, Georgia, to this Court. This action is removable to this Court, and this Court has jurisdiction, because Plaintiffs' Complaint could have been originally filed in this Court pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. §§ 1332(d)(2), 1441(a)-(b), and 1453(b). In support of this Notice of Removal, TSC states as follows:

BACKGROUND

1. On September 2, 2016, Plaintiff Samantha Kiker filed a nationwide class action Complaint in the Superior Court of Fulton County, Georgia. A copy of the Complaint captioned *Samantha Kiker v. Tropical Smoothie Café, LLC*, Civil Action No. 2016-CV-279710, is attached as Exhibit A. On September 19, 2016, before service of the original Complaint, Plaintiff Samantha Kiker filed an Amended Complaint, which was joined by newly added Plaintiffs Yleela Rodger and Jillian Onstad (collectively "Plaintiffs"), on their own behalves and those similarly situated ("putative Plaintiffs"), captioned *Samantha Kiker, et al. v. Tropical Smoothie Café, LLC*, Civil Action No. 2016-CV-279710. Plaintiffs' Amended Complaint is attached as Exhibit B. Plaintiffs made jury demands in their Complaint and Amended Complaint. Exhibit A, p. 3; Exhibit B, p. 1.

2. Pursuant to 28 U.S.C. § 1446(a), true and correct copies of all process, pleadings, and orders filed in the Superior Court of Fulton County, Georgia, as of the date of the filing of this Notice of Removal are attached as Exhibits A, B, C, and D. *See* Exhibit F, p. 2, ¶ 3.

3. The Complaint, as amended, asserts claims for breach of warranty, negligence, fraudulent concealment, and injunctive relief arising out of the putative

Plaintiffs' alleged consumption of contaminated food products at TSC's more than 500 franchise locations spread over dozens of states, during a nine-month period.

4. The Complaint defines two subclasses of putative Plaintiffs.

5. One, the Exposure Class, is defined as "all persons in the United States who consumed contaminated food or drink, including smoothies with strawberries, from Defendant during the exposure period in January 2016 through August 2016 and who, as a direct and proximate result of such consumption, were exposed to HAV and, following the recommendations of public health officials or other medical personal and organizations, including the VHD, CDC, and NIH obtained vaccination, and any related medical treatment, including blood tests, to prevent HAV infection, including Exposure Plaintiffs." Exhibit B, pp. 19-20, ¶ 28(a).

6. The Injury Class is defined as "all persons who consumed contaminated food or drink, including smoothies with strawberries, from Defendant during the exposure period from January 2016 and August 2016 and who, as a direct and proximate result of such consumption, were exposed to HAV and subsequently infected and diagnosed with HAV and, following the recommendations of public health officials or other medical personal and organizations, including the VHD, CDC, and NIH obtained vaccination, immune

globulin, and any related medical treatment, including blood tests and liver tests, to treat HAV infection." Exhibit B, pp. 20-21, ¶ 28(b).

7. The Complaint defines the classes broadly by its definition of contaminated food or drink: "All food and drink sold at Defendant's restaurants during the exposure period … was defective, contaminated, and not reasonably safe as a result of use of contaminated strawberries in the preparation of particular food items, or preparation in proximity or conjunction with such contaminated ingredients, rendering all food and drink prepared and sold during the exposure period contaminated, unsafe, and not fit for human consumption." Exhibit B, pp. 21-22, ¶ 30.

8. In other words, the classes are defined to include anyone who ate or drank *anything* at any of TSC's over 500 franchise locations, during a nine-month period, regardless of whether they became sick, as long as they incurred any medical bills, received any medical treatment, or otherwise incurred some pecuniary loss.

9. Accordingly, given the broad class definitions, Plaintiffs' Complaint asserts that because the number of persons who obtained "vaccination …and/or treatment for HAV infection remains confidential" that "[t]he number of potential class members is likely to be in the thousands." Exhibit B, p. 21, ¶ 29.

10. At the time Plaintiffs filed their Complaint, they alleged that the Injury Class alone consists of "[a]t least 100 people in seven states…[that] have been sickened in an HAV outbreak that health officials believe is linked to frozen strawberries Tropical Smoothie sourced from Egypt." Exhibit B, pp. 16-17, ¶ 16. As of the date of the filing of this Notice of Removal, the CDC website relied on by the Plaintiffs reports that the current tally of ill consumers is 131 people from eight states. Exhibit B, p. 13, ¶ 16, *citing* to http://www.cdc.gov/hepatitis/outbreaks/2016/hav-strawberries.htm.

11. Plaintiffs seek extraordinarily broad relief on behalf of thousands of putative Plaintiffs in the form of general and special damages, including: "wage loss, medical and medical-related expenses; travel and travel-related expenses; emotional distress; fear of harm and humiliation; physical pain; physical injury; and all other damages as would be anticipated to arise under the circumstances" for all persons who fit the class description, i.e. every customer of a TSC franchisee that ate any kind of food or drink between January 2016 and August 2016 and subsequently received preventive or other medical care. Exhibit B, p. 42, ¶ 76 (emphasis added). Furthermore, "[a]ll other damages as would be anticipated to arise under the circumstances" would include punitive damages which are an element of damages in controversy since Plaintiffs are pursuing a fraud claim.

Plaintiffs also request the Court award costs, disbursements and reasonable attorney's fees as well as injunctive relief. Exhibit B, p. 43, ¶ 76(C), Counts V and VI (emphasis added).

ALL PROCEDURAL REQUIREMENTS HAVE BEEN MET

12. TSC was served with a copy of Plaintiffs' Complaint and Amended Complaint on September 23, 2016. *See* Exhibit D. This Notice is filed within thirty (30) days of TSC being served with the Summons and Complaints pursuant to 28 U.S.C. § 1446(b)(1). Accordingly, this Notice of Removal is timely filed in accordance with 29 U.S.C. § 1446(b).

13. Pursuant to 28 U.S.C. § 1446(a), a true and correct copy of all pleadings filed in the Superior Court of Fulton County at the time of the filing of this pleading are attached hereto as Exhibits A through D.

14. Venue in this district and division is proper under 28 U.S.C. § 1441(a) because this district and division embrace the Superior Court of Fulton County, Georgia, the forum in which the removed action was pending.

15. A true and correct copy of this Notice of Removal will be filed with the Clerk of the Fulton County Court, Georgia, in accordance with 28 U.S.C. § 1446(d), along with a notice of that filing, a copy of which will be served on all parties.

16. In filing this Notice of Removal, TSC does not waive, and specifically reserves, any and all defenses, exceptions, rights, and motions. No statement or omission in this Notice of Removal shall be deemed an admission of any allegations leveled or damages sought in the Complaint.

THIS COURT HAS JURISDICTION
OVER THE ACTION PURSUANT TO CAFA

17. On February 18, 2005, Congress enacted the Class Action Fairness Act of 2005 ("CAFA") with the intent of significantly expanding federal diversity jurisdiction over most class actions. 28 U.S.C. § 1332(d).

18. To effectuate this purpose, CAFA provides that the United States District Courts have original jurisdiction over any putative class action: (1) involving a plaintiffs class of 100 or more members, (2) in which the matter in controversy exceeds (in the aggregate) the sum or value of $5,000,000, exclusive interest and costs, and (3) where at least one member of the plaintiffs class is a citizen of a State different from any defendant. *See* 28 U.S.C. § 1332(d)(2)(A) & (5)(B); *Cappuccitti v. DirecTV, Inc.*, 623 F.3d 1118, 1122 (11th Cir. 2010). All three conditions are satisfied in this case.

19. The party removing an action under CAFA bears the burden of establishing that CAFA's jurisdictional requirements are met by a preponderance

of the evidence, i.e., that it is more likely than not that each requirement is met. *See Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 752 (11th Cir. 2010).

A. The Action is a "Class Action" or "Mass Action"

20. First, a state court action must qualify as a "class action" or a "mass action" to fall within CAFA's purview. 28 U.S.C. §§ 1332(d)(2) and (11).

21. A "class action" under CAFA is any "civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by one or more representative persons as a class action." 28 U.S.C. § 1332(d)(2).

22. This action qualifies as a "class action" under CAFA because it is a civil action filed under Georgia's rule of judicial procedure authorizing class actions: O.C.G.A. § 9-11-23. Exhibit B, p. 2, Introductory Paragraph.

B. The Putative Class Exceeds 100 Members

23. CAFA requires that the putative class consist of at least 100 persons. 28 U.S.C. § 1332(d)(5). Section 1332(d)(1)(B) defines the term "class members" as "the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action." *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1348 (2013).

24. Plaintiffs allege that the "class includes all persons in the United States who consumed food or drink, including smoothies from strawberries, from Defendant during the exposure period in January 2016 through August 2016…." and incurred medical expenses, including blood tests; the putative classes include those that became infected with HAV and those that were not. Exhibit B, pp. 19-20, ¶ 28(a). As TSC has "at least 500 [franchised] restaurants in 40 states…." (Exhibit B, pp. 7 and 14, ¶¶ 12, 17), Plaintiffs' Complaint asserts that "[t]he number of potential class members is likely to be in the thousands." Exhibit B, p. 21, ¶ 29.

25. Moreover, Plaintiffs allege that "[a]t least 100 people in seven states [which does not include Georgia]…have been sickened in a HAV outbreak that health officials believe is linked to frozen strawberries Tropical Smoothie sourced from Egypt." Exhibit B, pp. 13-14, ¶ 16.

26. In fact, as of the date of this Notice of Removal, the CDC website Plaintiffs' rely upon reported an increase on September 30, 2016 of the current number of known persons that Plaintiffs believe belong in the Injury Class to 131. *Id.* citing to http://www.cdc.gov/hepatitis/outbreaks/2016/hav-strawberries.htm).

27. Thus, considering the Plaintiffs believe the actual number of the class members to be in the thousands; Plaintiffs' Complaint certainly meets the jurisdictional requirement that the purported class involve 100 or more plaintiffs.

C. Minimal Diversity of Citizenship Exists

28. The second CAFA requirement—that the parties be minimally diverse—also is readily satisfied here, because at least one putative class member is a citizen of a different state than TSC. 28 U.S.C. § 1332(d)(2).

29. Plaintiffs' Complaint alleges that Plaintiffs Yleela Rogers and Jillian Onstad are both citizens of Virginia. Exhibit B, pp. 5-6, ¶¶ 8, 9.

30. Under CAFA, a limited liability company is properly considered "an unincorporated association" within the meaning of 28 U.S.C. § 1332(d)(10), and thus is "deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized." 28 U.S.C. § 1332(d)(10); *Alabama Ins. Guar. Ass'n v. FrankCrum 1 Inc.*, 2012 WL 5931784, at *2 (N.D. Ala. Nov. 27, 2012) (acknowledging other circuits' holdings that the provision of § 1332(d)(10) for determining the citizenship of unincorporated associations applies only to class actions covered by CAFA); *see Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698 (4th Cir. 2010) (holding that an LLC is an unincorporated association under § 1332(d)(10) and thus citizenship is determined

by the LLC's State of Incorporation and where its principal place of business is located); *Cedar Lodge Plantation, L.L.C. v. CSH v. Fairway View I, L.L.C.*, 768 F.3d 425, n. 2 (5th Cir. 2014) (same); *Kirschenbaum v. 650 Fifth Ave. & Related Properties*, 830 F.3d 107, 127 (2d Cir. 2016) (same).

31. In enacting § 1332(d)(10) as a part of CAFA in 2005, Congress modified the domicile rule for limited liability companies and other non-corporate entities. For purposes of CAFA, the citizenship of all "unincorporated association[s]" is determined by the State under whose laws the unincorporated association is organized and the State where it has its principal place of business. *See* 28 U.S.C. § 1332(d)(10); *Ferrell*, 591 F.3d at 704.

32. For purposes of diversity of citizenship, a limited liability company, such as TSC, is an "unincorporated association" within the meaning of 28 U.S.C. § 1332(d)(10); *Ferrell*, 591 F.3d at 705.

33. TSC is a limited liability company organized under Georgia law with its principal place of business in Fulton County, Georgia. Exhibit B, pp. 6-7, ¶¶ 11-12. Accordingly, under CAFA, TSC is a citizen of Georgia for diversity purposes.

34. Therefore, since TSC and Plaintiffs Rogers and Onstad are citizens of different states (not to mention different than the citizens of numerous putative

class members), the requirement that the parties be minimally diverse is satisfied here. *See* 28 U.S.C. § 1332(d)(6).

D. The Amount in Controversy Requirement is Satisfied

35. Pursuant to CAFA, the claims of the individuals comprising a putative class are aggregated to determine if the amount in controversy exceeds the $5,000,000 jurisdictional threshold. 28 U.S.C. § 1332(d)(6). The possibility that the class will not be certified, or that some of the unnamed class members will opt out, is irrelevant to the jurisdictional determination, which is based only on the facts as alleged at the time of removal. *Pretka*, 608 F.3d at 772.

36. While TSC opposes class certification and denies that it engaged in any conduct giving rise to liability to Plaintiffs, the amount in controversy here, based on what Plaintiffs are asserting in their Complaint, exceeds the $5,000,000 threshold by a significant margin.

37. When a defendant seeks removal under CAFA, all that is required is "a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 551, 554 (2014). In fact, "the defendant's amount-in-controversy allegation should be accepted when not contested by the Plaintiffs or questioned by the court." *Id.* at 553.

38. When the amount in controversy is disputed, however, the district court must find "by the preponderance of the evidence, that the amount in controversy exceeds the jurisdictional threshold." *Id.* at 553.

39. In making this calculation, a court may rely on the defendant's own affidavits, declarations, or other documentation, as well as reasonable inferences and deductions drawn from that evidence. *Pretka*, 608 F.3d at 753–54 (concluding that a defendant can submit its own evidence in order to satisfy the jurisdictional removal).

40. A removing defendant is not required "to prove the amount in controversy beyond all doubt or to banish all uncertainty about it." *Id.* at 754. In fact, it is less a prediction of "how much the Plaintiffs are ultimately likely to recover," than it is an estimate of how much will be put at issue during the litigation; in other words, the amount is not discounted by the chance that the Plaintiffs will lose on the merits. *Id.* at 751.

41. In a futile and transparent attempt to avoid this Court and circumvent CAFA, Plaintiffs and their counsel purport to artificially cap the recovery of the very class to whom they owe fiduciary and other duties by making the following unattested statement: "Plaintiffs and all Classes [sic] Members recover judgment for damages of less than $5,000,000 (inclusive of the costs, disbursements, and

attorney fees sought below)." Exhibit B, p. 43, Wherefore ¶ C. The United States Supreme Court, however, has held that such a pre-certification stipulation is not an impediment to CAFA jurisdiction. *Knowles*, 133 S. Ct. at 1348. Such a stipulation by the Plaintiffs is non-binding pre-certification[1] and, therefore, this Court must determine whether it has jurisdiction based on its own calculation of the aggregate amount in controversy. *Id*. at 1350. Here, as explained below, Plaintiffs have alleged, and thus put in controversy, multiple causes of action on behalf of a nationwide class of "thousands" of persons (including at least the 131 individuals the CDC associates with the outbreak, 52 of which were hospitalized) that claim to sustained injuries over a nine-month period and who seek to recover: lost wages, medical and medical-related expenses; travel and travel-related expenses; emotional distress; fear of harm and humiliation; physical pain; physical injury, costs, fees, attorney's fees, punitive damages and injunctive relief. Accordingly, Plaintiffs' pre-certification attempt to cap damages at under $5 million damages for the very putative class they purport to adequately represent does not circumvent CAFA jurisdiction.

[1] In Georgia state courts, for example, where the Complaint was filed, a plaintiff may amend its pleadings at any time prior to a pre-trial order, without leave of court, to add claims. OCGA § 9-11-15(a); *Total Car Franchising Corp. v. Squire*, 259 Ga. App. 114, 115, 576 S.E.2d 90, 92 (2003).

42. Notably, a nearly identical class action styled *Martinez et.al. v. Tropical Smoothie Café, LLC, et al.*, Civil Action No. 1:16-CV-01242, was filed on September 30, 2016, in the United States District Court for the Eastern District of Virginia. A copy of *Martinez* Complaint is attached as Exhibit E. The *Martinez* class action arises out of the same events alleged here, except the Plaintiffs in *Martinez* are considerably more limited[2] with their claims in multiple ways. For example, they only seek certification for a much shorter period of time, May to August 2016, as opposed to Plaintiffs here that proposes a time span that is more than twice as broad - January to August 2016. Exhibit E, pp. 6-7, ¶¶ 21-24. The Plaintiffs in *Martinez* also do not allege that all the food and drink sold was contaminated, but instead limit their class definitions to only include those that purchased "smoothies from franchisees of Tropical Smoothie Café, LLC from May 2016 to August 2016 made with strawberries sourced from Egypt…" *Id.* They also do not seek injunctive relief. Significantly, although the *Martinez* class action pleads for significantly fewer damages, over a smaller time period, and for a significantly smaller class of people, the *Martinez* Complaint expressly alleges both CAFA jurisdiction and that the amount in controversy exceeds $5,000,000. *Id.*

[2] *Martinez*, admittedly, does also seek restitution for the cost of the smoothies but, obviously, that amount is not very significant, even if the calculation of the cost of each smoothie was multiplied by thousands. For example, if 2,000 smoothies were purchased at $5 per smoothie, that would add $10,000 to the controversy.

at p. 2, ¶ 2. Unlike the Plaintiffs here that have tried to avoid this Court by stipulating to an ineffective "cap" on what the putative class members may recover, the *Martinez* Plaintiffs recognize that the amounts in contention in that case, which seeks certification of much smaller and more temporally limited classes, exceed CAFA's jurisdictional limit.

43. Plaintiffs broadly allege that the "class includes all persons in the United States who consumed food or drink, including smoothies from strawberries, from Defendant during the exposure period in January 2016 through August 2016…." Exhibit B, pp. 19-20, ¶ 28(a). Plaintiffs also allege that TSC has "at least 500 restaurants in 40 states…." Exhibit B, p. 14, ¶ 17. According to Plaintiffs' Complaint, the class includes all persons who ate at any TSC franchisee's 500 locations during a nine-month period and that incurred any expenses even if they tested negative for hepatitis A.

44. Several relevant inferences can be drawn from the *Kiker* Complaint, starting with the assertion that "[t]he number of potential class members is likely to be in the thousands." Exhibit B, p. 21, ¶ 29.

45. Taking Plaintiffs allegation at face value, the *minimum* number of putative class members in the Exposure and Injury Classes is 2,000. The actual size of the classes Plaintiffs describe is many multiples higher as they contemplate

nationwide classes involving every single person that ate *anything* at any of the 500 or so franchise locations for a period of nine months who subsequently received medical treatment regardless of whether they became ill. Nevertheless, for purposes of this analysis TSC will make a very conservative assumption that the minimum class size Plaintiffs reference is 2,200 putative members – 2,000 potential Exposure Class plaintiffs and 200 potential Injury Class plaintiffs.

46. Again, Plaintiffs seek monetary damages for each of the putative class members for lost wages; medical and medical-related expenses; travel and travel-related expenses; emotional distress; fear of harm and humiliation; physical pain; physical injury; costs, fees, attorney's fees; fraud damages (punitive damages are an element of recoverable damages for fraud); and injunctive relief. Exhibit B, pp. 42-44, ¶ 76; Counts V and VI.

47. Accordingly, even using conservative damages estimate of the amounts in controversy for the 2,000 putative Exposure Class plaintiffs and the 200 Injury Class plaintiffs, the jurisdictional amount is easily satisfied. When considering the cost of medical testing, lost wages, in addition to emotional distress, even conservatively estimating a $1,000 figure in contention, the putative Exposure Class numbers are significant: at least $2,000,000, not including attorney's fees, punitive damages or any amount allocated for the Injury Class

plaintiffs that actually contracted hepatitis A. Obviously, the amount in controversy for the Exposure Class plaintiffs quickly rises as the number of prospective class members increase.

48. The size of the putative Injury Class and the expected demands arising from their injuries by itself overcomes the jurisdictional amount. Jury verdicts or settlements arising from hepatitis A food contamination cases, as shown in the footnote below, regularly exceed $100,000 per plaintiff, with some, admittedly representing exceptional circumstances, exceeding $6,000,000.[3] The facts related

[3] *Miller v. Chi-Chi's Mexican Restaurant*, JVR No. 437519 (Penn. St Ct. 2003) ($6,250,000 award. A 58-year-old male suffered hepatitis A that resulted in a liver transplant and the inability to return to work after eating food prepared by the defendant restaurant); *Rosen v. Kuhn and Wallace Inc.*, JVR No. 73729 (Fla. Cir. Ct. 1991) ($458,979 award. A 30-year-old male suffered hepatitis A when he ate a sandwich that was purchased from the defendant restaurant); *Mazzoli v. Publix Supermarkets Inc.*, JVR No. 1010120041 (Fla Cir. Ct. 2006) ($325,000 award. A 57-year-old male contracted hepatitis A when he consumed a watercress salad, grown by the codefendant and sold by the defendant grocery store); *Shepherd v. Taco Bell and Redi-cut Foods*, JVR No. 472418 (Fla. Cir Ct. 2007) ($250,000 award. Plaintiff contracted hepatitis A from green onions on a bean burrito); *Simpson v. Kloesel*, JVR No. 485562 (Tex. St. Ct. 1999) ($81,744 award. A 62-year-old male alleged that he suffered the development of hepatitis A after he ingested celery from a pea salad, purchased at the defendant steakhouse); *Sherrie Lleo v. Kuhn & Wallace, Inc.*, JVR No. 105765 (Fla Cir. 1992) ($136,301 award. Plaintiff was a customer at defendant's restaurant and contracted hepatitis A); *Rice v. Subway*, JVR No. 170219 (Cal Sup. Ct. 1993) ($35,000 award. A 10-year-old male suffered hepatitis A after eating a sandwich at the defendant's sandwich shop where an infected employee worked); *Stanton v. Town Crier of Brookwood Inc.*, JVR No. 1010200049 (Dist. Ct. Kan. 2004) ($30,000 award. A female alleged that she suffered hepatitis A after she ingested food at the defendant's restaurant where

to the injuries sustained by the individuals in the cited jury verdicts are not clear, just as the facts concerning the nature and severity of the injuries sustained by the 131 cases reported by the CDC remain unclear. It also is not yet known if there are one or more "outliers" with significant claimed damages involved in this outbreak. Again, for purposes of this calculation only, TSC is assuming liability and damages based on what is in contention according the allegation made in Plaintiffs' Complaint. All plaintiffs in the cited verdicts contracted hepatitis A after consuming adulterated food at a restaurant. Moreover, it is fairly safe to assume that for many, if not most, of the reported verdicts the amounts originally in contention at the time their suits was filed were higher than the reported verdicts.

49. Although the sale of strawberries at issue has ended, the reports of this outbreak are ongoing according to Plaintiffs and the CDC, and the *reported* numbers of persons sickened are expected to increase. Exhibit B, pp. 15, 21; ¶¶ 18, 29. If the number of putative personal injury claimants in the Injury Class is limited to the minimum possible number, i.e. the 131 cases reported by the CDC on September 30, 2016, there are at least 131 putative Injury Class members.

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she was a customer).*Osiason v. Kuhn & Wallace, Inc.*, JVR No. 76714 (Fla Cir. 1992). ($21,000 award. After eating food at defendant restaurant plaintiffs contracted hepatitis A).

