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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

NATIONAL RETAIL FEDERATION; NATIONAL FEDERATION OF INDEPENDENT BUSINESS; RELLES FLORIST; MAYFIELD EQUIPMENT COMPANY; and ABATE-A-WEED, INC.,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF OCCUPATIONAL SAFETY & HEALTH; OCCUPATIONAL SAFETY & HEALTH STANDARDS BOARD; DOUGLAS PARKER, in his official capacity as Chief of the California Department of Industrial Relations; and DOES 1-50, inclusive,

Defendants.

Case No. CGC-20-588367

DEFENDANTS' OPPOSITION TO APPLICATION FOR PRELIMINARY INJUNCTION

NO FEE PURSUANT TO GOVERNMENT CODE § 6103

Date: January 28, 2021
Time: 1:30 p.m.
Dep't: 302
Judge: The Hon. Ethan P. Schulman
Action Filed: December 16, 2020

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I. INTRODUCTION

The State of California, like the rest of the world, is combating a public health crisis unseen for at least a century stemming from COVID-19, a highly infectious disease spreading rapidly throughout the United States. As of the date of this filing, California is approaching three million reported cases, including over 33,000 deaths. These tragic numbers grow daily.

Since March 4, 2020, when California Governor Gavin Newsom proclaimed a state of emergency, California has deployed a panoply of measures to fight COVID-19, a dangerous and potentially deadly enemy that is able to mutate into more contagious variants and invade any space, whether home or work. Among such measures are California Department of Public Health (CDPH) orders and guidelines for the best ways to avoid exposure to the virus, which focus primarily on behavior, including: staying home except for essential needs and activities; practicing physical distancing of at least six feet from other people; wearing a cloth face mask when leaving home; and washing hands with soap and water for at least 20 seconds.

It is in this context that on November 30, 2020, emergency temporary regulations (ETS) related to COVID-19 prevention in places of employment went into effect. Subject to certain exceptions, the ETS generally apply to California employers under the jurisdiction of Cal/OSHA.

Plaintiffs, an assortment of businesses and business trade associations representing various participants in the retail sector, seek to enjoin key provisions of the ETS that protect workers from this ever-changing pandemic. But all of Plaintiffs' legal arguments fail. Additionally, if this Court grants Plaintiffs' requested injunction, numerous workers in California would suffer severe and irreparable harm given that the spread of COVID-19 continues to increase at a record pace and workplaces are not immune from this serious illness or its heightened spread. Many workers depend on their employers for their safety during their shifts (typically eight-hour), and should they become ill, their family, friends, and other members of the public they encounter face the risk of infection. Thus, failure to adequately protect workers not only impacts them but could have far reaching permanent repercussions for the public at large.

Plaintiffs have alleged only that for a temporary period of time they will need to modify and adjust their normal operations and may experience economic challenges as a result of the ETS. Employers have a responsibility to provide a safe workplace, including protecting workers against COVID-19 hazards. And it is a long-standing tenet of California law that the cost of compliance with safety standards should be borne by employers, not employees. (See *Bendix Forest Products Corp. v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465.) The balance of harms thus weighs strongly in Defendants' favor.

For all these reasons, the Court should deny the motion for a preliminary injunction.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The COVID-19 Pandemic

The COVID-19 pandemic poses an ongoing and deadly threat to public health, especially to workers who depend on their employers to protect them while at work. The SARS-CoV-2 virus, the novel coronavirus that causes COVID-19, spreads through droplets and aerosolized particles, which may be transferred unwittingly by individuals who exhibit *no* symptoms. (See *South Bay United Pentecostal Church v. Newsom* (2020) 140 S.Ct. 1613, 1613 (Roberts, C.J., concurring)). There is an acute risk of transmission in settings where prolonged contact with an infected person occurs or where large numbers of people gather. The virus may have serious long-term effects, including on individuals who do not initially experience significant symptoms.

As of the date of this filing, two vaccines have been developed and approved for use, and several others are at different stages; their deployment, however, has thus far failed to keep pace with the runaway rate of infections.[1] Consequently, safety and health measures like physical distancing remain the primary recognized ways to slow the spread of the virus until vaccinations can be adequately administered on the scale that is needed. (See *id.*; *Gish v. Newsom*, No. EDCV20-755-JGB (KKx), 2020 WL 1979970, at *4 (C.D.Cal. Apr. 23, 2020), appeal filed, No. 20-55445 (9th Cir. Apr. 28, 2020).)

