

IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

MARGARETE MORGENSTEIN, individually
and on behalf of the ESTATE OF GUNTER
MORGENSTEIN, and GARSHON
MORGENSTEIN,

CASE NO:

Plaintiffs,

v.

BOAR'S HEAD PROVISION CO., INC.,

Defendant.

_____ /

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs, MARGARETE MORGENSTEIN, individually and on behalf of the Estate of GUNTER MORGENSTEIN, Decedent, and GARSHON MORGENSTEIN, hereby sue Defendant, BOAR'S HEAD PROVISION CO., INC. and allege:

PARTIES

1. Plaintiff, MARGARETE MORGENSTEIN, the surviving spouse of Gunter Morgenstein, is a citizen of Newport News, Virginia.

2. Plaintiff, GARSHON MORGENSTEIN, the surviving child of Gunter Morgenstein, is a citizen of Virginia Beach, Virginia.

3. Defendant, BOAR'S HEAD PROVISION CO., INC. (hereinafter "Boar's Head") is a corporation organized and existing under the laws of the State of Florida with its headquarters located at 1819 Main St., Sarasota, FL 34236. It may be served through its registered agent Corporate Service Provisions Co., Inc., 1201 Hays Street, Tallahassee, FL 32301.

JURISDICTION AND VENUE

4. Jurisdiction is proper in Circuit Court, pursuant to Fla. Stat. §§ 26.012(2)(a) and 34.01(1)(c), because the amount in controversy exclusive of attorney's fees exceeds \$50,000.00.

5. Venue is proper in Sarasota County under Florida Stat. § 47.011.

GENERAL ALLEGATIONS

About *Listeria*

6. Listeriosis is a serious infection caused by eating food contaminated with the bacterium *Listeria monocytogenes*. The disease affects primarily persons of advanced age, pregnant women, newborns, and adults with weakened immune systems. However, people without these risk factors can also be affected. Food contaminated with *Listeria monocytogenes* bacteria usually look, smell, and taste normal, meaning that a consumer has no warning of contamination.

7. A person with listeriosis can experience a fever, muscle aches, headache, stiff neck, confusion, loss of balance and convulsions sometimes preceded by diarrhea or other gastrointestinal symptoms. Listeria poisoning can quickly lead to an invasive infection that spreads beyond the gastrointestinal tract. In people who are pregnant, the infection can cause miscarriages, stillbirths, premature delivery or life-threatening infection of the newborn. In addition, serious and sometimes fatal infections can occur in older adults and persons with weakened immune systems. These can include meningitis and dementia. In other victims, listeria can cross the blood brain barrier and cause encephalitis and meningitis, often accompanied by a fever and neck, back, or head pain. Listeriosis is treated with antibiotics.

8. Persons in the higher-risk categories who experience flu-like symptoms within two months after eating contaminated food should seek medical care and tell the health care provider about eating the contaminated food.

9. Each year, an estimated 1,600 people in the United States fall seriously ill with listeriosis. Of these, approximately 260 die of the disease annually.

The *Listeria* Outbreak

10. On July 19, 2024, the U.S. Food and Drug Administration (“FDA”) and the Centers for Disease Control and Prevention (CDC), along with health and regulatory officials in several states, and the U.S. Department of Agriculture’s Food Safety and Inspection Service (USDA-FSIS), announced an investigation into the multistate outbreak confirmed cases of *Listeria monocytogenes*. To date, the CDC has identified 57 victims in 18 states. All of the victims have been hospitalized, and nine have died.

11. According to the CDC, the true number of sick people in this outbreak is likely much higher than the number reported, and the outbreak may not be limited to the states with known illnesses. This is because some people recover without medical care and are not tested for *Listeria*. In addition, recent illnesses may not yet be reported as it usually takes 3 to 4 weeks to determine if a sick person is part of an outbreak.

