

1 Gary M. Messing, Bar No. 75363
gary@majlabor.com
2 Monique Alonso, Bar No. 127078
monique@majlabor.com
3 Laurie M. Burgess, Bar No. 302270
laurie@majlabor.com
4 **MESSING ADAM & JASMINE LLP**
235 Montgomery St., Suite 828
5 San Francisco, California 94104
Telephone: 415.266.1800
6 Facsimile: 415.266.1128

7 Mario Martinez (SBN 200721)
Edgar I. Aguilasocho (SBN 285567)
8 **MARTINEZ AGUILASOCHO & LYNCH, A Prof. Law Corp.**
9 P.O. Box 1998
Bakersfield, CA 93303
10 Telephone: (661) 859-1174
Facsimile: (661) 840-6154
11 Email: mmartinez@farmworkerlaw.com
eaguilasocho@farmworkerlaw.com
12

13 Attorneys for Plaintiffs
14 UNITED FARM WORKERS OF AMERICA,
MICAELA ALVARADO and MARIA
15 TRINIDAD MADRIGAL

16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
17 **COUNTY OF MERCED**

18 UNITED FARM WORKERS OF AMERICA,
19 MICAELA ALVARADO, an individual, and
20 MARIA TRINIDAD MADRIGAL, an
individual,
21 Plaintiffs,
22 v.
23 FOSTER POULTRY FARMS, a California
24 Corporation, and DOES 1-10, inclusive,
25 Defendants.

Case No.
**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF EX PARTE APPLICATION
FOR TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW CAUSE
RE PRELIMINARY INJUNCTION**
Date: December 18, 2020
Time: 1:15 p.m.
Crtrm.: 8

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	<u>Page</u>
INTRODUCTION.....	5
FACTUAL BACKGROUND	7
A. COVID-19.....	7
B. Outbreaks at the Plant	8
C. Merced County Closes the Livingston Plant.....	9
D. Foster Farms’ Compliance Failures at the Livingston, California Plant.....	9
1. Workers closer than six feet apart	10
2. Inconsistent or nonexistent mask provision	12
3. Inconsistent testing	13
4. Failure to effectively monitor for social distancing	13
5. Failure to provide information and safety direction.....	14
E. Foster Farms’ Post-Closure Failure to Comply with Safety Protocol and New Outbreak.....	15
LEGAL STANDARD	16
ARGUMENT	16
I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.....	17
A. Foster Farms’ Acts and Omissions Constitute a Public Nuisance	17
B. Foster Farms’ Acts and Omissions Constitute Unfair and Unlawful Business Practices Under Business & Professions Code § 17200.....	22
II. THE BALANCE OF HARMS WEIGHS STRONGLY IN PLAINTIFFS’ FAVOR	23
III. A TEMPORARY RESTRAINING ORDER IS PROPER AND URGENTLY NEEDED UNDER THE CIRCUMSTANCES HERE.....	24
CONCLUSION	26

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

FEDERAL CASES

California v. Azar,
385 F. Supp. 3d 960 (N.D. Cal. 2019) 24

STATE CASES

Beck Development Co. v. Southern Pacific Transportation Co.,
44 Cal. App. 4th 1160 (1996)..... 21

Benetatos v. City of Los Angeles,
235 Cal. App. 4th 1270 (2015)..... 21

Butt v. California,
4 Cal. 4th 668 (1992)..... 16, 23

Candelore v. Tinder, Inc.,
19 Cal. App. 5th 1138 (2018)..... 23

Cel-Tech Commc 'ns, Inc. v. Los Angeles Cellular Telephone Co.,
20 Cal. 4th 163 (1999)..... 22, 23

Cty. of Santa Clara v. Atl. Richfield Co.,
137 Cal. App. 4th 292 (2006)..... 17

Family Record Plan, Inc. v. Mitchell,
172 Cal. App. 2d 235 (1959)..... 23

Hardie v. Nationstar Mortgage LLC,
32 Cal. App. 5th 714 (2019)..... 16

In re Firearm Cases,
126 Cal. App. 4th 959 (2005)..... 17

Integrated Dynamic Solutions, Inc. v. VitaVet Labs, Inc.,
6 Cal. App. 5th 1178 (2016)..... 26

Mohilef v. Janovici,
51 Cal. App. 4th 267 (1996)..... 22

People ex rel. Gallo v. Acuna,
14 Cal. 4th 1090 (1997)..... 17

People ex rel. Gwinn v. Kothari,
83 Cal. App. 4th 759 (2000)..... 22

People v. ConAgra Grocery Prod. Co.,
17 Cal. App. 5th 51 (2017)..... 17, 25

People v. Niemeyer,
231 Cal. App. 5th 594 (1986)..... 22

00097992-6 6

TABLE OF AUTHORITIES
(Continued)

		<u>Page</u>
3	<i>Rogers v. Lyft, Inc.</i> ,	
4	2020 Cal. Super. LEXIS 59 (2020)	23
5	<i>Rose v. Bank of America, N.A.</i> ,	
6	57 Cal. 4th 390 (2013).....	22
7	<i>White v. Davis</i> ,	
8	30 Cal. 4th 528 (2003).....	16, 24
9	<u>OUT OF STATE CASES</u>	
10	<i>Massey v. McDonald’s Corp.</i> ,	
11	2020 Ill. Cir. LEXIS 465 (2020)	17
12	<u>STATE STATUTES</u>	
13	California Business & Professions Code	
14	section 17200.....	6, 22
15	section 17203.....	25
16	California Civil Code	
17	section 3479.....	6, 17, 18, 23
18	section 3480.....	6, 17
19	section 3491.....	18
20	section 3493.....	17, 18, 21
21	California Code of Civil Procedure	
22	section 731.....	18
23	section 1021.5.....	25
24	California Code of Regulations	
25	title 8, section 3205	15, 19
26	California Penal Code	
27	section 370.....	18
28	<u>OTHER AUTHORITIES</u>	
29	Restatement (Second) of Torts	
30	section 821B	17
31	<u>MISCELLANEOUS</u>	
32	Gary B. Ross, “Department: Practice Tips: Employers Beware: Anticipating A Post-Covid-	
33	19 Workplace,”	
34	43 Los Angeles Lawyer 14 (2020)	22

1 **INTRODUCTION**

2 Plaintiffs UNITED FARM WORKERS (“UFW”), MICAELA ALVARADO, and MARIA
3 TRINIDAD MADRIGAL (collectively, “Plaintiffs”) hereby move the Court for a temporary
4 restraining order (“TRO”) and order to show cause why an injunction should not issue to address
5 the ongoing public health emergency created by defendant Foster Poultry Farms (“Foster Farms”
6 or the “Company”) at its Livingston, California chicken-processing plant (the “Livingston Plant”
7 or the “Plant”). Since June, over 400 Foster Farms employees at the Plant have contracted
8 COVID-19, and at least nine have died from the virus—a death rate almost double that of Merced
9 County (the “County”), where the Plant is located.¹ In spite of national Center for Disease Control
10 (“CDC”) COVID-19 guidance and best practices, mandatory state and local safety regulations,
11 multiple Plant outbreaks, and a temporary, government-mandated shutdown in September of this
12 year, Foster Farms continues to ignore baseline workplace safety protocols, inexorably leading to
13 further spread and infection in the Plant and community at large. While the Company made certain
14 alterations following the September shutdown, its compliance has been irregular, ineffective,
15 inconsistent or nonexistent – all emblematic of a basic disregard of worker health and safety. The
16 Plant was again declared an outbreak site just over a week ago, and subsequent investigation into
17 current conditions at the Plant has made clear that urgent judicial intervention is now required.

