

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

DISCOVER PROPERTY & CASUALTY)
INSURANCE COMPANY AND THE)
TRAVELERS INDEMNITY COMPANY)
OF CONNECTICUT,)

Plaintiffs,)

v.)

Civil Action No.: 1:21-cv-00487

BLUE BELL CREAMERIES USA, INC.,)
BLUE BELL CREAMERIES, L.P.,)
BLUE BELL CREAMERIES, INC., JOHN)
W. BARNHILL, JR., GREG A. BRIDGES,)
RICHARD DICKSON, PAUL A.)
EHLERT, JIM E. KRUSE, PAUL W.)
KRUSE, W.J. RANKIN, HOWARD W.)
KRUSE, PATRICIA I. RYAN, AND)
DOROTHY MCLEOD MACINERNEY,)

Defendants.)

JURY DEMAND

DEFENDANTS’ ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM

Defendants Blue Bell Creameries USA, Inc., Blue Bell Creameries, L.P., Blue Bell Creameries, Inc., John W. Barnhill, Jr., Greg A. Bridges, Richard Dickson, Paul A. Ehlert, Jim E. Kruse, Paul W. Kruse, W.J. Rankin, Howard W. Kruse, Patricia I. Ryan, and Dorothy McLeod MacInerney (collectively, the “Blue Bell Defendants”), by and through their undersigned counsel, hereby file their Answer, Affirmative Defenses, and Counterclaim in response to the Complaint filed by Plaintiffs Discover Property & Casualty Insurance Company and The Travelers Indemnity Company of Connecticut (collectively, “Plaintiffs” or “Travelers”).

GENERAL DENIAL

The Blue Bell Defendants deny that Plaintiffs are entitled to the declaratory judgment and other relief that they seek. Plaintiffs' Complaint contains purported excerpts from and refers to the insurance policies they sold to the Blue Bell Defendants, the underlying case complaint, and other materials. Such materials speak for themselves, and the Blue Bell Defendants respectfully refer the Court to the respective documents for the complete contents thereof. The Blue Bell Defendants also generally deny any averments in the Complaint's headings and subheadings. Any allegation that is not specifically admitted below is denied.

SPECIFIC RESPONSES

I.

PARTIES AND SERVICE

1. In response to Paragraph 1, the Blue Bell Defendants admit that Discover Property & Casualty Insurance Company is a Connecticut corporation with its principal places of business in Hartford, Connecticut.

2. In response to Paragraph 2, the Blue Bell Defendants admit that The Travelers Indemnity Company of Connecticut is a Connecticut corporation with its principal places of business in Hartford, Connecticut.

3. In response to Paragraph 3, the Blue Bell Defendants admit that Blue Bell Creameries USA, Inc. is a Delaware Corporation with its principal place of business in Brenham, Texas. The remainder of Paragraph 3 alleges a legal conclusion to which no response is required.

4. In response to Paragraph 4, the Blue Bell Defendants admit that Blue Bell Creameries, L.P. is a Delaware limited partnership headquartered in Brenham, Texas. The remainder of Paragraph 4 alleges a legal conclusion to which no response is required.

5. In response to Paragraph 5, the Blue Bell Defendants admit that Blue Bell Creameries, Inc. is a Delaware corporation with its principal place of business in Brenham, Texas. The remainder of Paragraph 5 alleges a legal conclusion to which no response is required.

6. In response to Paragraph 6, the Blue Bell Defendants admit that John W. Barnhill, Jr. (“Mr. Barnhill”) is an individual who resides in Washington County, Texas. The Blue Bell Defendants also admit for jurisdictional purposes only that Mr. Barnhill is a citizen of Texas. The remainder of Paragraph 6 alleges a legal conclusion to which no response is required.

7. In response to Paragraph 7, the Blue Bell Defendants admit that Greg A. Bridges (“Mr. Bridges”) is an individual who resides in Washington County, Texas. The Blue Bell Defendants also admit for jurisdictional purposes only that Mr. Bridges is a citizen of Texas. The remainder of Paragraph 7 alleges a legal conclusion to which no response is required.

8. In response to Paragraph 8, the Blue Bell Defendants admit that Richard Dickson (“Mr. Dickson”) is an individual who resides in Washington County, Texas. The Blue Bell Defendants also admit for jurisdictional purposes only that Mr. Dickson is a citizen of Texas. The remainder of Paragraph 8 alleges a legal conclusion to which no response is required.

