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18 SUPERIOR COURT OF THE STATE OF CALIFORNIA
19 COUNTY OF ALAMEDA

20 YAMILETT OLIMARA OSOY HERNANDEZ,)
21 ANGELY RODRIGUEZ LAMBERT, MARIA)
22 OROZCO, MARCOS RICARDO GARCIA)
23 GIRON and EDGAR ESTEBAN SAZO OSOY,)
24 a minor, acting through his/her guardian ad)
25 litem, Yamilett Osoy,)

26 Plaintiffs,)

27 vs.)

28 VES McDONALD'S, a California corporation;)
MMSD MANAGEMENT, INC., a California)
corporation; VALERIE SMITH, a California)
resident; MICHAEL SMITH, a California)
resident; and DOES 1-100,)

Defendants.)

Case No.)
**PLAINTIFFS' MEMORANDUM OF)
POINTS AND AUTHORITIES IN)
SUPPORT OF *EX PARTE*)
APPLICATION FOR TEMPORARY)
RESTRAINING ORDER AND ORDER)
TO SHOW CAUSE)**

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1 **INTRODUCTION**

2 In the midst of the COVID-19 pandemic, Defendants have failed to take even the most
3 basic precautions to protect the employees at their McDonald’s-franchised store at 4514 Telegraph
4 Avenue from exposure to the virus. As a result, since mid-May 2020, eleven workers at that store,
5 including Plaintiffs Yamilett Osoy, Angely Lambert, and Maria Orozco, have become infected
6 with COVID-19. At least fourteen other COVID-19 cases, including workers’ family and
7 community members (including Plaintiff Edgar Osoy, a 10-month-old baby), can be traced directly
8 to that restaurant. Yet even as increasing numbers of Defendants’ employees became ill, and
9 despite the large number of positive COVID-19 test results reported to store management, until the
10 restaurant temporarily closed at the end of May Defendants continued to require its frontline
11 workers to work: while sick and while displaying and reporting obvious COVID-19 symptoms;
12 without adequate or sufficient personal protective gear; without social distancing; without adequate
13 cleaning or disinfection of the workplace during or between shifts; without information about the
14 availability of paid sick leave; and without timely notice when their co-workers were infected.

15 Plaintiffs seek a temporary restraining order and order to show cause requiring Defendants’
16 restaurant to remain closed unless and until Defendants comply with minimum COVID-19 health
17 and safety standards. Plaintiffs are likely to prevail on their public nuisance claim because
18 Defendants’ restaurant operations created or assisted in the creation of the spread and transmission
19 of a life-threatening disease and infection, a substantial and unreasonable interference with the
20 public health. *See* Cal. Civ. Code §§ 3479, 3480. Plaintiffs are also likely to prevail on their
21 Unfair Competition Law (UCL) claim, *see* Bus. & Prof. Code §§ 17200 et seq. because
22 Defendants’ actions are unfair and unlawful business practices that give Defendants a competitive
23 edge at the expense of their employees’ safety. And Plaintiffs are likely to prevail on their claims
24 under the City of Oakland’s paid sick leave laws (Oakland Municipal Code Ch. 5.92, 5.94) because
25 Defendants denied or interfered with workers’ lawful requests for sick leave in direct contravention
26 of those laws. Absent immediate injunctive relief, there will be serious irreparable physical and
27 emotional injury to Plaintiffs as COVID-19 continues to spread through their families and
28 communities. The Court should issue a temporary restraining order and order to show cause.

1 **FACTUAL BACKGROUND**

2 **1. COVID-19**

3 COVID-19 is a highly contagious respiratory disease that can cause fever, dry cough,
4 extreme fatigue, body aches, headache, sore throat, loss of taste and smell, and difficulty
5 breathing.¹ In the most severe cases, COVID-19 wreaks havoc on multiple organ systems. People
6 over 65, and with underlying medical conditions, are particularly vulnerable and have significantly
7 higher hospitalization and death rates due to the disease.² The virus is spread by interactions with
8 an infected person that allow the transmission by airborne particles or aerosolized droplets secreted
9 by talking, coughing and sneezing, and by contact with a contaminated surface.³ The infection risk
10 increases dramatically when individuals are in close physical proximity (e.g., within six feet of
11 each other), particularly indoors and for extended periods of time. COVID-19 can be spread by
12 individuals who show no symptoms or only mild symptoms. Doctors, scientists, and public health
13 experts worldwide agree that infection from COVID-19 can be minimized only by preventative
14 measures, primarily limiting close-proximity human contact, using personal protective equipment
15 (“PPE”) such as masks and gloves, and frequent handwashing and sanitization of physical objects.⁴

