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

| | | |
|---|---|---|
| *JAMES M. BARBER,* | ) | |
| | ) | |
| *SARAH M. BARBER,* | ) | |
| | ) | |
| *and* | ) | |
| | ) | |
| *JARED D. BARBER,* | ) | |
| | ) | |
| *Plaintiffs,* | ) | |
| | ) | |
| *v.* | ) | *Case No:* _____ |
| | ) | |
| *SAM'S CLUB EAST, INC.* | ) | |
| *702 S.W. 8TH St* | ) | |
| *Bentonville, AR 72716* | ) | |
| | ) | |
| *Serve* | ) | |
| *CT Corporation System* | ) | |
| *4701 Cox Rd. Ste. 285* | ) | |
| *Glen Allen, VA 23060* | ) | |
| | ) | |
| *WAL-MART STORES, INC.* | ) | |
| *702 S.W. 8TH St* | ) | |
| *Bentonville, AR 72716* | ) | |
| | ) | |
| *Serve* | ) | |
| *The Corporation Company* | ) | |
| *125 W. Capitol Ave. Suite 1900* | ) | |
| *Little Rock, AR 72201* | ) | |
| | ) | |
| *and* | ) | |
| | ) | |
| *TAYLOR FARMS RETAIL, INC.* | ) | |
| *150 Main St. Ste. 400* | ) | |
| *Salinas, CA 93901* | ) | |
| | ) | |
| *Serve* | ) | |
| *John Mazzei* | ) | |
| *150 Main St. Ste. 400* | ) | |
| *Salinas, CA 93901* | ) | |
| | ) | |
| *Defendants.* | | |

## COMPLAINT

COME NOW, the Plaintiffs, James M. Barber, Sarah M. Barber and Jared D. Barber, and propound this Complaint for Wanton and Gross Negligence and Breach of Warranty. In support of their complaint, plaintiffs state as follows:

## PARTIES, JURISDICTION AND VENUE

1. At all material times herein, Plaintiffs James M. "Matt" Barber, Sarah M. Barber and Jared D. Barber were natural persons, citizens of the Commonwealth of Virginia, and residents of the City of Lynchburg.

2. At all material times herein, Defendant Wal-Mart Stores, Inc. ("Wal-Mart") was, on information and belief, a corporation organized under the laws of the State of Arkansas, which operated and conducted business within the Commonwealth of Virginia. and in so doing purposefully availed itself of the protection of the laws of the Commonwealth of Virginia.

3. At all material times herein, Defendant Sam's Club East, Inc. ("Sam's") was, on information and belief, a corporation organized under the laws of the State of Arkansas, which operated and conducted business within the Commonwealth of Virginia. and in so doing purposefully availed itself of the protection of the laws of the Commonwealth of Virginia. Defendant Sam's Club, Inc. was also owned and operated by Defendant Wal-Mart Stores, Inc.

4. At all material times herein, Taylor Farms, Retail, Inc. ("Taylor Farms") was, on information and belief, a corporation organized under the laws of the State of Delaware, with its principal place of business located in the State of California, which operated and conducted business within the Commonwealth of Virginia, and in so doing purposefully availed itself of the protection of the laws of the Commonwealth of Virginia.

5. All Defendants are citizens of states other than Virginia, the Plaintiffs' state of residence,

and this Court may properly hear this matter under diversity jurisdiction.

6. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

7. Venue is proper in this jurisdiction under 28 U.S.C. § 1391(b)(2).

**STATEMENT OF FACTS**

8. On October 12, 2016, Plaintiff Sarah Barber purchased two bags of "Asian Chopped Salad" produced by Defendant Taylor Farms and sold by Defendant Sam's at its Lynchburg, Virginia retail store.

9. That evening, Plaintiff Sarah Barber tossed the salad and served it in a large serving bowl.

10. All three Plaintiffs served themselves salad from the bowl, and Plaintiffs Matt and Jared Barber left the table, while Sarah took a second serving of salad.

11. While eating the second serving, Sarah suddenly noticed an object that appeared to be the carcass of a mouse in the salad.

12. Sarah screamed for Matt and Jared, who returned and confirmed that the object was in fact a carcass of a mouse.

13. The mouse was severely chopped up, the head was missing, and the organs and guts of the mouse were scattered through the remainder of the salad.