18 To date, in naked disregard of both national and local guidelines, Foster Farms (1) requires
19 employees to work substantially less than six feet apart from each other for prolonged periods of
20 time over lengthy shifts with no sufficient plastic divider or similar protection between them, (2)
21 fails to rigorously or effectively enforce social distancing, (3) fails to supply masks, and (4) fails
22 to keep its workforce adequately informed of safety and sick leave protocol, including access to
23 COVID leave pay. These abject failures to impose and enforce protocols recognized the world
24 over have precipitated the current outbreak just three months after the County shut the Plant down.

25
26
27

¹ Alexandra Hall, *COVID-19 Again Sweeps Through Foster Farms Plants in Central Valley*, KQED (Dec.
28 8, 2020), available at ibit.ly/ycPb; *Central Valley Foster Farms plant shut down amid uncontrolled COVID-19 outbreak, 8 deaths*, ABC7 News (Aug. 28, 2020), available at ibit.ly/jkvi.

1 Plaintiffs seek a temporary restraining order and order to show cause requiring Foster
2 Farms to make those changes to production necessary to staunch the spread of infection inside and
3 outside the Plant, and to standardize monitoring efforts, and personal protective equipment
4 (“PPE”) and information provision. Plaintiffs are likely to prevail on their public nuisance claim
5 because Foster Farms’ manner of operating the Livingston Plant has created, or assisted in the
6 creation of, the spread and transmission of a life-threatening disease and infection, a substantial
7 and unreasonable interference with the public health. *See* Cal. Civ. Code §§ 3479, 3480. Foster
8 Farms’ conduct and the resulting human fall-out conclusively demonstrates that it is unwilling to
9 voluntarily comply with the safety precautions that California and local law requires, the CDC
10 recommends, and the company’s own experience has proven is necessary to protect its workers’
11 lives. As the Merced County Department of Public Health (“MCDPH”) expressly found in
12 shutting down the Plant in September, Foster Farms’ perpetuation of a hazardous workplace in
13 violation state and local safety standards has caused (and will continue to cause) the spread and
14 transmission of COVID-19 to employees and the surrounding community, and constitutes a
15 dangerous public nuisance under the law.

16 Plaintiffs are also likely to prevail on their claim under Business & Professions Code
17 § 17200 because Foster Farms’ manner of operations constitutes an unfair and unlawful business
18 practice that gives it a competitive edge at the expense of its employees’ safety. This claim is
19 based on Foster Farms’ conduct including, but not limited to, failing to maintain 6 feet between
20 workers and failing to provide basic PPE to its employees such as masks.

21 Foster Farms cannot credibly claim they will be the greater harmed by imposition of a
22 TRO. Plaintiffs do not request that the Court order the Plant closed, only that Foster Farms
23 actively abate the nuisance it has created and implement those changes required to comply with
24 regulations issued by California’s Division of Occupational Safety and Health (“Cal/OSHA”).
25 While some of these changes may require Foster Farms to alter its production processes in a way
26 that could cause a temporary decrease in the Company’s revenue, that hypothetical burden pales in
27 comparison to the very real and tragic harm that has already befallen the Plant’s workers and their
28 families: serious health risks, lasting physical and emotional damage, and in multiple cases, death.

1 In any event, any costs incurred by Foster Farms are really only the costs of bringing the Company
2 into compliance. This threat will persist unless the Court enjoins Foster Farms from continuing to
3 operate an unsafe workplace.

4 **FACTUAL BACKGROUND**

5 **A. COVID-19**

6 As is well-known by now, COVID-19 is a highly contagious and life-threatening
7 respiratory disease. Once infected, individuals may experience debilitating symptoms including
8 fever, dry cough, extreme fatigue, body aches, headache, sore throat, loss of taste and smell,
9 difficulty breathing, and pain or pressure on the chest.² Infection may also result in profound
10 long-term health complications, including inflammation in the lungs, clogging the air sacs in the
11 lungs, and limiting the body's oxygen supply, along with blood clots, organ failure, intestinal
12 damage, heart inflammation, problems with the liver, neurological malfunction, and acute kidney
13 disease. Since the outbreak of the disease in early 2020, it has been well understood that COVID-
14 19 also presents a serious threat of death to those it infects, particularly those with underlying
15 health conditions or other predispositions.³

16 COVID-19 primarily spreads through interpersonal exposure to an infected individual.
17 When individuals are in close physical proximity (i.e., within six feet of each other), infection risk
18 increases dramatically, particularly when indoors for prolonged periods of time. Symptomatic and
19 asymptomatic persons may spread the virus as can those experiencing only mild symptoms.⁴ As of
20 mid-December 2020, more than 300,000 people in the United States have died from COVID-19
21 and there have been over 16 million domestic infections.⁵ Doctors, scientists, and public health
22 experts worldwide agree that infection from COVID-19 can be minimized only by preventative
23

24 ² *Symptoms of Coronavirus*, CDC (May 13, 2020), available at [ibit.ly/h7Wv](https://www.cdc.gov/media/releases/2020/s0513-cv-symptoms.html).

25 ³ *People Who are at Higher Risk for Severe Illness*, CDC (last updated Nov. 30, 2020), available at
26 [ibit.ly/rNqQ](https://www.cdc.gov/media/releases/2020/s1130-cv-higher-risk.html).

27 ⁴ *How COVID-19 Spreads*, CDC (last updated Oct. 28, 2020), available at [ibit.ly/k768](https://www.cdc.gov/media/releases/2020/s1028-cv-how-it-spreads.html).

28 ⁵ *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times (Dec. 15, 2020), available at
[ibit.ly/mcqW](https://www.nytimes.com/interactive/2020/12/15/us/coronavirus-cases.html).

1 measures, primarily limiting close-proximity human contact, using personal protective equipment
2 (“PPE”) such as masks and gloves, and frequent handwashing and sanitization of physical
3 objects.⁶

4 **B. Outbreaks at the Plant**

5 The Plant’s first known positive COVID-19 test occurred on June 9, 2020, and the Merced
6 County Department of Public Health (“MCDPH”) declared the facility an outbreak location on
7 June 29, 2020. *See* Declaration of Monique Alonso (“Alonso Dec.”), filed concurrently herewith,
8 Ex. A.⁷ In mid-July, sanitation employees Maria Delgado, Arnulfo Martinez Delgado (Maria’s
9 brother) and an elderly worker named Porfirio (LNU) all went home on a Friday feeling ill and all
10 subsequently discovered they were COVID-19 positive.⁸ Declaration of Maria Delgado (“Delgado
11 Dec.”), filed concurrently herewith, ¶¶ 3, 4. Maria Delgado was out of work for four weeks. *Id.*, ¶
12 3. Porfirio has not returned to work. *Id.*, ¶ 4. Most tragically, Arnulfo Delgado passed away from
13 COVID-related complications in August. *Id.*, ¶ 5.