50. Assuming no other additional claimants come to light, even a conservative valuation of the amount the putative Injury Class has put in controversy exceeds the jurisdictional amount. For example, 131 personal injury plaintiffs would only need to seek to recover $38,167.94 each to exceed the $5,000,000 threshold. The collective group of plaintiffs most certainly will seek far more than this average based upon publically available information regarding other foodborne illness outbreaks.

51. The well-publicized Peanut Corporation of America ("PCA") *Salmonella* foodborne illness outbreak that occurred in 2008 is a good illustration. A summary of the PCA *Salmonella* outbreak can be found on the CDC website: http://www.cdc.gov/salmonella/2009/peanut-butter-2008-2009.html. Soon after the outbreak, PCA filed a Chapter 7 petition in the United States Bankruptcy Court, Western District of Virginia, Lynchburg Division, Case No. 09-60452-WA1-7. Exhibit G, pp. 5-8. The Bankruptcy Trustee established a claims procedure to address personal injury claims in the Bankruptcy Court. *Id.* A total of 122 personal injury claims were approved by the Bankruptcy Trustee for compensation and those claims were collectively valued at $15,155,000 (or $124,221 on average for each approved claim). *Id.* at p. 2, ¶ 5; p. 4. The Bankruptcy Trustee's valuations were reviewed and endorsed in a Report and

Recommendation authorized by the Honorable Michael F. Urbanski, United States Magistrate Judge for the Western District of Virginia. *Id.* at pp. 5-23. Judge Urbanski's recommendations were later approved by the Honorable Norman K. Moon, United States District Court Judge for the Western District of Virginia. *Id.* at pp. 25-29.

52. Applying the PCA average settlement value of $124,221 to the 131 personal injury cases reported by the CDC in this outbreak produces an amount in controversy of $16,272,951; half of that number ($62,110) produces an amount in controversy of $8,136,410; and a third of that number ($41,407) produces an amount in controversy of $5,424,317. Punitive damages were not at issue in the PCA settlement valuations. *Id.* at 10-11.

53. When the potential damages of the Injury Class are combined with the minimum 2,000 Exposure Class claims, the value of Plaintiffs' injunctive relief claim (discussed below), the value of Plaintiffs' possible punitive damages claim (discussed below), and Plaintiffs' expected claim for attorney's fees (discussed below), the amount in controversy is easily satisfied.

54. The court must also consider the value of Plaintiffs' requested injunctive relief to determine the amount in controversy. *S. Florida Wellness, Inc. v. Allstate Ins. Co.*, 745 F.3d 1312, 1316 (11th Cir. 2014). While absolute

certainty is neither attainable nor required, the value of injunctive relief must be "sufficiently measurable and certain" to satisfy the amount-in-controversy requirement. *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1269 (11th Cir. 2000).

55. Plaintiffs seek an injunction requiring TSC to "disclose exactly what Tropical Smoothie stores sold the contaminated products" and "post placards and/or notices" at all 500 stores relaying the facts of the outbreak, as well as "update its website with a full disclosure of the contamination." Exhibit B, pp. 37-41, ¶¶ 72 -73. Considering the interaction necessary with each franchisee that owns the stores, these requirements would cost TSC thousands of dollars and must be considered in determining the amount in controversy.

56. Moreover, potential punitive damage claims ought to be considered in determining the amount in controversy if the jurisdictional facts are sufficient to establish that punitive damages could be awarded. *See Back Doctors Ltd. v. Metropolitan and Cas. Ins. Co.*, 637 F.3d 827, 831 (7th Cir. 2011) (finding CAFA's amount in controversy requirement satisfied where a potential award of punitive damages could be high enough to reach the jurisdictional minimum, even though Plaintiffs did not plead punitive damages). *McDaniel v. Fifth Third Bank*, 568 F. App'x 729, 731 (11th Cir. 2014) (finding defendant met burden, when

considering punitive damages, to establish amount in controversy); *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1248 (10th Cir. 2012) ("A defendant seeking to remove because of a claim for punitive damages must affirmatively establish jurisdiction by proving jurisdictional facts that make it possible that punitive damages are in play.").

57. While Plaintiffs' Complaint is silent on punitive damages, it alleges fraud and, at least in the Georgia trial court where the action was filed, the Plaintiffs could have tried to pursue punitive damages based on the conduct alleged, as they would be permitted to further amend their complaint without leave of court before the entry of a pre-trial order. OCGA § 9-11-15(a); *Total Car Franchising Corp. v. Squire*, 259 Ga. App. 114, 115, 576 S.E.2d 90, 92 (2003). In their fraud count, Plaintiffs allege TSC "intentionally concealed and suppressed material facts concerning the adulteration of the food products it manufactured, distributed, provisioned, and/or sold to customers." Exhibit B, pp. 30-31, ¶ 60. Further, the Complaint alleges a number of other intentional acts. *Id.* at pp. 30-34, ¶¶ 60-64. It is irrelevant for the jurisdictional inquiry whether the Plaintiffs will ultimately recover on their fraud allegations. In light of the Supreme Court's edict that plaintiffs in a proposed class action cannot limit the damages of the putative class pre-certification, Plaintiffs here lack authorization to argue that they have or

would like to exclude punitive damages when asserting a fraud claim on behalf of the class. *Knowles*, 133 S. Ct. at 1348.

58. Fraud is a common ground for punitive damages under both Georgia and Virginia law. *Smithson v. Parker*, 242 Ga. App. 133, 136, 528 S.E.2d 886, 889 (2000); *See Glenn v. Trauben*, 70 Va. Cir. 446 (2004).

59. While the United States Supreme Court has held that "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424 (2003), this Court has awarded punitive damages of up to a 2173 to 1 ratio to compensatory damages when the state had a compelling interest in deterring the conduct and a single-digit multiplier would not have effectively deterred future misconduct. *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1284 (11th Cir. 2008) (*citing Kemp v. American Telephone & Telegraph Co.*, 393 F.3d 1354, 1363–65 (11th Cir. 2004)).

60. Even applying a conservative single digit punitive damages multiplier and extremely conservative valuations to Plaintiffs' claims, the jurisdictional amount is satisfied. For example, even assuming radically conservative amounts in contention of $1,000 to each Exposure Class plaintiff (minimum total of 2,000 members) and $10,000 to each injury class plaintiff (minimum potential total of

131 cases reported by the CDC), and applying a one-time multiplier to double the actual potential "damages" would place the amount in controversy at $6,600,000. If more realistic amounts are used, the amounts in controversy greatly increase.

61. Finally, a court may consider an award of attorney's fees in calculating the amount in controversy. *Porter v. MetroPCS Commc'ns Inc.*, 592 F. App'x 780, 783 (11th Cir. 2014) (noting that the court "[does] not doubt that" attorney's fees and punitive damages are included in the amount in controversy calculation).

62. The majority of common fund fee awards fall between 20% and 30% of the fund. *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1294 (11th Cir. 1999).

63. Again, even using ultra-conservative estimates of $1,000 in claimed damages for each Exposure Class plaintiff and $10,000 for each Injury Class plaintiff, and applying a one times compensatory punitive damages multiplier, would place the amount in controversy at $6,620,000. Conservatively adding 20% for attorney's fees would bring the amount in controversy to $7,944,000, well in excess of the threshold amount in controversy.

64. Adequately represented plaintiffs would concede that the very broadly defined putative classes herein that seek lost wages, pain and suffering, past

medical expenses, future medical damages, injunctive relief, fraud damages, costs (such as for medical and other experts), and attorney's fees far exceeds $5,000,000.

65. As highlighted above, even the most conservative estimates and projections reveal that the amount in controversy in this case exceeds $5,000,000 for purposes of establishing CAFA jurisdiction under 28 U.S.C. § 1332(d)(6).

FILING OF REMOVAL PAPERS

66. Pursuant to 28 U.S.C. § 1446(d), written notice of this removal has been provided simultaneously to Plaintiffs' counsel and the Superior Court of Fulton County, Georgia. *See* Exhibit H.

67. By removing this action to this Court, TSC does not waive any defenses, objections, or motions available under state or federal law. TSC expressly reserves the right to move for dismissal of some or all of Plaintiffs' claims pursuant to Rule 12 of the Federal Rules of Civil Procedure.

WHEREFORE, based on the foregoing, Defendant Tropical Smoothie Café, LLC respectfully removes this action from the Superior Court of Fulton County, Georgia, to this Court.

This 20th day of October, 2016.

WEINBERG, WHEELER,
HUDGINS, GUNN & DIAL, LLC

/s/ Alan M. Maxwell

ALAN M. MAXWELL
Georgia Bar No. 478625
NICK PANAYOTOPOULOS
Georgia Bar No.: 560679
JOSHUA E. SWIGER
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RULE 7.1D CERTIFICATE OF TYPE, FORMAT AND FONT SIZE

Pursuant to Local Rule 7.1D of the United States District Court for the Northern District of Georgia, the undersigned certifies that the foregoing submission to the Court was computer-processed, double-spaced between lines, and prepared with 14-point Times New Roman font.

This 20th day of October, 2016.

WEINBERG, WHEELER,
HUDGINS, GUNN & DIAL, LLC

/s/ Alan M. Maxwell
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been served via Odyssey E-file Ga and/or United States Mail with adequate postage affixed thereto and email to counsel of record as follows:

James F. McDonough, III
Henninger Garrison Davis, LLC
3621 Vinings Slope, Suite 4320
Atlanta, Georgia 30339

This 20th day of October, 2016.

WEINBERG, WHEELER,
HUDGINS, GUNN & DIAL, LLC

/s/ Alan M. Maxwell
ALAN M. MAXWELL
Georgia Bar No. 478625
NICK PANAYOTOPOULOS
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General Civil Case Filing Information Form (Non-Domestic)

Court
☒ Superior
☐ State

County Fulton

Date Filed 9/2/2016 (MM-DD-YYYY)

Docket # 2016CV279710

Plaintiff(s)

Kiker Samantha
Last First Middle I. Suffix Prefix Maiden

Last First Middle I. Suffix Prefix Maiden

Last First Middle I. Suffix Prefix Maiden

Last First Middle I. Suffix Prefix Maiden

No. of Plaintiffs 1 (Class action)

Plaintiff/Petitioner's Attorney ☐ Pro Se

McDonough James F. III
Last First Middle I. Suffix

Bar # 117088

Defendant(s)

Tropical Smoothie Cafe, LLC
Last First Middle I. Suffix Prefix Maiden

Last First Middle I. Suffix Prefix Maiden

Last First Middle I. Suffix Prefix Maiden

Last First Middle I. Suffix Prefix Maiden

No. of Defendants 1

Check Primary Type (Check only ONE)

- ☐ Contract/Account
- ☐ Wills/Estate
- ☐ Real Property
- ☐ Dispossessory/Distress
- ☐ Presonal Property
- ☐ Equity
- ☐ Habeas Corpus
- ☐ Appeals, Reviews
- ☐ Post Judgement Garnishment, Attachment, or Other Relief
- ☐ Non-Domestic Contempt
- ☒ Tort (If tort, fill in right column)
- ☐ Other General Civil Specify _____

If Tort is Case Type: (Check no more than TWO)

- ☐ Auto Accident
- ☐ Premises Liability
- ☐ Medical Malpractice
- ☐ Other Professional Negligence
- ☐ Product Liability
- ☒ Other Specify Negligence, Fraudulent Concealment, and Breach of Warranty Temporary/Permanent Injunction

Are Punitive Damages Pleaded? ☐ Yes ☒ No

☒ I hereby certify that the documents in this filing (including attachments and exhibits) satisfy the requirements for redaction of personal or confidential information in O.C.G.A. 9-11-7.1

Fulton County Superior Court
EFILEDBR
Date: 9/2/2016 5:01:39 PM
Cathelene Robinson, Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY, GEORGIA
136 PRYOR STREET, ROOM C-103, ATLANTA, GEORGIA 30303
SUMMONS

Samantha Kiker, on behalf of herself and all others similarly situated **Plaintiff,** **vs.** Tropical Smoothie Cafe, LLC **Defendant**	Case No.: 2016CV279710

TO THE ABOVE NAMED DEFENDANT(S):

You are hereby summoned and required to file with the Clerk of said Court and serve upon plaintiff's attorney, whose name and address is:

James F. McDonough, III
Heninger Garrison Davis, LLC
3621 Vinings Slope, Suite 4320
Atlanta, Georgia 30339
(404) 996-0869

An answer to the complaint which is herewith served upon you, within 30 days after service of this summons upon you, exclusive of the day of service; unless proof of service of this complaint is not filed within five (5) business days of such service. Then time to answer shall not commence until such proof of service has been filed. **IF YOU FAIL TO DO SO, JUDGMENT BY DEFAULT WILL BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.**

This 9/2/2016 day of _____, 20 ____

Honorable Cathelene "Tina" Robinson
Clerk of Superior Court
By Brenda Ray
Deputy Clerk

To defendant upon whom this petition is served:
This copy of complaint and summons was served upon you _____, 20 _____

_____
Deputy Sheriff

Instructions: Attach addendum sheet for additional parties if needed, make notation on this sheet if addendum is used

Fulton County Superior Court
EFILEDBR
Date: 9/2/2016 5:01:39 PM
Cathelene Robinson, Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SAMANTHA KIKER, on behalf of herself and all other similarly situated,

Plaintiffs,

v.

TROPICAL SMOOTHIE CAFE, LLC,

CIVIL ACTION FILE NO.
2016CV279710

COMPLAINT

DEMAND FOR JURY TRIAL

COMPLAINT

COMES NOW, Plaintiff Samantha Kiker in the above-captioned action, and pursuant to O.C.G.A Sec. 9-11-23, brings on behalf of themselves and all others similarly situated, including those that were exposed to or infected by Hepatitis A ("Plaintiffs"), via their undersigned counsel, this Complaint for damages and preliminary and permanent injunctive relief resulting from Tropical Smoothie Café, LLC's negligence, fraudulent concealment, and breach of warranty. This class action arises from Tropical Smoothie Café, LLC's manufacture, distribution, provision, and/or sale of adulterated food products that included strawberries contaminated with Hepatitis A ("HAV") and which has caused exposure, infection, and sickness to persons around the nation. To make matters worse, Tropical Smoothie Café, LLC concealed, and then only partially disclosed, the fact that its foods were contaminated with Hepatitis A, thereby compounding the damages and causing its customers to miss the two week window they had to get treatment that would have prevented infection. Plaintiffs seeks to temporarily and permanently enjoin Tropical Smoothie Café, LLC to disclose exactly what Tropical Smoothie stores sold the contaminated food products, post placards and/or notices to its customers at those stores and on its website. These placards and website postings

should relay the facts as they actually occurred, the dangers of HAV, the prophylactic steps that should be taken by those exposed to HAV, the treatment steps to be taken by those infected by HAV. Plaintiffs also seek to secure compensation from Tropical Smoothie Café, LLC for economic losses, personal injury, and other damages related to preventative treatment and post-infection treatment and otherwise needed as a result of Tropical Smoothie Café, LLC's actions. Plaintiffs and putative Classes Membersspecifically limit the damages, costs, disbursements, and attorney fees sought herein to less than $5,000,000 and disclaim any damages, costs, disbursements, and attorney fees equal to or above that threshold. Plaintiffs show this Honorable Court as follows:

I. PARTIES, JURISDICTION, AND VENUE

1. Samantha Kiker ("Ms. Kiker" or "Plaintiff Kiker"), is a resident of Roswell, Georgia, located in Fulton County, GA. She consumed food products from Tropical Smoothie Café, LLC that contained strawberries between January 2016 and August 2016. After learning that she was potentially exposed to Hepatitis A through the consumption of contaminated food from Tropical Smoothie Café, LLC, and following the recommendations and guidelines of public health officials, the CDC, and the NIH, Plaintiffs underwent the recommended

treatments recommended to those exposed to HAV.

2. Tropical Smoothie Cafe, LLC ("Tropical Smoothie" or "Defendant") is and was at all times relevant a domestic limited liability company doing business in the State of Georgia, and is organized under the laws of Georgia, with its principal place of business at 1117 Perimeter Center West, Suite W200, Atlanta, GA, 30338 ("Tropical Smoothie" or "Defendant"). Tropical Smoothie is a citizen of Georgia. Defendant is registered with the Georgia Secretary of State, Georgia Corporations Division, with control number 12052745.

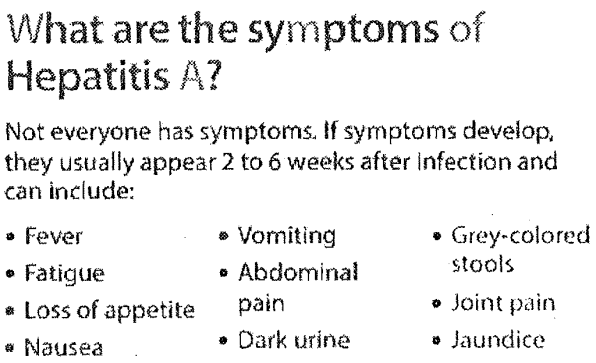
3. Venue as to Defendant is proper in this Court. Defendant operates its business in the State of Georgia and Fulton County, GA. Defendant franchises its name, trademarks, recipes, and other goodwill to its franchisees nationwide, and upon information and belief provides ingredients (including the subject Egyptian strawberries), advertising materials, and other materials to its franchisees out of its headquarters in Fulton County, GA. *See* http://tropicalsmoothiefranchise.com/about-us/ Venue is appropriate in this Court, under O.C.G.A. § 14-2-510 because Defendant's registered office is located within Fulton County (at 1117 Perimeter Center).

4. Plaintiffs visited one of the Defendant Tropical Smoothie's restaurants during the exposure period, between January 2016 and August 2016, during which time contaminated food products, including smoothies that contained strawberries, were purchased and consumed, exposing the Plaintiffs to Hepatitis A and thus causing an imminent and immediate risk of infection that urgently requires a preventive treatment, which included blood tests to determine infection, vaccination and/or immune globulin. (collectively, "Exposure Plaintiffs," as further defined below). Plaintiffs visited one of the Defendant Tropical Smoothie's restaurants during the exposure period, between, January 2016 and August 2016, during which time contaminated food products, including smoothies that contained strawberries, were purchased and consumed, exposing the Plaintiffs to Hepatitis A and thereby directly causing their infection with Hepatitis A, thus causing an immediate and imminent need for testing and treatment (collectively, "Injury Plaintiffs," as further defined below, and collectively with the Exposure Plaintiffs, the "Classes Members").

II. FACTS

5. Hepatitis A is a communicable (or contagious) disease that often spreads from person to person. Person-to-person transmission occurs via the "fecal-

oral route," while all other exposure is generally attributable to contaminated food or water. Exposure to hepatitis A virus ("HAV") can cause an acute infection of the liver that is typically mild and resolves on its own. The symptoms and duration of illness vary a great deal, with many persons showing no symptoms at all. Fever and jaundice are two of the symptoms most commonly associated with hepatitis A infection. Symptoms typically begin about 28 days after contracting HAV, but can begin as early as 15 days or as late as 50 days after exposure.



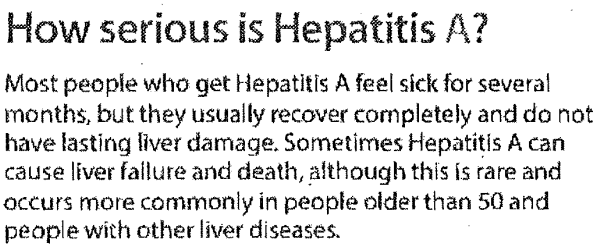
What are the symptoms of Hepatitis A?

Not everyone has symptoms. If symptoms develop, they usually appear 2 to 6 weeks after infection and can include:

- Fever
- Fatigue
- Loss of appetite
- Nausea
- Vomiting
- Abdominal pain
- Dark urine
- Grey-colored stools
- Joint pain
- Jaundice

http://www.cdc.gov/hepatitis/hav/pdfs/hepageneralfactsheet.pdf, at p. 2. The symptoms include muscle aches, headache, anorexia (loss of appetite), abdominal discomfort, fever, and malaise. After a few days of typical symptoms, jaundice (also termed "icterus") sets in. Jaundice is a yellowing of the skin, eyes and mucous membranes that occurs because bile flows poorly through the liver and backs up into the blood. The urine will also turn dark with bile and the stool light or clay-colored

from lack of bile. When jaundice sets in, initial symptoms such as fever and headache begin to subside. In general, symptoms usually last fewer than 2 months, although 10% to 15% of symptomatic persons have prolonged or relapsing disease for up to 6 months.



How serious is Hepatitis A?

Most people who get Hepatitis A feel sick for several months, but they usually recover completely and do not have lasting liver damage. Sometimes Hepatitis A can cause liver failure and death, although this is rare and occurs more commonly in people older than 50 and people with other liver diseases.

http://www.cdc.gov/hepatitis/hav/pdfs/hepageneralfactsheet.pdf, at p. 2. In rare situations, some people may die, have liver failure, or need a transplant. People are at risk for the disease if they live with or have sex with somebody that has HAV.

6. Early treatment after exposure to HAV is vital to avoid being infected with HAV. The disease is not curable but if it is treated through the administration of immune globulin or a HAV vaccine within two weeks of the initial exposure, infection can be prevented.

BOX. Summary of updated recommendations for prevention of hepatitis A after exposure to hepatitis A virus (HAV) and in departing international travelers

Postexposure prophylaxis

Persons who recently have been exposed to HAV and who previously have not received hepatitis A vaccine should be administered a single dose of single-antigen hepatitis A vaccine or immune globulin (IG) (0.02 mL/kg) as soon as possible.

- For healthy persons aged 12 months–40 years, single-antigen hepatitis A vaccine at the age-appropriate dose is preferred.
- For persons aged >40 years, IG is preferred; vaccine can be used if IG cannot be obtained.
- For children aged <12 months, immunocompromised persons, persons who have had chronic liver disease diagnosed, and persons for whom vaccine is contraindicated, IG should be used.

International travel

All susceptible persons traveling to or working in countries that have high or intermediate hepatitis A endemicity should be vaccinated or receive IG before departure. Hepatitis A vaccine at the age-appropriate dose is preferred to IG. The first dose of hepatitis A vaccine should be administered as soon as travel is considered.

- One dose of single-antigen hepatitis A vaccine administered at any time before departure can provide adequate protection for most healthy persons.
- Older adults, immunocompromised persons, and persons with chronic liver disease or other chronic medical conditions planning to depart to an area in ≤2 weeks should receive the initial dose of vaccine and also simultaneously can be administered IG (0.02 mL/kg) at a separate anatomic injection site.
- Travelers who elect not to receive vaccine, are aged <12 months, or are allergic to a vaccine component should receive a single dose of IG (0.02 mL/kg), which provides effective protection for up to 3 months.

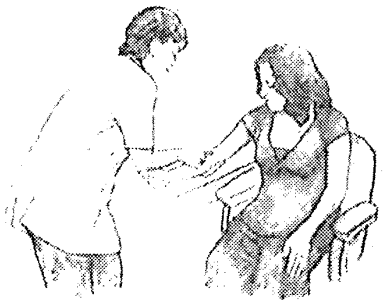
NOTE: Previous recommendations remain unchanged regarding 1) settings in which postexposure prophylaxis is indicated, and 2) timing of administration of postexposure prophylaxis.

http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5641a3.htm. "A doctor can determine if a person has Hepatitis A by discussing his or her symptoms and taking a blood sample. To treat Hepatitis A, doctors usually recommend rest, adequate

nutrition, fluids, and medical monitoring. Some people will need to be hospitalized. It can take a few months before people begin to feel better." *Id.*

How is hepatitis A diagnosed?

A blood test will show if you have hepatitis A. Blood tests are done at a doctor's office or outpatient facility. A blood sample is taken using a needle inserted into a vein in your arm or hand. The blood sample is sent to a lab to test for hepatitis A.