14. Further investigation revealed additional blood and hair also scattered through the remainder of the salad.

15. All three plaintiffs immediately became nauseated.

16. Plaintiff Matt Barber immediately rushed to the door and began vomiting in the yard.

17. He remained violently ill and vomited multiple more times overnight.

18. He remained sick to the stomach for the entire next day.

19. He has continued to have difficulty sleeping and to experience disturbing dreams since the incident.

20. Plaintiff Sarah Barber remained nauseated throughout the evening.

21. She continues to have flashbacks to the moment of discovering the mouse, and to become nauseated at the memory.

22. Plaintiff Jared Barber remained nauseated throughout the remainder of the evening.

23. He has continued to experience nausea and to have flashbacks to the moment of discovering the mouse.

24. He has to actively distract himself from the memory during mealtimes, in order to eat without continuing nausea.

25. Any memory of the incident continues to induce nausea and the urge to vomit.

26. All three Plaintiffs continue to be greatly affected to the present time.

**COUNT ONE – WILLFUL AND WANTON NEGLIGENCE**

27. Plaintiffs incorporate and reallege all facts in Paragraphs 1 to 26 above as if fully restated herein.

28. In Virginia, we have followed the common law doctrine that one who sells foodstuff for human consumption impliedly warrants its fitness and wholesomeness for such purpose, and is liable not only for the result of any negligent act involved in failing to use due and reasonable care in the preparation and handling of his product; but is also liable on the implied warranty where there is privity of contract between the vendor and vendee. *Swift and Company v. Wells*, 201 Va. 213, 217 (Va. 1959).

29. Accordingly, Defendants Wal-Mart and Sam's Club had an implied warranty of wholesomeness on the salad they sold to Plaintiffs, and are liable for the damages suffered by Plaintiffs.

30. However, products liability goes beyond just the immediate retailer, to the manufacturer

as well.

31. [W]here a manufacturer of food for human consumption sells such food, in sealed containers or packages, to a retailer, who in turn sells it to a consumer, and the consumer upon eating it suffers damage in consequence of impurities in the product, shown to have existed therein before it left the manufacturer's hands, the manufacturer is liable to the consumer on its implied warranty of wholesomeness of the food, and the consumer may recover against the manufacturer for damages suffered, irrespective of a lack of privity of contract between the manufacturer and the consumer. *Swift*, 201 Va. at 221.

32. Accordingly, if Defendant Taylor Farms was negligent in allowing the carcass of a mouse to enter the chain of distribution to the detriment of Plaintiffs, Defendant is liable for all damages arising therefrom.

33. Simple negligence requires merely that Defendants had a duty to exercise reasonable care, that Defendants breached that duty, and that their breach caused Plaintiff's damages.

34. Foreign substances in food packages not tampered with are in themselves evidence of negligence. When that is shown, prima facie case has been made out, which, if not overborne by evidence for the defendant, is sufficient to sustain a verdict for the plaintiff. Defendants had a duty to use reasonable care to provide food products free of foreign contamination and safe for human consumption. *Norfolk Coca-Cola Wks. v. Krausse*, 162 Va. 107, 121 (Va. 1934).

35. Defendants failed to take reasonable steps to ensure that the Asian Chopped Salad was free of foreign contaminants.

36. Defendant Taylor Farms failed to undertake reasonable inspection and testing to ensure that its products were free of foreign contaminants, and Defendants Wal-Mart and Sam's Club failed to insist on proper procedures form their supplier, in spite of years' worth of outbreaks of deadly illnesses tied to Taylor Farms products.

37. Defendants' actions go well beyond simple failure to exercise "reasonable care."

38. "Willful and wanton negligence is acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause

injury to another." *Etheron v. Doe*, 597 S.E.2d 87, 90 (Va. 2004).

39. " [I]ll will is not a necessary element of willful and wanton negligence. *Alfonso v. Robinson*, 514 S.E.2d 615, 618 (Va. 1999). Willful and wanton conduct is that which occurs with "actual or constructive consciousness of the danger involved." *Fravel v. Ford Motor Co*., 973 F. Supp. 2d 651, 655 (W.D. Va. 2013).

40. Defendants have a long and troubling history of introducing into the stream of commerce food intended for human consumption, but infested by rodents, bacteria and pathogens.

41. In 2012, a woman from Orlando, Florida found a dead mouse in a box of Taylor Farms organic spinach.

42. According to the New York Times article from August 30, 2013, Defendant Taylor Farms found it necessary to initiate three recalls each year from 2011 to 2013.

43. In early 2013, the largest outbreak since 1997 of cyclospora cayetanensis, a parasite found in feces, was tied to Taylor Farms products. Over 535 people were sickened, according to United Press International.

44. Two recalls in 2013 were for allergens in food products that Defendant Taylor Farms failed to label for the public.

45. On April 13, Taylor Farms spinach in Michigan tested positive for salmonella and e coli, a bacteria found in feces, according to the website www.foodsafetynews.com

46. In July 2015, a woman in Covina, California found a dead frog in a bag of Taylor Farms spinach, according to the San Gabriel Valley Tribune.

47. Also in 2015, 19 people were sickened in an e coli outbreak from Taylor Farms celery and onions.

48. In May 2016, seven more people were sickened by a salmonella outbreak caused by

organic salad produced by Defendant Taylor Farms and sold by Defendant Sam's Club, according to www.foodsafetynews.com.