14 On August 5, 2020, the Merced County Health Officer issued a directive to Foster Farms
15 mandating specific testing protocols and further measures to control the spread of the virus within
16 the Plant, requiring, among other things, that:

17 Foster Farms management shall *ensure that all employees be informed of testing*
18 *requirements, outbreaks that occur, areas affected, and trained on safety*
19 *requirements*, in English, Spanish, and Punjabi, working with the union as
20 applicable....

21 *Provide proper face coverings at no cost* to all contract employees, permanent
22 employees, temporary workers, and/or volunteers prior to each shift, and if a
23 replacement is needed during a shift, and require use as directed in the Merced
24 County Health Officer Order.

25 Foster Farms shall *follow all State Orders*, including State COVID-19 Industry
26 Guidance for Food Packing and Processing:
27 <https://files.covid19.ca.gov/pdf/guidance-food-packing--en.pdf>.

28 ⁶ *How to Protect Yourself and Others*, CDC, available at ibit.ly/0VqH.

⁷ *Statement Regarding COVID-19 Outbreak at Foster Farms Facility in Livingston*, Merced County (Aug. 27, 2020), available at ibit.ly/3QDK.

⁸ Arnulfo Delgado was employed by Foster Farms’ third-party sanitation service provider, Avitek. Maria Delgado and Porfirio both work for Foster Farms. Delgado Dec., ¶ 5.

1 Alonso Dec., Ex. C at 6 (emphasis added).⁹

2 In Merced County, as of this month, there have been over 14,000 documented COVID-19
3 infections and 201 deaths.¹⁰ For scale, the current population of the County is 281,000.¹¹ In
4 August, County positivity numbers roughly doubled in number.¹² *The COVID-19 fatality rate at
5 the Plant is nearly twice the Merced County rate and, as of late August 2020, accounted for
6 18% of all virus deaths of County residents under 65 and 4 out of 10 deaths due to COVID-19
7 in the city of Livingston.*¹³

8 **C. Merced County Closes the Livingston Plant**

9 By August 28, 2020, eight Plant workers had died from COVID-19 and 392 had tested
10 positive for the virus. Alonso Dec., Ex. C. In response to this rampant outbreak, on August 27,
11 2020, MCDPH determined to revise the August 5 Health Officer Order and shut down the
12 Livingston Plant for six days, effective September 1, 2020, declaring that the Plant had “the most
13 severe and long-lasting outbreak in Merced County.” *Id.* The Plant reopened on September 7,
14 2020, and a ninth Foster Farms worker died from COVID-19 ten days later. Alonso Dec., Ex. B.¹⁴

15 **D. Foster Farms’ Compliance Failures at the Livingston, California Plant**

16 Foster Farms is Livingston’s largest employer, employing approximately 2,600 workers at
17 its multi-building plant. Declaration of Javier Pena (“Pena Dec.”), filed concurrently herewith, ¶ 3.
18 Workers are primarily Latinx and Punjabi, and are represented by the UFW. *Id.* Workers are
19 employed in a variety of positions within the facility, including two initial processing plants
20 (known as “Plant 1” and “Plant 2”), specialized areas known as Rotisserie, Deli, Food Services
21

22 _____
23 ⁹ *Statement Regarding COVID-19 Outbreak at Foster Farms Facility in Livingston, Merced County and
Order of Merced County Health Officer* (Aug. 27, 2020), available at ibit.ly/3QDK.

24 ¹⁰ *California Coronavirus Map and Case Count*, N.Y. Times (Dec. 10, 2020), available at ibit.ly/PaqB

25 ¹¹ <https://worldpopulationreview.com/us-counties/ca/merced-county-population>.

26 ¹² *Coronavirus Resource Center*, Johns Hopkins, available at ibit.ly/zVPC.

27 ¹³ Manuela Tobias, *Foster Farms processing plant in California ordered to shut down over COVID-19
outbreak*, The Fresno Bee (Aug. 27, 2020), available at ibit.ly/nuLV.

28 ¹⁴ Press Release, *Health Officials Confirm Ninth Death Related to Foster Farms Outbreak*, MCDPH (Sept.
17, 2020), available at t.ly/04OG.

1 (“FSO”), Packing and NCDC2. Pena Dec., ¶ 4. Within these areas, many workers staff production
2 lines dedicated to specific tasks. *Id.* Other employees work off-site, including live haulers (a.k.a.,
3 “chicken catchers”) who are charged with catching the live chickens held at off-site “chicken
4 houses,” and fork-lift drivers who deliver the containers of live chickens into Plant 1 or Plant 2
5 (and also have access to the Plant facilities). Declaration of Gabriel Mendoza (“Mendoza Dec.”),
6 filed concurrently herewith, ¶ 2; Declaration of Jesus Ruiz (“Ruiz Dec.”), filed concurrently
7 herewith, ¶ 2. The effect of Foster Farms’ misconduct extends throughout the Plant and beyond.

8 **1. Workers closer than six feet apart**

9 Foster Farms transports live haulers to the off-site chicken houses in company vans.
10 Mendoza Dec., ¶ 3. The nine-passenger vans currently carry five to six passengers, which does not
11 permit six feet of social distancing inside. *Id.*, ¶ 4. Foster Farms does not provide monitoring for
12 mask wearing in the vans, and some workers remove their masks during the transport. *Id.*

13 Within Plant 1 and Plant 2, the first point of entry for production is the live hanger section.
14 Pena Dec., ¶ 5; Ruiz Dec., ¶ 2. Here, live chickens are released from the containers delivered by
15 forklift onto a conveyor belt. Pena Dec., ¶ 5. Workers known as “live hangers,” catch individual
16 chickens, and attach each chicken upside down on hooks hung above the workers that then carry
17 the chickens to the killing room. Ruiz Dec., ¶ 3; Pena Dec., ¶ 5. There are usually six to nine live
18 hangers in a row at a given time. *Id. There is no plexiglass or other divider between each line*
19 *hanger. Id. There is not now nor has there ever been six feet between the line hangers, who*
20 *stand approximately two feet or less apart, side by side to perform their job.* Ruiz Dec., ¶ 4; Pena
21 Dec., ¶ 5.

22 After the chickens are killed and bled out in the killing room, they are routed to a variety of
23 different production lines. Pena Dec., ¶ 6. Whole chickens may be sent to the Rotisserie section
24 where line workers standing side by side secure the chicken legs with elastic bands and season the
25 birds on their way to being vacuum-sealed and packed in cardboard boxes for shipping to Costco.
26 *Id.*; Declaration of Graciela Monares (“Monares Dec.”), filed concurrently herewith, ¶ 4. The line
27 workers stand approximately two feet apart separated by plexiglass dividers in four separate
28 production lines, staffed by 4-5 workers on either side of the line, standing face to face across the

1 lines. Monares Dec., ¶¶ 4, 5. Foster Farms installed the dividers after the September closure. *Id.*, ¶
2 5. However, there are no barriers between the workers facing each other. *Id.* Moreover, there are
3 two additional lines for packing the vacuum-sealed birds in boxes. ***These four to five workers, per***
4 ***line, work on one side of the line only, are not separated by any dividers and stand side by side,***
5 ***two feet or less apart.*** *Id.*, ¶ 6.