9. In response to Paragraph 9, the Blue Bell Defendants admit that Paul Ehlert (“Mr. Ehlert”) is an individual who resides in Washington County, Texas. The Blue Bell Defendants also admit for jurisdictional purposes only that Mr. Ehlert is a citizen of Texas. The remainder of Paragraph 9 alleges a legal conclusion to which no response is required.

10. In response to Paragraph 10, the Blue Bell Defendants admit that Jim E. Kruse is an individual who resides in Washington County, Texas. The Blue Bell Defendants also admit for jurisdictional purposes only that Jim E. Kruse is a citizen of Texas. The remainder of Paragraph 10 alleges a legal conclusion to which no response is required.

11. In response to Paragraph 11, the Blue Bell Defendants admit that Paul W. Kruse is an individual who resides in Washington County, Texas. The Blue Bell Defendants also admit for jurisdictional purposes only that Paul W. Kruse is a citizen of Texas. The remainder of Paragraph 11 alleges a legal conclusion to which no response is required.

12. In response to Paragraph 12, the Blue Bell Defendants admit that W.J. Rankin (“Mr. Rankin”) is an individual who resides in Washington County, Texas. The Blue Bell Defendants also admit for jurisdictional purposes only that Mr. Rankin is a citizen of Texas. The remainder of Paragraph 12 alleges a legal conclusion to which no response is required.

13. In response to Paragraph 13, the Blue Bell Defendants admit that Howard W. Kruse is an individual who resides in Washington County, Texas. The Blue Bell Defendants also admit for jurisdictional purposes only that Howard W. Kruse is a citizen of Texas. The remainder of Paragraph 13 alleges a legal conclusion to which no response is required.

14. In response to Paragraph 14, the Blue Bell Defendants admit that Patricia I. Ryan (“Ms. Ryan”) is an individual who resides in Kendall County, Texas. The Blue Bell Defendants also admit for jurisdictional purposes only that Ms. Ryan is a citizen of Texas. The Blue Bell Defendants deny that Ms. Ryan resides in Blanco County, Texas. The remainder of Paragraph 14 alleges a legal conclusion to which no response is required.

15. In response to Paragraph 15, the Blue Bell Defendants admit that Dorothy McLeod MacInerney (“Ms. MacInerney”) is an individual who resides in Travis County, Texas. The Blue Bell Defendants also admit for jurisdictional purposes only that Ms. MacInerney is a citizen of Texas. The remainder of Paragraph 15 alleges a legal conclusion to which no response is required.

16. In response to Paragraph 16, the Blue Bell Defendants admit that Plaintiffs’ Complaint refers to Blue Bell Creameries, USA, Inc. as “Blue Bell.” The Blue Bell Defendants

also admit that, at times, Plaintiffs' Complaint refers collectively to Blue Bell Creameries, USA, Inc., Blue Bell Creameries, L.P., and Blue Bell Creameries, Inc. as the "Blue Bell Entities." The Blue Bell Defendants further admit that Plaintiffs' Complaint, at times, refers to the individuals listed above collectively as the "Officers and Directors." In addition, the Blue Bell Defendants admit that Plaintiffs' Complaint refers to the Blue Bell Entities and the Officers and Directors collectively as "Defendants."

II.
JURISDICTION AND VENUE

17. In response to Paragraph 17, the Blue Bell Defendants admit that Plaintiffs have brought an action seeking certain declaratory relief pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.* and Federal Rule of Civil Procedure 57, but deny that Plaintiffs are entitled to the relief that they seek.

18. The Blue Bell Defendants admit the allegations of Paragraph 18 for jurisdictional purposes only.

19. The Blue Bell Defendants admit the allegations of Paragraph 19 for jurisdictional purposes only.

20. The Blue Bell Defendants admit the allegations of Paragraph 20 for jurisdictional purposes only.

21. The Blue Bell Defendants admit the allegations of Paragraph 21 for venue purposes only.

III.
INTRODUCTION AND FACTUAL BACKGROUND

22. In response to the first sentence of Paragraph 22, the Blue Bell Defendants admit that a Blue Bell shareholder initiated a derivative action on behalf of Blue Bell Creameries USA,

