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' BRIEF IN RESPONSE TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGEMENT

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I. INTRODUCTION

In its own cross-motion for summary judgment, the Blue Bell entity and individual defendants (collectively, "Blue Bell") demonstrated that Plaintiff insurers (collectively, "Travelers"), have a duty to defend Blue Bell in the underlying derivative action alleging damages arising out of the 2015 *Listeria* outbreak. Plaintiffs in that lawsuit allege that the company suffered catastrophic financial losses following that outbreak and resulting illness and death of several Blue Bell customers. The insurance policies issued by Travelers cover losses any insured may be legally obligated to pay as damages "because of bodily injury" and impose on Travelers a duty to defend any lawsuit raising allegations that potentially trigger coverage. Because the damages flowed from bodily injury suffered by Blue Bell customers and the resulting adverse publicity, the allegations at a minimum create the potential for coverage and trigger Travelers' duty to defend. The straightforward allegations of the underlying complaint are that the plaintiffs seek to hold Blue Bell directors liable for damages based on negligent performance of their duties as directors and officers, and that liability would never have arisen but for the *Listeria*-related bodily injury.

In its cross motion, Travelers makes three main arguments as to why it does not owe Defendants a duty to defend. First, Travelers asserts that individual directors and officers are not insured for the purposes of the Underlying Suit because (a) the underlying suit is a first-party claim for Blue Bell's own losses rather than a third-party liability claim seeking damages; and (b) the individuals were acting outside the scope of their position when they allegedly breached their fiduciary duties. In fact, the language of the policy supports Blue Bell's position, and courts routinely confirm liability coverage for alleged breaches of fiduciary duties in derivative suits. Second, Travelers claims that the underlying conduct was intentional and was therefore not an "accident" or an "occurrence" as required under the policy. Here, too, the language of the policy

and complaint support Blue Bell because nobody intended or anticipated a *Listeria* outbreak. The complaints merely allege failure to act upon warnings, which theoretically could have prevented the outbreak, but allegations like these still constitute an occurrence under Texas law. Finally, Travelers denies that the underlying suit seeks damages "because of bodily injury," but the damages sought stem from bodily injury allegedly caused by Blue Bell products, which is sufficient to satisfy the "because of bodily injury" standard. Travelers' position here has no support in the underlying complaint or under Texas law, which requires that any ambiguity in insurance policies be construed in favor of coverage. This Court should deny Plaintiffs' cross-motion and grant Defendants' motion for summary judgment on the duty to defend.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "against a party who 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 (1986). When parties have filed cross-motions for summary judgment, courts review each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party. *Evanston Ins. Co. v. OPF Enters., LLC*, 826 F. App'x 327, 329 (5th Cir. 2020). The existence of a duty to defend is question of law and appropriate for resolution at summary judgment. *Lyda Swinerton Builders, Inc. v. Okla. Surety Co.*, 903 F.3d 435, 445 (5th Cir. 2018),

The determination of whether there is a duty to defend is distinct from the determination of whether there is a duty to indemnify and the two must be decided separately. *D.R. Horton–Tex., Ltd. v. Markel Int'l Ins. Co.,* 300 S.W.3d 740, 743 (Tex. 2009). In order to decide the duty to defend, courts should "consider two issues: (1) whether '[the defendant] qualifies as an [] insured

under the policy, and (2) whether under Texas's strict eight-corners rule, the facts alleged in the underlying [] lawsuit are sufficient to trigger [the insurer's] duty to defend." *Gilbane Bldg. Co. v. Admiral Ins. Co.*, 664 F.3d 589, 594 (5th Cir. 2011). Courts must enforce insurance contracts as written, giving policy terms their plain meaning "without inserting additional provisions into the contract." *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008).

When policy language "is susceptible of more than one construction, such policies should be construed strictly against the insurer and liberally in favor of the insured." *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 666 (Tex. 1987). Moreover, when the issue involves a limitation on the insurer's liability under the policy, courts must adopt even stricter construction against the insurer: "Indeed, '[courts] must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not itself unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties [sic] intent.'" *Id.* (quoting *Glover v. Nat'l Ins. Underwriters*, 545 S.W.2d 755, 761 (Tex. 1977)). Courts must "resolve all doubts regarding the duty to defend in favor of the duty." *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 491 (Tex. 2008). If the underlying allegations raise even the potential for coverage of any of the claims asserted, the insurer must defend the entire lawsuit. *Id.*

III. ARGUMENT

Travelers makes three main arguments against a finding of the duty to defend. None of these arguments finds support within the express language of the Policy or the allegations of Underlying Complaint, nor do they find support under Texas law.