16 **2. Defendants Fail to Take Basic COVID-19 Safety Precautions**

17 Defendants are well aware of the risks of COVID-19, yet have failed to take even the most
18 basic precautions to protect their employees. Defendants have *required workers to work while sick*
19 and while displaying obvious COVID-19 symptoms and reporting those symptoms to managers.
20 Lambert Decl. ¶4; Martinez Decl. ¶4; Osoy Decl. ¶¶4-5. On Monday, May 18, 2020, for example,
21 Plaintiff Yamilett Osoy told her shift manager that she was having difficulty breathing, had a
22 headache and body aches, and felt like she was about to faint, and asked to leave work and go
23 home. Osoy Decl. ¶4. Her manager refused to let her leave unless she found someone to cover her

24 ¹ See CDC, “Symptoms of Coronavirus,” available at <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>

25 ² See CDC, “People Who are at Higher Risk for Severe Illness,” available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>

26 ³ See CDC, “How COVID-19 Spreads,” available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>

27 ⁴ See CDC, “How to Protect Yourself and Others,” available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>

1 shift, so she continued to work until a co-worker agreed to finish her shift. *Id.* ¶¶4-5. She
2 subsequently worked two full shifts while experiencing COVID-19 symptoms. *Id.* ¶6. On
3 Wednesday, May 20, Cindy Martinez experienced significant COVID-19 symptoms at work,
4 including a fever, headache, and severe body aches. Martinez Decl. ¶4. Before her shift, she
5 informed the store manager that she was sick, but the manager told her that she had to come to
6 work because no one was available to cover her shift. *Id.* On Saturday, May 23, Plaintiff Lambert
7 developed COVID-19 symptoms, including a strong headache and severe body aches, during her
8 work shift. Lambert Decl. ¶4. When she told her managers her symptoms and asked to leave work
9 to go home, the managers told her that she could not leave work until her shift was over. *Id.*

10 Defendants have also knowingly allowed and approved other workers to work while
11 symptomatic: employee Nancy Castillo worked on or about May 16 and 17, 2020 while having
12 symptoms consistent with COVID-19, and store manager Marisol Lopez worked while
13 symptomatic multiple days in May. Lambert Decl. ¶¶9, 21; Martinez Decl. ¶10; M. Orozco Decl.
14 ¶7; Osoy Decl. ¶13. Defendants' managers at the Telegraph Avenue McDonald's store often
15 pressure workers to work while they are sick. *See, e.g.,* Martinez Decl. ¶10.

16 Plaintiffs Yamilett Osoy and Lambert and Ms. Martinez, Ms. Lopez, and Ms. Castillo all
17 tested positive for COVID-19 shortly after the shifts during which they worked sick. Lambert
18 Decl. ¶¶3, 7; Martinez Decl. ¶¶6, 9; Osoy Decl. ¶3. The space in which these workers work is
19 small and enclosed, and these infected workers all worked in close contact with several other co-
20 workers, even when they were highly contagious. Lambert Decl. ¶¶9-11; Martinez ¶4; Osoy ¶17.
21 By denying those and other workers' valid requests for sick leave and by allowing (in fact,
22 requiring) those and other workers to work while sick, Defendants caused many other workers, as
23 well as those workers' family members, co-habitants, and fellow community members, to become
24 infected with COVID-19 as well. *See* Lambert Decl. ¶3; Osoy Decl. ¶8; M. Orozco Dec. ¶¶14-15.

25 Working conditions at Defendants' Telegraph Avenue store are insufficient to protect
26 workers and their families and community members from contagious co-workers. Defendants do
27 not require or enforce social distancing and have failed to implement a plan that permits employees
28 to remain at least six feet apart from one another in the small restaurant. Osoy Decl. ¶17; Lambert

1 Decl. ¶11; Martinez Decl. ¶14; Garcia Decl. ¶6; M. Orozco Decl. ¶10. Defendants do not provide
2 employees with sufficient and adequate PPE: Defendants initially told employees to wear doggie
3 diapers as face masks, and later required employees to wear masks designed for single use only for
4 multiple days, instructing employees to wash and reuse them until those masks fell apart and long
5 after they ceased to offer meaningful protection. Lambert Decl. ¶12; Martinez Decl. ¶11; Osoy
6 Decl. ¶15; Garcia Decl. ¶4; M. Orozco Decl. ¶11, E. Orozco Decl. ¶9. The gloves that Defendants
7 provide to workers are flimsy and tear frequently. Lambert Decl. ¶13; Martinez Decl. ¶13; Osoy
8 Decl. ¶16, M. Orozco Decl. ¶12; Garcia Decl. ¶4. Defendants do not enforce a regular or adequate
9 hand-washing regimen, and when the restaurant is busy there is no time for employees to wash or
10 sanitize. Lambert Decl. ¶15; Garcia Decl. ¶5; Osoy Decl. ¶16. Employees were not provided
11 cleaning protocols or instructions for cleaning during or between shifts, and commonly used
12 equipment and high-touch surfaces were not regularly and adequately sanitized and cleaned during
13 or between shifts. Lambert Decl. ¶17; Martinez Decl. ¶15; Garcia Decl. ¶8; M. Orozco Decl. ¶12;
14 Osoy Decl. ¶20.⁵ Defendants also failed to provide their employees with any information about the
15 availability of or any mechanism for requesting paid sick leave for COVID-19 symptoms and
16 positive tests. Lambert Decl. ¶21; Martinez Decl. ¶17; E. Orozco Decl. ¶4; Garcia Decl. ¶11;
17 Martinez Decl. ¶¶17, 18; M. Orozco Decl. ¶8.

