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No. 21-15963

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CORBY KUCIEMBA, ET AL.
Plaintiffs-Appellants,

vs.

VICTORY WOODWORKS, INC.
Defendant-Appellee

Appeal from the United States District Court
for the Northern District of California
No. 3:20-cv-09355-MMC
The Honorable Maxine M. Chesney

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Plaintiffs-Appellants Corby Kuciemba ("Mrs. Kuciemba") and her husband Robert Kuciemba ("Mr. Kuciemba", collectively referred to as "Plaintiffs") allege that Mrs. Kuciemba contracted a severe case of COVID-19 due to the negligence of Mr. Kuciemba's former employer, Defendant-Appellee Victory Woodworks, Inc. ("Defendant"). Defendant violated a COVID-19 Health Order of the City and County of San Francisco (the "Health Order"), CDC Guidelines, and other regulations, by moving workers exposed to COVID-19 at its Mountain View worksite to its San Francisco worksite without quarantining them, and thereafter by failing to take other day-to-day COVID-19 safety precautions at that San Francisco worksite. Defendant knew that its neglect would expose not only the employees, but also consequently each member of each employee's household, to a highly contagious and dangerous virus in COVID-19. But Defendant still failed to take basic precautions. Defendant caused Mr. Kuciemba to contract COVID-19 while at work at Defendant's location in San Francisco, by failing to follow the Health Order and the CDC Guidance. Mr. Kuciemba then brought the virus home from work and

unknowingly infected his wife Mrs. Kuciemba. Mrs. Kuciemba alleges she was infected either through "direct transmission" (from exposure to her infected husband) or "indirect transmission" (coming into contact with her husband's clothing or personal effects from, for example, doing laundry).

Mrs. Kuciemba became very ill, required extended hospital treatment, and still suffer from significant aftereffects of COVID-19. This case involves the direct injury to Mrs. Kuciemba from being contaminated by the virus, and for Mr. Kuciemba's derivative damages arising from the direct injury to his wife.

Defendant moved to dismiss Plaintiff's First Amended Complaint on the grounds that (a) Mrs. Kuciemba's claims were barred by the exclusive remedy of Workers' Compensation and (b) that Defendant owed no duty to Mrs. Kuciemba. The district court granted Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint without leave to amend (Excerpt of Record ("ER") ER-004-006). Plaintiffs timely appealed. Plaintiffs respectfully disagree with the district court's ruling which misapplied California law. We summarize each Issue on Appeal below:

Issue No. 1: The district court held that Mrs. Kuciemba's negligence claim based on "direct transmission" of COVID-19 was barred based on the exclusive remedy of Workers' Compensation. In summary, the district court held that because Mrs. Kuciemba's injuries were factually caused by Mr. Kuciemba's exposure to the virus at work, this means that her claims are "derivative" claims (rather than "direct"

claims) which are subsumed by the Workers' Compensation system.

This holding does not comport with California law. First, a core tenet of California law is that "[f]or every wrong there is a remedy". *Civ. Code* § 3523. On a fundamental level, Mrs. Kuciemba would be denied any ability to pursue a claim for her own direct personal injuries to her body and mind, even though she has no Workers' Compensation remedy available to her as a non-employee. If this Court rules against Plaintiffs and affirms the district court's ruling, Mrs. Kuciemba will be denied a chance to present her case, and will have no civil legal remedy. This would be a terrible result for an innocent person whose body and mind was ravaged by COVID-19 because of Defendant's wrongdoing, but, most importantly, the Court would be issuing a ruling that is directly contrary to controlling California law.

Second, the district court's holding goes against well-established California Supreme Court precedent in *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal 4th 991. *Snyder* holds that direct injury claims against an employer by a non-employee family member are <u>not</u> subject to Worker's Compensation. The pregnant mother in *Snyder* inhaled the toxic levels of carbon monoxide at work and then passed that toxic gas through the mother's body to her unborn child who was injured. The California Supreme Court expressly held that the direct physical injury to the infant plaintiff (a non-employee) in its mother's womb at work was distinct from the injuries to its mother (the employee), and that it was legally irrelevant that the mother (the

employee) was also injured at work. Here, Mrs. Kuciemba is a *non-employee* alleging a direct claim for her *own* physical injuries because of Defendant's negligence. She is not alleging a derivative claim such as loss of consortium, or emotional distress, which would flow from *Mr. Kuciemba*'s injuries.

The district court's error was to equate Mrs. Kuciemba's claims for physical injuries (which under *Snyder* are *not* subject to the exclusive remedy) with "typical" derivative injury claims such as wrongful death/emotional distress/loss of consortium claims which are subject to a workers' compensation bar.

Issue No. 2: The district court held that Mrs. Kuciemba's "indirect transmission" claim was barred because it lacked plausibility as required by FRCP 8(a)(2). Plaintiffs have alleged sufficient facts in their First Amended Complaint to meet this basic pleading standard. However, the district court erred by holding Mrs. Kuciemba to a much higher standard, effectively requiring her to present expert testimony as the complaint stage for her indirect transmission claim to survive.

Issue No. 3: The district court held that Defendant owed no legal duty to Mrs. Kuciemba. However, it is clear, under the controlling California Supreme Court precedent in *Kesner v. Superior Court* (2016) 1 Cal. 5th 1132, that an employer owes a duty to protect members of the workers' households from any pathogens that a worker may be exposed to at work. The duty at issue in this case is described in the very detailed Health Order and CDC Guidance. The district court erred by

finding no duty exists even though the district court acknowledged that foreseeability, the most important duty factor, favored Plaintiffs. In this brief Plaintiffs provide a detailed analysis of various *Kesner* foreseeability and public policy factors that illustrate why a duty of care is owed to Mrs. Kuciemba.

Plaintiffs believe this case should be heard on the merits before a jury of Plaintiffs' peers. Plaintiffs respectfully request this Court REVERSE the judgment of the district court. Alternatively, Plaintiffs respectfully request this Court certify Issue Nos. 1 and 3 to the California Supreme Court pursuant to Rule 8.548(a) of the California Rules of Court.

II. JURISDICTION

This appeal arises from a personal injury/negligence action originally filed on October 23, 2020 in the Superior Court of California, County of San Francisco. (ER-154-165) Defendant is a Nevada Corporation. (ER-154). Pursuant to 28 U.S.C. § 1446, Defendant removed this action to the Northern District of California on December 28, 2020, on the basis of diversity jurisdiction. (ER-170) Therefore, the district court had jurisdiction pursuant to 28 U.S.C. § 1332(a)(1).

The district court dismissed the first amended complaint with prejudice on May 10, 2021. (ER-005-006). The clerk entered a final judgment on the same day, therefore giving this Court jurisdiction under 28 U.S.C. § 1291. (ER-004). Plaintiffs

timely appealed on June 3, 2021. (ER-166-168, 175). This Court therefore has jurisdiction. 28 U.S.C. § 1291.

III. STATEMENT OF THE ISSUES PRESENTED

The issues presented on this appeal are as follows:

Issue 1: Did the district court err when it held that a non-employee spouse, who suffered physical injuries to her own body due to the employer's alleged negligence, had no remedy because such claims are mere 'derivative' injuries barred by Workers' Compensation exclusivity?

Issue 2: Did the district court err when it held on a Motion to Dismiss that Mrs. Kuciemba's "indirect transmission" claim lacked plausibility?

Issue 3: Did the district court err when it held that Defendant owed no duty to Mrs. Kuciemba as a matter of law?

IV. STATEMENT OF THE CASE

A. The district court dismissed Plaintiffs' claims with prejudice, without leave to amend.

In this section, we provide an overview of this case's procedural history, with a more detailed discussion below.

This action was filed on October 23, 2020 in the Superior Court of California, County of San Francisco. (ER-154-165). Defendant is a Nevada Corporation. (ER-154). Pursuant to 28 U.S.C. § 1446, Defendant removed this action to the Northern

District of California on December 28, 2020 on the basis of diversity jurisdiction. (ER-170). Defendant filed a Motion to Dismiss on January 4, 2021. (ER-171). Plaintiffs opposed the Motion and the district court heard oral argument on February 12, 2021. (ER-172-173) The district court granted Defendant's Motion with leave to amend on February 22, 2021. (ER-095-096; 173)

Plaintiffs then filed a First Amended Complaint (at times referred to as "FAC") on March 18, 2021. (ER-84-094, 173).

Defendant filed a renewed Motion to Dismiss on April 1, 2021. (ER-174). Plaintiffs opposed this renewed Motion and the district court heard oral argument on May 7, 2021. (ER-174). The district court dismissed the First Amended Complaint with prejudice on May 10, 2021 holding that Mrs. Kuciemba's "direct" transmission claims were barred by the Exclusive Remedy of Workers' Compensation; her "indirect" claims were dismissed for lack of plausibility and in the alternative, Defendant owed no duty to Mrs. Kuciemba. (ER-004-006, 174-175). Plaintiffs timely appealed the dismissal of the First Amended Complaint on June 3, 2021. (ER-084-094, 173).

B. Plaintiffs' original complaint alleged claims for negligence based on Defendant's violation of the Health Order. These violations caused Mr. Kuciemba to become infected with

COVID-19. Mr. Kuciemba then "took home" the virus to his wife, who became severely injured.

Defendant operates construction sites in the State of California. Mr. Kuciemba, husband of Mrs. Corby Kuciemba, worked for Defendant at a San Francisco jobsite from May 6, 2020 to July 10, 2020. (ER-154-165) The complaint alleges that Defendant knew or should have known that its employees at a Mountain View jobsite became infected, and/or exposed to persons infected with COVID-19, but knowingly transferred these workers to a San Francisco jobsite without requiring that the workers quarantine first, thus commingling its Mountainview and San Francisco workers. (ER-154-165) Defendant transferred these infected workers even though it was aware of a San Francisco County Health Order (ER-052-083), CDC Guidelines, and other regulations, required and/or called for quarantining, mandatory screening protocols, having workers stay home if they are feeling sick or were exposed to infected individuals, and taking specific COVID-19 precautions at work. (ER-154-165).

These infected workers, who were permitted to work at the San Francisco worksite, first caused Mr. Robert Kuciemba to become infected with COVID-19, and then to unknowingly bring the virus home and infect his wife Mrs. Kuciemba. (ER-155-165, 157).

As a result of Defendant's negligence, Mrs. Kuciemba developed a severe respiratory infection requiring her to stay in the hospital for weeks and requiring her

to be kept alive on a respirator. (ER-157). Mrs. Kuciemba seeks damages for her direct non-employee injury claims while Mr. Kuciemba only seeks loss of consortium damages due to his wife's injury claims. (ER-158).

The complaint contained the following causes of action: 1. Negligence; 2. Negligence Per Se; 3. Negligence – Premises Liability; 4. Public Nuisance – Assisting in the Creation of Substantial and Unreasonable Harm to Public Health and Safety that Affects an Entire Community of Considerable Number of Persons; and 5. Loss of Consortium. (ER-154-165).

C. Defendant filed a motion to dismiss the original complaint which was granted by the district court with leave to amend.

Defendant filed a Motion to Dismiss on January 4, 2021. (ER-171) Defendant's Motion primarily argued the following: (1) Plaintiffs' negligence causes of action were barred by the Exclusive Remedy of Workers' Compensation; and (2) Defendant owed no duty to Mrs. Kuciemba. (ER-171) Plaintiffs opposed the Motion, arguing in summary that the (1) the Workers' Compensation exclusivity does not apply to a non-employee spouse who received her own distinct and direct physical injuries; and (2) an analysis of the foreseeability and public policy factors under California law necessitate finding that Defendant owes a Duty to Mrs. Kuciemba. (ER-172). Plaintiffs discuss these arguments at length below.

The district court granted the Motion with leave to amend on February 22, 2021. (ER-095-096). The relevant portions of the District Court's Order are as follows: "[. . .] 2. The First, Second, Third, and Fifth Causes of Action, titled, respectively, "Negligence," "Negligence Per Se," "Negligence – Premises Liability," and "Loss of Consortium," are barred by the exclusive remedy provisions of California's workers' compensation statutes. See Cal. Labor Code §§ 3600, 3602." (ER-095-096).

D. Plaintiffs filed a First Amended Complaint which clarified certain factual allegations and re-emphasized that Mrs. Kuciemba does not have a Workers' Compensation remedy.

Plaintiffs amended their complaint on March 18, 2021 to address issues raised by the district court in its Order and at oral argument. (ER-084-094) The First Amended Complaint ("FAC") re-alleged nearly all of the original complaint's allegations, but also provided several key points of clarification, as well as additional facts that are consistent with the original complaint, the facts, and the law:

(1) The FAC eliminated references to the fact that Mr. Kuciemba himself suffered his own physical injuries from COVID-19 requiring hospitalization. These facts were true at the time the Complaint was filed and remain true. However, Plaintiffs removed these facts in the FAC because as a matter of well-established California law, described in detail below, it is irrelevant that Mr. Kuciemba was injured at all; (ER-084-094)

(2) Pursuant to the Court's Order, the FAC eliminated the Fourth Cause of Action for Public Nuisance;

(3) The FAC cites to CDC publications that describe how asymptomatic persons who suffer no physical injury can still act as a reservoir for COVID-19. (ER-086);

(4) The FAC explains how COVID-19 can be spread both directly through the transmission of droplets in a person's breath and indirectly from "fomites" (ER-086);

(5) The FAC explains how the most likely source of Mrs. Kuciemba's COVID-19 infection was from either direct exposure to Mr. Kuciemba or indirect exposure through his clothing or personal effects, as opposed to some other, unknown point of exposure. (ER-087-089). These specific factual allegations were designed to eliminate the speculative arguments Defendant made in their original Motion to Dismiss regarding possible alternate sources of infection.

(6) The FAC re-affirms that Mrs. Kuciemba is seeking damages for her own personal injuries and that she has no Workers' Compensation remedy. (ER-090-091).

The FAC contained the following causes of action: 1. Negligence; 2. Negligence Per Se; 3. Negligence – Premises Liability; and 4. Loss of Consortium. (ER-090-092)

E. Defendants filed a renewed motion to dismiss which the district court granted without leave to amend.

On April 1, 2021, Defendant filed a Motion to Dismiss the FAC. (ER-174). Defendant again argued that (1) Plaintiffs' negligence causes of action were barred by the Exclusive Remedy of Workers' Compensation; and (2) Defendant owed no duty to Mrs. Kuciemba. Plaintiffs opposed the Motion with the same substantive arguments. (ER-174)

The district court heard oral argument on May 7, 2021. (ER-174). Following oral argument, the district court granted the Motion and dismissed the complaint with prejudice on May 10, 2021. (ER-004-006, 174-175). The relevant portion of the district court's order is as follows:

> "Having read and considered the parties' respective written submissions as well as the arguments of counsel at the above-referenced hearing, the Court, for the reasons stated in detail on the record at said hearing, as well as the hearing conducted February 12, 2021, rules as follows:
>
> 1. To the extent plaintiffs' claims are based on allegations that Corby Kuciemba contracted COVID-19 "through direct contact with" Robert Kuciemba (see FAC ¶ 22), such claims are barred by the exclusive remedy provisions of California's workers' compensation statutes and, thus, are subject to dismissal. See Cal. Labor Code §§ 3600, 3602.
>
> 2. To the extent plaintiffs' claims are based on allegations that Corby

> Kuciemba contracted COVID-19 "indirectly through fomites such as [Robert Kuciemba's] clothing" (see FAC ¶ 22), such claims are subject to dismissal for failure to plead a plausible claim.
>
> 3. To the extent the above-described claims are neither barred by statute nor deemed insufficiently pleaded, such claims are subject to dismissal for the reason that defendant's duty to provide a safe workplace to its employees does not extend to nonemployees who, like Corby Kuciemba, contract a viral infection away from those premises."
>
> (ER-005-006)

Plaintiffs timely appealed from this order. (ER-166-168, 175).

V. STANDARD OF REVIEW

This Court "reviews de novo the district court's decision to grant a motion to dismiss a claim under Rule 12(b)(6)." *Eichenberger v. ESPN, Inc.* (9th Cir. 2017) 876 F.3d 979, 982.

VI. SUMMARY OF ARGUMENT

(1) The district court erred when it held that Mrs. Kuciemba's claims were barred by the exclusive remedy of Workers' Compensation. Binding California Supreme Court precedent, *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal 4th 991, 997, holds that Workers' Compensation exclusive remedy does not apply when a non-employee suffers her own distinct direct physical injury. The district court incorrectly read *Snyder* and found that the holding encompassed all physical injuries

by non-employee spouses including direct physical injuries to the non-employee spouse.

(2) The district court erred when it held that Mrs. Kuciemba's "indirect transmission claim" lacked plausibility. Plaintiffs have met this basic pleading standard, but the district court held Plaintiff to a higher pleading standard than legally required. In effect, the district court effectively required Plaintiffs to provide expert testimony at the initial pleading stage.

(3) The district court also erred when it held that Defendant owed no duty to Mrs. Kuciemba, even though it found that foreseeability, the most important duty factor, favors Plaintiffs. Furthermore, the holding and factors discussed by the California Supreme Court in *Kesner v. Superior Court* (2016) 1 Cal. 5th 1132 favor the existence of a duty.

(4) Alternatively, this Court should certify Issue 1 (regarding the applicability of the exclusive remedy of Workers' Compensation) and Issue 3 (regarding the existence of a duty) to the California Supreme Court pursuant to Rule 8.548(a) of the California Rules of Court.

VII. ARGUMENT

A. The district court was required to view the facts alleged in Plaintiffs' complaint as true.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."

Ashcroft v. Iqbal (2009) 556 U.S. 662, 678 (internal quotation marks omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* On a motion to dismiss, "[a]llegations of fact in the complaint must be taken as true and construed in the light most favorable to the nonmoving party." *Hernandez v. Wood* (N.D. Cal. 2016) 2016 WL 1070663 at *11. Finally, a Motion to Dismiss is inappropriate when there are disputed issues of fact. *See, e.g. Bruton v. Gerber Prod. Co.* (N.D. Cal. 2014) 2014 WL 172111 at *10. At the Motion to Dismiss stage, a Court must consider the pleading as true and should not "consider material outside the pleadings when assessing the sufficiency of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure". *Khoja v. Orexigent Therapeutics, Inc.* (9th Cir. 2018) 899 F.3d 988, 998-999.

At this stage of the litigation, the district court was obligated to accept as true that Mrs. Kuciemba contracted COVID-19 directly from Mr. Kuciemba, or indirectly through contact with his clothing or personal effects, and that Defendant negligently exposed Mr. Kuciemba and/or his clothing/personal effects to the virus. (ER088-089). Under these circumstances, the district court should have held in favor of Plaintiffs.

B. Mrs. Kuciemba's claims are not barred by the exclusive remedy of Workers' Compensation because she alleges a direct physical injury to her own body caused by Defendant's

negligence.

The district court held that Mrs. Kuciemba's "direct transmission" claims are barred by the exclusive remedy of Workers' Compensation. (ER-005-006). Plaintiffs respectfully disagree with the district court's ruling.

A key question in this appeal is: Are the claims of a non-employee spouse, who suffered direct physical injuries to her own body due to the employer's alleged negligence, subject to Workers' Compensation exclusivity? The answer is no.

The relevant Workers' Compensation statutes, *e.g. Labor Code* §§ 3600-3602 generally bar an employee from seeking a civil action against an employer when the employee suffers a work-related injury. "Based on the statutory language, California courts have held worker's compensation proceedings to be the exclusive remedy for certain third-party claims deemed collateral to or derivative of the employee's injury. Courts have held that the exclusive jurisdiction provisions bar civil actions against employers by nondependent parents of an employee for the employee's wrongful death, by an employee's spouse for loss of the employee's services or consortium, and for emotional distress suffered by a spouse in witnessing the employee's injuries." *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal 4th 991, 997 (internal citations omitted). This application of Workers' Compensation exclusivity to certain third-party claims is generally referred to as the "derivative injury doctrine." *Id.* at 997.

To determine whether a third party's claim is a "derivative" or "collateral" injury, a Court must first look to whether a claim was legally dependent on the employee's work-related injuries. *Id.* at 999. In *Snyder*, the Supreme Court had the opportunity to apply this rule to two factual scenarios: (1) the facts of the case itself and (2) a similar fact pattern in a prior Court of Appeal matter, *Bell v. Macy's California* (1989) 212 Cal. App. 3d 1442 (disapproved by *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal 4th 991) ("*Bell*").

In the *Bell* case, a "pregnant worker complained, during work, of severe abdominal pain. A nurse provided on premises by the employer misdiagnosed the worker's condition as gas pains and delayed calling for an ambulance. When the mother was finally taken to the hospital, she was found to have suffered a ruptured uterus, and her baby, delivered live by Cesarean section, had suffered consequential injuries including brain damage. Evidence accepted by the appellate court for purposes of the appeal from summary judgment in favor of the employer showed that the nurse's delay in calling an ambulance caused a significant portion of the fetal injuries." *Snyder*, 16 Cal 4th 991 at 997. The appellate court concluded that the derivative injury doctrine applied because "the child's prenatal injury was a collateral consequence of the treatment of [the mother]". *Id.* at 998.

However, the California Supreme Court in *Snyder* rejected the Court of Appeal's analytical approach in *Bell* and explained how the fetus in *Bell* had

suffered a distinct injury from any injuries its mother had suffered:

> **The question the *Bell* court should have asked, therefore, was not whether [the daughter's] injuries resulted from the employer's negligent treatment of [the mother] or from "some condition affecting" [the mother] but, rather, whether [the daughter's] claim was legally dependent on [the mother's] work-related *injuries*.** From the appellate opinion, no evidence of such dependence appears. Although the fetal injuries resulted in part from the mother's ruptured uterus, the appellate court and the parties all assumed that "[the mother's] ruptured uterus was unrelated to her employment save only that it occurred during working hours and on Macy's premises." As to the nurse's delay in summoning an ambulance, the majority's recitation of the evidence indicates simply that the delay "caused significant injury to [the daughter]" (*ibid.*); **nothing in the majority opinion suggests [the daughter's] claim depended conceptually on injuries the delay caused to [the mother].** The majority, in other words, says nothing to contradict the dissent's assertion that "the nurse's negligence caused an injury to [the daughter] which was not dependent on or derived from any injury to the mother." *Id.* at 999 (internal citations omitted, emphasis in original).
>
> [. . .]
>
> "Whether a toxin or other agent will cause congenital defects in the developing embryo or fetus depends heavily not on whether the mother is herself injured, but on the exact stage of the embryo or fetus's development at the time of exposure, as well as on the degree to which maternal exposure results in embryonic or fetal exposure. (See 7 Encyclopedia of Human Biology (1991) Human Teratology, pp. 411–418.) **Even when the mother *is* injured, moreover, the derivative injury rule does not apply unless the child's claim can be considered merely collateral to the mother's work-related injury, a conclusion that rests on the *legal* or *logical* basis of the claim rather than on the biological cause of the fetal injury**."
>
> […]

> **As we have emphasized above, however, the derivative injury doctrine does not bar civil actions by all children who were harmed *in utero* through some event or condition affecting their mothers; it bars only attempts by the child to recover civilly for the mother's own injuries or for the child's legally dependent losses.** [The daughter] does not claim any damages for injury to [the mother]. Nor does the complaint demonstrate [the daughter]'s own recovery is legally dependent on injuries suffered by [the mother]. For that reason, sections 3600 through 3602 did not defeat [the daughter]'s cause of action for her own injuries (the first cause of action) or her parents' claim for consequential losses due to [the daughter]'s injuries (the third cause of action).

Id. at 1000. (Emphasis added).

The California Supreme Court thus drew a line from the employer's negligence to the child's separate, independent injuries and the California Supreme Court found that for purposes of the direct injuries to the baby it was logically and legally irrelevant whether the mother was injured as well. As a result, the *Snyder* Court held that the child's claims were not subject to Workers' Compensation exclusivity.

With this analytical framework in mind, the *Snyder* Court then addressed the facts of the case before it. In *Snyder*, a minor child alleged that she suffered injuries because her mother was negligently exposed to toxic carbon monoxide at work, while pregnant with the child, and that this toxin passed through the mother to the child. *Snyder*, 16 Cal 4th at 994. The child alleged a direct claim for injuries against the employer. *Id*. at 995. The trial court sustained a demurrer on Worker's

Compensation grounds but the Court of Appeal reversed, holding that the daughter's injuries were "the result of her own exposure to toxic levels of carbon monoxide" and therefore the exclusive remedy of Worker's Compensation did not apply. *Id*. at 995. The Supreme Court affirmed the judgment of the Court of Appeal, holding that the child's separate injury claims were not barred by Workers' Compensation and that she could proceed against employer on her personal injury claims. *Id.* at 1008. In its holding, the California Supreme Court easily distinguished between derivative injury cases, and direct claims, by non-employee family members:

> **[Employer's] demurrer should have been sustained only if the facts alleged in the complaint showed either that [the child] was seeking damages for [mother's] work-related injuries or that [the child's] claim necessarily depended on [the mother's] injuries.** (See *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1060, 40 Cal.Rptr.2d 116, 892 P.2d 150 [complaint subject to demurrer only if it affirmatively alleges facts showing workers' compensation is exclusive remedy].) The facts alleged here did not so demonstrate. **Plaintiffs alleged simply that both [mother] and [daughter] were exposed to toxic levels of carbon monoxide, injuring both. [The daughter] sought recompense for her own injuries.** [. . .] [the daughter] does not claim any damages for injury to [the mother]. Nor does the complaint demonstrate [the daughter's] own recovery is legally dependent on injuries suffered by [the mother]. **For that reason, [*Labor Code*] sections 3600–3602 [i.e. the Workers Compensation exclusivity sections] did not defeat [daughter's] cause of action for her own injuries (the first cause of action) or her parents' claim for consequential losses due to [daughter's] injuries (the third cause of action).**
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> *Id.* at 796 (emphasis added).

The mother in Snyder thus inhaled the toxic levels of carbon monoxide at

work. The toxic carbon monoxide passed through the mother's body passed into her unborn child who was injured. The California Supreme Court analyzed the injuries to the child and concluded that those were her own injuries, not derivative of the mother's, and thus the Workers' Compensation exclusivity did not apply. It did not make a difference whether the employee mother was in fact injured to any extent by the toxic gas that entered her body because the injury to the mother was separate and distinct from the injury to her unborn child.

The same reasoning applies to this case. Here, Mrs. Kuciemba alleges that the employer was required to follow a binding Health Order to prevent the spread of COVID-19. (ER-084-094, 87). The employer's negligence (e.g. its repeated violations of the Health Order) resulted in the direct transmission of the virus from Mr. Kuciemba, or the indirect transmission of the virus from his clothing or personal effects, to Mrs. Kuciemba. (ER-088-089). We can thus draw a line from the employer's negligence to Mrs. Kuciemba's personal injuries.

Under the California Supreme Court holding in *Snyder*, it is irrelevant whether Mr. Kuciemba was injured. Like the toxins in *Snyder*, the virus entered the employee's body, clothing, or personal effects at work, and then passed on to the non-employee family member. Like the daughter's claims in *Snyder*, Mrs. Kuciemba's claims are not predicated upon her husband suffering a physical injury, they are her own personal injury claims not covered by Worker's Compensation. In

other words, even if Mr. Kuciemba was asymptomatic, no damage was done to his body whatsoever by the virus, and he incurred no distress as a result of the infection to his body, Mrs. Kuciemba would still suffer completely separate and independent damages as a result of the *direct* damage that the virus wrecked on her body. This direct physical injury is also a significant difference between Mrs. Kuciemba's claims and the typical claim barred by the derivative injury doctrine. *See e.g.* the nonemployee spouse in *Williams v. R.J. Schwartz* (1976) 61 Cal. App. 3d 628 who witnessed her husband's death in a workplace accident and suffered severe emotional distress, but no direct physical injuries of her own.[1]

Plaintiffs respectfully disagree with the district court's ruling. At oral argument, the district court explained that it was inclined to apply the derivative injury doctrine because "at least as a factual matter, [Mrs. Kuciemba]'s claim is wholly dependent on [Mr. Kuciemba] getting sick at work and she got it from him." (ER-120).

[1] Defendant is expected to note that Plaintiffs' counsel stated at oral argument that an asymptomatic person is considered to have suffered an "injury". While it is true that Plaintiffs' counsel did state that an asymptomatic person suffered an "injury", counsel also consistently took the position that it was irrelevant whether the employee was injured or not (ER-108-109, 132-133). This position is consistent with the law. Furthermore, the First Amended Complaint clarifies Plaintiffs' position by noting that an asymptomatic person, according to the CDC, is not injured and completely healthy but just happens to serve as a vehicle for the virus. (ER-086,). Mr. Kuciemba did in fact suffer an injury by being infected with a virus in the same way that the mothers in *Snyder* suffered an injury by having a toxic gas enter her body. However, the California Supreme Court did not find injury to the mother to be material in its analysis of the unborn baby's injuries because the baby's exposure to the toxic gas and subsequent injuries were logically and legally distinct from the injury to the mother.

The district court's reasoning is based in part on what the district court felt was ambiguous language within *Snyder's* holding. The district court noted that the *Snyder* Court had the opportunity to limit the derivative injury doctrine to three distinct categories of cases: loss of consortium, wrongful death, and emotional distress, but did not do so. (ER-012-013). Instead, according to the district court, the California Supreme Court left open the possibility that some cases involving non-employees who are *physically injured* may also be barred by the exclusive remedy:

> "And I looked at all the different ways that *Snyder* – this is the California Supreme Court case -- characterized claims that they would find barred by workers' compensation. And they use the words "derivative," "derivative in the purest sense." Then they looked like maybe they were going one way, and then they're backing off "necessarily dependent." That's another phrase they use. Then they go to "legally dependent." Then they go on to say "dependent conceptually." Then at another point they say -- and these are all quotes -- "legal or logical basis." So it's, quote-unquote, legal or logical; quote-unquote, dependent conceptually; quote, derivative; quote unquote, necessarily dependent; quote-unquote, legally dependent. As I say, they've used all these terms so that when you start looking conceptually and logically it seems to me that they've left this window open where they aren't sure what they want to do. And they're not prepared until they see a case that really makes the point, which ours does, how they're going to go on it."
>
> (ER-015)

Further muddying the waters, according to the district court, is *Salin v. Pacific Gas & Electric Co.* (1982) 136 Cal. App. 3d 185, a bizarre outlier of a case whose holding has been subsequently called into doubt by the California Supreme Court in

Snyder. In *Salin,* an employee alleged that workplace stress drove him insane and caused him to attempt suicide after murdering his two young daughters. *Id.* at 187-189. The employee then sued his employer for the wrongful death of the two daughters he murdered. *Id.* at 189-190. The Court of Appeal, applying the derivative injury doctrine, held that the daughter's civil wrongful death claim was subsumed by the Workers' Compensation system. *Id.* at 193. The Court cited *Labor Code* section 3600's language that injuries "proximately caused" by the employment must be adjudicated in the Workers' Compensation system, that the deaths of plaintiff's daughters was proximately caused by the employment, and therefore "had plaintiff's daughters survived the injuries he had inflicted upon them, or had otherwise been damaged due to his employment-related mental condition, *they* would have had no cause of action against PG&E." *Id.* at 191-192 (emphasis in original).

In *Snyder,* the Supreme Court addressed *Salin* in a footnote. After briefly reciting *Salin*'s facts, the Supreme Court criticized and questioned that holding stating: "While we have no occasion here to rule on the correctness of the decision in *Salin,* we observe that sections 3600-3602 do not directly support the *Salin* court's extension of the derivative injury rule to third party injuries allegedly caused by an injured employee's post-injury acts." *Snyder,* 16 Cal 4th at 999 fn 2. *Salin*'s holding is so broad that it would effectively swallow all direct injury claims by non-employees and runs counter to *Snyder's* careful and logical

distinction between indirect claims by non-employees, which are barred by Workers' Compensation, and direct claims which are not barred by Workers' Compensation. The Supreme Court in *Snyder* thus effectively overruled *Salin* and this extreme case has no persuasive value. Following the decision in *Snyder*, *Salin* has only been cited in two published opinions. The last time that *Salin* was cited was over 20 years ago in *Horwich v. Superior Court* (1999) 21 Cal 4th 272, 286 where the Supreme Court merely cited its *Snyder* footnote that called *Salin*'s holding into doubt.

However, because the *Salin* has not been definitively overruled the Supreme Court, the district court noted that "*Salin* espoused and held . . . that workers' compensation can bar claims that are factually dependent but not legally dependent on an injured worker." (ER-016).

Plaintiffs respectfully disagree with the district court's reading of *Snyder* or that *Salin* has any precedential value. The *Snyder* Court made clear that its holding about the derivative injury doctrine is based on *legal* causation. "As we have emphasized above, however, the derivative injury doctrine does not bar civil actions by all children who were harmed *in utero* through some event or condition affecting their mothers; it bars only attempts by the child to recover civilly for the mother's own injuries or for the child's **legally dependent** losses." *Snyder*, 16 Cal 4th at 1000 (emphasis added).

Under the district court's analysis, the infant in *Snyder* would also have been barred by the exclusive remedy because she was exposed to toxic chemicals that her mother inhaled at work then passed through her body onto her unborn child. The holding in *Snyder* is not only the binding precedent, but it is also common sense because Mrs. Kuciemba as a non-employee does not have any remedy under the Workers' Compensation system for her own physical injuries. As for the *Salin* case, it is a clear outlier case that has effectively been limited to what the district court accurately described as its "bizarre" facts. (ER-010).

Kesner v. Superior Court (2016) 1 Cal. 5th 1132 ("*Kesner*"), while not framed as a Workers' Compensation case, is also highly persuasive on these issues. In *Kesner*, workers were exposed to hazardous asbestos fibers and brought the fibers home to their households. The plaintiffs were exposed to hazardous asbestos fibers through the workers' clothing and personal effects. For example, the wife of one of the workers alleged she contracted mesothelioma "through contact with [the worker] and his clothing, tools, and vehicle after she began living with him in 1973." *Id.* at 1141. As described in detail below, the Supreme Court ultimately held that the employer owed a duty to members of its employees' households.

As the Court stated at oral argument, the issue of Workers' Compensation was never raised in *Kesner*. "And that never was a workers' comp claim case. It was never raised. I double-checked. Not only wasn't it discussed, it was never raised.

And that's probably because she didn't catch mesothelioma from him. And, as pointed out, the employer has a duty not to let this stuff float around, you know, in the environment either on the work site or beyond. And he became – the husband became just the conduit of the material to the wife." (ER-112)

The Court's summary of *Kesner* is highly analogous to this case. Here, it is probable that Mr. Kuciemba's clothing or personal effects carried the virus and indirectly transmitted it to Mrs. Kuciemba. (ER-088-089) It is also probable that the virus was directly transmitted from Mr. Kuciemba to her husband. (ER-088-089) This is a factual issue that would need to be evaluated by expert testimony and is not appropriately resolved on a Motion to Dismiss. Regardless, in both circumstances, Mr. Kuciemba and/or his clothing or personal effects are merely serving as a conduit of the virus and his own injuries are not relevant. In *Kesner*, under the same circumstances, the Supreme Court had no issue drawing a line from the employers' negligence to the *Kesner* plaintiffs' fatal injuries.

It is logical that the reason Workers' Compensation exclusivity was not raised in *Kesner* was because (1) the plaintiffs were not employees of the defendant; (2) the plaintiffs had their own distinct physical injuries; and (3) it was irrelevant whether the actual employees were injured because the employees merely served as a vehicle to transmit the toxic asbestos fibers to the plaintiffs. What mattered was the connection between the *employer defendant's* conduct and the non-employee

plaintiffs' injuries. However, under the District Court's ruling and reasoning the *Kesner* plaintiffs would have been barred by Workers' Compensation exclusivity. The fact that the parties nor the courts in *Kesner* even raised Workers' Compensation exclusivity as an issue indicates this cannot be the law.

Plaintiffs respectfully request that this Court follow the California Supreme Court authority in *Snyder* and *Kesner* which permits Mrs. Kuciemba to make civil claims for her direct injuries.

C. The district court erroneously held that Mrs. Kuciemba's "indirect transmission" claims lacked plausibility.

The district court held that, to the extent Mrs. Kuciemba's negligence claims were based upon "indirect transmission" of COVID-19, the claims were dismissed due to lack of plausibility. (ER-005-006) Plaintiffs respectfully disagree with the district court's ruling.

Mrs. Kuciemba's "indirect transmission" claim is based upon the science of how viruses spread. The First Amended Complaint alleges: "In addition to spreading through direct contact with another person, COVID-19 can also spread from inanimate objects (aka "fomites") such as clothing to humans when humans interact with the contaminated fomite. The CDC refers to this process as "indirect transmission" and the contaminated fomites are referred to as the "vehicles of transmission." (ER-086). The First Amended Complaint further alleges that "Mr.

Kuciemba's body, clothing, and/or personal belongings served as a vehicle for the virus and Mrs. Kuciemba was ultimately infected with the virus. Mrs. Kuciemba repeatedly came into contact with potential vehicles for the virus, including fomites such as Mr. Kuciemba's clothing (i.e. through preparing laundry) and Mr. Kuciemba's personal effects that he took with him to work. Thus, Mrs. Kuciemba was exposed to COVID-19 through direct contact with Mr. Kuciemba and/or indirectly through fomites such as his clothing and personal effects that served as a vehicle for the virus." (ER-088).

At oral argument, the district court rejected these assertions in the First Amended Complaint, stating:

> "But we don't really have the science here about bringing home virus on clothing. And I just don't think that there's anything at the moment, scientifically and, really, factually, that makes this claim plausible. I don't know if you can add any more to that.
>
> You know, typically they may say a person can grab a doorknob, and if somebody who sneezed and wiped their nose and grabbed the doorknob right before, and is infected with COVID leaves virus on the doorknob, and somebody comes up and grabs it and then rubs their nose or their eyes, some mucus membrane, not just, you know, goes off on their way and doesn't do one of those things, then if they rub their nose or their eyes, apparently, it's a means of transmission.
>
> Although, more and more, apparently, the science is that it's less likely to be a cause; that the more common and more likely cause is exhaling these droplets that have, then, the virus in them, either coughing it or breathing really hard and getting it in the air. So I think that it's just not there, at the moment, to plead a plausible claim. I don't know if you have anything else that you could add to that in some way. It's pretty hard to say."

(ER-018)

The problem with the district court's analysis is that it effectively requires Plaintiffs to present expert testimony at this early stage of the pleadings. Plaintiffs' counsel raised this issue at oral argument:

> "Your Honor, what I'll say to that is we all know what the CDC has advised, what the State of California has advised as part of the health orders, as part of their publications, and all of it involves this infecting the hands and keeping the virus from being on the body.
>
> And we've all heard that the virus can be transmitted through surfaces; that, you know, we've had this -- it's been a real concern. And where the science will end up on this, you know, six months from now, a year from now, I think it's a developing science and a developing field of study, this virus.
>
> So I think it will be unfair to ask the plaintiff to prove in their complaint that this is the science and somehow back it up with some expert testimony. I think -- I think, Your Honor, these facts must be accepted as true. And we do have evidence of both the CDC and the State of California and the health orders trying to prevent transmission of COVID through touch through surfaces. And I would just submit to the Court that that's sufficient for a complaint."

(ER-020)

FRCP 8(a)(2) requires that a Plaintiff merely needs to provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Interpreting Rule 8, the Supreme Court held that the complaint must allege "sufficient factual matter, accepted as true to state a claim to relief that

is plausible on its face. A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 663 (internal citations/quotation marks omitted). The district court must first accept the facts alleged as true. Once the district court takes that step, "determining whether a complaint states a plausible claim is context specific, requiring the reviewing court to draw on its experience and common sense." *Id*. at 664.

Here, Plaintiffs' allegations regarding indirect transmission are based upon (1) the Health Order; (2) CDC guidelines; (3) common sense experience regarding the precautions the public should take to avoid spreading the virus; and (4) general scientific principles regarding the spread of viruses. Plaintiffs have alleged how Defendant's failure to follow the Health Order resulted in Mr. Kuciemba contracting COVID-19 who then transmitted the virus to his wife. At the pleadings stage of the case, Plaintiffs should not be required to put up expert testimony to prove that Mrs. Kuciemba was infected via indirect (or direct) transmission. However, this is effectively the standard that the Court imposed in this case.

D. There is no question that defendant owed a duty of care to Mrs. Kuciemba.

The district court held that Defendant owed no duty to Mrs. Kuciemba. Plaintiffs respectfully disagree with the district court's ruling because the most

important factor favoring a duty, foreseeability, is in Plaintiffs' favor, and the other various public policy factors also favor Plaintiffs.

The relevant authority here is *Kesner v. Superior Court* (2016) 1 Cal. 5th 1132, which has strikingly similar facts and equally applicable reasoning. In *Kesner*, the California Supreme Court held that "the duty of employers and premises owners to exercise ordinary care in the use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission. . . . Importantly, we hold that this duty extends only to members of a worker's household. Because the duty is premised on the foreseeability of both the regularity and intensity of contact that occurs in a worker's home, it does not extend beyond this circumscribed category of potential plaintiffs." *Id.* at 1140.

Kesner involved individuals from the same household who were exposed to asbestos from workers who carried the toxic fibers home with them. These family members were subsequently diagnosed with mesothelioma. *Id.* at 1141. This is nearly identical to the fact pattern in our case where Mr. Kuciemba was exposed to the COVID-19 virus, either directly through his person, or indirectly through fomites such as clothing or personal effects, and unknowingly brought it home with him to

his wife. The issue before the California Supreme Court in *Kesner* was whether the employer owed a duty to these nonemployee family members living in the same household. To determine whether a duty existed (or put another way, whether the general duty of care should *not* otherwise extend to household members), the California Supreme Court analyzed certain policy considerations collectively known as the *Rowland* factors (named after the seminal case of *Rowland v. Christiansen* (1968) 69 Cal. 2d 108).

Kesner held that the *Rowland* factors dictated the existence of a duty by the employer to protect against asbestos fibers that a worker may bring back to their household and that could be breathed in by the family members. Here, we have a very similar facts where Mr. Kuciemba brought a virus from work into his household and that virus (directly through his body or indirectly through his clothing) infected and caused harm to his wife Mrs. Kuciemba. (ER-088-089). We summarize key portions of *Kesner's* application of the *Rowland* factors and how they apply to Plaintiffs' case.

1. ***Kesner's* analysis of the "foreseeability of injury factors" favors the establishment of a legal duty in this case.**

The first three *Rowland* factors "foreseeability, certainty, and the connection between the plaintiff and the defendant—address the foreseeability of the relevant injury." *Kesner*, 1 Cal. 5th at 1145. These factors favored the *Kesner* plaintiffs and also favor the Kuciembas. At oral argument, the Court noted that the foreseeability

factors favored Plaintiffs but believed foreseeability was outweighed by other public policy issues (ER-137).

Foreseeability: Foreseeability is the "most important factor to consider in determining whether to create an exception to the general duty to exercise ordinary care". *Id.* at 1145. The California Supreme Court found that "it was foreseeable that people who work with or around asbestos may carry asbestos fibers home with them and expose members of their household." *Id.* at 1145. Relevant to the Court's analysis was the existence of OSHA regulations that required employers to take precautions to prevent the spread of asbestos fibers. *Id.* at 1146.

In this case there is and was general public knowledge that COVID-19 is highly contagious and easily transmitted between persons. Similar to *Kesner*, there were also specific regulations and guidance, including the Health Order and CDC Guidelines, that informed, guided, and instructed employers about how to prevent the spread of the virus. The Health Order describes the virus as "easily transmitted, especially in group settings, and the disease can be extremely serious." (ER-052) The Health Order explains that the virus can spread through "asymptomatic transmission". (ER-057) The Health Order was "designed to keep the overall volume of person-to-person contact very low to prevent a surge in COVID-19 cases in the County and neighboring counties." (ER-053) Therefore, at the time that Defendants transferred the infected/exposed crew from the Mountain View site to the San

Francisco site without quarantine, Defendant knew that COVID-19 can be transmitted from an infected worker to members of the worker's household.[2]

Connection between the Plaintiff and the Defendant: This factor is closely related to foreseeability. The defense in *Kesner* argued that the connection between the defendants' conduct and the plaintiff's was indirect and attenuated because they required the intervening act of an employee to transmit the asbestos to his household. *Id.* at 1148. The California Supreme Court disagreed and explained that "[i]t is well established ... that one's general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct." *Id.* at 1148. The employee was part of the same causal chain and the California Supreme Court found that "[a]n employee's role as a vector in bringing asbestos fibers into his or her home is derived from the employer's or property owner's failure to control or limit exposure in the workplace." *Id.* at 1148. The California Supreme Court explained that "[a]n employee's return home at the end of the workday is not an

[2] Defendant is expected to argue that no duty exists because COVID-19 is a respiratory disease like influenza but employers are not liable when an employee's spouse contracts the flu. Putting aside that a number of people in government, media, and the general public dismissed the virus as "just like the flu" to their peril, the COVID-19 pandemic has resulted in an extensive number of binding government regulations, including the Health Order. There are no similar binding Health Orders that exist for the flu. Furthermore, the COVID-19 pandemic has completely upended our modern society's way of life in a way not seen for generations. This is no mere seasonal virus. Mrs. Kuciemba's injuries illustrate that it is a serious threat that cannot be taken lightly. Given how infectious and pernicious the virus is, it is foreseeable that Defendant's failure to follow the binding Health Order could result in a worker's spouse becoming infected with COVID-19.

unusual occurrence, but rather a baseline assumption that can be made about employees' behavior. The risk of take-home exposure to asbestos is likely enough in the setting of modern life that a reasonably thoughtful [employer or property owner] would take account of it in guiding practical conduct in the workplace." *Id.* at 1149.

Just like in *Kesner*, Plaintiffs allege that Defendant's failure to exercise due care and follow appropriate safety regulations designed to prevent the spread of COVID-19 lead to the infection of Mr. Kuciemba and/or his clothing or personal effects, and subsequently his wife, Mrs. Kuciemba. (ER-088-090). Thus, the events are all causally related and a direct line can be drawn from Defendant's conduct to Mrs. Kuciemba's injuries. On this factor, Defendant claims that *Kesner* is distinguishable because it was not the contact with the worker that allegedly caused the mesothelioma, rather the household's contact with asbestos fibers, a hazardous product that the employer used in its manufacturing process and was required to restrict the job site. This is a distinction without a difference that ignores the broader holding of the Court. The Supreme Court expressly recognized in its holding that "[w]here it is reasonably foreseeable that **workers**, their clothing, or personal effects **will act as vectors** carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission" *Kesner*, 1 Cal. 5th at 1140 (emphasis added). The Supreme Court was not so much concerned about the method of transmission of asbestos fibers, the issue was whether

a worker's subsequent transmission to household members was foreseeable based upon the Defendant's failure to control the movement of asbestos fibers. The fact that Mr. Kuciemba would come home to Ms. Kuciemba "at the end of the workday is not an unusual occurrence, but rather a baseline assumption that can be made about employees' behavior". *Id.* at 1149. Here, Defendant's failure to follow binding Health Orders, including but not limited to commingling workers it knew or should have known were exposed to the virus, with workers at Mr. Kuciemba's job site, was the cause of Mrs. Kuciemba's infection. (ER-088-090). Whether Mrs. Kuciemba contracted the virus from Mr. Kuciemba's hands or clothing, or the virus was in water droplets exhaled by Mr. Kuciemba is irrelevant to the duty analysis.

Defendant is expected to argue that with COVID-19, everything a worker does during the two-thirds of the day spent off-site, and what other household members do twenty-four hours a day, is likely, if not more likely, to be a source of infection. But this is really an argument about causation and the Defense is prohibited from making this argument at this stage of the litigation because the Court must take Plaintiff's allegations as true for purposes of this motion and not consider arguments about causation. The question of whether a legal duty exists as a matter of law, assuming that Plaintiffs' allegations are accepted as true is properly before the Court. Under the *Kesner* analysis Defendant did in fact have a legal duty to Mrs. Kuciemba.

2. ***Kesner's*** **analysis of the "public policy concerns" factors favors the establishment of a legal duty in this case.**

The remaining four *Rowland* factors "moral blame, preventing future harm, burden, and availability of insurance—take into account public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief." *Id.* at 1145. These factors favored the *Kesner* plaintiffs and also favor the Kuciembas.

Moral Blame: The existence of a duty is stronger when "plaintiffs are particularly powerless or unsophisticated compared to the defendants are where the defendant's exercise greater control over the risk that issue." *Id.* at 1151. Thus, the California Supreme Court found that commercial uses of asbestos received a financial benefit from asbestos but also "had greater information and control over the hazard than employees' households", meaning that "[n]egligence in their use of asbestos is morally blameworthy, and this factor weighs in favor of finding a duty." *Id.* at 1151. The same is true here. Employers, especially construction employers like Defendant, bring together many individuals from different households and therefore must take reasonable steps to keep their employees safe from a highly transmissible virus, including following the binding Health Orders specifically enacted to prevent the spread of that virus. Employers have superior knowledge of potential infections among their workforce as a whole and more resources to address potential infections than individual households, and therefore can and must take affirmative steps to ensure that potentially or actually infected workers stay away from work, and that

workers who do appear for work have their temperature checked, wear masks, maintain social distancing, wash their hands, etc. This is not to say that individuals have no responsibility to follow best practices, but that the employer, who receives a financial benefit from bringing their workers together and who can best control the spread of the virus at work, is more morally blameworthy for purposes of the duty analysis. This same reasoning remains true even though the virus is not a product manufactured by the Defendant; the Defendant is the party with superior knowledge and resources, and who has been ordered directed by the State of California to take specific, concrete steps to prevent the spread of COVID-19.

Preventing Future Harm: In *Kesner*, the Defense argued that it did not owe a duty because the future risk of harm from asbestos exposure was low due to current regulations that curtailed the use of asbestos. *Id.* at 1150-1151. However, the California Supreme Court explained that the existence of regulations meant that "legislatures and agencies readily adopted the premise that imposing liability would prevent future harm" and that there was a "strong public policy limiting or forbidding the use of asbestos." *Id.* at 1150-1151. The same reasoning is true here. The existence of the Health Order, and other regulations and guidance, is designed to prevent future infections and given the potential health risks, there is a strong public policy designed to curtail the spread of the virus, especially since the pandemic is severe and ongoing.

At oral argument, the district court stated that "There's only so much you can do in containing illness. . . . If you don't take every possible step that you could possibly take – that's redundant but every possible step to contain COVID at the workplace, that's not a guarantee that you can really prevent the spread of it. It's kind of everywhere." (ER-026-27). But the point is not that an employer take *all* possible steps, only that the employer take *reasonable* steps, or at least the *legally mandated* steps, as outlined in the Health Order, to prevent harm.

Availability of Insurance/Burden on Defendant: The California Supreme Court analyzed both of these factors together. Defendants in *Kesner* argued that allowing "tort liability for take-home asbestos exposure would dramatically increase the volume of asbestos litigation, undermine its integrity, and create enormous costs for the courts and community." *Id.* at 1152. The California Supreme Court disagreed noting that "[i]n general, preventing injuries to workers' household members due to asbestos exposure does not impose a greater burden than preventing exposure and injury to the workers themselves. Defendants do not claim that precautions to prevent transmission via employees to off-site individuals—such as changing rooms, showers, separate lockers, and on-site laundry—would unreasonably interfere with business operations." *Id.* at 1153. Furthermore, the court rejected the defense contention that finding a duty in these cases would open the door to an "enormous pool of potential plaintiffs" that creates an "unlimited duty [that] imposes

great costs and uncertainty, and invites voluminous and frequently meritless claims that will overwhelm the courts." *Id.* at 1153. The California Supreme Court stated that "[a]lthough defendants raise legitimate concerns regarding the unmanageability of claims premised upon incidental exposure, as in a restaurant or city bus, these concerns are not clearly justify a categorical rule against liability for foreseeable take-home exposure." *Id.* at 1154. Thus, the Court adopted a logical and bright-line rule that limited take-home exposure liability to members of a worker's household which the Court defined as "persons who live with the worker and are thus foreseeably enclose and sustain contact with the worker over a significant period of time." *Id.* at 1154-1155. Defendant is expected to make similar arguments as the employer in *Kesner*. Defendant claims that imposing a duty on Defendant would result in tremendous financial burdens by creating an enormous pool of plaintiffs such as the wife who claims her husband caught COVID-19 from the barista, the husband who claims his wife caught it from the dental hygienist, or the roommate who claims a co-tenant while on jury duty caught it from the court bailiff. But all of these potential plaintiffs involve *third party customers/visitors* which was not the focus of *Kesner* nor the proposal put forth by Plaintiffs, which is to limit claims to the members of employee households.

The district court was also concerned about a potential expansion of liability:

> "And then if you start expanding so that if they slip up with the employee that everybody in the employee's household -- this can be five

> children, the wife, a nephew that's living there during college, who knows, and all of a sudden you have a major expansion of their liability, all based on something that originally they were not required to cover. And I think, as a policy in this situation, that starts to run somewhat farther afield."
>
> (ER-027)

Like in *Kesner*, such concerns in this case do not call for a categorical rule that *no duty is owed*, rather the same commonsense limitation that an employer's duty extends but is limited to members of a worker's household. As the California Supreme Court explained, such a rule keeps the "potential plaintiffs to an identifiable category of persons who, as a class, are most likely to have suffered a legitimate, compensable harm. . . . This rule strikes a workable balance between ensuring that reasonably foreseeable injuries are compensated and protecting courts and defendants from the costs associated with litigation of disproportionately meritless claims." *Id.* at 1155.

Defendant is also expected to argue that *Kesner* should be limited to its facts. While the *Kesner* case was about asbestos, the California Supreme Court did not expressly state in the opinion that its reasoning can never be extended beyond asbestos cases, nor has it subsequently limited *Kesner* only to asbestos cases. As discussed at length above, the principles discussed in *Kesner* equally apply to cases involving COVID-19. *Kesner* is highly persuasive authority.

In summary, the California Supreme Court in *Kesner*, conducted a thorough policy-based analysis and ultimately determined that the factors weighed in favor of extending the employer's duty to members of employee's household.

The same policy considerations apply here and Defendant owes a duty to Mrs. Kuciemba.[3]

E. Alternatively, this Court should certify the workers' compensation and duty issues under California law to the California supreme court.

This Court should follow the clear precedents set by the California Supreme Court as discussed above. However, to the extent this Court believes these legal issues require further clarification and will have a determinative effect on the appeal, the Court may, in the alternative, certify the issue to the California Supreme Court. *Kilby v. CVS Pharmacy, Inc.* (9th Cir. 2013) 739 F.3d 1192, 1195.

Since *Erie R.R. v. Tompkins* (1938) 304 U.S. 64, federal courts have been required to apply state law as expounded by state courts in the disposition of cases or controversies pending before them. To the extent that state law is unclear or undeveloped, a federal court confronted with ascertaining and applying state law on

[3] As a final note, the California Legislature has had over a year to pass COVID-19 liability limitations. Unlike other jurisdictions, it has not done so. In fact, the Legislature enacted *Labor Code* § 77.8 which created a broad workers' compensation presumption for certain essential workers wherein a COVID-19 infection is deemed to have arisen in the course and scope of the workers' employment. *Compare Tenn. Code Annotated* 29-34-801 (generally no liability for COVID-19 claims against business entities except proof of clear and convincing evidence of gross negligence or willful misconduct); *NRS* 439.366 (similar liability restrictions); *Idaho Code* 6-3401 (same); *Ch. 64 Acts of 2020* (Mass.) (civil immunity for healthcare providers and facilities absent gross negligence or other reckless or willful misconduct).

unclear or undeveloped state law issues risks issuing a decision that later proves to be out of harmony with state decisions.

To prevent such avoidable errors, California created a mechanism via Rule 8.548(a) of the California Rules of Court, which provides that the California Supreme Court may decide a question of law posed by this Court if the decision could be outcome determinative or there is no controlling precedent. Here, certification may be appropriate because "a definitive decision from the California Supreme Court would avert the potential uncertainty of federal courts and state courts adopting different interpretations ... and would provide businesses in California with clear guidance on how to comply [California law]." *See Kilby*, 739 F.3d at 1196.

For example, as discussed in depth above, the district court expressed a belief that there was ambiguity in *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal 4th 991 regarding the extent of the derivative injury doctrine. (ER-015) The California Supreme Court's interpretation of *Snyder* would likely resolve any potential ambiguities identified by the district court. Futheremore, the district court was also attempting to determine whether a duty of care exists based on state law principles. Given that this issue potentially affects every potential COIVD-19 negligence case that may be filed in the future, it is appropriate that the California Supreme Court weigh in to decide these critical issues for this case and all future litigants.

VIII. CONCLUSION

Mrs. Kuciemba has clearly stated viable claims against Defendant and should be allowed to pursue her claims before jurors. Plaintiffs respectfully request that this Court REVERSE the decision of the district court, or alternatively, certify Issues 1 and 3 to the California Supreme Court.

Respectfully Submitted,

Dated: September 13, 2021

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/s/ Martin Zurada

By: Martin Zurada
Attorneys for Plaintiffs-Appellants
CORBY KUCIEMBA and
ROBERT KUCIEMBA

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C)

I hereby certify that Plaintiffs-Appellants' Opening Brief has been prepared using proportionally double-spaced 14-point Times New Roman typeface.

According to the Microsoft Office 365/Microsoft Word processing software, this brief contains 11,412 words.

Dated: September 13, 2021

VENARDI ZURADA LLP

/s/ Martin Zurada

By: Martin Zurada
Attorneys for Plaintiffs-Appellants
CORBY KUCIEMBA and
ROBERT KUCIEMBA

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 13, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 13, 2021

VENARDI ZURADA LLP

/s/ Martin Zurada

By: Martin Zurada
Attorneys for Plaintiffs-Appellants
CORBY KUCIEMBA and
ROBERT KUCIEMBA

STATEMENT OF RELATED CASES

(Circuit Rule 28-2.6)

Plaintiffs-Appellants' counsel is not aware of any related cases pending before this Court.

Dated: September 13, 2021

VENARDI ZURADA LLP

/s/ Martin Zurada

By: Martin Zurada
Attorneys for Plaintiffs-Appellants
CORBY KUCIEMBA and
ROBERT KUCIEMBA

No. 21-15963

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CORBY KUCIEMBA, ET AL.
Plaintiffs-Appellants,

vs.

VICTORY WOODWORKS, INC.
Defendant-Appellee

Appeal from the United States District Court
for the Northern District of California
No. 3:20-cv-09355-MMC
The Honorable Maxine M. Chesney

PLAINTIFFS-APPELLANTS' EXCERPTS OF RECORD

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PLAINTIFFS-APPELLANTS' EXCERPTS OF THE RECORD

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Dated: September 13, 2021

VENARDI ZURADA LLP

/s/ Martin Zurada

By: Martin Zurada
Attorneys for Plaintiffs-Appellants
CORBY KUCIEMBA and
ROBERT KUCIEMBA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CORBY KUCIEMBA, et al.,

Plaintiffs.

v.

VICTORY WOODWORKS, INC.,

Defendant.

Case No. 20-cv-09355-MMC

JUDGMENT IN A CIVIL CASE

Re: Dkt. No. 34

( ) Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint is GRANTED without further leave to amend and the instant action is hereby DISMISSED.

IT IS SO ORDERED AND ADJUDGED

Dated: 5/10/2021

Susan Y. Soong, Clerk

Tracy Geiger

Tracy Geiger
Deputy Clerk

United States District Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CORBY KUCIEMBA, et al.,

Plaintiffs,

v.

VICTORY WOODWORKS, INC.,

Defendant.

Case No. 20-cv-09355-MMC

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; DISMISSING FIRST AMENDED COMPLAINT WITHOUT FURTHER LEAVE TO AMEND

Before the Court is defendant Victory Woodworks, Inc.'s Motion, filed April 1, 2021, to Dismiss Plaintiffs' First Amended Complaint ["FAC"] for Failure to State a Claim. Plaintiffs Corby Kuciemba and Robert Kuciemba have filed opposition, to which defendant has replied. The matter came on regularly for hearing on May 7, 2021. Martin Zurada of Venardi Zurada LLP appeared on behalf of plaintiffs; William Bogdan of Hinshaw & Culbertson LLP appeared on behalf of defendant.

Having read and considered the parties' respective written submissions as well as the arguments of counsel at the above-referenced hearing, the Court, for the reasons stated in detail on the record at said hearing, as well as the hearing conducted February 12, 2021, rules as follows:

1. To the extent plaintiffs' claims are based on allegations that Corby Kuciemba contracted COVID-19 "through direct contact with" Robert Kuciemba (see FAC ¶ 22), such claims are barred by the exclusive remedy provisions of California's workers' compensation statutes and, thus, are subject to dismissal. See Cal. Labor Code §§ 3600, 3602.

2. To the extent plaintiffs' claims are based on allegations that Corby

Kuciemba contracted COVID-19 "indirectly through fomites such as [Robert Kuciemba's] clothing" (see FAC ¶ 22), such claims are subject to dismissal for failure to plead a plausible claim.

3. To the extent the above-described claims are neither barred by statute nor deemed insufficiently pleaded, such claims are subject to dismissal for the reason that defendant's duty to provide a safe workplace to its employees does not extend to nonemployees who, like Corby Kuciemba, contract a viral infection away from those premises.

Accordingly, the Motion to Dismiss is hereby GRANTED, and the instant action is hereby DISMISSED.

IT IS SO ORDERED.

Dated: May 10, 2021

MAXINE M. CHESNEY
United States District Judge

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MAXINE M. CHESNEY, JUDGE

CORBY KUCIEMBA, an individual; ROBERT KUCIEMBA, an individual, Plaintiffs, VS. VICTORY WOODWORKS, INC., a Nevada corporation; DOES 1-20, inclusive, Defendants.	)	**No. 20-cv-9355-MMC** San Francisco, California Friday, May 7, 2021

TRANSCRIPT OF PROCEEDINGS VIA ZOOM WEBINAR

APPEARANCES: (via Zoom Webinar)

For Plaintiffs:

VENARDI ZURADA LLP
25 Orinda Way, Suite 250
Orinda, California 94563
BY: MARTIN ZURADA, ESQ.

For Defendant Victory Woodworks, Inc.:

HINSHAW & CULBERTSON LLP
One California Street, 18th Floor
San Francisco, California 94111
BY: WILLIAM BOGDAN, ESQ.

Reported By: Katherine Powell Sullivan, CSR #5812, CRR, RMR
Official Reporter - U.S. District Court

Friday - May 7, 2021 **9:00 a.m.**

P R O C E E D I N G S

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THE CLERK: Calling Civil case number 20-935, Corby Kuciemba versus Victory Woodworks.

Will counsel please state your appearances for the record, starting with plaintiffs' counsel.

MR. ZURADA: Yes. Good morning, Your Honor. Martin Zurada for the plaintiffs Kuciemba.

THE COURT: Good morning. Thank you.

MR. BOGDAN: Good morning, Your Honor. For Victory Woodworks, this is Bill Bogdan, at Hinshaw & Culbertson.

THE COURT: Good morning.

All right. We're proceeding by Zoom again given that we are still operating at least, hopefully, in the tail end of the pandemic, but still in the pandemic.

So I have your papers, Counsel, which I've read; various cases I've also read and gone over again to the extent we discussed them last time.

As you know, there was a rather lengthy transcript from our prior hearing. At that hearing I asked plaintiffs' counsel whether there was anything they thought they could add to the record or the complaint itself that would perhaps change the landscape as far as the Court was reading the law, which I know plaintiff disagrees with that interpretation. I'm happy to

discuss that further a bit today.

But what happened is that then plaintiff added language in an effort to make this case more analogous to the case involving the asbestos fibers being brought home by stating that Mr. Kuciemba somehow, either on his clothes or his body, or somehow he carried home these virus particles, or whatever they are, and she must have touched something somewhere, somehow, and that infected her.

Is she even trying to allege, at this point, that she, sort of in lay terms, caught it from him?

MR. ZURADA: Yes, Your Honor. Yes. Certainly --

THE COURT: All right. She's still alleging that?

MR. ZURADA: Yes, Your Honor. We're not changing the causation, meaning she caught it from her husband. And that's what I'd like to address with Your Honor, the difference between the factual causation of the injury and the legal aspect of the injury, because I think the focus of the Court is on the causation rather than the legal claim that she's making.

THE COURT: Okay. Well, before we get to that --

MR. ZURADA: Yes.

THE COURT: -- the answer, I guess, to my first question, or my only question to you at the moment, was yes. Though, I just want to make sure that colds, flu, viruses such as COVID-19, can be passed from person to person by that person essentially breathing, if you will, on the other person, and

infecting them. We talked about that last time.

That was the only theory that Ms. Kuciemba was bringing with respect to her claim. And in a typical, as I say, somebody says, hey, I was with so-and-so, they had a cold, I caught it from them, I'm home with the sniffles, or I'm home in the flu, or in this instance she says I'm home or she went to the hospital because of COVID.

That is the traditional way that viruses are transmitted. There are other types of illnesses that are not transmitted that way, from, we'll say, person to person.

There's a case out there that I took a look at, in which somebody was saying they caught, in effect, typhus from someone. You can't catch typhus. Typhus is transmitted an entirely different way, through, essentially, lice or other ugly things that get infected themselves and then bite people who aren't infected. And you can't, quote-unquote, catch it from someone.

And so we have something you can catch. And she's still saying, then, the more typical way you would expect that somebody would get it from somebody in close contact is the typical catching it.

She is now adding -- in an effort to equate this case with *Kesner*, she's added language that somehow it came home on his clothes or somehow he's kind of carried it home externally in some way. You use the word "fomites." I had never looked at

that before. I did look it up in the dictionary. You are, of course, using it correctly. It's just an intangible vehicle for carrying something. Or tangible vehicle, rather.

So, all right. Putting that aside, then, that's the allegation. And I'll take that up with you because I'm not sure that you've really pled enough, in this instance, to make that kind of a claim.

I don't know how long we want to prolong various rulings in the sense of adding, you know, new allegations or not, but we can talk about that.

In my view -- and I've thought about this quite a bit -- I don't really think that my analysis, at the moment, of the law with respect to just him infecting her in the traditional way has changed; the catching it.

There is a very good argument you can make, Mr. Zurada, that the workers' compensation exclusivity, in being applied beyond the worker himself or herself, can only bar a claim if it is the type of claim that, as a matter of law, can only exist, ever, when the worker themselves is injured. And that is loss of consortium, wrongful death, and bystander emotional distress.

So there are three distinct causes of action. And there is no question, if she were bringing that kind of a claim, that many courts have recognized that kind of a claim is barred by workers' compensation.

I also want to add that, contrary to what you may be arguing, I have found and, in fact, you acknowledged this last time, even though you may be backing off of it now, that if somebody is asymptomatic but is still testing positive for the presence of COVID-19, that they are infected. And although they may not be able to -- you're saying no, but I find they are, and that's my finding, that they are infected and, therefore, they are injured.

And the fact that they cannot recover for it does not mean that workers' compensation doesn't bar, let's say, a derivative claim such as loss of consortium in some way; although, you wouldn't ordinarily have loss of consortium if somebody is asymptomatic. And there are cases, and if I have to I'll go find one, that even if the particular injury is not compensable, if it is an injury, then the claim is barred. And so getting back to that.

The problem that we face -- and, again, I read your papers, and I'm happy to hear from you further, but just to explain, each of you is taking a position with respect to the workers' compensation exclusivity. We're not talking about the *Kesner*-type situation. It wasn't even a worker's comp exclusivity argument made there, but, rather, this direct infection from catching a virus.

California, and the Supreme Court in particular, simply has not either wanted to or at least expressly wanted -- wanted

to expressly say, let me put it that way, that there's a bright line and they're going to cut off exclusivity at the three easily identifiable types of claims that they have recognized with no problem. I'll just say them once more, and then I'm going to just call them the "three claims." All right. Loss of consortium; wrongful death; and I'll just characterize it as bystander emotional distress.

Interesting, the cases that they cited in *Snyder*, which is the case that might be closest to you but then there's a distinction there, too, but in the *Snyder* case the fetus that was damaged by fumes at the workplace, that case -- they discuss all kinds of cases out of state, other circuits, and all of those cases are fetus cases. And in all those cases they had a chance, themselves, to say "We're cutting it off with those three types of cases that can only exist legally if there's an injured other person"; to wit, once more, workers' compensation, wrongful death, and bystander emotional distress.

And they essentially stuck to their very facts about talking about fetuses. And *Snyder* and all those cases decided, contrary to *Bell*, that was an earlier California case out of the Court of Appeal, that a baby in utero, a fetus, is its own little person. A very small person but, nonetheless, a person that happens to be there, coincidentally, with a bigger person, its mother, and both of them could be exposed at the same time. One of them might have gotten injured by it, one of them being

more fragile. One might not be; one might be. And it didn't matter whether the mother got injured by carbon monoxide or not, it did a real number on the baby. And another one, like if the mother fell down, maybe she got a bump and the baby had major brain damage.

The idea there is that all of them looked at it and they were saying the child's injury is not because the mother got hurt. Maybe the mother didn't get hurt at all but, rather, the child was there on the premises at the workplace, with the mother, a tiny visitor who coincidentally was there and got a major injury.

All right. And none of them just said we're going to drop it right here and drop a big curtain. And they kind of hinted away that they might do it, but they haven't done it.

Snyder definitely didn't do it, in criticizing *Bell*. *Bell* was a case that said the baby's part of mom and not a separate person. They said, no, no, separate person. We're going to go with all these other cases. Baby separate. And then they went on to make, as I mentioned last time, a considerable effort to show how in *Bell* the baby wasn't hurt because of the mother but because of the situation that applied to both the mother and the baby, a delay in getting care.

And so, again, they had that chance; they didn't do it. Then they went on in their own case to explain about the biology. They looked like they were going to stray and maybe

then make a more definite ruling that might bar claims like we have. Our claim not being, as a matter of law, always, always dependent on someone getting hurt, obviously, but a claim that in this instance is factually dependent on the husband being infected, which I find is an injury. And I'm not going to change that. So right or wrong, that part I'm finding.

And I looked at all the different ways that *Snyder* -- this is the California Supreme Court case -- characterized claims that they would find barred by workers' compensation. And they use the words "derivative," "derivative in the purest sense." Then they looked like maybe they were going one way, and then they're backing off "necessarily dependent." That's another phrase they use. Then they go to "legally dependent." Then they go on to say "dependent conceptually." Then at another point they say -- and these are all quotes -- "legal or logical basis." So it's, quote-unquote, legal or logical; quote-unquote, dependent conceptually; quote, derivative; quote-unquote, necessarily dependent; quote-unquote, legally dependent.

As I say, they've used all these terms so that when you start looking conceptually and logically it seems to me that they've left this window open where they aren't sure what they want to do. And they're not prepared until they see a case that really makes the point, which ours does, how they're going to go on it.

And at least as it stands now, we have *Salin*.

Or Salin. I'm not sure how you pronounce it. You want to take a stab at that, Mr. Bogdan? How are you pronouncing it?

MR. BOGDAN: I will go with Salin.

THE COURT: What about you, Mr. Zurada? Salin or Salin?

MR. ZURADA: Your Honor, I'm a bad person to ask about pronunciation. I'm from Eastern Europe, and I get pronunciation wrong all the time. Having been here 35 years, I still get it wrong.

THE COURT: Okay. Well, it's anybody's guess. And so far you haven't gotten anything wrong in any of our hearings, so you're an equal commentator. I'll say Salin. In other words, a long A in it.

And that case is so bizarre on its facts and so unusual that courts aren't totally comfortable with it. But they haven't thrown out the idea, again, that *Salin* espoused and held, which is that workers' compensation can bar claims that are factually dependent but not legally dependent on an injured worker.

So there we are. I think it's a problem. Everybody across the country has had a chance to make this patently clear, and nobody has as far as I know. So maybe they're looking for a case that makes the point clearer than fetuses and people who kill their children and then try and sue as

someone who's lost their care, comfort, and society.

In any event, all right. So that's where I -- I'm coming out on the workers' compensation idea, much as I did before. And I haven't changed anything I said in the earlier hearing, and I'm still relying on all of that. It's just that I wanted you to know that I looked at it again because I think it's -- it presents an issue and a problem worth looking at in great detail.

I do think that the asbestos case is different in the sense that that's a case where there was a bringing home asbestos fibers on clothing.

Now, in an effort to make this case like that case I, think there's some problems, Mr. Zurada. I mean, it's a given through science and long established medical and legal writings that asbestos fibers can be brought home on clothing. I don't know if they can be brought home on things they can't stick into. I don't know if you can bring them home on a piece of plywood or something.

But the problem with what those fibers do and why they make people sick, other than mesothelioma -- that's a whole other idea -- but for asbestosis, the most common form of asbestos injury, the fibers get in your lungs, the body is unable to break them down, takes a look and says foreign object, wall it off, makes a bunch of scar tissue, and pretty soon your lungs don't work. So the stuff sticks into things.

And it can stick into things besides squishy -- it can stick into clothing and get on things.

But we don't really have the science here about bringing home virus on clothing. And I just don't think that there's anything at the moment, scientifically and, really, factually, that makes this claim plausible. I don't know if you can add any more to that.

You know, typically they may say a person can grab a doorknob, and if somebody who sneezed and wiped their nose and grabbed the doorknob right before, and is infected with COVID leaves virus on the doorknob, and somebody comes up and grabs it and then rubs their nose or their eyes, some mucus membrane, not just, you know, goes off on their way and doesn't do one of those things, then if they rub their nose or their eyes, apparently, it's a means of transmission. Although, more and more, apparently, the science is that it's less likely to be a cause; that the more common and more likely cause is exhaling these droplets that have, then, the virus in them, either coughing it or breathing really hard and getting it in the air.

So I think that it's just not there, at the moment, to plead a plausible claim. I don't know if you have anything else that you could add to that in some way. It's pretty hard to say.

And even, you know, Mr. Bogdan said last time, although this isn't something I can consider on -- as a fact on a motion

to dismiss, that his knowledge at the last hearing was that none of the people who came from the work site where someone had COVID, that none of the people, not the person who went home with COVID but the other people who were then transferred to Mr. Kuciemba's work site, he had said none of those people ever were diagnosed as having COVID.

And I don't whether any of them ever got tested and were tested positive for it. But at least as of the last calling there was not anything to show any of those people ended up, as a factual matter, being carriers of COVID or where they worked in connection with whoever had it.

Mr. Kuciemba said he worked close to people who had been at the other work site, but he didn't say whether those people had worked close at their work site to the person who had COVID.

So who knows? At least at the moment we don't have anything that's pleading a strong case, shall we say. More of a, you know, a weaker case; but, nonetheless, one that could be barred by workers' comp.

So, okay. And then, as I say, I think the carrier idea, which I think Mr. Bogdan rather catchily described as "infection by fabric" is really not pled up enough.

Do you have anything more on the fabric idea, the *Kesner* idea?

MR. ZURADA: Your Honor, I would just like to point

out that what Your Honor's really talking about is expert witness testimony, which is not the standard that we're dealing with right now.

THE COURT: Well, we are to a certain extent. I mean, it was assumed in *Kesner* what that expert testimony was. There's no such assumption here, as far as I can tell.

But I'm sorry to interrupt you. Go ahead.

MR. ZURADA: Your Honor, what I'll say to that is we all know what the CDC has advised, what the State of California has advised as part of the health orders, as part of their publications, and all of it involves this infecting the hands and keeping the virus from being on the body.

And we've all heard that the virus can be transmitted through surfaces; that, you know, we've had this -- it's been a real concern. And where the science will end up on this, you know, six months from now, a year from now, I think it's a developing science and a developing field of study, this virus.

So I think it will be unfair to ask the plaintiff to prove in their complaint that this is the science and somehow back it up with some expert testimony. I think -- I think, Your Honor, these facts must be accepted as true. And we do have evidence of both the CDC and the State of California and the health orders trying to prevent transmission of COVID through touch through surfaces. And I would just submit to the Court that that's sufficient for a complaint.

THE COURT: Okay. Mr. Bogdan, do you want to say anything in that regard?

MR. BOGDAN: Yes, Your Honor. I don't know if you remember, recently there was a controversy involving Cheerios and glyphosate, which is g-l-y-p-h-o-s-a-t-e. It's a herbicide.

THE COURT: Uh-huh.

MR. BOGDAN: They found trace elements on the cereal.

THE COURT: Yes.

MR. BOGDAN: So to follow plaintiffs' logic, in response to a complaint alleging "I got cancer from Cheerios," there's no requirement that a doctor say it's Cheerios related; there's no pleading standard that requires them to prove that it was nonCheerio related. Their answer is, I know it was Cheerios; therefore, I get to plead it. And that's not the standard. It's not an issue of causation of proof; it's an issue of fundamental plausibility under *Iqbal*.

THE COURT: Let me ask you about glyphosate for a moment. What ever happened to that? Because I stopped eating Cheerios after that came out.

