IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FERDINAND BENJAMIN, Individually and as the Personal Representative of the **ESTATE OF ENOCK BENJAMIN**, deceased, *Plaintiff*,	:	**CIVIL ACTION**
v.	:	
	:	**No. 2:20-cv-2594-JP**
JBS S.A., **JBS USA FOOD COMPANY**, **JBS USA HOLDINGS, INC.**, **JBS SOUDERTON, INC.**, and **PILGRIM'S PRIDE CORPORATION**, *Defendants.*	:	

ORDER

AND NOW, this _____ day of _____, 2020, upon consideration of the Motion to Dismiss filed by defendants, JBS USA Food Company, JBS USA Holdings, Inc., JBS Souderton, Inc., and Pilgrim's Pride Corporation ("Moving Defendants") Motion to Remand (Docket No. 15), and upon consideration of Plaintiff's Response in Opposition and accompanying Memorandum of Law, and Plaintiff's Motion to Remand (Docket No. 17), and all documents and arguments filed in connection therewith, **IT IS HEREBY ORDERED** that Moving Defendants' Motion to Dismiss is **DENIED** as **MOOT**.

BY THE COURT:

_____
John R. Padova, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FERDINAND BENJAMIN, Individually and as the Personal Representative of the **ESTATE OF ENOCK BENJAMIN**, deceased, *Plaintiff*,	:	**CIVIL ACTION**
v.	:	
	:	**No. 2:20-cv-2594-JP**
JBS S.A., **JBS USA FOOD COMPANY**, **JBS USA HOLDINGS, INC.**, **JBS SOUDERTON, INC.**, and **PILGRIM'S PRIDE CORPORATION**, *Defendants.*	:	

ALTERNATIVE ORDER

AND NOW, this _____ day of _____, 2020, upon consideration of the Motion to Dismiss filed by defendants, JBS USA Food Company, JBS USA Holdings, Inc., JBS Souderton, Inc., and Pilgrim's Pride Corporation ("Moving Defendants") Motion to Remand (Docket No. 15), and upon consideration of Plaintiff's Response in Opposition and accompanying Memorandum of Law, and Plaintiff's Motion to Remand (Docket No. 17), and all documents and arguments filed in connection therewith, **IT IS HEREBY ORDERED** as follows:

1. Moving Defendants' Motion to Dismiss is **DENIED**.

2. Moving Defendants must Answer the Complaint within ten (10) days.

BY THE COURT:

_____
John R. Padova, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FERDINAND BENJAMIN, Individually and as the Personal Representative of the **ESTATE OF ENOCK BENJAMIN**, deceased,	:	**CIVIL ACTION**
Plaintiff,	:	
v.	:	
	:	**No. 2:20-cv-2594-JP**
JBS S.A., **JBS USA FOOD COMPANY**, **JBS USA HOLDINGS, INC.**, **JBS SOUDERTON, INC.**, and **PILGRIM'S PRIDE CORPORATION**,	:	
Defendants.	:	

PLAINTIFF'S RESPONSE IN OPPOSITION TO THE MOTION TO DISMISS FILED BY DEFENDANTS, JBS USA FOOD COMPANY, JBS USA HOLDINGS, INC., PILGRIM'S PRIDE CORPORATION, and JBS SOUDERTON, INC.

For the reasons more fully described in the accompanying Memorandum of Law, which is hereby incorporated by reference herein, Plaintiff, Ferdinand Benjamin, individually and as Personal Representative for the Estate of Enock Benjamin, hereby files his Response in Opposition to the Motion to Dismiss filed by defendants, JBS USA Food Company, JBS USA Holdings, Inc., Pilgrim's Pride Corporation, and JBS Souderton, Inc.[1]

[1] As set forth in Plaintiff's Motion to Remand (Docket No. 17), it is hereby requested that the removal motion be ruled upon prior to this Court reviewing the instant motion. See, e.g., Ahern v. BJ's Wholesale Club, 2020 WL 1308216 at *3 (E.D.P.A. March 18, 2020) (Goldberg, J.) (citing 5B Wright and A. Miler, Federal Practice and Procedure § 1350, n.39 (2009)) ("While Defendants' argument may be appropriate for a Rule 12(b)(6) motion to dismiss analysis, that issue cannot be considered until I determine whether I have subject-matter jurisdiction over this case. In order to discern whether jurisdiction exists, I must consider whether Defendants have met their more difficult burden of not just proving that the claim against Breslin are implausible under a 12(b)(6) standard, but that the claims are not 'colorable' such that Breslin was 'fraudulently joined' as a defendant. Only if Defendants prove fraudulent joinder may I disregard Breslin's citizenship and exercise diversity jurisdiction over this case.")

WHEREFORE, Plaintiff respectfully requests that this Honorable Court enter the attached order denying the Motion to Dismiss filed by defendants, JBS USA Food Company, JBS USA Holdings, Inc., JBS Souderton, Inc., and Pilgrim's Pride Corporation.

Respectfully submitted,

BY: ***/s/ rjm9362***

ROBERT J. MONGELUZZI; ID No. 36283
STEVEN G. WIGRIZER, ID No. 30369
JEFFREY P. GOODMAN; ID No. 309433
JASON S. WEISS; ID No. 310446

SALTZ MONGELUZZI & BENDESKY P.C.
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Attorneys for Plaintiff, Ferdinand Benjamin, individually and as the Personal Representative of The Estate of Enock Benjamin, deceased

dated: July 7, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FERDINAND BENJAMIN, Individually and as the Personal Representative of the **ESTATE OF ENOCK BENJAMIN**, deceased,	:	**CIVIL ACTION**
Plaintiff,	:	
v.	:	
	:	**No. 2:20-cv-2594-JP**
JBS S.A., **JBS USA FOOD COMPANY**, **JBS USA HOLDINGS, INC.**, **JBS SOUDERTON, INC.**, and **PILGRIM'S PRIDE CORPORATION**,	:	
Defendants.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S RESPONSE IN OPPOSITION TO THE MOTION TO DISMISS FILED BY DEFENDANTS, JBS USA FOOD COMPANY, JBS USA HOLDINGS, INC., PILGRIM'S PRIDE CORPORATION, and JBS SOUDERTON, INC.

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Attorneys for Plaintiff, Ferdinand Benjamin, individually and as the Personal Representative of The Estate of Enock Benjamin, deceased

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I. INTRODUCTION

It is respectfully suggested that this motion should not be considered until after the Court decides Plaintiff's Motion to Remand to the Common Pleas Court of Philadelphia County. (Doc. No. 17.)[1] For the reasons stated in Plaintiff's Motion to Remand, the law and facts are clear that this case should be remanded to the Philadelphia County Court of Common Pleas. Thus, any consideration of the merits of the pending Motion to Dismiss by this Court would be improper.

It is clear that Plaintiffs Motion to Remand should be granted for several reasons: (1) JBS is unable to establish diversity jurisdiction because Plaintiff and JBS Souderton, Inc. are both Pennsylvania residents; (2) There was no fraudulent joinder because based upon JBS's *own public filings* there exists a genuine issue of fact as to which entity was Mr. Benjamin's employer; and (3) there are no federal questions presented by Plaintiff's Complaint. (See Doc. No. 17.) Once the Court analyzes those issues, it is submitted that this Court will determine that Defendants' desperate Notice of Removal was blatant forum shopping and this case must be remanded. (See Doc No. 1.)

Accordingly, this Court should deny this motion as moot.

However, in the event the Court feels compelled to conduct further analysis, this motion must still be denied. Each of JBS' many arguments is utterly without merit. As a result, the instant Motion to Dismiss filed by JBS USA Food Company, JBS USA Holdings, Inc., Pilgrim's Pride Corporation, and JBS Souderton, Inc. (hereinafter collectively as the "JBS Defendants" or "JBS") must be denied.

---

[1] See, e.g., Ahern v. BJ's Wholesale Club, 2020 WL 1308216 at *3 (E.D.Pa. March 18, 2020) (Goldberg, J.) (citing 5B Wright and A. Miler, Federal Practice and Procedure § 1350, n.39 (2009)) ("While Defendants' argument may be appropriate for a Rule 12(b)(6) motion to dismiss analysis, that issue cannot be considered until I determine whether I have subject-matter jurisdiction over this case. In order to discern whether jurisdiction exists, I must consider whether Defendants have met their more difficult burden of not just proving that the claim against Breslin are implausible under a 12(b)(6) standard, but that the claims are not 'colorable' such that Breslin was 'fraudulently joined' as a defendant. Only if Defendants prove fraudulent joinder may I disregard Breslin's citizenship and exercise diversity jurisdiction over this case.")

The JBS Defendants have submitted seven (7) separate arguments for dismissal with flawed rationale accompanying each. In some instances, JBS's arguments are so inherently problematic that they mandate dismissal of this motion on their own.

For example, a self-inflicted problem arises in the context of JBS's arguments for dismissal under Fed. R. Civ. P. 12(b)(6). Specifically, there are *obvious* disputed facts related to Mr. Benjamin's "employer" and the Pennsylvania Workers' Compensation Act.

The fundamental argument underlying Defendants' efforts at dismissal (as well as their Notice of Removal) is their claim that JBS Souderton, Inc. is Plaintiffs employer and thus immune by the immunity provisions of the Workers Compensation Act. Defendants again ignore, that just a few months ago, they said the exact opposite in their filing to the Pennsylvania Department of Labor and Industry when they claimed that co-defendant JBS USA Holdings, Inc. was the employer. (See Doc. No. 17 at Ex. A, Ex. B., Ex. C, Ex. D.) Although JBS filed an amended document naming JBS Souderton, Inc., as the employer *after filing this motion*, that only highlights the fact that this is a disputed issue of material fact improper to be decided at this preliminary stage.

That problem is only magnified because JBS continues to claim that JBS USA Holdings, Inc. ceased to exist five (5) years ago. However, as set forth herein, someone forgot to tell the federal government (the FDA served a warning letter on JBS USA Holdings, Inc. for its conduct *at the Souderton plant* in 2019) and JBS's CEO (Andre Nogueira was interviewed in May 2020 by the Wall Street Journal *as the CEO of JBS USA Holdings, Inc.*). Moreover, after Mr. Benjamin's death, JBS filed their above-mentioned notice to the Department of Labor which said that JBS USA Holdings, Inc. was active and in fact the employer of Plaintiff's decedent.

While the failure to state a claim arguments must be denied because there are disputed issues of material fact, the arguments related to personal jurisdiction suffer from an utter lack of evidence. For example, JBS claims this Court cannot assert personal jurisdiction over Pilgrim's Pride Corporation – an entity *which is registered to do business in Pennsylvania.*

Plaintiff's Complaint contains one hundred and ninety-five (195) meticulously crafted paragraphs over the course of thirty-two (32) pages which provide clear notice of the basis for Plaintiff's state-law tort claims. Contentions to the contrary are almost as frivolous as claiming that this Court should invoke the *rarely* used primary jurisdiction doctrine to transfer this wrongful death and survival action to OSHA, a step never taken before by any Court in Pennsylvania.

For these reasons, and all that follow, JBS's Motion to Dismiss must be denied.

II. COUNTERSTATEMENT OF RELEVANT FACTS

At all relevant times prior to his death, Enock Benjamin was a resident of Philadelphia. (See *Plaintiff's Complaint*, attached to Doc. No. 17 as "Ex. E" at ¶ 113.) Mr. Benjamin worked as a union steward for UFCW Local 1776 of Philadelphia at the JBS beef production plant in Souderton, PA. (Id. at ¶ 3.) JBS, a multinational corporation, is the world's largest meat processor. (Id. at ¶ 41.) The Souderton, PA location has approximately 1,400 employees. (Id. at ¶ 49.)

On January 21, 2020, the United States reported its first case of the novel coronavirus. (Id. at ¶ 18.) Nine days later, the United States reported its first case of COVID-19 acquired via "community spread" which means "that people have been infected with the virus in an area, including some who are not sure how or where they became infected." (Id. at ¶¶ 20-21.)

On January 31, 2020, the World Health Organization declared COVID-19 a "public health emergency of international concern." (Id. at ¶ 22.)

On March 9, 2020, OSHA and the CDC published federal guidance for workplace safety during the pandemic which, as is *commonly known*, recommended distancing of workers at least six (6) feet and the use of Personal Protective Equipment ("PPE") for workers. (Id. at ¶¶ 23-25; 58.) By this time, the virus was already present at the Souderton plant. (Id. at ¶ 57.)

However, throughout the entire month of March, the JBS Defendants failed to enforce safe distancing or provide masks to workers at the Souderton plant. (Id. at ¶¶ 26-27.) Beef production plants are "notoriously dangerous" work environments that present unique safety issues because of the proximity within which employees work ("elbow-to-elbow") using cutting tools in a challenging environment. (Id. at ¶¶ 28-29.)

Instead of making the safety of their workers paramount, the culture at the Souderton plant resulted in workers coming to work sick in March of 2020 for fear of losing their job if they missed multiple days of work. (Id. at ¶ 56.) Instead of acknowledging the danger posed by COVID-19 to the workers in the Souderton plant, the JBS Defendants informed the workers that individuals were out with the flu – not COVID-19. (Id. at ¶ 61.) In fact, despite learning of the first positive test at the facility in early March 2020, the JBS Defendants failed to change its policies and procedures that month. (Id. at ¶ 62.)