12. As the investigation has unfolded, epidemiologic, laboratory, and traceback data pointed to meats sliced at deli counters. The CDC identified Boar’s Head brand liverwurst as the likely source. Among the agencies involved in the investigation is the Maryland Department of Health, which, in collaboration with the Baltimore City Health Department, collected an unopened liverwurst product from a retail store for testing as part of an outbreak investigation. It tested positive for the outbreak strain of *L. monocytogenes* matching that found in the victims’ lab samples.

13. On July 26, 2024, Boar's Head Provisions Co., Inc., located in Jarratt, Virginia., recalled all liverwurst products produced by the establishment that were in the stream of commerce because of the possibility it was adulterated with *Listeria monocytogenes*. The company also recalled additional deli meat products that were produced on the same line and on the same day as

the liverwurst and, therefore, also possibly adulterated with *L. monocytogenes*. Boar's Head recall included approximately 207,528 pounds of deli style meat.

14. According to the company, the ready-to-eat liverwurst products were produced between June 11, 2024, and July 17, 2024, and have a 44-day shelf life. The following liverwurst products are subject to recall:

- 3.5-lb. loaves in plastic casing, or various weight packages sliced in retail delis, containing "Boar's Head Strassburger Brand Liverwurst MADE IN VIRGINIA." The products shipped to retailer's bear sell by dates ranging July 25, 2024, to August 30, 2024, printed on the side of the packaging.

15. The other ready-to-eat deli meat products were produced on June 27, 2024. The following deli meat products are subject to recall:

- 9.5-lb. and 4.5-lb. full product, or various weight packages sliced in retail delis, containing "Boar's Head VIRGINIA HAM OLD FASHIONED HAM" with sell by date "AUG 10" on the product packaging.
- 4-lb., or various weight packages sliced in retail delis, containing "Boar's Head ITALIAN CAPPY STYLE HAM" with sell by date "AUG 10" on the product packaging.
- 6-lb., or various weight packages sliced in retail delis, containing "Boar's Head EXTRA HOT ITALIAN CAPPY STYLE HAM" with sell by date "AUG 10" on the product packaging.
- 4-lb., or various weight packages sliced in retail delis, containing "Boar's Head BOLOGNA" with sell by date "AUG 10" on the product packaging.
- 2.5-lb., or various weight packages sliced in retail delis, containing "Boar's Head BEEF SALAMI" with sell by date "AUG 10" on the product packaging.
- 5.5-lb., or various weight packages sliced in retail delis, containing "Boar's Head STEAKHOUSE ROASTED BACON HEAT & EAT" with sell by date "AUG 15" on the product packaging.
- 3-lb., or various weight packages sliced in retail delis, containing "Boar's Head GARLIC BOLOGNA" with sell by date "AUG 10" on the product packaging.
- 3-lb., or various weight packages sliced in retail delis, containing "Boar's Head BEEF BOLOGNA" with sell by date "AUG 10" on the product packaging.

16. The products subject to recall were distributed to retail deli locations nationwide. The products shipped to deli retailers bear establishment number “EST. 12612” inside the USDA mark of inspection on the product labels.

17. Notwithstanding the recall, FSIS remains concerned that some products may be in consumers’ refrigerators and in retail deli cases. Consumers who have purchased these products are urged not to consume them and retailers are urged not to sell these products with the referenced sell by dates. These products should be thrown away or returned to the place of purchase. Consumers who have purchased these products are also urged to clean refrigerators thoroughly to prevent the risk of cross-contamination.

18. FSIS recommends that retail delis clean and sanitize all food and non-food surfaces and discard any open meats and cheeses in the deli. Retailers may refer to FSIS’ guideline, *Best Practices Guidance for Controlling Listeria monocytogenes in Retail Delicatessens*, for information on steps to prevent certain ready-to-eat foods that are prepared or sliced in retail delis and consumed in the home, such as deli meats and deli salads, from becoming contaminated with *L. monocytogenes*.

19. Federal Inspectors continue to identify numerous violations at Boar’s Head’s deli meat plant in Jarratt, Virginia as part of their investigation into the Listeria Outbreak.

