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

DEFENDANTS' MOTION AND MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff insurers sold the Blue Bell Defendants a series of Commercial General Liability ("CGL") policies from 2009 through 2015 providing defense coverage for any lawsuit seeking damages "because of bodily injury." During the 2015 policy period, a number of Blue Bell customers suffered severe bodily injury, including three deaths, caused by *Listeria* contamination in Blue Bell ice cream products. Victims and their families filed lawsuits against Blue Bell, and various governmental agencies investigated *Listeria* contamination at Blue Bell facilities. The share price of Blue Bell's stock dropped significantly, and a shareholder filed a derivative suit against Blue Bell's officers and directors in Delaware Chancery Court, alleging in part that the defendants had failed to establish systems of control and monitoring that could have prevented the

Listeria contamination, the injury to customers, and, ultimately, the economic impact on shareholders. Dkt. No. 28-1 (the "Underlying Suit").[1] Blue Bell incurred significant defense costs from this lawsuit and sought coverage from Plaintiffs.

The CGL Policies sold to Blue Bell obligated Plaintiffs 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." Dkt. No. 27-1 at 1, § I.1.a. The Policies also assigned Plaintiffs "the right and duty to defend the insured against any 'suit' seeking those damages." *Id.* Even though the Underlying Suit sought damages caused in large part by bodily injury to customers, Plaintiffs refused to defend Blue Bell's directors and officers and instead filed this declaratory judgement action. As discussed below, however, the undisputed facts show that the Underlying Suit sought damages "because of bodily injury," and none of the conditions or exclusions identified by Plaintiffs relieve them of their duty to defend under Texas law.

In light of the policy language, the allegations of the underlying complaint, and Texas law governing the duty to defend, Defendants now move for summary judgment and ask this Court to find that (1) Plaintiffs have a duty to defend Defendants against the Underlying Suit; and (2) by failing to defend, Plaintiffs have breached their contractual duties to Defendants. There is no genuine dispute of any material facts, and Defendants are entitled to judgment as a matter of law.

II. FACTUAL BACKGROUND AND UNDISPUTED FACTS

A. The Policies

Plaintiffs issued various CGL policies to the Blue Bell Defendants covering the period January 1, 2009, through January 1, 2016. Compl. ¶ 23. The Policies listed as Named Insureds

[1] An unredacted version of the complaint in the Underlying Suit has been filed under seal as Dkt. No. 28-1. A redacted version of the same complaint is publicly available as Ex. A to the Complaint, Dkt. No. 1-1. References to the Underlying Suit refer to paragraph numbers in both documents.

Blue Bell Creameries, L.P., Blue Bell Creameries, Inc., and Blue Bell Creameries, U.S.A., Inc., and others. *Id.* Section II of the 2015 Policy, "Who Is An Insured," explains that if an entity is designated in the Declarations as "[a] partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business." Dkt. No. 27-1, § II.1.b. "An organization other than a partnership, joint venture or limited liability company" is also an insured. *Id.*, § II.1.d. In that case, the "'executive officers' and directors are insureds, but only with respect to their duties as [] officers or directors." *Id.* Thus, in addition to the corporate entities, all of the individual Defendants, as executives or directors of the companies being sued with respect to their duties, are insured under the Policies.

The Policy's Insuring Agreement A commits Travelers to paying "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." *Id.*, § I.1.a. Travelers also has "the right and duty to defend the insured against any 'suit' seeking those damages." *Id.* The Insuring Agreement further explains that it applies to damages because of bodily injury or property damage "caused by an 'occurrence' that takes place in the 'coverage territory'" and which "occurs during the policy period." *Id.*, §§ I.1.b.(1)–(2).. "Bodily injury" is defined in the Policies as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." *Id.*, § V.3. This definition was amended in the 2015 Policy to include "mental anguish, mental injury, shock, fright, disability, humiliation, sickness or disease . . . ." *Id.*, Extension of Coverage–Bodily Injury Endorsement. An "occurrence" is defined in the Policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," and "coverage territory" includes all of the U.S. and Canada, or any part of the world for injury from products made or sold in the U.S. or Canada. *Id.*, §§ V.4 & V.13.