A. The Underlying Suit seeks Damages from Individual Defendant Insureds Under the Policy for their Actions as Officers and Directors of Blue Bell

Travelers asserts that the Underlying Complaint does not raise the possibility that any insureds will be legally obligated to pay damages because, supposedly, (1) the Underlying

Complaint is not a third-party claim seeking damages covered by the policy; and (2) the officers and directors are not insureds under the policy for alleged breaches of fiduciary duty. Neither of these assertions are consistent with the Policy or Texas law.

1. The Underlying Suit is Covered under the Policy

Travelers first asserts that because the Underlying Complaint is a derivative action brought by shareholders on behalf of Blue Bell, any recovery will be paid to Blue Bell itself, and the lawsuit therefore "impermissibly seek[s] to convert third-party coverage into first-party Coverage." Travelers Br. at 5, Dkt. No. 30. This is not correct. Most obviously, the insuring agreement states that Travelers will "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," and individual officers and directors are insureds "with respect to their duties as [] officers or directors." Blue Bell Policy No. HC2E-GLSA-125DB8771-TCT-15 (the "Policy"), § II.1.d, Dkt. No. 27-1. In the Underlying Case, the plaintiffs seek to force the Blue Bell individual defendants to pay damages, and those damages result from alleged bodily injury to Blue Bell customers and the attendant publicity and governmental investigations. Nothing in the Policy limits "damages" to damages paid directly to third parties, and from the standpoint of the Individual Insureds, the impact of a requirement to pay damages does not depend on the identity of the recipient. The damages sought here fall within the plain language of the Policy.

Travelers' assertion that this claim falls outside the scope of a liability policy because the alleged injuries were incurred by Blue Bell itself also contradicts black letter law interpreting third-party liability policies. Courts routinely recognize that third-party liability policies cover shareholder derivative suits without any hint that they somehow constitute first-party claims. Thus, a Texas district court noted potential liability coverage of a shareholder derivative claim, even

though the court ultimately found that the claim fell within the policy's pollution exclusion. *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. U.S. Liquids, Inc.*, 271 F. Supp. 2d 926, 931 (S.D. Tex. 2003) ("The parties apparently agree that the securities and derivative claims alleged in the consolidated lawsuit fit within the Policy's definition of covered 'securities claims.'"). Similarly, in *Burks v. XL Specialty Ins. Co.*, 534 S.W.3d 458, 466–67 (Tex. App.—Houston [14th Dist.] 2015, pet. granted, judgm't vacated w.r.m.), the Texas Court of Appeals recognized that the insurer was obligated to advance defense costs for a derivative action under a Directors and Officers (D & O) liability policy. Of course, many of these cases involve D&O liability policies, rather than general liability policies, but none of the cases suggest that derivative claims fall outside the scope of third-party liability coverage. *See also World Water Works Holdings, Inc*. v. *Cont'l Cas. Co.*, 392 F.Supp.3d 923, 930 (N.D. Ill. 2019) (noting the agreement of the parties that, absent the exclusion at issue, the derivative action "would fall under the insurance policy and thus Continental would have a duty to defend that suit."); *BCB Bancorp, Inc. v. Progressive Cas. Ins. Co.*, 2017 WL 4155235, at *3 (D.N.J. 2017) (confirming coverage of defense costs for shareholder derivative suit against company's directors).