[1] See, e.g., Luke Money et al., "California's Vaccine Rollout Has Been Too Slow, Newsom Says, with Only 35% of Doses Administered," https://www.latimes.com/california/story/2021-01-04/newsom-california-covid-vaccine-rollout-too-slow> (last visited Jan. 19, 2021).

B. California's Response to the Pandemic

On March 4, 2020, the Governor proclaimed a State of Emergency in California. Two weeks later, on March 19, the Governor issued a stay-at home order (Executive Order N-33-20), requiring Californians to heed state and local public health directives and "to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors." (Administrative Record ("A.R.") Tab 1K2.)

In October 2020, the spread of the virus began a vigorous resurgence and the number of new cases, hospitalizations, and deaths have continued to climb ever since.[2] The United States is now experiencing the worst daily infection rates it has seen over the course of the pandemic, with the number of positive infections rising to over 226,000 per day.[3] Approximately 23.6 million Americans have been infected and more than 394,000 have died, including more than 33,000 Californians.[4]

As with the nation, infection cases in California are spiking: The number of daily positive tests has increased tenfold over the last two and a half months—to more than 40,000 positive tests per day—and the number of hospitalizations in that time has more than sextupled.[5]

C. Adoption of the ETS

Prior to the adoption of the ETS, Cal/OSHA did not have a specific standard to enforce that protected the majority of workers from the hazard of COVID-19 in the workplace. The Aerosol Transmissible Diseases (ATD) standard provides workers with important protections from

[2] See, e.g., Will Stone, "The Pandemic is Entering a Dangerous New Wave," <https://www.npr.org/sections/health-shots/2020/11/13/934566781/the-pandemic-this-week-8-things-to-know-about-the-surge> (last visited Jan. 19, 2021).

[3] See Johns Hopkins University & School of Medicine, Coronavirus Resource Center, <https://coronavirus.jhu.edu/data/new-cases> (last visited Jan. 19, 2021).

[4] See Defendant's Request for Judicial Notice ("RJN"), Ex. 1, Centers for Disease Control and Prevention COVID Data Tracker at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited Jan. 19, 2021); RJN, Ex. 2, California Department of Public Health COVID-19 Information, <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx> (last visited Jan. 19, 2021).

[5] See RJN, Ex. 3, State of California, Tracking COVID-19 in California—Coronavirus COVID-19 Response, <https://covid19.ca.gov/state-dashboard/#top> (showing a daily rate of 4,094 on November 1, 2020, and a daily rate of 44,593 on January 16, 2021) (last visited Jan. 19, 2021); *id*. (hospitalized COVID-19 patients more than sextupled from 3,241 on November 1 to 21,143 as of January 16, 2021).

exposure to novel pathogens, including COVID-19, in specified health care and correctional settings. (See generally Cal. Code Regs., tit. 8, § 5199.) But while ATD is an important component in the fight against the spread of the virus, ATD does not protect workers outside specified settings. (*Id.* at subd. (a).) Thus, the majority of California workers do not fall within ATD protections. (A.R. Tab 1E at p. 4.)

At the September 17, 2020, meeting, the Board considered Petition 583, which requested emergency rulemaking to address the potential harm posed to workers by COVID-19. The petition sought adoption of an emergency standard that would apply to employees in any facility, service category, or operation not covered by ATD. Cal/OSHA reviewed the petition and recommended to the Board that it be granted. (A.R. Tab 1K6 at p. 22.) A Board staff member's subsequent evaluation reached a different conclusion and recommended denial.[6] (A.R. Tab 1K5 at p. 3.) Ultimately, the Board voted to grant Petition 583 in part, agreeing with Cal/OSHA that "COVID-19 is a hazard to working people" and that "an emergency regulation would enhance worker safety." (*Id.*) The Board acknowledged its staff evaluation but explained that Cal/OSHA "is well positioned, as the State agency responsible for enforcement, to advise the Board regarding the enforceability of new safety order requirements under consideration." Moreover, the Board accepted "the Division's assertion that an emergency regulation would strengthen, rather than complicate, the Division's enforcement efforts." (*Id.* at pp. 3-4.) At or around the time the petition was submitted, Cal/OSHA had received nearly 7,000 complaints alleging inadequate protections and potential exposure to COVID-19 in workplaces. (A.R. Tab 1E at p. 5.)