To the contrary, due to increased business demands in March 2020, a "Saturday Kill" was added at the Souderton plan to meet increased business opportunity. (Id. at ¶ 63.) JBS has a "work while sick" policy and did not even require workers experiencing COVID-19 symptoms to report their illness to their superiors. (Id. at ¶¶ 79-80.) Workers at the Souderton plant were outspoken about the lack of safety equipment provided, complained about the lack of masks, and

were worried about bringing COVID-19 home to their families. (Id. at ¶¶ 73-75.) By the end of March 2020, panic was setting in with the workers of the Souderton plant. (Id. at ¶ 67.)

On March 27, 2020, Enock Benjamin left the Souderton plant after experiencing COVID-19 symptoms. (Id. at ¶ 93.) As of this date, workers at the Souderton plant were still ***required*** to work within 6 feet of one another, workers were not provided PPE materials, and workers were not required to wear masks. (Id. at ¶¶ 89-91.) By this date a number of Mr. Benjamin's co-workers had already become infected. (Id. at ¶ 92.)

On March 30, 2020, JBS USA stated publicly that it was "temporarily" reducing production at the Souderton plant after several senior management team members displayed flu-like symptoms: "The JBS Souderton, Pa., beef production facility has temporarily reduced production because several senior management team members have displayed flu-like symptoms." (Id. at ¶ 70.)

By April 2, 2020, there were *at least* nineteen (19) workers who tested positive at the Souderton plant. (Id. at ¶ 76.) Based upon JBS's public statements, this represented a 400% of increase of positive test results in only two (2) days following the plant's shutdown. (Id. at ¶ 71.) The true numbers of workers at Souderton that were infected with COVID-19 is unknown because JBS – to this day – (a) does not test workers; and (b) does not publicly release statistics of positive tests. (Id. at ¶¶ 104-110.)

On April 3, 2020, Enock Benjamin died of respiratory failure caused by the pandemic virus, COVID-19. (Id. at ¶ 2.) Mr. Benjamin's death was predictable and preventable, but instead the JBS Defendants' actions demonstrated a knowing and intentional mindset to sacrifice the health of Mr. Benjamin and others in the name of profit. (Id. at ¶ 103.)

On May 7, 2020, this wrongful death and survival action was initiated in the Common Pleas Court of Philadelphia County. Plaintiff sued several entities in JBS's corporate hierarchy involved in the operation of the Souderton Plant, including: JBS S.A., JBS USA Food Company, JBS USA Holdings, Inc., Pilgrim Pride Corporation, and JBS Souderton, Inc. (Id. at ¶¶ 114-141; 148-153.)

Plaintiff's wrongful death and survival action asserts causes of action sounding in intentional torts and negligence against the JBS Defendants. (Id. at ¶¶ 147-156; 157-167; 168-186.) This intention is made clear in Plaintiff's Introduction:

> 6. Enock Benjamin's death was the predictable and preventable result of the JBS Defendants' decisions to ignore worker safety.
>
> 7. The JBS Defendants ignored federal guidance and put plant workers in the crosshairs of a global pandemic.
>
> 8. Despite the known risks regarding COVID-19, prior to shutting down the plant on March 30, 2020, the JBS Defendants: (1) failed to provide sufficient personal protective equipment; (2) forced workers to work in close proximity; (3) forced workers to use cramped and crowded work areas, break areas, restrooms, and hallways; (4) discouraged workers from taking sick leave in a manner that had sick workers in fear of losing their jobs; and (5) failed to properly provide testing and monitoring for individuals who have may have been exposed to the virus that causes COVID-19.

9. Instead, at the Souderton facility where Mr. Benjamin worked, JBS increased production during March 2020, adding a "Saturday Kill" to capitalize on increased demand caused by public panic purchases of ground meat.

10. During this critical timeframe in March 2020, Mr. Benjamin contracted COVID-19 while working at JBS Souderton because the JBS Defendants inexplicably failed to take proper safety precautions to protect workers.

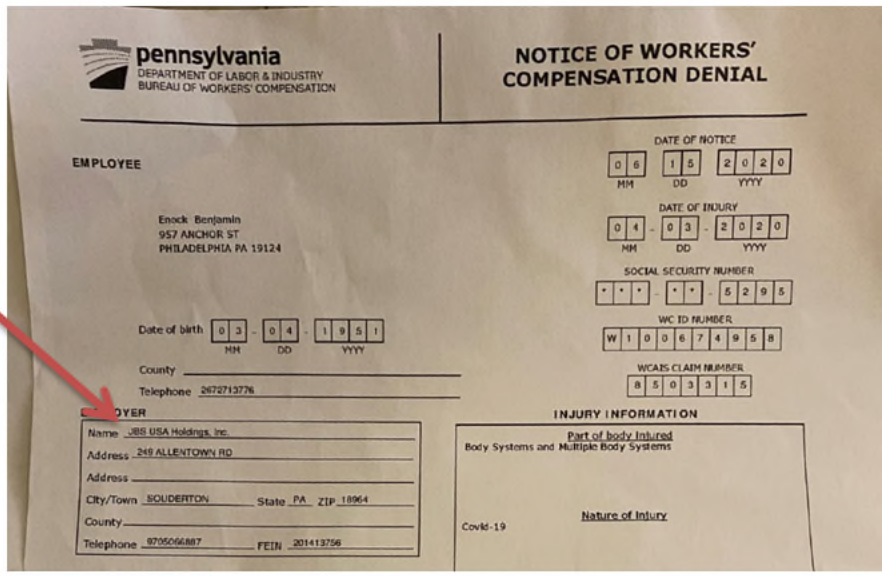
11. By keeping the Souderton plant open without providing the proper and recommended safety precautions, JBS intentionally misrepresented the safety of the facility.

12. By choosing profits over safety, JBS demonstrated a reckless disregard to the rights and safety of others, including Enock Benjamin.

(Id. at ¶¶ 6-12.)

On June 2, 2020, defendant, JBS USA Food Company filed a Notice of Removal, and removed this action from the Court of Common Pleas of Philadelphia County to this Court. (Doc. No. 1.)

On June 15, 2020, the JBS Defendants sent the family of Enock Benjamin a Notice of Workers' Compensation Denial. (Ex. A.) That document clearly lists Mr. Benjamin's employer as defendant, JBS USA Holdings, Inc.:



pennsylvania
DEPARTMENT OF LABOR & INDUSTRY
BUREAU OF WORKERS' COMPENSATION

NOTICE OF WORKERS' COMPENSATION DENIAL

EMPLOYEE

Enock Benjamin
957 ANCHOR ST
PHILADELPHIA PA 19124

Date of birth 03 - 04 - 1951 (MM DD YYYY)
County
Telephone 2672713776

DATE OF NOTICE 06 15 2020 (MM DD YYYY)
DATE OF INJURY 04 - 03 - 2020 (MM DD YYYY)
SOCIAL SECURITY NUMBER ***-**-5295
WC ID NUMBER W100674958
WCAIS CLAIM NUMBER 8503315

EMPLOYER
Name JBS USA Holdings, Inc.
Address 249 ALLENTOWN RD
Address
City/Town SOUDERTON State PA ZIP 18964
County
Telephone 8705066887 FEIN 201413756

INJURY INFORMATION
Part of body injured
Body Systems and Multiple Body Systems
Nature of Injury
Covid-19

(Ex. A.)

On June 16, 2020, the JBS Defendants filed the instant Motion to Dismiss Plaintiff's Complaint in its' entirety. (Doc. No. 15.)

On June 29, 2020, Plaintiff filed a Motion to Remand this matter back to the Common Pleas of Court of Philadelphia County. (Doc. No. 17.)

IV. LEGAL ARGUMENT

A. This motion must be denied because Plaintiff's Complaint sets forth a prima facie case of negligence, intentional misrepresentation, and fraudulent misrepresentation against the JBS Defendants.

1. Legal Standard for Fed. R. Civ. P. 12(b)(6).

Upon consideration of a defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), this Court should "consider ***only*** the complaint, exhibits attached to the complaint, [and] matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." Mayer v. Belichick, 605 F.3d, 223, 230 (3d Cir. 2010) (citing Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993) (emphasis added)).

All reasonable allegations should be drawn in favor of the plaintiff and the factual allegations contained within the complaint should be accepted as true. Del Rio-Mocci v. Connolly Props., Inc., 672 F.3d 241, 245 (3d Cir. 2012) (citing Warren Gen. Hosp. v. Amgen, Inc., 643 F.3d 77, 84 (3d Cir. 2011)).

Pursuant to Fed. R. Civ. P. 8(a)(2), a plaintiff's pleading obligation is to set forth a short and plain statement of the claim which provides the defendant "fair notice" of what the "claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations omitted). A plaintiff's complaint must set forth "sufficient factual matter to show the claim is facially plausible" so that the district court may draw a "reasonable inference"

that the defendant will be found liable for the conduct alleged. Warren Gen Hosp., 643 F.3d at 84 (quoting Fowler v. UPMC Shadyside, 578 F.3d 203, 2010 (3d Cir. 2009).

2. JBS cannot establish that JBS Souderton, Inc. is entitled to immunity under Pennsylvania's Workers Compensation Act.

The JBS Defendants *again* claim that JBS Souderton, Inc. is entitled to immunity from Plaintiff's claims pursuant to the immunity created by Pennsylvania's Workers Compensation Act. However, as explained previously in Plaintiff's Motion to Remand (Doc. No. 17), this argument must fail based upon JBS's own government filings.

Where a motion to dismiss under Rule 12(b)(6) is based on an affirmative defense, the "defendant must show that 'the defense is apparent on the face of the complaint and documents relied on in the complaint.'" Lupian v. Joseph Cory Holdings, LLC, 905 F.3d 127, 130 (3d Cir. 2018) (quoting Bohus v. Restaurant.Com, Inc., 784 F.3d 918, 923 n.2 (3d Cir. 2015)). This is because a plaintiff "***is not required to negate an affirmative defense in its complaint***." Arrington v. Terrace, 2016 WL 589925, at *5 (E.D. Pa. Oct. 7, 2016)(emphasis added).

Therefore, "dismissal is appropriate under Rule 12(b)(6) only when [the affirmative defense] is manifest in the complaint itself.'" Lupian, 905 F.3d at 130-131 (quoting In re Asbestos Prods. Liab. Litig. (No. VI), 822 F.3d 125, 133 n.6 (3d Cir. 2016)).

Here, the affirmative defense of the exclusivity provision was asserted *only on behalf of JBS Souderton, Inc*. This is ironic (and convenient for removal) because, prior to the filing of this motion, the JBS Defendants' submitted filings to the Pennsylvania Workers' Compensation Board that listed JBS USA Holdings, Inc. as the employer of workers at the Souderton facility, including Enock Benjamin. (See Doc. No. 17 at Ex. A; Ex. B; Ex. C; Ex. D.)

The exclusivity provision of the Pennsylvania Workers' Compensation Act, 77 P.S. § 481, provides that "the liability of **an employer** under this act shall be exclusive and in place of

any and all other liability to such **employees**." 77 P.S. § 481(a) (emphasis added). This provision is not to be applied broadly, as Pennsylvania's Superior Court has explained:

> The Workmen's Compensation Act, which was designated to extend benefits to the worker, should not be causally converted into a shield behind which negligent employers may seek refuge.

(Grant v. Riverside Corp., 364 Pa. 593, 528 A.2d 962 (Pa. 1987), quoting Stipanovich v. Westinghouse Electric Co., 210 Pa. Super. 98, 231 A.2d 894, 898 (Pa. Super. 1967).

Generally, the Workers' Compensation Act provides immunity for an employer and limits recovery for injured employees to the Worker's Compensation Act where: 1) There is an employer-employee relationship; 2) the injury alleged arose in the course of employment; and 3) the employer accepts responsibility for payment of Worker's Compensation benefits under the Act. 77 Pa. C.S.A. 481, *et. seq.*; Heckendorn v. Consol. Rail Corp., 439 A.2d 674, 678 (Pa. Super. 1981), aff'd, 502 Pa. 101, 465 A.2d 609 (Pa. 1983). In fact, here JBS *expressly denies* responsibility for the death of Enock Benjamin. (See Doc. No. 17 at Ex. A.)

JBS has presented *some* evidence in support of its Notice of Removal and Motion to Dismiss that *could* indicate that Enock Benjamin's employer was JBS Souderton, Inc. However, Plaintiff also discovered government filings of JBS *prior to filing this lawsuit* which indicated that JBS USA Holdings, Inc. was the employer of workers at the Souderton facility. (See Doc. No. 17 at Ex; B; Ex. C; Ex. D.)

Then, on June 15, 2020, ***only thirteen (13) days after JBS USA Food Company removed this case from Philadelphia County*** the JBS Defendants provided the Estate of Enock Benjamin with a denial of the Workers' Compensation application that it unilaterally submitted. (Ex. A.) That governmental filing ***clearly lists JBS USA Holdings, Inc. as Mr. Benjamin's employer***:

EMPLOYER

Name JBS USA Holdings, Inc.

Address 249 ALLENTOWN RD

Address

City/Town SOUDERTON State PA ZIP 18964

County

Telephone 9705066887 FEIN 201413756

(See Doc. No. 17 at Ex. A.)