Travelers cites two out-of-jurisdiction cases involving intra-shareholder disputes in this section of its brief, Travelers Br. at 6, but neither case supports its position. The first, *Farr v. Farm Bureau Insurance Co. of Nebraska*, 61 F.3d 677, 680 (8th Cir. 1995), involved a counterclaim filed by majority shareholders of DPPI for breach of fiduciary duty, fraud, and other claims against minority shareholders who allegedly "acted to cripple DPPI financially and then misrepresented DPPI's financial condition to a potential purchaser." Applying Nebraska law, the court held that the claims fell outside the "personal injury" coverage of the general liability policies because the policies were "designed to protect the officer who acts to advance the business interests of the

corporation, not the officer who acts in a manner that is antagonistic toward the corporation's business interests." *Id*. at 681. Here, of course, there is no allegation that the individual defendants acted to "cripple" Blue Bell or acted against what they perceived to be the company's business interests. Moreover, the *Farr* court expressly recognized that general liability policies may cover injuries caused to the corporation by officers or directors, noting that the policies "anticipate injuries caused (*either to the corporation* or to third parties) by corporate officers acting on behalf of the corporation." *Id*. (emphasis added).[1] In other words, the *Farr* case actually *supports* the position taken by Blue Bell in this litigation.

Similarly, in *First Mercury Syndicate, Inc. v. New Orleans Private Patrol Service, Inc.*, 600 So.2d 898, 901–02 (La. Ct. App. 1992), the Louisiana Court of Appeals found no coverage for a derivative action brought by a former executive and minority shareholder who alleged that other officers had terminated his employment and had also "engaged in acts that were illegal and that constituted self-dealing," such as "paying themselves excessive compensation for performing little or no work" and "raiding corporate funds and removing large sums of money from corporate accounts for the benefits of themselves." The court concluded that such acts were "not directly related to the conduct of their security guard business." *Id*. at 901. Here, by contrast, the allegations against the individual defendants directly relate directly to the operation of the business and lack any kind of self-dealing or fraud. Neither *Farr* nor *First Mercury* has any bearing on this case.

Travelers also cites three Texas cases for the unremarkable proposition that CGL policies generally involve damages to or claims by third parties, Travelers Br. at 6, but those cases have no

[1] In fact, the Eight Circuit explicitly rejected a comment by the district court (and the position taken by Travelers here) that any covered offense must "be committed against another person or organization," emphasizing that "We find nothing in the definition of offense that requires the victim to be a person (or organization) other than the perpetrator of the offense." *Id*. at 381 n.3.

relevance here. *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660, 675-75 (Tex. 2008) briefly discussed the statutory scope of third-party claims under Article 21.55 of the Texas Insurance Code (not at issue here) in the context of addressing the availability of attorney's fees but did not describe the broader scope of CGL policies. *Seger v. Yorkshire Insurance Co., Ltd.*, 503 S.W.3d 388, 402 (Tex. 2016), merely held that the claimant was a leased-in worker and therefore excluded under the relevant policy. The language cited by Travelers occurred in the context of inquiring whether the claimant was himself an insured under the policy (he was not). Finally, *St. Paul Guardian Insurance Co. v. Centrum GS Ltd.*, 283 F.3d 709, 713 (5th Cir. 2002), involved claims by a terminated employee, for which the court found a duty to defend. None of these cases mention derivative suits or suggest that claims involving shareholders are really first-party claims. Travelers' assertion that commercial general liability insurance policies exclude coverage for derivative suits, regardless of the nature of the suit, the allegations of the complaint, or the language in the policy itself, is without merit.

2. The Officers and Directors are Insureds under the Policy with Respect to the Underlying Suit

Travelers next contends that the individual defendants named in the Underlying Complaint are not insured because they were acting outside of their duties given that they stand accused of breaching those duties. This assertion is inconsistent with the Policy and the Underlying Complaint.

The Policy states that Blue Bell's executive officers' and directors are insureds "with respect to their duties as your officers or directors." Policy, § II.1.d. The Underlying Complaint alleges damages arising from their acts and omissions as officers and directors.

> As alleged herein, the Company's senior management responsible for the Company's operations, the Chairman, Chief Executive Officer and President Paul W. Kruse [], and the Vice President of Operations, Greg Bridges [],

> knowingly disregarded Listeria contamination risk and continued the Company's production and distribution of ice cream, in breach of their fiduciary duties of care and loyalty to the company.