6 There is also a sub-department in Rotisserie that makes the boxes to put the chickens in.
7 There is no separation for workers assembling the boxes and no 6 foot distancing. Pena Dec., ¶ 9.

8 Deboned chicken parts may also be routed to the Deli department, which handles both corn
9 dogs and natural franks. On the corn dog line, workers stand approximately two feet apart
10 separated only by flimsy plastic curtains hung from overhead. Because the curtains are hung above
11 the workers and therefore move around, the workers will often push them away in frustration
12 because the plastic interferes with their speed. Some of the curtains are ripped and scratched.
13 Declaration of Emma Zamora (“Zamora Dec.”), filed concurrently herewith, ¶ 3; Declaration of
14 Oscar Mejia (“Mejia Dec.”), filed concurrently herewith, ¶ 8. Moreover, the curtains are hung at
15 or below eye level of the workers. Pena Dec., ¶ 8.

16 Peelers also work in the Deli department. Declaration of Martin Vera (“Vera Dec’), filed
17 concurrently herewith, ¶ 2. After the chicken is processed, it is put through a plastic tube to create
18 the right shape for a frank; the peeler peels the plastic off of the frank after the shape is formed. *Id.*
19 There are four lines where this work is performed, with a total of seven or eight workers on the
20 lines. Lines 1 and 2 have two workers on the line plus a machinist and they prepare the smaller
21 packages of franks; Lines 3 and 4 have three workers (they process the larger orders) plus a
22 machinist, and Line 4 has three people peeling and one machinist. *Id.*, ¶ 3. ***The workers are about***
23 ***3 to 4 feet apart and there are no plastic sheets dividing the space from one another.*** *Id.*, ¶ 4.
24 The only section of the work area that does have plastic shields is in packing, where two workers
25 face each other. *Id.*

26 Still other chicken parts are sent to Packing, where they are sorted and packed into plastic
27 trays. Pena Dec., ¶ 7. Workers stand on both sides of parallel production lines separated by plastic
28 dividers side to side but not across. *Id.* However, ***the workers stand substantially closer than 6***

1 *feet apart and are not protected by the plastic barriers when they lean forward and over the*
2 *conveyor belt to perform their tasks.* See Mejia Dec., ¶¶ 3-5 & Exs. A & B thereto. When
3 Cal/OSHA toured Packing post-closure on September 16, to see what changes had been made the
4 Cal/OSHA inspector Greg (LNU) expressly noted that there needed to be more social distancing
5 on the line and that there was not sufficient protection for workers from the plastic dividers when
6 they leaned forward to do their work. Mejia Dec., ¶¶ 3-5 and Ex. C.¹⁵

7 In the Food Services Operations building (“FSO,” also known to workers as the “new
8 building”) workers charged with cleaning chicken feet stand in two lines receiving feet from
9 Plants 1 and 2. Declaration of Rafaela Alfaro (“Alfaro Dec.”), filed concurrently herewith, ¶ 3.
10 Approximately six people work on these lines, with three or four workers to a line. Alfaro Dec.,
11 ¶ 3. Everyone works on the same side of the line, with plastic shields between workers, standing
12 approximately 2 to 2.5 feet apart from one another. *Id.*

13 2. Inconsistent or nonexistent mask provision

14 Foster Farms’ provision of masks to its workers is characterized by inconsistency and
15 negligence. Pre-shutdown, Foster Farms provided approximately 50% of the workers in the
16 Rotisserie department with yellow cloth face coverings; the Company provided no explanation as
17 to why not all Rotisserie workers received masks. Monares Dec., ¶ 8; Declaration of Maria
18 Trinidad Madrigal (“Madrigal Dec.”), ¶ 5.

19 In August, MDPH mandated, among other things, that Foster Farms “[p]rovide proper face
20 coverings at no cost to all contract employees, permanent employees, temporary workers, and/or
21 volunteers prior to each shift, and if a replacement is needed during a shift, and require use as
22 directed in the Merced County Health Officer Order.” Alonso Dec., Ex. C.¹⁶ This has not
23 occurred. Post-shutdown, all Rotisserie workers received plastic shields, but the Company does
24

25 ¹⁵ Exhibit C to the Mejia Declaration shows a photograph of a worker bending over the conveyor belt and
26 in front of the plastic divider. When Foster Farms HR director Michael (LNU) noticed Mr. Mejia, a union
27 representative on the walk-through, taking the photograph, he told him to stop, with which Mr. Mejia
28 complied.

¹⁶ *Statement Regarding COVID-19 Outbreak at Foster Farms Facility in Livingston, Merced County* (Aug. 29, 2020), available at ibit.ly/iow6.

1 not provide workers with masks in this department. As of now, no one wears the company-
2 supplied yellow face coverings. Workers in Rotisserie all provide their own masks at their own
3 cost and there is no consistency as to type; some are cloth, some are paper. There is also no
4 consistency as to the type of mask worn by workers in Plant 1 or in the sanitation unit. Delgado
5 Dec., ¶ 11. Sanitation workers were originally given a box of masks in April; after that they have
6 replaced their masks at their own expense. *Id.*

7 In the live hanger area, the foremen provide masks; however, they discourage workers
8 from asking for replacements. Ruiz Dec., ¶ 5.

9 Initial mask provision in other departments was been equally haphazard, but the bottom
10 line is that *Foster Farms does not give its workers masks, expects them to provide them at their*
11 *own expense and provides them with no direction as to type or quality.* See Zamora Dec., ¶ 8;
12 Monares Dec., ¶¶ 8, 9; Alfaro Dec., ¶ 4.¹⁷

13 3. Inconsistent testing

14 Workers do not have their temperature regularly taken and monitoring for exposure is
15 perfunctory at best. For example, the live haulers self-report if they have a temperature. Mendoza
16 Dec., ¶ 5. The foremen used to ask workers if they had a fever or flu-like or cold-like symptoms,
17 and then workers would sign a sheet to confirm that they had been asked the questions. *Id.* Since
18 approximately one month ago, the foremen no longer ask the questions and simply have workers
19 sign the sheet saying they do not have symptoms. *Id.*

20 4. Failure to effectively monitor for social distancing

21 There is frequent congestion around certain areas where workers congregate, including
22 around the time clock and around bathrooms at breaks. Delgado Dec., ¶ 7. Little or no effort is
23 made to monitor that congestion and complaints have been met with no response from
24 management. Madrigal Dec. ¶ 8. Furthermore, to the extent the Company does provide a monitor,
25 there is only one for multiple areas, requiring one person simultaneously to monitor and enforce,
26

27 ¹⁷ On its website, Foster Farms effectively admits that it does not provide masks. See
28 <https://www.fosterfarms.com/our-story/safety-and-sustainability/> (“Protective face cloths are mandatory for employees”).