MR. BOGDAN: There was a -- I'll call it a difference of opinion in the scientific community. Ultimately, the EPA did not go with what other scientific groups were saying in regards to the amount in the cereal that would cause the problem.

THE COURT: Yeah. I wasn't thinking, necessarily, I'd get cancer. I just thought I don't want to eat anything with bug repellent on it. So that kind of took care of that or whatever it was. You know, so, sorry to General Mills or whoever makes that stuff.

Anyway, getting back to what I think is the situation there -- and I understand that Mr. Zurada is saying that you can't expect the plaintiff to put on their full case in a complaint. There's no question about that. But they do have to plead a plausible claim. That's *Twombly*, all right.

Returning to *Iqbal* and *Twombly* for a moment, *Iqbal* was someone who didn't plead enough. *Twombly* was someone who pled their case, and the Court looked at it and said it's not enough. They essentially pled themselves out of a claim.

And in our case, I think -- and in *Twombly* the Court just said, look, there are all kinds of different inferences you can draw from your evidence, and your evidence just doesn't point strongly enough to the one you want to point to.

In our case -- so they said it's not plausible.

And here, I think we just don't have a plausible claim. Yes, there is all kinds of direction and instruction, and it's been incorporated in various ways, into rules and what have you, about washing your hands. That's to protect yourself so that when you rub your eyes and nose there isn't a virus on it, and not transmitting it, yourself, to surfaces nearby.

But there's just nothing that supports a finding that somebody is taking it home on their clothes and hours later somebody is touching. I mean, it's just not -- it's just not there. I don't think you can just say something and then say, you know, maybe we can prove this up later if everything catches up on the science.

So there was a whole body of scientific and legal evidence and discussion before ***Kesner***, which they made very clear. And, of course, then we get to another subject. And that's the subject of duty.

Now, Mr. Bogdan was hoping that I would make a finding on duty in my last order because I did comment about it. And I think maybe it is worth making a finding in this instance.

I had mentioned last time the ***Cabral*** case, in which the Court looked at a couple of different ways that one might phrase duty. One can either start with a very broad duty and then decide whether you're going to chip out a chunk from that as a category or you can just start with the category and look at it at that point.

And, in this instance, I had commented about how you could look at it. Give me a second. I might be able to find that in what we were discussing.

In other words, one way we could phrase it here is, does the duty to provide a safe workplace to employees, which obviously exists, and which I would find includes a duty not to

knowingly or negligently expose them to highly contagious illness, does that extend to other people with whom that employee has contact? And then if you wanted to limit it, does it extend to those people with whom that employee shares a household?

And it seems to me that this is a very different case than ***Kesner***. They looked very closely at all the pros and cons of extending a duty, in that particular situation with asbestos, and found, you know, foreseeability alone isn't enough.

So that just because someone who, let's say, is sick with COVID goes home and is in close contact with someone, even though there's a foreseen opportunity to convey that illness at that time to that person with whom you share close contact, that that would not necessarily be enough. You have to keep going.

Or, in this instance -- in that instance, in ***Kesner***, was the foreseeability of somebody being exposed to fibers and then themselves having an asbestos-related illness. Here we have something -- it's a little different.

It's interesting that, of course, in ***Kesner*** it takes, usually, quite a bit of long-term exposure to get asbestosis. That's the science. It isn't like you walk by something where somebody's grinding up asbestos and then the next day you come down with asbestosis. It's a question of volume and how much of this stuff gets into your lungs and then over a period of

time, et cetera.

And here the idea that to impose on someone a duty to other people where it's not a repetitive conduct, like they had in *Kesner*, where they just kept letting people go home even though they had a duty -- specific identifiable and identified legal duty to keep asbestos on the premises. There's no such identified duty here -- and Mr. Bogdan pointed that out before -- to keep viruses on the premises. All right. There's nothing discussing that at this time.

You have an industrial tradeoff with asbestos. That's not been recognized here with respect to viruses. Certainly not with the flu, not with colds, not with anything that somebody might convey, in fact, including tuberculosis and other illnesses. And yet because of the scare and the fear that COVID-19 presented, it has a little different feel, maybe, than the flu. Although, we know thousands, hundreds of thousands can die in a year from the flu. But it didn't have that death threat in quite the same way for maybe the average person.

But there isn't really that original duty to keep something contained. There isn't the idea that the behavior -- how bad is it.

Let's say the employer let people commingle, and they shouldn't have done it, and it happens, essentially kind of on the short haul, the asbestos manufacturers and the people who use it in business are doing this day-in/day-out, sending the

workers home day-in/day-out, making a buck that way. And it's just not the same thing.

So when you look at the various factors, it doesn't quite add up in the same way. And I just want to go to those for a second. Let me see if I can find that. Hold on. Because I have it here somewhere. Give me a second. I just want to have the factors that we look at. And these are the Rowland factors.

So you're got foreseeability; the certainty that plaintiff suffered an injury. Well, okay, I don't think there's any disagreement that she came down with COVID.

Foreseeability of harm. Let's just give that to the plaintiff here for the moment. Although, again, even on the pleading of who worked with whom where there isn't a lot of detail.

The closeness of the connection between the defendant's conduct and the injuries suffered. Again, as I say, it's not quite the same as the asbestos situation, nor is the moral blame.

One looks at the policy of preventing future harm. I'm not sure how much you can prevent here. There's only so much you can do in containing illness. If somebody doesn't take their work clothes home with them, you can prevent somebody at home from getting asbestos. If you don't take every possible step that you could possibly take -- that's redundant but every

possible step to contain COVID at the workplace, that's not a guarantee that you can really prevent the spread of it. It's kind of everywhere.

And the burden on the defendant of trying to -- the burden on them in trying to contain it, the consequences to the community, the availability, cost, and prevalence of insurance, there are a lot of, at the moment, COVID -- COVID exclusions in the first-party policies. I don't know about third-party coverage.

But taking all that into the balance and then adding the idea that you're dealing with an employer here -- so the employer has the original bargain that they're going to pay for whatever happens to the employee. And if they knowingly expose the employee or -- not expose but certain knowing conduct they don't get out from under a tort claim. But for just what one would call ordinary negligence they definitely do. And they're willing to pay for that injury. And that's the bargain.

And then if you start expanding so that if they slip up with the employee that everybody in the employee's household -- this can be five children, the wife, a nephew that's living there during college, who knows, and all of a sudden you have a major expansion of their liability, all based on something that originally they were not required to cover. And I think, as a policy in this situation, that starts to run somewhat farther afield.

Interestingly, in *Snyder* they discussed what the defendant, Michaels Stores, had argued and also what the *Bell* court had noted, which were concerns about expanding beyond what would be covered for the injured worker. And they said, well, if you want to expand that in a certain way, maybe the legislature, California Legislature, could do that.

But they were never asked really, I guess, to make a separate policy determination in *Snyder*. They were just asked to find whether workers' compensation was going to bar a fetus claim. And they thought, well, if you want to bar fetuses, people who are hurt simultaneously with the injured employee, you're going to have to put that in some kind of legislation.

But we don't have that. We don't have the simultaneous. We have the domino effect, essentially, that's being pled here; something that didn't happen simultaneously but sequentially.

So I think that in this instance the policy really doesn't support -- the policy analysis doesn't support extending liability to people in the household under the circumstances that we have here.

I take that back. I don't want to say "circumstances we have here" because it's a categorical analysis. So I say putting our circumstances individually aside, it doesn't extend to people in the household. And I'd be willing to make that finding and for the reasons I stated.

We can go back to the final analogy, too. As I mentioned

earlier, very few people are really exposed to asbestos, but just about everybody has been exposed to COVID in some way, or at least in the vicinity of it, and the -- so the circumstances are quite different than asbestos.

And the *Kesner* court spent quite a bit of time deciding that even in that situation, with that initial duty to keep things on the premise and the ease at which one could have prevented it leaving the premises, they still spent quite a bit of time trying to decide whether they were going to extend the duty to someone; and it wasn't even something they came to lightly or quickly.

I think this case is sufficiently enough distinguishable that I would find the duty doesn't extend even if the claim is not, in the first instance, barred by workers' compensation exclusivity.

Okay. So we're back to, is there anything you think you can add?

I know you're not happy with this, Mr. Zurada. I understand that. And I want you to know that whatever decision I've made here, I didn't just kind of flip a coin. I really gave it a lot of thought.

And it's a matter of concern. Obviously, COVID is a matter of concern to everyone. But I just don't feel, at this point, that the case and the case law has gone far enough to recognize a claim.

MR. ZURADA: Your Honor, may I respond? I tried to keep notes. And so I don't know if I can respond to every point you made, Your Honor, but I would like to at least respond and perhaps, Your Honor, you could consider --

THE COURT: I will. I will.

MR. ZURADA: -- my arguments.

THE COURT: Okay.

MR. ZURADA: So, Your Honor, whatever -- whatever test that you take out of *Snyder*, right, whatever test we're applying to this case, if we take that test and apply it back to *Snyder*, we have to get the same result.

If Your Honor applies a test in this case that when applied to *Snyder* just doesn't fit the outcome or results in the employer winning, then we know that that's not what the *Snyder* court was holding.

And so on the first point, Your Honor, on the asymptomatic injury, now, you -- you could say an asymptomatic injury is still an injury. However, the mother in *Snyder* -- her name was Naomi. Naomi. The baby's name was Mikilah; the mother's name Naomi. The defendants there made the same argument. What they said is -- well, they didn't make an asymptomatic/symptomatic argument, but they made the argument about the injury to the mother and how it's connected.

Now, in that case, the mother was actually injured. She breathed in the fumes. And the fumes then went on through her

bloodstream and in a way infected the baby through her bloodstream, through the umbilical cord, and went to the baby.

Let's assume that the mother had no symptoms at all. Had no symptoms at all. Let's say the mother just breathed in the toxic fumes, it got in her bloodstream and then went to the baby. That's also the same kind of theoretical injury because she doesn't have any damages.

She breathed in toxins, they're in her body. They're in her body, we don't know for how long. Maybe they stay in her body; maybe they leave. But, Your Honor, the toxins are in her body. That is at least a theoretical injury to her. Just like if Mr. Kuciemba got COVID, had no symptoms, no emotional distress, and then the virus left his body but he managed to infect his wife in the meantime, that's also a theoretical injury.

But if Your Honor calls Mr. Kuciemba's injury an actual injury, then the mother's injury, Naomi's injury, in actually breathing the fumes, is also an injury.

And I would like to point out, Your Honor, that in that case the mother was actually injured. She breathed in the fumes from the cleaning machine. And when she breathed in the fumes, she had nausea; she was light-headed; I think she had ended up going to the emergency room in that case.

Now, she had a greater resistance, as an adult, to that toxic chemical that went into her blood, so she was less

injured. Just like Mr. Kuciemba had, apparently, greater resistance to the virus than his wife. And so while he was injured, the wife was more injured than he was.

It's just a matter of how resistant you are. In *Snyder*, the mother was more resistent; baby less resistant. In this case, Mr. Kuciemba was more resistant; Ms. Kuciemba was less resistant, and she suffered a greater injury.

However, the defendant in *Snyder* used Your Honor's reasoning and said expressly to all these courts, to the trial court that sided with them and then to the Appellate Court that overruled then, and then the Supreme Court which agreed with the Appellate Court, they said look, Judge, this injury was caused because the mother inhaled the toxic fumes. Right? And the mother was the mode of transmission of that. Because she's a worker, it's barred by workers' comp. The causation is derivative from the mother's injury. And they used the word "derivative" kind of in a causal sense.

And I would like to read to Your Honor a very important passage from *Snyder*, that addresses exactly that argument, that the causation through the mother's body and the infection from the mother through the blood into the child, that it's derivative so to speak. And, Your Honor, this is at the very end of page 1000 --

THE COURT: Uh-huh.

MR. ZURADA: -- in *Snyder*.

THE COURT: Hold on a minute. Let me get to it. All right. I'm there. Go ahead.

MR. ZURADA: And I'd like to read -- I'd like to read what the Court said. So this is after examining this argument by the defense of the causation that the mother or the baby was injured through the mother and is derivative of the mother breathing in these toxins. And what the Court says:

"Mikilah" -- that's the baby -- "sought recompense for her own injuries."

THE COURT: Wait a minute. Let me see if I can find where you are. You say it's at the end of 1000?

MR. ZURADA: Yes, Your Honor.

THE COURT: Oh, I see it. It's starting with the sentence that says "For that reason"?

MR. ZURADA: I'm starting with the sentence "Mikilah sought recompense for her own injuries."

THE COURT: Just a minute. I'm trying to see where that is then.

MR. BOGDAN: Your Honor, it looks like it's the third sentence of the paragraph that starts "Having clarified the scope."

THE COURT: Just a minute. I'm looking. Oh, I see it. I see it. All right. Go ahead.

MR. ZURADA: Okay. So, Your Honor, it says:

"Mikilah sought recompense for her own injuries.

Since Mikilah was not herself breathing at the time of the accident that her exposure to carbon monoxide occurred through Naomi's inhalation" -- that's the mother -- "of the fumes and toxic substances conveyed to her through the medium of her mother's body can be conceded."

THE COURT: Yes.

MR. ZURADA: (Reading)

"As we have emphasized above, however, the derivative injury doctrine does not bar civil actions by all children who were harmed in utero through some event or condition affecting their mothers. It bars only attempts by the child to recover civilly for the mother's own injuries or for the child's legally dependent losses."

THE COURT: Uh-huh.

MR. ZURADA: (Reading)

"Mikilah does not claim any damages for injury to Naomi, nor does the complaint demonstrate Mikilah's own recovery is legally dependent on the injuries suffered by Naomi."

THE COURT: Uh-huh.

MR. ZURADA: And then it says:

"For that reason, Sections 3600 through 3602 did not defeat Mikilah's cause of action for her own injuries," the first cause of action, "or her parents' claim for consequential losses due to Mikilah's injuries," the third

cause of action.

THE COURT: Uh-huh.

MR. ZURADA: Your Honor, the reason I read this is because the Court is separating the big three that Your Honor mentioned. I'll just refer to as the big three; the loss of consortium, the wrongful death, and the emotional distress claims.

The Court is saying those -- all those, if we look at CACI instructions, we will find that one of the legal elements of the injury is you have to prove injury to the mother and the extent to which the injury to that mother or the husband or the worker that it -- and it's tied in a legal sense, not a causal sense --

THE COURT: I know.

MR. ZURADA: In a legal sense it's tied to the injury; right?

THE COURT: Uh-huh.

MR. ZURADA: So if Mrs. Kuciemba was suing for any of the big three, what she would first have to prove is the extent of the injuries to Mr. Kuciemba and how his injuries affected her and how those are barred.

But in this case it doesn't matter whether he, you know, died on the job or never even felt anything because of COVID, because the injuries to Ms. Kuciemba are her own, just like the child's injuries in *Snyder* was the child's own injury.

And I think, Your Honor, that this is where I see the disconnect between -- between what you have kind of laid out for us and what *Snyder* is saying, because I think, Your Honor, you're focusing on the factual causation; whereas, *Snyder* actually laid a -- what I see as a bright-line rule. And they're saying, "We're looking at the legal causation."

And what we're looking at is if we look at the elements of Ms. Kuciemba's claim, do we see those elements and need to prove up Mr. Kuciemba's injuries? And the answer is no.

Just like in *Snyder*, just like we have to -- you know, they have to show that Naomi transferred the chemical to Mikilah through her blood, they have to show the causation, but it doesn't make a derivative injury.

In this case we have to show that Mr. Kuciemba transferred that virus to Ms. Kuciemba. But that's a causation issue. That's not a legal issue. A legal derivative issue.

So I think when Your Honor looks at "derivative" and "direct," Your Honor is talking about something different than what *Snyder* is talking about --

THE COURT: Okay.

MR. ZURADA: -- because --

THE COURT: I get your point. I want you to know, I get your point. But I have -- I've already said I acknowledge the distinction between this claim and we'll call them the big three, okay, just shorten things up. Thank you for that

description.

All right. So I've already acknowledged, yes, there is a difference in the sense that one can obviously say they got -- well, let me take that back for a second.

I don't know how the first person got COVID, okay. Maybe from an animal, I think. But after that everybody had to get COVID from somebody else, okay. So as a factual matter, though, I understand. As a factual matter almost everybody who has got COVID got it from someone else. If not, I think probably everybody who got COVID got it from someone else except patient 1 or however they describe the first person who comes down with something.

Okay. That is still different than legal. I understand that. And there are all manner of personal injuries that anybody can have that don't require anybody else get hurt. That's obvious.

And I've already acknowledged that there are the big three, in which there always has to be another injured person. Always has to be.

MR. ZURADA: That's true.

THE COURT: No, no, I totally understand that. I don't read *Snyder* to go as far as you said, however, and that's what I started saying.

And if they wanted to make our life easier and my job easier and your time less spent trying to discuss this matter,

they could have done it. And for whatever reason, they did not.

And let me just point out in the same paragraph that you were referring to. As you know, you focus on the word "legally dependent." And I've acknowledged that. But along with that they use all these other words. They used, as I'm saying, "logically dependent." And they used -- hang on. What was the other one? -- "conceptually dependent." In other words, they just kept backing off. It's like they kind of went up to the edge, and then they back off again.

And in the very paragraph and just right before, right before what you read to me, they -- let me go back maybe one sentence more. I may have to. Sorry. Let's see.

Well, here's another thing that's just -- gets me, all right. All right. The first sentence is just they've said that they're now going to talk about the case, all right. And they start. And Michaels -- Michaels is the name of the store, okay.

> "Michaels demurrer should have been sustained only if the facts alleged in the complaint showed either that Mikilah was seeking damages for Naomi's work-related injuries or that Mikilah's claim necessarily depended on Naomi's injuries."

Now, "necessarily." Didn't say "legally." So we're not sure what they mean by that.

Now, let's look at the first item of the two alternatives, "showed either that Mikilah was seeking damages for Naomi's work-related injuries." How could she? Children in California, to my knowledge, can't bring loss of consortium claims.

Am I right on that or not? I think I'm right. Only a spouse. In some states they can. But we're dealing with California law. This is the California Supreme Court.

So what was the claim Mikilah could bring for her mother's injuries? I don't know. Then it says -- but they seem to be saying there would be one.

Let's assume there is. It would have to be some kind of a derivative claim. It can't be a survivor claim; her mother didn't die. So, you know, she's not bringing a claim on behalf of her mother who's now dead and the kid is the executor of the estate or something.

So what is that? I don't know. But it seemed to be sort of saying, like loss of consortium, if she could do it, and then they say "or." Well, what's the or then? The first one is the legally you're talking about. The second one has to be factually. So then we keep going.

I mean, I'm telling you, I scanned this case trying to see if it would help me more. And I'm not really necessarily faulting the Court because I think they didn't want to decide this issue despite the fact you think they did.

All right. They were waiting for a different fact situation to see, then, which way they wanted to go.

But they didn't want to call the baby part of the mother. All right. *Bell* did. They don't want to.

So they kept going and they said, after -- you know, after making the statement it had to be one or the other, which I'm reading as somewhat legal or factual, all right, legally derivative or factually dependent, they go on to say:

> "The facts alleged here did not so demonstrate. Plaintiffs allege simply that both Naomi and Mikilah were exposed to toxic levels of carbon monoxide; injuring both."

And they're back to this idea that the baby is a separate little person who happens to be there, coincidentally, with the mother just as if it was in a stroller or a backpack. Only it's in this sort of internal backpack, and they both simultaneously get exposed. Mom may or may not be injured. Maybe she feels a little sick. Maybe it doesn't do anything to her and the baby gets brain damage. All right. And that's how they looked at it, as somebody on the premises.

We don't have that here. And, as I say, I looked at those words, but, again, read in context I think we actually have to wait to see what they would do. And you can try and predict it.

Even *Salin*, which is such -- I don't know. It's just, in

layman's terms, an oddball case. It's really an unusual situation. They had a chance, when they looked at that, to say "We're not going to say this isn't going to work." They just said:

> "While we have no occasion here to rule on the correctness of the decision in *Salin*, we observe that Sections 3600 to 3602 do not directly support the *Salin* court's extension of the derivative injury rule to third-party injuries allegedly caused by an injured employee's post-injury acts."

Now, what does that mean? That's a footnote in *Salin*. I'm not sure where they're going with that either. But how simple it would have been for every one of these courts, not only *Snyder* but the cases it cited that went the same way it did in other circuits and states, to simply say "We're going to limit it to the big three. In our view, that's it."

And they don't seem to want to do it. And we have a very, very clean case here of somebody who, in her instance, only got COVID if her husband was sick or at least was carrying it and was infected and thus, I'm finding, injured.

If somebody wants to say that's not injury, they can, and the rest of what I find then goes down the drain. But if they agree that testing positive is an injury, then you have the situation that the only way she could have gotten it, at least plausibly, is in the traditional way, from somebody who was

already infected.

And not only is it that she could have only done it, frankly, everybody who gets COVID can only have gotten it from someone else. And if that other person was an employee, we're back to workers' comp.

So I think that's where we are. It's really been a very interesting case to look at. I've certainly never been presented with anything of this nature.

If Mr. Bogdan wants to weigh in, I don't want to preclude him from making any arguments here that he came ready to make. I just kind of hogged the discussion, I guess, because I spent so much time looking at the cases.

Mr. Bogdan?

MR. BOGDAN: Well, thank you, Your Honor. And as you were speaking I kept crossing things out of my argument because you've already covered them. So I appreciate the offer, but I think the issue has been thoroughly discussed.

THE COURT: Okay. Well, then, I'm -- you know, I thank you both.

MR. ZURADA: Your Honor.

THE COURT: Yeah, Mr. Zurada.

MR. ZURADA: If I may, since argument is going against me, would you mind if I just briefly addressed the other points? Because there were a lot of points you made.

THE COURT: Sure.

MR. ZURADA: I would like to put a few more points on the record. I promise I'll be brief, because I know you're busy.

THE COURT: No, that's all right. I'm totally giving all my attention to you. I'm not being distracted by anything.

MR. ZURADA: No, I'm not suggesting that. I just know the workload that the courts are under.

So, Your Honor, one thing to consider is, would your decision be different if Ms. Kuciemba was a baby in her mother's womb, and the baby was the employee who got infected with COVID and then passed COVID through her bloodstream to the baby?

Because it sounds to me like -- I'm trying to understand whether that's -- whether you would accept that as being outside of workers' compensation or whether it's the COVID infection and the fact that, you know, it's COVID, whether that's what's making the difference, Your Honor, in your mind.

So it's just a -- I guess, I'm trying to understand where you're drawing the line. If it was more similar to *Snyder* and it was COVID and Ms. Kuciemba was the baby and her mother was the worker, whether that would be close enough to *Snyder* where you would then say, okay, that's -- that's beyond workers' comp.

THE COURT: What's your other points you want to discuss?

MR. ZURADA: Yes, Your Honor.

So the other points I wanted to discuss is with respect to amending the complaint. We can add -- we can look for studies, scientific studies on the transmission of COVID through surfaces, through skin, through clothing. We can add that to the complaint for the limited purpose.

I don't know, given -- given the standard you're setting, Your Honor, it's still a developing science. I don't know if at the complaint stage we can give you expert testimony and give you studies, you know, like this. It seems like this is something that's appropriate for discovery and further analysis in the case, but that should not be something that would bar us from proceeding.

Now, Your Honor, you mentioned a fact that counsel was talking about at the last hearing, which is, the other people didn't test positive for COVID. Well, one, it's outside of the scope of the complaint; but, two, I mean, it's something to discover.

As far as the duty analysis -- I want to move on to the duty analysis -- I think that the Court is looking at this and saying floodgates are open, the courts are inundated with COVID cases.

The way that we're looking at the case is, here's an employer, they knew the rules, they knew the health orders, they knew COVID was dangerous, yet that employer violated the

rules by not quarantining those workers, by not testing them for COVID, and just taking them, knowing they've been exposed to COVID, and taking them into another job, and essentially saying, "We don't want to lose these workers' time. We want to make money on this job. We are going to commingle these workers."

So these facts must be accepted as true. And so if Your Honor is looking at it from a duty analysis, Your Honor said we had foreseeability, we have the injury. The connection to the conduct is very clear.

And so, yes, it's true in theory, COVID is an infectious disease, but, you know, you can catch it in different ways. In this case the Kuciembas -- we pled that the Kuciembas were extremely careful, essentially cutting off, you know, contact with other people other than necessary work conduct, and she stayed at home.

But, you know, the connection to the conduct, I mean, it's pretty egregious conduct for an employer, you know, to know that their workers are exposed to COVID and then not follow the health orders that govern, you know, prevention of future harm.

The employer doesn't have to do anything extra to protect Ms. Kuciemba than what they would do to protect Mr. Kuciemba. Right? We're not talking about an accidental transmission where it's -- they did everything they're supposed to do under the orders and it still happened. If that was the case, we

wouldn't be bringing a lawsuit. So I just don't see the burden on the employee as being any greater.

And when we look at the consequences to the community, it's not a question of should we impose this burden on the employer? Are we opening floodgates? It's shouldn't the employers keep the employees safe and their family members?

And the way I read *Kesner* is, is not as a case that's been limited strictly to the asbestos situation. *Kesner* is another case that is making a bright-line test. And that bright line is we stop the duty analysis at the household.

And Your Honor is saying, well, maybe that's five or six children. True. But that's what *Kesner* is saying. It's whether it's one person like Ms. Kuciemba or five children and a wife. That's where the Court drew the line on the duty. And to me it's controlling Supreme Court authority that is not just strictly limited to asbestos.

And the fact that these employees were going day in and day out into the workplace, it's not just a one-off thing. I mean, they were coming in and going; coming in and going. Same employees, you know, that had been exposed to COVID and that, according to the facts we pled, had COVID and transmitted it to Mr. Kuciemba.

So, Your Honor, I will just conclude -- I don't want to take, you know, any more of the Court's time. And I understand, I will -- it's highly unlikely I'll change your

mind, but *Kesner* and the duty analysis falls in our favor.

So, Your Honor, I thank you for your time and your careful consideration of this case.

THE COURT: Okay. You asked me a question, what if the baby had caught COVID from the mother while it was in the uterus? Well, I don't even know that can happen, all right.

We don't have anything like that here. And that might or might not be like *Snyder* because now you've got someone who's catching something from somebody in some kind of sequential train that starts with the mother catching it from a worker at the workplace while the mother is visiting the workplace, I guess. And then to make it like *Snyder* you'd have the mother and the baby at the workplace.

I'm not sure what -- what somebody would think about that because I don't know that the baby could get it from the worker who's there while they're at the workplace. I have no idea how that would come out. But it's not what we have here, and it isn't what *Snyder* was.

Snyder was a condition that existed at the workplace that simultaneously injured, in the Court's view, two people. All right. In *Bell*'s view -- that's the case that *Snyder* disapproved of. In *Bell* it was one person, mom, with an attachment, okay.

In *Snyder* you got two people -- little fetus, big mom -- both experiencing, simultaneously, the same bad condition. One

got hurt; one didn't.

Then you have -- and I really can't answer your hypothetical. I didn't answer you right away because I wanted to think about it. Besides, I wanted you to finish your presentation.

Discovery. Yes, if somebody pleads a claim that is generally plausible on its face, then one can beef it up and fix it up with discovery. But you can't use discovery to plead a claim in the first instance. In other words, you can't say, "I don't have one now, but maybe I'd have one if you could just let me talk to these people and get further information."

And when you say you could get the articles, I don't know that you can get any article that says what you've pled here, which is she got COVID from his clothes. There just doesn't seem to be anything out there, at least that the Court can take judicial notice of. So, at the moment, that's what I'm looking at.

And you didn't plead that anybody at the workplace had COVID. You said that they were exposed to somebody who had it at another workplace. So it's a different fact situation.

I don't know if Mr. Bogdan -- I think I'll give you the last word here. Although, they're the movant so maybe they could have a rebuttal. But I don't know that they have anyone at this point.

MR. BOGDAN: Very, very briefly, Your Honor.

THE COURT: Okay.

MR. BOGDAN: The standard under *Twombly* is not make your pleading and then hope science catches up during the time that the suit is pending. There just isn't anything -- there's no "there" there. Not to slight Oakland.

THE COURT: Okay.

MR. BOGDAN: So, I mean, *Snyder* doesn't support the situation. *Snyder* turns out to be nothing more than a premises liability case. And that's not what we're dealing with here.

THE COURT: Okay. All right. Thank you.

MR. ZURADA: Your Honor --

THE COURT: We can't keep going back and forth.

MR. ZURADA: Your Honor, I would just -- I don't mean to upset Your Honor. Paragraph 21 of the complaint pleads that Ms. Kuciemba was -- Mr. Kuciemba was infected by one of the workers at his workplace. I just wanted to point that out to the Court, that we did make that specific allegation in paragraph 21.

THE COURT: That's not what I said. What I said is you didn't plead that anybody at the workplace had COVID, that -- if you were saying that they knew about. All right.

MR. ZURADA: No, Your Honor. We did specifically plead what you just said. In paragraph 21 of our First Amended Complaint we pled that one or more of the workers from the other site was infected with COVID.

THE COURT: "Was infected with it."

MR. ZURADA: With COVID.

THE COURT: All right. Maybe you pled it. All right. I don't think you have one fact to support it from what you've said. I don't know if you can plead that in good faith, if, in fact, there is nobody who was ever, to your knowledge, tested for or displayed symptoms of COVID. But maybe you can.

Okay. I leave that -- all right. If you want to say they're infected, at least asymptomatically, since you didn't say anybody was, you know, known to have it specifically, we'll take that as asymptomatic. And we're back to, again, just the question of let's say that happened. Workers' comp bars it, at least until someone says it doesn't. And I'm going to find that the duty simply doesn't extend as far as Mrs. Kuciemba.

So, okay. I appreciate that you did point that out. I guess I was thinking you didn't contradict what Mr. Bogdan had said directly. Okay -- at the last hearing.

In any event, my ruling is based on what I've explained here today and what I explained at the last hearing; that this hearing doesn't substitute for the last hearing. It's just additur at this point.

And I will think about what you said. Although, I want you to know, I've thought about everything that you said, before you said it, Mr. Zurada. But I will think about it before I issue an order.

And I will likely issue an order, though, whenever -- well, if I go in the way that I'm indicating today, as a tentative ruling, then it will be a short order. If I essentially change my mind, I would explain in much greater detail because it would be contrary to what I found here on the record today.

Okay. All right. Everyone, thank you very much. Then this is going to conclude the hearing at this time.

I appreciate the work that both parties put into the case. Thank you.

MR. BOGDAN: Thank you, Your Honor.

MR. ZURADA: Thank you, Judge.

THE CLERK: The Court is in recess.

THE COURT: Thank you, Ms. Geiger.

(At 10:12 a.m. the proceedings were adjourned.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Thursday, May 13, 2021

Katherine Sullivan

Katherine Powell Sullivan, CSR #5812, RMR, CRR
U.S. Court Reporter

ORDER OF THE HEALTH OFFICER No. C19-07c

ORDER OF THE HEALTH OFFICER OF THE CITY AND COUNTY OF SAN FRANCISCO DIRECTING ALL INDIVIDUALS IN THE COUNTY TO CONTINUE SHELTERING AT THEIR PLACE OF RESIDENCE EXCEPT FOR ESSENTIAL NEEDS AND IDENTIFIED OUTDOOR ACTIVITIES IN COMPLIANCE WITH SPECIFIED REQUIREMENTS; CONTINUING TO EXEMPT HOMELESS INDIVIDUALS FROM THE ORDER BUT URGING GOVERNMENT AGENCIES TO PROVIDE THEM SHELTER; REQUIRING ALL BUSINESSES AND RECREATION FACILITIES THAT ARE ALLOWED TO OPERATE TO IMPLEMENT SOCIAL DISTANCING, FACE COVERING, AND CLEANING PROTOCOLS; AND DIRECTING ALL BUSINESSES, FACILITY OPERATORS, AND GOVERNMENTAL AGENCIES TO CONTINUE THE TEMPORARY CLOSURE OF ALL OTHER OPERATIONS NOT ALLOWED UNDER THIS ORDER

(SHELTER IN PLACE)

DATE OF ORDER: April 29, 2020

Please read this Order carefully. Violation of or failure to comply with this Order is a misdemeanor punishable by fine, imprisonment, or both. (California Health and Safety Code § 120295, *et seq.*; California Penal Code §§ 69, 148(a)(1); and San Francisco Administrative Code § 7.17(b))

Summary: The City and County of San Francisco (the "County") and five other Bay Area counties and the City of Berkeley have been under shelter-in-place orders since March 16, 2020, in a collective effort to reduce the impact of the virus that causes Novel Coronavirus 2019 Disease ("COVID-19"). That virus is easily transmitted, especially in group settings, and the disease can be extremely serious. It can require long hospital stays, and in some instances cause long-term health consequences or death. It can impact not only those known to be at high risk but also other people, regardless of age. This is a global pandemic causing untold societal, social, and economic harm. To mitigate the harm from the pandemic, these jurisdictions issued parallel health officer orders on March 16, 2020 imposing shelter in place limitations across the Bay Area, requiring everyone to stay safe at home except for certain essential needs. Other jurisdictions in the Bay Area and ultimately the State have since joined in adopting stay-safe-at-home orders.

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Our collective effort has had a positive impact. But the danger to the health and welfare of all continues. As of the date of this Order, infection and hospitalization rates have not shown sustained decrease in all areas. Indeed, while hospitalizations for COVID-19 infected patients in San Francisco have been stable for several weeks, they have not shown a significant decrease over a 14-day period as health experts recommend before substantial easing of shelter in place restrictions. Also, while the search continues, there is not yet an effective treatment or cure for the disease. The vast majority of the population remains susceptible to infection. Testing ability, while improving, remains constrained, and San Francisco's health care system remains susceptible to being overwhelmed. The health officers of the coordinating jurisdictions are monitoring key indicators described in this Order, and several of those indicators do not yet support ending the protective requirements. Separately the health officers are issuing a document with benchmarks for those indicators they wish to see to further ease shelter in place restrictions. So, while San Francisco is working on building up its testing, case finding, case investigation, and contact tracing capacity, and its means to protect vulnerable populations and address outbreaks, it is imperative that San Francisco extend the duration of its stay-at-home order.

Still, in light of progress made, this extension, in addition to providing some clarifications to the prior order, allows a few additional essential businesses to resume safely as well as some other activities that are lower risk for transmission of the virus. This initial, measured resumption of those essential business activities and lower risk activities is designed to keep the overall volume of person-to-person contact very low to prevent a surge in COVID-19 cases in the County and neighboring counties. The Health Officer will assess the activities allowed by this Order on an ongoing basis and may need to modify them if the risk associated with COVID-19 increases in the future.

This new Order replaces the prior March 30, 2020 extension of the shelter in place order. Beginning at midnight on May 3, 2020, all people and businesses in San Francisco must strictly comply with this new Order. This new Order extends and modifies the stay safe at home restrictions for another 28 days, through May 31, 2020. But the Health Officer will continue to carefully monitor the evolving situation and could change that date.

Generally, under this Order gatherings of individuals with anyone outside of their household or living unit remain prohibited, with limited exceptions for essential activities or essential travel, or to perform work for essential businesses and government agencies. But this order makes three significant sets of changes that ease restrictions under the prior order. First, this Order now permits certain outdoor businesses to operate outdoors so long as they can do so safely. These outdoor operations are considered low risk because they are outdoors and involve brief and infrequent interactions among individuals. Allowed outdoor businesses include flea markets, car washes, nurseries, and gardening services. Second, the Order allows more outdoor recreation activities to occur again so long as they can be done safely, without physical contact, shared equipment or use of high touch areas in recreation facilities. Examples of permissible outdoor activities include sunbathing, hiking, golf, skateboarding, and fishing. These activities must be

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done in compliance with social distancing and sanitation protocols for any facilities that are used for those activities. And third, the Order allows all construction to proceed as Essential Business, consistent with the State shelter-in-place order, so long as it done safely in accordance with specified health protocols. The order includes a protocol for small projects, which means projects of 10 or fewer residential units or commercial projects with less than 20,000 square feet, and a separate one for large projects. The order also provides for a separate protocol for public works projects. The Order makes a number of other changes and clarifications. For instance, it now permits all real estate transactions (with limits on open houses) and people to move residences without restrictions. It expands the use of childcare services, and other child-focused educational or recreational institutions or programs, including by making those services available to those who are allowed to provide services related to essential businesses, outdoor businesses, government functions, essential infrastructure, or minimum basic operations.

Bars, nightclubs, theaters and movie theaters, and other entertainment venues must remain closed for any gatherings. Restaurants, cafes, coffee shops, and other facilities that serve food—regardless of their seating capacity and including outdoor seating areas—must remain closed except solely for takeout and delivery service. All gyms and fitness studios must remain closed. All hair and nail salons must also remain closed. Facilities that sell food and that provide health care remain open as permitted by this Order and other Health Officer orders. Homeless individuals continue to be exempt from the shelter in place requirement, but government agencies continue to be urged to take steps needed to provide shelter for those individuals. And this Order works in tandem with the separate order requiring face coverings in many settings.

The Health Officer may revise this Order as the situation evolves, and facilities must stay updated by checking the City Administrator's website (www.sfgsa.org) regularly.

In addition to extending and replacing Health Officer Order Number C19-07b (shelter in place), issued March 30, 2020, this Order also extends Order Nos. C19-01b (prohibiting visitors at Laguna Honda Hospital and Rehabilitation Center and Unit 4A at Zuckerberg San Francisco General Hospital), C19-03 (prohibiting visitors to specific residential facilities), C19-04 (imposing cleaning standards for residential hotels), C19-06 (prohibiting visitors to general acute care hospitals and acute psychiatric hospitals), C19-08 (prohibiting most routine appointments and elective surgeries and encouraging delivery of prescriptions and cannabis products), C19-09 (prohibiting visitors to residential care facilities for the elderly, adult residential facilities, and residential facilities for the chronically ill), and C19-11 (placing Laguna Honda Hospital and Rehabilitation Center under protective quarantine) through 11:59 p.m. on May 31, 2020, with those listed orders otherwise remaining in effect. Order Nos. C19-10 (requiring reporting by labs of COVID-19 testing information) and C19-12 (face coverings) remain in effect indefinitely, and this Order makes clear that face coverings are required for operators and customers of outdoor businesses as well as construction, with certain limitations. This Order also replaces a directive issued on April 2, 2020 that provided guidance for construction activities with guidance attached to this Order for small and

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large construction projects. The provisions of this Order are subject to any more restrictive provisions of the state shelter-in-place order. This summary is for convenience only and may not be used to interpret this Order; in the event of any inconsistency between the summary and the text of this Order below, the text will control.

UNDER THE AUTHORITY OF CALIFORNIA HEALTH AND SAFETY CODE SECTIONS 101040, 101085, AND 120175, THE HEALTH OFFICER OF THE CITY AND COUNTY OF SAN FRANCISCO ("HEALTH OFFICER") ORDERS:

1. **This Order supersedes the March 31, 2020 Order of the Health Officer directing all individuals to shelter in place ("Prior Order"). This Order amends, clarifies, and extends certain terms of the Prior Order to ensure continued social distancing and limit person-to-person contact to reduce the rate of transmission of Novel Coronavirus Disease 2019 ("COVID-19"). This Order continues to restrict most activity, travel, and governmental and business functions. But in light of progress achieved in slowing the spread of COVID-19 in the County and neighboring counties, the Order allows a limited number of additional Essential Businesses and certain lower risk Outdoor Businesses (both as defined in Section 16 below) to resume operating. This initial, measured resumption of those activities is designed to keep the overall volume of person-to-person contact very low to prevent a surge in COVID-19 cases in the County and neighboring counties. The activities allowed by this Order will be assessed on an ongoing basis and may need to be modified if the risk associated with COVID-19 increases in the future. As of the effective date and time of this Order set forth in Section 19 below, all individuals, businesses, and government agencies in the County are required to follow the provisions of this Order.**

2. **The primary intent of this Order is to ensure that County residents continue to shelter in their places of residence to slow the spread of COVID-19 and mitigate the impact on delivery of critical healthcare services. This Order allows a limited number of additional essential and outdoor business activities to resume while the Health Officer continues to assess the transmissibility and clinical severity of COVID-19 and monitors indicators described below in Section 11. All provisions of this Order must be interpreted to effectuate this intent. Failure to comply with any of the provisions of this Order constitutes an imminent threat and menace to public health, constitutes a public nuisance, and is punishable by fine, imprisonment, or both.**

3. **All individuals currently living within the County are ordered to shelter at their place of residence. They may leave their residence only for Essential Activities as defined in Section 16.a and Outdoor Activities as defined in Section 16.m, Essential Governmental Functions as defined in Section 16.d, Essential Travel as defined in Section 16.i, to work for Essential Businesses as defined in Section 16.f, and Outdoor Businesses as defined in Section 16.*l*, or to perform Minimum Basic Operations for other businesses that must remain temporarily closed, as provided in Section 16.g.**

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For clarity, individuals who do not currently reside in the County must comply with all applicable requirements of the Order when in the County. Individuals experiencing homelessness are exempt from this Section, but are strongly urged to obtain shelter, and governmental and other entities are strongly urged to, as soon as possible, make such shelter available and provide handwashing or hand sanitation facilities to persons who continue experiencing homelessness.

4. **When people need to leave their place of residence for the limited purposes allowed in this Order, they must strictly comply with Social Distancing Requirements as defined in Section 16.k, except as expressly provided in this Order, and must wear Face Coverings as provided in Health Officer Order No. C19-12 issued April 17, 2020 (the "Face Covering Order").**

5. **All businesses with a facility in the County, except Essential Businesses and Outdoor Businesses, as defined in Section 16, are required to cease all activities at facilities located within the County except Minimum Basic Operations, as defined in Section 16. For clarity, all businesses may continue operations consisting exclusively of owners, personnel, volunteers, or contractors performing activities at their own residences (i.e., working from home). All Essential Businesses are strongly encouraged to remain open. But all businesses are directed to maximize the number of personnel who work from home. Essential Businesses and Outdoor Businesses may only assign those personnel who cannot perform their job duties from home to work outside the home. Outdoor Businesses must conduct all business and transactions involving members of the public outdoors.**

6. **As a condition of operating under this Order, the operators of all businesses must prepare or update, post, implement, and distribute to their personnel a Social Distancing Protocol for each of their facilities in the County frequented by personnel or members of the public, as specified in Section 16.h. Businesses that include an Essential Business or Outdoor Business component at their facilities alongside other components must, to the extent feasible, scale down their operations to the Essential Business and Outdoor Business components only; provided, however, mixed retail businesses that are otherwise allowed to operate under this Order may continue to stock and sell non-essential products. All businesses allowed to operate under this Order must follow any industry-specific guidance issued by the Health Officer related to COVID-19.**

7. **All public and private gatherings of any number of people occurring outside a single household or living unit are prohibited, except for the limited purposes expressly permitted in this Order. Nothing in this Order prohibits members of a single household or living unit from engaging in Essential Travel, Essential Activities, or Outdoor Activities together.**

8. **All travel, including, but not limited to, travel on foot, bicycle, scooter, motorcycle, automobile, or public transit, except Essential Travel, as defined below in Section**

16.i, is prohibited. People may use public transit only for purposes of performing Essential Activities and Outdoor Activities, or to travel to and from work for Essential Businesses or Outdoor Businesses, to maintain Essential Governmental Functions, or to perform Minimum Basic Operations at non-essential businesses. Transit agencies and people riding on public transit must comply with Social Distancing Requirements, as defined in Section 16.k, to the greatest extent feasible, and personnel and passengers must wear Face Coverings as required by the Face Covering Order. This Order allows travel into or out of the County only to perform Essential Activities and Outdoor Activities, to operate or perform work for Essential Businesses or Outdoor Businesses, to maintain Essential Governmental Functions, or to perform Minimum Basic Operations at non-essential businesses.

9. **This Order is issued based on evidence of continued significant community transmission of COVID-19 within the County and throughout the Bay Area; continued uncertainty regarding the degree of undetected asymptomatic transmission; scientific evidence and best practices regarding the most effective approaches to slow the transmission of communicable diseases generally and COVID-19 specifically; evidence that the age, condition, and health of a significant portion of the population of the County places it at risk for serious health complications, including death, from COVID-19; and further evidence that others, including younger and otherwise healthy people, are also at risk for serious outcomes. Due to the outbreak of the COVID-19 disease in the general public, which is now a pandemic according to the World Health Organization, there is a public health emergency throughout the County. Making the problem worse, some individuals who contract the virus causing the COVID-19 disease have no symptoms or have mild symptoms, which means they may not be aware they carry the virus and are transmitting it to others. Further, evidence shows that the virus can survive for hours to days on surfaces and be indirectly transmitted between individuals. Because even people without symptoms can transmit the infection, and because evidence shows the infection is easily spread, gatherings and other direct or indirect interpersonal interactions can result in preventable transmission of the virus.**

10. **The collective efforts taken to date regarding this public health emergency have slowed the virus' trajectory, but the emergency and the attendant risk to public health remain significant. As of April 27, 2020, there were 1,424 confirmed cases of COVID-19 in the County (up from 37 on March 16, 2020, just before the first shelter-in-place order) as well as at least 7,273 confirmed cases (up from 258 confirmed cases on March 15, 2020) and at least 266 deaths (up from 3 deaths on March 15, 2020) in the seven Bay Area jurisdictions jointly issuing this Order. The cumulative number of confirmed cases continues to increase, though the rate of increase has slowed in the days leading up to this Order. Evidence suggests that the restrictions on mobility and social distancing requirements imposed by the Prior Order (and the March 16, 2020 shelter-in-place order) are slowing the rate of increase in community transmission and confirmed cases by limiting interactions among people, consistent with scientific evidence of the efficacy of similar measures**

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in other parts of the country and world.

11. The local health officers who jointly issued the Prior Order are monitoring several key indicators ("COVID-19 Indicators"), which are among the many factors informing their decisions whether to modify existing shelter-in-place restrictions. Progress on some of these COVID-19 Indicators—specifically related to hospital utilization and capacity—makes it appropriate, at this time, to ease certain restrictions imposed by the Prior Order to allow individuals to engage in a limited set of additional activities and perform work for a limited set of additional businesses associated with the lower risk of COVID-19 transmission, as set forth in Sections 16.*l* and 16.m. But the continued prevalence of the virus that causes COVID-19 requires most activities and business functions to remain restricted, and those activities that are permitted to occur must do so subject to social distancing and other infection control practices identified by the Health Officer. Progress on the COVID-19 Indicators will be critical to determinations by the local health officers regarding whether the restrictions imposed by this Order may be further modified. The Health Officer will continually review whether modifications to the Order are justified based on (1) progress on the COVID-19 Indicators; (2) developments in epidemiological and diagnostic methods for tracing, diagnosing, treating, or testing for COVID-19; and (3) scientific understanding of the transmission dynamics and clinical impact of COVID-19. The COVID-19 Indicators include, but are not limited to, the following:

a. The trend of the number of new COVID-19 cases and hospitalizations per day.

b. The capacity of hospitals and the health system in the County and region, including acute care beds and Intensive Care Unit beds, to provide care for COVID-19 patients and other patients, including during a surge in COVID-19 cases.

c. The supply of personal protective equipment (PPE) available for hospital staff and other healthcare providers and personnel who need PPE to safely respond to and treat COVID-19 patients.

d. The ability and capacity to quickly and accurately test persons to determine whether they are COVID-19 positive, especially those in vulnerable populations or high-risk settings or occupations.

e. The ability to conduct case investigation and contact tracing for the volume of cases and associated contacts that will continue to occur, isolating confirmed cases and quarantining persons who have had contact with confirmed cases.

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12. **The scientific evidence shows that at this stage of the emergency, it remains essential to continue to slow virus transmission to help (a) protect the most vulnerable; (b) prevent the health care system from being overwhelmed; (c) prevent long-term chronic health conditions, such as cardiovascular, kidney, and respiratory damage and loss of limbs from blood clotting; and (d) prevent deaths. Extension of the Prior Order is necessary to slow the spread of the COVID-19 disease, preserving critical and limited healthcare capacity in the County and advancing toward a point in the public health emergency where transmission can be controlled. At the same time, since the Prior Order was issued the County has made significant progress in expanding health system capacity and healthcare resources and in slowing community transmission of COVID-19. In light of progress on these indicators, and subject to continued monitoring and potential public health-based responses, it is appropriate at this time to allow additional Essential Businesses and Outdoor Businesses to operate in the County. Outdoor Businesses, by virtue of their operation outdoors, carry a lower risk of transmission than most indoor businesses. Because Outdoor Businesses, as defined in section 16.l, generally involve only brief and limited person-to-person interactions, they also carry lower risk of transmission than business activities prohibited under the Order, which tend to involve prolonged interactions between individuals in close proximity or in confined spaces where transmission is more likely. Existing Outdoor Businesses also constitute a relatively small proportion of business activity in the County, and therefore do not substantially increase the volume of interaction between persons in the County when reopened.**

13. **This Order is issued in accordance with, and incorporates by reference, the March 4, 2020 Proclamation of a State of Emergency issued by Governor Gavin Newsom, the March 12, 2020 Executive Order (Executive Order N-25-20) issued by Governor Gavin Newsom, the February 25, 2020 Proclamation by the Mayor Declaring the Existence of a Local Emergency issued by Mayor London Breed, as supplemented on March 11, 2020, the March 6, 2020 Declaration of Local Health Emergency Regarding Novel Coronavirus 2019 (COVID-19) issued by the Health Officer, and guidance issued by the California Department of Public Health, as each of them have been and may be supplemented.**

14. **This Order comes after the release of substantial guidance from the Health Officer, the Centers for Disease Control and Prevention, the California Department of Public Health, and other public health officials throughout the United States and around the world, including the widespread adoption of orders imposing similar social distancing requirements and mobility restrictions to combat the spread and harms of COVID-19. The Health Officer will continue to assess the quickly evolving situation and may modify or extend this Order, or issue additional Orders, related to COVID-19, as changing circumstances dictate.**

15. **This Order is also issued in light of the March 19, 2020 Order of the State Public Health Officer (the "State Shelter Order"), which set baseline statewide restrictions**

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on non-residential business activities, effective until further notice, as well as the Governor's March 19, 2020 Executive Order N-33-20 directing California residents to follow the State Shelter Order. The State Shelter Order was complementary to the Prior Order and is complementary to this Order. This Order adopts in certain respects more stringent restrictions addressing the particular facts and circumstances in this County, which are necessary to control the public health emergency as it is evolving within the County and the Bay Area. Without this tailored set of restrictions that further reduces the number of interactions between persons, scientific evidence indicates that the public health crisis in the County will worsen to the point at which it may overtake available health care resources within the County and increase the death rate. Also, this Order enumerates additional restrictions on non-work-related travel not covered by the State Shelter Order; sets forth mandatory Social Distancing Requirements for all individuals in the County when engaged in activities outside their residences; and adds a mechanism to ensure that all businesses with facilities that are allowed to operate under the Order comply with the Social Distancing Requirements. Where a conflict exists between this Order and any state public health order related to the COVID-19 pandemic, the most restrictive provision controls. Consistent with California Health and Safety Code section 131080 and the Health Officer Practice Guide for Communicable Disease Control in California, except where the State Health Officer may issue an order expressly directed at this Order and based on a finding that a provision of this Order constitutes a menace to public health, any more restrictive measures in this Order continue to apply and control in this County. In addition, to the extent any federal guidelines allow activities that are not allowed by this Order, this Order controls and those activities are not allowed.

16. **<u>Definitions and Exemptions.</u>**

    a. **For the purposes of this Order, individuals may leave their residence only to perform the following "Essential Activities." But people at high risk of severe illness from COVID-19 and people who are sick are strongly urged to stay in their residence to the extent possible, except as necessary to seek or provide medical care or Essential Governmental Functions. Essential Activities are:**

        i. **To engage in activities or perform tasks important to their health and safety, or to the health and safety of their family or household members (including pets), such as, by way of example only and without limitation, obtaining medical supplies or medication, or visiting a health care professional.**

        ii. **To obtain necessary services or supplies for themselves and their family or household members, or to deliver those services or supplies to others, such as, by way of example only and without limitation, canned food, dry goods, fresh fruits and vegetables, pet supply, fresh**

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meats, fish, and poultry, and any other household consumer products, products needed to work from home, or products necessary to maintain the habitability, sanitation, and operation of residences.

iii. To engage in outdoor recreation activity, including, by way of example and without limitation, walking, hiking, bicycling, and running, in compliance with Social Distancing Requirements and with the following limitations:

1. **Outdoor recreation activity at parks, beaches, and other open spaces must comply with any restrictions on access and use established by the Health Officer, government, or other entity that manages such area to reduce crowding and risk of transmission of COVID-19. Such restrictions may include, but are not limited to, restricting the number of entrants, closing the area to vehicular access and parking, or closure to all public access;**

2. **Use of outdoor recreational areas and facilities with high-touch equipment or that encourage gathering, including, but not limited to, playgrounds, gym equipment, climbing walls, picnic areas, dog parks, pools, spas, and barbecue areas, is prohibited outside of residences, and all such areas shall be closed to public access including by signage and, as appropriate, by physical barriers;**

3. **Sports or activities that include the use of shared equipment or physical contact between participants may only be engaged in by members of the same household or living unit; and**

4. **Use of shared outdoor facilities for recreational activities that may occur outside of residences consistent with the restrictions set forth in subsections 1, 2, and 3, above, including, but not limited to, golf courses, skate parks, and athletic fields, must, before they may begin, comply with social distancing and health/safety protocols posted at the site and any other restrictions, including prohibitions, on access and use established by the Health Officer, government, or other entity that manages such area to reduce crowding and risk of transmission of COVID-19.**

iv. To perform work for or access an Essential Business, Outdoor Business, or to otherwise carry out activities specifically permitted in

this Order, including Minimum Basic Operations, as defined in this Section.

v. To provide necessary care for a family member or pet in another household who has no other source of care.

vi. To attend a funeral with no more than 10 individuals present.

vii. To move residences. When moving into or out of the Bay Area region, individuals are strongly urged to quarantine for 14 days. To quarantine, individuals should follow the guidance of the United States Centers for Disease Control and Prevention.

b. For the purposes of this Order, individuals may leave their residence to work for, volunteer at, or obtain services at "Healthcare Operations," including, without limitation, hospitals, clinics, COVID-19 testing locations, dentists, pharmacies, blood banks and blood drives, pharmaceutical and biotechnology companies, other healthcare facilities, healthcare suppliers, home healthcare services providers, mental health providers, or any related and/or ancillary healthcare services. "Healthcare Operations" also includes veterinary care and all healthcare services provided to animals. This exemption for Healthcare Operations shall be construed broadly to avoid any interference with the delivery of healthcare, broadly defined. "Healthcare Operations" excludes fitness and exercise gyms and similar facilities.

c. For the purposes of this Order, individuals may leave their residence to provide any services or perform any work necessary to the operation and maintenance of "Essential Infrastructure," including airports, utilities (including water, sewer, gas, and electrical), oil refining, roads and highways, public transportation, solid waste facilities (including collection, removal, disposal, recycling, and processing facilities), cemeteries, mortuaries, crematoriums, and telecommunications systems (including the provision of essential global, national, and local infrastructure for internet, computing services, business infrastructure, communications, and web-based services).

d. For the purposes of this Order, all first responders, emergency management personnel, emergency dispatchers, court personnel, and law enforcement personnel, and others who need to perform essential services are categorically exempt from this Order to the extent they are performing those essential services. Further, nothing in this Order shall prohibit any individual from performing or accessing "Essential Governmental Functions." "Essential Government Functions" means all services needed to ensure the continuing operation of the government agencies and provide for the health, safety, and welfare of the public. Each governmental entity shall identify and designate appropriate personnel, volunteers, or contractors to

continue providing and carrying out any Essential Governmental Functions, including the hiring or retention of new personnel or contractors to perform such functions. Each governmental entity and its contractors must employ all necessary emergency protective measures to prevent, mitigate, respond to, and recover from the COVID-19 pandemic, and all Essential Governmental Functions shall be performed in compliance with Social Distancing Requirements to the greatest extent feasible.

e. For the purposes of this Order, a "business" includes any for-profit, non-profit, or educational entity, whether a corporate entity, organization, partnership or sole proprietorship, and regardless of the nature of the service, the function it performs, or its corporate or entity structure.

f. For the purposes of this Order, "Essential Businesses" are:

i. Healthcare Operations and businesses that operate, maintain, or repair Essential Infrastructure;

ii. Grocery stores, certified farmers' markets, farm and produce stands, supermarkets, food banks, convenience stores, and other establishments engaged in the retail sale of unprepared food, canned food, dry goods, non-alcoholic beverages, fresh fruits and vegetables, pet supply, fresh meats, fish, and poultry, as well as hygienic products and household consumer products necessary for personal hygiene or the habitability, sanitation, or operation of residences. The businesses included in this subsection (ii) include establishments that sell multiple categories of products provided that they sell a significant amount of essential products identified in this subsection, such as liquor stores that also sell a significant amount of food;

iii. Food cultivation, including farming, livestock, and fishing;

iv. Businesses that provide food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals;

v. Construction, but only as permitted under the State Shelter Order and only pursuant to the Construction Safety Protocols listed in Appendix B and incorporated into this Order by this reference. City public works projects shall also be subject to Appendix B, except if other protocols are specified by the Health Officer;

vi. Newspapers, television, radio, and other media services;

vii. **Gas stations and auto-supply, auto-repair (including, but not limited to, for cars, trucks, motorcycles and motorized scooters), and automotive dealerships, but only for the purpose of providing auto-supply and auto-repair services. This subsection (vii) does not restrict the on-line purchase of automobiles if they are delivered to a residence or Essential Business;**

viii. **Bicycle repair and supply shops;**

ix. **Banks and related financial institutions;**

x. **Service providers that enable real estate transactions (including rentals, leases, and home sales), including, but not limited to, real estate agents, escrow agents, notaries, and title companies, provided that appointments and other real estate viewings must only occur virtually or, if a virtual viewing is not feasible, by appointment with no more than two visitors at a time residing within the same household or living unit and one individual showing the unit (except that in person visits are not allowed when an occupant is present in a residence);**

xi. **Hardware stores;**

xii. **Plumbers, electricians, exterminators, and other service providers who provide services that are necessary to maintaining the habitability, sanitation, or operation of residences and Essential Businesses;**

xiii. **Businesses providing mailing and shipping services, including post office boxes;**

xiv. **Educational institutions—including public and private K-12 schools, colleges, and universities—for purposes of facilitating distance learning or performing essential functions, or as allowed under subsection (xxvi), provided that social distancing of six feet per person is maintained to the greatest extent possible;**

xv. **Laundromats, drycleaners, and laundry service providers;**

xvi. **Restaurants and other facilities that prepare and serve food, but only for delivery or carry out. Schools and other entities that typically provide free food services to students or members of the public may continue to do so under this Order on the condition that the food is provided to students or members of the public on a pick-up and take-away basis only. Schools and other entities that provide food services**

under this exemption shall not permit the food to be eaten at the site where it is provided, or at any other gathering site;

xvii. Funeral home providers, mortuaries, cemeteries, and crematoriums, to the extent necessary for the transport, preparation, or processing of bodies or remains;

xviii. Businesses that supply other Essential Businesses with the support or supplies necessary to operate, but only to the extent that they support or supply these Essential Businesses. This exemption shall not be used as a basis for engaging in sales to the general public from retail storefronts;

xix. Businesses that have the primary function of shipping or delivering groceries, food, or other goods directly to residences or businesses. This exemption shall not be used to allow for manufacturing or assembly of non-essential products or for other functions besides those necessary to the delivery operation;

xx. Airlines, taxis, rental car companies, rideshare services (including shared bicycles and scooters), and other private transportation providers providing transportation services necessary for Essential Activities and other purposes expressly authorized in this Order;

xxi. Home-based care for seniors, adults, children, and pets;

xxii. Residential facilities and shelters for seniors, adults, and children;

xxiii. Professional services, such as legal, notary, or accounting services, when necessary to assist in compliance with non-elective, legally required activities or in relation to death or incapacity;

xxiv. Services to assist individuals in finding employment with Essential Businesses;

xxv. Moving services that facilitate residential or commercial moves that are allowed under this Order; and

xxvi. Childcare establishments, summer camps, and other educational or recreational institutions or programs providing care or supervision for children of all ages that enable owners, employees, volunteers, and contractors for Essential Businesses, Essential Governmental Functions, Outdoor Businesses, or Minimum Basic Operations to work as allowed under this Order. To the extent possible, these

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operations must comply with the following conditions:

1. **They must be carried out in stable groups of 12 or fewer children ("stable" means that the same 12 or fewer children are in the same group each day).**

2. **Children shall not change from one group to another.**

3. **If more than one group of children is at one facility, each group shall be in a separate room. Groups shall not mix with each other.**

4. **Providers or educators shall remain solely with one group of children.**

The Health Officer will carefully monitor the changing public health situation as well as any changes to the State Shelter Order. In the event that the State relaxes restrictions on childcare and related institutions and programs, the Health Officer will consider whether to similarly relax the restrictions imposed by this Order.

g. **For the purposes of this Order, "Minimum Basic Operations" means the following activities for businesses, provided that owners, personnel, and contractors comply with Social Distancing Requirements as defined this Section, to the extent possible, while carrying out such operations:**

   i. **The minimum necessary activities to maintain and protect the value of the business's inventory and facilities; ensure security, safety, and sanitation; process payroll and employee benefits; provide for the delivery of existing inventory directly to residences or businesses; and related functions. For clarity, this subsection does not permit businesses to provide curbside pickup to customers.**

   ii. **The minimum necessary activities to facilitate owners, personnel, and contractors of the business being able to continue to work remotely from their residences, and to ensure that the business can deliver its service remotely.**

h. **For the purposes of this Order, all businesses that are operating at facilities in the County visited or used by the public or personnel must, as a condition of such operation, prepare and post a "Social Distancing Protocol" for each of these facilities; provided, however, that construction activities shall instead comply with the Construction Project Safety Protocols set forth in Appendix B and not the Social Distancing Protocol. The Social Distancing Protocol must be substantially in the form attached to this Order as Appendix A, and**

it must be updated from prior versions to address new requirements listed in this Order or in related guidance or directives from the Health Officer. The Social Distancing Protocol must be posted at or near the entrance of the relevant facility, and shall be easily viewable by the public and personnel. A copy of the Social Distancing Protocol must also be provided to each person performing work at the facility. All businesses subject to this paragraph shall implement the Social Distancing Protocol and provide evidence of its implementation to any authority enforcing this Order upon demand. The Social Distancing Protocol must explain how the business is achieving the following, as applicable:

i. **Limiting the number of people who can enter into the facility at any one time to ensure that people in the facility can easily maintain a minimum six-foot distance from one another at all times, except as required to complete Essential Business activity;**

ii. **Requiring face coverings to be worn by all persons entering the facility, other than those exempted from face covering requirements (*e.g.*, young children);**

iii. **Where lines may form at a facility, marking six-foot increments at a minimum, establishing where individuals should stand to maintain adequate social distancing;**

iv. **Providing hand sanitizer, soap and water, or effective disinfectant at or near the entrance of the facility and in other appropriate areas for use by the public and personnel, and in locations where there is high-frequency employee interaction with members of the public (*e.g.*, cashiers);**

v. **Providing for contactless payment systems or, if not feasible to do so, the providing for disinfecting all payment portals, pens, and styluses after each use;**

vi. **Regularly disinfecting other high-touch surfaces;**

vii. **Posting a sign at the entrance of the facility informing all personnel and customers that they should: avoid entering the facility if they have any COVID-19 symptoms; maintain a minimum six-foot distance from one another; sneeze and cough into their own elbow; and not shake hands or engage in any unnecessary physical contact; and**

viii. **Any additional social distancing measures being implemented (see the Centers for Disease Control and Prevention's guidance at:**

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https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html).

i. For the purposes of this Order, "Essential Travel" means travel for any of the following purposes:

i. Travel related to the provision of or access to Essential Activities, Essential Governmental Functions, Essential Businesses, Minimum Basic Operations, Outdoor Activities, and Outdoor Businesses.

ii. Travel to care for any elderly, minors, dependents, or persons with disabilities.

iii. Travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, and any other related services.

iv. Travel to return to a place of residence from outside the County.

v. Travel required by law enforcement or court order.

vi. Travel required for non-residents to return to their place of residence outside the County. Individuals are strongly encouraged to verify that their transportation out of the County remains available and functional prior to commencing such travel.

vii. Travel to manage after-death arrangements and burial.

viii. Travel to arrange for shelter or avoid homelessness.

ix. Travel to avoid domestic violence or child abuse.

x. Travel for parental custody arrangements.

xi. Travel to a place to temporarily reside in a residence or other facility to avoid potentially exposing others to COVID-19, such as a hotel or other facility provided by a governmental authority for such purposes.

j. For purposes of this Order, "residences" include hotels, motels, shared rental units, and similar facilities. Residences also include living structures and outdoor spaces associated with those living structures, such as patios, porches, backyards, and front yards that are only accessible to a single family or household unit.

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k. For purposes of this Order, "Social Distancing Requirements" means:

i. Maintaining at least six-foot social distancing from individuals who are not part of the same household or living unit;

ii. Frequently washing hands with soap and water for at least 20 seconds, or using hand sanitizer that is recognized by the Centers for Disease Control and Prevention as effective in combatting COVID-19;

iii. Covering coughs and sneezes with a tissue or fabric or, if not possible, into the sleeve or elbow (but not into hands);

iv. Wearing a face covering when out in public, consistent with the orders or guidance of the Health Officer; and

v. Avoiding all social interaction outside the household when sick with a fever, cough, or other COVID-19 symptoms.

All individuals must strictly comply with Social Distancing Requirements, except to the limited extent necessary to provide care (including childcare, adult or senior care, care to individuals with special needs, and patient care); as necessary to carry out the work of Essential Businesses, Essential Governmental Functions, or provide for Minimum Basic Operations; or as otherwise expressly provided in this Order. Outdoor Activities and Outdoor Businesses must strictly adhere to these Social Distancing Requirements.

l. **For purposes of this Order, "Outdoor Businesses" means:**

i. The following businesses that normally operated primarily outdoors prior to March 16, 2020 and where there is the ability to fully maintain social distancing of at least six feet between all persons:

1. Businesses primarily operated outdoors, such as wholesale and retail plant nurseries, agricultural operations, and garden centers.

2. Service providers that primarily provide outdoor services, such as landscaping and gardening services, and environmental site remediation services.

For clarity, "Outdoor Businesses" do not include outdoor restaurants, cafes, or bars.

m. For purposes of this Order, "Outdoor Activities" means:

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i. **To obtain goods, services, or supplies from, or perform work for, an Outdoor Business.**

ii. **To engage in outdoor recreation as permitted in Section 16.a.**

17. **Government agencies and other entities operating shelters and other facilities that house or provide meals or other necessities of life for individuals experiencing homelessness must take appropriate steps to help ensure compliance with Social Distancing Requirements, including adequate provision of hand sanitizer. Also, individuals experiencing homelessness who are unsheltered and living in encampments should, to the maximum extent feasible, abide by 12 foot by 12 foot distancing for the placement of tents, and government agencies should provide restroom and hand washing facilities for individuals in such encampments as set forth in Centers for Disease Control and Prevention Interim Guidance Responding to Coronavirus 2019 (COVID-19) Among People Experiencing Unsheltered Homelessness (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/unsheltered-homelessness.html).**

18. **Pursuant to Government Code sections 26602 and 41601 and Health and Safety Code section 101029, the Health Officer requests that the Sheriff and the Chief of Police in the County ensure compliance with and enforce this Order. The violation of any provision of this Order constitutes an imminent threat and menace to public health, constitutes a public nuisance, and is punishable by fine, imprisonment, or both.**

19. **This Order shall become effective at 11:59 p.m. on May 3, 2020 and will continue to be in effect until 11:59 p.m. on May 31, 2020, or until it is extended, rescinded, superseded, or amended in writing by the Health Officer.**

20. **Effective as of 11:59 p.m. on May 3, 2020, this Order revises and replaces Order Number C19-07b, issued March 31, 2020, and repeals the Directive of the Health Officer of the City and County of San Francisco (Guidance for Construction-Related Essential Businesses), issued April 2, 2020. The Guidance for Construction-Related Essential Businesses issued April 2, 2020, is replaced by Appendices B-1 and B-2 to this Order. This Order also extends Order Nos. C19-01b (prohibiting visitors at Laguna Honda Hospital and Rehabilitation Center and Unit 4A at Zuckerberg San Francisco General Hospital), C19-03 (prohibiting visitors to specific residential facilities), C19-04 (imposing cleaning standards for residential hotels), C19-06 (prohibiting visitors to general acute care hospitals and acute psychiatric hospitals), C19-08 (prohibiting most routine appointments and elective surgeries and encouraging delivery of prescriptions and cannabis products), C19-09 (prohibiting visitors to residential care facilities for the elderly, adult residential facilities, and residential facilities for the chronically ill), and C19-11 (placing Laguna Honda Hospital and Rehabilitation Center under protective quarantine) through 11:59 p.m. on May 31, 2020, without any further need to amend those orders, with those**

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listed orders otherwise remaining in effect. This Order does not prohibit amendment of those orders separately. This Order also does not affect Order Nos. C19-10 (requiring reporting by labs of COVID-19 testing information) and C19-12 (requiring face coverings), which continue indefinitely as provided in those respective orders until each of them is extended, rescinded, superseded, or amended in writing by the Health Officer.

21. **The County must promptly provide copies of this Order as follows: (1) by posting on the City Administrator's website (www.sfgsa.org) and the Department of Public Health website (www.sfdph.org); (2) by posting at City Hall, located at 1 Dr. Carlton B. Goodlett Pl., San Francisco, CA 94102; and (3) by providing to any member of the public requesting a copy. In addition, the owner, manager, or operator of any facility that is likely to be impacted by this Order is strongly encouraged to post a copy of this Order onsite and to provide a copy to any member of the public asking for a copy.**

22. **If any provision of this Order or its application to any person or circumstance is held to be invalid, the remainder of the Order, including the application of such part or provision to other persons or circumstances, shall not be affected and shall continue in full force and effect. To this end, the provisions of this Order are severable.**

IT IS SO ORDERED:

Tomás J. Aragón, MD, DrPH,
Health Officer of the
City and County of San Francisco

Dated: April 29, 2020

Attachments: Appendix A – Social Distancing Protocol (revised 4/29/20)
Appendix B-1 – Small Construction Project Safety Protocol
Appendix B-2 – Large Construction Project Safety Protocol

Order No. C19-07c - Appendix A: Social Distancing Protocol (revised 4/29/2020)

Business name:

Facility Address:

Approximate gross square footage of space open to the public:

Businesses must implement all applicable measures listed below, and be prepared to explain why any measure that is not implemented is inapplicable to the business.

Signage:

☐Signage at each public entrance of the facility to inform all personnel and customers that they should: avoid entering the facility if they have a cough, fever, or other COVID-19 symptoms; maintain a minimum six-foot distance from one another; sneeze and cough into a cloth or tissue or, if not available, into one's elbow; wear a face covering, as required; and not shake hands or engage in any unnecessary physical contact.

☐Signage posting a copy of the Social Distancing Protocol at each public entrance to the facility.

Measures To Protect Personnel Health (check all that apply to the facility):

☐ Everyone who can carry out their work duties from home has been directed to do so.

☐ All personnel have been told not to come to work if sick.

☐ Symptom checks are being conducted before personnel may enter the work space.

☐ Personnel are required to wear a face covering, as required by Order No. C19-12.

☐ All desks or individual work stations are separated by at least six feet.

☐ Break rooms, bathrooms, and other common areas are being disinfected frequently, on the following schedule:

- ☐ Break rooms:
- ☐ Bathrooms:
- ☐ Other:

☐ Disinfectant and related supplies are available to all personnel at the following location(s):

☐ Hand sanitizer effective against COVID-19 is available to all personnel at the following location(s):

☐ Soap and water are available to all personnel at the following location(s):

☐ Copies of this Protocol have been distributed to all personnel.

☐ Optional—Describe other measures:

Measures To Prevent Crowds From Gathering (check all that apply to the facility):

☐ Limit the number of customers in the store at any one time to_____, which allows for customers and personnel to easily maintain at least six-foot distance from one another at all practicable times.

☐ Post personnel at the door to ensure that the maximum number of customers in the facility set forth above is not exceeded.

☐ Placing per-person limits on goods that are selling out quickly to reduce crowds and lines. Explain:

☐ Optional—Describe other measures:

Measures To Keep People At Least Six Feet Apart (check all that apply to the facility)

☐ Placing signs outside the store reminding people to be at least six feet apart, including when in line.

☐ Placing tape or other markings at least six feet apart in customer line areas inside the store and on sidewalks at public entrances with signs directing customers to use the markings to maintain distance.

☐ Separate order areas from delivery areas to prevent customers from gathering.

☐ All personnel have been instructed to maintain at least six feet distance from customers and from each other, except personnel may momentarily come closer when necessary to accept payment, deliver goods or services, or as otherwise necessary.

☐ Optional—Describe other measures:

Measures To Prevent Unnecessary Contact (check all that apply to the facility):

☐ Preventing people from self-serving any items that are food-related.

☐ Lids for cups and food-bar type items are provided by personnel; not to customers to grab.

☐ Bulk-item food bins are not available for customer self-service use.

☐ Not permitting customers to bring their own bags, mugs, or other reusable items from home.

☐ Providing for contactless payment systems or, if not feasible, sanitizing payment systems regularly. Describe:

☐ Optional—Describe other measures (e.g., providing senior-only hours):

Measures To Increase Sanitization (check all that apply to the facility):

☐ Disinfecting wipes that are effective against COVID-19 are available near shopping carts and shopping baskets.

☐ Personnel are assigned to disinfect carts and baskets after each use.

☐ Hand sanitizer, soap and water, or effective disinfectant is available to the public at or near the entrance of the facility, at checkout counters, and anywhere else where people have direct interactions.

☐ All payment portals, pens, and styluses are disinfected after each use.

☐ All high-contact surfaces are disinfected frequently.

☐ Optional—Describe other measures:

* Any additional measures not included here should be listed on separate pages and attached to this document.

You may contact the following person with any questions or comments about this protocol:

Name: **Phone number:**

Appendix A: Social Distancing Protocol
(additional page(s)) **Page ____ of ____**

Business name:

Facility Address:

You may use this page to provide additional information in support of the Social Distancing Protocol required by Health Officer Order No. C19-07c. Use as many pages as you need. Please list the title of the section you are supplementing when listing information below.

ORDER OF THE HEALTH OFFICER No. C19-07c
Appendix B-1

Small Construction Project Safety Protocol

1. Any construction project meeting any of the following specifications is subject to this Small Construction Project Safety Protocol ("SCP Protocol"), including public works projects unless otherwise specified by the Health Officer:

    a. For residential projects, any single-family, multi-family, senior, student, or other residential construction, renovation, or remodel project consisting of 10 units or fewer. This SCP Protocol does not apply to construction projects where a person is performing construction on their current residence either alone or solely with members of their own household.

    b. For commercial projects, any construction, renovation, or tenant improvement project consisting of 20,000 square feet of floor area or less.

    c. For mixed-use projects, any project that meets both of the specifications in subsections 1.a and 1.b.

    d. All other construction projects not subject to the Large Construction Project Safety Protocol set forth in Appendix B-2.