As of June 18, 2020, this was consistent with JBS's other government filings in the Commonwealth of Pennsylvania for individuals seeking workers' compensation benefits for injuries that occurred at the Souderton facility. (See Doc. No. 17 at Ex; B; Ex. C; Ex. D.) As set forth in Plaintiff's Motion to Remand, JBS filed similar notices and other Workers Compensation documents listing JBS USA Holdings, Inc. as the employer for every other worker who sustained a work related injury while at work at the Souderton plant:

pennsylvania
DEPARTMENT OF LABOR & INDUSTRY
WORKERS' COMPENSATION OFFICE OF ADJUDICATION

Answe
Petition Number: **PET-8298644 -1-1**

Claimant/Employee: [redacted]	Defendant/Employer: JBS USA Holdings, Inc.
WCAIS Claim Number: [redacted]	Date of Injury: 2/4/2019

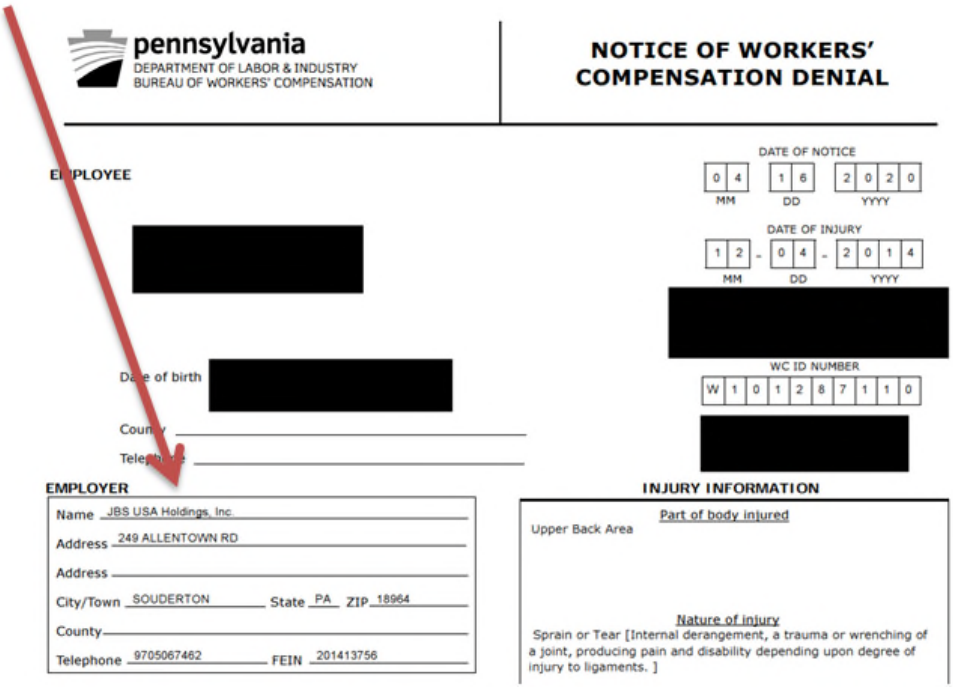
ANSWER TO PETITION TO/FOR (LIBC-377)

This document presents the Answer that was received by the Workers' Compensation Office of Adjudication.

Answer Information:

Date Submitted:	11/15/2019

(See Doc. No. 17 at Ex. B.)



pennsylvania
DEPARTMENT OF LABOR & INDUSTRY
BUREAU OF WORKERS' COMPENSATION

NOTICE OF WORKERS' COMPENSATION DENIAL

EMPLOYEE

[redacted]

Date of birth [redacted]

County

Telephone

DATE OF NOTICE 04 16 2020 (MM DD YYYY)

DATE OF INJURY 12-04-2014 (MM DD YYYY)

[redacted]

WC ID NUMBER W101287110

[redacted]

EMPLOYER

Name JBS USA Holdings, Inc.
Address 249 ALLENTOWN RD
Address
City/Town SOUDERTON State PA ZIP 18964
County
Telephone 9705067462 FEIN 201413756

INJURY INFORMATION

Part of body injured
Upper Back Area

Nature of injury
Sprain or Tear [Internal derangement, a trauma or wrenching of a joint, producing pain and disability depending upon degree of injury to ligaments.]

(See Doc. No. 17 at Ex. C.)[2]

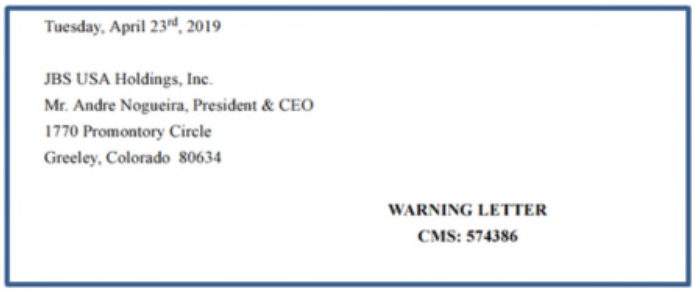
Now, in this motion as it has in previous filings, JBS has *strenuously* admonished Plaintiff's Counsel for even naming JBS USA Holdings, Inc. as a party to this action because it is alleged that JBS USA Holdings, Inc. ceased to exist in 2015.[3] Based upon the above, it is easy to determine why Plaintiff was under the impression JBS USA Holdings, Inc. was a proper entity

[2] As previously mentioned, two days after filing their Motion to Dismiss in this action, JBS filed a second denied petition for Mr. Benjamin that listed JBS Souderton, Inc. as the employer. There was no explanation for why this occurred, or in the alternative, why JBS USA Holdings, Inc. was listed as the employer on the initial denial letter and all other public filings related to workers at the Souderton facility as of June 18, 2020. (Ex. A; Ex. B; Ex. C; Ex. D.) At the very minimum, there exists a genuine issue of material fact as to whom actually was Enock Benjamin's employer that was created by JBS's own governmental filings.

[3] It should be noted that a search of the Federal EIN number listed by JBS in its' denial of Workers' Compensation Benefits to the Estate of Enock Benjamin linked to an entity named "Jbs Usa Holding Lux S.Á.r.l." (See Doc. No. 17 at Ex. I.) This is the same name of the entity that JBS USA Holdings was converted into according to attachments to JBS' Notice of Removal. (Docket No. 1 at Ex. D, pgs. 4-5.) However, at the very minimum, whatever the correct name of the entity is, it was still "also known as" or "doing business as" JBS USA Holdings, Inc., as of June 15, 2020 when the entity unilaterally submitted and denied Workers' Compensation Benefits to Mr. Benjamin's Estate. This represents precisely the type of situation that is usually addressed collegially between counsel with a Stipulation to Amend to insure the correct corporate entity is named. Instead, JBS' Notice of Removal chastised Plaintiff's counsel for naming JBS USA Holdings, Inc. on several occasions in an attempt to make Plaintiff's filing appear sloppy. Defense counsel should have reviewed their own clients' documents before making such accusations.

to name as a defendant in this litigation. However, Plaintiff's counsel was not the only one to come to this conclusion.

On April 23, 2019, the United States Food and Drug Administration ("FDA") sent a Warning Letter to Mr. Andre Nogueira, President & CEO of JBS USA Holdings, Inc., for activities occurring at the Souderton facility:



Tuesday, April 23rd, 2019

JBS USA Holdings, Inc.
Mr. Andre Nogueira, President & CEO
1770 Promontory Circle
Greeley, Colorado 80634

WARNING LETTER
CMS: 574386

(See *April 23, 2019 FDA Warning Letter to JBS USA Holdings, Inc.*, attached hereto as "Ex. A")

The FDA's 2019 letter to JBS USA Holdings, Inc., concerns inspections involving the placement of food into interstate commerce conducted at the Souderton plant in 2018:

> On March 13th and 14th, March 19th, March 30th, August 6th, and October 17th, 2018, the U.S. Food and Drug Administration (FDA or "we") conducted an inspection of your rendering plant, JBS Souderton, Inc dba MOPAC, located at 741 Souder Road, Souderton, Pennsylvania, 18964. The inspection was a joint effort with the Pennsylvania Department of Agriculture (PDA), which inspected your plant on several days between March 13th and June 6th, 2018. Your rendering plant produces animal food ingredients distributed to animal food manufacturers. This letter notifies you of the significant violations of the Federal Food, Drug, and Cosmetic Act (the Act) that we found during our inspection of your operation and listed in the Form FDA 483 issued to you at the conclusion of the inspection.
>
> Our inspection found you violated FDA's Current Good Manufacturing Practice (CGMP) requirements for animal food, which causes your products to be adulterated.[1] In addition, the presence of pentobarbital in your animal fat products, including pure tallow, "**(b)(4)** Tallow", and "**(b)(4)** Tallow", causes these products to be adulterated because the animal food contains an unsafe new animal drug.[2] The drug is unsafe because it was not used in conformance with the drug approval, which does not have a tolerance established for the presence of pentobarbital in the edible tissues of animals.[3]
>
> It is a prohibited act to introduce or deliver for introduction into interstate commerce any food that is adulterated or misbranded.[4]

(Ex. A.)

Now, in its' moving papers, JBS claims that JBS USA Holdings, Inc. has "no employees." (See Doc. No. 15 at 7.) However, this 2019 FDA letter is addressed to Andre Nogueira, in his capacity as the "President & CEO" of JBS USA Holdings, Inc. (Ex. A.) That is consistent with public statements of Mr. Noguiera himself, who was quoted on May 18, 2020 in a Wall Street Journal related to the pandemic as the CEO of JBS USA Holdings, Inc.:

> JBS USA Holdings Inc., which slaughters 23% of the country's cattle and produces nearly one-fifth of its pork, is revamping plant operations to space workers farther apart while about 10% of its workforce has been sent home because of their higher risk from Covid-19, Chief Executive Andre Nogueira said.
>
> "We will not be able to go to full capacity anytime soon as we fight this virus because of all the changes we have implemented," Mr. Nogueira said in an interview.

(See *May 18, 2020 Wall Street Journal Article*, attached hereto as "Ex. B.")

It is *impossible* to conclude that JBS USA Holdings, Inc. no longer exists given JBS's filings with Pennsylvania's Workers' Compensation Board, the filings of the FDA, and the public statements on behalf of JBS USA Holdings, Inc. that were made by Mr. Noguiera. Moreover, based upon JBS's own representations both to this Court and to the Workers' Compensation Board, it cannot be stated with any certainty which JBS entity was *actually* Mr. Benjamin's employer. In addition, JBS is expressly rejecting responsibility for payment of Workers' Compensation benefits to the Estate of Enock Benjamin. Heckendorn, 439 A.2d at. 678; see also Doc. No. 17 at Ex. A.

As a result, it cannot be stated that Plaintiff's claims against JBS Souderton, Inc. are barred by the Workers' Compensation Act and this motion should be denied.

3. Plaintiff has set forth a *prima facie* case of negligence against all Defendants.

JBS's arguments that Plaintiff's Complaint failsto state a cause of action is meritless. In sum, JBS's fallacious argument can be summarized as follows: *The Complaint only makes negligence allegations against Mr. Benjamin's employer. Mr. Benjamin's employer was JBS Souderton, Inc. and thus there is no valid negligence claim. Also we cannot be responsible for the safety of individuals at the plant during a pandemic*. That is just flatly incorrect from both a factual and legal standpoint.

Plaintiff's Complaint was meticulously developed after conducting extensive investigation as to the working conditions at the Souderton facility. Interviews conducted during extensive pre-Complaint investigation were extensively cited in the Complaint. (See Doc. No. 17 at Ex. E at ¶¶ 60-66; 73-75.) As a result, the negligence count is pled in scrupulous detail without being redundant in over 100 paragraphs of factual averments . (Id. at Ex. E at ¶¶ 147-156.)[4]

It is difficult to take JBS's boilerplate arguments as to any alleged lack of specificity or identification of a duty seriously. However, as an illustration, the allegations related to a comprehensive failure on behalf of all the defendants to develop and implement proper safety policies to protect the business invitees in the Souderton plant, including Enock Benjamin, will be analyzed below.

The Pennsylvania Supreme Court has made it clear that "in Pennsylvania a parent corporation and its subsidiary *must be regarded as separate entities in regards to the Workmen's Compensation Act*." Kiehl v. Action Manufacturing Co., 517 Pa. 183, 187 (1987) (emphasis added). Where a subsidiary meets the Act's definition of an employer and receives immunity against claims by injured employees under the Pennsylvania Workers Compensation Act, the

[4] The entirety of those paragraphs would take over five (5) pages to place in this memorandum in their entirety. Accordingly, they are incorporated by reference herein.

parent corporation which created the "corporate veil" separating the entities cannot electively pierce that veil to share in the immunity. Id. at 191.

In Kiehl, the Supreme Court specifically considered "whether a parent corporation is entitled to immunity (pursuant to the Pennsylvania Workmen's Compensation Act) . . . from a third party suit brought against the parent corporation by an employee of its wholly owned subsidiary corporation". Id. at 184. The court held that the parent was not entitled to immunity and the two factory workers injured in an explosion, who received Workers Compensation benefits from their employer, a wholly owned subsidiary, could pursue their negligence claim against the parent company. Id.

Corporations cannot choose which protections afforded by the "corporate veil" they claim and which they reject. The Kiehl court held that where a parent corporation creates a subsidiary with its own corporate status, the two stand as distinct legal entities, with concomitant benefits and liabilities:

> [I]n this case, we refuse to pierce the corporate veil at the request of the creator of the veil. To do so would permit a parent company to assert itself as an immune unit if sued by an employee of any of its subsidiaries for independent acts of negligence, and protect itself as a separate entity if sued by a member of the general public for the same conduct.

(Id. at 191-192 (citing Schenley Distillers v. United States, 326 U.S. 432 (1946); Copperweld v. Independence Tube Corp., 467 U.S. 752 (1984)).

