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Ralphs Grocery Company and Food 4 Less of California, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES-SPRING STREET COURTHOUSE

HENRY EPHRIAM, ALISIA RAMIREZ, GLORIA MAPP-PARKER, and YOLANDA PETTY, RANDAL ODUMS, SERGIO BALLON, RICARDO RAMIREZ, CRESCENCIO PERERA, individually and on behalf of others similarly situated,

Plaintiffs,

vs.

RALPHS GROCERY COMPANY, an Ohio corporation; and FOOD 4 LESS OF CALIFORNIA, INC., a California corporation; and DOES 1 through 25, inclusive,

Defendants.

CASE NO: 20STCV25845

Assigned For All Purposes:
Judge Carolyn B. Kuhl
Dept.: 12

DEFENDANTS' NOTICE OF DEMURRER AND DEMURRER TO PLAINTIFFS' COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Declaration of Daniel J. Kessler re: Meet & Confer Filed and Served Concurrently Herewith]

Hearing:
Date: September 11, 2020
Time: 1:45 p.m.
Dept.: 12

Complaint Filed: July 14, 2020
Trial Date: None Set

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on September 11, 2020, at 1:45 p.m., or as soon thereafter as the matter may be heard in Department 12 of the above-referenced Court, located at 312 North Spring Street, Los Angeles, California, Defendants Ralphs Grocery Company and Food 4 Less of California, Inc. (collectively "Ralphs") will and hereby does demurrer to Plaintiffs' Complaint pursuant to Code of Civil Procedure §§ 430.10 et seq.

Ralphs generally demurs to the Complaint, and to each and every cause of action alleged therein on two grounds: 1) on the grounds that the Court lacks jurisdiction over the subject matter of the Complaint and the claims alleged therein under the doctrine of judicial abstention. (Code Civ. Proc § 430.10(a); *Alvarado v. Selma Convalescent Hospital* (2007) 153 Cal.App.4th 1292, 1298; *Shamsian v. Department of Conservation* (2006) 136 Cal.App.4th 621, 631; *Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.Ap.4th 1284, 1301-1302); and 2) on the grounds that the Court lacks jurisdiction over the subject matter of the Complaint under the doctrine of preemption. (Code Civ. Proc. § 430.10(a); *King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039; *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800; *South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291.)

In addition, Ralphs specially demurs on two separate bases: 1) as to the third cause of action for Unfair Business Practices, the Complaint fails to state facts sufficient to constitute a viable cause of action (Code Civ. Proc. § 430.10(e)); and 2) as to the second cause of action for Declaratory Relief, the pleading is uncertain (Code Civ. Proc. § 430.10(f)).

Ralphs's Demurrer is based on this Notice, the Demurrer, the attached Memorandum of Points and Authorities, the Declaration of Daniel Kessler, the concurrently-filed Request for Judicial Notice, the pleadings, files, and records in this case, and any other evidence or argument as may be

considered at the hearing on this Demurrer. Ralphs respectfully requests that this Court sustain its Demurrer without leave to amend.

Dated: August 14, 2020

BURKHALTER KESSLER CLEMENT & GEORGE LLP

By: */s/Michael Oberbeck*
Daniel J. Kessler, Esq.
Michael Oberbeck, Esq.
Attorneys for Defendants Ralphs Grocery Company and Food 4 Less of California, Inc. (collectively "Ralphs")

DEMURRER

Defendants Ralphs Grocery Company and Food 4 Less of California, Inc. (collectively "Ralphs") demur to Plaintiffs' Complaint as follows:

A. **General Demurrer**.

1. Ralphs generally demurs on the grounds that the Court lacks jurisdiction over the subject matter of the entire Complaint, and of each and every cause of action alleged therein, under the doctrine of judicial abstention. (Code Civ. Proc § 430.10(a); *Alvarado v. Selma Convalescent Hospital* (2007) 153 Cal.App.4th 1292, 1298; *Shamsian v. Department of Conservation* (2006) 136 Cal.App.4th 621, 631; *Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.Ap.4th 1284, 1301-1302.).