A blood test will show if you have hepatitis A

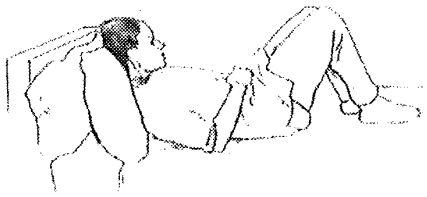
https://www.niddk.nih.gov/health-information/health-topics/liver-disease/hepatitis-a/Pages/ez.aspx. Persons infected with the disease should seek immediate medical attention. *Id.* "A dose of the hepatitis A vaccine or a medicine called hepatitis A immune globulin may protect you from getting sick if taken shortly after coming into contact with the hepatitis A virus." *Id.*

How is hepatitis A treated?

Hepatitis A usually gets better in a few weeks without treatment. However, some people can have symptoms for up to 6 months. Your doctor may suggest medicines to help relieve your symptoms. Talk with your doctor before taking prescription and over-the-counter medicines.

See your doctor regularly to make sure your body has fully recovered. If symptoms persist after 6 months, then you should see your doctor again.

When you recover, your body will have learned to fight off a future hepatitis A infection. However, you can still get other kinds of hepatitis.



Hepatitis A usually gets better in a few weeks without treatment.

Id. If a person is harboring HAV, it has an incubation period from two to four weeks and you can pass it along to others. After a person has been exposed they are shedding virus for two to four weeks. At that point, the person may not even be ill, but that person can pass it on at work, at school and to the other people they live with.

7. At least 70 people in seven states, including Virginia, Maryland, West Virginia, North Carolina, New York, Oregon, and Wisconsin have been sickened in a HAV outbreak that health officials believe is linked to frozen strawberries Tropical Smoothie sourced from Egypt; http://www.cdc.gov/hepatitis/outbreaks/2016/hav-strawberries.htm; http://www.sunherald.com/news/nation-world/national/article99166647.html (citing Nora Spencer-Loveall, a spokeswoman

from the Centers for Disease Control and Prevention). According to the Virginia Department of Health ("VDH"), Virginia has been hit hardest by the outbreak, with about 55 confirmed HAV cases there resulting from the consumption of Tropical Smoothie products. *Id.*

8. The first Virginia case dates back to May, Virginia Department of Health officials informed Tropical Smoothie on Aug. 5 of their suspicion that the cases were linked to frozen strawberries from Egypt. https://www.youtube.com/watch?v=u79YV5S0zGM; *see also,* http://www.sunherald.com/news/nation-world/national/article99166647.html. Tropical Smoothie, which has at least 500 restaurants in 40 states, removed the product from all its restaurants Aug. 6-8. This was not, however, before the Plaintiffs were exposed to HAV, and the Injury Plaintiffs infected and diagnosed with HAV, as a result of Tropical Smoothies' smoothies. The Centers for Disease Control and Prevention informed the Virginia Department of Health on Aug. 12 that the HAV cases were of a strain linked to other outbreaks involving strawberries from Egypt. Virginia health officials alerted the public on Aug. 19. Dr. Laurie Forlano, director of the VDH office of epidemiology, said the CDC research was just one piece of the investigative process. According to the CDC, more work needs to be

done to determine where the strawberries had been distributed and whether other ingredients might also be tainted. *See* http://www.sunherald.com/news/nation-world/national/article99166647.html. VDH also continues to investigate the cluster of HAV. The 66 people reported sickened are ages 14 to 68, and all said they consumed a Tropical Smoothie smoothie before exhibiting symptoms. According to the VHD, about half of those who tested positive for the virus and had their information available to health authorities had to be hospitalized. *See* http://www.sunherald.com/news/nation-world/national/article99166647.html.

9. After learning of the potential link to strawberries, Tropical Smoothie Cafe allegedly conducted a product withdrawal of all strawberries sourced from Egypt. ***However, it did not immediately notify its customers, including the Plaintiffs, of the HAV contaminated food products that it had and was incorporating into its customers' smoothies. This is especially troublesome given that the only preventative treatment post-exposure is treatment with immune globulin within two weeks of exposure to HAV.***

10. ***Instead, Tropical Smoothie waited over two weeks to inadequately notify its customers, including the Plaintiffs, (via a youtube video that was uploaded on August 21, 2016 and linked in its website) of the potential problem.***

See ***https://www.youtube.com/watch?v=u79YV5S0zGM. Notably, the notification did not caution its customers, including the Exposed Plaintiffs and Injured Plaintiffs, on the treatment, the risks, the periods of time that Tropical Smoothie was putting HAV contaminated strawberries in its smoothies, and did not otherwise give any guidance to its customers on what they should do if they indeed had recently had a smoothie with strawberries in it from Tropical Smoothie. Moreover, Tropical Smoothie did not disclose which stores were selling the contaminated strawberries in their smoothies, how many smoothies were made with the strawberries, how the strawberries got there, and did not otherwise put the actual Tropical Smoothie customers that were exposed on notice of their exposure or potential exposure. In the statement, Tropical Smoothie officials only said the Egyptian strawberries accounted for a small portion of the company's overall supply and that it removed the strawberries from all of its cafes.***

11. Tropical Smoothie's slogan is "Eat Better. Feel Better." However, this slogan is apparently not applicable to those of its customers that it exposed to and infected with HAV. The appropriate response to knowledge that a company infected its customers with HAV would be to post placards and/or notices at the affected Tropical Smoothie stores, address the steps that its customers should take

to avoid being infected with HAV, address the steps that its customers should take if they were infected with HAV, offer to pay for blood tests to exposed customers upon request, offer to pay for treatment and monitoring of the customers to ensure they are healthy, and otherwise guide its affected customers on how to "eat better" and "feel better" in the face of HAV exposure and infection.

12. Consistent with CDC recommendations, and with the recommendations made by the public health officials responding to the subject outbreak, Plaintiffs and Tropical Smoothie customers that had been exposed were told that post-exposure prophylactic treatment is recommended for all exposed individuals if such treatment can be administered within two weeks of exposure. *See, e.g.,* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5641a3.htm. "Post-exposure treatment," as noted above, consists of the administration by injection of either a Hepatitis A vaccine or immune globulin ("IG"). *Id.*

13. Plaintiffs were exposed to HAV during the exposure period as a result of consumption of contaminated food, including smoothies that contained strawberries, at the Defendant's Tropical Smoothie restaurants, and all subsequently received or need to immediately receive the recommended post-exposure treatment to prevent infection with Hepatitis A.

14. Injured Plaintiffs that were infected and diagnosed with HAV during the exposure period as a result of consumption of contaminated food, including smoothies that contained strawberries, at the Defendant's Tropical Smoothie restaurants must immediately receive the recommended post-infection treatment. Treatment generally involves supportive care, with specific complications treated as appropriate, including ongoing blood tests. Liver transplantation, in selected cases, is required if the patient has fulminant hepatic failure (FHF).

III. CLASS ALLEGATIONS

15. Plaintiffs repeats, realleges, and incorporates all allegations in the paragraphs above as if set fort fully herein.

16. This is a class action lawsuit brought by Plaintiffs on behalf of the Classes, including of all persons who were exposed to, and that were separately injured by, consumption of contaminated food and drink that contained HAV at the Defendant's restaurants during the exposure period in beginning in as early as January 2016 and through August 2016. Exposure Plaintiffs and Classes Members were and will be required for public health and personal safety reasons to obtain a Hepatitis A vaccination or an immune globulin shot (with some persons also getting an HAV blood test) because of their exposure at the Defendant's

restaurants. With respect to Injured Plaintiffs, those Plaintiffs will be required to take bi-annual blood tests, receive medical treatment, and otherwise seek treatment for HAV infection.

17. All such Exposure Plaintiffs, upon notice of the facts alleged herein, took or are taking immediate preventative action at the recommendation of public health authorities or other health professionals and organization, and, as a result, did not subsequently develop symptoms of HAV infection if they were not already infected. All such Injured Plaintiffs, which were infected, took or are taking or undergoing the recommended treatment for those infected with HAV.

18. **Class Definition.**

a. **Exposure Class:** The class includes all persons in the United States who consumed contaminated food or drink, including smoothies with strawberries, from Defendant during the exposure period in January 2016 through August 2016 and who, as a direct and proximate result of such consumption, were exposed to HAV and, following the recommendations of public health officials or other medical personnel and organizations, including the VHD, CDC, and NIH, obtained vaccination, and any related medical treatment, including blood tests, to prevent HAV infection, including Exposure Plaintiffs. The class does not include those

who developed HAV infections and does not include those persons who were exposed to HAV through consumption of contaminated food products from TLC Tropical Smoothie, LLC of Virginia, and does not include Defendant and its affiliates, parents, subsidiaries, employees, officers, agents, and directors (the "Exposure Class").

b. **Injury Class:** The class includes all persons who consumed contaminated food or drink, including smoothies with strawberries, from Defendant during the exposure period from January of 2016 through August 2016 and who, as a direct and proximate result of such consumption, were exposed to HAV and subsequently infected and diagnosed with HAV and, following the recommendations of public health officials or other medical personnel and organizations, including the VHD, CDC, and NIH, obtained vaccination, immune globulin, and any related medical treatment, including blood tests, to treat HAV infection. The class does not include those who were only exposed to HAV but that did not become infected with HAV. This class does not include Defendant and its affiliates, parents, subsidiaries, employees, officers, agents, and directors (the "Injury Class," and together with the Exposure Class, the "Classes").

19. **Numerosity**. Given the length of the exposure and the multiple

restaurants involved, the number of potential Classes Members of the Classes is likely to be in the thousands and the Classes Members are geographically dispersed. Disposition of the claims of the proposed Classes in a class action will provide substantial benefits to both the parties and the Court. However, because the number of persons who obtained vaccination, immune globulin, and/or treatment for HAV infection remains confidential and within the exclusive control of the applicable state and regional health departments and districts, the precise number of Classes Members is not currently known.

20. All food and drink sold at Defendant's restaurants during the exposure period of between January of 2016 and August of 2016 was defective, contaminated, and not reasonably safe as a result of use of contaminated strawberries in the preparation of particular food items, or preparation in proximity or conjunction with such contaminated ingredients, rendering all food and drink prepared and sold during the exposure period contaminated, unsafe, and not fit for human consumption. Because such food and drink was distributed and sold in high volume during the exposure periods to an a significant number of guests and patrons, the number of putative Classes Members is so numerous that joinder of all members in this case is impracticable.

21. **Commonality.** In addition to numerosity, there are significant questions of law or fact that are common to the class, including but not limited to:

a. Whether food prepared with HAV-contaminated strawberries is adulterated, unsafe to eat, defective, or otherwise prohibited from sale and distribution under all applicable local and state laws;

b. Whether food prepared in proximity or conjunction with HAV-contaminated strawberries is adulterated, unsafe to eat, defective, or otherwise prohibited from sale and distribution under all applicable local and state laws;

c. Whether Defendant is strictly liable for the sale of adulterated food;

d. Whether Defendant was negligent in its manufacture and sale of adulterated food under all applicable local and state health and safety regulations;

e. Whether Defendant breached its duties to Plaintiffs to make, prepare, and sell food products that were reasonably safe in construction, that did not materially deviate from applicable design specifications, and that did not deviate materially from identical units in the product line;

f. Whether Defendant manufactured, distributed, and sold a food product that was adulterated, not fit for human consumption, in a defective

condition unreasonably dangerous to Plaintiffs, and not reasonably safe as designed, manufactured, or sold;

g. Whether Defendant breached its duties to exercise reasonable care in the purchase, preparation and sale of food products;

h. Whether Defendant concealed from the public and its customers the knowledge it had that the food product was contaminated with HAV;

i. Whether Defendant should be enjoined and be required to post placards, signs, and other forms of notice to Plaintiffs warning them of their exposure and educating them on the steps they should take if they consumed food products at a location that sold and distributed contaminated food products, including those recommendations as provided by State health departments, the CDC, and the NIH;

j. Whether Defendant is liable for damages to all potentially exposed persons who obtained vaccinations to avoid HAV infections; and

k. Whether Defendant is liable for damages to all exposed persons who were injured by contracting and HAV infection;

22. **Typicality.** The claims of the Plaintiffs and named representative are typical of the claims of the putative members of the Classes, each of whom meet the class definition as set forth above. The damages and relief sought by

the named representative is also typical to the Classes and its members because of the essentially identical nature and process of treatment, its costs, and physical and emotional consequences amongst the class representative and the class members, and the claim of each of the Classes Members would necessarily require proof of the same material and substantive facts, and seek the same remedies

23. **Adequacy**. The named Plaintiffs has common interests with the members of the Classes, will vigorously prosecute the interests of the Classes through qualified counsel, and does not have identifiable conflicts with any other potential class member; thus, the named Plaintiffs will fairly and adequately represent and protect the interests of the Classes. The Plaintiffs is willing and prepared to serve the Court and the proposed Classes in a representative capacity. The Plaintiffs will fairly and adequately protect the interest of the Classes and have no interests adverse to, or which directly and irrevocably conflicts with, the interests of other members of the Classes. Further, Plaintiffs has retained counsel experienced in prosecuting complex class action litigation.

24. Defendant has acted or refused to act on grounds generally applicable to the proposed Classes, thereby making appropriate equitable relief with respect

to the Classes.

25. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because individual claims by the Classes Members are impractical, as the costs of prosecution may exceed what any Classes member has at stake.

26. The relevant State Departments of Health or the CDC or other appropriate health organization, can transmit notice of this class action to each known potential member of the Classes, once the respective individual classes are certified. Such notifications have been used successfully in prior HAV class actions that have obtained certification and settlement. The rights of each member of the proposed Classes were violated in a similar fashion based upon Defendant's uniform wrongful actions and/or inaction.

27. Prosecuting separate actions by individual Classes Members would create a risk of inconsistent or varying adjudications that would establish incomparable standards of conduct for Defendant. Moreover, adjudications with respect to individual Classes Members would, as a practical matter, be dispositive of the interests of other Classes Members. Tropical Smoothie has acted or refused to act on grounds generally applicable to the class, thereby making appropriate

final injunctive relief or corresponding declaratory relief with respect to the class as a whole. The questions of law and fact common to the members of the Classes (listed above) predominate over any questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of the controversy described herein.

IV. CAUSES OF ACTION

COUNT I
(BREACH OF WARRANTY)

28. Plaintiffs repeats, realleges, and incorporates all allegations in the paragraphs above as if set fort fully herein.

29. Plaintiffs brings this Count on behalf of the Classes.

30. Defendant is a manufacturer, distributor, provisioner, and/or seller of smoothie food products. Defendant, through its manufacture, distribution, provisioning, and/or sale of smoothie food products, warranted that its products were reasonably safe for their ordinary and foreseeable purpose (*i.e.*, consumption).

31. Defendant was the manufacturer, distributor, provisioner, and/or

seller of the smoothie food products consumed by Plaintiffs that caused Plaintiffs' exposure to HAV infection.

32. The smoothie food products manufactured, distributed, provisioned, and/or sold by Defendant were contaminated with HAV, a potentially fatal pathogen. As such, the smoothie food products were unreasonably dangerous for their ordinary and foreseeable use.

33. The smoothie food products were contaminated with HAV when they left the possession and control of Defendant.

34. Defendant breached the warranty of the safety of its goods for their expected and foreseeable purpose. This breach was the direct and proximate cause of Plaintiffs' injuries, and Plaintiffs suffered personal injuries, as well as economic loss, and Defendant is thus liable to Plaintiffs for the injuries sustained

35. Accordingly, Defendant is liable to Plaintiffs and Classes Members for damages in an amount to be proven at trial.

COUNT II
(NEGLIGENCE)

36. Plaintiffs repeats, realleges, and incorporates all allegations in the paragraphs above as if set fort fully herein.

37. Plaintiffs brings this Count on behalf of the Classes.

38. At all times relevant to this action, Defendant, in its manufacturing, distributing, provisioning, and/or sale operations, had a duty to comply with the relevant state and local laws and regulations prohibiting the manufacture and sale of adulterated food, including, without limitation, the provisions of Georgia Food Act (O.C.G.A. §§ 26-2-20 et seq) and other comparable State laws, which defines and prohibits the sale of adulterated food. For instance, the Georgia Food Act specifically defines "adulterated food" to include any food which contains a "deleterious substance which may render it injurious to health...." O.C.G.A. § 26-2-26(1). The appellate courts in Georgia have held that violations of this statute can constitute negligence per se.

39. With reference to duties identified in the preceding paragraph, Defendant did not comply with such duties in its manufacture, distribution, provision, and/or sale of the HAV-contaminated smoothie food products that ultimately caused Plaintiffs' exposure to, and infection with, HAV.

40. Under Georgia law and comparable and relevant State laws, Defendant's failure to comply with legislative or administrative regulations, whether relating to design, construction or performance of the smoothie food products or to warnings or instructions as to their use, can be evidence of

negligence.

41. Plaintiffs are among the specific class of persons designed to be protected by the statutory and regulatory provisions cited above, pertaining to the manufacture, distribution, provision, storage, labeling, and/or sale of food products by Defendant.

42. When an injury-causing aspect of the product was not, at the time of manufacture, distribution, provision, and/or sale, in compliance with specific mandatory government specifications, it is evidence that the manufacturer breached its duty of reasonable care, and is negligent *per se*.

43. Defendant owed a duty to Plaintiffs to use supplies and raw materials that complied with state, and local food laws, ordinances, and regulations; that were from safe and reliable sources; that were clean, wholesome, and free from adulteration; and that were safe for human consumption, and for their intended purposes. Defendant breached this duty

44. Defendant owed a duty to Plaintiffs to use reasonable care in the selection, supervision, and monitoring of its employees, suppliers, or other subcontractors. Defendant breached this duty.

45. Defendant owed a duty to Plaintiffs to use reasonable care in the

handling, manufacture, provision, storage, distribution, and/or sale of its smoothie food products, to keep them free of contamination with HAV. Defendant breached this duty.

46. As a result of Defendant's breaches of duties, and noncompliance with applicable law and safety regulations, it manufactured, distributed, provisioned, and/or sold smoothie food products that were not reasonably safe, and Plaintiffs suffered personal injuries, as well as economic loss, as a direct and proximate result, and Defendant is thus liable to Plaintiffs for the damages sustained

47. Accordingly, Defendant is liable to Plaintiffs and Classes Members for damages in an amount to be proven at trial.

COUNT III
(FRAUDULENT CONCEALMENT/FRAUD BY CONCEALMENT)

48. Plaintiffs repeats, realleges, and incorporates all allegations in the paragraphs above as if set fort fully herein.

49. Plaintiffs brings this Count on behalf of the Classes.

50. With knowledge of the contamination of its food products with HAV as of August 5, 2016, and despite the fact that time is of the essence to avoid infection with HAV when a person is exposed to HAV, Defendant intentionally

concealed and suppressed material facts concerning the adulteration of the food products it manufactured, distributed, provisioned, and/or sold to its customers. Defendant knew its food was adulterated and nonetheless failed to timely disclose that adulteration to the detriment of Plaintiffs that became infected with HAV. Plaintiffs relied upon Defendants claim that it responsibly sources its food and stands behind its logo, "Eat Better. Feel Better." Defendant failed to disclose the facts alleged in this Complaint regarding its adulterated food products for over two weeks, which is the time period most vital in preventing HAV infection.

51. Although Defendant did eventually post a video on YouTube and its website, that video is entitled, "A message from our CEO regarding Virginia area cafes." https://www.youtube.com/watch?v=u79YV5S0zGM (last accessed September 1, 2016); *see also, https://www.tropicalsmoothie.com/*


Tropical CAFE
FIND A CAFE
FRESH FOOD
FRESH SMOOTHIES
NUTRITION
CATERING
TROPICAL REWARDS APP
OPEN YOUR OWN CAFE
FOOD SAFETY
GET THE APP!
THE TROPICAL REWARDS APP
EARN $5 FOR EVERY $55 SPENT*
Tropical Rewards App
At Tropical Smoothie Cafe, we believe there's no better way to make a great meal than with fresh, natural, quality ingredients.
Catering
Franchising

Id. The video and its title insinuated that only Virginia cafes were affected, and further provides no information on which Tropical Smoothie stores were affected, the steps that its customers should take to avoid being infected with HAV, the steps that its customers should take if they were infected with HAV, and did not otherwise guide its affected customers on how to "eat better" and "feel better" in the face of HAV exposure and infection.

52. Defendant had a duty to immediately disclose that its food products were contaminated with HAV, and also had a duty to disclose the full truth (not a partial one) of that contamination in order to allow Plaintiffs to take prophylactic and treatment measures recommended by State health departments, the CDC, and NIH, among others. Defendant had exclusive knowledge of the scope and extent of the contamination and chose to wait and then only partially disclose the facts regarding manufacture, distribution, provision, and/or sale of the adulterated food products. Defendant also had a duty to disclose because it allegedly prides itself on selling fresh, healthy, and nutritious food products and it markets its food products accordingly and the HAV contamination is particularly important to those that value their health and that patronize Defendants' cafes.

53. These omissions are material because they are creating more damage to Tropical Smoothie customers that are unable to take prophylactic and treatment measure because they may not even know that they are in the Classes, which the Plaintiffs would have done had they been fully informed. Tropical Smoothie still has not made a full and adequate disclosure of the contamination and the where, when, and why the adulterated food products were manufactured, distributed, provisioned, and/or sold to its customers. Tropical Smoothie has actively and continues to actively conceal the true facts of the contamination to protect its profits.

54. As a result of the concealment and/or suppression of the facts, Plaintiffs have sustained damage as outlined herein, including being exposed to HAV, having to take the HAV vaccine and/or immune globulin, having to take blood tests, having to monitor their health, having to visit doctors and clinics, and suffering the symptoms of HAV, among other things, and Plaintiffs suffered personal injuries, as well as economic loss, as a direct and proximate result, and Defendant is thus liable to Plaintiffs for the damages sustained.

55. Accordingly, Defendant is liable to Plaintiffs and Classes Members for damages in an amount to be proven at trial.

COUNT IV
(PRELIMINARY INJUNCTION)

56. Plaintiffs repeats, realleges, and incorporates all allegations in the paragraphs above as if set fort fully herein.

57. Plaintiffs brings this Count on behalf of the Classes.

58. Plaintiffs allege that the administration of justice often requires that limited restrictions be placed on counsel and parties in cases in which class certification is sought.

59. In class actions where a putative class member is permitted to elect not to participate in the class action, there is an inherent risk that a class member's decision may, in the absence of court regulation of communications regarding the class action, not be based on a complete and balanced presentation of the relevant facts. Accordingly, special management of class actions is often necessary to protect the interests of both formal parties and absent class members.

60. Special management to further the administration of justice in this case in which class certification will be sought compels, as a matter of equity, granting on a temporary or preliminary basis, for some or all of the pendency of the case, an injunction restricting communications by parties and their counsel with members of the class proposed in the case.

