UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA
LINCOLN DIVISION

ALMA, et al., *Plaintiffs*, v. NOAH'S ARK PROCESSORS, LLC, *Defendants*.	Case No.: 4:20-cv-03141 **REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

The plant's opposition confirms the need for a preliminary injunction. The plant does not genuinely dispute that another outbreak at Noah's Ark would surge into the surrounding community. It agrees that distancing, testing, sick leave, and masks are critical infection control measures. It does not dispute that other plants are doing all of the things Plaintiffs are seeking. And it does not even claim, much less convincingly demonstrate, that these four protections were in place before this lawsuit. In fact, the opposition confirms that many of them will remain absent without a court order.

For instance, the plant does not genuinely dispute that workers remain crowded together on both the production lines and in the cafeteria. It provides only the vaguest assertions that it "encourage[s]" distancing "where possible." PI Opp., Dkt. 33 at 9, 21; *compare* Dkt. 19-6 ¶¶ 6-8 (photos of crowding). It does not dispute that it has conducted no testing or contact tracing, and confirms that it has no plans to ever conduct screening tests to identify burgeoning spikes. Helzer Decl., Dkt. 34-17 ¶ 13. It mentions only "plan[s]" to conduct *some* testing and install an outdoor break area, and suggests it has "now posted" a basic sick-leave notice, PI Opp. 21, but those

improvements, while positive, are clearly responses to this lawsuit instituted after nearly 8 full months of the pandemic. Such belated and incomplete responses to litigation are no basis to avoid an injunction.

Nor has the plant provided any written policies about virtually any of the protections Plaintiffs are seeking. That alone requires an injunction to ensure that workers and the community are protected. It strains credulity that an employer of hundreds, in such an at-risk industry, would not have detailed policies regarding basic infection control measures. Relatedly, the plant has provided almost no detail about the measures it claims to have in place, including their dates of adoption. And it has provided almost no documentary evidence. Noah's Ark is in complete control of this information. Its inability to produce it confirms Plaintiffs' assertions.

These failures necessitate a preliminary injunction to ensure that Plaintiffs, workers, and the Tri-Cities community are protected from another surge originating at Noah's Ark. Plaintiffs do not believe that there are any genuine factual disputes that need to be resolved for the proposed injunction to issue.

Noah's Ark has also raised a series of legal objections, but none of them provides a basis to avoid review. It invokes the doctrine of primary jurisdiction, which gives courts discretion to refer certain issues to administrative agencies. But referral here would guarantee that there is no abatement obligation during the pandemic, both because OSHA's abatement orders typically take *years* to become effective, and because OSHA has *already* failed for months to act on complaints by Noah's Ark workers. The plant also maintains Plaintiffs lack standing, but they face a wide variety of serious injuries that give them standing. And Noah's Ark challenges Plaintiffs' causes of action, but its arguments are foreclosed by black-letter law.

In short, an injunction remains necessary to ensure that Noah's Ark implements basic protections it concededly lacks, and retains and adheres to those it supposedly has adopted since this lawsuit. Without an injunction, there is a real risk that the plant will be putting its workers, the Plaintiffs, and the rest of the community in unnecessary danger.

ARGUMENT

I. The Evidence Demonstrates the Need for an Injunction.

Plaintiffs' evidence shows that Noah's Ark has gone months without a number of basic COVID-19 protections. *See* PI Br., Dkt. 18 at 4-7, 12-19. Defendant's response includes no written policies, few details, and almost no documentary evidence—glaring omissions given that the plant is "fully in control of" this information. Order, Dkt. 25 at 2. Its declarations largely confirm, and at least do not contest, Plaintiffs' main factual assertions.[1]

A. Applicable Legal Principles.

Before addressing the facts, several legal principles are important for resolving this motion.

First, fact disputes only need to be resolved at the preliminary injunction stage if they are "material" to the injunction. *United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 744-45 (8th Cir. 2002). Facts that "are not material to the preliminary injunction sought" do not need to be definitively addressed. *See McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1313 (11th Cir. 1998). And an evidentiary hearing is unnecessary where no material facts are genuinely disputed. *See Movie Sys., Inc. v. MAD Minneapolis Audio Distr.*, 717 F.2d 427, 432 & n.6 (8th Cir. 1983); *Hoehne v. Kerns*, 47 Fed. App'x 796, 797 (8th Cir. 2002) (unpublished).

[1] Noah's Ark nonetheless faults Plaintiffs for being former workers. PI Opp. 1-3, 10-11. But the harms they face are clear and concrete, *infra* Part III, and they maintain close ties with numerous current workers, who would face serious repercussions if they sued their employer, *id.*; Dkts. 2, 37.

