

STATE OF NEW YORK  
SUPREME COURT COUNTY OF MONROE

)  
Rochester, New York,

Plaintiff,

vs.

GOLDEN PONDS RESTAURANT & PARTY  
HOUSE, INC., a New York Corporation,  
500 Long Pond Road  
Rochester, New York 14612.

Defendant.

Plaintiff designates Monroe County  
as the place of trial.

The basis of venue is Defendant's  
place of business.

**SUMMONS**

Index No.:

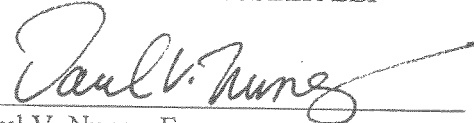
To the above-named Defendant:

**YOU ARE HEREBY SUMMONED** to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's attorneys within twenty (20) days after the service of this summons, exclusive of the day of service (or within thirty (30) days after the service is complete if this Summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded herein.

Dated: February 2, 2017

UNDERBERG & KESSLER LLP

By:



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STATE OF NEW YORK  
SUPREME COURT COUNTY OF MONROE

**COMPLAINT FOR PERSONAL  
INJURIES AND DAMAGES**

Plaintiff,

**JURY DEMANDED**

vs.

Index No.

GOLDEN PONDS RESTAURANT & PARTY  
HOUSE, INC., a New York Corporation,

Defendant.

COMES NOW the Plaintiff, \_\_\_\_\_, through her undersigned counsel of record Underberg & Kessler LLP and Marler Clark, LLP, PS, to allege upon information and belief as follows:

**I. PARTIES**

1.1 The Plaintiff \_\_\_\_\_ is and was, at all times relevant to this Complaint, a residents of Rochester, New York, Monroe County.

1.2 The Defendant, GOLDEN PONDS RESTAURANT & PARTY HOUSE, INC., upon information and belief, is a Corporation organized and existing under the laws of the State of New York, with its principal place of business located at 500 Long Pond Road, Rochester, New York 14612. At all times relevant to this Complaint, the Defendant manufactured and sold food products to the general public and the Plaintiff in this action, at its restaurant known as "Golden Ponds Restaurant & Party House" and/or "Golden Ponds" located at 500 Long Pond Road, Rochester, New York 14612 ("Golden Ponds").

## II. JURISDICTION AND VENUE

2.1 This Court is vested with jurisdiction over the Defendant because it was doing business within the State of New York, pursuant to New York CPLR §§ 301, *et seq.*

2.2 The venue of this action is proper in Monroe County, New York, pursuant to New York CPLR § 503, because the Plaintiff resides in Rochester, New York.

## III. FACTUAL ALLEGATIONS

### THE OUTBREAK

3.1 On Friday, November 25, 2016, The Monroe County Department of Public Health (“Health Department”) closed Golden Ponds Restaurant & Party House located at 500 Long Pond Road, Rochester, New York, after as many as sixty people reported being sick after eating at the restaurant on Thanksgiving Day. Four patrons were hospitalized; no deaths were reported.

3.2 John Ricci, spokesperson for the Health Department, stated “[G]iven what was seeming to turn out to be a pretty significant number of calls coming in, we thought it best to close them. . . This is a relatively rare action, with fewer than three restaurants closed each year.”

3.3 The Health Department started getting calls about people experiencing severe diarrhea on the Friday morning following Thanksgiving. While one or two calls about a given restaurant are not uncommon, “when you start to get multiple calls, similar time of day, all with the same story, that pretty quickly leads us to think that something might be going on,” said Ricci.

3.4 During a Health Department inspection at Golden Ponds on Friday, November 25, 2016, inspectors interviewed the staff, reviewed records, and collected samples of leftover

food. Following the collection of samples, the inspectors ordered that the rest of the leftover food be destroyed.

3.5 The site inspection revealed heavy deposits of food spills and mold on the walk-in refrigerator floor, a damaged gasket on a walk-in freezer preventing its door to close tightly, an ice maker with mildew growing inside, dirty knives stored as clean in the knife rack, heavily rusted shelving requiring replacement, and a pan of rice and carrots held at an unsafe room temperature. "Kitchen/store areas are in very poor sanitary condition. A drastic change in improving sanitation and cleanliness needs to occur ASAP. Lighting needs to improve," the report stated.