18 Even when workers started testing positive for COVID-19, Defendants made no efforts to
19 stop the spread of the virus, but instead continued business operations as usual. Lambert Decl. ¶20;
20 Martinez Decl. ¶17; Garcia Decl. ¶14. Defendants knew on May 21, 2020 that an employee had
21 tested positive for COVID-19, yet waited *three days* to inform employees that one of their co-
22 workers had been infected. Martinez Decl. ¶¶5-6; Lambert Decl. ¶20. Then, as employees
23 continued to report positive COVID-19 test results over the next few days, Defendants took no
24 steps to close the store, to perform a deep cleaning of the store, to provide employees with
25 additional PPE or precautions to control the outbreak, or to provide employees with paid sick leave

26 ⁵ While Defendants purport to take employees' temperature before each shift, the
27 thermometer they use is faulty and inaccurate, and Defendants did not ask questions about
28 COVID-19 symptoms before their shifts. Lambert Decl. ¶¶18, 19; Martinez Decl. ¶16; E. Orozco
Decl. ¶9; Garcia Decl. ¶¶9, 10; M. Orozco Decl. ¶13; Osoy Decl. ¶18.

1 or with information about paid sick leave. Lambert Decl. ¶20; Martinez Decl. ¶17; Garcia Decl.
2 ¶14; Defendants did not instruct infected employees to quarantine, and did not conduct even the
3 most basic contact tracing to identify and/or instruct to quarantine co-workers who had been in
4 close contact with infected workers and who were therefore at heightened risk of contracting
5 COVID-19 and transmitting it to others. Lambert Decl. ¶20; Martinez Decl. ¶17; Osoy Decl. ¶11;
6 Garcia Decl. ¶14. The Telegraph restaurant has been closed since May 26, 2020 due to the lack of
7 healthy workers available to work. Lambert Decl. ¶28; E. Orozco Decl. ¶10; Osoy Decl. ¶14.

8 **3. COVID-19 Outbreak at Defendants' Restaurant and Community Spread**

9 Defendants' actions and policies have exposed their workers to COVID-19 and caused the
10 virus to spread throughout the workplace, other workplaces, and the homes and communities of
11 Plaintiffs and their co-workers and customers. The COVID-19 outbreak at Defendants' 4514
12 Telegraph Avenue restaurant has led to at least 25 cases of COVID-19. Since mid-May 2020, at
13 least 11 workers at the 4514 Telegraph Avenue restaurant, including Plaintiffs Yamilett Osoy,
14 Lambert, and Orozco, as well as at least six workers' family members (including Plaintiff Edgar
15 Osoy) and one community member, have tested positive for COVID-19. Lambert Decl. ¶3; Osoy
16 Decl. ¶8; M. Orozco Dec. ¶¶14-15. These workers were exposed to the virus, causing them to
17 contract COVID-19, at Defendants' Telegraph Avenue store: During the last two weeks of May,
18 these workers worked in close contact with co-workers who were symptomatic and/or who tested
19 positive for COVID-19 shortly thereafter. Lambert Decl. ¶¶4, 9, 10; Martinez Decl. ¶¶4, 9; E.
20 Orozco Decl. ¶¶6, 7; Garcia Decl. ¶12; M. Orozco Decl. ¶¶4, 7; Osoy Decl. ¶13. Infected workers,
21 in turn, have transmitted COVID-19 to their family members and members of their communities
22 with whom they physically interact. Lambert Decl. ¶3; Osoy Decl. ¶8; M. Orozco Dec. ¶¶14-15.
23 Due to the lack of PPE and social distancing among employees, customers who order food from
24 the restaurant also risk exposure. Orozco Decl. ¶12; Lambert Decl. ¶22.

