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-RP JURY DEMAND

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO
PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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I.
INTRODUCTION

The underlying Shareholder Suit[1] was brought on behalf of Blue Bell, the named insured, to recover for the financial losses caused by its own Officers' and Directors' willful breaches of their fiduciary duties. Contrary to Defendants' arguments, the Officers and Directors are not "insureds" under the commercial general liability ("CGL") Policies at issue when sued for breaching their fiduciary duties to the named insured. Even if the Officers and Directors were "insureds," there still would be no coverage because the Shareholder Suit Complaint does not seek to recover "damages because of bodily injury" caused by an "occurrence," as required by the Policies. It seeks to recover Blue Bell's financial losses caused by the Officers' and Directors' knowing and willful misconduct. As a matter of law, there is no coverage for the Shareholder Suit under the Policies, and summary judgment should be granted for Travelers.

II.
ARGUMENT

A. The Policies do not cover claims for damages brought on behalf of the named insured against its own officers and directors for breach of fiduciary duty.

The Policies provide coverage for "sums that the insured becomes legally obligated to pay" because of a covered loss.[2] Blue Bell, the real party in interest in the Shareholder Suit, is a named insured under the Policies,[3] but the Officers and Directors, the defendants in the Shareholder Suit, are not. They are only "insureds" when sued "with respect to their duties as [Blue Bell's] officers or directors."[4] Because the Shareholder Suit alleges that they breached their duties to Blue Bell, they are not insureds and there is no coverage.

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[1] Capitalized terms have the meaning assigned in Plaintiffs' Cross-Motion for Summary Judgment ("Travelers' Motion") (Dkts. 30 (redacted), 34 (sealed unredacted).
[2] Ex. 2. to Travelers' Motion at Travelers_0015 (Dkt. 30-2) (emphasis added).
[3] *Id.* at Travelers_0010.
[4] *Id.* at Travelers_0022.

Defendants wrongly contend that Travelers owes a duty to defend the Officers and Directors, claiming courts "routinely confirm liability coverage for alleged breaches of fiduciary duties in derivative suits."[5] Courts do not "routinely" or even occasionally find coverage under CGL policies for shareholder derivative suits brought on behalf of the corporate insured. Defendants' argument relies on inapposite cases involving directors and officers liability policies ("D&O policies"), not CGL policies. D&O policies and CGL policies insure different risks and provide different coverage.

Moreover, the Texas cases involving D&O policies on which Defendants rely do not hold or even address whether those policies cover shareholder derivative actions.[6] The opinion in *U.S. Liquids* merely recited that there was no dispute that the "securities and derivative claims" at issue met the policy's definition of a "securities claim." 271 F. Supp. 2d at 931. Furthermore, *U.S. Liquids* involved direct claims brought by shareholders to recover for their own losses (i.e., third-party claims). *Id*. at 927. And *Burks* did not involve a shareholder derivative action or the duty to defend. Rather, it involved the insurer's obligation to advance defense expenses under a D&O policy, which is not subject to the eight-corners rule applicable here. *See* 534 S.W.3d at 461-62. Neither court's holding is pertinent here.

The non-Texas cases on which Defendants rely also are not applicable.[7] The opinion in *World Water Works* simply recited that the parties "do not appear to dispute that" the derivative "action would fall under the" D&O policy and, thus, the insurer "would have a duty to defend that suit" absent application of an exclusion. 392 F. Supp. 3d at 929. And *BCB Bancorp* only

[5] Defendants' Brief in Response to Plaintiffs' Cross-Motion for Summary Judgment ("Defendants' Response") at. p. 1 (Dkt. 37).
[6] *See id.* at pp. 4-5, 10 (citing *Nat'l Union Firs Ins. Co. of Pittsburgh, PA v. U.S. Liquids, Inc.*, 271 F. Supp. 2d 926 (S.D. Tex. 2003); *Burks v. XL Spec. Ins. Co.*, 534 S.W.3d 458 (Tex. App.—Houston [14th Dist.] 2015, pet. granted, judgm't vacated w.r.m.) (both involving D&O policies)).
[7] *Id*. at p. 5 (citing *World Water Works Holdings, Inc. v. Cont'l Cas. Co.*, 392 F. Supp. 3d 923 (N.D. Ill. 2019); *BCB Bancorp, Inc. v. Progressive Cas. Ins. Co.*, No. 13-1261, 2017 WL 4155235 (D.N.J. Sept. 18, 2017)).

involved whether the insured timely filed an interrelated claim under a D&O policy. 2017 WL 4155235, at *3. None of the cases cited by Defendants addressed the issue here—whether a CGL policy provides coverage for the insured's first-party losses allegedly caused by its officers' and directors' breach of fiduciary duties.

