

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND**

**LAURA L. PYKA,** :  
**Individually and on Behalf of** :  
**All Those Similarly Situated,** :  
**101 Brigade Drive** :  
**Yorktown, VA 23692** :

**Plaintiff,** :

**v.** : **Case No.** \_\_\_\_\_

**TLC TROPICAL SMOOTHIE, LLC** :  
**8604 Gillis Street** :  
**Richmond, VA 23228** :

**Serve: David Shane Smith, Esq.** :  
**LeClairRyan, P.C.** :  
**919 East Main Street, 24th Floor** :  
**Richmond, VA 23219** :

**Defendant.** :

**COMPLAINT FOR DAMAGES**

COMES NOW Plaintiff, Laura L. Pyka, individually and on behalf of all persons similarly situated (“Plaintiffs”), by and through her attorneys of record, Salvatore J. Zambri<sup>†</sup> and Christopher J. Regan, of Regan Zambri & Long, PLLC, in association with William D. Marler,<sup>†</sup> of Marler Clark, LLP, and respectfully moves for judgment against Defendant, TLC Tropical Smoothie, LLC, on the grounds and in the amount set forth below.

Regan Zambri Long  
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Suite 350  
Washington, D.C. 20036

202-463-3030

\_\_\_\_\_  
<sup>†</sup> Pending admission *pro hac vice*.

1. This cause of action arises under the common law of Virginia; therefore jurisdiction is appropriate in this Court.

2. Venue is appropriate in this Court, under Virginia Code Section 8.01-262(2), because the office of Defendant's registered agent is located within the City of Richmond (at 919 East Main Street).

### **PARTIES**

3. Plaintiff and class representative Laura L. Pyka is and was at all times relevant herein a citizen of the Commonwealth of Virginia. She consumed adulterated food in July and August 2016, at the Tropical Smoothie restaurant in Yorktown, Virginia. After learning that she had been exposed to Hepatitis A through the consumption of adulterated food, and following the recommendation of public health officials, Plaintiff received a Hepatitis A vaccine to prevent imminent infection due to her exposure to Hepatitis A.

4. Plaintiff, and all those similarly situated, (collectively, "Plaintiffs") visited one of the Defendant TLC Tropical Smoothie, LLC's restaurants during the exposure period, in July and August 2016, during which time adulterated food products, including smoothies that contained strawberries, were purchased and consumed, exposing the Plaintiffs to Hepatitis A and thus causing an imminent and immediate risk of infection that urgently required a preventive vaccination.

5. Upon information and belief, Defendant, TLC Tropical Smoothie, LLC, is and was at all times relevant herein a Virginia limited liability company with its

corporate headquarters and principal place of business is located at 8604 Gillis Street, Richmond, Virginia.

### **FACTS**

6. **Hepatitis A.** Hepatitis A is a communicable (or contagious) disease that often spreads from person to person. Person-to-person transmission occurs via the “fecal-oral route,” while all other exposure is generally attributable to contaminated food or water. Exposure to hepatitis A virus (“HAV”) can cause an acute infection of the liver that is typically mild and resolves on its own. The symptoms and duration of illness vary a great deal, with many persons showing no symptoms at all. Fever and jaundice are two of the symptoms most commonly associated with hepatitis A infection. Symptoms typically begin about 28 days after contracting HAV, but can begin as early as 15 days or as late as 50 days after exposure. The symptoms include muscle aches, headache, anorexia (loss of appetite), abdominal discomfort, fever, and malaise. After a few days of typical symptoms, jaundice (also termed “icterus”) sets in. Jaundice is a yellowing of the skin, eyes and mucous membranes that occurs because bile flows poorly through the liver and backs up into the blood. The urine will also turn dark with bile and the stool light or clay-colored from lack of bile. When jaundice sets in, initial symptoms such as fever and headache begin to subside. In general, symptoms usually last fewer than 2 months, although 10% to 15% of symptomatic persons have prolonged or relapsing disease for up to 6 months.

