

Complaints and Other Initiating Documents

2:11-cv-04227 Byerly et al v. Cargill Meat Solutions Corp.

U.S. District Court

Western District of Missouri

Notice of Electronic Filing

The following transaction was entered by Aleshire, Gregory on 8/25/2011 at 4:27 PM CDT and filed on 8/25/2011

Case Name: Byerly et al v. Cargill Meat Solutions Corp.

Case Number: 2:11-cv-04227-NKL

Filer: Jerry Byerly
Susanne Byerly

Document Number: 1

Judge(s) Assigned: Nanette K. Laughrey (presiding)

Docket Text:

COMPLAINT against All Defendants filed by Gregory W. Aleshire on behalf of All Plaintiffs. Filing fee \$350, receipt number 2549362Q. Service due by 12/27/2011. (Attachments: # (1) Civil Cover Sheet)(Aleshire, Gregory)

2:11-cv-04227-NKL Notice has been electronically mailed to:

Gregory W. Aleshire info@aleshirerobb.com

2:11-cv-04227-NKL It is the filer's responsibility for noticing the following parties by other means:

The following document(s) are associated with this transaction:

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI**

Civil Cover Sheet

This automated JS-44 conforms generally to the manual JS-44 approved by the Judicial Conference of the United States in September 1974. The data is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. The information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is authorized for use only in the Western District of Missouri.

**The completed cover sheet must be saved as a pdf document and filed as an attachment to the
Complaint or Notice of Removal.**

Plaintiff(s): Susanne Byerly ; Jerry Byerly	Defendant(s): CARGILL MEAT SOLUTIONS CORP., a Delaware Corporation
County of Residence: Jefferson	County of Residence: Outside State of Missouri
County Where Claim For Relief Arose: Outside State of Missouri	
Plaintiff's Atty(s): Gregory W. Aleshire , Esq. Aleshire Robb, P.C. 2847 S. Ingram Mill Rd., Suite A-102 Springfield, Missouri 65804 417.869.3737	Defendant's Atty(s): N/A Missouri

II. Basis of Jurisdiction: **4. Diversity (complete item III)**

III. Citizenship of Principal
Parties (Diversity Cases Only)

Plaintiff:- **1 Citizen of This State**
Defendant:- **2 Citizen of Another State**

IV. Origin : **1. Original Proceeding**

V. Nature of Suit: **365 Personal Injury - Product Liability**

VI. Cause of Action: **Strict Liability, Breach of Warranty, Negligence, Negligence per se 28
USC Sec. 1391(a)(3)**

VII. Requested in Complaint

Class Action:
Dollar Demand: **Fair and Reasonable**
Jury Demand: **Yes**

Signature: /s/ Gregory W. Aleshire

Date: 8/25/2011

If any of this information is incorrect, please go back to the Civil Cover Sheet Input form using the *Back* button in your browser and change it. Once correct, print this form, sign and date it and submit it with your new civil action. **Note: You may need to adjust the font size in your browser display to make the form print properly.**

Revised: 05/09/06

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
MISSOURI
CENTRAL DIVISION**

SUSANNE BYERLY and JERRY)	
BYERLY, ,)	
)	
Plaintiffs)	
)	No. _____
vs.)	
)	JURY TRIAL DEMANDED
CARGILL MEAT SOLUTIONS CORP.,)	
a Delaware corporation;)	
)	
Defendant.)	

COMPLAINT

COME NOW the plaintiffs SUSANNE BYERLY and JERRY BYERLY, by and through their attorneys, MARLER CLARK, L.L.P., P.S. and Gregory Aleshire of ALESHIRE ROBB, and for their causes of action against the defendant herein state:

I.

PARTIES

1. The plaintiffs, a married couple, reside in, and are citizens of, the State of Missouri.
2. The defendant CARGILL MEAT SOLUTIONS CORP. (hereinafter "Cargill") is a foreign corporation organized and existing under the laws of the State of Delaware, and registered as a corporation in the State of Kansas. Also, Cargill's corporate headquarters is located in Wichita, Kansas. At all times relevant to this action, Cargill carried on in its ordinary course of business the manufacture, distribution, and sale of ground turkey products to retail and wholesale foodservice locations nationwide, including in the state of Missouri. The defendant Cargill is, therefore, not a citizen of the

state of Missouri but does maintain a registered agent for the service of process in Missouri.

II.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to 28 USC § 1332(a) because the matter in controversy exceeds \$75,000.00, exclusive of costs, it is between citizens of different states, and because the defendant Cargill has certain minimum contacts with the State of Missouri such that the maintenance of the suit in this district does not offend traditional notions of fair play and substantial justice.