Another case that illustrates JBS's duty to provide a safe work environment is Bucks v. Pennfield Corp. In Bucks, the plaintiff was injured at her place of employment. Bucks v. Pennfield Corp.,4 Pa. D. & C. 4th 474 (Pa. Commw. Ct. 1989). The plaintiff brought suit against the subsidiary's parent company alleging various acts of independent negligence related to overseeing safety at the plant. Id. The parent company filed for summary judgment claiming

that it was under no duty to supervise safety at the workplace and that subsidiaries had their own safety operations. Id. at 479. In response, plaintiff raised many key factual issues including that the parent company had a safety committee that oversaw safety features at its subsidiary, that it voluntarily assumed a duty for safety, and that its agents testified that the ultimate responsibility for safety rested with the parent company. Id. at 480.

This is similar to the approach to safety decisions related to COVID-19 taken by JBS that is alleged in Plaintiff's Complaint. (See Doc. No. 17 at Ex. E at ¶¶ 148-153.) It is ***also consistent*** with a press release issued by JBS on May 13, 2020 which indicated that JBS USA ***and Pilgrim's Pride*** were responsible for safety measures implemented at individual plants:

> JBS USA and Pilgrim's have adopted more than $100 million in enhanced safety measures to keep their workplaces and team members safe, including increased sanitation and disinfection efforts, health screening and temperature checking, team member training, physical distancing, reduced line speeds and increased availability of personal protective equipment, including face masks and face shields. The companies have hired more than 1,000 new team members to conduct additional, around-the-clock sanitation and cleaning services, and to provide education, training and enforcement of COVID-19 preventive measures.
>
> The companies are also investing in innovative technologies to combat the potential spread of coronavirus in their facilities, including ultraviolet (UV) germicidal air sanitation and plasma air technology to neutralize potential viruses in plant ventilation and air purification systems.
>
> Out of an abundance of caution, JBS USA and Pilgrim's have removed the most vulnerable populations from their facilities, with full pay and benefits. This has resulted in the removal of approximately 10 percent of the eligible workforce in the United States. The policy exceeds any recommended guidance from the U.S. Centers for Disease Control and Prevention, or any other official health authority.

(See *May 13, 2020 JBS Press Release*, attached hereto as "Ex. C.")

Stated differently, JBS is publicly asserting that multiple entities have responsibility for safety at individual plants. Therefore, any contention to the contrary is purely opportunistic and a transparent effort at forum shopping by the Defendants.

Furthermore, in addition to the holding of Kiehl, this Court should consider the Restatement (Second) of Torts, Section 324A. *Liability to Third Persons for Negligent Performance of Undertaking*. In 1984, The Pennsylvania Supreme Court adopted §324A. Cantwell v. Allegheny County, 506 Pa. 35, 40 (Pa. 1984). In 2006, Pennsylvania's Supreme Court confirmed the Restatement's applicability, finding liability where it was foreseeable that

workers could be injured by the defendant's "failure to perform the active safety role [it] assumed." Farabaugh v. Pennsylvania Turnpike Commission, 590 Pa. 46, 54 (Pa. 2006).

Pennsylvania courts apply §324A to assign liability to those who undertake to render services, whether gratuitously or for consideration, which are necessary for the protection of a third party, and then do so negligently:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking if:
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

A party that undertakes a duty owed by another will be found liable even if the undertaking party's negligence does not add to the existing risks:

> *d. Undertaking duty owed to third person.* Even where the negligence of the actor does not create any new risk or increase an existing one, he is still subject to liability if, by his undertaking with the other, he has undertaken a duty which the other owes to the third person. Thus a managing agent who takes charge of a building for the owner, and agrees with him to keep it in proper repair, assumes the responsibility of performing the owner's duty to others in that respect. He is therefore subject to liability if his negligent failure to repair results in injury to an invitee upon the premises who falls upon a defective stairway, or to a pedestrian in the street who is hurt by a falling sign. Such liability is in addition to that which he may have to the person to whom he has agreed to render the services.

(RESTATEMENT (2D) OF TORTS, § 324A, comment D (emphasis added)).

Accordingly, it is clear that Plaintiff has asserted a valid claim sounding in negligence against all defendants and JBS's motion must be denied.

4. Plaintiff pleaded valid claims sounding in intentional misrepresentation and fraudulent misrepresentation.

JBS's arguments related to the sufficiency of Plaintiff's misrepresentation claims are entirely without merit.

Plaintiff's state-law claims sounding in (a) intentional misrepresentation and (b) fraudulent misrepresentation are pleaded with scrupulous compliance with the pleading requirements of the Commonwealth of Pennsylvania and provide the JBS Defendants clear notice of the basis for each claim.[5] Cardenas v. Schober, 2001 Pa. Super. 253, 783 A.2d 317, 325 (Pa. Super. 2001) (holding that "the complaint must not only apprise the defendant of the claim being asserted, but it must also summarize the essential facts to support the claim.") The Pennsylvania Superior Court has stressed the importance of reviewing the complaint "as a whole." Smith v. Wagner, 588 A.2d 1308, 1311 (Pa. Super 1991).

Similarly, pursuant to Fed R. Civ. P. 9(b), "in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

Under Pennsylvania law, the tort of intentional misrepresentation requires a plaintiff to prove that a defendant made an intentional representation about or intentionally failed to disclose information: (1) that is material; (2) was made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (3) with the intent of misleading another into relying

[5] It must be noted that the section of the JBS Defendants' brief fails to acknowledge the distinction between Plaintiff's two misrepresentation claims because it is more convenient to call each a "fraud." (See Doc. No. 15 at § C, pp. 41-42.)

It should also be noted that the case relied upon by the JBS Defendants, Frederico v. Home Depot, 507 F.3d 188, 200 (3d Cir. 2007) is irrelevant to this action, as it relates to a common-law claim for fraud under the elements necessary to prove that tort in the state it was filed – *New Jersey*.

on it; and (4) that the plaintiff justifiably relied on the misrepresentation. Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994); RESTATEMENT (2D) OF TORTS, § 557A.

Count III of Plaintiff's Complaint sets forth Plaintiff's cause of action sounding in intentional misrepresentation against the JBS Defendants:

COUNT III
Plaintiff, the Estate of Enock Benjamin v. The JBS Defendants
INTENTIONAL MISREPRESENTATION

168. Plaintiff hereby incorporates all preceding paragraphs of this Complaint here by reference.

169. The JBS Defendants owed lawful business invitees at the JBS Souderton Plant, including Enock Benjamin, the highest duty of care.

170. At all relevant times, the JBS Defendants represented to business invitees, including Enock Benjamin, that it was safe for workers to arrive for their shifts at the JBS Souderton Plant.

171. At all relevant times, the JBS Defendants' representations were material to Enock Benjamin's presence at the JBS Souderton Plant.

172. The JBS Defendants' representation that it was safe for workers to arrive for their shifts at the JBS Souderton Plant was false.

173. This misrepresentation was made intentionally and knowingly.

174. The JBS Defendants learned they had misrepresented the risk of COVID-19 infections to workers at the JBS Souderton Plant, learned that workers at the Plant, including Enock Benjamin, relied upon the JBS Defendants' misrepresentations, and the JBS Defendants failed to correct their misrepresentations.

175. At all relevant times, the JBS Defendants had actual knowledge of the risk of COVID-19 infections to workers at the JBS Souderton Plant, including Enock Benjamin.

176. At all relevant times, the JBS Defendants had actual knowledge that workers at the JBS Souderton Plant were infected with COVID-19 and/or were experiencing symptoms consistent with COVID-19.

177. Despite their actual knowledge of COVID-19 infections at the JBS Souderton Plant, and the risk these infections posed to other workers, including Enock Benjamin, the JBS Defendants kept the JBS Souderton Plant open to workers up to and through at least March 27, 2020.

178. The JBS Defendants' motivation for intentionally misrepresenting the safety of the JBS Souderton Plant was to make money and to continue to profit.

179. The JBS Defendants intentionally misrepresented and deceived workers into believing that the JBS Souderton Plant was safe to ensure that workers continued to show up each day for their shifts and to ensure that the JBS Defendants continued to profit.

180. Workers at the JBS Souderton Plant, including Enock Benjamin, justifiably relied upon the JBS Defendants' false representation that the JBS Souderton Plant was safe at all relevant times.

181. The conduct of the JBS Defendants, as described above, demonstrated a reckless disregard for the safety and health of workers at the JBS Souderton Plant.

182. The death and injuries sustained by Plaintiff's decedent was caused by the negligence, gross negligence, carelessness, recklessness, outrageous conduct and intentional misrepresentations of the JBS Defendants, acting by and through their agents, servants, workers and/or employees, both generally and in the following respects:

a. Failing to close the JBS Souderton Plant despite the known dangers caused by COVID-19 infections at the plant;

b. Failing to close the JBS Souderton Plant despite the known dangers caused by workers displaying symptoms of COVID-19 infections at the plant;

c. Failing to warn workers at the JBS Souderton Plant of the dangers posed by COVID-19 infections at the plant;

d. Failing to warn workers at the JBS Souderton Plant of the dangers posed by workers displaying symptoms of COVID-19 infections at the plant;

e. Exposing workers at the JBS Souderton Plant to unacceptable risks of harm;

f. Violating applicable OSHA regulations, including the General Duty Cause;

g. Failing to provide special precautions which would have protected workers from the particular and unreasonable risks of harm which the JBS Defendants recognized;

h. Failing to train and supervise workers at the JBS Souderton Plant properly;

i. Failing to adequately warn workers at the JBS Souderton Plant of the peculiar and/or unsafe conditions and/or special dangers existing at the JBS Souderton Plant;

j. Violating and failing to comply with Federal and State statutes, local ordinances, and all other rules or regulations applicable or in effect, and specifically OSHA and CDC guidance regarding COVID-19 protection and prevention for workplaces and workers;

k. Failing to adopt, enact, employ and enforce proper and adequate safety programs, precautions, procedures, measures and plans; and

l. Failing to cease and/or postpone operations until proper and necessary precautions could be taken to safeguard workers at the JBS Souderton Plant.

184. By reason of the intentional misrepresentations of the JBS Defendants, as set forth above, Plaintiff's decedent suffered an agonizing and horrific death.

185. By conducting itself as set forth above, the JBS Defendants' intentional misrepresentations were a substantial factor, a factual cause of and/or increased the risk of harm to Plaintiff's decedent.

(See Doc. No. 17 at Ex. E at ¶¶ 168-185.)[6]

By comparison, a cause of action for fraudulent misrepresentation is comprised of the following elements: "(1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention by the maker that the recipient will thereby be induced to act, (4) justifiable reliance by the recipient upon the misrepresentation and (5) damage to the recipient as the proximate result." Martin v. Lancaster Battery Co., 606 A.2d 444, 448 (Pa. 1991) (quoting Scaide Co. v. Rockwell-Standard Corp., 446 Pa. 280, 285 (Pa. 1971), cert. denied, 407 U.S. 920 (1972)); see also RESTATEMENT (2D) OF TORTS, § 310.

Count II of Plaintiff's Complaint sets forth the cause of action sounding in fraudulent misrepresentation against the JBS Defendants:

[6] Paragraph 168 incorporates the rest of the Complaint, which includes the Introduction (¶¶ 1-12) and the Facts Common to All Counts (¶¶ 13-110). (See Doc. No. 17 at Ex. E.)

COUNT II
Plaintiff, the Estate of Enock Benjamin v. The JBS Defendants
FRAUDULENT MISREPRESENTATION

157. Plaintiff hereby incorporates all preceding paragraphs of this Complaint by reference.

158. The JBS Defendants owed lawful business invitees at the JBS Souderton Plant, including Enock Benjamin, the highest duty of care.

159. The JBS Defendants knew that workers at the JBS Souderton Plant had become infected with COVID-19, and/or were displaying symptoms consistent with COVID-19, prior to closing The Plant on March 30, 2020.

160. The JBS Defendants knew that workers at the JBS Souderton Plant were especially susceptible to COVID-19, and knew that once one worker was infected, the virus was likely to spread to others.

161. Despite this knowledge, the JBS Defendants did not warn workers that others at the JBS Souderton Plant had become infected with COVID-19 and/or were displaying symptoms consistent with COVID-19 prior to March 27, 2020.

162. Despite this knowledge, the JBS Defendants directly misrepresented to workers that there was no risk of infection and/or that the workers were unlikely to become infected and/or deliberately withheld their knowledge of workers at The Plant becoming infected with COVID-19.

163. The JBS Defendants fraudulently misrepresented the risk of infection to other workers at The Plant to induce those workers to continue their employment at The Plant.

164. The JBS Defendants fraudulently misrepresented the risk of infection to other workers at The Plant to induce those workers to continue making the JBS Defendants profitable.

165. The JBS Defendants willfully and intentionally withheld their knowledge of COVID-19 infections at the JBS Souderton Plant.

166. Workers at the JBS Souderton Plant, including Enock Benjamin, relied on the JBS Defendants' misrepresentations and continued to arrive for work each day, completely unaware that other workers at the plant were infected with COVID-19 and/or were displaying symptoms consistent with COVID-19.

167. As a direct and proximate result of Enock Benjamin's reliance on the JBS Defendants' misrepresentations, Enock Benjamin became infected with COVID-19 while working at the JBS Souderton Plant, and died only days later.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and/or severally, in an amount in excess of the jurisdictional threshold in compensatory damages, punitive damages, delay damages pursuant to Pa.R.C.P. 238, interest, and allowable costs of suit, and brings this action to recover the same.

