IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA,	)	
Plaintiff,	)	
V.	)	**CIVIL ACTION NO. SA-20-CA-0040-FB**
MEDITERRANEAN GRILL & KABOB INC. d/b/a Pasha Mediterranean Grill, ET AL.,	)	
Defendants.	)	

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Before the Court are Travelers Casualty Insurance Company of America's Motion for Summary Judgment and Memorandum in Support (docket no. 145); The Patrons' Response to Travelers's Motion for Summary Judgment, Objections to Summary Judgment Evidence and Alternative Motion for Continuance (docket no. 146); Defendant Mediterranean Grill & Kabob Inc's Response to Plaintiff's Motion for Summary Judgment, and Objections to Summary Judgment Evidence (docket no. 149); Travelers Casualty Insurance Company of America's Reply Memorandum in Support of Motion for Summary Judgment (docket no. 152); and The Patrons' Sur-reply in Support of their Response to Travelers' Motion for Summary Judgment (docket no. 153). After careful consideration, the Court is of the opinion that the motion for summary judgment should be granted, the objections to the summary judgment evidence should be overruled, and the alternative request for a continuance should be denied.

The question in this insurance case is whether 124 separate cases of food poisoning, all allegedly caused by a single restaurant over a four-day period, are a single "occurrence," within the terms of the restaurant's insurance policy. Under the facts of this case, the Court concludes the 124 cases of food poisoning are a single "occurrence."

BACKGROUND

Mediterranean Grill & Kabob Inc. d/b/a Pasha Mediterranean Grill ("Pasha") operates a restaurant in San Antonio, Texas. Between August 29 and September 1, 2018, nearly 200 cases of food poisoning from salmonella bacteria were reported in San Antonio, all after patrons ("the Claimants") ate at Pasha. The food poisonings gave rise to seven lawsuits ("the Claims"), each of which alleged Pasha was negligent in the manufacture and preparation of the food, and that Pasha's negligence was a proximate cause of the food poisonings at issue.

Travelers Casualty Insurance Company of America ("Travelers") was Pasha's primary insurer at the time of the food poisonings under a Commercial General Liability policy. The policy contains a $1 million "per occurrence" coverage limit, and a $2 million "aggregate" limit.

Some of the Claims associated with the food poisonings have settled, with Travelers paying out approximately $450,000 of its $1 million "per occurrence" limit. Travelers has offered the remainder of the $1 million limit to settle the remaining 124 Claims, but its offer has been rejected.

Travelers therefore filed this declaratory judgment action against Pasha and the remaining 124 Claimants. If the food poisoning cases are all a single "occurrence," as Travelers maintains, Travelers will be liable only for the remainder of its $1 million "per occurrence" limit. If, on the other hand, the food poisonings are 124 separate occurrences, as defendants contend, Travelers will have to pay over $1.5 million. For the following reasons, the Court concludes the food poisoning cases were a single "occurrence" under the policy. Consequently, Travelers' coverage limit is $1 million.

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). "The movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of

material fact." *Lincoln Gen. Ins. Co. v. Reyna*, 401 F.3d 347, 349 (5th Cir. 2005) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-25 (1986)). Where, as here, the movant bears the burden of proof at trial because it is the plaintiff, it "must establish beyond peradventure *all* of the essential elements of the claim . . . to warrant judgment in [its] favor." *Fontenot v. Upjohn Co.,* 780 F.2d 1190, 1194 (5th Cir. 1986) (emphasis in original). A dispute about a material fact is "genuine" if the evidence is such that a reasonable fact finder could render a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). In ruling on a motion for summary judgment, the Court must view all evidence in the light most favorable to the non-movant and "draw all reasonable inferences in favor of the non-moving party." *Chaplin v. NationsCredit Corp.,* 307 F.3d 368, 372 (5th Cir. 2002) (citing *Anderson,* 477 U.S. at 249-50).