Marchand v. Barnhill, CA. No. 2017-0586-JRS, Compl. at 2 (Del Ch. Ct. August 18, 2017), Dkt. 28-1 ("Underlying Complaint" or "Underlying Suit"). Thus, the Underlying Complaint essentially alleges negligence or recklessness on the part of the named individual defendants in their oversight of the company's "production and distribution of ice cream." The Underlying Complaint repeatedly alleges that the named individuals failed to take various actions that would have prevented the *Listeria* outbreak that harmed consumers and consequently harmed the company, but nowhere does the Complaint allege that they were engaged in self-dealing or doing something other than managing and operating the ice cream company. For instance, the Complaint alleges that "Company management ignored complaints about factory conditions," Dkt. No. 28-1 ¶ 56; that there was "a Company-wide failure to institute controls and maintain safe and legally compliant operations," *id.* ¶ 68; that two directors "knowingly disregarded contamination risk and safety compliance," *id.* ¶ 96; and that the Board "willfully failed to exercise its fundamental authority to govern management and institute a system of controls for legal compliance and safe operations of the Company," *id.* ¶ 99. These allegations describe a supposed failure to *fulfill* fiduciary duties as plaintiffs believe they should have done, but they do not suggest that the defendants were acting in some other capacity or were pursuing the interests of some other entity.

Because all of the alleged acts or omissions were committed by the individuals as part of the performance of ongoing operations of the company and its facilities, these actions are at least *potentially* covered by the Policy. Consequently, Travelers has a duty to defend the entire lawsuit. *See Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 528 (5th Cir. 2004) (applying Texas law and explaining that if the insured establishes that "a claim against it is potentially within the policy's coverage," the insurer is then "obligated to defend the insured").

As authority for its position, Travelers points again to the Eighth Circuit case *Farr* and to a trio of California cases, none of which is applicable here. Travelers Br. at 8. As discussed above, *supra* at 6–7, *Farr* involved allegations that minority shareholders "acted to cripple" the business financially and "misrepresented" the company's financial condition to a potential purchaser, actions that were directly "antagonistic toward the corporation's business interests." 61 F.3d at 680-81. Here, of course, the alleged breaches of fiduciary duty were not directly or intentionally "antagonistic" to the company's operations or business.

The California cases cited are similarly inapposite. In the unpublished *Haggerty v. Federal Insurance Co.*, 32 F. App'x 845, 848 (9th Cir. 2002), the former officer sought coverage for a defamation claim, which alleged that he was "[c]ontacting employees of Plaintiffs for the purpose of disseminating false and misleading information about Plaintiffs' future plans, and/or soliciting said employees to leave their employment and become employees of Ryan's Express, all for the benefit of Ryan's Express." *Id*. In *Lomes v. Hartford Financial Services Group, Inc.*, 88 Cal. App. 4th 127, 130 (Cal. Ct. App. 2001), a disgruntled former director and minority shareholder sought coverage for a defamation counterclaim by the company that he "telephoned a lender and made false and defamatory statements that caused [the company] to lose its financing." The company filed the counterclaim against the director "as an individual," no one alleged that he had board authority for his communication with the lender, and the court found "no facts to support Lomes's claim that he was acting in his capacity as a director." *Id*. at 129, 134. Finally, in *Milazo v. Gulf Insurance Co*., 224 Cal. App. 3d 1528, 1531–32 (Cal. Ct. App. 1990), two partners sued a third partner, alleging that he had secretly negotiated a deal with the lessor of the property to refuse to extend the lease, creating the opportunity for lessor and the third partner to move further into the local retail market for meat. The court concluded that the partner's "conduct in destroying the

partnership's opportunity to remain in business could not be considered within the usual course of activity" and that "when a partner acts to misappropriate a partnership asset, interest or economic opportunity or to otherwise deprive the partnership thereof he cannot, as a matter of law, be deemed to be acting in his capacity as a partner." *Id*. at 1538–39. As with *Farr*, each of these cases involve intentional acts calculated to undermine the interests of the enterprise with no suggestion that the acts could plausibly have been taken in an insured capacity. The individual defendants here face no such allegations, and the complaint itself alleges they were acting to further the production and distribution of ice cream by the company.