Second, a factual assertion is only considered disputed when the dispute is "genuine." *Cobell v. Norton*, 391 F.3d 251, 261 (D.C. Cir. 2004); *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997); Wright & Miller § 2949 (explaining that at preliminary injunction stage, "written evidence is presumed true if it is not contradicted"). To create a genuine dispute, the disputing party must offer evidence that is directly responsive to the assertion it purports to dispute. *Blanton v. RoundPoint Mort. Serv. Corp.*, 825 Fed. App'x 369, 372-73 (7th Cir. 2020) (response must "directly contradict[]" the specific assertion). "[G]eneralized" or "conclusory" statements without sufficient detail do not create a dispute. *See Brooks v. Kerry*, 37 F.Supp.3d 187, 201 (D.D.C. 2014); *In re Smith*, 231 B.R. 130, 133 (M.D. Ga. 1999) (requiring "specific facts demonstrating the dispute").

Third, a party's failure "to provide readily available corroborating evidence" undercuts its testimonial assertions. *Rivera-Coca v. Lynch*, 844 F.3d 374, 379 (1st Cir. 2016). This common-sense principle is recognized in a wide variety of contexts. *See, e.g.*, *State v. ABC, Inc.*, 941 F.Supp.2d 27, 39 (D.D.C. 2013) (testimony "does not create genuine issues of material fact" when "that very testimony suggests that corroborating evidence should be readily available."); *Emekekwue v. Offor*, 26 F.Supp.3d 348, 357 (M.D. Pa. 2014) (same); *In re Maletta*, 159 B.R. 108, 116-17 (D. Conn. 1993) (similar); *Hill v. Bay Area Rapid Trans. Dist.*, 2013 WL 5272957, *5 (N.D. Cal. Sept. 18, 2013) (same).

Fourth, changes made after a lawsuit is filed do not alter the need for a preliminary injunction. *See Lankford v. Sherman*, 451 F.3d 496, 503 (8th Cir. 2006) (applying voluntary cessation doctrine to preliminary injunction). This rule is "well-settled," because "otherwise the defendant[] would be free to return to [its] old ways." *FTC v. Affordable Media*, 179 F.3d 1228, 1237 (9th Cir. 1999); *see Fed. Trade Comm'n v. Shire ViroPharma, Inc.*, 917 F.3d 147, 157 (3d

Cir. 2019) ("[T]he wrongdoer cannot avoid an injunction by voluntarily ceasing its illegal conduct."); *Activision TV, Inc. v. Pinnacle Bancorp, Inc.*, 2014 WL 197808, *1, 4 (D. Neb. Jan. 14, 2014) (granting preliminary injunction despite voluntary cessation); *Wood v. Kasputin*, 2013 WL 3833983 (D. Minn. July 23, 2013) (same).

B. The Court Should Order the Plant to Properly Implement Distancing, Testing, Sick Leave, and Masks.

For each of the protections Plaintiffs are seeking, the evidence demonstrates that an injunction is necessary to protect Plaintiffs, workers, and the community.

1. Physical Distancing

Noah's Ark does not dispute that physical distancing is an essential protection against the spread of COVID-19, especially in a crowded indoor setting, or that other plants have successfully implemented it. PI Br. 12 (summarizing evidence). Indeed, Noah's Ark repeats its belief in the importance of distancing throughout its brief and declarations. PI Opp. 7, 8, 9, 10, 21. Yet Plaintiffs' evidence shows that workers at Noah's Ark remain severely crowded for hours each day on the plant's processing lines and in its cafeteria. *See* PI Br. 13 (citing declarations); Dkt. 19-6 ¶ 2 (OSHA complaint); *id.* ¶¶ 6-8 (photos).

Noah's Ark does not seriously dispute that this crowding remains. Most notably, it has declined to provide any documentary evidence—like photos, video, or surveillance footage—that could show if Plaintiffs were wrong about crowding, all of which is easily within the plant's control. Its failure to produce this "readily available" evidence speaks volumes. *Brooks*, 37 F.Supp.3d at 200.

Nor has the plant provided any written policies or other documentation to explain the specific steps it has taken to decrease crowding. For the processing areas, it describes its physical distancing efforts in only the vaguest possible terms, such as a "strict policy of … social

distancing" with no details of any kind, Helzer Decl. ¶ 5, or signs "to encourage social distancing," *id.* ¶ 10; PI Opp. 6-10.[2] Such signs are obviously of no help to workers whom the plant stations two feet apart for hours on end. PI Br. 5. The plant's filings do not mention a single concrete action it has taken to increase the distance between workers in its three processing areas. This is plainly insufficient to create a genuine dispute about crowding in those areas.

The situation is similar in the cafeteria. The plant has offered no photos, videos, policies, floor plans, nothing. It thus provides no reason to doubt that the crowding there remains. Its manager vaguely mentions several steps the plant has allegedly taken, but none of them address crowding or contradict the Plaintiffs. With no further explanation, he mentions "staggering workers at tables," Helzer Decl. ¶ 9, but it is unclear what that even means. He mentions "staggering shift breaks," *id.*, but as Plaintiffs have explained, while each processing floor eats and takes breaks separately some days, that still means many dozens of people cram into the small cafeteria. PI Br. 13. Other days multiple floors eat and take breaks together. *Id.* The plant does not dispute any of that. And it offers no details, shift schedules, or the like to explain what staggering it has done, when, or how it has addressed crowding.