DISCUSSION

Defendants' Objections to Travelers' Summary Judgment Evidence

As an initial matter, the court finds that defendants' evidentiary objections to the Declaration of Benjamin B. Adam are without merit. The declaration reflects that Mr. Adams' statement that "it is believed that the contaminated hummus was the source of the salmonella" is based on Mr. Adams personal knowledge gained through investigation the salmonella food poisoning claims and participating in Pasha's defense of those claims. In addition, Mr. Adams does not offer legal conclusions but instead describes the theories of liability alleged in the underlying pleadings as well as attaches copies of those pleadings for the Court's consideration. Accordingly, the objections are overruled.

A Single "Occurrence" Caused the Claims

"Insurance policies are controlled by rules of interpretation and construction which are applicable to contracts generally. The primary concern of a court in construing a written contract is to

ascertain the true intent of the parties as expressed in the instrument." *National Union Fire Ins. Co. v. CBIIndus., Inc.,* 907 S.W.2d 517, 520 (Tex. 1995) (citations omitted).

Here, the policy contains a definition of the term occurrence: "Occurrence" means "an accident, including continuous or repeated exposure to the same general harmful conditions." The term "accident" is not separately defined in the policy, but the Texas Supreme Court has said that "[a]n accident is generally understood to be a fortuitous, unexpected, and unintended event." *Lamar Homes, Inc. v. Mid-Continent Cas. Co.,* 242 S.W.3d 1, 8 (Tex. 2007). Further, the Fifth Circuit has stated that "both state and federal courts in Texas have interpreted the terms 'accident' and 'occurrence' to include damage that is the unexpected, unforeseen or undesigned happening or consequence of an insured's negligent behavior." *Federated Mut. Ins. Co. v. Grapevine Excavation Inc.,* 197 F.3d 720, 725 (5th Cir. 1999) (quotation omitted).

Because the term "occurrence" is defined to mean "an accident" and not "a series of "accidents," defendants could argue that the food poisoning accidents constitute three separate occurrences. However, as the parties both acknowledge, "Texas courts agree that the proper focus in interpreting 'occurrence" is on the events that cause the injuries and give rise to the insured's liability, rather than on the number of injurious effects." *H.E. Butt Grocery Co. v. National Union Fire Ins. Co.,* 150 F.3d 526, 530 (5th Cir. 1998).

Several events "caused" a pause or interruption in the injuries in the underlying lawsuits, including when Pasha closed each night, as well as each time a new batch of food was prepared. However, only one cause gave rise to Pasha's liability, and that is Pasha's allegedly contaminated food. Thus, under Texas's "cause" analysis it appears there was a single, continuous event that both allegedly caused the injuries in the underlying suits, and gave rise to Pasha's liability. Therefore, the food poisonings were a single "occurrence" under the policy.

Importantly, this conclusion comports with the language of the policy. Included in the definition of occurrence is "continuous or repeated exposure to the same general harmful conditions." The allegedly harmful condition here was food that had been contaminated with salmonella bacteria and, therefore increased the risk of illness and possibly death. Individual patrons were continuously exposed to this alleged condition while they ate Pasha's food, and patrons, as a group, were repeatedly exposed to it.

The conclusion that there was only one "occurrence" is also consistent with *Evanston Insurance Co. v. Mid-Continent Casualty Co.,* 909 F.3d 143, 150 (5th Cir. 2018). In *Evanston*, the Court applied Texas law to find the ongoing negligence of a runaway Mack truck was the uninterrupted, continuing cause of a multi-vehicle accident because that there was no indication the driver regained control of the truck or that his negligence was otherwise interrupted between collisions. *Id.* at 151. Here, much like the *Evanston* car accident case where the parties agreed the insured "did not apply the brakes until all the vehicles came to rest,"*id.,* after Pasha's alleged negligence allowed the food to become contaminated, there is no allegation or evidence that Pasha returned to preparing food safely, allowed the food to become contaminated again, and then, because of Pasha's negligence, exposed more patrons to contaminated food. Thus, Pasha's purported negligence is alleged to have caused one uninterrupted chain of events, meaning there was but one proximate, uninterrupted and continuing cause of the contamination for which it may be liable.