Defendants fail to distinguish the cases Travelers cited to show that the CGL Policies do not cover actions brought on behalf of the insured company against its own officers and directors for breach of fiduciary duty.[8] In *Farr v. Farm Bureau Ins. Co. of Nebraska*, 61 F.3d 677 (8th Cir. 1995), the Eighth Circuit held that officers and directors are not "insureds" under a CGL policy when "the corporate insured suffer[ed] injury arising from a breach of duty by the corporate directors and/or officers"—the exact scenario here. *Id*. at 681 (construing the same policy language at issue here).[9] Defendants ignore this holding and argue that Farr supports coverage because it "recognized that general liability policies may cover injuries caused to the corporation by officers or directors."[10] But the court explained that "[t]he policies are intended to cover injuries caused by corporate officers when these officers are properly carrying out their duties to the corporation and are 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 interest." *Id*. (emphasis added). Thus, "[a]ny injuries caused by a breach of fiduciary duty" cannot be said to be "with respect to their duties as [the named insured's] officers and directors," as required by the policy. *Id*.

[8] *See id.* at pp. 6-11.
[9] *Compare Farr*, 61 F.3d at 680 ("the policy provides that directors and officers … are covered as insureds, 'but only with respect to their duties as [the corporate insured's] officers or directors.") *with* the Policies at Ex. 2 to Travelers' Motion at Travelers_0022 (Dkt. 30-2) (Blue Bell's "'executive officers' and directors are insureds, but only with respect to their duties as [Blue Bell's] officers or directors").
[10] Defendants' Response at p. 6 (citing *Farr*, 61 F.3d at 680-81) (Dkt. 37).

In *First Mercury Syndicate, Inc. v. New Orleans Private Patrol Service, Inc.*, 600 So. 2d 898 (La. Ct. App. 1992), the court held that CGL policies are only intended to cover the insured company's liabilities to third parties. *Id*. at 901. Defendants attempt to distinguish *First Mercury* by arguing that it involved allegations of fraud and self-dealing "not directly related to the conduct of [the] business," whereas the Officers' and Directors' conduct relates directly to the operation of Blue Bell's business.[11] But that is an immaterial distinction—the court's conclusion did not turn on allegations of fraud and self-dealing. The court only cited those allegations, as well as "other [alleged] violations of the corporate charter," to distinguish cases applying D&O policies, which the court held were inapplicable to the analysis of coverage under a CGL policy. *Id*. As *First Mercury* emphasized, if the Directors and Officers were covered in these circumstances, "it would violate public policy to allow indemnification for such wrongdoing on the part of the insured."[12] *Id*. at 902.

Defendants also argue that California law would find a duty to defend, citing *TriPacific Capital Advisors, LLC v. Fed. Ins. Co.*, No. 21-919, 2021 WL 5316407 (C.D. Cal. Nov. 15, 2021). But *TriPacific* did not involve a shareholder derivative lawsuit. Rather, a former executive sued the named insured and its president to recover damages allegedly suffered by the former executive. 2021 WL 5316407, at *4-6. There was no allegation that the president breached his fiduciary duty to the named insured. *See id*. Therefore, the case in inapposite.

[11] *Id*. at p. 6.

[12] Defendants attempt to characterize the Complaint as essentially alleging mere negligence (Defendants' Response at p. 8), not conduct that was antagonistic to the company business (*id*. at p. 9), which is utterly belied by the actual allegations in the Complaint. No claim for negligence is asserted, only claims for knowing and willful violations of fiduciary obligations, and the Complaint emphatically and repeatedly alleges knowing and willful misconduct toward Blue Bell committed in bad faith and in breach of the Officers' and Directors' duties of loyalty and care. *See* Complaint at p. 2 & ¶¶ 111-12, 139-40, 142-50 (Dkt. 29).

