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12 ATTORNEYS FOR PLAINTIFF  
GREGORY MEISSNER

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 IN AND FOR THE COUNTY OF SAN JOSE

15 UNLIMITED JURISDICTION

17 GREGORY MEISSNER,

18 Plaintiffs,

19 v.

20 SERGIO BECERRA CRUZ and LOURDES  
21 GARCIA BECERRA dba MARISCOS SAN  
JUAN NO. 3, and DOES 1-20, inclusive,

22 Defendants.  
23

CASE NO.

**COMPLAINT FOR DAMAGES**

**1<sup>st</sup> Cause of Action: Negligence**

**2<sup>nd</sup> Cause of Action: Strict Product Liability**

**3<sup>rd</sup> Cause of Action: Negligence Per Se**

**4<sup>th</sup> Cause of Action: Breach of Implied Warranty**

**DEMAND FOR JURY TRIAL**

24  
25 COMES NOW the Plaintiff, GREGORY MEISSNER, by and through his counsel of record,  
26 EUSTACE DE SAINT PHALLE of RAINS LUCIA STERN, PC, and WILLIAM D. MARLER of  
27 MARLER CLARK, L.L.P., P.S., *(pro hac vice pending)* and alleges and complains as follows by way of his  
28 Complaint.

1 1. The entirety of this Complaint is pled upon information and belief. Each allegation is likely  
2 to have evidentiary support after a reasonable opportunity for further investigation or discovery.

3 2. Plaintiff GREGORY MEISSNER purchased food and drink manufactured and sold by  
4 defendant SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN  
5 JUAN NO. 3 at its 205 N. 4th Street location in San Jose, California. After consuming the food, plaintiff  
6 became sick. The food that defendant SERGIO BECERRA CRUZ and LOURDES GARCIA  
7 BECERRA dba MARISCOS SAN JUAN NO. 3 sold to plaintiff was contaminated by Shigella bacteria,  
8 causing his illness and injuries described below.

9 **PARTIES**

10 3. At the time of the subject incident giving rise to his claims, GREGORY MEISSNER lived  
11 in the City of San Jose, in the County of Santa Clara, California.

12 4. Defendant SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba  
13 MARISCOS SAN JUAN NO. 3 is a California company with its principal place of business located at 205  
14 North 4th Street, San Jose, CA 95112. At all times relevant to this action, SERGIO BECERRA CRUZ  
15 and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3 manufactured and sold food  
16 products within the State of California.

17 **FACTUAL ALLEGATIONS**

18 **Shigella**

19 5. Shigella is a bacterium that can cause sudden and severe diarrhea (gastroenteritis) in  
20 humans. Shigellosis is the name of the disease that Shigella causes. The illness is also known as “bacillary  
21 dysentery.” Shigella bacteria can infect the intestinal tract after the ingestion of relatively few organisms.  
22 This is why shigellosis is the most communicable of the bacterial-induced diarrheas.

23 6. Shigella infection can be subclinical, but typically causes watery or bloody diarrhea with  
24 abdominal pain, fever, tenesmus, and malaise. Shigella is very infectious with just 10 -100 organisms are  
25 sufficient to cause disease. Transmission occurs via the fecal – oral route and can be spread by eating food  
26 prepared by an infected food handler or by direct person – to – person contact. Sexual transmission may  
27 also occur. Young children, the elderly, and HIV – infected individuals with CD4 count < 200 are more  
28 likely to have severe symptoms including dehydration, bacteremia, and seizures.

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

#### 10 **Shigella Outbreak at Marisco's San Juan Restaurant**

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

17           9.       Of the ill persons, over a dozen have tested positive for Shigella by PCR, and one has a  
18 blood culture growing Shigella sonnei; almost all of the reported cases have required hospital admission,  
19 and 11 are in intensive care. There are other individuals who were seen and not admitted or who were ill  
20 but did not seek medical attention.

#### 21 **Gregory Meissner's Illness**

22           10.      Gregory Meissner purchased a take-out order of food at the defendant's restaurant located  
23 at 205 N. 4th Street, San Jose, California, on or about Friday, October 16, 2015. He ordered the ceviche  
24 tostada, and consumed it shortly after picking it up.