Coverage A excludes coverage for "'[b]odily injury' or 'property damage' expected or intended from the standpoint of the insured." *Id.*, §§ I.2.a.–b. It also excludes coverage for "'bodily injury' or 'property damage' for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement." *Id.* However, this contractual exclusion does "not apply to liability for damages" that would have existed "in the absence of the contract or agreement." *Id.* Finally, the Policy excludes coverage for "[d]amages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal" of "Your product" if that product was recalled from the market because of known or suspected defects or deficiencies. *Id.*, § I.2.n.

B. The Underlying Suit

In August 2017, Blue Bell stockholder Jack L. Marchand II filed a derivative action in Delaware Chancery Court on behalf of Blue Bell Creameries USA, Inc. against two of its executive officers and all but one member of its Board of Directors. Dkt. No. 28-1. The suit alleged that these individuals breached their fiduciary duties, which "resulted in a Company-wide failure to maintain standards and controls necessary for the sanitary and safe production and distribution of the Company's ice cream products." *Id.* at 1. The suit alleges that despite notice of unsanitary conditions, and the discovery of *Listeria* bacteria contamination in the company's manufacturing facilities and products in 2015, the company continued to produce and distribute its ice cream. *Id.* ¶¶ 59–60, 109. The suit then alleges that the consequences of this failure in company oversight were human *Listeria* infections in multiple states that were directly traceable to Blue Bell products. *Id.* ¶ 63. Some consumers of Blue Bell products were seriously sickened by *Listeria* and several died. *Id.* The Underlying Suit identified various suits brought against Blue Bell between 2015 and 2017 for injuries suffered as part of the *Listeria* outbreak, as well as potential and ongoing

governmental investigations. *Id.* ¶¶ 61, 63, 66, 87–93, 96. Taken together, these issues caused "catastrophic" harm to the company. *Id.* ¶ 69; *see also id.* at 2.

The Underlying Suit advances two counts against the Individual Defendants in this action. Count I is a derivative claim against company Chairman, CEO and President Paul Kruse and Vice President of Operations Greg Bridges for breaching "their fiduciary duties of loyalty and care including by their failure to conduct safe operations, disregard of contamination risk and failure to report material information to the Board." *Id.* ¶ 143. Count II is a derivative claim against all individual defendants for breach of fiduciary duties through "willful failure to govern management of the Company and institute fundamental controls over managerial operations," *Id.* ¶ 148, thereby allowing the *Listeria* outbreak to occur and ultimately harm the company, *id.* at 1–2.

III. LEGAL STANDARDS

Rule 56(a) allows a court to grant summary judgment to a moving party "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). When a court considers a summary judgment motion, "[t]he record must be viewed in the light most favorable to the non-moving party; all justifiable inferences will be drawn in the non-movant's favor." *Envtl. Conservation Org. v. Cty. of Dallas*, 529 F.3d 519, 524 (5th Cir. 2008). To survive a motion for summary judgment, the non-moving party "must establish that there is a genuine issue of material fact." *Matushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986).

A genuine issue of material fact requires more than "some metaphysical doubt about the material facts." *Id.* at 587. "[T]he mere existence of *some* alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986)

(emphasis in original). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248. Thus, summary judgment must be entered against a party if it "fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

IV. ARGUMENT

The Policies require Plaintiffs to defend the Blue Bell Defendants against suits for damages because of bodily injury, and the Underlying Suit seeks damages allegedly caused in part by bodily injury to consumers. Plaintiffs' failure to defend the Underlying Suit breaches their obligations under the Policies. Plaintiffs advance three sets of arguments in disclaiming their duty to defend, none of which relieves them of that duty. First, they assert that Marchand does not seek damages because of bodily injury, but the underlying allegations draw a direct line between bodily injury to consumers and harm to the company and the shareholders. Second, Plaintiffs assert that even if the damages were due to bodily injury, they were not caused by an "occurrence." The complaint, however, does not allege that any Defendants intended the bodily injury to occur, and it expressly alleges that consumers were injured by exposure to harmful conditions. Third, Plaintiffs assert that various exclusions bar coverage and that Defendants failed to provide sufficient notice or cooperation, but Plaintiffs cannot meet their burden to show that any of the exclusions or conditions cited apply, particularly in the duty-to-defend context. In short, allegations in the Underlying Suit raise the potential for coverage, which triggers Plaintiffs' duty under Texas law and entitles Defendants to summary judgment.

A. The Underlying Suit Seeks Damages from Defendants "Because of Bodily Injury"

Under Texas law, "[t]he plain language of an insurance policy, like that of any other contract, must be given effect when the parties' intent may be discerned from the plain language."