61. In view of the above allegations, an order enjoining communications with proposed Classes Members should immediately issue and remain in effect until such time as the following events and conditions occur and are abided by to the court's satisfaction:

a. the parties and/or their counsel confer jointly to determine whether proper management of the case or the interests of putative Classes Members require the entry of an order limiting either the parties or counsel in communications with putative class members;

b. the above-described conference shall occur as soon as practicable, but in no event later than twenty (20) days after this Complaint is served;

c. within ten (10) days after the above-described conference, counsel shall submit to the court a joint statement of their collective or individual views as to whether an order should be entered limiting communications. If counsel agree no order is necessary, they shall so state in their report to the Court. If counsel agree that an order limiting communications should be entered, they shall submit the proposed content of such order and the grounds justifying entry of same. If counsel cannot agree whether an order should be entered or what the

content of such an order should be, they shall report this to the Court and either submit stipulated facts for the court's consideration or request a hearing to present evidence on the issue;

d. based on the record before the Court, a further order limiting communications may be entered upon a finding that a failure to so limit communications would likely result in imminent and irreparable injury to one of the parties; conversely, the Court may find upon the record that no further order is needed;

e. neither parties nor their counsel shall initiate communications with putative Classes Members regarding the substance of the lawsuit until counsel presents the required report described above to the court and any necessary order is entered pursuant to the report; and

f. during the pendency of the case, under any allowance of communications, parties and counsel are forbidden to communicate with prospective or actual Classes Members in a way which tends to misrepresent the status, purpose, and effects of the action or of any actual or potential court orders therein, which may create impressions tending without cause to reflect adversely on any party, any counsel, the Court, or the' administration of justice.

62. Plaintiffs and all Classes Members also request that Tropical Smoothie be preliminarily enjoined to notify the public as follows:

a. disclose exactly what Tropical Smoothie stores sold the contaminated food products,

b. post placards and/or notices to its customers at those stores relaying the facts as they occurred, the dangers of HAV, the prophylactic steps that should be taken by those exposed to HAV, the treatment steps to be taken by those infected by HAV; and

c. update its website with a full disclosure of the contamination and relaying the facts as they occurred, the dangers of HAV, the prophylactic steps that should be taken by those exposed to HAV, the treatment steps to be taken by those infected by HAV

63. This notification to the public is necessary and in the interests of justice because:

a. There is an ascertainable claim for relief as described herein;

b. The Plaintiffs and all Classes Members will likely succeed on the merits because, as described herein, Tropical Smoothie has already admitted to sickening Virginia customers and the CDC has determined that the source of the

HAV exposure and infections are the result of persons consuming smoothies with strawberries from Tropical Smoothie;

c. Irreparable harm will ensure without the preliminary injunction as the public and Classes Members will continue to be infected sickened by HAV without taking preventative measures, including, without limitation, getting the HAV vaccine or immune globulin and blood tests to determine exposure and/or infection, and the public will continue to be unaware of which stores created the contamination without the injunctive relief sought herein. A remedy at law is inadequate as monetary damages alone will not prevent the further exposure/spread of HAV or further HAV infections to the public and Classes Members;

d. It imposes a *de minimus* hardship to Tropical Smoothie to post placards and/or notices and update its website while the threat to the public of HAV infection is severe, imminent, and real, and on balance, the hardships are far more severe as to the public and Classes Members; and

e. The public interest will be served as the preliminary injunctive relief sought here is to protect the health and welfare of the public.

COUNT V
(INJUNCTION)

36

64. Plaintiffs also requests that Tropical Smoothie be permanently enjoined to notify the public as follows:

a. disclose exactly what Tropical Smoothie stores sold the contaminated food products,

b. post placards and/or notices to its customers at those stores relaying the facts as they occurred, the dangers of HAV, the prophylactic steps that should be taken by those exposed to HAV, the treatment steps to be taken by those infected by HAV; and

c. update its website with a full disclosure of the contamination and relaying the facts as they occurred, the dangers of HAV, the prophylactic steps that should be taken by those exposed to HAV, the treatment steps to be taken by those infected by HAV

65. This notification to the public is necessary and in the interests of justice because:

a. There is an ascertainable claim for relief as described herein;

b. Irreparable harm will ensure without the permanent injunction as the public and Classes Members will continue to be infected sickened by HAV without taking preventative measures, including, without limitation, getting the

HAV vaccine or immune globulin and blood tests to determine exposure and/or infection, and the public will continue to be unaware of which stores created the contamination without the injunctive relief sought herein. A remedy at law is inadequate as monetary damages alone will not prevent the further exposure/spread of HAV or further HAV infections to the public and Classes Members;

c. It imposes a *de minimus* hardship to Tropical Smoothie to post placards and/or notices and update its website while the threat to the public of HAV infection is severe, imminent, and real, and on balance, the hardships are far more severe as to the public and Classes Members; and

d. The public interest will be served as the permanent injunctive relief sought here is to protect the health and welfare of the public.

V. REQUEST FOR RELIEF

66. Plaintiff and all Class Members, *i.e.*, those persons who fit the Classes definitions, have suffered general and special damages as the direct and proximate result of Defendant's acts and omissions, which damages shall be fully proven at the time of trial. These damages are common among the

representative party and putative Classes Members and may include: wage loss; medical and medical-related expenses; travel and travel-related expenses; emotional distress; fear of harm and humiliation; physical pain; physical injury; and all other damages as would be anticipated to arise under the circumstances.

WHEREFORE, Plaintiffs and all Classes Members respectfully requests that the Court enter judgment in his favor and against Tropical Smoothie, as follows:

A. That, as soon as practicable, the Court certify with action as a class action;

B. That temporary and/or preliminary injunction relief be granted, as well as other equity, including, but not limited to, enjoining limiting the parties and counsel from communicating with the putative Classes Members as described above and also mandating that Tropical Smoothie post placards and/or notices and update its website as outlined above;

C. That Plaintiffs and all Classes Members recover judgment for damages of less than $5,000,000 (inclusive of the costs, disbursements, and attorney fees sought below), on behalf of themselves and all those similarly situated, against Defendant for such sums as shall be determined to fully and fairly compensate them for all general, special, incidental, and consequential damages respectively incurred

by them as the direct and proximate result of Defendant's acts and omissions;

D. That the court award Plaintiffs and all Classes Members their respective costs, disbursements and reasonable attorneys' fees incurred with such costs, disbursements, and reasonable attorneys' fees coupled with the damages claimed by Plaintiffs and putative Classes Members total less than $5,000,000;

E. That the court award Plaintiffs and all Class Members, the opportunity to amend or modify the provisions of this petition as necessary or appropriate after additional or further discovery is completed in this matter, and after all appropriate parties have been served;

F. That the Court permanently enjoin and mandate that Tropical Smoothie:

1. disclose exactly what Tropical Smoothie stores sold the contaminated food products,

2. post placards and/or notices to its customers at those stores relaying the facts as they occurred, the dangers of HAV, the prophylactic steps that should be taken by those exposed to HAV, the treatment steps to be taken by those infected by HAV; and

3. update its website with a full disclosure of the contamination and

relaying the facts as they occurred, the dangers of HAV, the prophylactic steps that should be taken by those exposed to HAV, the treatment steps to be taken by those infected by HAV.

G. That the Court award Plaintiffs and all Classes Members such other and further relief as it deems necessary and equitable in the circumstances.

XI. DEMAND FOR JURY TRIAL

Plaintiffs demands a jury trial.

DATED: September 2, 2016.

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Attorneys for Plaintiff

Fulton County Superior Court
EFILEDTV
Date: 9/19/2016 1:58:11 PM
Cathelene Robinson, Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SAMANTHA KIKER, on behalf of herself and all other similarly situated; YLEELA ROGERS, on behalf of herself and all other similarly situated; and JILLIAN ONSTAD, on behalf of herself and all other similarly situated;

Plaintiffs,

v.

TROPICAL SMOOTHIE CAFE, LLC,

Defendant.

CIVIL ACTION FILE NO.
2016CV279710

COMPLAINT

DEMAND FOR JURY TRIAL

COMPLAINT

COME NOW Plaintiff Samantha Kiker, Plaintiff Yleela Rogers, and Plaintiff Jillian Onstad ("Plaintiffs") in the above-captioned action, and pursuant to O.C.G.A Sec. 9-11-23, brings on behalf of themselves and all others similarly situated, including those that were exposed to or infected by Hepatitis A, via their undersigned counsel, this Complaint for damages and preliminary and permanent injunctive relief resulting from Tropical Smoothie Café, LLC's negligence, fraudulent concealment, and breach of warranty.

1. This class action arises from Tropical Smoothie Café, LLC's manufacture, distribution, provision, and/or sale of adulterated food products that included strawberries contaminated with Hepatitis A ("HAV"). The contaminated strawberries have caused exposure, infection, and sickness to persons around the nation. Those so exposed, infected, and sickened have suffered damages, including but not limited to (b) expenses for testing, vaccination, and medical treatment, (b) personal injury and pain and suffering, and (c) lost wages.

2. All such damages were preventable. Tropical Smoothie Café, LLC knew or should have known of the risks to its customers and their family members posed by the contaminated strawberries at issue, but upon information and believe,

it took no reasonable and effective steps to prevent or minimize that risk by, among other actions, testing and inspecting the fruit before it was used in the fruit products the Defendant sold and dispensed to customers. This failure to prevent the harm is a gross dereliction of the Defendant's duties to the representative Plaintiffs and the proposed class.

3. Having breached its duties to prevent the contaminated fruit from being dispensed to customers, Tropical Smoothie Café, LLC then concealed, and then only partially disclosed, the fact that these dispensed products were contaminated with Hepatitis A. That concealment prevented Plaintiffs who contracted the disease from obtaining timely vaccination from Hepatitis A, and they could and would have been vaccinated had the Defendant not concealed the fact of their exposure to the illness. The concealment ensured that the Plaintiffs would contract the illness, and it caused family and other household members of the Plaintiffs to themselves become exposed to the illness via exposure to the Plaintiffs sickened by the disease. Those so exposed who were tested or vaccinated against the disease are entitled to relief and are, like the sickened Plaintiffs, members of the class.

4. Consequently, Plaintiffs are entitled to compensation from Tropical Smoothie Café, LLC for economic losses, medical expenses, personal injury, and

other damages related to preventative treatment and post-infection treatment and otherwise needed as a result of the Defendant's inactions and actions.

5. The Plaintiffs also claim and pray for temporary and permanent injunctive relief to require Tropical Smoothie Café, LLC to disclose exactly what Tropical Smoothie stores sold the contaminated food products and to post placards and/or notices to its customers at those stores and on its website to caution them about the illness and to advise them on reasonable steps to take to prevent and treat it. These placards and website postings should relay the facts as they actually occurred, the dangers of HAV, the prophylactic steps that should be taken by those exposed to HAV, and the treatment steps to be taken by those infected by HAV. Absent this injunctive relief, customers and members of their family and household may contract and suffer the disease, and be exposed to it, without adequate knowledge of steps to take to test for, prevent, and treat Hepatitis A.

6. To support an award of all relief sought, the Plaintiffs show this Honorable Court as follows:

I. PARTIES, JURISDICTION, AND VENUE

7. Samantha Kiker ("Ms. Kiker" or "Plaintiff Kiker"), is a resident of Roswell, Georgia, located in Fulton County, GA. She consumed food products from

Tropical Smoothie Café, LLC that contained strawberries between January 2016 and August 2016. After learning that she was potentially exposed to Hepatitis A through the consumption of contaminated food from Tropical Smoothie Café, LLC, and following the recommendations and guidelines of public health officials, the CDC, and the NIH, Plaintiffs underwent the recommended treatments recommended to those exposed to HAV, including a blood test, which resulted in a negative finding for Hepatitis A.

8. Yleela Rogers ("Ms. Rogers" or "Plaintiff Rogers"), is a resident of Newport News, VA. She was a frequent patron of Tropical Smoothie Café, LLC up until her being sickened with Hepatitis A. She consumed contaminated food between January of 2016 and August 2016, at the Tropical Smoothie location in Newport News, Virginia. Plaintiff Rogers began feeling sick the week of September 4, 2016, and went to the doctor for treatment. The doctor suggested she get tested for Hepatitis A given her symptoms. The test returned as positive for Hepatitis A. The doctor suggested to her that she contracted the Hepatitis A from consuming a smoothie with strawberries in it from Tropical Smoothie Café, LLC. Plaintiff is undergoing liver testing to determine the severity of the infection. The doctor ordered that seven days of bedrest and no contact with others to prevent infecting

others.

9. Plaintiff Jillian Onstad ("Ms. Onstad" or "Plaintiff Onstad"), is a resident of Warrenton, VA. Upon information and belief, she consumed a smoothie contaminated with Hepatitis A on or about August 1, 2016, at the Tropical Smoothie location in Gainesville, Virginia. She began feeling sick two to three weeks afterward and promptly sought medical treatment. She was tested for Hepatitis A, and the test returned positive. She was immediately contacted and interviewed by the Faquier County, Virginia health department, which suggested vaccination of family members exposed to the disease due to Plaintiff's illness. Four of her family, acting on that medical advice, were vaccinated. Ms. Onstad, had the Defendant timely disclosed her exposure, also would have been vaccinated. She was not vaccinated, because the Defendant concealed her exposure.

10. Ms. Onstad has suffered from the illness and has missed significant time from her employment due to it, costing her paid time leave, among other damages.

11. Tropical Smoothie Café, LLC ("Tropical Smoothie" or "Defendant") is and was at all times relevant a domestic limited liability company doing business in the State of Georgia, and is organized under the laws of Georgia, with its principal

place of business at 1117 Perimeter Center West, Suite W200, Atlanta, GA, 30338 ("Tropical Smoothie" or "Defendant"). Tropical Smoothie is a citizen of Georgia. Defendant is registered with the Georgia Secretary of State, Georgia Corporations Division, with control number 12052745.

12. Venue as to Defendant is proper in this Court. Defendant operates its business in the State of Georgia and Fulton County, GA. Defendant franchises its name, trademarks, recipes, and other goodwill to its franchisees nationwide, and upon information and belief provides ingredients (including the subject strawberries), advertising materials, and other materials to its franchisees out of its headquarters in Fulton County, GA. See http://tropicalsmoothiefranchise.com/about-us/ Venue is appropriate in this Court, under O.C.G.A. § 14-2-510 because Defendant's registered office is located within Fulton County (at 1117 Perimeter Center).

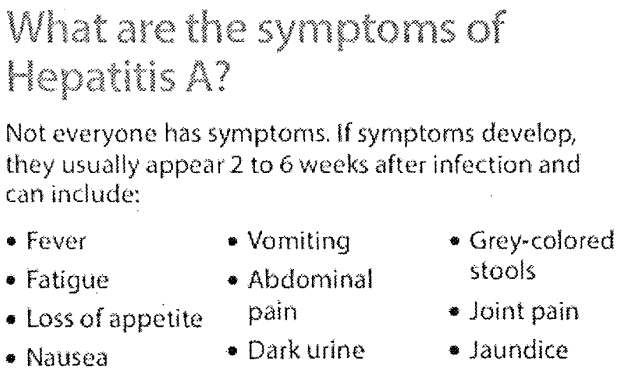
13. Plaintiff Kiker visited one of the Defendant Tropical Smoothie's restaurants during the exposure period, between January 2016 and August 2016, during which time contaminated food products, including smoothies that contained strawberries, were purchased and consumed, exposing the Plaintiffs to Hepatitis A and thus causing an imminent and immediate risk of infection that urgently requires

a preventive treatment, which included blood tests to determine infection, vaccination and/or immune globulin. (collectively, "Exposure Plaintiffs," as further defined below). Plaintiff Rogers visited one of the Defendant Tropical Smoothie's restaurants during the exposure period, between, January 2016 and August 2016, during which time contaminated food products, including smoothies that contained strawberries, were purchased and consumed, exposing the Plaintiffs to Hepatitis A and thereby directly causing their infection with Hepatitis A, thus causing an immediate and imminent need for testing and treatment (collectively, "Injury Plaintiffs," as further defined below, and collectively with the Exposure Plaintiffs, the "Classes Members"). Plaintiff Onstad similarly visited one of the Defendant Tropical Smoothie's restaurants during the exposure period, and she suffered the same exposure and risk of disease as the other Plaintiffs. She fell ill with the disease, and her family was exposed as well, as alleged.

II. FACTS

14. Hepatitis A is a communicable (or contagious) disease that often spreads from person to person. Person-to-person transmission occurs via the "fecal-oral route," while all other exposure is generally attributable to contaminated food or water. Exposure to hepatitis A virus ("HAV") can cause an acute infection of the

liver that is typically mild and resolves on its own. The symptoms and duration of illness vary a great deal, with many persons showing no symptoms at all. Fever and jaundice are two of the symptoms most commonly associated with hepatitis A infection. Symptoms typically begin about 28 days after contracting HAV, but can begin as early as 15 days or as late as 50 days after exposure.



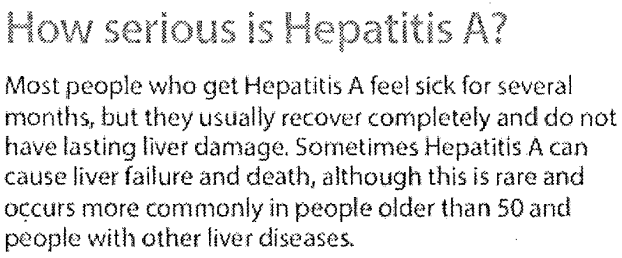
What are the symptoms of Hepatitis A?

Not everyone has symptoms. If symptoms develop, they usually appear 2 to 6 weeks after infection and can include:

- Fever
- Fatigue
- Loss of appetite
- Nausea
- Vomiting
- Abdominal pain
- Dark urine
- Grey-colored stools
- Joint pain
- Jaundice

http://www.cdc.gov/hepatitis/hav/pdfs/hepageneralfactsheet.pdf, at p. 2. The symptoms include muscle aches, headache, anorexia (loss of appetite), abdominal discomfort, fever, and malaise. After a few days of typical symptoms, jaundice (also termed "icterus") sets in. Jaundice is a yellowing of the skin, eyes and mucous membranes that occurs because bile flows poorly through the liver and backs up into the blood. The urine will also turn dark with bile and the stool light or clay-colored from lack of bile. When jaundice sets in, initial symptoms such as fever and headache begin to subside. In general, symptoms usually last fewer than 2 months,

although 10% to 15% of symptomatic persons have prolonged or relapsing disease for up to 6 months.



How serious is Hepatitis A?

Most people who get Hepatitis A feel sick for several months, but they usually recover completely and do not have lasting liver damage. Sometimes Hepatitis A can cause liver failure and death, although this is rare and occurs more commonly in people older than 50 and people with other liver diseases.

http://www.cdc.gov/hepatitis/hav/pdfs/hepageneralfactsheet.pdf, at p. 2. In rare situations, some people may die, have liver failure, or need a transplant. People are at risk for the disease if they live with or have sex with somebody that has HAV.

15. Early treatment after exposure to HAV is vital to avoid being infected with HAV. The disease is not curable but if it is treated through the administration of immune globulin or a HAV vaccine within two weeks of the initial exposure, infection can be prevented.

BOX. Summary of updated recommendations for prevention of hepatitis A after exposure to hepatitis A virus (HAV) and in departing international travelers

Postexposure prophylaxis

Persons who recently have been exposed to HAV and who previously have not received hepatitis A vaccine should be administered a single dose of single-antigen hepatitis A vaccine or immune globulin (IG) (0.02 mL/kg) as soon as possible.

- For healthy persons aged 12 months–40 years, single-antigen hepatitis A vaccine at the age-appropriate dose is preferred.
- For persons aged >40 years, IG is preferred; vaccine can be used if IG cannot be obtained.
- For children aged <12 months, immunocompromised persons, persons who have had chronic liver disease diagnosed, and persons for whom vaccine is contraindicated, IG should be used.

International travel

All susceptible persons traveling to or working in countries that have high or intermediate hepatitis A endemicity should be vaccinated or receive IG before departure. Hepatitis A vaccine at the age-appropriate dose is preferred to IG. The first dose of hepatitis A vaccine should be administered as soon as travel is considered.

- One dose of single-antigen hepatitis A vaccine administered at any time before departure can provide adequate protection for most healthy persons.
- Older adults, immunocompromised persons, and persons with chronic liver disease or other chronic medical conditions planning to depart to an area in ≤2 weeks should receive the initial dose of vaccine and also simultaneously can be administered IG (0.02 mL/kg) at a separate anatomic injection site.
- Travelers who elect not to receive vaccine, are aged <12 months, or are allergic to a vaccine component should receive a single dose of IG (0.02 mL/kg), which provides effective protection for up to 3 months.

NOTE. Previous recommendations remain unchanged regarding 1) settings in which postexposure prophylaxis is indicated, and 2) timing of administration of postexposure prophylaxis.

http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5641a3.htm. "A doctor can determine if a person has Hepatitis A by discussing his or her symptoms and taking a blood sample. To treat Hepatitis A, doctors usually recommend rest, adequate

nutrition, fluids, and medical monitoring. Some people will need to be hospitalized. It can take a few months before people begin to feel better." *Id.*

How is hepatitis A diagnosed?

A blood test will show if you have hepatitis A. Blood tests are done at a doctor's office or outpatient facility. A blood sample is taken using a needle inserted into a vein in your arm or hand. The blood sample is sent to a lab to test for hepatitis A.

A blood test will show if you have hepatitis A.

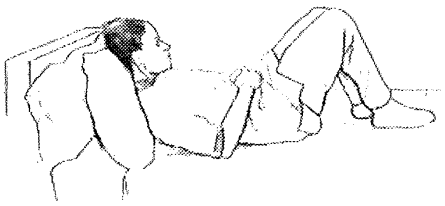
https://www.niddk.nih.gov/health-information/health-topics/liver-disease/hepatitis-a/Pages/ez.aspx. Persons infected with the disease should seek immediate medical attention. *Id.* "A dose of the hepatitis A vaccine or a medicine called hepatitis A immune globulin may protect you from getting sick if taken shortly after coming into contact with the hepatitis A virus." *Id.*

How is hepatitis A treated?

Hepatitis A usually gets better in a few weeks without treatment. However, some people can have symptoms for up to 6 months. Your doctor may suggest medicines to help relieve your symptoms. Talk with your doctor before taking prescription and over-the-counter medicines.

See your doctor regularly to make sure your body has fully recovered. If symptoms persist after 6 months, then you should see your doctor again.

When you recover, your body will have learned to fight off a future hepatitis A infection. However, you can still get other kinds of hepatitis.



Hepatitis A usually gets better in a few weeks without treatment.

Id. If a person is harboring HAV, it has an incubation period from two to four weeks and you can pass it along to others. After a person has been exposed they are shedding virus for two to four weeks. At that point, the person may not even be ill, but that person can pass it on at work, at school and to the other people they live with.

16. At least 100 people in seven states, including Virginia, Maryland, West Virginia, North Carolina, New York, Oregon, and Wisconsin have been sickened in a HAV outbreak that health officials believe is linked to frozen strawberries Tropical Smoothie sourced from Egypt; http://www.cdc.gov/hepatitis/outbreaks/2016/hav-strawberries.htm; http://www.sunherald.com/news/nation-world/national/article99166647.html (citing Nora Spencer-Loveall, a spokeswoman

from the Centers for Disease Control and Prevention). According to the Virginia Department of Health ("VDH"), Virginia has been hit hardest by the outbreak, with about 55 confirmed HAV cases there resulting from the consumption of Tropical Smoothie products. *Id.*

17. The first Virginia case dates back to May, Virginia Department of Health officials informed Tropical Smoothie on Aug. 5 of their suspicion that the cases were linked to frozen strawberries from Egypt. https://www.youtube.com/watch?v=u79YV5S0zGM; *see also,* http://www.sunherald.com/news/nation-world/national/article99166647.html. Tropical Smoothie, which has at least 500 restaurants in 40 states, removed the product from all its restaurants Aug. 6-8. This was not, however, before the Plaintiffs were exposed to HAV, and the Injury Plaintiffs infected and diagnosed with HAV, as a result of Tropical Smoothies' smoothies. The Centers for Disease Control and Prevention informed the Virginia Department of Health on Aug. 12 that the HAV cases were of a strain linked to other outbreaks involving strawberries from Egypt. Virginia health officials alerted the public on Aug. 19. Dr. Laurie Forlano, director of the VDH office of epidemiology, said the CDC research was just one piece of the investigative process. According to the CDC, more work needs to be

done to determine where the strawberries had been distributed and whether other ingredients might also be tainted. *See* http://www.sunherald.com/news/nation-world/national/article99166647.html. VDH also continues to investigate the cluster of HAV. The 66 people reported sickened are ages 14 to 68, and all said they consumed a Tropical Smoothie smoothie before exhibiting symptoms. According to the VHD, about half of those who tested positive for the virus and had their information available to health authorities had to be hospitalized. *See* http://www.sunherald.com/news/nation-world/national/article99166647.html.

