**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TEXAS**
**TYLER DIVISION**

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| **MICHAEL FIELDS; VICKIE GRANT; JESSICA MATLOCK; and KELLY REESE,** | § | |
| **Plaintiffs,** | § | |
| **v.** | § | **CIVIL ACTION NO. 6:20-cv-00475-jcb** |
| **TYSON FOODS, INC.; TOMMY BROWN; MICAH FENTON; and FELICIA ALEXANDER,** | § | |
| **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 [Tyson]" at the time of its "earlier motion," Fed. R. Civ. P. 12(g)(2), Tyson respectfully requests leave to supplement its pending Rule 12(b)(6) motion to dismiss. [Dkt. 17]

## INTRODUCTION

The Pandemic Liability Protection Act provides immunity to businesses from liability for "injury or death caused by exposing an individual to pandemic disease." To overcome that immunity, Plaintiffs bear the heavy burden of 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 either of those requirements.

## THE ACT

The Pandemic Liability Protection Act, enacted by the Texas legislature and signed by Governor Abbott on June 14, provides that businesses and other entities are "not liable for injury or 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").[1]

In addition, the plaintiff 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.*

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

# 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 complaint was filed in July 2020, and no final judgment has been entered. [Dkt. 1] The Act therefore applies to this case.

## II. The complaint fails to allege the elements required to overcome statutory immunity.

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 each 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 Tyson either (1) knowingly failed to warn about or remediate a condition that Tyson 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 and gross negligence"—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. 7 ¶ 30 (emphasis added)]

But 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 to 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. 7 ¶ 28] That is not enough to deprive Tyson of its statutory immunity.

The Act requires that Plaintiffs allege—and prove—actual knowledge. The complaint does not include any such allegations and should be dismissed.

**B. The Causation Requirement**

Tyson's pending motion to dismiss explains that the complaint should be dismissed for failure to satisfy federal pleading standards that require plausible, non-conclusory allegations of causation. [Dkt. 17, at 8–15]

The Act now imposes even greater requirements for causation, requiring that Plaintiffs allege the existence of "reliable scientific evidence" that Tyson's alleged conduct was "the cause in fact of the [Plaintiffs] contracting the disease." § 148.003(a)(2).

Plaintiffs have not alleged any facts—much less facts supported by "reliable scientific evidence"—to support the conclusion that any alleged conduct by Tyson was the "cause in fact" of Plaintiffs' alleged injuries. Indeed, the only allegation of causation is the unadorned, unsupported claim that each Plaintiff "contracted COVID-19 because of the unsafe working conditions at the Carthage, Texas facility." [Dkt. 7 ¶¶ 5-8] Plaintiffs do not articulate any mechanism of infection, nor do they allege facts that would foreclose the possibility that they contracted COVID-19 from alternative sources or before Tyson had the opportunity to warn or take any other action. And none of Plaintiffs' allegations are supported by "reliable scientific evidence."

## CONCLUSION

The legislature enacted the Pandemic Liability Protection Act to protect businesses and other organizations from liability for alleged exposure to pandemic diseases like COVID-19. The complaint fails to allege any of the elements necessary to fit within the narrow exceptions to that protection. The complaint therefore fails to state a claim and should be dismissed.

Dated: June 28, 2021

Respectfully submitted,

*/s/ Christopher S. Coleman*

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**CERTIFICATE OF SERVICE**

This is to certify that, on June 28, 2021, a true and correct copy of the foregoing document was served upon all counsel of record via the Court's CM/ECF system as follows:

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