AccuFleet, Inc. v. Hartford Fire Ins. Co., 322 S.W.3d 264, 269 (Tex. App.—Houston [1st Dist.] 2009, no pet.). Any exceptions or limitations on coverage "'are strictly construed against the insurer and in favor of the insured.'" *Id.* at 270 (quoting *Nat'l Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991)). In the duty-to-defend context, the insurer must defend whenever allegations raise any *potential* for coverage. "Under the eight-corners or complaint-allegation rule, an insurer's duty to defend is determined by the third-party plaintiff's pleadings, considered in light of the policy provisions, without regard to the truth or falsity of those allegations." *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006). Under this rule, "only two documents are ordinarily relevant to the determination of the duty to defend: the policy and the pleadings of the third-party claimant." *Id.* "A plaintiff's factual allegations that *potentially* support a covered claim *is all that is needed* to invoke the insurer's duty to defend." *Id.* at 310 (emphasis added). Courts must "resolve all doubts regarding the duty to defend in favor of the duty." *AccuFleet*, 322 S.W.3d at 270. If a complaint alleges even one claim that is potentially covered by the policy, the insurer must defend the entire lawsuit. *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 491 (Tex. 2008).

Here, the Policies require Travelers to pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury,'" and imposes "the duty to defend the insured against any 'suit' seeking those damages." Dkt. No. 27-1, § I.1.a. Thus, if the Underlying Suit seeks "damages because of bodily injury" in whole or in part, and raises any *potential* for coverage of an insured, Travelers must defend the entire lawsuit.

The Underlying Suit alleges that ten individual defendants, as officers and directors of Blue Bell Creameries USA, Inc., failed to fulfill their fiduciary duties to the company by failing to oversee company operations and by failing to implement sufficient control and reporting systems.

Dkt. No. 28-1 ¶¶ 142–50. The Policy expressly provides that with respect to Blue Bell Creameries USA, Inc., "'executive officers' and directors are insureds" with respect to their duties as [] officers or directors." Dkt. No. 27-1, § II.1.d. Given the myriad allegations concerning the alleged failure to fulfill their "duties," the Individual Defendants are insured under the policies. The question, then, is whether the Underlying Suit seeks "damages because of bodily injury." It plainly does.

Plaintiffs contend that the suit does not seek "damages because of bodily injury" but is rather "a suit for equitable and other relief resulting from a breach of fiduciary duty." Compl. ¶ 37. Plaintiffs appear to contend both that the Underlying Suit does not seek "damages," and that the relief sought is not "because of" bodily injury. Both parts of this contention are wrong. First, the Underlying Suit expressly asks the court to "determin[e] and award[] to Blue Bell the damages sustained by it as a result of the breaches of fiduciary duties set forth above from each of the Defendants, jointly and severally, together with interest thereon." Dkt. No. 28-1, Prayer for Relief. Thus, not only does the Underlying Suit explicitly request damages, but it demands an award from "each of the Defendants, jointly and severally." *Id.* If successful, those Defendants would be "legally obligated to pay" certain "sums" as "damages," thus satisfying the insuring agreement. The fact that in this case the defendants may be "legally obligated to pay" those damages to Blue Bell, rather than to an underlying claimant, does not lessen their obligation to pay or somehow convert the sums into something other than damages. Indeed, Texas courts routinely acknowledged that actual damages may be available to remedy breaches of fiduciary duty. *See*, *e.g.*, *ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867, 876–77 (Tex. 2010) (discussing the correct approach for calculating lost profit damages as part of breach of fiduciary duty claim).

Second, the Underlying Suit alleges that the damages sought are "because of bodily injury." Texas caselaw confirms that the phrase "because of" means "by reason of" or "on account of." *See*

Samsung Elecs. Am., Inc. v. Fed. Ins. Co., 202 S.W.3d 372, 381 (Tex. App.—Dallas 2006), *aff'd sub nom. Fed. Ins. Co. v. Samsung Elecs. Am.*, 268 S.W.3d 506 (Tex. 2008) (explaining that, when undefined in an insurance policy, the term "because of" is given its plain, ordinary meaning of "by reason of" or "on account of"); *see also Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013) (confirming that under federal law, "because of" generally means "by reason of" or "on account of"). Because the bodily injury suffered by victims led directly to the drop in share value and other harms alleged by Marchand, those harms occurred "by reason of" and "on account of" bodily injury to Blue Bell customers.

