

# Superior Court of California

## County of Orange



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Case Number : 30-2017-00935800-CU-PL-CJC

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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

13 GEORGE TOUBBEH, )  
14 )  
15 Plaintiff, )  
16 )  
17 v. )  
18 )  
19 HEINEKEN, USA, INCORPORATED, a New )  
20 York Corporation; THE KROGER CO., an )  
21 Ohio Corporation; JOHN DOE )  
22 DISTRIBUTOR (DOE 1), an entity of )  
23 business form unknown, and DOES 2 through )  
24 30, inclusive, )  
25 Defendants. )

26 CASE NO.: 30-2017-00935800-CU-PL-CJC  
27 Judge Walter Schwarm  
28 Civil Unlimited Jurisdiction  
**PLAINTIFF’S COMPLAINT FOR:**  
**1. STRICT PRODUCTS LIABILITY**  
**2. NEGLIGENCE**  
**3. BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY**  
**4. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**

29 Plaintiff alleges:

30 **GENERAL ALLEGATIONS**

31 1. That the true names and capacities, whether individual, corporate, associate or  
32 otherwise, of Defendants DOES 1 through 30, inclusive, are unknown to Plaintiff at this time, who  
33 therefore sues said Defendants by such fictitious names and will ask leave of Court to amend this  
34 Complaint to show their true names and capacities when ascertained. Said Defendants are sued as

1 principals, and all of the acts performed by them as agents, servants and employees were performed  
2 within the course and scope of their authority and employment.

3 2. That at all times mentioned herein, the Defendants, and each of them, were the agents,  
4 servants and employees of each, every, and all of the other defendants and were acting within the  
5 course and scope of their said agency, service, and employment.

6 3. Plaintiff was and is a resident of Orange County, State of California and, for the  
7 purposes of this action, a California citizen.

8 4. That Plaintiff is informed and believes and based thereon alleges that each of the  
9 defendants were and are in some manner responsible for the actions, acts, and omissions herein  
10 alleged, and for the damage caused by the Defendants, and each of them, and are therefore jointly  
11 and severally liable for the damages caused to Plaintiff.

12 5. That wherever appearing in this Complaint each and every reference to Defendants,  
13 or to any of them, is intended to and shall be reference to all Defendants hereto and to each of them,  
14 named and un-named, including all fictitiously named Defendants, unless said reference is  
15 otherwise specifically qualified.

16 6. That Plaintiff is informed and believes and based thereon alleges that at all times  
17 mentioned herein Defendant HEINEKEN USA INCORPORATED (hereafter "HEINEKEN") is a  
18 New York Corporation, with its principal place of business located at 360 Hamilton Avenue, White  
19 Plains, New York, 10601. Defendant HEINEKEN USA INCORPORATED regularly does business in  
20 the State of California.

21 7. That Plaintiff is informed and believes and based thereon alleges that at all times  
22 mentioned herein Defendant THE KROGER CO. (hereafter, "KROGER") is a corporation with its  
23 principal place of business located at 1014 Vine Street, Cincinnati, Ohio 45202. Defendant KROGER  
24 regularly does business in the State of California. KROGER owns, operates, and otherwise control  
25 Ralph's Grocery stores in the State of California.

26 8. That Plaintiff is informed and believes and based thereon alleges that at all times  
27 mentioned herein Defendant JOHN DOE DISTRIBUTOR, named here as DOE 1, is a citizen and/or  
28

1 resident of the State of California. Defendant JOE DOE DISTRIBUTOR is an entity of form  
2 unknown.

3 9. That Plaintiff is informed and believes and based thereon alleges that at all times  
4 mentioned herein, defendants DOES 1 through 30 are and were corporations, partnerships, limited  
5 liability corporations or other business entities of unknown form licensed and authorized to do business  
6 in the State of California and, at all times mentioned herein, were conducting business within the  
7 County of Orange, State of California.

8 **JURISDICTION AND VENUE**

9 10. This Court has jurisdiction in this matter pursuant to *Code of Civil Procedure* section  
10 410.10 because the product was sold and/or the injury occurred with Orange County, State of  
11 California.

12 11. Venue is proper in this Court pursuant to Code of Civil Procedure sections 395 and  
13 395.5 in that the product was sold and/or the injury occurred with Orange County, State of California.

14 **FACTS**

15 12. Plaintiff purchased 24-ounce cans of HEINEKEN beer from Ralph's Grocery store  
16 in Fountain Valley, California. Based on information and belief, Ralph's Grocery store in Fountain  
17 Valley, California is owned, operated, and/or otherwise controlled by Defendant KROGER.

18 13. On August 7, 2015, Plaintiff consumed the HEINEKEN beer and noted that the beer  
19 had a foul taste.

20 14. Immediately thereafter, Plaintiff experienced severe abdominal pain followed by  
21 vomiting.