18. After learning of the potential link to strawberries, Tropical Smoothie Café allegedly conducted a product withdrawal of all strawberries sourced from Egypt. ***However, it did not immediately notify its customers, including the Plaintiffs, of the HAV contaminated food products that it had and was incorporating into its customers' smoothies. This is especially troublesome given that the only preventative treatment post-exposure is treatment with immune globulin within two weeks of exposure to HAV.***

19. ***Instead, Tropical Smoothie waited over two weeks to inadequately notify its customers, including the Plaintiffs, (via a youtube video that was uploaded on August 21, 2016 and linked in its website) of the potential problem.***

See https://www.youtube.com/watch?v=u79YV5S0zGM. Notably, the notification did not caution its customers, including the Exposed Plaintiffs and Injured Plaintiffs, on the treatment, the risks, the periods of time that Tropical Smoothie was putting HAV contaminated strawberries in its smoothies, and did not otherwise give any guidance to its customers on what they should do if they indeed had recently had a smoothie with strawberries in it from Tropical Smoothie. Moreover, Tropical Smoothie did not disclose which stores were selling the contaminated strawberries in their smoothies, how many smoothies were made with the strawberries, how the strawberries got there, and did not otherwise put the actual Tropical Smoothie customers that were exposed on notice of their exposure or potential exposure. In the statement, Tropical Smoothie officials only said the Egyptian strawberries accounted for a small portion of the company's overall supply and that it removed the strawberries from all of its cafés.

20. The symptoms of Hepatitis A mimic symptoms of less severe temporary maladies such as dysentery and simple nausea, and persons who have contracted Hepatitis A due to the negligence and wrongdoing of the Defendant may mistake their sickness for one of those other less severe, temporary conditions and thus would be unaware of the steps needed to treat and monitor the true disease.

21. Tropical Smoothie's slogan is "Eat Better. Feel Better." However, this slogan is apparently not applicable to those of its customers that it exposed to and infected with HAV. The appropriate response to knowledge that a company infected its customers with HAV would be to post placards and/or notices at the affected Tropical Smoothie stores, address the steps that its customers should take to avoid being infected with HAV, address the steps that its customers should take if they were infected with HAV, offer to pay for blood tests to exposed customers upon request, offer to pay for treatment and monitoring of the customers to ensure they are healthy, and otherwise guide its affected customers on how to "eat better" and "feel better" in the face of HAV exposure and infection.

22. Consistent with CDC recommendations, and with the recommendations made by the public health officials responding to the subject outbreak, Plaintiffs and Tropical Smoothie customers that had been exposed were told that post-exposure prophylactic treatment is recommended for all exposed individuals if such treatment can be administered within two weeks of exposure. *See, e.g.,* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5641a3.htm. "Post-exposure treatment," as noted above, consists of the administration by injection of either a Hepatitis A vaccine or immune globulin ("IG"). *Id.*

23. Plaintiffs were exposed to HAV during the exposure period as a result of consumption of contaminated food, including smoothies that contained strawberries, at the Defendant's Tropical Smoothie restaurants, and all subsequently received or need to immediately receive the recommended post-exposure treatment to prevent infection with Hepatitis A.

24. Injured Plaintiffs that were infected and diagnosed with HAV during the exposure period as a result of consumption of contaminated food, including smoothies that contained strawberries, at the Defendant's Tropical Smoothie restaurants must immediately receive the recommended post-infection treatment. Treatment generally involves supportive care, with specific complications treated as appropriate, including ongoing blood tests. Liver transplantation, in selected cases, is required if the patient has fulminant hepatic failure (FHF).

III. CLASS ALLEGATIONS

25. Plaintiffs repeats, re-alleges, and incorporates all allegations in the paragraphs above as if set fort fully herein.

26. This is a class action lawsuit brought by Plaintiffs on behalf of the Classes, including of all persons who were exposed to, and that were separately injured by, consumption of contaminated food and drink that contained HAV at the

Defendant's restaurants during the exposure period in beginning in as early as January 2016 and through August 2016. Exposure Plaintiffs and Classes Members were and will be required for public health and personal safety reasons to obtain a Hepatitis A vaccination or an immune globulin shot (with some persons also getting an HAV blood test) because of their exposure at the Defendant's restaurants. With respect to Injured Plaintiffs, those Plaintiffs will be required to take bi-annual blood tests, receive medical treatment, have liver testing, and otherwise seek treatment for HAV infection.

27. All such Exposure Plaintiffs, upon notice of the facts alleged herein, took or are taking immediate preventative action at the recommendation of public health authorities or other health professionals and organization, and, as a result, did not subsequently develop symptoms of HAV infection if they were not already infected. All such Injured Plaintiffs, which were infected, took or are taking or undergoing the recommended treatment for those infected with HAV.

28. **Class Definition**.

a. **Exposure Class:** The class includes all persons in the United States who consumed contaminated food or drink, including smoothies with strawberries, from Defendant during the exposure period in January 2016 through

August 2016 and who, as a direct and proximate result of such consumption, were exposed to HAV and, following the recommendations of public health officials or other medical personnel and organizations, including the VHD, CDC, and NIH, obtained vaccination, and any related medical treatment, including blood tests, to prevent HAV infection, including Exposure Plaintiffs. The class does not include those who developed HAV infections and does not include those persons who were exposed to HAV through consumption of contaminated food products from TLC Tropical Smoothie, LLC of Virginia, and does not include Defendant and its affiliates, parents, subsidiaries, employees, officers, agents, and directors (the "Exposure Class").

b. **Injury Class:** The class includes all persons who consumed contaminated food or drink, including smoothies with strawberries, from Defendant during the exposure period from January of 2016 through August 2016 and who, as a direct and proximate result of such consumption, were exposed to HAV and subsequently infected and diagnosed with HAV and, following the recommendations of public health officials or other medical personnel and organizations, including the VHD, CDC, and NIH, obtained vaccination, immune globulin, and any related medical treatment, including blood tests and liver tests, to

treat HAV infection. The class does not include those who were only exposed to HAV but that did not become infected with HAV, and does not include Defendant and its affiliates, parents, subsidiaries, employees, officers, agents, and directors (the "Injury Class," and together with the Exposure Class, the "Classes").

29. **Numerosity**. Given the length of the exposure and the multiple restaurants involved, the number of potential Classes Members of the Classes is likely to be in the thousands and the Classes Members are geographically dispersed. Disposition of the claims of the proposed Classes in a class action will provide substantial benefits to both the parties and the Court. However, because the number of persons who obtained vaccination, immune globulin, and/or treatment for HAV infection remains confidential and within the exclusive control of the applicable state and regional health departments and districts, the precise number of Classes Members is not currently known.

30. All food and drink sold at Defendant's restaurants during the exposure period of between January of 2016 and August of 2016 was defective, contaminated, and not reasonably safe as a result of use of contaminated strawberries in the preparation of particular food items, or preparation in proximity or conjunction with such contaminated ingredients, rendering all food and drink prepared and sold during

the exposure period contaminated, unsafe, and not fit for human consumption. Because such food and drink was distributed and sold in high volume during the exposure periods to an a significant number of guests and patrons, the number of putative Classes Members is so numerous that joinder of all members in this case is impracticable.

31. **Commonality**. In addition to numerosity, there are significant questions of law or fact that are common to the class, including but not limited to:

a. Whether food prepared with HAV-contaminated strawberries is adulterated, unsafe to eat, defective, or otherwise prohibited from sale and distribution under all applicable local and state laws;

b. Whether food prepared in proximity or conjunction with HAV-contaminated strawberries is adulterated, unsafe to eat, defective, or otherwise prohibited from sale and distribution under all applicable local and state laws;

c. Whether Defendant is strictly liable for the sale of adulterated food;

d. Whether Defendant was negligent in its manufacture and sale of adulterated food under all applicable local and state health and safety regulations;

e. Whether Defendant breached its duties to Plaintiffs to make,

prepare, and sell food products that were reasonably safe in construction, that did not materially deviate from applicable design specifications, and that did not deviate materially from identical units in the product line;

f. Whether Defendant manufactured, distributed, and sold a food product that was adulterated, not fit for human consumption, in a defective condition unreasonably dangerous to Plaintiffs, and not reasonably safe as designed, manufactured, or sold;

g. Whether Defendant breached its duties to exercise reasonable care in the purchase, preparation and sale of food products;

h. Whether Defendant concealed from the public and its customers the knowledge it had that the food product was contaminated with HAV causing further infections in those who might have been vaccinated and/or received immune globulin to prevent infection had they been notified that they were exposed to HAV;

i. Whether Defendant should be enjoined and be required to post placards, signs, and other forms of notice to Plaintiffs warning them of their exposure and educating them on the steps they should take if they consumed food products at a location that sold and distributed contaminated food products, including those recommendations as provided by State health departments, the CDC, and the NIH;

j. Whether Defendant is liable for damages to all potentially exposed persons who obtained vaccinations to avoid HAV infections; and

k. Whether Defendant is liable for damages to all exposed persons who were injured by contracting and HAV infection.

32. **Typicality**. The claims of the Plaintiffs and named representative are typical of the claims of the putative members of the Classes, each of whom meet the class definition as set forth above. The damages and relief sought by the named representative is also typical to the Classes and its members because of the essentially identical nature and process of treatment, its costs, and physical and emotional consequences amongst the class representative and the class members, and the claim of each of the Classes Members would necessarily require proof of the same material and substantive facts, and seek the same remedies.

33. **Adequacy**. The named Plaintiffs has common interests with the members of the Classes, will vigorously prosecute the interests of the Classes through qualified counsel, and does not have identifiable conflicts with any other potential class member; thus, the named Plaintiffs will fairly and adequately represent and protect the interests of the Classes. The Plaintiffs is willing and prepared to serve the Court and the proposed Classes in a representative capacity.

The Plaintiffs will fairly and adequately protect the interest of the Classes and have no interests adverse to, or which directly and irrevocably conflicts with, the interests of other members of the Classes. Further, Plaintiffs has retained counsel experienced in prosecuting complex class action litigation.

34. Defendant has acted or refused to act on grounds generally applicable to the proposed Classes, thereby making appropriate equitable relief with respect to the Classes.

35. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because individual claims by the Classes Members are impractical, as the costs of prosecution may exceed what any Classes member has at stake.

36. The relevant State Departments of Health or the CDC or other appropriate health organization, can transmit notice of this class action to each known potential member of the Classes, once the respective individual classes are certified. Such notifications have been used successfully in prior HAV class actions that have obtained certification and settlement. The rights of each member of the proposed Classes were violated in a similar fashion based upon Defendant's uniform wrongful actions and/or inaction.

37. Prosecuting separate actions by individual Classes Members would create a risk of inconsistent or varying adjudications that would establish incomparable standards of conduct for Defendant. Moreover, adjudications with respect to individual Classes Members would, as a practical matter, be dispositive of the interests of other Classes Members. Tropical Smoothie has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. The questions of law and fact common to the members of the Classes (listed above) predominate over any questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of the controversy described herein.

IV. CAUSES OF ACTION

COUNT I
(BREACH OF WARRANTY)

38. Plaintiffs repeats, re-alleges, and incorporates all allegations in the paragraphs above as if set fort fully herein.

39. Plaintiffs brings this Count on behalf of the Classes.

40. Defendant is a manufacturer, distributor, provisioner, and/or seller of smoothie food products. Defendant, through its manufacture, distribution,

provisioning, and/or sale of smoothie food products, warranted that its products were reasonably safe for their ordinary and foreseeable purpose (i.e., consumption).

41. Defendant was the manufacturer, distributor, provisioner, and/or seller of the smoothie food products consumed by Plaintiffs that caused Plaintiffs' exposure to HAV infection.

42. The smoothie food products manufactured, distributed, provisioned, and/or sold by Defendant were contaminated with HAV, a potentially fatal pathogen. As such, the smoothie food products were unreasonably dangerous for their ordinary and foreseeable use.

43. The smoothie food products were contaminated with HAV when they left the possession and control of Defendant.

44. Defendant breached the warranty of the safety of its goods for their expected and foreseeable purpose. This breach was the direct and proximate cause of Plaintiffs' injuries, and Plaintiffs suffered personal injuries, as well as economic loss, and Defendant is thus liable to Plaintiffs for the injuries sustained.

45. Accordingly, Defendant is liable to Plaintiffs and Classes Members for damages in an amount to be proven at trial.

COUNT II
(NEGLIGENCE)

46. Plaintiffs repeats, re-alleges, and incorporates all allegations in the paragraphs above as if set fort fully herein.

47. Plaintiffs brings this Count on behalf of the Classes.

48. At all times relevant to this action, Defendant, in its manufacturing, distributing, provisioning, and/or sale operations, had a duty to comply with the relevant state and local laws and regulations prohibiting the manufacture and sale of adulterated food, including, without limitation, the provisions of Georgia Food Act (O.C.G.A. §§ 26-2-20 et seq) and other comparable State laws, which defines and prohibits the sale of adulterated food. For instance, the Georgia Food Act specifically defines "adulterated food" to include any food which contains a "deleterious substance which may render it injurious to health…." O.C.G.A. § 26-2-26(1). The appellate courts in Georgia have held that violations of this statute can constitute negligence *per se*.

49. With reference to duties identified in the preceding paragraph, Defendant did not comply with such duties in its manufacture, distribution, provision, and/or sale of the HAV-contaminated smoothie food products that ultimately caused Plaintiffs' exposure to, and infection with, HAV.

50. Under Georgia law and comparable and relevant State laws, Defendant's failure to comply with legislative or administrative regulations, whether relating to design, construction or performance of the smoothie food products or to warnings or instructions as to their use, can be evidence of negligence.

51. Plaintiffs are among the specific class of persons designed to be protected by the statutory and regulatory provisions cited above, pertaining to the manufacture, distribution, provision, storage, labeling, and/or sale of food products by Defendant.

52. When an injury-causing aspect of the product was not, at the time of manufacture, distribution, provision, and/or sale, in compliance with specific mandatory government specifications, it is evidence that the manufacturer breached its duty of reasonable care, and is negligent *per se*.

53. Defendant owed a duty to Plaintiffs to use supplies and raw materials that complied with state, and local food laws, ordinances, and regulations; that were from safe and reliable sources; that were clean, wholesome, and free from adulteration; and that were safe for human consumption, and for their intended purposes. Defendant breached this duty.

54. Defendant owed a duty to Plaintiffs to use reasonable care in the

selection, supervision, and monitoring of its employees, suppliers, or other subcontractors. Defendant breached this duty.

55. Defendant owed a duty to Plaintiffs to use reasonable care in the handling, manufacture, provision, storage, distribution, and/or sale of its smoothie food products, to keep them free of contamination with HAV. Defendant breached this duty.

56. As a result of Defendant's breaches of duties, and noncompliance with applicable law and safety regulations, it manufactured, distributed, provisioned, and/or sold smoothie food products that were not reasonably safe, and Plaintiffs suffered personal injuries, as well as economic loss, as a direct and proximate result, and Defendant is thus liable to Plaintiffs for the damages sustained.

57. Accordingly, Defendant is liable to Plaintiffs and Classes Members for damages in an amount to be proven at trial.

COUNT III
(FRAUDULENT CONCEALMENT/FRAUD BY CONCEALMENT)

58. Plaintiffs repeats, re-alleges, and incorporates all allegations in the paragraphs above as if set fort fully herein.

59. Plaintiffs brings this Count on behalf of the Injury Class.

60. With knowledge of the contamination of its food products with HAV

as of August 5, 2016, and despite the fact that time is of the essence to avoid infection with HAV when a person is exposed to HAV, Defendant intentionally concealed and suppressed material facts concerning the adulteration of the food products it manufactured, distributed, provisioned, and/or sold to its customers. Defendant knew its food was adulterated and nonetheless failed to timely disclose that adulteration to the detriment of Plaintiffs that became infected with HAV. Plaintiffs relied upon Defendants claim that it responsibly sources its food and stands behind its logo, "Eat Better. Feel Better." Defendant failed to disclose the facts alleged in this Complaint regarding its adulterated food products for over two weeks, which is the time period most vital in preventing HAV infection.

61. Although Defendant did eventually post a video on YouTube and its website, that video is entitled, "A message from our CEO regarding Virginia area cafes." https://www.youtube.com/watch?v=u79YV5S0zGM (last accessed September 1, 2016); *see also, https://www.tropicalsmoothie.com/*


Tropical CAFE
FIND A CAFE
FRESH FOOD
FRESH SMOOTHIES
NUTRITION
CATERING
TROPICAL REWARDS APP
OPEN YOUR OWN CAFE
FOOD SAFETY
GET THE APP!
Tropical CAFE
THE TROPICAL REWARDS APP
EARN $5 FOR EVERY $55 SPENT!
eat better. feel better.
At Tropical Smoothie Cafe, we believe there's no better way to make a great meal than with fresh, natural, quality ingredients.
Catering
Franchising

Id. The video and its title insinuated that only Virginia cafés were affected, and further provides no information on which Tropical Smoothie stores were affected, the steps that its customers should take to avoid being infected with HAV, the steps that its customers should take if they were infected with HAV, and did not otherwise guide its affected customers on how to "eat better" and "feel better" in the face of HAV exposure and infection.

62. Defendant had a duty to immediately disclose that its food products were contaminated with HAV, and also had a duty to disclose the full truth (not a partial one) of that contamination in order to allow Plaintiffs to take prophylactic and treatment measures recommended by State health departments, the CDC, and NIH, among others. Defendant had exclusive knowledge of the scope and extent of the contamination and chose to wait and then only partially disclose the facts regarding manufacture, distribution, provision, and/or sale of the adulterated food products. Defendant also had a duty to disclose because it allegedly prides itself on selling fresh, healthy, and nutritious food products and it markets its food products accordingly and the HAV contamination is particularly important to those that value their health and that patronize Defendants' cafés.

63. These omissions are material because they are creating more damage

to Tropical Smoothie customers that are unable to take prophylactic and treatment measure because they may not even know that they are in the Classes, which the Plaintiffs would have done had they been fully informed. Tropical Smoothie still has not made a full and adequate disclosure of the contamination and the where, when, and why the adulterated food products were manufactured, distributed, provisioned, and/or sold to its customers. Tropical Smoothie has actively and continues to actively conceal the true facts of the contamination to protect its profits.

64. As a result of the concealment and/or suppression of the facts, Plaintiffs have sustained damage as outlined herein, including being exposed to HAV, having to take the HAV vaccine and/or immune globulin, having to take blood tests, having to monitor their health, having to visit doctors and clinics, and suffering the symptoms of HAV, among other things, and Plaintiffs suffered personal injuries, as well as economic loss, as a direct and proximate result, and Defendant is thus liable to Plaintiffs for the damages sustained.

65. Accordingly, Defendant is liable to Plaintiffs and Classes Members for damages in an amount to be proven at trial.

COUNT IV
(PRELIMINARY INJUNCTION)

66. Plaintiffs repeats, re-alleges, and incorporates all allegations in the

paragraphs above as if set fort fully herein.

67. Plaintiffs brings this Count on behalf of the Classes.

68. Plaintiffs allege that the administration of justice often requires that limited restrictions be placed on counsel and parties in cases in which class certification is sought.

69. In class actions where a putative class member is permitted to elect not to participate in the class action, there is an inherent risk that a class member's decision may, in the absence of court regulation of communications regarding the class action, not be based on a complete and balanced presentation of the relevant facts. Accordingly, special management of class actions is often necessary to protect the interests of both formal parties and absent class members.

70. Special management to further the administration of justice in this case in which class certification will be sought compels, as a matter of equity, granting on a temporary or preliminary basis, for some or all of the pendency of the case, an injunction restricting communications by parties and their counsel with members of the class proposed in the case.

71. In view of the above allegations, an order enjoining communications with proposed Classes Members should immediately issue and remain in effect until

such time as the following events and conditions occur and are abided by to the court's satisfaction:

a. the parties and/or their counsel confer jointly to determine whether proper management of the case or the interests of putative Classes Members require the entry of an order limiting either the parties or counsel in communications with putative class members;

b. the above-described conference shall occur as soon as practicable, but in no event later than twenty (20) days after this Complaint is served;

c. within ten (10) days after the above-described conference, counsel shall submit to the court a joint statement of their collective or individual views as to whether an order should be entered limiting communications. If counsel agree no order is necessary, they shall so state in their report to the Court. If counsel agree that an order limiting communications should be entered, they shall submit the proposed content of such order and the grounds justifying entry of same. If counsel cannot agree whether an order should be entered or what the content of such an order should be, they shall report this to the Court and either submit stipulated facts for the court's consideration or request a hearing to present evidence on the issue;

d. based on the record before the Court, a further order limiting

communications may be entered upon a finding that a failure to so limit communications would likely result in imminent and irreparable injury to one of the parties; conversely, the Court may find upon the record that no further order is needed;

e. neither parties nor their counsel shall initiate communications with putative Classes Members regarding the substance of the lawsuit until counsel presents the required report described above to the court and any necessary order is entered pursuant to the report; and

f. during the pendency of the case, under any allowance of communications, parties and counsel are forbidden to communicate with prospective or actual Classes Members in a way which tends to misrepresent the status, purpose, and effects of the action or of any actual or potential court orders therein, which may create impressions tending without cause to reflect adversely on any party, any counsel, the Court, or the' administration of justice.

COUNT V
(PRELIMINARY INJUNCTION TO PREVENT FURTHER INJURY)

72. Because the symptoms of Hepatitis A mimic symptoms of less severe temporary maladies such as dysentery and simple nausea, persons who have contracted Hepatitis A due to the negligence and wrongdoing of the Defendant may

mistake their sickness for one of those other less severe, temporary conditions and thus would be unaware of the steps needed to treat and monitor the true disease. They are likely to suffer further injury as a result. Therefore, and for other reasons shown and alleged, Plaintiffs and all Classes Members request that Tropical Smoothie be preliminarily enjoined to notify the public as follows:

a. disclose exactly what Tropical Smoothie stores sold the contaminated food products,

b. post placards and/or notices to its customers at those stores relaying the facts as they occurred, the dangers of HAV, the prophylactic steps that should be taken by those exposed to HAV, and the treatment steps to be taken by those infected by HAV; and

c. update its website with a full disclosure of the contamination and relaying the facts as they occurred, the dangers of HAV, the prophylactic steps that should be taken by those exposed to HAV, and the treatment steps to be taken by those infected by HAV

73. Enjoining the Defendant preliminarily to so notify the public is necessary and in the interests of justice because:

a. Absent this relief, persons who have contracted Hepatitis A due

to the negligence and wrongdoing of the Defendant may mistake their sickness for one of those other less severe temporary conditions and thus would be unaware of the steps needed to treat and monitor the true disease;

b. Household and family members of persons who have contracted Hepatitis A due to the negligence and wrongdoing of the Defendant may become exposed to the disease without knowing the steps needed to test for, prevent, and treat their exposure;

c. There is an ascertainable claim for relief as described herein;

d. The Plaintiffs and all Classes Members will likely succeed on the merits because, as described herein, Tropical Smoothie has already admitted to sickening customers and the CDC has determined that the source of the HAV exposure and infections are smoothies with strawberries from Tropical Smoothie;

e. Irreparable harm will ensure without the preliminary injunction as the public and Classes Members will continue to be infected sickened by HAV without taking preventative measures, including, without limitation, getting the HAV vaccine or immune globulin and blood tests to determine exposure and/or infection, and the public will continue to be unaware of which stores created the contamination without the injunctive relief sought herein. A remedy at law is

inadequate as monetary damages alone will not prevent the further exposure/spread of HAV or further HAV infections to the public and Classes Members;

f. It imposes a *de minimus* hardship to Tropical Smoothie to post placards and/or notices and update its website while the threat to the public of HAV infection is severe, imminent, and real, and on balance, the hardships are far more severe as to the public and Classes Members; and

g. The public interest will be served as the preliminary injunctive relief sought here is to protect the health and welfare of the public.