Bodily injury is defined in the Policy as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." Dkt. No. 27-1, § V.3. The Underlying Suit alleges that multiple consumers got sick or injured, and some even died, from consuming contaminated Blue Bell products. Dkt. No. 28-1 ¶ 63. The Underlying Suit also specifically ties those injuries to the devaluation of the company by alleging that the outbreak caused catastrophic harm to the tune of hundreds of millions of dollars. *Id.* at 1–3; *id.* ¶ 69. The Underlying Suit alleges that "[a]s a result of Defendants' conduct, Blue Bell has been exposed to numerous lawsuits brought by injured parties." *Id.* ¶ 87. Moreover, in determining the duty to defend, the label attached to a cause of action matters less than whether the factual allegations trigger potential coverage. *Zurich Am. Ins. Co.*, 268 S.W.3d at 495. Here, the Underlying Suit alleges financial injury that occurred in part "because of bodily injury," and seeks damages from the insured Defendants as a result. Without the bodily injury to consumers, the financial injury to Marchand would not have happened. These allegations are sufficient to trigger the duty to defend.

Furthermore, insurance coverage cases in both federal and state courts, including Texas, confirm that damages may be owed because "because of bodily injury" even when the specific

relief sought does not directly remedy the bodily injury itself but rather addresses financial harm flowing from the bodily injury. For example, in *Scottsdale Insurance Co. v. National Shooting Sports Foundation*, 226 F.3d 642, 2000 WL 1029091, *1 (5th Cir. 2000) (unpublished op.), the City of New Orleans sued the firearm industry trade association over increased costs it had incurred from bodily injuries caused by handguns, including "the cost of increased police force" and "increased emergency medical care." The insurer argued that the complaint did not "allege damages 'because of' an injury to body or property," but the court noted that the "complaint alleges that because of the bodily injuries to its citizens, the City of New Orleans had to incur additional costs," an allegation "arguably covered by the policies." *Id.* at *2. The court expressly "reject[ed] Scottsdale's contention that the 'because of bodily injury' provision requires that the plaintiff seeking damages be the one who suffered the bodily injury." *Id*.

Similarly, when the State of West Virginia sought compensation for the money it spent addressing the opioid epidemic, the Seventh Circuit Court of Appeals rejected the insurer's argument that the relief sought was not "because of bodily injury," even though the state sought its own damages rather than money to compensate its injured citizens. *Cincinnati Ins. Co. v. H.D. Smith, L.L.C.*, 829 F.3d 771 (7th Cir. 2016). The court held that the state's damages were sustained as a "proximate result" of the manufacturer's negligence, and, therefore, were "because of bodily injury," triggering the insurer's duty to defend. *Id.* at 774–75. Just as New Orleans and West Virginia were allegedly harmed because of the bodily injury suffered by their residents, here too Blue Bell (as represented by Marchand) was allegedly harmed because of the bodily injury suffered by its consumers. Allegations like these require an insurer to defend the lawsuit.

Courts in Texas and around the country have reached similar conclusions in class action lawsuits premised on the alleged hazards of using cell phones without a headset. Those courts have

repeatedly found that damages sought to reimburse consumers for the financial burden of acquiring headsets to protect themselves from potential radiation exposure were damages "because of bodily injury" under CGL policies. Thus, in *Samsung Electronics America, Inc. v. Federal Insurance Co.*, Texas's Fifth Court of Appeals rejected the insurer's contention that the costs of purchasing headsets were purely economic loss and not a result of "bodily injury." 202 S.W.3d at 381–82. The court explained:

> The damages sought by the complaints—a cell phone headset for each class member who had purchased or leased a cell phone without one—are sought "on account of" or "by reason of" the plaintiffs' exposure to radiation from the cell phones. And the cost of a headset is not clearly within or excluded by the definition of "damages" in Federal's policies. Accordingly, we conclude the damages sought potentially state a claim for "damages because of bodily injury" triggering Federal's duty to defend the *Pinney* complaints.