[6] Plaintiffs rely heavily on this Board staff member's evaluation and appear to conflate his recommendation with an actual decision by the full Board. (See Plaintiffs' Memorandum of Points and Authorities in Support of Application for Preliminary Injunction ("Pls.' MPA") at p. 4 ["The Board Denies Petition for COVID-19 Temporary Emergency Standard"].) However, staff evaluations do not represent a formal position of the Board and are simply created to assist the Board in its decision-making process. (Declaration of Christina Shupe, ¶ 3.) Accordingly, the Board did not, as Plaintiffs assert, "reverse[] course" (Pls.' MPA at p. 5) when it decided that emergency regulations were necessary; it merely exercised its discretion to rely on different evidence and recommendations, namely those of Cal/OSHA as the enforcement agency (see A.R. Tab 1K5 at pp. 3-4).

On November 19, 2020, the Board held a public hearing to discuss the proposed ETS. Following the hearing, the Board adopted the ETS under Labor Code sections 142.3 and 144.6. Of relevance, the ETS added sections 3205, 3205.1., 3205.2, and 3205.3 to Title 8 of the California Code of Regulations. Among other measures discussed infra, those rules require:

(1) **Testing**: Employers must provide COVID-19 testing to employees, at no cost and during working hours if the employee is exposed to a COVID-19 case (§ 3205, subd. (c)(3)) or has been present in an exposed workplace that has been identified as the location of an outbreak (§ 3205.1, subd. (b)). Twice a week employers must provide COVID-19 testing to employees who have been present in an exposed workplace that has been identified as the location of an "major outbreak" of 20 or more COVID-19 cases within a 30-day period, until no new COVID-19 cases are detected in that workplace for a period of 14 days (§ 3205.2, subd. (b)); and

(2) **Exclusion period from workplace**: Employers must exclude from the workplace all employees who have COVID-19 or have been exposed to COVID-19 for a period consistent with current public health recommendations or orders (§ 3205, subd. (c)(10)-(11); Executive Order N-84-20). Employers must ensure workers receive pay during this exclusion period, unless the COVID-19 illness or exposure to COVID-19 is shown to be nonoccupational. (*Id*. at subd. (c)(11)).

III. ARGUMENT

A preliminary injunction is an extraordinary remedy that should rarely be granted. "[A] plaintiff must make some showing which would support the exercise of the rather extraordinary power to restrain the defendant's actions prior to a trial on the merits." (*Tahoe Keys Property Owners' Ass'n. v. State Water Resources Control Board* (1994) 23 Cal.App.4th 1459, 1471.) "The right must be clear, the injury impending and threatened, so as to be averted only by the protective preventive process of injunction." (*City of Tiburon v. Northwestern Pac. R. Co*. (1970) 4 Cal.App.3d 160, 179 [citation omitted].)

Two interrelated standards must be satisfied: "The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to

suffer if the preliminary injunction were issued." (*IT Corp. v. Cty. of Imperial* (1983) 35 Cal.3d 63, 69-70.) "Where, as here, the plaintiff seeks to enjoin public officers and agencies in the performance of their duties, the public interest must be considered," and there must be a significant showing of irreparable injury. (*Tahoe Keys*, supra, 23 Cal.App.4th at pp. 1471-1473.) The plaintiff must produce evidence of irreparable interim injury, which is not satisfied by conclusory allegations of injury. (*Loder v. City of Glendale* (1989) 216 Cal.App.3d 777, 782-783; *E.H. Renzel Co. v. Warehousemen's Union I.L.A. 38-44* (1940) 16 Cal.2d 369, 373.)

A. Plaintiffs Have Failed to Show a Likelihood of Success on the Merits of Their Claims

1. The ETS Were Properly Promulgated Pursuant to the APA's Emergency Regulation Procedure

Plaintiffs contend that the Board failed to establish substantial evidence to support the standard for emergency regulations related to the worker exclusion and testing provisions, specifically California Code of Regulations, title 8, sections 3205(c)(10)(B) and 3205.1(b). This claim is specious.