Inc. against certain Blue Bell directors and officers styled *Marchand v. Barnhill*, CA. No. 2017-0586-JRS, filed in the Delaware Court of Chancery (the “Underlying Case”). The allegations of the Underlying Case speak for themselves, and the Blue Bell Defendants respectfully refer to the Underlying Case for the complete contents thereof. To the extent the allegations in the first sentence of Paragraph 22 are inconsistent with the Underlying Case, the Blue Bell Defendants deny them. In further response to the first sentence of Paragraph 22, the Blue Bell Defendants admit that the Blue Bell Entities sent Travelers a tender letter regarding the Underlying Case on April 1, 2021, and refer to that letter for its complete contents. To the extent the allegations in the first sentence of Paragraph 22 are inconsistent with the content of that letter, the Blue Bell Defendants deny them. The second sentence of Paragraph 22 alleges a legal conclusion to which no response is required. To the extent a response is required, the Blue Bell Defendants deny those allegations. In response to the third sentence of Paragraph 22, the Blue Bell Defendants admit that Plaintiffs have brought an action seeking certain declaratory relief, but deny that Plaintiffs are entitled to the relief that they seek.

A. The Policies

23. In response to Paragraph 23, the Blue Bell Defendants admit that Plaintiffs issued to the Blue Bell Defendants various policies of commercial general liability insurance from 2009 through 2016 (the “Policies”). The terms of the Policies speak for themselves, and the Blue Bell Defendants respectfully refer to the Policies for the complete contents thereof. The Blue Bell Defendants deny the allegations of Paragraph 23 to the extent they are inconsistent with the terms of the Policies.

B. The Shareholder Suit

24. In response to Paragraph 24, the Blue Bell Defendants admit that on or about

August 14, 2017, a Blue Bell shareholder initiated the Underlying Case against certain Blue Bell directors and officers, and that a copy of the publicly filed version of the Verified Stockholder Derivative Action Complaint in the Underlying Case is attached as Exhibit A (the “Underlying Complaint”). The remainder of Paragraph 24 contains Plaintiffs’ characterization of the Underlying Complaint. The Underlying Complaint speaks for itself, and the Blue Bell Defendants respectfully refer to the Underlying Complaint for the complete contents thereof. The Blue Bell Defendants deny the allegations of Paragraph 24 to the extent they are inconsistent with the allegations of the Underlying Complaint.¹

25. In response to the first sentence of Paragraph 25, the Blue Bell Defendants admit that the Blue Bell Entities sent Travelers a tender letter regarding the Underlying Case on April 1, 2021, and refer to that letter for its complete contents. To the extent the allegations of the first sentence of Paragraph 25 are inconsistent with the content of that letter, the Blue Bell Defendants deny them. The Blue Bell Defendants also deny the remaining allegations in Paragraph 25.

26. Paragraph 26 contains Plaintiffs’ characterization of the Underlying Complaint, and quotes, in part, certain portions of the Underlying Complaint. The Underlying Complaint speaks for itself, and the Blue Bell Defendants respectfully refer to the Underlying Complaint for the complete contents thereof. The Blue Bell Defendants deny the allegations of Paragraph 26 to the extent they are inconsistent with the allegations of the Underlying Complaint.

27. Paragraph 27 contains Plaintiffs’ characterization of the Underlying Complaint, and quotes, in part, certain portions of the Underlying Complaint. The Underlying Complaint speaks

¹ The first sentence of Footnote 1 describes the Underlying Complaint. The Underlying Complaint speaks for itself, and the Blue Bell Defendants respectfully refer to the Underlying Complaint for the complete contents thereof. The Blue Bell Defendants deny the allegations of Footnote 1 to the extent they are inconsistent with the allegations of the Underlying Complaint. In response to the second sentence of Footnote 1, the Blue Bell Defendants lack knowledge or information sufficient to form a belief as to Travelers’ “knowledge of” or “position regarding” the allegations of the Underlying Complaint, and, therefore, deny them.

for itself, and the Blue Bell Defendants respectfully refer to the Underlying Complaint for the complete contents thereof. The Blue Bell Defendants deny the allegations of Paragraph 27 to the extent they are inconsistent with the allegations of the Underlying Complaint.