2. The following restrictions and requirements must be in place at all construction job sites subject to this SCP Protocol:

    a. Comply with all applicable and current laws and regulations including but not limited to OSHA and Cal-OSHA. If there is any conflict, difference, or discrepancy between or among applicable laws and regulations and/or this SCP Protocol, the stricter standard shall apply.

    b. Designate a site-specific COVID-19 supervisor or supervisors to enforce this guidance. A designated COVID-19 supervisor must be present on the construction site at all times during construction activities. A COVID-19 supervisor may be an on-site worker who is designated to serve in this role.

    c. The COVID-19 supervisor must review this SCP Protocol with all workers and visitors to the construction site.

    d. Establish a daily screening protocol for arriving staff to ensure that potentially infected staff do not enter the construction site. If workers leave the jobsite and return the same day, establish a cleaning and decontamination protocol prior to entry and exit of the jobsite. Post the daily screening protocol at all entrances and exits to the jobsite. More information on screening can be found online at: https://www.cdc.gov/coronavirus/2019-ncov/community/index.html.

    e. Practice social distancing by maintaining a minimum six-foot distance between workers at all times, except as strictly necessary to carry out a task associated with the construction project.

f. In the event of a confirmed case of COVID-19 at any jobsite, the following must take place:
   i. Immediately remove the infected individual from the jobsite with directions to seek medical care.
   ii. Each location the infected worker was at must be decontaminated and sanitized by an outside vendor certified in hazmat clean ups, and work in these locations must cease until decontamination and sanitization is complete.
   iii. The County Public Health Department must be notified immediately and any additional requirements per the County health officials must be completed, including full compliance with any tracing efforts by the County.

g. Where construction work occurs within an occupied residential unit, separate work areas must be sealed off from the remainder of the unit with physical barriers such as plastic sheeting or closed doors sealed with tape to the extent feasible. If possible, workers must access the work area from an alternative entry/exit door to the entry/exit door used by residents. Available windows and exhaust fans must be used to ventilate the work area. If residents have access to the work area between workdays, the work area must be cleaned and sanitized at the beginning and at the end of workdays. Every effort must be taken to minimize contact between workers and residents, including maintaining a minimum of six feet of social distancing at all times.

h. Where construction work occurs within common areas of an occupied residential or commercial building or a mixed-use building in use by on-site employees or residents, separate work areas must be sealed off from the rest of the common areas with physical barriers such as plastic sheeting or closed doors sealed with tape to the extent feasible. If possible, workers must access the work area from an alternative building entry/exit door to the building entry/exit door used by residents or other users of the building. Every effort must be taken to minimize contact between worker and building residents and users, including maintaining a minimum of six feet of social distancing at all times.

i. Prohibit gatherings of any size on the jobsite, including gatherings for breaks or eating, except for meetings regarding compliance with this protocol or as strictly necessary to carry out a task associated with the construction project.

j. Cal-OSHA requires employers to provide water, which should be provided in single-serve containers. Sharing of any of any food or beverage is strictly prohibited and if sharing is observed, the worker must be sent home for the day.

k. Provide personal protective equipment (PPE) specifically for use in construction, including gloves, goggles, face shields, and face coverings as appropriate for the activity being performed. At no time may a contractor secure or use medical-grade PPE unless required due to the medical nature of a jobsite. Face coverings must be worn in compliance with Section 5 of the Health Officer's Order No. C19-12, dated April 17, 2020, or any subsequently issued or amended order.

l. Prohibit use of microwaves, water coolers, and other similar shared equipment.

m. Strictly control "choke points" and "high-risk areas" where workers are unable to maintain six-foot social distancing and prohibit or limit use to ensure that six-foot distance can easily be maintained between individuals.

n. Minimize interactions and maintain social distancing with all site visitors, including delivery workers, design professional and other project consultants, government agency representatives, including building and fire inspectors, and residents at residential construction sites.

o. Stagger trades as necessary to reduce density and allow for easy maintenance of minimum six-foot separation.

p. Discourage workers from using others' desks, work tools, and equipment. If more than one worker uses these items, the items must be cleaned and disinfected with disinfectants that are effective against COVID-19 in between use by each new worker. Prohibit sharing of PPE.

q. If hand washing facilities are not available at the jobsite, place portable wash stations or hand sanitizers that are effective against COVID-19 at entrances to the jobsite and in multiple locations dispersed throughout the jobsite as warranted.

r. Clean and sanitize any hand washing facilities, portable wash stations, jobsite restroom areas, or other enclosed spaces daily with disinfectants that are effective against COVID-19. Frequently clean and disinfect all high touch areas, including entry and exit areas, high traffic areas, rest rooms, hand washing areas, high touch surfaces, tools, and equipment

s. Maintain a daily attendance log of all workers and visitors that includes contact information, including name, phone number, address, and email.

t. Post a notice in an area visible to all workers and visitors instructing workers and visitors to do the following:
    i. Do not touch your face with unwashed hands or with gloves.
    ii. Frequently wash your hands with soap and water for at least 20 seconds or use hand sanitizer with at least 60% alcohol.
    iii. Clean and disinfect frequently touched objects and surfaces such as work stations, keyboards, telephones, handrails, machines, shared tools, elevator control buttons, and doorknobs.
    iv. Cover your mouth and nose when coughing or sneezing, or cough or sneeze into the crook of your arm at your elbow/sleeve.
    v. Do not enter the jobsite if you have a fever, cough, or other COVID-19 symptoms. If you feel sick, or have been exposed to anyone who is sick, stay at home.
    vi. Constantly observe your work distances in relation to other staff. Maintain the recommended minimum six feet at all times when not wearing the necessary PPE for working in close proximity to another person.

vii. Do not carpool to and from the jobsite with anyone except members of your own household unit, or as necessary for workers who have no alternative means of transportation.
viii. Do not share phones or PPE.

u. The notice in Section 2.t must be translated as necessary to ensure that all non-English speaking workers are able to understand the notice.

ORDER OF THE HEALTH OFFICER No. C19-07c
Appendix B-2

Large Construction Project Safety Protocol

1. Any construction project meeting any of the following specifications is subject to this Large Construction Project Safety Protocol ("LCP Protocol"), including public works projects unless otherwise specified by the Health Officer:

    a. For residential construction projects, any single-family, multi-family, senior, student, or other residential construction, renovation, or remodel project consisting of more than 10 units.

    b. For commercial construction projects, any construction, renovation, or tenant improvement project consisting of more than 20,000 square feet of floor area.

    c. For construction of Essential Infrastructure, as defined in Section 16.c of the Order, any project that requires five or more workers at the jobsite at any one time.

2. The following restrictions and requirements must be in place at all construction job sites subject to this LCP Protocol:

    a. Comply with all applicable and current laws and regulations including but not limited to OSHA and Cal-OSHA. If there is any conflict, difference or discrepancy between or among applicable laws and regulations and/or this LCP Protocol, the stricter standard will apply.

    b. Prepare a new or updated Site-Specific Health and Safety Plan to address COVID-19-related issues, post the Plan on-site at all entrances and exits, and produce a copy of the Plan to County governmental authorities upon request. The Plan must be translated as necessary to ensure that all non-English speaking workers are able to understand the Plan.

    c. Provide personal protective equipment (PPE) specifically for use in construction, including gloves, goggles, face shields, and face coverings as appropriate for the activity being performed. At no time may a contractor secure or use medical-grade PPE, unless required due to the medical nature of a job site. Face Coverings must be worn in compliance with Section 5 of the Health Officer's Order, dated April 17, 2020, or any subsequently issued or amended order.

    d. Ensure that employees are trained in the use of PPE. Maintain and make available a log of all PPE training provided to employees and monitor all employees to ensure proper use of the PPE.

    e. Prohibit sharing of PPE.

    f. Implement social distancing requirements including, at minimum:

i. Stagger stop- and start-times for shift schedules to reduce the quantity of workers at the jobsite at any one time to the extent feasible.
ii. Stagger trade-specific work to minimize the quantity of workers at the jobsite at any one time.
iii. Require social distancing by maintaining a minimum six-foot distance between workers at all times, except as strictly necessary to carry out a task associated with the project.
iv. Prohibit gatherings of any size on the jobsite, except for safety meetings or as strictly necessary to carry out a task associated with the project.
v. Strictly control "choke points" and "high-risk areas" where workers are unable to maintain minimum six-foot social distancing and prohibit or limit use to ensure that minimum six-foot distancing can easily be maintained between workers.
vi. Minimize interactions and maintain social distancing with all site visitors, including delivery workers, design professional and other project consultants, government agency representatives, including building and fire inspectors, and residents at residential construction sites.
vii. Prohibit workers from using others' phones or desks. Any work tools or equipment that must be used by more than one worker must be cleaned with disinfectants that are effective against COVID-19 before use by a new worker.
viii. Place wash stations or hand sanitizers that are effective against COVID-19 at entrances to the jobsite and in multiple locations dispersed throughout the jobsite as warranted.
ix. Maintain a daily attendance log of all workers and visitors that includes contact information, including name, address, phone number, and email.
x. Post a notice in an area visible to all workers and visitors instructing workers and visitors to do the following:
    1. Do not touch your face with unwashed hands or with gloves.
    2. Frequently wash your hands with soap and water for at least 20 seconds or use hand sanitizer with at least 60% alcohol.
    3. Clean and disinfect frequently touched objects and surfaces such as workstations, keyboards, telephones, handrails, machines, shared tools, elevator control buttons, and doorknobs.
    4. Cover your mouth and nose when coughing or sneezing or cough or sneeze into the crook of your arm at your elbow/sleeve.
    5. Do not enter the jobsite if you have a fever, cough, or other COVID-19 symptoms. If you feel sick, or have been exposed to anyone who is sick, stay at home.
    6. Constantly observe your work distances in relation to other staff. Maintain the recommended minimum six-feet distancing at all times when not wearing the necessary PPE for working in close proximity to another person.
    7. Do not share phones or PPE.

xi. The notice in section 2.f.x must be translated as necessary to ensure that all non-English speaking workers are able to understand the notice.

g. Implement cleaning and sanitization practices in accordance with the following:
   i. Frequently clean and sanitize, in accordance with CDC guidelines, all high-traffic and high-touch areas including, at a minimum: meeting areas, jobsite lunch and break areas, entrances and exits to the jobsite, jobsite trailers, hand-washing areas, tools, equipment, jobsite restroom areas, stairs, elevators, and lifts.
   ii. Establish a cleaning and decontamination protocol prior to entry and exit of the jobsite and post the protocol at entrances and exits of jobsite.
   iii. Supply all personnel performing cleaning and sanitization with proper PPE to prevent them from contracting COVID-19. Employees must not share PPE.
   iv. Establish adequate time in the workday to allow for proper cleaning and decontamination including prior to starting at or leaving the jobsite for the day.

h. Implement a COVID-19 community spread reduction plan as part of the Site-Specific Health and Safety Plan that includes, at minimum, the following restrictions and requirements:
   i. Prohibit all carpooling to and from the jobsite except by workers living within the same household unit, or as necessary for workers who have no alternative means of transportation.
   ii. Cal-OSHA requires employers to provide water, which should be provided in single-serve containers. Prohibit any sharing of any food or beverage and if sharing is observed, the worker must be sent home for the day.
   iii. Prohibit use of microwaves, water coolers, and other similar shared equipment.

i. Assign a COVID-19 Safety Compliance Officer (SCO) to the jobsite and ensure the SCO's name is posted on the Site-Specific Health and Safety Plan. The SCO must:
   i. Ensure implementation of all recommended safety and sanitation requirements regarding the COVID-19 virus at the jobsite.
   ii. Compile daily written verification that each jobsite is compliant with the components of this LCP Protocol. Each written verification form must be copied, stored, and made immediately available upon request by any County official.
   iii. Establish a daily screening protocol for arriving staff, to ensure that potentially infected staff do not enter the construction site. If workers leave the jobsite and return the same day, establish a cleaning and decontamination protocol prior to entry and exit of the jobsite. Post the daily screening protocol at all entrances and exit to the jobsite. More information on screening can be found online at: https://www.cdc.gov/coronavirus/2019-ncov/community/index.html.
   iv. Conduct daily briefings in person or by teleconference that must cover the following topics:
      1. New jobsite rules and pre-job site travel restrictions for the prevention of COVID-19 community spread.
      2. Review of sanitation and hygiene procedures.
      3. Solicitation of worker feedback on improving safety and sanitation.
      4. Coordination of construction site daily cleaning/sanitation requirements.

5. Conveying updated information regarding COVID-19.
6. Emergency protocols in the event of an exposure or suspected exposure to COVID-19.

v. Develop and ensure implementation of a remediation plan to address any non-compliance with this LCP Protocol and post remediation plan at entrance and exit of jobsite during remediation period. The remediation plan must be translated as necessary to ensure that all non-English speaking workers are able to understand the document.

vi. The SCO must not permit any construction activity to continue without bringing such activity into compliance with these requirements.

vii. Report repeated non-compliance with this LCP Protocol to the appropriate jobsite supervisors and a designated County official.

j. Assign a COVID-19 Third-Party Jobsite Safety Accountability Supervisor (JSAS) for the jobsite, who at a minimum holds an OSHA-30 certificate and first-aid training within the past two years, who must be trained in the protocols herein and verify compliance, including by visual inspection and random interviews with workers, with this LCP Protocol.

i. Within seven calendar days of each jobsite visit, the JSAS must complete a written assessment identifying any failure to comply with this LCP Protocol. The written assessment must be copied, stored, and, upon request by the County, sent to a designated County official.

ii. If the JSAS discovers that a jobsite is not in compliance with this LCP Protocol, the JSAS must work with the SCO to develop and implement a remediation plan.

iii. The JSAS must coordinate with the SCO to prohibit continuation of any work activity not in compliance with rules stated herein until addressed and the continuing work is compliant.

iv. The remediation plan must be sent to a designated County official within five calendar days of the JSAS's discovery of the failure to comply.

k. In the event of a confirmed case of COVID-19 at any jobsite, the following must take place:

i. Immediately remove the infected individual from the jobsite with directions to seek medical care.

ii. Each location the infected worker was at must be decontaminated and sanitized by an outside vendor certified in hazmat clean ups, and work in these locations must cease until decontamination and sanitization is complete.

iii. The County Public Health Department must be notified immediately and any additional requirements per the County health officials must be completed, including full compliance with any tracing efforts by the County.

l. Where construction work occurs within an occupied residential unit, any separate work area must be sealed off from the remainder of the unit with physical barriers such as plastic sheeting or closed doors sealed with tape to the extent feasible. If possible, workers must access the work area from an alternative entry/exit door to the entry/exit door used by

residents. Available windows and exhaust fans must be used to ventilate the work area. If residents have access to the work area between workdays, the work area must be cleaned and sanitized at the beginning and at the end of workdays. Every effort must be taken to minimize contact between workers and residents, including maintaining a minimum of six feet of social distancing at all times.

m. Where construction work occurs within common areas of an occupied residential or commercial building or a mixed-use building in use by on-site employees or residents, any separate work area must be sealed off from the rest of the common areas with physical barriers such as plastic sheeting or closed doors sealed with tape to the extent feasible. If possible, workers must access the work area from an alternative building entry/exit door to the building entry/exit door used by residents or other users of the building. Every effort must be taken to minimize contact between worker and building residents and users, including maintaining a minimum of six feet of social distancing at all times.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CORBY KUCIEMBA, an individual; ROBERT KUCIEMBA, an individual,

Plaintiffs,

vs.

VICTORY WOODWORKS, INC., a Nevada corporation; DOES 1-20, inclusive,

Defendants.

Case No.: 3-20-cv-09355-MMC

FIRST AMENDED COMPLAINT FOR DAMAGES; DEMAND FOR JURY TRIAL

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Plaintiffs CORBY KUCIEMBA and ROBERT KUCIEMBA allege as follows:

PARTIES

1. Plaintiffs CORBY KUCIEMBA and ROBERT KUCIEMBA ("Plaintiffs") are and were married at the time of the events described in this Complaint. Plaintiffs are members of the same household.

2. Defendant VICTORY WOODWORKS, INC. is a Nevada corporation with its principal place of business located at 340 Kresge Lane, Sparks, Nevada. Defendant conducts business throughout California, including in San Francisco, California.

3. The true names or capacities, whether individual, corporate, associate or otherwise, of Defendants, DOES 1 through 20, inclusive, are unknown to Plaintiffs who, therefore, sue said Defendants by such fictitious names and will seek leave of Court to amend this Complaint when the same have been ascertained. Plaintiffs are informed and believes, and upon such information and belief, alleges that each Defendant designated herein as a DOE was responsible, negligently or in some other actionable manner, for the events and happenings referred to herein which proximately caused injury to Plaintiffs as hereinafter alleged. Each reference in this Complaint to "defendant," "defendants" or a specifically named defendant refers also to all defendants sued under fictitious names. Plaintiffs are informed and believe, and based thereon allege, that at all times herein mentioned each of the defendants was the agent, employee and servant of each of the remaining defendants, and in doing the things hereinafter alleged was acting within the scope of such agency, employment, and servitude, with the knowledge and consent of each of the defendants. Whenever this Complaint makes reference to "defendants" or "defendants, and each of them," such allegations shall be deemed to mean the acts of defendants acting individually, jointly and/or severally.

SUBJECT MATTER JURISDICTION AND VENUE

4. This matter was filed on October 23, 2020 in the San Francisco County Superior Court and then removed by Defendant on December 28, 2020 on the basis of diversity jurisdiction. The Court has subject matter jurisdiction and is a proper venue because Mr. Kuciemba was employed by Defendant in San Francisco County. Furthermore, Mrs. Kuciemba contracted COVID-19 in San Francisco County as a result of Defendant's negligence. Mrs. Kuciemba was not employed by

Defendant and has no Workers' Compensation remedy.

GENERAL ALLEGATIONS

5. Severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) is a strain of coronavirus. This virus is responsible for causing the disease known as COVID-19.

6. COVID-19 is a highly contagious respiratory illness. One of the primary ways that COVID-19 spreads is between people through close contact and via respiratory droplets produced from coughs or sneezes. The virus can be devastating and even fatal especially for vulnerable populations, e.g. persons who are over 65 or who have pre-existing health conditions.

7. Like many infectious diseases, COVID-19 does not sicken every person it infects. According to the U.S. Centers for Disease Control ("CDC") humans can serve as "reservoirs" (e.g. a habitat for a virus) even if they do not show symptoms. The CDC's online textbook, Principles of Epidemiology in Public Health Practice explains that "Asymptomatic or passive or healthy carriers are those who never experience symptoms despite being infected." (See: https://www.cdc.gov/csels/dsepd/ss1978/lesson1/section10.html). In short, a healthy person who suffers no physical injury can still act as a reservoir for COVID-19 capable of transmitting the virus.

8. In addition to spreading through direct contact with another person, COVID-19 can also spread from inanimate objects (aka "fomites") such as clothing to humans when humans interact with the contaminated fomite. The CDC refers to this process as "indirect transmission" and the contaminated fomites are referred to as the "vehicles" of transmission.

9. The indirect transmission of an infectious disease described above is analogous to the indirect transmission of toxic asbestos fibers from fomites to humans. In both situations, the harmful substance (asbestos fibers/virus) can make its way from fomites to the human body when a person handles the contaminated fomites. See *Kesner v. Superior Court* (2016) 1 Cal. 5th 1132.

10. After the virus arose in an initial outbreak in Wuhan, China, it spread rapidly around the globe in early 2020. The World Health Organization declared COVID-19 a pandemic in March 2020. As of the filing of this First Amended Complaint, it is estimated that COVID-19 has infected over 119 million people and killed at least 2.63 million worldwide, with over 530,000 deaths in the United States alone.

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11. Beginning in March 2020, the Bay Area Counties issued Shelter in Place Orders that Order prohibited all nonessential travel and required individuals to otherwise remain at their place of residence in order to limit the spread of COVID-19.

12. In the early days of the pandemic, the CDC issued guidance stating that individuals exposed to people infected with COVID-19 must quarantine at home for 14 days after their last contact with the infected individual. This guidance is designed to limit the spread of the highly infectious virus.

13. Over time, these various Shelter in Place Orders were relaxed to allow for the safe reopening of the economy. Government agencies at the state, federal, and local level also issued various health orders targeted for specific industries. Most relevant here is San Francisco City and County's Order of the Health Officer No. C19-07c (Issued May 5, 2020) (the "Health Order").

14. The Health Order requires individuals engaged in the construction industry to follow strict health and safety guidelines to prevent the spread of COVID-19. The Health Order required that construction sites must "Establish a daily screening protocol for arriving staff to ensure that potentially infected staff do not enter the construction site. If workers leave the jobsite and return the same day, establish a cleaning and decontamination protocol prior to entry and exit of the jobsite." Construction sites were also required to "[p]ost the daily screening protocol at all entrances and exits to the jobsite."

15. The Health Order also required construction sites to provide notices to employees that they should "not enter the jobsite if you have a fever, cough, or other COVID-19 symptoms. If you feel sick, or have been exposed to anyone who is sick, stay at home."

16. Beginning on May 6, 2020 Plaintiff Robert Kuciemba began working for Defendant at a construction jobsite in San Francisco (the "Premises").

17. Prior to July 2020, the Kuciembas strictly complied with the Shelter in Place orders in their jurisdiction. Mrs. Kuciemba, who is 65 and a high-risk individual, stayed at home, and avoided leaving her home for non-essential purposes. Mrs. Kuciemba also avoided seeing other people outside of her household. Mr. Kuciemba also followed all recommended safety precautions to protect himself and his wife and minimized his exposure to other people other than his co-workers. In short, the only

place where Mr. Kuciemba frequently came into contact with other persons outside of his household, and therefore was most likely exposed to COVID-19, was at Defendant's workplace on the Premises.

18. In or around July 3, 2020, Defendant transferred workers from a jobsite in Mountain View, California jobsite operated by Defendant to Mr. Kuciemba's location.

19. Defendant transferred these workers from its Mountain View jobsite after workers at the same location became infected with COVID-19. Defendant knew or should have known that its workers at the Mountain View jobsite were all potentially exposed to COVID-19. Defendant was also aware of the CDC guidelines and the San Francisco Health Order that would have prohibited these potentially infected individuals from entering the Premises without properly quarantining.

20. Instead of quarantining the individuals from its Mountain View jobsite, Defendant decided to put profits over safety by commingling the Mountain View workers with workers at the Premises including Mr. Kuciemba. Defendant was well aware of the dangers posed by COVID-19, including that it was highly infectious and potentially lethal for older, high-risk individuals. Despite this knowledge, Defendant knowingly, recklessly, and willfully failed to follow all health and safety protocols issued CDC and the Health Order when it permitted potentially infected individuals to enter and re-enter the Premises.

21. One or more of these workers from the Mountain View jobsite was in fact infected with COVID-19. In early July 2020, Mr. Kuciemba was forced to work in close contact with workers at the Premises, who came from the infected Mountain View jobsite, and one or more of these workers then infected him with COVID-19.

22. Mr. Kuciemba's last day on the job at the Premises was July 10, 2020. Mr. Kuciemba carried the virus back to his household where Mrs. Kuciemba was infected. Mr. Kuciemba's body, clothing, and/or personal belongings served as a vehicle for the virus and Mrs. Kuciemba was ultimately infected with the virus. Mrs. Kuciemba repeatedly came into contact with potential vehicles for the virus, including fomites such as Mr. Kuciemba's clothing (i.e. through preparing laundry) and Mr. Kuciemba's personal effects that he took with him to work. Thus, Mrs. Kuciemba was exposed to COVID-19 through direct contact with Mr. Kuciemba and/or indirectly through fomites such as his clothing and personal effects that served as a vehicle for the virus.

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23. On information and belief, the indirect transmission of COVID-19 from fomites to Mrs. Kuciemba is one of the probable modes of transmission, with transmission from Mr. Kuciemba's body being another probable mode of transmission.

24. Within the next 1-2 days of Mr. Kuciemba's last day on the job on the Premises, Mrs. Kuciemba began experiencing COVID-19 symptoms. Mrs. Kuciemba tested positive for COVID-19 on July 16, 2020.

25. Mrs. Kuciemba was ultimately hospitalized after she developed respiratory symptoms from COVID-19. Mrs. Kuciemba, who is 65 and a high risk individual due to her age and health, developed a severe infection and remained hospitalized until early August 2020. During this time, Mrs. Kuciemba had to be kept alive on a respirator.

26. The actions of Defendant were a substantial factor in causing Plaintiff Mrs. Kuciemba's severe and traumatic injuries resulting from the COVID-19 infection to Mrs. Kuciemba.

27. Defendant committed various wrongful acts, including without limitation, Defendant:

(a) Improperly operated, managed, used, maintained and controlled the Premises in violation of applicable building codes and federal, state and municipal regulations including without limitation OSHA, Cal OSHA and the San Francisco Health Order as well as CDC guidelines;

(b) Failed to properly screen employees for COVID-19 who were entering the Premises;

(c) Failed to protect employees from COVID-19 symptomatic (or asymptomatic persons) or potentially infectious persons;

(d) Failed to cleanse and sanitize the workspace at the Premises;

(e) Failed to provide personal protective equipment;

(f) Failed to implement a social distancing policy;

(g) Failed to otherwise follow the health and safety mandates required by OSHA, Cal OSHA, and/or the San Francisco Health Order as well as CDC guidelines;

(h) Failed to warn Mr. Kuciemba, and other persons lawfully on the Premises property, of the danger presented by the workers from the Mountain View job site

who were working at the Premises when Defendant knew, or in the exercise of reasonable care should have known, that the warnings were necessary to prevent injury to Plaintiffs, residents and/or visitors at the Premises;

(i) Failed to make a reasonable inspection of the Premises when Defendant knew, or in the exercise of reasonable care should have known, that the inspection was necessary to prevent injury to Plaintiff, residents and/or visitors at the Premises;

(j) Allowed the aforementioned premise to remain in a dangerous condition, for an unreasonable length of time; and/or

(k) Failed to otherwise exercise due care with respect to the matters alleged in this Complaint.

28. Mr. Kuciemba is bringing a claim for Loss of Consortium in this Court arising from injuries to his wife.

FIRST CAUSE OF ACTION
Negligence
(Plaintiff Mrs. Kuciemba Against all Defendants)

29. Plaintiffs re-allege and incorporate the allegations set forth in paragraphs 1–28 of this Complaint.

30. Defendant breached the duty of care owed to Plaintiffs when it knowingly, recklessly, and willfully acted as set forth above. Defendant owed a duty to individuals in Mr. Kuciemba's household (e.g. Mrs. Kuciemba) to reasonably protect its workers and their households from becoming infected with COVID-19. *Kesner v. Superior Court* (2016) 1 Cal. 5th 1132. This duty includes, but is not limited to, following the binding Health Order and CDC guidelines. Defendant exposed Mr. Kuciemba to COVID-19 at the jobsite and it was foreseeable that Mrs. Kuciemba, a member of the same household as Mr. Kuciemba, would also develop COVID-19.

31. Defendant's breach of the duty of care to Ms. Kuciemba was the actual and proximate cause of Plaintiffs' damages alleged herein.

32. Mrs. Kuciemba is making a direct claim for damages because she was directly injured by Defendant's actions. She is not making a "derivative injury" claim. The derivative injury rule

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applies when the plaintiff, in order to state a cause of action, *must* allege injury to another person—the employee. For example, one spouse cannot have a loss of consortium claim without a prior disabling injury to the other spouse. *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal. 4th 991, 998-999. In this case, it is irrelevant whether or not Mr. Kuciemba was injured; he could have been completely asymptomatic with COVID-19 (i.e. suffering no physical injury because asymptomatic individuals only serve as a reservoir for the virus but are not sick or injured themselves) or the virus could have been indirectly transmitted via fomites such his clothing or personal belongings. Mrs. Kuciemba's cause of action is legally and factually based on the premise that *she* was physically injured. So long as Mrs. Kuciemba can prove, more likely than not, that Defendant's negligence was a substantial factor in causing her own personal injuries, Mrs. Kuciemba has properly stated a direct claim for negligence.

33. Mrs. Kuciemba's claims are appropriately adjudicated in this Court because she is making a claim for her own direct injuries and, because she was never an employee of Defendant, she has no Workers' Compensation remedy. To deny Mrs. Kuciemba a remedy here would prevent her from exercising a core right under California law: "For every wrong there is a remedy." *Civ Code* § 3523.

SECOND CAUSE OF ACTION
Negligence Per Se
(Plaintiff Mrs. Kuciemba Against all Defendants)

34. Plaintiffs re-allege and incorporate the allegations set forth in paragraphs 1–33 of this Complaint.

35. Defendant's actions constitute a violation of San Francisco City and County's Order of the Health Officer No. C19-07c (Issued May 5, 2020) and all related state, federal, and local statutes, regulations, and orders including without limitation OSHA and Cal OSHA. Plaintiff Mrs. Kuciemba is in the class of persons protected under such state, federal, and local statutes, regulations and orders.

36. Defendant's violation of the above laws/regulations/orders was a substantial factor in bringing about Plaintiff Mrs. Kuciemba's harms and losses.

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37. As a direct and proximate result of Defendant's negligent acts and omissions, Mrs. Kuciemba was injured and is entitled to recover compensatory damages in an amount according to proof.

THIRD CAUSE OF ACTION
Negligence – Premises Liability
(Plaintiff Mrs. Kuciemba Against All Defendants)

38. Plaintiffs re-allege and incorporate the allegations set forth in paragraphs 1–37 of this Complaint.

39. Defendant, as owners and/or operator of the Premises, by and through their agents, servants, and/or employees, as the persons responsible for the maintenance of the Premises, acted with less than reasonable care and committed one or more of the following careless and negligent acts and/or omissions as described above.

40. The dangerous condition on property owned or controlled by Defendants was the actual and proximate cause of the injuries alleged herein.

FOURTH CAUSE OF ACTION
Loss of Consortium
(Plaintiff Mr. Kuciemba Against All Defendants)

41. Plaintiffs re-allege and incorporate the allegations set forth in paragraphs 1–40 of this Complaint.

42. Mr. Kuciemba and Mrs. Kuciemba are and were married at all relevant times.

43. Prior to July 2020, Mrs. Kuciemba was able to and did perform her duties as a wife.

44. As a direct and proximate result of the conduct, acts, and/or omissions of defendants, and each of them, as set forth herein above, Mrs. Kuciemba has been unable to perform the necessary duties of a spouse including but not limited to the work and services usually performed in the care, maintenance and management of the family home, and she will be unable to perform such work, services and duties in the future. By reason thereof, Mr. Kuciemba has been deprived and will be deprived of the love, companionship, comfort, care, assistance, protection, affection, society, moral support, and the loss of enjoyment of sexual relations.

45. Plaintiffs reserve the right to prove the amount of damages at trial. The amount of compensatory damages sought will be in excess of the amount sufficient to establish jurisdiction.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that judgment be entered against Defendant follows:

1. For general and compensatory damages, including damages for pain and suffering, loss of enjoyment of life, lost wages, loss of consortium, lost earning capacity and emotional distress damages, in excess of the amount sufficient to establish jurisdiction according to proof at trial;
2. For prejudgment interest on all amounts claimed;
3. For costs of suit; and
4. For such other and further relief as the Court may deem just and proper.

Date:March 18, 2021

VENARDI ZURADA LLP

/s/ Martin Zurada

Martin Zurada
Attorneys for Plaintiffs
CORBY KUCIEMBA and
ROBERT KUCIEMBA

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury.

Date:March 18, 2021

VENARDI ZURADA LLP

/s/ Martin Zurada

Martin Zurada
Attorneys for Plaintiffs
CORBY KUCIEMBA and
ROBERT KUCIEMBA

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CORBY KUCIEMBA, et al.,

Plaintiffs,

v.

VICTORY WOODWORKS, INC.,

Defendant.

Case No. 20-cv-09355-MMC

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; AFFORDING PLAINTIFFS LEAVE TO AMEND

Before the Court is defendant Victory Woodworks, Inc's "Motion to Dismiss for Failure to State a Claim," filed January 5, 2021. Plaintiffs Corby Kuciemba and Robert Kuciemba have filed opposition, to which defendant has replied. The matter came on regularly for hearing on February 12, 2021. Mark Freeman of Venardi Zurada LLP appeared on behalf of plaintiffs; William Bogdan of Hinshaw & Culbertson LLP appeared on behalf of defendant.

Having read and considered the parties' respective written submissions as well as the arguments of counsel at the hearing, the Court, for the reasons stated in detail on the record at the hearing, rules as follows:

1. The Fourth Cause of Action, titled, "Public Nuisance," fails for lack of standing.

2. The First, Second, Third, and Fifth Causes of Action, titled, respectively, "Negligence," "Negligence Per Se," "Negligence – Premises Liability," and "Loss of Consortium," are barred by the exclusive remedy provisions of California's workers' compensation statutes. See Cal. Labor Code §§ 3600, 3602.

Accordingly, the Motion to Dismiss is hereby GRANTED, and plaintiffs are hereby

afforded leave to file, no later than March 19, 2021, a First Amended Complaint.

IT IS SO ORDERED.

Dated: February 22, 2021

MAXINE M. CHESNEY
United States District Judge

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MAXINE M. CHESNEY, JUDGE

CORBY KUCIEMBA, an individual; ROBERT KUCIEMBA, an individual, Plaintiffs, VS. VICTORY WOODWORKS, INC., a Nevada corporation; DOES 1-20, inclusive, Defendants.	)	**No. 20-cv-9355-MMC** San Francisco, California Friday, February 12, 2021

TRANSCRIPT OF PROCEEDINGS VIA ZOOM WEBINAR

APPEARANCES: (via Zoom Webinar)

For Plaintiffs:

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BY: MARK FREEMAN, ESQ.

For Defendant Victory Woodworks, Inc.:

HINSHAW & CULBERTSON LLP
One California Street, 18th Floor
San Francisco, California 94111
BY: WILLIAM BOGDAN, ESQ.

Reported By: Katherine Powell Sullivan, CSR #5812, CRR, RMR
Official Reporter - U.S. District Court

Friday - February 12, 2021 **2:02 p.m.**

P R O C E E D I N G S

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THE CLERK: Calling Civil case number 20-9355, Corby Kuciemba, et al. versus Victory Woodworks.

Will counsel please state your appearances for the record, starting with plaintiffs' counsel.

MR. FREEMAN: Good afternoon, Your Honor. Mark Freeman for plaintiffs.

THE COURT: Good afternoon. Thank you.

MR. BOGDAN: Good afternoon, Your Honor. William Bogdan for defendant and moving party Victory Woodworks.

THE COURT: Very good. Thank you.

And, also, I'm glad that you were able to make the switch to the afternoon for this hearing. I'll tell you, if you had been on this morning, you wouldn't have gotten heard. It was the worst in terms of mornings. We went from 9:00 to 12:00, with one short break in between, and then kept going after that until 1:00 o'clock. So it's been a really, really long day already.

And, unfortunately, this is a case with a number of issues that need to be discussed. It's an interesting case, somewhat of first impression, even though neither one of you wants to say it is.

And I'm just stopping for a minute because there's a weird

noise outside the building, and it's distracting, but I don't know what it is. It almost sounds like fireworks going off without any break, and it's out in the street somewhere.

Okay. Also, I'm wearing a mask not because I'm super paranoid about COVID-19 but because I had some surgery on my face and, frankly, I don't want to scare anybody by not having a mask on.

Okay. I was kind of trying to see where we should start. Just assume, you know, I know what the various statutes are and the various cases. I read a lot of cases in connection with this -- cases you cited, cases cited in cases you cited -- hoping to have some definitive answer, which, of course, there isn't.

I do have some questions, and I thought maybe I'll just pose those to start with, and then we can get rolling from there maybe.

Okay. Let's see. Well, as you know, the defendant has a number of grounds on which they're moving. They're moving on workers' compensation exclusivity. If they didn't prevail there, they're moving on lack of duty. And, in any event, that -- this is a case then which the Court should apply primary jurisdiction doctrine.

Let's see. What else? Did I leave any out on that? I think that was it.

Let me hit primary jurisdiction for a moment, just the

last point first. Is this argument going only to the injunctive relief that's being sought in connection with the public nuisance claim or is it broader than that, Mr. Bogdan?

MR. BOGDAN: Well, the concept in the papers was that, conceivably, the Court could find that the personal injury claim was either covered by the workers' comp exclusion or there's no duty.

There'd still potentially be an injunctive relief/equitable relief question out there. So that's primarily the direction of that.

THE COURT: Okay.

MR. BOGDAN: I mean, if the Court were to rule that primary jurisdiction would also take care of the personal injury claim, I would have no objection.

THE COURT: I didn't think it was particularly applicable, but I wanted to just make sure that there was a limitation here because, either way, I think there may be a problem with bringing public nuisance as a claim just because of the law on public nuisance and, in particular, standing.

So, Mr. Freeman, you can be thinking about that.

But, ordinarily, you have to have an injury that's not just a bad form of what the law is supposed to be protecting against but something really different.

I guess they're just afraid anybody who could potentially be affected by some noxious circumstance could come in and we'd

be overrun with plaintiffs. You have to have, essentially, a separate and almost unforeseeable injury to have it fly.

So I'll talk to you about that. If I find that she has not pled standing, we don't even have to get into primary jurisdiction.

As Mr. Freeman says, if you wanted to send this somewhere, you didn't really spell out exactly who it was going to be and where it was going to go and what the limitations are for their particular bailiwick. And so, okay, but I'll just bring that up so that it's kind of there and we don't forget about it.

All right. It wasn't clear to me, again, Mr. Bogdan, whether in bringing up different ways that one can be exposed to COVID-19 -- and irrespective, by the way, Mr. Freeman, with whether I were to take judicial notice of commercial establishments in the plaintiffs' neighborhood, let's say I don't do that, it doesn't really matter unless she lives on a desert island. Everybody's somewhere where there's something that you could be exposed to or at which you could be exposed.

But is the defendant, Mr. Bogdan, challenging the complaint under *Iqbal* and *Twombly* as either not enough facts or conclusory language, or are you just saying if you feed in what you could just take either best common knowledge or by judicial notice, the claim is defeated for that reason?

MR. BOGDAN: The basic thrust of that argument is that you may make whatever allegations you wish, but it has to be

tethered to this planet. I don't think the Court is required to be ignorant of what is now accepted as a universal norm in regards to the nature of COVID and how it is transmitted so that, you know, it is -- it goes beyond the strict case law that says you must look at this only in this box.

THE COURT: Okay. I had some concerns about whether the language itself might be considered conclusory. And it might go to the question of duty, also, of just what happened here.

And I'm mainly wanting to ask you, Mr. Freeman, what you understand did happen, how much you do know about what went down at Mountain View, or if Mr. Bogdan knows, and then what happened when these people, or how many of them, or if all of them came up, and why were they -- and did they close Mountain View or not, just, you know, kind of a background scenario.

In looking -- and I'm just jumping around, but eventually I'll make this more orderly, but just in touching various points and looking at how you frame the concept of duty and whether you start with some very, very broad duty and then decide whether the particular specific facts are an exception or whether you start with those specific facts and call that the duty.

And in one of the ***Williams*** cases the Court gave that as an option. Can you even look at it one way or the other. And it may be that one may need more facts to know whether one

wants -- is able to really form a question of duty.

Okay. Let's see. I've written down some questions, but I'll tell you, my handwriting is so bad I'm having trouble reading. Give me a second here.

MR. FREEMAN: I have the same problem too, Judge.

THE COURT: Oh, good. Well, I'm not alone in that.

Then, yeah, is the defendant then asking that we dismiss the claim for injunctive relief and tell the plaintiff and/or her husband to go to OSHA? Or how is that working?

MR. BOGDAN: Yes. Your Honor, you made brief mention earlier about -- I'll call it the "scattered" argument. We only cited the same investigative agencies as plaintiff did in the complaint, and there is no pled facts that indicate that plaintiff ever sought any relief from any of those entities.

THE COURT: Okay. Did I use "scattered" to describe the entities? I might have just said scattered now, but it didn't have anything to do with what you allege.

The allegation from -- or the argument by Mr. Freeman is he didn't give us any idea of where you wanted this to go if the Court didn't hear it.

MR. BOGDAN: Right. It's plaintiffs' papers that said scattered.

THE COURT: Oh, he said it. Oh, well, he may have. I really didn't pay too much attention to that adjective. Okay.

MR. BOGDAN: But, yes, a dismissal would be warranted.

THE COURT: Okay. All right. Are you arguing that -- maybe you haven't addressed it because you don't have to. But if this were not a bar by workers' comp, clearly, for Mr. -- is it pronounced Kuciemba? How is it pronounced, Mr. Freeman?

MR. FREEMAN: It's pronounced Kuciemba.

THE COURT: All right. We know his claim is barred, clearly, under workers' comp, not for loss of consortium necessarily, but his direct claim for catching COVID.

And if it weren't an employer situation -- let's just say he came in as a visitor and, you know, they let him get shown around by somebody who they knew was sick -- would you be arguing, then -- well, let's just use our case.

Are you arguing that there is no duty to the husband, that they really -- maybe I'll put it this way -- that there was no negligence as to Mr. Kuciemba?

MR. BOGDAN: Well, as to the employee, Mr. Kuciemba, there is no negligence requirement --

THE COURT: I know.

MR. BOGDAN: -- for purposes of workers' comp. And our position would be that, certainly, we followed whatever instructions were required, but that we now have a presumption that if you get a COVID diagnosis from a job, it is presumed that it came from the job.

THE COURT: Where is that presumption?

MR. BOGDAN: I'm sorry, where is it?

THE COURT: Yeah. In other words, are you saying there's a presumption that if you work at a particular place and you get COVID, you got it there? That would be contrary to everything you've been arguing.

MR. BOGDAN: Well, Your Honor, I think it's a recognition that, for workers' compensation purposes, the Court -- I'm sorry -- the legislature has decided we need these essential businesses open --

THE COURT: Oh, I see -- I see what you're saying. Okay.

MR. BOGDAN: Right.

THE COURT: You're saying for purposes of making out a comp claim, that it's presumed if you're sick, you got it at work?

MR. BOGDAN: That is the current state of the law.

THE COURT: Okay. Maybe you don't have to say one way or the other whether -- if he wasn't, you know, an employee, they would have no duty to him. The focus here is on the wife, so --

MR. BOGDAN: Correct. And I would -- if he -- if Mr. Kuciemba was a customer of a business, that business would owe a duty to the customer who is standing in the store.

THE COURT: Okay.

MR. BOGDAN: It doesn't owe a duty to people who never visit the store.

THE COURT: Okay. So the position is, essentially, even if there was -- even if you have a duty and even if it was breached as to a customer, it stops there, that you just can't expand it to everybody they came in contact with.

MR. BOGDAN: That is correct.

THE COURT: All right. Mr. Freeman says, well, we're not trying to, we're just trying to expand it to the household, and that's what the asbestos coming home case was about. So, all right.

All right. Here's one. Okay. What's an injury? Okay. In other words, for purposes of compensation law and coverage under the -- or the bar, shall we say, from workers' compensation law, if you have -- we'll start this way.

Let's say you have some condition or injury that, say, you got at work, but it really doesn't rise to whatever they're going to say you can get money for. You still would be barred, right, by the workers' compensation law and couldn't bring a civil case.

MR. BOGDAN: Correct.

THE COURT: Okay.

MR. BOGDAN: And -- and an asymptomatic person may be a good analogy to that. They are injured by the virus, they just haven't suffered any damages.

THE COURT: Okay. Well, that would be my question, what's the definition of injury. If you are carrying it, so to

speak, and could give it to someone else, you are essentially infected with the virus. And the fact that you then are asymptomatic may not mean that you're not injured.

But if Mr. Freeman is taking the position that you're not injured, you're just -- kind of like the clothing in the asbestos case, that you just sort of brought this home clinging to you in some way, then I want to see what he's saying about that.

Did you want to weigh in on that then, Mr. Freeman, at all?

MR. FREEMAN: Yes, Your Honor. I guess, to clarify -- and I realize that, you know, you have the *Snyder* case and, you know, this other case law that tries to kind of distinguish between, you know, derivative injury and a -- what I'm calling a direct injury. I don't know that the case law actually uses the phrase "direct injury," but --

THE COURT: But I know what you mean.

MR. FREEMAN: Right. And so, I guess, what I'm saying is, for purposes of Mrs. Kuciemba, it doesn't matter if her husband was injured or not. Her injuries aren't legally dependent -- it's not like a loss of consortium claim where, you know, husband gets hit in a car accident and then wife has this derivative claim for loss of consortium, emotional distress, things like that. Obviously, that is subsumed by workers' comp.

This is more like -- and I know it's not a perfect example, you know, it's as if the two of them were in a car together driven by, you know, an employee of the defendant, and then they get into a -- the guy gets into a car accident. Certainly, Mr. Kuciemba, you know, he's got a worker's comp claim because he gets injured. Mrs. Kuciemba, she's just there, she's hitching a ride. She would not have -- she's got no workers' comp remedy. She should be able to bring a direct claim for injuries against the driver and the employer of the driver.

THE COURT: Well, I know there are distinction -- Hang on for a minute, Mr. Bogdan.

I know there are distinctions between the body of cases on wrongful death and loss of consortium, bystander emotional distress, that you can draw between that case and this. It's what puts this case in a little different light. And it's one of the reasons that I spent as much time as I did looking into it, and I want to get to that eventually.

These are sort of the easy questions, okay. And so the easy question is, are you saying the husband -- are you saying that someone who is asymptomatic but infected with the virus, in a position to be able to convey it to another person, is or is not, quote-unquote, injured?

MR. FREEMAN: Yes, I would argue -- my position is that, first, if he was asymptomatic, he's, in fact, injured

because they now have a pathogen living in their body that they did not have before.

THE COURT: Okay. So they would be -- an infected person is injured, although not capable maybe of getting recovery for it --

MR. FREEMAN: Sure.

THE COURT: -- under workers' comp. Workers' comp is reasonably restricted; there are reasons for that. But I could see how someone who's asymptomatic could have various claims that are more economic rather than non-economic; for example, where, you know, okay, I got infected and I tested positive and I lost three weeks of work as a result of it or something like that. That may not be recoverable under a comp claim, I'm not sure.

You know, I just don't know that much about the ins and outs of what you can get recovery for under workers' compensation. It's one of the reasons I asked some of the questions I did.

Is the defendant arguing that even if the wife has a claim, the husband shouldn't have a loss of consortium claim based on it, or is it kind of a package deal for you, Mr. Bogdan?

MR. BOGDAN: That will be a package deal.

THE COURT: Okay.

MR. BOGDAN: Certainly, a loss of consortium claim

can't exist independently of the wife's claim.

THE COURT: Right. Okay.

MR. BOGDAN: But if her claim is extinguished, his claim is extinguished.

THE COURT: Okay. All right. Let me lay a little groundwork here so I can put this into, I don't know, a category, if you will.

Mr. Bogdan says, okay, this is -- by the way, is the case pronounced *Salin*? "Sailin"? "Sawlin?" Anybody know?

It's S-A-L-I-N, I think, for the court reporter.

MR. BOGDAN: I don't think anybody would be offended with either pronunciation. So whatever you choose, Your Honor, that'll be it.

THE COURT: Okay. And Mr. Freeman is nodding. So, all right. I'll just say *Salin*.

Mr. Bogdan says, oh, we've got a case out of the California Court of Appeal, *Salin*, and it has extended the bar to claims that are not loss of consortium, not wrongful death, or bystander emotional distress, all based on the phrase "any person in the operative statutes," and in particular Section 3600 of the Labor Code, and 3602 -- I think, 3601 is in the middle for co-worker liability as opposed to the employer liability.

Okay. All right. All right. *Salin* is a case that there was no way that plaintiff was going to ever recover under any

theory you could possibly bring. You might say in the vernacular it was kind of the *hutzpah* case of the week, or, essentially, something akin to the criminal defendant who's accused of murder, found guilty, and throws -- murders his parents and throws himself on the mercy of the court for being an orphan.

This is someone who claimed to have been driven crazy by stressful work conditions. He then killed his two daughters, and brought a wrongful death action based on that. And the chances of anyone winning that case are pretty slim in general. And he didn't win.

What the Court ended up finding was, first, looking at wrongful death just outside the workers' compensation, I guess, law, and just under tort law, if the decedent had lived and couldn't bring a claim or did live and, frankly, brought one and lost, that the survivor couldn't bring a wrongful death claim. If the decedent loses or would lose, then so does the surviving family member who's bringing wrongful death.

So they said, okay, let's look at what would have happened to the daughters if they had just been injured and not died. They couldn't bring a claim against the employer because it's barred by workers' comp and, therefore, the father can't bring a wrongful death claim.

That case has been mentioned in later cases and perhaps questioned as to how far one should take it. No one has

overruled it yet specifically, and it's been around a long time. It is, however, a case on aberrant facts, and one has to consider that to a certain extent.

Okay. Mr. Freeman is relying on the *Kesner* case, in part, which is the case where the husband brings asbestos fibers home on his clothes and the wife gets mesothelioma doing laundry or otherwise.

And that never was a worker's comp claim case. It was never raised. I double-checked. Not only wasn't it discussed, it was never raised. And that's probably because she didn't catch mesothelioma from him.

And, as pointed out, the employer has a duty not to let this stuff float around, you know, in the environment either on the work site or beyond. And he became -- the husband became just the conduit of the material to the wife.

And there was a nephew, too, I guess, in that case, but I'm just going to focus on the husband-wife. It's closer.

Okay. Then we have the *Snyder* case, and that's a case that falls into a large number of cases involving injured mothers and -- who are carrying fetuses, who then either aren't born or are born with birth defects or are born and shortly die from whatever the encounter was that the mother had at the workplace.

And, of course, Mr. Freeman would rely on that case as well. And that certainly is a case that looked at the bar from

compensation -- by workers' compensation.

And what the courts have ended up doing pretty much all around the country, interestingly, and contrary to the *Salin* case, these are all cases that are very sympathetic, and essentially everybody has pretty much said at this point, first of all, the law treats fetuses as just regular people, so we'll just look and see if they would have a claim.

And they've decided that all these fetuses were exposed at essentially the same time the mother was, at the work site, and, therefore, they just simultaneously got injured. And in some instances they found the mother didn't really get injured at all, but it's just a case that fetuses are far more sensitive to these kinds of changes in environment and cause far more serious consequences if there's an aberration in that environment that shouldn't have been there.

They eventually sort of say if the fetus had, you know, been holding its mother's hand and standing there at the work site, there would have never been an issue of bar of workers' comp, so we're just going to put the child inside the mother and, you know, there's kind of a tube where things go through and, okay, no problem.

Snyder took a good long look at *Bell*, which was a case that -- to show you how old I am, I know all the judges who were in the *Bell* case, and I think they've all passed away by this time, but *Bell* had gone the other way with one dissent by

Justice White. And *Snyder* took some pains to distinguish -- well, to show why it was wrongly decided.

Now, here's the problem I have in terms of this whole issue. Our case is a case where you have a husband who is allegedly exposed to and becomes infected with because of that exposure -- well, he's exposed at the workplace. And because of that, he alleges that he became infected by reason of that exposure at the workplace, and then he came home and he gave it to his wife. And she is our plaintiff.

If he didn't -- if he doesn't have it, according to the complaint, she wouldn't have it. And if he didn't get it at work, then she doesn't have a claim.

So right now, as a factual matter, she has a claim that can only survive if there was, essentially, a wrong done to the husband. In other words, if this hadn't been an employer bar, then if there was negligence of one sort or another as to the husband, then that's the only way, really, that she can recover.

And that's, one could say, okay, derivative. Or you could say, well, it's different than those cases where everybody agrees as to derivative. And in that little group of cases that we talked about -- loss of consortium, wrongful death, et cetera, et cetera -- those plaintiffs never, ever, ever can bring those claims without having injured the other person. So the injured husband, we'll just say. Make it easy.

In a case like ours, yes, you could bring a negligence case without having an injured spouse. But in our case that isn't the factual case.

So the question is, do the -- does the California Supreme Court, who hasn't weighed in on this yet, directly at least -- we have to try to figure out what it would do. Is it going to say they're going to draw a bright line down after those cases that can never, ever be brought except as derivative ones, and just say we're stopping there?

If you've got any other kind of claim where somebody got hurt, we're just going to let them bring it, not barred by workers' compensation? Are they going to look at the facts and either draw lines individually or at some farther point down the road that they haven't articulated?

We -- we don't know yet for certain which way they would go. So that is how I'm kind of framing -- framing this up in reading the cases.

Now, I will tell you that there was one thing that tended to sway me somewhat toward a bar, but it's not -- it hasn't bowled me over yet, so we'll see where this all goes.

In reading ***Snyder*** in particular -- so that's the case that had a footnote at least possibly criticizing ***Salin***, and I think in one other case, I think it was ***Herwich***.

In Herwich -- that was another one. Let me that grab that for a second, because they just added to the confusion by

citing both *Salin* and *Snyder* and not helping us at all in that respect. But let me grab that if I can. Wait a minute. I've just got a bunch of cases here. Yeah. Hang on a minute. All right.

All right. Then in talking about what happened there, where they're discussing a case that really was not a workers' comp defense but a different law that could bar someone, and trying to draw some guidance from other statutory schemes that might bar a claim, that was one, I think, where uninsured drivers was -- yeah, uninsured drivers can't get non-economic damage.

And so the question was the daughter who was driving wasn't insured, but her parents were -- you know, weren't driving. And they questioned whether the law barred their emotional distress in which -- you know, aspects of wrongful death, for example, as opposed to pecuniary loss.

All right. So they're just talking about trying to look at wrongful death cases involving a statutory defense. And they say, well, we're really looking at the language of the statutes here. And they say, thus, the exclusive -- this is a quote, by the way.

> "Thus, the exclusivity of workers' compensation prevails as to heirs in light of Labor Code Section 3600, which provides that liability under the Workers' Compensation Act is" -- internal quote -- "'in lieu of any

other liability whatsoever to any person for the death of any employee.'" I guess, closed quote, closed internal quote.

And then they go on to say, "See also *Salin*, but see *Snyder*." Well, that was not helpful. All right.

So going back to *Snyder* and trying to perceive what they were doing here -- maybe I'll read the footnote there, too.

In Footnote 2, they say, While we -- this is a quote.

> "While we have no occasion here to rule on the correctness of the decision in *Salin*, we observe that Sections 3600 to 3602 do not directly support the *Salin* court's extension of the derivative injury rule to third-party injuries allegedly caused by an injured employee's post-injury acts," closed quote.

Okay. Well, what do they mean exactly by "post-injury acts"? Do we have any post-injury acts here? Is the husband acting by coming home, giving his wife a kiss on the doorstep? I have no idea.

Okay. But in looking at how they were analyzing this case -- and this was one of the fetus cases. The mother was exposed, I think, to carbon monoxide at work. It effects the ability to carry oxygen in red blood cells. It made her feel generally off and dizzy, kind of nauseous or whatever, and the child had permanent brain injury from lack of enough oxygen during development.

In that case, they had an opportunity, if they wanted to, to say, okay, we're going to draw the bright line now. This is a case that doesn't have anything to do with loss of consortium, wrongful death.

This kind of a plaintiff, if they'd just been there, you know, with mom, can be injured. They could be injured in a million ways. It's not the kind of plaintiff who's stuck in bringing this kind of a cause of action, always tied to someone else's injury.

And they didn't say, well, we're just going to drop the curtain here and right after we've gotten through talking about bystander emotional distress, that's three and that's good enough for us, that's it. No, they don't say that.

They went -- that would have been easy. They didn't do that. They went through a long discussion, essentially, of the medical and factual manner in which this child got injured in order to say that it didn't come through the mother.

In discussing the *Bell* case -- and *Bell* was another sad case in which a mother at Macy's apparently had a ruptured uterus, not because of her work.

So her uterus erupts at work but not because of her work, and then she gets one of these Nurse Ratchets, who, essentially, at Macy's just say, oh, it's fine, you've got a little stomachache, there's hardly anything wrong with you, just go lie down.

And the next thing you know she's in major distress and has to be seen by someone who can really do something, and by this time the child has been damaged and, I think, doesn't survive for very long.

Now, in that case -- all right. So the Court there had done a more -- a little bit more of a simplistic approach and said mother hurt, child hurt, child must have gotten hurt because the mother got hurt, and that's the end of our discussion.

And in ***Snyder***, they said no, no, you went through it all wrong, you should have gone along with the dissent that went through the whole causation discussion. And they then, again, went through this whole long analysis about how it wasn't the ruptured uterus that hurt the child, it was the delay, and the ruptured uterus didn't happen at work, and even if the mother was hurt, oh, it wasn't really that big a deal with respect to the child's injury, we're not going to find that it's derivative.

So in all of these they seem to leave open that there's some kind of opportunity here to show as a factual matter that a claim is dependent or collateral, almost like the person's collateral damage. And they use both derivative and collateral in all these cases in discussing barred claims.

So it leaves me with an open area of the law that I don't think either of you has a case right on point. And if you did,

I'd love to see it because it would make things a lot easier in trying to predict what the California Supreme Court is going to do.

I could see that they could go in either direction, but they have not yet done it. And at least as a factual matter, her claim is wholly dependent on him getting sick at work and she got it from him.

So I'm somewhat inclined to find the workers' compensation bar. If I do, I'm sure that someone will want to have this reviewed and looked at further.

But I -- and we haven't even gone into duty and whether -- and that's a very difficult issue too. You know, we have the various factors; foreseeability is particularly important, but there are public policy reasons also.

And I think one could say it's probably foreseeable if somebody gets COVID, we all know it's highly contagious, and that if you go home with it, probably you're going to convey it.

They're constantly putting articles in the paper about families of fairly large size and they're getting sick, or you've got gatherings. They want to keep people out of church, restaurants, everywhere that you could be close. So I think it's foreseeable.

You could say, well, we can cabin this a bit by making the group the household, again, much as they did in *Kesner*. But

there's some other considerations here. Asbestos is not something that most people are exposed to. There are very few businesses that are using asbestos, and there are very few workers today -- not maybe in World War II. All right? You had all kinds of people working in the shipyards and getting the liberty ships out and working with pipe insulation and what have you. And even then, you have a defined industry or a defined body of employers where somebody could be exposed, environments where people could be exposed.

Not so with a highly contagious illness. It's very, very hard to tell and be able to prove. And I understand proof doesn't go to duty, but it may bear a little bit on the question of duty in the sense of would someone be deluged, in effect, with just an uncontainable number of cases that would be hard to prove because of so many places that people can be exposed to COVID, and it doesn't have to have that nice clean line that asbestos and asbestosis has, or asbestos and mesothelioma.

So, in and of itself, it's a self-contained body of cases. And then if you narrow it to just a few people who can sue for it, it's so much smaller than what you would have here.

So we have these duty issues, too. I think duty gets more involved, though. At least for the workers' compensation bar we're looking at a statutory interpretation with a broadly worded statute and courts that have not yet weighed in directly

on the kind of claim that we have, just claims around our kind of claim but not our kind of claim.

So I'm not sure how much we should do to talk about all of this. If I shorten our discussion at all, it won't be because I didn't spend a lot of time reading and thinking about it. It's really a tough area.

The only one that seemed rather easy -- and I guess I'll turn to Mr. Freeman on this -- was the nuisance claim and the law that bears on nuisance.

And if you give me a second here, let me just get the statute.

One in particular, which is Cal Civil Code 3493, it's one of the statutes you rely on. I think you relied on three in the complaint; 3491, '93, and, I think, '95. I'm not looking at it right now, but that's my recollection.

So 3493 reads, quote:

> "A private person may maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise."

And we won't read that by they're using "himself" to mean it doesn't apply to herself also.

Okay. In reading some case law that might apply here, one is the *Venuto* case, ***Venuto v. Owens-Corning Fiberglass***. That goes back to 1971, before, I think, they were probably put out of business by the asbestos litigation. And that's at

22 Cal.App.3d 116, in which there was -- this one was sufficient where people's views were being blocked.

And this particular plaintiff had a general view, like everybody else that was blocked, but then they had this strange thing involving their own property in an unusual way, and the Court said, okay, that's enough.

Perhaps a more -- I guess, a case more similar to ours -- just a second. Let's see. I thought that one was okay. Now I'm not sure. Maybe I'm wrong on that one, and that one went the other way. Now I'm getting mixed up.

Well, in it they're discussing if -- for example, if the idea is you're going to get cancer from some carcinogen and, instead, you've got an allergy problem, then you could sue, all right, because nobody figured anybody was going to get an allergy from carcinogen. It's really sort of a reverse foreseeability requirement of some sort.

Let me see the other because I'm wondering if I just flipped these in some way. This one was secondhand smoke. Just a sec.

MR. BOGDAN: Yes, Your Honor, secondhand smoke was --

THE COURT: I think they said --

MR. BOGDAN: -- the one you were referring to, the little girl who had the allergies.

THE COURT: Oh, is that the allergy one?

MR. BOGDAN: Correct.

THE COURT: Oh, okay. It's kind of discussing the *Venuto* case also. That's "Birk" or *Birke*, B-I-R-K-E, *versus Oakwood Worldwide*, at 169 Cal.App.4th 1540.

Either way, they make it very clear that the idea was that whatever was in the air was likely to cause one kind of problem, and all you did was have a really bad case of whatever the problem was, that isn't going to count. And if you could come up with something else that nobody was really thinking about, then you could sue.

And it seems to me that what we have here is somebody claiming a very serious reaction from the -- COVID. These are not people who just had a couple of coughs and sneezes. They got seriously ill, both the husband and wife. I don't mean to say it's a trivial claim in any way.

But for purposes of nuisance, it sounds like this is exactly the kind of thing that you're supposed to protect against, getting a reaction to COVID or getting COVID-19, or infected with it and then getting sick. And that's what happened to them. They got very sick instead of just plain sick.

So without going into primary jurisdiction, since I believe the nuisance claim was the only one that really was seeking injunctive relief, I would be inclined to dismiss that.

And I really -- I really wanted to ask you -- and I don't know if you can -- you know, you feel comfortable telling me

what happened or not.

Maybe I'll start with Mr. Freeman and see if he knows.

Did they close down Mountain View when they found out someone got sick or did they just keep going and happen to transfer a few people? Do you know what happened there?

MR. FREEMAN: Your Honor, I really don't beyond the facts that are pled in the complaint. My understanding is that they -- I don't know if it was a partial shutdown. All I just know is there was a transfer of workers, and either because there was a threat of -- you know, because normally they would have to be quarantined or, you know, there was some kind of health department thing -- I'm just kind of speculating at this point -- there was a transfer of workers from one facility to another.

And our argument is, well, basically, they did this hasty transfer and, you know, when they kind of commingled workers, that's how you ended up with the infection.

THE COURT: Right. And I understand that on sort of a kind of high-level discussion, but do we know how big the Mountain View site was? Are these people working essentially a half a block away from each other or are they in a little room?

Do you know anything about what the actual physical layout was?

MR. FREEMAN: I do not, Your Honor.

THE COURT: Do you, Mr. Bogdan?

MR. BOGDAN: I'm not familiar with the Mountain View property. I am familiar with the --

THE COURT: San Francisco.

MR. BOGDAN: -- Observatory of Music, I believe, was this project on Oak Street. And it's sizable buildings. I don't know at what stage the construction was at the time of the alleged exposure.

THE COURT: Okay.

MR. BOGDAN: There is a degree of an underlying union jurisdictional issue about Mr. Kuciemba as a local employee being pushed out of his job as a result of people coming from the Mountain View job.

But my understanding is there were no Victory Woodworks employees diagnosed at Mountain View. There were no Victory Woodworks employees diagnosed at the San Francisco Conservatory of Music. And Mr. Kuciemba did not begin experiencing symptoms until he was no longer employed by Victory Woodworks.

THE COURT: Okay. So although that's not in the complaint, of course, what you're saying is that -- it's one of the things I was going to ask, actually, Mr. Freeman. Did anybody actually get sick or, do we know, did they test positive?

If one is just speculating that someone might have gotten infected because they were working at a -- even if it was close to someone who was infected, and then went and worked with

someone else, and even if it was close to -- because you do plead that he worked close to people who were transferred from Mountain View. I know you said that. But whoever he worked with was, you know, transferred from Mountain View, never even got close to whoever got sick, or the person in Mountain View never got close, I mean, it's sort of like who was close to whom, when, and where?

And even -- but if you look at it in just a broader level, the arguments being made by Mr. Bogdan are essentially just let's assume all this happened, there is no duty, and even if there were, it's barred by workers' compensation.

But I was just wondering in particular about the duty part because of how you define duty. Maybe I'll just find that one case for a second because it was kind of helpful in my, I guess, reading of various cases on duty.

Here's one. It wasn't one of the ***Williams***, actually. It was ***Cabral***, I think. Let me see. Yeah, it's the ***Cabral*** case at 51 Cal.4th 764.

So I felt better after I read this because I kept thinking, well, where do you draw the line between breach and description of duty? How broad do you describe duty? Is it always just you have a duty not to gratuitously put other people at risk?

Anyway, so they said that -- they describe the issue as follows. They say, quote:

"We take the issue between the parties to be whether a freeway driver owes other drivers a duty of ordinary care in choosing whether, where, and how to stop on the side of the road."

This was a truck driver who pulled a big vehicle over to the side of the road, somebody had a problem and essentially ran into them when they came off the road and, I think, were killed. And maybe it would not have been as serious if there hadn't been something big that they ran into right there.

So the issue is here, as they describe it, do you have a duty to carefully pick where you park next to the road? Okay.

Then they say -- and then they keep going, okay, quote:

"Because the general duty to take ordinary care in the conduct of one's activities" -- and then they have a cite -- "indisputably applies to the operation of a motor vehicle," okay, closed quote.

So there they're saying, okay, so if you want to look at it from the big picture, if you have a general duty to operate a motor vehicle safely, okay, and then they go on to say, under those circumstances, quote:

"The issue is also properly stated as whether a categorical exception to that general rule should be made exempting drivers from potential liability to other freeway users for stopping along a freeway."

So they say go whichever way you want. You can either

call the duty very broad and then pick out what you want to do and call that an exception, or you can start with what they also want to call an exception and call it a duty, either way.

So, I guess, here we could say, does the duty to provide a safe workplace to employees, which includes a duty to not knowingly or negligently expose them to highly contagious illness, apply to other people with whom that employee then has contact, or at least other people in the household, which they have contact.

All right. That's one way of putting it. That would be the second, I guess, of the *Cabral* alternatives. Broad duty, looking at exception. It's kind of the way that *Kesner* went in the asbestos case, where they talked about broad duty and then are we going to carve out a group.

But you could also just carve it out at the beginning and say do you have a duty to those people? So it could be framed either way.

And, of course, the question is not whether this individual plaintiff has a good or bad case. As they point out in *Cabral*, how close to the roadside were they? Was it an emergency or not? What was the reason they picked to stop there? You don't go into all that. Just as a categorical matter, could you ever bring a case like this?

But it bothered me that -- how you frame it. And I was very happy to have them say you could go either way. And so

that's what we would have here on duty.

And I think a duty analysis goes into so much about policy. One of the things is insurance. I do not know, in third-party claims, what the insurance companies have been doing.

In first-party claims they have virus exclusions in all their policies now so that you can't get insurance -- if you have to close your business because of, let's say, a general order like we have in this case, most of the insurance policies that covered that business have virus exclusions.

So now you've got somebody who can't -- if it were a first-party claim, you can get insurance, but, again, I'm not sure what they're doing in third-party claims. This would be a third-party claim, and I don't know how those policies view them.

You know, earthquake insurance today, at least in California, is almost impossible to get. And if you get it, it's not very good.

And then we just have this idea of huge numbers of people who could bring claims even if you limited it to a household. And then how are they ever going to prove them?

In this instance, if nobody came down with COVID or was tested positive for COVID, it's really the same thing that the plaintiff knows about, it's going to be awfully hard to say that the wife -- well, the husband got it at work. And then,

of course, the wife's claim is derivative of that or at least dependent on it.

So there's tons of issues. And, I don't know. You both did a fine job in exploring them, but you didn't want to really concede some of the things I've been talking about because you each wanted to stay with the cases that you felt you could best rely on for your position. I don't know.

I'm happy to hear from any of you. And, also, let me just say if I did -- I did grant a motion to dismiss, would you want to amend? Is there a way you could amend? Is it worth doing it?

Or do you want to just take me up on it, Mr. Freeman? I wouldn't take personal offense on that, by the way, for all the reasons we've been discussing. And this is only an if. I'm not quite sure yet. But at least don't want to forget to ask you that.

MR. FREEMAN: Your Honor, can I bring up two points --

THE COURT: Absolutely.

MR. FREEMAN: -- that I --

THE COURT: That was just one I didn't want to forget. But I'm not trying to cut you off in any way, or Mr. Bogdan.

MR. FREEMAN: Absolutely.

And, first of all, I want to thank the Court for really going into -- grappling with a really -- it is a difficult, you know, case on the legal side, you know, trying to figure out --

I mean, I guess I was surprised that I hadn't found another similar case in the Ninth Circuit or, you know, even in your court touching on these issues.

The COVID cases I did find were mostly related in the prisoner context. People were trying to get, you know, compassionate release, things like that. I found, I think, a Northern District case in the admiralty context. So I don't have any new cases to offer you.

I guess I just want to point out -- I guess the two things I want to point out are, first, the cases that we've talked about collateral, you know, discussing collateral cases, derivative cases, I think, almost universally, those kinds of cases involve a situation where the person bringing the claim is -- was not injured themselves. They were not physically injured; so loss of consortium, loss of services, things of that nature.

I mean, here we --

THE COURT: Let me stop you for one second.

What about the wife who watches some big crane come down on her husband at the work site? She's claiming the emotional distress of observing that. So you're drawing the line with just physical versus emotional? I don't know --

MR. FREEMAN: Yes.

THE COURT: -- what if she was, in fact, watching it?

MR. FREEMAN: I guess I'm just -- obviously, they have

an injury, right, they have emotional injury. But I still see the case as -- you know, he's not -- it doesn't matter whether Mr. Kuciemba is hurt or not.

THE COURT: Doesn't it? Well, let me ask you, doesn't it depend on whether he's hurt?

And I asked you, and you seemed to concede, and I'm inclined to find that getting infected is an injury. So if you want to call that hurt, then as long as he's infected, he's injured. And then that's how she gets injured.

I don't know, do you want to draw a bright line between if your claim goes to physical but not emotional, assuming those can be divided up, or economic, then you should be able to bring it even if you couldn't bring it for other reasons?

I don't know, it's a kind of hard line to draw, even to define. I mean, I see your point. She's got her own illness, yes. And in those cases they are suffering not an illness but the consequences of somebody else, let's say, being ill. All right. Or injured. You know, either way.

So, yeah, there is that distinction. Amongst whatever else I've identified, there's certainly a distinction. All right. So we'll put that one as a distinction. I'm not sure if it's the most persuasive one, but we'll put it in the distinction box.

You got any others?

MR. FREEMAN: Right. And then the second point I

just -- I just want to point out is there is a -- you know, we've been talking generally, you know, about the negligence claim and the general duty to keep your workers safe.

But there is a -- you know, this binding order issued by the City of San Francisco that lays out a whole slew of requirements. And I guess, from my perspective, you know, that order -- you know, I guess I think it was a negligence per se, but I could borrow the text of that order and make it the standard of care, you know, my negligence case.

And then I'd have to prove if there was a violation of that order. And then, you know, I get the presumption of negligence. And I think that's -- the presence of that order, I think, is key. It spells out very specific things they had to do.

THE COURT: Let me stop you for a minute, though. To which issue are you making this particular argument? Are you making it on the question of duty? On the question -- where does it fit in?

I don't disagree with you that, contrary, perhaps, to what Mr. Bogdan argued, it has teeth. It can make it a criminal violation if you don't follow what's -- what's in that general order. That is part of the general order. It's not just, you know, a sort of a recommendation or best practices.

It may be best practices, but if you don't follow them, there could be penalties. Certainly, it provides for it. And

it also says that if you don't go along with it, it's a public nuisance. Not that I'm essentially finding that's fine for them to say but not for her to say.

In any event, what do we do about where you want to put this, though? Where are you fitting it into whichever argument? If you're just saying there's negligence per se -- and let's say you can rely on it for that purpose, as if it was a regular ordinance or statute.

Negligence per se does not go to duty. It goes to breach, much as *res ipsa loquitur* does, and basically says you don't have to prove someone was negligent, it's enough that you violated this statute.

You know, if they take out the wrong kidney while you're under anesthesia, you don't have to show someone, you know, was negligent in doing that. That's -- you're out, they're going to have to explain it.

But first they have to have a duty. And, of course, they do. A doctor has a duty to a patient. And here they're saying employers have a duty to their employees not to gratuitously expose them to COVID.

But it still goes to breach, which we are not supposed to be talking about, according to the cases, including *Kesner*. So I'm not sure. Anyway, but I don't disagree with you that it does lay out what you're supposed to do. I'm not sure, by the way, that it's totally clear.

There's only one place in your complaint where you're actually alleging what I pretty much call a breach. You say, well, you didn't have a protocol or policy to screen people coming on to the work site.

From that, maybe you could infer if you did have one, you would have kept these people out because they would have been potentially exposed. And you may have quarantined them, but you still have the causation questions later. But, okay.

I'm not even going to get hung up on what you ought to plead in the complaint, because Mr. Bogdan is doing it.

All right. We have --

MR. FREEMAN: And let me --

(Unreportable simultaneous colloquy.)

THE COURT: -- the general order.

What else do you want to talk about?

MR. FREEMAN: Well, I just wanted to say the general order, it does go to the question of duty to the extent that it's one of the *Rowland* factors. I can't remember which one. I think it's part of the foreseeability analysis if there has been regulation specifically enacted.

Like in *Kesner*, you know, you had those specific OSHA regulations going to asbestos.

THE COURT: You're going to have this primary jurisdiction argument in a minute.

MR. FREEMAN: Well, yeah. And I'm just saying that

that's where I would've slotted it is --

THE COURT: Well, okay. So we're talking duty, right?

MR. FREEMAN: Yes, Your Honor.

THE COURT: Okay. And you're talking about foreseeability; right?

MR. FREEMAN: Yes.

THE COURT: All right. And I don't -- I think the foreseeability factor weighs in your favor on the question of duty. It's the other aspects. Even though foreseeability is the -- I think they're all important, but it's the most important as I read the cases, but it could be outweighed. And it's almost sort of like a gatekeeping factor. If it's not foreseeable, forget it, you know.

So you have going back, of course, to way, way long ago -- and you probably all read about it in law school -- ***Palsgraf v. Long Island Railway***, where it just wasn't foreseeable that the scale, or whatever it was, was going to fall on somebody given fireworks or firecrackers, whatever they were in a box on a train, what have you. So I will give you that.

I'm concerned about the other factors that may be considered if we go to duty. I may not get to duty if I -- if I find that there's a workers' compensation bar. But I certainly have questions about duty, and I'm certainly happy to hear more about it from yourself. I think we have foreseeability. I will give you that.

And to the extent Mr. Bogdan had argued, well, this is just going to open the floodgates, and you said, well, like in *Kesner*, you can narrow the spigot, basically, by making it the household. And she certainly qualifies. She's -- she's a spouse, she lives with him.

So that part, okay, but then there's where you start before you get to that sort of lower part of the funnel that concerns me.

If you looked at it like a funnel, for asbestos, the top part of the funnel would be pretty small in circumference, whereas this would be huge. And that's part of the concern that I have. You can funnel it down, ultimately, but you're still going to have this huge, big part. And that's where I see the policy.

Mr. Bogdan didn't argue the insurance per se, and so, as I say, I've seen it in first-party, but I don't know what the story is for third.

Okay. Keep going.

MR. FREEMAN: Yeah. Your Honor, I would also say that, you know, as to the policy consideration on opening the floodgates, certainly, it was a -- it was raised in *Kesner*. You know, they -- the Supreme Court, they did put that limitation.

They also said that, you know, this -- if the Legislature wanted to, they could draw that line. They haven't. Similar

here, you know, the Legislature has had almost a year now to draw that line. They haven't.

Other states actually have. I think that there are some -- I don't know -- I don't have any authority for you right now, but I think there are other states that impose a gross negligence requirement or things like that.

California hasn't done that. There's -- I don't think there's any -- I know there's been talk of federal legislation to, you know, limit the scope of these potential claims. That hasn't happened.

So I guess my position is, while -- we're just trying to do the best we can here in a -- you know, in a complicated situation. And the most -- the *Kesner* approach, it may not be perfect. It may not be a perfect fit for where we are here, but I think it's the best we've got. And I think it's a logical route for the Supreme Court to go if it goes in that direction.

THE COURT: Well, it is the best you've got, and I can understand why you relied on it. And it's certainly a well-reasoned opinion.

Let me ask you a question. Who's that white bust of behind you, on your bookshelf?

MR. FREEMAN: That is Michelangelo.

THE COURT: Okay.

MR. FREEMAN: And you can't see him in the frame, but

next to him is Da Vinci on the other side.

THE COURT: Oh, is that right? Oh, yes, I didn't see it. And I can't tell what the other item is in the middle.

MR. FREEMAN: Just a pair of hands.

THE COURT: Oh, okay. All right. Well, okay. Very scholarly and artistic.

All right. Mr. Bogdan, am I pronouncing your name right?

MR. BOGDAN: You are, Your Honor. Thank you for asking.

So, fortunately, we've compressed my argument by the discussion you've already had. My first point was going to be the issue of Mrs. Kuciemba doesn't have an injury unless there is a workplace injury incurred by Mr. Kuciemba. I'm not going to drive that point any further. We've already got that established.

One issue that hasn't been discussed -- and this has been a fascinating discussion -- is the duty question, creating a duty for a virus.

Kesner is a product, and it's a product that's supposed to stay on the job site. Highly regulated, regulated for decades. And it is brought home off the job site, where it doesn't belong, and it's not the contact -- and this is the Supreme Court language in *Kesner* -- it's not the contact with the employee that creates the action.

The actionable -- the thing you can sue about, it's the

contact with the fiber, this product used for profit that shouldn't be in the household. So --

THE COURT: Okay. Let me stop you just like I did Mr. Freeman. Is this argument going to duty? To workers' comp bar? Which issue are we discussing?

MR. BOGDAN: It's going to duty.

THE COURT: Okay. Keep going.