An "'[e]mergency' means a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." (Gov. Code, § 11342.545.) The term "emergency" has been given a practical, commonsense meaning in California case law: "[E]mergency has long been accepted in California as an unforeseen situation calling for immediate action. This is 'the meaning of the word that obtains in the mind of the lawyer as well as in the mind of the layman.'" (*Sonoma Cty. Organization of Public/Private Employees v. Cty. of Sonoma* (1991) 1 Cal.App.4th 267, 276-277 [citations omitted].) As discussed above, immediate action was clearly needed here.

The emergency rulemaking process requires an agency to include a written statement containing "a description of the specific facts demonstrating the existence of an emergency and the need for immediate action, and demonstrating, by substantial evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency." (Gov. Code, § 11346.1, subd. (b)(2).) The Office of Administrative Law ("OAL") then reviews the adopted regulations and may disapprove them

if, among other things, "it determines that the situation addressed by the regulations is not an emergency." (Gov. Code, § 11349, subd. (b); see also Cal. Code Regs., tit. 1, § 50.)

Historically, when reviewing the validity of emergency regulations promulgated under Section 11346.1(b), "'[w]hat constitutes an emergency is primarily a matter for the agency's discretion.'" (*Doe v. Wilson* (1997) 57 Cal.App.4th 296, 310 (quoting *Schenley Affiliated Brands Corp. v. Kirby* (1971) 21 Cal.App.3d 177).) Accordingly, while "a court is not necessarily bound by an agency's determination of the existence of an emergency," it "must accord *substantial deference* to this agency finding, and may only overturn such an emergency finding if it constitutes an abuse of discretion by the agency." (*Id.* [emphasis in original].) When determining whether an agency action is supported by substantial evidence, a court must "accept all evidence which supports the successful party, disregard the contrary evidence, and draw all reasonable inferences to uphold" the agency's decision. (*M.N. v. Morgan Hill Unified Sch. Dist*. (2018) 20 Cal.App.5th 607, 616. [citation omitted]) [7] "Only if no reasonable person could reach the conclusion reached by the administrative agency, based on the entire record before it, will a court conclude that the agency's findings are not supported by substantial evidence." (*Doe v. Regents of Univ. of Cal.* (2016) 5 Cal.App.5th 1055, 1073. [citation omitted]) This accords with the standard of review for agency action more generally. (See *Pulaski v. Cal. Occupational Safety & Health Stds. Bd.* (1999) 75 Cal.App.4th 1315, 1329 ["It is not the court's function to second-guess the Board's conclusions or resolve conflicting scientific views in an area committed to the discretion of the rulemaking agency."].)

The administrative record includes a detailed 57-page Finding of Emergency ("FOE"), with 71 attachments, that the Board relied upon to determine emergency regulations were appropriate in this circumstance. The attachments include scientific data surrounding the transmission of COVID-19, guidance from CDC and CDPH, and studies or reports surrounding investigations of

[7] Moreover, under the substantial evidence framework, review is conducted "solely on the record of the proceeding before the administrative agency." *Toyota of Visalia, Inc. v. New Motor Vehicle Bd.* (1987) 188 Cal.App.3d 872, 881. Accordingly, the "evidence" cited by Plaintiffs for the proposition that retail workplaces in particular are relatively safe or that the ETS will not reduce the spread of COVID-19 (see, e.g., Pls.' MPA at 7 n.3, 11) is not appropriately considered as part of this inquiry.

the spread of COVID-19 at certain work-related areas throughout the State. (See generally FOE, A.R. Tab 1E and Documents Relied Upon, A.R. Tab 1K *et seq*.) These documents establish that the Board's decision to promulgate the ETS was based upon sound scientific evidence showing that COVID-19 represented a serious and ongoing workplace emergency and that the proposed regulations—including the specific provisions Plaintiffs seek to enjoin—were tailored to combat the spread of COVID-19 within the workplace.