28. Paragraph 28 contains Plaintiffs' characterization of the Underlying Complaint, and quotes, in part, certain portions of the Underlying Complaint. The Underlying Complaint speaks for itself, and the Blue Bell Defendants respectfully refer to the Underlying Complaint for the complete contents thereof. The Blue Bell Defendants deny the allegations of Paragraph 28 to the extent they are inconsistent with the allegations of the Underlying Complaint.

29. Paragraph 29 contains Plaintiffs' characterization of the Underlying Complaint, and quotes, in part, certain portions of the Underlying Complaint. The Underlying Complaint speaks for itself, and the Blue Bell Defendants respectfully refer to the Underlying Complaint for the complete contents thereof. The Blue Bell Defendants deny the allegations of Paragraph 29 to the extent they are inconsistent with the allegations of the Underlying Complaint.

30. Paragraph 30 contains Plaintiffs' characterization of the Underlying Complaint, and quotes, in part, certain portions of the Underlying Complaint. The Underlying Complaint speaks for itself, and the Blue Bell Defendants respectfully refer to the Underlying Complaint for the complete contents thereof. The Blue Bell Defendants deny the allegations of Paragraph 30 to the extent they are inconsistent with the allegations of the Underlying Complaint.

31. Paragraph 31 contains Plaintiffs' characterization of the Underlying Complaint, and quotes, in part, certain portions of the Underlying Complaint. The Underlying Complaint speaks for itself, and the Blue Bell Defendants respectfully refer to the Underlying Complaint for the complete contents thereof. The Blue Bell Defendants deny the allegations of Paragraph 31 to the extent they are inconsistent with the allegations of the Underlying Complaint.

32. Paragraph 32 contains Plaintiffs' characterization of the Underlying Complaint. The Underlying Complaint speaks for itself, and the Blue Bell Defendants respectfully refer to the Underlying Complaint for the complete contents thereof. The Blue Bell Defendants deny the allegations of Paragraph 32 to the extent they are inconsistent with the allegations of the Underlying Complaint.

C. Duty to Defend and Indemnify Shareholder Suit Defendants Under the Policies

33. In response to Paragraph 33, the Blue Bell Defendants admit that they are seeking coverage from Travelers against the Underlying Case because the Underlying Case seeks damages that occurred "because of" bodily injury. The Blue Bell Defendants deny the remaining allegations of Paragraph 33, including the allegation that their coverage position is "wrong[.]"

34. Paragraph 34 quotes, in part, certain terms of the Policies. The terms of the Policies speak for themselves, and the Blue Bell Defendants respectfully refer to the Policies for the complete contents thereof.² The Blue Bell Defendants deny the allegations of Paragraph 34 to the extent they are inconsistent with the terms of the Policies.³

35. Paragraph 35 contains Plaintiffs' characterization of the Policies and quotes, in part, certain terms of the Policies. The terms of the Policies speak for themselves, and the Blue Bell Defendants respectfully refer to the Policies for the complete contents thereof. The Blue Bell Defendants deny the allegations of Paragraph 35 to the extent they are inconsistent with the terms of the Policies.

² Footnote 2 contains Plaintiffs' characterization of the Policies. The terms of the Policies speak for themselves, and the Blue Bell Defendants respectfully refer to the Policies for the complete contents thereof. The Blue Bell Defendants deny the allegations of Footnote 2 to the extent they are inconsistent with the terms of the Policies.

³ Footnote 3 quotes, in part, certain terms of the Policies. The terms of the Policies speak for themselves, and the Blue Bell Defendants respectfully refer to the Policies for the complete contents thereof. The Blue Bell Defendants deny the allegations of Footnote 3 to the extent they are inconsistent with the terms of the Policies

36. Paragraph 36 contains legal and other conclusions to which no response is required. To the extent a response is required, the Blue Bell Defendants deny the allegations in Paragraph 36.

37. Paragraph 37 contains legal and other conclusions to which no response is required. To the extent a response is required, the Blue Bell Defendants deny the allegations in Paragraph 37.

38. Paragraph 38 contains legal and other conclusions to which no response is required. To the extent a response is required, the Blue Bell Defendants deny the allegations in Paragraph 38.

39. Paragraph 39 contains legal and other conclusions to which no response is required. To the extent a response is required, the Blue Bell Defendants deny the allegations in Paragraph 39.

40. Paragraph 40 contains legal and other conclusions to which no response is required. To the extent a response is required, the Blue Bell Defendants deny the allegations in Paragraph 40.

