

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

LINDSAY PHILLIPS,

Plaintiff,

v.

NESTLE USA, INC., a foreign corporation,

Defendant.

NO. _____

Demand for Jury Trial

COMPLAINT FOR DAMAGES

COMES NOW the plaintiff, by and through her attorney of record, William D. Marler, Marler Clark, L.L.P., P.S., and allege as follows:

I. PARTIES

1. The plaintiff LINDSAY PHILLIPS is a resident of Yelm, Thurston County, Washington.

2. The defendant, NESTLE USA, INC. (“Nestle”), is a Delaware corporation, organized under the laws of the state of Delaware with its principal place of business located at 800 North Brand Boulevard, Glendale, California.

3. At all times relevant hereto, Nestle was a manufacturer and seller of various cookie dough products which are sold throughout the United States, including in the State of Washington.

II. JURISDICTION AND VENUE

4. 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 Washington such that the maintenance of the suit in this district does not offend traditional notions of fair play and substantial justice.

5. Venue in the United States District Court for the Western District of Washington 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—i.e., the plaintiff's consumption of the Nestle cookie dough product that caused her *E. coli* O157:H7 illness. Additionally, the defendant Nestle was subject to personal jurisdiction in this judicial district at the time of the commencement of the action.

III. GENERAL ALLEGATIONS

Nestle *E. coli* O157:H7 Outbreak

6. On June 18, 2009, the defendant Nestle announced a voluntary product recall after it was notified by the United States Food and Drug Administration (“FDA”) and the Centers for Disease Control (“CDC”) of a possible link between reported illnesses caused by *E. coli* O157:H7 and the consumption of Nestle-brand raw cookie dough.

7. As of June 24, 2009, 70 persons infected with a genetically indistinguishable strain of *E. coli* O157:H7 have been reported from 30 states. 30 persons have been hospitalized and 7 have developed hemolytic uremic syndrome (“HUS”).

Plaintiff's Injuries

8. During the week prior to the onset of her *E. coli* O157:H7 illness, Lindsay Phillips consumed Nestle cookie dough on several occasions.

9. On or around May 11, 2009, Lindsay began to suffer from severe lower abdominal pain accompanied by profuse diarrhea that turned bloody.

10. After Lindsay's symptoms failed to subside, on or about May 13, 2009 her mother took her to the emergency room ("ER"). Initially diagnosed with dysentery, she was treated and given a prescription for antibiotics and anti-cramping medication and instructed to return if her symptoms did not improve or worsened.

11. Lindsay returned home after the ER visit, but her symptoms continued to worsen. She returned to the ER a short time later and was admitted to the hospital for further evaluation.

12. During her hospitalization a stool sample was obtained and cultured. It ultimately tested positive for *E. coli* O157:H7, and was later determined to match the strain of *E. coli* O157:H7 associated with the Nestle cookie dough outbreak.

13. On or about May 16, 2009, Lindsay was discharged from the hospital and taken home to continue her recovery.

14. As of the filing of this Complaint, Lindsay continues to recover from the effects of her *E. coli* O157:H7 infection.

15. The plaintiff has incurred and will continue to incur medical expenses, has suffered and will continue to suffer pain, loss of enjoyment of life, emotional distress, and medical problems in the future as a direct and proximate result of contaminated Nestle cookie dough product.

IV. CAUSES OF ACTION

Strict Liability—Count I

16. The defendant Nestle was at all times relevant hereto the manufacturer and seller of the adulterated food product that is the subject of the action.

17. The adulterated food product that defendant Nestle 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 *E. coli* O157:H7, a deadly pathogen.

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

19. The defendant Nestle owed a duty of care to the plaintiff to design, manufacture, and sell food that was not adulterated, that was fit for human consumption, that was reasonably safe in construction, and that was free of pathogenic bacteria or other substances injurious to human health. The defendant Nestle breached this duty.

20. The defendant Nestle owed a duty of care to the plaintiff to design, prepare, serve, and sell food that was fit for human consumption, and that was safe to the extent contemplated by a reasonable consumer. The defendant Nestle breached this duty.

21. The plaintiff suffered injury and damages as a direct and proximate result of the defective and unreasonably dangerous condition of the adulterated food product that the defendant manufactured, distributed, and sold.

Breach of Warranty—Count II

22. The defendant Nestle is liable to the plaintiff for breaching express and implied warranties it made regarding the adulterated product that the plaintiff purchased. These express and implied warranties included the implied warranties of merchantability and fitness for a particular use. Specifically, the defendant Nestle expressly warranted, through its sale of food to the public and by the statements and conduct of its employees and agents, that the food it prepared and sold was fit for human consumption and not otherwise adulterated or injurious to health.

23. The plaintiff alleges that the *E. coli* O157:H7-contaminated food that defendant Nestle sold to the plaintiff would not pass without exception in the trade and was therefore in breach of the implied warranty of merchantability.

24. The plaintiff alleges that the *E. coli* O157:H7-contaminated food that the defendant Nestle sold to the plaintiffs was not fit for the uses and purposes intended, *i.e.* human consumption, and that this product was therefore in breach of the implied warranty of fitness for its intended use.

25. As a direct and proximate cause of the defendant Nestle's breach of warranties, as set forth above, the plaintiff sustained injuries and damages in an amount to be determined at trial.

Negligence—Count III

26. The defendant Nestle owed a duty to the plaintiff to use reasonable care in its manufacture, distribution, and sale of its food products, which duty would have prevented or eliminated the risk that the defendant Nestle's food products would become contaminated with *E. coli* O157:H7 or any other dangerous pathogen. The defendant Nestle breached this duty.

27. The defendant Nestle had a duty to comply with all statutes, laws, regulations, and 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 and provision pertaining to the manufacture, distribution, storage, and sale of similar food products.

28. The defendant Nestle had a duty to properly supervise, train, and monitor its respective employees, and to ensure its compliance with all applicable statutes, laws, regulations, and safety codes pertaining to the manufacture, distribution, storage, and sale of similar food products, but it failed to do so and was therefore negligent.

29. The defendant Nestle 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 it failed to do so and was therefore negligent.

30. As a direct and proximate result of the defendant Nestle's acts of negligence, the plaintiff sustained injuries and damages in an amount to be determined at trial.

Negligence Per Se—Count IV

31. The defendant Nestle had a duty to comply with all applicable state and federal regulations intended to ensure the purity and safety of its food products, including the requirements of the Federal Food, Drug and Cosmetics Act (21 U.S.C. § 301 *et seq.*), and the Washington adulterated food statutes, RCW 69.04.210 *et. seq.*

32. The defendant Nestle 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 *E. coli* O157:H7, a deadly pathogen.

33. As a direct and proximate result of the conduct by the defendant Nestle that was negligent *per se*, the plaintiff sustained injury and damages in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff prays:

- (a) That the Court awards the plaintiff judgment against the defendant in such sum as shall be determined to fully and fairly compensate plaintiff for all general, special, incidental and consequential damages incurred, or to be incurred, by them as the direct and proximate result of the acts and omissions of the defendant;
- (b) That the Court awards the plaintiff her costs, disbursements and reasonable attorneys' fees incurred;
- (c) That the Court awards 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; and
- (d) That the Court awards such other and further relief as it deems necessary and proper in the circumstances.

JURY DEMAND

The plaintiff hereby demands a jury trial.

MARLER CLARK, LLP, PS

/s/ William D. Marler

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