IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

JAMIE WAZELLE; TAY AUNG; ELIZABETH CASEL; MANIVANH CHANTHANAKHONE; MANUEL CONTRERAS; REBECA CORRAL; PATRICIA COSSEY; JOZETTE ESCOTO; CRUZ GARCIA, SR.; SHERYL GARDNER; DENETRIA GONZALEZ; RENE GUTIERREZ; BRIAN HALL; BRANDON IVORY; NINI AYE KAYAHPHU; KO LATT; ARMANDO LIRA; DERESTIA LIRA; MYA LIRA; VALARIE LIRA; AUNG MOE; BIAK MORRIS; MALEAK RECTOR; MARICELA RIOS; NATASHA RIOS; GUADALUPE RONDAN; MIGUEL RONDAN; JAVIER RUBIO; IGNACIO RUIZ; SYLVIA RUIZ; MITCHELL SANCHEZ; BILLY SHAW; KYAW SOE; NYEIN SOE; THIDA SOE; BREANA SOLIS; LADONNA TRULL; AND TIN SOE, Individually and as Personal Representative of the Estate of Maung Maung Tar; DANNY WOODALL; CARLOS CORRAL; and JONATHAN HAWS,	§	**NO. 2:20-cv-00203-Z**
Plaintiffs,	§	
vs.	§	
TYSON FOODS, INC.; ERNESTO SANCHEZ; KEVIN KINIKIN; and FAR-REN FERNANDEZ,	§	
Defendants.	§	

DEFENDANT TYSON FOODS, INC.'S
SUPPLEMENTAL MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED COMPLAINT

Earlier this month, Governor Abbott signed the Pandemic Liability Protection Act, which protects businesses and other organizations from liability for alleged exposure to pandemic diseases like COVID-19. Because the Act provides a new ground for dismissal that was not "available to [Defendant]" at the time of its "earlier motion," Fed. R. Civ. P. 12(g)(2), Defendant Tyson Foods, Inc. respectfully requests leave to supplement its pending Rule 12(b)(6) motion to dismiss. [Dkt. 6]

INTRODUCTION

The Act imposes a heightened standard for liability for claims against businesses and individuals for "injury or death caused by exposing an individual to pandemic disease," removing them from the typical negligence framework. Plaintiffs bear the heavy burden of pleading, and ultimately proving, that Tyson "knowingly" failed to warn of or remediate conditions that Tyson knew were likely to result in Plaintiffs' exposure to COVID-19, and that "reliable scientific evidence" shows that Tyson's alleged conduct "was the cause in fact" of Plaintiffs' COVID-19 infections. Plaintiffs' complaint fails to satisfy those requirements.

THE ACT

The Pandemic Liability Protection Act, which became effective immediately after Governor Abbott signed it into law on June 14,[1] provides that individuals, businesses, and other entities are "not liable for injury or

[1] The relevant portion of the Act will be codified at Tex. Civ. Prac. & Rem. Code § 148.003.

death caused by exposing an individual to a pandemic disease during a pandemic emergency" unless the plaintiff establishes that the defendant:

> (A) knowingly failed to warn the [plaintiff] of or remediate a condition that the [defendant] knew was likely to result in the exposure of an individual to the disease, provided that the [defendant]:
>
> (i) had control over the condition;
>
> (ii) knew that the [plaintiff] was more likely than not to come into contact with the condition; and
>
> (iii) had a reasonable opportunity and ability to remediate the condition or warn the [plaintiff] of the condition before the [plaintiff] came into contact with the condition; or
>
> (B) knowingly failed to implement or comply with government-promulgated standards, guidance, or protocols intended to lower the likelihood of exposure to the disease that were applicable to the [defendant] or the [defendant's] business, provided that:
>
> (i) the [defendant] had a reasonable opportunity and ability to implement or comply with the standards, guidance, or protocols;
>
> (ii) the [defendant] refused to implement or comply with or acted with flagrant disregard of the standards, guidance, or protocols; and
>
> (iii) the government-promulgated standards, guidance, or protocols that the [defendant] failed to implement or comply with did not, on the date that the [plaintiff] was exposed to the disease, conflict with government-promulgated standards, guidance, or protocols that the [defendant] implemented or complied with….

S.B. 6, Section 3 ("Sec. 148.003").

In addition, Plaintiffs must also establish that "reliable scientific evidence shows that the failure to warn the [plaintiff] of the condition,

remediate the condition, or implement or comply with the government-promulgated standards, guidance, or protocols was the cause in fact of the [plaintiff's] contracting the disease." *Id.*

ARGUMENT

I. The Pandemic Liability Protection Act applies to this case.

The Act applies retroactively to "any action commenced on or after March 13, 2020, for which a judgment has not become final before the effective date of this Act." S.B. 6, Section 5(a) (2021). The Plaintiffs filed their Original Petition in the Potter Country District Court in July 2020, and no final judgment has been entered. [Dkt. 1-3] The Act therefore applies to this case.

II. The Complaint fails to allege the statutorily required elements to impose liability.

To survive a 12(b)(6) motion, "every element of each cause of action must be supported by specific factual allegations." *Kan v. OneWest Bank, FSB*, 823 F. Supp. 2d 464, 468 (W.D. Tex. 2011). Plaintiffs have the burden of pleading all element of both Sec. 148.003(a)(1) (the "Knowing Conduct Requirement") and (a)(2) (the "Causation Requirement"). Plaintiffs have failed to carry their burden as to either.

A. The Knowing Conduct Requirement

Plaintiffs must allege facts demonstrating that Defendants either (1) knowingly failed to warn about or remediate a condition that Defendants knew would likely expose Plaintiffs to COVID-19 or (2) knowingly failed to implement or comply with government-promulgated guidance that was intended to lower the likelihood of exposure and was applicable to Tyson's business at the time Plaintiffs were allegedly exposed.

But the Complaint—which alleges only "negligence," "gross negligence," and premises liability[2]—contains no such allegations. The closest Plaintiffs come are allegations that Tyson "either knew *or should have known* that the condition on its premises created an unreasonable risk of harm" and that Tyson "*should have known* that the conditions regarding COVID-19 posed an unreasonable risk of harm to invitees." [Dkt. 1-14 ¶ 69 (emphasis added)]

Constructive knowledge—what Tyson "should have known"—is not the same as actual knowledge. *City of Corsicana v. Stewart*, 249 S.W.3d 412, 414–15 (Tex. 2008) ("Actual knowledge requires knowledge that the dangerous condition existed at the time of the accident, as opposed to constructive knowledge which can be established by facts or inferences that a dangerous condition could develop over time."). Nor do Plaintiffs allege a knowing failure to implement or comply with government-promulgated guidance.

Plaintiffs likewise do not allege that Tyson *knowingly* failed to warn Plaintiffs about a dangerous condition or remedy that condition. They allege only that Tyson failed to give "adequate warning" and failed to exercise "ordinary care to keep its premises in reasonably safe condition." [Dkt. 1-14 ¶ 67] That is not enough to deprive Tyson of statutory protection from liability.

Plaintiffs also fail to allege other statutory elements associated with Tyson's compliance with government-promulgated guidance, including that:

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[2] Plaintiff Tin Soe also alleges a wrongful death and survival claim on behalf of Maung Maung Tar. However, each of those claims is derivative in that it must be premised upon Maung Maung Tar's ability to bring those claims immediately prior to death. Thus, absent pleading and proof compliant with Section 148.003, those claims fail. *In re Labatt Food Svc., L.P.*, 279 S.W.3d 640, 644 (Tex. 2009).

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