22 15. Plaintiff's daughter examined the contents of the HEINEKEN can that her father was  
23 drinking from and found two geckos in the HEINEKEN beer can.

24 16. The animals have been identified as juvenile leopard geckos (Eublepharis  
25 macularius), a species that is not indigenous to the United States.

26 17. When discovered, the geckos had not been decomposed at all and were likely alive  
27 when the beer was poured and sealed into the cans in the bottling and/or canning facility.  
28

1 18. Based upon information and belief, the subject geckos likely got into the  
2 HEINEKEN canning facility and into a can before the HEINEKEN beer was poured and the top  
3 was sealed onto the subject can.

4 19. As a result of drinking the HEINEKEN beer with the geckos inside, Plaintiff became  
5 violently ill and went to the Emergency Room at Fountain Valley Regional Hospital.

6 20. At the Emergency Room, Plaintiff was examined, several labs were ordered and  
7 Plaintiff was discharged with prescriptions for Xanax and Zofran and instructions to return if his  
8 symptoms did not improve or his health deteriorated.

9 21. Plaintiff continued to experience severe gastrointestinal ailments, emotional distress,  
10 trauma, and anxiety.

11 22. On August 9, 2015, two days after the incident, Plaintiff went to Urgent Care with  
12 severe stomach pains and cramps, loss of sensation, hyperactive bowel movements, and nearly  
13 complete loss of appetite.

14 23. Plaintiff continued to have symptomolgy related to the ingestion of the contaminated  
15 HEINEKEN beer.

16 24. He also suffered from extreme anxiety and post traumatic stress disorder (“PTSD”)  
17 as a result of finding the two geckos in his HEINEKEN beer.

18 25. As a result of the incident, Plaintiff missed several weeks of work and had to incur  
19 substantial medical expenses.

20 **FIRST CAUSE OF ACTION**

21 **STRICT LIABILITY CLAIM**

22 **[Violation of Federal Food and Drug and Cosmetic Act, 21 U.S.C. §342(a), and**  
23 **California Sherman Food, Drug, and Cosmetics Laws, California Health and Safety**  
24 **Code §109875, *et seq.*]**

25 **(As Against All Defendants)**

26 26. Plaintiff hereby repeats and incorporates by reference the preceding paragraphs as  
27 though set forth fully herein.

1           27. Defendants HEINEKEN, KROGER, JOHN DOE DISTRIBUTOR, and DOES 2 to  
2 30 inclusive, and each of them, are in the business of manufacturing, bottling, distributing, canning,  
3 and/or selling food and drink products or food and drink product ingredients for human  
4 consumption. Defendants Defendants HEINEKEN, KROGER, JOHN DOE DISTRIBUTOR, and  
5 DOES 2 to 30 inclusive, and each of them, are in the chain of distribution for the subject product—  
6 the HEINEKEN beer that Plaintiff purchased and consumed and subsequently found two geckos  
7 inside the HEINEKEN beer can. As a result of being the manufacturer of the subject product,  
8 Defendants HEINEKEN, KROGER, JOHN DOE DISTRIBUTOR, and DOES 2 to 30 inclusive,  
9 and each of them, are participants in the enterprise responsible for the placing the subject product in  
10 the stream of commerce and, thus, subject to strict product liability under the law of the State of  
11 California.

12           28. The HEINEKEN beer that Plaintiff purchased and consumed was a ready-to-  
13 consume product, intended for consumption without further preparation, cooking, or other step that  
14 could possible eliminate the presence of the two geckos in the HEINEKEN beer can or other  
15 pathogens.

16           29. The HEINEKEN beer can, which was contaminated with 2 geckos inside the can, is  
17 adulterated within the meaning of Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 342(a) and its  
18 implementing regulations and California Sherman Food, Drug, and Cosmetic Act, California Health  
19 and Safety Code § 110545. See C.F.R. § 109.3(c) and (d). In addition, the HEINEKEN beer can  
20 contaminated with 2 geckos inside was defective, unreasonably dangerous, and not fit for human  
21 consumption. The subject product was adulterated, as well as being defective, unreasonably dangerous  
22 and not fit for human consumption.

23           30. The subject product was expected by Defendants HEINEKEN, KROGER, JOHN  
24 DOE DISTRIBUTOR, and DOES 2 to 30 inclusive, and each of them, to reach all consumers and  
25 to be consumed by them, without any substantial change, and the subject product did in fact reach  
26 Plaintiff without any substantial changes in the product.

1 31. Plaintiff consumed the subject product, having received the same without any  
2 substantial change occurring, and Plaintiff consumed the subject product in the manner expected  
3 and intended, including when Plaintiff consumed the subject product.

