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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

<p>VINCENT GRANO, an individual,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>SODEXO MANAGEMENT, INC., a New York Corporation; and CARGILL MEAT SOLUTIONS CORP., a Delaware Corporation,</p> <p style="text-align: right;">Defendants</p>	<p>Case No.: 3:18-cv-01818-GPC BLM Case No.: 3:19-cv-01903-GPC-BLM Case No.: 3:19-cv-01904-GPC-BLM Case No.: 3:19-cv-01905-GPC-BLM Case No.: 3:19-cv-01907-GPC-BLM Case No.: 3:19-cv 01908-GPC-BLM Case No.: 3:19-cv-01909-GPC-BLM Case No.: 3:19-cv-01917-GPC-BLM</p> <p>PLAINTIFFS’ REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED COMPLAINTS</p>
<p>21 AND RELATED CASES</p>	

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24 NOW come Plaintiffs, by and through their undersigned counsel, and by way of reply to
25 Defendant Sodexo’s Opposition to Plaintiffs’ Motion for Leave to File Amended Complaints,
26 state as follows:
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1 **I. Introduction**

2 Sodexo attempts to reframe the issue by claiming that “negligently preparing hamburgers
3 for one meal” is insufficient to support a claim for punitive damages. Plaintiffs are not arguing
4 that a single, ill-fated meal justifies their move to add punitive damages. Instead, it is Sodexo’s
5 knowing refusal to construct a safe cooking method for hamburgers during the 18 years leading
6 up to the October 21, 2017 incident that warrants allowing a jury the option to award punitive
7 damages against it.
8

9 Sodexo had specific knowledge since the 1993 Jack In The Box (JITB) outbreak of the
10 potentially fatal consequences of serving undercooked ground beef to consumers. Despite the
11 knowledge of the high health risks of undercooked ground beef, especially for a susceptible
12 USMC recruit population, Sodexo spent 18 years maintaining the haphazard operation at MH
13 569 thoroughly described in Plaintiffs’ motion without any validation of its cooking process or
14 sufficient oversight to ensure end-product cook temperatures, Sodexo’s only process control,
15 were properly taken and recorded.
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18 That Sodexo only faces liability now is not attributable to a sudden, isolated change in its
19 behavior on October 21, 2017; its claim that it safely cooked millions of burgers in its 18 years
20 of service at USMC merely reflects that no other large outbreaks came to the attention of public
21 health departments. The catastrophic injuries suffered by Plaintiffs due to the meal Sodexo served
22 them on that day were a long time coming: it was only a matter of time before Sodexo received
23 a shipment of *E. coli* O157:H7 contaminated patties from its supplier and its unvalidated, poorly
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1 overseen cooking process allowed undercooked patties to poison an estimated 243 susceptible
2 recruits.¹

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4 **II. Argument**

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6 **1. JITB’s current food safety system is an example of the level of control necessary to**
7 **ensure consistently safe hamburgers and stands in stark contrast to Sodexo’s**
8 **woefully inadequate hamburger cooking process.**

9 The JITB outbreak put the entire industry on notice of the risks of serving undercooked
10 ground beef to consumers almost three decades ago. Snyder acknowledged this transformative
11 moment in her deposition, saying food service providers must be “eternally vigilant” in their
12 handling, preparing, and serving of ground beef. Post-JITB outbreak, the industry understood
13 with new urgency the need to install process controls to ensure that ground beef patties were
14 thoroughly cooked to eliminate *E. coli* O157:H7 before serving to consumers.
15

16 *E. coli* outbreaks linked to hamburgers have become far less common because
17 commercial food providers learned from and applied the JITB lessons. In Plaintiff’s motion,
18 JITB is not the absolute requirement of what Sodexo would have needed to do to have an
19 adequate process for hamburger manufacturing. Instead, JITB’s food safety process is
20 emblematic of the type of multiple control point systems that the industry adopted for hamburger
21 preparation after the JITB outbreak. However, when asked why Sodexo did not use process
22 controls like the ones JITB used, district manager David Bowser simply replied, “I don’t know
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¹ See Exhibit A, Amelia Keaton, CDC, “Epi-Aid Trip Report: Outbreak Investigation of Shiga toxin-producing
Escherichia coli Infections; Epi-Aid 2018-16,” (January 23, 2018), at SDX011259.

1 the answer to that.”² If Sodexo’s hamburger process controls reflected a structure similar to
2 JITB’s layers of product control, the numerous, severe injuries in this outbreak would not have
3 occurred.