(See Doc. No. 17 at Ex. E at ¶¶ 157-167.)[7]

When reviewing Plaintiff's Complaint as a whole "the inference is inescapable" that the pleading is sufficient as to both the intentional misrepresentation and fraudulent misrepresentation claim. Smith, 588 A.2d at 1311. In fact, the very first sentence of Plaintiff's Complaint sets the table for the rest of the document by informing the JBS Defendants that, while placing profits over safety, they misrepresented the safety of the plant to the workers – including Enock Benjamin. (See Doc. No. 17 at E at ¶ 1.)

The Complaint is filled with specific examples of conduct including: (a) that due to increased business demands in March 2020, a "Saturday Kill" was added at the Souderton plant to meet increased business opportunity; (b) JBS's "work while sick" policy; (c) no requirement to report COVID-19 symptoms; (d) ignoring complaints of safety; (e) ignoring requests for masks; (f) ignoring workers' concerns of bringing home the virus to their families; and (g) failing to implement safety policies or procedures despite learning of the first positive test at the plant in early March 2020. (See Doc. No. 17 at E at ¶¶ 62, 63, 73-75, 97-80.)

Moreover, instead of making the safety of their workers paramount, the culture at the Souderton plant resulted in workers coming to work sick in March of 2020 for fear of losing their job if they missed multiple days of work. (Ex. E at ¶ 56.) Workers were expressly told that those sick around them had the flu – not COVID-19. (Ex. E at ¶ 61.) The Complaint is clearly representing that these statements as to safety were false, and were intended to keep people working so that they could contribute to the nearly Ten Billion Dollars of net revenue generated by the JBS Defendants in the first quarter of 2020. (Ex. G.)

[7] Paragraph 157 incorporates the rest of the Complaint, which includes the Introduction (¶¶ 1-10) and the Facts Common to All Counts (¶¶ 11-110). (See Doc. No. 17 at Ex. E.)

These allegations provide *more than sufficient* specific, detailed notice of the basis for Plaintiff's misrepresentation claims. As a result, the JBS's arguments related to the specificity of these claims should be denied.[8]

5. Plaintiff is entitled to discovery concerning the facts essential to respond to discovery concerning the facts essential to JBS's disguised motion for summary judgment.

JBS attached limited affidavits and other extraneous materials to their motion to dismiss in an attempt to prove that they did nothing to incur liability. JBS's reliance on these materials converts their motion to one for summary judgment pursuant to Fed. R. Civ. P. 56.

If on a motion to dismiss for failure to state a claim, "matters outside the pleadings are presented to and not excluded by the court, the motion *must* be treated as one for summary judgment under Rule 56. All parties *must* be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d) (emphasis added); In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997) ("As a general matter, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings."); Cooper v. Martucchi, 2015 WL 4773450, at *3 (W.D. Pa. Aug. 12, 2015) ("[W]henever a declaration or affidavit is attached to a defendant's motion to dismiss, conversion will always be necessary."). Given that no discovery has been taken, Plaintiffs have a right to discovery prior to Defendants' Rule 56 motion is ruled upon. Pa. Dep't of Public Welfare v. Sebelius, 674 F.3d

[8] Plaintiff's misrepresentation claims also represent an exception to the exclusivity provision of Pennsylvania's Workers' Compensation Act. Martin v. Lancaster Battery Co., 606 A.2d 444, 447-48 (Pa. 1991). For the reasons already stated herein, it is respectfully submitted that this analysis is unnecessary to find that Plaintiff's Complaint should not be dismissed in this Motion. However, to the extent this Court seeks to engage in an analysis of whether these claims were properly pled in a manner that satisfies that exception to the exclusivity provision, Plaintiff hereby incorporates by reference the argument as set forth in Plaintiff's Motion to Remand in its' entirety. (See Doc. No. 17 at pp. 20-25.) This argument was advanced again by JBS in the instant motion under the same flawed assumption that JBS Souderton, Inc. was fraudulently joined as the Mr. Benjamin's employer that was used in the Notice of Removal. (See Doc. No. 1 and Doc. No. 15). For all the reasons set forth herein, as well as those previously set forth in Plaintiff's Motion to Remand, that contention is entirely unsupported on this record.

To the extent this Court desires further briefing on this issue, Plaintiff would respectfully request the opportunity to amplify this response.

139, 157 (3d Cir. 2012); Doe v. Abington Friends Sch., 480 F.3d 252, 257 (3d Cir. 2007); see also Fed. R. Civ. P. 56(d).

Accordingly, this Court must either exclude these extraneous materials or convert the instant motion to dismiss into a motion for summary judgment and afford Plaintiff time to conduct discovery so that they can present facts essential to their opposition. *See* Fed. R. Civ. P. 56(d); *see also Electrographics Int'l Corp. v. Fed. Ins. Co.*, 1998 WL 646831, at *3 (E.D. Pa. Sept. 21, 1998) (denying motion to dismiss without prejudice, affording plaintiff time for discovery, and allowing defendant to file motion for summary judgment at proper time).

B. This Motion Must Be Denied Because This Court Can Properly Assert Personal Jurisdiction Over All Defendants.

1. Legal Standard for Fed. R. Civ. P. 12(b)(2).

When reviewing a defense motion filed under Fed. R. Civ. P. 12(b)(2), the district court "must accept all of the plaintiff's allegations as true and construe disputed facts in favor of the plaintiff." Pinker v. Roche Holdings, Ltd., 292 F.3d 361, 368 (3d Cir. 2002) (quoting Carteret Sav. Bank. F.A. v. Shushan, 954 F.2d 141, 142 n.1 (3d Cir. 1992)).

Pursuant to Fed. R. Civ. P. 4(k)(1), "a District Court typically exercises personal jurisdiction according to the law of the state where it sits." O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 316 (3d Cir. 2007). In Pennsylvania, the long-arm statute permits the exercise of personal jurisdiction based "on the most minimum contact with this Commonwealth allowed under the Constitution of the United States." 42 Pa.C.S. § 5322(b). "Pennsylvania's long-arm statute permits courts to exercise personal jurisdiction over nonresident defendants 'to the fullest extent allowed under the Constitution of the United States'". Ackourey v. Sonellas Custom Tailors, 573 F. Appx. 208, 211 (3d Cir. 2014) (quoting 42 Pa.C.S. § 5322(b)).

"The Due Process Clause of the Fourteenth Amendment to the United States Constitution limits the authority of a state to exercise *in personam* jurisdiction over non-resident defendants." Mendel v. Williams, 53 A.3d 810, 817 (Pa. Super. 2012). The extent to which jurisdiction is proscribed is dependent upon the nature and quality of contacts with the forum state. Id. (citing Burger King Corp. v. Ruzewicz, 471 U.S. 462, 474-76 (1985). To meet "constitutional muster" in Pennsylvania, "a defendant's contacts with the forum state must be such that the defendant could reasonably anticipate being called to defend itself in the forum." GMAC v. Keller, 737 A.2d 279, 281 (Pa. Super. 1999) (citations omitted).

"Random, fortuitous, and attenuated contacts cannot reasonably notify a party that it may be called to defend itself in a foreign forum and, thus, cannot support the exercise of personal jurisdiction." Id. (citations omitted). However, "where a defendant has 'purposefully directed' his activities at the residents of the forum, he is presumed to have 'fair warning' that he may be called to suit there." Mendel, 53 A.2d at 817 (quoting Burger King, 471 U.S. at 472).

Once it is determined that a defendant has "certain minimum contacts" with a forum, the court must determine whether exercise of jurisdiction over the defendant "does not offend traditional notions of fair play and substantial justice" under the Due Process Clause. International Shoe Co. v. Wash., 326 U.S. 310, 316 (1945).

"Any disputes created by the affidavits, documents, or other records submitted for the court's consideration are resolved in favor of the non-moving party." Davis v. PNGI Charles Town Gaming, LLC, 2007 WL 4553695 (E.D. Pa. Dec. 26, 2007) (Padova, J.) (internal citations omitted).

2. JBS has conceded that this Court maintains personal jurisdiction over JBS Souderton, Inc. and JBS USA Food Company.

Pursuant to Fed. R. Civ. P. 12(b)(2), a defendant seeking to challenge whether a district court has personal jurisdiction over plaintiff's claims must do so prior to filing a responsive pleading. Here, the JBS Defendants were granted a seven (7) day extension to file a responsive pleading after filing their Notice of Removal. (See Doc. No. 7.) The JBS Defendants then filed this Motion to Dismiss. (See Doc. No. 15.)

JBS's Motion to Dismiss makes no personal jurisdiction argument with respect to JBS Souderton, Inc. or JBS USA Food Company. As a result, any such argument should be deemed waived and it is presumed that personal jurisdiction is conceded as to those two defendants.

3. This Court should assert personal jurisdiction over JBS USA Holdings, Inc.

The entirety of JBS's personal jurisdiction argument related to JBS USA Holdings, Inc. is premised upon the representation that it is no longer an entity. However, as set forth in detail herein, that is not reflected by the evidence before this Court. To the contrary, JBS USA Holdings, Inc. has consistently held itself out to Pennsylvania's Workers Compensation Board as the employer of the individuals who work at the Souderton facility. (See Doc. No. 17 at Ex. A; Ex. B; Ex. C; Ex. D.)

There are two types of personal jurisdiction: (1) general jurisdiction and (2) specific jurisdiction. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-415 (1984). As explained by the Third Circuit, these are two "analytically distinct categories":

> If the defendant maintains continuous and substantial forum affiliations, then general jurisdiction. If the defendant's contact falls short of that standard, then at least one contact must give rise or relate to the plaintiff's claim. These categories constitute two distinct theories and our cases recognize the importance of the separate analysis."

(O'Connor, 496 F.3d at 321.)

General jurisdiction involves, "circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from, and thus an intention to submit to, the laws of the forum State." Mendel, 53 A.3d at 817. For general jurisdiction, the paradigm forum is a place "in which the corporation is fairly regarded as home." Goodyear Dunlop Tires Operations, S.A. v. Brown, 584 U.S. 915, 131 S. Ct. 2846, 2853-54 (2011) (citations omitted).

General jurisdiction in Pennsylvania is governed by 42 Pa.C.S. § 5301. Plaintiff contends that, based upon JBS USA Holdings, Inc.'s own governmental filings, that this Court maintains personal jurisdiction over this entity under 42 Pa.C.S. § 5301(a) (2) (iii): "The carrying on of a continuous and systematic part of its general business within this Commonwealth."

"When jurisdiction over a defendant is based on section 5301(a), ***any cause of action*** may be asserted against the defendant, whether or not it arises from the defendant's conduct in Pennsylvania."[9] Mendel, 53 A.3d at 817 (citing 42 Pa.C.S. § 5301(b) (emphasis added).) Admittedly, recent United States Supreme Court opinions have heightened the Constitutional threshold for a state to exercise general jurisdiction over a non-resident corporation. BNSF Ry. v. Tyrell, 137 S. Ct. 1549 (2017); Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017); Daimler AG v. Bauman, 134 S.Ct. 746 (2014).[10] While the primary intent of these cases was to limit the exercise of general jurisdiction to forums where a corporation: (a) is incorporated or resides; or (b) has its principal place of business – an exception was created. BNSF, 137 S. Ct. at 1552-53; Daimler, 134 S. Ct. at 761 n. 19.

[9] It is for this reason that this Memorandum addresses general jurisdiction first. Should the Court find general jurisdiction exists, there is no reason to conduct the more tortured specific jurisdiction analysis. However, the order of analysis should not be construed to reflect perceived strength in position. Plaintiff feels very strongly about the specific acts of JBS that relate, and give rise to, his intentional tort and negligence claims.

[10] It must be noted that the plaintiffs in BNSF, Bristol-Myers, and Daimler were all non-residents of the forums. By comparison, Ferdinand Benjamin, and the Estate of Enoch Benjamin, are residents of Pennsylvania. This is a significant distinction in the Constitutional analysis. Asahi Metals Indus. Co. v. Sup.Ct. of California, 480 U.S. 102 (1987).

In an "*exceptional case*," a corporate defendant's operations in another forum "may be so substantial and of such a nature as to render the corporation at home in that State." Id. The focus of the minimum contacts analysis is "the relationship among the defendant, the forum, and the litigation." Schaeffer v. Heitner, 433 U.S. 186, 204 (1977). This assessment must be made on a case-by-case basis because "there is no statutory framework by which courts may determine whether a non-resident corporate defendant has conducted a 'continuous and systematic' part of its business in this Commonwealth." Mendell, 53 A.3d at 818.

It is submitted that the act of maintaining workers' compensation insurance and filing denial letters concerning Pennsylvania residents in the Commonwealth of Pennsylvania gives this Court a sufficient basis to assert general jurisdiction over JBS USA Holdings, Inc. as an exceptional case.

However, even assuming *arguendo* that this Court elects not to exercise general jurisdiction over JBS USA Holdings, Inc. as an "exceptional case," there is no doubt that Pennsylvania still can and should maintain personal jurisdiction over this defendant. This is because the facts of this case clearly reveal that it would be appropriate for this Court to exercise specific jurisdiction over JBS USA Holdings, Inc.