MR. BOGDAN: Because, as an employer, I have an obligation to keep hazardous products out of the general circulation. So we have Tyvek suits, we have showers, we have clothes-changing areas to ensure that this product stays on site.

Like asbestos, there's no Tyvek suit or shower that's going to wash away the COVID. This is a virus. And we've lived with viruses forever. We have them everywhere.

So one of the issues to be considered in regards to duty is not so much the *Kesner* analysis on how they try to create an exception, but whether it should apply to the virus at all.

THE COURT: That's why I asked you in the first instance whether you thought there was a duty to the husband. You might well argue there's no duty about flu. Or maybe there would be. I'm not sure.

But it seems like we have enough of -- enough of a general order here, enough legislation to say there's some duty that's owed at least to the husband. And if you want to say that you

just can't, you know, box it up the way you can asbestos, that's true.

You also point out there didn't seem to be any case where anyone ever sued over the flu. And, well, you didn't actually say that. You said there's no case finding you have a duty. But, of course, there's no case because nobody's ever brought a lawsuit to claim that they got the flu because their employer didn't keep somebody who was sneezing and coughing off the site.

Everyone is running scared with COVID. There's no question about it. Not because people get sick, because people die. And that's why this has just put things in such a different light, if you will, and why they publish not only who got sick or who tested positive but who died.

And because the stakes are quite high -- although, again, the percentage of people who have that extreme reaction is small, it's enough that it's significant in the population.

We just all hope, heaven forbid, if you get it, that you don't go into whatever they call a cytokine storm, or whatever, and have your immune system go crazy and ultimately kill you off along with the virus, or be so weakened that it's going to do you in.

But there is some legislation. But you can say, yes, it's still different for all the reasons that you've said. And I think -- you know, that's why a little bit I asked should we be

looking at more facts, you know, to know exactly what happened. But taking it at least on the conclusions that are raised here, that's what we're doing in this case.

If you really put Mr. Freeman to the test, I don't know that he could actually plead that someone was exposed and got it as a result and gave it to his client, who went home and gave it to the wife as opposed to the wife giving it to him or vice versa. And where are you going to go with that?

But it doesn't really make too much difference for our discussion in trying to frame a duty since he's doing it as you have -- you have an obligation not to knowingly commingle workers. Okay. And if somebody gets sick as a result of that and brings it home, that's his case.

So whether he could actually show that that happened is not the question. I don't know that we need to narrow the duty to if you knew that Harry Smith worked next to John Brown and John Brown tested positive and then you let Harry come to San Francisco and he worked right next to the plaintiff, and within some specific period of time that, you know, is commensurate with the latency period he got sick and he didn't go anywhere hardly at all except to work and, you know, whatever, and his wife stayed home the whole time, and what have you, I don't know if it's going to make a difference in trying to frame the duty.

So, all right. But, again, what do you have to say about

all these policy considerations? Maybe that last discussion had to do with the policy as opposed to foreseeability necessarily.

What else might you say about it? Do you know anything about insurance coverage specifically as to virus -- viruses?

MR. BOGDAN: I'm not that smart to be a coverage lawyer.

THE COURT: Well, yeah. Call someone up.

MR. BOGDAN: But in regards to policy, I think it's important to remember that there's two floodgates. There's the floodgates on the number of plaintiffs and there's the floodgates on the number of defendants.

There's no allegation here that this is going to be limited to a duty owed by the employer to the employee. We are creating a duty of all essential businesses to their patrons, which may exist already, but then the people who the patrons come in contact with, who never entered the premises. So now we have boatloads of defendants.

And I'll raise the point that I raised in the reply papers, which was, in addition, you create a duty against Victory Woodworks, then what stops Victory Woodworks from cross-complaining against Lucky's, saying Mrs. Kuciemba shops there, they have a duty to protect her as well, they failed to protect Home Depot?

THE COURT: Well, wait, wait. They can

cross-complain, yes. But I don't think it would be, however, contributory fault. At that point they're just trying to pass a hundred percent of liability.

Because unlike, let's say, asbestosis or even mesothelioma, which is the end result in either case of a duration over a protracted period and extent of composure, and you could have someone getting that duration and number of fibers from a number of different people.

But here I think you're talking about one carrier giving it to the one individual.

MR. BOGDAN: Thank you for correcting me, Your Honor.

THE COURT: Well, I'm not really correcting. I just want to clarify that you can cross-complain if the plaintiff didn't sue everybody that they could think of, and say, okay, you may not have sued anybody else, but we're going to bring them in, and we think they're the one who did you wrong, not us. Yes, I can see how that could expand.

All right. So the funnel at the top is getting bigger and bigger from what you're saying.

MR. BOGDAN: Correct, Your Honor.

THE COURT: Okay. Anything else you want to add?

I'm so glad I came up with the funnel because it helped me picture it.

MR. BOGDAN: Right. It was helpful for me as well.

I'm happy to address any further questions, but we realize

you had a full dance card already today and --

THE COURT: This was the most interesting, though.

MR. BOGDAN: Oh, good.

THE COURT: The other ones were just more aggravating, because one of them was, like, a motion for preliminary approval of a class action settlement. And aside from some questions I had about the settlement terms, they had a long form notice to the class members, an email shorter form notice to the class members. If the email address didn't work, they had a postcard that was different. Then they had a reminder notice. And then they had a claim form.

And by the time we went through all those different forms and where there were either typos or things that were inconsistent or whatever along with whatever more substantive issues, it took all morning. And then we had case management conferences on top of that. So it was -- you know, it was long.

But I geared up for this because I think it's really an interesting case, and so I don't mind spending as much time as you want.

MR. BOGDAN: Thank you.

So the only last point I wanted to make was I don't look at this as issues where more facts change the results.

THE COURT: Uh-huh.

MR. BOGDAN: Regardless of the number of facts that

are added in an amended complaint, you still wind up with the question of is it barred by workers' comp, and can you have a duty to protect people off site from a virus?

THE COURT: Yes, I'm accepting that. And I'm not going to put Mr. Freeman through the task of amending unless he thought there was something that he could add if -- if I dismiss, that would change the lay of the land.

And it sounds like there isn't, but he never -- I think he didn't answer the question specifically, and so I'll just go back to him for a minute.

He wanted to argue some points, and I just wanted to keep this in mind because, ordinarily, I would give someone leave to amend if I dismiss, even if it looked like a long shot.

But I'm just wondering here whether it's worth doing since it's conceded, at least for our purposes, that he has pled a claim based on the knowing or should have known exposure of the husband and his passing the infection on to his wife, and both of them then were more than asymptomatic.

Mr. Freeman, what do you think? Should we just assume that there's nothing much more you can say on it that would really change the analysis or not?

MR. FREEMAN: Your Honor, it's possible that maybe I could -- you know, if you were to, you know, dismiss the claim that maybe if there's some more facts that really kind of bring clarity to the sequence of the infection and maybe possibly

rule out, you know, other sources of infection, you know, that's been kind of raised today, I would certainly -- I would certainly never say no to leave to amend, you know, in a situation like this.

THE COURT: Okay. If I say to you, as Mr. Bogdan seems to say, look, it doesn't really matter how strong a case you might make out by putting more facts in, you have put the ultimate facts in, and that those ultimate facts, if proved up and if there were no bar and if there is no duty, then she would have a claim.

So I don't think -- at first I was thinking maybe I'd really like to know what all happened in Mountain View and then what happened up here in the City. And this company is Woodworks. It's not like they're a general contractor. Yes, everybody just building cabinets, and is everybody close together or what exactly is going on here.

And, you know, it's always nice to have a little bit of the picture, but I don't think that it's going to make a difference here.

He's not really making an *Iqbal* argument. *Twombly*, interestingly, was a case where they really pled themselves out of a case by putting too many facts in. *Iqbal* was a different case where they didn't put enough in.

We'll just take those as a given. And so if there weren't another idea here, I think that there probably isn't much

reason.

I'll tell you, if I did dismiss and, just for the reasons we've discussed here, didn't provide leave to amend, and if something happened -- new case, new something -- you know, that really changed the analysis that we've been discussing, then, of course, you could just ask for reconsideration and, you know, give me a chance to look at it before doing much else with it.

But if you want -- I mean, you know, if you want, I can say with leave to amend. I don't mind doing it.

I'm not sure whether I'm going to write a big order up or not. I might just rely on what we've discussed here and the reasoning that I've set out, which is pretty detailed.

Certainly, it's leaning -- and I'm sorry to say this to Mr. Freeman, he seemed like a very nice person, but I'm kind of leaning toward dismissal. Not full-bore ahead to that result, but I'm leaning that way.

And, you know, if I -- if I -- I think that the record we have so far is tending to support that if I were to go the other way and rule against Mr. Bogdan's position -- and he also seemed like a very nice person -- then I would perhaps take more time to say in the order why it looks like I'm going the other way.

Because right now, in summing up, I found that this was a case that really had not been directly addressed by the

California Supreme Court or enough addressed by the lower Courts of Appeal of California as to the type of fact situation that we have here, and that it seemed, for the reasons that I've described, that this was a claim that would be covered by Section 3600 and 3602 of the Labor Code, absent one of those courts and, ultimately, the Supreme Court drawing a line at a point before you reach this type of a fact pattern, and essentially draw it between cases such as loss of consortium and cases such as we have here. And they haven't done that despite one or more opportunities to do so, at least not to date.

On policy, if I go to duty and go that far, it did seem to me this is a foreseeable injury if the husband is infected at work, to bring it home to the household with their significant risk, because it's highly contagious. So significant risk of infection of household members.

But there are real policy considerations here that distinguish this case from the ***Kesner*** case with the asbestos and the limitations that are placed on the body of cases that could be created.

And, also, the provability of those cases. Because you can't get asbestosis except from asbestos, you can't get mesothelioma except from asbestos and, I think, something nobody is ever exposed to besides asbestos. It's very, very limited in that regard and is an unusual illness.

So there are those concerns about just overwhelming, essentially, the employer community to the point where they haven't really obtained much of the bargain they struck for workers' compensation.

The cases do discuss it as a bargain. And one can say, okay, you know, she didn't get anything out of it. That could be another point, I guess, to put in the plaintiffs', I guess, box of arguments. In the same light, the people who are bringing loss of consortium didn't get anything.

So, okay. I think we've probably explored it as much as we can. I'll mull this over. I don't want to make any decision after a day like I've had. I want to take some time to sit back, go over your arguments once more, which, again, I thank you for.

And just to let you know that whichever way I rule it's not because of any deficiency on the part of the lawyer who represented the side that didn't prevail.

So that would be it, then. I think we're going to go into recess.

I want to make sure Ms. Geiger has nothing that she wanted to add.

THE CLERK: No, Your Honor. Only that they do have their initial case management conference on April 2nd.

THE COURT: Okay. Well, that's still a ways off.

THE CLERK: Yeah.

THE COURT: Hopefully, I can rule before that. If not -- if I don't for some reason, then I will just move -- you know, move the CMC. But I think that we're okay for now on that. But thank you for letting me know.

THE CLERK: Okay.

THE COURT: So, at a minimum, you're not dropping off the face of the earth. We do have you scheduled for another appearance.

All right, then. Thank you again. And I hope you all have a very nice weekend, including our court reporter and courtroom deputy.

And everybody stay well. All right. Thank you.

MR. BOGDAN: Thank you, Your Honor.

THE COURT: This concludes our hearing. Thank you.

MR. FREEMAN: Thank you, Your Honor.

THE CLERK: Court is in recess.

THE COURT: Good-bye.

(At 3:34 p.m. the proceedings were adjourned.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Monday, March 1, 2021

Katherine Powell Sullivan, CSR #5812, RMR, CRR
U.S. Court Reporter

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FILED
San Francisco County Superior Court

OCT 23 2020

CLERK OF THE COURT
BY: Ekalene Nolania
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

CORBY KUCIEMBA, an individual; ROBERT KUCIEMBA, an individual,

Plaintiffs,

v.

VICTORY WOODWORKS, INC., a Nevada Corporation; and Does 1-20, inclusive,

Defendants.

CASE NO.: CGC-20-587507

COMPLAINT FOR DAMAGES; DEMAND FOR JURY TRIAL

BY FAX

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Plaintiffs CORBY KUCIEMBA and ROBERT KUCIEMBA allege as follows:

PARTIES

1. Plaintiffs CORBY KUCIEMBA and ROBERT KUCIEMBA ("Plaintiffs") are and were married at the time of the events described in this Complaint.

2. Defendant VICTORY WOODWORKS, INC. is a Nevada corporation with its principal place of business located at 340 Kresge Lane, Sparks, Nevada. Defendant conducts business throughout California, including in San Francisco, California.

3. The true names or capacities, whether individual, corporate, associate or otherwise, of Defendants, DOES 1 through 20, inclusive, are unknown to Plaintiffs who, therefore, sue said

Defendants by such fictitious names and will seek leave of Court to amend this Complaint when the same have been ascertained. Plaintiffs are informed and believes, and upon such information and belief, alleges that each Defendant designated herein as a DOE was responsible, negligently or in some other actionable manner, for the events and happenings referred to herein which proximately caused injury to Plaintiffs as hereinafter alleged. Each reference in this Complaint to "defendant," "defendants" or a specifically named defendant refers also to all defendants sued under fictitious names. Plaintiffs are informed and believe, and based thereon allege, that at all times herein mentioned each of the defendants was the agent, employee and servant of each of the remaining defendants, and in doing the things hereinafter alleged was acting within the scope of such agency, employment, and servitude, with the knowledge and consent of each of the defendants. Whenever this Complaint makes reference to "defendants" or "defendants, and each of them," such allegations shall be deemed to mean the acts of defendants acting individually, jointly and/or severally.

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SUBJECT MATTER JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction and is a proper venue because Mr. Kuciemba was employed by Defendant in San Francisco County. Furthermore, Mr. Kuciemba contracted COVID-19 on a job site operated by Defendant in San Francisco County and thereafter infected his wife with COVID-19.

GENERAL ALLEGATIONS

5. Severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) is a strain of coronavirus. This virus is responsible for causing the disease known as COVID-19.

6. COVID-19 is a highly contagious respiratory illness that spreads between people through close contact and via respiratory droplets produced from coughs or sneezes. The virus can be devastating and even fatal especially for vulnerable populations, e.g. persons who are over 65 or who have pre-existing health conditions.

7. After the virus arose in an initial outbreak in Wuhan, China, it spread rapidly around the globe in early 2020. The World Health Organization declared COVID-19 a pandemic in March 2020. As of the filing of this complaint, it is estimated that COVID-19 has infected over 41 million people and killed at least 1.13 million.

8. Beginning in March 2020, the Bay Area Counties issued Shelter in Place Orders that Order prohibited all nonessential travel and required individuals to otherwise remain at their place of residence in order to limit the spread of COVID-19.

9. In the early days of the pandemic, the Centers for Disease Control ("CDC") issued guidance stating that individuals exposed to people infected with COVID-19 must quarantine at home for 14 days after their last contact with the infected individual. This guidance is designed to limit the spread of the highly infectious virus.

10. Over time, these various Shelter in Place Orders were relaxed to allow for the safe reopening of the economy. Government agencies at the state, federal, and local level also issued various health orders targeted for specific industries. Most relevant here is San Francisco City and County's Order of the Health Officer No. C19-07c (Issued May 5, 2020) (the "Health Order").

11. The Health Order requires individuals engaged in the construction industry to follow strict health and safety guidelines to prevent the spread of COVID-19. The Health Order required that construction sites must "Establish a daily screening protocol for arriving staff to ensure that potentially infected staff do not enter the construction site. If workers leave the jobsite and return the same day, establish a cleaning and decontamination protocol prior to entry and exit of the jobsite." Construction sites were also required to "[p]ost the daily screening protocol at all entrances and exits to the jobsite."

12. The Health Order also required construction sites to provide notices to employees that they should "not enter the jobsite if you have a fever, cough, or other COVID-19 symptoms. If you feel sick, or have been exposed to anyone who is sick, stay at home."

13. Beginning on May 6, 2020 Plaintiff Robert Kuciemba began working for Defendant at a construction jobsite in San Francisco (the "Premises").

14. In or around July 3, 2020, Defendant transferred workers from a jobsite in Mountain View, California jobsite operated by Defendant to Mr. Kuciemba's location.

15. Defendant transferred these workers from its Mountain View jobsite after workers at the same location became infected with COVID-19. Defendant knew or should have known that its workers at the Mountain View jobsite were all potentially exposed to COVID-19. Defendant was

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also aware of the CDC guidelines and the San Francisco Health Order that would have prohibited these potentially infected individuals from entering the Premises without properly quarantining.

16. Instead of quarantining the individuals from its Mountain View jobsite, Defendant decided to put profits over safety by commingling the Mountain View workers with workers at the Premises including Mr. Kuciemba. Defendant was well aware of the dangers posed by COVID-19, including that it was highly infectious and potentially lethal for older, high-risk individuals. Despite this knowledge, Defendant knowingly, recklessly, and willfully failed to follow all health and safety protocols issued CDC and the Health Order when it permitted potentially infected individuals to enter and re-enter the Premises.

17. One or more of these workers from the Mountain View jobsite was in fact infected with COVID-19. In early July 2020, Mr. Kuciemba was forced to work in close contact with workers at the Premises, who came from the infected Mountain View jobsite, and one or more of these workers then infected him with COVID-19.

18. Mr. Kuciemba's last day on the job at the Premises was July 10, 2020. Within the next 1-2 days, Mr. Kuciemba and his wife both began experiencing symptoms. Mr. and Mrs. Kuciemba both tested positive for COVID-19 on July 16, 2020.

19. Both Plaintiffs were ultimately hospitalized after they developed respiratory symptoms from COVID-19. Mrs. Kuciemba, who is 65 and a high risk individual due to her age and health, developed a severe infection and remained hospitalized until early August 2020.

20. The actions of Defendant were a substantial factor in causing Plaintiff Mrs. Kuciemba's severe and traumatic injuries resulting from the COVID-19 infection to Mrs. Kuciemba.

21. Defendant committed various wrongful acts, including without limitation, Defendant:

(a) Improperly operated, managed, used, maintained and controlled the Premises in violation of applicable building codes and federal, state and municipal regulations including without limitation OSHA, Cal OSHA and the San Francisco Health Order as well as CDC guidelines;

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(b) Failed to properly screen employees for COVID-19 who were entering the Premises;

(c) Failed to protect employees from COVID-19 symptomatic (or asymptomatic persons) or potentially infectious persons;

(d) Failed to cleanse and sanitize the workspace at the Premises;

(e) Failed to provide personal protective equipment;

(f) Failed to implement a social distancing policy;

(g) Failed to otherwise follow the health and safety mandates required by OSHA, Cal OSHA, and/or the San Francisco Health Order as well as CDC guidelines;

(h) Failed to warn Mr. Kuciemba, and other persons lawfully on the Premises property, of the danger presented by the workers from the Mountain View job site who were working at the Premises when Defendant knew, or in the exercise of reasonable care should have known, that the warnings were necessary to prevent injury to Plaintiffs, residents and/or visitors at the Premises;

(i) Failed to make a reasonable inspection of the Premises when Defendant knew, or in the exercise of reasonable care should have known, that the inspection was necessary to prevent injury to Plaintiff, residents and/or visitors at the Premises;

(j) Allowed the aforementioned premise to remain in a dangerous condition, for an unreasonable length of time; and/or

(k) Failed to otherwise exercise due care with respect to the matters alleged in this Complaint.

22. Mr. Kuciemba is bringing a claim for Loss of Consortium in this Court arising from injuries to his wife.

FIRST CAUSE OF ACTION

Negligence

(Plaintiff Mrs. Kuciemba Against all Defendants)

23. Plaintiffs re-allege and incorporate the allegations set forth in paragraphs 1–22 of this Complaint.

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24. Defendant breached the duty of care owed to Plaintiffs when it knowingly, recklessly, and willfully acted as set forth in paragraph 21. Defendant exposed Mr. Kuciemba to COVID-19 at the jobsite and it was foreseeable that Mrs. Kuciemba would also develop COVID-19 through her husband.

25. Defendant's breach of the duty of care to Ms. Kuciemba was the actual and proximate cause of Plaintiffs' damages alleged herein.

26. Defendant's actions were malicious, oppressive, and fraudulent, and Plaintiff Mrs. Kuciemba is entitled to recover punitive damages

SECOND CAUSE OF ACTION
Negligence Per Se
(Plaintiff Mrs. Kuciemba Against all Defendants)

27. Plaintiffs re-allege and incorporate the allegations set forth in paragraphs 1–26 of this Complaint.

28. Defendant's actions constitute a violation of San Francisco City and County's Order of the Health Officer No. C19-07c (Issued May 5, 2020) and all related state, federal, and local statutes, regulations, and orders including without limitation OSHA and Cal OSHA. Plaintiff Mrs. Kuciemba is in the class of persons protected under such state, federal, and local statutes, regulations and orders.

29. Defendant's violation of the above laws/regulations/orders was a substantial factor in bringing about Plaintiff Mrs. Kuciemba's harm and the loss.

30. As a direct and proximate result of Defendant's negligent acts and omissions, Mrs. Kuciemba was injured and is entitled to recover compensatory damages in an amount according to proof.

31. Defendant's actions were malicious, oppressive, and fraudulent, and Mrs. Kuciemba is entitled to recover punitive damages.

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THIRD CAUSE OF ACTION
Negligence – Premises Liability
(Plaintiff Mrs. Kuciemba Against All Defendants)

32. Plaintiffs re-allege and incorporate the allegations set forth in paragraphs 1–31 of this Complaint.

33. Defendant, as owners and/or operator of the Premises, by and through their agents, servants, and/or employees, as the persons responsible for the maintenance of the Premises, acted with less than reasonable care and committed one or more of the following careless and negligent acts and/or omissions as described in paragraph 21.

34. The dangerous condition on property owned or controlled by Defendants was the actual and proximate cause of the injuries alleged herein.

FOURTH CAUSE OF ACTION
Public Nuisance – Assisting in the Creation of Substantial and Unreasonable Harm to Public Health and Safety that Affects an Entire Community or Considerable Number of Persons
[Cal. Civil Code §§ 3479, 3480, 3491, 3493; C.C.P. § 731]
(Plaintiff Mrs. Kuciemba Against All Defendants)

35. Plaintiffs re-allege and incorporate the allegations set forth in paragraphs 1–34 of this Complaint.

36. California Civil Code§ 3479 defines "nuisance" as "[a]nything which is injurious to health, ... or is indecent or offensive to the senses, ... so as to interfere with the comfortable enjoyment of life or property."

37. California Civil Code § 3480 defines "public nuisance" as any nuisance that "affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

38. To constitute a "public nuisance," the offense against, or interference with the exercise of rights common to the public must be substantial and unreasonable. *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1102, 1105.

39. The acts and omissions of Defendant alleged herein, which caused a considerable number of persons to suffer increased exposures and risks of exposures to the COVID-19 virus at Defendant's workplaces (including the Premises), including but not limited to Defendant's workers,

and other persons with whom those workers come into contact with both at Defendant's workplaces (including the Premises) and outside of Defendant's workplaces (including Mrs. Kuciemba). Defendant substantially and unreasonably created, and substantially assisted in the creation of, a grave risk to public health and safety, and wrongfully and unduly interfered with Mrs. Kuciemba's comfortable enjoyment of their lives and property. *See County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 305-06.

40. The acts and omissions of Defendant alleged herein substantially and unreasonably created or assisted in the creation of the spread and transmission of grave, life-threatening disease and infection, the risk of spread and transmission of grave, life-threatening disease and infection disease or infection, and the actual and real fear and anxiety of the spread and transmission of grave, life-threatening disease and infection, all of which constitutes an actionable public nuisance. *See, e.g.*, Restatement (Second) of Torts § 821B & cmt. G ("[T]he threat of communication of smallpox to a single person may be enough to constitute a public nuisance because of the possibility of an epidemic; and a fire a hazard to one adjoining landowner may be a public nuisance because of the danger of a conflagration."); *Birke v. Oakwood Worldwide (2009)* 169 Cal.App.4th 1540, 1546 (secondhand smoke in condominium complex); *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 306.

41. The public nuisance caused by Defendant as alleged herein has caused and will continue to cause special injury to Mrs. Kuciemba within the meaning of Civil Code § 3493, due to the infection Mrs. Kuciemba personally suffered, the risk of exposures she faced, and the increased anxiety and fear caused by her pre-existing medical condition and her need to separate herself fromclose family members to minimize the risk of further community spread. Those harms are different from the types of harms suffered by members of the general public who did not work or have direct contact with employees who worked at the Premises.

42. California Code of Civil Procedure § 731 and California Civil Code § 3491, 3493, and 3495 authorize Mrs. Kuciemba to bring this action for injunctive, equitable abatements, and damages relief from Defendant.

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43. Defendant's failure to comply with health and safety standard in its workplace, including the Premises, has caused, and is reasonably certain to cause, community spread of the COVID-19 infection. Such community spread has not been, and will not be, limited to the physical location of Defendant's workplaces only, or to the workers at the workplaces only (including the Premises), as infected works and other persons present at Defendant's workplaces (including the Premises) have interacted with their family members, co-residents neighbors, and others with whom they must necessarily interact as they undertake essential daily activities such as shopping, doctor's visits, and childcare.

44. This community spread has resulted in increased disease and will continue to result in increased disease.

45. Defendant's conduct as alleged herein unreasonably interferes with the common public right to public health and safety.

46. Defendant's decision to operate its workplaces (including the Premises) without ensuring minimum basic health and safety standards, including by meeting the OSHA, Cal Osha, the Health Order, and/or CDC regulations, guidelines, and other minimum public health standards necessary to stop or substantially reduce the spread of COVID-19, is reasonably certain to cause further spread of COVID-19 infection and the reasonable and severe fear of the further spread of COVID-19 to Plaintiffs and other members of the community.

47. Administrative and governmental remedies have proven inadequate to protect Mrs. Kuciemba from the harms alleged in this complaint and the wrongful conduct by Defendant alleged in this complaint. OSHA and Cal/OSHA, the principal government agencies tasked with ensuring workplace safety, have deprioritized inspections an enforcement at non-medical workplaces. The CDC, while able to issue recommendations, does not have or exercise independent enforcement authority against businesses that fail to follow those recommendations.

48. The risk of injury faced by Mrs. Kuciemba outweighs the cost of the reasonable measures included in Mrs. Kuciemba's proposed injunction.

49. Defendant and each of them are substantial contributors to the public nuisance alleged herein.

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50. Defendant's past and ongoing conduct is a direct and proximate cause of Mrs. Kuciemba's injuries and threatened injuries.

51. Defendant knew and should have known that their conduct as alleged herein would be the direct and proximate cause of the injuries alleged herein to Mrs. Kuciemba .

52. Defendant's conduct as alleged herein constitutes a substantial and unreasonable interference with and obstruction of public rights and property, including the public rights to health, safety and welfare of Mrs. Kuciemba and members of the public, and those who come in contact with them, whose safety and lives are at risk due to Defendant's failure to adopt an implement proper procedures for protecting workers, customers, and other from exposure to the COVID-19 virus.

53. Defendant has committed and continue to commit the acts alleged herein knowingly and willfully.

54. As a proximate result of Defendant's unlawful actions and omissions, Mrs. Kuciemba has been damaged in an amount according to proof of trial.

55. In addition to declaratory relief, injunctive relief, and damages as alleged herein, Mrs. Kuciemba is entitled to interest, penalties, attorneys' fees and expenses pursuant to *CCP* § 1021.5, and costs of suit.

FIFTH CAUSE OF ACTION
Loss of Consortium
(Plaintiff Mr. Kuciemba Against All Defendants)

56. Plaintiffs re-allege and incorporate the allegations set forth in paragraphs 1–55 of this Complaint.

57. Mr. Kuciemba and Mrs. Kuciemba were married at all relevant times.

58. Prior to July 2020, Mrs. Kuciemba was able to and did perform her duties as a wife.

59. As a direct and proximate result of the conduct, acts, and/or omissions of defendants, and each of them, as set forth herein above, Mrs. Kuciemba has been unable to perform the necessary duties of a husband including but not limited to the work and services usually performed in the care, maintenance and management of the family home, and he will be unable to perform

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such work, services and duties in the future. By reason thereof, Mr. Kuciemba has been deprived and will be deprived of the love, companionship, comfort, care, assistance, protection, affection, society, moral support, and the loss of enjoyment of sexual relations.

60. Plaintiffs reserve the right to prove the amount of damages at trial. The amount of compensatory damages sought will be in excess of the amount sufficient to establish jurisdiction.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that judgment be entered against Defendants follows:

1. For general and compensatory damages, including damages for pain and suffering, loss of enjoyment of life, lost wages, loss of consortium, lost earning capacity and emotional distress damages, in excess of the amount sufficient to establish jurisdiction according to proof at trial;
2. For punitive damages against Defendants;
3. For attorneys' fees and costs pursuant to *CCP* § 1021.5;
4. For injunctive relief;
5. For prejudgment interest on all amounts claimed;
6. For costs of suit; and
7. For such other and further relief as the Court may deem just and proper.

Date: October 22, 2020

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Martin Zurada
Attorneys for Plaintiff
CORBY KUCIEMBA and
ROBERT KUCIEMBA

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DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury.

Date: October 22, 2020

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Martin Zurada
Attorneys for Plaintiff
CORBY KUCIEMBA and
ROBERT KUCIEMBA

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 1. Notice of Appeal from a Judgment or Order of a United States District Court

Name of U.S. District Court: Northern District of California

U.S. District Court case number: 20-cv-09355-MMC

Date case was first filed in U.S. District Court: 12/28/2020

Date of judgment or order you are appealing: 05/10/2021

Fee paid for appeal? *(appeal fees are paid at the U.S. District Court)*

◉ Yes ○ No ○ IFP was granted by U.S. District Court

List all Appellants *(List **each** party filing the appeal. Do not use "et al." or other abbreviations.)*

Corby Kuciemba and Robert Kuciemba

Is this a cross-appeal? ○ Yes ◉ No

If Yes, what is the first appeal case number?

Was there a previous appeal in this case? ○ Yes ◉ No

If Yes, what is the prior appeal case number?

Your mailing address:

25 Orinda Way

Suite 250

City: Orinda State: CA Zip Code: 94563

Prisoner Inmate or A Number (if applicable):

Signature s/Mark L. Venardi **Date** June 3, 2021

Complete and file with the attached representation statement in the U.S. District Court

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 6. Representation Statement

Instructions for this form: http://www.ca9.uscourts.gov/forms/form06instructions.pdf

Appellant(s) *(List **each** party filing the appeal, do not use "et al." or other abbreviations.)*

Name(s) of party/parties:

Corby Kuciemba and Robert Kuciemba

Name(s) of counsel (if any):

Mark L. Venardi, Martin Zurada, Mark Freeman
Venardi Zurada LLP

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Email(s): mzurada@vefirm.com; mvenardi@vefirm.com; mfreeman@vefirm.com

Is counsel registered for Electronic Filing in the 9th Circuit? (•) Yes ( ) No

---

Appellee(s) *(List only the names of parties and counsel who will oppose you on appeal. List separately represented parties separately.)*

Name(s) of party/parties:

Victory Woodworks, Inc.

Name(s) of counsel (if any):

William Bogdan and Michael McConathy
Hinshaw & Culbertson LLP

Address: One California Street, 18th Floor, San Francisco, CA 94111

Telephone number(s): (415) 362-6000

Email(s): wbogdan@hinshawlaw.com; mmcconathy@hinshawlaw.com

To list additional parties and/or counsel, use next page.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Continued list of parties and counsel: *(attach additional pages as necessary)*

Appellants

Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

Is counsel registered for Electronic Filing in the 9th Circuit? ○ Yes ○ No

Appellees

Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

ADRMOP,APPEAL,CLOSED

U.S. District Court
California Northern District (San Francisco)
CIVIL DOCKET FOR CASE #: 3:20-cv-09355-MMC

Kuciemba et al v. Victory Woodworks, Inc.
Assigned to: Judge Maxine M. Chesney
Case in other court: United States Court of Appeals for the 9th Circuit, 21-15963
San Francisco Superior Court, CGC-20-587507
Cause: 28:1332 Diversity-Personal Injury

Date Filed: 12/28/2020
Date Terminated: 05/10/2021
Jury Demand: Plaintiff
Nature of Suit: 360 P.I.: Other
Jurisdiction: Diversity

Plaintiff

Corby Kuciemba represented by **Mark Thomas Freeman**
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Plaintiff

Robert Kuciemba represented by **Mark Thomas Freeman**
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Mark Lain Venardi , Esq.
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Martin Zurada
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V.

Defendant

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ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
12/28/2020	1	NOTICE OF REMOVAL from San Francisco Superior Court. Their case number is CGC-

		20-587507. (Filing fee $402 receipt number 0971-15369678). Filed byVictory Woodworks, Inc.. (Attachments: # 1 Exhibit 1, # 2 Civil Cover Sheet)(Bogdan, William) (Filed on 12/28/2020) (Entered: 12/28/2020)
12/28/2020	2	Request for Judicial Notice re 1 Notice of Removal, filed byVictory Woodworks, Inc.. (Related document(s) 1) (Bogdan, William) (Filed on 12/28/2020) (Entered: 12/28/2020)
12/28/2020	3	Corporate Disclosure Statement by Victory Woodworks, Inc. identifying Corporate Parent Victory Woodworks, Inc. for Victory Woodworks, Inc.. (Bogdan, William) (Filed on 12/28/2020) (Entered: 12/28/2020)
12/28/2020	4	Certificate of Interested Entities by Victory Woodworks, Inc. (Bogdan, William) (Filed on 12/28/2020) (Entered: 12/28/2020)
12/28/2020	5	Case assigned to Magistrate Judge Joseph C. Spero. Counsel for plaintiff or the removing party is responsible for serving the Complaint or Notice of Removal, Summons and the assigned judge's standing orders and all other new case documents upon the opposing parties. For information, visit *E-Filing A New Civil Case* at http://cand.uscourts.gov/ecf/caseopening. Standing orders can be downloaded from the court's web page at www.cand.uscourts.gov/judges. Upon receipt, the summons will be issued and returned electronically. Counsel is required to send chambers a copy of the initiating documents pursuant to L.R. 5-1(e)(7). A scheduling order will be sent by Notice of Electronic Filing (NEF) within two business days. Consent/Declination due by 1/11/2021. (haS, COURT STAFF) (Filed on 12/28/2020) (Entered: 12/28/2020)
12/28/2020	6	**Initial Case Management Scheduling Order with ADR Deadlines: Case Management Statement due by 3/26/2021. Initial Case Management Conference set for 4/2/2021 02:00 PM in San Francisco, - Videoconference Only. (arkS, COURT STAFF) (Filed on 12/28/2020) (Entered: 12/28/2020)**
01/04/2021	7	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by Victory Woodworks, Inc... (Bogdan, William) (Filed on 1/4/2021) (Entered: 01/04/2021)
01/04/2021	8	MOTION to Dismiss *for Failure to State A Claim [FRCP 12(b)(6)]* filed by Victory Woodworks, Inc.. Motion Hearing set for 2/12/2021 09:30 AM in San Francisco, Courtroom F, 15th Floor before Magistrate Judge Joseph C. Spero. Responses due by 1/19/2021. Replies due by 1/26/2021. (Attachments: # 1 Declaration of William A. Bogdan, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Proposed Order)(Bogdan, William) (Filed on 1/4/2021) (Entered: 01/04/2021)
01/04/2021	9	Request for Judicial Notice re 8 MOTION to Dismiss *for Failure to State A Claim [FRCP 12(b)(6)]* filed byVictory Woodworks, Inc.. (Attachments: # 1 Exhibit B, # 2 Exhibit C, # 3 Exhibit D, # 4 Exhibit E)(Related document(s) 8) (Bogdan, William) (Filed on 1/4/2021) (Entered: 01/04/2021)
01/05/2021	10	CLERK'S NOTICE OF IMPENDING REASSIGNMENT TO A U.S. DISTRICT COURT JUDGE: The Clerk of this Court will now randomly reassign this case to a District Judge because either (1) a party has not consented to the jurisdiction of a Magistrate Judge, or (2) time is of the essence in deciding a pending judicial action for which the necessary consents to Magistrate Judge jurisdiction have not been secured. You will be informed by separate notice of the district judge to whom this case is reassigned. ALL HEARING DATES PRESENTLY SCHEDULED BEFORE THE CURRENT MAGISTRATE JUDGE ARE VACATED AND SHOULD BE RE-NOTICED FOR HEARING BEFORE THE JUDGE TO WHOM THIS CASE IS REASSIGNED.

		This is a text only docket entry; there is no document associated with this notice. (klhS, COURT STAFF) (Filed on 1/5/2021) (Entered: 01/05/2021)
01/05/2021	11	**ORDER, Case Reassigned using a proportionate, random, and blind system pursuant to General Order No. 44 to Judge Maxine M. Chesney for all further proceedings. Magistrate Judge Joseph C. Spero no longer assigned to the case. Notice: The assigned judge participates in the Cameras in the Courtroom Pilot Project. See General Order No. 65 and http://cand.uscourts.gov/cameras.. Signed by The Clerk on 1/5/21. (Attachments: # 1 Notice of Eligibility for Video Recording)(haS, COURT STAFF) (Filed on 1/5/2021) (Entered: 01/05/2021)**
01/05/2021	12	**CASE MANAGEMENT SCHEDULING ORDER: Initial Case Management Conference set for 4/2/2021 at 10:30 AM in San Francisco, Courtroom 07, 19th Floor. Joint Case Management Statement due by 3/26/2021.. Signed by Judge Maxine M. Chesney on 1/5/2021. (tlS, COURT STAFF) (Filed on 1/5/2021) (Entered: 01/05/2021)**
01/05/2021	13	Amended MOTION to Dismiss *Notice* filed by Victory Woodworks, Inc.. Motion Hearing set for 2/12/2021 09:00 AM in San Francisco, Courtroom 07, 19th Floor before Judge Maxine M. Chesney. Responses due by 1/19/2021. Replies due by 1/26/2021. (Attachments: # 1 Proposed Order Amended)(Bogdan, William) (Filed on 1/5/2021) (Entered: 01/05/2021)
01/08/2021	14	Certificate of Interested Entities by Corby Kuciemba, Robert Kuciemba (Venardi, Mark) (Filed on 1/8/2021) (Entered: 01/08/2021)
01/19/2021	15	OPPOSITION/RESPONSE (re 8 MOTION to Dismiss *for Failure to State A Claim [FRCP 12(b)(6)]*) *Plantiff's Memorandum of Poins and Authorities in Support of Opposition to Defendant's Motion to Dismiss* filed byCorby Kuciemba, Robert Kuciemba. (Attachments: # 1 Declaration Plaintiffs' Opposition to Defendant's Request for Judicial Notice, # 2 Proposed Order Proposed Order Denying Defendant's Motion to Dismiss, # 3 Certificate/Proof of Service Certificate of Service)(Freeman, Mark) (Filed on 1/19/2021) (Entered: 01/19/2021)
01/26/2021	16	REPLY (re 8 MOTION to Dismiss *for Failure to State A Claim [FRCP 12(b)(6)]*) filed byVictory Woodworks, Inc.. (Bogdan, William) (Filed on 1/26/2021) (Entered: 01/26/2021)
02/08/2021	17	CLERK'S NOTICE - CHANGING HEARING TIME. FEBRUARY 12, 2021 MOTION HEARING TO BE HELD AT 2:00 PM BY ZOOM WEBINAR. Defendant's Motion to Dismiss Hearing reset to 2/12/2021 at 02:00 PM in San Francisco, - Videoconference Only before Judge Maxine M. Chesney. This proceeding will be held via a Zoom webinar. **Webinar Access:** All counsel, members of the public, and media may access the webinar information at https://www .cand.uscourts.gov/mmc **General Order 58.** Persons granted access to court proceedings held by telephone or videoconference are reminded that photographing, recording, and rebroadcasting of court proceedings, including screenshots or other visual copying of a hearing, is absolutely prohibited. **Zoom Guidance and Setup:** https://www.cand.uscourts.gov/zoom/. Motion Hearing reset to 2/12/2021 at 02:00 PM in San Francisco, - Videoconference Only before Judge Maxine M. Chesney. *(This is a text-only entry generated by the court. There is no document associated with this entry.)*, Set/Reset Deadlines as to 13 Amended MOTION to Dismiss *Notice*.,.(tlS, COURT STAFF) (Filed on 2/8/2021) (Entered: 02/08/2021)

02/12/2021	18	**Minute Entry for proceedings held before Judge Maxine M. Chesney: Motion Hearing held on 2/12/2021. re 8 MOTION to Dismiss *for Failure to State A Claim [FRCP 12(b)(6)]* filed by Victory Woodworks, Inc., 13 Amended MOTION to Dismiss *Notice* filed by Victory Woodworks, Inc. Total Time in Court: 1 hour 33 minutes. Court Reporter: Katherine Sullivan - Zoom Webinar. Plaintiff Attorney: Mark Freeman. Defendant Attorney: William Bogdan. Attachment: Civil Minutes. (tlS, COURT STAFF) (Date Filed: 2/12/2021) (Entered: 02/12/2021)**
02/22/2021	19	**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; AFFORDING PLAINTIFFS LEAVE TO AMEND.** The Motion to Dismiss is granted, and plaintiffs are afforded leave to file, no later than March 19, 2021, a First Amended Complaint. Signed by Judge Maxine M. Chesney on February 22, 2021. (mmclc2, COURT STAFF) (Filed on 2/22/2021) (Entered: 02/22/2021)
02/22/2021	20	TRANSCRIPT ORDER for proceedings held on 02/12/2021 before Judge Maxine M. Chesney by Victory Woodworks, Inc., for Court Reporter Katherine Sullivan. (Bogdan, William) (Filed on 2/22/2021) (Entered: 02/22/2021)
02/25/2021	21	TRANSCRIPT ORDER for proceedings held on 02/12/2021 before Judge Maxine M. Chesney by Corby Kuciemba, Robert Kuciemba, for Court Reporter Katherine Sullivan. (Zurada, Martin) (Filed on 2/25/2021) (Entered: 02/25/2021)
03/07/2021	22	Transcript of Proceedings held on 2-12-21, before Judge Maxine M. Chesney. Court Reporter Katherine Sullivan, Katherine_Sullivan@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 20 Transcript Order, 21 Transcript Order) Release of Transcript Restriction set for 6/7/2021. (Related documents(s) 20 , 21) (Sullivan, Katherine) (Filed on 3/7/2021) (Entered: 03/07/2021)
03/18/2021	23	AMENDED COMPLAINT against All Defendants. Filed byCorby Kuciemba, Robert Kuciemba. (Zurada, Martin) (Filed on 3/18/2021) (Entered: 03/18/2021)
03/19/2021	24	CLERK'S NOTICE - APRIL 2, 2021 INITIAL CASE MANAGEMENT CONFERENCE WILL BE HELD TELEPHONICALLY. The Court will initiate the call. Counsel participating in the conference call are directed to email their name and direct phone number to: mmccrd@cand.uscourts.gov. Due to multiple hearings, counsel are directed to be on telephone stand-by from 10:30 AM until called by the Court.. *(This is a text-only entry generated by the court. There is no document associated with this entry.)* (tlS, COURT STAFF) (Filed on 3/19/2021) (Entered: 03/19/2021)
03/22/2021	25	STIPULATION WITH PROPOSED ORDER *to Continue Case Management Conference Date* filed by Victory Woodworks, Inc.. (Bogdan, William) (Filed on 3/22/2021) (Entered: 03/22/2021)
03/22/2021	26	**ORDER APPROVING STIPULATION TO CONTINUE CASE MANAGEMENT CONFERENCE DATE.** The Initial Case Management Conference is continued from April 2, 2021, to July 2, 2021. The parties' deadline to file a Joint Case Management Conference Statement is extended to June 25, 2021. Signed by Judge Maxine M. Chesney on March 22, 2021. (mmclc2, COURT STAFF) (Filed on 3/22/2021) (Entered: 03/22/2021)
03/23/2021		Set/Reset Deadlines:, Set/Reset Hearing re 26 Order,, Terminate Motions, Joint Case Management Statement due by 6/25/2021. Initial Case Management Conference reset to

		7/2/2021 at 10:30 AM in San Francisco, Courtroom 07, 19th Floor. (tlS, COURT STAFF) (Filed on 3/23/2021) (Entered: 03/23/2021)
04/01/2021	27	MOTION to Dismiss *First Amended Complaint for Failure to State A Claim* filed by Victory Woodworks, Inc.. Motion Hearing set for 5/7/2021 09:00 AM in San Francisco, Courtroom 07, 19th Floor before Judge Maxine M. Chesney. Responses due by 4/15/2021. Replies due by 4/22/2021. (Attachments: # 1 Declaration of William A. Bogdan, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Proposed Order) (Bogdan, William) (Filed on 4/1/2021) (Entered: 04/01/2021)
04/15/2021	28	OPPOSITION/RESPONSE (re 27 MOTION to Dismiss *First Amended Complaint for Failure to State A Claim*) filed byCorby Kuciemba, Robert Kuciemba. (Attachments: # 1 Proposed Order)(Zurada, Martin) (Filed on 4/15/2021) (Entered: 04/15/2021)
04/22/2021	29	REPLY (re 27 MOTION to Dismiss *First Amended Complaint for Failure to State A Claim*) filed byVictory Woodworks, Inc.. (Bogdan, William) (Filed on 4/22/2021) (Entered: 04/22/2021)
05/04/2021	30	CLERK'S NOTICE CONVERTING MOTION HEARING SCHEDULED ON MAY 7, 2021 AT 9:00 A.M., TO A ZOOM WEBINAR. As to 27 MOTION to Dismiss *First Amended Complaint for Failure to State A Claim*.,. Motion Hearing set for 5/7/2021 at 09:00 AM in San Francisco, - Videoconference Only before Judge Maxine M. Chesney. This proceeding will be held via a Zoom webinar. **Webinar Access:** All counsel, members of the public, and media may access the webinar information at https://www.cand.uscourts.gov/mmc **General Order 58.** Persons granted access to court proceedings held by telephone or videoconference are reminded that photographing, recording, and rebroadca sting of court proceedings, including screenshots or other visual copying of a hearing, is absolutely prohibited. **Zoom Guidance and Setup:** https://www.cand.uscourts.gov/zoom/< /A>. Motion Hearing set for 5/7/2021 at 09:00 AM in San Francisco, - Videoconference Only before Judge Maxine M. Chesney. *(This is a text-only entry generated by the court. There is no document associated with this entry.)*,(tlS, COURT STAFF) (Filed on 5/4/2021) (Entered: 05/04/2021)
05/07/2021	31	**Minute Entry for proceedings held before Judge Maxine M. Chesney: Motion Hearing held on 5/7/2021. re 27 MOTION to Dismiss *First Amended Complaint for Failure to State A Claim* filed by Victory Woodworks, Inc. Total Time in Court: 1:12. Court Reporter: Katherine Sullivan - Zoom Webinar. Plaintiff Attorney: Martin Zurada. Defendant Attorney: William Bogdan. Attachment: Civil Minutes. (tlS, COURT STAFF) (Date Filed: 5/7/2021) (Entered: 05/07/2021)**
05/07/2021	32	TRANSCRIPT ORDER for proceedings held on May 7, 2021 before Judge Maxine M. Chesney by Corby Kuciemba, Robert Kuciemba, for Court Reporter Katherine Sullivan. (Zurada, Martin) (Filed on 5/7/2021) (Entered: 05/07/2021)
05/07/2021	33	TRANSCRIPT ORDER for proceedings held on 05/07/2021 before Judge Maxine M. Chesney by Victory Woodworks, Inc., for Court Reporter Katherine Sullivan. (Bogdan, William) (Filed on 5/7/2021) (Entered: 05/07/2021)
05/10/2021	34	**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; DISMISSING FIRST AMENDED COMPLAINT WITHOUT FURTHER LEAVE TO AMEND.**

		Signed by Judge Maxine M. Chesney on May 10, 2021. (mmclc2, COURT STAFF) (Filed on 5/10/2021) (Entered: 05/10/2021)
05/10/2021	35	CLERK'S JUDGMENT in favor of Victory Woodworks, Inc. against Corby Kuciemba, Robert Kuciemba. Defendants Motion to Dismiss Plaintiffs First Amended Complaint is GRANTED without further leave to amend and the instant action is hereby DISMISSED. (tlS, COURT STAFF) (Filed on 5/10/2021) (Entered: 05/10/2021)
05/13/2021	36	TRANSCRIPT ORDER for proceedings held on 2/12/2021; 5/7/2021 before Judge Maxine M. Chesney for Court Reporter Katherine Sullivan. (rjdS, COURT STAFF) (Filed on 5/13/2021) (Entered: 05/13/2021)
05/13/2021	37	Transcript of Proceedings held on 5/7/21, before Judge Maxine M. Chesney. Court Reporter Katherine Sullivan, Katherine_Sullivan@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 33 Transcript Order, 32 Transcript Order) Release of Transcript Restriction set for 8/11/2021. (Related documents(s) 33 , 32) (Sullivan, Katherine) (Filed on 5/13/2021) (Entered: 05/13/2021)
05/13/2021	38	TRANSCRIPT ORDER for proceedings held on 5/7/2021 before Judge Maxine M. Chesney for Court Reporter Katherine Sullivan. (rjdS, COURT STAFF) (Filed on 5/13/2021) (Entered: 05/13/2021)
06/03/2021	39	NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Corby Kuciemba, Robert Kuciemba. Appeal of Clerk's Judgment, 35 (Appeal fee of $505 receipt number 0971-16038857 paid.) (Venardi, Mark) (Filed on 6/3/2021) (Entered: 06/03/2021)
06/03/2021	40	USCA Case Number 21-15963 United States Court of Appeals for the 9th Circuit for 39 Notice of Appeal to the Ninth Circuit filed by Corby Kuciemba, Robert Kuciemba. (arkS, COURT STAFF) (Filed on 6/3/2021) (Entered: 06/08/2021)

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No. 21-15963

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CORBY KUCIEMBA and ROBERT KUCIEMBA,

Appellants-Appellants,

v.

VICTORY WOODWORKS, INC., a Nevada Corporation,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 3:20-cv-09355-MMC
Hon. Maxine M. Chesney

APPELLEE'S ANSWERING BRIEF

HINSHAW & CULBERTSON LLP
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ATTORNEYS FOR APPELLEE

CORPORATE DISCLOSURE STATEMENT

The undersigned, counsel of record for Appellee Victory Woodworks, Inc. hereby makes the following disclosure statement pursuant to Federal Rule of Civil Procedure 7.1:

Victory Woodworks, Inc. is a Nevada corporation with its principal place of business at 340 Kresge Lane, Sparks, Nevada. No publicly traded corporation owns 10% or more of the company.

Dated: November 12, 2021

HINSHAW & CULBERTSON LLP

By: */s/ William Bogdan*
WILLIAM BOGDAN
Attorneys for Appellee
VICTORY WOODWORKS, INC.

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I. ISSUES PRESENTED

Robert Kuciemba claims he caught a virus at his construction site in the course and scope of his employment. His spouse Corby Kuciemba claims she caught that virus at home from Mr. Kuciemba. Ms. Kuciemba filed a civil action for negligence against Mr. Kuciemba's employer Victory Woodworks, Inc.

A. Was the district court correct in dismissing Ms. Kuciemba's civil suit against Victory Woodworks, Inc. because her injury was derivative of his on-the-job injury, and thus barred by the workers' compensation exclusive remedy?

B. Was the district court correct in refusing to extend an employer's duty under California's "take-home asbestos" product liability theory to encompass a virus contracted off-site by a non-employee from an employee who was exposed to that virus at work?

II. INTRODUCTION

Each morning, whether by BART train, carpool or otherwise, Robert Kuciemba would undertake the long commute from his home in Antioch to his construction job with Victory Woodworks in San Francisco. Eight hours later he would return home during the afternoon rush hour. How he spent the other two-thirds of his workdays, how he chose to relax on the weekends, and who he saw during his non-work hours was his prerogative.

It appears Mr. Kuciemba would leave his wife Corby Kuciemba behind in

Antioch during the workday. There is no allegation that she ever visited her husband's jobsite in San Francisco. What she did and who she met throughout the week was her prerogative.

Mr. Kuciemba claims the only place on the planet where he could have contracted the COVID-19 virus was at his jobsite. Ms. Kuciemba claims the only place on the planet she could have caught the virus was at home from her husband.

Mr. Kuciemba filed a workers' compensation claim against Victory Woodworks for the illness he contracted on the job. Ms. Kuciemba filed a civil complaint against Victory Woodworks for the illness she contracted from her husband which he claims he contracted on the job.

The district court refused to allow Ms. Kuciemba's suit to proceed. This result was not the product of an unanticipated exercise in judicial activism, but through a measured application of a century of workers' compensation law and the refusal to extend a product liability theory applicable only to asbestos to a virus.

Because Ms. Kuciemba's illness was entirely dependent on Mr. Kuciemba's injury in the course and scope of his employment for which he sought workers' compensation, the district court correctly held the workers' compensation exclusive remedy barred her claim. Moreover, because Ms. Kuciemba's illness was entirely dependent on transmission of a virus, not a commercial product used in commerce, the district court correctly determined that California's "take-home"

product liability theory remained limited to asbestos alone, and did not extend to a virus.

III. STATEMENT OF JURISDICTION

Appellee does not contest appellants' statement of jurisdiction.

IV. STATEMENT OF THE CASE

Corby Kuciemba and her husband Robert live in Hercules on Crystal Court, a residential block of contiguous homes bordering several retail complexes. (Appellee's Excerpts of Record VWER_071) The City of Hercules has been under a Local Emergency Order because of COVID-19 since March 20, 2020. (VWER_106-110) Within walking distance of the Kuciemba home is a Rite Aid, Big Lots, Post Office, McDonald's, Home Depot and Lucky's Supermarket. (VWER_046-49.)

Robert Kuciemba works in construction, an industry deemed essential by California and San Francisco. (CCSF Order of the Health Officer [hereafter "SFOHO"] §16(f)(v) VWER_085.) On May 6, 2020, he started working for Victory Woodworks at a jobsite in San Francisco. (Appellant's Corrected Excerpts of Record ER-156 ¶13.)

On July 11 or 12, 2020, Ms. Kuciemba began experiencing unidentified symptoms of the COVID-19 virus. (ER-157 ¶18) Mr. Kuciemba, who by then was no longer working for Victory Woodworks, began experiencing symptoms within

the same timeframe. Appellants tested positive on July 16, 2020, and were eventually hospitalized. (ER-157 ¶19.)

Mr. Kuciemba was convinced that he became infected on the job (ER-157 ¶17), and on that basis filed a workers' compensation claim. (WCAB Application for Adjudication of Claim VWER_062-72.) Appellants allege that Mr. Kuciemba infected Ms. Kuciemba. (ER-159 ¶24.) They do not believe it was Ms. Kuciemba who infected her husband, or that Ms. Kuciemba contracted the virus from any other source.

A. Original Complaint Filed

Ms. Kuciemba sued Victory Woodworks, alleging that there were twelve things her husband's employer could have done better in managing the jobsite. (ER-157 ¶5 ER-158¶21.) Because she believed her husband was exposed at work to COVID-19, she claimed Victory Woodworks was liable to her for her own exposure on various theories of negligence and premises liability. In turn, Mr. Kuciemba filed a civil claim for his loss of his wife's consortium. Appellants sought tort damages, punitive damages and attorney's fees.

B. Original Complaint Dismissed

Appellants were unequivocal in their original complaint as to the basis of their claims: Mr. Kuciemba was infected with COVID-19 by his co-workers on the jobsite, and Ms. Kuciemba contracted that disease from her husband at home.

(ER-157:10-16, ER-159:2-4.) In response, Victory Woodworks filed a FRCP 12(b)(6) motion to dismiss the complaint on grounds that appellants' claims were subsumed by the workers' compensation remedy, and that Victory Woodworks did not owe a duty to prevent non-employees off-site from contracting COVID-19.

Appellants' opposition to the Motion to Dismiss complaint repeatedly stressed that Mr. Kuciemba's co-workers caused him to become infected, resulting in him bringing that illness home and infecting his wife. (VWER_028:23-25.) "[T]he virus entered the employee's body at work and then passed on to the non-employee member." (VWER_031:21-24)

Despite the allegations of workplace exposures, the court during oral argument posed "the easy question" to counsel for appellants: if Mr. Kuciemba was infected with the virus at work but asymptomatic, would he still be considered injured? Counsel responded, "Yes. I would argue my position is first if he was asymptomatic, he's in fact injured because they now have a pathogen living in their body that they did not have before." Counsel also conceded that an infected though asymptomatic person would be "injured," but not capable of making a financial recovery. (ER-108:19-109:6)

Because Ms. Kuciemba would have no injury but for Mr. Kuciemba's illness contracted in the course and scope of employment, the district court dismissed the complaint based on the workers' compensation exclusive remedy, but provided

appellants leave to amend. (ER-095-96.)

C. Amended Complaint Filed

Deprived of using Mr. Kuciemba's jobsite illness as the cornerstone to their claims, appellants changed tack in the amended complaint. They expunged any mention of his contraction of the disease, serious COVID-19 symptoms, positive COVID-19 test, or subsequent hospitalization. (Compare ER-157:14-18 with ER-089:4-8) Now it was only "most likely" that Mr. Kuciemba was exposed in the workplace (ER-088:2), and that despite his hospitalization for COVID-19, Mr. Kuciemba might really have only been asymptomatic (ER-86:11-15, ER-09:4-7.) Instead, Ms. Kuciemba claimed to have been made ill by her husband's clothing. (ER-88:21-38.)

D. Amended Complaint Dismissed

The district court again dismissed the complaint, this time without leave to amend. Claims that Ms. Kuciemba contracted COVID-19 from direct contact with Mr. Kuciemba were still barred by the exclusive remedy. (ER-005-06.) To the extent appellants were attempting to claim Mr. Kuciemba was never infected, and that Ms. Kuciemba contracted the disease through droplets perched on Mr. Kuciemba's clothing, the employer's duty to provide an employee a safe workplace did not extend to non-employees who contract a virus away from the jobsite. Even if take-home liability existed, appellants failed to allege a factually

plausible claim.

V. SUMMARY OF THE ARGUMENT

A. The Workers' Compensation Act bars the civil claims of a spouse alleging injury resulting from a worker's illness contracted in the course and scope of employment. If a non-employee suffers an illness contracted from a contagious employee, the employee's exclusive remedy through worker's compensation encompasses the employer's liability to that worker and any other person.

1. An employer's sole liability exposure to any person harmed as a result of an employee's work-related injury is through worker's compensation. Claims of family members derivative of a worker's injury have always been subject to the exclusive remedy of workers' compensation, even though the injuries sustained by the family members are independent of those sustained by the worker, and only the worker receives compensation for the injury.

2. Non-employees cannot claim a civil recovery unless they visit the premises and sustain harm independent of the injury the worker sustains. Here, the spouse claims she caught the virus at home from her husband who caught the same virus at work, thus triggering the bar of the exclusive remedy.

B. The theory of asbestos take-home liability against an employer is inapplicable and inappropriate for a virus contracted by non-employees off-site. Ms. Kuciemba claims she had no injury until she came in contact with her husband

who supposedly contracted COVID-19 on the job. In contrast, mesothelioma is not contracted by contact with a contagious employee: the asbestos fibers cause the harm, not the injured employee. Not only has a take-home theory never been applied to a pathogen, it has never been applied to any non-asbestos product.

1. The nature of an infectious disease is radically different from the harm caused by asbestos exposure. Asbestos is a regulated commercial product from an identifiable source used for financial gain. COVID-19 is a ubiquitous virus of unknown origin from which no commercial enterprise benefits. As such, state and local regulations establish best practices for essential industries to slow the spread of the virus, but do not penalize those employers for failing to guarantee that workers remain COVID-19 free. Exposing employers to liability would create a morass of civil litigation that could destroy many of those very industries which society has deemed essential to its ability to function during the pandemic. Never has an employer in California been held liable to an infected spouse who caught a virus from her husband who brought it home from work.

2. Manufacturers, distributors and users of asbestos have always been subject to strict liability principles for its improper use. Applying that theory to a virus could extend liability far beyond the employment context to impose culpability in any social setting.

C. A COVID-19 take-home liability theory is not supported by science

nor is it capable of proof. The allegation fails to meet the plausibility standard required to state a claim.

VI. ARGUMENT

A. Standard of Review

This Court reviews an order granting a Rule 12(b)(6) motion to dismiss de novo. *Doe v. CVS Pharmacy, Inc*., 982 F.3d 1204, 1208 (9th Cir. 2020). A complaint may be dismissed under Fed. R. Civ. P. 12(b)(6) if the plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support a cognizable legal theory. *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013).

Though generally the factual allegations of the complaint must be assumed to be true, not everything in the complaint need necessarily be accepted as binding. Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2009). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" *See Id.*, at 678. The complaint must proffer sufficient facts to state a claim for relief that is plausible on its face. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

B. The District Court was Correct in Determining that Workers' Compensation Bars a Claim for a Non-Employee's Injury Caused by an Employee's On-the-Job Injury

1. Appellants' Claims Are Subsumed by the Workers' Compensation Exclusive Remedy

Never have California courts permitted a spouse injured as a result of an

employee's on-the-job injury to maintain a civil claim against the worker's employer. All of appellants' claims find their genesis in the injury Mr. Kuciemba alleges he incurred on his jobsite, for which he filed a claim with the Workers' Compensation Appeals Board.

Mr. Kuciemba's application for benefits is a concession that appellants' personal injury allegations are not the proper subject of a civil suit, and are subsumed by the workers' compensation exclusive remedy. Their claims are barred, even though Ms. Kuciemba was never employed by Victory Woodworks.

For more than a century, California workers have been guaranteed a "no-fault" recovery system of workers' compensation from their employers for injuries sustained in the course and scope of employment. Rather than incurring the uncertainties of litigating workplace claims, employees are instead statutorily entitled to prompt compensation under a strict liability system. In exchange, employers are protected from facing excessive civil liability because workers' compensation is the exclusive remedy for all workplace injury claims.

The Workers' Compensation Act (WCA) at Labor Code section 3600 et seq., "offers protection with one hand even as it removes access to civil recourse with the other." *Gund v. County of Trinity,* (2020) 10 Cal.5th 503, 527. The Legislature enacted the statutory scheme to balance two competing goals: (1) offering employees "relatively swift and certain payment of benefits to cure or

relieve the effects of industrial injury" regardless of fault, and (2) limiting the amount of liability faced by employers by requiring employees to "give[] up the wider range of damages potentially available in tort." *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund,* (2001) 24 Cal.4th 800, 811. To that end, where a "remedy is available as an element of the compensation bargain[,] it is exclusive of any other remedy to which the worker might otherwise be entitled from the employer." *King v. CompPartners, Inc.,* (2018) 5 Cal.5th 1039, 1052.

The compensation bargain—and the bar on civil actions based on injuries to employees—encompasses injuries "collateral to or derivative of a compensable workplace injury." *Vacanti*, *supra*, 24 Cal.4th at p. 814. That court recognized that pursuant Labor Code § 3600, an employer's compensation obligation is "*in lieu of any other liability whatsoever to any person*" *Id.* (italics in original).

Encompassed within this statutory scheme by virtue of Labor Code section 3602(a) are claims by the employee's dependents for harm arising out of work-related injuries to the employee: "[T]he right to recover compensation is . . . the sole and exclusive remedy of the employee or his or her dependents against the employer."

The Workers' Compensation Appeals Board is the sole arbiter of claims presented by workers or their family members. Labor Code section 3601(a) provides that "Where the conditions of compensation exist, the right to recover

such compensation, pursuant to the provisions of this division is . . . the exclusive remedy for injury or death of an employee against the employer . . . ." Moreover, Labor Code section 5300(a), declares that proceedings "for the recovery of compensation, or concerning any right or liability arising out of or incidental thereto" shall be instituted before the Workers' Compensation Appeals Board.

Consistent with this broad statutory language, the California Supreme Court has liberally construed the scope of the derivative injury rule: The exclusive remedy precludes "third-party cause[s] of action" against the employer that "would not have existed in the absence of injury to the employee." *Snyder v. Michael's Stores, Inc.,* (1997) 16 Cal.4th 991, 998.

The derivative injury rule is critical to advancing the policies underlying the statutory scheme. Courts must rigorously apply that rule to ensure that "the work-connected injury engenders a single remedy against the employer"—no matter who that injury affects—that is "exclusively cognizable by the compensation agency and not divisible into separate elements of damage available from separate tribunals." *Williams v. State Comp. Ins. Fund,* (1975) 50 Cal.App.3d 116, 122. The rule enforces the "compensation bargain" that is "[a]t the core of the WCA" by "limit[ing] an employee's remedies against an employer for work-related injuries to those remedies provided by the statute itself." *King*, *supra*, 5 Cal.5th at pp. 1046, 1051.

Even though Ms. Kuciemba was never employed by Victory Woodworks, all civil claims she asserts are derivative of her husband's workers' compensation injury. In such circumstances, California courts have consistently barred such claims based on the WCA exclusive remedy, even though she alleges an independent injury separate from that suffered by her husband.

In *Williams v. R. J. Schwartz*, 61 Cal.App.3d. 3d 628 (1976) (*Williams*), Mr. Williams was killed in the course and scope of employment. The bridge where his logging truck was parked collapsed, causing him to fall, followed closely by his truck which ultimately crushed him. All these events took place in full view of his wife, who received workers' compensation benefits from her husband's employer as a result of his death. Thereafter, she filed a civil suit against the employer, seeking a separate recovery for her own mental anguish as a result of witnessing the accident on the theory that the employer negligently inflicted emotional distress on her under *Dillon v. Legg*, 68 Cal.2d 728 (1968).

The trial court in *Williams* granted the employer's demurrer on grounds that the exclusive remedy barred her claim, and the court of appeals affirmed. The appellate court acknowledged that a negligent infliction claim is not one where a wife seeks to redress an injury principally incurred by the husband. Rather, that claim is personal to the wife, not merely collateral to her husband's injury, for her own injury imposed on her by the employer. As a result, "the loss is hers alone."

Williams, *supra*, at 632 [citation and brackets omitted.] However, because the wife's claim was derivative of her husband's injury, her civil claim was subsumed by the workers' compensation claim.

The *Williams* court recognized that workers' compensation precludes both derivative actions as well as "any other liability whatsoever to any person . . . for any injury sustained by [an employee] arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death . . . (Lab. Code § 3600)." *Id*. at 632. As such, "When an employee's injuries or death are compensable under the Workmen's Compensation Act, the right of the employee or his dependents, as the case may be, to recover such compensation is the exclusive remedy against the employer." *Id*. at 633. "In the most explicit terms, § 3600 declares the exclusive character of the employer's workmen's compensation liability in lieu of any *other* liability to *any* person." *Id*. [citations omitted; emphasis in original].

Though the issue of civil liability for negligent infliction against the employer was one of first impression for the court in *Williams*, the court did not view its holding as novel: the workers' compensation system was always intended to encompass such claims. That a wife's injury is precluded by the workers' compensation scheme is part of the *quid pro quo* of the legislative scheme which imposes reciprocal concessions upon both the employer and employee, while

withdrawing from each certain rights and defenses available at common law:

> [T]he employer assumes liability without fault, receiving relief from some elements of damage available at common law; the employee gains relatively unconditional protection for impairment of his earning capacity, surrendering his common law right to elements of damage unrelated to earning capacity; the work-connected injury engenders a single remedy against the employer, exclusively cognizable by the compensation agency and not divisible into separate elements of damage available from separate tribunals.

Id. at 633. Workers' compensation was thus the sole remedy against the employer for his death and her personal loss, even though she could not obtain a separate financial recovery for her own injury.

Similarly, a spouse's claim for loss of consortium is subsumed within the statutory scheme. As with a negligent infliction claim, loss of consortium is recognized as "an independent form of mental suffering and involves a deprivation of interests which are personal to the spouse who brings suit and not merely collateral to those of the other spouse." *Id*. at 632.

So wide-reaching is the workers' compensation exclusive remedy that a wife's loss of consortium claim is subsumed even where the husband is permitted to file a civil suit for his own work-related injury. As an exception to the exclusive remedy, pursuant to Labor Code section 4558 a worker may file a civil action against the employer where the company removes a safety guard from a power press and the employee is injured as a result. Yet as recognized in *Lefiell*

Manufacturing Company v. Superior Court, 55 Cal.4th 275 (2012), notwithstanding the availability of a civil remedy to a worker, that workplace injury would still be compensable under the workers' compensation system. *Id.* at 286. Because the availability of a civil remedy did not take the employee's case out of the workers' compensation system, a spouse's loss of consortium claim is still barred by the exclusive remedy. *Id*. at 289. As a result, the employee could recover against the employer in a civil suit, but his wife could not seek any recovery, either through a claim for separate payment in workers' compensation or via a superior court action.

That Ms. Kuciemba's personal injury claim and Mr. Kuciemba's resulting loss of consortium claim are both barred by the exclusive remedy is confirmed by the decision in *Salin v. Pacific Gas & Electric Co.*, 136 Cal.App.2d. 3d 185 (1982), *rev'w denied* 12/1/82. In that action, Mr. Salin's job was so stressful that he became depressed to the point of insanity, which drove him to murder his two daughters and attempt suicide. After filing a workers' compensation claim for his own stress-related injuries, Mr. Salin filed a wrongful death civil action, claiming that he stood in the stead of his non-employee daughters who had suffered independent injuries and damages as a result of the tortious acts of PG&E.

The court rejected the claim, recognizing that "[W]here, following a work-related injury or death, conditions of compensation exist, third parties who have

suffered prejudice or damages by virtue of such injury or death are barred from recovery against the employer." *Id*. at 191. As the court observed, "It follows that had plaintiff's daughters survived the injuries he had inflicted upon them, or had otherwise been damaged due to his employment-related mental condition, *they* would have had no cause of action against PG&E." *Id*. at 192 (emphasis in original). Because he stood in their shoes as heir and personal representative, Salin only had such rights as his daughters would have had if they had survived. As a result, workers' compensation served as the family's sole remedy, and recovery for the daughters' losses was subsumed by their father's claim within the workers' compensation system.

Though Ms. Kuciemba's injury may be separate from her husband's, her causes of action are indivisible from his allegation that the illness he incurred purportedly in the course and scope of employment is covered by workers' compensation. She is seeking to recover as a result of an injury to her, allegedly caused by an injury to him at work: she believes she was injured only because he was injured on the job. Thus, her claims, and the claim of Mr. Kuciemba for his loss of consortium, are barred by the exclusive remedy.

Even if Mr. Kuciemba was asymptomatic, a position entirely contradicted by the original complaint, appellants concede he was still injured by an infection incurred at work, even though he may not have been damaged by that injury. In

reality, however, even asymptomatic cases of COVID-19 may present risks later in life.[1] In any event, without Mr. Kuciemba's injury in the course and scope of his employment, Ms. Kuciemba could not allege her entitlement to a recovery for the illness she contracted at home.

These facts eliminate any precedential value appellants assert under *Snyder v. Michael's Stores, Inc.,* 16 Cal.4th 991 (1997). In that action, a fetus was exposed to fumes from commercial cleaning product at a business during her mother's shift at work there, eventually suffering birth defects directly related to the chemicals. Her mother, in contrast, received brief treatment for nausea, headache and breathing difficulties. The unborn child did not "catch" birth defects from the employee, and the child's birth defects were independent of any injury to her mother. The child could recover in a civil action because her injury did not require the worker to have sustained an antecedent injury.

Rather, the child's injury would have occurred whether the mother was injured or not. As the Supreme Court explained: "Plaintiffs alleged simply that

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[1] See Shabir, *What Does COVID-19 Do to the Lungs?* (Feb. 22, 2021) <https://www.news-medical.net/health/What-Does-COVID-19-do-to-the-Lungs.aspx> ["Whilst asymptomatic individuals who test positive for COVID-19 may not overtly show any signs of lung damage, new evidence suggests that there may be some subtle changes that occur in such patients, potentially predisposing asymptomatic patients for future health issues and complications in later life."]).

both Naomi [mother] and Mikayla [fetus] were exposed to toxic levels of carbon monoxide, injuring both. Mikayla sought recompense for her own injuries." (*Snyder, supra*, 16 Cal.4th at p. 1000; see also *id.* at p. 995 [endorsing the Court of Appeal finding that the derivative injury rule did not apply "[b]ecause Mikayla's injuries were not derivative of Naomi's, but the result of *her own* exposure to toxic levels of carbon monoxide" (emphasis added)]).

It is for this very reason that the Supreme Court held the exclusive remedy did not apply to the unborn child. The exclusive remedy "applies when the plaintiff, in order to state a cause of action, *must* allege injury to another person—the employee." *Id*. at 998 (emphasis in original).

Rather than sanction a civil claim by Ms. Kuciemba, the Supreme Court ruling in *Snyder* instead supports the conclusion that the exclusive remedy bars her claim and affirms the applicability of the derivative injury rule. Present here is precisely the allegation that was missing from *Snyder*: Ms. Kuciemba's causes of action only exist if her illness was the result of "injury to another person—the employee," *i.e.*, the injury to Mr. Kuciemba. Her claims therefore squarely fall within the derivative injury rule as mandated by the Supreme Court in *Snyder*.

Just as importantly, *Snyder* focused on the child's status as a third-party lawfully on the employer's premises and her right to be free from injury just as any customer in the store. *Id*. at 1006-1007. As a result, the store merely owed the child

the same duty it owed any customer: to conduct its business in a manner not to harm invitees. Despite the child being *in utero* at the time of exposure, that situation was no different than where a family member is injured while visiting an employee's jobsite. *Snyder* at 1005, citing *Robbins v. Yellow Cab Co.* 85 Cal.App.2d 811, 813-814 (1948).

In contrast, there is no allegation that Ms. Kuciemba ever visited her husband's jobsite, and Victory Woodworks never owed a duty to protect her at home. She contracted Mr. Kuciemba's virus, not an independent disease different from what he suffered. While *Snyder* merely affirms a business owner's liability for injuries to third parties sustained on site, it does not support "take-home" liability to a member of the public who allegedly catches a virus at home from an employee.

Appellants make two erroneous assumptions, unsupported by California law, in attempting to find exceptions to the preclusive effect of the exclusive remedy by claiming the rule applies 1) only to employees, and 2) only to claimants who qualify for a separate financial recovery under workers' compensation.

Appellants' first erroneous assumption stems from their classification of any spouse's loss of consortium and negligent infliction of emotional distress as mere outcroppings of the employee's injuries. As recognized in *Williams* and *Lefiell,* these claims do not seek redress for injuries collateral to the employee's injury.

Rather than being "merely derivative or collateral to the spouse's cause of action," they are independent injuries precluded by the broad language of the Labor Code because they are based on the injury to the spouse in the course and scope of employment. *Cole v. Fair Oaks Fire Protection District,* 43 Cal.3d 148, 162-163 (1987). Thus, as to the wife of an injured employee, "the loss is hers alone." *Williams* at 632. Yet despite these separate classes of injuries to non-employees, the workers' compensation exclusive remedy bars such claims because they are wholly dependent on an employee's injury in the course and scope of employment.

Appellants' second erroneous assumption is that the exclusive remedy cannot apply unless the injured spouse makes an independent financial recovery. Spouses make no separate claim for loss of consortium or negligent infliction under a workers' compensation policy. Rather, "the work-related injury engenders a single remedy against the employer, exclusively cognizable by the compensation agency." *Snyder*, *supra,* at 997, *citing Williams* at 122.

Most devastating to appellants' claims is the recognition in *Salin* that household members injured as a result of an employee's worksite injury are precluded from filing a civil suit by application of the exclusive remedy. Rather than admit that *Salin* disposes of their claims entirely, appellants instead claim *Salin* has been overruled. The subsequent history of the *Salin* decision in fact proves otherwise.

The California Supreme Court had the opportunity to either overrule or depublish *Salin* in 1982, but instead denied the request for Supreme Court review on December 1, 1982. *Id*. at 193. For forty years, the *Salin* holding has remained undisturbed.

Though the California Supreme Court saw fit in *Snyder* to mention *Salin* in a footnote, the Supreme Court clearly instructed that its reference carried no precedential effect because "we have no occasion here to rule on the correctness of the decision in *Salin* . . . ." *Snyder, supra* 16 Cal.4th 991, at 999 n.2. "When a case assumes a point without discussion, the case does not bind future panels." *Estate of Magnin v. Commissioner of Internal Revenue*, 184 F.3d 1074, 1077 (9th Cir. 1999). "In our circuit, statements made in passing, without analysis, are not binding precedent." *In re Magnacom Wireless, LLC,* 503 F.3d 984, 993-94 (9th Cir. 2007).

