

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MERCED
Civil Law and Motion Special Set Tentative Rulings
Hon. Brian L. McCabe
Courtroom 8
627 W. 21st Street, Merced
December 23, 2020
10:00 a.m.

The following tentative rulings shall become the ruling of the court unless a party gives notice of intention to appear as follows:

1. You must call (209) 725-4240 to notify the court of your intent to appear.
2. You must give notice to all other parties before 4:00 p.m. of your intent to appear.

Per California Rules of Court, rule 3.1308(a)(1), failure to do both items 1 and 2 will result in no oral argument. **To limit the spread of the COVID-19 virus, the court will only conduct remote hearings. Parties who contest the tentative ruling or wish to appear remotely at a hearing must contact the clerk of the court at (209) 725-4240 to provide their contact information for the remote hearing.**

Case No. Title / Description

20CV-03605 United Farm Workers of America, et al. vs Foster Poultry Farms

Hearing on Ex Parte Application for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction

The Complaint for Injunction filed on December 17, 2020 alleges the following three causes of action: (1) Public Nuisance in Violation of California Code of Civil Procedure section 731; (2) Unfair and Unlawful Business Practice in Violation of California Business & Professions Code section 17200; and (3) Declaratory Relief pursuant to California Code of Civil Procedure section 1060. The instant application by Plaintiffs for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction seeks eleven categories of mandatory injunctive relief and is supported by twelve initial and four responsive declarations. Notice of the instant application has been provided to Defendant and Defendant has filed an opposition supported by three initial declarations and four supplemental declarations.

Defendant Foster Farms has filed a number of evidentiary objections to which Plaintiff have filed a response. The court rules as follows:

1. Objection to ¶ 3 of Zamora Declaration: **OVERRULED**
2. Objection to ¶ 4 of Zamora Declaration: **OVERRULED**
3. Objection to ¶ 7 of Zamora Declaration: **OVERRULED**
4. Objection to ¶ 4 of Monares Declaration: **OVERRULED**
5. Objection to ¶ 8 of Monares Declaration: **OVERRULED**
6. Objection to ¶ 3 of Pena Declaration: **OVERRULED**
7. Objection to ¶ 4 of Pena Declaration: **OVERRULED**

8. Objection to ¶ 5 of Pena Declaration: OVERRULED
9. Objection to ¶ 7 of Pena Declaration: OVERRULED
10. Objection to ¶ 8 of Pena Declaration: OVERRULED
11. Objection to ¶ 9 of Pena Declaration: OVERRULED
12. Objection to ¶ 10 of Pena Declaration: OVERRULED
13. Objection to ¶ 6 of Ruiz Declaration: OVERRULED
14. Objection to ¶ 8 of Delgado Declaration: OVERRULED
15. Objection to ¶ 5 of Madrigal Declaration: OVERRULED
16. Objection to ¶ 7 of Madrigal Declaration: OVERRULED
17. Objection to ¶ 9 of Madrigal Declaration: OVERRULED
18. Objection to ¶ 8 of Vera Declaration: OVERRULED
19. Objection to ¶ 9 of Vera Declaration: OVERRULED
20. Objection to ¶ 11 of Vera Declaration: OVERRULED
21. Objection to ¶ 12 of Vera Declaration: OVERRULED
22. Objection to ¶ 6 of Mejia Declaration: OVERRULED
23. Objection to ¶ 10 of Mejia Declaration: OVERRULED
24. Objection to ¶ 11 of Mejia Declaration: OVERRULED
25. Objection to ¶ 13 of Mejia Declaration: OVERRULED
26. Objection to ¶ 14 of Mejia Declaration: OVERRULED
27. Objection to ¶ 15 of Mejia Declaration: OVERRULED
28. Objection to ¶ 17 of Mejia Declaration: OVERRULED
29. Objection to ¶ 4 of Alfaro Declaration: OVERRULED
30. Objection to ¶ 8 of Alfaro Declaration: OVERRULED
31. Objection to ¶ 3 of Alonso Declaration: OVERRULED
32. Objection to ¶ 4 of Alonso Declaration: OVERRULED
33. Objection to ¶ 5 of Alonso Declaration: OVERRULED