3.6 A Health Department inspector visited Golden Ponds again on December 5, 2016; he found one red violation and sixteen blue violations. According to the Health Department's inspection report, pans of food that had been in the walk-in cooler the day of the suspended permit—tripe, sausage, potatoes, meatballs, Italian sausage, and Polish sausage—were not stored in the walk-in freezer. The door gasket on the walk-in freezer was still an issue, the kitchen ice maker was rusting on the inside, and ice sinks and chiller plates in the bar had lime buildup and "bio-slime" starting to grow.

3.7 Following weeks of investigation and testing, the Health Department reported that approximately 260 people were made sick having consumed food contaminated by the bacteria *Clostridium Perfringens* served by Golden Ponds on Thanksgiving Day.

#### **A HISTORY OF HEALTH INSPECTION VIOLATIONS**

3.8 On November 1, 2016, weeks before the outbreak, Health Department inspectors listed eighteen violations that were classified as blue—non-critical violations. Among the violations were mouse droppings in the kitchen, grease and food debris

throughout the kitchen, spilled and leaking food containers in the floor of a walk-in cooler, mold on the beverage gun holder, and a buildup of grease and dust on hood filters. "Discussed massive cleaning required to eliminate violations and fire hazards. Cooling and reheating and glove use discussed also," the report concluded. The report also noted that the restaurant was "high risk," based upon its menu and cooking processes.

### ***CLOSTRIDIUM PERFRINGENS***

3.9 *Clostridium perfringens* are bacteria that produce toxins harmful to humans.

3.10 Although *Clostridium perfringens* and its toxins are found everywhere in the environment, human infection is most likely to come from eating food with *Clostridium perfringens* in it.

3.11 The majority of outbreaks are associated with undercooked meats, often in large quantities of food prepared for a large group of people and left to sit out for long periods of time. Because of this, *Clostridium perfringens* is sometimes referred to as the "food service germ."

3.12 Meat products such as stews, casseroles, and gravy are the most common source of illness from *Clostridium perfringens*.

3.13 Most outbreaks come from food whose temperature is poorly controlled. If food is kept between 70 and 140 F, it is likely to grow *Clostridium perfringens* bacteria.

3.14 People generally experience symptoms of *Clostridium perfringens* infection six to twenty-four hours after consuming the bacteria or toxins. *Clostridium perfringens* toxins cause abdominal pain and stomach cramps, followed by diarrhea. Nausea is also a common symptom.

3.15 Food contaminated with *Clostridium perfringens* is unfit for human consumption. Like most food-borne illnesses, a *Clostridium perfringens* infection is particularly dangerous to the elderly, and those who have immuno-illness or disorders.

#### THE PLAINTIFF'S ILLNESSES AND INJURIES

3.16 On November 24, 2016, Thanksgiving Day, [redacted] who is 90 years old) and several members of her family, dined at the Golden Ponds restaurant as part of a group of family and friends to celebrate the holiday.

3.17 For her meal, [redacted] ( [redacted] to her relatives) consumed a variety of typical Thanksgiving Day foods, including meat and vegetables. The meal was paid for by Mary Fazio's nephew.

3.18 [redacted] first symptoms of illness manifested only several hours after eating at Defendant's restaurant. Her symptoms included nausea, cramping, severe abdominal pain and diarrhea, which eventually turned bloody.

3.19 [redacted] learned on Friday that many of the family members who shared the meal together at Golden Ponds Thanksgiving Day also became ill with some of these same symptoms.

3.20 Although the diarrhea had somewhat subsided by Friday, she continued to feel ill and out of sorts. She complained of having no energy and lower belly pain and cramps.

3.21 On Monday, November 28, 2016, [redacted] symptoms did not subside and she was in significant pain. Since her symptoms worsened, she called her niece at approximately 8:00 Monday evening and asked her to take her to the Emergency Department ("ED") at Rochester General Hospital. Aunt Mary has diverticulosis and her family believed she was experiencing a diverticulitis attack and needed immediate treatment.

3.22 A series of tests were performed, including a CT scan. [REDACTED] was diagnosed with diverticulitis with no perforation. She was prescribed antibiotics and pain medication and she returned home.

3.23 [REDACTED] took the antibiotics as prescribed, but her symptoms did not subside, and in fact worsened.

3.24 While home, [REDACTED] continued to suffer with horrible pain and discomfort, diarrhea and extreme abdominal bloating. She followed up with her primary care physician, Dr. Waleed Quwateli.

