

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SEAN McGUIRK,

Plaintiff,

v.

**COMPLAINT
AND JURY DEMAND**

AMERICAN PISTACHIO
COMMODITY CORP. d/b/a
SUNRISE COMMODITIES,
a foreign corporation;

Case No.: _____

Defendant.

COMES NOW the plaintiff SEAN McGUIRK, by and through his attorneys of record, MARLER CLARK, LLP, PS and UNDERBERG & KESSLER LLP, and alleges as follows:

PARTIES

1.1 The plaintiff Sean McGuirk resides in the Town of Perinton, County of Monroe, New York. The plaintiff is a citizen of the State of New York.

1.2 Upon information and belief, the defendant AMERICAN PISTACHIO COMMODITY CORP. is at all material times a corporation organized under the laws of the State of Delaware, and is not a citizen of the State of New York. AMERICAN PISTACHIO COMMODITY CORP., at all material times, was and is doing business as "Sunrise Commodities." The defendant, at all material times, had and has a principal place of business in Englewood Cliffs, New Jersey, but also conducted business in the State of New York. The defendant is hereafter referred to as "Sunrise Commodities."

JURISDICTION AND VENUE

2.1 This Court has jurisdiction over the subject matter of this action pursuant to 28 USC § 1332(a) because the matter in controversy exceeds \$75,000.00, exclusive of costs, it is

between citizens of different states, and because the defendant has certain minimum contacts with the State of New York such that the maintenance of the suit in this district does not offend traditional notions of fair play and substantial justice.

2.2 Venue in the United States District Court for the Western District of New York is proper pursuant to 28 USC § 1391(a)(2) 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, and because the defendant was subject to personal jurisdiction in this judicial district at the time of the commencement of the action.

GENERAL ALLEGATIONS

Salmonella Infections

3.1 *Salmonella* is an enteric bacterium, which means that it lives in the intestinal tracts of humans and other animals. *Salmonella* bacteria are usually transmitted to humans by eating foods contaminated with human or animal feces. Contaminated foods usually look and smell normal. Contaminated foods are often of animal origin, such as beef, poultry, milk, or eggs, but all foods, including vegetables, may become contaminated. An infected food handler who neglects to wash his or her hands with soap and warm water after using the bathroom may also contaminate food.

3.2 Once in the lumen of the small intestine, the bacteria penetrate the epithelium, multiply, and enter the blood within 24 to 72 hours. As few as 15-20 cells of *Salmonella* bacteria can cause salmonellosis or a more serious typhoid-like fever. Variables such as the health and age of the host, and virulence differences among the serotypes, affect the nature and extent of the illness. Infants, elderly, hospitalized, and immune suppressed persons are the populations that are the most susceptible to disease, and suffer the most severe symptoms.

3.3 The acute symptoms of *Salmonella* gastroenteritis include the sudden onset of nausea, abdominal cramping, and bloody diarrhea and mucous over a period of days. There is no real cure for *Salmonella* infection, except treatment of the symptoms. Persons with severe diarrhea may require rehydration, often with intravenous fluids.

3.4 Persons with diarrhea usually recover completely, although it may be several months before their bowel habits are entirely normal. A small number of persons who are infected with *Salmonella* will go on to develop pains in their joints, irritation of the eyes, and painful urination. This is called Reiter's syndrome and/or reactive arthritis. It can last for months or years, and can lead to chronic arthritis, which is difficult to treat. Antibiotic treatment does not make a difference in whether or not the person later develops arthritis.

Pine Nut *Salmonella* Outbreak and Recall

3.5 On October 26, 2011 the U.S. Centers for Disease Control and Prevention (CDC) announced a "multistate outbreak of *Salmonella* Enteritidis infections linked to Turkish pine nuts purchased from bulk bins at Wegmans grocery stores."

3.6 The CDC reported a total of 42 individuals infected with the outbreak strain of *Salmonella* Enteritidis have been reported from six states. The number of ill persons identified in each state with the outbreak strain is as follows: Arizona (1), Maryland (1), New Jersey (2), New York (26), Pennsylvania (8), and Virginia (4).

3.7 On November 4, 2011, the FDA announced that the defendant Sunrise Commodities was recalling pine nuts sold at Wegman's stores due to contamination with *Salmonella* Enteritidis.

Sean McGuirk's Injuries

3.8 On August 24, 2011, the plaintiff's mother purchased "Grade A Pine Nuts-Product of Turkey" at a Wegman's grocery store. The pine nuts were manufactured and distributed by the defendant Sunrise Commodities.

3.9 On or about August 28, 2011, the plaintiff consumed a meal that included the defendant's pine nuts.

3.10 On September 3, 2011 the plaintiff fell ill with severe gastrointestinal symptoms. The plaintiff remained ill for several days, missing his opening day at college.

3.11 Sean McGuirk's condition continued to worsen, and he required medical care. Despite the medical care, his symptoms persisted.