COUNT VI
(PERMAMENT INJUNCTION TO PREVENT FURTHER HARM)

74. Plaintiffs also requests that Tropical Smoothie be permanently enjoined to notify the public as follows:

a. disclose exactly what Tropical Smoothie stores sold the contaminated food products,

b. post placards and/or notices to its customers at those stores relaying the facts as they occurred, the dangers of HAV, the prophylactic steps that should be taken by those exposed to HAV, and the treatment steps to be taken by those infected by HAV; and

c. update its website with a full disclosure of the contamination and relaying the facts as they occurred, the dangers of HAV, the prophylactic steps that should be taken by those exposed to HAV, and the treatment steps to be taken by those infected by HAV.

75. This notification to the public is necessary and in the interests of justice because:

a. There is an ascertainable claim for relief as described herein;

b. Irreparable harm will ensure without the permanent injunction as the public and Classes Members will continue to be infected sickened by HAV without taking preventative measures, including, without limitation, getting the HAV vaccine or immune globulin and blood tests to determine exposure and/or infection, and the public will continue to be unaware of which stores created the contamination without the injunctive relief sought herein. A remedy at law is inadequate as monetary damages alone will not prevent the further exposure/spread of HAV or further HAV infections to the public and Classes Members;

c. It imposes a *de minimus* hardship to Tropical Smoothie to post placards and/or notices and update its website while the threat to the public of HAV infection is severe, imminent, and real, and on balance, the hardships are far more

severe as to the public and Classes Members; and

d. The public interest will be served as the permanent injunctive relief sought here is to protect the health and welfare of the public.

V. REQUEST FOR RELIEF

76. Plaintiff and all Class Members, i.e., those persons who fit the Classes definitions, have suffered general and special damages as the direct and proximate result of Defendant's acts and omissions, which damages shall be fully proven at the time of trial. These damages are common among the representative party and putative Classes Members and may include: wage loss; medical and medical-related expenses; travel and travel-related expenses; emotional distress; fear of harm and humiliation; physical pain; physical injury; and all other damages as would be anticipated to arise under the circumstances.

WHEREFORE, Plaintiffs and all Classes Members respectfully requests that the Court enter judgment in his favor and against Tropical Smoothie, as follows:

A. That, as soon as practicable, the Court certify with action as a class action;

B. That temporary and/or preliminary injunction relief be granted, as well as other equity, including, but not limited to, enjoining limiting the parties and counsel from communicating with the putative Classes Members as described above

and also mandating that Tropical Smoothie post placards and/or notices and update its website as outlined above;

C. That Plaintiffs and all Classes Members recover judgment for damages of less than $5,000,000 (inclusive of the costs, disbursements, and attorney fees sought below), on behalf of themselves and all those similarly situated, against Defendant for such sums as shall be determined to fully and fairly compensate them for all general, special, incidental, and consequential damages respectively incurred by them as the direct and proximate result of Defendant's acts and omissions;

D. That the court award Plaintiffs and all Classes Members their respective costs, disbursements and reasonable attorneys' fees incurred with such costs, disbursements, and reasonable attorneys' fees coupled with the damages claimed by Plaintiffs and putative Classes Members total less than $5,000,000;

E. That the court award Plaintiffs and all Class Members, the opportunity to amend or modify the provisions of this petition as necessary or appropriate after additional or further discovery is completed in this matter, and after all appropriate parties have been served;

F. That the Court permanently enjoin and mandate that Tropical Smoothie:

1. disclose exactly what Tropical Smoothie stores sold the contaminated food products,

2. post placards and/or notices to its customers at those stores relaying the facts as they occurred, the dangers of HAV, the prophylactic steps that should be taken by those exposed to HAV, the treatment steps to be taken by those infected by HAV; and

3. update its website with a full disclosure of the contamination and relaying the facts as they occurred, the dangers of HAV, the prophylactic steps that should be taken by those exposed to HAV, the treatment steps to be taken by those infected by HAV.

G. That the Court award Plaintiffs and all Classes Members such other and further relief as it deems necessary and equitable in the circumstances.

VI. DEMAND FOR JURY TRIAL

Plaintiffs demands a jury trial.

DATED: September 19, 2016.

/s/ James F. McDonough, III.
JAMES F. MCDONOUGH, III.
GA Bar No.: 117088
jmcdonough@hgdlawfirm.com
HENINGER GARRISON DAVIS, LLC
3621 Vinings Slope, Suite 4320
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Fax: 205-326-3332

Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SAMANTHA KIKER, on behalf of herself and all others similarly situated, et al.,	
Plaintiffs,	Civil Action No. 2016CV279710
vs.	Honorable Ural D. Glanville
TROPICAL SMOOTHIE CAFÉ, LLC,	
Defendant.	

ORDER TO PERFECT SERVICE

On September 2, 2016, Plaintiff commenced the above-captioned case. (Doc. no. 1). Examination of the record reveals that Plaintiff has failed to perfect service of process upon Defendant. Plaintiff is **HEREBY ADVISED** that, under the Civil Practice Act, service of process must be perfected upon each defendant who does not waive service of process. O.C.G.A. § 9-11-4. Therefore, Plaintiff is **ORDERED** to either (1) perfect service of process upon Defendant or (2) show cause why the Court should not dismiss this matter for failure to comply with O.C.G.A. § 9-11-4. **Failure to comply by October 14, 2016, will be deemed as an election to have this matter dismissed without prejudice.**

SO ORDERED, this 26th day of September, 2016, at Atlanta, Georgia.

Ural D. Glanville, Judge
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies to:
JAMES F. MCDONOUGH, III
jmcdonough@hgdlawfirm.com

Fulton County Superior Court
EFILEDLS
Date: 9/29/2016 4:57:10 PM
Cathelene Robinson, Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SAMANTHA KIKER, on behalf of himself and all others similarly situated;	)	
Plaintiff,	)	Civil Action No. 2016-CV-279710
v.	)	
TROPICAL SMOOTHIE CAFÉ, LLC,	)	JURY TRIAL DEMANDED
Defendant.	)	

PLAINTIFF'S NOTICE OF SERVICE

Plaintiff Samantha Kiker, by and through undersigned counsel, provides notice that Defendant Tropical Smoothie Café, LLC was served with a copy of the summons, original complaint, and civil cover sheet on September 23, 2016. See Attached Exhibit A (Affidavit of Service) and Exhibit B (Order For Appointment).

Respectfully Submitted,

/s/ James F. McDonough, III
James F. McDonough, III – GA Bar No. 117088
HENINGER GARRISON DAVIS, LLC
3621 Vinings Slope, Suite 4320
Atlanta, GA 30339-3372
Phone: (404) 996-0864
jmcdonough@hgdlawfirm.com

EXHIBIT A

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SAMANTHA KIKER

Plaintiff(s),

vs.

TROPICAL SMOOTHIE CAFE, LLC

Defendant(s).

_____/

Case No.: 2016CV279710

AFFIDAVIT OF SERVICE

Personally appeared before me, the undersigned officer duly authorized to administer oaths, Christopher Todd Horton, who, first being duly sworn, on oath deposes and states that he/she is a citizen of the United States and 18 years of age or older and is a party having no interest in the above-styled case. Affiant further states that on **September 23, 2016** at **2:33 PM**, I served **Tropical Smoothie Cafe, LLC** by personally serving **BARRY SCHNUR**, , located at **1117 Perimeter Center West , Atlanta, GA 30338** with the following: Summons & Original Complaint, First Amended Complaint and Civil Cover Sheet.

Description of person process was left with:

Sex: **Male** - Skin: **White** - Hair: **Salt and Pepper** - Age: **45-50** - Height: **5ft9in** - Weight: **160**

Comments: **Mr Schnur is the chief financial and administrative officer for Tropical Smoothie Cafe, LLC and is authorized to accept service on their behalf.**

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 09/27/2016

Signed and sworn to before me on this ___ day of _____, 20__ by an affiant who is personally known to me or produced identification.

Notary Public

Christopher Todd Horton
MLQ Attorney Services
2000 Riveredge Parkway, Suite 885
Atlanta, GA 30328
770-984-7007/800-446-8794

524083

Heninger Garrison Davis, LLC

KIMBERLY ERVIN NOTARY PUBLIC FULTON COUNTY GEORGIA EXPIRES JAN 2, 2020

EXHIBIT B

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAN 04 2016
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

Administrative Order No. 2016-EX-00001

ORDER FOR APPOINTMENT FOR PROCESS SERVICE

Having read and considered the petitions and criminal records, and it appearing to the Court that sufficient grounds exist that each petitioner meets the requirements for appointment by the Court, it is hereby

ORDERED and **ADJUDGED** that the following:

Abebe, Chali
Acree, William
Adams Jr., John
Allen, Lakeita
Anderson, William
Andrews, Gene
Bailey, Anna
Baker, Benjamin
Banks, Randy
Barney, Steven
Barry, Paul
Bass, Susan
Benito, Richard
Benito, Robert
Benson, James
Bolling, Katherine
Brazeman, Craig
Briley, Donnie
Brookshire, David
Brown Jr., Joseph
Brown, Reginald
Brown, Stephanie
Byer, Edmond
Chastain, Michael
Cline, Travis
Collier, William
Creech, David
Cunningham, Sally
Daniels, Alysa
Daniels, Sonia
Davenport, Alterick
Davidson, Danny
Day, Duane
Dolbier, Jeffrey
Dreeman, Douglas
Duchon, Deborah
Echols, Eric
Echols, Patricia
Edwards, Donnie
Elliott, Maurice
Evans, Alonzo
Faulkner, Dana
Feathers, Jennifer
Ferrero, Amy
Fitzgerald, Floretta
Fogle, Johnny
Folds, George
Ford, Ronnie
Fox, Juhani
Franklin, Anthony
Freese, Jessica
Fuller, Thomas
Gayle, Earl
George, Randal
Gibbs III, Thomas
Gruhn, Tammie
Handley, Wiley
Harris, Beverly
Harris, Constance
Harris, Parks
Hassan, Muhsin
Hassan, Muhsin S.
Heimerich, Richard
Highsmith, Amos
Hightower, Anthonio
Hill, Hollis
Hindsman, Cherrod
Horton, Christopher
Hudson, Hakimah
Hudson, Kyle
Irvin, Randall
James, Frank
Jensen, Patricia
Johnson, Christina
Johnson, Earl
Jones, Alicia
Jones, Christopher
Jones, Drexele
Kahssu, Haile
Kidd, Elizabeth
Kim, Leonard
King, Amos
King, Heather
Knott, Thomas
Kotlar, Michael
Lair, Aaron
Lane, Madeline
Lausman, Marsha
Letts , William
Lewis, Kevin
Lobin, Jerome
Lutwack, William
Maggard, J. D.
Mallas, Nicholas
McClellan, Rodney
Mitchell, Kevin
Moore, Jeanine
Morgan, Todd
Moss, Cynthia
Murrieta, Francisco
Nadler, Jonathan
Nichols, Jean
Nichols, Lathan
Nowik, Dennis
O'Brien, Christopher
O'Leary, Christine
Orlins, Peter
Perkins, Karen
Poncinie, Richard
Price, James
Rauser, Jayne
Reddick, Derek
Reid, Cletis
Rhodes, Kathryn
Rice, Robert
Rivers, Michael
Roberson, Antawon
Robertson, Brad
Robertson, Marlena
Robinson, Jeroy
Sadler, Jr., John
Sanchez, Melany
Saxon, Jasmine
Saxon, Robin
Sexton, Traici
Shadix, Jimmy
Shepherd, Elizabeth
Singleton, Amanda
Singleton, Wesley
Smith Jr., Bruce
Smith, Delacie
Smith, Ronald
Smith, Terral
Smith, Virginia
Snellings, Sharon
Spears, Joye
Stanton, Christopher
Steidl, David
Stevenson, Nosiba
Stewart, Ronnie
Stinyard, Kelvin
Stokes, Brian
Stone, Rodney
Suttles Jr., Marvin

Swindle, Frank
Tamaroff, Paul
Tassaw, Berhane
Thompson, Vanessa
Thorne, Marcus
Thrash, Nancy
Trumble, Jr., Garfield
Tucker, Paul
Tuttle, Garry
Underwood, Robert
Velasquez, Julius
Walker, Reginald
Washington, Sabrina
Watson, Eddie
Wayne, John
Webber, Melina
Weeks, Frances
West, Eric
White Jr., Andy
Wingo, Michael
Winkleman, Nan
Wolfe, Lisa
Woodman, Howard
Wright, Christopher
Zayas, Roberto

be appointed and authorized to serve as a Permanent Process Server in the Fulton County Superior Court, for the Calendar Year 2016, without the necessity of an order for appointment in each individual case.

BY ORDER OF THE Court this 4th day of January, 2016.

Gail S. Tusan, Chief Judge
Fulton County Superior Court
Atlanta Judicial Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

JORDY MARTINEZ, individually and on behalf of all others similarly situated,

MICHAEL MIDDLETON, individually and on behalf of all others similarly situated,

MIN JIN BYUN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PATAGONIA FOODS LLC,
SERVE: Gary Bernstein
3590 Sacramento Dr., Suite 150
San Luis Obispo, CA 93401

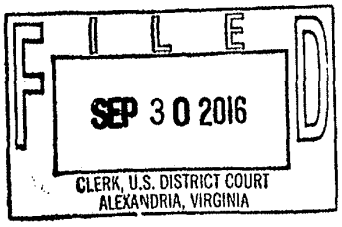
SYSCO VIRGINIA, LLC
SERVE: Corporation Service Company
Bank Of America Center, 16th Floor
1111 East Main St.
Richmond, VA 23219

SYSCO HAMPTON ROADS, INC.
SERVE: Corporation Service Company
Bank Of America Center, 16th Floor
1111 East Main St.
Richmond, VA 23219

TROPICAL SMOOTHIE CAFE, LLC
SERVE: Joel Cameron
1117 Perimeter Center West, Suite W200
Atlanta, GA 30338

TSC AT NOVA INC., individually and on behalf of all others similarly situated,
SERVE: Abraham Razeq
1106 Austin Dr.
Fredericksburg VA 22401

Defendants.



Civil Action No. 1:16-CV-1242
GBL/IDD

CLASS ACTION COMPLAINT

Plaintiffs, by counsel, for their Class Action Complaint against Defendants, state as follows:

NATURE OF THE CASE

1. This is a class action brought to redress injuries from the sale of adulterated food by Tropical Smoothie restaurants resulting in an outbreak of Hepatitis A.

JURISDICTION AND VENUE

2. Jurisdiction is proper under 28 U.S.C. § 1332(d) as there is at least minimal diversity among the parties and the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

3. Venue is proper in this judicial district under 28 U.S.C. § 1391(b)(2), as a substantial part of the events or omissions giving rise to the claims occurred in this judicial district.

PARTIES

4. Jordy Martinez is an adult individual and is a resident of the Commonwealth of Virginia. He sues on his own behalf and on behalf of all others similarly situated.

5. Michael Middleton is an adult individual and is a resident of the Commonwealth of Virginia. He sues on his own behalf and on behalf of all others similarly situated.

6. Min Jin Byun is an adult individual and is a resident of the Commonwealth of Virginia. She sues on her own behalf and on behalf of all others similarly situated.

7. Defendant Patagonia Foods, LLC is a California limited liability company involved in the supply of food products for consumption by the general public.

8. Defendant Sysco Virginia, LLC is a Delaware limited liability company involved in the supply of food products for consumption by the general public.

9. Defendant Sysco Hampton Roads, Inc. is a Delaware corporation involved in the supply of food products for consumption by the general public.

10. Defendant Tropical Smoothie Cafe, LLC is a Georgia limited liability company involved in franchising and licensing the trademark, goodwill, and other intellectual property of Tropical Smoothie to franchisees. It is also involved in sourcing food products for consumption at its franchisees' Tropical Smoothie restaurants.

11. Defendant tsc at nova inc. is a Virginia corporation doing business as Tropical Smoothie Cafe. It is a franchisee of Tropical Smoothie Cafe, LLC and served adulterated smoothies to its customers. Defendant tsc is sued individually and as representative of a Defendant Class consisting of 89 other Virginia franchisees of Tropical Smoothie Cafe, LLC that served smoothies from May 2016 to August 2016 made with strawberries sourced from Egypt.

FACTS

12. From May through August 2016 (the Class Period), Tropical Smoothie franchisees in Virginia sold smoothies containing strawberries sourced from Egypt by Defendant Patagonia Foods and distributed to the franchisees both by Defendants Sysco Virginia, LLC and Sysco Hampton Roads, Inc. These strawberries contained a strain of the hepatitis virus and were used in at least six popular smoothies served in locations throughout the Commonwealth of Virginia.

13. Further, even customers who did not order smoothies containing the tainted strawberries were exposed to the virus because blenders were not sanitized between the successive mixing of smoothies.

14. Plaintiff Jordy Martinez contracted the Hepatitis A virus from a smoothie he purchased from Defendant tsc at nova inc. in Woodbridge, Virginia, within this judicial district. As a result, he was required to seek medical treatment and incurred damages. As of September 16, 2016, 119 people have contracted Hepatitis A from this outbreak, of which 47 people have been hospitalized.

15. Plaintiffs Michael Middleton and Min Jin Byun purchased smoothies during the Class Period from a Tropical Smoothie franchisee located in Fairfax County, Virginia, within this judicial district. As a result, both were required to obtain a vaccination against the Hepatitis A virus and incurred damages.

PLAINTIFF CLASS ACTION ALLEGATIONS

16. The members of the Plaintiff classes are so numerous that joinder of all class members is impracticable.

17. The following are questions of law or fact, among others, common to the respective proposed Plaintiff classes:

Hepatitis A Class

- Whether class members were infected with the Hepatitis A virus from smoothies sold by Tropical Smoothie franchisees;
- Whether tainted strawberries were distributed by Defendants Patagonia Foods, Sysco Virginia, LLC, and Sysco Hampton Roads, Inc.
- Whether the order of the tainted strawberries was facilitated by Defendant Tropical Smoothie Cafe, LLC;
- Whether the actions of the Defendants and Defendant Class members violated Virginia law; and,

- Whether class members are entitled to actual damages, statutory damages, restitution, future medical monitoring, and/or attorney's fees.

Hepatitis Vaccination Class

- Whether class members were potentially exposed to the Hepatitis A virus from smoothies sold by Tropical Smoothie franchisees;
- Whether class members sought and received a vaccination against the Hepatitis A virus;
- Whether tainted strawberries were distributed by Defendants Patagonia Foods, Sysco Virginia, LLC, and Sysco Hampton Roads, Inc.;
- Whether the order of the tainted strawberries was facilitated by Defendant Tropical Smoothie Cafe, LLC;
- Whether the actions of the Defendants and Defendant Class members violated Virginia law; and,
- Whether class members are entitled to actual damages, statutory damages, restitution, future medical monitoring, and/or attorney's fees.

Smoothie Purchaser Class

- Whether class members were potentially exposed to the Hepatitis A virus from smoothies sold by Tropical Smoothie franchisees;
- Whether class members paid Tropical Smoothie franchisees for smoothies that either contained contaminated strawberries or that were potentially cross-contaminated because blenders were not sanitized between the successive mixing of smoothies
- Whether tainted strawberries were distributed by Defendants Patagonia Foods, Sysco Virginia, LLC, and Sysco Hampton Roads, Inc.;

- Whether the order of the tainted strawberries was facilitated by Defendant Tropical Smoothie Cafe, LLC;
- Whether the actions of the Defendants and Defendant Class members violated Virginia law; and,
- Whether class members are entitled to actual damages, statutory damages, restitution, future medical monitoring, and/or attorney's fees.

18. The Plaintiffs' claims are typical of the claims of the respective classes as the underlying facts are the same for all members of the proposed classes.

19. Moreover, the Plaintiffs will fairly and adequately protect the interests of the classes as they have no interests that are adverse or antagonistic to those of the classes.

20. Finally, consistent with Federal Rule of Civil Procedure 23(b)(3), questions of law or fact common to putative class members predominate over questions affecting only individual members and a class action is superior to other available methods (i.e., individual pursuit of litigation) for fairly and efficiently adjudicating the controversy.

21. The proposed Hepatitis A Class is as follows:

> All persons who purchased smoothies from franchisees of Tropical Smoothie Cafe, LLC from May 2016 to August 2016 made with strawberries sourced from Egypt and who subsequently contracted Hepatitis A.

22. The proposed Hepatitis Vaccination Class is as follows:

> All persons who purchased smoothies from franchisees of Tropical Smoothie Cafe, LLC from May 2016 to August 2016 made with strawberries sourced from Egypt and who subsequently received a vaccination against Hepatitis A, but excluding members of the Hepatitis A Class.

23. The proposed Smoothie Purchaser Class is as follows:

> All persons who purchased smoothies from franchisees of Tropical Smoothie Cafe, LLC from May 2016 to August 2016 made with strawberries sourced from Egypt.

DEFENDANT CLASS ALLEGATIONS

24. The proposed Defendant Class consists of approximately 90 Virginia Tropical Smoothie franchisees, all of which served the tainted strawberries during the Class Period, which were distributed by Patagonia Foods and then redistributed by either Sysco Virginia, LLC or Sysco Hampton Roads, Inc. Thus the members of the Defendant Class are so numerous that joinder of all class members is impracticable.

25. The following are questions of law or fact, among others, common to the Defendant Class:

- Whether members of the Defendant Class sold smoothies containing tainted strawberries;
- Whether other smoothies sold by members of the Defendant Class not containing such tainted strawberries were potentially cross-contaminated by using the same blender; and,
- Whether members of the Defendant Class are liable for actual damages, statutory damages, restitution, future medical monitoring, and/or attorney's fees.

26. The claims against Defendant tsc are typical of the claims against members of the Defendant Class as the underlying facts are the same for all members of the proposed class.

27. Moreover, Defendant tsc will fairly and adequately protect the interests of the Defendant Class as it has no interests that are adverse or antagonistic to those of the classes.

28. Finally, consistent with Federal Rule of Civil Procedure 23(b)(3), questions of law or fact common to putative class members predominate over questions affecting only individual members and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

29. The proposed Tropical Smoothie Defendant Class is as follows:

All franchisees of Tropical Smoothie Cafe, LLC that served smoothies from May 2016 to August 2016.