The Application by Plaintiffs for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction in connection with the First Cause of Action for Public Nuisance in Violation of California Code of Civil Procedure section 731 is DENIED WITHOUT PREJUDICE. While there is no dispute that an initial outbreak of COVID-19 infection resulted in closure of the plant operated by Defendant, Plaintiffs fails to provide sufficient admissible evidence to establish a reasonable probability that Plaintiffs will prevail on the First Cause of Action for Public Nuisance in Violation of California Code of Civil Procedure section 731 because Plaintiffs' evidence does not establish that, as of the date the Application for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction was filed, the COVID-19 infection rate for employees of the plant operated by Defendant is significantly higher than the infection rate for the population of Merced County and evidence provided by Defendant establishes that, as of the date the Application for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction was filed, the infection rate for employees of the plant operated by Defendant is significantly lower than the infection rate for the population of Merced County. This Denial of Plaintiffs' Application for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction in connection with the First Cause of Action for Public Nuisance in Violation of California Code of Civil Procedure section 731 is WITHOUT PREJUDICE to the right to present a renewed application supported by admissible evidence establishing that, as of the date the renewed application is filed, a public nuisance exists.

The Application by Plaintiffs for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction in connection with the Second Cause of Action for Unfair and

Unlawful Business Practice in Violation of California Business & Professions Code section 17200 is GRANTED IN PART AND DENIED IN PART. Plaintiffs have provided sufficient anecdotal evidence to establish a reasonable probability that Plaintiffs will prevail on their claim that Defendant is not complying with the August 5, 2020 directive issued by the Merced County Health Officer to Defendant, and therefore that Defendant has engaged in sufficient unfair and unlawful business practices to justify injunctive relief. While Defendant argues that Regulatory Agencies have primary authority over workplace safety issues, the doctrine of primary authority does not preclude a court from enforcing directives already issued by an appropriate regulatory agency in the exercise of that agencies' expertise and discretion to the defendant in question. Furthermore, Defendant cannot assert that enforcement of directives issued by an appropriate regulatory agency directly to Defendant is unduly burdensome where Defendant itself has agreed to implement certain "Livingston COVID Mitigation Measures" as its "COVID-19 Assessment and Control Plan" for its Livingston Plant based on the "*Meat and Poultry Processing Workers and Employers—Interim Guidance*" jointly issued by the Center for Disease Control ("CDC") and Department of Labor, Occupational Safety and Health Administration ("OSHA") on April 26, 2020 (the "Joint Guidance") and similar guidance for the food packaging and processing industry jointly issued by the California Department of Public Health ("CADPH"), California Department of Food and Agriculture, and CAL/OSHA (the "California Guidance").

Specifically, the "Order of the Health Officer of the County of Merced Directing Foster Farms Poultry Processing Plant in Livingston, CA to Respond to Current Outbreaks at the Livingston Complex and Comply with other Directives of this Order issued August 28, 2020 provides, in part:

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

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

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

(Order of the Health Officer of the County of Merced Directing Foster Farms Poultry Processing Plant in Livingston, CA to Respond to Current Outbreaks at the Livingston Complex and Comply with other Directives of this Order issued August 28, 2020 at Page 6 of 8.)

The State COVID-19 Industry Guidance for Food Packing and Processing provides that:

"People in California must wear face coverings when they are engaged in work, whether at the workplace or performing off-site when:...Working in any space where food is prepared or packaged for sale or distribution to others; Working in, or walking through common areas, such as hallways,

stairways, elevators, and parking facilities; In any room or enclosed area where other people (except for members of the person's own household or residence) are present when unable to physically distance...

Food processing workers often work in close proximity on industrial equipment and lines. In order to ensure these workers' safety, physical distancing in the workplace must be practiced. Implement measures to ensure physical distancing of at least six feet between workers whenever possible. This can include use of physical partitions or visual cues (e.g., floor markings, colored tape, or signs to indicate where workers should stand).

Modify the alignment of workstations, including along processing lines, if feasible, so that workers are at least six feet apart in all directions (e.g. side-to-side and when facing one another). Ideally, modify the alignment of workstations so that workers do not face one another. Consider using markings and signs to remind workers to maintain their location at their stations away from each other and practice physical distancing on breaks.

Use physical barriers such as strip curtains, Plexiglas or similar materials, or other impermeable dividers or partitions to separate packing or processing workers from each other, if feasible.

Designate workers to monitor and facilitate distancing on processing floor lines.

If necessary to ensure physical distancing, increase the number of shifts in a day, slow down the line speeds, and space out workers in accordance with CDC guidelines. Practice six-foot physical distancing to the greatest extent possible, even if this means production slows down....