7. **The Tropical Smoothie Outbreak.** The Virginia Department of Health (VDH) is investigating a cluster of hepatitis A cases and has identified a potential association with smoothies from Tropical Smoothie Cafe restaurants in Virginia. Genetic testing shows the illnesses were caused by a strain of hepatitis A that has been associated with past outbreaks due to frozen strawberries from Egypt. Upon learning of the potential link to strawberries, Tropical Smoothie Cafe immediately conducted a voluntary product withdrawal of all strawberries sourced from Egypt. Findings of the investigation suggested that the related exposure to HAV ranged between August 5 and August 8, 2016.

8. Consistent with CDC recommendations, and with the recommendations made by the public health officials responding to the subject outbreak, Plaintiff and other persons who had been exposed were told that post-exposure prophylactic treatment is recommended for all exposed individuals if such treatment can be administered within two weeks of exposure. “Post-exposure treatment” consisted of the administration by injection of either a Hepatitis A vaccine or immune globulin (“IG”).

9. Plaintiffs were exposed to HAV, during the exposure period, as a result of consumption of adulterated food, including smoothies that contained strawberries, at the Defendant’s Tropical Smoothie restaurants, and all subsequently received the recommended post-exposure treatment to prevent infection with Hepatitis A.

## CLASS ACTION ALLEGATIONS

10. This is a class action lawsuit brought on behalf of all persons who were exposed, by consumption of adulterated food and drink, to the Hepatitis A virus (HAV) at the Defendant's restaurants during the exposure period in July and August 2016. Plaintiffs and class members were required for public health and personal safety reasons to obtain a Hepatitis A vaccination or an IG shot (with some persons also getting an HAV blood test) because of their exposure at the Defendant's restaurants.

11. All such persons took immediate preventative action at the recommendation of public health authorities or other health professionals, and, as a result, did not subsequently develop symptoms of HAV infection.

12. **Class Definition.** The class includes all persons who consumed adulterated food or drink, including smoothies with strawberries, during the exposure period in July and August 2016 and who, as a direct and proximate result of such consumption, were exposed to HAV and, following the recommendations of public health officials or other medical personnel, obtained vaccination, and any related medical treatment, including blood tests, to prevent HAV infection. The class does not include those who developed HAV infections.

13. Given the length of the exposure and the multiple restaurants involved, the number of potential class members is likely to be in the thousands. But because the number of persons who obtained vaccination remains confidential and within the

exclusive control of the applicable state and regional health departments and districts, the precise number of class members is not currently known.

14. All food and drink sold at Defendant's restaurants during the exposure period was defective, adulterated, and not reasonably safe as a result of use of contaminated strawberries in the preparation of particular food items, or preparation in proximity or conjunction with such contaminated ingredients, rendering all food and drink prepared and sold during the exposure period adulterated, unsafe, and not fit for human consumption. Because such food and drink was distributed and sold in high volume during the exposure periods to an a significant number of guests and patrons, the number of putative class members is so numerous that joinder of all members in this case is impracticable.

15. The Virginia Department of Health can transmit notice of this class action to each known potential class member, once the respective individual class is certified. Such notifications have been used successfully in prior HAV class actions for which counsel of record have obtained certification and settlement.

16. In addition to numerosity, there are significant questions of law or fact that are common to the class, including but not limited to:

a. Whether food prepared with HAV-contaminated strawberries is adulterated, unsafe to eat, defective, or otherwise prohibited from sale and distribution under the laws of the Commonwealth of Virginia;

b. Whether food prepared in proximity or conjunction with HAV-contaminated strawberries is adulterated, unsafe to eat, defective, or otherwise prohibited from sale and distribution under the laws of the Commonwealth of Virginia;

c. Whether Defendant is strictly liable for the sale of adulterated food;

d. Whether Defendant was negligent in its manufacture and sale of adulterated food under both Federal and Virginia's Food, Drugs and Cosmetics Acts (Title, 3.2, Subtitle IV, Chapter 51, Article 3) and all applicable local, state, and federal health and safety regulations;

e. Whether Plaintiffs are among the class of persons designed to be protected by the statutory and regulatory provisions of both Federal and Virginia's Food, Drugs and Cosmetics Acts (Title, 3.2, Subtitle IV, Chapter 51, Article 3) and all applicable local, state, and federal health and safety regulations;

f. Whether Defendant breached its duties to Plaintiffs to make, prepare, and sell food products that were reasonably safe in construction, that did not materially deviate from applicable design specifications, and that did not deviate materially from identical units in the product line;

g. Whether Defendant manufactured, distributed, and sold a food product that was adulterated, not fit for human consumption, in a defective condition unreasonably dangerous to Plaintiffs, and not reasonably safe as designed, manufactured, or sold;

h. Whether Defendant breached its duties to exercise reasonable care in the purchase, preparation and sale of food products; and

i. Whether Defendant is liable for damages to all potentially exposed persons who obtained vaccinations to avoid HAV infections.

