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' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Travelers breached its contractual duties to Defendants by failing to defend against the Underlying Suit and then filed this lawsuit. Blue Bell and its individual directors and officers moved for summary judgment, demonstrating that the Underlying Suit alleged damages against insured individuals "because of" bodily injury to Blue Bell customers, that no exclusion clearly applied, and that, at a minimum, Travelers had a duty to defend its Insureds. In response Travelers again asserts the suit is not covered because, supposedly, (1) a derivative action alleging breach of fiduciary duty automatically implies the insureds were not acting in an insured capacity; (2) there was no occurrence under the Policies because the complaint alleged that the Insureds acted "intentionally" when they "intentionally" failed to establish sufficient controls to prevent a *Listeria* outbreak; (3) the lawsuit does not seek damages "because of" bodily injury because the complaint seeks financial damages to the corporation; and (4) the intentional acts exclusion applies, even though nowhere does the complaint allege that anyone at Blue Bell intended the injury to occur. Travelers is wrong on each of these points, and summary judgment for Blue Bell is warranted.

ARGUMENT

A. The Individual Defendants in the Underlying Suit are insureds under the Policies

Travelers again asserts that the named Individual Defendants are not Insureds because they were accused of having breached their fiduciary duties to the company. Travelers Opp. at 2-3, Dkt. No. 35. As demonstrated in Blue Bell's opposition, however, the Underlying Suit alleges the failure to fulfill fiduciary duties in the course of ongoing operation of the company and its facilities, without any allegation that Individual Defendants were acting in some other capacity or were pursuing the interests of some other entity. Blue Bell Opp. at 8-9, Dkt. No. 37 (citing allegations). Courts routinely acknowledge that liability coverage may be available for alleged breaches of fiduciary duty in those circumstances. *TriPacific Capital Advisors, LLC v. Fed. Ins. Co.*, No.

SACV 21-919 JVS (JDEx), 2021 WL 5316407 (C.D. Cal. Nov. 15, 2021) (finding duty to defend case brought against a director for breaches of fiduciary duty); *Burks v. XL Specialty Ins. Co.*, 534 S.W.3d 458 (Tex. App.—Houston [14th Dist.] 2015), pet. granted, judgm't vacated w.r.m (noting potential coverage despite allegations of breaches of fiduciary duty).

Travelers once again relies on cases in which a particular insured executive acted outside of an insured capacity, but each of those cases involve self-dealing or conduct plainly unconnected to executive duties. For example, *American States Insurance Co. v. Synod of the Russian Orthodox Church Outside of Russia*, involved intentional criminal sexual abuse by a monk. 170 F. App'x 869 (5th Cir. 2006). In *Milazo v. Gulf Ins. Co.*, the partner seeking coverage allegedly undermined the partnership by negotiating his own deal with a third party. 224 Cal. App. 3d 1528, 1531–32 (Cal. Ct. App. 1990) (describing situation "when a partner acts to misappropriate a partnership asset, interest or economic opportunity or to otherwise deprive the partnership thereof"). Similarly, in *Haggerty v. Federal Ins. Co.*, the officer undermined the company's business by recruiting employees to leave the company and by making false and defamatory statements against the company. 32 F. App'x 845, 848 (9th Cir. 2002). Finally, in *Farr v. Farm Bureau Ins. Co. of Nebraska*, the executive allegedly acted "antagonistic toward the corporation's business interests" by crippling the business financially and misrepresenting its financial condition to a potential purchaser. 61 F.3d 677, 680 (8th Cir. 1995). In contrast to each of these cases, Defendants here are not accused of self-dealing or deliberately acting to undermine the company. Rather, Defendants allegedly failed to fulfill their obligations through poor management and oversight—allegations that squarely fall within traditional liability insurance protection.