Mr. Morgenstein’s Illness

20. On June 30, 2024, Gunter Morgenstein purchased Boar’s Head Liverwurst and other Boar’s Head products. In the coming days, he consumed them on various occasions. He subsequently became ill, suffering from weakness, diarrhea, fatigue, and a fever.

21. Mr. Morgenstein, himself a Holocaust survivor who was born in June of 1936, waited a few days, but as his condition deteriorated, he began to look increasingly ill, and his family called

emergency medical services.

22. On July 8, 2024, Mr. Morgenstein arrived at Riverside Regional Hospital by ambulance, shortly before 9 a.m. The EMS had administered oxygen due to low oxygen saturation. The admitting physician explained Mr. Morganstein's arrival at Riverside Regional as prompted by shortness of breath, weakness, feeling unsteady, chest pain, swelling w/ prolonged standing, as well as episodes of diarrhea, decreased appetite, bilateral lumbar paraspinal pain, as well as the recent onset of constipation. The attending physician went out of his way to note how active Mr. Morgenstein remained, prior to his arrival in the hospital, still working several days per week. A thorough physical exam indicated elevated blood pressure of 129/99, with irregular cardiac rhythm, and a neurological tremor. His physician ordered a UA, CBC with Diff, a CMP, and a chest x-ray. The chest x-ray was inconclusive, requiring further work-up, so an abdominal and pelvic CT was performed. Of concern, Mr. Morgenstein's Sepsis Score Predictive Model ranged from 2.24 to 3.33.

23. At 2:00 p.m. on July 8, 2024, Mr. Morgenstein was still able to ambulate to the bathroom. Shortly thereafter, however, his oxygen saturation declined precipitously to 87%, requiring oxygen. Mr. Morgenstein's urine analysis also returned abnormal, with elevated ketones and protein. Just before 3:00 p.m., Mr. Morgenstein was admitted to the hospital. The attending anticipated Mr. Morgenstein would be in the hospital for only 48-72 hours.

24. For the first few days the hospital staff was perplexed by his worsening condition. But on July 11, 2024, the diagnosis would finally become clear. After noting a fever and that Mr. Morgenstein was encephalopathic, his physician ordered blood cultures that returned positive for listeria bacteria.

25. An infectious disease consult ordered repeat cultures, including a cerebral spinal fluid

(CSF) culture, and noted Mr. Morgenstein was “critically ill.”

26. The CSF tests returned consistent with bacterial meningitis, and the meningitis encephalitis panel detected the presence of *listeria monocytogenes*.

27. Over the next week Mr. Morgenstein’s Red Blood Count continued to drop, as did his hemoglobin and hematocrit. His fever remained unabated even with heavy antibiotic administration.

28. By July 17, 2024, Mr. Morgenstein’s condition continued to visibly decline and his family, ever at his side, grew increasingly concerned.

29. On July 18, 2024, his physician detailed his overall medical history, adding: *“His hospital course was complicated with sepsis and bacteremia due to listeria, and listeria meningitis encephalitis. He was treated aggressively with antibiotics, IV fluids, heart rate control medications, pain control medications. Multiple specialists on board during hospital course pulmonary, Neurology, Infectious Disease, palliative. Despite all aggressive measures, his clinical condition was continued to deteriorate so family decided eventually to provide him comfort measures only. Patient pronounced on 7/18 at 4.10 am.”*

30. Health officials later determined that Mr. Morgenstein was a confirmed case in the Boar’s Head Listeria Outbreak.

COUNT I
STRICT LIABILITY

31. Plaintiffs restate and reallege paragraphs 1-30 as if fully restated herein.

32. At all times, Defendant was in the business of producing, manufacturing, preparing, marketing, selling, supplying, and serving food (hereinafter “the product”) to the public.

33. There was a manufacturing defect in the product when it left Defendant’s possession and control. The product was defective because it contained *listeria*. The presence of *listeria* was

a condition of the product that rendered it unreasonably dangerous to decedent.

