

COPY

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18 ANDRES GUERRA

19 SUPERIOR COURT OF THE STATE OF CALIFORNIA
20
21 IN AND FOR THE COUNTY OF SANTA CLARA
22
23 UNLIMITED JURISDICTION

24 ANDRES GUERRA,

25 Plaintiffs,

26 v.

27 SERGIO BECERRA CRUZ and LOURDES
28 GARCIA BECERRA dba MARISCOS SAN
JUAN NO. 3, SERGIO'S RESTAURANTS,
INC., and DOES 1-20, inclusive,

Defendants.

CASE NO. **115CV287287**

COMPLAINT FOR DAMAGES

1st Cause of Action: Negligence

2nd Cause of Action: Strict Product Liability

3rd Cause of Action: Negligence Per Se

4th Cause of Action: Breach of Implied Warranty

DEMAND FOR JURY TRIAL

29 COMES NOW the Plaintiff, ANDRES GUERRA, by and through his counsel of record,
30 EUSTACE DE SAINT PHALLE of RAINS LUCIA STERN, PC, and WILLIAM D. MARLER of
31 MARLER CLARK, L.L.P., P.S., (*pro hac vice pending*) and alleges and complains as follows by way of his
32 Complaint.

ENDORSED

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David H. Wernick, Clerk of the Superior Court
County of Santa Clara, California

Sharon Ulleselt

FAXED

also occur. Young children, the elderly, and HIV – infected individuals with CD4 count < 200 are more likely to have severe symptoms including dehydration, bacteremia, and seizures.

7. The source of *Shigella* bacteria is the excrement (feces) of an infected individual that is ultimately ingested by another person. The infectious material is spread to new cases by person-to-person contact or via contaminated food or water. Approximately 20% of the nearly 450,000 cases of shigellosis that occur annually in the U.S are foodborne-related. Generally, the food preparer is the individual who contaminates the food, but food may also become contaminated during processing. Contamination of drinking water by *Shigella* is a problem that more often occurs in the developing world, but swimming pools and beaches in the U.S. can become contaminated by infected individuals. No group of individuals is immune to shigellosis, but certain individuals are at increased risk, particularly small children. Persons infected with HIV experience shigellosis much more commonly than other individuals.

Shigella Outbreak at Marisco's San Juan Restaurant

8. According to a Public Health Warning, on Saturday afternoon, October 17, 2015, the Santa Clara County Public Health Department was notified by a local hospital of 5 patients with fever and diarrhea who had all eaten at the same restaurant. Subsequent case finding has revealed a total of over two dozen individuals with fever and diarrhea who ate at Mariscos San Juan restaurant (205 N. 4th Street) in downtown San Jose on Friday October 16 or Saturday October 17. The restaurant was closed on the morning of Sunday, October 18, 2015 and remains closed.

9. Of the ill persons, over a dozen have tested positive for *Shigella* by PCR, and one has a blood culture growing *Shigella sonnei*; almost all of the reported cases have required hospital admission, and 12 are in intensive care. There are other individuals who were seen and not admitted or who were ill but did not seek medical attention. The number of ill individuals sickened in this outbreak has reached at least 110.

Andres Guerra's Illness

10. Andres Guerra purchased and consumed the shrimp cocktail at defendant's restaurant on or about Friday, October 16, 2015.

11. Late the same night, October 16, Mr. Guerra began to suffer from alternating chills and fever. Soon afterward, he became intensely nauseated, and began to vomit and suffer repeated bouts of

1 diarrhea. Late at night, his temperature reached a peak of 104 degrees.

2 12. By Saturday morning, October 17, Mr. Guerra had been vomiting and suffering ceaseless
3 bouts of diarrhea for seven straight hours, causing him to call and schedule an appointment with a primary
4 care physician the same day at a Kaiser medical facility. The physician briefly saw Mr. Guerra, and
5 instructed him to go to the emergency room immediately at Kaiser Santa Clara Hospital.

6 13. Mr. Guerra was admitted to the hospital on October 17 and taken to the intensive care
7 unit, where he remained until mid-day on October 18. He would be discharged from the hospital the
8 following day, Monday, October 19.

9 14. Mr. Guerra continues to suffer symptoms related to his *Shigella* infection.

10 **FIRST CAUSE OF ACTION**
11 **NEGLIGENCE**

12 **(Against Defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba
13 MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20)**

14 15. By this reference, paragraphs 1 through 14 of this Complaint are fully incorporated as if
15 each and every one of these paragraphs was set forth here in its entirety.