17. The claims of the Plaintiff and named representative are typical of the claims of the potential class members, each of whom meet the class definition as set forth above. The damages and relief sought by the named representative is also typical to the class and its members because of the essentially identical nature and process of treatment, its costs, and physical and emotional consequences amongst the class representative and the class members.

18. The named Plaintiff has common interests with the members of the class, will vigorously prosecute the interests of the class through qualified counsel, and does not have identifiable conflicts with any other potential class member; thus, the named Plaintiff will fairly and adequately represent and protect the interests of the whole class.

19. The named Plaintiff has retained competent counsel, who are experienced in foodborne illness litigation, have extensive experience with class action litigation, and are experienced trial attorneys who have tried numerous complex trials to verdict. Salvatore J. Zambri and Christopher J. Regan, of Regan Zambri & Long, are experienced and able counsel who have litigated numerous foodborne illness claims on behalf of ill consumers. Plaintiff's co-counsel, Marler Clark of Seattle, Washington, has represented thousands of individuals in similar class actions related to HAV, including:

- a. More than 1,500 individuals in a class action related to a previous HAV outbreak at the D'Angelo's in Swansea, Massachusetts in 2001;
- b. Approximately 1,300 persons as part of a class action on behalf of persons who received IG shots due to an HAV outbreak in June and July 2000 in Spokane, Washington, which was associated with food served at a Carl's Jr. fast-food restaurant;
- c. Approximately 9,000 persons who received IG shots due to an outbreak of HAV at a Chi-Chi's restaurant near Pittsburgh, Pennsylvania in 2003;
- d. Approximately 3,800 persons as part of a class action on behalf of persons who received IG shots due to an HAV exposure in June 2004 at a Friendly's restaurant in Arlington, Massachusetts;
- e. Approximately 850 persons as part of a class action on behalf of persons who received IG shots due to an HAV exposure at a Quizno's in Boston, Massachusetts in 2004.
- f. Approximately 2,700 people infected with Cryptosporidium at a New York spray-park in 2005.
- g. Over 3,000 persons who received IG shots due to potential HAV exposure in January 2007 at a Houlihan's restaurant in Geneva, Illinois;
- h. More than 5,000 persons who were required to get vaccinations against HAV following exposure at a McDonald's restaurant in Milan, Illinois in 2009;

i. Approximately 3000 claimants who dined at The Olive Garden Italian Restaurant in Fayetteville, North Carolina who thereby were required to get vaccinations against HAV following their potential exposure to hepatitis A.

j. Approximately 700 persons who consumed food and drink at a McDonald's Restaurant in Northport, Alabama on March 14, 2012 or on March 16, 2012, and who thereby were required to get vaccinations against HAV following their potential exposure to HAV; and

k. Approximately 2,400 persons who received HAV vaccines in 2014 due to exposure at a Charlotte, North Carolina Papa Johns.

20. Marler Clark is also presently class counsel in the following similar cases:

(i) approximately 3,000 persons who received HAV vaccines in New York due to exposure at the New Hawaiian restaurant in 2013; this class action was recently certified; (ii) for 2,700 persons who received HAV vaccines in Springfield, Missouri due to exposure at a Red Robin restaurant in 2014; and (iii) for a nine-state putative HAV class involving as many as 25,000 claimants who were forced to obtain preventive vaccinations after consuming recalled Townsend Farms frozen berry mix that had been purchased at Costco.

**COUNT I**  
**(BREACH OF WARRANTY)**

21. Plaintiff incorporates by reference paragraphs 1 through 20 as if fully set forth herein.

22. Defendant is a manufacturer and seller of smoothie food products. Defendant, through its manufacture and sale of smoothie food products, warranted that its products were reasonably safe for their ordinary and foreseeable purpose (*i.e.*, consumption).