Id. at 382–83. *See also Ericsson, Inc. v. St. Paul Fire & Marine Ins. Co.*, 423 F. Supp. 2d 587, 594 (N.D. Tex. 2006) (concluding that costs of purchasing headsets were "damages because of bodily injury" because the term is ambiguous and must be construed in favor of the insured); *Voicestream Wireless Corp. v. Fed. Ins. Co.*, 112 F. App'x 553, 556–57 (9th Cir. 2004) ("To the extent that seeking damages, in part, in the form of a headset neither clearly falls within a policy provision, nor is clearly excluded by the text of the policy, the policies are ambiguous. As with 'bodily injury,' this ambiguity must be construed against the Defendant Insurers."); *Motorola, Inc. v. Associated Indem. Corp.*, 878 So. 2d 824, 834 (Ct. App. La. 2004) ("Although the relief purportedly sought consists of tangible accessories to property of the class action plaintiffs, or the accessories' monetary value, the class action plaintiffs plainly seek such relief 'because of bodily injury.'").

Texas courts reached the same result when analyzing the analogous question of whether economic loss can meet a policy requirement that harm occur "because of property damage." For instance, in *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007), homeowners found defects in their foundation several years after the purchase of the home and

brought suit against the homebuilder. The builder's insurer declined to defend the suit, arguing that that homeowners' claim resulted from defective work by a subcontractor, which from the point of view of the builder constituted only a breach of contract, resulting in economic loss rather than "property damage." *Id.* at 8. The Supreme Court of Texas rejected the insurer's argument, explaining that the economic loss doctrine "is a liability defense or remedies doctrine, not a test for insurance coverage." *Id.* at 13. The duty to defend was triggered because "[t]he CGL's insuring agreement simply asks whether 'property damage' has been caused by an 'occurrence,'" and the idea that a claim for economic loss could not be due to property damage "must yield to the policy's actual language." *Id.* Here, as well, a claim for economic loss may arise "because of bodily injury."

The U.S. District Court for the Southern District of Texas likewise concluded that claims for diminution in home values because of water leaks caused by faulty construction of a nearby lake's retaining walls were sufficient to allege damage because of physical injury to tangible property. *Mid-Continent Cas. Co. v. Academy Dev., Inc.*, 2010 WL 3489355, *6 (S.D. Tex. Aug. 24, 2010). The builder's insurer argued that the homeowners, who sued the retaining wall builder, were seeking relief for purely economic loss, rather than property damage to their own property, and therefore did not implicate its duty to defend. *Id.* at *5. The court found that even though the homeowners did not allege physical damage to their own homes, but rather diminution in economic value, that did "not mean that they have not alleged 'property damage' per the terms of the policies." *Id.* at *6. The court explained that

> The plain language of the policies state that coverage is provided for 'damages because of property damage,' or in other words, 'damages because of physical injury to tangible property.' There is no requirement in the policy that the tangible property *belong* to the Budiman plaintiffs, and the court cannot read into the policy terms that are not there.

Id. (emphasis in original). Accordingly, the plaintiff in an underlying suit need not directly suffer bodily injury in order for that plaintiff to suffer "damages because of bodily injury" under a CGL

policy. Instead, the suit need only allege that "bodily injury" occurred and that the plaintiff's damages resulted because of that bodily injury. The Underlying Suit here alleges exactly that.

The allegations here thus fall squarely within a well-recognized line of cases supporting coverage. Like the City of New Orleans and the State of West Virginia, even though the shareholders here did not personally suffer sickness or death, the direct effect of the outbreak and resulting injury to the company's value still states a claim for damages "because of bodily injury." As in the cellphone cases, even when the remedy sought is in part proactively aimed at preventing future harm (by switching to headsets), the plaintiffs may still seek relief due to damages "because of bodily injury." Marchand's request for additional relief in the form of improved operational controls to prevent future health violations and outbreaks does not mean that the damages sought are not "because of bodily injury." And just as allegations of economic loss may arise from harm "because of property damage" within the meaning of CGL policies, Marchand's claims for shareholder injury may arise "because of bodily injury" because that loss was attributable to the sickness and death of consumers. *See* Dkt. No. 28-1 at 2.

B. The *Listeria* Outbreak was an Occurrence Under the Policies and Was Neither Expected Nor Intended

Plaintiffs also contend that "any alleged 'bodily injury' was not 'caused by an occurrence,' defined as an accident, as required for coverage under the Policies." Compl. ¶ 39. In Plaintiffs' view, because the Underlying Suit alleges intentional conduct by the Individual Defendants, harm resulting from that conduct is not covered. This position contradicts the language of the Policies and has also been rejected repeatedly by Texas courts. The *Listeria* outbreak that caused bodily injury to Blue Bell consumers was an occurrence under Texas law.