"Specific jurisdiction is the cost of enjoying the benefits" of contacts with a state." O'Connor, 496 F.3d at 323. Due Process permits jurisdiction based solely on "single or occasional" acts purposefully directed at the forum. Goodyear, 131 S. Ct. at 2851. Given that there are factual disputes over whether JBS USA Holdings, Inc. actually employed workers at the Souderton plant – located in PA, this unquestionably established adequate contacts for jurisdictional purposes.

As a result, analysis of the act or occurrence alleged to give rise to specific jurisdiction requires a focus that is "narrow in scope" designed to "examine *the particular events* that gave rise to the underlying claim." Haas v. Four Seasons Campground, Inc., 952 A.2d 688, 693 (Pa. Super. 2008) (quoting GMAC, 737 A.2d at 281).

In Pennsylvania, a foreign defendant who does not have sufficient contacts to establish general jurisdiction may nonetheless be subject to specific jurisdiction pursuant to Pennsylvania's long-arm statute, 42 Pa.C.S. 5322. Mendell, 53 A.3d at 820. "Section 5322(a) contains ten paragraphs that specify particular types of contact with Pennsylvania deemed sufficient to warrant the exercise of specific jurisdiction." Id. (citations omitted).

Additionally, Section 5322(b) operates as a "catchall" provision, permitting Pennsylvania to exercise specific jurisdiction over a non-resident corporation "to the fullest extent permissible by the Due Process Clause." Id. (quoting 42 Pa.C.S. 5322(b)).

Most jurisdictions view the inquiry as to whether specific jurisdiction exists as a three-part test: "**First**, the defendant must have purposefully directed its activities at the forum. **Second**, the litigation must '*arise out or relate to*' at least one of those activities. And **third**, if the prior two requirements are met, a court may consider whether the exercise of jurisdiction otherwise comports with fair play and substantial justice." O'Connor, 496 F.3d at 317 (internal citations omitted) (emphasis added).

In Pennsylvania, the second element was codified in the long-arm statute, making it a statutory requirement: "When jurisdiction over a person is based solely upon this section, *only a cause of action or other matter arising from acts enumerated in subsection (a), or from acts forming the basis of jurisdiction under subsection (b), may be asserted against him*." 42 Pa.C.S. § 5322(c) (emphasis added).

Typically, an assessment of specific jurisdiction occurs on a claim-by-claim basis. Remick v. Manfredy, 238 F.3d 248, 255-56 (3d Cir. 2001). Here, Plaintiff has asserted claims against JBS USA Holdings, Inc. sounding in: (1) misrepresentation and (2) negligence. The first two elements of each of those claims will be assessed separately and a combined Due Process analysis follows.[11]

i. First element – Purposeful Availment

As a threshold matter, JBS USA Holdings, Inc. "must have purposely availed itself of the privilege of conducting activities within the forum." O'Connor, 496 F.3d at 317 (internal citations omitted). Physical entrance into the forum is not required. Burger King, 471 at 476. However, "what is necessary is a deliberate targeting of the forum." O'Connor, 496 F.3d at 317 (internal citations omitted).

In 2006, the Third Circuit articulated this distinction in clever fashion:

> Contact with vacationing Pennsylvanians is no substitute for contact with Pennsylvania. A Philadelphia vendor may sell a lot of cheesesteaks to German tourists, but that does not mean he has purposefully availed himself of the privilege of conducting activities within Germany.

[Id. at 318.]

Here, it is undisputed that JBS USA Holdings, Inc. purposefully conducted business in Pennsylvania. This is a conclusion that was reached by the FDA. (Ex. A.) Similarly, the existence of the entity was recently confirmed publicly in the Wall Street Journal by JBS CEO, Andre Nogueira (Ex. B.)

In its' brief, JBS USA Holdings appears to concede this point, arguing only that an entity that has ceased to exist cannot purposefully avail itself to a forum. Sure, but an entity that has ceased to exist also can't deny workers' compensation benefits to employees in government

[11] This Due Process analysis also applies to the exercise of general jurisdiction – if applicable.

filings or have its CEO provide public statements on its behalf. (See Doc. No. 17 at Ex. A; Ex. B; Ex. C.; Ex. D.)

The applicable provisions of Pennsylvania's long-arm statute that apply to Plaintiff's negligence and misrepresentation claims are 42 Pa.C.S. § 5322(a)(1)(ii): "The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts;" and/or 42 Pa.C.S. § 5322(a)(1)(iv):"The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by any government unit of this Commonwealth; and/or 42 Pa.C.S. § 5322(a)(3): "causing harm or tortious injury by an act or omission in this commonwealth."

In the alternative, the "catch-all" provision, which permits jurisdiction to be exercised "based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States," also applies. 42 Pa.C.S. § 5322(b). JBS USA Holdings, Inc. voluntarily elected to continue to engage in business and obtain a pecuniary benefit within Pennsylvania instead of taking steps to prevent foreseeable harm. As such, all of the above provisions apply.

ii. Second element – "Arising from or Related to"

As explained by the Third Circuit, "identifying some purposeful contact with the forum is but the first step in the specific-jurisdiction analysis." O'Connor, 496 F.3d at 318. The second element requires that a plaintiff's claim "arise out of or relate to" the specific purposeful contact identified. 42 Pa.C.S. 5322(c); see also Helicopteros, 466 U.S. at 415 n.10.

In O'Connor v. Sandy Lake Hotel Co., the Third Circuit held that "specific jurisdiction requires a closer and more direct causal connection than that provided by the but-for test." Id. at 323. The Court further explained "[t]hat the causal connection can be somewhat looser than the

tort concept of proximate causation, but it must nonetheless be enough to keep the quid pro quo proportional and personal jurisdiction reasonably foreseeable." Id.

In O'Connor, the Court reasoned that "it is enough that a meaningful link exists between a legal obligation that arose in the forum and the substance of plaintiff's claims." Id. at 324. Plaintiff hereby incorporates the analysis of his negligence and misrepresentations claims set forth above to illustrate how the actions of JBS USA Holdings, Inc. were causally connected to the death of Enock Benjamin.[12]

iii. Third element - Due Process Analysis

Once it is determined that minimum contacts exist, it is well-settled that the reviewing court must determine whether the exercise of jurisdiction would otherwise comport with "traditional notions of fair play and substantial justice." International Shoe Co. v. Wash., 326 U.S. 310, 316 (1945).

The test employed by Pennsylvania courts in these circumstances is well-established. Under Pennsylvania law, there are five additional factors that a Court may consider when determining if it is "reasonable and fair to require him to conduct his defense in the state:"

> Factors to be considered include: (1) the burden on the defendant, (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial systems interest in obtaining the most efficient resolution of controversies and (5) the shared interest of the several states in furthering fundamental substantive social policies.

[Mendell, 53 A.3d at 821 (citations omitted).]

These factors will be addressed *in seriatim* below.

The burden on the defendant. The existence of minimum contacts makes jurisdiction *"presumptively constitutional"* and the defendant "must present a compelling case that the

[12] See §(A)(4) above, at pp. 20-24.

presence of some other considerations would render jurisdiction unreasonable." O'Connor, 496 F.3d at 324 (quoting Burger King, 471 U.S. at 477); see also Grand Entertainment Group, Ltd., v. Star Media Sales, Inc., 988 F.2d 476, 483 (3d Cir. 1993) ("The burden on a defendant who wishes to show an absence of fairness or lack of substantial justice is heavy.") The canonical United States Supreme Court case where a non-resident defendant satisfied this heavy burden after sufficient contacts were found is Asahi Metals Indus. Co. v. Sup.Ct. of California, 480 U.S. 102 (1987). In Asahi, the Supreme Court found that California had only a "slight" interest in a lawsuit where the only remaining claim was a dispute between parties from Japan and Taiwan:

> When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant. In the present case, however, the interests of the plaintiff and the forum in California's assertion of jurisdiction over Asahi are slight. All that remains is a claim for indemnification asserted by Cheng Shin, a Taiwanese corporation, against Asahi. The transaction on which the indemnification claim is based took place in Taiwan; Asahi's components were shipped from Japan to Taiwan. Cheng Shin has not demonstrated that it is more convenient for it to litigate its indemnification claim against Asahi in California rather than in Taiwan or Japan.

[Id. at 114 (emphasis added).]

To put it mildly, the circumstances here are more compelling. Without attacking JBS USA Holdings Inc. for failing to address this point, it is safe to say they have fallen woefully short of establishing their burden on this factor. Based upon the precedent, this factor favors jurisdiction over JBS USA Holdings, Inc. in Pennsylvania.

The forum state's interest in adjudicating the dispute. As explained in Asahi, the residency of the plaintiff bears heavily on the forum state's interest in adjudicating the dispute. Asahi, 480 U.S. at 114 ("Because the plaintiff is not a resident, California's legitimate interests in the dispute have considerably diminished"). Here, Ferdinand Benjamin, as well as Enock Benjamin, the decedent, are residents of Pennsylvania. As the Supreme Court just re-affirmed the

importance of a Plaintiff's residence in the forum in Bristol-Myers, this is a determinative factor. It should also be noted that This factor weighs heavily in favor of exercising jurisdiction in Pennsylvania.

The plaintiff's interest in obtaining convenient and effective relief. Requiring Ferdinand Benjamin to litigate in Colorado would cause a tremendous burden to Mr. Benjamin at least equal to the burden on JBS USA Holdings, Inc. – with the obvious distinction that JBS is an international corporation with significant financial means. This factor also weighs in Plaintiff's favor.

The intestate judicial systems' interest in obtaining the most efficient resolution of controversies. If JBS USA Holdings, Inc. were to be dismissed from this action, it would not mean they would not have to answer for their conduct. It would only mean that Plaintiff would need to file a separate action against JBS USA Holdings, Inc. in a different jurisdiction. This would not be the most efficient way to resolve this controversy, especially considering JBS Souderton, Inc. and JBS USA Food Company have waived challenges to personal jurisdiction.

The shared interests of the states in furthering fundamental substantive social policies. The residents of Pennsylvania surely have an interest in analyzing any entity that will deny workers' compensation benefits to it's' residents on one hand and then claim not to exist on the other hand. JBS USA Holdings' arguments in this action are entirely self-serving and in no manner serve the interests of the substantive social policies of the Commonwealth. Even further, this case involves failing to protect a Pennsylvania resident in the face of a known danger so that a business could continue to make profits. Each state government should be interested in protecting their residents from corporations who would elect to act in this manner, and should support having them answer for their conduct before a jury of their peers. Furthermore, there are

"no interstate or international concerns that make jurisdiction unreasonable." Antonini v. Ford Motor Co., 2017 WL 3633287 at *19 (M.D. Pa. Aug. 23, 2017).

Stated simply, this is not one of those "rare" and "compelling" cases where jurisdiction would be unreasonable. O'Connor, 496 F.3d at 325. Moreover, any burden that JBS USA Holdings, Inc. suffers from having to defend this case in Pennsylvania was a logical consequence of the actions it took in purposefully availing itself to jurisdiction in the forum.

Accordingly, this Court should assert personal jurisdiction over JBS USA Holdings, Inc. and deny this motion.

4. This Court should assert personal jurisdiction over Pilgrim's Pride Corporation.

This should be a much quicker analysis. In what appears to be a theme, JBS is either blissfully ignorant or hoping Plaintiff won't realize what governmental filings say about each individual entity. With respect to Pilgrim's Pride Corporation, this is an entity that is ***registered to do business in Pennsylvania***. (See *Pilgrim's Pennsylvania Entity Registration*, attached hereto as "Ex. D.")

As was recently stated by Pennsylvania's Superior Court – ***this is grounds for this Court to assert personal jurisdiction over Pilgrim's***: "we conclude that Daimler does not eliminate consent as a method of obtaining personal jurisdiction. Accordingly, pursuant to 42 Pa.C.S.A. § 5301, Pennsylvania may exercise general personal jurisdiction" over an entity registered to business in the Commonwealth. Webb-Benjamin, LLC v. International Rug Group, LLC, 192 A.3d 1133, 1139 (Pa. Super. 2018).

Accordingly, this Court has general jurisdiction over Pilgrim's Pride Corporation.

In the alternative, this Court may assert specific jurisdiction over Pilgrim's.[13] While it is true that Pilgrim's Pride does not have governmental filings that claim it was the employer of individuals that worked at the Souderton facility and does not have Warning Letters issued to it concerning the Souderton facility by the FDA, the company did ***publicly claim responsibility for the exact issues raised by this litigation.*** (Ex. C.) Specifically, Pilgrim's Pride has represented publicly that, along with JBS USA Food Company, it has undertaken a COVID-19 safety initiative for all JBS plants:

> "Since the arrival of the global coronavirus pandemic to the United States, our priority has been and remains the safety of our team members providing food for all of us," said Andre Nogueira, JBS USA CEO. "We recognize our responsibility as a food company during this crisis and we have continuously evolved our operations, based on the latest available guidance from experts, to improve our coronavirus preventive measures. We have already invested more than $100 million to enhance safeguards for our workforce and more than $50 million to reward our team members with thank-you bonuses. Today, we are also excited to reaffirm our long-standing commitment to the rural towns and cities we call home across America."
>
> Consistent with their ongoing sustainability and social responsibility efforts, JBS USA and Pilgrim's will invest more than $50 million in the local communities where their team members live and work. The investment will include donations to alleviate food insecurity, strengthen long-term community infrastructure and well-being, and support COVID-19 emergency response and relief efforts. The investment is part of the $120 million global social commitment recently announced by JBS S.A.
>
> JBS USA and Pilgrims have adopted more than $100 million in enhanced safety measures to keep their workplaces and team members safe, including increased sanitation and disinfection efforts, health screening and temperature checking, team member training, physical distancing, reduced line speeds and increased availability of personal protective equipment, including face masks and face shields. The companies have hired more than 1,000 new team members to conduct additional, around-the-clock sanitation and cleaning services, and to provide education, training and enforcement of COVID-19 preventive measures.