The plant repeatedly mentions plastic barriers it has placed in several parts of the plant. *See, e.g.*, Helzer Decl. ¶¶ 5, 8; Acosta Decl., Dkt. 34-1 ¶ 6. But as Plaintiffs explained and the plant has not contested, such barriers are no substitute for core protections like distancing, especially when workers stand side by side for hours. PI Br. 14. Nor is there any factual dispute

[2] Beyond the plant manager, the plant has submitted a handful of declarations by other employees. With a few small exceptions, these other declarations duplicate the plant manager's assertions but with even less detail. *See, e.g.*, Colón Decl., Dkt. 34-7. For simplicity, Plaintiffs will only refer to the Helzer Declaration unless independent responses to other declarations are warranted.

about barriers, since the plant's assertions match the Plaintiffs'. *Compare id.* at 13 (no barriers on kill or packaging floors, some on fabrication floor), *with* Helzer Decl. ¶ 5 (same).

Finally, the manager states that the plant has recently purchased an outdoor tent to create additional space for eating. Helzer Decl. ¶ 9. This could be an improvement for the cafeteria, depending on its size and how the plant uses it. PI Br. 13 (advocating the same). But it cannot defeat an injunction, because its timing—still just a "plan" a month after the complaint, PI Opp. 21—makes it a clear example of voluntary cessation. After going months without serious distancing efforts, the plant cannot avoid an injunction by adopting a few practices at the last minute. *Supra* Part I.A. An injunction remains necessary to ensure that the plant implements and retains this and other distancing measures in a way that actually addresses crowding.

The Court should order Noah's Ark to take concrete steps to implement physical distancing in its processing areas and cafeteria. In the cafeteria, Noah's Ark does not dispute that crowding can be reduced by moving people to an outdoor cafeteria, and by using staggered shifts to cap the number of people in the cafeteria.

In the processing areas, there are many ways to reduce crowding, such as using excess floor space, spreading out workstations, expanding work hours, adding new shifts. *See* Lauritsen Decl., Dkt. 19-9 ¶¶ 10-14; Harrison Decl., Dkt. 19-19-7 ¶ 26. Noah's Ark barely responds. It does not address whether there is excess space along its processing lines for workers to spread out. It does not address which workstations could be reconfigured or moved. *See* Antonio Supp. Decl., Dkt. 39-3 ¶ 8; Alma Supp. Decl., Dkt. 39-1 ¶ 8; Isabel Supp. Decl., Dkt. 39-2 ¶ 3 (describing recent temporary reconfigurations). And while it briefly mentions prior interactions with workers about a second shift, PI Opp. 8, it gives no details about the terms on offer, how many workers it asked, which days it proposed, or the like. Given that crowding is not genuinely disputed, the Court

should order the plant to produce a concrete and specific plan for how to reduce crowding in the three processing areas, in which it can describe and document any feasibility concerns in detail.

2. Testing Program

Noah's Ark does not dispute that a proper testing program is a vital protection against COVID-19 at a meatpacking plant. PI Br. 16-17. Nor does it dispute that other plants implemented testing programs months ago. Harrison Decl. ¶ 37; Lauritsen Decl. ¶ 25. And it does not dispute any of Plaintiffs' main claims about testing at Noah's Ark: The plant has not implemented any kind of testing program for its workers. PI Br. 18 (citing evidence). The plant does not test symptomatic workers, but rather sends them to find testing in the community. *Id*. The plant does not test workers exposed to sick co-workers. *Id.* The plant is not doing any screening testing of any kind, and thus has no way to identify burgeoning outbreaks, *id.*; Harrison Decl. ¶¶ 38, 44-45, nor does it ever plan to do any screening tests, Helzer Decl. ¶ 13. The plant does not do any contact tracing or even inform people about sick co-workers. PI Br. 18.[3]

All of these facts are undisputed. And they answer the plant's unsupported assertion that it "presently has no employee infected with the virus." PI Opp. 2. The plant has no idea, because it is testing nobody and doing no contact tracing, and it has avoided telling its workers about paid sick leave. *See infra*.