25           11.      The following morning, October 17, 2015, Mr. Meissner fell ill with severe gastrointestinal  
26 symptoms, including chills, abdominal cramps, diarrhea, fever, a severe headache, dizziness, and malaise.  
27 That evening, he was taken to the emergency department of O'Connor Hospital in San Jose, where he was  
28 diagnosed with bacterial enteritis. Mr. Meissner remained at the emergency department for approximately

1 7 hours before being discharged at 1:00 AM on Sunday, October 18, 2015.

2 12. Mr. Meissner continues to suffer from the effects of his Shigellosis illness, which was  
3 proximately caused by his consumption of Shigella-contaminated food manufactured and sold by the  
4 defendant on October 16, 2015.

5 **FIRST CAUSE OF ACTION**  
6 **NEGLIGENCE**

7 **(Against Defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba**  
8 **MARISCOS SAN JUAN NO. 3, and DOES 1-20)**

9 13. By this reference, paragraphs 1 through 12 of this Complaint are fully incorporated as if  
10 each and every one of these paragraphs was set forth here in its entirety.

11 14. Defendants were negligent in manufacturing, distributing and selling food products that  
12 were not reasonably safe because adequate warnings or instructions were not provided, including but not  
13 limited to the warning that the food product may contain *Shigella*, and thus should not be given to, or  
14 consumed by, people.

15 15. Defendants had a duty to comply with all statutory and regulatory provisions that pertained  
16 or applied to the manufacture, distribution, storage, labeling, and sale of food products, including, but not  
17 limited to, California's Sherman Food, Drug and Cosmetic Laws and the California Health and Safety  
18 Code, which bans the manufacture, sale and distribution of any "adulterated" food.<sup>1</sup> Defendants failed to  
19 do so. Plaintiff was among the class of persons designed to be protected by the statutory and regulatory  
20 provisions pertaining to the defendants' manufacture, distribution, storage, labeling and sale of their food.

21 16. Defendants had a duty to use supplies and/or raw materials in producing the food product  
22 which were in compliance with applicable federal, state, and local laws, ordinances and regulations, which  
23 were from safe and reliable sources, which were clean, wholesome and free from spoilage and adulteration,  
24 and which were safe for human consumption, but failed to do so. Defendants also had a duty to  
25 consumers of their products to produce their products using reasonable care, but breached this duty as  
26 well.

27  
28 <sup>1</sup> The other states in which the subject product was sold to the plaintiffs also expressly prohibit the sale of any adulterated food products. *See* Ariz. Stat. § 36-904, Nev. Rev. Stat. 585-300, New Mex. Stat. 25-2-10, Haw. Rev. Stat. § 328-6, and Colo. Rev. Stat. § 25-5-402.

1 17. Defendants were negligent in the selection of their material and ingredient suppliers, or  
2 other subcontractors, and failed to adequately supervise them, or provide them with adequate standards in  
3 writing, and as a result, purchased and used products contaminated with *Shigella*.

4 18. More specifically, defendants owed a duty to properly supervise, train, and monitor their  
5 employees, or the employees of their agents or subcontractors, in the preparation of the products it sold,  
6 doing so to ensure compliance with the each defendant's own specifications and performance standards, as  
7 well as to ensure compliance with all applicable health regulations, including the FDA's Good  
8 Manufacturing Practices regulations, 21 C.F.R. Part 110, Subparts (A)-(G). Defendants breached all of  
9 these duties, and plaintiff was injured as a direct and proximate result of such breaches.

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

15 20. Defendants breached the aforementioned duties as alleged above, which breach constituted  
16 the proximate cause of injury to the plaintiff.

17 21. As a result of the defendants' negligence, the plaintiff suffered severe and permanent  
18 personal injuries, as well as economic loss.

19 22. The plaintiff has suffered general and special, incidental and consequential damages, as the  
20 direct and proximate result of the acts and/or omissions of the defendants as set forth above, which  
21 damages shall be fully proven at the time of trial, including, but not limited to, damages for loss of  
22 enjoyment of life, both past and future; medical and medical related expenses, both past and future; wage  
23 and economic loss, past and future; emotional distress, and future emotional distress; medical and  
24 pharmaceutical expenses, past and future; and other ordinary, incidental and consequential damages as  
25 would be anticipated to arise under the circumstances.

