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Sandy Erhardt
CLERK
Gallatin County District Court
STATE OF MONTANA
By: Don Adams
DV-16-2023-0000465-OC
McElyea, Rienne H.
1.00

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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT,
GALLATIN COUNTY, MONTANA

E. HILL, an individual, Plaintiff, vs. APCH, INC. d/b/a DAVE'S SUSHI, a State of Montana corporation, and 115 APCH, LLC, a State of Montana limited liability company, and JOHN DOES/JANE DOES 1-5, and ABC COMPANIES 1-5, Defendants.	Case No.: DV-16-2023-0000465-OC **CIVIL COMPLAINT AND DEMAND FOR JURY TRIAL**

COMES NOW, Plaintiff E. Hill ("Plaintiff"), by and through his undersigned counsel of record, and for his cause of action against Defendants APCH, Inc. d/b/a Dave's Sushi, 115 APCH, LLC, John Does/Jane Does 1-5, and ABC Companies 1-5 (collectively, the "Defendants"), states and alleges as follows:

PARTIES

1. Plaintiff is a resident of Bozeman, Gallatin County, Montana.

2. APCH, Inc. is a State of Montana corporation, having its principal place of business in Bozeman, Gallatin County, Montana.

3. 115 APCH, LLC is a State of Montana limited liability company, having its principal place of business in Bozeman, Gallatin County, Montana.

4. Plaintiff also brings this civil action against Defendants John Does/Jane Does 1-5 and ABC Companies 1-5, whose true names, identities, and forms are currently unknown to Plaintiff. Plaintiff will amend this Civil Complaint to allege their true names, identities, and forms when they are ascertained.

JURISDICTION AND VENUE

5. Plaintiff re-alleges, and incorporates herein by this reference, each and every allegation contained in the preceding paragraphs of this Civil Complaint.

6. This Court has subject-matter jurisdiction over the above-captioned lawsuit pursuant to MONT. CODE ANN. § 3-5-302(1) and MONT. CONST. ART. VII § 4(1), because there is an actual and justiciable civil controversy at law and/or equity between the parties to this lawsuit.

7. This Court has personal jurisdiction over each of the Defendants to this action pursuant to MONT. CODE ANN. § 25-20-4(b)(1) because Plaintiff's claims herein arise from each Defendant's: (A) transaction of business within Montana, (B) commission of an act resulting in accrual within Montana of a tort action, and/or (C) the ownership, use, or possession of any property, or of an interest therein, situated in Montana. In addition, personal jurisdiction over each Defendant herein complies with the Constitutions of the State of Montana and the United States.

8. Venue is proper in Gallatin County, Montana pursuant to MONT. CODE ANN. § 25-2-118 and MONT. CODE ANN. § 25-2-122 because one or more of the Defendants are entities having residence within the State of Montana and the torts set forth by Plaintiff herein are alleged to have been committed in Gallatin County, Montana.

GENERAL ALLEGATIONS

9. Plaintiff re-alleges, and incorporates herein by this reference, each and every allegation contained in the preceding paragraphs of this Civil Complaint.

10. APCH, Inc. owns a sushi restaurant business under the assumed business name "Dave's Sushi." The below photo depicts Dave's Sushi restaurant in Bozeman, Montana. (Photo by Bozeman Daily Chronicle, "*Dave's Sushi food poisoning outbreak sickens 30; morel mushrooms possible culprit*," May 3, 2023, URL: https://www.bozemandailychronicle.com/news/business/daves-sushi-food-poisoning-outbreak-sickens-30-morel-mushrooms-possible-culprit/article_f1c6e440-e9d0-11ed-b524-7fecf5a5d9eb.html).



11. Dave's Sushi restaurant is located at 115 N. Bozeman Avenue, Bozeman, Montana 59715 (the "Property").

12. 115 APCH, LLC owns the Property where Dave's Sushi restaurant is operated.

13. APCH, Inc. and 115 APCH (collectively, the "Dave's Sushi Defendants"), together, have expressly or implicitly formed a joint venture that engages in and carries out the business operations of Dave's Sushi restaurant for profit.

14. In furtherance of their expressed or implied joint venture, the Dave's Sushi Defendants combine their efforts, property, money, skill, and knowledge to engage in and carry out the business operations of Dave's Sushi restaurant for profit.

15. As part of their restaurant operations, the Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers, prepare and serve food, on a retail basis, to the public for consumption.

16. Upon information and belief, in or around March and April of 2023, Dave's Sushi restaurant featured and offered for sale to its customers a certain "daily special" on its menu, which was a prepared in-house, sushi roll food item that contained a poisonous or deleterious substance rendering it injurious to human health (the "Adulterated Sushi Roll").