Travelers also argues that finding coverage would create a "moral hazard," encouraging reliance on insurance policies rather than creating incentives to reduce bad behavior. *See* Travelers

Opp. at 4. Of course, unlike the cases cited by Travelers, this Court is not asked to consider indemnity coverage for intentional torts, but whether individual insureds can rely on their insurer to defend them when a derivative lawsuit makes allegations about their conduct. Travelers asserts that a derivative suit, by its nature, does not involve a third-party liability claim, but as discussed in Defendants' response brief, case law demonstrates the contrary. Blue Bell Opp. at 5–6 (collecting cases). CGL policies are not often called on to cover claims against directors because (unlike here) such claims generally do not involve bodily injury, but nothing precludes that coverage, and liability policies frequently cover alleged breaches of fiduciary duty. Indeed, as one of the cases cited by Travelers recognizes, CGL policies "anticipate injuries caused (*either to the corporation* or to third parties) by corporate officers acting on behalf of the corporation." *Farr*, 61 F.3d at 681 (emphasis added). Moreover, from the perspective of an individual director, part of the standard protection afforded board members is defense coverage against lawsuits relating to their conduct, so long as it does not involve illegality or self-dealing. The attempt by Travelers to withhold that protection creates its own moral hazard: reluctance to serve on a corporate board.

B. The *Listeria* outbreak constituted an occurrence under the Policies

Travelers asserts that the Defendants allegedly engaged in knowing and willful misconduct which cannot produce an "occurrence." Travelers ignores the role of an "occurrence" in the Policy and under Texas law. The Policy requires only that the *bodily injury* be caused by an occurrence, defined in part as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," and that the insured be required to pay damages "because of" that injury. *See* Policy, §§ I.1.a., I.1.b.(1)–(2) & V.13. Here, of course, the actual presence of *Listeria* in the ice cream was unintentional, and it allegedly caused consumers to be "exposed" to a "harmful condition." As Defendants have shown, the alleged "intentional" failure to respond

adequately to reports of contamination at the factory does not make the exposure of customers to bacteria any less of an occurrence. Blue Bell Opp. at 12–15, Travelers itself admits that claims by consumers for the bodily injury they suffered triggered potential coverage under the general liability policy, a fact which led Travelers to defend those lawsuits. Travelers Opp. at 10 n.18. The present lawsuit involves a separate set of damages flowing from that same bodily injury, but the occurrence analysis is the same.

Travelers again points to several cases in which allegations of intentionality led courts to conclude that there had been no accident, even if the specific nature of the injury was "unexpected" or "unforeseen." Travelers Opp. at 5–6. Each of those cases, however, involved deliberate conduct that directly produced the injury to the underlying claimants, and that injury was the inevitable or "natural" outcome of the intentional act. Thus, in *Trinity Universal Ins. Co. v. Cowan*, a photoshop employee "did exactly what he intended to do when he purposefully copied the photographs and showed them to his friends." 945 S.W.2d 819, 827 (Tex. 1997). In *Argonaut Southwest Insurance Co. v. Maupin*, the unauthorized removal of material from a property without proper authorization was not an accident because the "[d]amage complained of here was the removal of the large amount of material from the property" and "Respondents did exactly what they intended to do." 500 S.W.2d 633, 635 (Tex. 1973). In *Meridian Oil Production, Inc. v. Hartford Accident and Indemnity Co.*, the insured company intentionally drilled through a freshwater aquifer without using a surface casing and "discharged contaminants into open pits on sandy soil." 27 F.3d 150, 151 (5th Cir. 1994). Travelers characterizes *Meridian Oil* as a "knowing failure to take protective action," Travelers Opp. at 7, but the court described specific, deliberate actions taken by the policyholder, concluding that "damage to the surface and subsurface was a necessary companion event to Meridian's conduct" and that "contaminants dumped on sandy, permeable soil without