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5 Indeed, Sodexo’s choice to include a bullet point list illustrating the differences between
6 its facility and the JITB facility is self-incriminating. Sodexo’s comparison of its meal and time
7 constraints compared to those of JITB, which it appears to argue are less stressful, shows exactly
8 why multiple process controls and stringent oversight were necessary in Sodexo’s facility. If
9 JITB knew to implement a scientifically validated, multi-control point cook process for its
10 hamburgers in a routine fast food situation, then Sodexo certainly knew that it needed to
11 implement a food safety system that was either equal to or better than JITB’s to meet the demands
12 of a high rush, high volume meal setting serving a recognized susceptible population like MH
13 569.
14

15 Sodexo knew of the potentially lethal consequences of serving undercooked ground beef,
16 it knew that *E. coli* O157:H7 is frequently associated with ground beef, and it recognized the
17 USMC recruits as a susceptible population. Even knowing this, Sodexo made the choice to serve
18 3,045 hamburger patties in the space of a few hours using frozen, raw ground beef patties and
19 relying on end-product temperatures as its sole process control.
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21 Within this framework, Sodexo maintains that its created-for-its-own-convenience “batch
22 temping” method of taking and recording two temperatures for 3,045 hamburgers was sufficient
23 to ensure that each one of the 3,045 hamburger patties had been cooked to 155°F for 15 seconds.
24 Never mind that the patties were at various stages of freeze-thaw when they were put on old,
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28 ² Exhibit B, at page 2_(112:7).

1 unreliable grills or into the ovens, a process of which USMC did not approve. Meanwhile, Sodexo
2 relied on a head cook who did not even know what *E. coli* was, nor at what grill temperature
3 hamburgers were supposed to be cooked, to adequately supervise the hamburger process and
4 accurately record the two temperatures that were taken.³ This also requires, however, the grand
5 assumption that the suspicious continuum of 170-degree temperatures recorded in Sodexo's
6 HACCP logs for September and October 2017 was not fraudulent.⁴ When compared to the
7 industry standards evinced by JITB's hamburger process, a jury could plausibly find Sodexo's
8 slipshod operation despicable enough to warrant an award of punitive damages.
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11 **2. Sodexo is a sophisticated entity that had multiple chances to change its cook process**
12 **or stop serving hamburgers all together, but it did not act until faced with the**
13 **consequences of its actions.**

14 Throughout its response, Sodexo casts itself as a powerless entity oppressed by the
15 contract imposed on it by USMC. Notably, Sodexo claims it was contractually required to use
16 the USMC hamburger recipe, so any lapses in cooking processes are not its fault. But Sodexo
17 has candidly admitted that it did not follow that recipe; it cannot now turn around and use the
18 recipe as a shield to justify its misconduct. Indeed, Sodexo's deflections and excuse-making
19 reflect its complete lack of sober, science-driven food safety analysis that allowed this outbreak
20 to occur.

21 Sodexo's characterization that its hands were tied by the contract also ignores the reality
22 that Sodexo is a billion-dollar, multi-national corporation with decades of experience in the food
23 service industry. It is a quintessential "sophisticated party" that engaged in extensive negotiations
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27 ³ Exhibit C, at pages 2-5 (16:25-17:23; 23:25-24:3)

28 ⁴ Exhibit D, at pages 2-3 (101:22-102:2).

1 with the USMC to secure its contracts. The extent of its autonomy becomes clear only after the
2 CDC investigation concluded that undercooked beef was a potential source of the outbreak. If
3 Sodexo was able to decide to stop serving hamburgers at MCRD and Camp Pendleton after the
4 outbreak, as it did, or to start using pre-cooked patties, as it did at the Parris Island base, it
5 certainly could have chosen to do so before the outbreak occurred.
6

7 Sodexo always had institutional knowledge of the risks associated with serving
8 undercooked ground beef; the only thing that changed was its exposure to liability for failing to
9 control that risk. Conduct like this, acting only after it was personally affected by its own
10 misconduct, is what would lead a jury to find Sodexo had acted with willful and conscious
11 disregard for the safety of others.⁵
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13 **3. There is nothing “common” about undercooking hamburgers in a post-JITB**
14 **outbreak world, and Sodexo’s misconduct is sufficiently egregious to support**
15 **punitive damages.**