Most importantly, the Policies only require that the *bodily injury* be caused by an occurrence, not that all actions relevant to the claims be accidental or unintentional. The policy

covers "all sums the insured becomes legally required to pay because of bodily injury" and separately requires that the "'bodily injury' . . . is caused by an 'occurrence' that takes place in the 'coverage territory.'" Dkt. No. 27-1, §§ I.1.a., I.1.b.(1)–(2). "Occurrence," in turn, is defined in the Policies as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.*, § V.13. The *Listeria* outbreak was an "occurrence" because the bacteria's presence in the ice cream was unintended and accidental and because affected consumers were "exposed" to the "harmful condition" of the bacteria. That bodily injury, caused by accidental contamination and exposure to harmful bacteria, then caused further harm to the company, but Defendants need not show that the subsequent economic harm was somehow caused by another or separate occurrence. The "occurrence" condition only applies to the bodily injury. Nowhere does the Underlying Suit allege that any of the Individual Defendants intended any of their products to contain bacteria or intended that any consumers suffer injury. Indeed, as alleged in the Underlying Suit, all of the individual Defendants had a vested interest in the success of the company, Dkt. No. 28-1 ¶¶ 9–18; 127–137, giving them no reason to intentionally harm customers.

Texas courts have long held that even intentional acts may constitute an occurrence that results in covered bodily injury or property damage when the damage itself is not intended or expected by the actor. For example, in *Massachusetts Bonding & Insurance Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396 (Tex. 1967), the Supreme Court of Texas confirmed general liability coverage for a company that intentionally applied a pesticide to a rice mill's facilities, damaging the rice itself. Noting that the damage was not expected or intended from the standpoint of the insured, the court concluded that "the damage for which Orkin was held liable was caused by an 'accident' within the meaning of the policy." *Id.* at 401. Similarly, Texas's Fifth Court of Appeals found coverage of a lawsuit against a neighboring landowner for the consequence of

mining activities on her property, even though she allegedly "acted intentionally by leasing her property to the mining companies" and "knew or should have known that the mining companies failed to follow normal blasting procedures." *Hallman v. Allstate Ins. Co.*, 114 S.W.3d 656, 661 (Tex. App.—Dallas 2003), *rev'd on other grounds*, 159 S.W.3d 640 (2005). The Fifth Court of Appeals stressed that "the intentional act on Hallman's part was to lease her property for mining operations," but "the effect of the lease, that is, the alleged damage to neighboring property from blasting and dust, was not the intended result had the lease been performed non-negligently." *Id.*; *see also Westchester Fire Ins. Co. v. Gulf Coast Rod, Reel & Gun Club*, 64 S.W.3d 609, 613 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (underlying lawsuit that alleged deliberate dredging resulting in sand erosion on neighboring property alleged an "occurrence" because such damage "was neither expected nor intended from the standpoint of [the defendant]" and "[t]here is nothing in the underlying plaintiffs' petition to indicate that [the defendant] intended to erode the sand from the plaintiffs' property").

Here, too, there is no indication that the Individual Defendants intended to cause any bodily injury. Most obviously, the Underlying Suit primarily alleges that they failed to supervise company operations or to investigate potential hazards. *See* Dkt. No. 28-1 ¶¶ 99, 148–50. This type of allegation is consistent with negligent behavior. *See*, *e.g.*, *State Farm Gen. Ins. Co. v. White*, 955 S.W.2d 474, 476–77 (Tex. App.—Austin 1997, no pet.) (noting that intent cannot, as a matter of law, be inferred from an omission or failure to act, and that an action taken with consciousness that it may cause an appreciable risk of harm to others may constitute negligence, "but it is not an intentional wrong."). While the Underlying Suit uses words like "intentional" or "willful" in various places, it largely does so by alleging that the Board "willfully failed to exercise control" over the company or exhibited "willful failure to govern the management of the Company." *See*,

e.g., Dkt. No. 28-1 ¶¶ 99 & 148. This type of "intentional" or "knowing" failure to control may give rise to an occurrence because the bodily injury itself was neither expected nor intended from the standpoint of the insured. Thus, a Florida court found liability coverage despite allegations that the defendants "knowingly permitted their dogs to freely roam about the parties' neighborhood without restriction or supervision" and "fail[ed] to adequately control, supervise and confine their dogs to their own premises" because "if the resulting damages are unintended, the resulting damage is 'accidental even though the original acts were intentional." *McCreary v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n*, 758 So. 2d 692, 694 (Fla. Ct. App. 1994) (quoting John A. Appleman & Walter F. Berdal, Insurance Law and Practice § 4492.02 (1979)).