At the same time, Defendants fail to distinguish the relevant California cases cited by Travelers.[13] In *Haggarty* and *Lomes*, the courts held that officers and directors were not acting "with respect to their duties as … officers and directors," and, thus, were not "insureds," when breaching their duties owed to the insured company. *Haggerty*, 32 F. App'x at 849; *Lomes*, 88 Cal. App. 4th at 133; *see also Milazo*, 224 Cal. App. 3d at 1539 (a partner is not an "insured" under the partnership's CGL policy for acts committed against the insured partnership). Defendants attempt to distinguish these cases arguing that, unlike in those cases, the Officers and Directors were acting to further Blue Bell's interests.[14] But that is not what the Complaint alleges—it alleges that the Officers and Directors knowingly and willfully breached their duties of loyalty and care to Blue Bell by failing to remediate known Listeria contamination to Blue Bell's near financial ruin.[15]

As in *Farr*, *First Mercury*, *Haggarty*, *Lomes* and *Milazo*, there is no coverage under Blue Bell's CGL Policies for claims against the Officers and Directors for their knowing and intentional breaches of their fiduciary duties to Blue Bell. Summary judgment should be granted for Travelers.

B. Knowing and willful misconduct is not an "occurrence" under Texas law, regardless of whether the consequences were expected or intended.

The Policies only cover claims for damages "caused by an occurrence," defined as "an accident."[16] As discussed in Travelers' Motion and Response to Defendants' Motion, the

[13] *See* Travelers' Motion at p. 8 (citing *Haggerty v. Fed. Ins. Co.*, 32 F. App'x 845, 848-49 (9th Cir. 2002); *Lomes v. Hartford Fin. Servs. Group, Inc.*, 88 Cal. App. 4th 127, 132-36 (Cal. Ct. App. 2001); *Milazo v. Gulf Ins. Co.*, 224 Cal. App. 3d 1528, 1539 (Cal. Ct. App. 1990)) (Dkts. 30, 34); *see also* Plaintiffs' Response to Defendants' Motion and Memorandum of Law in Support of Motion for Summary Judgment ("Travelers' Response") at pp. 2-3 (Dkt. 36-1).
[14] Defendants' Response at p. 10 (Dkt. 37).
[15] Complaint ¶¶ 111-13, 139-40, 142-50 (Dkt. 29); *see also* Travelers' Motion at pp. 10-11 (describing the Officers' and Directors' alleged numerous knowing breaches of duties owed to Blue Bell) *and id.* at p. 13 (describing the alleged disastrous financial consequences of their breaches) (Dkts. 30, 34).
[16] Ex. 2. to Travelers' Motion at Travelers_0015, 0028 (Dkt. 30-2) (emphasis added).

Complaint does not seek damages "caused by an occurrence" because all of the damages are alleged to have been caused by the Officers' and Directors' knowing and willful violations of their fiduciary duties.[17]

Defendants argue there was an "occurrence" because the Officers and Directors are not alleged to have expected or intended to cause the bodily injuries sustained by some of Blue Bell's customers.[18] Whether the injury was expected or intended is irrelevant if the defendant's actions were intentional, as alleged here. Nearly fifty years ago, the Texas Supreme Court held there is no "occurrence" if the insured's "acts were voluntary and intentional, *even though the result or injury may have been unexpected, unforeseen and unintended*." *Argonaut Sw. Ins. Co. v. Maupin*, 500 S.W.2d 633, 635 (Tex. 1973) (emphasis added). Defendants completely ignore *Maupin* because it is fatal to their argument. Because the Officers and Directors are alleged to have committed knowing, willful, and intentional acts, which resulted in injuries that were the probable consequences of such acts, there was no "occurrence," and therefore, there is no coverage.[19]

C. The Shareholder Suit alleges financial losses caused by the Listeria outbreak and resulting recalls, not "because of" bodily injury.

Defendants' claim also fails because the Complaint does not assert any claim for "damages because of bodily injury," as required by the Polices.[20] The Shareholder Suit does not seek to recover for bodily injury suffered by Blue Bell, nor does it seek to recover costs spent by Blue Bell to care for or treat any alleged bodily injury. Instead, the Shareholder Suit only seeks to recover Blue Bell's pure financial losses caused by the Listeria outbreak and product recalls.[21]

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[17] Travelers' Motion at pp. 9-12 (Dkts. 30, 34); Travelers' Response at pp. 5-7 (Dkt. 36-1).
[18] Defendants' Response at pp. 11-14 (Dkt. 37).
[19] *See* Travelers' Response at pp. 5-10 (Dkt. 36-1) (explaining there is no "occurrence" here).
[20] *See* Travelers' Motion at pp. 12-17 (Dkts. 30, 34).
[21] Complaint, p. 2-3, ¶¶ 75-77, 85.