4. Venue in the United States District Court for the Eastern District of Missouri is proper pursuant to 28 USC § 1391(a)(3) because defendant Cargill is subject to personal jurisdiction at the time this action is commenced, and because the provisions of 28 USC § 1391(a)(1) and (2) are inapplicable.

III.

RELEVANT FACTS

THE OUTBREAK:

5. On July 29, 2011, the U.S. Department of Agriculture's (USDA) Food Safety Inspection Service (FSIS) announced that ground turkey contaminated with *Salmonella* Heidelberg was the source of a *Salmonella* outbreak among at least 78 people in 26 states, including a California resident who died.

6 On August 11, 2011, the Centers for Disease Control and Prevention (CDC) announced that a total of 107 persons had been infected with the outbreak strain of *Salmonella* Heidelberg from 31 states between February 27 and August 9, 2011.

7. On August 18, the CDC increased the total number of ill persons in the outbreak to 111. The number of ill persons identified in each state is as follows: Alabama (1), Arkansas (1), Arizona (3), California (6), Colorado (3), Georgia (2), Illinois (14), Indiana (1), Iowa (2), Kansas (1), Kentucky (2), Louisiana (1), Massachusetts (3), Maryland (1), Michigan (12), Minnesota (2), Mississippi (1), Missouri (4), Nebraska (2), Nevada (1), New York (2), North Carolina (3), Ohio (10), Oklahoma (2), Oregon (1), Pennsylvania (5), South Dakota (3), Tennessee (2), Texas (15), Utah (1), and Wisconsin (4). These numbers of ill people in the Cargill ground turkey *Salmonella* Heidelberg outbreak are expected to continue to increase.

8. On August 3, 2011, Cargill recalled 35,709,675 pounds of fresh and frozen ground turkey products produced at the company's Springdale, Arkansas, facility from February 20, 2011, through August 2, 2011, due to possible contamination with *Salmonella* Heidelberg.

9. A government agency called NARMS (National Antimicrobial Resistance Monitoring System), which tracks antibiotic-resistant pathogens, detected the outbreak strain of *Salmonella* Heidelberg in retail ground turkey samples produced at Cargill's Springdale, Arkansas facility on at least five (5) occasions between March 7 and June 27, 2011.

10. Further, *Salmonella* Heidelberg was also detected at Cargill's Springdale, Arkansas plant—i.e. the plant where the contaminated turkey was produced that caused the outbreak—on multiple occasions in 2010. NARMS may well have found *Salmonella* Heidelberg-positive samples of Cargill ground turkey as early as 2007.

11. The *Salmonella* involved in the outbreak is an antibiotic-resistant strain of *Salmonella* Heidelberg. As of August 5, 2011, investigators have collected antibiotic resistance information on isolates from four samples of ground turkey collected at retail and from nine (9) ill persons infected with the outbreak strain of *Salmonella* Heidelberg. The isolates from the ground turkey samples are resistant to antibiotics including ampicillin, streptomycin, tetracycline, and gentamicin. Antimicrobial resistance may increase the risk of hospitalization or possible treatment failure in infected individuals.

12. The defendant Cargill has a history of recalls and association with food borne illness outbreaks:

- A. **1993** - Cargill supplied meat to Northwest Sizzler restaurants that was implicated in an outbreak of *E. coli* O157:H7 infection involving 39 confirmed and 54 probable cases. Public health investigators said the illnesses were the result of cross-contamination between raw Cargill Tri-tips and salad bar ingredients.
- B. **2000** - Cargill provided meat to Sizzler restaurants linked to an outbreak of *E. coli* O157:H7 illnesses that killed one person and sickened that 62.
- C. **2000** - Sliced turkey from a Cargill processing plant in Texas was found to be the source of a multi-state outbreak of *Listeria monocytogenes*. The company recalled 16 million pounds of turkey after reports of infection that eventually included seven deaths and 29 illnesses. Eight of the case

patients were pregnant and three miscarriages/stillbirths were attributed to the contaminated turkey.