For example, the FOE established: (1) "the majority of California workplaces are allowed to engage in on-site work operations despite the continuing spread of COVID-19"; (2) "[c]lusters and outbreaks of COVID-19 have occurred in workplaces throughout California, including in food manufacturing, agricultural operations, and warehouses"; and (3) no specific regulation "protects all workers from exposure to infectious diseases such as COVID-19." (A.R. Tab 1E at pp. 4, 5.) The FOE further noted that "employees who report to their places of employment are often exposed to an increased risk of contracting COVID-19, which may require medical treatment, including hospitalization" and that "employees who report to work while sick increase health and safety risks for themselves, their fellow employees, and others with whom they come into contact." (*Id.* at 5 [quoting Executive Order N-62-20, A.R. Tab 1K4].) Moreover, the FOE noted an estimated 400 COVID-19 workplace outbreaks in California that were not covered by existing ATD standards (*id.* at 52), and over 6,937 Cal/OSHA complaints alleging inadequate protections for and/or potential exposure to COVID-19 in the workplace (*id.* at 15).

In support of its FOE, the Board relied on a wealth of testimony from essential workers and advocates at the November 19, 2020, hearing regarding the failures of employers to protect workers from COVID-19 in the workplace and the outbreaks resulting from those failures.[8] The Board also provided multiple documents and scientific publications illustrating the emergency

[8] See, e.g., A.R. Tab 5 at 35:24-36:2 ["I've seen the store I work at and most of the other stores on the block I work at fail to comply with local health orders and make necessary changes to keep workers safe."], 47:18-50:15 [restaurant failed to identify and notify potential contacts of positive cases or report positive cases to local authorities], and 104:6-105:17 [grocery store cashier describing how "[m]y employer is failing to comply with basic public health orders protections . . . . We have experienced an outbreak at my job"].

threat of COVID-19, both generally and in the workplace, including recommended measures for addressing its dangers. Specifically, the Board relied on credible evidence that carriers of COVID-19, including asymptomatic and presymptomatic carriers, pose a risk of infection to their fellow employees in the workplace.[9] For the purpose of reducing the risk of contracting COVID-19, the Board relied upon scientific and medical experts in reaching its findings regarding testing and exclusion of close contacts.[10]

The administrative record thus amply supports the Board's determination that emergency regulations were appropriate and needed. OAL's independent affirmation of an emergency and ultimate approval of the ETS further buttresses that determination. (Gov. Code, § 11349, subd. (b); Cal. Code Regs., tit. 1, § 50.)

Plaintiffs misstate the standard when they contend that the Board failed to show that a "majority of California's workplaces" or that "most California employers . . . are the source of widespread infections" before enacting regulations that apply to all of the State's employers. (Pls.' MPA at p. 11.) An "emergency" is a "situation that calls for immediate action to *avoid* serious harm to the public peace, health, safety, or general welfare" (Gov. Code, § 11342.545 (emphasis added)). As amply demonstrated by the administrative record, COVID-19 is a serious harm and the purpose of the ETS is to avoid and prevent its spread in workplaces. There is no requirement, and Plaintiffs cite none, that the evidence of an emergency must show that a particular danger or hazard exists in "most" or a "majority" of workplaces.

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[9] See, e.g., A.R. Tab 1K8 at 2 [identifying "[w]orking in confined indoor space," "difficulties maintaining the recommended distance of at least two metres," working as "transport workers" or "sales people," and "'presenteeism' (i.e. reporting to work despite being symptomatic for a disease)" as "[p]ossible factors contributing to clusters and outbreaks in occupational settings"]); A.R. Tab 1K46 ["COVID-19 infection is also disproportionately impacting our essential workforce."].

[10] See, e.g., A.R. Tab 1K54 [containing Sept. 8, 2020 CDPH guidance explaining, among other things that "[e]mployers must use the reporting threshold of three or more laboratory-confirmed cases of COVID-19 among workers who live in different households within a two-week period"; "[t]esting all workers should be the first strategy considered for identification of additional cases"; "[e]mployers should offer on-site COVID-19 testing of workers or otherwise arrange for testing"; and "[c]lose contacts should be instructed to quarantine at home for 14 days from their last known contact with the worker with COVID-19."]; A.R. Tab 5 at 52:13-55:4 [supportive testimony from Dr. Robert Harrison at UCSF].

Finally, Plaintiffs contend that the Board's reliance on existing regulations between March and September 2020 demonstrates a lack of sufficient evidence to support a finding of emergency. Not so.

