

VIRGINIA:

IN THE CIRCUIT COURT FOR PRINCE WILLIAM COUNTY

ROBERT DALY

2228 Dimoreta Drive

Woodbridge, VA 22191

Plaintiff.

vs.

COMMERCIAL CONCEPTS &

DEVELOPMENT, LLC d/b/a TROPICAL

SMOOTHIE CAFE

2511 Luckland Way

Woodbridge, VA 22191

Case No.

Plaintiff, by and through his attorneys of record **Ron Simon & Associates** (pending pro hac vice) and **The Warren Firm**, hereby allege as follows:

PARTIES

1. Plaintiff ROBERT DALY (hereinafter "Plaintiff") is a resident of Woodbridge, Virginia in Prince William County.

2. Defendant COMMERCIAL CONCEPTS & DEVELOPMENT, LLC d/b/a TROPICAL SMOOTHIE CAFE (hereinafter "Defendant") is a Virginia limited liability corporation headquartered in Woodbridge, Virginia, that manufactures, distributes and sells fruit smoothies and other beverage items. It may be served through its agent for service of process, Curtis M. Williams at 2511 Luckland Way, Woodbridge, Virginia, 22191.

JURISDICTION AND VENUE

3. Plaintiff hereby incorporates paragraphs 1 through 2 above.

4. Jurisdiction is proper in Prince William County, Virginia, because the Plaintiff lives and resides in Prince William County, Virginia. Further, Defendant conducts regular business activities in Virginia and engages in substantial, continuous, and systematic contacts with the State of Virginia and

Virginia and purposefully directs its activities towards that State. This litigation arises out of those activities.

5. In addition, Venue is appropriate in this Court pursuant to Virginia Code Section 8.01-262(2) because the office of Defendant's registered agent is located at 2511 Luckland Way, Woodbridge, Virginia, which is located within Prince William County.

GENERAL ALLEGATIONS

6. Plaintiff hereby incorporates paragraphs 1 through 5 above.

About Hepatitis A Virus

7. Hepatitis A (formerly known as infectious hepatitis) is an acute infectious disease of the liver caused by the hepatitis A virus ("HAV"), a virus usually spread by the fecal-oral route, with infection often being traced to conditions of poor sanitation. In addition, HAV is highly resilient, and is resistant to detergent, acid (pH 1), solvents (e.g., ether, chloroform), drying, and temperatures up to 60 °C. It can survive for months in fresh and salt water, as well as in frozen products.

8. Following ingestion, HAV enters the bloodstream through the epithelium of the oropharynx, or intestine. The blood carries the virus to its target, the liver, where it multiplies within hepatocytes and Kupffer cells. As a result, virions are secreted into the bile and released in stool. HAV is excreted in large quantities approximately 11 days prior to appearance of symptoms or anti-HAV IgM antibodies in the blood. The incubation period is 15--50 days, with a mortality rate of 0.5%.

9. Hepatitis A is an acute illness, which means that the symptoms can come on suddenly and sharply, causing a range of clinical problems from mild or asymptomatic illness to more severe illness. Typical symptoms include fatigue, nausea, vomiting, abdominal pain or discomfort (especially in the area of the liver beneath the lower ribs on the right side), loss of appetite, low-grade fever, dark urine, muscle pain, and yellowing of the skin and eyes (jaundice). HAV is one of several types of hepatitis viruses that can cause inflammation affecting a liver's ability to function, and in some cases can cause liver failure, chronic liver disease, or death.

The HAV Outbreak

10. On September 1, 2016, the U.S. Centers for Disease Control and Prevention ("CDC")

announced it was collaborating with public health officials in several states and the U.S. Food and Drug Administration ("FDA") to investigate a multistate outbreak of at least 70 HAV infections. According to the CDC, investigation began in early August when the Virginia Department of Health ("VDH") identified an outbreak of HAV cases linked to smoothies from Tropical Smoothie Café restaurants (hereinafter "TSC Product").