16 16. Defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba
17 MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20 were negligent in
18 manufacturing, distributing and selling food products that were not reasonably safe because adequate
19 warnings or instructions were not provided, including but not limited to the warning that the food product
20 may contain *Shigella*, and thus should not be given to, or consumed by, people.

21 17. Defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba
22 MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20 had a duty to
23 comply with all statutory and regulatory provisions that pertained or applied to the manufacture,
24 distribution, storage, labeling, and sale of food products, including, but not limited to, California's
25 Sherman Food, Drug and Cosmetic Laws and the California Health and Safety Code, which bans the
26 manufacture, sale and distribution of any "adulterated" food. Defendants SERGIO BECERRA CRUZ
27 and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S
28 RESTAURANTS, INC., and DOES 1-20 failed to do so. Plaintiff was among the class of persons
designed to be protected by the statutory and regulatory provisions pertaining to the defendants SERGIO

1 BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3,
2 SERGIO'S RESTAURANTS, INC., and DOES 1-20's manufacture, distribution, storage, labeling and
3 sale of their food.

4 18. Defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba
5 MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20 had a duty to use
6 supplies and/or raw materials in producing the food product which were in compliance with applicable
7 federal, state, and local laws, ordinances and regulations, which were from safe and reliable sources, which
8 were clean, wholesome and free from spoilage and adulteration, and which were safe for human
9 consumption, but failed to do so. Defendants SERGIO BECERRA CRUZ and LOURDES GARCIA
10 BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20
11 also had a duty to consumers of their products to produce their products using reasonable care, but
12 breached this duty as well.

13 19. Defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba
14 MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20 were negligent in
15 the selection of their material and ingredient suppliers, or other subcontractors, and failed to adequately
16 supervise them, or provide them with adequate standards in writing, and as a result, purchased and used
17 products contaminated with *Shigella*.

18 20. More specifically, defendants SERGIO BECERRA CRUZ and LOURDES GARCIA
19 BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20
20 owed a duty to properly supervise, train, and monitor their employees, or the employees of their agents or
21 subcontractors, in the preparation of the products it sold, doing so to ensure compliance with the each
22 defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN
23 JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20's own specifications and performance
24 standards, as well as to ensure compliance with all applicable health regulations, including the FDA's
25 Good Manufacturing Practices regulations, 21 C.F.R. Part 110, Subparts (A)-(G). Defendants SERGIO
26 BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3,
27 SERGIO'S RESTAURANTS, INC., and DOES 1-20 breached all of these duties, and plaintiff was
28 injured as a direct and proximate result of such breaches.

1 21. Under applicable state law, food is adulterated if it contains a “poisonous or deleterious
2 substance which may render it injurious to health.” *Shigella* is such a substance. Thus, by either
3 manufacture, distribution, storage, or sale of the subject product or the subject product’s ingredients,
4 defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN
5 JUAN NO. 3, SERGIO’S RESTAURANTS, INC., and DOES 1-20 breached their statutory and
6 regulatory duties, and plaintiff was injured as a direct and proximate result of such breaches.

7 22. Defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba
8 MARISCOS SAN JUAN NO. 3, SERGIO’S RESTAURANTS, INC., and DOES 1-20 breached the
9 aforementioned duties as alleged above, which breach constituted the proximate cause of injury to the
10 plaintiff.

11 23. As a result of the defendants SERGIO BECERRA CRUZ and LOURDES GARCIA
12 BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO’S RESTAURANTS, INC., and DOES 1-20’s
13 negligence, the plaintiff suffered severe and permanent personal injuries, as well as economic loss.

14 24. The plaintiff has suffered general and special, incidental and consequential damages, as the
15 direct and proximate result of the acts and/or omissions of the defendants SERGIO BECERRA CRUZ
16 and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO’S
17 RESTAURANTS, INC., and DOES 1-20 as set forth above, which damages shall be fully proven at the
18 time of trial, including, but not limited to, damages for loss of enjoyment of life, both past and future;
19 medical and medical related expenses, both past and future; wage and economic loss, past and future;
20 emotional distress, and future emotional distress; medical and pharmaceutical expenses, past and future;
21 and other ordinary, incidental and consequential damages as would be anticipated to arise under the
22 circumstances.