Just two years after the *Snyder* decision, the same justices of the California Supreme Court who decided *Snyder* (including Justice Werdegar who authored the *Snyder* opinion) cited to *Salin* to support the very proposition at issue here: "[T]he exclusivity of worker's compensation prevails as to heirs in light of Labor Code section 3600, which provides that liability under the Workers' Compensation Act is in lieu of any other liability whatsoever to any person . . ." *Horwich v. Superior Court,* 21 Cal.4th 272, 286 (1999), *citing Salin* at 190. Even the dissent in *Horwich* found support in *Salin*. *Horwich, supra,* at 290.

The California Supreme Court on three occasions has left the holding in *Salin* undisturbed, and the Legislature has not seen fit to abrogate that holding. The *Salin* decision mandates that the workers' compensation exclusive remedy bars claims brought by non-employees arising from an employee's on-the-job injury. There is no California law to the contrary.

The workers' compensation statutory scheme allows recovery for an on-the-job injury without proof of the employer's negligence, providing the certainty of recovery to the employee in "in lieu of any other liability whatsoever to any person." (California Labor Code § 3600). Labor Code section 77.8, cited by appellants, shows the lengths to which California promotes that policy: the burden of proving that an employee contracted COVID-19 on the job is so overwhelmingly difficult that the Legislature had to go so far as to enact a statutory presumption to aid employees in establishing coverage. An exemption to the exclusive remedy for people who catch COVID-19 from a worker was not legislated as part of that statute.

C. The District Court was Correct in Determining that the Duty to Provide a Safe Workplace Does Not Extend to Non-Employees who Contract a Virus Away from that Workplace

1. California Does Not Recognize "Take-home" Liability for Biological Pathogens

After their original complaint was dismissed, appellants realized that they would have no cognizable theory of recovery unless they could somehow shoehorn

their claims into the holding of *Kesner v. Superior Court*, 1 Cal.5th 1132 (2016). As a result, they disavowed their original transmission theory that Ms. Kuciemba caught Mr. Kuciemba's virus. Instead, the complaint was amended to allege that Mr. Kuciemba was asymptomatic, and that Ms. Kuciemba contracted COVID-19 because of droplets nestled in Mr. Kuciemba's work clothes at his job twenty-five miles away somehow survived the commute and infected her. Though this this new theory—infection by fabric—should be barred by their prior judicial admissions, their newly created supposition is supported by neither California law nor science.

(a) *Kesner* and its Narrow Application to Asbestos

If the exclusive remedy does not subsume all their civil claims, appellants cannot establish that Victory Woodworks owes a duty to keep everyone that an infected employee encounters off the job free from COVID-19. Never has a California court authorized a civil suit against an employer by the spouse of a worker allegedly infected by a virus the worker carried home from the jobsite.

In *Kesner,* the nephew of a worker involved in the manufacture of asbestos brake shoes died of mesothelioma. The uncle, who apparently did not contract mesothelioma, testified that his nephew would spend the night at the uncle's house and would roughhouse with or sleep close to his uncle. The nephew's successor-in-interest sued the uncle's employer for exposing the nephew to asbestos fibers carried home on his uncle's clothes.

At issue in *Kesner* was whether a company that uses a hazardous product as part of its commercial enterprise, and allows that product to be conveyed off-site by an employee, owed a duty to protect those in the employee's household from harm. The Supreme Court found that a such a duty was consistent with precedent which imposed "liability for harm caused by substances that escape an owner's property" if the company fails to exercise reasonable care in its use of asbestos-containing materials. *Id*. at 1159.

In re-acknowledging that duty, *Kesner* made a key finding distinguishing that case from the Kuciembas' suit: it was not the nephew's contact with the employee or his contagious work-related illness, but the third-party's contact with asbestos fibers—a hazardous product that the employer used in its manufacturing process and was required to restrict to the jobsite—which caused the harm. *Id*. at 1146-1147, 1156.

The California Supreme Court stressed that it was not creating a new duty: commercial use of asbestos in business or on one's property already fell within the general duty to exercise ordinary care in one's activities under Cal. Civ. Code §1714. *Id*. at 1143. Asbestos has long been recognized as a product that the employer was duty bound to restrict to the premises, based on 40 years of government regulation and 80 years of industry knowledge. *Id*. at 1147. Thus, *Kesner* viewed the issue not as whether to create a new duty, but rather whether an

exception to an already existing duty should be established. *Id*. at 1143.

One motivation for refusing to create an exception to the already existing duty was the fact that "commercial users of asbestos benefitted financially from their use of asbestos." *Kesner*, 1 Cal.5th at 1151. In contrast, there is no commercial viability in the COVID-19 virus: it is not used in the commercial process, nor is it a byproduct of any industry.

Kesner also relied upon the fact that asbestos comes from an identifiable source. "Indeed, liability for harm caused by substances that escape an owner's property is well established in California law." *Id.* at 1159. The Supreme Court recognized there are some natural substances, such as soil, animals, or fires, for which someone who controls a property may be responsible, but those agents must originate on the property for liability to be established. A fire originating off-site, or damage caused by someone else's wandering cow, which happens to pass through a person's property into a neighboring area does not make that property owner liable. However, where these calamities, like asbestos, originate on the defendant's property, liability may follow.

Here, the Kuciembas are requesting the court to fashion a new duty: the duty of employers to protect non-employees from a virus of unknown origin by guaranteeing that a worker will arrive home COVID-19 free. Unlike the asbestos in *Kesner*, the virus did not originate on the construction site. No employer can

ensure that employees will enter or leave its premises uninfected. Likewise, nowhere in the San Francisco Order of the Health Officer does it require the employer guarantee all workers immunity from COVID-19. (VWER_079 §9, 081 §12). Short of isolating at home and not participating in any essential industry, only a repeatedly administered vaccine could produce such result, and even then "break-through" infections are still possible.

The San Francisco Health Officer's Order is merely "best practices regarding the most effective approaches to slow the transmission of communicable diseases . . . ." (VWER_079 §9) As best practices, essential industries are expected to comply with those recommendations "except to the extent necessary . . . to carry out the work the Essential Business." (VWER_091§16k) The Order of the Health Officer nonetheless acknowledges that transmission of the disease can still take place by interactions with those who are asymptomatic. (VWER_079 §9)

Appellants claim that the district court's ruling below must be wrong because the Supreme Court in *Kesner* never discussed the exclusive remedy or the holding in *Snyder*. (Appellants' Corrected Opening Brief (AOB) 30:3-4). Were *Snyder* relevant to "take-home" liability, the California Supreme Court in *Kesner* would have made that holding the bedrock of its decision. Mesothelioma is not an infectious disease, and the fact that the nephew in *Kesner* contracted that illness had nothing to do with whether his uncle also contracted the disease on the jobsite.

Instead, *Kesner* neither discusses *Snyder* nor the effect of the exclusive remedy because the nephew did not catch mesothelioma from his uncle, and the nephew was not exposed to asbestos on his uncle's jobsite.

Entirely absent from *Kesner* was any allegation of a workplace injury. Here, the COVID-19 virus could only be transmitted to Ms. Kuciemba if her husband was injured on the job first. An employee with mesothelioma cannot possible transmit that illness to anyone. The "take-home" asbestos theory is the polar opposite of and is entirely inconsistent with viral transmission.

Moreover, asbestos is of an industrial origin as opposed to a transmittable disease. The overwhelming odds are that any person suffering from mesothelioma did not contract it while drinking coffee in a café, riding on a BART train, or singing in a church choir. With COVID-19, everything a worker does during the time spent off-site, and what household members do twenty-four hours a day, is likely, if not more likely, to be a source of infection.

Although an employer's goal may be to avoid having any worker exposed to the virus, that goal does not equate to a duty to render every employee COVID-19 free, particularly when those with the disease often show no symptoms. All an employer can do, and all that the SF Health Order requires an employer to do, is minimize the potential of exposure during the limited time the employee is on the worksite and possibly exposed to the virus. What the employer can't do, and what

it has no duty to do, is control the actions of relatives off-site who may interact with (and possibly infect) the worker who returns home at the end of the day.

Our nation's experience with the effects of COVID-19 is still in its infancy and our limited understanding of the disease continues to evolve. Short of vaccination, to date isolation appears to be the most effective manner by which to avoid the disease. Compare this to asbestos where there are documented preventative measures developed over decades to prevent the escape of fibers from the jobsite, e.g., disposable Tyvek suits, changing rooms, showers, separate lockers, on-site laundry, etc. *See Kesner,* at 1152. In contrast, no COVID regulation requires disposable coveralls, booties or decontamination procedures outside the medical field. Yet as evidenced by that industry most aggressive about implementing COVID-19 precautions, health care practitioners despite the most comprehensive efforts still cannot prevent doctors and nurses from contracting the disease. Instead, essential industries do the best they can.

For workers in essential industries, the only way to guarantee that a person carrying the COVID-19 virus would not leave the site would be to require all employees to live on site. While the creation of such a bubble may be financially viable for the professional athletes of the NBA, it is not an option for hourly workers with families.

Contrary to appellants' assertions, foreseeability alone does not equate to

duty. *Id*. at 1148-1151. "A judicial conclusion that a duty is present or absent is merely a shorthand statement . . . rather than an aid to analysis . . . '[D]uty,' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." *Dillon, supra,* 68 Cal.2d at 734. "Courts, however, have invoked the concept of duty to limit generally "the otherwise potentially infinite liability which would follow from every negligent act . . ." *Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 750, quoting *Dillon,* 68 Cal.2d at p. 739.

In sum, asbestos is a manufactured product fashioned purposefully by industry for financial gain. COVID-19 is a virus which suddenly evolved through a mishap of nature and benefits no one. Asbestos and its health effects have been studied for over a century, and industry has developed myriad effective preventative measures to contain the product, as evidenced by the ever-dwindling number of patients with asbestos-related diseases. COVID-19 remains a mystery, addressed by our best guesses of what might be effective, as evidenced by the continually increasing number of flare-ups across the nation.

(b) The Policy Supporting Asbestos Take-Home Liability Does Not Support Employer Liability for Viruses

In the five years since the *Kesner* decision, no court in the nation has applied that holding to any substance outside the asbestos realm. In other words, except for

the release of asbestos from a jobsite, no court has ever held the employer liable to non-employees for any manufactured or organic substance an employee might have brought home from work. There is nothing in the California Supreme Court's opinion in *Kesner* to suggest that a virus, secreted into the worksite through no act of the employer, should be treated the same as an industrial product used for profit.

During the early stages of the pandemic when appellants allege the exposure occurred, Victory Woodworks had no greater information or control over the COVID-19 virus than the general public. As noted by the district court, "There is only so much you can do in containing illness." (ER-026:21-22.) These circumstances are in sharp contrast to the decades of industry's experience in controlling asbestos fibers on the jobsite and protecting outsiders from contact with the product.

Compounding the problem, appellants make no effort to cap potential civil liability that would result from this new duty to just workplace exposures. There is no limit to how wide the net is cast: the wife who claims her husband caught COVID-19 from the supermarket checker, the husband who claims his wife caught it from the dental hygienist, the roommate who claims a co-tenant while on jury duty caught it from the court bailiff, all these people would have potential claims against entities deemed essential to society's ability to function. The financial burden that duty would impose on employers would be devastating. Even if that

duty were limited to the employee's household, the expansion of liability would be too great in the wake of a replicating virus.

Here, appellants are asking the employer to do what the global public health system and pharmaceutical industry failed to do: keep COVID-19 from invading the home. As a matter of public policy, requiring private industry to meet that standard sets the bar too high.

2. Application of Asbestos Strict Liability Law does not apply to a Virus

Appellants repeatedly claim *Kesner* is rooted in a concept never mentioned by the California Supreme Court: take-home liability must be imposed whenever a direct line can be drawn between the employer's conduct and the injury to the household. (AOB 21 ¶1, 24 ¶1, 30 ¶¶2-3, 38 ¶1.) Presumably in this case, that "direct line" was Mr. Kuciemba's commute from work to home. Setting aside the numerous potential exposures Mr. Kuciemba encountered upon leaving his job, getting to his mode of transportation, commuting home, and interacting with others using that same mode of travel or elsewhere, the Supreme Court has never endorsed such a simplistic approach to establishing liability.

At issue in *Kesner* was whether companies which use a hazardous product in their commercial enterprise and improperly allow employees to convey and release that product off-site, owed a duty to protect the employees' households from harm.

Kesner found that such a duty was consistent with precedent long recognizing "liability for harm caused by *substances* that escape an owner's property" where the companies failed to exercise reasonable care in regulating use of asbestos-containing materials. *Id*. at 1159 (emphasis added). The employer used a commercial product irresponsibly, and people were harmed as a result.

Prior to the *Kesner* decision, California had long recognized that liability for harm caused by products in the stream of commerce required different treatment than application of traditional concepts of negligence and privity between the injured party and the defendant. For example, because those in the business of distributing goods are an integral part of the overall production and marketing enterprise, they must bear the cost of injuries resulting from defective products, even if they had no role in making that product dangerous. *Greenman v. Yuba Power Products, Inc.,* 59 Cal.2d 57, 63 (1963). Thus, in the asbestos realm, liability is imposed on all those in the chain of distribution because those parties are free to adjust liability among themselves through indemnity actions. *Arena v. Owens-Corning Fiberglas Corporation,* 63 Cal.App.4th 1178, 1198 n. 13 (1998).

In effect, *Kesner* merely aligned employers who incorporate harmful commercial products as part of their work with the liability chain that already existed for manufacturers, distributors, sellers and commercial users of asbestos. As such, the employers held liable in *Kesner* could turn to the others in the

documented chain of distribution to seek indemnity based on their relative fault. All those in the chain made money on asbestos; all those in the chain had to bear the financial burden of the harm the substance caused.

If Victory Woodworks were saddled with indemnity of non-employee claimants, it would have the right to file a cross-complaint for equitable indemnity against any (and every) entity or person who could have contaminated appellants with COVID-19. Thus, Lucky's, Home Depot, the US Post Office and other essential businesses, whether in appellants' neighborhood or beyond, could find themselves embroiled in the Kuciembas' suit. In effect, an individual's recovery could drastically affect California's financial recovery at large as the economy attempts to recover from the pandemic.

COVID-19 is not a commercial product or substance used for profit. Whereas liability for asbestos is justified through regulation of the commercial market, imposing liability on employers for COVID-19 leaves the employer to carry society's responsibility to regulate and protect public health. That the California Legislature still has not exempted employers from such suits may be more of a recognition that there is no need for an exemption from liability that does not exist. Take-home liability for the virus does not exist under California law.

D. The District Court was Correct in Concluding that the Theory of Contracting the Virus via Personal Items Fails to Meet the Plausibility Standard of Pleading

Even if *Kesner* could somehow be construed as applying to a virus, appellants must establish a factual, as opposed to fanciful, basis for their claim. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, *supra*, 556 U.S. at 678. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id*. at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

This plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678. Thus, where plaintiff is armed with nothing more than conclusions, the complaint will not serve to "unlock the doors of discovery." *Id*. at 678-679. "Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Id* at 678.

Determining whether the complaint states a plausible claim requires the court "to draw on its judicial experience and common sense." *Iqbal*, *supra*, 556 U.S. at 679. "[I]t is within [the court's] wheelhouse to reject, as implausible, allegations that are too speculative to warrant further factual development." *Dahlia v. Rodriguez,* 735 F.3d 1060, 1076 (9th Cir. 2013). The court it is not required to

"assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam).

Moreover, appellants cannot pretend that by filing an amended complaint they are writing on a clean slate. "A party cannot amend pleadings to directly contradict an earlier assertion made in the same proceeding." *Airs Aromatics, LLC v. Opinion Victoria's Secret Stores Brand Mgmt., Inc.,* 744 F.3d 595, 600 (9th Cir. 2014). An amended complaint should only include "additional allegations that are consistent with the challenged pleading and that do not contradict the allegations in the original complaint." *United States v. Corinthian Colleges,* 655 F.3d 984, 995 (9th Cir. 2011).

Rather, the court is to use a keen eye in examining any attempt by a claimant to preserve a claim through an amended pleading by disavowing the assertions in the original complaint. At the very least, "when evaluating an amended complaint, '[t]he court may also consider the prior allegations as part of its "context-specific" inquiry based on its judicial experience and common sense to assess whether an amended complaint 'plausibly suggests an entitlement to relief.'" *McKenna v. WhisperText*, No. 5:14-CV-00424-PSG, 2015 WL 5264750, at *3 (N.D. Cal. Sept. 9, 2015) (quoting *Cole v. Sunnyvale*, No. C-08-05017-RMW, 2010 WL 532428, at *4 (N.D. Cal. Feb. 9, 2010)).

In a similar vein, judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, prevents a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. *Helfand v. Gerson*, 105 F.3d 530, 534 (9th Cir. 1997). "It is an equitable doctrine intended to protect the integrity of the judicial process by preventing a litigant from 'playing fast and loose with the courts.'" *Id.*

Ms. Kuciemba supposedly got sick at home from a virus because Mr. Kuciemba allegedly got sick at work from that virus. Appellants now try to avoid that reality by asserting the scientifically unsupported claim that Ms. Kuciemba somehow contracted the virus from Mr. Kuciemba's clothes. (VWER_010:3-6; ER-088:21-28), with no explanation as to why they forgot to make such a crucial allegation in the original complaint. Even absent the allegations of the original complaint, the court would be justified in looking askance at the allegation that the virus on anyone's clothing or materials could traverse the 25 miles from San Francisco to Antioch and somehow secrete droplets sufficient to infect Ms. Kuciemba through inhalation.

Appellants do not pretend they can self-diagnose the source of Ms. Kuciemba's virus, or distinguish between potential sources of that virus. Rather, they engage in the academic exercise of "What if?"—What if Mr. Kuciemba never got sick on the job, yet Ms. Kuciemba still caught COVID-19? What if Mr.

Kuciemba was infected on the job but was asymptomatic and gave the virus to his wife? From there, appellants premise their amended complaint on imagining how their claims might be different if Mr. Kuciemba never contracted a work-related illness, but instead carried the virus home in his lunch box.

Appellants substitute speculation for facts to buttress their revised claim that Ms. Kuciemba caught COVID-19 from infected clothing: It is "probable" that Mr. Kuciemba's clothing or personal effects carried the virus and indirectly transmitted it to Ms. Kuciemba, though appellants then argue it is equally "probable" that the virus was directly transmitted from Mr. Kuciemba. (VWER_013: 2-4.) These competing allegations cannot both be "probable."

Compounding the lack of scientific evidence is the impossibility of proving the allegation that the virus was carried home by Mr. Kuciemba by any means other than his own infection. Dust clouds are visible manifestations of friable asbestos, and serve as the basis for worker allegations of exposure to that hazardous product. See *Arena*, *supra* at 1182 ["one big cloud of asbestos dust]; *Stewart v. Union Carbide*, 190 Cal.App.4th 23, 26 ["The dust formed a white cloud, which got into the hair and clothes"]. The COVID-19 virus, in contrast, is invisible. No one has ever described being infected by walking into a visible cloud of COVID-19. Not only did Mr. Kuciemba lack any real-time appreciation that he inhaled or was exposed to COVID-19, but there is also no way he can prove that he

ever carried the virus home on his clothing now that eighteen months have passed since his initial exposure to the virus.

If Ms. Kuciemba could contract COVID-19 from clothing, then Mr. Kuciemba could have contracted it from his co-worker's clothing as well. If the means by which COVID-19 entered the jobsite was the clothing of workers rather than the workers themselves, then no screening device or protective equipment would permit the employer to effectively prevent the virus from entering the project. As such, the alleged presence of COVID-19 on the jobsite could not have been the result of any violation of the San Francisco Health Officer's Order. Moreover, the Kuciembas might just as likely have been exposed to the virus from others' clothing either during Mr. Kuciemba's time spent commuting or while he was off the job, or during Ms. Kuciemba's many trips outside the home which she concedes were necessary for essential purposes. (ER-087:24-26)

Fortunately, the court is spared the task of separating myth from reality based on the claim as originally presented and ruled upon. Regardless of appellants' amendments, they are still bound by their admissions in the original complaint that Ms. Kuciemba must have been injured at home because Mr. Kuciemba was injured at work. (ER-087-88 ¶¶ 17-18, 89 ¶24.) Though appellants suggested on amendment that Mr. Kuciemba was asymptomatic, they again conceded that he would still be "injured" by an infection incurred at work despite

having not been "damaged" by that injury. (VWER_014:25-27) Moreover, the fact that Mr. Kuciemba himself suffered his own physical injuries from COVID at the jobsite "remains true" despite the allegations of the amended complaint (VWER_008:27-009:1.) Each allegation of negligent conduct relates to the injury he sustained on the job.

E. Certification of Unspecified Issues to the California Supreme Court is Unnecessary and Would Be Improper

Appellants are incorrect in asserting that this Court has the option of certifying an issue to the California Supreme Court "if the decision could be outcome determinative or there is no controlling precedent." (AOB p.46 ¶1) To the contrary, California Rule of Court 8.548 limits the California Supreme Court's jurisdiction over certified questions exclusively to circumstances where: "1) The decision could determine the outcome of a matter pending in the requesting court; **and** 2) There is no controlling precedent" (emphasis added). Both elements are mandatory.

The California Supreme Court cannot exercise jurisdiction over this dispute. Appellants cite to no split in authority that would require the California Supreme Court to determine how it would address any issue presented here. To the contrary, appellants' request for certification concedes that this Court "should follow the clear precedents set by the California Supreme Court" in deciding this matter.

(AOB 45 ¶3.) Victory Woodworks could not agree more.

Decades of California decisions have evaluated the worker's compensation scheme and uniformly held that the exclusive remedy precludes a non-employee from suing an employer where the non-employee's injury is totally dependent upon the harm caused initially to an employee in the course and scope of employment. Only where the non-employee is injured on the employer's premises and suffers a harm separate from that incurred by the employee might a claim be allowed to proceed.

Likewise, in the five years since *Kesner* was decided, no appellate court in the nation, let alone in California, has ever issued a reported opinion applying the take-home theory of liability to anything other than asbestos products. Thus, the instant action is in drastic contrast to the decision in *Kilby v. CVS Pharmacy, Inc.*, 899 F.3d 988 (9th Cir. 2018) cited by appellants, where there was no controlling precedent explaining the interpretation of the wage order. The Kuciemba matter merely requires the application of precedent to a new, but far from unique, fact pattern.

Additionally, it is unclear exactly what question appellants seek to have certified. If the application of precedent resolves either the workers' compensation issue or the take-home liability issue, then that issue would be case-dispositive and the need to certify the other issue would be moot. Circuit courts, including the

Ninth Circuit, routinely deny certification requests when a case can be resolved without an answer to the question to be certified. *See*, *e.g.*, *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001) ("Of course, if a question may not be dispositive to a case, then it is a weak candidate for certification."); *Stollenwerk v. Tri-W. Health Care All.*, 254 F. App'x 664, 668–69 (9th Cir. 2007) (declining to certify question to state supreme court because the "answer to the legal question on which Appellants seek certification would not affect our disposition of this case."). Certification of a question that is not case-dispositive would also be inconsistent with the California Rules of Court, which authorize certification only if "[t]he decision could determine the outcome." Cal. R. Ct. 8.548(a)(1).

"The task of a federal court in a diversity action is to approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum." *Gee v. Tenneco, Inc.,* 615 F.2d 857, 861 (9th Cir. 1980). In performing that analysis, pronouncements of the state's highest court bind the federal court on questions of applicable state law. *Davis v. Metro Productions, Inc.,* 885 F.2d 515, 524 (9th Cir. 1989). "Where the state's highest court has not decided an issue, the task of the federal courts is to predict how the state high court would resolve it." *Dimidowich v. Bell & Howell,* 803 F.2d 1473, 1482 (9th Cir. 1986), *modified at* 810 F.2d 1517 (9th Cir.

1987).

In the absence of controlling state authority, federal courts look to existing state law to assess how a state's highest court would resolve a state law question, "without predicting potential changes in that law." *Moore v. R.G. Industries, Inc.,* 789 F.2d 1326, 1327 (9th Cir. 1986). "There is always a chance that a state supreme court, if it had the same case before it, might decide the case differently. This ever-present possibility is not sufficient to warrant certification." *State Farm, supra,* at 672.

VII. CONCLUSION

As California businesses recover from the COVID-19 pandemic and continuously adapt to changing public health measures, employers and employees rely more than ever on the certainty of the legal rules governing the workers' compensation system. The Workers' Compensation Act—and the derivative injury rule encompassed within it—subjects any harm that is derivative of a workplace injury suffered by an employee to the statutory exclusive remedy provision. The position appellants advocate violates that well-established principle by attempting to judicially legislate a COVID-19 exception to the longstanding derivative injury rule. That exception would undermine the policies underlying the workers' compensation scheme, resulting in deeply destabilizing consequences for businesses across the state.

An expansion of the *Kesner* holding beyond asbestos would be just as debilitating. Employers would become liable not only to their workers' family and friends, but to anyone with whom those workers came in contact—none of whom were under the control of the employer accused of causing the harm. In effect, employers would become the insurers of anyone who could claim their infection came through an asymptomatic worker employed by the accused.

The district court's ruling should be affirmed and appellants amended complaint dismissed.

Dated: November 12, 2021

HINSHAW & CULBERTSON LLP

By: */s/ William Bogdan*
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,090 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using [insert name and version of word processing program] Times New Roman 14-point font.

Dated: November 12, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on [insert date], I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: November 12, 2021

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No. 21-15963

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CORBY KUCIEMBA and ROBERT KUCIEMBA,

Plaintiffs-Appellants,

v.

VICTORY WOODWORKS, INC., a Nevada Corporation,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 3:20-cv-09355-MMC
Hon. Maxine M. Chesney

APPELLEE'S EXCERPTS OF RECORD

Volume 1 of 1

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APPELLEE'S EXCERPTS OF RECORD

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9-3	Dated 04/29/2020	Exhibit D to RJN in support of Motion to Dismiss Complaint - City and County of San Francisco Department of Public Health Order of the Health Officer No. C19-07c (4/29/20)	VWER_073 – VWER_105
9-1	Dated 03/20/2020	Exhibit B to RJN in support of Motion to Dismiss Complaint - City of Hercules Resolution No. 20-015 COVID-19 Proclamation of the Existence of a Local Emergency (3/20/20)	VWER_106 – VWER_110
39	06/03/2021	Notice of Appeal	VWER_111 – VWER_113
		United States District Court for the Northern District of California (San Francisco) Civil Docket for Case No. 3:20-cv-09355-MMC	VWER_114 – VWER_120

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CORBY KUCIEMBA, an individual; ROBERT KUCIEMBA, an individual,

Plaintiffs,

vs.

VICTORY WOODWORKS, INC., a Nevada corporation; DOES 1-20, inclusive,

Defendants.

Case No.: 3-20-cv-09355-MMC

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Complaint Filed: October 23, 2020

Date Removed: December 28, 2020

Date: May 7, 2021
Time: 9:00 a.m.
Department: Courtroom 7 – 19th Floor

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I. INTRODUCTION

This Court granted Defendant VICTORY WOODWORKS INC.'s original Motion to Dismiss on the grounds that Plaintiff CORBY KUCIEMBA's claim for her own personal injuries was "barred by the exclusive remedy provisions of California's workers' compensation statutes §§ 3600, 3602". The Court permitted Plaintiffs to amend the Complaint and they did so primarily to (1) clarify that the source of Mrs. Kuciemba's severe COVID-19 infection came from Defendant's workplace and (2) to reinforce Plaintiffs' position that it is irrelevant whether her husband Mr. Kuciemba (i.e. the employee) was injured because Mrs. Kuciemba (a non-employee) suffered direct personal injuries to her body and mind. Plaintiffs' amendments are common sense changes that reflect Plaintiffs' position and the law though Defendant alleges they are "sham" amendments. Not surprisingly, Defendant continues to avoid responsibility for recklessly exposing Mr. Kuciemba to COVID-19 and carrying it home to infect Mrs. Kuciemba. Defendant's renewed Motion to Dismiss cites both the Court's order, which is solely based upon Workers' Compensation exclusivity grounds, as well as their previous argument that it owed no duty to Mrs. Kuciemba.

Plaintiffs respectfully disagree with the Court's order. A core tenet of California law is that "[f]or every wrong there is a remedy". *Civ. Code* § 3523. On a fundamental level, Mrs. Kuciemba would be denied any ability to pursue a claim for her own personal injuries to her body and mind, even though she has no Workers' Compensation remedy available to her. If the Court again rules against Plaintiffs again, Mrs. Kuciemba will be denied a chance to present her case, and will have no civil legal remedy. This would be a terrible result for an innocent person whose body and mind was ravaged by COVID-19 because of Defendant's wrongdoing, but, most importantly, the Court would be issuing a ruling that is directly contrary to controlling California law.

The Court's prior ruling goes against well-established California Supreme Court precedent in *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal 4th 991. *Snyder* holds that direct injury claims against an employer by a non-employee family member are not subject to Worker's Compensation. The mother in *Snyder* thus inhaled the toxic levels of carbon monoxide at work and then through the mother's body passed that toxic monoxide gas onto plaintiff (her unborn child) who was injured. We previously briefed *Snyder* at length in our prior Opposition. In this Opposition, we focus on how the

Supreme Court expressly held that the physical injury to the infant plaintiff (a non-employee) in its mother's womb at work was distinct from the injuries to its mother (the employee), and that it was legally irrelevant that the mother (the employee) was also injured at work. Here, Mrs. Kuciemba is a *non-employee* alleging a direct claim for her *own* physical injuries because of Defendant's negligence. She is not alleging a derivative claim such as loss of consortium, or emotional distress, due to physical injuries to Mr. Kuciemba who was employed by Defendant. Therefore Mrs. Kuciemba's claims are properly before this Court and should be permitted to proceed.

Defendant's Motion to Dismiss also retreads Defendant's position that it owed no duty to Mrs. Kuciemba. We summarize our prior arguments regarding the applicability of *Kesner v. Superior Court* (2016) 1 Cal. 5th 1132. In short, the foreseeability and public policy factors cited in *Kesner* all favor Plaintiffs.

Plaintiffs believe this case should be heard on the merits before a jury of Plaintiffs' peers. Plaintiffs respectfully request the Court DENY Defendant's Motion to Dismiss.

II. RELEVANT PROCEDURAL HISTORY

This matter was filed on October 23, 2020 in the San Francisco County Superior Court and then removed by Defendant on December 28, 2020 on the basis of diversity jurisdiction. Defendant filed a Motion to Dismiss and Oral Argument was heard on February 12, 2021. On February 22, 2021 the Court ruled as follows: "1. The Fourth Cause of Action, titled, "Public Nuisance," fails for lack of standing. 2. The First, Second, Third, and Fifth Causes of Action, titled, respectively, "Negligence," "Negligence Per Se," "Negligence – Premises Liability," and "Loss of Consortium," are barred by the exclusive remedy provisions of California's workers' compensation statutes. See Cal. Labor Code §§ 3600, 3602." (Doc. 19).

On March 18, 2021 Plaintiffs amended their complaint (Doc. 21, "FAC"). The FAC made several relevant changes to address issues raised by the Court in its Order and at oral argument. The FAC is not a "sham" pleading, it provides several key points of clarification, as well as additional facts that are consistent with the original complaint, the facts, and the law:

(1) The FAC eliminated references to the fact that Mr. Kuciemba himself suffered his own physical injuries from COVID-19 requiring hospitalization. These facts were true at the

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time the Complaint was filed and remain true. However, Plaintiffs removed these facts in the FAC because as a matter of well-established California law, described in detail below, it is irrelevant that Mr. Kuciemba was injured at all;

(2) Pursuant to the Court's Order, the FAC eliminated the Fourth Cause of Action for Public Nuisance;

(3) The FAC cites to CDC publications that describe how asymptomatic persons who suffer no physical injury can still act as a reservoir for COVID-19. (FAC ¶ 7);

(4) The FAC explains how COVID-19 can be spread both directly through the transmission of droplets in a person's breath and indirectly from "fomites" (FAC ¶¶8-9);

(5) The FAC explains how the most likely source of Mrs. Kuciemba's COVID-19 infection was from either direct exposure to Mr. Kuciemba or indirect exposure through his clothing or personal effects, as opposed to some other, unknown point of exposure. (FAC ¶¶ 17, 22-23). These specific factual allegations are designed to eliminate the speculative arguments Defendant made in the last Motion to Dismiss regarding possible alternate sources of infection.

(6) The FAC re-affirms that Mrs. Kuciemba is seeking damages for her own personal injuries and that she has no Workers' Compensation remedy. (FAC ¶¶ 30-33).

III. LEGAL ANALYSIS

A. THE COURT MUST VIEW THE FACTS ALLEGED IN PLAINTIFFS' COMPLAINT AS TRUE.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 678 (internal quotation marks omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* On a motion to dismiss, "[a]llegations of fact in the complaint must be taken as true and construed in the light most favorable to the nonmoving party." *Hernandez v. Wood* (N.D. Cal. 2016) 2016 WL 1070663 at *11. Finally, a Motion to Dismiss is inappropriate when there are disputed issues of fact. *See, e.g. Bruton v. Gerber Prod. Co.* (N.D. Cal. 2014) 2014 WL 172111 at *10. At the Motion to Dismiss stage, a Court must consider the pleading as true and should not "consider material outside

the pleadings when assessing the sufficiency of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure". *Khoja v. Orexigent Therapeutics, Inc.* (9th Cir. 2018) 899 F.3d 988, 998-999.

At this stage of the litigation, the Court is obligated to accept as true that Mrs. Kuciemba contracted COVID-19 directly from Mr. Kuciemba, or indirectly through contact with his clothing or personal effects, and that Defendant negligently exposed Mr. Kuciemba and/or his clothing/personal effects to the virus.

B. MRS. KUCIEMBA'S CLAIMS ARE NOT BARRED BY THE EXCLUSIVE REMEDY OF WORKERS' COMPENSATION BECAUSE SHE ALLEGES A DIRECT PHYSICAL INJURY TO HER OWN BODY CAUSED BY DEFENDANT'S NEGLIGENCE.

The key legal issue in this Motion is: Are the claims of a non-employee spouse, who suffered physical injuries to her own body due to the employer's alleged negligence, subject to Workers' Compensation exclusivity? The answer is no.

The relevant Workers' Compensation statutes, *e.g. Labor Code* §§ 3600-3602 generally bar an employee from seeking a civil action against an employer when the employee suffers a work-related injury. "Based on the statutory language, California courts have held worker's compensation proceedings to be the exclusive remedy for certain third-party claims deemed collateral to or derivative of the employee's injury. Courts have held that the exclusive jurisdiction provisions bar civil actions against employers by nondependent parents of an employee for the employee's wrongful death, by an employee's spouse for loss of the employee's services or consortium, and for emotional distress suffered by a spouse in witnessing the employee's injuries." *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal 4th 991, 997 (internal citations omitted). This application of Workers' Compensation exclusivity to certain third-party claims is generally referred to as the "derivative injury doctrine." *Id.* at 997.

To determine whether a third party's claim is a "derivative" or "collateral" injury, a Court must first look to whether a claim was legally dependent on the employee's work-related injuries. *Id.* at 999. In *Snyder*, the Supreme Court had the opportunity to apply this rule to two factual scenarios: (1) the facts of the *Snyder* case itself and (2) a similar fact pattern in a prior Court of Appeal matter, *Bell v. Macy's California* (1989) 212 Cal. App. 3d 1442 (disapproved by *Snyder v. Michael's Stores,*

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Inc. (1997) 16 Cal 4th 991) ("*Bell*").

In the *Bell* case, a "pregnant worker complained, during work, of severe abdominal pain. A nurse provided on premises by the employer misdiagnosed the worker's condition as gas pains and delayed calling for an ambulance. When the mother was finally taken to the hospital, she was found to have suffered a ruptured uterus, and her baby, delivered live by Cesarean section, had suffered consequential injuries including brain damage. Evidence accepted by the appellate court for purposes of the appeal from summary judgment in favor of the employer showed that the nurse's delay in calling an ambulance caused a significant portion of the fetal injuries." *Snyder*, 16 Cal 4th 991 at 997). The appellate court concluded that the derivative injury doctrine applied because "the child's prenatal injury was a collateral consequence of the treatment of [the mother]". *Id.* at 998.

The *Snyder* Court rejected the Court of Appeal's analytical approach in *Bell* and explained how the fetus in *Bell* had suffered a distinct injury from any injuries its mother had suffered:

> **The question the *Bell* court should have asked, therefore, was not whether [the baby's] injuries resulted from the employer's negligent treatment of [the mother] or from "some condition affecting" [the mother] but, rather, whether [the baby's] claim was legally dependent on [the mother'] work-related *injuries*.** From the appellate opinion, no evidence of such dependence appears. Although the fetal injuries resulted in part from the mother's ruptured uterus, the appellate court and the parties all assumed that "[the mother's] ruptured uterus was unrelated to her employment save only that it occurred during working hours and on Macy's premises." As to the nurse's delay in summoning an ambulance, the majority's recitation of the evidence indicates simply that the delay "caused significant injury to [the baby]" (*ibid.*); **nothing in the majority opinion suggests [the baby's] claim depended conceptually on injuries the delay caused to [the mother].** The majority, in other words, says nothing to contradict the dissent's assertion that "the nurse's negligence caused an injury to [the baby] which was not dependent on or derived from any injury to the mother." *Id.* at 999 (internal citations omitted, emphasis in original).
>
> [. . .]
>
> "Whether a toxin or other agent will cause congenital defects in the developing embryo or fetus depends heavily not on whether the mother is herself injured, but on the exact stage of the embryo or fetus's development at the time of exposure, as well as on the degree to which maternal exposure results in embryonic or fetal exposure. (See 7 Encyclopedia of Human Biology (1991) Human Teratology, pp. 411–

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> 418.) **Even when the mother *is* injured, moreover, the derivative injury rule does not apply unless the child's claim can be considered merely collateral to the mother's work-related injury, a conclusion that rests on the legal or logical basis of the claim rather than on the biological cause of the fetal injury**." *Id.* at 1000. (Emphasis added).

The Supreme Court thus drew a line from the employer's negligence to the child's separate, independent damages claims and the Supreme Court found that it was irrelevant whether the mother was injured. As a result, the *Snyder* Court held that *Bell* erred in finding that the child's claims were subject to Workers' Compensation exclusivity and overruled *Bell*.

With this analytical framework in mind, the *Snyder* Court then addressed the facts of the case before it. In *Snyder*, a minor child alleged that she suffered injuries because her mother was negligently exposed to toxic carbon monoxide at work, while pregnant with the child, and that this toxin passed through the mother to the child. *Snyder*, 16 Cal 4th at 994. The child alleged a direct claim for injuries against the employer. *Id*. at 995. The trial court sustained a demurrer on Worker's Compensation grounds but the Court of Appeal reversed, holding that the daughter's injuries were "the result of her own exposure to toxic levels of carbon monoxide" and therefore the exclusive remedy of Worker's Compensation did not apply. *Id*. at 995. The Supreme Court affirmed the judgment of the Court of Appeal, holding that the child's separate injury claims were not barred by Workers' Compensation and that she could proceed against employer on her personal injury claims. *Id.* at 1008. In its holding, the Supreme Court easily distinguished between derivative injury cases and direct claims by non-employee family members:

> **[Employer's] demurrer should have been sustained only if the facts alleged in the complaint showed either that [the child] was seeking damages for [mother's] work-related injuries or that [the child's] claim necessarily depended on [the mother's] injuries.** (See *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1060, 40 Cal.Rptr.2d 116, 892 P.2d 150 [complaint subject to demurrer only if it affirmatively alleges facts showing workers' compensation is exclusive remedy].) The facts alleged here did not so demonstrate. **Plaintiffs alleged simply that both [mother] and [daughter] were exposed to toxic levels of carbon monoxide, injuring both. [The daughter] sought recompense for her own injuries.** [. . .] [the daughter] does not claim any damages for injury to [the mother]. Nor does the complaint demonstrate [the daughter's] own recovery is legally dependent on injuries suffered by [the mother]. **For that reason, [*Labor Code*] sections 3600–3602 [i.e. the Workers Compensation exclusivity sections] did not**

> **defeat [daughter's] cause of action for her own injuries (the first cause of action) or her parents' claim for consequential losses due to [daughter's] injuries (the third cause of action).**

Id. at 796 (emphasis added).

The mother in Snyder thus inhaled the toxic levels of carbon monoxide at work and then through the mother's body passed that toxic monoxide gas into her unborn child who was injured. The Supreme Court drew a line from the employer's negligence to injuries alleged by the child were her own injuries, not derivative of the mother's, and thus the Workers' Compensation exclusivity did not apply. It did not make a difference whether the mother as an employee was injured by the toxic gas that entered her body because her injury was separate and distinct from the injury to her unborn child.

The same reasoning applies to this case. Here, Mrs. Kuciemba alleges that the employer was required to follow a binding Health Order to prevent the spread of COVID-19. The employer's negligence (e.g. its repeated violations of the Health Order) resulted in the direct transmission of the virus from Mr. Kuciemba, or the indirect transmission of the virus from his clothing or personal effects, to Mrs. Kuciemba. We can thus draw a line from the employer's negligence to Mrs. Kuciemba's personal injuries.

Similar to the facts in *Snyder*, it is irrelevant whether Mr. Kuciemba was injured. Like the toxins in *Snyder*, the virus entered the employee's body, clothing, or personal effects at work and then passed on to the non-employee family member. Like the daughter's claims in *Snyder*, Mrs. Kuciemba's claims are not predicated upon her husband suffering a physical injury, they are her own personal injury claims not covered by Worker's Compensation. In other words, even if Mr. Kuciemba was asymptomatic, no damage was done to his body whatsoever by the virus, and he incurred no distress as a result of the infection to his body, Mrs. Kuciemba would still suffer completely separate and independent damages as a result of the *direct* damage that the virus wrecked on her body. This direct physical injury is also a significant difference between Mrs. Kuciemba's claims and the typical claim barred by the derivative injury doctrine. *See e.g.* the nonemployee spouse in *Williams v. R.J. Schwartz* (1976) 61 Cal. App. 3d 628 who witnessed her husband's death in a workplace accident

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and suffered severe emotional distress, but no physical injuries of her own.[1]

Plaintiffs respectfully disagree with this Court's ruling on the original Motion to Dismiss. At oral argument, this Court explained that it was inclined to apply the derivative injury doctrine because "at least as a factual matter, [Mrs. Kuciemba]'s claim is wholly dependent on [Mr. Kuciemba] getting sick at work and she got it from him." [Transcript at 24:5-7] But under this analysis, the infant in *Snyder* should also have been barred by the exclusive remedy because she was exposed to toxic chemicals that her mother inhaled at work then passed through her body onto her unborn child. The holding in *Snyder* is not only the binding precedent, but it is also common sense because Mrs. Kuciemba as a non-employee does not have any remedy under the Workers' Compensation system for her own physical injuries.

Kesner v. Superior Court (2016) 1 Cal. 5th 1132 ("*Kesner*"), while not framed as a Workers' Compensation case, is also highly persuasive on these issues. In *Kesner*, workers were exposed to hazardous asbestos fibers and brought the fibers home to their households. The plaintiffs were exposed to hazardous asbestos fibers through the workers' clothing and personal effects. For example, the wife of one of the workers alleged she contracted mesothelioma "through contact with [the worker] and his clothing, tools, and vehicle after she began living with him in 1973." *Id.* at 1141. As described in detail below, the Supreme Court ultimately held that the employer owed a duty to members of its employees' households.

As the Court stated at oral argument, the issue of Workers' Compensation was never raised in *Kesner*. "And that never was a workers' comp claim case. It was never raised. I double-checked. Not only wasn't it discussed, it was never raised. And that's probably because she didn't catch mesothelioma from him. And, as pointed out, the employer has a duty not to let this stuff float around, you know, in the environment either on the work site or beyond. And he became – the husband

[1] Defendant makes much ado about statements made by Plaintiffs' counsel at oral argument discussing whether an asymptomatic person is "injured". While it is true that Plaintiffs' counsel did state that an asymptomatic person suffered an "injury", counsel also consistently took the position that it was irrelevant whether the employee was injured or not (Transcript at 12:11-10; 36:25-37:3). This position is consistent with the law. Furthermore, the FAC clarifies Plaintiffs' position by noting that an asymptomatic person, according to the CDC, is not injured and completely healthy but just happens to serve as a vehicle for the virus. (FAC ¶7).

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became just the conduit of the material to the wife." [Transcript at 16:8-15]

The Court's summary of *Kesner* is highly analogous to this case. Here, it is probable that Mr. Kuciemba's clothing or personal effects carried the virus and indirectly transmitted it to Mrs. Kuciemba. It is also probable that the virus was directly transmitted from Mr. Kuciemba to her husband. This is a factual issue that would need to be evaluated by expert testimony and is not appropriately resolved on a Motion to Dismiss. Regardless, in both circumstances, Mr. Kuciemba and/or his clothing or personal effects are merely serving as a conduit of the virus and his own injuries are not relevant. In *Kesner*, under the same circumstances, the Supreme Court had no issue drawing a line from the employers' negligence to the *Kesner* plaintiffs' fatal injuries.

It is logical that the reason Workers' Compensation exclusivity was not raised in *Kesner* was because (1) the plaintiffs were not employees of the defendant; (2) the plaintiffs had their own distinct physical injuries; and (3) it was irrelevant whether the actual employees were injured because the employees merely served as a vehicle to transmit the toxic asbestos fibers to the plaintiffs. What mattered was the connection between the *employer defendant's* conduct and the non-employee plaintiffs' injuries. However, under this Court's ruling the *Kesner* plaintiffs would have been barred by Workers' Compensation exclusivity. The fact that the parties nor the Courts in *Kesner* even raised Workers' Compensation exclusivity as an issue indicates this cannot be the law.

Plaintiffs respectfully request that this Court follow the California Supreme Court authority in *Snyder* and *Kesner* which permits Mrs. Kuciemba to make civil claims for her direct injuries.

C. THERE IS NO QUESTION THAT DEFENDANT OWED A DUTY OF CARE TO MRS. KUCIEMBA.

At the first Motion to Dismiss, Defendant argued it owed no duty to Mrs. Kuciemba. The Court did not reach the issue of duty because it ruled on Workers' Compensation exclusivity grounds. Plaintiffs extensively briefed the duty issue in their prior opposition and summarize portions of the relevant duty arguments below.

The relevant authority here is *Kesner v. Superior Court* (2016) 1 Cal. 5th 1132, which has strikingly similar facts and equally applicable reasoning. In *Kesner*, the California Supreme Court held that "the duty of employers and premises owners to exercise ordinary care in the use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where

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it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission. . . . Importantly, we hold that this duty extends only to members of a worker's household. Because the duty is premised on the foreseeability of both the regularity and intensity of contact that occurs in a worker's home, it does not extend beyond this circumscribed category of potential plaintiffs." *Id.* at 1140.

Kesner involved individuals from the same household who were exposed to asbestos from workers who carried the toxic fibers home with them. These family members were subsequently diagnosed with mesothelioma. *Id.* at 1141. This is a nearly identical to the fact pattern in our case where Mr. Kuciemba was exposed to the COVID-19 virus, either directly through his person, or indirectly through fomites such as clothing or personal effects, and unknowingly brought it home with him to his wife. The issue before the California Supreme Court in *Kesner* was whether the employer owed a duty to these nonemployee family members living in the same household. To determine whether a duty existed (or put another way, whether the general duty of care should *not* otherwise extend to household members), the Supreme Court analyzed certain policy considerations collectively known as the *Rowland* factors (named after the seminal case of *Rowland v. Christiansen* (1968) 69 Cal. 2d 108).

Kesner held that the *Rowland* factors dictated the existence of a duty by the employer to protect against asbestos fibers that a worker may bring back to their household and that could be breathed in by the family members. Here, we have a very similar facts where Mr. Kuciemba brought a virus from work into his household and that virus infected and caused harm to Mrs. Kuciemba. We summarize key portions of *Kesner's* application of the *Rowland* factors and how they apply to Plaintiffs' case.

1. *Kesner's* analysis of the "foreseeability of injury factors" favors the establishment of a legal duty in this case.

The first three *Rowland* factors "foreseeability, certainty, and the connection between the plaintiff and the defendant—address the foreseeability of the relevant injury." *Kesner,* 1 Cal. 5th at 1145. These factors favored the *Kesner* plaintiffs and also favor the Kuciembas. At oral argument,

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the Court noted that the foreseeability factors favored Plaintiffs but believed this factor was outweighed by other public policy issues (Transcript at 41:7-8).

Foreseeability: Foreseeability is the "most important factor to consider in determining whether to create an exception to the general duty to exercise ordinary care". *Id.* at 1145. The Supreme Court found that "it was foreseeable that people who work with or around asbestos may carry asbestos fibers home with them and expose members of their household." *Id.* at 1145. Relevant to the Court's analysis was the existence of OSHA regulations that required employers to take precautions to prevent the spread of asbestos fibers. *Id.* at 1146.

In this case there is and was general public knowledge that COVID-19 is highly contagious and easily transmitted between persons. Similar to *Kesner*, there were also specific regulations and guidance, including the Health Order and CDC Guidelines, that informed, guided, and instructed employers about how to prevent the spread of the virus. The Health Order describes the virus as "easily transmitted, especially in group settings, and the disease can be extremely serious." (Doc. 27-6 (Defendant's Exhibit E to Decl. of William A. Bogdan) at p. 1) The Health Order explains that the virus can spread through "asymptomatic transmission". (Doc. 27-6 at p. 6, ¶9) The Health Order was "designed to keep the overall volume of person-to-person contact very low to prevent a surge in COVID-19 cases in the County and neighboring counties." (Doc. 27-6 at p. 2) Therefore, at the time that Defendants transferred the infected/exposed crew from the Mountain View site to the San Francisco site without quarantine, Defendant knew that COVID-19 can be transmitted from an infected worker to members of the worker's household.[2]

Connection between the Plaintiff and the Defendant: This factor is closely related to foreseeability. The defense in *Kesner* argued that the connection between the defendants' conduct

[2] Defendant argues that no duty exists because COVID-19 is a respiratory disease like influenza but employers are not liable when an employee's spouse contracts the flu. Putting aside that a number of people in government, media, and the general public dismissed the virus as "just like the flu" to their peril, the COVID-19 pandemic has resulted in an extensive number of binding government regulations, including the Health Order. There are no similar binding Health Orders that exist for the flu. Furthermore, the COVID-19 pandemic has completely upended our modern society's way of life in a way not seen for generations. This is no mere seasonal virus; Mrs. Kuciemba's injuries illustrate that it is a serious threat that cannot be taken lightly. Given how infectious and pernicious the virus is, it is foreseeable that Defendant's failure to follow the binding Health Order could result in a worker's spouse becoming infected with COVID-19.

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and the plaintiff's was indirect and attenuated because they required the intervening act of an employee to transmit the asbestos to his household. *Id.* at 1148. The Supreme Court disagreed and explained that "[i]t is well established ... that one's general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct." *Id.* at 1148. The employee was part of the same causal chain and the Supreme Court found that "[a]n employee's role as a vector in bringing asbestos fibers into his or her home is derived from the employer's or property owner's failure to control or limit exposure in the workplace." *Id.* at 1148. The Supreme Court explained that "[a]n employee's return home at the end of the workday is not an unusual occurrence, but rather a baseline assumption that can be made about employees' behavior. The risk of take-home exposure to asbestos is likely enough in the setting of modern life that a reasonably thoughtful [employer or property owner] would take account of it in guiding practical conduct in the workplace." *Id.* at 1149.

Just like in *Kesner*, Plaintiffs allege that Defendant's failure to exercise due care and follow appropriate safety regulations designed to prevent the spread of COVID-19 lead to the infection of Mr. Kuciemba and/or his clothing or personal effects, and subsequently his wife, Mrs. Kuciemba. Thus, the events are all causally related and a direct line can be drawn from Defendant's conduct to Mrs. Kuciemba's injuries. On this factor, Defendant claims that *Kesner* is distinguishable because it was not the contact with the worker that allegedly caused the mesothelioma, rather the household's contact with asbestos fibers, a hazardous product that the employer used in its manufacturing process and was required to restrict the job site. This is a distinction without a difference that ignores the broader holding of the Court. The Supreme Court expressly recognized in its holding that "[w]here it is reasonably foreseeable that **workers**, their clothing, or personal effects **will act as vectors** carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission" *Kesner*, 1 Cal. 5th at 1140 (emphasis added). The Supreme Court was not so much concerned about the method of transmission of asbestos fibers, the issue was whether a worker's subsequent transmission to household members was foreseeable based upon the Defendant's failure to control the movement of asbestos fibers. The fact that Mr. Kuciemba would come home to Ms. Kuciemba "at the end of the workday is not an unusual occurrence, but rather a

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baseline assumption that can be made about employees' behavior". *Id.* at 1149. Here, Defendant's failure to follow binding Health Orders, including but not limited to commingling workers it knew or should have known were exposed to the virus, with workers at Mr. Kuciemba's job site, was the cause of Mrs. Kuciemba's infection. Whether Mrs. Kuciemba contracted the virus from Mr. Kuciemba's hands or clothing, or the virus was in water droplets exhaled by Mr. Kuciemba is irrelevant to the duty analysis.

Defendant also argues that with COVID-19, everything a worker does during the two-thirds of the day spent off-site, and what other household members do twenty-four hours a day, is likely, if not more likely, to be a source of infection. But this is really an argument about causation and the Defense is prohibited from making this argument at this stage of the litigation because the Court must take Plaintiff's allegations as true for purposes of this motion and not consider arguments about causation. The question of whether a legal duty exists as a matter of law, assuming that Plaintiffs' allegations are accepted as true is properly before the Court. Under the *Kesner* analysis Defendant did in fact have a legal duty to Mrs. Kuciemba.

2. *Kesner's* analysis of the "public policy concerns" factors favors the establishment of a legal duty in this case.

The remaining four *Rowland* factors "moral blame, preventing future harm, burden, and availability of insurance—take into account public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief." *Id.* at 1145. These factors favored the *Kesner* plaintiffs and also favor the Kuciembas.

Moral Blame: The existence of a duty is stronger when "plaintiffs are particularly powerless or unsophisticated compared to the defendants are where the defendant's exercise greater control over the risk that issue." *Id.* at 1151. Thus, the Supreme Court found that commercial uses of asbestos received a financial benefit from asbestos but also "had greater information and control over the hazard than employees' households", meaning that "[n]egligence in their use of asbestos is morally blameworthy, and this factor weighs in favor of finding a duty." *Id.* at 1151. The same is true here. Employers, especially construction employers like Defendant, bring together many individuals from different households and therefore must take reasonable steps to keep their employees safe from a highly transmissible virus, including following the binding Health Orders. Employers have superior

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knowledge of potential infection and more resources than individual households, and therefore can and must take affirmative steps to ensure that potentially or actually infected workers stay away from work, and that workers who do appear for work have their temperature checked, wear masks, maintain social distancing, wash their hands, etc. This is not to say that individuals have no responsibility to follow best practices, but that the employer, who receives a financial benefit from bringing their workers together and who can best control the spread of the virus at work, is more morally blameworthy for purposes of the duty analysis.

Preventing Future Harm: In *Kesner*, the Defense argued that it did not owe a duty because the future risk of harm from asbestos exposure was low due to current regulations that curtailed the use of asbestos. *Id.* at 1150-1151. However, the Supreme Court explained that the existence of regulations meant that "legislatures and agencies readily adopted the premise that imposing liability would prevent future harm" and that there was a "strong public policy limiting or forbidding the use of asbestos." *Id.* at 1150-1151. The same reasoning is true here. The existence of the Health Order, and other regulations and guidance, is designed to prevent future infections and given the potential health risks, there is a strong public policy designed to curtail the spread of the virus, especially since the pandemic is severe and ongoing.

Availability of Insurance/Burden on Defendant: The Supreme Court analyzed both of these factors together. Defendants in *Kesner* argued that allowing "tort liability for take-home asbestos exposure would dramatically increase the volume of asbestos litigation, undermine its integrity, and create enormous costs for the courts and community." *Id.* at 1152. The Supreme Court disagreed noting that "[i]n general, preventing injuries to workers' household members due to asbestos exposure does not impose a greater burden than preventing exposure and injury to the workers themselves. Defendants do not claim that precautions to prevent transmission via employees to off-site individuals—such as changing rooms, showers, separate lockers, and on-site laundry—would unreasonably interfere with business operations." *Id.* at 1153. Furthermore, the court rejected the defense contention that finding a duty in these cases would open the door to an "enormous pool of potential plaintiffs" that creates an "unlimited duty [that] imposes great costs and uncertainty, and invites voluminous and frequently meritless claims that will overwhelm the courts." *Id.* at 1153. The

Supreme Court stated that "[a]lthough defendants raise legitimate concerns regarding the unmanageability of claims premised upon incidental exposure, as in a restaurant or city bus, these concerns are not clearly justify a categorical rule against liability for foreseeable take-home exposure." *Id.* at 1154. Thus, the Court adopted a logical and bright-line rule that limited take-home exposure liability to members of a worker's household which the Court defined as "persons who live with the worker and are thus foreseeably enclose and sustain contact with the worker over a significant period of time." *Id.* at 1154-1155.

Defendant makes similar arguments as the employer in *Kesner*. It claims that imposing a duty on Defendant would result in tremendous financial burdens by creating an enormous pool of plaintiffs such as "the wife who claims her husband caught COVID-19 from the barista, the husband who claims his wife caught it from the dental hygienist, the roommate who claims a co-tenant while on jury duty caught it from the court bailiff, all these people would have potential claims against entities deemed essential to society's ability to function." (Doc. 27 at 8:23-27). But all of these potential plaintiffs involve *third party customers/visitors* which was not the focus of *Kesner* nor the proposal put forth by Plaintiffs, which is to limit claims to the members of employee households.

Like in *Kesner*, such concerns in this case do not call for a categorical rule that *no duty is owed*, rather that the same commonsense limitation that an employer's duty extends but is limited to members of a worker's household.[3] As the Supreme Court explained, such a rule keeps the "potential plaintiffs to an identifiable category of persons who, as a class, are most likely to have suffered a legitimate, compensable harm. . . . This rule strikes a workable balance between ensuring that reasonably foreseeable injuries are compensated and protecting courts and defendants from the costs associated with litigation of disproportionately meritless claims." *Id.* at 1155.

[3] As a practical matter, a denial of this Motion to Dismiss may not necessarily lead to an explosion of claims as Defendant suggests. Prior to oral argument in the first Motion to Dismiss, neither the parties nor the Court could find an analogous "take home" case in California. Plaintiffs' counsel performed another search while preparing this Opposition and again could not locate an analogous case.

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In summary, the California Supreme Court in *Kesner*, conducted a thorough policy-based analysis and ultimately determined that the factors weighed in favor of extending the employer's duty to members of employee's household. The same policy considerations apply here and Defendant owes a duty to Mrs. Kuciemba.[4]

IV. CONCLUSION

For purposes of the Motion to Dismiss the FAC, the Court must accept Plaintiffs' allegations as true. Mrs. Kuciemba has clearly stated viable claims against Defendant and should be allowed to pursue her claims before jurors. Plaintiffs respectfully request that the Court DENY Defendant's Motion to Dismiss.

Respectfully Submitted,

Dated: April 15, 2021

VENARDI ZURADA LLP

/s/ Martin Zurada

By: Martin Zurada
Attorneys for Plaintiffs CORBY KUCIEMBA and ROBERT KUCIEMBA

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[4] As a final note, the Legislature has had over a year to pass COVID-19 liability limitations. Unlike other jurisdictions, it has not done so. In fact, the Legislature enacted *Labor Code* § 77.8 which created a broad workers' compensation presumption for certain essential workers wherein a COVID-19 infection is deemed to have arisen in the course and scope of the workers' employment. *Compare Tenn. Code Annotated* 29-34-801 (generally no liability for COVID-19 claims against business entities except proof of clear and convincing evidence of gross negligence or willful misconduct); *NRS* 439.366 (similar liability restrictions); *Idaho Code* 6-3401 (same); *Ch. 64 Acts of 2020* (Mass.) (civil immunity for healthcare providers and facilities absent gross negligence or other reckless or willful misconduct).

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CORBY KUCIEMBA, an individual; ROBERT KUCIEMBA, an individual,

Plaintiffs,

vs.

VICTORY WOODWORKS, INC., a Nevada corporation; DOES 1-20, inclusive,

Defendants.

Case No.: 3-20-cv-09355-MMC

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Complaint Filed: October 23, 2020

Date Removed: December 28, 2020

Date: February 12, 2021
Time: 9:00 a.m.
Department: Courtroom 7 – 19th Floor

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I. INTRODUCTION

Plaintiffs Corby Kuciemba ("Mrs. Kuciemba") and her husband Robert Kuciemba ("Mr. Kuciemba") allege that Mrs. Kuciemba contracted a severe case of COVID-19 due to the negligence of Mr. Kuciemba's former employer, Defendant Victory Woodworks, Inc. ("Defendant"). Defendant violated a COVID-19 Health Order of the City and County of San Francisco (the "Health Order"), CDC Guidelines, and other regulations, by moving workers exposed to COVID-19 at its Mountain View worksite to its San Francisco worksite without quarantining them, and thereafter by failing to take other day-to-day COVID-19 safety precautions at that San Francisco worksite. Defendant knew that its neglect would expose not only the employees, but also consequently each member of each employee's household, to a highly contagious and dangerous virus in COVID-19. But Defendant still failed to take basic precautions. Defendant caused Mr. Kuciemba to contract COVID-19 while at work at Defendant's location in San Francisco, by failing to follow the Health Order and the CDC Guidance. Mr. Kuciemba then brought the virus home from work and unknowingly infected his wife Mrs. Kuciemba. Both Mr. and Mrs. Kuciemba became very ill, required extended hospital treatment, and still suffer from significant aftereffects of COVID-19. Mr. Kuciemba's injury, and any derivative claim of Mrs. Kuciemba arising out of Mr. Kuciemba's injury such as loss of consortium, are subject to Workers' Compensation and are excluded from this case. This case is for the direct injury to Mrs. Kuciemba from being contaminated by the virus, and for Mr. Kuciemba's derivative damages arising from the injury to his wife.

Having failed to take fundamental precautions to protect Mrs. Kuciemba from COVID-19, Defendant is eager to avoid responsibility for its wrongdoing.

(A) Defendant ignores the applicable standard on a Motion to Dismiss which requires that facts stated in the Complaint be accepted as true. Littered throughout the Defendant's moving papers are statements and facts injected from outside of the Complaint that attempt to question and contradict the allegations in the complaint. These statements and extraneous facts primarily question causation i.e. Defendant argues that Mr. Kuciemba could have been infected with the virus outside of work. Defendants are asking this Court to violate Rule 12(b)(6) and the controlling authority in *Khoja v. Orexigent Therapeutics, Inc.* (9th Cir. 2018) 899 F.3d 988, 998-999 which holds that at "the Motion

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to Dismiss stage, a Court must consider the pleadings as true and should not "consider material outside the pleadings when assessing the sufficiency of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure". A Motion to Dismiss is simply not the proper place to raise factual disputes regarding causation or any other disputed matters.

(B) Defendant first claims that Mrs. Kuciemba's claims are barred because they are subject to the exclusive remedy of Workers' Compensation. This is an illogical argument given that Mrs. Kuciemba is not covered by Defendant's workers' compensation insurance and therefore does not have a Workers' Compensation remedy. More importantly Defendant's argument is directly contrary to controlling California Supreme Court precedent in *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal 4th 991, which Defendant failed to cite. *Snyder* holds that direct injury claims against an employer by a non-employee family member are not subject to Worker's Compensation. Mrs. Kuciemba is a *non-employee* alleging a direct claim for *her* personal injuries because of Defendant's negligence. She is not alleging a derivative claim such as loss of consortium, or emotional distress, due to injuries to Mr. Kuciemba who was employed by Defendant. Therefore Mrs. Kuciemba's claims are properly before this Court.

(C) Defendant also argues that the case is "not Defendant's problem" and that the matter should be referred to an administrative agency pursuant to the Primary Jurisdiction Doctrine. This is contrary to controlling Ninth Circuit authority in *Robles v. Domino's Pizza, LLC* (9th Cir. 2019) 913 F.3d 898, 910 which establishes very narrow grounds on referrals of cases to an administrative agency. Under the *Robles* analysis the Court should adjudicate a case if an administrative agency is aware of but has not expressed an interest in the subject matter of the litigation, or a referral would significantly postpone the ruling. Here, Defendant has not identified a specific agency that has expressed any interest in intervening in the subject matter of this litigation, or generally in personal injury claims of non-employee family members due to COVID-19. The governmental entities have laid out the standard of care in the Health Order and the CDC Guidelines, and it is squarely within the competency of this Court to determine whether Defendant breached that standard of care.

(D) Defendant finally states that it owed no legal duty to Mrs. Kuciemba. However, it is clear, under the controlling California Supreme Court precedent in *Kesner v. Superior Court* (2016)

1 Cal. 5th 1132, that an employer owes a duty to protect members of the workers' households from any pathogens that a worker may be exposed to at work. The duty is described in the very detailed Health Order and CDC Guidance. Furthermore, Plaintiff provides a detailed analysis of various *Kesner* foreseeability and public policy factors that illustrate why a duty of care is owed to Mrs. Kuciemba.

The end result is that Defendant cannot evade responsibility for negligently exposing Mrs. Kuciemba to COVID-19 and causing her to contract the virus. This case should be heard on the merits before a jury of Plaintiffs' peers. Plaintiffs respectfully request the Court DENY Defendant's Motion to Dismiss.

II. STATEMENT OF FACTS

The Complaint (Doc. 8-2, Ex. A to Decl. of William A. Bogdan) states Plaintiffs' allegations in detail. Plaintiffs provide a brief summary for the Court's convenience.

Defendant operates construction sites in the State of California. Mr. Kuciemba, husband of Mrs. Corby Kuciemba, worked for Defendant at a San Francisco jobsite from May 6, 2020 to July 10, 2020. (Complaint at ¶¶ 13, 18) The complaint alleges that Defendant knew or should have known that its employees at a Mountain View jobsite became infected, and/or exposed to persons infected with COVID-19, but knowingly transferred these workers to a San Francisco jobsite without requiring that the workers quarantine first, thus commingling its Mountainview and San Francisco workers. (Complaint at ¶¶15-16) Defendant transferred these infected workers even though it was aware of the San Francisco County Health Order, CDC Guidelines, and other regulations, required and/or called for quarantining, mandatory screening protocols, having workers stay home if they are feeling sick or were exposed to infected individuals, and taking specific COVID-19 precautions at work. (Complaint at ¶¶9-15, and 21). These infected workers, who were permitted to work at the San Francisco worksite, first caused Mr. Robert Kuciemba to become infected with COVID-19, and then to unknowingly bring the virus home and infect his wife Mrs. Kuciemba. (Complaint at ¶¶ 4, 17-18). As a result of Defendant's negligence, Mrs. Kuciemba developed a severe respiratory infection requiring her to stay in the hospital for weeks and requiring her to be kept alive on a respirator.

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(Complaint at ¶19-21). Mrs. Kuciemba seeks damages for her direct non-employee injury claims while Mr. Kuciemba only seeks loss of consortium damages due to his wife's injury claims.

This matter was filed on October 23, 2020 in the San Francisco County Superior Court and then removed by Defendant on December 28, 2020 on the basis of diversity jurisdiction.

III. LEGAL ANALYSIS

A. THE COURT MUST VIEW THE FACTS ALLEGED IN PLAINTIFFS' COMPLAINT AS TRUE.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 678 (internal quotation marks omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* On a motion to dismiss, "[a]llegations of fact in the complaint must be taken as true and construed in the light most favorable to the nonmoving party." *Hernandez v. Wood* (N.D. Cal. 2016) 2016 WL 1070663 at *11. Finally, a Motion to Dismiss is inappropriate when there are disputed issues of fact. *See, e.g. Bruton v. Gerber Prod. Co.* (N.D. Cal. 2014) 2014 WL 172111 at *10. At the Motion to Dismiss stage, a Court must consider the pleading as true and should not "consider material outside the pleadings when assessing the sufficiency of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure". *Khoja v. Orexigent Therapeutics, Inc.* (9th Cir. 2018) 899 F.3d 988, 998-999.

Defendant attempts to inject extraneous facts and challenges the truthfulness or accuracy of the allegations of the Complaint. These arguments focus primarily on causation. Defendant suggests that Mrs. Kuciemba could have been infected with COVID-19 from some source other than Defendant's jobsite, including but not limited to "Rite Aid, Big Lots, Post Office, McDonald's Home Depot and Lucky's Supermarket", or that she possibly even infected her husband herself (Doc. 8 at Pg. 1:23-25; 2:16-17) Defendant is improperly asking the Court to (1) take judicial notice of these various retail and restaurant locations that are within walking distance of the Kuciemba home and (2) asking the Court to consider disputed facts that are outside the four corners of Plaintiff's complaint. The Court should simply disregard these extraneous and irrelevant facts. At this stage of the litigation, the Court is obligated to accept as true that Mrs. Kuciemba contracted COVID-19 from Mr. Kuciemba who in turn contracted the virus because Defendant negligently exposed him to it.

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B. MRS. KUCIEMBA'S CLAIMS ARE NOT BARRED BY THE EXCLUSIVE REMEDY OF WORKERS' COMPENSATION BECAUSE SHE ALLEGES A DIRECT PHYSICAL INJURY CAUSED BY DEFENDANT'S NEGLIGENCE.

Defendant argues that Mrs. Kuciemba's civil claims are barred by the exclusive remedy of the California workers' compensation system. Essentially, Defendant says that, because Mr. Kuciemba was infected at work and unknowingly brought the virus home and infected his wife, Mrs. Kuciemba's *non-employee personal injury claim* is merely a "derivative claim" that is subsumed by the Worker's Compensation system. The problem with this argument is that Mrs. Kuciemba is not alleging a "derivative" claim but a *direct claim* for physical injuries to her as a non-employee arising from Defendant's negligence. The California Supreme Court in *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal 4th 991 held that direct injury claims against an employer by a non-employee family member are not subject to Worker's Compensation. Defendant failed to cite this binding authority which sinks their argument.

In *Snyder*, a minor child alleged that she suffered injuries because her mother was negligently exposed to toxic carbon monoxide at work, while pregnant with the child, and that this toxin passed through the mother to the child. *Snyder*, 16 Cal 4th at 994. The child alleged a direct claim for injuries against the employer. *Id*. at 995. The trial court sustained a demurrer on Worker's Compensation grounds but the Court of Appeal reversed, holding that the daughter's injuries were "the result of her own exposure to toxic levels of carbon monoxide" and therefore the exclusive remedy of Worker's Compensation did not apply. *Id*. at 995. The Supreme Court affirmed the judgment of the Court of Appeal, holding that the child's separate injury claims were not barred by Workers' Compensation and that she could proceed against employer on her personal injury claims. *Id.* at 1008.

In its analysis, the Supreme Court distinguished between derivative and direct claims. The Supreme Court first described the "derivative injury doctrine", which includes a line of cases that discusses how an employee's noninjured spouse/dependents' claims for loss of services, loss of consortium, or emotional distress, *were* covered and therefore barred by the Worker's Compensation system. *Id.* at 997. This line of cases includes *Williams v. R.J. Schwartz* (1976) 61 Cal. App. 3d 628 (a case cited by Defendant in their Motion) where an employee's (non-injured) wife witnessed her

husband's death in a tragic workplace accident but her claim for "bystander" emotional distress was subsumed by the Worker's Compensation system.[1]

According to the Supreme Court in *Snyder*, the cases that cite the "derivative injury doctrine" apply "the statutory language to actions that are necessarily dependent on the existence of an employee injury." *Snyder,* 16 Cal 4th at 998. Thus, for example "[o]ne spouse cannot have a loss of consortium claim without a prior disabling injury to the other spouse." *Id.* at 999. Therefore, derivative claims such as these can only be brought through the Worker's Compensation system. In its holding, the Supreme Court easily distinguished between derivative injury cases and direct claims by non-employee family members:

> **[Employer's] demurrer should have been sustained only if the facts alleged in the complaint showed either that [the child] was seeking damages for [mother's] work-related injuries or that [the child's] claim necessarily depended on [the mother's] injuries.** (See *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1060, 40 Cal.Rptr.2d 116, 892 P.2d 150 [complaint subject to demurrer only if it affirmatively alleges facts showing workers' compensation is exclusive remedy].) The facts alleged here did not so demonstrate. **Plaintiffs alleged simply that both [mother] and [daughter] were exposed to toxic levels of carbon monoxide, injuring both. [The daughter] sought recompense for her own injuries.** [. . .] [the daughter] does not claim any damages for injury to [the mother]. Nor does the complaint demonstrate [the daughter's] own recovery is legally dependent on injuries suffered by [the mother]. **For that reason, [*Labor Code*] sections 3600–3602 [i.e. the Workers Compensation exclusivity sections] did not defeat [daughter's] cause of action for her own injuries (the first cause of action) or her parents' claim for consequential losses due to [daughter's] injuries (the third cause of action).**
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> *Id.* at 796 (emphasis added).

This case is very close to *Snyder* on its facts. Here, Mrs. Kuciemba alleges that she suffered physical injuries because of Defendant's negligence in failing to protect Mr. Kuciemba from the COVID-19 virus. Like the toxins in *Snyder*, the virus entered the employee's body at work and then passed on to the non-employee family member. Like the daughter's claims in *Snyder*, Mrs.

[1] *LeFiell Manufacturing Co. v. Superior Court* (2012) 55 Cal 4th 275, another case cited by Defendant is also a straightforward application of the derivative injury doctrine. *LeFiell* (citing *Snyder*) held that the spouse of a worker who brought claims for a workplace "power press" injury (which is a partial exception to the Workers' Compensation scheme) had to pursue her loss of consortium claim through Workers' Compensation because she was alleging a derivative injury. *Id.* at 289. The case is primarily an analysis of the power press exception which is not applicable here.

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Kuciemba's claims are not predicated upon her husband suffering a physical injury, they are her own personal injury claims not covered by Worker's Compensation. In other words, even if Mr. Kuciemba was asymptomatic, no damage was done to his body whatsoever by the virus, and he incurred no distress as a result of the infection to his body, Mrs. Kuciemba would still suffer completely separate and independent damages as a result of the *direct* damage that the virus wrecked on her body. The holding in *Snyder* is not only the binding precedent, but it is also common sense because Mrs. Kuciemba as a non-employee does not have any remedy under the Workers' Compensation system for her own physical injuries.

Defendant cites *Salin v. Pacific Gas & Electric Co.* (1982) 136 Cal. App. 3d 185, a bizarre outlier of a case whose holding has been subsequently called into doubt by the California Supreme Court in *Snyder*. In *Salin*, an employee alleged that workplace stress drove him insane and caused him to attempt suicide after murdering his two young daughters. *Id.* at 187-189. The employee then sued his employer for the wrongful death of the two daughters he murdered. *Id.* at 189-190. The Court of Appeal, applying the derivative injury doctrine, held that the daughter's civil wrongful death claim was subsumed by the Workers' Compensation system. *Id.* at 193. The Court cited *Labor Code* section 3600's language that injuries "proximately caused" by the employment must be adjudicated in the Workers' Compensation system, that the deaths of plaintiff's daughters was proximately caused by the employment, and therefore "had plaintiff's daughters survived the injuries he had inflicted upon them, or had otherwise been damaged due to his employment-related mental condition, they would have had no cause of action against PG&E." *Id.* at 191-192.

In *Snyder*, the Supreme Court addressed *Salin* in a footnote. After briefly reciting *Salin*'s facts, the Supreme Court stated: "While we have no occasion here to rule on the correctness of the decision in *Salin*, we observe that sections 3600-3602 do not directly support the *Salin* court's extension of the derivative injury rule to third party injuries allegedly caused by an injured employee's post-injury acts." *Snyder*, 16 Cal 4th at 999 fn 2. *Salin*'s holding is so broad that it would effectively swallow all direct injury claims by non-employees and runs counter to *Snyder's* careful and logical distinction between indirect claims by non-employees, which are barred by Workers' Compensation, and direct claims which are not barred by Workers' Compensation. The Supreme Court in *Snyder* thus

effectively overruled *Salin* and this extreme case has no persuasive value. Following the decision in *Snyder*, *Salin* has only been cited in two published opinions. The last time that *Salin* was cited was over 20 years ago in *Horwich v. Superior Court* (1999) 21 Cal 4th 272, 286 where the Supreme Court merely cited its *Snyder* footnote that called *Salin*'s holding into doubt.

Plaintiffs respectfully request that this Court follow the binding precedent in *Snyder* which permits Mrs. Kuciemba to make civil claims for her direct injuries and Mr. Kuciemba for indirect loss of consortium injuries premised on his wife's injuries.