Modify or stagger start times and alternate locker locations to increase physical distancing inside locker rooms and at the time clock.

Because food processing workers often have uniform break times, which can mean hundreds of workers congregating in break rooms and cafeteria spaces at once, stagger breaks to limit the number of workers in a break room or cafeteria at the same time.

Add barriers, remove or rearrange chairs and tables, or add partitions to tables, in break rooms and other areas workers may frequent to increase worker separation and ensure workers do not face each other. Identify alternative areas to accommodate overflow volume such as training and conference rooms or using outside tents for break or lunch areas.

(The State COVID-19 Industry Guidance for Food Packing and Processing at Page 3 and Pages 8-10.)

Defendant agreed to implement certain the following "Livingston COVID Mitigation Measures" as its "COVID-19 Assessment and Control Plan" for its Livingston Plant based on the "*Meat and Poultry Processing Workers and Employers—Interim Guidance*"

jointly issued by the Center for Disease Control (“CDC”) and Department of Labor, Occupational Safety and Health Administration (“OSHA”) on April 26, 2020 (the “Joint Guidance”) and similar guidance for the food packaging and processing industry jointly issued by the California Department of Public Health (“CADPH”), California Department of Food and Agriculture, and CAL/OSHA (the “California Guidance”):

1. All workers are required to wear face coverings and Foster Farms supplies face masks to workers in addition to their normal PPE;
2. Require employees to wear and provide employees with face shields where social distancing not possible;
3. Enhanced/expanded sanitation and personal hygiene measures that are at the core of its Good Manufacturing Practices (GMP) and Hazard Critical Control Point (HACCP) plans;
4. Installed physical dividers in break rooms and workplace areas where social distancing is difficult to maintain, including production lines where possible;
5. Added additional break area to facilitate social distancing;
6. Added additional handwashing and sanitizing stations throughout the complex;
7. Implement enhanced cleaning protocols, including requiring continuous cleaning of breakrooms and other common areas;
8. Changed operational schedules, including by staggering employee meal times, break times, and start times;
9. Implement a travel policy requiring workers who have traveled internationally or domestically to quarantine;
10. Implement health screenings for all outside visitors and workers, including temperature screenings, and questioning concerning COVID-19 symptom, before permitting them to enter the complex.
11. Implemented attendance polices aimed at proving infected workers from coming to Livingston.
12. Implemented a comprehensive investigation and close contact process for all known COVID-19 cases.
13. Implemented public health return to work criteria for employees exposed to COVID-19 or diagnosed with COVID-19.
14. Posted educational materials concerning COVID-19 mitigation throughout the worksite;
15. Conducted formal training on COVID-19 hazard and mitigation in multiple languages
16. Allow employees whose job duties permit to work remotely;
17. Promote social distancing by cohorting (grouping together) employees to reduce exposure, including by changing shift rotations and changing carpools;
18. Restrict vendor access to our facilities;
19. Implemented an ongoing COVID-19 testing protocol to monitor employees for COVID-19.

(Livingston COVID Mitigation Measures issued by Defendant as its “COVID-19 Assessment and Control Plan” for its Livingston Plant based on the “*Meat and Poultry Processing Workers and Employers—Interim Guidance*” jointly issued by the Center for Disease Control (“CDC”) and Department of Labor, Occupational Safety and Health Administration (“OSHA”) on April 26, 2020 (the “Joint Guidance”) and similar guidance for the food packaging and processing industry jointly issued by the California Department of Public Health (“CADPH”), California Department of Food and Agriculture, and CAL/OSHA (the “California Guidance”).

Accordingly, a Temporary Restraining Order shall issue, effective five calendar days after receipt of notice of this order, providing, as follows:

1. Defendant Foster Poultry Farms shall require all workers to wear face coverings; Foster Farms shall supply face masks to workers in addition to their normal PPE; Defendant Foster Poultry Farms shall active monitor worker compliance with the official face mask policy of Defendant Foster Poultry Farms, and Foster Poultry Farms shall warn or provide other appropriate discipline to employees that fail to wear masks in accordance with the official policy of Defendant Foster Poultry Farms;
2. Defendant Foster Poultry Farms shall require employees to wear face shields and provide employees with face shields where social distancing is not possible and Foster Poultry Farms shall warn or provide other appropriate discipline to employees that fail to wear face shields in accordance with the official policy of Defendant Foster Poultry Farms;
3. Defendant Foster Poultry Farms shall employ enhanced/expanded sanitation and personal hygiene measures that are at the core of its Good Manufacturing Practices (GMP) and Hazard Critical Control Point (HACCP) plans, Defendant Foster Poultry Farms shall actively monitor compliance with such plans, and Defendant Foster Poultry Farms shall warn or provide other appropriate discipline to employees that fail comply with such plans;
4. Defendant Foster Poultry Farms shall Install physical dividers in break rooms and workplace areas where social distancing is difficult to maintain, including production lines where possible;
5. Defendant Foster Poultry Farms shall install additional break areas to facilitate social distancing;
6. Defendant Foster Poultry Farms shall install handwashing and sanitizing stations throughout the complex;
7. Defendant Foster Poultry Farms shall implement enhanced cleaning protocols, including requiring continuous cleaning of breakrooms and other common areas, Defendant Foster Poultry Farms shall actively monitor compliance such enhanced cleaning protocols, and Defendant Foster Poultry Farms shall warn or provide other appropriate discipline to employees that fail comply with such enhanced cleaning protocols;
8. Defendant Foster Poultry Farms shall implement changed operational schedules, including by staggering employee meal times, break times, and start times;
9. Defendant Foster Poultry Farms shall Implement a travel policy requiring workers who have traveled internationally or domestically to quarantine;
10. Defendant Foster Poultry Farms shall conduct health screenings for all outside visitors and workers, including temperature screenings, and questioning concerning COVID-19 symptoms, before permitting them to enter the complex; Defendant Foster Poultry Farms shall actively monitor compliance with such screening procedures, and Defendant Foster Poultry Farms shall warn or provide other appropriate discipline to employees charged with conducting health screening or participating in health screenings who fail to conduct or cooperate with such health screenings;
11. Defendant Foster Poultry Farms shall implement and enforce attendance polices aimed at preventing infected workers from coming to Livingston; Defendant Foster Poultry Farms shall actively monitor compliance with such policies, and Defendant Foster Poultry Farms shall warn or provide other appropriate discipline to employees that fail comply with such policies;

12. Defendant Foster Poultry Farms shall implement a comprehensive investigation and close contact process for all known COVID-19 cases.
13. Defendant Foster Poultry Farms shall implement public health return to work criteria for employees exposed to COVID-19 or diagnosed with COVID-19.
14. Defendant Foster Poultry Farms shall post educational materials concerning COVID-19 mitigation throughout the worksite;
15. Defendant Foster Poultry Farms shall conduct formal training on COVID-19 hazard and mitigation in multiple languages, Defendant Foster Poultry Farms shall actively monitor compliance with such training, and Defendant Foster Poultry Farms shall warn or provide other appropriate discipline to employees charged with providing or receiving training that fail to provide or receive training;
16. Defendant Foster Poultry Farms shall allow employees whose job duties permit to work remotely;
17. Defendant Foster Poultry Farms shall promote social distancing by cohorting (grouping together) employees to reduce exposure, including by changing shift rotations and changing carpools;
18. Defendant Foster Poultry Farms shall restrict vendor access to its facilities;
19. Defendant Foster Poultry Farms shall implemented an ongoing COVID-19 testing protocol to monitor employees for COVID-19, Defendant Foster Poultry Farms shall actively monitor compliance with such protocols, and Defendant Foster Poultry Farms shall warn or provide other appropriate discipline to employees charged to perform such protocols who fail to perform such protocols.
20. Defendant Foster Poultry Farms shall comply with Paragraph 8 of the "Order of the Health Officer of the County of Merced Directing Foster Farms Poultry Processing Plant in Livingston, CA to Respond to Current Outbreaks at the Livingston Complex and Comply with other Directives of this Order issued August 28, 2020 which provides, in part: "8. Foster Farms management shall ensure that all employees be informed of testing requirements, outbreaks that occur, areas affected, and trained on safety requirements, in English, Spanish, and Punjabi, working with the union as applicable..."