49. In the instant matter, Defendants have demonstrated a complete lack of concern for the injuries sustained by Plaintiffs, or the negligence that allowed a mouse to contaminate the salad purchased by Plaintiffs.

50. Defendant Taylor Farms has failed to address the continuing and repeated injection of pathogens into the public food supply, and Defendants Wal-Mart and Sam's Club have continued to supply Taylor Farms products to consumers without insisting that the wanton and negligent conduct be stopped. This constitutes willful and wanton conduct on their part as well.

51. "Foreign substances in food packages not tampered with are in themselves evidence of negligence." *Norfolk Coca-Cola Wks. v. Krausse*, 162 Va. 107, 121 (Va. 1934).

52. A one-time mistake, or even a handful of onetime mistakes, might point toward simple negligence. But Defendants were placed on notice, but the events of the past four years, that pathogens and animal carcasses could be placed into the stream of commerce.

53. Yet Defendants made no significant efforts to prevent multiple recurrences of years' worth of risks to public health. Defendants' complete lack of concern for the damages inflicted by their contaminated food, and their apparent acquiescence in allowing pathogens into the public's food supply reveals large corporations "acting consciously in disregard of another person's rights or acting with reckless indifference" to the consequences. *Fravel v. Ford Motor Co.*, 973 F. Supp. 2d 651, 655 (W.D. Va. 2013).

54. Nor can Defendants claim any defense of lack of notice of the danger. The record of years' worth of repeated incidents of sickened and injured consumers, and numerous news reports of the outbreaks, is sufficient to show that Defendants had "actual or constructive consciousness

of the danger involved." *Id.*

55. Defendants are accordingly liable to Plaintiffs for both compensatory and punitive damages.

**COUNT ONE – GROSS NEGLIGENCE**

56. Plaintiffs incorporate and reallege all facts in Paragraphs 1 to 55 above as if fully restated herein.

57. "Gross negligence requires a showing of "indifference … and an utter disregard of prudence that amounts to a complete neglect of the safety of another person." *Cowan v. Hospice Support Care, Inc*., 603 S.E.2d 916, 918 (Va. 2004).

58. "Unlike simple negligence, gross negligence requires 'an unusual and marked departure' from the routine performance of business activities." *Id.* at 919.

59. "This requires a degree of negligence that would shock fair-minded persons, although demonstrating something less than willful recklessness." *Cowan*, 603 S.E. 2d at 918.

60. "Gross negligence is the 'absence of slight diligence, or the want of even scant care." *Frazier v. City of Norfolk,* 234 Va. 388, 393, 362 S.E.2d 688, 691 (Va. 1987).

61. As shown in Count One *supra*, the repeated and ongoing incidents of pathogens being injected into the chain of distribution by Defendants demonstrates their lack of concern for public health, showing "indifference … and an utter disregard of prudence that amounts to a complete neglect of the safety of another person." *Cowan*, 603 S.E.2d at 918.

62. As a result of Defendants' breach, Plaintiffs were caused to consume the contaminated salad, resulting in the damages claimed herein.

63. Even should the Court find that Defendants are not liable for willful and wanton negligence, Defendants are liable to Plaintiffs for gross negligence.

**COUNT THREE – BREACH OF IMPLIED WARRANTY OF FITNESS AND WHOLESOMENESS**

64. Plaintiffs incorporate and reallege all facts in Paragraphs 1 to 63 above as if fully restated herein.

65. Defendants Taylor Farms, Wal-Mart and Sam's are merchants because they manufacture and/or distribute for retail purchase food products including the Asian Chopped Salad purchased and consumed by Plaintiffs, and because they earn profits from selling goods such as the salad in question.

66. Defendants deal in goods of the kind, including the Asian Chopped Salad purchased and consumed by Plaintiffs.

67. Under Code of Virginia § 8.2-314, a merchant in goods of the kind is held to make an implied warranty that the goods will be fit for the ordinary purposes for which such goods are used. The courts in Virginia have held that when the "implied warranty of fitness for a particular purpose" involves food for human consumption, it equates to a warranty of "wholesomeness."

68. "Where a manufacturer of food for human consumption sells such food, in sealed containers or packages, to a retailer, who in turn sells it to a consumer, and the consumer upon eating it suffers damage in consequence of impurities in the product, shown to have existed therein before it left the manufacturer's hands, the manufacturer is liable to the consumer on its implied warranty of wholesomeness of the food, and the consumer may recover against the manufacturer for damages suffered." *Swift,* 201 Va. at 221.

69. The salad was unfit for its ordinary purpose because it contained unwholesome contamination, in the form of the mouse carcass, which rendered the salad dangerous for human consumption.