1 for example, the men's and women's restroom, the hallway (a frequent congestion spot) and the
2 breakroom. Delgado Dec., ¶ 10. Foremen do not provide positive examples, sending mixed
3 messages. Alfaro Dec., ¶ 11 (in full view of the workers, when leads or foremen talk to each other
4 they frequently take off their face masks or pull up their plastic shields so that they can talk).

5 Break areas become very crowded due to scheduling and the failure to provide enough
6 microwaves during peak hours. *See* Alfaro Dec., ¶ 10. For example, workers from four
7 departments, around 120 people, are released within 10 minutes of each other to take their 30-
8 minute lunchbreak at the same time. It becomes very congested in the lunch room in the area
9 where people are trying to use the seven microwaves and it is not possible for people to stay 6 feet
10 apart during that time. Zamora Dec., ¶ 5.

11 **5. Failure to provide information and safety direction**

12 Foster Farms has held little to no live meetings or trainings connected with the pandemic
13 or workers' rights in light of COVID, and provides no live guidance on what workers are to do in
14 the event of illness from COVID. Madrigal Dec., ¶¶ 6, 7; Zamora Dec., ¶¶ 6,7; Monares Dec., ¶
15 11; Alfaro Dec., ¶¶ 5,6, 8; Ruiz Dec., ¶¶ 6-8; Delgado Dec., ¶ 8. This pervasive lack of
16 information coupled with worker knowledge of illness and death among their colleagues causes
17 substantial worry and anxiety, sometimes causing workers to return to work before they are fully
18 recovered. Zamora Dec. ¶ 7; Alfaro Dec., ¶¶ 5, 8. Although some foremen used to give workers
19 reports on infection rates, they no longer do. Vera Dec., ¶ 8.

20 Furthermore, Foster Farms is not taking steps to collect data regarding employees who
21 experience COVID-19-related symptoms. Vera Dec., ¶ 8. If they are not feeling well, workers are
22 instructed to call the phone number on the back of their ID tag which connects them to the supply
23 room. Madrigal Dec., ¶ 7. The person answering these calls takes no information regarding the
24 nature of the employees' symptoms and there is no follow-up to ascertain whether the employee
25 has taken a COVID test and if so, what the outcome is. *Id.* Also, Foster Farms fails to follow up
26 with employees who have tested positive regarding the status of their illness before they are
27 required to return to work. Alfaro Dec., ¶¶ 5, 8; Vera Dec., ¶ 9. Due to the Company's failure to
28 track this information, it cannot trace the potential spread of COVID-19 in the plant and the

1 workers are left speculating, and worrying, about why co-workers stop reporting to work. Zamora
2 Dec., ¶ 7. As one worker noted, “Without this type of notice people are fearful about the spread of
3 COVID in the plant.” Vera Dec., ¶ 9.

4 Finally, workers are unsure about whether they will be paid when self-quarantining or ill,
5 and are not informed about COVID-19 pay, causing more anxiety as workers use personal savings
6 because of uncertainty about whether sick leave may be used. Vera ¶ 6. This additional stress only
7 compounds the effects of COVID-19 when they become ill. *See id.*

8 **E. Foster Farms’ Post-Closure Failure to Comply with Safety Protocol and New**
9 **Outbreak**

10 As discussed above, since re-opening, Foster Farms has continued to operate the Plant
11 unsafely, requiring employees to work within six feet of each other for extended periods of time,
12 requiring employees to supply their own masks, only recently performing mandated testing, and
13 only sporadically and inconsistently enforcing safety protocols.

14 On December 1, 2020, Cal/OSHA enacted emergency “COVID-19 Protection” regulations
15 requiring, among other things, that employers like Foster Farms ensure six feet of distance
16 between workers. 8 Cal. C.R. §3205. Just two days later, Foster Farms experienced yet another
17 COVID-19 outbreak, defined by the new regulations as at least three confirmed new cases.¹⁸
18 Despite these regulations and the current, ongoing outbreak, employees continue to work in close
19 proximity. *See* Section D.1, *supra*. As described above, in the months preceding the issuance of
20 these regulations and currently, employees in particular assignments in the Plant: (1) continue to
21 work substantially less than six feet apart, (2) continue to have non-socially-distanced exposure
22 due to Foster Farms’ failure to monitor and/or direct foot traffic in highly trafficked areas,
23 including near time clocks, (3) must personally supply their own masks, and (4) receive little to no
24 information about infections at the Plant or what to do if they become or feel ill.

25
26
27
28 ¹⁸ *COVID-19 outbreak at Livingston Foster Farms facility, health officials say, ABC30 (Dec. 5, 2020), available at [ibit.ly/8ZIP](https://www.ibt.ly/8ZIP).*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

LEGAL STANDARD

In deciding whether to issue a temporary restraining order, a court must weigh “two interrelated factors:” the likelihood that the plaintiffs will succeed on the merits and the “relative interim harm” of the parties caused either by the issuance or non-issuance of the injunction. *White v. Davis*, 30 Cal. 4th 528, 554 (2003); *Hardie v. Nationstar Mortgage LLC*, 32 Cal. App. 5th 714, 722 (2019). A court’s determination is thus “guided by a ‘mix’ of the potential-merit and interim-harm factors; the greater the plaintiff’s showing on one, the less must be shown on the other to support an injunction.” *Butt v. California*, 4 Cal. 4th 668, 678 (1992).

ARGUMENT

As discussed below, the public record of outbreaks at the Plant coupled with the recent testimony of its employees who are directly affected by Foster Farms’ ongoing and knowing lack of compliance underscores the likelihood that Plaintiffs will be successful in demonstrating that Foster Farms has created and continues to permit a public nuisance at the Plant. Further, given the indisputable balance of harms—with documented illness and death on the one hand, and potential short-term loss of revenue on the other hand—Plaintiffs submit that issuance of an injunction should prevail.

As Attorney General Becerra observed at the time of the September closure: “If we’re going to keep food on our tables during this pandemic, we must do a better job of protecting the essential workers who are putting it there. That means standing up for the people in our poultry facilities, agricultural fields, meat processing plants, restaurants, grocery stores, and more. Foster Farms’ poultry operation in Livingston, California has experienced an alarming spread of COVID-19 among its workers. Nobody can ignore the facts: It’s time to hit the reset button on Foster Farms’ Livingston plant.” *See* Alonso Dec., Ex. A. The fact that the Company is once more in a public health crisis just three short months after the County closed it down makes clear that judicial intervention is required to bring Foster Farms into compliance.