16 Sodexo appears to argue that, because this case involves allegations of failing to properly
17 cook hamburgers, such a claim is “common,” and therefore does not justify punitive damages.
18 But food poisoning cases can rise, and have risen, to the level of punitive conduct, even when a
19 manufacturer lacked intent to cause harm. For example, in the case of Jensen Farms in 2013, two
20 brothers were criminally prosecuted in the USDC for the District of Colorado for failing to
21 adequately clean their cantaloupes. *See* DOJ, “Eric and Ryan Jensen Charged with Introducing
22 Tainted Cantaloupe into Interstate Commerce,” (Sept. 26, 2013) [https://www.justice.gov/usao-](https://www.justice.gov/usao-co/pr/eric-and-ryan-jensen-charged-introducing-tainted-cantaloupe-interstate-commerce)
23 [co/pr/eric-and-ryan-jensen-charged-introducing-tainted-cantaloupe-interstate-commerce](https://www.justice.gov/usao-co/pr/eric-and-ryan-jensen-charged-introducing-tainted-cantaloupe-interstate-commerce). Like
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27 ⁵ *See, e.g., Pfeifer v. John Crane, Inc.*, 220 Cal. App. 4th 1270, 1300 (2013); *George F. Hillenbrand, Inc. v.*
28 *Insurance Co. of North America*, 104 Cal. App. 4th 784, 816 (2002) (it is the jury who is “charged with assessing
the degree of reprehensibility and meting out an appropriate financial disincentive” for unacceptable conduct).

1 Sodexo, the brothers were aware of the potentially fatal consequences that selling *Listeria*-
2 contaminated melon could have on consumers. Unlike Sodexo, the Jensen brothers operated a
3 small, family-run farm and had no sophisticated knowledge of food safety. Nevertheless, they
4 failed to take the necessary precautions to properly disinfect their products, and such failure was
5 deemed egregious enough to warrant their criminal prosecution in Colorado.
6

7 When compared to the Jensen brothers, Sodexo had vastly greater institutional knowledge
8 of the risk its hamburger cooking process created and, in failing to subject its system to any sort
9 of formal or informal review or validation, was far more willful in ignoring adequate safety
10 measures. In a post-JITB outbreak world, the only entity in sight that “commonly” undercooked
11 its hamburgers was Sodexo, and it had been doing so for 18 years. It is this entire time span of
12 inexcusable, dangerous behavior that pushes Sodexo’s misconduct into the punitive ambit. A jury
13 could plausibly find Sodexo acted with sufficient callous disregard for the safety of others to
14 warrant punitive damages.
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17 **4. By failing to validate or review Sodexo’s cooking process at MH 569, Sodexo**
18 **corporate employees, including its Director of Food Safety, ratified Sodexo’s**
19 **misconduct.**

20 Sodexo’s misconduct in this case was systematic and prevalent up through the highest
21 levels of management, including its Food Safety manager, which Plaintiffs allege in their
22 amended complaints at paragraph 38. Plaintiffs allege that the woefully inadequate cooking
23 process implemented in the kitchens was due to corporate management’s total lack of initiative
24 to review, validate, or ensure adequate oversight of hamburger Saturdays at MH 569.

25 As Sodexo’s Food Safety Director, Heidi Snyder certainly “exercise[d] substantial
26 independent authority and judgment over decisions that ultimately determine[d] corporate policy.”
27 *White v. Ultramar*, 21 Cal. 4th 563, 573, 88 Cal. Rptr. 2d 19, 26, 981 P.2d 944, 951 (1999). Yet,
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1 as Food Safety Director she had never personally observed the hamburger process at MH 569,
2 nor did she make any effort to validate or otherwise review the hamburger process despite her
3 recognition of the fact that *E. coli* O157:H7 can kill people. Such lack of action is tacit approval
4 of Sodexo's hamburger process at MH 569. Plaintiffs have included sufficient allegations of
5 managerial ratification of Sodexo's misconduct in their amended complaints to support a claim
6 for punitive damages against Sodexo.
7

8 **III. Conclusion**

9 Plaintiffs' motion to amend is not based on a single meal. As alleged in their amended
10 complaint, it is almost two decades of Sodexo willfully ignoring its own institutional knowledge
11 of the unique risks posed by ground beef and *E. coli* O157 and its refusal to implement a
12 scientifically-validated, multi-control point system up to industry standards to ensure it produced
13 and served safe hamburgers to a recognized susceptible population that subjects it to a claim of
14 punitive damages. Plaintiffs must be allowed to amend their complaints in these cases to add a
15 claim for punitive damages because a jury could plausibly find that Sodexo's utter disregard of
16 comprehensive knowledge of risk and its failure to implement a system with adequate product
17 controls or oversight to eliminate that risk was malicious as defined under California Civil Code
18 § 3294(a).
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21 Respectfully submitted:

22 Dated: August 7, 2020

23
24 /s/ Frederic L. Gordon
25 Frederic L. Gordon
26 Attorneys for Plaintiffs
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