25 Moreover, the outbreak at the Telegraph Avenue store is no longer limited to workers at
26 that store and their families. One of the managers and one of the workers at the Telegraph Avenue
27 restaurant who contracted COVID-19 also worked at the McDonald's restaurant at 1998 Shattuck
28 Avenue in Oakland. Lambert Decl. ¶4. An additional seven workers have now tested positive for

1 COVID-19 at that second restaurant. Rubin Decl. Ex. B.

2 Plaintiffs and their co-workers and family members who have contracted COVID-19 have
3 experienced severe, potentially life-threatening, and invariably terrifying symptoms. *See, e.g.*,
4 Martinez Decl. ¶¶5, 7 (worker with severe fever, cough, diarrhea, headaches, body ache, and
5 nausea for several days); Osoy Decl. ¶7 (10-month-old son with fever of 104 degrees Fahrenheit,
6 diarrhea, and convulsions for several days). Workers at the Telegraph Avenue store have suffered
7 and continue to suffer reasonable and justifiable fear and anxiety that the inadequate safety
8 precautions mean they are likely contract COVID-19 while working there. Lambert Decl. ¶25,
9 Martinez Decl. ¶19; M. Orozco Decl. ¶9. Workers are also very worried about the likelihood and
10 the consequences of spreading the virus to their loved ones and community members with whom
11 they necessarily interact, especially those with underlying medical conditions who are vulnerable
12 to the virus. Lambert Decl. ¶26; Martinez Decl. ¶19; Garcia Decl. ¶15; Osoy Decl. ¶¶7, 11.

13 **4. Defendants' Operations Violate Minimum COVID-19 Health and Safety Standards**

14 Defendants' operations at the Telegraph Avenue restaurant violate well-publicized and
15 established laws, regulatory requirements, medical wisdom, and best practices for containing the
16 spread of COVID-19. Since March 2020, several government agencies have issued orders and
17 guidance establishing the basic safety measures necessary to reduce the transmission of COVID-
18 19. On March 16, 2020, the Alameda County Public Health Department issued a shelter-in-place
19 order that requires all essential businesses (including restaurants), to the greatest extent possible, to
20 require all individuals to be separated by six feet; to enable and allow frequent handwashing; and to
21 regularly clean high-touch surfaces.⁶ The Alameda Public Health Department has also issued
22 isolation and quarantine orders and instructions, which require individuals to quarantine themselves
23 at home for 14 days if they have had close contact with anyone diagnosed with COVID-19.⁷

24 The Alameda Department of Public Health has issued updated and extended shelter-in-
25

26 ⁶ Available at <https://www.acgov.org/documents/Final-Order-to-Shelter-In-Place.pdf> (superseded
by June 5, 2020 order).

27 ⁷ See Alameda Quarantine Order, available at [http://acphd.org/media/564573/covid-19-quarantine-
28 order-english.pdf](http://acphd.org/media/564573/covid-19-quarantine-order-english.pdf) (issued April 3, 2020, amended May 4, 2020 and June 5, 2020). *See also*
<http://www.acphd.org/media/568835/covid-19-health-officer-order-packet-english.pdf>

1 place orders, including on March 31, April 29, May 18, and June 5, 2020 (collectively, “Alameda
2 Public Health Orders”). Until June 21, essential businesses are required to implement a “Social
3 Distancing Protocol” that, among other things, (1) requires face coverings of all individuals; (2)
4 ensures maintenance of a minimum six-foot distance between individuals at all times where
5 possible; (3) regularly disinfects high-touch surfaces; and (4) posts a sign prohibiting anyone from
6 entering the facility if they have COVID-19 symptoms. See May 18, 2020 Public Health Order.⁸

7 Effective June 22, 2020, essential businesses must implement a “Site-Specific Protection
8 Plan” that, among other things, (1) directs employees who are sick or symptomatic to remain home
9 and to self-quarantine; (2) provides and ensures employees are properly using face coverings at all
10 times; (3) requires employees to maintain six feet of distance between themselves and other
11 workers and customers; (4) thoroughly and regularly cleans and disinfects commonly used surfaces
12 and areas; (5) sanitizes shared equipment between uses; and (6) screens employees’ temperature or
13 symptoms before each shift. See June 5, 2020 Public Health Order.⁹

14 The Alameda Public Health Orders also require restaurants to follow the industry-specific
15 “Guidance for Food Facilities” issued by the Alameda County Department of Environmental
16 Health, which instructs restaurants to (1) perform daily checks of employees for illness and ensure
17 employees stay home when sick; (2) immediately send home employees who appear too ill to
18 work; (3) advise employees with fever or respiratory illness to remain home and not to return to
19 work until at least three days after recovery and seven days after the appearance of symptoms; (4)
20 require face coverings at all times; (5) require employees to keep a six-foot distance between
21 themselves and other workers; (6) inform the Department if an employee tests positive or presumed
22 positive; (7) ensure employees are permitted to wash their hands every 30 minutes and at additional
23 times; (8) increase frequency of cleaning and sanitizing per the Center for Disease Control’s (CDC)
24 Cleaning and Disinfection Guidance of all hard surfaces; (9) designate employees to clean and
25

26 ⁸ See <http://www.acphd.org/media/577582/alameda-county-health-officer-order-20-11-english.pdf>

27 ⁹ See <http://www.acphd.org/media/584322/alameda-county-health-officer-order-20-14-english.pdf>;
28 <http://www.acphd.org/media/584337/health-officer-order-20-14-appendix-a-protection-plan-guidance-and-template-english.pdf>.