2. Ralphs generally demurs on the grounds that the Court lacks jurisdiction over the subject matter of the entire Complaint, and of each and every cause of action alleged therein, under the doctrine of preemption. (Code Civ. Proc. § 430.10(a); *King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039; *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800; *South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291.)

B. **Special Demurrer**.

1. Ralphs specially demurs to the third cause of action for Unfair Business Practices pursuant to Bus. & Prof. Code § 17200 et seq. on the grounds that Plaintiff has failed to state a cause of action for which relief can be granted. (Code Civ. Proc. § 430.10(e).) In an action brought under § 17200, Plaintiffs may only seek disgorgement of profits as a remedy to the extent that the disgorgement is restitutionary, and Plaintiffs may not seek disgorgement of profits that were not received from the Plaintiffs or in which the Plaintiffs otherwise have no ownership interest. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134, 1144–1148.)

2. Ralphs specially demurs to the second cause of action for Declaratory Relief on the ground that the cause of action is uncertain and therefore fails to state a cause of action against Ralphs. (Code Civ. Proc. § 430.10(f).)

Dated: August 14, 2020

BURKHALTER KESSLER CLEMENT & GEORGE LLP

By: /s/Michael Oberbeck
Daniel J. Kessler, Esq.
Michael Oberbeck, Esq.
Attorneys for Defendants Ralphs Grocery Company and Food 4 Less of California, Inc.

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I. INTRODUCTION

By their Class Action lawsuit for public nuisance, declaratory relief, and unfair business practices, Plaintiffs ask this Court to take over for administrative agencies like Cal/OSHA, the CDC and the County of Los Angeles Department of Public Health – who have teams of experts promulgating and administering guidance to prevent the spread of COVID-19 – and be *more of an expert than the experts are*.

Plaintiffs acknowledge in their Complaint that it is the express jurisdiction of Cal/OSHA to oversee the protocols and procedures employers like Ralphs have adopted and are enforcing in response to the COVID-19 pandemic. (Complaint ¶¶ 40-45.) Cal/OSHA and the Los Angeles County Health department have the technical expertise to oversee Ralphs's compliance with the various state and local regulatory provisions governing its response to the COVID-19 pandemic, and the authority to take effective enforcement action if its efforts fall short of those required to protect employee and public health. (See *Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 633-634; *Alvarado v. Selma Convalescent Hospital* (2007) 153 Cal.App.4th 1292, 1298 ("*Alvarado*").) And, Cal/OSHA and the Los Angeles County Health Department have exercised their authority and jurisdiction to monitor the conditions at the Ralphs warehouse in Compton. (See Request for Judicial Notice, Declaration of Daniel J. Kessler, Exhibits 1-5.)

The doctrine of judicial abstention applies when there is an expert administrative agency – like Cal/OSHA or the County Health Department – already tasked with the tasks the Court would undertake adjudicating a case like this. When "granting the requested relief would require a trial court to *assume the functions of an administrative agency*, or to *interfere with the functions* of an administrative agency", or where granting injunctive relief would be *unnecessarily burdensome* for the trial court to monitor and enforce given the availability of mor effective means of redress', the Court should *sustain a demurrer without leave to amend*. (*Alvarado,* 153 Cal.App.4th at 1298; *Shamsian v. Department of Conservation* (2006) 136 Cal.App.4th 621, 631 ("*Shamsian*"); *Samura v. Kaiser*

Foundation Health Plan, Inc. (1993) 17 Cal.Ap.4th 1284, 1301-1302 ("*Samura*").) As explained in detail below, all of these authorities compel this Court to dismiss Plaintiffs' lawsuit.