17. On or about April 17, 2023, Plaintiff went to Dave's Sushi restaurant to eat lunch.

18. For lunch that day, Plaintiff ordered several sushi rolls, one of which being the Adulterated Sushi Roll.

19. Plaintiff consumed all or part of the Adulterated Sushi Roll.

20. Within approximately 20 to 30 minutes after finishing his meal and leaving Dave's Sushi restaurant, Plaintiff became extremely ill.

21. Plaintiff's physical medical symptoms during the time he was ill included, but were not limited to, intense vomiting, diarrhea, body ache, stomachache, body chills, fever, loss of consciousness, loss of appetite, swelling of the hands and feet, confusion, disorientation, brain fog, difficulty breathing, painful breathing, difficulty standing, kidney pain, and painful urination.

CLAIM I

STRICT PRODUCT LIABILITY

22. Plaintiff re-alleges, and incorporates herein by this reference, each and every allegation contained in the preceding paragraphs of this Civil Complaint.

23. In or around March and April of 2023, the Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers, were engaged in the business

of designing, manufacturing, preparing, serving, and selling sushi rolls, including the Adulterated Sushi Roll, to Dave's Sushi restaurant customers.

24. Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers, expected the Adulterated Sushi Roll to be consumed by its customers, including Plaintiff, in substantially the same condition as it was in when it was designed, manufactured, prepared, sold, and served.

25. On or about April 17, 2023, the Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers, designed, manufactured, prepared, sold, and served the Adulterated Sushi Roll to Plaintiff.

26. The Adulterated Sushi Roll was consumed by Plaintiff in substantially the same condition as it was in when it was designed, manufactured, prepared, sold, and served to him.

COUNT (1) – STRICT LIABILITY DESIGN DEFECT

27. Plaintiff re-alleges, and incorporates herein by this reference, each and every allegation contained in the preceding paragraphs of this Civil Complaint.

28. Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers, had a strict duty to, but failed to, design the Adulterated Sushi Roll in such a way as to make it safe and fit for consumption by Plaintiff when it left their control.

29. As a proximate result of the actions and/or inactions of the Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers, in said design of the Adulterated Sushi Roll, Plaintiff' has sustained physical and emotional injuries and damages.

30. Plaintiff's physical and emotional injuries and damages include past and future medical expenses, lost wages, physical and mental pain, suffering, anguish, emotional distress, anxiety, stress, embarrassment, annoyance, and loss of enjoyment, in amounts to be proven at trial.

31. The Dave's Sushi Defendants are vicariously liable for the actions or omissions of their employees, agents, and/or joint venturers, including, but not limited to, under the doctrine of *respondeat superior*, all theories of agency, and/or all theories of joint venture.

32. The Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers: (A) intentionally disregarded blatant facts demonstrating the design the Adulterated Sushi Roll would create a high probability of injury to Plaintiff, and (B) deliberately proceeded to act with indifference to said high probability of injury.

COUNT (2) – STRICT LIABILITY MANUFACTURING DEFECT

33. Plaintiff re-alleges, and incorporates herein by this reference, each and every allegation contained in the preceding paragraphs of this Civil Complaint.

34. Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers, had a strict duty to, but failed to, manufacture and prepare the Adulterated Sushi Roll in such a way as to make it safe and fit for consumption by Plaintiff when it left their control.

35. As a proximate result of the actions and/or inactions of the Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers, in said manufacturing and preparation of the Adulterated Sushi Roll, Plaintiff' has sustained physical and emotional injuries and damages.

36. Plaintiff's physical and emotional injuries and damages include past and future medical expenses, lost wages, physical and mental pain, suffering, anguish, emotional distress, anxiety, stress, embarrassment, annoyance, and loss of enjoyment, in amounts to be proven at trial.

37. The Dave's Sushi Defendants are vicariously liable for the actions or omissions of their employees, agents, and/or joint venturers, including, but not limited to, under the doctrine of *respondeat superior*, all theories of agency, and/or all theories of joint venture.

38. The Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers: (A) intentionally disregarded blatant facts demonstrating the manufacturing and preparation of the Adulterated Sushi Roll would create a high probability of injury to Plaintiff, and (B) deliberately proceeded to act with indifference to said high probability of injury.

COUNT (3) – STRICT LIABILITY FAILURE TO WARN

39. Plaintiff re-alleges, and incorporates herein by this reference, each and every allegation contained in the preceding paragraphs of this Civil Complaint.

40. Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers, had a strict duty to, but failed to, warn Plaintiff that consuming the Adulterated Sushi Roll was unreasonably dangerous to human health and that it was unfit for human consumption when it left their control.

41. As a proximate result of the actions and/or inactions of the Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers, in failing to provide said warning, Plaintiff has sustained physical and emotional injuries and damages.

