

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

**BETWEEN:**

**HELEN FAKHRI and ADY AYLON  
as Representative Plaintiffs**

**Plaintiffs**

**AND:**

**ALFALFA'S CANADA, INC.  
Carrying on business as  
CAPERS COMMUNITY MARKETS**

**Defendant**

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

**STATEMENT OF CLAIM**

**The Parties**

*The Plaintiffs and the Class*

1. The plaintiff, Helen Fakhri (“Fakhri”), resides at 203 – 1920 Alberni Street, Vancouver, British Columbia, V6G 1B5.
2. The plaintiff, Ady Aylon (“Aylon”), resides at 104 – 2142 Carolina Street, Vancouver, British Columbia, V5T 3S2.
3. The Plaintiffs claim, on their behalf and on behalf of persons who suffered damages as a result of handling and/or consuming food products that were or might have been tainted with the Hepatitis A virus and were produced, manufactured, distributed, and/or sold by the Defendant. Those products are referred to herein as the “Tainted Products.”
4. Fakhri represents persons who were infected with Hepatitis A as a result of handling and/or consuming the Tainted Products, or having contact with a person who was

infected with Hepatitis A as a result of handling and/or consuming the Tainted Products (the “Infected Class”).

5. Aylon represents the approximately 6,400 persons who received anti-Hepatitis A injections because they were exposed to Hepatitis A as a result of handling and/or consuming the Tainted Products, or having contact with a person who was infected with Hepatitis A as a result of handling and/or consuming the Tainted Products (the “Immunized Class”).
6. The Infected Class and the Immunized Class are collectively referred to as the “Class Members”.
7. The Plaintiffs claim on their own behalf and on behalf of the Class Members, general, aggravated, special, and punitive damages for injuries, loss, inconvenience, anxiety, and expenses suffered as a consequence of handling and/or consuming the Tainted Products, or as a result of contact with a person who was infected with Hepatitis A as a result of handling and/or consuming the Tainted Products.

#### *The Defendant*

8. The Defendant (“Capers”) is a company incorporated under the laws of British Columbia with a registered and records office located at 3000 Royal Centre, PO Box 11130, 1055 West Georgia Street, Vancouver, BC, V6E 3R3. Capers is engaged in the business of the commercial manufacture and sale of food products. Capers markets its food products through its retail stores located at 2285 West 4th Avenue, Vancouver, 1675 Robson Street, Vancouver, and 2496 Marine Drive, West Vancouver.
9. Capers is the Canadian subsidiary of Wild Oats Markets Inc., a Delaware corporation. Wild Oats Markets Inc. operates natural and organic stores in Canada and the U.S.

**HEPATITIS A**

10. Hepatitis is a general term meaning inflammation of the liver and can be caused by a variety of different viruses such as Hepatitis A, B, C, D and E.
11. Hepatitis A, one of the oldest diseases known to humankind, is a self-limited disease that results in fulminant hepatitis and death in a small proportion of infected persons. It can be life threatening in the elderly and those with other liver disease. It is a significant cause of morbidity and socio-economic losses in many parts of the world.
12. Hepatitis A is caused by infection with the Hepatitis A virus (“HAV”). The virus interferes with the liver’s functions and, as a consequence, the liver becomes inflamed. HAV infection is characterized by fever, chills, fatigue, loss of appetite, nausea, vomiting, diarrhea, abdominal pain or pain in the liver area, dark urine, and yellowing or discolouration of the skin and eyeballs (jaundice). Symptoms usually last less than two months, although some HAV infected persons have prolonged or relapsing symptoms.
13. Since Hepatitis A is a viral disease, antibiotics are of no value in the treatment of the infection. There is currently no treatment for HAV infection, although rest and proper nutrition can relieve some symptoms.
14. The incubation period for HAV ranges from 15 to 50 days. The average incubation period is 28 to 30 days. Infected individuals can spread the virus from two weeks before the symptoms begin to two weeks after symptoms end. An infected person who has no symptoms can spread the virus.
15. A person has to ingest HAV to get sick from it. As HAV is abundantly excreted in feces, and can survive in the environment for prolonged periods of time, it is typically acquired by ingestion of feces-contaminated food or water. Transmission is almost entirely fecal-oral, and may occur through fecal contamination of food by poor food handling practices.