11. The FDA, CDC and state officials later confirmed that frozen strawberries imported from Egypt and used in the smoothies served at Tropical Smoothie Café locations (hereinafter "TSC Berries") were the likely source of the outbreak (hereinafter "HAV Outbreak").

12. The CDC report released on September 16th confirmed 119 HAV Outbreak cases had been reported from eight states (AR, MD, NC, NY, OR, VA, WI and WV).

13. On September 20th, VDH reported three new HAV Outbreak cases had been confirmed in the past 24 hours, bringing the total number of HAV Outbreak cases in Virginia to 102. The release indicates all 102 residents who tested positive for hepatitis A reported consuming TSC Product prior to becoming ill. In Virginia, the victim count by region is 59 Northern, 15 Northwest, 16 Eastern, and 12 Central.

14. Taking into account the eight Virginia HAV Outbreak cases reported after the most recent CDC update, the total number of HAV Outbreak cases stands at 127, spread across eight states.

15. According to VDH, approximately 37% of the victims for whom information is available have been hospitalized for their illness, including Plaintiff.

16. The victims range in age from 14-70. Among those made ill by TSC Product for whom information is available, the onset dates range from early May through September 2016.

17. Tropical Smoothie Café reported that it had stopped using Egyptian frozen strawberries in their locations in Virginia and neighboring states by August 8, 2016.

18. This does not constitute the first time berries imported from the Middle East have caused an outbreak of HAV. Three recent such cases include a 2013 outbreak involving 165 confirmed cases identified in 10 U.S. states linked to contaminated pomegranate arils imported from Turkey; an outbreak that took place in Europe during 2012 and 2013 traced to frozen berries imported from Egypt, Morocco and/or Turkey; and a 2012 outbreak in British Columbia linked to pomegranate seeds from

Egypt.

19. According to the CDC and FDA, the investigation into the source and distribution of the strawberries is ongoing, with governmental representatives in dialogue with their counterparts in the Egyptian International Health Regulations National Focal Point.

Plaintiff's Hepatitis A Illnesses

20. Robert purchased a number of smoothies from Tropical Smoothie Cafe ("TSC Product") during the two months preceding the onset of HAV symptoms, which occurred in late August 2016.

21. On August 24, 2016, Robert became ill and sought medical treatment at Inova Urgent Care, where he was treated for fever, nausea and extreme fatigue and body aches. The treating physicians performed routine labs, released Plaintiff with instructions to recuperate at home and to stay hydrated.

22. Over the course of the next few days, his condition continued to deteriorate. On August 29th, he again sought medical treatment and was hospitalized at Sentara Northern Virginia Medical Center.

23. The attending physician at Sentara Northern Virginia Medical Center noted his liver enzymes were highly elevated and ordered a Hepatitis A screen. Robert tested positive for HAV.

24. Robert remained hospitalized for three days before being released. He has since been under the care of his primary care physician.

FIRST CAUSE OF ACTION

(Negligence, including Negligence Per Se)

25. Plaintiff hereby incorporates paragraphs 1 through 24 above.

26. Defendant owes Plaintiff a duty of ordinary care in the manufacture, preparation, testing, packaging, marketing, distribution, and selling of TSC Product and, as applicable, TSC Berries. Further, Defendant owes Plaintiff the duty of warning or instructing Plaintiff of potentially hazardous or life-threatening conditions with respect to TSC Product.

27. Defendant breached its duties in at least one or more of the following ways:

- a. purchasing berries from a region responsible for producing at least three distinct

outbreaks of HAV linked to fruit and berries within the past five years:

- b. negligently importing, distributing, and marketing the TSC Berries and TSC Product;
- c. failing to properly test the TSC Berries and/or TSC Product before placing it into the stream of commerce;
- d. failing to prevent human and/or animal feces from coming into contact with the TSC Berries and/or TSC Product;
- e. failing to adequately monitor the safety and sanitary conditions of their premises;
- f. failing to apply their own policies and procedures to ensure the safety and sanitary conditions of their premises;
- g. failing to adopt and/or follow FDA recommended good manufacturing practices;
- h. failing to take reasonable measures to prevent the transmission of HAV and related filth and adulteration from their premises;
- i. failing to properly train and supervise their employees and agents to prevent the transmission of HAV and related filth and adulteration from their premises;
- j. failing to warn Plaintiff and the general public of the dangerous propensities of the TSC Product, particularly that it was contaminated with HAV, despite knowing or having reason to know of such dangers; and
- k. failing to timely disclose post-sale information concerning the dangers associated with TSC Product.