In contrast to the very different circumstances in the cases cited by Travelers, other courts have concluded that liability coverage is available to directors facing derivative suits or accused of breaching their fiduciary duties, particularly in the defense context. Thus, in *Burks*, the court reversed a grant of summary judgment for an insurer in a suit by a director seeking defense coverage. *See* 534 S.W.3d at 470. The court noted that the policy applied to "any ... alleged act, error, or omission by any Insured Person while acting in his or her capacity as an ... Insured Person of the Company" and that the complaint alleged "acts and omissions—the receipt of money, stock, and other benefits, and the failure to give [the company] something of reasonably equivalent value—while Burks was acting as a corporate officer." *Id*. at 464. The court further noted that two derivative suits had been filed against the director during the policy period for breaches of fiduciary duty and related claims based on similar allegations. *Id*. at 465. Thus, alleged breaches of fiduciary duty do not preclude liability coverage.

Similarly, a federal district court in California recently rejected an insurer's argument that it "does not have a duty to defend because the breach of fiduciary duty cause of action is not brought against [the director] in his 'insured capacity.'" *TriPacific Capital Advisors, LLC v. Fed.*

Ins. Co., No. SACV 21-919 JVS (JDEx), 2021 WL 5316407 (C.D. Cal. Nov. 15, 2021). The court rejected caselaw cited by the insurers because "the facts in those situations conclusively showed that the defendant was not acting in an insured capacity," whereas here the insurer could not "conclusively prove" that the plaintiff had sued the director in a different capacity. *Id*. at *6. Again, the fact that a plaintiff raises claims for breach of fiduciary duty does not automatically mean that an accused individual is acting outside of his or her capacity as an insured. When, as here, the allegations relate to actions or omissions taken as part of the duties and obligations of the individual, the insurer must defend the entire suit.

B. The Underlying Complaint Alleges a Covered Occurrence

Travelers also asserts that the Underlying Complaint is not covered because it alleges that the acts and omissions of the individual defendants were "committed intentionally, knowingly, and willfully, and the injuries were therefore not caused by an accident or occurrence. Travelers Br. at 9. In fact, the Underlying Complaint does not allege that any of the Defendants expected or anticipated that the bodily injury would occur, which is required under Texas law. The Underlying Complaint thus alleges an occurrence and Travelers must defend the entire suit.

The Policy requires only that the *bodily injury* be caused by an occurrence, not that all actions cited in the Complaint be accidental or unintentional. The Policy covers "all sums the insured becomes legally required to pay because of bodily injury" and requires that the "bodily injury" be "caused by an 'occurrence,'" defined in turn as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Policy, §§ I.1.a., I.1.b.(1)–(2) & V.13. In this case, the presence of *Listeria* in the ice cream was unintended and "accidental," leaving affected consumers "exposed" to the "harmful condition" of the bacteria. The bodily injury itself was therefore caused by an "occurrence." That bodily injury caused further harm to the company, exposing the company to damages 'because of bodily injury," but

Defendants need not show that the resulting economic harm was separately caused by a different occurrence. Furthermore, the Underlying Complaint never alleges that the individual defendants intended their products to contain bacteria or anticipated that any consumers would suffer injury.

Travelers argues that under Texas law there can be no accident "where the injury is the inevitable and predictable result of the insured's actions," even if the insured did not intend the specific injury. Travelers Br. at 9. Travelers then cites allegations concerning the defendants' knowledge of *Listeria* and asserts that "intentional failures caused the Listeria outbreak and Blue Bell's resulting financial losses." *Id*. at 10. This analysis fails under Texas law for several reasons.

First, Travelers selectively quotes language from Texas cases, but each of the cases cited involved intentional acts that the insured either knew would cause injury or would almost certainly be expected to cause that injury regardless of how the act was performed. Thus, in *HVAW v. American Motorists Insurance Co.*, 149 F.3d 1175, 1998 WL 413803 (5th Cir. 1998) (unpub.), the insured intentionally engaged in a conspiracy to defraud and damage clients, while in *Butler & Binion v. Hartford Lloyd's Insurance Co.*, 957 S.W.2d 566 (Tex. App.–Houston [14th Dist.] 1995), the claimant alleged that the law firm "unfairly restricted her access to clients, reassigned her work, and reduced her employment compensation," which the court found to be intentional. In *Trinity Universal Insurance Co. v. Cowan*, 945 S.W.2d 819 (Tex. 1997), a photoshop employee intentionally made copies of revealing photographs and showed them to friends, and in *Meridian Oil Production, Inc. v. Hartford Accident and Indemnity Co.*, 27 F.3d 150 (5th Cir. 1994), the insured company intentionally drilled through a freshwater aquifer.