Multiple Acts Do Not Necessarily Equate to Multiple "Occurrences"

Defendants argue multiple acts, such as a pause or interruption in business operations during the course of the negligent conduct, equates to multiple occurrences. *Foust v. Ranger Insurance Company,* 975 S.W.2d 329, 331 (Tex. App.–San Antonio 1998, writ denied), illustrates that mere

pauses in the causal chain such as the closing and reopening of Pasha's restaurant and the preparing of different batches of food do not create separate occurrences.

In *Foust*, a pilot was hired to dust a farmer's fields with herbicide and some of the herbicide drifted onto neighboring tracts of land. The neighbors and the pilot's insurer disputed the number of occurrences that had taken place. *Id.* at 333. The crop dusting procedure lasted almost three hours, and the neighbors emphasized the plane had to land for refueling several times during the period and that the altitude, wind and temperature varied during the various passes made by the pilot. *Id.*

The San Antonio Court of Appeals, focusing on the plain meaning of the policy language, concluded there was only one occurrence. *Id.* at 335. The crop dusting process had damaged the neighboring tracts and despite the fact that the "single procedure" required the plane to land for refueling on several occasions or change altitude did not affect the continuous nature of the crop dusting. *Id.* "In other words, because the Court in *Foust* considered all the injuries to have been caused by the same continuous negligence of the insured, there was only one occurrence under the policy." *See Evanston,* 909 F.3d at 150. Here, as in *Foust*, where a separate occurrence did not occur each time the crop dusting airplane made a pass over the target area and stopped to reload while performing the job, a separate occurrence did not occur each time Pasha prepared a new batch of food or closed overnight during the salmonella outbreak

Defendants argue "*Foust* predates *Evanston* by twenty years. . . . , does not appear to have applied the cause test, and to the extent that it suggested that a pause would not result in multiple occurrences in San Antonio in 1998, the Fifth Circuit [in *Evanston*] has explained that a pause does result in multiple occurrences in the Fifth Circuit in 2020." This argument is not persuasive. In *Evanston*, the Fifth Circuit cited to *Foust* as "the seminal Texas case on the topic" and confirmed that Texas law comports with its understanding of how the number of occurrences is to be analyzed. 909

F.3d at 149 (citing *Foust,* 975 S.W.2d at 331). Specifically, the Fifth Circuit explained, "because the Court in *Foust* considered all the injuries to have been caused by the same continuous negligence of the insured, there was only one occurrence under the policy." *Id.* at 150. Here, as in *Foust*, although there were events distinguishable in time and/or space, the insured's negligence was one proximate, uninterrupted and continuing cause which resulted in all of the alleged injuries and damage.

In support of their multiple "occurrence" theory, defendants also cite *Goose Creek Consolidated ISD v. Continental Casualty Company,* 658 S.W.2d 338, 339 (Tex. App.–Houston [1st Dist.] 1983, no writ), and *H.E. Butt Grocery Co. v. National Union Fire Insurance Co.,* 150 F.3d 526, 530 (5th Cir. 1998). In both of these cases, an intentional tort was found to have broken the causal chain. Here, defendants point to no intervening tort or independent negligence which interrupted the proximate and continuing cause of the Claimants' injuries, *i.e.,* the salmonella contamination.

The Cause of the Contamination

Defendants suggest there are multiple occurrences because the parties do not know which products were contaminated. They also imply there are multiple occurrences because the salmonella poisoning appears to have more than one cause. Food poisoning cases from outside this Circuit are instructive.

In *Republic Underwriters Ins. Co. v. Moore,* 493 F. App'x 907, 909 (10th Cir. 2012), the exact source of the E.Coli contamination was unknown. A report issued by the Oklahoma Department of Health "was inconclusive as to how the bacteria contaminated the restaurant and spread during the outbreak" but "the Claimants observed that the report suggested multiple likely contributing factors, including contamination by food-handlers, as well as cross-contamination from food-preparation equipment, counter surfaces, and storage areas." *Id.* The Tenth Circuit Court of Appeals determined that the potential for multiple and indeterminate contributing factors was irrelevant:

> As long as the injuries stem from one proximate cause, there is a single occurrence. Here, all the injuries were proximately caused by the restaurant's ongoing preparation of contaminated food. Hence, there was but one occurrence. It does not matter that the food was served with other food items prepared at another location because the contamination originated at the restaurant. Nor does it matter that the precise underlying cause of the contamination is unknown because the fact remains that the contamination originated at the restaurant.