(Ex. C.)

[13] Instead of reiterating the entire legal analysis set forth above related to JBS USA Holdings, Inc., Plaintiff hereby incorporates the legal arguments related to specific jurisdiction as if the same were fully set forth herein with respect to Pilgrim's Pride Corporation.

As these public statements were made *during this litigation* it is difficult to imagine how Pilgrim's Pride can distance itself from the safety actions, or lack thereof, which led to Enock Benjamin's death as a result of him contracting COVID-19 at the Souderton facility. This is a significant aspect of Plaintiff's claims. Pilgrim's Pride is free to defend their actions, or lack thereof, but denying responsibility entirely is directly at odds with its' public statements. The combination of Pilgrim's registration to do business in Pennsylvania and their public acceptance of responsibility of the safety programs occurring in the face of COVID at individual plants render the arguments advanced in JBS's motion meaningless.

Accordingly, this Court should assert personal jurisdiction over Pilgrim's Pride Corporation and deny this motion.

5. In the alternative, this Court should assert personal jurisdiction over JBS USA Holdings, Inc. and Pilgrim's Pride Corporation as alter-egos of JBS USA Food Company.

In their moving papers, the JBS Defendants assert that "Neither JBS Holdings nor Pilgrims is an alter ego of JBS Souderton." (See Doc. No. 15 at p. 13.) That is an argument that was never advanced, but the denial is appreciated. However, there exists evidence publicly available to suggest each is an alter-ego of JBS USA Food Company.[14]

According to its' website JBS USA is the "majority shareholder of Pilgrim's Pride Corporation." (See *JBS Website: "About Us"*, attached hereto as "Ex. E.") In JBS's 2020 first quarter presentation to shareholders, JBS includes the net revenue generated by Pilgrim's Pride in its' financial calculations. (See Doc. No. 17 at Ex. G.)

Moreover it was JBS USA that said, in a statement related to a separate COVID-19 death, that JBS USA had *allegedly* instituted a policy on March 20, 2020 to remove high risk populations from their facilities nationwide:

[14] As JBS S.A. has not joined in this motion, its role in the corporate hierarchy will not be analyzed.

> "We understand the family's frustration and sympathize with them. Our team member had not been at work since March 20, 2020. He was on vacation and scheduled to return to work on March 30, 2020. However, on March 20, 2020, JBS USA instituted a policy that removed high risk populations from our facilities, including those more than 70 years of age. Given his age, we informed him he was a part of a high risk population while he was on vacation and encouraged him to stay home, which he did. He was never symptomatic while at work and never worked in the facility while sick.

(See *April 8, 2020 Denver Channel Article*, attached hereto as "Ex. F.")[15]

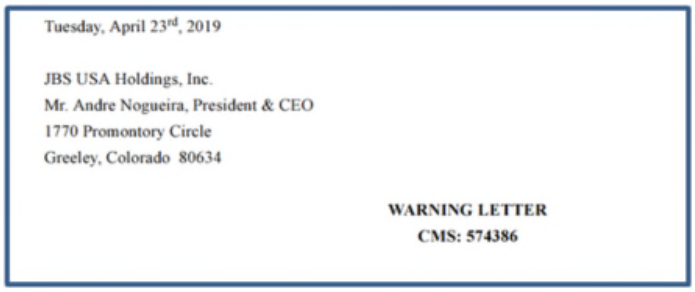
According to JBS USA's website, Cameron Bruett works for JBS USA and is in charge of Corporate Affairs and Sustainability. In a statement issued on behalf of JBS, Mr. Bruett took responsibility for the closure of the Souderton facility and referred to the workers there as "team members":

> "The JBS Souderton, Pa., beef production facility has temporarily reduced production because several senior management team members have displayed flu-like symptoms," according to an email from company spokesman Cameron Bruett. "Out of an abundance of caution, these team members have been sent home to self-monitor their health in light of the continued spread of coronavirus (COVID-19). We anticipate the facility will return to normal operations on April 14, 2020."

(See *March 31, 2020 Beef Magazine Article*, attached hereto as "Ex. G.")

Moreover, to the extent that this Court accepts JBS USA Holding, Inc.'s representation that it ceased to exist in 2015, then it raises the logical question of what entity was benefitting from the workers' compensation denials under that name. (See Doc. No. 17 at Ex. A; Ex. B; Ex. C; Ex. D.) A similarly fair inquiry is justified to determine what steps Andre Noguiera undertook to inform the FDA that he was *not* the CEO of JBS USA Holdings, Inc. when he received the warning letter in 2019:

[15] It will be interesting during discovery to see which entities take responsibility for: (a) the creation of this policy and (b) the failure to implement at Souderton.



Tuesday, April 23rd, 2019

JBS USA Holdings, Inc.
Mr. Andre Nogueira, President & CEO
1770 Promontory Circle
Greeley, Colorado 80634

WARNING LETTER
CMS: 574386

(Ex. A.)

The same questions must be posed to Mr. Noguiera to learn what steps he took to correct the Wall Street Journal's attribution of quotes to him as the CEO of JBS USA Holdings, Inc. in May 2020. (Ex. B.)

As asserted the Complaint, the safety related decisions were not formulated, designed, implemented, or determined at the local facility level. (Doc. No. 17 at Ex. E at ¶¶ 150, 152.) Instead, "the specific decisions related to whether or not to provide PPE, whether or not to properly distance workers, and whether or not to take other measures to prevent the spread of COVID-19 at the Souderton Plant were controlled by the corporate leaders in Colorado and Brazil." (Id. at ¶ 151.) These assertions find support in the public statements of Mr. Bruett, who has worked to prevent the publication of COVID-19 test results at individual JBS facilities because releasing the data "would distort any one company's role in community spread":

> A spokesman for JBS, Cameron Bruett, said the company did not want to publicize the number of positive cases at the plant because little testing was being conducted in the broader area. Releasing the data, he said, "would distort any one company's role in community spread."

(See *May 25, 2020 New York Times Article*, attached hereto as "Ex. H.")

It would be fair to characterize Mr. Bruett's statement to reflect an interest in profits over the safety of the people in the plants. Why provide important contact-tracing data when you can prevent the public from learning just how widespread the problem is at your facilities? This

sentiment is reflected in JBS's mission statement, which heavily mentions business and profits but makes no mention of safety:

(See Doc. No. 17 at Ex. G at p. 24.)

"The activities of a parent company are imputed to the subsidiary only if the subsidiary is the parent's agent or alter ego so that the 'independence of the separate corporate entities was disregarded.'" Fisher v. Teva PFC SRL., 212 Fed. Appx. 72, 76 (3d Cir. 2006) (quoting Lucas v. Gulf & Western Indus., Inc., 666 F.2d 800, 806 (3d Cir. 1981)). "'A subsidiary will be considered the alter-ego of its parent only if the parent exercises control over the activities of the subsidiary.'" Simeone v. Bombardier-Rotax GMBH, 360 F. Supp. 2d 665, 675 (E.D. Pa. 2005) (internal citations omitted).

If Plaintiff is able to prove that JBS USA Food Company "controls the day-to-day operations" of JBS USA Holdings, Inc. or Pilgrim's Pride such that either is "a mere department of the parent" then this Court may exercise jurisdiction over those entities based upon the jurisdiction it holds over JBS USA Food Company. Simeone, 360 F. Supp. 2d at 675 (citing Arch v. Am. Tobacco Co., 984 F. Supp. 830, 837 (E.D. Pa. 1997); Aamco Automatic Transmissions, Inc. v. Taylor, 368 F. Supp. 1283, 1300 (E.D. Pa. 1973)).

Courts consider the following ten factors in determining whether there is an alter ego relationship:

> (1) ownership of all or most of the stock of the subsidiary; (2) common officers and directors; (3) a common marketing image; (4) common use of a trademark or logo; (5) common use of employees; (6) an integrated sales system; (7)

> interchange of managerial and supervisory personnel; (8) performance of business functions by the subsidiary which the principal corporation would normally conduct through its own agents or departments; (9) marketing by the subsidiary on behalf of the principal corporation, or as the principal's exclusive distributor; and (10) receipt by the officers of the subsidiary corporation of instruction from the principal corporation.

[Simeone, 360 F. Supp. 2d at 675 (internal citations omitted).]

While discovery has yet to commence, the above discussion illustrates that several of those factors are already satisfied as shown in public documents/governmental filings. Certainly, the ownership of stock, common officers and directors, interchange of managerial and supervisory personnel, common use of employees, and receipt of the subsidiary corporation of instruction from the principal corporation are established. Thus, taking the allegations contained within Plaintiff's Complaint, along with documents publicly available, and viewing them in a light most favorable to Plaintiff, there exists a sufficient basis to assert jurisdiction over all defendants in this litigation.

However, if the Court feels further discovery is required, that issue is addressed below.

6. If the Court finds any of JBS's personal jurisdiction arguments meritorious, then Plaintiff should be afforded the opportunity to conduct discovery.

It is well-settled that a motion to dismiss sounding in lack of personal jurisdiction "is inherently a matter which requires resolution of factual issues outside of the pleadings." Time Share Vacation Club v. Atl. Resorts, Ltd., 735 F.2d 61, 66 n.9 (3d Cir. 1984). Thus, once a defendant has properly raised a Rule (12)(b)(2) defense, the plaintiff bears the burden of proving sufficient contacts with the forum state to establish personal jurisdiction. North Penn Gas Co. v. Corning Natural Fas Corp., 987 F.2d 687, 689 (3d Cir. 1990).

"Although the plaintiff bears the burden of demonstrating facts that support personal jurisdiction, courts are to assist the plaintiff by allowing jurisdictional discovery unless the

plaintiff's claim is clearly frivolous." Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 456 (3d Cir. 2003).

Where the plaintiff has made this required threshold showing, courts within this Circuit have sustained the right to conduct discovery before the district court dismisses for lack of personal jurisdiction. See, e.g., In re Auto. Refinishing Paint Antitrust Litig., 2002 WL 31261330, at *9 (E.D.Pa. July 31, 2002) (denying motion to dismiss and permitting jurisdictional discovery where plaintiff made a "threshold prima facie showing of personal jurisdiction over Defendants"); W. Africa Trading & Shipping Co., v. London Int'l Group, 968 F.Supp. 996, 1001 (D.N.J.1997) (denying defendant's motion to dismiss where the plaintiffs' "request for jurisdictional discovery is critical to the determination of whether [the court can] exercise personal jurisdiction over the defendant."); Centralized Health Systems, Inc. v. Cambridge Medical Instruments, Inc., 1989 WL 136277, at *1 (E.D.Pa. Nov.8, 1989) (holding motion to dismiss in abeyance to permit party to take discovery on jurisdiction where distribution arrangement might satisfy minimum contacts).

Here, to the extent the Court is swayed by the arguments advanced by JBS, it is respectfully requested that jurisdictional discovery is permitted prior to the entry of an adverse ruling. To the extent discovery proves that one or more defendants was not properly named, there are alternatives available to JBS, whether in state or federal court. However, that is not a decision that is warranted at this stage of litigation when Plaintiff has more than satisfied his pleading requirement against all defendants. This request is sought *only* if the Court requires more evidence on any of the multitude of issues raised by JBS under Fed. R. Civ. P. 12(b)(2).

C. The primary jurisdiction doctrine does not apply to this case.

In an effort to piggy-back off of an unrelated, recent holding in the Western District of Missouri, JBS argues in vain that the exceedingly rarely used "primary jurisdiction doctrine" should be applied in this case. However, the JBS Defendants' reliance upon the holding of Rural Community Workers Alliance v. Smithfield Foods, Inc., 2020 WL 2145350 (W.D. Mo. May 5, 2020) (hereinafter as "RCWA"), is misplaced.

"Primary jurisdiction is a common-law doctrine that is utilized to coordinate judicial and administrative decision making." Access Telecomms. v. Sw. Bell Tel. Co., 137 F.3d 605, 608 (8th Cir. 1998). "There exists no fixed formula for determining when to apply the doctrine of primary jurisdiction." Id. (citing United States v. W. Pac. R.R. Co., 352 U.S. 64, 77 (1956)). Thus, it logically follows that a court "must be mindful that the primary jurisdiction doctrine 'is to be invoked sparingly, as it often results in added expense and delay.'" RWCA, at *7 (quoting Alphapharma, Inc. v. Pennfield Oil Co., 411 F.3d 934, 938 (8th Cir. 2015).

It is true that in RWCA the beef processing plant-defendant filed a motion to dismiss and invoked the primary jurisdiction doctrine for events that occurred during the pandemic. Id. *1-2. Ultimately, that is where the similarities end as RWCA is entirely distinguishable from this case.

In RWCA, the plaintiffs were a group of workers at the plant who sought injunctive relief asking for the meat processing plant to provide a safe workplace moving forward:

> The [RWCA] Complaint brings state-law claims for public nuisance and breach of duty to provide a safe workplace. Plaintiffs are not seeking monetary damages, only declaratory judgments stating that: (1) Smithfield's practices at the Plant constitute a public nuisance; and (2) Smithfield has breached its duty to provide a safe workplace.

[Id. at *2 (emphasis added).]