The Policies also contain an exclusion for bodily injury "expected or intended from the standpoint of the insured," Dkt. N. 27-1, § I.2.a., but Texas law makes clear that the exclusion only applies when the insured intended to cause the injury that occurred, not when the insured merely intentionally committed the acts that led to that injury. *See Tanner v. Nationwide Mut. Fire Ins. Co.*, 289 S.W.3d 828, 831 (Tex. 2009) (holding that the exclusion "language is effect-focused and not cause-focused, voiding coverage when the resulting *injury* was intentional, not merely when the insured's conduct was intentional") (emphasis in original); *Mid-Continent Cas. Co. v. BFH Mining, Ltd.*, No. CIV.A. H-14-0849, 2015 WL 5178118, at *2 (S.D. Tex. Sept. 3, 2015) ("The 'expected or intended' injury exclusion only excludes an injury which the insured intended, not one which the insured caused, however intentional the injury-producing act."). As the Supreme Court of Texas explained, "[a] contrary reading of the exclusion—that reckless acts absent deliberate injury are sufficient to forfeit coverage—would render insurance coverage illusory for many of the things for which insureds commonly purchase insurance." *Tanner*, 289 S.W. 3d at 831. Therefore, regardless of any warnings the defendants allegedly received regarding sanitary

conditions in Blue Bell's manufacturing facilities, the exclusion would not apply absent a showing they had specifically intended that consumers contract listeriosis from consuming Blue Bell products. "It is not enough that an insured was warned that damages might ensue from its actions, or that, once warned, an insured decided to take a calculated risk and proceed as before. Recovery will be barred only if the insured intended the damages." *Gulf Chem. & Metallurgical Corp. v. Assoc. Metals & Minerals Corp.*, 1 F.3d 365, 370 (quoting *City of Johnstown, N.Y. v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1150 (2d Cir. 1989)). No allegations in the Underlying Suit support any inference that the defendants intended to harm consumers, and this Court should conclude that the exclusion does not apply.

C. No Other Exclusions or Policy Provisions Operate to Defeat the Duty to Defend

Plaintiffs' Complaint also cites various exclusions and other Policy conditions in an attempt to avoid coverage, but none of those provisions negate their duty to defend. Exclusions for "contractual liability," "recall of products," "personal and advertising injury," and "knowing violation of rights of another," Compl. ¶ 41, do not apply to the claims here, and Plaintiffs cannot resort to the Policy's notice or cooperation provisions to defeat their duty to defend.

Once an insured has met its burden to show that a claim is "potentially within the scope of coverage," as Blue Bell has done here, the insurer must then show, within the eight corners of the policy and pleading, "'that the plain language of a policy exclusion or limitation allows [it] to avoid coverage of all claims.'" *State Farm Lloyds v. Richards*, 966 F.3d 389, 393 (5th Cir. 2020) (quoting *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 528 (5th Cir. 2004)). Under Texas law, exclusions or limitations on liability are interpreted strictly against the insurer and in favor of the insured. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991). Furthermore, as the Supreme Court of Texas has made clear, "[t]he

court must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent." *Id.* (citing *Glover v. Nat'l Ins. Underwriters*, 545 S.W.2d 755, 761 (Tex. 1977)).

Plaintiffs cite the exclusion for "contractual liability," Compl. ¶ 41, which the Policy states may apply when the insured "is obligated to pay damages by reason of the assumption of liability in a contract," Dkt. No. 27-1, §§ I.2.b. Nothing in the Underlying Suit alleges the assumption of liability in a contract, and, in any case, the exclusion only applies when the express terms of a contract add to an insured's scope of liability. *Mid-Continent Cas. Co. v. Castagna*, 410 S.W.3d 445, 463 (Tex. App.—Dallas 2013, pet. denied). Furthermore, the exclusion does not apply to any liability "the insured would have in the absence of a contract," Dkt. No. 27-1, §§ I.2. b., and the individual Defendants here are being sued for breaches of fiduciary duty—duties they would have regardless of any contract given their roles as officers and directors of the company.