adequate lining will always pollute." *Meridian Oil*, 27 F.3d. at 152; *see also Martin Marietta Materials Sw., Ltd. v. St. Paul Guardian Ins. Co.*, 145 F. Supp. 2d 794 (N.D. Tex. 2001) (finding no occurrence because the intentional diversion of a creek necessarily deprived downstream users of water). Travelers also cites for support *Admiral Ins. Co. v. Little Big Inch Pipeline Co., Inc.*, but that court concluded there *had* been an occurrence because while the company deliberately dug up gas lines, it misunderstood the job it had been hired to do which created an "inadvertent and unexpected result." 523 F. Supp. 2d 524, 537 (W.D. Tex. 2007). In other words, because the facts alleged were compatible with both an intentional tort and a negligence claim, the court found a duty to defend. *Id.* at 536. Here, too, the allegations of "intentional" acts are compatible with negligent failure to establish sufficient controls on contamination, not an intentional tort aimed at consumers.

Travelers largely ignores the large body of Texas law holding that "intentional" conduct may not amount to an intentional tort and thus may trigger a duty to defend. The Fifth Circuit has noted that Texas law defining "accidents" distinguishes "between negligence and intentional torts." *Matl v. St. Paul Fire & Marine Ins. Co.*, 31 F. App'x 838, 2002 WL 261437, at *2 (5th Cir. 2002) (unpubl.). Similarly, *Harken Exploration Co. v. Sphere Drake Ins. PLC*, held that "if the act is deliberately taken, performed negligently, and the effect is not the intended or expected result had the deliberate act been performed non-negligently, there is an accident." 261 F.3d 466, 472–73 (5th Cir. 2001). In that case, the insurer argued that contaminated water and dead cattle were the "natural and probable consequences of operating an oil facility" and, more to the point, that the damages were the natural and probable consequence of *continuing* to operate that facility with knowledge that the consequences were happening. *Id*. at 474. The court rejected the argument, noting that "according to the Texas Supreme Court we are supposed to focus on whether the effect

is intended or expected not whether the negligent performance is intended or expected." *Id*. The court found a duty to defend because "whether the Rices should have expected the negligent operation of the oil facility because it is continuing is irrelevant, if the deliberate operation of the oil facility, the act, is performed negligently and the effect, the resulting property damage, is not the intended or expected result of operating an oil facility non-negligently." *Id*.

Here, of course, there are no allegations in the Underlying Suit that Defendants expected or intended the *Listeria* outbreak that harmed consumers and which in turn led to a drop in the company's value. Travelers points to allegations in the Underlying Suit that certain Defendants "knowingly disregarded *Listeria* contamination risk and continued the Company's production and distribution of ice cream." Underlying Suit at 2–3, Dkt. No. 28-1. Travelers focuses solely on the words "knowing" and "willful" but ignores the nature of the acts alleged. In reality, the Underlying Suit alleges, at worst, that Defendants performed their duties in an inappropriate or negligent manner by failing to respond to reports of contamination. Blue Bell Opp. at 14–15 (reviewing allegations in the Underlying Complaint). These factual allegations are compatible with negligent conduct and thus constitute an "occurrence" under Texas law, regardless of whether plaintiffs expressly pled a claim of negligence. *Mid-Continent Cas. Co. v. Safe Tire Disposal Corp.*, 16 S.W.3d 418, 421 (Tex. App.—Waco 2000, pet. denied) (noting that courts examining a duty to defend focus on the "factual allegations that show the origins of damage rather than the legal theories alleged." Moreover, if there is even the *potential* for coverage, Travelers must defend the entire suit. *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 491 (Tex. 2008).

C. The alleged damages were because of bodily injury

Under Texas law, the Underlying Suit alleges damages "because of bodily injury." The lawsuit alleges that Defendants' actions and inactions caused a *Listeria* outbreak, which led to

widespread injuries suffered by consumers of the company's contaminated products, and that, in turn, led to a drop in share prices for which the Underlying Suit claims damages. The bodily injuries suffered as part of the *Listeria* outbreak form the linchpin of the Underlying complaint, connecting the actions of Defendants to the alleged damages.