- D. **2001** - Cargill ground beef patties tested positive for *E. coli* O157:H7 after a child from Georgia became ill. Three of the patties were purchased at Kroger and one from Sam's Club, but all of the ill children and the tested meat had genetically indistinguishable strains of *E. coli*. Emmpak recalled 254,000 pounds of potentially contaminated ground beef.
- E. **2002** - Antibiotic-resistant *Salmonella* Newport was found in ground beef from Emmpak, a Cargill subsidiary. The CDC reported one fatality, 47 illnesses and 12 hospitalizations linked to consumption of the ground beef. Emmpak recalled a record 2.8 million pounds of potentially contaminated ground beef.
- F. **2007** - After Minnesota health officials traced 46 *E. coli* O157:H7 illnesses to ground beef patties, Cargill Meat Solutions Corporation recalled 845,000 pounds of frozen ground beef patties from retail locations across the U.S.
- G. **2007** - Cargill recalled 1,084,384 pounds of ground beef after federal tests detected *E. coli* O157:H7 in the product. No illnesses were associated with this recall.
- H. **2008** - Beef cheek produced by Beef Packers, a Cargill subsidiary, tested positive for *E. coli* O157:H7, prompting a 1,560 pound recall. No illnesses were associated with this recall.
- I. **2009** - At least 40 cases of *Salmonella* Newport infection were linked to Beef Packers ground beef in the summer, sparking a summertime recall of 830,000 pounds of ground beef. Then, in December, more *Salmonella* illnesses tied to the producer's meat led to a recall of 20,000 pounds of products. Both recalls involved contamination with drug-resistant *Salmonella* bacteria.
- J. **2010** - Cargill Meat Solutions recalled 8,500 pounds of ground beef after reports of illnesses caused by *E. coli* O26, a rare strain of the bacteria that

produces the same Shiga-like toxin as the more common *E. coli* O157:H7. The meat was distributed by BJ's Wholesale Club.

- K. **2011** - Cargill Meat Solutions recalled almost 36 million pounds of ground turkey linked to an outbreak of drug-resistant *Salmonella* Heidelberg. Current outbreak numbers: one dead and 111 ill.
- L. **Since 1993**, Cargill has been the source of contaminated meat implicated in at least 10 major outbreaks, 10 deaths, three stillbirths and 366 illnesses.

THE PLAINTIFF'S ILLNESS AND INJURIES:

13. On or about July 31, 2011, at a Food City grocery location in Pigeon Forge, Tennessee, plaintiff Susanne Byerly purchased a package of ground turkey that had been manufactured and sold by defendant Cargill. Plaintiffs and several members of their extended family were on the first day of a vacation at the time of purchase.

14. Plaintiff Jerry Byerly prepared a meal for his family and relatives using the ground turkey on or about the following day, August 1, 2011. He made spaghetti, adding the cooked ground turkey to the sauce. Susanne Byerly consumed some of the spaghetti.

15. Plaintiff Susanne Byerly woke up the next day, August 2, 2011, with a headache and feeling very fatigued. The same condition persisted for the next several days.

16. Plaintiff Susanne Byerly's symptoms evolved the evening of August 4, to include extreme chills, a fever, and bodyaches. The next morning, Friday, August 5, Mrs. Byerly began to vomit.

17. Frequent bouts of diarrhea began for plaintiff Susanne Byerly on or about Sunday August 7, 2011. Mrs. Byerly visited a physician the next day, August 8, where

blood was drawn for testing. Ultimately, days later, test results from this sample showed that the *Salmonella* bacteria she had ingested from the defendant's contaminated turkey had escaped her gastrointestinal tract and invaded her bloodstream.

18. Plaintiff Susanne Byerly's symptoms, including abdominal cramps, nausea, vomiting, headache, fatigue, and frequent diarrhea, persisted over the next several days. By August 11, 2011, she was still so ill that her physician recommended that she be hospitalized for treatment with intravenous antibiotics.

19. Plaintiff Susanne Byerly was discharged from St. John's Hospital in St. Louis, Missouri, on or about August 12. Thereafter, her symptoms gradually began to fade. Since being discharged from St. John's Hospital, Mrs. Byerly learned from Jefferson County public health officials that the strain of *Salmonella* Heidelberg that had infected her matched the strain of *Salmonella* Heidelberg associated with the nationwide Cargill ground turkey *Salmonella* outbreak.

IV.

CAUSES OF ACTION

Strict Liability—Count I

20. The defendant manufactured and sold the ground turkey product that caused the plaintiff to become infected with *Salmonella* Heidelberg and suffer damages as a result.

21. The ground turkey product that the defendant sold was contaminated with *Salmonella* Heidelberg at the time it left the defendant's possession or control.

22. Food, including the ground turkey product that caused plaintiff's illness and injuries, that is contaminated with *Salmonella* bacteria is unreasonably dangerous

for its ordinary and expected use—*i.e.*, consumption. Such a product is thus in an unreasonably dangerous condition not contemplated by an ordinary consumer, making it defective *per se*.

23. The ground turkey product was used by the plaintiff in the manner expected and intended when plaintiff consumed it.

24. The plaintiff suffered injury and damages as a direct and proximate result of the defective and unreasonably dangerous condition of the product sold by the defendant.

