

Cause No. 2013-49114

**Kennon Smith and
Lyndsay Smith**

V.

**Bob's Taco Station,
Mex Luna Produce Company, Inc.,
Taylor Fresh Foods, Inc., and
John Does 1-50**

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In the District Court of

Harris County, Texas

189th **Judicial District**

PLAINTIFFS' ORIGINAL PETITION

The law firm of **Simon & Luke, L.L.P.** files this Original Petition on behalf of Kennon Smith and Lyndsay Smith and respectfully shows as follows:

I. Discovery Control Plan

1. Pursuant to Rule 190.3 of the Texas Rules of Civil Procedure, discovery in this case is to be conducted under Level 2.

II. Parties

2. Plaintiffs Kennon Smith and Lyndsay Smith (hereinafter "Plaintiffs") are residents of Ft. Bend County, Texas.

3. Defendant Bob's Taco Station is located at 1901 Avenue H, Rosenberg, Texas 77471.

4. Defendant Mex Luna Produce Company Inc. is a Texas corporation with its headquarters and principal place of business in Harris County, Texas. Mex Luna conducts business in Texas by selling and distributing its food products to consumers through the state. Mex Luna may be served through its registered agent, Rodolfo Luna, 2520 Airline Drive, Houston, Texas 77009.

5. Defendant Taylor Fresh Foods, Inc. is a Delaware corporation headquartered in Salinas, California. It may be served through its agent for service of process, John Joseph Mazzei, 911-B Blanco Circle, Salinas, California 93902.

III. Jurisdiction

6. The Court has jurisdiction over this matter because the damages in controversy are within the jurisdictional limits of this Court, and because Defendants Bob's Taco Station, Mex Luna Produce, Company Inc., and Taylor Fresh Foods, Inc. (collectively "Defendants") conduct substantial and continuous business in Texas. Accordingly, jurisdiction is proper in this Court under Texas Civil Practice and Remedies Code § 17.042.

IV. Venue

7. Venue is proper in Harris County, Texas pursuant to Section 15.002 (a)(3) of the Texas Civil Practice and Remedies Code because Mex Luna Produce Company, Inc.'s principal office and place of business is located in Harris County, Texas.

V. Facts and General Allegations

About Cyclospora

8. *Cyclospora cayetanensis* is a parasite composed of a single cell, too small to be seen without a microscope. This parasite causes an intestinal infection called cyclosporiasis.

9. *Cyclospora* is spread when people ingest something - such as food or water - that is contaminated with feces (stool). People living or traveling in tropical or subtropical regions of the world may be at increased risk for infection because cyclosporiasis is endemic to those regions. In the United States, foodborne outbreaks of cyclosporiasis are relatively rare, and in the past have been linked to various types of imported fresh produce, including fruits and vegetables.

10. The time between becoming infected and becoming sick is approximately seven days, though it can vary greatly. *Cyclospora* infects the small intestine (bowel) and usually

causes watery diarrhea, with frequent, sometimes explosive, bowel movements. Other common symptoms include loss of appetite, weight loss, stomach cramps/pain, bloating, increased gas, nausea, and fatigue. Vomiting, body aches, headache, fever, and other flu-like symptoms are also relatively common.

11. If not treated, the illness often lasts from for two months. Symptoms may also seem to go away and then return one or more times during infection. It is common for a victim of *Cyclospora* to suffer chronic fatigue.

Cyclospora Outbreak

12. On June 28, 2013, the Centers for Disease Control and Prevention (CDC) was notified of two laboratory-confirmed cases of *Cyclospora* infection in Iowa residents who had become ill in June and did not have a history of international travel during the 14 days before the onset of illness. Since that date, CDC has been collaborating with public health officials in at least 20 states and/or cities, as well as the US Food and Drug Administration (FDA), to investigate an outbreak of cyclosporiasis.

13. As of August 20, 2013 (when this petition was filed), reports compiled from various sources have identified approximately 600 *Cyclospora* victims in the following 20 states: Texas (258), Iowa (153), Nebraska (86), Florida (29), Wisconsin (14), Illinois (11), Arkansas (10), New York City (5), Georgia (4), Kansas (4), Missouri (4), Louisiana (3), Minnesota (2), New Jersey (2), New York (2), Ohio (2), Virginia (2), California (1), Connecticut (1), and New Hampshire (1). Texas has the highest number of confirmed cases of *Cyclospora* infection at the time of this filing. Most of the illness onset dates have ranged from mid-June through early July. At present, at least 36 persons have been hospitalized.