1 disinfect all high-touch surfaces; and (10) follow certain cleaning and disinfecting practices.¹⁰

2 The CDC has similarly issued guidance for retail food establishments, recommending
3 several steps for protecting employee safety, including: (1) actively encouraging sick employees to
4 stay home; (2) requiring employees diagnosed with COVID-19 to stay home; (3) implementing
5 store policies to minimize contact with others; (4) implementing measures to maintain physical
6 distance between customers; (5) regularly cleaning and disinfecting frequently touched surfaces,
7 using disinfectant solutions, including in break rooms; (6) providing disposable disinfectant wipes,
8 cleaner, or spray to enable workers to wipe down frequently touched surfaces; (7) implementing
9 flexible sick leave policies and practices that do not require a positive COVID-19 test result or
10 doctor's note before an employee is allowed to qualify; and (8) providing information on whom to
11 contact if a worker become sick and what practices to implement.¹¹

12 **5. Municipal Sick Leave Requirements**

13 Under the City of Oakland's (Oakland) Emergency Paid Sick Leave Ordinance (OMC
14 Chpt. 5.94), effective May 12, 2020, Defendants are required to provide employees with two weeks
15 of Emergency Paid Sick Leave, which may be used by employees who are subject to a COVID-19-
16 related quarantine or isolation order, are diagnosed with or experiencing COVID-19 symptoms and
17 seeking a medical diagnosis, have been advised by a health care provider to quarantine, are of an
18 age or have a health condition that renders them especially vulnerable to COVID-19 complications,
19 or are caring for family members who are diagnosed with or experiencing COVID-19 symptoms or
20 at home due to school or childcare closure. OMC §5.94.030(B). Employers may not interfere with
21 this necessary and critical use of emergency sick leave. *Id.* § 5.94.080(A),(B). The City Council
22 adopted the emergency ordinance because providing paid sick leave is critical to ensuring that sick
23 workers are able to stay home, thereby reducing opportunities for transmission of the virus.¹²

24
25 ¹⁰ See CDC Retail Food Guidance, available at [https://deh.acgov.org/deh-](https://deh.acgov.org/deh-assets/docs/Guidance%20for%20Food%20Facility_4-22-2020.pdf)
[assets/docs/Guidance%20for%20Food%20Facility_4-22-2020.pdf](https://deh.acgov.org/deh-assets/docs/Guidance%20for%20Food%20Facility_4-22-2020.pdf)

26 ¹¹ Available at [https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/grocery-](https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/grocery-food-retail-workers.html)
[food-retail-workers.html](https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/grocery-food-retail-workers.html)

27 ¹² See City of Oakland May 12, 2020 Emergency Ordinance §2 ("Efforts to limit the spread of
28 COVID-19 are undermined if individuals unable to avail themselves of paid sick leave benefits must leave their residences to continue to receive income"), available at

1 Under Oakland’s preexisting Oakland Paid Sick Leave Ordinance (Chapter 5.92),
2 employees accrue sick leave as they work, and can use that sick leave when they are ill or injured;
3 when receiving medical care, treatment, or diagnosis; or to aid or care for ill or injured relatives.
4 OMC §§5 .92.030(A), (B)(1). Employees may not be required to find a replacement in order to
5 take sick leave. *Id.* § 5.92.030(B)(2).

6 ARGUMENT

7 In deciding whether to issue a temporary restraining order, “a court must weigh two
8 ‘interrelated’ factors: (1) the likelihood that the moving party will ultimately prevail on the merits
9 and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction.”
10 *Butt v. California*, 4 Cal.4th 668, 677-78 (1992). The court’s determination is thus “guided by a
11 ‘mix’ of the potential-merit and interim-harm factors; the greater the plaintiff’s showing on one,
12 the less must be shown on the other to support an injunction.” *Id.* at 678 (quotation omitted).

13 **I. Plaintiffs Are Likely to Succeed on the Merits of Their Claims**

14 **A. Defendants’ restaurant operations are a public nuisance**

15 Defendants’ manner of operating their restaurants constitutes a public nuisance because it
16 substantially and unreasonably interferes with the health and safety of the public by contributing to
17 and increasing the risk of community spread of the COVID-19 virus. A “nuisance” is “[a]nything
18 which is injurious to health, ... or is indecent or offensive to the senses ..., so as to interfere with the
19 comfortable enjoyment of life or property.” Cal. Civ. Code § 3479. A nuisance is “public” if it
20 “affects at the same time an entire community or neighborhood, or any considerable number of
21 persons.” *Id.* § 3480. “A public nuisance cause of action is established by proof that a defendant
22 knowingly created or assisted in the creation of a substantial and unreasonable interference with a
23 public right.” *People v. ConAgra Grocery Prod. Co.*, 17 Cal.App.5th 51, 79 (2017); *see also*
24 *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1103 (1997). A private party may bring an action
25 to abate a public nuisance if the nuisance is “specially injurious” to the plaintiff. *See* Cal. Civil
26 Code §3493; *see also id.* §§ 3491, 3495; C.C.P. § 731.