42. Plaintiff's physical and emotional injuries and damages include past and future medical expenses, lost wages, physical and mental pain, suffering, anguish, emotional distress, anxiety, stress, embarrassment, annoyance, and loss of enjoyment, in amounts to be proven at trial.

43. The Dave's Sushi Defendants are vicariously liable for the actions or omissions of their employees, agents, and/or joint venturers, including, but not limited to, under the doctrine of *respondeat superior*, all theories of agency, and/or all theories of joint venture.

44. The Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers: (A) intentionally disregarded blatant facts demonstrating that the failure to issue said warning to Plaintiff about the Adulterated Sushi Roll would

create a high probability of injury Plaintiff, and (B) deliberately proceeded to act with indifference to said high probability of injury.

CLAIM II

NEGLIGENCE

45. Plaintiff re-alleges, and incorporates herein by this reference, each and every allegation contained in the preceding paragraphs of this Civil Complaint.

46. The Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers, had a duty to observe reasonable care in the design, manufacture, preparation, sale, and service of the food served to customers of Dave's Sushi restaurant, including Plaintiff, such that said food would be free from any poisonous or deleterious substance rendering it injurious and/or unsafe to human health.

47. The Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers, breached said duty to Plaintiff by designing, manufacturing, preparing, selling, and serving him the Adulterated Sushi Roll, which he consumed.

48. As a proximate result of said breach, Plaintiff has sustained physical and emotional injuries and damages.

49. Plaintiff's physical and emotional injuries and damages include past and future medical expenses, lost wages, physical and mental pain, suffering, anguish, emotional distress, anxiety, stress, embarrassment, annoyance, and loss of enjoyment, in amounts to be proven at trial.

50. The Dave's Sushi Defendants are vicariously liable for the actions or omissions of their employees, agents, and/or joint venturers, including, but not limited to, under the doctrine of *respondeat superior*, all theories of agency, and/or all theories of joint venture.

51. The Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers: (A) intentionally disregarded blatant facts demonstrating that the design, manufacture, preparation, sale, service, and consumption of the Adulterated

Sushi Roll would create a high probability of injury to their customers, including Plaintiff, and (B) deliberately proceeded to act with indifference to said high probability of injury.

CLAIM III

NEGLIGENCE *PER SE*

52. Plaintiff re-alleges, and incorporates herein by this reference, each and every allegation contained in the preceding paragraphs of this Civil Complaint.

53. Pursuant to MONT. CODE ANN. § 50-31-202, et al., "[a] food is considered to be adulterated if: (1) it bears or contains any poisonous or deleterious substance that may render it injurious to health[,] . . . (5) it consists in whole or in part of a diseased, contaminated, filthy, putrid, or decomposed substance or if it is otherwise unfit for food[, or] (6) it has been produced, prepared, packed, or held under unsanitary conditions under which it may have become contaminated with filth or under which it may have been rendered diseased, unwholesome, or injurious to health . . . ."

54. Pursuant to MONT. CODE ANN. § 50-31-501, et al., "[t]he following acts and the causing of the acts within the state of Montana are prohibited: (1) the manufacture, sale or delivery, holding, or offering for sale of any food, drug, device, or cosmetic that is adulterated or misbranded[, or] (2) the adulteration or misbranding of any food, drug, device, or cosmetic . . . ."

55. Pursuant to MONT. CODE ANN. § 50-1-105, et al., "[i]t is the policy of the state of Montana that the health of the public be protected and promoted to the extent practicable through the public health system . . . ."

56. As such, MONT. CODE ANN. § 50-31-501 and MONT. CODE ANN. § 50-31-105 are statutes that were enacted, in whole or in part, to protect a certain class of people who consume food sold by Montana retail restaurant establishments.

57. Plaintiff is a member of said class of people.

58. Said statutes were enacted to prevent, in whole or in part, the kind of physical and emotional injuries and damages sustained by Plaintiff as a proximate result of the actions and/or inactions of the Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers.

59. Said statutes were enacted with the intention of regulating, in whole or in part, members of the Dave's Sushi Defendants' class who operate retail restaurant businesses such as Dave's Sushi restaurant.

60. As a proximate result of Dave's Sushi Defendants', and/or their agents', employees', and/or joint venturers', violation of said statutes, Plaintiff has sustained physical and emotional injuries and damages.

61. Plaintiff's physical and emotional injuries and damages include past and future medical expenses, lost wages, physical and mental pain, suffering, anguish, emotional distress, anxiety, stress, embarrassment, annoyance, and loss of enjoyment, in amounts to be proven at trial.

62. The Dave's Sushi Defendants are vicariously liable for the actions or omissions of their employees, agents, and/or joint venturers, including, but not limited to, under the doctrine of *respondeat superior*, all theories of agency, and/or all theories of joint venture.