14. The CDC and FDA have implicated salad mix imported by Taylor Farms of Mexico, and sold at various restaurants. In addition, upon information and belief, Ft. Bend county health officials have linked a number of local victims, including Plaintiffs, to local retail establishments and suppliers of produce, including Bob's Taco Station in Rosenberg, Texas and

its produce distributor Mex Luna Produce Company, Inc.

15. The outbreak in Texas remains under investigation.

Plaintiff's Injuries

16. Both Plaintiffs, who lead physically active and healthy lives, consumed tamales and tacos with, among other ingredients, lettuce and cilantro at Bob's Taco Station in Rosenberg, Texas, on or about July 6, 2013.

17. Shortly thereafter, Plaintiffs began experiencing symptoms consistent with *Cyclospora* poisoning, including nausea, persistent diarrhea, fever, headaches and dehydration, abdominal cramping and stomach pain, muscle pain, severe bloating and gas, persistent fatigue, and loss of appetite.

18. Plaintiffs endured their illnesses for nearly one week, believing they were suffering from food poisoning, before calling on a family physician to prescribe medication for them, which he did. Within days it was evident that the symptoms were not subsiding, and they again sought medical attention at a local clinic and were treated with additional medication.

19. By late July, Plaintiff Kennon was getting nervous because the symptoms would not resolve and he was losing significant amounts of work (and beginning to believe he would lose his job). He again sought medical treatment which, this time, included a stool test.

20. When the stool test results came back, Plaintiff Kennon Smith was found to be positive for *Cyclospora*. His wife, Plaintiff Lindsay Smith, was also treated as a probable *Cyclospora* victim. Both were prescribed a sulfate-antibiotic, Bactrim. Plaintiff Kennon was contacted by the health officials from Ft. Bend County and recorded as a part of the Texas outbreak of *Cyclospora*.

VI. FIRST CAUSE OF ACTION (Strict Products Liability)

21. At all times, Defendants were in the business of importing, manufacturing,

distributing, and marketing salad ingredients (“Product”).

22. There was a manufacturing defect in the Product when it left Defendants’ possession and control. The Product was defective because it contained *Cyclospora cayetanensis*. The presence of *Cyclospora cayetanensis* was a condition of the product that rendered it unreasonably dangerous.

23. There was a marketing defect in the Product when it left Defendants’ possession and control. The Product was defective because it contained *Cyclospora cayetanensis* and Defendants failed to give adequate warnings of the product’s dangers that were known or by the application of reasonably developed human skill and foresight should have been known. Defendants also failed to give adequate warnings and instructions to avoid such dangers. Defendants’ failure to provide such warnings and instructions rendered the Product unreasonably dangerous.

24. Defendants’ conduct was a direct, proximate, and producing cause of Plaintiffs’ injuries and damages set forth below.

25. Defendants are therefore strictly liable for importing, manufacturing, distributing, and marketing defective and unreasonably dangerous Product and introducing it into the stream of commerce.

VII. SECOND CAUSE OF ACTION (Negligence)

26. Defendants owed Plaintiffs a duty of ordinary care in the manufacture, preparation, testing, packaging, marketing, distribution, and selling of the Product in question. Further, Defendants owed Plaintiffs the duty of warning or instructing Plaintiffs of potentially hazardous or life-threatening conditions with respect to the Product.

27. Defendants breached their duties in one or more of at least the following ways:

- a. negligently importing, manufacturing, distributing, and marketing the Product;

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

28. Defendants' conduct was a direct, proximate, and producing cause of Plaintiffs' injuries and damages set forth below.

29. All dangers associated with the contaminated Product were reasonably foreseeable and/or scientifically discoverable by Defendants at the time Defendants placed the Product into the stream of commerce.

**VIII. THIRD CAUSE OF ACTION
(Implied Warranty of Merchantability)**

30. Defendants are liable to Plaintiffs for breach of the implied warranty of merchantability. TEX. BUS. & COM. CODE § 2.314.

31. Plaintiffs are consumers.

32. Defendants are merchants who manufacture and market the Product.

33. Because Defendants are merchants, the Product at issue was sold with an implied warranty of merchantability created under § 2.314 of the Texas Business and Commerce Code.