Instead of a proper testing program, the plant simply tells workers "to go and be tested" outside the plant. Helzer Decl. ¶ 13; Lezcano Decl., Dkt. 34-18 ¶ 6; *accord* PI Br. 18 (workers cannot afford to pay for tests). The plant manager states that "[t]he Health Department provides

[3] The plant manager mentions "several occasions" when testing happened in the past. Helzer Decl. ¶ 13. He conspicuously fails to provide any dates or details. The Plaintiffs also described early testing by the National Guard and local health departments. Perry Decl., Dkt. 19-8 ¶ 8. This is clearly no substitute for an ongoing testing program.

free testing in Hastings." Helzer Decl. ¶ 13. But in fact the Health Department does not provide any testing, it simply directs people to use Test Nebraska, *see* S. Heartland Dist. Health Dep't, https://southheartlandhealth.org/ (website);[4] Third R. Godinez Decl., Dkt. 39-4 ¶ 6 (call to confirm), where wait times vary widely and it can take days to get a test and longer to get results, *id.* ¶¶ 2-4. The plant's blasé response on testing confirms the urgency of an injunction. Other plants are not just leaving workers to fend for themselves. Lauritsen Decl. ¶ 25. As a company that employs hundreds of workers in one of the highest-risk industries, Noah's Ark should be providing a basic testing program.[5]

The plant's manager mentions a recent change—that the plant has ordered a rapid testing machine. Helzer Decl. ¶ 13. This "plan" is welcome, PI Opp. 21, but clearly does not lessen the need for an injunction, coming so late and after this lawsuit. *Lankford*, 451 F.3d at 503. Moreover, the manager admits the plant does not intend to conduct any screening testing, *id.* ¶ 13, which is one of the most critical pieces of a testing regime, Harrison Decl. ¶¶ 38, 41, 44-45. And the plant has not provided any details about the device it has ordered, including receipts, testing policies, plans for informing workers—nothing. After going months without testing, an injunction is necessary to ensure that the plant properly implements this protection.

The Court should therefore order the plant to implement a basic testing program as described in Dr. Harrison's declaration. Dkt. 19-7 ¶¶ 41-48.

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[4] *See also* https://southheartlandhealth.org/public-health-data/corona-virus.html (no testing offered).

[5] The plant's declarations mention temperature checks, but they do not dispute that these are no substitute for testing because they do not identify afebrile or asymptomatic cases. PI Br. 19.

3. Paid Sick Leave

The plant does not dispute the necessity of paid sick leave for workers who have symptoms of COVID-19 or a positive test. PI Br. 15-16. Plaintiffs have identified a number of serious failures in this regard. They assert that the plant has not clearly communicated its own sick-leave policies to workers. PI Br. 16 (collecting evidence). They provide detailed firsthand accounts of workers—including themselves—being allowed or pressured to work despite symptoms instead of being paid sick leave. *Id.* They explain that workers widely believe they must keep working while sick if they want to get paid. *Id.*; *see also* Dkt. 19-11 (fine issued against Noah's Ark for refusing to pay a worker with COVID-19 symptoms).

Strikingly, the plant's response appears to confirm that it has no written policy governing paid sick leave and has done virtually nothing to inform its workers of this right.

The plant's manager states that a one-page flyer from the Department of Labor's website is what "sets forth the Plant's COVID-19 Sick Leave Policy." Helzer Decl. ¶ 14; PI Opp. 9 (same). But the poster just summarizes the basics of the Families First Coronavirus Response Act.[6] The manager thus appears to admit that the plant has no written paid-leave policy of its own—nothing to inform workers or managers how to actually implement paid leave, such as who must be paid, when, how much, whether payment is automatic, if not how to request it, how workers can document their eligibility, the list goes on. *Accord* Antonio Decl. ¶ 24. It is hard to believe that a large employer during a pandemic would not have a written leave policy. *Compare* Lauritsen Decl. ¶ 22.[7]

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[6] https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf.

[7] The plant's declarations demonstrate some of the problems with not having a clear policy. One manager suggests that federal law only requires paid leave when a person has COVID-19 or a quarantine order. Acosta Decl. ¶ 2. But pay is also required in other situations, such as when a

The plant also identifies almost no steps it has taken to inform workers about the right to paid leave. The only thing it mentions is that it has posted a single copy of the online printout. PI Opp. 9; Acosta Decl. ¶ 7 (contrasting "*a* poster" with multiple "signs" about masks). That's it. The plant thus appears to admit that it has not distributed any policies to workers directly or made any verbal or other announcements. The flyer it submitted is only in English, Helzer Decl. Ex. C, which means most of its workers can't understand it. Dkt. 34 (all worker declarations translated from Spanish). Current workers were unable to locate it as recently as last week. Antonio Supp. Decl. ¶ 5. And it appears to be a very recent development: The plant provides no posting date, and says the flyer is "*now* posted at the plant." PI Opp. 21 (emphasis added); Helzer Decl. ¶ 14. By contrast, where the plant took an action earlier in the pandemic, it said so explicitly. *See, e.g.*, Helzer Decl. ¶ 6, 7 ("We installed this on April 7th….").

These failures pose a great danger, because without a real policy and clearly communicated access to paid sick leave, it is inevitable that sick people will stay at work. Harrison Decl. ¶ 32; Perry Decl. ¶ 33. The Court should therefore order Noah's Ark to immediately write a paid-leave policy and communicate it clearly to its workers and managers. This would pose little burden and is essential to prevent further infections.