COUNT 1: VIOLATION OF VIRGINIA CONSUMER PROTECTION ACT

30. The previous allegations are incorporated.

31. The Virginia Consumer Protection Act prohibits misrepresenting that goods have certain quantities, characteristics, ingredients, uses, or benefits; misrepresenting that goods or services are of a particular standard, quality, grade, style, or model; advertising goods or services with intent not to sell them as advertised; and using any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction. *See* Va. Code § 59.1-200(A)(2), (5), (6), (8), and (14).

32. Each Defendant and each member of the Defendant Class is a "supplier" as defined by Code section 59.1-198.

33. The transactions described herein were consumer transactions as defined by Code section 59.1-198 because the smoothies were purchased primarily for personal, family, or household purposes.

34. All Defendants and members of the Defendant Class warranted that the ingredients in the smoothies sold to Plaintiffs and Plaintiff Class members were sound, free of foreign substances, and fit for human consumption. This was false.

35. Defendants' conduct and the conduct of Defendant Class members proximately caused damages to Plaintiffs and Plaintiff class members.

COUNT 2: BREACH OF WARRANTY

36. The allegations of paragraphs 1 through 29 are incorporated.

37. All Defendants and members of the Defendant Class warranted that the ingredients in the smoothies sold to Plaintiffs and Plaintiff Class members were sound, free of foreign substances, and fit for human consumption.

38. Defendants and members of the Defendant Class breached this warranty by selling products contaminated with the Hepatitis A virus.

39. As a result of this breach of warranty, Plaintiffs and Plaintiff Class members were damaged.

COUNT 3: NEGLIGENCE PER SE

40. The allegations of paragraphs 1 through 29 are incorporated.

41. Title 3.2, Subchapter IV, Chapter 51, Article 3 of the Virginia Code prohibits, among other acts, the manufacture, sale, or delivery, holding or offering for sale of any food that is adulterated or misbranded and the receipt in commerce of any food that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

42. Plaintiffs and Plaintiff Class members are members of a class of persons whom these statutes were intended to protect.

43. Defendants' violation of these statues constituted negligence *per se* and caused damage to Plaintiff and Plaintiff Class members.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request the following relief:

A. That this Court certify this action as a class action pursuant to Federal Rule of Civil Procedure 23(b)(3), in accordance with the class descriptions proposed above;

B. An award of compensatory and/or statutory damages;

C. Restitution;

D. An award of damages for medical monitoring;

E. An award of attorney's fees and costs; and,

F. Such other and further relief as to the Court may appear just.

JURY DEMAND

Trial by jury is demanded as to all claims.

JORDY MARTINEZ
MICHAEL MIDDLETON
MIN JIN BYUN
By Counsel

WEBSTER BOOK LLP

By: _____

Steven T. Webster (VSB No. 31975)
swebster@websterbook.com
Aaron S. Book (VSB No. 43868)
abook@websterbook.com
Webster Book LLP
300 N. Washington St., Suite 404
Alexandria, VA 22314
(888) 987-9991 (telephone and fax)
Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SAMANTHA KIKER, on behalf of herself and others similarly situated; YLEELA ROGERS, on behalf of Herself and others similarly situated; and JILLIAN ONSTAD, on behalf of herself and others similarly situated,	)	**CIVIL ACTION FILE NO.**
Plaintiffs,	)	
v.	)	
TROPICAL SMOOTHIE CAFÉ, LLC,	)	
Defendant.	)	

DECLARATION OF DIANA BATSON IN SUPPORT OF DEFENDANT'S NOTICE OF REMOVAL

1. My name is Diana Batson. I am over 18 years of age. I am competent to provide the testimony contained in this Declaration.

2. I am a legal assistant with the law firm of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, 3344 Peachtree Street, N.E., Suite 2400, Atlanta, Georgia 30326, Telephone: 404-876-2700, Facsimile: 404-875-9400, Email: dbatson@wwhgd.com.

3. On Wednesday, October 19, 2016, I visited the Clerk's Office of the Superior Court of Fulton County, Georgia, and obtained copies of all materials on file in the civil action captioned *Samantha Kiker et al. v. Tropical Smoothie Café, LLC*, Civil Action Number 2016CV279710. The documents I obtained were:

a. General Civil Case Filing Information Form (Non-Domestic), Summons, and Complaint filed on September 2, 2016, which are attached to Tropical Smoothie Café, LLC ("TSC's") Notice of Removal filed in the above-referenced matter as Exhibit A;

b. Complaint filed on September 19, 2016, which is attached to TSC's Notice of Removal filed in the above- referenced matter as Exhibit B;

c. Order to Perfect Service filed on October 4, 2016, which is attached to TSC's Notice of Removal filed in the above- referenced matter as Exhibit C; and

d. Plaintiff's Notice of Service, which is attached to TSC's Notice of Removal Filed in the above-referenced matter as Exhibit D.

4. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

This 20th day of October, 2016.

Diana Batson

Diana Batson

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SAMANTHA KIKER, on behalf of herself and others similarly situated; YLEELA ROGERS, on behalf of Herself and others similarly situated; and JILLIAN ONSTAD, on behalf of herself and others similarly situated,	)	**CIVIL ACTION FILE NO.**
Plaintiffs,	)	
v.	)	
TROPICAL SMOOTHIE CAFÉ, LLC,	)	
Defendant.	)	

DECLARATION OF ALAN M. MAXWELL IN SUPPORT OF DEFENDANT'S NOTICE OF REMOVAL

1. My name is Alan M. Maxwell. I am over 18 years of age. I suffer no disabilities. I am competent to provide the testimony contained in this Declaration.

2. I am a partner with the law firm of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, 3344 Peachtree Street, N.E., Suite 2400, Atlanta, Georgia 30326, Telephone: 404-876-2700, Facsimile: 404-875-9400, Email: amaxwell@wwhgd.com. I have been retained by Defendant Tropical Smoothie Café, LLC ("TSC") to serve as its lead counsel in the above-referenced matter.

3. I am intimately familiar with the 2008 Peanut Corporation of America *Salmonella* outbreak as I served as PCA's lead civil defense counsel prior to its bankruptcy filing in 2009 in the United States Bankruptcy Court, Western District of Virginia, Lynchburg Division, Case No. 09-60452-WA1-7.

4. After PCA filed for bankruptcy, I was retained by the Bankruptcy Trustee to assist him with creating and administering a claims procedure for personal injury cases submitted to the Bankruptcy Court for adjudication.

5. I've attached to this declaration at Tab 1 a true and accurate copy of the Report and Recommendation issued by the Honorable Michael F. Urbanski, United States Magistrate Judge, Western District of Virginia, approving the Bankruptcy Trustee's claims evaluation procedures wherein 122 personal injury cases were approved for a gross compensation amount of $15,155,000.

6. Judge Urbanski's Report and Recommendations were approved by an Order issued by the Honorable Norman K. Moon, United States District Judge, Western District of Virginia. A true and accurate copy of Judge Moon's Order is attached to this declaration as Tab 2.

4. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

This 19th day of October, 2016.

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

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TAB 1

MAXWELL DECLARATION

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

In re: Peanut Corporation of America, Debtor No. 09-60452 Debtor,	
In re: Plainview Peanut Co., LLC Debtor No. 09-61651 Debtor,	Case No. 6:10CV027
In re: Tidewater Blanching Co., LLC Debtor No. 09-61652 Debtor.	By: Hon. Michael F. Urbanski United States Magistrate Judge

REPORT AND RECOMMENDATION

This matter comes before the court on a multitude of motions from the Bankruptcy Trustee, Counsel for Claimants, and the *Guardians ad litem* for minor claimants. Together, all of these motions seek the approval of an elaborate settlement between the Claimants, the bankruptcy estate, and Kellogg as well as the corresponding distribution of the twelve million dollar BI Fund pursuant to Federal Rule of Bankruptcy Procedure 9019. The parties provided extensive briefs in support of their proposed settlement, as well as exhaustive factual materials. Finally, all parties participated in several hearings in front of the undersigned on a variety of issues, culminating in a hearing in Lynchburg on August 19, 2010. For the reasons detailed below, the undersigned **RECOMMENDS** that the settlement agreements be approved and the distribution of the BI fund proceed according to the terms of the settlement agreements.

I. General Background

Peanut Corporation of America and its subsidiaries[1] (collectively, "PCA") all filed voluntary petitions under Chapter 7 of the Bankruptcy Code early in 2009. Roy V. Creasy was

[1] Plainview Peanut Co., LLC and Tidewater Blanching Co., LLC.

appointed as Trustee. PCA was a manufacturer and processor of peanut butter, peanut paste and other peanut products. PCA distributed these peanut products to other manufacturers for incorporation into a variety other food products until January 13, 2009, when PCA instituted a nationwide recall in response to the discovery of *Salmonella* bacteria in some of their peanut products. Due to the contamination of the PCA products with *Salmonella*, and the consequent illnesses across the nation, suits were filed and claims asserted against PCA by many parties. Persons allegedly infected by the *Salmonella* in PCA products had claims for personal injuries ("Tort Claims"), manufacturers and distributors had claims for compensation they had incurred in connection with the recall of PCA's products ("Recall Claims"), and those manufacturers who were also sued by injured consumers had claims for contribution of indemnity against PCA ("Contribution Claims"). To defend these claims, PCA would turn to the Commercial General Liability and Umbrella Liability insurance policies they owned, policies underwritten by Hartford Casualty Insurance Company ("Hartford Insurance").

In lieu of independently litigating all of these various claims, as well as coverage disputes between the Bankruptcy Estate and Hartford Insurance, the Trustee elected to seek a global resolution of these claims. After negotiations between all of the interested parties, the method elected was that the Trustee would sell the insurance policies to Hartford Insurance for $12,750,000. The lion's share of this amount, $12,000,000, would be set aside in the BI Fund and would be reserved for paying the Tort Claims. The remaining $750,000 was available to the Trustee for expenses incurred in connection with setting up a claims resolution process ("the Procedures") for the Tort Claims. The manufacturers and distributors, specifically Kellogg and Kanan, Inc., who had asserted some Recall Claims and would also possess Contribution Claims would not be permitted to seek monies from the BI Fund. Although the manufacturers would not

receive any monies from the BI Fund, to the detriment of their Recall and Contribution Claims[2], they would be permitted to participate in the settlement process alongside the BI Fund in an attempt to reach a complete settlement of each Tort Claim. Although Kanan Inc. was permitted to participate in the settlement process, it appears to the Court that they have not taken advantage of this opportunity. Kellogg, on the other hand, has reached settlements with the vast majority of claimants.

The precise machinations of the Procedures, as approved by the Bankruptcy Court, revolved around the evaluation of each claim by a claims administrator, in this case, Alan Maxwell, an expert in food borne illness litigation. Individuals who believed they were injured by the *Salmonella* in PCA products would be required to complete a proof of claim form and submit that form, along with any required documentation, to the Trustee. To be considered for a distribution from the BI Fund by the claims administrator, a claimant had to meet one of several criteria set forth by the Trustee: (A) have a confirmed case per the CDC's definition of a *Salmonella* infection from the PCA outbreak; (B) have a confirmed infection of the correct type of *Salmonella* as well as a verified consumption of recalled PCA products; (C) have a verified consumption of recalled PCA products, symptoms consistent with a *Salmonella* infection, and the opinion of an epidemiologist that the infection was caused by the PCA *Salmonella*. The Claims Administrator originally identified 123 potentially eligible claimants, but later determined that one of these claims was without merit.[3]

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[2] These claims they could assert against the remaining assets of the bankruptcy estate, which the court has been told amounts to approximately $1,000,000. According to testimony at the hearing, the outstanding claims against this $1,000,000 are approximately $320,000,000 – meaning that the contribution claims and recall claims of Kellogg and Kanan, Inc., are valued at pennies on the dollar.

[3] The undersigned recommended that the claimant whose claim was determined to be without merit, Mr. Hinton, be excluded from the settlement of the fund and be subject to a pre-filing injunction in the Western District of Virginia. See Dkt. No. 102.

For all 122 other eligible claimants, including forty five minor claimants and nine wrongful death claimants, the precise value of their claim was to be determined through a three way negotiation between counsel for the claimant, counsel for Kellogg (or Kanan, Inc.), and the Trustee, with the assistance of Alan Maxwell. These negotiations eventually resulted in Maxwell creating a matrix which would account for the specific circumstances of all the claimants and assign each claimant a presumptive claim value. According to Maxwell's valuation, the total value of all the valid claims was approximately $15,000,000. Because the BI Fund contained only $12,000,000, the actual pay out on each claim was reduced *pro rata* to 79.00166% of the value Maxwell had assigned the claim.[4]

The undersigned closely reviewed the appropriateness of Maxwell's valuation method for all claims, and the fairness of his conclusion with respect to both the wrongful death claims and the minor claims. But at the same time as Maxwell valuation was being determined, the claimants and Kellogg and Kanan, Inc. continued to negotiate for potential additional payments to the injured claimants. Settlements between adult claimants, represented by counsel, and the manufacturers are not before the court. For the two wrongful death claims which have settled with Kellogg, the Court also evaluated the Kellogg settlement for fairness. Each of the minor claimants were appointed a *guardian ad litem* who evaluated the fairness of the total settlement to the minor, as well as the disposition of the minor's recovery. The undersigned also evaluated for fairness the minor claimants' settlements with Kellogg. No settlements were reached by any minor claimant or wrongful death claimant with Kanan, Inc.

[4] The only claims that are not reduced to 79.00166% are what the parties have referred to as "orphan" claims. These claims are demonstrably related to the PCA *Salmonella* outbreak, but cannot be tied to any manufacturer or distributor. Thus, because this entire settlement was predicated on the ability of the parties to have a secondary recourse with the manufacturers, all parties agreed at the outset that the orphan claims would receive 100% of their claim, as determined by Alan Maxwell.

II. Jurisdiction and Procedural Compliance

A. The Court Has Jurisdiction Over The BI Fund

The BI Fund consists of funds that Hartford Insurance paid in exchange for the retirement of policies that Hartford Insurance had previously sold to PCA. Thus, these funds are quite rightly considered to be assets of the bankruptcy estate. See A.H. Robins Co., Inc., v. Piccinin, 788 F.2d 994, 1001 (holding that a "products liability policy of the debtor...is a valuable property of the debtor...and may well be the most important asset of the estate") (citation omitted). And, because the distribution of these funds is to resolve personal injury claims against the bankruptcy estate, it is properly before the district court to approve these settlements. See 28 U.S.C. § 157(b)(5).

B. The Court Has Jurisdiction To Approve The Kellogg Settlements

The Court has also been asked to approve settlements between the eligible claimants and Kellogg, a non-debtor third party. Although the settlement agreements between Kellogg and the eligible claimants involve monies which are not part of the bankruptcy estate, these settlements will have "an impact[] upon the handling and administration of the bankruptcy estate." Owens-Illinois, Inc., v. Rapid Am. Corp. (In re Celotex Corp.), 124 F.3d 619, 625-26 (4th Cir. 1994) (citations omitted). See also Valley Historic Ltd. P'ship v. Bank of N.Y., 486 F.3d 831 (4th Cir. 2007). This requirement springs from 28 U.S.C. 1334(b), which provides district courts with original jurisdiction for all civil proceedings "related to" cases under Title 11. It is well established law that "suits between third parties which have an effect on the bankruptcy estate" are proceedings that are "related to" the bankruptcy. Celotex Corp. v. Edwards, 514 U.S. 300, 308 n.5 (1995).

Here, the settlement agreements between Kellogg and the eligible claimants have *already* had a fundamental effect on the handling and administration of the bankruptcy estate. In fact, Kellogg's participation was crucial to formation of the original agreement by all parties to create the BI Fund, an agreement approved by the Bankruptcy Court on October 2, 2009. See Slip Opinion, *Order Approving Settlement Agreement*, Bankruptcy Action No. 09-60452, October 2, 2009. The Procedures envisioned in the original agreement recognized the essential fairness of including the manufacturer's settlements by stipulating that "orphan claims" would recover 100% of the value assigned by the claims administrator, while claims that could recover further from Kellogg or Kanan, Inc. would receive only 79% of Maxwell's valuation. Moreover, because the Procedures required joint negotiation on the amount of recovery for the eligible claimants, the court also possesses jurisdiction over the Kellogg settlements that have been reached with the eligible claimants because these claimants may not settle with the bankruptcy estate without the additional funds supplied by Kellogg. A failure to settle with the BI Fund would necessarily affect the "administration of the bankruptcy estate." In re Celotex, 124 F.3d at 626. Finally, the settlements between Kellogg and the eligible claimants also "relate to" the bankruptcy proceeding because Kellogg will have a contribution claim against the remaining Bankruptcy Estate.[5] The Fourth Circuit has specifically held that future contribution claims can form the basis for "relating to" jurisdiction when they affect the liabilities of the bankruptcy estate. In re Celotex, 124 F.3d at 626 ("Any recovery...would reduce Owen's claim against the Celotex bankruptcy estate for contribution by the same amount, thus altering the liabilities of the Celotex bankruptcy estate.").

[5] The Trustee informed the Court that the remaining assets of the estate amount to approximately one million dollars, while the outstanding claims are approximately 320 million dollars.

C. Procedures For Death Claims And Minor Claims Are Appropriate

In approving the proposed settlements that relate to the wrongful death claims, the court is sitting in bankruptcy jurisdiction. As such, the court does not have to hew to the wrongful death procedures set forth in Virginia law, such as requiring qualification of estate representatives in Virginia. The claims for wrongful death may arise under state law, but because "the bankruptcy code is superimposed upon the law of the State which has created the obligation," it is the specific policies that underlie the Bankruptcy code which the court must implement. Grady v. A. H. Robins Co., Inc., 839 F.2d 198, 202 (4th Cir. 1988). Under bankruptcy law, foreign personal representatives in wrongful death claims will have standing to assert a claim against the bankruptcy estate. See 11 U.S.C. § 101(15); In re Evans, 114 B.R. 434, 437-38 (Bankr. E.D.Pa. 1990) ("a party who has been designated, under the terms of applicable state law, as the personal representative....can maintain an action for statutory damages on behalf of the [decedent's] estate."). The undersigned determined, therefore, that because the wrongful death claims arose under various different state laws, the settlement of each wrongful death claim should comply with the law of the state where the claim arose.[6] Accordingly, counsel for each wrongful death claimant supplied the court with evidence that each personal representative was qualified in the state where the action arose, and that the settlement complied with all statutory requirements of that state.[7] With these motions, the counsel for the wrongful death claimants have complied with the court's instructions and suitably demonstrated that the settlements of these claims comply with applicable state law.

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[6] Additionally, as was explained by the Trustee at the August 18, 2010 hearing, the claims administrator Alan Maxwell took the particularities and differences of state law into account in formulating his expert opinion on valuation of the wrongful death claims.

[7] See Motion for Settlement by Estate of Betty Banks Shelander, Dkt No. 123; Motion for Settlement by Estate of Minnie Borden, Dkt. No. 124; Motion for Settlement by Estate of Robert Otis Moss, Dkt. No. 138; Motion for Settlement by Estate of Nellie Napier, Dkt. No. 143 (as amended by Dkt. No. 200); Motion for Settlement by Estate

Although the court might have chosen to rely on its bankruptcy jurisdiction to determine a proper procedure to protect minor claimant's interests, the undersigned deemed it more appropriate to evaluate minor's settlements under state law. "The rules governing settlement of minor's claims are embedded in traditional state-law domain of contract, agency, and family law. Rather than developing federal common law to govern such questions of authority, we can instead rely on the well-established rules of the various States." Reo v. United States Postal Serv., 98 F.3d 73 (3d Cir. 1996). Court approval of a minor claimant's settlement, under Virginia law, will be granted if the compromise is in the interest of the infant. Va. Code § 8.01-424. And the interests of the minor claimants are further protected because federal courts are always charged with the duty of seeing that the minor is properly represented, the minor's interests have not been sacrificed, and the compromise is to the minor's advantage. Carter Coal Co. v. Litz, 54 F.Supp. 115 (W.D.Va. 1943); see also Friends For All Children, Inc. v. Lockheed Aircraft Corp., 567 F.Supp. 790 (D.D.C. 1983).

To make certain the interests of the minor claimants were well represented, the Court appointed *guardians ad litem* for each minor claimant. See Orders Granting Motions to Appoint *Guardian Ad Litem,* Dkt. Nos. 91, 98, 104, 107. The two *guardians ad litem*, David Carson and Gary Coates, reviewed all aspects of the minor's claims: medical records, medical bills, health department information, expert reports, and other pertinent information.[8] Carson and Coates talked to at least one parent of each minor. Both reviewed in detail the settlement agreements which the parents had reached with the BI Fund and with Kellogg. The *guardians ad litem*

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of Doris Flatgard, Dkt. No. 144 & 203; Motion for Settlement by Estate of Clifford Frederick Tousignant, Dkt. No. 146 (as Amended by Dkt. No. 209); Motion for Settlement by Estate of Shirley Almer, Dkt. No. 156 & 201; Motion for Settlement by Estate of Hester Fields, Dkt. No. 165; Motion for Settlement by Estate of Margie Parsons, Dkt. No. 167.

[8] Whereas David Carson provided the court with written descriptions of the underlying circumstances of each minor claims, counsel for the minor claimants represented by Gary Coates provided an explanation of these circumstances and illness of each of his minor clients.

recommended in each case that the settlement of the claim, being in the best interests of the minor in accordance with Va. Code Ann. § 8.01-424, should be approved. Because the settlement provided for payments in the future, each *guardian ad litem* made sure that the interests of the minor were protected by assuring that these payments were backed by statutorily sanctioned insurance companies, per Va. Code. Ann. § 8.01-424(C). Thus, the undersigned concludes that the procedural requirements under Virginia law were met and that the settlement process and result were in the best interests of the minor claimants.

III. Valuation Process and Settlements Are Fair

Beyond assuring that the procedural requirements for the wrongful death claims and the minor claims were met, the court was also tasked with approving the entire settlement process as fair to all creditors. To this end, the court received evidence from the claims administrator, Alan Maxwell, on the process he used to determine the value of each claim.

A. Maxwell's Process Was Fair To All Claimants

Alan Maxwell was chosen by the Trustee as the claims administrator for the settlement process. Maxwell is an attorney with the law firm of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC. He has been defending food borne illness claims for over 11 years, and focusing exclusively on the defense of companies implicated as the source of food borne illness outbreaks for over five years. In the course of his work he has reviewed thousands of claims by individuals suffering from *Salmonella* infections and other food borne illnesses. In his capacity as claims administrator, Maxwell was asked to receive, process, and review the *Salmonella* proof of claim forms as well as the supporting documentation, and to determine that the claimants were eligible claimants with valid claims. As described *supra*, to be deemed eligible, a claimant had to fall within one of three categories of claims (A, B, or C) – depending on the strength of the

causation evidence that the *Salmonella* infection originated from PCA product. After determining the claimant's eligibility, and having considered the totality of the evidence relating to each claim, Maxwell was to assign settlement values to all qualifying claims.

In determining the settlement values for these claims Maxwell considered a wide variety of factors. Maxwell began with a verification of the medical expenses, days of total illness, hospital stays, Emergency Room visits, Doctor's Office visits, and incurred lost wages. Next, Maxwell created classes based on severity of the infection – which they determined by the course of treatment and the length of the illness. For example, 1-2 ER or Office visits and a course of infection of less than seven days was the lowest category, while the highest category included those infections which required to hospitalizations of over six days in length. Next, Maxwell assigned a rough valuation range to each of these categories, $20,000-$25,000 for the least severe category, and $100,000-$200,000 for the most severe category. These valuation ranges were created by consulting a database of past *Salmonella* infection settlements from earlier outbreaks – taking into account additional criteria such as the permanency of any effects, the age of the afflicted individual, and all incurred medical expenses. Although this matrix of claims was the starting point, Maxwell would often adjust some claim valuations on the basis of additional factors. Chief among these was the strength of the causation evidence. Whereas claims within the causation categories A & B were considered strong causation cases, those in category C were considered weaker and had $5,000 deducted from their values. Finally, those claimants who suffered particularly long lasting illnesses or hospitalizations beyond those levels set forth in the matrix were given enhancements in the value of their claim. Importantly, however, all of these valuations were made in a sterile environment of bankruptcy, with no

consideration given to possible punitive damages, nor to ongoing business concerns such as adverse publicity for the manufacturers.