3.12 On September 9, 2011, the plaintiff was hospitalized due to his symptoms. While hospitalized, he tested positive for *Salmonella* Enteritidis. The plaintiff has been informed that the strain of *Salmonella* that caused his symptoms is a "genetic match" to the outbreak strain associated with the recalled pine nuts.

3.13 The plaintiff was discharged from the hospital on September 11, 2011, but has yet to make a full recovery.

CAUSES OF ACTION

Strict Liability—Count I

4.1 Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs of this complaint as if set forth in full herein.

4.2 At all times relevant hereto, the defendant was a manufacturer and seller of the adulterated food product that is the subject of the action.

4.3 The adulterated food product that the defendant manufactured, distributed, and/or

sold was, at the time it left the defendant's control, defective and unreasonably dangerous for its ordinary and expected use because it contained *Salmonella*, a deadly pathogen.

4.4 The adulterated food product that the defendant manufactured, distributed, and/or sold was delivered to the plaintiff without any change in its defective condition. The adulterated food product that the defendant manufactured, distributed, and/or sold was used in the manner expected and intended, and was consumed by the plaintiff.

4.5 As a direct and proximate result of the defective and unreasonably dangerous condition of the adulterated food product that the defendant manufactured, distributed, and/or sold, the plaintiff suffered injury and damages in an amount to be determined at trial, in excess of \$75,000.00.

Negligence—Count II

4.6 Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs of this complaint as if set forth in full herein.

4.7 The defendant owed to the plaintiff a duty to use reasonable care in the manufacture, distribution, and sale of their food product, which duty would have prevented or eliminated the risk that the defendant's food products would become contaminated with *Salmonella* or any other dangerous pathogen. The defendant breached this duty.

4.8 The defendant had a duty to comply with all statutes, laws, regulations, or safety codes pertaining to the manufacture, distribution, storage, and sale of its food product, but failed to do so, and was therefore negligent. The plaintiff is among the class of persons designed to be protected by these statutes, laws, regulations, safety codes or provisions pertaining to the manufacture, distribution, storage, and sale of similar food products.

4.9 The defendant had a duty to properly supervise, train, and monitor its employees,

and to ensure its employees' compliance with all applicable statutes, laws, regulations, or safety codes pertaining to the manufacture, distribution, storage, and sale of similar food products, but the defendant failed to do so and was therefore negligent.

4.10 The defendant had a duty to use ingredients, supplies, and other constituent materials that were reasonably safe, wholesome, free of defects, and that otherwise complied with applicable federal, state, and local laws, ordinances, and regulations, and that were clean, free from adulteration, and safe for human consumption, but the defendant failed to do so and was therefore negligent.

4.11 As a direct and proximate result of the defendant's acts and omissions of negligence, the plaintiff sustained injuries and damages in an amount to be determined at trial, in excess of \$75,000.00.

Negligence Per Se—Count IV

4.12 Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs of this complaint as if set forth in full herein.

4.13 The defendant had a duty to comply with all applicable state and federal regulations intended to ensure the purity and safety of its food product, including the requirements of the Federal Food, Drug and Cosmetics Act (21 U.S.C. § 301 *et seq.*).

4.14 The defendant violated federal, state, and/or local food safety regulations, including but not limited to New York Agriculture and Markets Law, New York Consolidated Law, Chapter 69, Article 17, Section 198, *et seq.* by its manufacture and/or sale of adulterated food and/or by its operation in accordance with standards and procedures that were insufficient, unsafe, and inconsistent with applicable food safety regulations.

4.15 The defendant failed to comply with the provisions of the health and safety acts

identified above, and, as a result, was negligent *per se* in its manufacture, distribution, and sale of food adulterated with *Salmonella*, a deadly pathogen.

4.16 As a direct and proximate result of conduct by the defendant that was negligent *per se*, the plaintiff sustained injury and damages in an amount to be determined at trial, in excess of \$75,000.00.

DAMAGES

5.1 The plaintiff has suffered general, special, incidental, and consequential damages as the direct and proximate result of the acts and omissions of the defendant, in an amount that shall be fully proven at the time of trial. These damages include, but are not limited to: damages for general pain and suffering; damages for loss of enjoyment of life, both past and future; medical and medical related expenses, both past and future; travel and travel-related expenses, past and future; emotional distress, past and future; pharmaceutical expenses, past and future; and all other ordinary, incidental, or consequential damages that would or could be reasonably anticipated to arise under the circumstances.

JURY DEMAND

6.1 The plaintiff hereby demands a jury trial.

PRAYER FOR RELIEF


WHEREFORE, the plaintiff prays for judgment against the defendant as follows:

- A. Ordering compensation for all general, special, incidental, and consequential damages suffered by the plaintiff as a result of the defendant's conduct;
- B. Awarding plaintiff his reasonable attorneys fees and costs, to the fullest extent allowed by law; and
- C. Granting all such additional and/or further relief as this Court deems just and

equitable.

DATED: November 10, 2011.

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