Finally, the plant denies that it has pressured or allowed workers to keep working despite COVID-19 symptoms. Helzer Decl. ¶ 18. Its "generalized, conclusory" denial of Plaintiffs' specific and detailed accounts does not create a genuine dispute. *Brooks*, 37 F.Supp.3d at 201; *but see* Acosta Decl. ¶ 11 (disputing one particular incident). But these factual issues need not be

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person is "seeking" a diagnosis. 29 U.S.C. § 2601 note. The same manager states that the plant "immediately send[s] home any worker who ... may have been exposed." Acosta Decl. ¶ 11. But without any contact tracing, it is unclear how the plant could determine exposures. None of the other declarations mention this supposed practice.

resolved for the Court to issue an injunction on paid sick leave. The plant agrees it cannot pressure or allow people to work while sick, and the Court could memorialize that agreement in its order. Going forward, the most important thing is that the plant be ordered to provide clear written procedures for accessing paid leave and communicate them widely.

4. Masks

Noah's Ark agrees that "universal" mask use is an essential infection control measure. PI Opp. 21. It does not dispute that its workers' masks quickly become soiled with blood, fat, and sweat. PI Br. 7. Nor does it dispute that workers in its plant are frequently wearing their masks below their nose and mouth. *Id.* And it does not claim that, prior to this lawsuit, it had a system in place to provide replacements throughout the plant as soon as masks became soiled and unwearable.

The plant's practices have apparently begun to improve since this lawsuit was filed, with replacement masks more widely available in some parts of the plant. Alma Supp. Decl. ¶ 6. The plant asserts that its nurse now walks the floors giving out masks, and that floor managers now have their own boxes. Helzer Decl. ¶ 11. But notably, the plant does not state or document when these practices began. *Compare id.* ¶¶ 6, 7 (giving dates for other actions). The only fair inference is that this, too, is a case of voluntary cessation. It is no basis to avoid an injunction, because without one, the plant "would be free to return to [its] old ways." *Affordable Media*, 179 F.3d at 1237. Nor does the plant identify any written protocols governing mask distribution, or explain where the managers are stationed, given that the nurse only visits once every three hours. Helzer Decl. ¶ 11.

An injunction is also necessary because these new practices have so far been inconsistent at best. A co-worker recently provided Antonio a soiled mask that the co-worker had to wear for

an entire shift on December 18, 2020 because the co-worker could not get a replacement. Antonio Supp. Decl. ¶ 11. Obviously no one would work with such a dirty mask if there had been a clean one available.

The Court should therefore order the plant to ensure that workers have a constant supply of clean masks while working. The plant agrees it should be doing this. To make sure it happens, the Court should require the plant to issue written procedures for mask distribution, and to provide an explanation whether existing staff can accomplish this, or if the plant will hire additional staff as other plants have done. Lauritsen Decl. ¶ 13.

II. The Court Should Not Apply the Primary Jurisdiction Doctrine.

Defendant raises the doctrine of primary jurisdiction, PI Opp. 22-23, which gives district courts discretion to dismiss or stay a case while the parties bring the matter before an administrative agency. The doctrine is used "sparingly" where it is necessary to consult agency "expertise" or ensure "uniform[]" regulation, and where it does not unduly harm the parties. *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988); *Access Telecomm. v. Sw. Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998) ("We are always reluctant, however, to invoke the doctrine….").

Primary jurisdiction should not be applied here. Doing so would guarantee that no changes are ordered at Noah's Ark during the pandemic, because OSHA's citation process takes years to impose any abatement requirements. Nor has OSHA shown any interest in this issue. For months now, it has failed to act on multiple complaints from Noah's Ark workers. And it has disavowed any uniformity during the pandemic by declining to impose any rules on meatpacking plants and taking almost no enforcement action against them. Its expertise is not needed here, because the

necessity of the protections at issue is undisputed. There is accordingly nothing to be gained by referring this matter to OSHA.

First, even if OSHA issued an abatement order tomorrow, there is no chance it would have any effect until years after the pandemic is over. Employers can first contest such orders before an ALJ, then take an administrative appeal, then petition for review in the court of appeals. Felsen Decl., Dkt. 39-5 ¶ 6-8; 29 U.S.C. §§ 659, 660. This process takes multiple years, and while it is ongoing, OSHA's abatement order has no effect. *Id.*; Felsen Decl. ¶ 9. Referral to OSHA would thus guarantee that Plaintiffs, workers, and the public would have no redress during the pandemic. *See Alpharma, Inc. v. Pennfield Oil Co*., 411 F.3d 934, 939 (8th Cir. 2005) (rejecting primary jurisdiction where it would "result in substantial added expense and delay"); *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 910 (9th Cir. 2019) (same where "undue delay is . . . inevitable").

Second, OSHA has already failed to take meaningful action at Noah's Ark. Workers there filed multiple OSHA complaints this summer and fall, sounding the alarm about the same conditions at issue here. Dkt. 19-6 ¶ 2; Antonio Decl. ¶ 26. Yet OSHA has done virtually nothing for four entire months and counting. It conducted a cursory inspection in September, did not order any changes, and has provided no updates. *See* Second R. Godinez Decl., Dkt. 19-6 ¶ 5; Felsen Decl. ¶ 11. OSHA thus "is aware of but has expressed no interest in the subject matter of the litigation." *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 761 (9th Cir. 2015).