16. Fecal-oral transmission means that the virus is spread from person to person by putting something in the mouth that has been contaminated with the feces of a person with HAV. By failing to wash his or her hands adequately after a bowel movement, an HAV carrier can spread the virus to food in the preparation and serving process.
17. Careful hand washing after using the toilet and before handling, preparing, or eating food is one of the best preventive measures against HAV. In commercial settings, food handlers must follow good hygiene and proper food handling procedures to prevent the transmission of HAV. This includes ensuring that prepared foods are handled with gloved hands or tongs.
18. Infection with HAV can also be prevented by inoculation with a Hepatitis A Vaccine prior to infection. It is not recommended for use after exposure to HAV. In such situations, Immune Globulin (“IG”) is used. IG can help prevent or improve the clinical manifestations of HAV if given within two weeks of infection.
19. IG, also known as immune serum globulin or gamma globulin, is a blood byproduct used as temporary protection against HAV. It is a sterile solution of naturally produced antibodies taken from donated human blood. It is given by intra-muscular injection. It is of little or no benefit when received more than 14 days after exposure to HAV or during the acute phase of HAV infection. IG provides protection from HAV for only four to six months.
20. As with any vaccine, drug, or injection of an immunizing agent, there is a possibility of a shock-like allergic reaction (anaphylaxis) from IG and the Hepatitis A Vaccine. Symptoms include hives, wheezy breathing, or swelling of some part of the body. The inoculation can also have side effects that include soreness, redness, stiffness of muscles, and pain and tenderness around the injection site. Mild fever, flushing, headache, weakness, chills, nausea, and/or just not feeling very well may also occur.

## **THE EVENTS**

21. In or about March 2002, the Vancouver Coastal Health Authority (“VCHA”) notified

Capers that a former commissary staff member had been diagnosed with HAV infection and was infectious while working in the Capers commissary kitchen. The Capers commissary kitchen supplies products to Capers' three Vancouver-area stores. An estimated 45,000 people shop at Capers stores each week.

22. In or about March 2002, Capers and the VCHA distributed alerts to the news media about the situation to notify customers of the potential threat. The initial warning covered food products purchased during the period of March 4 - 26, 2002. The first list of the Tainted Products included about 35 different food items.
23. In March and April 2002, VCHA set up vaccination clinics near each Capers store location for customers to receive free IG injections.
24. By mid-April, five Capers patrons had been diagnosed with HAV infection. Three of the five had not consumed products on the first list of the Tainted Products. VCHA officials believed a second food handler could have been infected, and expanded their advisory to include patrons who consumed Capers products during February 2002.
25. At the time of the expanded advisory, it was too late for many people who handled and/or consumed the Tainted Products to receive inoculations. Capers and VCHA notified people that if they purchased, handled, and/or consumed the Tainted Products in February, and subsequently had flu-like symptoms, they might have been preparing food for others not realizing they had the HAV.
26. On or about April 9, 2002, the VCHA expanded the list of the Tainted Products to include muffins, hummus, and black olive tapenade purchased from Capers in late February or early March. These extra products were added to the list as the five confirmed HAV infected customers had all consumed the added food items. The additional items were reported to have been the biggest sellers at the three Capers stores. At that time, Capers' three outlets had altogether been selling about 400 muffins a day and about 10,000 containers of hummus a week.
27. By May 2002, VCHA had identified seven cases of Hepatitis A that were linked to the

Tainted Products. The confirmed cases appeared to have come into contact with the Tainted Products in late February or early March.

28. By the end of April 2002, more than 6,400 people had attended the VCHA vaccination clinics and received the IG injection.