Defendants have shown that economic loss can trigger coverage in a liability policy when that loss is alleged to have happened "because of" bodily injury or property damage. Blue Bell Br. at 8–13, Dkt. No. 32; Blue Bell Opp. at 18–19 (describing cases). Travelers recognizes, as it must, that these cases find coverage for economic losses but attempts to distinguish them on the basis that the losses were more closely linked to property damage. Travelers Opp. at 11–12. Travelers is correct that "economic damages in and of themselves" cannot satisfy the bodily injury requirement of a general liability policy, but Defendants do not claim that any of the cases cited stand for that proposition. Rather, cases like *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 242 S.W.3d 1 (Tex. 2007) and *Mid-Continent Casualty Co. v. Academy Development., Inc.*, No. H-08-21, 2010 WL 3489355 (S.D. Tex. Aug. 24, 2010), merely show that other types of damages may trigger the duty to defend when those damages allegedly occur "because of" bodily injury or property damage, as they do here. Travelers responds that the Underlying Suit "does not allege that the financial injury was caused by bodily injury," Travelers Opp. at 12, but the complaint alleges that multiple consumers got sick or injured from consuming contaminated products, Dkt. No. 28-1, ¶ 63, that the outbreak and publicity caused catastrophic harm to the company, *id*. at ¶ 69, and that "[a]s a result of Defendants' conduct, Blue Bell has been exposed to numerous lawsuits brought by injured parties." *Id*. at ¶ 87. The economic damages suffered by Blue Bell happened at least in part "because of" bodily injury.

Travelers turns to *Preau v. St. Paul Fire & Marine Ins. Co.*, 645 F.3d 293 (5th Cir. 2011), and *Fox Electric I, Ltd. v. Amerisure Ins. Co.*, No. 4:05-CV-118-Y, 2006 WL 8438294 (N.D. Tex. Mar. 21, 2006), but those cases have no bearing here. *See* Travelers Opp. at 13. In *Preau*, a policyholder wrote a letter of recommendation for a doctor who later injured a patient, but the coverage action turned on a separate suit over misrepresentation, which had not been caused by bodily injury. 645 F.3d at 294–95. Similarly, in *Fox Electric*, a contractor sought defense costs for a suit by a former property owner that was itself being sued by a buyer, but the court found that the underlying suit did not allege property damage at all. 2006 WL 8438294, at *1. Unlike these cases, the Underlying Suit here *does* allege damage because of bodily injury.

Travelers next tries to distinguish the cases cited by Blue Bell showing coverage for lawsuits brought by entities who did not themselves suffer bodily injury, but the minor factual distinctions do not undermine their relevance. For example, Travelers asserts that *Scottsdale Insurance Co. v. National Shooting Sports Foundation*, 226 F.3d 642, 2000 WL 1029091 (5th Cir. 2000) (unpubl.), merely "sought to recover costs for the care and treatment of persons who suffered bodily injury" and relied upon policy language including "damages claimed by any person or organization for care, loss of services, or death resulting at any time from the bodily injury." Travelers Opp. at 14. However, the court did not tie its conclusion to the provision cited by Travelers, which in any case is the *exact same language present in the Travelers policy*. Policy § 1(e). Moreover, the City also sought the "cost of increased police force" and other costs, not just "care," and the court expressly rejected the insurer's contention that "the 'because of bodily injury' provision requires that the plaintiff seeking damages be the one who suffered the bodily injury." *Scottsdale Ins.*, 2000 WL 1029091, at *2. Here, too, nothing in the policy requires the claim to be brought by the claimant suffering the bodily injury, and the Policy even provides that

damages claimed by "an organization" can be covered, including for "loss of services," when those damages result from bodily injury. *See* Policy § 1(e).