1 **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR**
2 **CLAIMS**

3 **A. Foster Farms’ Acts and Omissions Constitute a Public Nuisance**

4 Under the circumstances of this case, there can be no credible dispute that Foster Farms’
5 demonstrated failure to comply with directives of the MCDPH and to provide a safe workplace for
6 its employees substantially and unreasonably increases and contributes to both the risk of and the
7 actual transmission and spread of COVID-19 to Plaintiffs and to the public. As such Foster Farms
8 bears responsibility for actionable public nuisance. *See, e.g.*, Restatement (Second) of Torts §821B
9 & cmt. G (“[T]he threat of communication of smallpox to a single person may be enough to
10 constitute a public nuisance because of the possibility of an epidemic”); *Cty. of Santa Clara v.*
11 *Atl. Richfield Co.*, 137 Cal. App. 4th 292, 306 (2006); *Massey v. McDonald’s Corp.*, 2020 Ill. Cir.
12 LEXIS 465, *47 (2020) (stating that “there is a right to be free from conduct that creates a public
13 nuisance-a highly contagious and dangerous disease” such as COVID-19); *see also People ex rel.*
14 *Gallo v. Acuna*, 14 Cal. 4th 1090, 1104-05 (1997) (stating that Restatement (Second) of Torts
15 §821B “crystallized” the law of public nuisance); *In re Firearm Cases*, 126 Cal. App. 4th 959, 989
16 (2005) (possibility of “epidemic” can be public nuisance due to “danger of a conflagration”
17 (citing Restatement (Second) of Torts §821B)).

18 California law defines a “nuisance” as “[a]nything which is injurious to health . . . so as to
19 interfere with the comfortable enjoyment of life or property.” Cal. Civ. Code § 3479. A “public
20 nuisance” is any nuisance that “affects at the same time an entire community or neighborhood, or
21 any considerable number of persons, although the extent of the annoyance or damage inflicted
22 upon individuals may be unequal.” Cal. Civ. Code § 3480. A public nuisance cause of action is
23 established “by proof that a defendant knowingly created or assisted in the creation of a substantial
24 and unreasonable interference with a public right.” *People v. ConAgra Grocery Prod. Co.*, 17 Cal.
25 App. 5th 51, 79 (2017); *see also Acuna*, 14 Cal. 4th at 1103-05. A private party may bring an
26 action to abate a public nuisance if that nuisance is “specially injurious” to the plaintiff. Cal. Civ.
27 Code § 3493. Furthermore, when asserting a claim for public nuisance, a plaintiff is entitled to
28

1 seek, among other remedies, injunctive relief. Cal. Code Civ. Proc. § 731; Cal. Civ. Code §§ 3491,
2 3493.

3 As borne out by a robust evidentiary record, Foster Farms’ knowing and improper conduct
4 has created and assisted in the creation of the spread and transmission of COVID-19 to employees
5 and the surrounding community—a paradigmatic public nuisance. The County has already reached
6 this conclusion and acted on it. On June 29, the County declared the Plant to be an outbreak
7 location and issued a Directive to Foster Farms mandating required testing protocols and
8 preventative measures to control the spread of COVID-19 on their premises. *Alonso Dec., Ex. A.*
9 When that Directive failed to produce meaningful improvement, the County closed the Plant for
10 six days, citing its 13.7 percent positivity rate and declaring that the outbreak “has become the
11 most severe and long-lasting outbreak in Merced County.” *Id.* The County’s order identified the
12 Livingston Plant as a “public nuisance as defined by California Penal Code § 370 and Civil Code
13 § 3479 ... posing a great risk to the health and safety of Merced residents and the surrounding
14 counties.” *Alonso Dec., Ex. C.* The Order directed that “Foster Farms shall follow all State
15 Orders” and that “[v]iolation [of this Order] also subjects Foster Farms to civil enforcement
16 actions including injunctive relief A violation of this Order constitutes a public nuisance.”
17 *Id.* Per the Merced County website, the Order is still in effect.¹⁹

18 After issuance of the Order, another worker died of COVID-19, and subsequent to the
19 promulgation of Cal/OSHA regulations in early December, the County again placed the Plant on
20 its COVID-19 outbreak list.²⁰ The current outbreak is directly attributable to Foster Farms’ failure
21 to adhere to the basic standards it was well aware were codified by Cal/OSHA and numerous other
22 scientific and regulatory authorities.

23 Photographs post-closure by union representatives and the declaration testimony of
24 numerous employees show that Foster Farms continues to knowingly operate an unsafe
25 workplace. *See Pena Dec., Ex. A; Mejia Dec., Ex. C.* These photographs, as well as the testimony
26

27 ¹⁹ *COVID-19 Updates*, Merced County, available at ibit.ly/VtBN.

28 ²⁰ *COVID-19 outbreak at Livingston Foster Farms facility, health officials say*, ABC30 (Dec. 5, 2020),
available at ibit.ly/8ZIP.

1 submitted herewith, show that workers are not a minimum of six feet apart, as required by
2 Cal/OSHA. 8 Cal. C.R. § 3205(6)(A).

3 This evidence also demonstrates Foster Farms’ failure to comply with *federal* health and
4 safety guidance related to meatpacking operations, which also requires six feet of distance or
5 plexiglass—if working across from each other on either side of a production line narrower than six
6 feet wide—between workers. Specifically, guidance for meat and poultry processors promulgated
7 by federal OSHA and the CDC notes that processors should “[c]onfigure communal work
8 environments so that workers are spaced at least six feet apart, if possible,” and provides further
9 that “[c]hanges in production practices may be necessary in order to appropriately distance
10 between workers.”²¹ The guidance further notes that lines should be modified to prevent workers
11 from working across from each other, and even provides an image demonstrating that, if workers
12 *must* work across from each other, there should be a plexiglass between them (*i.e.*, in the center of
13 the line):

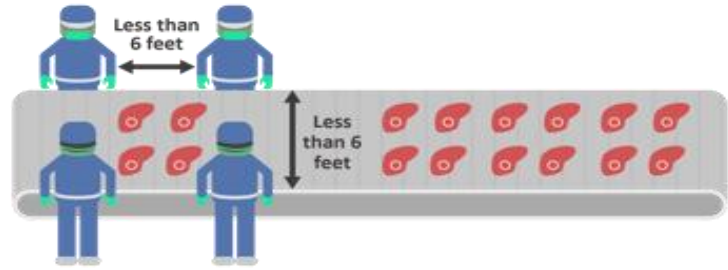
14 ///
15 ///
16 ///
17 ///
18 ///
19 ///
20 ///
21 ///
22 ///
23 ///
24 ///
25 ///
26 ///

27 _____

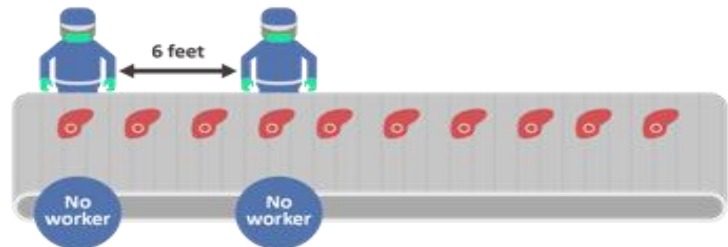
28 ²¹ Interim Guidance, *Meat and Poultry Processing Workers and Employers*, CDC & OSHA (last updated
Nov. 12, 2020), available at t.ly/CzMo.

How to Align Meatpacking and Meat Processing Workstations, If Feasible

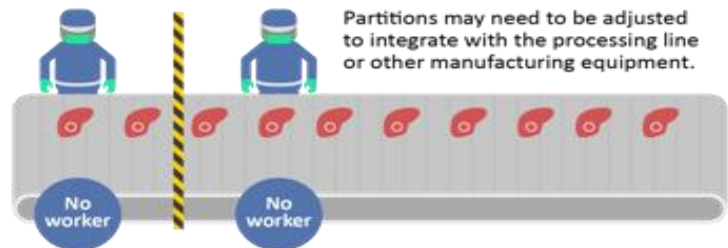
Bad:
Workers are within six feet of one another, including at side-by-side or facing workstations.