23 Wherefore, Plaintiff ANDRES GUERRA prays for judgment against Defendants SERGIO
24 BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3,
25 SERGIO’S RESTAURANTS, INC., and DOES 1-20, as set forth below.

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**STRICT LIABILITY CLAIM – Violation of California’s Sherman Food, Drug, and Cosmetic Laws, California Health and Safety Code § 109875, et seq.
(Against Defendants SERGIO BECERRA CRUZ and LOURDES GARCÍA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO’S RESTAURANTS, INC., and DOES 1-20)**

26. Defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20 are in the business of manufacturing and selling food and drink products, including the contaminated food product that is at issue herein.

28. Defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20 sold the food products used by plaintiff knowing the products would be used by plaintiff without inspection for defects.

30. Defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20 prepared, distributed and sold food that was adulterated and contaminated with *Shigella* bacteria, by which the food was rendered adulterated, unwholesome and injurious to health, in violation of California's Sherman Food,

1 Drug and Cosmetic Laws, California Health and Safety Code sections 109875, et seq. and particularly
2 section 110620, and similar federal health and safety standards and regulations.

3 31. Plaintiff utilized the contaminated food product as anticipated by defendants SERGIO
4 BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3,
5 SERGIO'S RESTAURANTS, INC., and DOES 1-20 when he consumed it. As a proximate cause of
6 plaintiff's use of the products in a fashion anticipated by the defendants SERGIO BECERRA CRUZ and
7 LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS,
8 INC., and DOES 1-20, plaintiff suffered injury and damages as described herein. Plaintiff was injured by
9 his consumption of contaminated, which was adulterated, contaminated, unwholesome, injurious to his
10 health and unfit for human consumption.

11 32. The plaintiff has suffered general and special, incidental and consequential damages, as the
12 direct and proximate result of the acts and/or omissions of the defendants SERGIO BECERRA CRUZ
13 and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S
14 RESTAURANTS, INC., and DOES 1-20 as set forth above, which damages shall be fully proven at the
15 time of trial, including, but not limited to, damages for loss of enjoyment of life, both past and future;
16 medical and medical related expenses, both past and future; wage and economic loss, past and future;
17 emotional distress, and future emotional distress; medical and pharmaceutical expenses, past and future;
18 and other ordinary, incidental and consequential damages as would be anticipated to arise under the
19 circumstances.

20 Wherefore, Plaintiff ANDRES GUERRA prays for judgment against Defendants SERGIO
21 BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3,
22 SERGIO'S RESTAURANTS, INC., and DOES 1-20, as set forth below.

23 **THIRD CAUSE OF ACTION**

24 **NEGLIGENCE PER SE – Violation of California's Sherman Food, Drug, and Cosmetic**
25 **Laws, California Health and Safety Code § 109875, et seq.**
26 **(Against Defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba**
MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20)

27 33. By this reference, paragraphs 1 through 32 of this Complaint are fully incorporated as if
28 each and every one of these paragraphs was set forth here in its entirety.

34. Defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20 were negligent in manufacturing, distributing and selling food products that were not reasonably safe because adequate warnings or instructions were not provided, including but not limited to, the warning that the food product may contain *Shigella* and thus, should not be given to, or eaten by, people.

35. The defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20 each additionally owed a duty to comply with statutory and regulatory provisions that pertained or applied to either the import, manufacture, distribution, storage, or sale of their product or product-ingredients, including, but not limited to, California's Sherman Food, Drug, and Cosmetic Act, CA Health & Safety Code §110545, which bans the manufacture, sale and distribution of any "adulterated" food. The Federal Food, Drug, and Cosmetics Act, §402(a), as codified at 21 U.S.C. §342(a) also provides the standard for the manufacture, sale and distribution of any "adulterated" food.

36. Under applicable state law, food is adulterated if it contains a "poisonous or deleterious substance, which may render it injurious to health." *Shigella* is such a substance. Thus, by either manufacture, distribution, storage, or sale of the subject product, defendants breached their statutory and regulatory duties, and the plaintiff was injured as a direct and proximate result of such breaches.

37. The defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20's negligent acts and omissions included, but were not limited to:

(a) Failure to prevent the contamination of the product by *Shigella*, including the failure to implement or non-negligently perform inspection and monitoring of the product such that its adulterated condition would be discovered prior to its sale or distribution to the public for human consumption.