In each case, the insured may not have anticipated the exact extent of the damages to the claimant, but the insured knew or should have known that damage to the claimant was the "highly probable" outcome of the intentional acts. *See, e.g.*, *Meridian Oil*, 27 F.3d at 152 ("Although the

extent of monetary recovery for the damages in the present case might have been unexpected, damage to the surface and subsurface was a necessary companion event to Meridian's conduct."); *Trinity*, 945 S.W.2d at 828) (concluding that "Gage's conduct was not an 'accident' because "[h]e did exactly what he intended to do when he purposefully copied the photographs and showed them to his friends"); *see also Lamar Homes, Inc. v. Mid–Continent Casualty Co.,* 242 S.W.3d 1, 9 (Tex. 2007) (noting that a claim does not involve an accident when "circumstances confirm that the resulting damage was the natural and expected result of the insured's actions, that is, was highly probable whether the insured was negligent or not"). Here, by contrast, the insured is accused of continuing to operate an ice cream business despite warnings of possible contamination at certain facilities, an activity with heightened risk if done negligently but not one that would necessarily produce bodily injury or death. This case also involves alleged "exposure" to "hazardous conditions," rather than injury directly caused by an intentional act, a separate clause of the occurrence definition not at issue in any of the cases cited by Travelers.

Second, the "intentional" actions alleged here are of a very different character than the actions alleged in the cases cited by Travelers. Most obviously, the Underlying Complaint primarily alleges that the defendants intentionally failed to act, rather than acted intentionally in way that caused the injury. In other words, they allegedly failed to supervise company operations adequately or to investigate potential hazards. *See* Dkt. No. 28-1 ¶¶ 96, 99, 121, 143–44, 148–50. Texas courts have noted that this type of allegation is not consistent with an intentional wrong. *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"). As noted in Blue Bell's

own opening brief, the Underlying Suit uses words like "intentional" or "willful" in various places but largely does so by alleging that the defendants "willfully" failed to exercise control." Dkt. No. 28-1 ¶ 99. Because the only "intentional" actions were a failure to implement stricter controls, those omissions may constitute an occurrence because the bodily injury itself was not intended, nor would bodily injury normally result from the failure to inform the board adequately or to implement greater monitoring of production systems. At a minimum, the allegations of inadequate supervision create the *potential* for coverage, thus triggering the duty to defend.

Furthermore, as set forth in Blue Bell's opening briefs, Texas courts have found that intentional acts may constitute an occurrence when the bodily injury or property damage is not intended or anticipated. *See, e.g.*, *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) (lawsuit against a neighboring landowner was covered, even though the landowner 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" because the damage "was not the intended result had the lease been performed non-negligently"); *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.) (lawsuit alleging that deliberate dredging resulted in sand erosion on neighboring property involved 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").[2]

[2] Additionally, even if the Court were to conclude that certain officers somehow intended the *Listeria* outbreak through their acts and omissions, those actions and intentions cannot be imputed to other individual defendants. For example, the Underlying Complaint does not even allege that all of the Directors had full knowledge of the *Listeria* contamination at different plants. Dkt. No. 28-1 ¶¶ 101–11.

C. The Underlying Complaint Seeks Damages Because of Bodily Injury

Travelers finally contends that Underlying Suit does not seek damages because of bodily injury, but the allegations of the Underlying Suit belie this position, and the cases cited by Travelers are wholly inapposite. Travelers asserts that the Underlying Complaint seeks only monetary damages and that "under Texas law, economic losses and claims for pure monetary relief are not covered damages." Travelers Br. at 13. Each of the cases cited, however, stands solely for the unremarkable position that in the absence of bodily injury or property damage, a commercial general liability policy does not cover other economic losses. That proposition bears no resemblance to the damages here, which flow directly from actual bodily injury.