Id. at 912 (internal citations omitted).

Here, the City of San Antonio Metropolitan Health District's report was similarly inconclusive as to how the Salmonella bacteria contaminated the Pasha restaurant and spread during the outbreak. In addition, the report also suggested multiple likely contributing factors like the presence of unclean utensils and improper hand washing procedures. As in *Moore,* although the source of the contamination is unknown, "the fact remains that the contamination originated at the restaurant." *Id.*

In Moore, the Tenth Circuit also applied the "cause" approach to find only one "occurrence" in the continuing preparation, handling, and storage of contaminated food despite the fact that the actual injuries' occurred in different locations over several days. 493 F. App'x at 909-13. There, the Court considered whether bodily injury sustained by 341 people who consumed E.coli contaminated food served by a restaurant over a ten day period at two different locations was caused by a single "occurrence." The Court of Appeals rejected the claimants' arguments that each sale of contaminated food was a separate "occurrence" and also reversed the lower court's ruling that two "occurrences" (based on two places of food preparation) were at issue. *Id.* at 913. The Tenth Circuit held that "all of the injuries were caused by the restaurant's ongoing preparation of contaminated food." *Id.* Applying the analysis in *Moore* to the facts of this case, the causal chain flowing from Pasha's ongoing negligence to the claimants' injuries was not broken by Pasha's preparation of different meals with different contaminated foods at different times by different employees over the course of four days.

Similarly, in *Western World Insurance. Co. v. Wilkie,* No. 5:06-CV-64-H(3), 2007 WL 3256947, at *1 (E.D.N.C. Nov. 2, 2007), several children were exposed over the course of ten days to E-Coli as a result of contact with animals at the insured's petting zoo at the North Carolina State fair. The insured argued multiple "occurrences" were at issue because the children were exposed through multiple incidents in multiple places at different times. *Id.* at *3. Applying the "cause test," the Court rejected those arguments and held that, while "it was impossible to determine exactly how each individual defendant was exposed," there was a single occurrence because the "presence of E. coli at the petting zoo is the general harmful condition to which defendants were exposed, and the cause of this condition was [the insured's] ongoing negligence." *Id.* at *5. As in *Wilkie*, the lack of information regarding the source of the salmonella contamination does not create multiple occurrences under the Policy.

Defendants also argue that the lack of information regarding exactly how the food was exposed to and contaminated by salmonella precludes summary judgment because Pasha might have purchased already contaminated food. *See Maurice Pincoffs Co. v. St. Paul Fire & Marine Ins. Co.,* 447 F.2d 204 (5th Cir. 1971) (reasoning that insured's liability arose from each sale of contaminated seed and concluding there were eight "occurrences" for purposes of general liability insurance policy). This argument is inconsistent with the position of the Claims, all of which maintain that Pasha "manufactured" and "prepared" contaminated food products for products and strict liability causes of action arising out of Pasha's sale of the contaminated food products. Accordingly, the Claimants have judicially admitted that Pasha manufactured and prepared the contaminated food which allegedly made them sick. *See Val-Com Acquisitions Trust v. CityMortgage, Inc.,* 421 F. App'x 398 (5th Cir. 2011) ("In a declaratory judgment action, the parties litigate the underlying claim, and the declaratory judgment is merely a form of relief that the court may grant.").

Moreover, *Pincoffs* does not support a contrary conclusion under Texas law. In *Pincoffs,* the insured had unknowingly imported bird seek which had been contaminated in Argentina and then sold the previously contaminated seed to eight different dealers who in turn sold it to consumers. *Id.* at 207. As the Southern District of Texas observed in *Westchester Surplus Lines Co. v. Maverick Tube Corp.,* 722 F. Supp. 2d 787, 797 (S.D. Tex. 2010), the insured in *Pincoffs* was not the seed manufacturer, but rather the importer and wholesale distributor who had no role in causing the contamination. In other words, it was the insured's sale of the already contaminated seed in *Pincoffs* which gave rise to its liability, not the preexisting contamination of the seed. *Maurice Pincoffs Co.,* 447 F.2d at 206. Unlike the insured in *Pincoffs,* Pasha's liability does not arise from the sale of food made by other persons or entities, but instead arises from its own preparation of a contaminated product which was then sold to the Claimants.