In addition, and as an additional ground to sustain the Demurrer to the entire Complaint without leave to amend, all of Plaintiffs' claims are pre-empted by the Worker's Compensation Act ("WCA") because the injuries and harms Plaintiffs allege in their Complaint are all work-related injuries and harms, and the remedies they seek all are related to their workplace. (*King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039 ("*King*"). The Labor Code is clear, and a long line of authorities broadly apply the WCA to preempt claims arising out of the work place. (*Id.*; see also Lab. Code §§ 3602 *et seq.*, 6308.)

As explained below, the doctrines of judicial abstention and preemption provide two separate and independent grounds for the Court to sustain the Demurrer to the entire Complaint *without leave to amend*. If, for any reason, the Court finds that these two doctrines do not apply, there are specific grounds upon which the Court should sustain the Demurrer as to the Second and Third Causes of Action. Ralphs's special demurrer to the Third Cause of Action for Unfair Competition under Bus. & Prof. Code § 17200 should be sustained without leave to amend because Plaintiffs cannot seek disgorgement of profits to which they have no ownership interest. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134, 1144–1148.) Finally, should the Complaint have any merit at all, Plaintiffs should be ordered to amend their second cause of action for Declaratory Relief to clearly and specifically state the relief they seek.

II. SUMMARY OF RELEVANT ALLEGATIONS

Plaintiffs allege a Class Action lawsuit consisting of three causes of action: 1) Public Nuisance; 2) Declaratory Relief; and 3) Unfair and Unlawful Business Practices. Plaintiffs purport to allege "an action for public nuisance and other public-health related claims under state and local law stemming from Defendants' ongoing failure to protect their captive workforce from the deadly COVID-19 pandemic. (Complaint ¶1.) Plaintiffs "seek injunctive and declaratory relief to remedy Defendants' dangerous, unreasonable, and unjustifiable policies and practices to the COVID-19 pandemic which not

only exposed their employees to an unreasonable risk of harm, but facilitated the spread of this deadly disease to the community at large through their reckless indifference." (Complaint ¶ 11.)

Plaintiffs specifically allege that Ralphs failed to comply with guidance and recommendations issued by the CDC (Complaint ¶¶ 40, 42, 45), Cal/OSHA (Complaint ¶¶ 41, 45), and the Los Angeles County of Public Health (Complaint ¶¶ 43-45). In their nuisance claim, Plaintiffs allege that Defendants "caused a considerable number of persons to suffer increased exposures and risks of exposures to the COVID-19 virus, including but not limited to employees of the Compton warehouse, those employees' family members, the persons with whom employees resided, and the persons with who those employees came into contact, substantially and unreasonably created and substantially assisted in the creation of a grave risk to public health and safety…" (Complaint ¶ 53.) Plaintiffs seek injunctive relief to prevent "a significant risk of irreparable harm in the form of physical and emotional injuries and death from Defendants' continuing creation and assistance in the creation of a public nuisance." (Complaint ¶ 61.)

Plaintiffs' Declaratory relief claim vaguely states that an "actual controversy has arisen and now exists between the parties relating to the legal rights and duties of the parties …" as alleged in the preceding 70 paragraphs of the Complaint. (Complaint ¶ 72.) Plaintiffs do not actually allege what the controversy is requiring a declaration from the Court.

Finally, Plaintiffs' Unlawful Business Practices claim under Business and Professions Code Section 17200 et seq. (the Unfair Competition law, or "UCL") is derivative of its public nuisance claim. (Complaint ¶ 75.) Plaintiffs generally allege that because Ralphs violated certain health directives – issued by the Los Angeles County of Public Health – Ralphs gained a competitive advantage over other businesses who took steps to comply with those directives. (Complaint ¶¶ 78-80.) Plaintiffs seek "restitution", in that they seek a share of profits that Ralphs purportedly gained from this competitive advantage. (Complaint ¶¶ 80-81.)