Third, OSHA has disclaimed any desire for uniformity by declining to issue any binding rules regarding COVID-19 protections at meatpacking plants. *See* Dkt. 19-24 ¶ 25 (letter declining to issue rule); PI Br. 9; *Jones v. ConAgra Foods, Inc.*, 912 F.Supp.2d 889, 898 & n.4 (N.D. Cal. 2012) (rejecting primary jurisdiction where agency "has shown no intention of setting out a national standard"); *Smith v. W. Elec. Co.*, 643 S.W.2d 10, 14 (Mo. Ct. App. 1982) (same where

OSHA declined to issue rule); *Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 692 (3d Cir. 2011) (similar).

Fourth, the Court is competent to resolve this motion without OSHA. The protections Plaintiffs seek are uniformly considered critical and undisputed in this case. And courts frequently reject primary jurisdiction where "expert testimony" addresses any technical issues. *U.S. Pub. Interest Research Grp. v. Atl. Salmon of Maine, LLC*, 339 F.3d 23, 34 (1st Cir. 2003); *Morsey v. Chevron USA, Inc.*, 779 F.Supp. 150, 153 (D. Kan. 1991); *see also Astiana*, 783 F.3d at 760 ("Not every case that implicates the expertise of federal agencies warrants invocation of primary jurisdiction.").

Noah's Ark cites two cases that were dismissed based on primary jurisdiction, but neither is apposite. PI Opp. (citing *Palmer v. Amazon.com*, 2020 WL 6388599, at *6 (E.D.N.Y. 2020); *Rural Cmty. Workers All. v. Smithfield Foods*, 459 F.Supp.3d 1228, 1236 (W.D. Mo. 2020)). Neither case involved workers who had *already* tried and failed to seek OSHA's protection.[8] Neither decision addressed the years-long delays in OSHA's citation process. And neither case focused on the consensus precautions at issue here. By contrast, *Palmer* involved an effort to regulate "detailed aspects" of "how Amazon manages employee productivity" and "the time and tools provided" for sanitation, 2020 WL 6388599, at *6, while *Smithfield* focused narrowly on "Smithfield's compliance with OSHA's guidelines," 459 F.Supp.3d at 1236, 1240-41.

[8] *Smithfield* mentioned that, if OSHA failed to act in response to a future complaint, the workers there could sue OSHA under 29 U.S.C. § 662(d). But a separate lawsuit against OSHA would hardly "aid the purposes for which the doctrine was created," *Access Telecomm.*, 137 F.3d at 608, and would simply bring the same issues back before the Court.

III. Plaintiffs Have Standing.

Plaintiffs have standing (a) for their nuisance claim, because they face special injuries, and (b) for their safe-workplace claim, because they have third-party standing. Either claim is sufficient to ground the relief Plaintiffs are seeking.

Article III. Another outbreak at Noah's Ark would cause widespread infections and deaths, just like last time, especially in Plaintiffs' community. PI Br. 19-20; Perry Decl. ¶¶ 15-26.[9] Plaintiffs and their family members could get sick, their kids' schools could close, businesses in their community could close, the list goes on. Alma Supp. Decl. ¶ 9; Isabel Supp. Decl. ¶ 4; Antonio Supp. Decl. ¶ 9. Plaintiffs also face a number of unique injuries discussed below. This is more than enough for Article III standing. *See, e.g.*, *Baur v. Veneman*, 352 F.3d 625, 628, 633 (2d Cir. 2003) (standing based on "exposure to an enhanced risk of disease transmission"); *Western Watersheds Project v. Christiansen*, 348 F.Supp.3d 1204, 1214-15 (D. Wyo. 2018) (standing based on spread of disease in others). Noah's Ark objects that another outbreak would also harm "the public at large." PI Opp. 14 n.9, 18 (quoting *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013)). But where a plaintiff faces concrete harms, "standing is not to be denied simply because many people [would also] suffer." *United States v. SCRAP*, 412 U.S. 669, 687 (1973); *Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000) (en banc) (same).

Nuisance. Noah's Ark maintains that Plaintiffs lack the "special injury" required to bring a public nuisance claim. PI Opp. 14-19; *see Karpisek v. Cather & Sons Const., Inc.*, 174 Neb. 234,

[9] The plant does not dispute Plaintiffs' evidence showing that another plant outbreak would again lead to accelerated community transmission. PI Br. 19-20. It faults Plaintiffs' experts for not performing a "differential etiology," PI Opp. 17-18, but that analysis is only used to determine what caused a single patient's already-existing illness. *King v. Burlington N. Santa Fe Ry. Co.*, 277 Neb. 203, 237-38 (2009). It has no coherent application to the epidemiological analysis here, and the plant cites no case or other source using it in this context.