34. Defendants breached the implied warranty of merchantability because Defendants manufactured and sold a Product that was not fit for its ordinary purpose and lacked something necessary to be adequate. Specifically, the Product contained *Cyclospora cayetanensis*.

35. Defendants did not disclaim the implied warranty of merchantability.

36. Defendants' breach of warranty was a proximate and producing cause of Plaintiffs' injuries.

37. Plaintiffs suffered damages as a result of Defendants' breach of warranty.

**IX. FOURTH CAUSE OF ACTION
(Implied Warranty of Fitness for Particular Purpose)**

38. Defendants are liable to Plaintiffs for breach of the implied warranty of fitness for particular purpose. TEX. BUS. & COM. CODE § 2.315.

39. Plaintiffs are consumers.

40. Defendants are merchants who manufacture and market the Product.

41. Defendants manufactured the Product contaminated with *Cyclospora cayetanensis*.

42. Plaintiffs relied on Defendants' skill and judgment when representing that the Product at issue was fit for human consumption.

43. Defendants breached the implied warranty of fitness for particular purpose because Defendants manufactured and sold the Product that was not fit for human consumption - i.e. it contained *Cyclospora cayetanensis*.

44. Defendants did not disclaim this warranty.

45. Defendants' breach of warranty was a proximate and producing cause of Plaintiffs' illness and injuries.

46. Plaintiffs suffered damages as a result of Defendants' breach of warranty.

**X. FIFTH CAUSE OF ACTION
(Deceptive Trade Practices Act ("DTPA"))**

47. Defendants also violated the Texas Deceptive Trade Practices Act ("DTPA").

48. Plaintiffs are consumers.

49. Defendants are merchants.

50. Section 17.50 (a)(2) of the Texas Business and Commerce Code provides that a plaintiff may pursue a DTPA cause of action for breach of an implied warranty. Although the DTPA does not create any warranties, warranties recognized under Texas law are actionable under the DTPA.

51. Defendants violated the DTPA by breaching the implied warranties of merchantability and fitness for particular purpose.

52. Defendants did not disclaim either warranty.

53. Defendants breach was a proximate and producing cause for Plaintiffs' damages.

54. Plaintiffs suffered damages a result of Defendants' DTPA violations.

XI. Damages

55. As a result of the acts and omissions outlined above, Plaintiffs have suffered, and will continue to suffer in the future, damages within the jurisdictional limits of this Court.

56. For Plaintiffs' manufacturing defect, marketing defect, and negligence claims, Plaintiffs seek damages for past and future: pain and suffering, mental anguish, physical impairment, physical disfigurement, lost earnings, medical, pharmaceutical and hospital expenses, pre-judgment and post-judgment interest, and costs of court.

57. For Plaintiffs' warranty and DTPA claims, Plaintiffs seek damages for past and future: lost earnings, property damage, medical, pharmaceutical and hospital expenses, mental anguish, attorneys' fees, pre-judgment and post-judgment interest, and costs of court.

XII. Gross Negligence and Exemplary Damages

58. Defendants' conduct as described above constituted acts and/or omissions which, when viewed objectively from their standpoint at the time of the occurrence involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others. Defendants had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, and welfare of others. Accordingly, Defendants' actions constitute gross negligence and Plaintiffs seek an award of exemplary damages.

XIII. Treble Damages

59. Defendants knowingly and intentionally breached the implied warranties of merchantability and fitness for particular purpose and thus violated the DTPA. Plaintiffs are therefore entitled to treble economic damages and mental anguish damages under the DTPA.

XIV. Attorney's Fees

60. Because Defendants violated the DTPA, Plaintiffs are entitled to recover and hereby seek attorney's fees pursuant to § 17.50(c) of the Texas Business and Commerce Code.

XV. Jury Demand

61. Plaintiffs hereby request a trial by jury and tender the applicable fee.

XVI. Prayer

62. Wherefore, Plaintiffs pray that Defendants be cited to appear and answer and that upon trial of this matter, Plaintiffs be awarded the following:

- a. Past and future actual damages;
- b. Past and future economic damages;
- c. Exemplary damages;
- d. Treble damages under the DTPA;
- e. Attorney's fees;
- f. Court costs;
- g. Pre-judgment interest at the highest rate allowed by law;
- h. Post-judgment interest at the highest rate allowed by law; and
- i. All other relief to which Plaintiffs are entitled.

Respectfully submitted,

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