

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EAST CENTRAL DIVISION

<p>Shane G. Smith, a North Dakota resident,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>Fresh Express Incorporated, a North Carolina Corporation,</p> <p style="text-align: center;">Defendant.</p>	<p>Case No. _____</p>
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COMPLAINT

COMES NOW the Plaintiff, Shane G. Smith, by and through his attorneys of record, Ashley R. Brost of Davenport Evans, and William D. Marler of Marler Clark, LLP, PS, (*pro hac vice* pending) complaining against the Defendant, Fresh Express Incorporated, alleges and states as follows:

PARTIES

1. At all times relevant to this action, the Plaintiff, Shane G. Smith (hereinafter “Plaintiff”), resides in Fargo, Cass County, North Dakota. The Plaintiff is a citizen of the State of North Dakota.
2. At all times relevant to this action, the Defendant, Fresh Express Incorporated (hereinafter “Defendant”), is a North Carolina corporation with its principal place of business located at 4757 The Grove Drive, Suite 260, Windermere, Florida. Defendant is a citizen of the States of North Carolina and Florida. At all times relevant to this action, Defendant designed, manufactured, distributed, delivered, and sold salad to customers,

including the Plaintiff, at Walmart Supercenter located in Fargo, Cass County, North Dakota.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to 28 USC § 1332(a) because the matter in controversy exceeds \$75,000, exclusive of costs; it is between citizens of different states; and because Defendant has certain minimum contacts with the State of North Dakota such that the maintenance of this suit in this district does not offend traditional notions of fair play and substantial justice.
4. Venue in the United States District Court for the District of North Dakota is proper pursuant to 28 USC § 1391(a)(1) and (2) because Defendant was subject to personal jurisdiction in this judicial district at the time of the commencement of the action, and because a substantial part of the events or omissions giving rise to the Plaintiff's claims and causes of action occurred in this judicial district.

FACTS

The Outbreak

5. The CDC, public health and regulatory officials in several states, and the U.S. Food and Drug Administration (FDA) are investigating a multistate outbreak of *Cyclospora* infections linked to bagged salad mix purchased at ALDI, Hy-Vee, Jewel-Osco, and Walmart stores in Arkansas, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, and Wisconsin. As of June 29, 2020, a total of 206 people with laboratory-confirmed *Cyclospora* infections associated with this outbreak have been reported from eight states: Illinois (57), Iowa (74), Kansas (1), Minnesota (25), Missouri (10), Nebraska (20), North Dakota (6), and Wisconsin (13).

6. People with laboratory confirmed *Cyclospora* infections and who reported eating bagged salad mix before getting sick have been reported from eight states (Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, and Wisconsin). Illnesses started on dates ranging from May 11, 2020, to June 17, 2020. Twenty-three people have been hospitalized. No deaths attributed to *Cyclospora* have been reported.
7. Consumers who have ALDI Little Salad Bar Brand Garden Salad, Hy-Vee Brand Garden Salad, Jewel-Osco Signature Farms Garden Salad, or Walmart Marketside Brand Classic Iceberg Salad, purchased at ALDI, Hy-Vee, Jewel-Osco, and Walmart stores in Arkansas, Illinois, Indiana, Iowa, Kansas, Michigan, Missouri, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin in their homes should not eat it.
8. Defendant designed, manufactured, distributed, delivered, and sold salad through Walmart, ALDI, Hy-Vee, and Jewel-Osco.

What is *Cyclospora*?

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

developing countries, cyclosporiasis is common among the population and travelers to those areas have become infected as well.

10. *Cyclospora* is spread when people ingest water or food contaminated with infected stool. For example, exposure to contaminated water among farm workers may have been the original source of the parasite in raspberry-associated outbreaks in North America.
11. *Cyclospora* needs time (one to several weeks) after being passed in a bowel movement to become infectious. Therefore, it is unlikely that *Cyclospora* is passed directly from one person to another. It is not known whether or not animals can be infected and pass infection to people.
12. *Cyclospora* infects the small intestine (bowel) and usually causes watery diarrhea, bloating, increased gas, stomach cramps, and loss of appetite, nausea, low-grade fever, and fatigue. In some cases, vomiting, explosive diarrhea, muscle aches, and substantial weight loss can occur. Some people who are infected with *Cyclospora* do not have any symptoms. Symptoms generally appear about a week after infection. If not treated, the illness may last from a few days up to six weeks. Symptoms may also recur one or more times. In addition, people who have previously been infected with *Cyclospora* can become infected again.
13. *Cyclospora* has been associated with a variety of chronic complications such as Guillain-Barré syndrome, reactive arthritis, biliary disease, and acalculous cholecystitis. Since *Cyclospora* infections tend to respond to the appropriate treatment, complications are more likely to occur in individuals who are not treated or not treated promptly. Extraintestinal infection also appears to occur more commonly in individuals with a compromised immune system.

Shane Smith's *Cyclospora* Infection

14. Plaintiff shopped at Walmart Supercenter's Fargo location and purchased Walmart Marketside Brand Classic Iceberg Salad on May 29, 2020. Plaintiff consumed the salad on June 1 and June 2, 2020.
15. Plaintiff first became ill on or about June 7, 2020. Symptoms included stomachache, which turned severe, with explosive diarrhea, nausea and vomiting, abdominal cramps, fatigue, body aches, and fever.
16. On June 14, 2020, Plaintiff sought medical treatment. Stool and blood samples were collected, and Plaintiff was given medication.
17. On June 19, 2020, Plaintiff was taken to the ER and hospitalized until June 22, 2020. During that time, Plaintiff endured numerous tests and was started on treatment with IV fluids.
18. He incurred medical expenses and wage loss.
19. He continues to suffer the ill effects of the *Cyclospora* illness.