C. THE PRIMARY JURISDICTION DOCTRINE DOES NOT APPLY.

Defendant invokes the Primary Jurisdiction Doctrine which "allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency." *Robles v. Domino's Pizza, LLC* (9th Cir. 2019) 913 F.3d 898, 910. In short, when the doctrine applies, the Court "refers" the matter to an administrative agency so that a plaintiff may pursue administrative remedies. *Clark v. Time Warner Cable* (9th Cir. 2008) 523 F.3d 1110, 1115. In the 9th Circuit, the doctrine should not be invoked lightly. "The purpose of the doctrine is not to secure expert advice from an agency every time a court is presented with an issue conceivably within the agency's ambit. Rather, efficiency is the deciding factor in whether to invoke primary jurisdiction. [. . .] [E]ven when agency expertise would be helpful, a court should not invoke primary jurisdiction when the agency *is aware of but has expressed no interest* in the subject matter of the litigation. Similarly, primary jurisdiction is not required *when a referral to the agency would significantly postpone a ruling* that a court is otherwise competent to make." *Robles*, 913 F.3d at 910 (emphasis in original; internal citations and quotation marks omitted).

Here, the Primary Jurisdiction Doctrine simply does not apply. First, as a preliminary matter, Defendant does not even identify the specific agency it thinks should handle the "referral" of Plaintiff's claims. Defendant rattles off the CDC, OSHA, the State of California, and the City and County of San Francisco, but Defendant does not reveal which agency it thinks should handle the "referral", does not suggest that any of these agencies is even interested in adjudicating this subject matter, and conveniently omits that Plaintiffs would not be able to pursue an adequate remedy for the injuries at issue in this case before any of these agencies. Thus, referral would merely delay the

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inevitable and significantly postpone a ruling that this Court is otherwise competent to make. The Court is perfectly capable of determining if Defendant in fact violated the Health Order, CDC Guidelines, or any other regulations and if Plaintiffs were more likely than not infected as a result. Plaintiff is not asking the Court to create new health or safety regulations.

Defendant relies on *Rural Cmty. Workers All. v. Smithfield Foods* (W.D. Mo 2020) 459 F. Supp. Ed 1228, a Missouri case where the court invoked the Primary Jurisdiction Doctrine following worker concerns about COVID-19. In that case, workers at a meatpacking plant sought declaratory and injunctive relief, arguing that the Defendant's meatpacking plants had not properly implemented certain precautions to keep their workers safe from the virus. *Id.* at 1234. Importantly, none of the plaintiffs were seeking monetary damages. *Id.* at 1234. The Court invoked the Primary Jurisdiction Doctrine so that the USDA and OSHA "can take a measured and uniform approach to the meat-processing plants under its oversight." *Id.* at 1241.

The *Rural Cmty. Workers All.* case was in a very different procedural posture from this one. First, the plaintiffs were not seeking any monetary damages and so there were no inadequate remedy issues. Second, OSHA had specifically expressed an interest in determining whether the meatpacking plant was abiding by safety guidelines to protect workers from the virus and had already requested information from the defendant about its safety measures; this was important for the court because OSHA's interest mitigated any potential delays. *Id.* at 1241. Here, no agency has expressed any interest in the subject matter of this litigation. The City and County of San Francisco has already issued the binding Health Order, CDC has issued its Guidance, and other agencies have set rules and standards. Finally, the Missouri District Court's analysis required that the court consider "whether the court's disposition of the case could lead to inconsistent regulation of businesses in the same industry", *Id.* at 1240. This is not a consideration approved by the Ninth Circuit in *Robles*, but there is no evidence that any decision by this Court in applying health regulatory rules or guidelines based on the specific facts of this case would lead to inconsistent regulation of business. Thus, the Primary Jurisdiction Doctrine does not apply.

D. THERE IS NO QUESTION THAT DEFENDANT OWED A DUTY OF CARE TO MRS. KUCIEMBA.

Defendant argues that it owes no duty to Mrs. Kuciemba and that Plaintiffs are asking the

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Court to fashion a duty "to keep everyone that [Defendant's] employee comes in contact with free from COVID-19." (Doc. 8 at p. 8:27-9:1) Not so. Plaintiffs merely request that Defendant engage in *reasonable care* to keep their workers, and therefore members of their employees' household, safe from the virus. This duty of care is imposed by and carefully defined by the relevant local, state, and federal regulations and guidelines cited in Plaintiffs' complaint. For example, as alleged in the Complaint, the Health Order requires individuals engaged in the construction industry to follow strict health and safety guidelines to prevent the spread of COVID-19. The Health Order required that construction sites must "Establish a daily screening protocol for arriving staff to ensure that potentially infected staff do not enter the construction site. If workers leave the jobsite and return the same day, establish a cleaning and decontamination protocol prior to entry and exit of the jobsite." (Complaint at ¶11) Construction sites were also required to "[p]ost the daily screening protocol at all entrances and exits to the jobsite." (Complaint at ¶11) The Health Order also required construction sites to provide notices to employees that they should "not enter the jobsite if you have a fever, cough, or other COVID-19 symptoms. If you feel sick, or have been exposed to anyone who is sick, stay at home." (Complaint at ¶12). While the analysis should end there, Plaintiffs provide a detailed discussion as to why a duty should exist below. Defendants failed to follow the Health Orders, and other regulations and guidance, requiring them to quarantining workers who had been exposed to COVID-19 at the Mountain View worksite, and failing to take the required or recommended virus precautions at the San Francisco worksite.

Defendant cites and attempts to distinguish controlling California Supreme Court authority in *Kesner v. Superior Court* (2016) 1 Cal. 5th 1132 ("*Kesner*") which has strikingly similar facts and equally applicable reasoning. In *Kesner*, the California Supreme Court held that "the duty of employers and premises owners to exercise ordinary care in the use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission. . . . Importantly, we hold that this duty extends only to members of a worker's household. Because the duty is premised on the foreseeability of both the regularity and intensity of

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contact that occurs in a worker's home, it does not extend beyond this circumscribed category of potential plaintiffs." *Id.* at 1140.

Kesner involved individuals from the same household who were exposed to asbestos from workers who carried the toxic fibers home with them. These family members were subsequently diagnosed with mesothelioma. *Id.* at 1141. This is a nearly identical to the fact pattern in our case where Mr. Kuciemba was exposed to the COVID-19 virus and unknowingly brought it home with him to his wife. The issue before the California Supreme Court in *Kesner* was whether the employer owed a duty to these nonemployee family members living in the same household. To determine whether a duty existed (or put another way, whether the general duty of care should *not* otherwise extend to household members), the Supreme Court analyzed certain policy considerations collectively known as the *Rowland* factors (named after the seminal case of *Rowland v. Christiansen* (1968) 69 Cal. 2d 108).

Kesner held that the *Rowland* factors dictated the existence of a duty by the employer to protect against asbestos fibers that a worker may bring back to their household and that could be breathed in by the family members. Here, we have a very similar facts where Mr. Kuciemba brought a virus from work into his household and that virus infected and caused harm to Mrs. Kuciemba. Below we analyze *Kesner's* application of the *Rowland* factors and how they apply to Plaintiffs' case.

1. *Kesner's* analysis of the "foreseeability of injury factors" favors the establishment of a legal duty in this case.

The first three *Rowland* factors "foreseeability, certainty, and the connection between the plaintiff and the defendant—address the foreseeability of the relevant injury." *Kesner,* 1 Cal. 5th at 1145. These factors favored the *Kesner* plaintiffs and also favor the Kuciembas.

Foreseeability: Foreseeability is the "most important factor to consider in determining whether to create an exception to the general duty to exercise ordinary care". *Id.* at 1145. The Supreme Court found that "it was foreseeable that people who work with or around asbestos may carry asbestos fibers home with them and expose members of their household." *Id.* at 1145. Relevant to the Court's analysis was the existence of OSHA regulations that required employers to take precautions to prevent the spread of asbestos fibers. *Id.* at 1146.

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In this case there is and was general public knowledge that COVID-19 is highly contagious and easily transmitted between persons. Similar to *Kesner*, there were also specific regulations and guidance, including the Health Order and CDC Guidelines, that informed, guided, and instructed employers about how to prevent the spread of the virus. The Health Order describes the virus as "easily transmitted, especially in group settings, and the disease can be extremely serious." (Doc. 9-3 (Defendant's Exhibit D to Decl. of William A. Bogdan) at p. 1) The Health Order explains that the virus can spread through "asymptomatic transmission". (Doc. 9-3 at p. 6, ¶9) The Health Order was "designed to keep the overall volume of person-to-person contact very low to prevent a surge in COVID-19 cases in the County and neighboring counties." (Doc. 9-3 at p. 2) Therefore, at the time that Defendants transferred the infected/exposed crew from the Mountain View site to the San Francisco site without quarantine, Defendant knew that COVID-19 can be transmitted from an infected worker to members of the worker's household.[2]

Certainty: The Supreme Court noted that this factor "has been noted primarily, if not exclusively, when the only claimed injury is an intangible harm such as emotional distress." *Id.* at 1148. Given that plaintiffs in *Kesner* suffered physical injuries and died of mesothelioma, the Supreme Court concluded that "there injuries are certain and compensable under the law." *Id.* at 1148. Similarly, Mrs. Kuciemba claims physical injuries caused by COVID-19, meaning that this factor also favors her claims.

Connection between the Plaintiff and the Defendant: This factor is closely related to foreseeability. The defense in *Kesner* argued that the connection between the defendants' conduct and the plaintiff's was indirect and attenuated because they required the intervening act of an employee to transmit the asbestos to his household. *Id.* at 1148. The Supreme Court disagreed and

[2] Defendant argues that no duty exists because COVID-19 is a respiratory disease like influenza but employers are not liable when an employee's spouse contracts the flu. (Doc. 8 p. 11:24-12:2) Putting aside that a number of people in government, media, and the general public dismissed the virus as "just like the flu" to their peril, the COVID-19 pandemic has resulted in an extensive number of binding government regulations, including the Health Order. There are no similar binding Health Orders that exist for the flu. Furthermore, the COVID-19 pandemic has completely upended our modern society's way of life in a way not seen for generations. This is no mere seasonal virus; Mrs. Kuciemba's injuries illustrate that it is a serious threat that cannot be taken lightly. Given how infectious and pernicious the virus is, it is foreseeable that Defendant's failure to follow the binding Health Order could result in a worker's spouse becoming infected with COVID-19.

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explained that "[i]t is well established ... that one's general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct." *Id.* at 1148. The employee was part of the same causal chain and the Supreme Court found that "[a]n employee's role as a vector in bringing asbestos fibers into his or her home is derived from the employer's or property owner's failure to control or limit exposure in the workplace." *Id.* at 1148. The Supreme Court explained that "[a]n employee's return home at the end of the workday is not an unusual occurrence, but rather a baseline assumption that can be made about employees' behavior. The risk of take-home exposure to asbestos is likely enough in the setting of modern life that a reasonably thoughtful [employer or property owner] would take account of it in guiding practical conduct in the workplace." *Id.* at 1149.

Just like in *Kesner,* Plaintiffs allege that Defendant's failure to exercise due care and follow appropriate safety regulations designed to prevent the spread of COVID-19 lead to the infection of Mr. Kuciemba and subsequently his wife, Mrs. Kuciemba. Thus, the events are all causally related and a direct line can be drawn from Defendant's conduct to Mrs. Kuciemba's injuries. On this factor, Defendant claims that *Kesner* is distinguishable because "it was not the contact with the worker that allegedly caused the mesothelioma, rather the household's contact with asbestos fibers, a hazardous product that the employer used in its manufacturing process and was required to restrict the job site." (Doc. 8 at p. 9:20-23) This is a distinction without a difference that ignores the broader holding of the Court. The Supreme Court expressly recognized in its holding that "[w]here it is reasonably foreseeable that **workers**, their clothing, or personal effects **will act as vectors** carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission" *Kesner*, 1 Cal. 5th at 1140 (emphasis added). The Supreme Court was not so much concerned about the method of transmission of asbestos fibers, the issue was whether a worker's subsequent transmission to household members was foreseeable based upon the Defendant's failure to control the movement of asbestos fibers. The fact that Mr. Kuciemba would come home to Ms. Kuciemba "at the end of the workday is not an unusual occurrence, but rather a baseline assumption that can be made about employees' behavior". *Id.* at 1149. Here, Defendant's failure to follow binding Health Orders, including but not limited to commingling workers it knew or

should have known were exposed to the virus, with workers at Mr. Kuciemba's job site, was the cause of Mrs. Kuciemba's infection. Whether Mrs. Kuciemba contracted the virus from Mr. Kuciemba's hands or clothing, or the virus was in water droplets exhaled by Mr. Kuciemba is irrelevant to the duty analysis.

Defendant also argues that "[w]ith COVID-19, everything a worker does during the two-thirds of the day spent off-site, and what other household members do twenty-four hours a day, is likely, if not more likely, to be a source of infection." (Doc. 8 at p. 11:15-17) But this is really an argument about causation and, as discussed in subsection (A) above, the Defense is prohibited from making this argument at this stage of the litigation because the Court must take Plaintiff's allegations as true for purposes of this motion and not consider arguments about causation. The question of whether a legal duty exists as a matter of law, assuming that Plaintiffs' allegations are accepted as true is properly before the Court. Under the *Kesner* analysis Defendant did in fact have a legal duty to Mrs. Kuciemba.

2. *Kesner's* analysis of the "public policy concerns" factors favors the establishment of a legal duty in this case.

The remaining four *Rowland* factors "moral blame, preventing future harm, burden, and availability of insurance—take into account public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief." *Id.* at 1145. These factors favored the *Kesner* plaintiffs and also favor the Kuciembas.

Moral Blame: The existence of a duty is stronger when "plaintiffs are particularly powerless or unsophisticated compared to the defendants are where the defendant's exercise greater control over the risk that issue." *Id.* at 1151. Thus, the Supreme Court found that commercial uses of asbestos received a financial benefit from asbestos but also "had greater information and control over the hazard than employees' households", meaning that "[n]egligence in their use of asbestos is morally blameworthy, and this factor weighs in favor of finding a duty." *Id.* at 1151. The same is true here. Employers, especially construction employers like Defendant, bring together many individuals from different households and therefore must take reasonable steps to keep their employees safe from a highly transmissible virus, including following the binding Health Orders. Employers have superior knowledge of potential infection and more resources than individual households, and therefore can

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and must take affirmative steps to ensure that potentially or actually infected workers stay away from work, and that workers who do appear for work have their temperature checked, wear masks, maintain social distancing, wash their hands, etc. This is not to say that individuals have no responsibility to follow best practices, but that the employer, who receives a financial benefit from bringing their workers together and who can best control the spread of the virus at work, is more morally blameworthy for purposes of the duty analysis.

Preventing Future Harm: In *Kesner*, the Defense argued that it did not owe a duty because the future risk of harm from asbestos exposure was low due to current regulations that curtailed the use of asbestos. *Id.* at 1150-1151. However, the Supreme Court explained that the existence of regulations meant that "legislatures and agencies readily adopted the premise that imposing liability would prevent future harm" and that there was a "strong public policy limiting or forbidding the use of asbestos." *Id.* at 1150-1151. The same reasoning is true here. The existence of the Health Order, and other regulations and guidance, is designed to prevent future infections and given the potential health risks, there is a strong public policy designed to curtail the spread of the virus, especially since the pandemic is severe and ongoing.

Availability of Insurance/Burden on Defendant: The Supreme Court analyzed both of these factors together. Defendants in *Kesner* argued that allowing "tort liability for take-home asbestos exposure would dramatically increase the volume of asbestos litigation, undermine its integrity, and create enormous costs for the courts and community." *Id.* at 1152. The Supreme Court disagreed noting that "[i]n general, preventing injuries to workers' household members due to asbestos exposure does not impose a greater burden than preventing exposure and injury to the workers themselves. Defendants do not claim that precautions to prevent transmission via employees to off-site individuals—such as changing rooms, showers, separate lockers, and on-site laundry—would unreasonably interfere with business operations." *Id.* at 1153. Furthermore, the court rejected the defense contention that finding a duty in these cases would open the door to an "enormous pool of potential plaintiffs" that creates an "unlimited duty [that] imposes great costs and uncertainty, and invites voluminous and frequently meritless claims that will overwhelm the courts." *Id.* at 1153. The Supreme Court stated that "[a]lthough defendants raise legitimate concerns regarding the

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unmanageability of claims premised upon incidental exposure, as in a restaurant or city bus, these concerns are not clearly justify a categorical rule against liability for foreseeable take-home exposure." *Id.* at 1154. Thus, the Court adopted a logical and bright-line rule that limited take-home exposure liability to members of a worker's household which the Court defined as "persons who live with the worker and are thus foreseeably enclose and sustain contact with the worker over a significant period of time." *Id.* at 1154-1155.

Defendants make similar arguments as the employer in *Kesner*. They claim that imposing a duty on Defendant would result in tremendous financial burdens such as requiring all employees to actually live on-site. (Doc. 8, p. 12:8-10) This is a disingenuous argument – Defendant was merely obligated to follow a legally required and reasonable course of action to protect its employees from COVID-19 – so that they could prevent the spread of the virus to their households. Like in *Kesner*, such concerns in this case do not call for a categorical rule that *no duty is owed*, rather that the same commonsense limitation that an employer's duty extends but is limited to members of a worker's household. As the Supreme Court explained, such a rule keeps the "potential plaintiffs to an identifiable category of persons who, as a class, are most likely to have suffered a legitimate, compensable harm. . . . This rule strikes a workable balance between ensuring that reasonably foreseeable injuries are compensated and protecting courts and defendants from the costs associated with litigation of disproportionately meritless claims." *Id.* at 1155.

In summary, the California Supreme Court in *Kesner*, conducted a thorough policy-based analysis and ultimately determined that the factors weighed in favor of extending the employer's duty to members of employee's household. The same policy considerations apply here and Defendant owes a duty to Mrs. Kuciemba.

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IV. CONCLUSION

For purposes of the Motion to Dismiss, the Court must accept Plaintiffs' allegations as true. Mrs. Kuciemba has clearly stated viable claims against Defendant and should be allowed to pursue her claims before jurors. Plaintiffs respectfully request that the Court DENY Defendant's Motion to Dismiss.

Respectfully Submitted,

Dated: January 19, 2021

VENARDI ZURADA LLP

/s/ Martin Zurada

By: Martin Zurada
Attorneys for Plaintiffs CORBY KUCIEMBA and ROBERT KUCIEMBA

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CORBY KUCIEMBA, an individual; ROBERT KUCIEMBA, an individual, Plaintiffs, vs. VICTORY WOODWORKS, INC., a Nevada corporation; DOES 1-20, inclusive, Defendants.	Case No. 3:20-cv-09355-JCS **DEFENDANT VICTORY WOODWORKS, INC.'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO DISMISS** Complaint Filed: October 23, 2020

Defendant Victory Woodworks, Inc. ("Defendant"), by and through its attorneys, hereby requests the Court to take judicial notice pursuant to Federal Rule of Evidence 201 of the following documents:

1. **Exhibit B**-City of Hercules Resolution No. 20-015 COVID-19 Proclamation of the Existence of a Local Emergency (3/20/20): https://www.ci.hercules.ca.us/home/showpublisheddocument?id=13603 .

2. **Exhibit C**-Google Maps of areas within one half mile of plaintiffs' residence: https://www.google.com/maps/dir/25+Crystal+Cir,+Hercules,+CA+94547/The+Home+Depot,+Sycamore+Avenue,+Hercules,+CA/@38.009672,-122.2728344,17z/data=!3m2!4b1!5s0x808576d507886781:0x78ba647d4d3cc5c0!4m14!4m13!1m5!1m1!1s0x808576d64f40c1c5:0xd3816b77f35c3c7b!2m2!1d-122.273269!2d38.008889!1m5!1m1!1s0x808576d577b90147:0xc438bbb9c988a5a3!2m2!1d-122.2680472!2d38.0108744!3e2?hl=en ; https://www.google.com/maps/dir/25+Crystal+Cir,+Hercules,+CA+94547/Lucky,+Sycamore+Avenue,+Hercules,+CA/@38.0085035,-122.2730622,18z/data=!3m2!4b1!5s0x808576d507886781:0x78ba647d4d3cc5c0!4m14!4m13!1m5!1m1!1s0x808576d64f40c1c5:0xd3816b77f35c3c7b!2m2!1d-122.273269!2d38.008889!1m5!1m1!1s0x8085772a0717472d:0x97136c1f4e9f7cba!2m2!1d-122.270706!2d38.00799!3e2?hl=en ; https://www.google.com/maps/dir/25+Crystal+Cir,+Hercules,+CA+94547/United+States+Postal+Service,+Sycamore+Avenue,+Hercules,+CA/@38.0097125,-122.2728344,17z/data=!3m2!4b1!5s0x808576d59df8062d:0x5cb840a9bac1195c!4m14!4m13!1m5!1m1!1s0x808576d64f40c1c5:0xd3816b77f35c3c7b!2m2!1d-122.273269!2d38.008889!1m5!1m1!1s0x808576d44abfa305:0x60b1603fc115c49c!2m2!1d-122.2695601!2d38.0109234!3e2?hl=en .

3. **Exhibit D**-City and County of San Francisco Department of Public Health Order of the Health Officer No. C19-07c (4/29/20):

https://sf.gov/sites/default/files/2020-04/2020.04.29%20FINAL%20%28signed%29%20Health%20Officer%20Order%20C19-07c-%20Shelter%20in%20Place.pdf .

4. **Exhibit E**-Redacted copy of Application for Adjudication of Claim filed by Robert Kuciemba against Victory Woodworks on August 13, 2020 with the California Workers' Compensation Appeals Board, case number #: ADJ13490519 (OAK-ADJ).

Dated: January 4, 2020

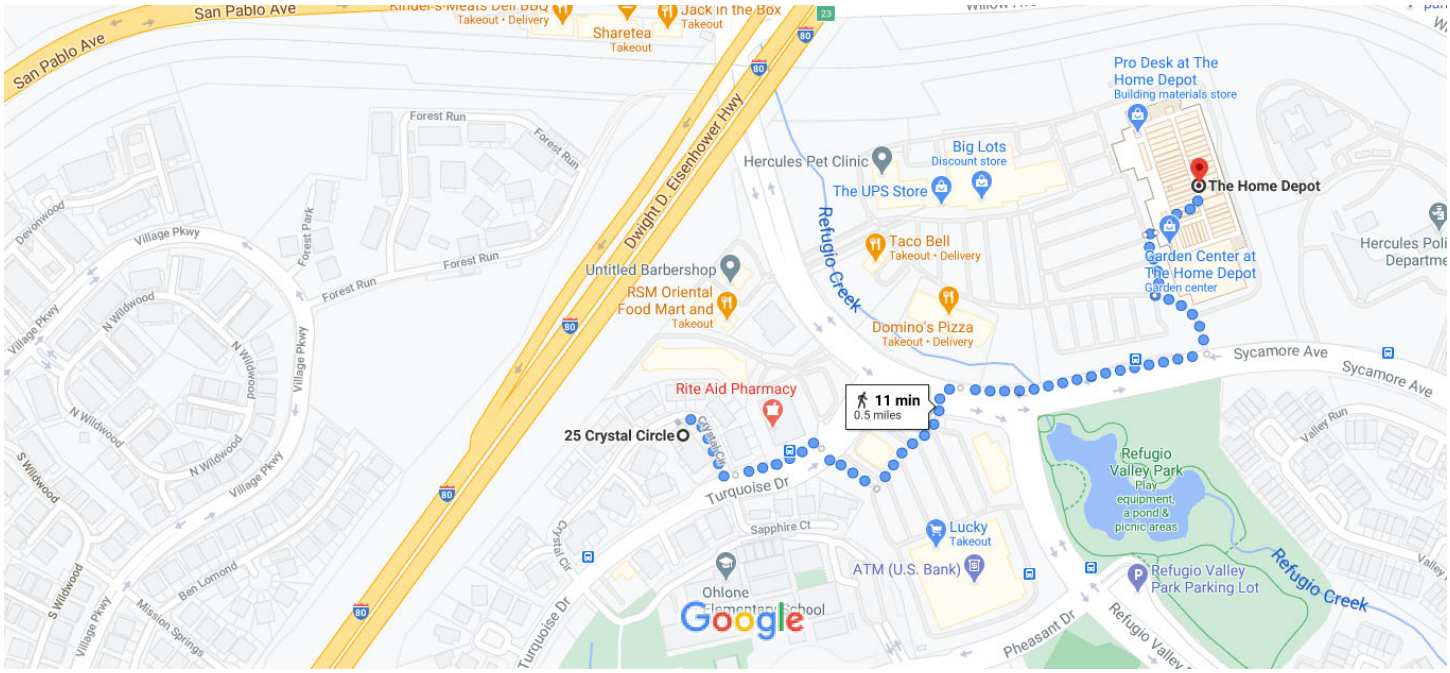
HINSHAW & CULBERTSON LLP

By: */s/ William Bogdan*
WILLIAM BOGDAN
MICHAEL MCCONATHY
Attorneys for Defendant
VICTORY WOODWORKS, INC.

EXHIBIT “C”

25 Crystal Cir, Hercules, CA 94547 to The Home Depot

Walk 0.5 mile, 11 min



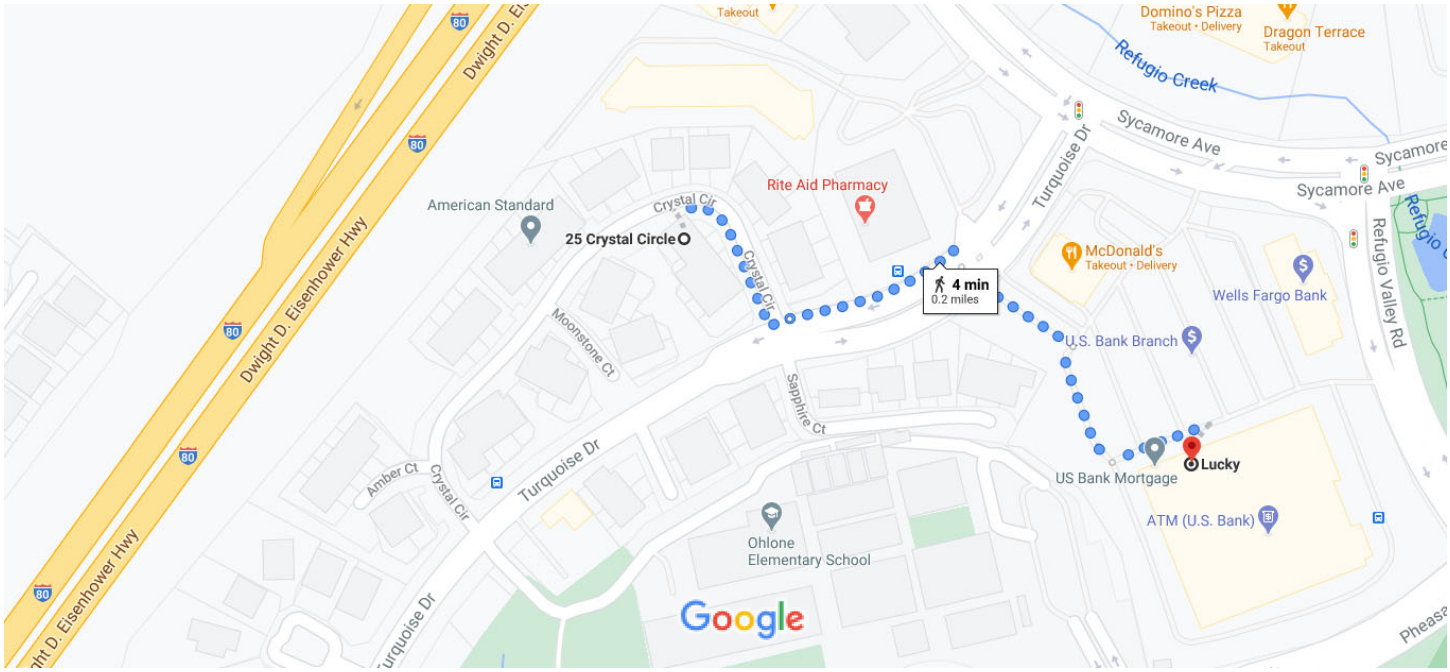
Map data ©2021 Google 200 ft

via Sycamore Ave — 11 min, 0.5 mile

Mostly flat

25 Crystal Cir, Hercules, CA 94547 to Lucky, Sycamore Avenue, Hercules, CA

Walk 0.2 mile, 4 min



Map data ©2021 100 ft

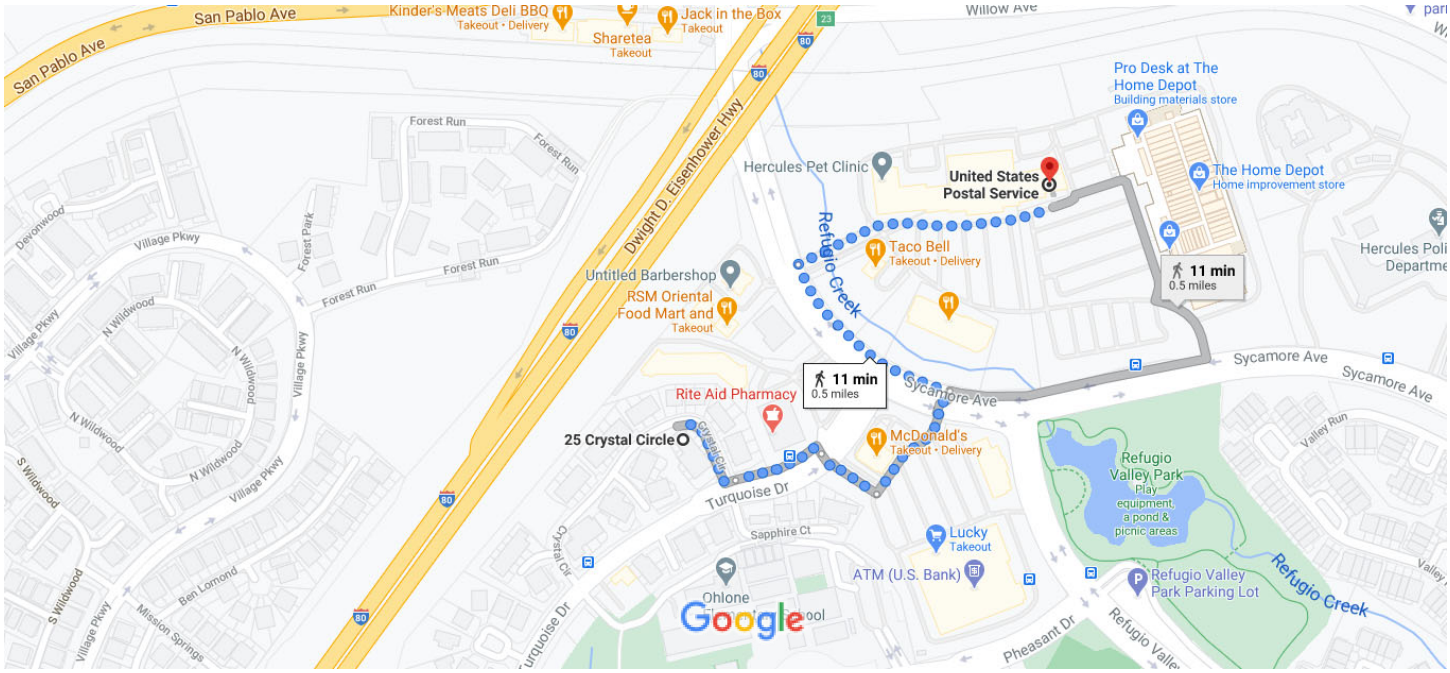
via Turquoise Dr — 4 min

0.2 mile

Mostly flat

25 Crystal Cir, Hercules, CA 94547 to United States Postal Service

Walk 0.5 mile, 11 min



Map data ©2021 Google 200 ft

via Sycamore Ave — 11 min, 0.5 mile

via Turquoise Dr and Sycamore Ave — 11 min, 0.5 mile

All routes are mostly flat

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Attorneys for Plaintiffs
CORBY KUCIEMBA and
ROBERT KUCIEMBA

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

CORBY KUCIEMBA, an individual; ROBERT KUCIEMBA, an individual,

Plaintiffs,

v.

VICTORY WOODWORKS, INC., a Nevada Corporation; and Does 1-20, inclusive,

Defendants.

CASE NO.: CGC-20-587507

COMPLAINT FOR DAMAGES; DEMAND FOR JURY TRIAL

BY FAX

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Plaintiffs CORBY KUCIEMBA and ROBERT KUCIEMBA allege as follows:

PARTIES

1. Plaintiffs CORBY KUCIEMBA and ROBERT KUCIEMBA ("Plaintiffs") are and were married at the time of the events described in this Complaint.

2. Defendant VICTORY WOODWORKS, INC. is a Nevada corporation with its principal place of business located at 340 Kresge Lane, Sparks, Nevada. Defendant conducts business throughout California, including in San Francisco, California.

3. The true names or capacities, whether individual, corporate, associate or otherwise, of Defendants, DOES 1 through 20, inclusive, are unknown to Plaintiffs who, therefore, sue said

Defendants by such fictitious names and will seek leave of Court to amend this Complaint when the same have been ascertained. Plaintiffs are informed and believes, and upon such information and belief, alleges that each Defendant designated herein as a DOE was responsible, negligently or in some other actionable manner, for the events and happenings referred to herein which proximately caused injury to Plaintiffs as hereinafter alleged. Each reference in this Complaint to "defendant," "defendants" or a specifically named defendant refers also to all defendants sued under fictitious names. Plaintiffs are informed and believe, and based thereon allege, that at all times herein mentioned each of the defendants was the agent, employee and servant of each of the remaining defendants, and in doing the things hereinafter alleged was acting within the scope of such agency, employment, and servitude, with the knowledge and consent of each of the defendants. Whenever this Complaint makes reference to "defendants" or "defendants, and each of them," such allegations shall be deemed to mean the acts of defendants acting individually, jointly and/or severally.

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SUBJECT MATTER JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction and is a proper venue because Mr. Kuciemba was employed by Defendant in San Francisco County. Furthermore, Mr. Kuciemba contracted COVID-19 on a job site operated by Defendant in San Francisco County and thereafter infected his wife with COVID-19.

GENERAL ALLEGATIONS

5. Severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) is a strain of coronavirus. This virus is responsible for causing the disease known as COVID-19.

6. COVID-19 is a highly contagious respiratory illness that spreads between people through close contact and via respiratory droplets produced from coughs or sneezes. The virus can be devastating and even fatal especially for vulnerable populations, e.g. persons who are over 65 or who have pre-existing health conditions.

7. After the virus arose in an initial outbreak in Wuhan, China, it spread rapidly around the globe in early 2020. The World Health Organization declared COVID-19 a pandemic in March 2020. As of the filing of this complaint, it is estimated that COVID-19 has infected over 41 million people and killed at least 1.13 million.

8. Beginning in March 2020, the Bay Area Counties issued Shelter in Place Orders that Order prohibited all nonessential travel and required individuals to otherwise remain at their place of residence in order to limit the spread of COVID-19.

9. In the early days of the pandemic, the Centers for Disease Control ("CDC") issued guidance stating that individuals exposed to people infected with COVID-19 must quarantine at home for 14 days after their last contact with the infected individual. This guidance is designed to limit the spread of the highly infectious virus.

10. Over time, these various Shelter in Place Orders were relaxed to allow for the safe reopening of the economy. Government agencies at the state, federal, and local level also issued various health orders targeted for specific industries. Most relevant here is San Francisco City and County's Order of the Health Officer No. C19-07c (Issued May 5, 2020) (the "Health Order").

11. The Health Order requires individuals engaged in the construction industry to follow strict health and safety guidelines to prevent the spread of COVID-19. The Health Order required that construction sites must "Establish a daily screening protocol for arriving staff to ensure that potentially infected staff do not enter the construction site. If workers leave the jobsite and return the same day, establish a cleaning and decontamination protocol prior to entry and exit of the jobsite." Construction sites were also required to "[p]ost the daily screening protocol at all entrances and exits to the jobsite."

12. The Health Order also required construction sites to provide notices to employees that they should "not enter the jobsite if you have a fever, cough, or other COVID-19 symptoms. If you feel sick, or have been exposed to anyone who is sick, stay at home."

13. Beginning on May 6, 2020 Plaintiff Robert Kuciemba began working for Defendant at a construction jobsite in San Francisco (the "Premises").

14. In or around July 3, 2020, Defendant transferred workers from a jobsite in Mountain View, California jobsite operated by Defendant to Mr. Kuciemba's location.

15. Defendant transferred these workers from its Mountain View jobsite after workers at the same location became infected with COVID-19. Defendant knew or should have known that its workers at the Mountain View jobsite were all potentially exposed to COVID-19. Defendant was

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also aware of the CDC guidelines and the San Francisco Health Order that would have prohibited these potentially infected individuals from entering the Premises without properly quarantining.

16. Instead of quarantining the individuals from its Mountain View jobsite, Defendant decided to put profits over safety by commingling the Mountain View workers with workers at the Premises including Mr. Kuciemba. Defendant was well aware of the dangers posed by COVID-19, including that it was highly infectious and potentially lethal for older, high-risk individuals. Despite this knowledge, Defendant knowingly, recklessly, and willfully failed to follow all health and safety protocols issued CDC and the Health Order when it permitted potentially infected individuals to enter and re-enter the Premises.

17. One or more of these workers from the Mountain View jobsite was in fact infected with COVID-19. In early July 2020, Mr. Kuciemba was forced to work in close contact with workers at the Premises, who came from the infected Mountain View jobsite, and one or more of these workers then infected him with COVID-19.

18. Mr. Kuciemba's last day on the job at the Premises was July 10, 2020. Within the next 1-2 days, Mr. Kuciemba and his wife both began experiencing symptoms. Mr. and Mrs. Kuciemba both tested positive for COVID-19 on July 16, 2020.

19. Both Plaintiffs were ultimately hospitalized after they developed respiratory symptoms from COVID-19. Mrs. Kuciemba, who is 65 and a high risk individual due to her age and health, developed a severe infection and remained hospitalized until early August 2020.

20. The actions of Defendant were a substantial factor in causing Plaintiff Mrs. Kuciemba's severe and traumatic injuries resulting from the COVID-19 infection to Mrs. Kuciemba.

21. Defendant committed various wrongful acts, including without limitation, Defendant:

(a) Improperly operated, managed, used, maintained and controlled the Premises in violation of applicable building codes and federal, state and municipal regulations including without limitation OSHA, Cal OSHA and the San Francisco Health Order as well as CDC guidelines;

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(b) Failed to properly screen employees for COVID-19 who were entering the Premises;

(c) Failed to protect employees from COVID-19 symptomatic (or asymptomatic persons) or potentially infectious persons;

(d) Failed to cleanse and sanitize the workspace at the Premises;

(e) Failed to provide personal protective equipment;

(f) Failed to implement a social distancing policy;

(g) Failed to otherwise follow the health and safety mandates required by OSHA, Cal OSHA, and/or the San Francisco Health Order as well as CDC guidelines;

(h) Failed to warn Mr. Kuciemba, and other persons lawfully on the Premises property, of the danger presented by the workers from the Mountain View job site who were working at the Premises when Defendant knew, or in the exercise of reasonable care should have known, that the warnings were necessary to prevent injury to Plaintiffs, residents and/or visitors at the Premises;

(i) Failed to make a reasonable inspection of the Premises when Defendant knew, or in the exercise of reasonable care should have known, that the inspection was necessary to prevent injury to Plaintiff, residents and/or visitors at the Premises;

(j) Allowed the aforementioned premise to remain in a dangerous condition, for an unreasonable length of time; and/or

(k) Failed to otherwise exercise due care with respect to the matters alleged in this Complaint.

22. Mr. Kuciemba is bringing a claim for Loss of Consortium in this Court arising from injuries to his wife.

FIRST CAUSE OF ACTION

Negligence

(Plaintiff Mrs. Kuciemba Against all Defendants)

23. Plaintiffs re-allege and incorporate the allegations set forth in paragraphs 1–22 of this Complaint.

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24. Defendant breached the duty of care owed to Plaintiffs when it knowingly, recklessly, and willfully acted as set forth in paragraph 21. Defendant exposed Mr. Kuciemba to COVID-19 at the jobsite and it was foreseeable that Mrs. Kuciemba would also develop COVID-19 through her husband.

25. Defendant's breach of the duty of care to Ms. Kuciemba was the actual and proximate cause of Plaintiffs' damages alleged herein.

26. Defendant's actions were malicious, oppressive, and fraudulent, and Plaintiff Mrs. Kuciemba is entitled to recover punitive damages

SECOND CAUSE OF ACTION
Negligence Per Se
(Plaintiff Mrs. Kuciemba Against all Defendants)

27. Plaintiffs re-allege and incorporate the allegations set forth in paragraphs 1–26 of this Complaint.

28. Defendant's actions constitute a violation of San Francisco City and County's Order of the Health Officer No. C19-07c (Issued May 5, 2020) and all related state, federal, and local statutes, regulations, and orders including without limitation OSHA and Cal OSHA. Plaintiff Mrs. Kuciemba is in the class of persons protected under such state, federal, and local statutes, regulations and orders.

29. Defendant's violation of the above laws/regulations/orders was a substantial factor in bringing about Plaintiff Mrs. Kuciemba's harm and the loss.

30. As a direct and proximate result of Defendant's negligent acts and omissions, Mrs. Kuciemba was injured and is entitled to recover compensatory damages in an amount according to proof.

31. Defendant's actions were malicious, oppressive, and fraudulent, and Mrs. Kuciemba is entitled to recover punitive damages.

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THIRD CAUSE OF ACTION

Negligence – Premises Liability
(Plaintiff Mrs. Kuciemba Against All Defendants)

32. Plaintiffs re-allege and incorporate the allegations set forth in paragraphs 1–31 of this Complaint.

33. Defendant, as owners and/or operator of the Premises, by and through their agents, servants, and/or employees, as the persons responsible for the maintenance of the Premises, acted with less than reasonable care and committed one or more of the following careless and negligent acts and/or omissions as described in paragraph 21.

34. The dangerous condition on property owned or controlled by Defendants was the actual and proximate cause of the injuries alleged herein.

FOURTH CAUSE OF ACTION

Public Nuisance – Assisting in the Creation of Substantial and Unreasonable Harm to Public Health and Safety that Affects an Entire Community or Considerable Number of Persons
[Cal. Civil Code §§ 3479, 3480, 3491, 3493; C.C.P. § 731]
(Plaintiff Mrs. Kuciemba Against All Defendants)

35. Plaintiffs re-allege and incorporate the allegations set forth in paragraphs 1–34 of this Complaint.

36. California Civil Code§ 3479 defines "nuisance" as "[a]nything which is injurious to health, ... or is indecent or offensive to the senses, ... so as to interfere with the comfortable enjoyment of life or property."

37. California Civil Code § 3480 defines "public nuisance" as any nuisance that "affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

38. To constitute a "public nuisance," the offense against, or interference with the exercise of rights common to the public must be substantial and unreasonable. *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1102, 1105.

39. The acts and omissions of Defendant alleged herein, which caused a considerable number of persons to suffer increased exposures and risks of exposures to the COVID-19 virus at Defendant's workplaces (including the Premises), including but not limited to Defendant's workers,

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and other persons with whom those workers come into contact with both at Defendant's workplaces (including the Premises) and outside of Defendant's workplaces (including Mrs. Kuciemba). Defendant substantially and unreasonably created, and substantially assisted in the creation of, a grave risk to public health and safety, and wrongfully and unduly interfered with Mrs. Kuciemba's comfortable enjoyment of their lives and property. *See County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 305-06.

40. The acts and omissions of Defendant alleged herein substantially and unreasonably created or assisted in the creation of the spread and transmission of grave, life-threatening disease and infection, the risk of spread and transmission of grave, life-threatening disease and infection disease or infection, and the actual and real fear and anxiety of the spread and transmission of grave, life-threatening disease and infection, all of which constitutes an actionable public nuisance. *See, e.g.*, Restatement (Second) of Torts § 821B & cmt. G ("[T]he threat of communication of smallpox to a single person may be enough to constitute a public nuisance because of the possibility of an epidemic; and a fire a hazard to one adjoining landowner may be a public nuisance because of the danger of a conflagration."); *Birke v. Oakwood Worldwide (2009)* 169 Cal.App.4th 1540, 1546 (secondhand smoke in condominium complex); *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 306.

41. The public nuisance caused by Defendant as alleged herein has caused and will continue to cause special injury to Mrs. Kuciemba within the meaning of Civil Code § 3493, due to the infection Mrs. Kuciemba personally suffered, the risk of exposures she faced, and the increased anxiety and fear caused by her pre-existing medical condition and her need to separate herself fromclose family members to minimize the risk of further community spread. Those harms are different from the types of harms suffered by members of the general public who did not work or have direct contact with employees who worked at the Premises.

42. California Code of Civil Procedure § 731 and California Civil Code § 3491, 3493, and 3495 authorize Mrs. Kuciemba to bring this action for injunctive, equitable abatements, and damages relief from Defendant.

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43. Defendant's failure to comply with health and safety standard in its workplace, including the Premises, has caused, and is reasonably certain to cause, community spread of the COVID-19 infection. Such community spread has not been, and will not be, limited to the physical location of Defendant's workplaces only, or to the workers at the workplaces only (including the Premises), as infected works and other persons present at Defendant's workplaces (including the Premises) have interacted with their family members, co-residents neighbors, and others with whom they must necessarily interact as they undertake essential daily activities such as shopping, doctor's visits, and childcare.

44. This community spread has resulted in increased disease and will continue to result in increased disease.

45. Defendant's conduct as alleged herein unreasonably interferes with the common public right to public health and safety.

46. Defendant's decision to operate its workplaces (including the Premises) without ensuring minimum basic health and safety standards, including by meeting the OSHA, Cal Osha, the Health Order, and/or CDC regulations, guidelines, and other minimum public health standards necessary to stop or substantially reduce the spread of COVID-19, is reasonably certain to cause further spread of COVID-19 infection and the reasonable and severe fear of the further spread of COVID-19 to Plaintiffs and other members of the community.

47. Administrative and governmental remedies have proven inadequate to protect Mrs. Kuciemba from the harms alleged in this complaint and the wrongful conduct by Defendant alleged in this complaint. OSHA and Cal/OSHA, the principal government agencies tasked with ensuring workplace safety, have deprioritized inspections an enforcement at non-medical workplaces. The CDC, while able to issue recommendations, does not have or exercise independent enforcement authority against businesses that fail to follow those recommendations.

48. The risk of injury faced by Mrs. Kuciemba outweighs the cost of the reasonable measures included in Mrs. Kuciemba's proposed injunction.

49. Defendant and each of them are substantial contributors to the public nuisance alleged herein.

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50. Defendant's past and ongoing conduct is a direct and proximate cause of Mrs. Kuciemba's injuries and threatened injuries.

51. Defendant knew and should have known that their conduct as alleged herein would be the direct and proximate cause of the injuries alleged herein to Mrs. Kuciemba .

52. Defendant's conduct as alleged herein constitutes a substantial and unreasonable interference with and obstruction of public rights and property, including the public rights to health, safety and welfare of Mrs. Kuciemba and members of the public, and those who come in contact with them, whose safety and lives are at risk due to Defendant's failure to adopt an implement proper procedures for protecting workers, customers, and other from exposure to the COVID-19 virus.

53. Defendant has committed and continue to commit the acts alleged herein knowingly and willfully.

54. As a proximate result of Defendant's unlawful actions and omissions, Mrs. Kuciemba has been damaged in an amount according to proof of trial.

55. In addition to declaratory relief, injunctive relief, and damages as alleged herein, Mrs. Kuciemba is entitled to interest, penalties, attorneys' fees and expenses pursuant to *CCP* § 1021.5, and costs of suit.

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FIFTH CAUSE OF ACTION
Loss of Consortium
(Plaintiff Mr. Kuciemba Against All Defendants)

56. Plaintiffs re-allege and incorporate the allegations set forth in paragraphs 1–55 of this Complaint.

57. Mr. Kuciemba and Mrs. Kuciemba were married at all relevant times.

58. Prior to July 2020, Mrs. Kuciemba was able to and did perform her duties as a wife.

59. As a direct and proximate result of the conduct, acts, and/or omissions of defendants, and each of them, as set forth herein above, Mrs. Kuciemba has been unable to perform the necessary duties of a husband including but not limited to the work and services usually performed in the care, maintenance and management of the family home, and he will be unable to perform

such work, services and duties in the future. By reason thereof, Mr. Kuciemba has been deprived and will be deprived of the love, companionship, comfort, care, assistance, protection, affection, society, moral support, and the loss of enjoyment of sexual relations.

60. Plaintiffs reserve the right to prove the amount of damages at trial. The amount of compensatory damages sought will be in excess of the amount sufficient to establish jurisdiction.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that judgment be entered against Defendants follows:

1. For general and compensatory damages, including damages for pain and suffering, loss of enjoyment of life, lost wages, loss of consortium, lost earning capacity and emotional distress damages, in excess of the amount sufficient to establish jurisdiction according to proof at trial;
2. For punitive damages against Defendants;
3. For attorneys' fees and costs pursuant to *CCP* § 1021.5;
4. For injunctive relief;
5. For prejudgment interest on all amounts claimed;
6. For costs of suit; and
7. For such other and further relief as the Court may deem just and proper.

Date: October 22, 2020

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ROBERT KUCIEMBA

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DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury.

Date: October 22, 2020

VENARDI ZURADA LLP

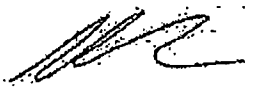

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EXHIBIT “E”

20201397 4

STATE OF CALIFORNIA
DWC DISTRICT OFFICE

DOCUMENT COVER SHEET

Is this a new case? Yes ☒ No ☐ Companion Cases Exist ☐ Walkthrough Yes ☐ No ☒

More than 15 Companion Cases ☐

08/13/2020
Date:(MM/DD/YYYY)

SSN: [redacted]

☐ Specific Injury

Case Number 1

☒ Cumulative Injury 06/29/2020 (Start Date: MM/DD/YYYY) 07/10/2020 (End Date: MM/DD/YYYY)

(If Specific Injury, use the start date as the specific date of injury)

Body Part 1: 900 COVID-19

Body Part 2: 850 RESP SYS

Body Part 3: 842 PSYCH

Body Part 4: 801 CIRC SYS

Other Body Parts: 700 MULTIPLE

Please check unit to be filed on (check only one box)

☒ ADJ ☐ DEU ☐ SIF ☐ UEF ☐ SAU ☐ INT ☐ RSU

Companion Cases

☐ Specific Injury

Case Number 2

☐ Cumulative Injury (Start Date: MM/DD/YYYY) (End Date: MM/DD/YYYY)

(If Specific Injury, use the start date as the specific date of injury)

Body Part 1:

Body Part 2:

Body Part 3:

Body Part 4:

Other Body Parts:

STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD
APPLICATION FOR ADJUDICATION OF CLAIM

☐ Amended Application

Case No.

[redacted]
SSN (Numbers Only)

Venue choice is based upon (Completion of this section is required)

☐ County of residence of employee (Labor Code section 5501.5(a)(1) or (d).)

☐ County where injury occurred (Labor Code section 5501.5(a)(2) or (d).)

☒ County of principal place of business of employee's attorney (Labor Code section 5501.5(a)(3) or (d).)

OAK
Select 3 - Letter Office Code For Place/Venue of Hearing (From the Document Cover Sheet)

Injured Worker (Completion of this section is required)

ROBERT — First Name
A — MI

KUCIEMBA
Last Name

25 CRYSTAL CIRCLE
Street Address/PO Box (Please leave blank spaces between numbers, names or words)

Street Address2/PO Box (Please leave blank spaces between numbers, names or words)

International Address (Please leave blank spaces between numbers, names or words)

HERCULES — City
CA — State
94547 — Zip Code

Applicant (If other than Injured Worker)

☐ Insurance Carrier ☐ Employer ☐ Lien Claimant

Name (Please leave blank spaces between numbers, names or words)

Street Address/PO Box (Please leave blank spaces between numbers, names or words)

Street Address2/PO Box (Please leave blank spaces between numbers, names or words)

City — State — Zip Code

Employer Information (Completion of this section is required)

☒ Insured ☐ Self-Insured ☐ Legally Uninsured ☐ Uninsured

VICTORY WOODWORKS
Employer Name (Please leave blank spaces between numbers, names or words)

340 KRESGE LANE
Employer Street Address/PO Box (Please leave blank spaces between numbers, names or words)

SPARKS (City) NV (State) 89431 (Zip Code)

Insurance Carrier Information (If known and if applicable - include even if carrier is adjusted by claims administrator)

WCF NATIONAL INSURANCE COMPANY
Insurance Carrier Name (Please leave blank spaces between numbers, names or words)

100 W TOWNE RIDGE PARKWAY 110
Insurance Carrier Street Address/PO Box (Please leave blank spaces between numbers, names or words)

SANDY (City) UT (State) 84070 (Zip Code)

Claims Administrator Information (If known and if applicable)

ADVANTAGE ROCKLIN
Name (Please leave blank spaces between numbers, names or words)

PO BOX 2229
Street Address/PO Box (Please leave blank spaces between numbers, names or words)

SANDY (City) UT (State) 84091 (Zip Code)

IT IS CLAIMED THAT (Complete all relevant information):

1. The injured worker, born [redacted] (DATE OF BIRTH: MM/DD/YYYY), while employed as a(n) CARPENTER (OCCUPATION AT THE TIME OF INJURY)

(Choose only one)

☐ specific injury _____ (Date of injury: MM/DD/YYYY)

suffered a :

☒ cumulative injury which began on 06/29/2020 (Start Date: MM/DD/YYYY) and ended on 07/10/2020 (End Date: MM/DD/YYYY)

The injury occurred at 200 VAN NESS AVENUE
Street Address/PO Box - Please leave blank spaces between numbers, names or words

SAN FRANCISCO (City), CA (State) 94102 (Zip Code).

(State which parts of the body were injured)

Body Part 1: 900 COVID-19

Body Part 2: 850 RESP SYS

Body Part 3: 842 PSYCH

Body Part 4: 801 CIRC SYS

Other Body Parts: 700 MULTIPLE

2. The injury occurred as follows:

(EXPLAIN WHAT THE WORKER WAS DOING AT THE TIME OF INJURY AND HOW THE INJURY OCCURED)

APPLICANT SUSTAINED INJURY CONTRACTING COVID 19 WHILE ENGAGING IN HIS REGULAR REPETITIVE CUSTOMARY JOB DUTIES AS A CARPENTER CUTTING SAWING HAMMERING SCREWING BUILDING WITH COMPENSABLE CONSEQUENCE TO HIS RESPIRATORY SYSTEM PSYCH PTSD CIRCULATORY SYSTEM SPEECH IMPEDIMENT MEMORY LOSS SLEEP DYSFUNCTION WEIGHT LOSS

3. Actual earnings at the time of injury:

Rate of Pay $ 52.00 ☐ Monthly ☐ Weekly ☒ Hourly

State value of tips, meals, lodging, or other advantages, regularly received $ _____ ☐ Monthly ☐ Weekly ☐ Hourly

Number of hours worked per week 40

4. The injury caused disability as follows:

Last day off work due to injury: _____ MM/DD/YYYY

First Period of Disability: Start Date _____ MM/DD/YYYY End Date _____ MM/DD/YYYY

Second Period of Disability: Start Date _____ MM/DD/YYYY End Date _____ MM/DD/YYYY

5. Compensation:

Compensation was paid: ☐ Yes ☒ No

Total paid: _____

Weekly rate(s): _____

Date of last payment: _____ MM/DD/YYYY

6. Has the worker received any unemployment insurance benefits and/or any unemployment compensation disability benefits (state disability) since the date of injury? ☐ Yes ☒ No

7. Medical treatment:

Medical treatment was received: ☒ Yes ☐ No

All treatment was furnished by the Employer or Insurance Carrier: ☐ Yes ☒ No

Date of last treatment: 08/03/2020
MM/DD/YYYY

Other treatment was provided/paid by: ANTHEM BLUE CROSS
(NAME OF PERSON OR AGENCY PROVIDING OR PAYING FOR MEDICAL CARE)

Did Medi-Cal pay for any health care related to this claim? ☐ Yes ☒ No

Names and addresses of doctor(s)/hospital(s)/clinic(s) that treated or examined for this injury, but that were not provided or paid for by the employer or insurance carrier:

JOHN MUIR HEALTH
Name of Doctor/Hospital/Clinic 1 (Please leave blank spaces between numbers, names or words)

STANFORD HEALTH CARE ALLIANCE
Name of Doctor/Hospital/Clinic 2 (Please leave blank spaces between numbers, names or words)

8. Other cases have been filed for industrial injuries by this worker as follows:

Case Number 1

Case Number 2

Case Number 3

Case Number 4

9. This application is filed because of a disagreement regarding liability for:

☒ Temporary disability indemnity
☒ Reimbursement for medical expense
☒ Medical treatment
☒ Compensation at proper rate
☒ Permanent disability indemnity
☒ Rehabilitation
☒ Supplemental Job Displacement/Return to Work
☒ Other (Specify) MED MILEAGE SELF PRO

Is the Applicant Represented? ☒ Yes ☐ No **If "No", applicant is to sign and date below.**

If "Yes", applicant's representative is to complete the following and is to sign and date below.

☒ Law Firm/Attorney ☐ Non-Attorney Representative

CAL INJURY LAW HERCULES
Law Firm or Company Name (If Applicable)

13505035
Law Firm Number (If Applicable)

HOPE
Attorney/Representative First Name

E
MI

RANOA
Attorney/Representative Last Name

500 ALFRED NOBEL DRIVE SUITE 275A
Street Address/PO Box (Please leave blank spaces between numbers, names or words)

HERCULES
City

CA
State

94547
Zip Code

Applicant Attorney/Representative Signature

Applicant Signature

Dated at HERCULES, California
City

Date 08/13/2020
MM/DD/YYYY

State of California
Department of Industrial Relations
Division of Workers' Compensation

FEE DISCLOSURE STATEMENT

If you choose to be represented by an attorney, your attorney's fee will be deducted from your benefits. The fee will be approved by the Workers' Compensation Appeals Board with consideration given to the: (1) responsibility assumed by the attorney; (2) care exercised in representing you; (3) time involved; and, (4) results obtained.

Attorney's fees normally range from 15% to 20% of the benefits awarded, in the venue indicated below.

There are certain circumstances where your employer (or his/her insurer) may be liable for the attorney's fees. For example, if the employer disputes a permanent disability evaluation obtained when you were not represented by an attorney, your employer may be liable for any attorney fees you incur because of the dispute.

If at any time you no longer wish to be represented by the attorney, you may withdraw from representation by notifying the attorney. If you withdraw from representation, the fee amount found by a workers' compensation judge to be the fair value of any work the attorney did in your case will be deducted from your award.

Your case is being filed at the Division of Workers' Compensation at the following location:

Oakland WCAB (1515 Clay St, 6th Flr, Oakland, CA 94612)

The employee has been advised of the district office at which his or her case will be filed and that he or she may be required to attend conferences or hearings at this location at his or her own expense.

An Information and Assistance Officer may be able to answer your questions concerning your workers' compensation benefits at no charge to you. The Officer may be able to resolve your problems without the need for litigation.

Call this toll-free number: 1-800-736-7401

Employee's Signature: _____ Date: 8-9-20

Employee's Name: _____

Any person who makes or causes to be made any knowingly false or fraudulent material statement or material representation for the purpose of obtaining or denying workers' compensation benefits or payments is guilty of a felony.

I hereby declare under penalty of perjury that I am the attorney representing the above-named employee, or am an attorney licensed by the State Bar of California regularly employed by the firm which the employee will be represented, and have advised the employee of their rights as set forth above and in Labor Code section 4906(c) and (g)(1).

Attorney's Signature: _____ Date: 8/10/20

Attorney's Name: ANTHONY REMO LUNA, ESQ.

Address: CAL INJURY LAW GROUP
500 ALFRED NOBEL DRIVE, SUITE 275A
HERCULES, CA 94547

Phone No.: [illegible]

DECLARATION PURSUANT TO LABOR CODE SECTION 4906(h)

Pursuant to Labor Code Section 4906(h), I declare under penalty of perjury that I have not violated Section 139.3 and I have not offered, delivered, received, or accepted any rebate, refund, commission, preference, patronage dividend, discount, or other consideration, whether in the form of money or otherwise, as compensation or inducement for any referred examination or evaluation.

Date: 8-9-20

Signature

Before signing this form, you should be aware that: "Any person who makes or causes to be made any knowingly false or fraudulent material statement or representation for the purpose of obtaining or denying workers' compensation benefits or payments is guilty of a felony."

State of California
Department of Industrial Relations
DIVISION OF WORKERS' COMPENSATION

WORKERS' COMPENSATION CLAIM FORM (DWC 1)

Employer: Complete the "Employer" section and give the form to your employee. Keep a copy and mark it "Employee's Temporary Receipt" until you receive the signed and dated copy from your employee. You may call the Division of Workers' Compensation and hear recorded information at (800) 736-7401. An explanation of workers' compensation benefits is included in the Notice of Potential Eligibility, which is the cover sheet of this form. Detach and save this notice for future reference.

You should also have received a pamphlet from your employer describing workers' compensation benefits and the procedures to obtain them. You may receive written notices from your employer or its claims administrator about your claim. If your claim administrator offers to send you notices electronically, and you agree to receive these notices only by email, please provide your email address below and check the appropriate box. If you later decide you want to receive the notices by mail, you must inform your employer in writing.

[redacted]

Estado de California
Departamento de Relaciones Industriales
DIVISION DE COMPENSACIÓN AL TRABAJADOR

PETITION DEL EMPLEADO PARA DE COMPENSACIÓN DEL TRABAJADOR (DWC 1)

Empleador: Complete la sección "Empleado" y entregue la forma a su empleador. Quédese con la copia designada "Recibo Temporal del Empleado" hasta que Ud. reciba la copia firmada y fechada de su empleador. Ud. puede llamar a la División de Compensación al Trabajador al (800) 736-7401, para mi información grabada. Una explicación de los beneficios de compensación de trabajadores está incluida en la Notificación de Posible Elegibilidad, que es la hoja de portada de esta forma. Separe y guarde esta notificación como referencia para el futuro.

Ud. también debería haber recibido de su empleador un folleto describiendo los beneficios de compensación al trabajador lesionado y los procedimientos para obtenerlos. Es posible que reciba notificaciones escritas de su empleador, o de su administrador de reclamos sobre su reclamo. Si su administrador de reclamos ofrece enviarle notificaciones electrónicamente, y usted acepta recibir estas notificaciones sólo por correo electrónico, por favor proporcione su dirección de correo electrónico abajo y marque la casa apropiada. Si usted decide después que quiere recibir las notificaciones por correo, usted debe de informar a su empleador por escrito.

[redacted]

Employee—complete this section and see note above. *Empleado—complete esta sección y note la notación arriba.*

1. Name. *Nombre.* ROBERT KUCIEMBA — Today's Date. *Fecha de Hoy.* 08/07/2020
2. Home Address. *Dirección Residencial.* 25 Crystal Circle
3. City. *Ciudad.* Hercules — State. *Estado.* CA — Zip. *Código Postal.* 94547
4. Date of Injury. *Fecha de la lesión (accidente).* _____ Time of Injury. *Hora en que ocurrió.* _____ a.m. _____ p.m.
5. Address and description of where injury happened. *Dirección lugar donde ocurrió el accidente.* 200 VAN NESS AVENUE, SAN FRANCISCO, CA 94102
6. Describe injury and part of body affected. *Describa la lesión y parte del cuerpo afectada.* IW contracted Covid-19 at job site, was hospitalized 7/23-8/3/2020 with compensable consequences to his respiratory system, psych, circulatory system, speech, memory, sleep, weight loss
7. Social Security Number. *Número de Seguro Social del Empleado.* [redacted]
8. ☐ Check if you agree to receive notices about your claim by email only. ☐ *Marque si usted acepta recibir notificaciones sobre su reclamo sólo por correo electrónico.* Employee's e-mail: _____ *Correo electrónico del empleado.* _____
   You will receive benefit notices by regular mail if you do not choose, or your claims administrator does not offer, an electronic service option. *Usted recibirá notificaciones de beneficios por correo ordinario si usted no escoge, o su administrador de reclamos no le ofrece, una opción de servicio electrónico.*
9. Signature of employee. *Firma del empleado.* [signature]

Employer—complete this section and see note below. *Empleador—complete esta sección y note la notación abajo.*

10. Name of employer. *Nombre del empleador.* _____
11. Address. *Dirección.* _____
12. Date employer first knew of injury. *Fecha en que el empleador supo por primera vez de la lesión o accidente.* _____
13. Date claim form was provided to employee. *Fecha en que se le entregó al empleado la petición.* _____
14. Date employer received claim form. *Fecha en que el empleado devolvió la petición al empleador.* _____
15. Name and address of insurance carrier or adjusting agency. *Nombre y dirección de la compañía de seguros o agencia administradora de seguros.* _____
16. Insurance Policy Number. *El número de la póliza de Seguro.* _____
17. Signature of employer representative. *Firma del representante del empleador.* _____
18. Title. *Título.* _____ 19. Telephone. *Teléfono.* _____

Employer: You are required to date this form and provide copies to your insurer or claims administrator and to the employee, dependent or representative who filed the claim within one working day of receipt of the form from the employee.

SIGNING THIS FORM IS NOT AN ADMISSION OF LIABILITY.

Empleador: Se requiere que Ud. feche esta forma y que provea copias a su compañía de seguros, administrador de reclamos, o dependiente representante de reclamos y al empleado que hayan presentado esta petición dentro del plazo de un día hábil desde el momento de haber sido recibida la forma del empleado.

EL FIRMAR ESTA FORMA NO SIGNIFICA ADMISION DE RESPONSABILIDAD

☐ Employer copy/Copia del Empleador ☐ Employee copy/Copia del Empleado ☐ Claims Administrator/Administrador de Reclamos ☐ Temporary Receipt/Recibo del Empleado

Rev. 01/2016

APPLICANT'S ATTORNEY

CAL INJURY LAW GROUP
500 ALFRED NOBEL DR SUITE 275A
HERCULES, CA 94547

VENUE AUTHORIZATION

I HEREBY AUTHORIZE MY WORKERS' COMPENSATION CASE(S) FOR INJURY(IES) DATED CT 6/29/2020 - 7/10/2020 TO BE FILED AT THE OAKLAND WORKERS' COMPENSATION APPEALS BOARD.

DATED 8-9-20

APPLICANT

EXHIBIT “D”

ORDER OF THE HEALTH OFFICER No. C19-07c

ORDER OF THE HEALTH OFFICER OF THE CITY AND COUNTY OF SAN FRANCISCO DIRECTING ALL INDIVIDUALS IN THE COUNTY TO CONTINUE SHELTERING AT THEIR PLACE OF RESIDENCE EXCEPT FOR ESSENTIAL NEEDS AND IDENTIFIED OUTDOOR ACTIVITIES IN COMPLIANCE WITH SPECIFIED REQUIREMENTS; CONTINUING TO EXEMPT HOMELESS INDIVIDUALS FROM THE ORDER BUT URGING GOVERNMENT AGENCIES TO PROVIDE THEM SHELTER; REQUIRING ALL BUSINESSES AND RECREATION FACILITIES THAT ARE ALLOWED TO OPERATE TO IMPLEMENT SOCIAL DISTANCING, FACE COVERING, AND CLEANING PROTOCOLS; AND DIRECTING ALL BUSINESSES, FACILITY OPERATORS, AND GOVERNMENTAL AGENCIES TO CONTINUE THE TEMPORARY CLOSURE OF ALL OTHER OPERATIONS NOT ALLOWED UNDER THIS ORDER

(SHELTER IN PLACE)

DATE OF ORDER: April 29, 2020

Please read this Order carefully. Violation of or failure to comply with this Order is a misdemeanor punishable by fine, imprisonment, or both. (California Health and Safety Code § 120295, *et seq.*; California Penal Code §§ 69, 148(a)(1); and San Francisco Administrative Code § 7.17(b))

Summary: The City and County of San Francisco (the "County") and five other Bay Area counties and the City of Berkeley have been under shelter-in-place orders since March 16, 2020, in a collective effort to reduce the impact of the virus that causes Novel Coronavirus 2019 Disease ("COVID-19"). That virus is easily transmitted, especially in group settings, and the disease can be extremely serious. It can require long hospital stays, and in some instances cause long-term health consequences or death. It can impact not only those known to be at high risk but also other people, regardless of age. This is a global pandemic causing untold societal, social, and economic harm. To mitigate the harm from the pandemic, these jurisdictions issued parallel health officer orders on March 16, 2020 imposing shelter in place limitations across the Bay Area, requiring everyone to stay safe at home except for certain essential needs. Other jurisdictions in the Bay Area and ultimately the State have since joined in adopting stay-safe-at-home orders.

ORDER OF THE HEALTH OFFICER No. C19-07c

Our collective effort has had a positive impact. But the danger to the health and welfare of all continues. As of the date of this Order, infection and hospitalization rates have not shown sustained decrease in all areas. Indeed, while hospitalizations for COVID-19 infected patients in San Francisco have been stable for several weeks, they have not shown a significant decrease over a 14-day period as health experts recommend before substantial easing of shelter in place restrictions. Also, while the search continues, there is not yet an effective treatment or cure for the disease. The vast majority of the population remains susceptible to infection. Testing ability, while improving, remains constrained, and San Francisco's health care system remains susceptible to being overwhelmed. The health officers of the coordinating jurisdictions are monitoring key indicators described in this Order, and several of those indicators do not yet support ending the protective requirements. Separately the health officers are issuing a document with benchmarks for those indicators they wish to see to further ease shelter in place restrictions. So, while San Francisco is working on building up its testing, case finding, case investigation, and contact tracing capacity, and its means to protect vulnerable populations and address outbreaks, it is imperative that San Francisco extend the duration of its stay-at-home order.

Still, in light of progress made, this extension, in addition to providing some clarifications to the prior order, allows a few additional essential businesses to resume safely as well as some other activities that are lower risk for transmission of the virus. This initial, measured resumption of those essential business activities and lower risk activities is designed to keep the overall volume of person-to-person contact very low to prevent a surge in COVID-19 cases in the County and neighboring counties. The Health Officer will assess the activities allowed by this Order on an ongoing basis and may need to modify them if the risk associated with COVID-19 increases in the future.

This new Order replaces the prior March 30, 2020 extension of the shelter in place order. Beginning at midnight on May 3, 2020, all people and businesses in San Francisco must strictly comply with this new Order. This new Order extends and modifies the stay safe at home restrictions for another 28 days, through May 31, 2020. But the Health Officer will continue to carefully monitor the evolving situation and could change that date.

Generally, under this Order gatherings of individuals with anyone outside of their household or living unit remain prohibited, with limited exceptions for essential activities or essential travel, or to perform work for essential businesses and government agencies. But this order makes three significant sets of changes that ease restrictions under the prior order. First, this Order now permits certain outdoor businesses to operate outdoors so long as they can do so safely. These outdoor operations are considered low risk because they are outdoors and involve brief and infrequent interactions among individuals. Allowed outdoor businesses include flea markets, car washes, nurseries, and gardening services. Second, the Order allows more outdoor recreation activities to occur again so long as they can be done safely, without physical contact, shared equipment or use of high touch areas in recreation facilities. Examples of permissible outdoor activities include sunbathing, hiking, golf, skateboarding, and fishing. These activities must be

ORDER OF THE HEALTH OFFICER No. C19-07c

done in compliance with social distancing and sanitation protocols for any facilities that are used for those activities. And third, the Order allows all construction to proceed as Essential Business, consistent with the State shelter-in-place order, so long as it done safely in accordance with specified health protocols. The order includes a protocol for small projects, which means projects of 10 or fewer residential units or commercial projects with less than 20,000 square feet, and a separate one for large projects. The order also provides for a separate protocol for public works projects. The Order makes a number of other changes and clarifications. For instance, it now permits all real estate transactions (with limits on open houses) and people to move residences without restrictions. It expands the use of childcare services, and other child-focused educational or recreational institutions or programs, including by making those services available to those who are allowed to provide services related to essential businesses, outdoor businesses, government functions, essential infrastructure, or minimum basic operations.

Bars, nightclubs, theaters and movie theaters, and other entertainment venues must remain closed for any gatherings. Restaurants, cafes, coffee shops, and other facilities that serve food—regardless of their seating capacity and including outdoor seating areas—must remain closed except solely for takeout and delivery service. All gyms and fitness studios must remain closed. All hair and nail salons must also remain closed. Facilities that sell food and that provide health care remain open as permitted by this Order and other Health Officer orders. Homeless individuals continue to be exempt from the shelter in place requirement, but government agencies continue to be urged to take steps needed to provide shelter for those individuals. And this Order works in tandem with the separate order requiring face coverings in many settings.

The Health Officer may revise this Order as the situation evolves, and facilities must stay updated by checking the City Administrator's website (www.sfgsa.org) regularly.

In addition to extending and replacing Health Officer Order Number C19-07b (shelter in place), issued March 30, 2020, this Order also extends Order Nos. C19-01b (prohibiting visitors at Laguna Honda Hospital and Rehabilitation Center and Unit 4A at Zuckerberg San Francisco General Hospital), C19-03 (prohibiting visitors to specific residential facilities), C19-04 (imposing cleaning standards for residential hotels), C19-06 (prohibiting visitors to general acute care hospitals and acute psychiatric hospitals), C19-08 (prohibiting most routine appointments and elective surgeries and encouraging delivery of prescriptions and cannabis products), C19-09 (prohibiting visitors to residential care facilities for the elderly, adult residential facilities, and residential facilities for the chronically ill), and C19-11 (placing Laguna Honda Hospital and Rehabilitation Center under protective quarantine) through 11:59 p.m. on May 31, 2020, with those listed orders otherwise remaining in effect. Order Nos. C19-10 (requiring reporting by labs of COVID-19 testing information) and C19-12 (face coverings) remain in effect indefinitely, and this Order makes clear that face coverings are required for operators and customers of outdoor businesses as well as construction, with certain limitations. This Order also replaces a directive issued on April 2, 2020 that provided guidance for construction activities with guidance attached to this Order for small and

ORDER OF THE HEALTH OFFICER No. C19-07c

large construction projects. The provisions of this Order are subject to any more restrictive provisions of the state shelter-in-place order. This summary is for convenience only and may not be used to interpret this Order; in the event of any inconsistency between the summary and the text of this Order below, the text will control.

UNDER THE AUTHORITY OF CALIFORNIA HEALTH AND SAFETY CODE SECTIONS 101040, 101085, AND 120175, THE HEALTH OFFICER OF THE CITY AND COUNTY OF SAN FRANCISCO ("HEALTH OFFICER") ORDERS:

1. **This Order supersedes the March 31, 2020 Order of the Health Officer directing all individuals to shelter in place ("Prior Order"). This Order amends, clarifies, and extends certain terms of the Prior Order to ensure continued social distancing and limit person-to-person contact to reduce the rate of transmission of Novel Coronavirus Disease 2019 ("COVID-19"). This Order continues to restrict most activity, travel, and governmental and business functions. But in light of progress achieved in slowing the spread of COVID-19 in the County and neighboring counties, the Order allows a limited number of additional Essential Businesses and certain lower risk Outdoor Businesses (both as defined in Section 16 below) to resume operating. This initial, measured resumption of those activities is designed to keep the overall volume of person-to-person contact very low to prevent a surge in COVID-19 cases in the County and neighboring counties. The activities allowed by this Order will be assessed on an ongoing basis and may need to be modified if the risk associated with COVID-19 increases in the future. As of the effective date and time of this Order set forth in Section 19 below, all individuals, businesses, and government agencies in the County are required to follow the provisions of this Order.**

2. **The primary intent of this Order is to ensure that County residents continue to shelter in their places of residence to slow the spread of COVID-19 and mitigate the impact on delivery of critical healthcare services. This Order allows a limited number of additional essential and outdoor business activities to resume while the Health Officer continues to assess the transmissibility and clinical severity of COVID-19 and monitors indicators described below in Section 11. All provisions of this Order must be interpreted to effectuate this intent. Failure to comply with any of the provisions of this Order constitutes an imminent threat and menace to public health, constitutes a public nuisance, and is punishable by fine, imprisonment, or both.**

3. **All individuals currently living within the County are ordered to shelter at their place of residence. They may leave their residence only for Essential Activities as defined in Section 16.a and Outdoor Activities as defined in Section 16.m, Essential Governmental Functions as defined in Section 16.d, Essential Travel as defined in Section 16.i, to work for Essential Businesses as defined in Section 16.f, and Outdoor Businesses as defined in Section 16.*l*, or to perform Minimum Basic Operations for other businesses that must remain temporarily closed, as provided in Section 16.g.**

ORDER OF THE HEALTH OFFICER No. C19-07c

For clarity, individuals who do not currently reside in the County must comply with all applicable requirements of the Order when in the County. Individuals experiencing homelessness are exempt from this Section, but are strongly urged to obtain shelter, and governmental and other entities are strongly urged to, as soon as possible, make such shelter available and provide handwashing or hand sanitation facilities to persons who continue experiencing homelessness.