Defendants cite *Samsung Elec. Am., Inc. v. Fed. Ins. Co.*, 202 S.W.3d 372 (Tex. App.—Dallas 2006), aff'd, 268 S.W.3d 506 (Tex. 2008) and *Ericsson, Inc. v. St. Paul Fire & Marine Ins. Co.*, 423 F. Supp. 2d 587 (N.D. Tex. 2006) in support of their argument that the Complaint seeks damages because of bodily injury.[22] But both of those cases involved plaintiffs suing to recover for their own bodily injuries, which is why the courts found coverage. *See Samsung*, 202 S.W.3d at 375 (finding a potential for coverage because the complaint alleged that the plaintiffs themselves sustained "biological" injury); *Ericsson*, 423 F. Supp. 2d at 589 (same). There are no such allegations in the Shareholder Suit.

Defendants also cite *Cincinnati Ins. Co. v. H.D. Smith, L.L.C.*, 829 F.3d 771 (7th Cir. 2016) and *Scottsdale Ins. Co. v. Nat'l Shooting Sports Found., Inc.*, No. 99-31046, 226 F.3d 642 (table), 2000 WL 1029091 (5th Cir. July 11, 2000) (per curiam).[23] But both of those cases involved plaintiffs suing, in part, to recover damages measured by the cost to care for and treat persons with bodily injuries, and that was why the courts found coverage. *See H.D. Smith*, 829 F.3d at 773-74 (finding a potential for coverage because the plaintiff sought damages for the cost of providing care for its injured citizens, and the policy covered "damages claimed by any person or organization for care, loss of services or death resulting at any time from the bodily injury"); *Scottsdale*, 2000 WL 1029091, at *2 (same). Again, there are no such allegations in the Shareholder Suit.

Actions to recover purely economic damages are not covered, even where there is tangential bodily injury, if the damages sustained did not occur because of bodily injury. *See Preau v. St. Paul Fire & Marine Ins. Co.*, 645 F.3d 293 (5th Cir. 2011) (per curiam); A*ce Am. Ins. Co. v. Rite Aid Corp.*, No. 339,2020, 2022 WL 90652 (Del. Jan. 10, 2022); *Nat'l Union Fire*

[22] Defendants' Response at p. 18 (Dkt. 37).
[23] *Id.* at pp. 17, 19.

Ins. Co. of Pitt., PA v. Ready Pac Foods, Inc., 782 F. Supp. 2d 1047 (C.D. Cal. 2011). Defendants fail to explain how, under the holdings of each of these cases, there could be coverage here.

In *Preau*, a hospital sued an independent medical practice for misrepresentation after one of its principals signed a letter of recommendation for a doctor without disclosing that he had a substance abuse problem, and the hospital hired that doctor who later committed malpractice and subjected the hospital to liability for bodily injury to a patient. *Id*. at 294-95. The defendants sought coverage under their CGL policy, arguing that the claim sought damages "for bodily injury." *Id*. at 296. But the Fifth Circuit held there was no coverage, despite the obvious relevance of the underlying bodily injury claim, because the hospital sought reimbursement from the insured for the amount it paid to settle the bodily injury claim, which was purely an economic loss to the hospital. *Id*.

Defendants' only response to *Preau* is to emphasize that the court was applying Louisiana law and to surmise that the result turned on slightly different wording in the policy.[24] But the Fifth Circuit itself has implicitly rejected this argument because it later applied its holding in *Preau* to a CGL coverage dispute governed by Mississippi law where, as here, the policy applied to claims for damages "because of" bodily injury (as opposed to claims "for" bodily injury), and held there was no coverage in that case. *See Nationwide Mut. Ins. Co. v. A.H. ex rel. Hunter*, 444 F. App'x 753, 755 (5th Cir. 2011) (citing *Preau*).