25. The defendant is strictly liable to the plaintiff for all damages proximately caused by its defective product.

WHEREFORE, Plaintiffs pray for judgment on Count I of their Complaint against the defendant in an amount that is fair and reasonable, for costs, and for any other relief the Court deems proper.

Breach of Warranty—Count II

26. The defendant is liable to the plaintiff for breaching express and implied warranties that it made regarding the adulterated product that the plaintiff purchased. These express and implied warranties included the implied warranties of merchantability and/or fitness for a particular use.

27. Plaintiff alleges that the *Salmonella*-contaminated food that the defendant manufactured and sold would not pass without exception in the trade and was therefore in breach of the implied warranty of merchantability.

28. Plaintiff alleges that the *Salmonella*-contaminated food that the defendant manufactured and sold was not fit for the uses and purposes intended, *i.e.* human

consumption, and that this product was therefore in breach of the implied warranty of fitness for its intended use.

29. As a direct and proximate cause of the defendant's breach of warranties, as set forth above, the plaintiff sustained injuries and damages in an amount to be determined at trial.

WHEREFORE, Plaintiffs pray for judgment on Count II of their Complaint against the defendant in an amount that is fair and reasonable, for costs, and for any other relief the Court deems proper.

Negligence and Negligence Per Se—Count III

30. The defendant owed a duty to the plaintiff to use reasonable care in the production, manufacture, and sale of its food products to ensure that the products did not become contaminated with *Salmonella* or any other dangerous pathogen. The defendant breached this duty.

31. The defendant had a duty to comply with all statutes, laws, regulations, or safety codes pertaining to the distribution, storage, and sale of its food product, but failed to do so, and was therefore negligent. The plaintiff is among the class of persons designed to be protected by these statutes, laws, regulations, safety codes, or provisions pertaining to the manufacture, distribution, storage, and sale of similar food products.

32. The defendant had a duty to comply with all applicable state and federal regulations intended to ensure the purity and safety of its food product, including the requirements of the Federal Food, Drug and Cosmetics Act (21 U.S.C. § 301 *et seq.*).

33. The defendant failed to comply with the provisions of the health and safety acts identified above, and, as a result, was negligent *per se* in its distribution and sale of food adulterated with *Salmonella*, a deadly pathogen.

WHEREFORE, Plaintiffs pray for judgment on Count II of their Complaint against the defendant in an amount that is fair and reasonable, for costs, and for any other relief the Court deems proper.

Loss of Consortium-Count IV

34. Plaintiffs hereby incorporate by reference all the proceeding paragraphs 1 through 34 of this complaint as set forth above.

35. Plaintiff Jerry Byerly was and is the lawfully wedded husband of Plaintiff Susanne Byerly.

36. As a direct and proximate result of Defendant Cargill's acts and omissions as afore mentioned, Plaintiff Jerry Byerly has been deprived of his wife's society, services, companionship and consortium, both in the past and in the future.

37. As a further direct and proximate result of Defendant Cargill's acts and omissions as afore mentioned, Plaintiff Jerry Byerly has incurred and will continue to incur in the future, medical bills related to his wife's medical care and treatment.

WHEREFORE, Plaintiff Jerry Byerly prays for judgment on Count IV of this complaint against Defendant in an amount that is fair and reasonable, for his costs, and for any other relief the Court deems proper.

Punitive Damages—Count V

38. *Salmonella* Heidelberg was detected at the Springdale, Arkansas plant as far back as 2010, if not as early as 2007. From this, Cargill had knowledge that the

ground turkey products that it was producing for retail sale and other uses were contaminated by *Salmonella* Heidelberg. Despite this knowledge, and despite being aware of the high likelihood of serious harm that pathogenic bacteria like *Salmonella* Heidelberg cause to human beings, defendant Cargill failed to alert consumers of the potential danger, issue a recall of products that it knew to be contaminated, or reasonably act to prevent consumers of its products from becoming infected and sickened by *Salmonella* Heidelberg.

39. Defendant Cargill's knowledge and failures to act, described in the foregoing paragraph, constituted deliberate indifference and conscious disregard for the safety of its consumers. Plaintiffs therefore pray for an assessment of punitive damages in an amount sufficient to punish Cargill and to deter others from like conduct.

WHEREFORE, Plaintiffs pray for judgment on Count IV of their Complaint against Defendant for punitive damages, for costs, and for any other relief the Court deems proper.

PLAINTIFF DEMANDS A JURY TRIAL ON ALL SUCH ISSUES SO TRIABLE

Respectfully Submitted,

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