27 [https://www.oaklandca.gov/documents/emergency-paid-sick-leave-for-oakland-employees-during-](https://www.oaklandca.gov/documents/emergency-paid-sick-leave-for-oakland-employees-during-the-novel-coronavirus-covid-19-pandemic-ordinance)
28 [the-novel-coronavirus-covid-19-pandemic-ordinance](https://www.oaklandca.gov/documents/emergency-paid-sick-leave-for-oakland-employees-during-the-novel-coronavirus-covid-19-pandemic-ordinance)

1 Contributing to the spread or transmission of a disease, or the risk of the spread or
2 transmission of a disease, constitutes an actionable public nuisance. *See, e.g.*, Restatement
3 (Second) of Torts §821B & cmt. g (“[T]he threat of communication of smallpox to a single person
4 may be enough to constitute a public nuisance because of the possibility of an epidemic; and a fire
5 hazard to one adjoining landowner may be a public nuisance because of the danger of a
6 conflagration.”); *Birke v. Oakwood Worldwide*, 169 Cal.App.4th 1540, 1549 (2009) (public
7 nuisance where secondhand smoke in condominium complex increased tenants’ risk of heart and
8 lung disease); *County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal.App.4th 292, 306 (2006)
9 (public nuisance where defendants’ promotions increased spread of hazardous lead paint).

10 Here, Defendants’ improper conduct has created and assisted in the creation of the spread
11 and transmission of COVID-19 among Defendants’ employees, their families, and their
12 communities, and thus constitutes a public nuisance. Defendants’ operations—including denying
13 requests for sick leave and requiring and pressuring employees to work while displaying obvious
14 COVID-19 symptoms, failing to enable or allow social distancing, failing to provide adequate and
15 sufficient PPE, failing to regularly clean and disinfect commonly used equipment and surfaces,
16 failing to screen workers for COVID-19 symptoms, failing to enable or enforce frequent
17 handwashing, failing to timely notify exposed workers and provide them with paid time off to
18 quarantine, and failing to perform contact tracing, *see* Section 2, *supra*— violate well-established
19 minimum health and safety standards, including Alameda County orders and CDC guidelines,
20 designed to prevent the spread of COVID-19, *see* Section 4, *supra*.

21 The foreseeable result of Defendants’ failure to provide employees these basic COVID-19
22 health and safety precautions has been and will continue to be increased community exposure to
23 and transmission of the COVID-19 virus. *See* Section 3, *supra*. The increased infections and risk
24 of infection are not limited to Defendants’ restaurant, but rather tear through the workers’
25 communities, as workers infected with this highly contagious disease interact with their families,
26 roommates, neighbors, and others. *See id.* This substantial and unreasonable interference with
27 public health and safety is a quintessential public nuisance. *See* Restatement (Second) of Torts
28 §821B & cmt. g; *Birke*, 169 Cal.App.4th at 1549; *County of Santa Clara*, 137 Cal.App.4th at 306.

1 Plaintiffs have the requisite “special injury” to abate this public nuisance, due to the
2 infections Plaintiffs have suffered, the heightened risk of exposures they have faced, and the
3 increased anxiety and fear caused by their employment in hazardous workplace conditions and
4 their need to separate themselves from close family members to minimize the risk of further
5 community spread. *See* Section 3, *supra*. Those injuries are different from the types of harms
6 suffered by members of the general public who did not work or have direct contact with employees
7 who worked at the 4514 Telegraph Avenue restaurant where multiple employees contracted
8 COVID-19. Plaintiffs are thus highly likely to succeed on their public nuisance claim.

9 **B. Defendants’ restaurant operations violate the UCL**

10 The UCL prohibits unfair competition, defined as “any unlawful, unfair or fraudulent
11 business practice.” *Olszewski v. Scripps Health*, 30 Cal.4th 798, 827 (2003) (quotation omitted).
12 The UCL’s coverage is “sweeping” and extends to “anything that can properly be called a business
13 practice.” *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 181 (1999).
14 “A business practice is unlawful if it is forbidden by any law.” *Olszewski*, 30 Cal.4th at 827
15 (quotation omitted). A business practice is “unfair” if it, among other things, significantly
16 threatens or harms competition. *Cel-Tech Commc’ns*, 20 Cal.4th at 187.

17 Here, Defendants’ challenged operations are business practices because they have been
18 engaged in repeatedly over a significant period of time and in a systematic manner, to the detriment
19 of Plaintiffs and to Defendants’ economic benefit. Defendants’ operations that create and assist in
20 the creation of a public nuisance are “unlawful” for purposes of the UCL because they violate
21 California public nuisance law, *see* Section I.A, *supra*, and applicable state and local laws,
22 ordinances, and Alameda Public Health Orders. *See Saunders v. Superior Ct.*, 27 Cal.App.4th 832,
23 838-39 (1994) (“‘unlawful’ business practices ... are any practices forbidden by law, be it civil or
24 criminal, federal, state, or municipal, statutory, regulatory, or court-made”); Cal. Health & Safety
25 Code § 120295 (violations of local public health orders are misdemeanors).