4 32. Accordingly, Defendants HEINEKEN, KROGER, JOHN DOE DISTRIBUTOR, and  
5 DOES 2 to 30 inclusive, and each of them, and each of them, are strictly liable for the damages  
6 proximately caused by the manufacture, distribution, marketing, canning, bottling and/or sale of the  
7 subject defective and unreasonably dangerous product.

8 33. Plaintiff suffered severe injuries as a result of consuming the subject product, the  
9 HEINEKEN beer can contaminated with 2 geckos. The HEINEKEN beer can was defective and  
10 unreasonably dangerous. Furthermore, Plaintiff suffered and is continuing to suffer injuries as  
11 alleged above, as a direct and proximate result of the subject product being placed into the stream of  
12 commerce by Defendants HEINEKEN, KROGER, JOHN DOE DISTRIBUTOR and DOES 2-30,  
13 and each of them.

14 34. As a direct and proximate result of the defective and unreasonably dangerous  
15 HEINEKEN beer can, as well as the aforementioned conduct of Defendants HEINEKEN, KROGER,  
16 JOHN DOE DISTRIBUTOR, and DOES 2 to 30 inclusive, and each of them, and by reason of the  
17 incident herein described, Plaintiff sustained the following injuries and damages:

- 18 a. Injuries to the body and limbs, all to the general damage in an amount to be  
19 ascertained;
- 20 b. Necessary medical expenses, past and future, in an amount not yet fully ascertainable;
- 21 c. Loss of earnings in an amount not yet fully ascertainable.

22 **SECOND CAUSE OF ACTION**

23 **BREACH OF THE IMPLIED WARRANTY CLAIM**

24 (As Against All Defendants)

25 35. Plaintiff hereby repeats and incorporates by reference the preceding paragraphs as  
26 though set forth fully herein.

1 36. Defendants HEINEKEN, KROGER, JOHN DOE DISTRIBUTOR, and DOES 2 to  
2 30 inclusive, and each of them, impliedly warranted that the subject product, the HEINEKEN beer,  
3 was of merchantable quality, and thus safe and fit for human consumption.

4 37. Plaintiff purchased and consumed the subject product, and reasonably relied upon  
5 the skill and judgment of Defendants HEINEKEN, KROGER, JOHN DOE DISTRIBUTOR, and  
6 DOES 2 to 30 inclusive, and each of them, as to whether the subject product was of merchantable  
7 quality and fit for human consumption.

8 38. Defendants HEINEKEN, KROGER, JOHN DOE DISTRIBUTOR, and DOES 2 to  
9 30 inclusive, and each of them, breached these implied warranties in that the subject product was  
10 contaminated with 2 geckos inside the HEINEKEN beer can.

11 39. As a direct, legal, and proximate result of the breach of implied warranties, Plaintiff  
12 suffered and will continue to suffer injury, harm, special damages, and economic loss.

13 **THIRD CAUSE OF ACTION**

14 **NEGLIGENCE AND NEGLIGENCE *PER SE***

15 (As Against All Defendants)

16 40. Plaintiff hereby repeats and incorporates by reference the preceding paragraphs as  
17 though set forth fully herein.

18 41. Defendants HEINEKEN, KROGER, JOHN DOE DISTRIBUTOR, and DOES 2 to  
19 30 inclusive, and each of them, were negligent in the manufacture, sale, bottling, distributing,  
20 canning, handling, and/or distribution of the subject product, thus causing Plaintiff's injuries and  
21 damages.

22 42. More specifically, Defendants HEINEKEN, KROGER, JOHN DOE  
23 DISTRIBUTOR, and DOES 2 to 30 inclusive, and each of them, owed a duty to properly supervise,  
24 train, and/or monitor employees, and/or the employees of their agent or subcontractors, the  
25 preparation of the subject product so as to ensure compliance with each Defendants' own  
26 specification and performance standards, as well as ensure compliance with all applicable health  
27 regulations including, but not limited to, Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 342(a)  
28 and its implementing regulations, see C.F.R. § 109.3(c) and (d), FDA Good Manufacturing Practices



1 regulations, 21 C.F.R. Part 110, Subparts (A) – (G), and California Sherman Food, Drug, and Cosmetic  
2 Act, California Health and Safety Code § 110545. Defendants HEINEKEN, KROGER, JOHN DOE  
3 DISTRIBUTOR, and DOES 2 to 30 inclusive, and each of them, violated one or more of the safety  
4 requirements that the law imposed and, as a direct, legal and proximate result, breached duties owed  
5 to Plaintiff and caused Plaintiff's injuries and damages as a direct, legal, and proximate result of  
6 such breaches.