The administrative record establishes that any passage in time from the start of the declared emergency to the effective date of the ETS was indicative of an evolving and worsening health crisis requiring evolving and escalating governmental actions. The Board made clear the reason to adopt the ETS: "[i]nvestigations in the field over the summer, along with rising positivity rates, showed that employers were struggling to address the novel hazards presented by COVID-19." (A.R. Tab 3E1 at pp. 2-3.) The Board exercised its lawful discretion to act when it did, rather than earlier in the pandemic, because "cases began to rise precipitously in October and November 2020"; current "[g]uidance is not sufficient to address the present increase in cases and the risk of occupational spread"; the new regulations are "critical to reduce occupational spread during the ongoing rise in infections"; and "[t]he present threat of exponential growth in COVID-19 cases demands immediate action." (*Id.* at 3.)

Consequently, the administrative record amply supports the Board's conclusion, with which OAL agreed, that emergency regulations were appropriate and authorized. Plaintiffs' arguments to the contrary lack merit.

2. The ETS Represent a Lawful and Appropriate Exercise of the Board's Broad Authority and Are within Cal/OSHA's Authority to Enforce

As an initial matter, the Board is the sole agency in the state vested with quasi-legislative authority to adopt occupational safety and health standards. (Lab. Code, § 142.3, subd. (a)(1).) (*Bautista v. State of California* (2011) 201 Cal.App.4th 716, 722.) The California Supreme Court has held that the "Labor Code is to be liberally interpreted to achieve a safe work environment" (*United Air Lines, Inc. v. Occupational Safety and Health Appeals Bd.* (1982) 32 Cal.3d 762, 771.) That is precisely what the Board did in adopting the ETS, which accomplish the Board's mandate of achieving a safer work environment during the COVID-19 pandemic by establishing workplace testing, quarantine, and physical distancing protocols, each of which are rooted in CDPH and CDC guidance on preventing and controlling the spread of COVID-19. (See,

supra, section A.1.) Cal/OSHA "enforces those standards, inspecting workplaces and issuing citations for health and safety violations." (*Cal. Dept. of Industrial Relations v. Occupational Safety and Health Appeals Bd.* (2018) 26 Cal.App.5th 93, 97.)

Plaintiffs argue—in a single sentence with no law to support their assertions (Pls.' MPA at p. 12)—that because other state agencies regulate wages and paid leave, Cal/OSHA's jurisdiction to enforce ETS provisions bearing on these matters is circumscribed. This claim lacks merit. Under Labor Code sections 6303 and 6307, Cal/OSHA has jurisdiction over a place of employment unless "the health and safety jurisdiction is **vested by law in**, and **actively exercised by**, any state or federal agency other than the division." (Lab. Code, § 6303 [emphasis added].) It is not enough for another agency to have the power to enact safety regulations concerning a place of employment; the agency must be "*specifically mandated* to regulate the working environment . . . for the protection of the employees' health and safety." (*United Air Lines Inc.*, supra, 32 Cal.3d at p. 770 [italics in original].)

Plaintiffs cite no law or evidence that the agencies they mention—the Division of Labor Standards Enforcement, the Division of Workers' Compensation, or the Employment Development Department—are specifically mandated to regulate the working environment for the protection of the employees' health and safety *and* actively enforce in these areas to the exclusion of Cal/OSHA. Moreover, Plaintiffs' contention that the ETS's exclusion pay and benefits provision is a wage and hour issue as opposed to a health and safety issue also flies in the face of the record; the Board's FOE makes clear that these provisions are meant to address a matter of health and safety insofar as they were adopted specifically to ensure that "employees will notify their employers if they test positive for COVID-19 or have an exposure to COVID-19, and stay away from the workplace during the high-risk exposure period when they may be infectious." (A.R. Tab 1E at pp. 19-20.) When Plaintiffs seek to couch these provisions as wage-and-hour requirements, that framing ignores their fundamental purpose and looks only at the cost of compliance with a critical occupational health and safety standard, which, as is well-established, Cal/OSHA has the authority under the Occupational Safety and Health Act to require employers to pay. (*Bendix Forest Products Corp.,* supra, 25 Cal.3d at p. 465.)