Specifically, as pointed out by the Court, the plaintiffs sought for the plant to provide working conditions that adhered to the federal guidance set forth by OSHA and the CDC:

"*Plaintiffs characterize their requested relief as compliance with the Joint Guidance*." Id. at *4. The Missouri District Court explained that, because the plaintiffs were seeking injunctive relief for safe workplace conditions moving forward, "their claims both succeed or fail on the determination of whether the Plant is complying with the Joint Guidance":

> Plaintiffs allege that because the Plant is not abiding by the Joint Guidance, it constitutes a public nuisance and has created an unreasonably unsafe workplace. Thus, Plaintiffs' claims both succeed or fail on the determination of whether the Plant is complying with the Joint Guidance. Due to its expertise and experience with workplace regulation, OSHA (in coordination with the USDA per the Executive Order) is better positioned to make this determination than the Court is. Indeed, this determination goes to the heart of OSHA's special competence: its mission includes "enforcing" occupational safety and health standards. In fact, OSHA has already shown interest in determining whether the Plant is abiding by the Joint Guidance. The day before Plaintiffs filed this lawsuit, OSHA sent Smithfield a request for information regarding its COVID-19 work practices and infection at the Plant.

[Id. at *8 (emphasis added).]

RWCA further explained that "any determination by this Court whether the Plant is complying with the Joint Guidance could easily lead to inconsistent regulation of businesses in the same industry." Id. Significantly, the RWCA opinion then explained that Plaintiffs were unable to prove they would succeed on their breach of duty claim because *there was no actual injury alleged*:

> Under Missouri law, Plaintiffs must prove that Smithfield negligently breached its duty to provide a safe place to work and that such negligence was the direct and proximate cause of the Plaintiffs injuries. As discussed, Smithfield has taken substantial steps to reduce the potential for COVID-19 exposure at the Plant and appears to the Court to be complying with the Joint Guidance regarding the same. Thus, Plaintiffs are not substantially likely to prove Smithfield breached any duty.
>
> More importantly, however, Plaintiffs have not alleged they have suffered any injury, only that they may suffer an injury in the future. A potential injury is insufficient to state a claim of the breach of the duty to provide a safe workplace under Missouri law.

[Id. at *11. (internal citations omitted) (emphasis added).]

For those reasons, the Missouri District Court dismissed the action and held that the United States Department of Agriculture and OSHA have "authority over compliance with the Joint Guidance[.] Id. at *12.

By contrast, this wrongful death and survival action does not seek injunctive relief against the JBS Defendants moving forward. To the contrary, this civil action seeks monetary damages from the JBS Defendants. This is a fact known to the JBS Defendants and one that was wholeheartedly embraced in their Notice of Removal when it was *convenient*: "Accordingly, existing legal authority demonstrates that the amount-in-controversy exceeds the sum of $75,000." (See Doc. No. 1 at ¶ 37.)

More importantly, this litigation does not concern some unknown injury that could occur in the future – it concerns ***the death of Enock Benjamin***. There can be no argument that Plaintiff in this case has failed to assert a concrete injury. In effect, the RWCA case was seeking injunctive relief to try to prevent what has already occurred. Here, an individual has lost his life due to contracting COVID-19 in an unsafe work environment.

Further, Plaintiff is not filing a claim under any OSHA or CDC regulation because there is no common right of action for a wrongful death and survival suit created by OSHA or the CDC, nor does this case turn on whether any federal guidance was violated. To the contrary, the federal guidance issued on March 9, 2020 by OSHA and the CDC is being used as evidence as to the standard of care *and* as notice of mechanisms that existed to provide a safe workplace. This type of evidence is precisely why the role of OSHA and/or ANSI violations in jury instructions was squarely addressed in Wood v. Smith, 495 A.2d 601 (Pa. Super 1985), when the Superior Court held that "Proof of the violation of a statute or ordinance is permissible, not as conclusive proof of negligence, but as evidence to be considered with all other evidence in the case." This

concept was similarly adopted in Pennsylvania's Standard Civil Jury Instructions. (*Pa. SSJI (Civ.) 13.110*; see Doc. No. 17 at Ex. K.)

Further, the JBS Defendants still fail to point out to the Court the significance of the timing of President Trump's April 28, 2020 "Food Chain Supply Order." (See Doc. No. 17 at Ex. J.) ***As a reminder, the Food Supply Chain Order did not occur until twenty-five (25) days after Enock Benjamin's death***. (See Docket No. 17 at Ex. H.) Whereas the RWCA plaintiffs sought injunctive relief to address future injuries, the Estate of Enock Benjamin seeks monetary damages for a preventable death that has already occurred. This is especially significant considering that President Trump's proclamation contains no provision related to retroactivity.[16]

For these reasons, it would be wildly inappropriate to transfer jurisdiction of this wrongful death and survival action to OSHA or the CDC *for any of the reasons* advanced by the JBS Defendants that were relied upon by the Court in RWCA. Plaintiff has filed this civil action to have the merits of his claims ultimately decided *by a jury of his peers*. It is misplaced to compare workers currently without any injuries who file an action in equity seeking *future* injunctive relief to Enock Benjamin merely because the defendants are in the same industry. It is hereby asserted that if the defendant in RWCA was an entity that existed in any industry *other than the meat processing plant industry* that the JBS Defendants would not even endeavor to waste judicial resources by advancing this argument.

OSHA, CDC and/or the Department of Agriculture have no mechanism, method, rules, or procedures regarding the litigation of wrongful death and survival claims in negligence actions. Instead, those are administrative agencies that hear administrative cases. Additionally, they are

[16] The actual impact, or lack thereof, of the April 28, 2020 Order is not at issue in this motion. Should the Court seek additional briefing on this issue, Plaintiff requests the right to amplify this response on that topic. To the extent necessary, Plaintiff hereby incorporates all arguments related to President Trump's proclamation set forth in Plaintiff's Motion to Remand as if set forth herein in their entirety. (*See* Doc. No. 17 at pp. 25-28.)

administrative agencies that have no juries or constitutional ability to even summon or empanel a jury. Any such proceeding would infringe upon and demolish plaintiffs' constitutional right to trial by jury under both the US Constitution and the Pennsylvania Constitution. JBS's argument that jurisdiction of this wrongful death and survival action should be transferred to one of those agencies pursuant to the "Food Chain Supply Order" is unrealistic and without precedent.

Accordingly, the primary jurisdiction doctrine does not apply to this wrongful death and survival action and JBS's motion to dismiss should be denied.

D. Plaintiff's prayer for a punitive damage award is properly supported in the Complaint and is not preempted by federal law.

JBS's arguments in support of its' request to dismiss Plaintiff's prayer for a punitive damage award range from legally baseless to a dramatic misrepresentation of the case law cited.

First, the case that JBS relies upon, In re Agent Orange Product Liability Litigation, 580 F. Supp. 690 (E.D.N.Y. 1984) is entirely distinguishable from this case as it involves plaintiffs from a vast number of states who were joined into a class action, many of whom had claims sounding in different torts. But more importantly, the Eastern District of New York ***did not rule on the issue of whether punitive damages were preempted in that opinion***. Id. at 705-706. To the contrary, with respect to determining whether punitive damages would be available to the class action plaintiffs the Court *repeatedly* elected *to defer the issue*. Id. at 705, 706, 713.

In fact, the Orange opinion is entirely devoid of anything to suggest that federal law preempts *the imposition* of punitive damages – which is the result sought by JBS. Instead, Orange contains extensive *choice-of-law* analysis that is entirely unrelated to this motion nor is it a legal issue that is raised in any fashion by JBS in this motion to dismiss.

Second, the invocation of President Trump's April 28, 2020 "Food Chain Supply Order" is done *again* without pointing out that the proclamation had no retroactivity.[17] Moreover, that Order mentions nothing whatsoever about the imposition of punitive damages. JBS's intent to turn an award of punitive damages in this case into a federal question is an even further stretch than pretending that Plaintiff's complaint sounds in violations of OSHA or CDC regulations merely to support a Notice of Removal.

On the other hand, it is fair to state that as the pandemic has progressed, the federal government has passed the baton to individual states to make decisions with respect to business openings and enforcement of safety protocols and guidance. To the extent that JBS seeks to make arguments to the contrary, these are questions of fact properly left to a jury. However, it *cannot be disputed* that the decisions made it the Souderton plant in March 2020 were made entirely by the JBS Defendants without any input from the federal government. As such, the Food Supply Chain Order should have no impact on this litigation.

Third, JBS's point that "punitive damages are not available in a wrongful death cause of action" is puzzling. (See Doc. No. 15 at pg. 38) The case that JBS cites for that proposition, Harvey v. Hassinger, 461 A.2d 814, 816 (Pa. Super. 1983) literally states only one page later that "In a survival action the decedent's estate may recover punitive damages only if the decedent could have recovered them had he lived." Id. JBS *knows* that. JBS also *knows* that this is a wrongful death *and* survival action. It is unclear why this point was even raised.

In any event, under Pennsylvania law, a right to punitive damages is "a mere incident to a cause of action." Hilbert v. Roth, 149 A.2d 648, 652 (Pa. 1959). Stated differently: "A request

[17] This issue was fully briefed in Plaintiff's Motion to Remand and that argument is hereby included by reference as if fully set forth herein. (See Doc. No. 17.)

for punitive damages does not constitute a cause of action in and of itself." Nix v. Temple Univ., 596 A.2d 1132, 1138 (Pa. Super. 1991).

The legal standard for the imposition of punitive damages is found in Section 908 of the Restatement (Second) of Torts, which was adopted as the law of this Commonwealth. Under the seminal case of Chambers v. Montgomery, 192 A.2d 355 (Pa. 1963), the Pennsylvania courts recognized that punitive damages may be awarded due to a defendant's "reckless indifference to the rights of others." See Martin v. Johns-Mansville Corp., 494 A.2d 1088, 1096 (Pa. 1985).

The purpose of punitive damages is to punish and deter outrageous and egregious conduct done in reckless disregard of another's rights. Johnson v. Hyundai Motor America, 698 A.2d 631, 639 (Pa. Super. 1997). The determination of whether a person's conduct rises to the level of recklessness as would warrant an award of punitive damages **lies within the exclusive province of the jury**. SVH Coal, Inc. v. Continental Grain Co., 587 A.2d 702, 704-705 (Pa. 1991) (emphasis added).

Plaintiff's Complaint easily sets forth the factual predicate necessary to satisfy the Commonwealth's pleading requirements. The detailed factual allegations discussed above were all specifically set forth in the Complaint and clearly indicate that JBS either knew of the dangers posed by the pandemic to workers in the Souderton facility, or should have known yet failed to take any safety precautions whatsoever prior to March 30, 2020. In effect, the JBS Defendants placed profits over safety, which is not only an allegation made by the Plaintiff but it is reflected in the revenue generated during JBS's first quarter of 2020.

JBS claims that Plaintiff failed to set forth any evidence of its subjective awareness, but as the above discussion indicates – that could not be further from the truth. Plaintiff conducted an extensive investigation into the conduct of the JBS Defendants in March 2020 and learned that

they lied about individuals having the flu instead of COVID-19, threatened the jobs of individuals who called out sick, and failed to implement any safety precautions whatsoever. Instead, the JBS Defendants added a "Saturday kill" to capitalize on market demand created by media claims of shortages of meat products. (See Doc. No. 17 at Ex. E at ¶¶ 1-110.)

It is up for a jury to determine whether JBS's conduct demonstrated a reckless disregard for the rights and safety of others, including Enock Benjamin. For all of the reasons stated herein, the jury that hears this case should be comprised of the Benjamin family's peers in a courtroom in their home county and validly selected venue, the Common Pleas Court of Philadelphia County.

V. CONCLUSION

JBS's Motion to Dismiss must fail for all of the reasons set forth above. First, there exist genuine issues of material fact as to which entity was the employer of Enock Benjamin and, therefore, it cannot be stated that any entity is entitled to the immunity offered by Pennsylvania's Workers Compensation Act. Second, Plaintiff's Complaint states a *prima facie* case of negligence, intentional misrepresentation, and fraudulent misrepresentation against all of the defendants. Third, this Court has personal jurisdiction over all of the JBS Defendants. Fourth, there is no basis to apply the primary jurisdiction doctrine to this wrongful death and survival action based upon President Trump's April 28, 2020 "Food Supply Chain Order." Finally, Plaintiff's Complaint, including the prayer for punitive damages, is pleaded with the requisite specificity necessary to provide JBS notice of the basis for all of Plaintiff's claims.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court enter an Order in the accompanying form and denies the Motion to Dismiss filed by defendants, JBS USA Food Company, JBS USA Holdings, Inc., Pilgrim's Pride Corporation, and JBS Souderton, Inc.

Respectfully submitted,

BY: ***/s/ rjm9362***

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dated: July 7, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FERDINAND BENJAMIN, Individually and as the Personal Representative of the **ESTATE OF ENOCK BENJAMIN**, deceased, *Plaintiff,*	:	**CIVIL ACTION**
v.	:	
	:	**No. 2:20-cv-2594-JP**
JBS S.A., **JBS USA FOOD COMPANY**, **JBS USA HOLDINGS, INC.**, **JBS SOUDERTON, INC.**, and **PILGRIM'S PRIDE CORPORATION**, *Defendants.*	:	

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of Plaintiff's Response in Opposition to the Motion to Dismiss filed by the JBS Defendants, and accompanying Memorandum of Law, to be served via the Court's CM/ECF system on the following:

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