4. **When people need to leave their place of residence for the limited purposes allowed in this Order, they must strictly comply with Social Distancing Requirements as defined in Section 16.k, except as expressly provided in this Order, and must wear Face Coverings as provided in Health Officer Order No. C19-12 issued April 17, 2020 (the "Face Covering Order").**

5. **All businesses with a facility in the County, except Essential Businesses and Outdoor Businesses, as defined in Section 16, are required to cease all activities at facilities located within the County except Minimum Basic Operations, as defined in Section 16. For clarity, all businesses may continue operations consisting exclusively of owners, personnel, volunteers, or contractors performing activities at their own residences (i.e., working from home). All Essential Businesses are strongly encouraged to remain open. But all businesses are directed to maximize the number of personnel who work from home. Essential Businesses and Outdoor Businesses may only assign those personnel who cannot perform their job duties from home to work outside the home. Outdoor Businesses must conduct all business and transactions involving members of the public outdoors.**

6. **As a condition of operating under this Order, the operators of all businesses must prepare or update, post, implement, and distribute to their personnel a Social Distancing Protocol for each of their facilities in the County frequented by personnel or members of the public, as specified in Section 16.h. Businesses that include an Essential Business or Outdoor Business component at their facilities alongside other components must, to the extent feasible, scale down their operations to the Essential Business and Outdoor Business components only; provided, however, mixed retail businesses that are otherwise allowed to operate under this Order may continue to stock and sell non-essential products. All businesses allowed to operate under this Order must follow any industry-specific guidance issued by the Health Officer related to COVID-19.**

7. **All public and private gatherings of any number of people occurring outside a single household or living unit are prohibited, except for the limited purposes expressly permitted in this Order. Nothing in this Order prohibits members of a single household or living unit from engaging in Essential Travel, Essential Activities, or Outdoor Activities together.**

8. **All travel, including, but not limited to, travel on foot, bicycle, scooter, motorcycle, automobile, or public transit, except Essential Travel, as defined below in Section**

16.i, is prohibited. People may use public transit only for purposes of performing Essential Activities and Outdoor Activities, or to travel to and from work for Essential Businesses or Outdoor Businesses, to maintain Essential Governmental Functions, or to perform Minimum Basic Operations at non-essential businesses. Transit agencies and people riding on public transit must comply with Social Distancing Requirements, as defined in Section 16.k, to the greatest extent feasible, and personnel and passengers must wear Face Coverings as required by the Face Covering Order. This Order allows travel into or out of the County only to perform Essential Activities and Outdoor Activities, to operate or perform work for Essential Businesses or Outdoor Businesses, to maintain Essential Governmental Functions, or to perform Minimum Basic Operations at non-essential businesses.

9. **This Order is issued based on evidence of continued significant community transmission of COVID-19 within the County and throughout the Bay Area; continued uncertainty regarding the degree of undetected asymptomatic transmission; scientific evidence and best practices regarding the most effective approaches to slow the transmission of communicable diseases generally and COVID-19 specifically; evidence that the age, condition, and health of a significant portion of the population of the County places it at risk for serious health complications, including death, from COVID-19; and further evidence that others, including younger and otherwise healthy people, are also at risk for serious outcomes. Due to the outbreak of the COVID-19 disease in the general public, which is now a pandemic according to the World Health Organization, there is a public health emergency throughout the County. Making the problem worse, some individuals who contract the virus causing the COVID-19 disease have no symptoms or have mild symptoms, which means they may not be aware they carry the virus and are transmitting it to others. Further, evidence shows that the virus can survive for hours to days on surfaces and be indirectly transmitted between individuals. Because even people without symptoms can transmit the infection, and because evidence shows the infection is easily spread, gatherings and other direct or indirect interpersonal interactions can result in preventable transmission of the virus.**

10. **The collective efforts taken to date regarding this public health emergency have slowed the virus' trajectory, but the emergency and the attendant risk to public health remain significant. As of April 27, 2020, there were 1,424 confirmed cases of COVID-19 in the County (up from 37 on March 16, 2020, just before the first shelter-in-place order) as well as at least 7,273 confirmed cases (up from 258 confirmed cases on March 15, 2020) and at least 266 deaths (up from 3 deaths on March 15, 2020) in the seven Bay Area jurisdictions jointly issuing this Order. The cumulative number of confirmed cases continues to increase, though the rate of increase has slowed in the days leading up to this Order. Evidence suggests that the restrictions on mobility and social distancing requirements imposed by the Prior Order (and the March 16, 2020 shelter-in-place order) are slowing the rate of increase in community transmission and confirmed cases by limiting interactions among people, consistent with scientific evidence of the efficacy of similar measures**

in other parts of the country and world.

11. The local health officers who jointly issued the Prior Order are monitoring several key indicators ("COVID-19 Indicators"), which are among the many factors informing their decisions whether to modify existing shelter-in-place restrictions. Progress on some of these COVID-19 Indicators—specifically related to hospital utilization and capacity—makes it appropriate, at this time, to ease certain restrictions imposed by the Prior Order to allow individuals to engage in a limited set of additional activities and perform work for a limited set of additional businesses associated with the lower risk of COVID-19 transmission, as set forth in Sections 16.*l* and 16.m. But the continued prevalence of the virus that causes COVID-19 requires most activities and business functions to remain restricted, and those activities that are permitted to occur must do so subject to social distancing and other infection control practices identified by the Health Officer. Progress on the COVID-19 Indicators will be critical to determinations by the local health officers regarding whether the restrictions imposed by this Order may be further modified. The Health Officer will continually review whether modifications to the Order are justified based on (1) progress on the COVID-19 Indicators; (2) developments in epidemiological and diagnostic methods for tracing, diagnosing, treating, or testing for COVID-19; and (3) scientific understanding of the transmission dynamics and clinical impact of COVID-19. The COVID-19 Indicators include, but are not limited to, the following:

a. The trend of the number of new COVID-19 cases and hospitalizations per day.

b. The capacity of hospitals and the health system in the County and region, including acute care beds and Intensive Care Unit beds, to provide care for COVID-19 patients and other patients, including during a surge in COVID-19 cases.

c. The supply of personal protective equipment (PPE) available for hospital staff and other healthcare providers and personnel who need PPE to safely respond to and treat COVID-19 patients.

d. The ability and capacity to quickly and accurately test persons to determine whether they are COVID-19 positive, especially those in vulnerable populations or high-risk settings or occupations.

e. The ability to conduct case investigation and contact tracing for the volume of cases and associated contacts that will continue to occur, isolating confirmed cases and quarantining persons who have had contact with confirmed cases.

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12. **The scientific evidence shows that at this stage of the emergency, it remains essential to continue to slow virus transmission to help (a) protect the most vulnerable; (b) prevent the health care system from being overwhelmed; (c) prevent long-term chronic health conditions, such as cardiovascular, kidney, and respiratory damage and loss of limbs from blood clotting; and (d) prevent deaths. Extension of the Prior Order is necessary to slow the spread of the COVID-19 disease, preserving critical and limited healthcare capacity in the County and advancing toward a point in the public health emergency where transmission can be controlled. At the same time, since the Prior Order was issued the County has made significant progress in expanding health system capacity and healthcare resources and in slowing community transmission of COVID-19. In light of progress on these indicators, and subject to continued monitoring and potential public health-based responses, it is appropriate at this time to allow additional Essential Businesses and Outdoor Businesses to operate in the County. Outdoor Businesses, by virtue of their operation outdoors, carry a lower risk of transmission than most indoor businesses. Because Outdoor Businesses, as defined in section 16.l, generally involve only brief and limited person-to-person interactions, they also carry lower risk of transmission than business activities prohibited under the Order, which tend to involve prolonged interactions between individuals in close proximity or in confined spaces where transmission is more likely. Existing Outdoor Businesses also constitute a relatively small proportion of business activity in the County, and therefore do not substantially increase the volume of interaction between persons in the County when reopened.**

13. **This Order is issued in accordance with, and incorporates by reference, the March 4, 2020 Proclamation of a State of Emergency issued by Governor Gavin Newsom, the March 12, 2020 Executive Order (Executive Order N-25-20) issued by Governor Gavin Newsom, the February 25, 2020 Proclamation by the Mayor Declaring the Existence of a Local Emergency issued by Mayor London Breed, as supplemented on March 11, 2020, the March 6, 2020 Declaration of Local Health Emergency Regarding Novel Coronavirus 2019 (COVID-19) issued by the Health Officer, and guidance issued by the California Department of Public Health, as each of them have been and may be supplemented.**

14. **This Order comes after the release of substantial guidance from the Health Officer, the Centers for Disease Control and Prevention, the California Department of Public Health, and other public health officials throughout the United States and around the world, including the widespread adoption of orders imposing similar social distancing requirements and mobility restrictions to combat the spread and harms of COVID-19. The Health Officer will continue to assess the quickly evolving situation and may modify or extend this Order, or issue additional Orders, related to COVID-19, as changing circumstances dictate.**

15. **This Order is also issued in light of the March 19, 2020 Order of the State Public Health Officer (the "State Shelter Order"), which set baseline statewide restrictions**

on non-residential business activities, effective until further notice, as well as the Governor's March 19, 2020 Executive Order N-33-20 directing California residents to follow the State Shelter Order. The State Shelter Order was complementary to the Prior Order and is complementary to this Order. This Order adopts in certain respects more stringent restrictions addressing the particular facts and circumstances in this County, which are necessary to control the public health emergency as it is evolving within the County and the Bay Area. Without this tailored set of restrictions that further reduces the number of interactions between persons, scientific evidence indicates that the public health crisis in the County will worsen to the point at which it may overtake available health care resources within the County and increase the death rate. Also, this Order enumerates additional restrictions on non-work-related travel not covered by the State Shelter Order; sets forth mandatory Social Distancing Requirements for all individuals in the County when engaged in activities outside their residences; and adds a mechanism to ensure that all businesses with facilities that are allowed to operate under the Order comply with the Social Distancing Requirements. Where a conflict exists between this Order and any state public health order related to the COVID-19 pandemic, the most restrictive provision controls. Consistent with California Health and Safety Code section 131080 and the Health Officer Practice Guide for Communicable Disease Control in California, except where the State Health Officer may issue an order expressly directed at this Order and based on a finding that a provision of this Order constitutes a menace to public health, any more restrictive measures in this Order continue to apply and control in this County. In addition, to the extent any federal guidelines allow activities that are not allowed by this Order, this Order controls and those activities are not allowed.

16. **<u>Definitions and Exemptions.</u>**

    a. **For the purposes of this Order, individuals may leave their residence only to perform the following "Essential Activities." But people at high risk of severe illness from COVID-19 and people who are sick are strongly urged to stay in their residence to the extent possible, except as necessary to seek or provide medical care or Essential Governmental Functions. Essential Activities are:**

        i. **To engage in activities or perform tasks important to their health and safety, or to the health and safety of their family or household members (including pets), such as, by way of example only and without limitation, obtaining medical supplies or medication, or visiting a health care professional.**

        ii. **To obtain necessary services or supplies for themselves and their family or household members, or to deliver those services or supplies to others, such as, by way of example only and without limitation, canned food, dry goods, fresh fruits and vegetables, pet supply, fresh**

meats, fish, and poultry, and any other household consumer products, products needed to work from home, or products necessary to maintain the habitability, sanitation, and operation of residences.

iii. To engage in outdoor recreation activity, including, by way of example and without limitation, walking, hiking, bicycling, and running, in compliance with Social Distancing Requirements and with the following limitations:

1. **Outdoor recreation activity at parks, beaches, and other open spaces must comply with any restrictions on access and use established by the Health Officer, government, or other entity that manages such area to reduce crowding and risk of transmission of COVID-19. Such restrictions may include, but are not limited to, restricting the number of entrants, closing the area to vehicular access and parking, or closure to all public access;**

2. **Use of outdoor recreational areas and facilities with high-touch equipment or that encourage gathering, including, but not limited to, playgrounds, gym equipment, climbing walls, picnic areas, dog parks, pools, spas, and barbecue areas, is prohibited outside of residences, and all such areas shall be closed to public access including by signage and, as appropriate, by physical barriers;**

3. **Sports or activities that include the use of shared equipment or physical contact between participants may only be engaged in by members of the same household or living unit; and**

4. **Use of shared outdoor facilities for recreational activities that may occur outside of residences consistent with the restrictions set forth in subsections 1, 2, and 3, above, including, but not limited to, golf courses, skate parks, and athletic fields, must, before they may begin, comply with social distancing and health/safety protocols posted at the site and any other restrictions, including prohibitions, on access and use established by the Health Officer, government, or other entity that manages such area to reduce crowding and risk of transmission of COVID-19.**

iv. To perform work for or access an Essential Business, Outdoor Business, or to otherwise carry out activities specifically permitted in

this Order, including Minimum Basic Operations, as defined in this Section.

v. To provide necessary care for a family member or pet in another household who has no other source of care.

vi. To attend a funeral with no more than 10 individuals present.

vii. To move residences. When moving into or out of the Bay Area region, individuals are strongly urged to quarantine for 14 days. To quarantine, individuals should follow the guidance of the United States Centers for Disease Control and Prevention.

b. For the purposes of this Order, individuals may leave their residence to work for, volunteer at, or obtain services at "Healthcare Operations," including, without limitation, hospitals, clinics, COVID-19 testing locations, dentists, pharmacies, blood banks and blood drives, pharmaceutical and biotechnology companies, other healthcare facilities, healthcare suppliers, home healthcare services providers, mental health providers, or any related and/or ancillary healthcare services. "Healthcare Operations" also includes veterinary care and all healthcare services provided to animals. This exemption for Healthcare Operations shall be construed broadly to avoid any interference with the delivery of healthcare, broadly defined. "Healthcare Operations" excludes fitness and exercise gyms and similar facilities.

c. For the purposes of this Order, individuals may leave their residence to provide any services or perform any work necessary to the operation and maintenance of "Essential Infrastructure," including airports, utilities (including water, sewer, gas, and electrical), oil refining, roads and highways, public transportation, solid waste facilities (including collection, removal, disposal, recycling, and processing facilities), cemeteries, mortuaries, crematoriums, and telecommunications systems (including the provision of essential global, national, and local infrastructure for internet, computing services, business infrastructure, communications, and web-based services).

d. For the purposes of this Order, all first responders, emergency management personnel, emergency dispatchers, court personnel, and law enforcement personnel, and others who need to perform essential services are categorically exempt from this Order to the extent they are performing those essential services. Further, nothing in this Order shall prohibit any individual from performing or accessing "Essential Governmental Functions." "Essential Government Functions" means all services needed to ensure the continuing operation of the government agencies and provide for the health, safety, and welfare of the public. Each governmental entity shall identify and designate appropriate personnel, volunteers, or contractors to

continue providing and carrying out any Essential Governmental Functions, including the hiring or retention of new personnel or contractors to perform such functions. Each governmental entity and its contractors must employ all necessary emergency protective measures to prevent, mitigate, respond to, and recover from the COVID-19 pandemic, and all Essential Governmental Functions shall be performed in compliance with Social Distancing Requirements to the greatest extent feasible.

e. For the purposes of this Order, a "business" includes any for-profit, non-profit, or educational entity, whether a corporate entity, organization, partnership or sole proprietorship, and regardless of the nature of the service, the function it performs, or its corporate or entity structure.

f. For the purposes of this Order, "Essential Businesses" are:

i. Healthcare Operations and businesses that operate, maintain, or repair Essential Infrastructure;

ii. Grocery stores, certified farmers' markets, farm and produce stands, supermarkets, food banks, convenience stores, and other establishments engaged in the retail sale of unprepared food, canned food, dry goods, non-alcoholic beverages, fresh fruits and vegetables, pet supply, fresh meats, fish, and poultry, as well as hygienic products and household consumer products necessary for personal hygiene or the habitability, sanitation, or operation of residences. The businesses included in this subsection (ii) include establishments that sell multiple categories of products provided that they sell a significant amount of essential products identified in this subsection, such as liquor stores that also sell a significant amount of food;

iii. Food cultivation, including farming, livestock, and fishing;

iv. Businesses that provide food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals;

v. Construction, but only as permitted under the State Shelter Order and only pursuant to the Construction Safety Protocols listed in Appendix B and incorporated into this Order by this reference. City public works projects shall also be subject to Appendix B, except if other protocols are specified by the Health Officer;

vi. Newspapers, television, radio, and other media services;

vii. **Gas stations and auto-supply, auto-repair (including, but not limited to, for cars, trucks, motorcycles and motorized scooters), and automotive dealerships, but only for the purpose of providing auto-supply and auto-repair services. This subsection (vii) does not restrict the on-line purchase of automobiles if they are delivered to a residence or Essential Business;**

viii. **Bicycle repair and supply shops;**

ix. **Banks and related financial institutions;**

x. **Service providers that enable real estate transactions (including rentals, leases, and home sales), including, but not limited to, real estate agents, escrow agents, notaries, and title companies, provided that appointments and other real estate viewings must only occur virtually or, if a virtual viewing is not feasible, by appointment with no more than two visitors at a time residing within the same household or living unit and one individual showing the unit (except that in person visits are not allowed when an occupant is present in a residence);**

xi. **Hardware stores;**

xii. **Plumbers, electricians, exterminators, and other service providers who provide services that are necessary to maintaining the habitability, sanitation, or operation of residences and Essential Businesses;**

xiii. **Businesses providing mailing and shipping services, including post office boxes;**

xiv. **Educational institutions—including public and private K-12 schools, colleges, and universities—for purposes of facilitating distance learning or performing essential functions, or as allowed under subsection (xxvi), provided that social distancing of six feet per person is maintained to the greatest extent possible;**

xv. **Laundromats, drycleaners, and laundry service providers;**

xvi. **Restaurants and other facilities that prepare and serve food, but only for delivery or carry out. Schools and other entities that typically provide free food services to students or members of the public may continue to do so under this Order on the condition that the food is provided to students or members of the public on a pick-up and take-away basis only. Schools and other entities that provide food services**

under this exemption shall not permit the food to be eaten at the site where it is provided, or at any other gathering site;

xvii. Funeral home providers, mortuaries, cemeteries, and crematoriums, to the extent necessary for the transport, preparation, or processing of bodies or remains;

xviii. Businesses that supply other Essential Businesses with the support or supplies necessary to operate, but only to the extent that they support or supply these Essential Businesses. This exemption shall not be used as a basis for engaging in sales to the general public from retail storefronts;

xix. Businesses that have the primary function of shipping or delivering groceries, food, or other goods directly to residences or businesses. This exemption shall not be used to allow for manufacturing or assembly of non-essential products or for other functions besides those necessary to the delivery operation;

xx. Airlines, taxis, rental car companies, rideshare services (including shared bicycles and scooters), and other private transportation providers providing transportation services necessary for Essential Activities and other purposes expressly authorized in this Order;

xxi. Home-based care for seniors, adults, children, and pets;

xxii. Residential facilities and shelters for seniors, adults, and children;

xxiii. Professional services, such as legal, notary, or accounting services, when necessary to assist in compliance with non-elective, legally required activities or in relation to death or incapacity;

xxiv. Services to assist individuals in finding employment with Essential Businesses;

xxv. Moving services that facilitate residential or commercial moves that are allowed under this Order; and

xxvi. Childcare establishments, summer camps, and other educational or recreational institutions or programs providing care or supervision for children of all ages that enable owners, employees, volunteers, and contractors for Essential Businesses, Essential Governmental Functions, Outdoor Businesses, or Minimum Basic Operations to work as allowed under this Order. To the extent possible, these

operations must comply with the following conditions:

1. **They must be carried out in stable groups of 12 or fewer children ("stable" means that the same 12 or fewer children are in the same group each day).**

2. **Children shall not change from one group to another.**

3. **If more than one group of children is at one facility, each group shall be in a separate room. Groups shall not mix with each other.**

4. **Providers or educators shall remain solely with one group of children.**

The Health Officer will carefully monitor the changing public health situation as well as any changes to the State Shelter Order. In the event that the State relaxes restrictions on childcare and related institutions and programs, the Health Officer will consider whether to similarly relax the restrictions imposed by this Order.

g. **For the purposes of this Order, "Minimum Basic Operations" means the following activities for businesses, provided that owners, personnel, and contractors comply with Social Distancing Requirements as defined this Section, to the extent possible, while carrying out such operations:**

   i. **The minimum necessary activities to maintain and protect the value of the business's inventory and facilities; ensure security, safety, and sanitation; process payroll and employee benefits; provide for the delivery of existing inventory directly to residences or businesses; and related functions. For clarity, this subsection does not permit businesses to provide curbside pickup to customers.**

   ii. **The minimum necessary activities to facilitate owners, personnel, and contractors of the business being able to continue to work remotely from their residences, and to ensure that the business can deliver its service remotely.**

h. **For the purposes of this Order, all businesses that are operating at facilities in the County visited or used by the public or personnel must, as a condition of such operation, prepare and post a "Social Distancing Protocol" for each of these facilities; provided, however, that construction activities shall instead comply with the Construction Project Safety Protocols set forth in Appendix B and not the Social Distancing Protocol. The Social Distancing Protocol must be substantially in the form attached to this Order as Appendix A, and**

it must be updated from prior versions to address new requirements listed in this Order or in related guidance or directives from the Health Officer. The Social Distancing Protocol must be posted at or near the entrance of the relevant facility, and shall be easily viewable by the public and personnel. A copy of the Social Distancing Protocol must also be provided to each person performing work at the facility. All businesses subject to this paragraph shall implement the Social Distancing Protocol and provide evidence of its implementation to any authority enforcing this Order upon demand. The Social Distancing Protocol must explain how the business is achieving the following, as applicable:

i. **Limiting the number of people who can enter into the facility at any one time to ensure that people in the facility can easily maintain a minimum six-foot distance from one another at all times, except as required to complete Essential Business activity;**

ii. **Requiring face coverings to be worn by all persons entering the facility, other than those exempted from face covering requirements (*e.g.*, young children);**

iii. **Where lines may form at a facility, marking six-foot increments at a minimum, establishing where individuals should stand to maintain adequate social distancing;**

iv. **Providing hand sanitizer, soap and water, or effective disinfectant at or near the entrance of the facility and in other appropriate areas for use by the public and personnel, and in locations where there is high-frequency employee interaction with members of the public (*e.g.*, cashiers);**

v. **Providing for contactless payment systems or, if not feasible to do so, the providing for disinfecting all payment portals, pens, and styluses after each use;**

vi. **Regularly disinfecting other high-touch surfaces;**

vii. **Posting a sign at the entrance of the facility informing all personnel and customers that they should: avoid entering the facility if they have any COVID-19 symptoms; maintain a minimum six-foot distance from one another; sneeze and cough into their own elbow; and not shake hands or engage in any unnecessary physical contact; and**

viii. **Any additional social distancing measures being implemented (see the Centers for Disease Control and Prevention's guidance at:**

https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html).

i. For the purposes of this Order, "Essential Travel" means travel for any of the following purposes:

   i. Travel related to the provision of or access to Essential Activities, Essential Governmental Functions, Essential Businesses, Minimum Basic Operations, Outdoor Activities, and Outdoor Businesses.

   ii. Travel to care for any elderly, minors, dependents, or persons with disabilities.

   iii. Travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, and any other related services.

   iv. Travel to return to a place of residence from outside the County.

   v. Travel required by law enforcement or court order.

   vi. Travel required for non-residents to return to their place of residence outside the County. Individuals are strongly encouraged to verify that their transportation out of the County remains available and functional prior to commencing such travel.

   vii. Travel to manage after-death arrangements and burial.

   viii. Travel to arrange for shelter or avoid homelessness.

   ix. Travel to avoid domestic violence or child abuse.

   x. Travel for parental custody arrangements.

   xi. Travel to a place to temporarily reside in a residence or other facility to avoid potentially exposing others to COVID-19, such as a hotel or other facility provided by a governmental authority for such purposes.

j. For purposes of this Order, "residences" include hotels, motels, shared rental units, and similar facilities. Residences also include living structures and outdoor spaces associated with those living structures, such as patios, porches, backyards, and front yards that are only accessible to a single family or household unit.

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k. For purposes of this Order, "Social Distancing Requirements" means:

i. Maintaining at least six-foot social distancing from individuals who are not part of the same household or living unit;

ii. Frequently washing hands with soap and water for at least 20 seconds, or using hand sanitizer that is recognized by the Centers for Disease Control and Prevention as effective in combatting COVID-19;

iii. Covering coughs and sneezes with a tissue or fabric or, if not possible, into the sleeve or elbow (but not into hands);

iv. Wearing a face covering when out in public, consistent with the orders or guidance of the Health Officer; and

v. Avoiding all social interaction outside the household when sick with a fever, cough, or other COVID-19 symptoms.

All individuals must strictly comply with Social Distancing Requirements, except to the limited extent necessary to provide care (including childcare, adult or senior care, care to individuals with special needs, and patient care); as necessary to carry out the work of Essential Businesses, Essential Governmental Functions, or provide for Minimum Basic Operations; or as otherwise expressly provided in this Order. Outdoor Activities and Outdoor Businesses must strictly adhere to these Social Distancing Requirements.

l. **For purposes of this Order, "Outdoor Businesses" means:**

i. The following businesses that normally operated primarily outdoors prior to March 16, 2020 and where there is the ability to fully maintain social distancing of at least six feet between all persons:

1. Businesses primarily operated outdoors, such as wholesale and retail plant nurseries, agricultural operations, and garden centers.

2. Service providers that primarily provide outdoor services, such as landscaping and gardening services, and environmental site remediation services.

For clarity, "Outdoor Businesses" do not include outdoor restaurants, cafes, or bars.

m. For purposes of this Order, "Outdoor Activities" means:

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i. **To obtain goods, services, or supplies from, or perform work for, an Outdoor Business.**

ii. **To engage in outdoor recreation as permitted in Section 16.a.**

17. **Government agencies and other entities operating shelters and other facilities that house or provide meals or other necessities of life for individuals experiencing homelessness must take appropriate steps to help ensure compliance with Social Distancing Requirements, including adequate provision of hand sanitizer. Also, individuals experiencing homelessness who are unsheltered and living in encampments should, to the maximum extent feasible, abide by 12 foot by 12 foot distancing for the placement of tents, and government agencies should provide restroom and hand washing facilities for individuals in such encampments as set forth in Centers for Disease Control and Prevention Interim Guidance Responding to Coronavirus 2019 (COVID-19) Among People Experiencing Unsheltered Homelessness (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/unsheltered-homelessness.html).**

18. **Pursuant to Government Code sections 26602 and 41601 and Health and Safety Code section 101029, the Health Officer requests that the Sheriff and the Chief of Police in the County ensure compliance with and enforce this Order. The violation of any provision of this Order constitutes an imminent threat and menace to public health, constitutes a public nuisance, and is punishable by fine, imprisonment, or both.**

19. **This Order shall become effective at 11:59 p.m. on May 3, 2020 and will continue to be in effect until 11:59 p.m. on May 31, 2020, or until it is extended, rescinded, superseded, or amended in writing by the Health Officer.**

20. **Effective as of 11:59 p.m. on May 3, 2020, this Order revises and replaces Order Number C19-07b, issued March 31, 2020, and repeals the Directive of the Health Officer of the City and County of San Francisco (Guidance for Construction-Related Essential Businesses), issued April 2, 2020. The Guidance for Construction-Related Essential Businesses issued April 2, 2020, is replaced by Appendices B-1 and B-2 to this Order. This Order also extends Order Nos. C19-01b (prohibiting visitors at Laguna Honda Hospital and Rehabilitation Center and Unit 4A at Zuckerberg San Francisco General Hospital), C19-03 (prohibiting visitors to specific residential facilities), C19-04 (imposing cleaning standards for residential hotels), C19-06 (prohibiting visitors to general acute care hospitals and acute psychiatric hospitals), C19-08 (prohibiting most routine appointments and elective surgeries and encouraging delivery of prescriptions and cannabis products), C19-09 (prohibiting visitors to residential care facilities for the elderly, adult residential facilities, and residential facilities for the chronically ill), and C19-11 (placing Laguna Honda Hospital and Rehabilitation Center under protective quarantine) through 11:59 p.m. on May 31, 2020, without any further need to amend those orders, with those**

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listed orders otherwise remaining in effect. This Order does not prohibit amendment of those orders separately. This Order also does not affect Order Nos. C19-10 (requiring reporting by labs of COVID-19 testing information) and C19-12 (requiring face coverings), which continue indefinitely as provided in those respective orders until each of them is extended, rescinded, superseded, or amended in writing by the Health Officer.

21. **The County must promptly provide copies of this Order as follows: (1) by posting on the City Administrator's website (www.sfgsa.org) and the Department of Public Health website (www.sfdph.org); (2) by posting at City Hall, located at 1 Dr. Carlton B. Goodlett Pl., San Francisco, CA 94102; and (3) by providing to any member of the public requesting a copy. In addition, the owner, manager, or operator of any facility that is likely to be impacted by this Order is strongly encouraged to post a copy of this Order onsite and to provide a copy to any member of the public asking for a copy.**

22. **If any provision of this Order or its application to any person or circumstance is held to be invalid, the remainder of the Order, including the application of such part or provision to other persons or circumstances, shall not be affected and shall continue in full force and effect. To this end, the provisions of this Order are severable.**

IT IS SO ORDERED:

Tomás J. Aragón, MD, DrPH,
Health Officer of the
City and County of San Francisco

Dated: April 29, 2020

Attachments: Appendix A – Social Distancing Protocol (revised 4/29/20)
Appendix B-1 – Small Construction Project Safety Protocol
Appendix B-2 – Large Construction Project Safety Protocol

Order No. C19-07c - Appendix A: Social Distancing Protocol (revised 4/29/2020)

Business name:

Facility Address:

Approximate gross square footage of space open to the public:

Businesses must implement all applicable measures listed below, and be prepared to explain why any measure that is not implemented is inapplicable to the business.

Signage:

☐Signage at each public entrance of the facility to inform all personnel and customers that they should: avoid entering the facility if they have a cough, fever, or other COVID-19 symptoms; maintain a minimum six-foot distance from one another; sneeze and cough into a cloth or tissue or, if not available, into one's elbow; wear a face covering, as required; and not shake hands or engage in any unnecessary physical contact.

☐Signage posting a copy of the Social Distancing Protocol at each public entrance to the facility.

Measures To Protect Personnel Health (check all that apply to the facility):

☐ Everyone who can carry out their work duties from home has been directed to do so.

☐ All personnel have been told not to come to work if sick.

☐ Symptom checks are being conducted before personnel may enter the work space.

☐ Personnel are required to wear a face covering, as required by Order No. C19-12.

☐ All desks or individual work stations are separated by at least six feet.

☐ Break rooms, bathrooms, and other common areas are being disinfected frequently, on the following schedule:

- ☐ Break rooms:
- ☐ Bathrooms:
- ☐ Other:

☐ Disinfectant and related supplies are available to all personnel at the following location(s):

☐ Hand sanitizer effective against COVID-19 is available to all personnel at the following location(s):

☐ Soap and water are available to all personnel at the following location(s):

☐ Copies of this Protocol have been distributed to all personnel.

☐ Optional—Describe other measures:

Measures To Prevent Crowds From Gathering (check all that apply to the facility):

☐ Limit the number of customers in the store at any one time to_____, which allows for customers and personnel to easily maintain at least six-foot distance from one another at all practicable times.

☐ Post personnel at the door to ensure that the maximum number of customers in the facility set forth above is not exceeded.

☐ Placing per-person limits on goods that are selling out quickly to reduce crowds and lines. Explain:

☐ Optional—Describe other measures:

Measures To Keep People At Least Six Feet Apart (check all that apply to the facility)

☐ Placing signs outside the store reminding people to be at least six feet apart, including when in line.

☐ Placing tape or other markings at least six feet apart in customer line areas inside the store and on sidewalks at public entrances with signs directing customers to use the markings to maintain distance.

☐ Separate order areas from delivery areas to prevent customers from gathering.

☐ All personnel have been instructed to maintain at least six feet distance from customers and from each other, except personnel may momentarily come closer when necessary to accept payment, deliver goods or services, or as otherwise necessary.

☐ Optional—Describe other measures:

Measures To Prevent Unnecessary Contact (check all that apply to the facility):

☐ Preventing people from self-serving any items that are food-related.

☐ Lids for cups and food-bar type items are provided by personnel; not to customers to grab.

☐ Bulk-item food bins are not available for customer self-service use.

☐ Not permitting customers to bring their own bags, mugs, or other reusable items from home.

☐ Providing for contactless payment systems or, if not feasible, sanitizing payment systems regularly. Describe:

☐ Optional—Describe other measures (e.g., providing senior-only hours):

Measures To Increase Sanitization (check all that apply to the facility):

☐ Disinfecting wipes that are effective against COVID-19 are available near shopping carts and shopping baskets.

☐ Personnel are assigned to disinfect carts and baskets after each use.

☐ Hand sanitizer, soap and water, or effective disinfectant is available to the public at or near the entrance of the facility, at checkout counters, and anywhere else where people have direct interactions.

☐ All payment portals, pens, and styluses are disinfected after each use.

☐ All high-contact surfaces are disinfected frequently.

☐ Optional—Describe other measures:

* Any additional measures not included here should be listed on separate pages and attached to this document.

You may contact the following person with any questions or comments about this protocol:

Name: **Phone number:**

Appendix A: Social Distancing Protocol
(additional page(s)) **Page ____ of ____**

Business name:

Facility Address:

You may use this page to provide additional information in support of the Social Distancing Protocol required by Health Officer Order No. C19-07c. Use as many pages as you need. Please list the title of the section you are supplementing when listing information below.

ORDER OF THE HEALTH OFFICER No. C19-07c
Appendix B-1

Small Construction Project Safety Protocol

1. Any construction project meeting any of the following specifications is subject to this Small Construction Project Safety Protocol ("SCP Protocol"), including public works projects unless otherwise specified by the Health Officer:

    a. For residential projects, any single-family, multi-family, senior, student, or other residential construction, renovation, or remodel project consisting of 10 units or fewer. This SCP Protocol does not apply to construction projects where a person is performing construction on their current residence either alone or solely with members of their own household.

    b. For commercial projects, any construction, renovation, or tenant improvement project consisting of 20,000 square feet of floor area or less.

    c. For mixed-use projects, any project that meets both of the specifications in subsections 1.a and 1.b.

    d. All other construction projects not subject to the Large Construction Project Safety Protocol set forth in Appendix B-2.

2. The following restrictions and requirements must be in place at all construction job sites subject to this SCP Protocol:

    a. Comply with all applicable and current laws and regulations including but not limited to OSHA and Cal-OSHA. If there is any conflict, difference, or discrepancy between or among applicable laws and regulations and/or this SCP Protocol, the stricter standard shall apply.

    b. Designate a site-specific COVID-19 supervisor or supervisors to enforce this guidance. A designated COVID-19 supervisor must be present on the construction site at all times during construction activities. A COVID-19 supervisor may be an on-site worker who is designated to serve in this role.

    c. The COVID-19 supervisor must review this SCP Protocol with all workers and visitors to the construction site.

    d. Establish a daily screening protocol for arriving staff to ensure that potentially infected staff do not enter the construction site. If workers leave the jobsite and return the same day, establish a cleaning and decontamination protocol prior to entry and exit of the jobsite. Post the daily screening protocol at all entrances and exits to the jobsite. More information on screening can be found online at: https://www.cdc.gov/coronavirus/2019-ncov/community/index.html.

    e. Practice social distancing by maintaining a minimum six-foot distance between workers at all times, except as strictly necessary to carry out a task associated with the construction project.

f. In the event of a confirmed case of COVID-19 at any jobsite, the following must take place:
   i. Immediately remove the infected individual from the jobsite with directions to seek medical care.
   ii. Each location the infected worker was at must be decontaminated and sanitized by an outside vendor certified in hazmat clean ups, and work in these locations must cease until decontamination and sanitization is complete.
   iii. The County Public Health Department must be notified immediately and any additional requirements per the County health officials must be completed, including full compliance with any tracing efforts by the County.

g. Where construction work occurs within an occupied residential unit, separate work areas must be sealed off from the remainder of the unit with physical barriers such as plastic sheeting or closed doors sealed with tape to the extent feasible. If possible, workers must access the work area from an alternative entry/exit door to the entry/exit door used by residents. Available windows and exhaust fans must be used to ventilate the work area. If residents have access to the work area between workdays, the work area must be cleaned and sanitized at the beginning and at the end of workdays. Every effort must be taken to minimize contact between workers and residents, including maintaining a minimum of six feet of social distancing at all times.

h. Where construction work occurs within common areas of an occupied residential or commercial building or a mixed-use building in use by on-site employees or residents, separate work areas must be sealed off from the rest of the common areas with physical barriers such as plastic sheeting or closed doors sealed with tape to the extent feasible. If possible, workers must access the work area from an alternative building entry/exit door to the building entry/exit door used by residents or other users of the building. Every effort must be taken to minimize contact between worker and building residents and users, including maintaining a minimum of six feet of social distancing at all times.

i. Prohibit gatherings of any size on the jobsite, including gatherings for breaks or eating, except for meetings regarding compliance with this protocol or as strictly necessary to carry out a task associated with the construction project.

j. Cal-OSHA requires employers to provide water, which should be provided in single-serve containers. Sharing of any of any food or beverage is strictly prohibited and if sharing is observed, the worker must be sent home for the day.

k. Provide personal protective equipment (PPE) specifically for use in construction, including gloves, goggles, face shields, and face coverings as appropriate for the activity being performed. At no time may a contractor secure or use medical-grade PPE unless required due to the medical nature of a jobsite. Face coverings must be worn in compliance with Section 5 of the Health Officer's Order No. C19-12, dated April 17, 2020, or any subsequently issued or amended order.

l. Prohibit use of microwaves, water coolers, and other similar shared equipment.

m. Strictly control "choke points" and "high-risk areas" where workers are unable to maintain six-foot social distancing and prohibit or limit use to ensure that six-foot distance can easily be maintained between individuals.

n. Minimize interactions and maintain social distancing with all site visitors, including delivery workers, design professional and other project consultants, government agency representatives, including building and fire inspectors, and residents at residential construction sites.

o. Stagger trades as necessary to reduce density and allow for easy maintenance of minimum six-foot separation.

p. Discourage workers from using others' desks, work tools, and equipment. If more than one worker uses these items, the items must be cleaned and disinfected with disinfectants that are effective against COVID-19 in between use by each new worker. Prohibit sharing of PPE.

q. If hand washing facilities are not available at the jobsite, place portable wash stations or hand sanitizers that are effective against COVID-19 at entrances to the jobsite and in multiple locations dispersed throughout the jobsite as warranted.

r. Clean and sanitize any hand washing facilities, portable wash stations, jobsite restroom areas, or other enclosed spaces daily with disinfectants that are effective against COVID-19. Frequently clean and disinfect all high touch areas, including entry and exit areas, high traffic areas, rest rooms, hand washing areas, high touch surfaces, tools, and equipment

s. Maintain a daily attendance log of all workers and visitors that includes contact information, including name, phone number, address, and email.

t. Post a notice in an area visible to all workers and visitors instructing workers and visitors to do the following:
    i. Do not touch your face with unwashed hands or with gloves.
    ii. Frequently wash your hands with soap and water for at least 20 seconds or use hand sanitizer with at least 60% alcohol.
    iii. Clean and disinfect frequently touched objects and surfaces such as work stations, keyboards, telephones, handrails, machines, shared tools, elevator control buttons, and doorknobs.
    iv. Cover your mouth and nose when coughing or sneezing, or cough or sneeze into the crook of your arm at your elbow/sleeve.
    v. Do not enter the jobsite if you have a fever, cough, or other COVID-19 symptoms. If you feel sick, or have been exposed to anyone who is sick, stay at home.
    vi. Constantly observe your work distances in relation to other staff. Maintain the recommended minimum six feet at all times when not wearing the necessary PPE for working in close proximity to another person.

vii. Do not carpool to and from the jobsite with anyone except members of your own household unit, or as necessary for workers who have no alternative means of transportation.
viii. Do not share phones or PPE.

u. The notice in Section 2.t must be translated as necessary to ensure that all non-English speaking workers are able to understand the notice.

ORDER OF THE HEALTH OFFICER No. C19-07c
Appendix B-2

Large Construction Project Safety Protocol

1. Any construction project meeting any of the following specifications is subject to this Large Construction Project Safety Protocol ("LCP Protocol"), including public works projects unless otherwise specified by the Health Officer:

    a. For residential construction projects, any single-family, multi-family, senior, student, or other residential construction, renovation, or remodel project consisting of more than 10 units.

    b. For commercial construction projects, any construction, renovation, or tenant improvement project consisting of more than 20,000 square feet of floor area.

    c. For construction of Essential Infrastructure, as defined in Section 16.c of the Order, any project that requires five or more workers at the jobsite at any one time.

2. The following restrictions and requirements must be in place at all construction job sites subject to this LCP Protocol:

    a. Comply with all applicable and current laws and regulations including but not limited to OSHA and Cal-OSHA. If there is any conflict, difference or discrepancy between or among applicable laws and regulations and/or this LCP Protocol, the stricter standard will apply.

    b. Prepare a new or updated Site-Specific Health and Safety Plan to address COVID-19-related issues, post the Plan on-site at all entrances and exits, and produce a copy of the Plan to County governmental authorities upon request. The Plan must be translated as necessary to ensure that all non-English speaking workers are able to understand the Plan.

    c. Provide personal protective equipment (PPE) specifically for use in construction, including gloves, goggles, face shields, and face coverings as appropriate for the activity being performed. At no time may a contractor secure or use medical-grade PPE, unless required due to the medical nature of a job site. Face Coverings must be worn in compliance with Section 5 of the Health Officer's Order, dated April 17, 2020, or any subsequently issued or amended order.

    d. Ensure that employees are trained in the use of PPE. Maintain and make available a log of all PPE training provided to employees and monitor all employees to ensure proper use of the PPE.

    e. Prohibit sharing of PPE.

    f. Implement social distancing requirements including, at minimum:

i. Stagger stop- and start-times for shift schedules to reduce the quantity of workers at the jobsite at any one time to the extent feasible.
ii. Stagger trade-specific work to minimize the quantity of workers at the jobsite at any one time.
iii. Require social distancing by maintaining a minimum six-foot distance between workers at all times, except as strictly necessary to carry out a task associated with the project.
iv. Prohibit gatherings of any size on the jobsite, except for safety meetings or as strictly necessary to carry out a task associated with the project.
v. Strictly control "choke points" and "high-risk areas" where workers are unable to maintain minimum six-foot social distancing and prohibit or limit use to ensure that minimum six-foot distancing can easily be maintained between workers.
vi. Minimize interactions and maintain social distancing with all site visitors, including delivery workers, design professional and other project consultants, government agency representatives, including building and fire inspectors, and residents at residential construction sites.
vii. Prohibit workers from using others' phones or desks. Any work tools or equipment that must be used by more than one worker must be cleaned with disinfectants that are effective against COVID-19 before use by a new worker.
viii. Place wash stations or hand sanitizers that are effective against COVID-19 at entrances to the jobsite and in multiple locations dispersed throughout the jobsite as warranted.
ix. Maintain a daily attendance log of all workers and visitors that includes contact information, including name, address, phone number, and email.
x. Post a notice in an area visible to all workers and visitors instructing workers and visitors to do the following:
    1. Do not touch your face with unwashed hands or with gloves.
    2. Frequently wash your hands with soap and water for at least 20 seconds or use hand sanitizer with at least 60% alcohol.
    3. Clean and disinfect frequently touched objects and surfaces such as workstations, keyboards, telephones, handrails, machines, shared tools, elevator control buttons, and doorknobs.
    4. Cover your mouth and nose when coughing or sneezing or cough or sneeze into the crook of your arm at your elbow/sleeve.
    5. Do not enter the jobsite if you have a fever, cough, or other COVID-19 symptoms. If you feel sick, or have been exposed to anyone who is sick, stay at home.
    6. Constantly observe your work distances in relation to other staff. Maintain the recommended minimum six-feet distancing at all times when not wearing the necessary PPE for working in close proximity to another person.
    7. Do not share phones or PPE.

xi. The notice in section 2.f.x must be translated as necessary to ensure that all non-English speaking workers are able to understand the notice.

g. Implement cleaning and sanitization practices in accordance with the following:
   i. Frequently clean and sanitize, in accordance with CDC guidelines, all high-traffic and high-touch areas including, at a minimum: meeting areas, jobsite lunch and break areas, entrances and exits to the jobsite, jobsite trailers, hand-washing areas, tools, equipment, jobsite restroom areas, stairs, elevators, and lifts.
   ii. Establish a cleaning and decontamination protocol prior to entry and exit of the jobsite and post the protocol at entrances and exits of jobsite.
   iii. Supply all personnel performing cleaning and sanitization with proper PPE to prevent them from contracting COVID-19. Employees must not share PPE.
   iv. Establish adequate time in the workday to allow for proper cleaning and decontamination including prior to starting at or leaving the jobsite for the day.

h. Implement a COVID-19 community spread reduction plan as part of the Site-Specific Health and Safety Plan that includes, at minimum, the following restrictions and requirements:
   i. Prohibit all carpooling to and from the jobsite except by workers living within the same household unit, or as necessary for workers who have no alternative means of transportation.
   ii. Cal-OSHA requires employers to provide water, which should be provided in single-serve containers. Prohibit any sharing of any food or beverage and if sharing is observed, the worker must be sent home for the day.
   iii. Prohibit use of microwaves, water coolers, and other similar shared equipment.

i. Assign a COVID-19 Safety Compliance Officer (SCO) to the jobsite and ensure the SCO's name is posted on the Site-Specific Health and Safety Plan. The SCO must:
   i. Ensure implementation of all recommended safety and sanitation requirements regarding the COVID-19 virus at the jobsite.
   ii. Compile daily written verification that each jobsite is compliant with the components of this LCP Protocol. Each written verification form must be copied, stored, and made immediately available upon request by any County official.
   iii. Establish a daily screening protocol for arriving staff, to ensure that potentially infected staff do not enter the construction site. If workers leave the jobsite and return the same day, establish a cleaning and decontamination protocol prior to entry and exit of the jobsite. Post the daily screening protocol at all entrances and exit to the jobsite. More information on screening can be found online at: https://www.cdc.gov/coronavirus/2019-ncov/community/index.html.
   iv. Conduct daily briefings in person or by teleconference that must cover the following topics:
      1. New jobsite rules and pre-job site travel restrictions for the prevention of COVID-19 community spread.
      2. Review of sanitation and hygiene procedures.
      3. Solicitation of worker feedback on improving safety and sanitation.
      4. Coordination of construction site daily cleaning/sanitation requirements.

5. Conveying updated information regarding COVID-19.
6. Emergency protocols in the event of an exposure or suspected exposure to COVID-19.

v. Develop and ensure implementation of a remediation plan to address any non-compliance with this LCP Protocol and post remediation plan at entrance and exit of jobsite during remediation period. The remediation plan must be translated as necessary to ensure that all non-English speaking workers are able to understand the document.

vi. The SCO must not permit any construction activity to continue without bringing such activity into compliance with these requirements.

vii. Report repeated non-compliance with this LCP Protocol to the appropriate jobsite supervisors and a designated County official.

j. Assign a COVID-19 Third-Party Jobsite Safety Accountability Supervisor (JSAS) for the jobsite, who at a minimum holds an OSHA-30 certificate and first-aid training within the past two years, who must be trained in the protocols herein and verify compliance, including by visual inspection and random interviews with workers, with this LCP Protocol.

i. Within seven calendar days of each jobsite visit, the JSAS must complete a written assessment identifying any failure to comply with this LCP Protocol. The written assessment must be copied, stored, and, upon request by the County, sent to a designated County official.

ii. If the JSAS discovers that a jobsite is not in compliance with this LCP Protocol, the JSAS must work with the SCO to develop and implement a remediation plan.

iii. The JSAS must coordinate with the SCO to prohibit continuation of any work activity not in compliance with rules stated herein until addressed and the continuing work is compliant.

iv. The remediation plan must be sent to a designated County official within five calendar days of the JSAS's discovery of the failure to comply.

k. In the event of a confirmed case of COVID-19 at any jobsite, the following must take place:

i. Immediately remove the infected individual from the jobsite with directions to seek medical care.

ii. Each location the infected worker was at must be decontaminated and sanitized by an outside vendor certified in hazmat clean ups, and work in these locations must cease until decontamination and sanitization is complete.

iii. The County Public Health Department must be notified immediately and any additional requirements per the County health officials must be completed, including full compliance with any tracing efforts by the County.

l. Where construction work occurs within an occupied residential unit, any separate work area must be sealed off from the remainder of the unit with physical barriers such as plastic sheeting or closed doors sealed with tape to the extent feasible. If possible, workers must access the work area from an alternative entry/exit door to the entry/exit door used by

residents. Available windows and exhaust fans must be used to ventilate the work area. If residents have access to the work area between workdays, the work area must be cleaned and sanitized at the beginning and at the end of workdays. Every effort must be taken to minimize contact between workers and residents, including maintaining a minimum of six feet of social distancing at all times.

m. Where construction work occurs within common areas of an occupied residential or commercial building or a mixed-use building in use by on-site employees or residents, any separate work area must be sealed off from the rest of the common areas with physical barriers such as plastic sheeting or closed doors sealed with tape to the extent feasible. If possible, workers must access the work area from an alternative building entry/exit door to the building entry/exit door used by residents or other users of the building. Every effort must be taken to minimize contact between worker and building residents and users, including maintaining a minimum of six feet of social distancing at all times.

EXHIBIT “B”

Lori Martin, Administrative Services Director/City Clerk

CITY OF HERCULES
CERTIFICATION

STATE OF CALIFORNIA)
COUNTY OF CONTRA COSTA) ss.
CITY OF HERCULES)

I, LORI MARTIN, City Clerk of the City of Hercules, California, DO HEREBY CERTIFY that the attached is a true and correct copy of City Council Resolution No. 20-015, the original of which is on file in my office, and that I have carefully compared the same with the original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the City of Hercules, California, this 20th day of March, 2020.

Lori Martin

LORI MARTIN, CITY CLERK
Hercules, California

RESOLUTION NO. 20-015

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF HERCULES CONFIRMING THE CITY MANAGER/DIRECTOR OF EMERGENCY SERVICES' PROCLAMATION OF THE EXISTENCE OF A LOCAL EMERGENCY DUE TO INTRODUCTION OF CORONAVIRUS DISEASE 2019 (COVID-19) IN CONTRA COSTA COUNTY

WHEREAS, Section 3-106(1) of the Hercules Municipal Code empowers the City Manager/Director of Emergency Services to proclaim a local emergency if the City Council is not in session and requires that the City Council shall take action to ratify the proclamation within seven days thereafter; and

WHEREAS, conditions of extreme peril to the safety of persons and property have arisen within the City of Hercules due to the introduction of coronavirus disease 2019 (COVID-19), commencing on or about March 3, 2020 at which time the City Council of the City of Hercules was not in session; and

WHEREAS, the City Council does hereby find that the above described conditions of extreme peril did warrant and necessitate the proclamation of the existence of a local emergency in the vicinity of the City of Hercules; and

WHEREAS, the City Manager acting as the Director of Emergency Services did proclaim the existence of a local emergency within the City on the 15th day of March, 2020; and

WHEREAS, pursuant to Government Code section (c), the governing body shall review the need for continuing the local emergency at least once every 60 days until the governing body terminates the local emergency; and

WHEREAS, pursuant to Government Code section 8630 (d), the governing body shall proclaim the termination of the local emergency at the earliest possible date that conditions warrant.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Hercules that the Proclamation of Existence of a Local Emergency, as issued by the City Manager/Director of Emergency Services, is hereby ratified and confirmed.

BE IT FURTHER RESOLVED that the local emergency shall be deemed to continue to exist until its termination is proclaimed by the City Council of the City of Hercules.

The foregoing Resolution was duly and regularly adopted at a special meeting of the City Council of the City of Hercules held on the twentieth day of March, 2020 by the following vote of the Council:

AYES: COUNCIL MEMBERS: D. Bailey, D. Romero, Vice Mayor C. Kelley, Mayor R. Esquivias
NOES: None.
ABSTAIN: None.
ABSENT: COUNCIL MEMBER: G. Boulanger

Roland Esquivias, Mayor

ATTEST:

Lori Martin, MMC
Administrative Services Director & City Clerk

PROCLAMATION OF THE EXISTENCE OF A LOCAL EMERGENCY

WHEREAS, section 3-1.06 (1) of the Hercules Municipal Code empowers the Director of Emergency Services to proclaim the existence or threatened existence of a local emergency when the City is affected or likely to be affected by a public calamity and the City Council is not in session; and

WHEREAS, the City Manager, as Director of Emergency Services of the City of Hercules, does hereby find that:

1. Conditions of extreme peril to the safety of persons and property have arisen within the City of Hercules, due to the introduction of coronavirus disease 2019 (COVID-19), commencing on or about March 3, 2020; and

2. That the City Council of the City of Hercules is not in session and cannot immediately be called into session.

NOW, THEREFORE, IT IS HEREBY PROCLAIMED, that a local emergency now exists throughout the City; and

BE IT FURTHER PROCLAIMED AND ORDERED that during the existence of said local emergency the powers, functions, and duties of the emergency organization of this City shall be those prescribed by state law, ordinances, and resolutions of this City, and by the City of Hercules Emergency Plan.

David Biggs, City Manager

Director of Emergency Services

3/15/2020 9:35 AM

Date and Time

APPROVED AS TO FORM:

Patrick Tang

City Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 1. Notice of Appeal from a Judgment or Order of a United States District Court

Name of U.S. District Court: Northern District of California

U.S. District Court case number: 20-cv-09355-MMC

Date case was first filed in U.S. District Court: 12/28/2020

Date of judgment or order you are appealing: 05/10/2021

Fee paid for appeal? *(appeal fees are paid at the U.S. District Court)*

◉ Yes ○ No ○ IFP was granted by U.S. District Court

List all Appellants *(List **each** party filing the appeal. Do not use "et al." or other abbreviations.)*

Corby Kuciemba and Robert Kuciemba

Is this a cross-appeal? ○ Yes ◉ No

If Yes, what is the first appeal case number?

Was there a previous appeal in this case? ○ Yes ◉ No

If Yes, what is the prior appeal case number?

Your mailing address:

25 Orinda Way

Suite 250

City: Orinda State: CA Zip Code: 94563

Prisoner Inmate or A Number (if applicable):

Signature s/Mark L. Venardi **Date** June 3, 2021

Complete and file with the attached representation statement in the U.S. District Court

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 6. Representation Statement

Instructions for this form: http://www.ca9.uscourts.gov/forms/form06instructions.pdf

Appellant(s) *(List **each** party filing the appeal, do not use "et al." or other abbreviations.)*

Name(s) of party/parties:

Corby Kuciemba and Robert Kuciemba

Name(s) of counsel (if any):

Mark L. Venardi, Martin Zurada, Mark Freeman
Venardi Zurada LLP

Address: 25 Orinda Way, Suite 250, Orinda, CA 94563

Telephone number(s): (925) 937-3900

Email(s): mzurada@vefirm.com; mvenardi@vefirm.com; mfreeman@vefirm.com

Is counsel registered for Electronic Filing in the 9th Circuit? (•) Yes ( ) No

---

Appellee(s) *(List only the names of parties and counsel who will oppose you on appeal. List separately represented parties separately.)*

Name(s) of party/parties:

Victory Woodworks, Inc.

Name(s) of counsel (if any):

William Bogdan and Michael McConathy
Hinshaw & Culbertson LLP

Address: One California Street, 18th Floor, San Francisco, CA 94111

Telephone number(s): (415) 362-6000

Email(s): wbogdan@hinshawlaw.com; mmcconathy@hinshawlaw.com

To list additional parties and/or counsel, use next page.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Continued list of parties and counsel: *(attach additional pages as necessary)*

Appellants

Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

Is counsel registered for Electronic Filing in the 9th Circuit? ○ Yes ○ No

Appellees

Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

ADRMOP,APPEAL,CLOSED

U.S. District Court
California Northern District (San Francisco)
CIVIL DOCKET FOR CASE #: 3:20-cv-09355-MMC

Kuciemba et al v. Victory Woodworks, Inc.
Assigned to: Judge Maxine M. Chesney
Case in other court: United States Court of Appeals for the 9th Circuit, 21-15963
San Francisco Superior Court, CGC-20-587507
Cause: 28:1332 Diversity-Personal Injury

Date Filed: 12/28/2020
Date Terminated: 05/10/2021
Jury Demand: Plaintiff
Nature of Suit: 360 P.I.: Other
Jurisdiction: Diversity

Plaintiff

Corby Kuciemba represented by **Mark Thomas Freeman**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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ATTORNEY TO BE NOTICED

Plaintiff

Robert Kuciemba represented by **Mark Thomas Freeman**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Mark Lain Venardi , Esq.
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Martin Zurada
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Martin Jacek Zurada
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

Victory Woodworks, Inc.
a Nevada Corporation represented by **William Alexander Bogdan**
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One California Street
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San Francisco, CA 94111
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Fax: 415-834-9070
Email: wbogdan@hinshawlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text

12/28/2020	1	NOTICE OF REMOVAL from San Francisco Superior Court. Their case number is CGC-20-587507. (Filing fee $402 receipt number 0971-15369678). Filed byVictory Woodworks, Inc.. (Attachments: # 1 Exhibit 1, # 2 Civil Cover Sheet)(Bogdan, William) (Filed on 12/28/2020) (Entered: 12/28/2020)
12/28/2020	2	Request for Judicial Notice re 1 Notice of Removal, filed byVictory Woodworks, Inc.. (Related document(s) 1) (Bogdan, William) (Filed on 12/28/2020) (Entered: 12/28/2020)
12/28/2020	3	Corporate Disclosure Statement by Victory Woodworks, Inc. identifying Corporate Parent Victory Woodworks, Inc. for Victory Woodworks, Inc.. (Bogdan, William) (Filed on 12/28/2020) (Entered: 12/28/2020)
12/28/2020	4	Certificate of Interested Entities by Victory Woodworks, Inc. (Bogdan, William) (Filed on 12/28/2020) (Entered: 12/28/2020)
12/28/2020	5	Case assigned to Magistrate Judge Joseph C. Spero. Counsel for plaintiff or the removing party is responsible for serving the Complaint or Notice of Removal, Summons and the assigned judge's standing orders and all other new case documents upon the opposing parties. For information, visit *E-Filing A New Civil Case* at http://cand.uscourts.gov/ecf/caseopening. Standing orders can be downloaded from the court's web page at www.cand.uscourts.gov/judges. Upon receipt, the summons will be issued and returned electronically. Counsel is required to send chambers a copy of the initiating documents pursuant to L.R. 5-1(e)(7). A scheduling order will be sent by Notice of Electronic Filing (NEF) within two business days. Consent/Declination due by 1/11/2021. (haS, COURT STAFF) (Filed on 12/28/2020) (Entered: 12/28/2020)
12/28/2020	6	**Initial Case Management Scheduling Order with ADR Deadlines: Case Management Statement due by 3/26/2021. Initial Case Management Conference set for 4/2/2021 02:00 PM in San Francisco, - Videoconference Only. (arkS, COURT STAFF) (Filed on 12/28/2020) (Entered: 12/28/2020)**
01/04/2021	7	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by Victory Woodworks, Inc... (Bogdan, William) (Filed on 1/4/2021) (Entered: 01/04/2021)
01/04/2021	8	MOTION to Dismiss *for Failure to State A Claim [FRCP 12(b)(6)]* filed by Victory Woodworks, Inc.. Motion Hearing set for 2/12/2021 09:30 AM in San Francisco, Courtroom F, 15th Floor before Magistrate Judge Joseph C. Spero. Responses due by 1/19/2021. Replies due by 1/26/2021. (Attachments: # 1 Declaration of William A. Bogdan, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Proposed Order)(Bogdan, William) (Filed on 1/4/2021) (Entered: 01/04/2021)
01/04/2021	9	Request for Judicial Notice re 8 MOTION to Dismiss *for Failure to State A Claim [FRCP 12(b)(6)]* filed byVictory Woodworks, Inc.. (Attachments: # 1 Exhibit B, # 2 Exhibit C, # 3 Exhibit D, # 4 Exhibit E)(Related document(s) 8) (Bogdan, William) (Filed on 1/4/2021) (Entered: 01/04/2021)
01/05/2021	10	CLERK'S NOTICE OF IMPENDING REASSIGNMENT TO A U.S. DISTRICT COURT JUDGE: The Clerk of this Court will now randomly reassign this case to a District Judge because either (1) a party has not consented to the jurisdiction of a Magistrate Judge, or (2) time is of the essence in deciding a pending judicial action for which the necessary consents to Magistrate Judge jurisdiction have not been secured. You will be informed by separate notice of the district judge to whom this case is reassigned. ALL HEARING DATES PRESENTLY SCHEDULED BEFORE THE CURRENT MAGISTRATE JUDGE ARE VACATED AND SHOULD BE RE-NOTICED FOR

		HEARING BEFORE THE JUDGE TO WHOM THIS CASE IS REASSIGNED. *This is a text only docket entry; there is no document associated with this notice.* (klhS, COURT STAFF) (Filed on 1/5/2021) (Entered: 01/05/2021)
01/05/2021	11	**ORDER, Case Reassigned using a proportionate, random, and blind system pursuant to General Order No. 44 to Judge Maxine M. Chesney for all further proceedings. Magistrate Judge Joseph C. Spero no longer assigned to the case. Notice: The assigned judge participates in the Cameras in the Courtroom Pilot Project. See General Order No. 65 and http://cand.uscourts.gov/cameras.. Signed by The Clerk on 1/5/21. (Attachments: # 1 Notice of Eligibility for Video Recording)(haS, COURT STAFF) (Filed on 1/5/2021) (Entered: 01/05/2021)**
01/05/2021	12	**CASE MANAGEMENT SCHEDULING ORDER: Initial Case Management Conference set for 4/2/2021 at 10:30 AM in San Francisco, Courtroom 07, 19th Floor. Joint Case Management Statement due by 3/26/2021.. Signed by Judge Maxine M. Chesney on 1/5/2021. (tlS, COURT STAFF) (Filed on 1/5/2021) (Entered: 01/05/2021)**
01/05/2021	13	Amended MOTION to Dismiss *Notice* filed by Victory Woodworks, Inc.. Motion Hearing set for 2/12/2021 09:00 AM in San Francisco, Courtroom 07, 19th Floor before Judge Maxine M. Chesney. Responses due by 1/19/2021. Replies due by 1/26/2021. (Attachments: # 1 Proposed Order Amended)(Bogdan, William) (Filed on 1/5/2021) (Entered: 01/05/2021)
01/08/2021	14	Certificate of Interested Entities by Corby Kuciemba, Robert Kuciemba (Venardi, Mark) (Filed on 1/8/2021) (Entered: 01/08/2021)
01/19/2021	15	OPPOSITION/RESPONSE (re 8 MOTION to Dismiss *for Failure to State A Claim [FRCP 12(b)(6)]*) *Plantiff's Memorandum of Poins and Authorities in Support of Opposition to Defendant's Motion to Dismiss* filed byCorby Kuciemba, Robert Kuciemba. (Attachments: # 1 Declaration Plaintiffs' Opposition to Defendant's Request for Judicial Notice, # 2 Proposed Order Proposed Order Denying Defendant's Motion to Dismiss, # 3 Certificate/Proof of Service Certificate of Service)(Freeman, Mark) (Filed on 1/19/2021) (Entered: 01/19/2021)
01/26/2021	16	REPLY (re 8 MOTION to Dismiss *for Failure to State A Claim [FRCP 12(b)(6)]*) filed byVictory Woodworks, Inc.. (Bogdan, William) (Filed on 1/26/2021) (Entered: 01/26/2021)
02/08/2021	17	CLERK'S NOTICE - CHANGING HEARING TIME. FEBRUARY 12, 2021 MOTION HEARING TO BE HELD AT 2:00 PM BY ZOOM WEBINAR. Defendant's Motion to Dismiss Hearing reset to 2/12/2021 at 02:00 PM in San Francisco, - Videoconference Only before Judge Maxine M. Chesney. This proceeding will be held via a Zoom webinar. **Webinar Access:** All counsel, members of the public, and media may access the webinar information at https://www .cand.uscourts.gov/mmc **General Order 58.** Persons granted access to court proceedings held by telephone or videoconference are reminded that photographing, recording, and rebroadcasting of court proceedings, including screenshots or other visual copying of a hearing, is absolutely prohibited. **Zoom Guidance and Setup:** https://www.cand.uscourts.gov/zoom/. Motion Hearing reset to 2/12/2021 at 02:00 PM in San Francisco, - Videoconference Only before Judge Maxine M. Chesney. *(This is a text-only entry generated by the court. There is no document associated with this entry.)*, Set/Reset Deadlines as to 13 Amended

		MOTION to Dismiss *Notice*.,.(tlS, COURT STAFF) (Filed on 2/8/2021) (Entered: 02/08/2021)
02/12/2021	18	**Minute Entry for proceedings held before Judge Maxine M. Chesney: Motion Hearing held on 2/12/2021. re 8 MOTION to Dismiss *for Failure to State A Claim [FRCP 12(b)(6)]* filed by Victory Woodworks, Inc., 13 Amended MOTION to Dismiss *Notice* filed by Victory Woodworks, Inc. Total Time in Court: 1 hour 33 minutes. Court Reporter: Katherine Sullivan - Zoom Webinar. Plaintiff Attorney: Mark Freeman. Defendant Attorney: William Bogdan. Attachment: Civil Minutes. (tlS, COURT STAFF) (Date Filed: 2/12/2021) (Entered: 02/12/2021)**
02/22/2021	19	**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; AFFORDING PLAINTIFFS LEAVE TO AMEND.** The Motion to Dismiss is granted, and plaintiffs are afforded leave to file, no later than March 19, 2021, a First Amended Complaint. Signed by Judge Maxine M. Chesney on February 22, 2021. (mmclc2, COURT STAFF) (Filed on 2/22/2021) (Entered: 02/22/2021)
02/22/2021	20	TRANSCRIPT ORDER for proceedings held on 02/12/2021 before Judge Maxine M. Chesney by Victory Woodworks, Inc., for Court Reporter Katherine Sullivan. (Bogdan, William) (Filed on 2/22/2021) (Entered: 02/22/2021)
02/25/2021	21	TRANSCRIPT ORDER for proceedings held on 02/12/2021 before Judge Maxine M. Chesney by Corby Kuciemba, Robert Kuciemba, for Court Reporter Katherine Sullivan. (Zurada, Martin) (Filed on 2/25/2021) (Entered: 02/25/2021)
03/07/2021	22	Transcript of Proceedings held on 2-12-21, before Judge Maxine M. Chesney. Court Reporter Katherine Sullivan, Katherine_Sullivan@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 20 Transcript Order, 21 Transcript Order) Release of Transcript Restriction set for 6/7/2021. (Related documents(s) 20 , 21) (Sullivan, Katherine) (Filed on 3/7/2021) (Entered: 03/07/2021)
03/18/2021	23	AMENDED COMPLAINT against All Defendants. Filed byCorby Kuciemba, Robert Kuciemba. (Zurada, Martin) (Filed on 3/18/2021) (Entered: 03/18/2021)
03/19/2021	24	CLERK'S NOTICE - APRIL 2, 2021 INITIAL CASE MANAGEMENT CONFERENCE WILL BE HELD TELEPHONICALLY. The Court will initiate the call. Counsel participating in the conference call are directed to email their name and direct phone number to: mmccrd@cand.uscourts.gov. Due to multiple hearings, counsel are directed to be on telephone stand-by from 10:30 AM until called by the Court.. *(This is a text-only entry generated by the court. There is no document associated with this entry.)* (tlS, COURT STAFF) (Filed on 3/19/2021) (Entered: 03/19/2021)
03/22/2021	25	STIPULATION WITH PROPOSED ORDER *to Continue Case Management Conference Date* filed by Victory Woodworks, Inc.. (Bogdan, William) (Filed on 3/22/2021) (Entered: 03/22/2021)
03/22/2021	26	**ORDER APPROVING STIPULATION TO CONTINUE CASE MANAGEMENT CONFERENCE DATE.** The Initial Case Management Conference is continued from April 2, 2021, to July 2, 2021. The parties' deadline to file a Joint Case Management Conference Statement is extended to June 25, 2021. Signed by Judge Maxine M. Chesney on March 22, 2021. (mmclc2, COURT STAFF) (Filed on 3/22/2021) (Entered: 03/22/2021)
03/23/2021		Set/Reset Deadlines:, Set/Reset Hearing re 26 Order,, Terminate Motions, Joint Case

		Management Statement due by 6/25/2021. Initial Case Management Conference reset to 7/2/2021 at 10:30 AM in San Francisco, Courtroom 07, 19th Floor. (tlS, COURT STAFF) (Filed on 3/23/2021) (Entered: 03/23/2021)
04/01/2021	27	MOTION to Dismiss *First Amended Complaint for Failure to State A Claim* filed by Victory Woodworks, Inc.. Motion Hearing set for 5/7/2021 09:00 AM in San Francisco, Courtroom 07, 19th Floor before Judge Maxine M. Chesney. Responses due by 4/15/2021. Replies due by 4/22/2021. (Attachments: # 1 Declaration of William A. Bogdan, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Proposed Order) (Bogdan, William) (Filed on 4/1/2021) (Entered: 04/01/2021)
04/15/2021	28	OPPOSITION/RESPONSE (re 27 MOTION to Dismiss *First Amended Complaint for Failure to State A Claim*) filed byCorby Kuciemba, Robert Kuciemba. (Attachments: # 1 Proposed Order)(Zurada, Martin) (Filed on 4/15/2021) (Entered: 04/15/2021)
04/22/2021	29	REPLY (re 27 MOTION to Dismiss *First Amended Complaint for Failure to State A Claim*) filed byVictory Woodworks, Inc.. (Bogdan, William) (Filed on 4/22/2021) (Entered: 04/22/2021)
05/04/2021	30	CLERK'S NOTICE CONVERTING MOTION HEARING SCHEDULED ON MAY 7, 2021 AT 9:00 A.M., TO A ZOOM WEBINAR. As to 27 MOTION to Dismiss *First Amended Complaint for Failure to State A Claim*.,. Motion Hearing set for 5/7/2021 at 09:00 AM in San Francisco, - Videoconference Only before Judge Maxine M. Chesney. This proceeding will be held via a Zoom webinar. **Webinar Access:** All counsel, members of the public, and media may access the webinar information at https://www.cand.uscourts.gov/mmc **General Order 58.** Persons granted access to court proceedings held by telephone or videoconference are reminded that photographing, recording, and rebroadca sting of court proceedings, including screenshots or other visual copying of a hearing, is absolutely prohibited. **Zoom Guidance and Setup:** https://www.cand.uscourts.gov/zoom/< /A>. Motion Hearing set for 5/7/2021 at 09:00 AM in San Francisco, - Videoconference Only before Judge Maxine M. Chesney. *(This is a text-only entry generated by the court. There is no document associated with this entry.)*,(tlS, COURT STAFF) (Filed on 5/4/2021) (Entered: 05/04/2021)
05/07/2021	31	**Minute Entry for proceedings held before Judge Maxine M. Chesney: Motion Hearing held on 5/7/2021. re 27 MOTION to Dismiss *First Amended Complaint for Failure to State A Claim* filed by Victory Woodworks, Inc. Total Time in Court: 1:12. Court Reporter: Katherine Sullivan - Zoom Webinar. Plaintiff Attorney: Martin Zurada. Defendant Attorney: William Bogdan. Attachment: Civil Minutes. (tlS, COURT STAFF) (Date Filed: 5/7/2021) (Entered: 05/07/2021)**
05/07/2021	32	TRANSCRIPT ORDER for proceedings held on May 7, 2021 before Judge Maxine M. Chesney by Corby Kuciemba, Robert Kuciemba, for Court Reporter Katherine Sullivan. (Zurada, Martin) (Filed on 5/7/2021) (Entered: 05/07/2021)
05/07/2021	33	TRANSCRIPT ORDER for proceedings held on 05/07/2021 before Judge Maxine M. Chesney by Victory Woodworks, Inc., for Court Reporter Katherine Sullivan. (Bogdan, William) (Filed on 5/7/2021) (Entered: 05/07/2021)
05/10/2021	34	**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; DISMISSING FIRST AMENDED COMPLAINT WITHOUT FURTHER LEAVE TO AMEND.**

		Signed by Judge Maxine M. Chesney on May 10, 2021. (mmclc2, COURT STAFF) (Filed on 5/10/2021) (Entered: 05/10/2021)
05/10/2021	35	CLERK'S JUDGMENT in favor of Victory Woodworks, Inc. against Corby Kuciemba, Robert Kuciemba. Defendants Motion to Dismiss Plaintiffs First Amended Complaint is GRANTED without further leave to amend and the instant action is hereby DISMISSED. (tlS, COURT STAFF) (Filed on 5/10/2021) (Entered: 05/10/2021)
05/13/2021	36	TRANSCRIPT ORDER for proceedings held on 2/12/2021; 5/7/2021 before Judge Maxine M. Chesney for Court Reporter Katherine Sullivan. (rjdS, COURT STAFF) (Filed on 5/13/2021) (Entered: 05/13/2021)
05/13/2021	37	Transcript of Proceedings held on 5/7/21, before Judge Maxine M. Chesney. Court Reporter Katherine Sullivan, Katherine_Sullivan@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 33 Transcript Order, 32 Transcript Order) Release of Transcript Restriction set for 8/11/2021. (Related documents(s) 33 , 32) (Sullivan, Katherine) (Filed on 5/13/2021) (Entered: 05/13/2021)
05/13/2021	38	TRANSCRIPT ORDER for proceedings held on 5/7/2021 before Judge Maxine M. Chesney for Court Reporter Katherine Sullivan. (rjdS, COURT STAFF) (Filed on 5/13/2021) (Entered: 05/13/2021)
06/03/2021	39	NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Corby Kuciemba, Robert Kuciemba. Appeal of Clerk's Judgment, 35 (Appeal fee of $505 receipt number 0971-16038857 paid.) (Venardi, Mark) (Filed on 6/3/2021) (Entered: 06/03/2021)
06/03/2021	40	USCA Case Number 21-15963 United States Court of Appeals for the 9th Circuit for 39 Notice of Appeal to the Ninth Circuit filed by Corby Kuciemba, Robert Kuciemba. (arkS, COURT STAFF) (Filed on 6/3/2021) (Entered: 06/08/2021)

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10/25/2021 12:21:00			
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Description:	Docket Report	**Search Criteria:**	3:20-cv-09355-MMC
Billable Pages:	6	**Cost:**	0.60

CERTIFICATE OF SERVICE

I hereby certify that on [insert date], I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: November 12, 2021

HINSHAW & CULBERTSON LLP

By: */s/ William Bogdan*
WILLIAM BOGDAN
Attorneys for Appellee
VICTORY WOODWORKS, INC.

No. 21-15963

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CORBY KUCIEMBA, ET AL.
Plaintiffs-Appellants,

vs.

VICTORY WOODWORKS, INC.
Defendant-Appellee

Appeal from the United States District Court
for the Northern District of California
No. 3:20-cv-09355-MMC
The Honorable Maxine M. Chesney

PLAINTIFFS-APPELLANTS' BRIEF IN REPLY TO APPELLEE'S ANSWERING BRIEF

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I. INTRODUCTION

Defendant-Appellee Victory Woodworks, Inc. ("Defendant") raises many of the same arguments from its Motion to Dismiss in its Answering Brief. The problem for Defendant is that it fails to account for, and cure, the numerous flaws in the district court's ruling dismissing Plaintiffs' claims. We address each issue in turn.

Workers' Compensation does not bar Mrs. Kuciemba's direct injury claims: The district court improperly held that Mrs. Kuciemba's claims were subject to the Workers' Compensation "derivative injury" doctrine because her claims arose out of Mr. Kuciemba's COVID-19 infection. Defendant adopts this dubious legal reasoning in its brief. Defendant completely misconstrues the facts alleged in the First Amended Complaint, ignores the California Supreme Court's clear holding in *Snyder* that the exclusive remedy of Workers' Compensation does not apply to direct injury claims, and glosses over the clear distinction drawn by the *Snyder* court that *factual causation* and *legal causation* are two separate concepts; the derivative injury doctrine does not apply if the non-employee plaintiff can establish her claim without having to prove up injuries to the employee. *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 998. This is the case here. Nothing in Defendant's Answering Brief can save the district court's incorrect application of California law on this issue.

