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 FARREN FERNANDEZ,	§	
Defendants.	§	

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

Plaintiffs concede that the Pandemic Liability Protection Act (the "Act") applies to their claims and that, to avoid dismissal, they must plead factual content satisfying each element. But the Complaint fails to plead at least the following required elements:

- Plaintiffs must allege that Tyson "knowingly failed to warn [Plaintiffs] of or remediate a condition that [Tyson] knew was likely to result in" exposure to COVID-19. The Complaint fails to include any such allegation.
- Plaintiffs must allege that Tyson "had control over the condition" that caused the exposure. The Complaint fails to include any such allegation—indeed, Plaintiffs do not even identify what specific "condition" allegedly caused any given Plaintiff to contract an infection.
- Plaintiffs must allege that Tyson "knew that [Plaintiffs were] more likely than not to come into contact with the condition." Here again, Plaintiffs do not even identify the specific condition in issue for each Plaintiff or otherwise satisfy this required element.
- Plaintiffs must allege that Tyson "had a reasonable opportunity and ability to remediate the condition or warn [Plaintiffs] of the condition before [Plaintiffs] came into contact with the condition." The Complaint does not contain any such allegation.
- Plaintiffs must allege that Tyson "knowingly failed to implement or comply with government-promulgated standards, guidance, or protocols . . . applicable to" Tyson's business at the time. The Complaint does not contain any such allegation.
- Plaintiffs must allege that Tyson "had a reasonable opportunity and ability to implement or comply with the standards, guidance, or protocols." The Complaint does not contain any such allegation.

- Plaintiffs must allege that Tyson "refused to implement or comply with or acted with flagrant disregard of the standards, guidance, or protocols." The Complaint does not contain any such allegation.
- Plaintiffs must allege that Tyson was not subject to conflicting "government-promulgated standards, guidance, or protocols that [Tyson had] implemented or complied with" on "the date that [Plaintiffs were] exposed to the disease." The Complaint contains no such allegation—indeed, Plaintiffs do not even allege what date they were allegedly exposed to the disease.
- Plaintiffs must allege that "reliable scientific evidence shows" that Tyson's alleged failure to warn, remediate, or comply with government-promulgated standards "was the cause in fact of [Plaintiffs'] contracting" COVID-19. The Complaint contains no substantiated allegations of causation.

See Tex. Civ. Prac. & Rem. Code § 148.003(a).

The Complaint does not contain these allegations, and the Response does not show otherwise. Instead, the Response simply asserts—without analysis—that "Plaintiffs have provided notice of their claims." [Dkt. 47 ("Resp.") at 8]

But saying it does not make it so. The Complaint must be dismissed because it fails to include "factual allegations that would permit this [C]ourt to find that the elements of [the Pandemic Liability Protection Act] are properly pleaded." *Lindgren v. Spears*, No. CV H-10-1929, 2010 WL 5437270, at *3 (S.D. Tex. Dec. 27, 2010).

In particular, Plaintiffs fail to allege various required elements of the "Knowing Conduct Requirement" of Section 148.003(a)(1) and the "Causation Requirement" of Section 148.003(a)(2).

No Knowing Conduct. Plaintiffs do not dispute that the Act requires them to plead that Tyson either (1) *knowingly* failed to warn Plaintiffs of or remediate a condition it *knew* was likely to result in Plaintiffs' exposure, or (2) *knowingly* failed to implement government-promulgated standards that applied to Tyson's business at the time of Plaintiffs' exposure. Tex. Civ. Prac. & Rem. Code § 148.003(a)(1)(A) & (B); *see also* Resp. at 4. Nor do Plaintiffs dispute that alleged *constructive* knowledge is insufficient to satisfy the statute.

But the Response largely ignores these stringent and detailed requirements. Plaintiffs' entire argument on this point is to reproduce three statements from the Complaint that contain the words "knew" or "subjective awareness" and simply claim without explanation that they somehow have pleaded the required elements. [Resp. at 7-8] But mere conclusory statements like "Defendants . . . had actual, subjective awareness of the risk involved" (Compl. ¶ 63) and unwarranted inferences cannot be credited. *See Modelist v. Miller*, 445 F. App'x 737, 739 (5th Cir. 2011) ("[W]e will not strain to find inferences favorable to the plaintiffs nor accept conclusory allegations, unwarranted deductions or legal conclusions.") (quoting *Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 361 (5th Cir. 2004)) (quotation marks omitted).

And even accepting as true the three statements Plaintiffs rely on, these allegations come nowhere near plausibly alleging the specific requirements of the Act. To plead that Tyson had actual knowledge of a condition likely to result in Plaintiffs' exposure or an intentional or flagrant disregard of government-promulgated standards, far more specificity is required. *See, e.g.*, *Singleton v. Champagne*, No. CV 17-17423, 2019 WL 917728, at *4 (E.D. La. Feb. 25, 2019) (dismissing complaint for failure to "allege that the Sheriff had actual or constructive knowledge of any alleged practices or customs that allegedly violated Plaintiffs' constitutional rights" where "Plaintiffs simply assert bare

allegations that [the Sheriff] 'maintained an atmosphere' of lawlessness without providing any specific facts as to how this activity was carried out").

More fundamentally, Plaintiffs are unable to even identify the particular failure they allege to be the cause of their injuries. As such, they cannot allege any knowing failure on Tyson's part. Plaintiffs describe the alleged "dangerous condition" in numerous, nonspecific ways. For example, Plaintiffs assert that Tyson allegedly failed to "provide a safe work environment," provide "appropriate PPE protections," "implement adequate precautions," "follow guidelines," and "warn of the dangerous conditions[.]" [Resp. at 6-7; Compl. ¶ 60] But nowhere do Plaintiffs elaborate on these generic statements with factual allegations plausibly demonstrating that Tyson had *actual knowledge* that a specific condition at the Amarillo facility (over which Tyson had control) was likely to result in Plaintiffs' contracting COVID-19.

In other words, "[n]ot only is [Plaintiffs' Complaint] unclear about what 'dangerous condition' [they] allege[] to exist," but also Plaintiffs' Complaint "does not specifically allege that [Tyson] had actual knowledge of the dangerous condition." *Norwood v. Indus. Warehouse Servs., Inc.*, No. 1:17-CV-396, 2018 WL 1464660, at *3 (E.D. Tex. Mar. 2, 2018), *report and recommendation adopted*, No. 1:17-CV-396, 2018 WL 1463381 (E.D. Tex. Mar. 23, 2018). Accordingly, "[a]t most, [the Complaint] is a threadbare recital of some elements of a . . . claim supported by conclusory statements without factual allegations to back up the statements." *Id.*

And the bare allegation that Tyson "[f]ailed to follow" unspecified "guidelines set forth by the WHO and CDC" on unspecified dates (*see* Resp. at 7; Compl. ¶ 60(e)) is not enough to allege that Tyson *knowingly* refused to comply with or acted with "flagrant disregard" of government-promulgated standards applicable at the time of Plaintiffs' exposure, along with the other

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