#### **FAKHRI'S EXPOSURE**

29. Fakhri works as an esthetician in a beauty salon.
30. Fakhri was a regular customer of Capers prior to the HAV outbreak of February – April 2002. She shopped at Capers approximately five times in February and March 2002.
31. In or about March 2002, she ate some of the Tainted Products, particularly salad, salad dressing, and muffins purchased from the Capers Robson Street and West 4<sup>th</sup> Avenue locations.
32. In March and April 2002, Fakhri suffered from fever, chills, nausea, and fatigue. Fakhri consulted with several family physicians on different occasions. She was extremely worried about the symptoms she was experiencing because she was then one and a half months pregnant. Fakhri miscarried in May 2002.
33. In separate blood tests conducted on or about April 4, 22, and 30, 2002, Fakhri was reactive to HAV. By the time Fakhri learned about the Capers HAV incident from the media, it was too late for her to receive the IG injection.

#### **AYLON'S EXPOSURE**

34. Aylon is a businessman who attends to and manages his own flower shop.

35. Aylon was also a regular customer of Capers prior to the HAV outbreak. He used to shop at Capers once or twice a week.
36. On or about March 16, 2002, Aylon purchased and consumed potato salad, hummus, and a variety of juices from Capers.
37. On the day the Capers HAV incident was reported in the media, Aylon went to Capers 4<sup>th</sup> Avenue store and told the customer service personnel that he had eaten goods purchased from Capers. He asked for advice on what he should do to protect himself. The Capers' representative told Aylon not to worry because the food items he had eaten were not on the first list of the Tainted Products.
38. After VCHA expanded the Tainted Products list, Aylon and his girlfriend went to one of the IG clinics for protection against HAV. Aylon closed his flower shop for the day to get his IG injection. He was number 550 in line and waited for about 4 hours before receiving his IG injection.
39. Around ten minutes after receiving the IG injection, Aylon experienced muscle stiffness, flushing, headache, weakness, and nausea. He reported his condition to the health workers in the IG clinic. They directed Aylon to rest in a designated area, together with other persons who were having adverse reactions to the IG injection. Aylon rested in the designated area for about 45 minutes to wait for the symptoms to resolve, before going home.
40. About three to four hours after coming home from the IG clinic, Aylon again experienced the above symptoms. He was alarmed by the symptoms because he had never experienced them before. He went to the emergency ward of the Vancouver General Hospital to have himself checked. Aylon told the attending physician about his recent IG shot. He stayed for about four hours in the hospital waiting for medical attention and the results of blood tests. The examining physician told Aylon that he was probably having a reaction to the IG injection and that it was normal for some people to have such a reaction and he sent Aylon home.

41. Several days later, Aylon experienced the same symptoms described above, and went to the emergency ward of Vancouver General Hospital where he once more examined, put under observation and released after about 4 hours.

#### **LIABILITY AND DAMAGES**

42. Capers owed a duty of care to the Plaintiffs and the Class Members to ensure that all food products sold by it were safe, free from contaminants, and reasonably fit for human consumption.
43. Capers placed the Tainted Products into the normal stream of commerce with the knowledge and expectation that the products would be sold and ultimately consumed by members of the public such as the Plaintiffs and other Class Members without further inspection of condition or without inspection adequate to reveal the latent defect of HAV contamination.
44. Capers knew or ought to have known that failing to take proper care in the manufacture and distribution of the Tainted Products could cause serious injury, loss, and damage to members of the public such as the Plaintiffs and other Class Members.
45. Capers knew or ought to have known that the standard of care applicable to its behaviour was especially high since it was manufacturing and distributing food products intended to be consumed by humans.
46. The Plaintiffs and those Class Members who purchased the Tainted Products from Capers entered into contracts with Capers for valuable consideration. The contracts of sale contained express or implied conditions and warranties that the Tainted Products were reasonably fit for human consumption, of merchantable quality, safe, and free from harmful contaminants. The Plaintiffs plead and rely on the provisions of the *Sale of Goods Act*, R.S.B.C. 1996, c. 410.