Defendant owed Mrs. Kuciemba a duty of care: The district court held that

Defendant owed no duty to Mrs. Kuciemba, largely because the district court believed that the various public policy factors articulated in *Kesner v. Superior Court* (2016) 1 Cal. 5th 1132 did not favor Plaintiffs. However, the district court made this ruling even though it found that the most important duty factor, foreseeability, favored Plaintiffs. Defendant ignores this critical finding, and instead tries to engage in fearmongering by claiming there will be an "enormous pool of Plaintiffs" if this Court were to rule for the Kuciembas. Defendant is mischaracterizing the nature of the duty of care at issue, which is clearly articulated in the San Francisco Health Order, as well as the scope of the duty of care, which *Kesner* limited to household members. Defendant also ignores that the public policy factors in *Kesner* are equally applicable to this case; i.e. Defendant's moral blame is particularly high because it had superior knowledge of potential infections in its workforce and the resources to combat potential infections, yet Defendant knowingly breached a clear duty set by the Health Order anyway by failing to quarantine workers exposed to COVID-19 and instead sending them to a different job site.

Plaintiffs have plausibly pled an "indirect transmission" claim: The district court improperly foreclosed Plaintiffs' ability to pursue an "indirect transmission" claim at the pleading stage. This claim is sufficiently supported by science, and will ultimately require an examination of expert testimony. Yet Defendant dismisses this claim as "unscientific" out of hand, before any expert discovery. Plaintiffs' First

Amended Complaint stated a plausible theory of "indirect" exposure to COVID-19, and Plaintiffs should be allowed to develop this claim in expert discovery. The district court cannot bar a plausible claim at the pleading stage.

This Court, in its discretion, should have the ability to certify Issues 1 and 3 to the California Supreme Court: Defendant claims this Court does not have the ability to certify a question to the California Supreme Court because "clear precedent" already exists. The district court seemed to disagree on this point and expressed confusion and uncertainty about applying existing case law to the unique circumstances presented in this case. As of this Reply, the California Supreme Court has not had the opportunity to directly address the issues presented in this Appeal; if this Court so chooses, it can give the California Supreme Court an opportunity to set clear rules for current and future litigants who confront the unique issues presented by COVID-19. To suggest this Court lacks discretion to certify the issues presented in this case to the California Supreme Court is simply wrong.

Plaintiffs respectfully request this Court REVERSE the judgment of the district court. Alternatively, Plaintiffs respectfully request this Court certify Issue Nos. 1 and 3 of this Appeal to the California Supreme Court pursuant to Rule 8.548(a) of the California Rules of Court.

II. ARGUMENT

A. Mrs. Kuciemba's claims are not barred by the exclusive remedy of Workers' Compensation because she alleges a direct physical injury to her own body caused by Defendant's negligence and her claims are legally distinct and entirely separate from any injuries suffered by Mr. Kuciemba.

Defendant's Answering brief at p. 17 argues that Mrs. Kuciemba's personal injury claim is barred by the exclusive remedy of Workers' Compensation because "she believes she was injured only because [Mr. Kuciemba] was injured on the job." Defendant is incorrect on both the facts and the law and ignores the errors made by the district court.

The First Amended Complaint at ¶¶6-9 describes how humans and fomites can serve as vectors/vehicles of transmission for COVID-19. (ER-086). The FAC at ¶¶22-23 further alleges that Mr. Kuciemba and/or his clothing or personal effects served as the vehicle of transmission for the virus to Mrs. Kuciemba. (ER-088-089). Finally, the FAC at ¶¶29-33 repeatedly makes clear that Mrs. Kuciemba is suing for her own direct, personal injuries. (ER-090-091). Contrary to Defendant's argument, the FAC does *not* allege that Mr. Kuciemba was asymptomatic, however the FAC did eliminate prior references to his COVID-19 infection because it is completely irrelevant whether Mr. Kuciemba suffered physical injuries (i.e. whether he was symptomatic or asymptomatic).

Even though the FAC clearly alleges that Mrs. Kuciemba is suing Defendant

because *her own body was injured* as a result of Defendant's negligence, Defendant and the district court improperly stretch the derivative injury doctrine to cover Mrs. Kuciemba's legally distinct and entirely separate claims. (ER-120). The issue here is that the district court committed the same error by the appellate court criticized in *Snyder*: "The question the [appellate] court should have asked, therefore, was not whether [the daughter's] injuries resulted from the employer's negligent treatment of [the mother] or from "some condition affecting" [the mother] but, rather, whether [the daughter's] claim was legally dependent on [the mother's] work-related *injuries*." *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal 4th 991, 999 (emphasis in original).

Snyder emphasizes that an action is not considered to be derivative or collateral under the derivative injury rule just simply because it arises out of the same employer negligence that caused a similar injury or condition to an employee, or simply because there is some connection between the employee's work-related condition and that which the third party independently suffers. The point is that the California Supreme Court already recognizes that in the presence of employer negligence, Workers' Compensation exclusivity cannot bar a civil lawsuit by a third-party based upon the derivative injury rule unless the civil action truly is derivative of the employee's injury in the "purest sense": "**Neither the statutes nor the decisions enunciating the rule suggest that workers' compensation exclusivity**

extends to all third party claims deriving from some 'condition affecting' the employee. Nor is the nonemployee's injury collateral to or derivative of an employee injury merely because they both resulted from the same negligent conduct by the employer. The employer's civil immunity is not for all liability resulting from negligence toward employees, but only for all liability to any person deriving from an employee's work related *injuries* (§ 3600.)" *Snyder,* 16 Cal.4th at 998 (emphasis added).

Plaintiffs' counsel raised the practical implications of *Snyder's* holding at oral argument:

> "[I]f we look at the CACI instructions, we will find that one of the legal elements of injury is you have to prove injury to the mother and the extent to which the injury to that mother or the husband or the worker that it – and it's tied in a legal sense, not a causal sense [. . .] So if Mrs. Kuciemba was suing for [loss of consortium, wrongful death, or emotional distress], what she would first have to prove is that extent of the injuries to Mr. Kuciemba and how his injuries affected her and how those are barred. But in this case, it doesn't matter whether he, you know, died on the job or never even felt anything because of COVID, because the injuries to Ms. Kuciemba are her own just like the child's injuries in *Snyder* was the child's own injury. And I think, Your Honor, this is where I see the disconnect between – between what you have kind of laid out for us and what *Snyder* is saying, because I think, Your Honor, you're focusing on the factual causation; whereas, *Snyder* actually laid a – what I see as a bright-line rule. And they're saying, **"We're looking at the legal causation. And what we're looking at is if we look at the elements of Ms. Kuciemba's claim do we see those elements and need to prove up Mr. Kuciemba's injuries? And the answer is no."** (ER-035-036). (emphasis added)

Defendant simply ignores *Snyder's* common-sense distinction between factual and

legal causation. Mrs. Kuciemba's claims are not barred by the exclusive remedy because her claims are *legally* distinct from her husband's. Thus, unlike a loss of consortium claim by Mrs. Kuciemba which would be legally based on her husband's injuries, the legal elements necessary to prove Mrs. Kuciemba's own bodily injury claim, as laid out in the CACI jury instructions and the law, do not legally require any injury to Mr. Kuciemba. The district court completely overlooked this crucial distinction in its analysis and Order.

We briefly address two other points raised in Defendant's answering brief. First, Defendant's brief at p. 7 argues that "Non-employees cannot claim a civil recovery unless they visit the premises". Defendant cites no authority for this novel theory, which is contrary to *Kesner*: "We have never held that the physical or spatial boundaries of a property define the scope of a landowner's liability . . . Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite." *Kesner*, 1 Cal. 5th at 1159. California law does not impose a bright line rule requiring the injured nonemployee to physically visit the premises. In any event, this issue is not properly before this Court because there is no evidence in the record whether Mrs. Kuciemba did, or did not, visit the premises. The reality is that it is immaterial whether Mrs. Kuciemba was physically at Defendant's premises; what matters is whether she can prove,

more likely than not, that Defendant's negligence was a substantial factor in causing her physical injuries.

Second, Defendant claims that *Salin v. Pacific Gas & Electric Co*. (1982) 136 Cal. App. 3d 185, which the district court relied on, is still good law because it has remained "undisturbed" for forty years. Defendant glosses over the blistering footnote in *Snyder* which effectively neutralized any persuasive value remaining in *Salin*: "While we have no occasion here to rule on the correctness of the decision in *Salin,* we observe that sections 3600-3602 do not directly support the *Salin* court's extension of the derivative injury rule to third party injuries allegedly caused by an injured employee's post-injury acts." *Snyder*, 16 Cal 4th at 999 fn 2. This footnote is clearly the reason why no appellate court has relied on *Salin* in the ensuing decades. *Salin* may still be "on the books", but it is hardly good law.

B. There is no question that defendant owed a duty of care to Mrs. Kuciemba. Defendant ignores that the district court found that the foreseeability factors favored Plaintiffs.

Plaintiffs previously argued at length how the various public policy factors in *Kesner v. Superior Court* (2016) 1 Cal. 5th 1132 weigh in favor of Plaintiffs. Defendant does not challenge the district court's analysis that the foreseeability factors favored Plaintiffs (ER-137). Foreseeability is the "most important factor to consider in determining whether to create an exception to the general duty to exercise

ordinary care". *Kesner*, 1 Cal. 5th at 1145. Instead, Defendant (1) mischaracterizes the nature and scope of the duty owed; and (2) claims *Kesner* is limited to asbestos cases/cases involving commercial products.

Defendant's brief at page 26, claims that Plaintiffs seek to create a "new duty: the duty of employers to protect non-employees from a virus of unknown origin by guaranteeing that a worker will arrive home COVID-19 free." This statement is incorrect for two reasons. First, Defendant mischaracterizes the *nature* of the duty owed. Plaintiffs have consistently alleged that the nature of Defendant's duty of care was defined by the detailed San Francisco Health Order (ER-052-083). As we discussed in our opening brief, the point is not that an employer take *all* possible steps to prevent COVID-19 infections, only that the employer take *reasonable* steps, or at very least the *legally mandated* steps, as outlined in the Health Order, to prevent harm. The FAC alleges that Defendant violated the Health Order when it failed to quarantine and instead commingled workers from its Mountain View jobsite with the San Francisco workers even though Defendant knew or should have known that those Mountain View workers were infected with COVID-19. (ER-154-165).

Second, Defendant mischaracterizes the *scope* of the duty owed. Defendant claims that a ruling for the Kuciembas will create "an enormous pool of plaintiffs" such as a husband who catches COVID-19 while visiting a coffee shop and brings the virus home to his wife. But the scope of the duty of care owed in this case is

properly limited to employees who contract the virus at work due to a breach of duty of care by Defendant and then infect members of the employee's households as described in *Kesner*. Like in *Kesner*, such concerns in this case do not call for a categorical rule that *no duty is owed*, rather the same commonsense limitation that an employer's duty extends but is limited to members of a worker's household. As the California Supreme Court explained, such a rule keeps the "potential plaintiffs to an identifiable category of persons who, as a class, are most likely to have suffered a legitimate, compensable harm. . . . This rule strikes a workable balance between ensuring that reasonably foreseeable injuries are compensated and protecting courts and defendants from the costs associated with litigation of disproportionately meritless claims." *Kesner*, 1 Cal. 5th at 1155. The scope of the duty in this case is no greater than what the California Supreme Court has already held.

Defendant argues that *Kesner* is limited to asbestos and/or claims involving commercial products. But the California Supreme Court gave no indication in its opinion that its reasoning can never be extended beyond asbestos cases, nor has it subsequently limited *Kesner* only to asbestos cases. Plaintiffs have extensively argued why the policies that supported a ruling for the *Kesner* plaintiffs also support the Kuciembas. For example, the moral blame factor is particularly strong because Defendant was required to follow the binding Health Order, had superior knowledge of potential infections among their workforce as a whole and superior resources to

ensure that workers were safe. The employer receives financial benefits from bringing its workers together, and it is obligated to take all reasonable steps (including following the legally binding Health Order) to keep them safe.

The reality is that the district court did not rule in favor of Defendant because *Kesner* was limited to commercial products. The district court ruled the way it did because it was concerned about a "major expansion" in liability claims related to COVID-19. (ER-027). But the district court was essentially substituting its judgment over the Legislature's; the State of California, unlike other jurisdictions, has not expressly chosen to limit COVID-19 liability claims.

C. Plaintiffs have stated a plausible "indirect transmission" claim and have no duty to prove their case at the pleading stage.

Defendant argues that Plaintiff's "indirect transmission" theory is "scientifically unsupported" and therefore lacks plausibility. This argument is meritless. Whether a particular theory is "scientifically supported" is the purview of expert witnesses, not defense counsel. For the record, indirect transmission *is* scientifically supported, and the FAC at ¶¶7-8 cites to the CDC publication *Principles of Epidemiology in Public Health Practice*, which clearly describes the scientific basis for how viruses such as COVID-19 can be indirectly spread through fomites. (ER-086). The district court improperly foreclosed these claims at the pleading stage.

Defendant claims that Mrs. Kuciemba may have difficulty establishing causation on an "indirect transmission" theory. That is disputed. What is probable is that Mrs. Kuciemba was exposed to COVID-19 through repeated contact with her husband *and* his contaminated personal effects; so long as she can prove sufficient exposure from one or both sources, she can establish causation. But on a motion to dismiss, the district is required to accept all the facts as true, including that Mrs. Kuciemba was indirectly exposed to the virus through her husband rather than some other source. (ER-088-089). The district court should not have granted a motion to dismiss because the plaintiff *may* have a challenging case without giving Plaintiffs the opportunity to conduct discovery and prove their case.

D. Alternatively, this Court should certify the workers' compensation and duty issues under California law to the California Supreme Court due to the case's potential precedential value.

Defendant claims that this Court cannot certify Issues 1 and 3 of this Appeal to the California Supreme Court because California Rule of Court 8.548 does not apply. Defendant, at p. 30 in its brief, claims that there is already "clear precedent" and that the claims that this case merely represent a "new, but far from unique, fact pattern". The district court disagreed. The district court described this case as "somewhat of first impression" (ER-098) The district court struggled with ambiguous language in *Snyder*'s discussion of claims that are subject to the derivative injury doctrine. For example, the district court described how the

California Supreme Court used a variety of open-ended terms such as "derivative", "necessarily dependent", and "legal or logical basis" to describe the claims subject to the derivative injury doctrine, and that the district court felt the *Snyder* Court "left this window open where they aren't sure what they want to do" regarding the full scope of the doctrine. (ER-015). Certification would allow the California Supreme Court to clarify these issues raised by the district court.

Defendant seems to believe this case is more than just a run-of-the-mill negligence claim as well because in Defendant's conclusion, Defendant claims that a ruling for the Kuciembas would result in "deeply destabilizing consequences for businesses across the state". The reality is that certification would allow the California Supreme Court to issue a ruling that definitively applies the *Snyder* and *Kesner* rulings in a way that addresses the unique challenge of COVID-19. All California litigants would benefit from a clear ruling from the California Supreme Court. Defendant is simply wrong when it claims this Court lacks discretion to certify the issues presented in this case to the California Supreme Court.

III. CONCLUSION

Nothing in Defendant's Answering Brief can save the flaws in the district court's decision. Plaintiffs respectfully request that this Court REVERSE the decision of the district court. Alternatively, Plaintiffs respectfully request this Court certify Issue Nos. 1 and 3 to the California Supreme Court pursuant to

Rule 8.548(a) of the California Rules of Court.

Respectfully Submitted,

Dated: December 3, 2021

VENARDI ZURADA LLP

/s/ Martin Zurada

By: Martin Zurada
Attorneys for Plaintiffs-Appellants
CORBY KUCIEMBA and
ROBERT KUCIEMBA

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C)

I hereby certify that Plaintiffs-Appellants' Brief in Reply to Appellee's Answering Brief has been prepared using proportionally double-spaced 14-point Times New Roman typeface.

According to the Microsoft Office 365/Microsoft Word processing software, this brief contains 3,235 words.

Dated: December 3, 2021

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/s/ Martin Zurada

By: Martin Zurada
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 3, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 3, 2021

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December 21, 2021

Molly Dwyer, Clerk of the Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 941119-3939

Re: *Kuciemba, et al. v. Victory Woodworks, Inc.* Case No. 21-15963
FRAP 28(j) Notice of Supplemental Authorities

Dear Clerk of the Court:

We represent Plaintiffs-Appellants. We respectfully notify the Court of new authority on the issues presented in this Appeal, specifically Workers' Compensation Exclusivity (Issue 1 of Appeal, Opening Brief pp. 17-30) and the existence of a Duty of Care (Issue 3 of Appeal, Opening Brief pp. 33-45). We attach a copy of the slip opinion to this letter.

In *See's Candies, Inc. v. Superior Court of California for the County of Los Angeles (Matilde Ek)* Case No. B312241 (*certified for publication*, filed 12/12/21), in a virtually identical case, an employee contracted COVID-19 allegedly due to the employer-defendant's negligence. The wife employee "took home" the virus and her non-employee husband died. The employer argued on demurrer that the employee-wife's wrongful death action was barred by the exclusive remedy of Workers', lost and then sought a writ of mandate. **The Court of Appeals denied the writ, holding that the derivative injury doctrine did not apply because the employee-wife was suing based on her injuries arising directly from her non-employee husband's death not her own workplace injury.** Slip op. p. 30.

The Court of Appeals extensively analyzed *Snyder*, noting that "[t]he *Snyder* Court made clear, however that "logical" or "legal" dependence [on a workplace injury] is not equivalent to *causal* dependence, Slip Op. at 24 (emphasis in original). The district court in this case, i.e. *Kuciemba*, erroneously adopted a *causal* dependence test instead of a *legal* dependence test. The *See's Candies* Court also noted that the district court's opinion in this matter, was not persuasive because "[the district court's] dismissal orders in *Kuciemba* are conclusory, with no explanations or discussion of relevant authority. They provide no basis upon which to question our holding." Slip op. p. 34.

As to duty of care, the Court did not directly opine on whether a duty existed, but noted that the "unique factual and legal issues presented by the ongoing pandemic will not inexorably lead to unlimited liability" based on *Kesner*. Slip op. at 37.

The holding and analysis of *See's Candies* is thus directly relevant and controlling law to the issues presented in this Appeal.

Very Truly Yours,

VENARDI ZURADA LLP

/s/ Martin Zurada

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Filed 12/21/21

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SEE'S CANDIES, INC., et al.,

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent;

MATILDE EK et al.,

Real Parties in Interest.

B312241

(Los Angeles County Super. Ct. No. 20STCV49673)

OPINION AND ORDER DENYING PETITION FOR WRIT OF MANDATE

ORIGINAL PROCEEDING; petition for writ of mandate. Daniel M. Crowley, Judge. Petition is denied.

Munger, Tolles & Olson, Joseph D. Lee (Los Angeles) and Malcolm A. Heinicke (San Francisco) for Petitioners.

Gibson, Dunn & Crutcher, Bradley J. Hamburger (Los Angeles) and Lucas C. Townsend (Washington, D.C.) for Chamber of Commerce of the United States of America, California Chamber of Commerce, California Workers' Compensation Institute, Restaurant Law Center, California Restaurant Association, National Association of Manufacturers, National Retail Federation, and National Federation of Independent Business Small Business Legal Center as Amici Curiae on behalf of Petitioners.

No appearance for Respondent.

Krissman & Silver, Joel Krissman and Donna Silver for Real Parties in Interest.

See's Candies, Inc. and See's Candy Shops, Inc. (collectively, defendants) petition for a writ of mandate directing the trial court to vacate an order overruling their demurrer to a wrongful death action filed by real parties in interest Matilde Ek (Mrs. Ek), Karla Ek-Elhadidy, Lucila del Carmen Ek, and Maria Ek-Ewell (collectively, plaintiffs). Plaintiffs are the wife and daughters of decedent Arturo Ek (Mr. Ek).

Plaintiffs allege that Mrs. Ek, defendants' employee, contracted COVID-19 at work because of defendants' failure to implement adequate safety measures. They claim that Mr. Ek subsequently caught the disease from Mrs. Ek while she convalesced at home. He died from the disease a month later.

Defendants filed a demurrer asserting that plaintiffs' claims are preempted by the exclusivity provisions of the Workers' Compensation Act (WCA; Lab. Code,[1] § 3200 et seq.). Specifically, defendants argued plaintiffs' claims are barred by the "derivative injury doctrine" (see *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 1000 (*Snyder*)), under which "the WCA's exclusivity provisions preempt not only those causes of action premised on a compensable workplace injury, but also those causes of action premised on injuries ' "collateral to or derivative of" ' such an injury." (*King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1051 (*King*).) Among other things, this doctrine preempts third party claims "based on the physical injury or disability of the spouse," such as loss of consortium or emotional distress. (*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 162–163.)

Defendants argued below, as they do in this writ proceeding, that under *Snyder*, a claim is derivative if it would not exist absent injury to the employee. Because plaintiffs allege Mr. Ek contracted COVID-19 from Mrs. Ek, who in turn contracted the disease at work, defendants contend Mr. Ek's death would not have occurred absent Mrs. Ek's workplace exposure, and thus was derivative of Mrs. Ek's work-related injury. Accordingly, defendants argue that plaintiffs' claims are subject to WCA exclusivity. The trial court rejected this argument and overruled the demurrer.

We agree with the trial court. Assuming arguendo that Mrs. Ek's workplace infection constitutes an injury for purposes of the WCA, we reject defendants' efforts to apply the derivative

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[1] Unspecified statutory citations are to the Labor Code.

injury doctrine to any injury causally linked to an employee injury. Defendants' interpretation is inconsistent with the language of *Snyder*, which establishes that the fact an employee's injury is the biological cause of a nonemployee's injury does not thereby make the nonemployee's claim derivative of the employee's injury.

Further, *Snyder*'s discussion of prior case law applying the derivative injury doctrine does not support applying the doctrine based solely on causation. *Snyder* approved of cases applying the doctrine to claims by family members for losses stemming from an employee's disabling or lethal injury, such as wrongful death, loss of consortium, or emotional distress from witnessing a workplace accident. In contrast, the Supreme Court called into question a case applying the derivative injury doctrine outside these contexts based on causation alone.

Defendants' interpretation of the derivative injury doctrine would lead to anomalous results, shielding employers from civil liability in contexts the drafters of the WCA could not have intended. Although the breadth of the derivative injury doctrine presents serious policy considerations, *Snyder* recognizes that such policy considerations are within the province of the Legislature and should not be judicially addressed by expansion of the derivative injury doctrine.

Amici arguing in support of defendants describe the trial court's ruling as an "outlier," and contend other jurisdictions have dismissed complaints alleging similar facts and legal theories. Amici's hyperbole notwithstanding, the rulings they cite either were decided on bases other than workers' compensation exclusivity or do not articulate their reasoning sufficiently to be

persuasive. Analogous precedents from other jurisdictions support our holding.

Because the parties have framed this writ exclusively to address the applicability of the WCA, we have no occasion to decide whether defendants owed Mr. Ek a duty of care or whether plaintiffs can demonstrate that Mr. or Mrs. Ek contracted COVID-19 because of any negligence in defendants' workplace, as opposed to another source during the COVID-19 pandemic. The parties have not raised these issues, and we decline to address them sua sponte.

Accordingly, we deny the petition.

PROCEDURAL BACKGROUND

Plaintiffs filed their complaint against defendants on December 30, 2020, alleging the following:

"Defendants operated a candy assembly and packing line and employed workers in the course and scope of said business, including [Mrs. Ek]. During said time there was a global, national, state and County of Los Angeles pandemic and epidemic, Sars-Cov-2 coronavirus, commonly referred to as Covid-19. Defendants were aware of the highly dangerous, contagious and transmissible nature of that virus, particularly where people are working and interacting in close proximity to each other. Further, Defendants' employees at the plant complained directly and through their union representative to Defendants about the close proximity of their work environment[,] requesting safety mitigation efforts due to fear of the virus. Defendants failed to operate and conduct their business as would and should be expected to protect their employees, including [Mrs. Ek], from the known high risk of this viral infection by failing to put known,

appropriate and necessary safety mitigation measures in place. Defendants knew and should have known that the workers' duties, locations within the plant, and physical distancing from one another, created a foreseeable and high risk of viral infection and transmission among the workers, including [Mrs. Ek]. Defendants knew and should have known that their failure to take appropriate and necessary safety mitigation measures would increase the known and foreseeable risk that their workers, like [Mrs. Ek], would become infected in the course and scope of their work for Defendants, and carry said viral infection home infecting one or more of their family members[.]"

The complaint continued: "On or about 3/1/20–3/19/20, [Mrs. Ek] was working without appropriate and necessary social distancing on the packing line, using restrooms and break-rooms at times inches [or] only a few feet from other workers, some of whom were coughing [and] sneezing, and became infected along with other co-workers with Covid-19. [Mrs. Ek], unable to work[,] then convalesced at her home where she resided with her husband, [Mr. Ek], and one of their daughters, Plaintiff Karla Ek-Elhadidy, who provided care for her. Within a few days, on or about 3/22/20 both [Mr. Ek], and daughter Karla Ek-Elhadidy, became sick with Covid-19. [Mr. Ek], after struggling with the illness, died as a proximate and legal cause therefrom, on 4/20/20."

Plaintiffs asserted causes of action for general negligence and premises liability. They sought "all recoverable damages for the wrongful death of [Mr. Ek], including loss of love, care, comfort and society." Mrs. Ek, as Mr. Ek's successor in interest, also sought "economic losses for medical and care costs for the

period of time [Mr. Ek] survived after being infected with Covid-19."

Defendants filed a demurrer contending that plaintiffs' claims were preempted by the WCA under the derivative injury doctrine. The doctrine applied, defendants argued, because plaintiffs could not state a claim against defendants for Mr. Ek's death without alleging an injury to an employee, namely Mrs. Ek's workplace infection with COVID-19. Plaintiffs filed an opposition.

Following a hearing, the trial court overruled the demurrer. The court found that any injury to Mrs. Ek was "irrelevant" to plaintiffs' claims because "that injury is not the injury upon which Plaintiffs sue." Rather, "[i]t was [Mr. Ek's] exposure to the COVID-19 brought home by Mrs. Ek that Plaintiffs claim caused Plaintiffs' injury."

The trial court continued: "Mrs. Ek did not have to become ill herself for Plaintiffs' injury to occur, and, so, contrary to Defendants' position, Plaintiffs do not allege that their injuries would not have existed in the absence of the workplace injury to Mrs. Ek. Accordingly, Plaintiffs' claimed injuries are not collateral to nor derivative of Mrs. Ek's becoming ill with COVID-19. Were Plaintiffs alleging that their injuries stemmed from Mrs. Ek's illness, say, because they lost income or missed out on Mrs. Ek's companionship while she was sick with the COVID-19 she contracted at work, a different outcome would result."

The trial court analogized the allegations in the complaint to those in *Kesner v. Superior Court* (2016) 1 Cal.5th 1132 (*Kesner*), a case holding that an employer could be held liable for injuries to an employee's family members caused by asbestos

fibers on the employee's clothing. (See *id.* at p. 1140.) The court also discussed *Snyder*, which held that the derivative injury doctrine did not apply to fetal injuries stemming from a mother's exposure to carbon monoxide in the workplace. (See *Snyder*, *supra*, 16 Cal.4th at p. 994.) The court characterized both *Kesner* and *Snyder* as cases in which plaintiffs "sustained their own independent injuries as a result of their being exposed to a toxin in a related employee's workspace."

Defendants petitioned for a writ of mandate ordering the trial court to vacate the overruling of the demurrer. We issued an order to show cause why a peremptory writ should not be granted. Plaintiffs filed a return, and defendants filed a reply.

PROPRIETY OF WRIT REVIEW

An appellate court may review an order overruling a demurrer prior to final judgment through a writ of mandate. (*California Dept. of Tax & Fee Administration v. Superior Court* (2020) 48 Cal.App.5th 922, 929 (*California Dept. of Tax & Fee Administration*).) "However, writ review is appropriate only when (1) 'the remedy by appeal would be inadequate' [citation] or (2) the writ presents a 'significant issue of law' or an issue of 'widespread' or 'public interest' [citations]." (*Ibid.*) Employer liability for COVID-19 exposure is a significant issue of law that is also of public interest; indeed, another case with allegations similar to those of the instant case is pending before the Los Angeles Superior Court. (See *Gomez v. Logix Federal Credit Union, Inc.* (Super. Ct. Los Angeles County, Apr. 27, 2021, No. 21STCV15877.) On this basis we issued the order to show cause.

STANDARD OF REVIEW

"In reviewing an order overruling a demurrer, we ask whether the operative complaint ' "states facts sufficient to constitute a cause of action" ' [citation] and, if it does, whether that complaint nevertheless ' "disclose[s] some defense or bar to recovery" [citation]' [citation]. In undertaking the inquiry, we accept as true all ' " ' "material facts properly pleaded" ' " '[2] and consider any materials properly subject to judicial notice. [Citation.] We independently review a trial court's order overruling a demurrer [citation], including its analysis interpreting constitutional and statutory provisions [citation]." (*California Dept. of Tax & Fee Administration*, *supra*, 48 Cal.App.5th at p. 929.)

DISCUSSION

A. The Workers' Compensation Act and Derivative Injury Doctrine

The WCA is " 'a comprehensive statutory scheme governing compensation given to California employees for injuries incurred in the course and scope of their employment.' [Citations.] At the core of the WCA is what we have called the ' " 'compensation bargain.' " ' [Citation.] Under this bargain, ' "the employer assumes liability for industrial personal injury or death without

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[2] Notably, we accept as true for purposes of this writ proceeding that Mrs. Ek contracted COVID-19 at work due to defendants' negligence, and that Mr. Ek contracted the disease from Mrs. Ek. Whether these allegations in fact are true is a matter for the trial court, and we express no opinion on these questions.

regard to fault in exchange for limitations on the amount of that liability." ' [Citation.] The employee, for his or her part, ' "is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort." ' [Citation.]" (*King*, *supra*, 5 Cal.5th at pp. 1046–1047.)

"To give effect to the compensation bargain underlying the system, the WCA generally limits an employee's remedies against an employer for work-related injuries to those remedies provided by the statute itself." (*King*, *supra*, 5 Cal.5th at p. 1051.) Put another way, the WCA preempts "causes of action premised on a compensable workplace injury" (*ibid.*), which instead must be addressed within the workers' compensation system. This exclusivity is enshrined particularly in sections 3600 and 3602. (See *King*, at p. 1051.)

Under section 3600, subdivision (a), when the "conditions of compensation" are met, workers' compensation liability "shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death . . . ." This liability is "in lieu of any other liability whatsoever to any person," subject to exceptions not applicable here. (§ 3600, subd. (a).) Section 3602, subdivision (a) provides, "Where the conditions of compensation set forth in Section 3600 concur, the right to recover compensation is . . . the sole and exclusive remedy of the employee or his or her dependents against the employer," again subject to exceptions not relevant here.

As applicable to this case, the "conditions of compensation" include that "at the time of the injury, both the employer and the employee are subject to the compensation provisions of [the WCA]," "the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment," and "the injury is proximately caused by the employment, either with or without negligence." (§ 3600, subd. (a)(1)–(3).)

WCA exclusivity is not limited to claims brought by injured employees themselves. The workers' compensation system also is "the exclusive remedy for certain third party claims deemed collateral to or derivative of the employee's injury." (*Snyder*, *supra*, 16 Cal.4th at p. 997.) Courts have referred to this principle as the "derivative injury rule" or "derivative injury doctrine." (See, e.g., *id.* at p. 1000.)

The rule follows from the language of the WCA itself: "The employer's compensation obligation is 'in lieu of any other liability whatsoever *to any person*' (§ 3600, italics added), including, but not limited to, the employee's dependents (§ 3602) for work-related injuries to the employee. This statutory language conveys the legislative intent that 'the work-connected injury engender[ ] a single remedy against the employer, exclusively cognizable by the compensation agency.' [Citation.]" (*Snyder*, *supra*, 16 Cal.4th at pp. 996–997.)

Examples of claims courts have held barred under this doctrine include "civil actions against employers by nondependent parents of an employee for the employee's wrongful death [citation], by an employee's spouse for loss of the employee's services [citation] or consortium [citations], and for emotional distress suffered by a spouse in witnessing the

employee's injuries [citations]." (*Snyder*, *supra*, 16 Cal.4th. at p. 997.)

The derivative injury doctrine also bars causes of action based on "injuries that arose during the treatment of [an employee's] industrial injury and in the course of the workers' compensation claims process." (*King*, *supra*, 5 Cal.5th at pp. 1052–1053.) In *King*, for example, the doctrine preempted an employee's claim that he suffered injury when a workers' compensation utilization reviewer denied him a particular drug. (*Id.* at p. 1046.) Similarly, the doctrine preempts civil claims for contractual or economic damages arising from the workers' compensation claims process, for example, by employees contending their workers' compensation benefits were wrongfully delayed or discontinued, or by medical providers "seeking compensation for services rendered to an employee in connection with his or her workers' compensation claim." (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 815 (*Vacanti*).)[3]

Defendants contend that the derivative injury doctrine applies when an employee contracts a virus at work, subsequently infects a family member, and the family member dies as a result. Their argument relies primarily on two

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[3] In *Vacanti*, plaintiff medical providers alleged workers' compensation insurers intentionally delayed or denied payments in bad faith. (*Vacanti*, *supra*, 24 Cal.4th at p. 823.) The Supreme Court held these claims were collateral to or derivative of workplace injuries. (*Id.* at p. 815.) Although this barred some of plaintiffs' causes of action (*id.* at p. 823), it did not bar their antitrust, RICO, and conspiracy claims, which alleged acts by the defendants the court held were outside the risks encompassed by the compensation bargain. (*Id.* at pp. 825–828.)

sentences from *Snyder*. First, "[T]he derivative injury rule governs cases in which 'the third party cause of action [is] derivative of the employee injury in the purest sense: It simply would not have existed in the absence of injury to the employee.' [Citation.]" (*Snyder*, *supra*, 16 Cal.4th at p. 998.) Second, "[T]he rule applies when the plaintiff, in order to state a cause of action, *must* allege injury to another person—the employee." (*Ibid.*)

Defendants assert the instant case meets this test because Mr. Ek's illness would not have occurred but for Mrs. Ek contracting the virus at work and transmitting it to him. In other words, Mr. Ek's injury " 'would not have existed in the absence of injury' " to Mrs. Ek. (*Snyder*, *supra*, 16 Cal.4th at p. 998.) Further, in order to state a cause of action against defendants, plaintiffs "*must* allege injury to . . . the employee" (*ibid.*), because Mrs. Ek's alleged workplace infection is the only link between the harm to Mr. Ek and defendants' alleged negligence.

While these two sentences from *Snyder* in isolation provide fodder for defendants' interpretation, in the full context of the *Snyder* opinion defendants' contention is not persuasive. Accepting for purposes of this writ proceeding that Mrs. Ek's contraction of a virus, without more, constitutes a cognizable WCA injury, defendants' contention that any injury caused by an employee injury necessarily falls within the derivative injury doctrine is inconsistent with other language in *Snyder* as well its analysis of case law establishing the boundaries of the doctrine. Accepting defendants' position would also lead to anomalous results and extend the "compensation bargain" beyond its underlying rationale.

We next turn to a detailed discussion of *Snyder*.[4]

B. *Snyder*

Snyder involved a civil suit for damages brought by Mikayla Snyder, a minor, and her mother and father, Naomi and David Snyder, against Naomi's former employer, Michael's Stores, Inc. (Michael's), and others.[5] (*Snyder*, *supra*, 16 Cal.4th at p. 995.) The plaintiffs alleged that "Michael's negligently allowed a janitorial contractor to operate a propane-powered floor-buffing machine in the store without adequate ventilation, resulting in hazardous levels of carbon monoxide." (*Ibid.*) "[B]oth Naomi and Mikayla, who was then *in utero*, were exposed to toxic levels of carbon monoxide . . . ." (*Ibid.*) Naomi was "taken to the hospital with symptoms of nausea, headaches and respiratory distress," and "Mikayla suffered permanent damage to her brain and nervous system, causing her to be born with cerebral palsy and other disabling conditions." (*Ibid.*) Mikayla sought damages for her physical injuries, and her parents sought "economic damages for the increased medical, educational and other expenses they have incurred and will incur due to Mikayla's physical injuries." (*Ibid.*)

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[4] *Kesner*, cited by the trial court, did not address workers' compensation exclusivity, but rather whether the defendant employers had a duty to protect the family members of their employees from exposure to asbestos fibers brought into the home on the employees' clothing and personal effects. (See *Kesner*, *supra*, 1 Cal.5th at p. 1140.) *Kesner* therefore is not instructive on the application of the derivative injury doctrine.

[5] The *Snyder* opinion refers to the plaintiffs by their first names (see, e.g., *Snyder*, *supra*, 16 Cal.4th at pp. 994–995), and we shall do the same.

The trial court sustained Michael's demurrer, concluding that the WCA provided the exclusive remedy for the plaintiffs' claims. (*Snyder*, *supra*, 16 Cal.4th at p. 995.) The trial court relied on *Bell v. Macy's California* (1989) 212 Cal.App.3d 1442 (*Bell*), "which held fetal injuries are, as a matter of law, derivative of injury to the pregnant mother." (*Snyder*, at p. 994, citing *Bell*, at pp. 1453–1454.) The Court of Appeal reversed, "explicitly rejecting *Bell*'s rationale and holding." (*Snyder*, at p. 994.) The Supreme Court granted review to resolve the conflict between *Bell* and the Court of Appeal's decision in *Snyder*. (*Snyder*, at p. 995.)

Bell involved a pregnant worker who complained at her workplace of severe abdominal pain. A nurse provided by her employer "misdiagnosed the worker's condition as gas pains and delayed calling for an ambulance." The mother ultimately went to the hospital, where doctors discovered she had a ruptured uterus. The baby "suffered consequential injuries including brain damage." The *Bell* court accepted for purposes of the appeal that "the nurse's delay in calling an ambulance caused a significant portion of the fetal injuries." (*Snyder*, *supra*, 16 Cal.4th at p. 997, citing *Bell*, *supra*, 212 Cal.App.3d at pp. 1446–1447.)

The *Bell* majority "concluded the derivative injury rule barred the tort claims of the child (called Baby Freytes in the opinion) because the child's prenatal injury '*was a collateral consequence of the treatment of Bell* [the mother].' [Citation.] '[*B*]*ecause the injuries to Baby Freytes were the direct result of Macy's work-related negligence towards Bell, they derived from that treatment and are within the conditions of compensation of the workers' compensation law*.' [Citation.] More generally, the *Bell* majority reasoned that, even if the employee mother was

not herself injured, a 'central physical fact . . . compels application of the [derivative injury] doctrine: that the fetus *in utero* is inseparable from its mother. *Any injury to it can only occur as a result of some condition affecting its mother. When, as in the case at bench, the condition arises in the course of employment, the derivative injury doctrine would apply.*' [Citation.]" (*Snyder*, *supra*, 16 Cal.4th at pp. 997–998, quoting *Bell*, *supra*, 212 Cal.App.3d at p. 1453 & fn. 6.)

The Supreme Court in *Snyder* held that *Bell* misapplied the derivative injury doctrine. (*Snyder*, *supra*, 16 Cal.4th at p. 997.) The court rejected the proposition that "workers' compensation exclusivity extends to all third party claims deriving from some 'condition affecting' the employee," or that "a nonemployee's injury [is] collateral to or derivative of an employee injury merely because they both resulted from the same negligent conduct by the employer." (*Id.* at p. 998.) "The employer's civil immunity is not for all liability resulting from negligence toward employees, but only for all liability, to any person, deriving from an employee's work-related *injuries*." (*Ibid.*)

Quoting the dissent in *Bell*, *Snyder* stated, "[T]he derivative injury rule governs cases in which 'the third party cause of action [is] derivative of the employee injury in the purest sense: It simply would not have existed in the absence of injury to the employee.' [Citation.]" (*Snyder*, *supra*, 16 Cal.4th at p. 998.) "[T]he rule applies when the plaintiff, in order to state a cause of action, *must* allege injury to another person—the employee." (*Ibid.*)

The court explained that in prior cases applying the derivative injury doctrine to third party claims, the actions were "necessarily dependent on the existence of an employee injury."

(*Snyder*, *supra*, 16 Cal.4th at p. 998.) For example, parents could not "s[eek] their own damages for the work-related death of their minor son" because the claim "existed 'by reason of the injury accruing to the employee.' " (*Ibid.*, quoting *Treat v. Los Angeles Gas etc. Corp.* (1927) 82 Cal.App. 610, 613, 616 (*Treat*).)

WCA exclusivity also applies to "claims for loss of services or consortium by a nonemployee spouse" because such claims are " 'based on the physical injury or disability of the [employee] spouse.' " (*Snyder*, *supra*, 16 Cal.4th at pp. 998–999, quoting *Cole v. Fair Oaks Fire Protection Dist.*, *supra*, 43 Cal.3d at p. 163.) "While the losses for which damages are sought in a consortium action may properly be characterized as 'separate and distinct' from the losses to the physically injured spouse [citation], the former are unquestionably dependent, legally as well as causally, on the latter. One spouse cannot have a loss of consortium claim without a prior disabling injury to the other spouse." (*Snyder*, at p. 999.) "Similarly, a claim for negligent or intentional infliction of emotional distress, based on the plaintiff's having witnessed the physical injury of a close relative [at the relative's workplace], is logically dependent on the prior physical injury," and thus "barred as 'deriv[ing] from injuries sustained by an employee in the course of his employment.' " (*Ibid.*, quoting *Williams v. Schwartz* (1976) 61 Cal.App.3d 628, 634.)

Though it wrote approvingly of the cases applying the derivative injury doctrine to claims for an employee's wrongful death, loss of consortium by an employee's spouse, and the emotional distress of a relative who witnessed an employee's workplace injury, the Supreme Court called into question the holding of *Salin v. Pacific Gas & Electric Co.* (1982) 136 Cal.App.3d 185 (*Salin*), which "appl[ied] the derivative injury

rule to an action by an employee for wrongful deaths of the employee's children, where the employee alleged he killed his children as a result of insanity caused by working conditions." (*Snyder*, *supra*, 16 Cal.4th at p. 999, fn. 2.)

The court stated, "While we have no occasion here to rule on the correctness of the decision in *Salin*, we observe that sections 3600 through 3602 do not directly support the *Salin* court's extension of the derivative injury rule to third party injuries allegedly caused by an injured employee's postinjury acts." (*Snyder*, *supra*, 16 Cal.4th at p. 999, fn. 2.)

Turning back to *Bell*, the *Snyder* court observed the proper question "was not whether Baby Freytes's injuries resulted from the employer's negligent treatment of Bell or from 'some condition affecting' Bell [citation], but, rather, whether Baby Freytes's claim was legally dependent on Bell's work-related *injuries*." (*Snyder*, *supra*, 16 Cal.4th at p. 999.) The court found "evidence of such dependence" lacking in the *Bell* opinion. (*Ibid.*) "Although the fetal injuries resulted in part from the mother's ruptured uterus, the appellate court and the parties all assumed that 'Bell's ruptured uterus was unrelated to her employment save only that it occurred during working hours and on Macy's premises.' [Citation.] As to the nurse's delay in summoning an ambulance, the majority's recitation of the evidence indicates simply that the delay 'caused significant injury to Baby Freytes' [citation]; nothing in the majority opinion suggests Baby Freytes's claim depended conceptually on injuries the delay caused to Bell." (*Ibid.*)

The *Snyder* court disagreed with *Bell's* conclusion that the inseparability of a fetus from the mother "dictat[es] application of the derivative injury rule to all fetal injuries. Biologically, fetal

and maternal injury have no necessary relationship. The processes of fetal growth and development are radically different from the normal physiological processes of a mature human. Whether a toxin or other agent will cause congenital defects in the developing embryo or fetus depends heavily not on whether the mother is herself injured, but on the exact stage of the embryo or fetus's development at the time of exposure, as well as on the degree to which maternal exposure results in embryonic or fetal exposure. [Citation.] Even when the mother *is* injured, moreover, the derivative injury rule does not apply unless the child's claim can be considered merely collateral to the mother's work-related injury, a conclusion that rests on the legal or logical basis of the claim rather than on the biological cause of the fetal injury." (*Snyder*, *supra*, 16 Cal.4th at p. 1000.)

Applying these principles to the case before it, the *Snyder* court concluded the plaintiffs' claims were not barred by the derivative injury doctrine. "Plaintiffs alleged simply that both Naomi and Mikayla were exposed to toxic levels of carbon monoxide, injuring both. Mikayla sought recompense for her own injuries. Since Mikayla was not herself breathing at the time of the accident, that her exposure to carbon monoxide occurred through Naomi's inhalation of the fumes and the toxic substance conveyed to her through the medium of her mother's body can be conceded. As we have emphasized above, however, the derivative injury doctrine does not bar civil actions by all children who were harmed *in utero* through some event or condition affecting their mothers; it bars only attempts by the child to recover civilly for the mother's own injuries or for the child's legally dependent losses. Mikayla does not claim any damages for injury to Naomi. Nor does the complaint demonstrate Mikayla's own recovery is

legally dependent on injuries suffered by Naomi." (*Snyder*, *supra*, 16 Cal.4th at p. 1000.) The court summarized cases from other jurisdictions similarly holding that fetal injuries were not subject to workers' compensation preemption. (*Id.* at pp. 1001–1002.)[6]

Michael's, the defendant in *Snyder*, argued "permitting children to pursue civil actions for prenatal injuries suffered in their parents' workplaces exposes employers to 'liability for injuries allegedly arising out of commonplace industrial accidents and thus defeats the "compensation bargain," ' " a concern also raised by the *Bell* court. (*Snyder*, *supra*, 16 Cal.4th at p. 1004.) The Supreme Court recognized this concern "may be substantial," but was "more properly addressed to the Legislature than to this court." (*Ibid.*)

The court emphasized that the " 'compensation bargain' . . . is between businesses and their *employees* and generally does not include third party injuries." (*Snyder*, *supra*, 16 Cal.4th at p. 1004.) "The employee's 'concession' of a common law tort action under sections 3600 to 3602 extends, as we have seen, to family members' collateral losses deriving from the employee's injury. Neither the statutory language nor the case law, however, remotely suggests that third parties who, because of a business's negligence, suffer injuries—logically and legally independent of any employee's injuries—have conceded their common law rights of action as part of the societal 'compensation bargain.' " (*Snyder*, at pp. 1004–1005.)

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[6] The court rejected arguments that the Legislature had impliedly endorsed the holding of *Bell* or that the fetus herself could be considered an employee of Michael's. (*Snyder*, *supra*, 16 Cal.4th at pp. 1002–1003.)

The court noted the difficult policy choices it would have to make if it "formulat[ed] a rule of civil immunity for fetal injuries." (*Snyder*, *supra*, 16 Cal.4th at p. 1005.) "[T]he current workers' compensation system provides little if any compensation to parents for birth defects or other harms their child suffers as a result of injury in the mother's workplace," and "provides none to the child." (*Id.* at pp. 1005–1006.) The court asked whether a rule of civil immunity for fetal injuries would have to be "coupled with a provision" allowing payments to parents and children not currently permitted. (*Id.* at p. 1005.) "These are questions that only the political branches of government can answer." (*Id.* at p. 1006.)

C. Analysis

1. Third-party injuries are not subject to the derivative injury doctrine merely because they are caused by an employee injury

Defendants' interpretation of *Snyder* views a "derivative" injury for purposes of the derivative injury doctrine as any injury causally linked to an employee's injury. That is, if a nonemployee's injury would not have occurred but for an employee's compensable workplace injury, any civil claim by the nonemployee would be preempted by WCA exclusivity. This is because the nonemployee's injury " 'would not have existed' " but for the employee's injury. (*Snyder*, *supra*, 16 Cal.4th at p. 998.)

Defendants contend the *Snyder* court declined to apply the derivative injury rule to the fetal injuries in that case because, defendants argue, the Supreme Court concluded the mother's injuries were *not* the cause of the fetal injuries. Instead, the fetus suffered injury from her own independent exposure to the

carbon monoxide. Specifically, defendants state, "The Court in *Snyder* went into considerable scientific detail to make clear that Mikayla's injury did not depend upon any antecedent injury to her mother Naomi." They note the passage from *Snyder* stating that "fetal and maternal injury have no necessary relationship" and "[w]hether a toxin or other agent will cause congenital defects in the developing embryo or fetus depends heavily not on whether the mother is herself injured, but on the exact stage of the embryo or fetus's development at the time of exposure, as well as on the degree to which maternal exposure results in embryonic or fetal exposure." (*Snyder*, *supra*, 16 Cal.4th at p. 1000.) Defendants assert that whether the mother was injured was "not relevant to the Court's analysis" because "the ruling makes clear that the fetus sustained her injury herself directly in the workplace."

Defendants contrast the case before us from *Snyder* by asserting plaintiffs' claims here depend on the allegation that Mrs. Ek contracted a disease, which defendants contend constitutes an "injury" under the WCA. They cite section 3208, stating that for workers' compensation purposes, " '[i]njury' includes any injury or disease arising out of the employment . . . ." Thus, defendants argue, what distinguishes the instant case from *Snyder* is that the fetal injury in *Snyder* happened independent of any injury to the mother, whereas Mr. Ek would not have died but for the injury to Mrs. Ek, that is, her contracting COVID-19.

We question defendants' premise that Mr. Ek's injury necessarily was caused by an injury to Mrs. Ek, whereas the fetal injuries in *Snyder* were not caused by any injury to the mother. It is well known that people may transmit viruses, including the

virus that causes COVID-19, before they themselves have developed symptoms. (See, e.g., Centers for Disease Control and Prevention, *Ending Isolation and Precautions for People with COVID-19: Interim Guidance*, at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html> (as of Dec. 13, 2021), archived at https://perma.cc/T7SX-RWXB [noting that persons afflicted with "asymptomatic" or "pre-symptomatic" COVID-19 can transmit the virus to others].) Thus, persons need not themselves suffer adverse health impacts in order to transmit a virus. Arguably, then, viral transmission does not depend upon, and therefore under defendants' analytic model, is not caused by, any injury to the transmitting party. The transmitting party may indeed suffer ill effects, as Mrs. Ek allegedly did, but those effects are not themselves the but-for cause of the viral transmission to another.

In our view, moreover, there is little difference conceptually between a mother breathing in a poisonous gas and conveying it to her unborn child, and a wife breathing in viral particles that she then conveys to family members. In both cases, the employee is merely the conduit of a toxin or pathogen; whether the employee herself was harmed by the toxin or pathogen is not relevant to the claims of the injured family members.

Assuming arguendo that Mrs. Ek's infection constitutes an injury for purposes of the WCA, and that injury in turn caused Mr. Ek's injury, we nonetheless reject defendants' reading of *Snyder* to extend the derivative injury doctrine to any injury for which an employee injury was a but-for cause.

Throughout the *Snyder* opinion, the Supreme Court referred to collateral or derivative claims as those that are

"legally" or "logically" dependent on an employee's injuries. (See, e.g., *Snyder*, *supra*, 16 Cal.4th at p. 999 [emotional distress claim based on witnessing injury to close relative "is logically dependent on the prior physical injury"]; *ibid.* [the question the *Bell* court "should have asked" was "whether Baby Freytes's claim was legally dependent" on mother's injuries]; *id.* at p. 1000 [derivative injury doctrine "bars . . . attempts by the child to recover civilly for the mother's own injuries or for the child's legally dependent losses"]; *id.* at p. 1005 [" 'compensation bargain' " does not encompass nonemployee injuries "logically and legally independent of any employee's injuries"]; *ibid.* [WCA preemption "does not include logically independent claims by family members or other third parties"].)

The *Snyder* court made clear, however, that "logical" or "legal" dependence is not equivalent to *causal* dependence. Following its explanation of how both the *Bell* and *Snyder* fetuses could be injured independently of any workplace injury sustained by their mothers, the court stated, "Even when the mother *is* injured, moreover, the derivative injury rule does not apply unless the child's claim can be considered merely collateral to the mother's work-related injury, a conclusion that rests on the legal or logical basis of the claim *rather than on the biological cause of the fetal injury*." (*Snyder*, *supra*, 16 Cal.4th at pp. 999–1000, second italics added.) In other words, the fact that a mother's injury is the "biological cause" of a fetal injury does not by itself make the mother's injury the "legal or logical basis of the [fetus's] claim" for purposes of the derivative injury rule. (*Ibid.*)

We read *Snyder*'s extensive discussion of the independent nature of fetal injuries as refuting the *Bell* majority's assertion that the physical inseparability of the mother and fetus renders a

fetal injury necessarily collateral to the mother's injury. The Supreme Court did not intend thereby to invite courts to scrutinize the particular biological causes of third-party injuries to determine the applicability of the derivative injury doctrine.

Our conclusion is supported by *Snyder*'s analysis of prior case law applying the derivative injury doctrine, which illustrates that derivative claims require more than a causal link to an antecedent injury. The court favorably invoked cases involving parents seeking "their own damages for the work-related death of their minor son," loss of an injured employee's consortium, and emotional distress from witnessing the workplace death of a spouse. (See *Snyder*, *supra*, 16 Cal.4th at pp. 998–999.) As we explain in greater detail below, these causes of action recognize that when a person suffers a disabling or lethal injury, the harms from that injury necessarily extend beyond the injured person to those who love and/or depend on that person.

What unites these types of claims is not merely that they are causally linked to an injury occurring to another person, but also that they are based on losses arising simultaneously from that injury—the directly injured party is disabled or killed, which in turn deprives close relatives of the injured party's support and companionship. In other words, when a tortious event occurs, multiple parties may immediately be affected, and the law entitles the close relatives of the directly injured party to recover damages on top of what the injured party may recover. It is this aspect of wrongful death, loss of consortium, and bystander emotional distress claims that makes them "derivative" of the directly injured party's claim.

Accordingly, it is legally impossible to state a cause of action for such claims without alleging a disabling or lethal

injury to another person. This is reflected in the elements of the causes of action themselves. Code of Civil Procedure section 376, the subject of the *Treat* case, provided at the time that a father or, in his absence, a mother, "may maintain an action for the injury or death of a minor child . . . caused by the wrongful act or neglect of another." (Code Civ. Proc., former § 376 (Code Am. 1873–1874, ch. 383, p. 294, § 39); see *Treat*, *supra*, 82 Cal.App. at p. 613.) A claim for loss of consortium requires " 'a tortious injury to the plaintiff's spouse . . . .' " (*LeFiell Manufacturing Co. v. Superior Court* (2012) 55 Cal.4th 275, 284.) A witness to an "injury-producing" event may recover for negligent infliction of emotional distress if the witness "is closely related to the injury victim." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 647 (*Thing*).)

Similarly, the damages recoverable for these causes of action all refer back to the disability or death suffered by the directly injured party. Wrongful death actions allow recovery for, inter alia, " 'the loss of *the decedent's* financial support, services, training and advice' " and " 'the pecuniary value of *the decedent's* society and companionship.' [Citation.] " (*Fernandez v. Jimenez* (2019) 40 Cal.App.5th 482, 489, italics added.) Loss of consortium involves harms to " ' "the noneconomic aspects of the *marriage relation*, including conjugal society, comfort, affection, and companionship," ' " as well as "sexual relations, moral support, and household services." (*Mealy v. B-Mobile, Inc.* (2011) 195 Cal.App.4th 1218, 1223, italics added.) The damages for emotional distress recoverable in a bystander claim, of course, reflect the trauma of witnessing a tortious injury to a loved one. (See *Thing*, *supra*, 48 Cal.3d at p. 667.)

In contrast to these examples, the *Snyder* court took issue with the holding of *Salin*, a case extending the derivative injury

doctrine to a nonemployee's injury based on causation alone. In that case, the plaintiff alleged he suffered a psychotic episode caused by the negligence or wrongful acts of his employer, and killed his daughters as a result. (See *Salin*, *supra*, 136 Cal.App.3d at p. 190.) He sued for the wrongful death of his daughters. (*Id.* at p. 187.) The Court of Appeal affirmed judgment on the pleadings against the father because "the circumstances of plaintiff's employment was, at least, one of the '*proximate causes'* of the injury and damages suffered by him as a result of the wrongful death of his daughters," and therefore his " 'exclusive remedy' " was in the workers' compensation system. (*Id.* at p. 191.)

As we have said, the Supreme Court in *Snyder* stated, "[S]ections 3600 through 3602 do not directly support the *Salin* court's extension of the derivative injury rule to third party injuries allegedly caused by an injured employee's postinjury acts." (*Snyder*, *supra*, 16 Cal.4th at p. 999, fn. 2.) This language questioning *Salin*'s holding is inconsistent with defendants' position in the instant case. If, as defendants posit, the *Snyder* court intended to apply the derivative injury doctrine to any injury allegedly caused by an employee injury, *Salin* clearly would meet that test. Yet the *Snyder* court did not embrace *Salin*, but instead called its validity into doubt.

Further illustrating the *Snyder* court's rejection of causation as the sole requirement for application of the derivative injury doctrine is *Snyder*'s favorable discussion of a Louisiana fetal injury case, *Cushing v. Time Saver Stores, Inc.* (La.Ct.App. 1989) 552 So.2d 730 (*Cushing*). (See *Snyder*, *supra*, 16 Cal.4th at p. 1001.) *Cushing* involved "a child's suit for *in utero* brain injuries, allegedly caused by his mother's accidental workplace

fall." (*Snyder*, at p. 1001.) The Supreme Court in *Snyder* summarized *Cushing* thusly: "While prior Louisiana decisions had barred civil actions for third party derivative injuries, in all those cases the claimant's injury 'hinged upon the injuries of the employee. Because Dad or Mom suffered an injury, the family suffered a loss based on that injury.' [Citation.] The collateral loss might be economic, as in a claim for loss of support, or intangible, as in a claim for loss of consortium based on the employee's inability to continue participating in family life. [Citation.] In contrast, the fetal injuries at issue in *Cushing* were not logically derivative of the mother's injury: 'Whether Mom is there to continue bringing home a paycheck or to participate in the child's life has no relevance to this child's alleged brain damage.' [Citation.]" (*Snyder*, at pp. 1001–1002, quoting *Cushing*, at pp. 731–732.)

The Supreme Court's reliance on *Cushing* establishes that the mere fact that an employee's injury is the alleged cause of a nonemployee's injury does not make the nonemployee's injury "logically derivative" of the employee injury. (*Snyder*, *supra*, 16 Cal.4th at p. 1002.) Derivative injuries are the "economic" and "intangible" losses suffered by an employee's loved ones as a result of the employee's disability or death. (*Id.* at pp. 1001–1002.) This definition does not extend to separate physical injuries suffered by nonemployees, even when, as in *Cushing*, an employee's injury was part of the causal chain leading to those injuries.

To conclude otherwise would lead to anomalous outcomes. Consider if the carbon monoxide in *Snyder* had not merely passed through the mother to the child, but instead, damaged the mother's lungs, thus depriving the fetus of oxygen. Compared to

the facts of *Snyder*, the employer in this hypothetical would be no less negligent, and the fetus no less injured. Yet under defendants' logic, the derivative injury rule would apply to the fetus in our hypothetical because the mother's lung injury would be a but-for cause of the fetus's oxygen deprivation. Thus, in contrast to the fetus's remedies in *Snyder*, in our hypothetical the fetus's remedies would be limited to whatever was available through workers' compensation, if anything, rather than tort remedies. We cannot conceive why the particular manner in which the fetus was injured should determine whether the employer should be shielded from full tort liability by the workers' compensation system, nor is it apparent that the compensation bargain underlying the WCA compels such a rule.

We pause here to note that, although the case before us involves injuries allegedly suffered by family members of an employee, a construction of the derivative injury rule premised solely on causation would bar civil claims by *any* person injured as a result of the employee's injury, family member or not. Indeed, at oral argument, defendants' counsel conceded the wide reach of their proposed interpretation of the derivative injury doctrine.

To take an extreme example, imagine that a researcher in a laboratory studying dangerous pathogens inadvertently becomes infected due to the employer's lax safety protocols. That researcher then boards a bus home and infects all the passengers with a lethal virus. Under defendants' interpretation of *Snyder*, the passengers, whose illnesses " 'would not have existed in the absence of injury to the employee' " (*Snyder*, *supra*, 16 Cal.4th at

p. 998), would be barred from asserting civil claims seeking tort remedies against the laboratory.[7]

In *Snyder*'s own words, "The 'compensation bargain' . . . is between businesses and their *employees* and generally does not include third party injuries." (*Snyder*, *supra*, 16 Cal.4th at p. 1004.) "The employee's 'concession' of a common law tort action under sections 3600 to 3602 extends, as we have seen, to family members' collateral losses deriving from the employee's injury. Neither the statutory language nor the case law, however, remotely suggests that third parties who, because of a business's negligence, suffer injuries—logically and legally independent of any employee's injuries—have conceded their common law rights of action as part of the societal 'compensation bargain.' " (*Snyder*, at pp. 1004–1005.)

2. The derivative injury doctrine does not apply under the facts of this case

It is readily apparent that the derivative injury doctrine does not apply to the facts of the case before this court. Plaintiffs do not seek damages for losses arising from a disabling or lethal injury to Mrs. Ek, such as loss of her support or companionship, or emotional trauma caused by observing Mrs. Ek's suffering. Nor do they sue for "injuries that arose during the treatment of [an employee's] industrial injury" or "in the course of the workers' compensation claims process." (*King*, *supra*, 5 Cal.5th at pp. 1052–1053.) Instead, they sue for damages arising from Mr. Ek's death, an event allegedly causally related to Mrs. Ek's

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[7] We do not suggest that defendants' alleged conduct is comparable to this example. We posit it to illustrate the broad implications of defendants' argument on tort law.

alleged infection by the virus in the workplace, but under *Snyder*, not derivative of that infection.

Our holding accords with those of appellate courts of other jurisdictions on analogous facts. In *Woerth v. United States* (6th Cir. 1983) 714 F.2d 648 (*Woerth*), the plaintiff sued the United States government after he contracted hepatitis from his wife, who herself contracted the disease while employed as a nurse at a Veteran's Administration facility. (*Id.* at p. 649.) The district court dismissed the claim, concluding that, although the plaintiff was not an employee of the government, his injury was subject to the exclusive remedy provision of the Federal Employee's Compensation Act (FECA). (*Woerth*, at p. 649; see *Collins v. Plant Insulation Co.* (2010) 185 Cal.App.4th 260, 272 [FECA is "an alternative compensation system for federal employees . . . akin to the alternative compensation system provided by the California's workers' compensation law."].) In so concluding, the district court relied upon federal cases holding that FECA barred claims for loss of consortium by a government employee's spouse. (*Woerth*, at p. 649.)

The Sixth Circuit reversed, stating the proper question for FECA preclusion is "whether the claim is 'with respect to the injury or death of an employee.' While Woerth's hepatitis may derive from his wife as a matter of proximate cause, his cause of action does not. His right to recover for the negligence of the United States is based upon his own personal injury, not a right of 'husband and wife' [as it would be in a claim for loss of consortium]. The fact that the disease was transmitted through his spouse does not place Woerth in a position different from that of any other unrelated, but similarly injured tort victim." (*Woerth*, *supra*, 714 F.2d at p. 650.)

In *Vallery v. Southern Baptist Hosp.* (La.App. 4th Cir. 1993) 630 So.2d 861 (*Vallery*), a hospital security guard was exposed to the human immunodeficiency virus (HIV) by a patient. (*Id.* at pp. 862–863.) The guard, not yet aware he had been exposed to the virus, had sexual relations with his wife that evening. (*Id.* at p. 862.) Although neither the guard nor his wife ultimately contracted the virus, they sued the hospital for their emotional distress and "for loss of consortium due to their having to use condoms for a year" while being routinely tested for HIV. (*Id.* at p. 863.)

The trial court dismissed the suit, concluding the claims were barred by the exclusive remedy provision of the workers' compensation statute. (*Vallery*, *supra*, 630 So.2d at p. 862.) The Louisiana Court of Appeal agreed with the trial court as to the guard's claims, and also as to the wife's claim for loss of consortium, "a claim that arises due to the injury to her husband." (*Id.* at pp. 864–865.)

"However, Mrs. Vallery's claim for injury to her, i.e. exposure of Mrs. Vallery to HIV, is not an 'injury' referred to in the worker's compensation statute. [Citation.] It is self-evident that the worker's compensation scheme is to provide an exclusive remedy in the form of worker's compensation with regard to injuries to employees and not with regard to injuries to the spouses or other 'dependents' or 'relations' of employees. If Mrs. Vallery had been visiting her husband at work at the hospital, and a hospital employee had negligently injured both of them, no one would suggest that Mrs. Vallery's claim for her injury would be subject to the 'exclusive remedy' provision of the

worker's compensation statute even though her husband's claim would be."[8] (*Vallery*, *supra*, 630 So.2d at p. 865.)

Amici contend that the trial court's ruling in the instant case is an "outlier" that "conflicts with the decisions of every other court that has addressed claims arising from alleged COVID-related injuries in the workplace." In support, amici cite trial court rulings from other jurisdictions. As we discuss more fully below, the cited rulings either were decided on grounds other than workers' compensation preemption, or do not sufficiently address the issues raised in the instant case to be persuasive.[9]

In *Kuciemba v. Victory Woodworks, Inc.*, the United States District Court for the Northern District of California dismissed a complaint against an employer alleging that an employee contracted COVID-19 in the workplace, then infected his wife who developed a severe case of the disease. In the first dismissal order, the court stated that the claims were "barred by the exclusive remedy provisions of California's workers' compensation statutes," citing sections 3600 and 3602. (N.D.Cal., Feb. 22, 2021, No. 3:20-cv-09355-MMC.)

After the plaintiffs amended their complaint, the court dismissed the claims with prejudice, stating again that the claims were barred by WCA exclusivity to the extent they were "based

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[8] *Vallery* relied in part on *Cushing*, the Louisiana fetal injury case cited favorably in *Snyder*. (See *Vallery*, *supra*, 630 So.2d at p. 865; *Snyder*, *supra*, 16 Cal.4th at pp. 1001–1002.)

[9] Defendants also cite these cases in arguing for the appropriateness of writ review, as well as other cases involving claims based on COVID-19. Defendants notably do not discuss the reasoning of any rulings in those cases.

on allegations that [the wife] contracted COVID-19 'through direct contact with' [the employee]." Plaintiffs also alleged that the wife "contracted COVID-19 'indirectly through fomites such as [the employee's] clothing," which the district court dismissed "for failure to plead a plausible claim." The court further found that the "defendant's duty to provide a safe workplace to its employees does not extend to nonemployees who . . . contract a viral infection away from those premises." (N.D.Cal., May 10, 2021, No. 3:20-cv-09355-MMC.)

Setting aside that we are not bound by federal district court rulings (*Mitchell v. State Dept. of Public Health* (2016) 1 Cal.App.5th 1000, 1009, fn. 4), the dismissal orders in *Kuciemba* are conclusory, with no explanations or discussion of relevant authority. They provide no basis upon which to question our holding.

In *Lathourakis v. Raymours Furniture Co., Inc.* (NY.Sup.Ct., Mar. 8, 2021, No. 59130/2020), the plaintiff alleged she contracted COVID-19 at the workplace and transmitted it to her mother and husband. The husband subsequently died from COVID-19. Plaintiff sought damages for her own illness and the emotional distress caused by the death of her husband. It does not appear the plaintiff sought damages for her husband's death apart from the emotional distress it allegedly caused her.

The trial court dismissed the complaint on the basis of workers' compensation exclusivity. The sole argument addressed by the court in its written order was whether the plaintiff sufficiently pleaded intentional conduct on the part of her employer to bring her claims outside the scope of the workers' compensation statute. Although the court mentioned in the summary of the allegations that the plaintiff's husband died, the

court did not discuss, nor did it indicate the plaintiff addressed, whether injuries arising from the husband's death should be treated differently than the injuries plaintiff suffered from her own illness for purposes of workers' compensation preemption. The case therefore is not instructive on the issues before us. (See *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 85, fn. 4 [" '[C]ases are not authority for propositions that are not considered.' [Citation.]"].)

Estate of Madden v. Southwest Airlines Co. (D.Md. June 23, 2021, 1:21-cv-00672-SAG) [2021 WL 2580119] and *Iniguez v. Aurora Packing Company, Inc.* (Ill.Cir.Ct., Kane County, Mar. 31, 2021, No. 20 L 372) [2020 WL 4734941], concerned suits against employers based on individuals who died allegedly from COVID-19 infections brought home from work by their employee spouses. The courts in these cases dismissed the complaints upon a finding that the employers owed no duty to the nonemployee decedents.

Madden did not address workers' compensation at all. *Iniguez* looked to the policies behind workers' compensation in its duty analysis, stating that "the relationship of employer/employee has . . . been codified limiting liability and damages pursuant to the Worker's Compensation Act," and that extending a duty to someone outside the employer-employee relationship "would completely disembowel the policy considerations" underlying that relationship. These cases plainly do not address what constitutes a derivative injury for purposes of workers' compensation preemption.

Kurtz v. Sibley Memorial Hospital (Md.Cir.Ct., Montgomery County, Mar. 25, 2021, No. 483758V) was a wrongful death action based on an employee contracting COVID-

19 at work and transmitting it to her husband, who died. The trial court dismissed the complaint on three bases: The Washington, D.C. wrongful death statute upon which the plaintiff relied was inapplicable because the husband contracted the disease in Maryland, the employer hospital owed no duty to the husband, and the hospital was shielded by statutory immunity. Workers' compensation exclusivity was not at issue.

In contrast to the cases cited by defendants and amici, both *Woerth* and *Vallery*, decisions by the Sixth Circuit and the Louisiana Court of Appeal, respectively, firmly support our holding. The trial court's ruling below was neither an outlier nor a deviation from the precedent articulated in *Snyder*.

Defendants and amici argue public policy concerns compel application of the derivative injury doctrine in this case. Defendants warn that given the prevalence of COVID-19, courts will be "overwhelmed by civil litigation brought by non-employee spouses and other family members." Amici go further, noting that in the absence of the derivative injury doctrine, claims may be brought not only by "the infected employee's family and friends who contract COVID-19, but also the family and friends of each of those individuals who become infected with the virus, and anyone else who might claim some derivative injury." Amici argue that "[s]uch a never-ending chain of derivative injuries and unchecked liability is antithetical to the WCA."

Defendants further note the difficulties of proof these cases create, particularly as to causation, which defendants contend is "exactly the sort of complex civil litigation issues that [WCA] exclusivity was adopted to avoid."

Whatever may be said of these public policy concerns, any extension of the " 'compensation bargain' " to encompass the third

party injuries at issue here is "more properly addressed to the Legislature than to this court." (*Snyder*, *supra*, 16 Cal.4th at p. 1004.) We cannot distort the derivative injury doctrine as articulated in *Snyder* to address these policy concerns.

The unique factual and legal issues presented by the ongoing pandemic will not inexorably lead to unlimited liability. Unaddressed in this writ proceeding is whether defendants owe a duty of care to nonemployees infected with COVID-19 as a result of an employee contracting the disease at work. (See, e.g., *Kesner*, *supra*, 1 Cal.5th at pp. 1142–1143 [applying the factors from *Rowland v. Christian* (1968) 69 Cal.2d 108 to "determine whether an employer has a duty to members of an employee's household to prevent take-home asbestos exposure"].) That analysis would include an assessment of "public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief." (*Kesner*, at p. 1145.) We express no opinion on the question of duty apart from that it would appear worthy of exploration.

Finally, we emphasize that today's holding is based on our interpretation of the WCA and case law applying that statutory scheme. Our analysis of issues such as causation and derivative injuries is limited to that context, and is not intended to apply more generally to principles of civil litigation.

DISPOSITION

The petition is denied. Real parties in interest shall recover their costs with regard to this writ proceeding.

CERTIFIED FOR PUBLICATION.

BENDIX, Acting P. J.

We concur:

CHANEY, J.

CRANDALL, J.*

* Judge of the San Luis Obispo County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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December 23, 2021

Molly Dwyer
Clerk of the Court
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P. O. Box 193939
San Francisco, CA

Re: *Kuciemba, et al. v. Victory Woodworks, Inc.*
Case No. 21-15963
Response to Appellants' FRAP 28(j) Notice of Supplemental Authorities

Dear Clerk of the Court:

Appellee Victory Woodworks, Inc. responds to Appellants' letter of 12.21.21 as follows:

- Citation to the *See's Candies* decision within 30 days of issuance is premature pursuant to CRC 8.264(b). Within that time, the parties are permitted to file a petition for review or a request for de-publication to the California Supreme Court, either of which, if granted, could prevent the opinion from becoming final;

- As noted in our Answering Brief at page 42, only the decisions of a state's highest court bind the federal court in a diversity case on questions of applicable state law. Where the state's highest court has not decided an issue, the task of the federal courts is to predict how the state high court would resolve it;

- The Court of Appeal in *See's Candies* misinterpreted California Supreme Court precedent. It also ignored the Supreme Court's explicit instruction in *Snyder v. Michael's Stores* that the Court had no occasion in *Snyder* to rule on the correctness of its decision in *Salin v. Pacific Gas & Electric Co.* Instead, *See's Candies* states that *Snyder* questioned *Salin*'s validity, notwithstanding the fact that the same justices who decided *Snyder* cited favorably to *Salin* two years later in *Horwich v. Superior Court* to support the very proposition at issue in the *Kuciemba* action. See Answering Brief pages 21-23;

- The *See's Candies* court went to great lengths to point out that it was not ruling on the issues of plausibility or duty raised in the *Kuciemba* action because neither issue

was before it. Slip Op. at 34, 37. In fact, *See's Candies* noted the trial court erred in citing to *Kesner v. Superior Court* because the *Kesner* decision did not address the issue of workers' compensation exclusivity and had no bearing on the application of the derivative injury doctrine. Slip Op. at 14 n.4.

Respectfully submitted,

HINSHAW & CULBERTSON LLP

/s/ William A. Bogdan

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April 15, 2022

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P.O. Box 193939
San Francisco, CA 941119-3939

Re: *Kuciemba, et al. v. Victory Woodworks, Inc.* Case No. 21-15963
FRAP 28(j) Notice of Supplemental Authorities

Dear Clerk of the Court:

We represent Plaintiffs-Appellants. At oral argument, we informed the Court that the defendant in *See's Candies, Inc. v. Superior Court of California for the County of Los Angeles (Matilde Ek)* 73 Cal. App. 5th 66 had filed a petition for review with the California Supreme Court.

On April 13, 2022, the California Supreme Court denied See's Candies' petition for review. The California Supreme Court's decision is final. *Cal. Rules of Court* Rule 8.532(2)(A). Therefore, the decision of the Court of Appeal in *See's Candies* is final and binding. The holding and analysis of *See's Candies* is directly relevant and controlling law to the issues presented in this Appeal.

Very Truly Yours,

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/s/ Martin Zurada

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April 19, 2022

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San Francisco, CA

Re: *Kuciemba, et al. v. Victory Woodworks, Inc.*
Case No. 21-15963
Response to Appellants' FRAP 28(j) Notice of Supplemental Authorities

Dear Clerk of the Court:

Appellee Victory Woodworks, Inc. responds to Appellants' letter of 4.15.22 as follows:

Though the *See's Candies* decision may be final, that appellate decision is not controlling precisely because the California Supreme Court has refused to revisit its precedents as to how to analyze civil cases in light of the workers' compensation exclusive remedy. It is well established that when the California Supreme Court denies discretionary review, it is not expressing a view of the merits of the underlying decision. See, e.g., *Vergara v. State of California*, 246 Cal. App. 4th 619, 652 (2016) ("[A]n order denying review represents only a determination that, for whatever reason, a grant of review is not appropriate at the time of the order." (Cantil-Sakauye, C.J.)) Nor is such a denial "deemed a *sub silentio* overruling" of prior Supreme Court decisions. *People v. Triggs*, 8 Cal.3d 884, 890-891 (1973). By denying review in *See's Candies*, the California Supreme Court left undisturbed its precedents establishing that that the derivative injury rule bars Appellants' claim here.

This Court must rule consistent with prior direction set forth by the state's highest court. *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986), modified at 810 F.2d 1517 (9th Cir. 1987). Here, the analysis of *See's Candies* is inconsistent with the California Supreme Court's explicit instructions as to how a spouse's loss, arising solely from an employee's workplace injury, is evaluated in a civil case. The exclusive remedy "applies when the plaintiff, in order to state a cause of action, must allege injury to another person—the employee." *Snyder v. Michael's Stores, Inc*., 16 Cal.4th 991, 998 (1997).

The denial of review merely indicates that the California Supreme Court sees no reason to re-address its precedents on the derivative injury rule. As such, certification of that question here is unwarranted. However, if this Court chooses to certify, it should certify both the workers' compensation and employer-duty questions to ensure a thorough consideration of all legal arguments.

Respectfully submitted,

HINSHAW & CULBERTSON LLP

/s/ William A. Bogdan

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