For the wrongful death claims, Maxwell also considered the jurisdiction in which the death occurred. This involved reviewing the wrongful death statute for that jurisdiction to determine legal damages, discussion with counsel from that jurisdiction, and research into jury verdicts and settlements reached in those jurisdictions on other wrongful death claims. Maxwell also considered the circumstances of the decedent: age, pain and suffering, employment status, funeral expenses, and family relationships.

After Maxwell reached what he felt to be an appropriate rough valuation for each claim, Maxwell supplied copies of Valuation Spreadsheet[9] to counsel for both the Tort Claimants and Kellogg and Kanan, Inc. as well as an explanation of his valuation process. Each of these parties was encouraged to identify any flaws in the valuation methodology, particularly mistakes in omitting or misapplying some valuation criteria, alternative information on past valuations in *Salmonella* settlements, and legal analysis on the wrongful death cases. Following this collaboration, Maxwell made additional changes to the Valuation Spreadsheet. When Maxwell then released his final version, counsel for the Tort Claimants and for Kellogg and Kanan, Inc. all approved of the amounts and valuations ascribed to every individual claimant.

Given the thoroughness of Maxwell's analysis, and the consideration of the multitude of relevant factors which entered into his analysis, the undersigned concludes that the process of valuation undertaken by Maxwell is fair and equitable to all parties. Considering that each counsel for the Tort Claimants agreed not simply to the valuations ascribed to their clients, but rather to the valuations ascribed to *every other claimant*, the proposed distribution appears to be

[9] Capitalized terms used herein but not otherwise defined were defined in the Motion to Approve Claim Amounts and Authorize Pro Rata Distributions from the BI Fund. Dkt. No. 3.

substantially equitable and fair to all parties. Nevertheless, the total settlements that this court was asked to approve consist of more than simply the Maxwell valuation (reduced *pro rata*). And these total settlement figures often have vast differences in settlement funds provided by Kellogg, resulting in a larger variance among the total settlements received by each claimant. A considerable portion of the hearing on August 18, 2010 was devoted to these variances.

B. Wrongful Death Settlements With Kellogg Are Fair

It is the conclusion of the undersigned that the wrongful death settlements that the claimants reached with Kellogg, though disparate, are fair. For example, although Maxwell assigned a value of $250,000 to the claim of Robert Otis Moss, and $275,000 to the claim of Minnie Borden, Moss settled with Kellogg for an additional $400,000 and Borden settled for only an additional $180,000. Counsel explained, convincingly, that these distinctions derived primarily from his opinion on causation with respect to Moss. Moss did not die until one year after his *Salmonella* infection – which counsel opined would lead a jury to conclude that the entire last year of his life was filled with suffering. Counsel explained, moreover, that given this analysis the family would be willing to pursue a more aggressive negotiating stance with Kellogg. And considering that the Maxwell valuation was reached in a "sterile bankruptcy environment," it is clear that this discrepancy between Maxwell's valuation and Kellogg's valuation can be sensibly explained. Thus, for both of these settlements with Kellogg, the undersigned believes them to be fair and equitable to the claimants.

C. Minor Claimant Settlements With Kellogg Are Fair

As with the wrongful death claimants, there are several minor claimants who are asking the court to approve settlements with Kellogg which are substantially larger than the valuations provided by Maxwell. These different settlements with Kellogg result in a different overall

picture of the variety of minor claimants' total settlements. For example, with the exception of the minor S.S., all of the minor claims were valued by Maxwell at $115,000 or less, with a large majority valued between $25,000 and $50,000. The total settlements, however, again excluding S.S., range up to $290,000 with many settlements worth more than $100,000. There are several cases where Kellogg is providing settlement funds which are greater than the Maxwell value. The undersigned questioned counsel for the minor claimants and counsel for Kellogg on these discrepancies, focusing particularly on whether the values reached in the Kellogg settlements called into question the underlying fairness and correctness of the Maxwell valuation. Having considered the evidence provided by counsel as to all of these discrepancies, the undersigned concludes that the settlement values reached in negotiation with Kellogg are fair and equitable to the minor claimants and do not call into question the separate valuation assigned by Maxwell.

The differences between Maxwell's valuations and Kellogg's valuations, according to counsel, derive from a few major factors. First, the expectation of the plaintiff's counsel and the parents of the minor child at the beginning of the process. Counsel for the minor claimants explained that they assign, at the outset, a valuation which they believe is appropriate for each claim. When the Maxwell value matched counsel's and the parent's expectation, the incentive to pursue further remuneration though settlement with Kellogg was reduced. This explains the odd fact that minor S.S. was assigned a value of $395,000 by Maxwell, and yet Kellogg offered S.S. no additional money. Counsel for S.S. explained that the Maxwell valuation was exceptionally close to his expected value of the claim, and there was little additional value to be sought from Kellogg.[10] Similarly, if Kellogg's expected value of the claim is close to the Maxwell valuation, Kellogg's incentive to contribute additional funds is reduced because they anticipate their

[10] Counsel for minor claimant C.C. explained that a similar situation arose with the valuation assigned by Maxwell as to C.C.'s claim.

potential liability being small, thanks to an offset from the BI Fund payout. This expected valuation phenomenon also explains the case of the twins B.B.T. and B.L.T. Here although Maxwell assigned one twin a value of $100,000 and the other a value of $50,000, the total settlement for each was $84,000. This value of $84,000 was both close to counsel's expected value of each claim, and perhaps more importantly, in keeping with the expectations of the parents of these twins that both would receive similar settlements. The phenomenon of matching expectations appeared again with the case of minor claimant F.B. This minor claimant was assigned a value by Maxwell which very nearly matched counsel's expectations, and thus the settlement with Kellogg was correspondingly small compared to the total value of the claim.[11]

The undersigned recognizes that it is inherent in a process such as this for different parties to have different valuation expectations. The mere existence of these differences, therefore, can not be considered evidence that certain valuations are necessarily flawed. It also follows that when different parties' valuation expectations coincide the incentive to seek additional remuneration from Kellogg would be reduced. Accordingly, the fact that Kellogg has contributed no money to some claims does not indicate that a fair value has not been reached.

The second major factor is also an example of different expectations, but in reverse. In certain cases, the parents of the minor claimant and counsel for the minor claimant had much higher expected values for the claim than Maxwell's valuation. These expectations were usually shaped by factors which were not as central to Maxwell's valuation. For example, minor C.M. was assigned a value of $115,000 by Maxwell. Kellogg, however, settled with C.M. for an additional $200,000. Counsel explained that although C.M. was not hospitalized for a substantial period of time (a major factor in Maxwell's valuation), his conversations with C.M.'s

[11] In the case of F.B. it is clear that Maxwell's causation analysis and Kellogg's causation analysis were significantly different. In the opinion of the undersigned, however, both should be considered reasonable from their perspectives.

parents indicated that the effect the infection had on C.M. was substantial, disruptive and long lasting. In fact, C.M. is still undergoing a course of antibiotics because *Salmonella* is still present in his GI tract. Similarly, minor B.W. did not require extensive hospitalization but suffered from lingering effects of the infection as well as complications which likely arose from the original *Salmonella* infection.[12] In the case of minor R.S., Maxwell's valuation was based on the medical bills which were abnormally low. Accordingly, counsel for R.S. expected a higher valuation based on the severity of the illness, but with medical bills abnormally low, the Maxwell valuation lagged counsel's expected recovery for the minor claimant. Overall, counsel for all the minor claimants provided cogent, reasonable explanations for the different values assigned by Kellogg and by Maxwell. And the court, as explained above, recognizes that mere differences of opinion in circumstances like these are not, by themselves, indicative of inequitable results. Thus, the undersigned concludes that the minor settlements with Kellogg are fair and reasonable under all of the circumstances and, most importantly, in the best interests of the minor claimants.

IV. Distribution Of Funds and Attorneys' Fees

A. Guardians Ad Litem Have Set Up Annuities For The Minor Claimants

Both *Guardians ad litem* have set up annuities for their minor claimants. These annuities are paid out to the minor claimants once they reach the age of 18. Some annuities are paid out semi-annually once the minor reaches the age of majority, some have benefits paid out in more elaborate schemes. In all of these cases, however, the net settlement being paid by the defendants PCA and Kellogg presently will result in more substantial sums being made available to the minor later in life – most likely when these claimants are about to enter college. All of

[12] It appears from testimony at the hearing that B.W. became infected with MRSA following his hospital stay for the *Salmonella* infection, a factor which, were the case to go to trial, might lead to extensive additional liability for Kellogg.

these annuities are backed by insurance companies authorized to do business in the state of Virginia and rated "A plus" (A+) or better by Best's Insurance Reports, in accordance with Va. Code Ann. § 8.01-424(C). The undersigned is satisfied that these arrangements are in the best interests of the children.

B. Funds Paid to the Parents for the Benefit of the Children are Approved

Several parents of minors have requested that portions of the settlement monies be set aside to reimburse the parents for out-of-pocket expenses, such as medical bills. Such reimbursement is appropriate and reasonable. A few parents have also requested that monies be set aside to be paid directly to the parents, to be used for the sole benefit of the minor claimant, the stated reason being they wish to enroll the student in private school. The court has examined each of these instances, and the amounts being paid to the parents in each case are a very small portion of the total settlement proceeds. On balance, the court also believes that these payments are appropriate and reasonable.

C. Attorney's Fees Are Excessive And Marked Down To 33-1/3%

This court has been asked to approve a very few settlements which call for attorney's fees of well over 33-1/3%. For example, the attorney's fee provided for in the settlement agreement of Robert Otis Moss is 40%. The attorney's fee provision in the Margie Parsons settlement is fully 45%. Both of these attorney's fees provisions are excessive in the context of this overall global settlement in which the vast majority of fee agreements are at the 33-1/3% level. Moreover, the attorney's fees for these two settlements arise in the settlements which are the highest to date. In the case of Margie Parsons, the settlement figure of $987,520.00 would result in a net award of attorney's fees of $444,384.34. Given the particular context of this and considering the global nature of the settlement reached, the relatively recent occurrence of these

claims, the absence of any protracted litigation on any individual claims, and the economies of scale available to the law firms involved, the court views an attorney's fee in excess of 33-1/3% to be excessive, and does not recommend approval of any fee over 33-1/3%.[13] Accordingly, the undersigned recommends that the attorney's fees provisions in the Parsons and Moss settlements be reduced to 33-1/3%. Even at this reduced level, the attorney's fees will total significant sums. In the case of Robert Otis Moss, the fee award will still be approximately $198,968. In the case of Margie Parsons, the fees will still reach the sum of approximately $328,844. It is noteworthy that these awards still dwarf the award sought by counsel in the Tousignant wrongful death settlement, a mere 20% of the settlement of $217,254.00 – or only $43,450.91.

V. Trustee's Request For Distribution Of Administrative Funds Is Approved

The Trustee notified the court at the 11th hour that the administration of the bankruptcy estate had entailed costs greater than the $750,000 which had been previously agreed upon by all parties. In fact, the Trustee's costs were so extensive (and his investment returns so incredibly limited) that his request exceeded even the safety valve for cost overruns imagined in the agreement, *i.e.*, the interest earned on the $12,000,000. The undersigned is mindful of the outstanding efforts of the Trustee and his counsel to put together this global resolution of a serious case. However, given that all of the parties have agreed to specific dollar settlement and the annuity figures have been agreed upon with the insurers based on these specific dollar values, the court does not believe that the payments to the claims under the BI Fund should be reduced to defray the Trustee's expenses. It is the court's view that the benefits to all of the parties, including the Trustee, achieved in this global settlement would be substantially undone if the

[13] The undersigned notes that there are a limited number of settlement agreements which provide for attorney's fees of 35% rather than 33-1/3%, a distinction which should be considered neither material nor excessive. It is recommended that the fee agreements of 35% be approved. The undersigned also notes that these recommendations apply only to the settlement agreements for minor and wrongful death claimants.

apple cart is upset at this late date. At the hearing on August 18, 2010, the court offered the parties the opportunity to reach an agreement between themselves – Plaintiffs' counsel, the Trustee, Trustee's counsel, and Kellogg – which would avoid asking the court to dip into the settlement funds. The court instructed the Trustee to file a motion with the court if the Trustee wished to renew his request for additional funds. No such motion was filed. Thus, the undersigned recommends approval only of the distribution to the Trustee of the original administrative set-aside of $750,000, as this original amount protects the interests of all the tort claimants and the workability of the settlement agreements.

VI. Conclusion

All parties involved in the distribution of the BI fund and the settlement of the multitude of personal injury claims against PCA and Kellogg were tasked with a complicated and difficult problem. They endeavored to reach an agreement between all parties that splits the available funds in a fair and equitable manner. After considering all of the evidence provided by the parties, and after a thorough hearing on the complex and inherently nebulous issues of valuation, the undersigned concludes that they have done so. It is, therefore, **RECOMMENDED** that the settlement agreements be approved and the distributions permitted in accordance with those agreements with one caveat; that being that attorney's fee to be paid in infant and death claims are limited to no more than 33-1/3%[14].

The Clerk is directed to transmit the record in this case to Norman K. Moon, Senior United States District Judge, and to provide copies of this Report and Recommendation to counsel of record. Both sides are reminded that pursuant to Rule 72(b), they are entitled to note any objections to this Report and Recommendation within fourteen (14) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned that is not

[14] Excepting, as noted above, those fee provisions at 35%.

specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusion reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

It is the court's understanding from the parties that time is of the essence as regards the date by which the annuities must be purchased. Should the parties want the District Court to consider approving this Report and Recommendation before the 14 day period provided for in Rule 72(b), they should file with the court a pleading stating that they have no objection to this Report and Recommendation immediately.

Finally, although it has been recommended above that the settlement be approved in its entirety (except certain attorney fee provisions), the undersigned is mindful that to effectuate and implement the settlement, the District Court must issue specific directives to the Bankruptcy Court. The Trustee and Plaintiffs' counsel are hereby instructed to submit a proposed Consent Order consistent with this Report and Recommendation to Judge Moon, providing a mechanism to implement all the relevant terms of the settlement agreement.

Entered: August 25, 2010.

/s/ Michael F. Urbanski

Michael F. Urbanski
United States Magistrate Judge

TAB 2

MAXWELL DECLARATION

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

In re: PEANUT CORPORATION OF AMERICA,
Debtor No. 09-60452
Debtor,

In re: PLAINVIEW PEANUT CO., LLC,
Debtor No. 09-61651
Debtor,

In re: TIDEWATER BLANCHING CO., LLC,
Debtor No. 09-61652
Debtor.

CASE NO. 6:10-cv-00027

ORDER

JUDGE NORMAN K. MOON

This matter is before the Court upon the Motion to Approve Claim Amounts and Authorize Pro Rata Distributions from the BI Fund ("Motion to Approve"), which was filed on May 26, 2010 by Roy V. Creasy, the Bankruptcy Trustee ("Trustee") for the Peanut Corporation of America ("PCA") and its subsidiaries Plainview Peanut Co., LLC ("Plainview") and Tidewater Blanching Co., LLC ("Tidewater") (docket no. 3).

On June 2, 2010, the Court referred the Motion to Approve to United States Magistrate Judge Michael F. Urbanski, pursuant to 28 U.S.C. § 636(b)(1)(B), for proposed findings of fact and recommendations for disposition (docket no. 4). The Magistrate Judge conducted several hearings on the Motion to Approve, and issued a Report & Recommendation on August 25, 2010, which recommended that the Court approve the proposed settlements (docket no. 215).

By August 31, 2010, all counsel of record (which includes counsel for all *Salmonella* claimants, the *guardians ad litem* appointed for the minor claimants, counsel for The Kellogg Company and Kanan Enterprises, Inc., and counsel for the Trustee) had waived any and all

objections to the Magistrate Judge's Report & Recommendation. *See* Trustee's Notice of Filing of Waivers of Objection (docket no. 240).

On September 1, 2010, the Court held that the only disputed *Salmonella* claim, which had been filed by one Kenneth Hinton, was appropriately valued at $0 and did not warrant a distribution from the BI Fund (docket no. 242).

The Court has reviewed the Report & Recommendation of the Magistrate Judge (docket no. 215) along with the other filings in this case. Finding the matter ripe for disposition, and that the Report & Recommendation is well-supported in law, reason, and fact, the Court hereby adopts in full the findings of fact and recommendations of the Magistrate Judge set forth therein.

Accordingly, it will be and hereby is ORDERED as follows:

1. The Report & Recommendation of the Magistrate Judge (docket no. 215) is hereby ADOPTED in its entirety.
2. The Motion to Approve (docket no. 3) is hereby GRANTED, and the settlements set out therein are APPROVED in their entirety, except that those attorney's fees to be paid in infant and death claims shall be limited to those amounts not found to be excessive by the Magistrate Judge. *See* Report & Recommendation, at 16 – 19.
3. The form of Settlement Agreement and Release ("Release") is hereby APPROVED. *See* Motion to Approve (docket no. 3, ex. C). The Trustee is authorized to enter into a Release, in substantially that form, as to the settlement with each of the claimants.
4. The Trustee is hereby AUTHORIZED, and ORDERED, to make distributions from the BI Fund in the amounts detailed in the Proposed Claim Amount Column of the Second Amended Schedule B (docket no. 184). Such distributions shall be made in accordance with the provisions and subject to the conditions of the PCA *Salmonella*

Claim Settlement and Distribution Procedures previously approved by the Bankruptcy Court.

5. The Trustee is hereby ORDERED to make payments to adult (non minor, non death) claimants by check, payable jointly to the claimant and the claimant's counsel, such payments to be in the amounts shown as the "Proposed Claim Amount" on the Second Amended Schedule B (docket no. 184), and such payments to operate as a full and complete release and discharge of all liability or claim of liability which might now or hereafter be made by or on behalf of the claimant receiving such payment against the Trustee, PCA, Plainview, and Tidewater, against any of their related or affiliated companies, or against any of their officers, directors, agents, employees, former employees, affiliates, subsidiaries, successors, assigns, insurers, trustees, and/or receivers, arising out of any injuries suffered, which are related in any way to the incident that is the basis of the claim asserted in this proceeding. Claims against persons or entities other than the aforesaid not expressly released are preserved.

6. Each adult claimant receiving a distribution from the BI Fund shall be solely responsible for satisfying all liens, claims of liens, subrogated interests, encumbrances or demands of whatever kind (including but not limited to) any bills or liens for health care services rendered to such claimant in connection with the incident that is the basis of the claim asserted in this proceeding; or other services rendered to such claimant in connection with the incident that is the basis of the claim asserted in this proceeding; and any liens, subrogation rights or claims that might exist by virtue of any insurance benefits paid in connection with the incident

that is the basis of the claim asserted in this proceeding; out of the settlement proceeds paid to such claimant, and the Trustee is, accordingly, released from any and all liability for these items.

7. The Court will enter a separate Order for the approval of the settlement of each of the claims involving a minor claimant, and for the approval of each of the wrongful death claims, in the form submitted with the motions filed by the claimant's counsel seeking approval of such settlement. As to all such Orders, if the claimant is receiving settlement funds from any entity other than the BI Fund, then the portion of the settlement to be paid by the Trustee shall be the amount shown as the "Proposed Claim Amount" for such claim on the Second Amended Schedule B (docket no. 184).

8. In the event a claimant receiving a distribution from the BI Fund has filed a claim in the United States Bankruptcy Court for the Western of District of Virginia against PCA, Plainview, or Tidewater in connection with the incident that is the basis of the claim asserted in this proceeding, the Trustee is authorized to either withdraw such claim on behalf of the claimant or tender an Order to the Bankruptcy Court expunging such claim from the Claims Register.

It is so ORDERED.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record, to United States Magistrate Judge Michael F. Urbanski, and to the United States Bankruptcy Court for the Western District of Virginia.

Counsel for the Trustee shall mail a copy of this Order to all parties whom were served with the Motion to Approve.

Entered this 2nd day of September, 2010.

NORMAN K. MOON
UNITED STATES DISTRICT JUDGE

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SAMANTHA KIKER, on behalf of herself and others similarly situated; YLEELA ROGERS, on behalf of Herself and others similarly situated; And JILLIAN ONSTAD, on behalf of Herself and others similarly situated,	)	**CIVIL ACTION FILE NO.**
Plaintiffs,	)	**2016-cv-279710**
v.	)	
TROPICAL SMOOTHIE CAFÉ, LLC,	)	
Defendant.	)	

NOTICE OF FILING NOTICE OF REMOVAL IN FEDERAL COURT

Pursuant to 28 U.S.C. § 1446(d), Defendant Tropical Smoothie Café, LLC ("TSC") hereby gives notice that it has filed a Notice of Removal in the United States District Court for the Northern District of Georgia, Atlanta Division on October 20, 2016. A copy of TSC's Notice of Removal is attached as Exhibit 1.

Pursuant to the provision cited, the Superior Court of Fulton County shall not proceed further with this case unless and until it is remanded back to the Superior Court by order of the United States District Court.

This 20th day of October, 2016.

[Signature continued on next page]

WEINBERG, WHEELER,
HUDGINS, GUNN & DIAL, LLC

/s/ Alan M. Maxwell

ALAN M. MAXWELL
Georgia Bar No. 478625
NICK PANAYOTOPOULOS
Georgia Bar No.: 560679
JOSHUA E. SWIGER
Georgia Bar No. 695426
JENNIFER A. ADLER
Georgia Bar No. 585635
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npanayo@wwhgd.com
jswiger@wwhgd.com
jadler@wwhgd.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been served via Odyssey E-file Ga and/or United States Mail with adequate postage affixed thereto and email to counsel of record as follows:

James F. McDonough, III
Henninger Garrison Davis, LLC
3621 Vinings Slope, Suite 4320
Atlanta, Georgia 30339

This 20th day of October, 2016.

/s/ Alan M. Maxwell

ALAN M. MAXWELL
Georgia Bar No. 478625
NICK PANAYOTOPOULOS
Georgia Bar No.: 560679
JOSHUA E. SWIGER
Georgia Bar No. 695426
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JS 44 (Rev. 11/04)

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 THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Samantha Kiker et al.

(b) County of Residence of First Listed Plaintiff Fulton
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

James F. McDonough, III, Heninger Garrison Davis, LLC, 3621 Vinings Slope, Suite 4320, Atlanta, Georgia 30339, Tel: (404) 996-0869

DEFENDANTS

Tropical Smoothie Cafe, LLC

County of Residence of First Listed Defendant Fulton
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

See Attachment

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☒ 4
Citizen of Another State	☒ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury - Med. Malpractice
- ☒ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs.
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt.Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes

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 ☐ 7 Appeal to District Judge from Magistrate Judgment

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(d)(2), 1441(a)(b), 1455(b)

Brief description of cause:
Product liability arising from adulterated food products

VII. REQUESTED IN COMPLAINT:

☑ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $ 4,999,999.99

CHECK YES only if demanded in complaint:
JURY DEMAND: ☑ Yes ☐ No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE
10/20/16

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

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

ATTACHMENT TO CIVIL COVER SHEET

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