41. Paragraph 41 contains legal and other conclusions to which no response is required. To the extent a response is required, the Blue Bell Defendants deny the allegations in Paragraph 41.

42. Paragraph 42 contains legal and other conclusions to which no response is required. To the extent a response is required, the Blue Bell Defendants deny the allegations in Paragraph 42.

43. Paragraph 43 contains legal and other conclusions to which no response is required. To the extent a response is required, the Blue Bell Defendants deny the allegations in Paragraph

43.

44. Paragraph 44 contains legal and other conclusions to which no response is required.

To the extent a response is required, the Blue Bell Defendants deny the allegations in Paragraph

44.

IV.

CAUSE OF ACTION: DECLARATORY JUDGMENT

45. In response to Paragraph 45, the Blue Bell Defendants hereby incorporate Paragraphs 1–44 of this Answer, as if fully set forth herein.

46. In response to Paragraph 46, the Blue Bell Defendants admit that an actual case or controversy exists between Plaintiffs and the Blue Bell Defendants regarding the availability of coverage for the Underlying Case under one or more of the Policies.

47. In response to Paragraph 47, the Blue Bell Defendants admit that Plaintiffs are seeking declaratory relief as described in Paragraph 47, but deny that Plaintiffs are entitled to the relief that they seek.

V.

ATTORNEYS' FEES

48. In response to Paragraph 48, the Blue Bell Defendants admit that Plaintiffs are seeking to recover their reasonable and necessary attorneys' fees, but deny that Plaintiffs are entitled to the relief that they seek.

VI.

JURY DEMAND

49. In response to Paragraph 49, the Blue Bell Defendants admit that Plaintiffs have requested a jury trial on all issues so triable.

PRAYER

The Blue Bell Defendants admit that Plaintiffs pray for a judgment regarding the relief

sought in Paragraphs (i), (ii), (iii), (iv), (v), (vi), and (vii) of their Prayer for Relief, but deny that Plaintiffs are entitled to any such relief

AFFIRMATIVE AND OTHER DEFENSES

The Blue Bell Defendants state the following affirmative and other defenses to Plaintiffs' claims, without assuming the burden of proof on such defenses that would otherwise rest on Plaintiffs:

FIRST DEFENSE

Plaintiffs' Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

Plaintiffs' Complaint is barred, in whole or in part, by the terms of the Policies sold to the Blue Bell Defendants by Travelers.

THIRD DEFENSE

Plaintiffs' Complaint is barred, in whole or in part, by the doctrine of waiver, estoppel, laches, or unclean hands.

FOURTH DEFENSE

Plaintiffs' Complaint is barred, in whole or in part, by public policy.

FIFTH DEFENSE

Plaintiffs' Complaint is barred, in part, because the duty to indemnify issue is not ripe.

SIXTH DEFENSE

The Blue Bell Defendants reserve the right to assert additional defenses as discovery or investigation in this matter may reveal.

PRAYER FOR RELIEF

WHEREFORE, having answered Plaintiffs' Complaint, the Blue Bell Defendants

respectfully request that this Court enter judgment against Travelers as follows:

- a. Declaring that, under the terms of the Policies and applicable law, Travelers has a duty to defend the Blue Bell Defendants in the Underlying Case;
- b. Declaring that, under the terms of the Policies and applicable law, Travelers is liable to reimburse, or to pay on the Blue Bell Defendant's behalf, all costs incurred by the Blue Bell Defendants to defend the Underlying Case to date;
- c. Declaring that, under the terms of the Policy and applicable law, Travelers is not entitled to any damages, costs, interest, attorneys' fees, and/or any other relief against the Blue Bell Defendants; and
- d. Granting such other and further relief as this Court deems just and proper, including awarding the Blue Bell Defendants their attorneys' fees and costs incurred in connection with this action.

JURY DEMAND

The Blue Bell Defendants hereby demand a trial by jury on all issues so triable raised in the Complaint.

COUNTERCLAIM

Counterclaimants Blue Bell Creameries USA, Inc., Blue Bell Creameries, L.P., Blue Bell Creameries, Inc., John W. Barnhill, Jr., Greg A. Bridges, Richard Dickson, Paul A. Ehlert, Jim E. Kruse, Paul W. Kruse, W.J. Rankin, Howard W. Kruse, Patricia I. Ryan, and Dorothy McLeod MacInerney (collectively, “Counterclaimants”),⁴ by and through their undersigned counsel, bring this Counterclaim against Discover Property & Casualty Insurance Company and The Travelers Indemnity Company of Connecticut (collectively, “Travelers”).