26 For instance, Defendants’ failure to provide employees with sufficient and adequate masks,
27 to perform regular cleaning and disinfection of high-touch surfaces, and to enable and require
28 social distancing all violate the Alameda Public Health Orders, as well as those Orders’

1 Appendices and the Department of Environmental Health’s Guidance for Food Facilities, which
2 are incorporated by those Orders. *See, e.g.*, May 18, 2020 Public Health Order §§6, 15(h); June 5,
3 2020 Public Health Order §§6, 15(h); Guidance for Food Facilities at 1-3. Defendants’ practice of
4 requiring and pressuring workers to work while sick also violates the Alameda Public Health
5 Orders, as well as the Guidance for Food Facilities those Orders incorporate. *See, e.g.*, June 5,
6 2020 Public Health Order § 15(h); Guidance for Food Facilities at 3. And Defendants’ failure to
7 allow for frequent handwashing further violates the Guidance for Food Facilities. *See* Guidance
8 for Food Facilities at 4. Finally, Defendants’ refusals of employees’ sick leave requests constitute
9 unlawful business practices because they violate Oakland’s paid sick leave ordinances. *See* Section
10 I.C, *infra*.

11 Defendants’ violations of Alameda Public Health Orders and failure to provide employees
12 with basic COVID-19 sick leave precautions are also “unfair” for UCL purposes because they give
13 Defendants an unfair competitive advantage and additional profits over other restaurants that
14 adequately protect the health and safety of their employees, customers, and the public, and because
15 they offend public policies designed to prevent the spread of infectious disease. *See Cel-Tech*
16 *Commc’ns*, 20 Cal.4th at 187; *Candelore v. Tinder, Inc.*, 19 Cal.App.5th 1138, 1155-56 (2018)
17 (“an ‘unfair’ business practice occurs when that practice offends an established public policy or
18 when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to
19 consumers.”). Plaintiffs are thus highly likely to succeed on their UCL claim.¹³

20 **C. Defendants violated Oakland’s paid sick leave ordinances**

21 Defendants’ refusals to grant employees’ requests for sick leave and conditioning the use of
22 sick leave on finding a replacement worker, *see* Section 2, *supra*, violate Oakland’s Emergency
23 Sick Leave Ordinance, OMC § 5.94.080(A),(B) (employers may not interfere with employees’ use
24

25 ¹³ Plaintiffs have standing to bring a UCL claim because they have “suffered injury in fact and ...
26 lost money or property as a result of” Defendants’ unfair and unlawful business practices. Bus. &
27 Prof. Code §17204. Plaintiffs’ economic injuries include medical expenses, Osoy Decl. ¶10;
28 expenditures for PPE because Defendants did not provide sufficient masks and gloves, Garcia
Decl. ¶4; additional rent in order to quarantine away from family members, Lambert Decl. ¶26; and
lost wages due to days of work lost due to exposure to COVID-19 and due to Defendants’ closure
of the restaurant to deal with the COVID-19 outbreak, *id.* ¶28.

1 of emergency sick leave), and Oakland’s Paid Sick Leave Ordinance, OMC § 5.92.030.B.2
2 (employers may not condition paid sick leave on finding a replacement worker). Plaintiffs have
3 brought claims pursuant to both ordinances and are likely to succeed on those claims as well.

4 **II. The Balance of Harms Tips Strongly in Favor of Plaintiffs**

5 Given the strong likelihood of success on the merits, Plaintiffs need only demonstrate that a
6 denial of injunctive relief will result in a greater interim harm to Plaintiffs than to Defendants. *See*
7 *Butt*, 4 Cal.4th at 693-94. “[T]he trial court must determine which party is the more likely to be
8 injured by the exercise of its discretion and it must then be exercised in favor of that party.”
9 *Family Record Plan, Inc. v. Mitchell*, 172 Cal.App.2d 235, 242 (1959) (citation omitted).