241 (1962) (requirement satisfied as long as injury is not "identical with that of the public"). Plaintiffs have unique personal connections to Noah's Ark which give rise to a variety of injuries not shared by the public.

Plaintiff Leonard owns a pediatric clinic that treats patients whose family members work at Noah's Ark. Leonard Decl., Dkt. 19-5 ¶ 10. An outbreak at the plant could overwhelm his practice; jeopardize a core component of his business (well-child checks and routine vaccinations); divert his resources to contact tracing; and deprive him of PPE and crucial medical supplies. *Id.* ¶¶ 11, 13-15, 18, 20-23, 25. These are clearly special injuries different in kind from those faced by the general public. *See* 58 Am. Jur. 2d *Nuisances* § 212 (2020) (interfering with a specific business practice can constitute special injury); Restatement (Second) of Torts § 821C (similar). Dr. Leonard's special injuries alone are sufficient for Plaintiffs' nuisance claim to proceed. *See Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650-51 (2017) (only one plaintiff needs standing for each claim).

Noah's Ark has little response. It asserts without explanation that these "are not special injuries to [Dr. Leonard] *personally*." PI Opp. 17 (emphasis added). But Dr. Leonard owns and runs his practice, so of course he will personally suffer if his practice is harmed. And as a doctor, he would suffer obvious personal harm from a lack of PPE and a shortage of medical equipment. The plant also suggests it would be hard to trace specific cases back to Noah's Ark, *id.*, ignoring that "[a] substantial number" of Dr. Leonard's clinic patients have family members who work at Noah's Ark, Leonard Decl. ¶¶ 10, 12-14, 17, that Hastings already had one surge after an outbreak at Noah's Ark, and that the connection between meatpacking outbreaks and community spread is well-established and undisputed, PI Br. PI Br. 19-20; *supra* n.9.

Plaintiffs Alma, Isabel, and Antonio face their own special injuries. For instance, their unique connections to the plant subject them to emotional injuries that the public does not share. They personally endured the plant's deficient safety practices and first outbreak, and they maintain close personal ties to Noah's Ark workers. Another outbreak amongst their friends, neighbors, and co-workers at a place they know intimately would cause them emotional distress and fear that sets them apart from the public at large. Alma Supp. Decl. ¶¶ 2, 9-10; Isabel Supp. Decl. ¶ 4-5; Antonio Supp. Decl. ¶¶ 9-10; *see, e.g.*, *Illeto v. Glock Inc.*, 349 F.3d 1191, 1212 (9th Cir. 2003) (emotional harms were special injury); *Wilson v. Parent*, 228 Or. 354, 367 (1961) (similar).

Finally, because of their continuing proximity to Noah's Ark workers, Plaintiffs are at special risk of infection, hospitalization, and death. Physical injuries have long been recognized as "different in kind from [injuries] suffered by other members of the public." Restatement (Second) of Torts § 821C (collecting cases); 58 Am. Jur. 2d *Nuisances* § 210 (2020) (same). The plant ignores this principle. Nor does the whole public face physical injury, because an increasing number are vaccinated. *See Karpisek*, 174 Neb. at 241 (injury that some of the public does not face constitutes special injury). The plant maintains that an injury cannot be special if a large number of people share it, PI Opp. 17-18, but "[t]he number of the persons who are specially injured by a nuisance does not affect the right of action" as long as the injury is not "identical with that of the public at large." *Karpisek*, 174 Neb. at 241 (quotation marks omitted); *see Sullivan v. Am. Mfg. Co. of Massachusetts*, 33 F.2d 690, 693 (4th Cir. 1929) (similar); *W. Morgan-E. Lawrence Water & Sewer Auth. v. 3M Co.*, 208 F.Supp.3d 1227, 1234 n.5 (N.D. Ala. 2016) (similar).[10]

[10] Defendant cites *Palmer*, 2020 WL 6388599, at *7, but the plaintiffs there did not assert the varied and unique harms that Dr. Leonard and the Doe Plaintiffs face. The decision did not even

Safe workplace. Plaintiffs have third-party standing to raise their safe-workplace claim, because they have a close relationship to current workers at the plant, and those workers face enormous barriers to asserting this claim. Third-party standing exists where a plaintiff (1) faces an "injury in fact," (2) has a "close relation" to the third party, and where (3) the third party is "hindered in his ability to protect his own interests." *Hodak v. City of St. Peters*, 535 F.3d 899, 904 (8th Cir. 2008). Plaintiffs face an injury in fact as explained above regarding Article III.