28. Furthermore, Defendant has a duty to comply with all applicable health regulations, including FDA Good Manufacturing Practices Regulations, 21 C.F.R. part 110, subparts (A)-(G), and all statutory and regulatory provisions that apply to the import, manufacture, distribution, storage, and/or sale of the product or product ingredients, including but not limited to, the Federal Food, Drug, and Cosmetics Act, § 402(a), as codified at 21 U.S.C. § 342(a), which bans the manufacture, sale and distribution of any “adulterated” food, and Virginia Food Regulation, 12 VAC 5-421-260, which imposes a similar ban.

poisonous or deleterious substance which may render it injurious to health.

30. The TSC Berries and TSC Product were adulterated because they contained HAV. Thus, through the import, manufacture, distribution, delivery, storage, sale, and/or offering for sale of TSC Product and/or components of TSC Product (including TSC Berries), Defendant breached its statutory and regulatory duties.

31. Plaintiff is a member of the classes intended to be protected by the regulations and statutes identified above.

32. Defendant's conduct was a direct, proximate, and producing cause of Plaintiff's injuries and damages set forth in this complaint.

33. All dangers associated with the TSC Berries and TSC Product were reasonably foreseeable and/or scientifically discoverable by Defendant at the time Defendant placed the TSC Berries and TSC Product into the stream of commerce.

SECOND CAUSE OF ACTION

(Breach of Implied Warranties)

34. Plaintiff hereby incorporates paragraphs 1 through 33 above.

35. Defendant is a merchant who imports, distributes, and markets product, including TSC Berries and TSC Product.

36. Plaintiff is a consumer.

37. Defendant breached the implied warranty of merchantability by impliedly warranting that TSC Product was of merchantable quality and fit for human consumption when, in fact, due to the presence of HAV it was not. Plaintiff reasonably relied upon Defendant's skill and judgment as to whether TSC Product was of merchantable quality and fit for human consumption.

38. Defendant breached the implied warranty of fitness for a particular purpose by holding out unreasonably dangerous product (i.e. product containing HAV) to the public as being safe when they knew or had reason to know that the product was not safe and that the public would consume the product.

39. Defendant did not disclaim these implied warranties.

40. Defendant's conduct was a direct, proximate, and producing cause of Plaintiff's injuries

40. Defendant's conduct was a direct, proximate, and producing cause of Plaintiff's injuries and damages set forth below.

DAMAGES

41. Plaintiff hereby incorporates paragraphs 1 through 40 above.

42. Defendant's conduct was a direct, proximate, and producing cause of Plaintiff's injuries and damages, including but not limited to damages in the past and future for the following: pain and suffering, mental anguish, physical impairment, physical disfigurement, loss of enjoyment of life, medical and pharmaceutical expenses, travel and travel-related expenses, emotional distress, lost wages, lost earning capacity, and attorneys' fees (to the extent recoverable) and other general, special, ordinary, incidental and consequential damages as would be anticipated to arise under the circumstances.

WHEREFORE, Plaintiff, Robert Daly, demands judgment against Defendant, COMMERCIAL CONCEPTS & DEVELOPMENT, LLC d/b/a Tropical Smoothie Cafe, in the full and just amount of Three Hundred Thousand Dollars (\$300,000.00), plus interest from the date of injury and costs.

TRIAL BY JURY IS DEMANDED

ROBERT DALY
By Counsel

Respectfully Submitted,

THE WARREN FIRM

By: _____

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