The cases cited by Travelers on this point involve the complete absence of bodily injury or property damage allegations. In *CSA Nutraceuticals GP, LLC v. Chubb Custom Insurance Co.*, 2012 WL 12882137 (N.D. Tex. Jan. 30, 2012), the plaintiffs alleged that CSA had made false representations about the impact of its products on body weight. As the court noted, "the problem which occasioned the underlying suit was that CSA Nutraceuticals' product failed to result in weight loss, not that it caused bodily injury." *Id*. at *6 ("Failing to achieve weight reduction means the body basically did not change. It does not mean that the body was injured."). In *Nautilus Insurance Co. v. John Gannon*, 103 Fed. Appx. 534 (5th Cir. 2004), the claimants signed a contract to put up a billboard, but their contract partner didn't have the relevant authority, and the local authorities denied a permit. No property was damaged. The claimants in *Nutmeg Insurance Co. v. Pro-Line Corp.*, 836 F. Supp. 385 (N.D. Tex. 1993), alleged that the conduct of the defendant caused *other* parties to make disparaging comments about the claimants, leading to a loss of sales. Unsurprisingly, the court found no property damage. *See also Daneshjou Daran, Inc. v. Truck Ins. Exch.,* No.03-06-00206-CV, 2009 WL 2410932, at *2 (Tex. App.—Austin Aug. 5, 2009, no pet.) (mem. op.) ("The Bullocks did not assert a claim for property damage as defined by the policy.

They did not allege any physical injury to any property, nor did they allege that they were deprived of personal use of the property."); *State Farm Lloyds v. Kessler,* 932 S.W.2d 732 (Tex. App.—Fort Worth 1996, writ denied) (noting that "the Fannings do not assert that the Kesslers injured the property, destroyed the property, or caused the resulting loss of use"). In contrast to each of these cases, here there are substantial allegations concerning bodily injury to Blue Bell customers.

Travelers acknowledges that Blue Bell customers allegedly suffered bodily injury but asserts that the Underlying Suit only has an "indirect connection to bodily injury claims," which cannot "transform the Shareholder Suit into a covered claim." Travelers Br. at 14. In fact, if successful, the Underlying Suit would cause individual defendants to pay damages "because of" that bodily injury, thus satisfying the requirements of the Policy and triggering the duty to defend. None of the cases cited by Travelers undermines this direct connection to Policy language.

Travelers first cites *Fox Electric I, Ltd. v. Amerisure Insurance Co.*, 2006 WL 8438294 (N.D. Tex. Mar 21, 2006), but that case merely held that the former owner had not actually asserted a claim for loss based on property damage. *See id.* at *4 ("Since the CGL policy only applies to property damage and such damage is not alleged in the third-party petition, there is no genuine issue remaining as to whether Amerisure had a duty to defend Fox in the third-party action."). Here of course the Underlying Complaint expressly alleges bodily injury to consumers and seeks damages from individual defendants "because of" that bodily injury," which is alleged to have occurred as a result of their actions at Blue Bell. Travelers also cites *Preau v. St. Paul Fire & Marine Insurance Co.*, 645 F.3d 293 (5th Cir. 2011), which applied Louisiana law to a claim for general liability coverage by an association of anesthesiologists who allegedly failed to disclose a former employee's substance abuse when writing a letter of recommendation. The policy required the insurer to pay "amounts any protected person is legally required to pay as damages for covered

bodily injury," and the court concluded that the damages for tortious misrepresentation were not damages for covered bodily injury. *Id*. at 296.[3] Travelers then cites *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Ready Pac Foods, Inc.*, 782 F. Supp. 2d 1047 (Mar. 18, 2011), in which a California district court declined to permit coverage under California law for claims of lost profits by Taco Bell. The restaurant chain claimed that fewer people had eaten at its restaurants after an *E. coli* outbreak, and the court noted that, under California law, "suits for lost profits and loss of goodwill equate to intangible loss and therefore not generally covered under a commercial general liability policy." Here, of course, Blue Bell seeks coverage under Texas law for direct, tangible loss because of bodily injury.

Moreover, as demonstrated in Blue Bell's opening brief, numerous insurance coverage cases throughout the country confirm that damages may be owed because "because of bodily injury" and covered by a general liability policy even when the specific relief sought does not directly remedy the bodily injury itself but rather addresses harm flowing from the bodily injury. Thus, the Fifth Circuit found defense coverage for a suit by the City of New Orleans against a firearm industry trade association based on increased costs from bodily injuries caused by handguns, including "the cost of increased police force" and "increased emergency medical care." *Scottsdale Ins. Co. v. Nat'l Shooting Sports Found.*, 226 F.3d 642, 2000 WL 1029091, at *1 (5th Cir. 2000) (unpublished op.), The court acknowledged that the "complaint alleges that because of the bodily injuries to its citizens, the City of New Orleans had to incur additional costs," and found "arguably covered by the policies." *Id.* at *2. Similarly, financial damages incurred by consumers of cell phones who had to purchase headsets because of potential radiation exposure were damages