34. There was a marketing defect in the product when it left Defendant's possession and control. The product was defective because it contained *listeria* and Defendant failed to give adequate warnings of the product's dangers that were known or by the application of reasonably developed human skill and foresight should have been known. Defendant also failed to give adequate warnings and instructions to avoid such dangers. Defendant's failure to provide such warnings and instructions rendered the product unreasonably dangerous to decedent.

35. The product reached Decedent without substantial change in the condition in which the product was sold.

36. The product was defective and unreasonably dangerous at the time that it was manufactured and distributed and at the time Decedent was exposed to it. Said defects in the product include, but are not limited to:

- a. Contamination with listeria bacteria, a deadly pathogen;
- b. The presence of listeria in the product;
- c. The products were designed and manufactured in such a way, and under such conditions, that led it to be adulterated;
- d. Lack of sufficient warnings to advise consumers of the hazards presented due to the presence of listeria;
- e. The product failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by Decedent;
- f. The risk of damage in the product's design outweighed the benefits obtained with the use of the product and reasonable alternatives to the contaminated product were readily available; and

- g. The product failed to perform safely and reached decedent without substantial change affecting its condition.

37. Defendant's conduct and the defective product was a direct, proximate, and producing cause of Plaintiffs' injuries and damages.

38. Decedent ingested listeria from the product and developed listeriosis, encephalitis, meningitis, sepsis, and sustained other injuries as a result of the ingestion of the product.

39. The ingestion of the product, contaminated with listeria caused great pain and suffering, including anguish of mind and body and loss of capacity for the enjoyment of life and said injuries directly and proximately caused Decedent's death.

40. As a further direct and proximate result of the defects described above, and the wrongful death of Decedent, his Estate has incurred damages pursuant to the Florida Wrongful Death Act, including, but not limited to, loss of the prospective net accumulations of an estate, which might reasonably have been expected but for the wrongful death, reduced to present money value, medical expenses and/or funeral expenses that have become a charge against his estate or that were paid by or on behalf of decedent, as well as other damages.

41. As a further direct and proximate cause of the defects described above and the wrongful death of Decedent, Mr. Morgenstein's surviving spouse, Margarete Morgenstein, and surviving son, Garshon Morgenstein, have suffered and continue to damages pursuant to the Florida Wrongful Death Act, including, but not limited to the loss of decedent's support and services, companionship, protection, instruction, and guidance, medical or funeral expenses due to the decedent's injury and death, and has suffered and will continue to suffer mental pain and suffering. This includes losses from the date of his injury to his death, and future loss of support and services from the date of death, mental pain and suffering from the time of his injury, and medical and

funeral expenses.

42. Plaintiffs, the Estate, and the Survivors claim any and all other damages to which the Decedent, the Plaintiff, the survivors and the Estate may be entitled to under applicable law.

43. Defendant is therefore strictly liable for manufacturing, distributing, marketing, and selling defective and unreasonably dangerous product and introducing it into the stream of commerce, and Plaintiffs, Margarete Morgenstein and Garshon Morgenstein, in their capacity as surviving spouse and child, demand judgment for damages against Defendant, trial by jury of all issues so triable in this cause, and for relief as the Court deems just and proper.

COUNT II
NEGLIGENCE AND NEGLIGENCE PER SE

44. Plaintiffs reallege and reassert paragraphs 1-43 as if fully alleged herein.

45. Defendant, at all times, owed Decedent a duty of ordinary care in the preparation, testing, packaging, labelling, marketing, distribution, and/or selling of the product in such a manner that the product would be safe and not pose an unreasonable risk of harm to the life and safety of the consuming public, including Decedent, when the product was used in a foreseeable manner.

46. Further, Defendant owed Decedent the duty of warning or instructing Decedent of potentially hazardous or life-threatening conditions with respect to the product.

47. At all times Defendant knew, or in the exercise of ordinary care should have known, that its product contained or was contaminated with listeria.

48. At all times Defendant knew, or in the exercise of ordinary care should have known, that the listeria in its product was invisible to the naked eye, and yet when ingested during the course of ordinary and foreseeable use could and did cause terminal illness and death.