47. The Plaintiffs also plead and rely on *Food and Drugs Act*, R.S.C. 1985, c.F-27, s. 4 for the standard of care in the sale of food products.
48. Capers breached its duty of care and the terms and conditions of its contracts by providing food that was prepared under unsanitary conditions, unfit for human consumption, of unmerchantable quality, unsafe, and/or tainted with HAV.
49. Capers is vicariously liable for the negligence of its HAV infected agents, servants, and employees who prepared, handled, and/or served the Tainted Products.
50. As a result of the Capers' negligence, breach of contractual warranties, and breach of statutory duties, the Plaintiffs and the Class Members have suffered injury, loss, and damages.
51. Particulars of Capers' negligence and breach of duty include:
  - (a) failure to take adequate or any steps to ensure that its products were safe and reasonably fit for human consumption and of merchantable quality prior to placing them into the normal stream of commerce;
  - (b) failure to ensure that its products were prepared under sanitary conditions;
  - (c) failure to ensure that its food handlers follow optimum hand washing practices (e.g. washing of hands on arrival at work and after using the restroom), thereby eliminating any contaminant, specifically fecal-borne pathogens, before handling any food product;
  - (d) failure to properly investigate, evaluate, and correct inappropriate hand washing and food handling procedures in its food preparation;
  - (e) failure to properly investigate and evaluate the health of its employees, particularly its food handlers, before and after an HAV-infected food handler was identified;

- (f) failure to ensure that high-risk food products are not touched with bare hands and are handled only with gloves or appropriate utensils, before these products are sold and/or served for consumption;
- (g) failure to provide reasonably conspicuous sanitation rules (posters and written notices) and materials (soap, towels, warm running water) to facilitate and enforce good hygiene and proper sanitation in its employees' restrooms or toilets;
- (h) failure to provide an accurate assessment of and monitor the hygienic status of its food handlers;
- (i) failure to meet the minimum standards of practice for preventing the transmission of infectious disease, including fecal-borne pathogens, in a food retail setting;
- (j) failure to take adequate or any steps to maintain sanitary manufacturing facilities for its food products;
- (k) failure to take adequate or any steps to handle its food products or their components in a manner to avoid or eliminate contamination;
- (l) failure to take adequate or any steps to prepare its food products or their components in a manner to avoid or eliminate contamination;
- (m) failure to take adequate or any steps to store its food products or their components, or have them stored in a manner to avoid or eliminate contamination;
- (n) failure to take adequate or any steps to examine, inspect, and/or test its food products or their components, or have them examined, inspected, and/or tested for contamination prior to placing them into the normal stream of commerce;
- (o) failure to take adequate or any steps to transport its food products or their components, or have them transported in a manner to avoid or eliminate contamination;
- (p) failure to take adequate or any steps to employ competent personnel in the manufacture, handling, preparation, storage, examination, inspection, testing, transportation, and distribution of its food products or their components;
- (q) failure to adequately train, inspect, and supervise staff in the hygienic preparation and service of food;

- (r) failure to anticipate the presence of foreign and potentially dangerous substances, particularly fecal borne pathogens, in its food products;
- (s) failure to maintain its premises in a state of cleanliness and good sanitation or otherwise fit for the preparation and service of food to customers; and
- (t) such other and further particulars that may become known to the Plaintiffs.

52. The Plaintiffs claim on their behalf and on behalf of all Class Members damages against Capers for injuries, loss, inconvenience, anxiety, and incidental expenses.

53. The Plaintiffs therefore claim on their behalf and on behalf of all Class Members:

- (a) an order certifying this action as a class proceeding and appointing them representative plaintiffs under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50;
- (b) general damages;
- (c) special damages;
- (d) punitive damages;
- (e) interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c.79;
- (f) costs of this action pursuant to section 37(2) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50; and
- (g) such further and other relief as this Honourable Court may deem just.

PLACE OF TRIAL: Vancouver, British Columbia

DATED at Vancouver, November 27, 2002.

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Counsel for the Plaintiffs

THIS STATEMENT OF CLAIM is filed and served by David A. Klein of the firm of Klein, Lyons, Barristers and Solicitors, whose place of business and address for service and delivery is at 1100 – 1333 West Broadway, Vancouver, B.C. V6H 4C1. Telephone: (604) 874-7171. Fax: (604) 874-7180.