3.25 Yet, [REDACTED] continued to decline. Her family was becoming increasingly concerned about her health and well-being given her age of 90 and the fact that her health was compromised with an immuno-disease. [REDACTED] had always been an active and lively woman, even at her age. She still drove her own car, lived in and maintained her own home and frequently socialized with friends and family. [REDACTED] continued decline was cause for fear and concern.

3.26 With no improvement, on December 24, 2016, [REDACTED] was again forced to seek emergency care at the hospital. She complained of continuing abdominal pain. She was vomiting and was experiencing bouts of bloody diarrhea. Lab work and various tests were again performed, including another CT scan.

3.27 This time, however, the ED physician told [REDACTED] that she now had a micro perforation of the diverticulum with acute diverticulitis and severe inflammation.

3.28 [REDACTED] was admitted to Rochester General Hospital on December 25, 2017, Christmas Day. Her health unfortunately continued to deteriorate.

3.29 now required surgery, which was scheduled for January 2, 2017. Dr. Patricia Solan performed the surgery, which included the removal of her colon and the installation of a colostomy bag to collect the excretion of s waste. will require the use of this colostomy bag for the rest of her life.

3.30 suffered yet another complication and was diagnosed with a MRSA infection, for which she was treated. Her family grew more concerned as they watched their struggle to recover from these various infections, surgeries and conditions resulting from her consumption of contaminated food served by Golden Ponds.

3.31 On January 12, 2017, was transferred to a local long-term care facility to participate in physical and occupational therapy. She continues to reside at the long-term care facility and is working to get better. It is uncertain whether will ever be able to return to her home and resume the independent life she once enjoyed.

#### IV. CAUSES OF ACTION COUNT ONE – STRICT LIABILITY

4.1 By this reference, the Plaintiff incorporates each of the preceding paragraphs of this Complaint as if each were set forth here in its entirety.

4.2 The Defendant prepared, manufactured, supplied, packaged, provided, shipped, delivered, distributed, and/or sold the adulterated food product that is the subject of this action.

4.3 The adulterated food product that the Defendant prepared, manufactured, supplied, packaged, provided, shipped, delivered, distributed, and/or sold was, at the time that it left the Defendant's control, defective and unreasonably dangerous for its ordinary intended use because it contained *Clostridium perfringens*, a deadly pathogen.



4.4 The adulterated food product that the Defendant prepared, manufactured, supplied, packaged, provided, shipped, delivered, distributed, and/or sold was delivered to the general public, including the Plaintiff, without any change in its defective condition.

4.5 The adulterated food product that the Defendant prepared, manufactured, supplied, packaged, provided, shipped, delivered, distributed, and/or sold was used in the manner expected and intended, and was consumed by the Plaintiff.

4.6 The Defendant owed a duty of care to the Plaintiff to prepare, manufacture, supply, package, provide, ship, deliver, distribute, and/or sell food that was not adulterated, that was fit for human consumption, that was reasonably safe, and that was free of pathogenic bacteria or other substances injurious to human health.

4.7 The Defendant breached this duty.

4.8 The Defendant owed a duty of care to the Plaintiff to prepare, manufacture, supply, package, provide, ship, deliver, distribute, and/or sell food that was fit for human consumption and that was safe to the extent contemplated by a reasonable consumer.

4.9 The Defendant breached this duty.

4.10 The Plaintiff suffered injury and damages as a direct and proximate result of the defective and unreasonably dangerous condition of the adulterated food product that the Defendant prepared, manufactured, supplied, packaged, provided, shipped, delivered, distributed, and/or sold.

#### COUNT TWO - NEGLIGENCE

5.1 By this reference, the Plaintiff incorporates each of the preceding paragraphs of this Complaint as if each were set forth here in its entirety.

5.2 The Defendant owed a duty to the Plaintiff to manufacture a food product that was reasonably safe.

5.3 The food product that the Defendant manufactured, distributed, and sold was not reasonably safe because adequate warnings or instructions were not provided including, but not limited to, a warning that the food product was adulterated with *Clostridium perfringens* and should not be consumed by humans.

5.4 The Defendant breached this duty and was therefore negligent.

5.5 The Defendant owed the Plaintiff a duty to use reasonable care in the manufacture, distribution, and sale of its product to prevent bodily injury.

5.6 The Defendant breached this duty and was therefore negligent in failing to exercise reasonable care in the manufacture of the food product to prevent contamination of the product by bacteria likely to produce physical injury.

5.7 Because the Plaintiff suffered injuries as the direct and proximate result of the Defendant's negligence, the Defendant is liable to the Plaintiff for her injuries and damages.