Parties

1. Travelers is the plaintiff in its Complaint and is before the Court for all purposes. Accordingly, service of this counterclaim may be had on its attorneys.
2. Counterclaimants have appeared and answered herein and are before the Court for all purposes.

Jurisdiction and Venue

3. The Court has jurisdiction over this counterclaim because it has jurisdiction over the original claim. Under 28 U.S.C. § 1332, diversity of citizenship exists between Counterclaimants and Travelers and the amount in controversy exceeds \$75,000, exclusive of interests and costs.
4. Venue is proper in this Court under 28 U.S.C. § 1391 because Travelers transacts substantial business in Texas, is subject to personal jurisdiction in this judicial district with respect to this civil action, and a substantial part of the events or omissions giving rise to the claims asserted in this counterclaim, including Travelers’ sale of the relevant insurance policies to the Blue Bell Entities, occurred in this judicial district.

⁴ Blue Bell Creameries USA, Inc. is referred to herein as “Blue Bell.” Blue Bell, Blue Bell Creameries, L.P., and Blue Bell Creameries, Inc. are referred to herein as “the Blue Bell Entities.”

5. This Court has personal jurisdiction over Travelers by virtue of Travelers submitting themselves to the jurisdiction of this Court by filing their Complaint.

Factual Background

THE POLICIES AT ISSUE

6. From January 1, 2009 - January 1, 2012 and again from January 1, 2013 - January 1, 2016, the Blue Bell Entities purchased commercial general liability policies from Travelers. Those policies are incorporated by reference in Travelers' complaint (the "Policies"). The Blue Bell Entities purchased the Policies to protect themselves from liability incurred because of bodily injury or property damage.

7. The Policies each provide a limit of liability of \$5,000,000 for each "Occurrence" and a general aggregate limit of \$10,000,000.

8. The Policies also impose a duty to defend on Travelers, requiring it to provide a defense for the Blue Bell Entities, as well as their directors and officers, against any suit seeking covered damages. See Policy §§ I.A, II.1.d, & Named Insured Endorsement.⁵ In addition, defense costs are covered outside of the Policies' limits of liability.

9. Relevant here, the Policies require Travelers to pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." Policy § I.1.a (emphasis added).

10. The Blue Bell Entities paid substantial premiums to Travelers to purchase the Policies.

⁵ The policy language referred to herein is found in the 2015-2016 policy, bearing policy number HC2E-GLSA-125D8771-TCT-15.

11. All relevant conditions and requirements imposed on the Blue Bell Entities by the Policies, including the payment of premiums, have been satisfied, are subject to waiver or estoppel, or are otherwise excused.

THE UNDERLYING CASE

12. In August 2017, Jack Marchand II, a Blue Bell shareholder, commenced a derivative lawsuit against Blue Bell company Chairman, CEO, and President Paul W. Krause and the Vice President of Operations, Greg Bridges, as well as other members of the board of directors (the “Officer and Director Defendants”). A copy of the publicly filed version of the Verified Stockholder Derivative Action Complaint in the Underlying Case is attached as Exhibit A to Travelers’ Complaint (the “Underlying Complaint”).

13. The Underlying Complaint alleged that the Officer and Director Defendants breached their fiduciary duties in connection with a 2015 *Listeria* outbreak involving Blue Bell products. *See, e.g.*, Underlying Compl., pmb1., ¶¶ 59-68, 140.

14. According to the Underlying Complaint, the Officer and Director Defendants allegedly failed to properly govern management and failed to institute any system of corporate controls and reporting at the company regarding health and safety compliance. *Id.* ¶ 140.