70. Virginia law requires the same showing both for negligence and for breach of warranty of

wholesomeness. A plaintiff must show "(1) that the goods were unreasonably dangerous either for the use to which they would ordinarily be put or for some other reasonably foreseeable purpose, and (2) that the unreasonably dangerous condition existed when the goods left the defendant's hands." *Bussey v. E.S.C. Rests., Inc*., 620 S.E.2d 764, 767 (Va. 2005).

71. The mouse was contained in a sealed, one-piece plastic bag with the salad. When Plaintiff Sarah Barber prepared to open the two bags of salad, there were no openings in either bag, and no evidence to suggest that either bag had been tampered with since its packaging.

72. As a result of Defendants' breach of warranty, Plaintiffs immediately endured severe shock, emotional distress and mental anguish.

73. As a result of Defendants' breach of warranty, Plaintiffs immediately endured extreme and severe physical symptoms, including nausea and in the case of Plaintiff Matt Barber, painful and violent vomiting.

74. As a result of Defendants' breach of warranty, Plaintiffs have been caused to suffer ongoing mental and emotional distress, difficulty eating and loss of appetite.

75. As a result of Defendants' breach of warranty, Plaintiffs have been forced to seek medical diagnosis in fear of contracting a communicable disease from contact with the mouse carcass.

76. As a result of Defendants' breach of warranty, Plaintiffs have endured and continue to endure extreme and ongoing fear of future health effects.

77. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-V") recognizes the Avoidant/Restrictive Food Intake Disorder ("ARFID").

78. Psychology has recognized that psychological avoidance of certain foods can result from stressful experiences while eating.

79. All three Plaintiffs have experienced continuing inability to eat salad since the incident, and continue to experience nausea due to the memory of the trauma upon finding the mouse carcass in their meal.

**COUNT THREE – BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY**

80. Plaintiffs incorporate and reallege all facts in Paragraphs 1 to 79 above as if fully restated herein.

81. Code of Virginia § 8.2-314 reads, in relevant part:

> "(2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and
>
> (b) in the case of fungible goods, are of fair average quality within the description; and
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
>
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) conform to the promises or affirmations of fact made on the container or label if any…."

82. The salad purchased by Plaintiffs contained a decomposing and shredded mouse carcass. Accordingly, it would not "pass without objection in the trade" of selling food for human consumption.

83. Likewise, the salad was not of "fair average quality."

84. As stated in Count Three *supra*, the salad was unwholesome and accordingly not fit for the ordinary purpose for which salad intended for human consumption is used.

85. As a result of Defendants' breach of warranty, Plaintiffs immediately endured severe shock, emotional distress and mental anguish.

86. As a result of Defendants' breach of warranty, Plaintiffs immediately endured extreme and severe physical symptoms, including nausea and in the case of Plaintiff Matt Barber, painful and violent vomiting.

87. As a result of Defendants' breach of warranty, Plaintiffs have been caused to suffer ongoing mental and emotional distress, difficulty eating and loss of appetite.

88. As a result of Defendants' breach of warranty, Plaintiffs have been forced to seek medical diagnosis in fear of contracting a communicable disease from contact with the mouse carcass.

89. As a result of Defendants' breach of warranty, Plaintiffs have endured and continue to endure extreme and ongoing fear of future health effects.

90. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-V") recognizes the Avoidant/Restrictive Food Intake Disorder ("ARFID").

91. Psychology has recognized that psychological avoidance of certain foods can result from stressful experiences while eating.

92. All three Plaintiffs have experienced continuing inability to eat salad since the incident, and continue to experience nausea due to the memory of the trauma upon finding the mouse carcass in their meal.

**COUNT FOUR – BREACH OF EXPRESS WARRANTY**

93. Code of Virginia § 8.2-313 governs the law of express warranties in Virginia.

94. Code § 8.2-313 reads, in relevant part:

> 1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

95. The bags of salad contained the statement plainly printed in large text on the front, "WASHED & READY-TO-ENJOY!"

96. This statement was a clear express warranty that the salad was ready for human consumption with no additional preparation.

97. Yet the salad purchased by Plaintiffs contained a decomposing and shredded mouse carcass.

98. Accordingly, Defendants have breached their express warranty with Plaintiffs, and are liable for all damages flowing from the breach.

**PRAYER FOR RELIEF**

99. WHEREFORE, your Plaintiffs respectfully request that this Court award them a judgment as follows:

100. A monetary judgment in the amount of $60,000 to each of the three Plaintiffs for that Plaintiff's physical injuries.

101. A monetary judgment in the amount of $60,000 to each of the three Plaintiffs for that Plaintiff's emotional and mental suffering.

102. Punitive damages in a total amount of $350,000.

103. Such other and further relief as this Court shall deem to be just and equitable.

Respectfully Submitted,

JAMES M. BARBER
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By Counsel

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