#### COUNT THREE – NEGLIGENCE PER SE

6.1 By this reference, the Plaintiff incorporate each of the preceding paragraphs of this Complaint as if each were set forth here in its entirety.

6.2 The Defendant owed a duty to comply with statutory and regulatory provisions that pertained or applied to either the import, manufacture, distribution, storage, or sale of their food product or product-ingredients, including, but not limited to, New York Agricultural Markets Law §200, which provides the standard for the manufacture, sale, and distribution of “adulterated” food.

6.3 The state food safety regulations applicable here, and as set forth above, establish a positive and definite standard of care in the import, manufacture, distribution or sale of food, and the violation of these regulations constitutes negligence per se.

6.4 The Plaintiff was in the class of persons intended to be protected by these statutes and regulations, and were injured as a direct and proximate result of the Defendant's violation of these statutes and regulations.

6.5 Under applicable state law, food is adulterated "if it bears or contains any poisonous or deleterious substance which may render it injurious to health" or if "it contains in whole or in part of a diseased, contaminated, filthy, putrid or decomposing substance, or if it is otherwise unfit for food." *Clostridium perfringens* is such a substance. Thus, either by manufacture, distribution, storage or sale of the subject product, the Defendant breached its statutory duty, and the Plaintiff was injured as a direct and proximate result of such breach.

6.6 The Defendant's breach of this duty was a proximate cause of Plaintiff's injuries and damages, for which Defendant is liable.

#### COUNT FOUR – BREACH OF WARRANTIES

7.1 By this reference, the Plaintiff incorporates each of the preceding paragraphs of this Complaint as if each were set forth here in its entirety.

7.2 At all material times, the Defendant was and is the owner of Golden Ponds, the retail food establishment that manufactured, distributed, prepared, served, and/or sold the adulterated food product that injured the Plaintiff.

7.3 At all material times, the adulterated food product reached its intended consumers, including the Plaintiff, without substantial change from the condition in which it was sold by the Defendant.

7.4 The Defendant expressly and impliedly warranted, through its distribution and sale of food to the public, and by the statements and conduct of its employees and agents, that the food it manufactured, distributed, prepared, served, and/or sold to its patrons, including the Plaintiff, was fit for human consumption, and not otherwise potentially adulterated or injurious to health.

7.5 However, food sold by the Defendant and consumed by its patrons, including the Plaintiff, was contaminated with *Clostridium perfringens*, and as such was adulterated, and not fit for human consumption. Thus, Defendant breached its expressed and implied warranty of merchantability.

7.6 The Plaintiff further alleges that the adulterated food manufactured, distributed, prepared, served, and/or sold by the Defendant and consumed by its patrons, including the Plaintiff, was not fit for the uses and purposes intended, *i.e.*, human consumption, and that the product was therefore in breach of the implied warranty of fitness for its intended use.

7.7 Because the food that the Plaintiff purchased and consumed was adulterated, not fit for human consumption, not reasonably safe in design and construction, lacked adequate warnings and instructions, and was unsafe to an extent beyond that contemplated by the ordinary consumer, the Defendant breached both express and implied warranties, and is liable to the Plaintiff for the harm proximately caused to them by its manufacture, distribution, and/or sale of contaminated and adulterated food products.

## VI. DAMAGES

8.1 By this reference, the Plaintiff incorporates each of the preceding paragraphs of this Complaint as if each were set forth here in its entirety.

8.2 The Plaintiff has suffered general and special, incidental and consequential damages as the direct and proximate result of the acts and omissions of the Defendant, which damages shall be fully proven at the time of trial, including, but not limited to, pain and suffering, emotional distress, medical and medical related expenses, pharmaceutical expenses, and other ordinary, incidental and consequential damages as would be anticipated to arise under the circumstances.

8.3 The Plaintiff is entitled to recovery of any lost wage sustained as a result of their injury, in an amount to be proven at trial.

**PRAYER FOR RELIEF**


WHEREFORE, the Plaintiff prays:

- (1) That the court award the Plaintiff judgment against the Defendant in such sums as shall be determined to fully and fairly compensate the Plaintiff for all general, special, incidental, and consequential damages incurred, or to be incurred, by the Plaintiff as the direct and proximate result of the acts and omissions of the Defendant;
- (2) That the court award the Plaintiff her costs and disbursements incurred in this litigation; and

(3) That the Court award such other and further relief as it deems necessary and proper in these circumstances.

Dated: February 2, 2017

UNDERBERG & KESSLER LLP

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