15. As a result of the Officer and Director Defendants’ purported conduct, the Underlying Complaint alleged that “Blue Bell has been exposed to numerous lawsuits brought by injured parties,” (*id.* ¶ 87), including, among others: (1) a May 2015 lawsuit in the United States District Court for the Western District of Texas alleging that the plaintiff “had suffered brain damage from *Listeria*-related meningitis after eating Blue Bell ice cream,” *id.* ¶ 88; (2) an April 2017 lawsuit brought in Fort Bend County, Texas alleging that the plaintiff became “violently ill after eating [Blue Bell] ice cream” and that his illness was a ‘direct and proximate’ result of Blue

Bell's negligence," *id.* ¶ 91; (3) an April 2017 lawsuit brought by a mother who contended that her daughter suffered injuries after eating Blue Bell ice cream contaminated with *Listeria*, *id.* ¶ 92; and (4) a May 2015 lawsuit filed in the United States District Court for the Western District of Texas claiming that a "severe *Listeria* infection caused by Blue Bell ice cream left [plaintiff] with permanent brain damage and unable to work." *Id.* ¶ 93.

16. The Underlying Complaint also alleged that, in April 2015, the Centers for Disease Control and Prevention ("CDC") stated that tests indicated that Blue Bell products from manufacturing plants in Texas and Oklahoma were the source of a *Listeria* outbreak that had infected five adults in Kansas, three of whom had died. The CDC also stated that three adults in Texas had been sickened by the *Listeria*. *Id.* ¶ 63.

17. According to the Underlying Complaint, the CDC also issued a subsequent warning advising consumers not to eat certain Blue Bell products. *Id.* ¶ 64.

18. The Underlying Complaint contends that Blue Bell and its stockholders suffered "at least hundreds of millions of dollars" in damages due to the "catastrophic consequences" of the 2015 *Listeria* outbreak. *See id.* pmb1.

19. As explained above, the Underlying Complaint alleges that the Officer and Director Defendants breached their fiduciary duties and failed to exercise sufficient care and oversight of company operations, causing numerous consumers to suffer bodily injury and even death.

20. The injury to the consumers, in turn, allegedly damaged Blue Bell.

21. The Underlying Complaint seeks compensatory and other damages, none of which would be owed had it not been for the bodily injury suffered by the consumers.

22. As a matter of plain language, the claim satisfies the contractual language of the Policies that the damages occur "because of" bodily injury.

23. In addition, the facts alleged in the Underlying Complaint occurred throughout the period covered by the Policies and within the coverage territory covered by the Policies.

24. The Blue Bell Entities provided timely notice of the occurrence to Travelers under the Policies.

25. The Blue Bell Entities have incurred, and will continue to incur, substantial costs to defend the Underlying Case.

26. Travelers has denied coverage for the Underlying Case under the Policies and has refused to pay any defense costs incurred by the Blue Bell Entities against the Underlying Case.

FIRST CAUSE OF ACTION
Breach of Contract

27. Counterclaimants hereby incorporate paragraphs 1 through 26 of this Counterclaim as if fully set forth herein.

28. Travelers has breached its contractual obligations by refusing to pay the Blue Bell Entities' defense costs incurred in defending against the Underlying Case, as required under the Policies.

29. As a direct result of Travelers' breach, the Blue Bell Entities have been and will continue to be deprived of the full benefits of the commercial general liability insurance coverage that Travelers sold to the Blue Bell Entities and for which the Blue Bell Entities paid substantial premiums.

30. As a direct result of Travelers' breach, the Blue Bell Entities have been damaged in an amount to be proved at trial, but over \$75,000, for all unreimbursed defense costs.

31. As a direct result of Travelers' breach, the Blue Bell Entities have been forced to incur and will continue to incur additional consequential damages, including without limitation, attorneys' fees, and other expenses in bringing this action.

PRAYER FOR RELIEF

WHEREFORE, Counterclaimants respectfully request that this Court enter judgment against Travelers as follows:

- a. Awarding Counterclaimants actual money damages according to proof at trial, plus interest according to applicable law;
- b. Awarding Counterclaimants their reasonable attorney's fees incurred in connection with this action under Tex. Civ. Prac. & Rem. Code § 38.001; and
- c. Granting such other and further relief as this Court deems just and proper.

JURY DEMAND

Counterclaimants hereby demand a trial by jury on all issues so triable raised in the Counterclaim.

Dated: August 6, 2021

By: */s/ Douglas A. Daniels*

Douglas A. Daniels

Texas Bar No. 00793579

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RICHARD DICKSON, PAUL A. EHLERT,
JIM E. KRUSE, PAUL W. KRUSE, W.J.
RANKIN, HOWARD W. KRUSE,
PATRICIA I. RYAN, AND DOROTHY
MCLEOD MACINERNEY**

**Pro Hac Vice Motions Pending*