Similarly, in *Cincinnati Ins. Co. v. H.D. Smith, L.L.C.*, the insurer argued against coverage based on the fact that "West Virginia seeks its own damages, not damages on behalf of its citizens" who suffered the bodily injury. 829 F.3d 771, 774 (7th Cir. 2016). The court asked "But so what? Cincinnati's argument is untethered to any language in the policy." *Id*. Here, too, Travelers' attempt to limit "damages because of bodily injury" to claims for the bodily injury itself is "untethered to any language in the policy." This language also directly undermines Travelers' attempt to distinguish the cell phone cases seeking reimbursement for the purchase of headsets on the basis that "the plaintiffs who filed suit were the actual consumers who purchased the defendant's product and claimed to have sustained a 'biological' or bodily injury as a result." Travelers Opp. at 16. While that is true, it is irrelevant, as nothing in the policy there, or here, limits the Underlying claimants to those who suffered the bodily injury itself, and there, as here, financial harm can constitute "damages because of bodily injury."[1]

D. The expected or intended exclusion does not apply

Finally, Travelers asserts that the expected or intended exclusion applies, arguing that Defendants have "failed to cite a single case" showing the exclusion would not apply. Travelers Opp. at 17–18. Of course, under Texas law, the insurer bears the burden to show an exclusion

[1] Travelers also points to a recent Delaware case in which the state supreme court found that a municipality seeking costs related to opioid addiction was not covered under Delaware law because the harm had to be an "immediate and direct result" of bodily injury. *Ace Am. Ins. Co. v. Rite Aid Corp.*, No. 339, 2020, 2022 WL 90652 (Del. Jan. 10, 2022). As previously noted in Blue Bell's Response at 20 n.4, some courts have concluded that general liability policies do not cover costs incurred by the state for treatment of the bodily injury of its citizens, while other courts have concluded they do. *See also Rite Aid*, 2022 WL 90652, at *7–9 & 11 (distinguishing other cases finding coverage); *id*. at *13–15 (Vaughn, J, dissenting) (discussing additional cases).

applies. *State Farm Lloyds v. Richards*, 966 F.3d 389, 393 (5th Cir. 2020) (insurer has the burden to show that "the plain language of a policy exclusion or limitation allows [it] to avoid coverage of all claims"). Travelers cites only one case for support, *Butler & Bunion v. Hartford Lloyd's Insurance Co.*, but that case barred coverage for a claim that a partner had been "constructively expelled as partner" after reporting unethical conduct, a type of direct, willful, affirmative act not relevant here. 957 S.W.2d 566 (Tex. App.— Houston [14th Dist.] 1995). Travelers also notes that certain Texas cases addressing intentional act exclusions do not contain the word "expected," but Travelers fails to demonstrate why that makes any difference here, given that, as shown above, the defendants neither intended nor expected any bodily injury to Blue Bell customers. See Travelers Opp. at 18. Furthermore, the exclusion here is for "bodily injury expected or intended from the standpoint of the insured," Policy § 2(a), making it "effect-focused and not cause-focused" and voiding coverage only when the "resulting *injury* was intentional, not merely when the insured's *conduct* was intentional." *Tanner v. Nationwide Mut. Fire Ins. Co.*, 289 S.W.3d 828, 831 (Tex. 2009); *see also Bishop v. USAA Texas Lloyd's Co.*, No. 09–14–00445–CV, 2016 WL 423564 (Tex. App.—Beaumont Feb. 4, 2016) (no pet.) (applying the same *Tanner* language to an exclusion including conduct that would "reasonably be expected to result in bodily injury").

CONCLUSION

For the reasons set forth herein and in their Memorandum of Law in Support of Their Motion for Summary Judgment, Dkt. No. 32, Defendants request that this Court grant Defendants' Motion for Summary Judgment in its entirety and deny Plaintiff's Cross-Motion for Summary Judgment.

DATED: February 4, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February 2022, 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