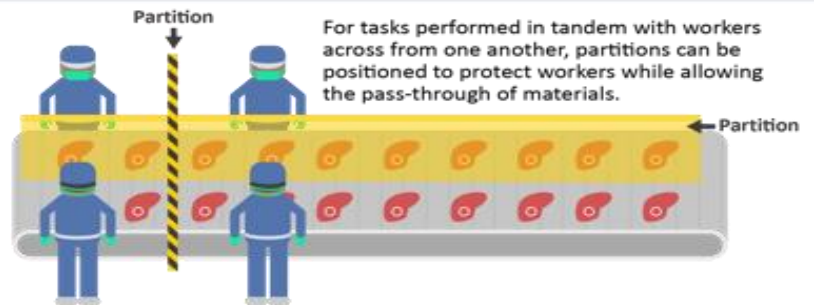
Good:
Workers are spaced at least six feet apart, not facing one another. Other configurations may be used to achieve similar distancing between workers.



Good:
Physical barriers, such as partitions, separate workers from each other.



Good:
Physical barriers, such as partitions, separate workers from each other, including where workers need to perform tasks in tandem across from one another.



Id. While these OSHA/CDC standards are phrased as guidance, they are incorporated—and made mandatory—by the Executive Order signed by President Trump deeming meat and poultry processing plants to be critical infrastructure.²²

²² See Executive Order on Delegating Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19 (Apr. 28, 2020), 85 Fed. Reg. 26, 313 (“Executive Order”), available at t.ly/MfXU.

1 The Executive Order was issued in response to the “complete closure of some large
2 processing facilities.” *Id.*, § 1. It provides that meat and poultry processing facilities could
3 continue operations “consistent with the guidance for their operations jointly issued by the CDC
4 and OSHA.” *Id.* Operations that are inconsistent with that guidance—such as Foster Farms’
5 current operations at the Livingston Plant—are inconsistent with, and therefore unprotected by, the
6 Executive Order. Thus, the relief Plaintiffs request—that measures like those the CDC and OSHA
7 have recommended be employed at the Livingston Plant—is entirely consistent with the Executive
8 Order.

9 Nor is Plaintiffs’ requested relief different from or additional to any other requirements
10 imposed by federal law relating to poultry production because Plaintiffs simply request that Foster
11 Farms comply with federal COVID-19 guidance. Moreover, nothing in the Executive Order
12 preempts or prohibits this Court from ensuring the Plant operates consistently with this guidance,
13 particularly because Plaintiffs do not seek the “complete closure” of the Plant. *See Executive*
14 *Order* § 1. Certainly this Court is empowered to hear and grant relief in this state-law public
15 nuisance suit. California courts have repeatedly held that circumstances that are potentially
16 “injurious to public health” are a quintessential public nuisance. *See Beck Development Co. v.*
17 *Southern Pacific Transportation Co.*, 44 Cal. App. 4th 1160, 1209 (1996); *see also Benetatos v.*
18 *City of Los Angeles*, 235 Cal. App. 4th 1270, 1273 (2015). Foster Farms’ knowing failure to
19 comply with Cal/OSHA’s health and safety standards and emergency regulations has caused and
20 continues causing community spread of COVID-19, creating a workplace injurious to the health of
21 workers. Moreover, the community spread has not been, and will not be, confined the physical
22 location of the Plant because infected workers will go home to interact with their family members,
23 cohabitants, neighbors, and others with whom they must necessarily interact as they undertake
24 essential daily activities, such as shopping, doctor’s visits, and childcare.

25 Under California law, plaintiffs may file claims for public nuisance when they have
26 suffered a special injury, as per Cal. Civ. Code § 3493, and during the pandemic, claims by
27 workers against large employers equating unsafe workplaces to public nuisances have become
28 quite commonplace. *See, e.g.*, Gary B. Ross, “Department: Practice Tips: Employers Beware:

1 Anticipating A Post-Covid-19 Workplace,” 43 *Los Angeles Lawyer* 14, 15-16 (2020).
2 Furthermore, the physical and psychological strain of the unnecessarily high exposure risk
3 suffered by UFW’s members due to their unsafe workplace sufficiently demonstrates that they
4 have incurred the requisite “special injury” to abate this public nuisance. These injuries—ones that
5 risk their lives, the lives of their loved ones, and of those in their communities—are “different in
6 kind and not merely in degree from that suffered by other members of the public,” who are not
7 directly subjected to the conditions of the Plant. *Mohilef v. Janovici*, 51 Cal. App. 4th 267, 297
8 (1996) (defining “special injury”) (citation omitted). Moreover, these injurious conditions remain
9 materially unchanged since the Plant’s designation as a public nuisance by the County in August
10 2020.

11 Plaintiffs are likely to succeed on the merits because Foster Farms knowingly has
12 perpetuated and continues to perpetuate a public nuisance injurious to public health at the Plant,
13 one that will further harm its workers and the Merced community at large unless a temporary
14 restraining order is granted mandating them to comply with state and local regulations requiring,
15 among other basic safety measures.

16 **B. Foster Farms’ Acts and Omissions Constitute Unfair and Unlawful Business**
17 **Practices Under Business & Professions Code § 17200.**

18 As interpreted by California courts, Business & Professions Code § 17200 “borrows
19 violations of other laws and treats them as unlawful practices that the unfair competition law
20 makes independently actionable.” *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Telephone*
21 *Co.*, 20 Cal. 4th 163, 180 (1999). Within this framework, an unlawful public nuisance may be
22 treated as a violation of §17200. *See e.g., People v. Niemeyer*, 231 Cal. App. 5th 594 (1986);
23 *People ex rel. Gwinn v. Kothari*, 83 Cal. App. 4th 759, 762 (2000). The statutory language of
24 § 17200 has also been interpreted to confer upon private plaintiffs “specific power” to prosecute
25 such violations of other laws under this claim of right. *Rose v. Bank of America, N.A.*, 57 Cal. 4th
26 390, 397 (2013). Therefore, the same acts and omissions discussed in Section I.A, *supra*, may also
27 constitute unfair and unlawful business practices under § 17200 and be asserted under its
28 authority.

1 Foster Farms’ acts and omissions further constitute unfair business practices because,
2 while competitors were spending money to adequately protect the health and safety of their
3 employees and the public, at its Livingston Plant Foster Farms has been saving on expenses by
4 underspending on safety, refusing to moderate production procedures sufficiently to protect its
5 employees, conducting minimal due diligence, and offending public policies that were designed
6 explicitly to prevent the spread of an infectious disease. *See Cel-Tech Commc’ns*, 20 Cal. 4th at
7 187; *Candelore v. Tinder, Inc.*, 19 Cal. App. 5th 1138, 1155-56 (2018). Requiring its employees to
8 furnish their own masks, in direct violation of MCDPH orders, has resulted in company savings as
9 has its failure to add staffing to provide sufficient monitors of social distancing or to conduct
10 training or information sessions. Most significantly, by continuing to staff lines with workers in
11 close proximity, often lacking even plastic dividers, Foster Farms has maximized and prioritized
12 the Company’s productivity over its workers’ and its community’s health.