Texas federal district courts have held that multiple claims arising from the same defect in the same product are caused by a single occurrence. In *Maverick Tube,* the Court held that a single occurrence applied to the insured's liability for defectively manufactured drill casings which were incorporated into and damaged four different wells. 772 F. Supp. 2d at 792. Relying on Texas precedent, the Court found;

> The liability-causing event was [the insured's] defective manufacturing of the drill casings. All of the damage flowed proximately from the manufacturing defect. Neither the sale of the casings nor its installation . . . were necessary to make [the insured] liable. Nor did those later events interrupt the causal chain.

Id. at 796. The Court emphasized the defect in the "manufacturing process," not the eleven downstream sales of the casing or its installation in the four wells, was the event which triggered [the insured's] liability and exposed others to harm." *Id.* Therefore, the "'cause' analysis support[ed] a conclusion that [the insured's] defective manufacturing was a single 'occurrence.'" *Id.* at 796-97.

In *National Union Fire Ins. Co. v. Puget Plastics Corp.,* 649 F. Supp. 2d 613, 629 (S.D. Tex. 2009), the Court found that damages arising from the insured's manufacturing defects were caused by a single "occurrence" under Texas law. The insured in *Puget Plastics* defectively manufactured plastic water chambers which were sold and then incorporated into 800 water heaters which allegedly failed, causing water damage. *Id.* at 631. Although the damage to those 800 heaters was caused by 800 defective water chambers, the Court emphasized that "[m]ost courts have . . . held that there is a single occurrence when multiple claims have arisen from the policyholder's manufacture and sale of the same product to many customers." *Id.* at 628. The Court ultimately concluded that the "finding of a single occurrence when liability stems from a manufacturer's defects" is "consistent with Texas (and nationwide) precedent." *Id.* at 629. Like the claims in *Maverick Tube* and *Puget Plastics*, the Claims at issue here resulted from a single, proximate cause–Pasha's contaminated food.

A Continuance to Determine the Cause of the Salmonella Outbreak is Unwarranted

In the alternative to their suggestion that there were multiple occurrences or that the motion must be denied because the exact source of the salmonella bacteria is unknown, defendants move for a continuance to conduct discovery in order to determine how the food was contaminated. Defendants have not demonstrated that additional discovery is likely to yield a conclusive determination. It has been over two years since the salmonella contamination occurred and the City of San Antonio Metropolitan Health District was unable to conclusively determine the exact source of the contamination in its investigation shortly after the outbreak. Without more, permitting additional discovery would be futile. *Malbrough v. Kanawha Ins. Co.,* 943 F. Supp. 2d 684, 693 (W.D. La. 2013) ("This [Circuit] has long recognized that "entitlement to discovery prior to a ruling on a motion for summary judgment is not unlimited, and may be cut off when the record shows that the requested discovery is not likely to produce the facts needed . . . to withstand a motion for summary judgment.")

(citing *Fisher v. Metropolitan Life Ins. Co.,* 895 F.2d 1073 (5th Cir. 1990); *Netto v. Amtrak,* 863 F.2d 1210, 1216 (5th Cir. 1989); *Paul Kadair, Inc. v. Sony Corp of Am.,* 694 F.2d 1017, 1029-30 (5th Cir. 1983)). Accordingly, the request for a continuance to determine the source of the salmonella contamination is denied.

IT IS THEREFORE ORDERED that Travelers Casualty Insurance Company of America's Motion for Summary Judgment (docket no. 145) is GRANTED such that the Court finds that the Claimants' injuries were caused by a single "occurrence" and that Travelers' liability under the policy for the damages sought is capped at the Policy's $1 million per occurrence limit.

It is so ORDERED.

SIGNED this 4th day of November, 2020.

FRED BIERY
UNITED STATES DISTRICT JUDGE