(b) Failure to properly supervise, train, and monitor their employees, or the employees of their agents or subcontractors, on how to ensure the manufacture, distribution or sale of food product free of adulteration by potentially lethal pathogens.

38. The state food safety regulations applicable here, and as set forth above, establish a positive

1 and definite standard of care in the import, manufacture, distribution or sale of food, and the violation of
2 these regulations constitutes negligence *per se*.

3 39. The plaintiff was in the class of persons intended to be protected by these statutes and
4 regulations, and was injured as the direct and proximate result of the defendants SERGIO BECERRA
5 CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S
6 RESTAURANTS, INC., and DOES 1-20's violation of applicable state and local food safety regulations.

7 40. The defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba
8 MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20 breached the
9 aforementioned duties as alleged above, which breach constituted the proximate cause of injury to
10 plaintiff.

11 41. The plaintiff has suffered general and special, incidental and consequential damages, as the
12 direct and proximate result of the acts and/or omissions of the defendants SERGIO BECERRA CRUZ
13 and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S
14 RESTAURANTS, INC., and DOES 1-20 as set forth above, which damages shall be fully proven at the
15 time of trial, including, but not limited to, damages for loss of enjoyment of life, both past and future;
16 medical and medical related expenses, both past and future; wage and economic loss, past and future;
17 emotional distress, and future emotional distress; medical and pharmaceutical expenses, past and future;
18 and other ordinary, incidental and consequential damages as would be anticipated to arise under the
19 circumstances.

20 Wherefore, Plaintiff ANDRES GUERRA prays for judgment against SERGIO BECERRA CRUZ
21 and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S
22 RESTAURANTS, INC., and DOES 1-20, as set forth below.

23 **FOURTH CAUSE OF ACTION**
24 **BREACH OF IMPLIED WARRANTY**
25 **(Against Defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba**
26 **MARISCOS SAN JUAN NO. 3, and DOES 1-20)**

27 42. By this reference, paragraphs 1 through 41 of this Complaint are fully incorporated as if
28 each and every one of these paragraphs was set forth here in its entirety.

43. Defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba

MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20 impliedly warranted that the contaminated food product was of merchantable quality, and was safe and fit for human consumption. Plaintiff purchased and consumed the food product, and reasonably relied upon the skill and judgment of defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20 as to whether the products were of merchantable quality and fit for human consumption.

44. Defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20 breached these implied warranties in that defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20's food products were contaminated with *Shigella*. As a direct, legal and proximate result of the breach of implied warranties, plaintiff suffered and may continue to suffer injury, harm, special damages and economic loss.

45. The plaintiff has suffered general and special, incidental and consequential damages, as the direct and proximate result of the acts and/or omissions of the defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20 as set forth above, which damages shall be fully proven at the time of trial, including, but not limited to, damages for loss of enjoyment of life, both past and future; medical and medical related expenses, both past and future; wage and economic loss, past and future; emotional distress, and future emotional distress; medical and pharmaceutical expenses, past and future; and other ordinary, incidental and consequential damages as would be anticipated to arise under the circumstances.

Wherefore, Plaintiff ANDRES GUERRA prays for judgment against Defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS, INC., and DOES 1-20, as set forth below.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays as follows:

(1) That the court award plaintiffs judgment against each of the defendants, jointly and severally liable, in such sums as shall be determined to fully and fairly compensate plaintiffs for all general,

1 special, incidental and consequential damages incurred, or to be incurred, by plaintiffs as the direct and
2 proximate result of the acts and omissions of the defendants;

3 (2) That the court award plaintiffs their costs, disbursements and reasonable attorneys' fees
4 incurred;

5 (3) That the court award plaintiffs the opportunity to amend or modify the provisions of this
6 complaint as necessary or appropriate after additional or further discovery is completed in this matter, and
7 after all appropriate parties have been served; and

8 (4) That the court awards such other and further relief as it deems necessary and proper in the
9 circumstances.

10 **DEMAND FOR JURY TRIAL**

11 As to the matters complained of herein against Defendants ANDRES GUERRA and
12 LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, SERGIO'S RESTAURANTS,
13 INC., and DOES 1-20, and each of them, Plaintiff ANDRES GUERRA demands a trial by jury.

14
15 Dated: October 27, 2015

Respectfully submitted,

RAINS LUCIA STERN, PC

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18 By: Eustace de Saint Phalle
19 Attorneys for Plaintiff ANDRES GUERRA
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