13 Foster Farms has reaped unfair and illegal profits at the expense of their workforce and the
14 surrounding communities. In light of the hazardous conditions the Company continues to subject
15 its workers to, Plaintiffs are likely to succeed with this claim on the merits.

16 **II. THE BALANCE OF HARMS WEIGHS STRONGLY IN PLAINTIFFS’ FAVOR**

17 Given the strong likelihood of success on the merits, Plaintiffs need only demonstrate that
18 a denial of injunctive relief will result in a greater interim harm to them than to Foster Farms. *See*
19 *Butt*, 4 Cal. 4th at 693-94. The Court must assess “which party is the more likely to be injured by
20 the exercise of its discretion and it must then be exercised in favor of that party.” *Family Record*
21 *Plan, Inc. v. Mitchell*, 172 Cal. App. 2d 235, 242 (1959) (citation omitted).

22 As discussed above, Foster Farms’ disregard of mandated COVID-19 safety requirements
23 caused to become a facility “injurious to [the] health” of its workers—as MCDPH concluded, a
24 public nuisance. *Alonso Dec., Ex. M*; Cal. Civil Code § 3479. When employers shirk safety
25 obligations as Foster Farms has done here, the COVID-19 pandemic has “catastrophic effects” on
26 the health and safety of workers who find themselves in the “unfortunate situation” of having to
27 risk their own and others’ lives unnecessarily for a paycheck. *Rogers v. Lyft, Inc.*, 2020 Cal. Super.
28 LEXIS 59, *21-22 (2020).

1 As the County has already recognized, conditions at the Plant, in addition to being a public
2 nuisance, threaten to inflict irreparable harm on the public health. *See, e.g., California v. Azar*, 385
3 F. Supp. 3d 960, 969 (N.D. Cal. 2019). Permitting Foster Farms to operate without proper
4 adherence to COVID-19 safety protocols and protections places workers and their families along
5 with the greater community at risk of physical and emotional injuries from the continued spread of
6 the virus. Given the highly contagious nature of the virus, a temporary restraining order is
7 necessary pending a determination of a preliminary injunction as repeated outbreaks, forced
8 closures, over 400 infected workers, and at least nine dead workers have made clear. The potential
9 harm to Plaintiffs is not measured in dollars or lost productivity but instead in physical and
10 psychological well-being and lives lost.

11 In contrast to the dire consequences of allowing the virus to go unchecked, any harm to
12 Foster Farms resulting from the imposition of a temporary restraining order would be *de minimis*.
13 Plaintiffs seek relief consistent with, and in some cases required by, public health orders and
14 guidance. Because Foster Farms should already be following these directives, they cannot
15 legitimately assert that they will be harmed by compliance. Compliance with mandated health and
16 safety obligations will not require Foster Farms to shutter the Plant. Rather, Foster Farms could
17 slow the line speed to ensure proper physical distancing between workers. The balance of harms
18 thus weighs decidedly in Plaintiffs' favor. *See, e.g., White*, 30 Cal. 4th at 554 (“The ultimate goal
19 ... in deciding whether a preliminary injunction should issue is to minimize the harm which an
20 erroneous interim decision may cause”).

21 **III. A TEMPORARY RESTRAINING ORDER IS PROPER AND URGENTLY**
22 **NEEDED UNDER THE CIRCUMSTANCES HERE**

23 Based on the above evidence, Plaintiffs seek a temporary restraining order preventing
24 Foster Farms from operating the Plant such that it contributes to the continued spread of COVID-
25 19. Specifically, Plaintiffs request an order prohibiting and enjoining Defendant, its agents,
26 employees, and representatives, and all persons acting in concert or participating with it, at the
27 Livingston Plant, from failing or refusing to comply with minimum health and safety standards,
28 including:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. Placing production line workers in any and all Livingston Plant buildings less than six feet from each other during shifts, including but not limited to, the live hanger lines in Plants 1 and 2, production lines in Deli and production lines in Packing;
2. Erecting and/or replacing existing dividers with sufficiently sized plastic dividers to protect production line workers when they bend forward over the production lines, including but not limited to, in Packing, and with sufficiently durable plastic dividers that neither move nor tear, including but not limited to, in Deli;
3. Ensuring and enforcing reasonably safe physical distancing of at least six feet between workers in all work, clock in/clock out, and break areas, including by adequately staffing these areas to provide enough company monitors to supervise multiple areas, including bathrooms, break rooms and hallways;
4. Providing workers with, and when necessary replacing, adequate and sufficient facemasks, face shields, and other necessary personal protective equipment to workers at company expense;
5. Replacing facemasks on demand at company expense;
6. Requiring, instructing and enforcing managers, supervisors, forepersons, and employees that all workers must stay home from work when they are experiencing COVID-19 symptoms, have tested positive for COVID-19, or have come in close contact with another person or persons who have tested positive for COVID-19;
7. Verbally and in writing informing workers of the availability of paid sick leave due to COVID-19 under applicable law, and pay employees sick pay for self-quarantining in accordance with such law;
8. Conducting contact tracing of all persons known or suspected to have been infected with COVID-19 while physically present at the Plant;
9. Effectively (verbally and in writing) and regularly notifying all employees and their representative(s) when there is a reported illness or exposure in the Plant;
10. Restricting passenger capacity in Foster Farms' transport vans to a number sufficient to allow six feet social distancing during transport and require use of face masks or coverings during such transportation; and
11. Monitoring and enforcing use of masks while inside transport vans.

Plaintiffs' requested relief is entirely proper. Public nuisances may be remedied by "an injunction proper and suitable to the facts of each case," and the court has broad discretion to issue such relief based upon "the particular circumstances of each individual case." *ConAgra Grocery Prod. Co.*, 17 Cal. App. 5th at 132-34. Preliminary injunctions and temporary restraining orders are also available under Business & Professions Code §17203 and Code of Civil Procedure §1021.5. Furthermore, preliminary relief such as a temporary restraining order that necessitates affirmative action by the defendant is appropriate in "extreme cases where the right thereto is

1 clearly established.” See *Integrated Dynamic Solutions, Inc. v. VitaVet Labs, Inc.*, 6 Cal. App. 5th
2 1178, 1184-85 (2016). There can be no dispute that Plaintiffs’ right to basic protections against the
3 spread of a deadly, highly communicable disease in their workplace and communities is clearly
4 established.

5 **CONCLUSION**

6 For the foregoing reasons, Plaintiffs respectfully request that the Court grant their request
7 for a temporary restraining order.

8
9 Dated: December 17, 2020

MESSING ADAM & JASMINE LLP

10
11 By 

12 Gary M. Messing
13 Monique Alonso
14 Laurie M. Burgess
15 Attorneys for Plaintiffs
16 UNITED FARM WORKERS, MICAELA
17 ALVARADO and MARIA TRINIDAD
18 MADRIGAL
19
20
21
22
23
24
25
26
27
28