23. Defendant was the manufacturer and seller of the smoothie food products consumed by Plaintiffs that caused Plaintiffs' exposure to HAV infection.

24. The smoothie food products manufactured and sold by Defendant were contaminated with HAV, a potentially fatal pathogen. As such, the smoothie food products were unreasonably dangerous for their ordinary and foreseeable use.

25. The smoothie food products were contaminated with HAV when they left the possession and control of Defendant.

26. Defendant breached the warranty of the safety of its goods for their expected and foreseeable purpose. This breach was the direct and proximate cause of Plaintiffs' injuries, and Defendant is thus liable to Plaintiffs for the injuries sustained.

**COUNT II**  
**(NEGLIGENCE)**

27. Plaintiff incorporates by reference paragraphs 1 through 26 as if fully set forth herein.

28. At all times relevant to this action, Defendant, in its manufacturing and sale operations, had a duty to comply with the federal and Virginia laws and regulations prohibiting the manufacture and sale of adulterated food, including, without limitation, the provisions of Virginia statutes Title, 3.2, Subtitle IV, Chapter 51, Article 3.

29. With reference to duties identified in the preceding paragraph, Defendant did not comply with such duties in its manufacture of the HAV-contaminated smoothie food products that ultimately caused Plaintiffs' exposure to HAV.

30. Under Virginia law, Defendant's failure to comply with legislative or administrative regulations, whether relating to design, construction or performance of the smoothie food products or to warnings or instructions as to their use, may be evidence of negligence.

31. Plaintiffs are among the specific class of persons designed to be protected by the statutory and regulatory provisions cited above, pertaining to the manufacture, distribution, storage, labeling, and sale of food products by Defendant.

32. When an injury-causing aspect of the product was not, at the time of manufacture, in compliance with specific mandatory government specifications, it is evidence that the manufacturer breached its duty of reasonable care, and is negligent *per se*.

33. Defendant owed a duty to Plaintiffs to use supplies and raw materials that complied with federal, state, and local food laws, ordinances, and regulations; that were from safe and reliable sources; that were clean, wholesome, and free from adulteration; and that were safe for human consumption, and for their intended purposes. Defendant breached this duty

34. Defendant owed a duty to Plaintiffs to use reasonable care in the selection, supervision, and monitoring of its employees, suppliers, or other subcontractors. Defendant breached this duty.

35. Defendant owed a duty to Plaintiffs to use reasonable care in the handling, manufacture, storage, and distribution of its smoothie food products, to keep them free of contamination with HAV. Defendant breached this duty.

36. As a result of Defendant's breaches of duties, and noncompliance with applicable law and safety regulations, it manufactured smoothie food products that were not reasonably safe, and Plaintiffs suffered personal injuries, as well as economic loss, as a proximate result.

### **DAMAGES**

37. Plaintiff, and all those similarly situated, *i.e.*, those persons who fit the class definition, have suffered general and special damages as the direct and proximate result of Defendant's acts and omissions, which damages shall be fully proven at the time of trial. These damages are common among the representative party and putative class members and may include: wage loss; medical and medical-related expenses; travel and travel-related expenses; emotional distress; fear of harm and humiliation; physical pain; physical injury; and all other damages as would be anticipated to arise under the circumstances.

WHEREFORE, Plaintiff, individually and on behalf of all those similarly situated, prays for the following relief from Defendant:

(1) That Plaintiff and all class members recover judgment for damages, on behalf of themselves and all those similarly situated, against Defendant for such sums as shall be determined to fully and fairly compensate them for all general, special, incidental, and consequential damages respectively incurred by them as the direct and proximate result of Defendant's acts and omissions;

(2) That the court award Plaintiff, and all those similarly situated, their respective costs, disbursements and reasonable attorneys' fees incurred;

(3) That the court award Plaintiff, and all those similarly situated, the opportunity to amend or modify the provisions of this petition as necessary or appropriate after additional or further discovery is completed in this matter, and after all appropriate parties have been served; and

(4) That the Court award Plaintiff, and all those similarly situated, such other and further relief as it deems necessary and equitable in the circumstances.

**TRIAL BY JURY IS DEMANDED.**

LAURA L. PYKA  
By Counsel

Respectfully submitted,

REGAN ZAMBRI & LONG, PLLC

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