Plaintiffs' "close relation" to current Noah's Ark workers is clear. Alma, Isabel, and Antonio worked alongside them for years and maintain close personal relationships. Alma Decl. ¶¶ 2, 32; Isabel Decl. ¶¶ 2, 30; Antonio Decl. ¶¶ 2, 28; *see, e.g.*, *Camacho v. Brandon*, 317 F.3d 153, 159 (2d Cir. 2003) (requirement satisfied by "close professional and personal relationship"); *Doe v. Piper*, 165 F.Supp.3d 789 (D. Minn. 2016) (close relation where "the plaintiff has a professional relationship with the" third party). Dr. Leonard, likewise, treats the family members of Noah's Ark workers, Leonard Decl. ¶ 10, and courts frequently allow doctors to assert health-related claims involving their patients. *See Singleton v. Wulff*, 428 U.S. 106, 114-15 & n.5 (1976). With their own health, community, and business on the line, Plaintiffs "will be [] motivated, effective advocate[s]" to protect their "common interest" in basic safety at Noah's Ark. *Powers v. Ohio*, 499 U.S. 400, 413 (1991); *see Reese Bros., Inc. v. USPS*, 531 F.Supp.2d 64, 69 (D.D.C. 2008).

The impediments faced by current Noah's Ark workers are also clear. They reasonably fear that if they assert their rights to a safe workplace, they will lose their jobs and be blacklisted. Dkt. 2 at 2, 6 (collecting evidence); Dkt. 35 (retaliation against Plaintiffs' attorneys). The

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mention the physical-injury principle above. And it did not involve a Nebraska-law claim where *Karpisek* governs.

hindrance element is satisfied where the possibility of "suffer[ing] some sanction prevents or deters the third party." *Hodak*, 535 F.3d at 904; *see East Coast Test Prep LLC v. Allnurses.com, Inc.*, 167 F.Supp.3d 1018, 1022-23 (D. Minn. 2016) (similar); *Camacho*, 317 F.3d at 160 (fear of "further retribution"). Given these widespread fears of retaliation, third-party standing is "necessary to insure protection of the rights asserted." *Hodak*, 535 F.3d at 904.

IV. Plaintiffs Assert Valid Causes of Action.

Noah's Ark makes two incorrect arguments regarding Plaintiffs' claims.

First, it argues that only "illegal activity" can be a public nuisance. PI Opp. 3, 21. But it is black-letter law that a "legitimate and legal" activity can be a public nuisance if it interferes with a public right. *Sarraillon v. Stevenson*, 153 Neb. 182, 188-89 (1950); *see, e.g.*, *City of Syracuse v. Farmers Elevator, Inc.*, 182 Neb. 783 (1968) (same); *Andrew v. Village of Nemaha*, 2017 WL 2774067 (Neb. Ct. App. June 27, 2017) (unpublished) (upholding nuisance determination even though activity was "in compliance with applicable regulations"); *Trickett v. Ochs*, 176 Vt. 89 (2003) (collecting cases).

Second, the plant argues that a safe-workplace claim cannot seek to prevent imminent injury without showing past harm. PI Opp. 3, 24. But the plant's practices already *did* cause one major outbreak that spread widely in the community. In any event, it is well-established that "[i]n negligence actions where irreparable injury is threatened, a court may act by injunction to prevent harm before it occurs." *Women Prisoners v. D.C.*, 899 F.Supp. 659, 666 (D.D.C. 1995) (citing *Prosser and Keeton on The Law of Torts*, § 30 n.8 (5th Ed. 1984)); *see* Restatement (Second) of Torts § 933 (explaining "[t]he availability of an injunction against a . . . threatened tort"). Courts therefore enjoin practices that violate the safe-workplace duty when those practices threaten imminent harm. *See, e.g.*, *Smith*, 643 S.W.2d at 13; *Shimp*, 145 N.J. Super. at 531. Noah's Ark

does not address these cases or principles. The Nebraska cases it cites only involved damages claims, not injunctions.

CONCLUSION

The Court should grant the preliminary injunction.

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Respectfully submitted,

/s/ Spencer Amdur
Spencer Amdur*
Julie Veroff*
ACLU Foundation
39 Drumm Street
San Francisco, CA 94111
T: (415) 343-0770
F: (415) 395-0950
samdur@aclu.org
jveroff@aclu.org

Lee Gelernt*
Noor Zafar*
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10004
T: (212) 549-2660
F: (212) 549-2654
lgelernt@aclu.org
nzafar@aclu.org

Adam Sipple (SBN 20557)
Rose Godinez (SBN 25925)
ACLU Foundation of Nebraska, Inc.
134 S. 13th St. #1010
Lincoln, NE 68508
T: (402) 476-8091
ajsipple@aclunebraska.org
rgodinez@aclunebraska.org

Maren Lynn Chaloupka (SBN 20864)
Chaloupka Law LLC
P.O. Box 1724
Scottsbluff, NE 69363
T: (308) 270-5091
F: (308) 270-5105
mlc@chaloupkalaw.net

Attorneys for Plaintiffs
**Admitted Pro Hac Vice*

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of NECivR 7.1(d) because it contains 6,483 words. I certify that I relied on Microsoft Word 2019 word count function, which included all text including the caption, headings, footnotes, and quotations.

/s/ Spencer Amdur
Spencer Amdur

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2020, I electronically filed the foregoing with the Clerk of Court by using the District Court CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

/s/ Spencer Amdur
Spencer Amdur