[3] Furthermore, as the Seventh Circuit has noted, a policy that "covers suits seeking damages 'because of bodily injury' … provides broader coverage than one that covers only damages 'for bodily injury.'" *Cincinnati Ins. Co. v. H.D. Smith, LLC*, 829 F.3d 771, 774 (7th Cir. 2016).

"because of bodily injury" under general liability policies. *Samsung Elec. Am., Inc. v. Fed. Ins. Co.*, 202 S.W.3d 372, 381–82 (Tex. App.—Dallas 2006), *aff'd* 268 S.W.3d 506 (Tex. 2008). As the court explained, the damages were "sought 'on account of' or 'by reason of' the plaintiffs' exposure to radiation from the cell phones," which meant they "potentially state a claim for 'damages because of bodily injury'" and trigger the duty to defend. *Id*. *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 ambiguity must be construed in favor of the insured). Texas courts have reached a similar result when analyzing whether economic loss can constitute harm "because of property damage." *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007) (concluding that a claim for economic loss can arise "because of bodily injury under the terms of a particular policy); *Mid-Continent Cas. Co. v. Academy Dev., Inc.*, 2010 WL 3489355, at *6 (S.D. Tex. Aug. 24, 2010) (finding that diminution in economic value of homes could be "damage because of physical injury to tangible property because it flowed from nearby property damage to a lake retaining wall).

The allegations here thus fall within a well-recognized line of cases supporting coverage that are factually closer to the situation here than the cases cited by Travelers. Even though the shareholders here did not personally suffer sickness or death, customers allegedly did, and the direct effect of their injuries caused injury to the company. Similarly, just as allegations of economic loss may constitute damages "because of physical injury to tangible property," claims for shareholder injury may arise "because of bodily injury" when that loss is attributable to the sickness and death of consumers allegedly caused by Blue Bell products. *See* Dkt. No. 28-1 at 2.

Finally, Travelers argues that the "government opioid-litigation cases" are "inapposite and non-binding" because the governmental entities seek "to recover, at least in part, medical costs

spent to care for and treat their citizens who have been injured by opioid abuse and addiction." Travelers Br at 17.[4] While this is an accurate description of *some* of the damages sought in those cases, courts finding in favor of coverage have not limited their decisions to the costs of treating citizens. For example, in *Cincinnati Insurance Co.*, the Seventh Circuit rejected the insurer's argument that, even if the policy theoretically covered the costs of care incurred by the state to treat the bodily injury of its citizens, "this case is different in fact because West Virginia does not actually seek reimbursement for money it spent because of its citizens' injuries." 829 F.3d at 774. The court instead described various ways that the state had been forced to "spend money addressing and combating the prescription drug abuse epidemic" and concluded that, while the state "asserts numerous legal theories and seeks a variety of remedies," the "duty to defend arises even if only one of several theories is within the potential coverage of the policy." Here, too, Blue Bell has alleged sufficient damage "because of bodily injury" to trigger the duty to defend.

IV. CONCLUSION

For the reasons discussed herein, Defendants respectfully request that the Court deny Travelers' cross motion and grant their own motion for summary judgment on the duty to defend.

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[4] As Travelers notes, some courts applying the law of different states have concluded that general liability policies do not cover costs incurred by the state for treatment of the bodily injury of its citizens. Travelers Br. at 18 n.44. The Delaware Supreme Court recently denied coverage under Delaware law for an opioid-related claim by the state, though in that case the "governmental entities sought to recover only their own economic damages, specifically disclaiming recovery for personal injury or any specific treatment damages." *ACE Am. Ins. Co. v. Rite Aid*, --- A.3d ----, 2022 WL 90652, *1 (Del. Sup. Ct. Jan. 10, 2022).

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of January 2022, the undersigned electronically filed the foregoing instrument by CM/ECF system which will send notice of the filing to all counsel of record.

/s/ Douglas A. Daniels
Douglas A. Daniels