COUNT I (Strict Product Liability)

20. The Plaintiff incorporates the preceding paragraphs of this Complaint, by this reference, as if each of these paragraphs were set forth here in their entirety.
21. The Defendant designed, manufactured, distributed, delivered, and sold the adulterated salad product that injured the Plaintiff.
22. The Defendant designed, manufactured, distributed, delivered, and sold a food product, including salad, for sale to the public.
23. Food that is contaminated by *Cyclospora* is unsafe when put to the use reasonably foreseeable considering the nature of the product. Namely, *Cyclospora*-contaminated food is unfit for human consumption.

24. The salad that the Plaintiff purchased and consumed was contaminated with *Cyclospora* when it left the control of the Defendant. The Plaintiff's consumption of the contaminated food caused him to become infected by *Cyclospora* and to suffer injuries as a direct and proximate result of that consumption.
25. The Defendant is strictly liable to the Plaintiff for the harm proximately caused by the design, manufacture, distribution, delivery, and sale of an unsafe and defective food product.

COUNT II (Negligence)

26. The Plaintiff incorporates the preceding paragraphs of this Complaint, by this reference, as if each of these paragraphs were set forth here in their entirety.
27. The Defendant designed, manufactured, distributed, delivered, and sold salad that was contaminated with *Cyclospora*, a pathogen.
28. The Defendant owed a duty to all persons who purchased and consumed its product, including the Plaintiff, to design, manufacture, distribute, deliver, and sell salad that was safe to eat, that was not adulterated with pathogens like *Cyclospora*, and that was not in violation of applicable food and safety regulations. The Defendant breached this duty.
29. The Defendant owed a duty to all persons who purchased and consumed its products, including the Plaintiff, to ensure that any representations regarding the certifications of its products undergone prior to distribution and sale were made with reasonable care. The Defendant breached this duty.
30. The Defendant had a duty to comply with all statutes, laws, regulations, or safety codes pertaining to the design, manufacture, distribution, delivery, and sale of its food products, but failed to do so, and is therefore negligent. The Plaintiff was among the

class of persons designed to be protected by statutes, laws, regulations, safety codes, and provisions pertaining to the design, manufacture, distribution, delivery, and sale of similar food products.

31. The Defendant breached the duties owed to the ultimate consumers, including the Plaintiff, of the salad by committing the following acts and omissions of negligence:
 - a. Failed to adequately maintain or monitor the sanitary conditions of its products, premises, equipment and employees, and the products, premises, equipment, and employees of other entities in the supply chain of the subject salad;
 - b. Failed to properly operate its facilities and equipment in a safe, clean, and sanitary manner;
 - c. Failed to apply its food safety policies and procedures to ensure the safety and sanitary conditions of its food products, premises, and employees;
 - d. Failed to apply food safety policies and procedures that met industry standards for the safe and sanitary production of food products, and the safety and sanitary condition of its premises and employees;
 - e. Failed to prevent the transmission of *Cyclospora* to consumers of its salad mix;
 - f. Failed to properly train its employees and agents on how to prevent the transmission of *Cyclospora* on its premises, from its facilities or equipment, or in its food products;
 - g. Failed to test its salad mix for microbial pathogens like *Cyclospora*.
32. The Defendant owed a duty to the Plaintiff to use reasonable care in the design, manufacture, distribution, delivery, and sale of its food products to prevent contamination with *Cyclospora*. The Defendant breached this duty.

33. The Plaintiff's injuries proximately and directly resulted from the negligence of the Defendant and from the Defendant's violations of statutes, laws, regulations, and safety codes pertaining to the manufacture and distribution of food.
34. Plaintiff is entitled to be fully compensated for his injuries and for damage caused by Defendant's negligence.

COUNT III (Breach of Warranty)

35. The Plaintiff incorporates the preceding paragraphs of this Complaint, by this reference, as if each of these paragraphs were set forth here in their entirety.
36. By offering salad for sale to the public, the Defendant impliedly warranted that such salad was safe to eat, that it was not adulterated with pathogens, and that the salad had been safely prepared under sanitary conditions.
37. The Defendant breached the implied warranties about the food it designed, manufactured, distributed, delivered, and sold, which was ultimately consumed by the Plaintiff causing the Plaintiff's injuries and losses.
38. The Plaintiff's injuries proximately and directly resulted from the Defendant's breach of implied warranties, and the Plaintiff is thus entitled to recover for all actual, consequential, and incidental damages that flow directly and in a foreseeable fashion from these breaches.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays as follows:

39. That the Court award the Plaintiff judgment against the Defendant for damages.
40. That the Court award all such other sums as shall be determined to fully and fairly compensate the Plaintiff for all general, special, incidental, consortium and

consequential damages incurred or to be incurred by the Plaintiff as the direct and proximate result of the acts and omissions of the Defendant.

41. That the Court award the Plaintiff his costs, disbursements, and reasonable attorneys' fees incurred.
42. That the Court award the Plaintiff the opportunity to amend or modify the provisions of this Complaint as necessary or appropriate after additional or further discovery is completed in this matter, and after all appropriate parties have been served.
43. That the Court award such other and further relief as it deems necessary and proper in the circumstances.

JURY TRIAL DEMAND

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

Dated this 2nd day of July, 2020.

Respectfully submitted,

\s\ Ashley R. Brost
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