10 Plaintiffs seek a temporary restraining order preventing Defendants from resuming
11 operations in the Telegraph Restaurant in such a manner that causes the continued spread of
12 COVID-19. Specifically, Plaintiffs request an order enjoining Defendants from re-opening their
13 restaurant unless they comply with minimum health and safety standards, such that Defendants do
14 not re-open unless and until they:

- 15 1. Desist from refusing their employees’ lawful sick leave requests and from discouraging
16 employees from taking sick leave that Defendants are legally obligated to provide;
- 17 2. Require, enforce, and instruct managers and employees that all employees must stay home
18 and not work when they are experiencing COVID-19 symptoms, are awaiting COVID-19
19 test results, have tested positive for COVID-19, or have come in close contact with another
20 person or persons who have tested positive for COVID-19;
- 21 3. Train all employees and managers on the availability of paid sick leave due to COVID-19
22 under applicable law, and pay employees sick pay for self-quarantining in accordance with
23 such law;
- 24 4. Perform a deep cleaning by professional cleaners of the restaurant, and regularly perform
25 adequate deep cleaning and sanitization of the restaurant’s facilities and equipment going
26 forward;
- 27 5. Make possible and enforce reasonably safe physical distancing of at least six feet between
28 workers in work areas;

- 1 6. Provide adequate and sufficient masks and gloves to employees;
- 2 7. Provide wellness checks and accurate temperature testing of all employees
- 3 8. Provide and enforce paid breaks every 30 minutes to enable handwashing and other
- 4 sanitization procedures by employees;
- 5 9. Develop a protocol for, instruct managers and employees on, and regularly conduct
- 6 sufficient and proper cleaning and disinfection of equipment, workstations, and other
- 7 physical spaces between and during shifts;
- 8 10. Conduct contact tracing of all persons known or suspected to have been infected with the
- 9 COVID-19 virus while physically present at the restaurant, including employees;
- 10 11. If an employee tests positive, identify all co-workers who worked in close contact with the
- 11 employee and are thus required to quarantine by the Alameda Public Health Quarantine
- 12 Order, and provide them paid sick leave for the duration of the required quarantine.

13 Plaintiffs face a significant risk of irreparable harm if this relief is not provided.

14 If Defendants resume operations without adequate COVID-19 protections, Plaintiffs risk
15 physical and emotional injuries from the continued spread of the virus, due to workplace
16 exposure, throughout their families and communities, some members of which face special
17 vulnerability because of their medical preconditions. Due to the highly contagious nature of the
18 virus, *see* Section 1, *supra*, this relief is necessary pending a determination of a preliminary
19 injunction—as the repeated outbreaks have made clear. *See* Section 4, *supra* (at least 25
20 individuals infected from Telegraph Avenue restaurant outbreak since mid-May). In particular,
21 ensuring employees remain home during the quarantine/isolation period required by law and/or
22 recommended by a health care provider is necessary to ensure that the outbreak is contained.
23 Preliminary relief requiring Defendants to comply with the Oakland paid sick leave ordinances is
24 also necessary. Defendants’ violations are not compensable by monetary damages after the fact
25 because if workers are not provided sick leave at the time they are sick, they may not be able to
26 afford to stay home and so will work while they are sick. *See, e.g.*, Lambert Decl. ¶25.

27 In contrast to the continued spread of the dangerous COVID-19 virus, any harm to
28 Defendants resulting from imposition of the required TRO would be minimal at most. The relief

1 Plaintiffs seek is consistent with, and in some cases required by, public health orders and guidance
2 that Defendants should already be following, and thus Defendants cannot complain about the costs
3 of compliance. Defendants need not face any lost business from the temporary restraining order,
4 because they are free to re-open as long as they meet the minimum health and safety standards in
5 the order. And complying with their health and safety obligations will not prevent Defendants
6 from re-opening—many other restaurants and business are operating successfully in compliance
7 with those standards. The balance of harms thus weight decidedly in Plaintiff’s favor. *See White v.*
8 *Davis*, 30 Cal.4th 528, 554 (2003) (“The ultimate goal ... in deciding whether a preliminary
9 injunction should issue is to minimize the harm which an erroneous interim decision may cause.”).

10 Plaintiffs’ requested relief is entirely proper. Public nuisances are abated by “an injunction
11 proper and suitable to the facts of each case,” and the trial court has “broad discretion” to issue
12 preliminary or permanent injunctive relief based on “the particular circumstances of each individual
13 case.” *ConAgra Grocery Prod. Co.*, 17 Cal.App.5th at 132, 134. Injunctive relief is also available
14 under the UCL, Bus. & Prof. Code §17203, and Oakland’s sick leave ordinances, OMC
15 §§5.92.050(G)(3), 5.94.100(A). To the extent Defendants’ restaurant is currently closed, the
16 temporary restraining order will simply maintain the status quo. To the extent Defendants’
17 restaurant is open, preliminary relief that mandates an affirmative act is appropriate in “extreme
18 cases where the right thereto is clearly established.” *Integrated Dynamic Solutions, Inc. v. VitaVet*
19 *Labs, Inc.*, 6 Cal.App.5th 1178, 1184-85 (2016). There can be no dispute that Plaintiffs’ right to
20 basic protections against the spread of a dangerous, communicable disease in their workplace and
21 communities is clearly established. *See* Section I.A, *supra*.

22 CONCLUSION

23 For the foregoing reasons, the Court should enter Plaintiffs’ requested temporary restraining
24 order and order to show cause.

25 Dated: June 16, 2020

Respectfully submitted,

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28 By: 
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