Accordingly, Plaintiffs fail to meet their movant's burden of showing a likelihood of success on the merits of their claims.

3. The ETS Satisfy Due Process

Plaintiffs argue that the ETS violate due process. When, as here, the state regulates economic and social relations and no fundamental right is in issue, due process requires that the law or regulation be rationally related to a permissible state goal. (*Exxon Corp. v. Governor of Md.* (1978) 437 U.S. 117, 124–25.) Accordingly, Plaintiffs bear the burden to establish that the Board acted in an arbitrary and irrational way in promulgating certain standards of the ETS. (See *Usery v. Turner Elkhorn Mining Co.* (1976) 428 U.S. 1, 15.) That is, the portions of the ETS Plaintiffs claim are unconstitutional may only be enjoined if there is no rational connection between those challenged sections and a legitimate government objective. (See *Williamson v. Lee Optical of Okla. Inc.* (1955) 348 U.S. 483, 488.)

Plaintiffs first argue that the Board failed to comply with the procedural and substantive requirements of the U.S. Constitution and the APA by engaging in the emergency rulemaking process. As already explained in detail above, these arguments lack merit as the ETS were lawfully and appropriately promulgated under the emergency rulemaking process. (See supra section A.1.)

Plaintiffs also argue that the provisions requiring (1) the potential mandatory testing of all employees at a workplace in the event of an "outbreak," i.e., when three employees test positive within 14 days, and/or (2) full pay and benefits to all employees who were potentially exposed to COVID-19 amount to an arbitrary and capricious deprivation of property. This contention is without merit. As demonstrated above, the administrative record amply supports the Board's rational basis for promulgating the challenged provisions of the ETS. The record establishes that COVID-19 is a potentially deadly disease with no cure; the best way to stop its spread is through physical distancing and testing during an outbreak. This is what the ETS require. Moreover, the ETS are rationally related to the goal of eliminating the hazard posed to other workers by "employees who test positive," and ensuring that "[c]ontacts can be traced and self-isolation or quarantine can be started sooner to help stop the spread of the virus." (A.R. Tab 1E at p. 21.)

Similarly, the exclusion requirements accompanied by paid leave are important to ensure that "employees who are COVID-19 cases or who had exposure to COVID-19 do not come to work" and "that employees will notify their employers if they test positive for COVID-19 or have an exposure to COVID-19, and stay away from the workplace during the high-risk exposure period when they may be infectious." (*Id.* at 19-20.)

Therefore, the challenged portions of the ETS are rationally connected to legitimate government objectives related to stopping the spread of COVID-19. Accordingly, Plaintiffs have failed to show they are likely to succeed on the merits of their federal and state constitutional due process claims.

B. The Balance of Harms Favors Maintaining the ETS

1. Plaintiffs Have Failed to Demonstrate Irreparable Harm

As noted above, Plaintiffs must make a "significant" showing of irreparable injury to enjoin a public officer or agency from performing its duties (*Tahoe Keys,* 23 Cal.App.4th at p. 1471), and bear the burden to prove actual or threatened injury, which cannot be inferred from conclusory allegations. (See *E.H. Renzel Co.,* supra, 16 Cal.2d at p. 373). Plaintiffs fail to meet this burden.

First, Plaintiffs' claim that the ETS and other Cal/OSHA regulations offer no relief from the injuries they anticipate is simply not true. A cursory review of California law, the ETS, and the FAQs Defendants released in December 2020 and January 2021, show that Plaintiffs may be able to obtain variances from the ETS's standards. For example, if an employer is unable to comply with the ETS, Cal/OSHA will grant a temporary variance if the employer is (1) taking all available steps to safeguard employees against possible COVID-19 hazards and (2) has a program to come into compliance as quickly as practicable. (Lab. Code, §§ 6450, 6451.).

Second, Plaintiffs contend that they "face the imminent and unpredictable threat of severe financial harm, potentially to the extent of being forced out of business," (Pls.' MPA at p. 15.). While Defendants are aware and sympathetic to the reality that COVID-19 has created substantial burdens on many, employers and employees alike, financial harms of this kind are generally not sufficient to merit injunctive relief. (See *Sampson v. Murray* (1974) 415 U.S. 61, 89 [absent

extraordinary situations, loss of earnings or damage to reputation does not provide a basis for temporary injunctive relief]).