The product recall exclusion applies to "loss, cost, or expense incurred" for the "loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of" products withdrawn from the market. Dkt. No. 27-1, § I.2.n. In this case, Blue Bell does not seek coverage for the costs of the recall or loss of the product but rather for damages to shareholders incurred "because of bodily injury." Courts interpreting similar exclusions have noted that they apply to the expenses of the recall itself, not other damages incurred as a result of the underlying contamination that prompted the recall. For example, in *Netherlands Ins. Co. v. Main St. Ingredients, LLC*, 745 F.3d 909 (8th Cir. 2014), a customer purchased contaminated dried milk from the insured and incorporated it into its own cereal products, prompting a recall of products containing the milk. The Eighth Circuit held that the recall exclusion did not apply because the

damages sought by the insured's customer were for "property damage"—*i.e.*, the rendering of the customer's cereal products unfit for sale—not for the recall itself. *Id*. at 919 ("Construing the recall exclusion 'strictly against the insurer,' as we must, we conclude the district court correctly found the exclusion does not apply.") (citations omitted). Here, too, exclusion for recall expenses would not apply to the "damages sustained [] as a result of the breaches of fiduciary duties" sought by the Underlying Suit. Dkt. No. 28-1, Prayer for Relief ¶ (c).

The advertising injury exclusion applies to "bodily injury" due to "personal and advertising injury" and arising from various offenses such as false arrest, wrongful eviction, and defamation. Dkt. No. 27-1, § V.14. But here, the bodily injury arises out of product contamination, which in turn caused the damage to the company, and the Underlying Suit does not allege personal and advertising injury. Similarly, the exclusion for "Knowing Violation of Rights of Another" applies only to damages because of claims for "personal and advertising injury" not the damages "because of bodily injury." *Id.*, Coverage B § 2.a.

Finally, Plaintiff's complaint alleges that "Defendants failed to comply with the notice and/or cooperation provisions of the Policies" and also "failed to mitigate their damages." Compl. ¶¶ 42–43. There is no allegation or evidence behind either assertion, and Plaintiffs were well aware of the lawsuits relating to the *Listeria* outbreak described in the complaint, Dkt No. 28-1, ¶¶ 87–93. Furthermore, Blue Bell has been defending the Underlying Suit (without the insurance protection it purchased), and Plaintiffs have therefore not been prejudiced by any delay in notice, even if there were such a delay. Under Texas law, an insurer must demonstrate prejudice before disclaiming coverage on the basis of notice or cooperation. *See, e.g.*, *PAJ, Inc. v. Hanover Ins. Co.*, 243 S.W.3d 630, 636–37 (Tex. 2008) ("We hold that an insured's failure to timely notify its

insurer of a claim or suit does not defeat coverage if the insurer was not prejudiced by the delay."). Plaintiffs have not done so and cannot do so here.

Similarly, there is no evidence that Defendants failed to mitigate damages. In fact, the Underlying Suit acknowledges that Defendants have settled or engaged in talks to settle some of the personal injury claims arising from the outbreak, suggesting efforts to minimize damages. Dkt. No. 28-1 ¶¶ 87–93. Moreover, the Supreme Court of Texas has made clear that, "[t]he duty to defend depends on the language of the policy setting out the contractual agreement between insurer and insured." *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 655 (Tex. 2009). Plaintiffs cannot escape their duty to defend by asserting a failure to mitigate, a defense that could, at most, impact Defendants' ultimate claim for indemnity, not its current claim for a declaratory judgment on the duty to defend. The scope of damages ultimately awarded does not impact whether there is presently a potentially covered claim that triggers the duty to defend.

Defendants have met their burden of showing that a claim is "potentially within the scope of coverage," and Plaintiffs have failed to show, within the eight corners of the policy and pleading, "that the plain language of a policy exclusion or limitation allows [them] to avoid coverage of all claims." *Richards*, 966 F.3d at 393 (citation omitted). Because the undisputed facts show a potential for coverage and also that at least some of the claims in the Underlying Suit fall outside of the named exclusions, Plaintiffs are obligated to defend the entire suit. *See Zurich Am. Ins. Co.*, 268 S.W.3d at 491. Because they have refused to do so, they have also breached their contract and are liable to Defendants for damages and other relief.

V. CONCLUSION

Based on the foregoing, Defendants respectfully request that this Court find that Plaintiffs have a duty to defend the Underlying Suit and grant this motion for summary judgment.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December 2021, a true and correct copy of the foregoing document has been forwarded to counsel of record via ECF.

/s/ Douglas A. Daniels
Douglas A. Daniel