Other cases applying the same "because of" language found in the Policies have similarly held that claims for purely economic loss are not covered. For instance, in *Rite Aid*, counties in Ohio sued a drug store chain to recover costs relating to the opioid epidemic. 2022 WL 90652, at

[24] *See id*. at pp. 16-17 & n.3 (emphasizing that the policy applied to claims for damages "for" bodily injury, as opposed to "because of" bodily injury).

*5. The complaint sought to recover damages based on the increased financial burden on the counties' health care and criminal justice systems but did not seek damages based on the cost to treat and care for any particular individuals. *Id*. The Delaware Supreme Court held that because the claims did not seek to recover bodily injury damages, either directly or derivatively, the claims did not seek damages "because of" bodily injury and did not trigger a duty to defend. *Id*. at *6. Defendants' only response to *Rite Aid* is to suggest, with no support, that it was uniquely an application of Delaware law.[25]

In *Ready Pac*, the court held that economic losses caused by an E. coli outbreak were not damages "because of" bodily injury or property damage. *Id*. at 1055-57. There, a restaurant chain (Taco Bell) sued a supplier for lost profits allegedly caused by a decline in patronage because of lettuce that was contaminated with E. coli. *Id*. at 1049-50. The lettuce supplier sought coverage under its CGL policy, arguing that the case sought damages "because of" bodily injury or property damage. *Id*. Bodily injuries from contaminated product obviously were a precursor to Taco Bell's claim, but the court held that the claim against the lettuce supplier was not covered because the complaint sought purely economic damages to Taco Bell that were measured by lost profits and goodwill, not the cost to remedy bodily injury or property damage. *Id*. at 1055-57.[26] Defendants' only response to *Ready Pac* is to conclude, without support, that it was uniquely an

[25] *Id*. at p. 19 n.4. Notably, the policy in *Rite Aid* was governed by Pennsylvania law, not Delaware law, but because the court found that Pennsylvania law and Delaware law did not conflict, the court applied Delaware law. 2022 WL 90652, at *3.

[26] The court in *Ready Pac* further explained that if the insured's argument for coverage were accepted, it would "expand[] the coverage of the policy so as to provide coverage for almost any liability where bodily injury is a factor," which other courts have rejected. 782 F. Supp. 2d at 1057 (citing *Atl. Mut. Ins. Co. v. Roffe, Inc.*, 872 P.2d 536, 538-39 (Wash. Ct. App. 1994) (holding claims against employer for disability discrimination were not "because of" bodily injury, and were not covered under CGL policy, because they were based on the employer's discriminatory conduct in response to a bodily injury, not the bodily injury itself), and *Diamond State Ins. Co. v. Chester-Jensen Co., Inc.*, 611 N.E.2d 1083, 1087-88 (Ill. App. Ct. 1993) (holding claim against manufacturer of HVAC units for selling defective cooling equipment, whose failure made the plaintiff's building too hot for its employees, was not "because of" bodily injury and was not covered under CGL policy, even though employees arguably sustained bodily injuries, because the plaintiff's claim sought only economic losses and did not seek to recover compensation for bodily injuries, directly or derivatively)).

application of California law and to assert that the Shareholder Suit here is different because it seeks damages "for direct, tangible loss because of bodily damage."[27]

The Complaint does not seek to recover any "direct, tangible loss because of bodily injury." The Complaint merely states that some consumers were sickened by Blue Bell's ice cream, resulting in lawsuits against Blue Bell.[28] The Complaint does not tie the millions of dollars in damages sought to any payment by Blue Bell to care for or treat any bodily injuries. These are uncovered financial losses in the form of lost profits and value, not "damages because of bodily injury."[29]

III.
CONCLUSION AND PRAYER

The Shareholder Suit does not seek to hold any "insured" liable for damages "because of bodily injury" caused by an "occurrence," but instead seeks to hold the Officers and Directors liable to the named insured—Blue Bell—for purely economic loss caused by their knowing and willful breaches of fiduciary duty. Such claims are not covered by the Policies. Therefore, Travelers' Motion should be granted and Defendants' Motion should be denied.

[27] Defendants' Response at p. 17 (Dkt. 37).
[28] Complaint ¶¶ 87-93 (Dkt. 29).
[29] *See* fn. 21 *supra*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 4, 2022, a copy of this instrument was served on counsel of record as listed below either via the Court's ECF noticing system or via US First Class Mail, postage prepaid, in accordance with the Federal Rules of Civil Procedure.

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