Here, Plaintiffs made no evidentiary showing that compliance with the ETS could give rise to the sort of "extraordinary situation" warranting injunctive relief. Instead of facts, Plaintiffs' declarations are litanies of speculation and generalities lacking any evidentiary foundation or substantive value. (See, e.g., Feil Decl. ¶ 7; Harned Decl. ¶ 19; Martz Decl. ¶ 25; Relles Decl. ¶¶ 5-6.) As discussed in Defendants' objections to Plaintiffs' evidence, these declarations provide minimal, if any, evidentiary weight to plaintiffs' assertions of irreparable harm because they lack foundation, contain inadmissible hearsay, and are rooted in speculative, hypothetical, and conclusory assertions instead of facts establishing an actual, imminent threat of irreparable harm.

2. Enjoining the ETS Would Endanger Workers and the Public at Large

The difference in harms at stake in this action are stark. Granting the injunctive relief plaintiffs seek will effectively prevent Defendants from fulfilling their statutory mandate to protect workers in California when such protection is most needed given the high COVID-19 infection rates. (A.R. Tab 1E at p. 4.) Preventing Defendants from taking these calibrated, scientifically-grounded measures to mitigate the spread of COVID-19 will, plainly put, exacerbate this unfolding crisis. COVID-19's "acute and chronic adverse health effects which can manifest as serious illness, permanent incapacitation, or death," (*id.*) inflict harms to individuals, their families, and our community that are deep, abiding, and sometimes permanent. By contrast, the harms Plaintiffs face—even those which are not speculative—are mostly pecuniary and temporary, although there can be no doubt that the ETS and other measures which governments have been forced to take have inflicted real economic pain on businesses, individuals and the economy as a whole.

As the massive number of COVID-19-related complaints that Cal/OSHA received in the eight months before the Board adopted the ETS—almost 7,000 (*id.*)—shows, the ETS are critical to ensure that employers are taking reasonable steps to prevent the transmission of COVID-19 in

workplaces until vaccines provide sufficient herd immunity to the population.[11] COVID-19 continues to be transmitted in the workplace, and retail workplaces continue to be at risk for such transmission. (Declaration of Amy Heinzerling, ¶ 7.) To date, CDPH has received reports of 469 outbreaks and 3,402 cases associated with those outbreaks—almost certainly an undercount—in California retail trade workplaces alone. (*Id.* ¶¶ 5-6.) And as discussed above, while vaccines are being distributed throughout the United States, only a small fraction of the population—an estimated 2.7% of Californians—has been vaccinated to date.[12] Thus, quarantining COVID-19 cases, testing and similar measures remain the primary ways to slow the spread of COVID-19 and prevent it from overwhelming our health care system. The ETS simply mandates these scientifically grounded standards within the workplace on a temporary basis to allow workers to continue to support themselves and their families without putting them, their co-workers, customers, and others at further risk of serious harm to their health while the crisis remains.[13]

The ETS are intended to protect California workers who are the most vulnerable to infection and complications resulting from exposure to COVID-19 in the workplace. Plaintiffs' request to enjoin implementation for speculative commercial reasons simply does not outweigh the public harm. (See *Coronel v. Decker* (S.D.N.Y. 2020) 449 F.Supp.3d 274, 287 [noting public interest in reducing risk of COVID-19 spread "in light of the rapidly-evolving public health crisis engendered by the spread of COVID-19"]; *City of Santa Monica v. Super. Ct. for L.A. Cty.* (1964) 231 Cal.App.2d 223, 226 [Trial courts should be extremely hesitant to enjoin enforcement of a regulation, the purpose of which is to protect the public.])

IV. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' application.

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[11] See FOE at ¶¶ 16 ["there is currently no specific regulation that protects all workers from exposure to infectious diseases such as COVID-19"]; vii ["Guidance is not sufficient to address the present increase in cases and the risk of occupational spread."].

[12] CDC, "COVID-19 Vaccinations in the United States," <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (last visited Jan. 19, 2021).

[13] See, e.g., A.R. Tab 1K66 [CDC masking recommendations], Tab 1K12 [study re physical distancing].

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