26 Wherefore, Plaintiff GREGORY MEISSNER prays for judgment against Defendants SERGIO  
27 BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, and  
28 DOES 1-20, as set forth below.

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2 **SECOND CAUSE OF ACTION**

3 **STRICT LIABILITY CLAIM – Violation of California’s Sherman Food, Drug, and Cosmetic**  
4 **Laws, California Health and Safety Code § 109875, et seq.**

5 **(Against Defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba**  
6 **MARISCOS SAN JUAN NO. 3, and DOES 1-20)**

7 23. By this reference, paragraphs 1 through 22 of this Complaint are fully incorporated as if  
8 each and every one of these paragraphs was set forth here in its entirety.

9 24. Defendants are in the business of manufacturing and selling food and drink products,  
10 including the contaminated food product that is at issue herein.

11 25. Defendants manufactured and sold food that was defective at the time it left defendants’  
12 control in that it was contaminated with *Shigella*, which rendered it adulterated, unwholesome and injurious  
13 to health and unfit for human consumption. This defective condition created an unreasonable risk to  
14 people such as the plaintiff.

15 26. Defendants sold the food products used by plaintiff knowing the products would be used  
16 by plaintiff without inspection for defects.

17 27. It was reasonably foreseeable to defendants that the contaminated food, when put to its  
18 reasonably foreseeable use, would expose people such as the plaintiff to harm.

19 28. Defendants prepared, distributed and sold food that was adulterated and contaminated  
20 with *Shigella* bacteria, by which the food was rendered adulterated, unwholesome and injurious to health, in  
21 violation of California’s Sherman Food, Drug and Cosmetic Laws, California Health and Safety Code  
22 sections 109875, et seq. and particularly section 110620, and similar federal health and safety standards and  
23 regulations.

24 29. Plaintiff utilized the contaminated food product as anticipated by defendants when he  
25 consumed it. As a proximate cause of plaintiff’s use of the products in a fashion anticipated by the  
26 defendants, plaintiff suffered injury and damages as described herein. Plaintiff was injured by his  
27 consumption of contaminated, which was adulterated, contaminated, unwholesome, injurious to his health  
28 and unfit for human consumption.

30. The plaintiff has suffered general and special, incidental and consequential damages, as the

1 direct and proximate result of the acts and/or omissions of the defendants as set forth above, which  
2 damages shall be fully proven at the time of trial, including, but not limited to, damages for loss of  
3 enjoyment of life, both past and future; medical and medical related expenses, both past and future; wage  
4 and economic loss, past and future; emotional distress, and future emotional distress; medical and  
5 pharmaceutical expenses, past and future; and other ordinary, incidental and consequential damages as  
6 would be anticipated to arise under the circumstances.

7 Wherefore, Plaintiff GREGORY MEISSNER prays for judgment against Defendants SERGIO  
8 BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, and  
9 DOES 1-20, as set forth below.

10 **THIRD CAUSE OF ACTION**  
11 **NEGLIGENCE PER SE – Violation of California’s Sherman Food, Drug, and Cosmetic**  
12 **Laws, California Health and Safety Code § 109875, et seq.**  
13 **(Against Defendants SERGIO BECERRA CRUZ and LOURDES GARCIA BECERRA dba**  
14 **MARISCOS SAN JUAN NO. 3, and DOES 1-20)**

15 31. By this reference, paragraphs 1 through 30 of this Complaint are fully incorporated as if  
16 each and every one of these paragraphs was set forth here in its entirety.

17 32. Defendants were negligent in manufacturing, distributing and selling food products that  
18 were not reasonably safe because adequate warnings or instructions were not provided, including but not  
19 limited to, the warning that the food product may contain *Shigella* and thus, should not be given to, or  
20 eaten by, people.