Accordingly, an Order to Show Cause shall issue and Defendant Foster Poultry Farms is ordered to appear on Friday, January 29, 2021, at 8:15 a.m. and show cause why a Preliminary Injunction should not issue containing the following provisions:

1. Defendant Foster Poultry Farms shall require all workers to wear face coverings; Foster Farms shall supply face masks to workers in addition to their normal PPE; Defendant Foster Poultry Farms shall active monitor worker compliance with the official face mask policy of Defendant Foster Poultry Farms, and Foster Poultry Farms shall warn or provide other appropriate discipline to employees that fail to wear masks in accordance with the official policy of Defendant Foster Poultry Farms;
2. Defendant Foster Poultry Farms shall require employees to wear face shields and provide employees with face shields where social distancing is not possible and Foster Poultry Farms shall warn or provide other appropriate discipline to employees that fail to wear face shields in accordance with the official policy of Defendant Foster Poultry Farms;
3. Defendant Foster Poultry Farms shall employ enhanced/expanded sanitation and personal hygiene measures that are at the core of its Good Manufacturing Practices (GMP) and Hazard Critical Control Point (HACCP) plans, Defendant Foster Poultry Farms shall actively monitor compliance with such plans, and

Defendant Foster Poultry Farms shall warn or provide other appropriate discipline to employees that fail comply with such plans;

- 4. Defendant Foster Poultry Farms shall Install physical dividers in break rooms and workplace areas where social distancing is difficult to maintain, including production lines where possible;**
- 5. Defendant Foster Poultry Farms shall install additional break areas to facilitate social distancing;**
- 6. Defendant Foster Poultry Farms shall install handwashing and sanitizing stations throughout the complex;**
- 7. Defendant Foster Poultry Farms shall implement enhanced cleaning protocols, including requiring continuous cleaning of breakrooms and other common areas, Defendant Foster Poultry Farms shall actively monitor compliance such enhanced cleaning protocols, and Defendant Foster Poultry Farms shall warn or provide other appropriate discipline to employees that fail comply with such enhanced cleaning protocols;**
- 8. Defendant Foster Poultry Farms shall implement changed operational schedules, including by staggering employee meal times, break times, and start times;**
- 9. Defendant Foster Poultry Farms shall Implement a travel policy requiring workers who have traveled internationally or domestically to quarantine;**
- 10. Defendant Foster Poultry Farms shall conduct health screenings for all outside visitors and workers, including temperature screenings, and questioning concerning COVID-19 symptoms, before permitting them to enter the complex; Defendant Foster Poultry Farms shall actively monitor compliance with such screening procedures, and Defendant Foster Poultry Farms shall warn or provide other appropriate discipline to employees charged with conducting health screening or participating in health screenings who fail to conduct or cooperate with such health screenings;**
- 11. Defendant Foster Poultry Farms shall implement and enforce attendance polices aimed at preventing infected workers from coming to Livingston; Defendant Foster Poultry Farms shall actively monitor compliance with such policies, and Defendant Foster Poultry Farms shall warn or provide other appropriate discipline to employees that fail comply with such policies;**
- 12. Defendant Foster Poultry Farms shall implement a comprehensive investigation and close contact process for all known COVID-19 cases.**
- 13. Defendant Foster Poultry Farms shall implement public health return to work criteria for employees exposed to COVID-19 or diagnosed with COVID-19.**
- 14. Defendant Foster Poultry Farms shall post educational materials concerning COVID-19 mitigation throughout the worksite;**
- 15. Defendant Foster Poultry Farms shall conduct formal training on COVID-19 hazard and mitigation in multiple languages, Defendant Foster Poultry Farms shall actively monitor compliance with such training, and Defendant Foster Poultry Farms shall warn or provide other appropriate discipline to employees charged with providing or receiving training that fail to provide or receive training;**
- 16. Defendant Foster Poultry Farms shall allow employees whose job duties permit to work remotely;**
- 17. Defendant Foster Poultry Farms shall promote social distancing by cohorting (grouping together) employees to reduce exposure, including by changing shift rotations and changing carpools;**
- 18. Defendant Foster Poultry Farms shall restrict vendor access to its facilities;**
- 19. Defendant Foster Poultry Farms shall implemented an ongoing COVID-19 testing protocol to monitor employees for COVID-19, Defendant Foster Poultry Farms**

shall actively monitor compliance with such protocols, and Defendant Foster Poultry Farms shall warn or provide other appropriate discipline to employees charged to perform such protocols who fail to perform such protocols.

20. Defendant Foster Poultry Farms shall comply with Paragraph 8 of the “Order of the Health Officer of the County of Merced Directing Foster Farms Poultry Processing Plant in Livingston, CA to Respond to Current Outbreaks at the Livingston Complex and Comply with other Directives of this Order issued August 28, 2020 which provides, in part: “8. Foster Farms management shall ensure that all employees be informed of testing requirements, outbreaks that occur, areas affected, and trained on safety requirements, in English, Spanish, and Punjabi, working with the union as applicable...”
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