63. The Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers: (A) intentionally disregarded blatant facts demonstrating that the design, manufacture, preparation, sale, service, and consumption of the Adulterated Sushi Roll would create a high probability of injury to their customers, including Plaintiff, and (B) deliberately proceeded to act with indifference to said high probability of injury.

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CLAIM IV

BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

64. Plaintiff re-alleges, and incorporates herein by this reference, each and every allegation contained in the preceding paragraphs of this Civil Complaint.

65. In operating a retail restaurant, the Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers, implicitly warranted to Plaintiff that the food Dave's Sushi restaurant was designing, manufacturing, preparing, selling, and serving to him was safe for consumption.

66. The Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers, breached said warranty by designing, manufacturing, preparing, selling, and serving the Adulterated Sushi Roll to Plaintiff, which he consumed.

67. As a proximate result of said breach, Plaintiff has sustained physical and emotional injuries and damages.

68. Plaintiff's physical and emotional injuries and damages include past and future medical expenses, lost wages, physical and mental pain, suffering, anguish, emotional distress, anxiety, stress, embarrassment, annoyance, and loss of enjoyment, in amounts to be proven at trial.

69. The Dave's Sushi Defendants are vicariously liable for the actions or omissions of their employees, agents, and/or joint venturers, including, but not limited to, under the doctrine of *respondeat superior*, all theories of agency, and/or all theories of joint venture.

70. The Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers: (A) intentionally disregarded blatant facts demonstrating that the design, manufacture, preparation, sale, service, and consumption of the Adulterated Sushi Roll would create a high probability of injury to their customers, including Plaintiff, and (B) deliberately proceeded to act with indifference to said high probability of injury.

COUNT V

PREMISES LIABILITY

71. Plaintiff re-alleges, and incorporates herein by this reference, each and every allegation contained in the preceding paragraphs of this Civil Complaint.

72. At all relevant times, the Dave's Sushi Defendants, together, owned and possessed the Property upon which they operated Dave's Sushi restaurant.

73. At all relevant times, the design, manufacture, preparation, sale, service, and consumption of the Adulterated Sushi Roll at Dave's Sushi restaurant presented a dangerous and unsafe condition at the Property.

74. The Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers, created said dangerous and unsafe condition, knew of said dangerous and unsafe condition, or, by the exercise of reasonable care, should have known of said dangerous and unsafe condition.

75. The Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers, had a duty to protect Plaintiff from said dangerous and unsafe condition.

76. The Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers, should have expected that Plaintiff would not discover or realize said dangerous and unsafe condition prior to consuming the Adulterated Sushi Roll.

77. The Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers, breached said duty by failing to protect Plaintiff from said dangerous and unsafe condition.

78. As a proximate result of said breach, Plaintiff has sustained physical and emotional injuries and damages.

79. Plaintiff's physical and emotional injuries and damages include past and future medical expenses, lost wages, physical and mental pain, suffering, anguish,

emotional distress, anxiety, stress, embarrassment, annoyance, and loss of enjoyment, in amounts to be proven at trial.

80. The Dave's Sushi Defendants are vicariously liable for the actions or omissions of their employees, agents, and/or joint venturers, including, but not limited to, under the doctrine of *respondeat superior*, all theories of agency, and/or all theories of joint venture.

81. The Dave's Sushi Defendants, and/or their agents, employees, and/or joint venturers: (A) intentionally disregarded blatant facts demonstrating that the design, manufacture, preparation, sale, service, and consumption of the Adulterated Sushi Roll would create an unsafe condition on the Property and a high probability of injury to their customers thereon, including Plaintiff, and (b) deliberately proceeded to act with indifference to said high probability of injury.

WHEREFORE, for all counts in his cause of action herein, Plaintiff prays for judgment against Defendants, all of them, as set forth in the Prayer for Relief below.

PRAYER

Plaintiff prays for relief as follows:

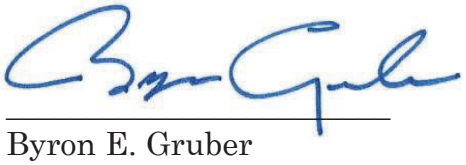
1. For a judgment against Defendants and in favor of Plaintiff,
2. For general, special, incidental, and consequential damages in amounts to be determined at trial,
3. For punitive damages,
4. For reasonable attorney fees and costs as permitted by law, contract, or equity,
5. For pre-judgment and post-judgment interest thereon at the highest legal rate, and
6. Such other relief as this Court deems just and equitable.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all matters and issues raised herein so triable.

DATED: May 11, 2023

E.HILL

By: 

Byron E. Gruber
FRASER STRYKER PC LLO

ATTORNEY FOR PLAINTIFF