21 33. The defendants each additionally owed a duty to comply with statutory and regulatory  
22 provisions that pertained or applied to either the import, manufacture, distribution, storage, or sale of their  
23 product or product-ingredients, including, but not limited to, California’s Sherman Food, Drug, and  
24 Cosmetic Act, CA Health & Safety Code §110545, which bans the manufacture, sale and distribution of  
25 any “adulterated” food. The Federal Food, Drug, and Cosmetics Act, §402(a), as codified at 21 U.S.C.  
26 §342(a) also provides the standard for the manufacture, sale and distribution of any “adulterated” food.

27 34. Under applicable state law, food is adulterated if it contains a “poisonous or deleterious  
28 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

1 regulatory duties, and the plaintiff was injured as a direct and proximate result of such breaches.

2 35. The defendants' negligent acts and omissions included, but were not limited to:

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

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

10 36. The state food safety regulations applicable here, and as set forth above, establish a positive  
11 and definite standard of care in the import, manufacture, distribution or sale of food, and the violation of  
12 these regulations constitutes negligence *per se*.

13 37. The plaintiff was in the class of persons intended to be protected by these statutes and  
14 regulations, and was injured as the direct and proximate result of the defendants' violation of applicable  
15 state and local food safety regulations.

16 38. The defendants breached the aforementioned duties as alleged above, which breach  
17 constituted the proximate cause of injury to plaintiff.

18 39. The plaintiff has suffered general and special, incidental and consequential damages, as the  
19 direct and proximate result of the acts and/or omissions of the defendants as set forth above, which  
20 damages shall be fully proven at the time of trial, including, but not limited to, damages for loss of  
21 enjoyment of life, both past and future; medical and medical related expenses, both past and future; wage  
22 and economic loss, past and future; emotional distress, and future emotional distress; medical and  
23 pharmaceutical expenses, past and future; and other ordinary, incidental and consequential damages as  
24 would be anticipated to arise under the circumstances.

25 Wherefore, Plaintiff GREGORY MEISSNER prays for judgment against Defendants SERGIO  
26 BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, and  
27 DOES 1-20, as set forth below.

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

6 40. By this reference, paragraphs 1 through 39 of this Complaint are fully incorporated as if  
7 each and every one of these paragraphs was set forth here in its entirety.

8 41. Defendants impliedly warranted that the contaminated food product was of merchantable  
9 quality, and was safe and fit for human consumption. Plaintiff purchased and consumed the food product,  
10 and reasonably relied upon the skill and judgment of defendants as to whether the products were of  
11 merchantable quality and fit for human consumption.

12 42. Defendants breached these implied warranties in that defendants' food products were  
13 contaminated with *Shigella*. As a direct, legal and proximate result of the breach of implied warranties,  
14 plaintiff suffered and may continue to suffer injury, harm, special damages and economic loss.

15 43. The plaintiff has suffered general and special, incidental and consequential damages, as the  
16 direct and proximate result of the acts and/or omissions of the defendants as set forth above, which  
17 damages shall be fully proven at the time of trial, including, but not limited to, damages for loss of  
18 enjoyment of life, both past and future; medical and medical related expenses, both past and future; wage  
19 and economic loss, past and future; emotional distress, and future emotional distress; medical and  
20 pharmaceutical expenses, past and future; and other ordinary, incidental and consequential damages as  
21 would be anticipated to arise under the circumstances.

22 Wherefore, Plaintiff GREGORY MEISSNER prays for judgment against Defendants SERGIO  
23 BECERRA CRUZ and LOURDES GARCIA BECERRA dba MARISCOS SAN JUAN NO. 3, and  
24 DOES 1-20, as set forth below.

25 **PRAYER FOR RELIEF**

26 WHEREFORE, plaintiff prays as follows:

27 (1) That the court award plaintiffs judgment against each of the defendants, jointly and  
28 severally liable, in such sums as shall be determined to fully and fairly compensate plaintiffs for all general,  
special, incidental and consequential damages incurred, or to be incurred, by plaintiffs as the direct and

1 proximate result of the acts and omissions of the defendants;

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

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

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

9 **JURY TRIAL DEMANDED.**

10 Dated: October 21, 2015

11 Respectfully submitted,

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