49. Defendant breached its duties in one or more of at least the following ways:

- a. Negligently manufacturing, distributing, and/or marketing the product;
- b. failing to properly test the product before placing it into the stream of commerce;
- c. failing to prevent human and/or animal feces from coming into contact with the product;
- d. failing to adequately monitor the safety and sanitary conditions of its premises;
- e. failing to apply its own policies and procedures to ensure the safety and sanitary conditions of its premises;
- f. failing to adopt and/or follow FDA recommended good manufacturing practices;
- g. failing to take reasonable measures to prevent the transmission of *listeria* and related filth and adulteration from its premises;
- h. failing to properly train and supervise its employees and agents to prevent the transmission of *listeria* and related filth and adulteration from its premises;
- i. failing to warn Decedent and the general public of the dangerous propensities of the product, particularly that it was contaminated with *listeria*, despite knowing or having reason to know of such dangers; and
- j. failing to timely disclose post-sale information concerning the dangers associated with the product.

50. Furthermore, Defendant had a duty to comply with all applicable health regulations, including the FDA's Good Manufacturing Practices Regulations, 21 C.F.R. part 110, subparts (A)-(G), and all statutory and regulatory provisions that applied to the manufacture, distribution, storage, and/or sale of the products or their ingredients, including but not limited to, the *Federal Food, Drug, and Cosmetics Act*, § 402(a), as codified at 21 U.S.C. § 342(a), which bans the manufacture, sale and distribution of any "adulterated" food, and the similar provision in the *Florida Food Safety Act*, including §§ 500.01, 500.04, 500.10, and 500.11, *et. seq.*

51. Under both federal and applicable state law, food is adulterated if it contains a "poisonous or deleterious substance which may render it injurious to health."

52. The product was adulterated because it contained *listeria*. Thus, by the manufacture, distribution, delivery, storage, sale, and/or offering for sale of the product and/or the product's ingredients, Defendant breached its statutory and regulatory duties.

53. Decedent was a member of the classes sought to be protected by the regulations and statutes identified above.

54. Decedent ingested *listeria* and developed listeriosis, encephalitis, meningitis, sepsis, and sustained other injuries as a result of the ingestion of the product.

55. The ingestion of the product, contaminated with *listeria* exacerbated previous infirmity, caused great pain and suffering, including anguish of mind and body and loss of capacity for the enjoyment of life and said injuries directly and proximately caused Decedent's death.

56. As a further direct and proximate result Defendant's negligence, and the wrongful death of Decedent, his Estate has incurred damages pursuant to the Florida Wrongful Death Act, including, but not limited to, loss of the prospective net accumulations of an estate, which might reasonably have been expected but for the wrongful death, reduced to present money value,

medical expenses and/or funeral expenses that have become a charge against his estate or that were paid by or on behalf of decedent, as well as other damages.

57. As a further direct and proximate cause of Defendant's negligence and the wrongful death of Decedent, Mr. Morgenstein's surviving spouse, Margarete Morgenstein, and surviving son, Gershon Morgenstein, have suffered and continue to suffer damages pursuant to the Wrongful Death Act, including but not limited to the loss of decedent's support and services, companionship, protection, instruction, and guidance, medical or funeral expenses due to the decedent's injury and death, and has suffered and will continue to suffer mental pain and suffering. This includes losses from the date of his injury to his death, and future loss of support and services from the date of death, mental pain and suffering from the time of his injury, and medical and funeral expenses.

58. Plaintiffs, the Estate, and the Survivors claim any and all other damages to which the Decedent, the Plaintiff, the survivors and the Estate may be entitled to under applicable law.

59. Defendant is therefore liable for negligence in the manufacturing, distributing, marketing, and selling defective and unreasonably dangerous product and introducing it into the stream of commerce, and Plaintiffs, Margarete Morgenstein and Garshon Morgenstein, in their capacity as surviving spouse and child, demand judgment for damages against Defendant, trial by jury of all issues so triable in this cause, and for relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand trial by jury on all issues so triable.

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