7 43. Defendants HEINEKEN, KROGER, JOHN DOE DISTRIBUTOR, and DOES 2 to  
8 30 inclusive, and each of them, additionally owed a duty to comply with statutory and regulatory  
9 provisions that pertained or applied to either the import, manufacture, distribution, storage, or sale  
10 of their product including, but not limited to, Federal Food, Drug, and Cosmetics Act, §402(a), as  
11 codified at 21 U.S.C. §342(a), which bans the manufacture, sale, and distribution of any adulterated  
12 food or drink, and California Sherman Food, Drug, and Cosmetic Act, California Health and Safety  
13 Code § 110545, which imposes an identical ban on such adulteration.

14 44. Under both federal and state law, food or drink is adulterated if it contains a  
15 "poisonous or deleterious substance, which may render it injurious to health." The presence of two  
16 geckos in the can of HEINEKEN beer is such a substance. Thus, by the manufacture, distribution,  
17 canning, bottling, storage, and/or sale of the subject product, Defendants HEINEKEN, KROGER,  
18 JOHN DOE DISTRIBUTOR, and DOES 2 to 30 inclusive, and each of them, and each of them,  
19 breached their statutory and regulatory duties, and Plaintiff was injured as a direct and proximate  
20 cause of such breaches.

21 45. Defendants HEINEKEN, KROGER, JOHN DOE DISTRIBUTOR, and DOES 2 to  
22 30 inclusive, and each of them, committed negligent acts and omissions including, but not limited  
23 to:

- 24 (a) Failure to prevent contamination of the HEINEKEN beer with the 2 geckos, including  
25 failure to implement or non-negligently perform inspection and monitoring of the  
26 subject product so that its adulterated condition would be discovered prior to its sale or  
27 distribution to the public for human consumption;

1 (b) Failure to properly supervise, train, and/or monitor their employees, or the employees of  
2 their agents, subcontractors, on how to ensure the manufacture, distribution or sale of the  
3 subject product free of adulteration by foreign items and/or lethal pathogens.

4 46. The federal and state food and drink safety regulations applicable here, and as set forth  
5 above, establish a positive and definitive standard of care in the import, manufacture, distribution,  
6 canning, bottling, storage, and/or sale of food and drink for human consumption, and the violation of  
7 these regulations constitutes negligence *per se*.

8 47. Plaintiff was in the class of persons intended to be protected by these statutes and  
9 regulations, and was injured and damaged as the direct and proximate result of Defendants' violation  
10 of applicable federal, state and local food and drink safety regulations.

11 48. Defendants HEINEKEN, KROGER, JOHN DOE DISTRIBUTOR, and DOES 2 to  
12 30 inclusive, and each of them, breached the aforementioned duties as alleged above, which breach  
13 constituted the proximate cause of the injury to Plaintiff.

14 **FOURTH CAUSE OF ACTION**

15 **NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**

16 (As Against All Defendants)

17 49. Plaintiff hereby repeats and incorporates by reference the preceding paragraphs as  
18 though set forth fully herein.

19 50. Defendants HEINEKEN, KROGER, JOHN DOE DISTRIBUTOR, and DOES 2 to  
20 30 inclusive, and each of them, knew or should have known that their failure to exercise due care in  
21 the performance of their duties would cause Plaintiff to suffer severe emotional distress.

22 51. As a proximate result of the acts of Defendants HEINEKEN, KROGER, JOHN DOE  
23 DISTRIBUTOR, and DOES 2 to 30 inclusive, and each of them, as alleged above, Plaintiff suffered  
24 severe emotional distress and mental suffering all to Plaintiff's detriment.

25 **DAMAGES**

26 52. Plaintiff has suffered general and special, incidental and consequential, damages as  
27 the direct and proximate result of the acts and omissions of Defendants HEINEKEN, KROGER,  
28 JOHN DOE DISTRIBUTOR, and DOES 2 to 30 inclusive, and each of them, which damages shall

1 be fully proven at the time of trial, including but not limited to, damages for loss of enjoyment of  
2 life, both past and future; medical and medical related expenses, both past and future; wage and  
3 economic loss, past and future; emotional distress, and future emotional distress; medical and  
4 pharmaceutical expenses, past and future; and other ordinary, incidental and consequential damages  
5 as would be expected and anticipated to arise under the circumstances.

6 WHEREFORE, Plaintiff prays for judgment against defendants, and each of them, for  
7 all causes of action, as follows:

- 8 1. For general damages in an amount to be ascertained;
- 9 2. For actual medical expenses incurred;
- 10 3. For future medical expenses according to proof;
- 11 4. For actual loss of earnings sustained;
- 12 5. For future loss of earnings according to proof;
- 13 6. For interest according to law;
- 14 7. For costs of suit incurred herein; and
- 15 8. For such other and further relief as the Court may deem just and proper.

16  
17 DATED: August 4, 2017

**DiMARCO | ARAUJO | MONTEVIDEO**  
A Professional Law Corporation

18  
19  
20 By: 

JOHN A. MONTEVIDEO  
ZAHRA H. AZIZ  
Attorneys for Plaintiff

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24 4828-9818-7596, v. 1