III. ARGUMENT

A. The Standard For Sustaining A Demurrer Without Leave To Amend.

In ruling on a demurrer, a trial court should consider, based on all the facts alleged, whether "the plaintiff is entitled to any relief at the hands of the court against the defendants." (*Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1152.) A demurrer should be sustained without leave to amend if the plaintiff does not show "a reasonable possibility to cure any defect by amendment" or "that the pleading liberally construed can state a cause of action." (*Id.*) While the allegations of the complaint must be treated as having been admitted, this applies only to well-pleaded allegations. (*Consumer Cause, Inc. v. Weider Nutrition International, Inc.* (2001) 92 Cal.App.4th 363, 366 ("In reviewing a demurrer dismissal, all well-pleaded factual allegations must be assumed as true.").) A court need not accept as true a plaintiff's contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) A complaint will not survive demurrer if it does not allege facts sufficient to support a cause of action.

B. The Court May Sustain A Demurrer Without Leave To Amend Based On The Doctrine Of Judicial Abstention.

A court may dismiss a complaint based on the doctrine of judicial abstention. "As a general rule, a trial court may abstain from adjudicating a suit that seeks equitable remedies if 'granting the requested relief would require a trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency.'" (*Alvarado,* 153 Cal.App.4th at 1298; see also *Shamsian,* 136 Cal.App.4th at 631; *Samura,* 17 Cal.Ap.4th at 1301-1302.) In addition, "judicial abstention may be appropriate in cases where 'granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress.'" (*Id.*)

There are various reasons to apply the doctrine of judicial abstention in UCL lawsuits, and all of them apply here. (*Alvarado*, 153 Cal.App.4th at 1298.) First, "[c]ourts may abstain when the lawsuit involves determining complex economic policy, which is best handled by the legislature or an administrative agency. (*California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 218

("*California Grocers"*).) Second, judicial abstention also is appropriate in cases where granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress. (*Diaz v. Kay–Dix Ranch* (1970) 9 Cal.App.3d 588, 599 ("*Diaz*").) Third, courts may also abstain when federal enforcement of the subject law would be "'more orderly, more effectual, less burdensome to the affected interests.'" [Citation.]" (*Id.*)

Each of those reasons compels abstention in this case, as the lawsuit will determine complicated policy better handled by administrative agencies *who are already handling it*, would be unnecessarily burdensome for the Court to monitor and enforce, given that the body of knowledge about COVID-19 continues to evolve, as does the guidance being issued by the governing administrative agencies.

1. In *Alvarado*, The Trial Court Properly Sustained A Demurrer To A Class Action Lawsuit Seeking Injunctive Relief Under The UCL Against Skilled Nursing Care Providers.

In *Alvarado*, the plaintiff, purporting to act as a private attorney general, filed a class action lawsuit against a number of defendants, who owned or operated skilled nursing and/or intermediate care facilities. (*Alvarado*, 153 Cal.App.4th at 1295.) Like Plaintiffs in the instant matter, Alvarado alleged that defendants engaged in a pervasive and intentional failure to provide sufficient direct nursing care as required by the relevant statutes, which allowed them to receive a substantial profit and obtain a competitive advantage by not complying with the law. (*Id.* at 1296.)

The trial court sustained a demurrer, without leave to amend, to a class action complaint seeking injunctive relief to require the owners and operators of skilled nursing and intermediate care facilities to comply with certain nursing hour requirements set forth in the Health and Safety Code. On appeal, the Court held that the trial court properly sustained defendants' demurrer without leave to amend on the basis of the judicial abstention doctrine, and did not abuse its discretion, since granting injunctive relief "would place a tremendous burden on the trial court to undertake a classwide regulatory function and manage a long-term monitoring process to ensure compliance" with the statute." (*Id.* at 1296.)

The *Alvarado* Court reviewed Health and Safety Code § 1276.5 and noted that the statute "directs the DHS (or another state agency) to prioritize existing regulations, adopt new regulations or standards, enforce regulations, or ensure that certain health care providers operate in compliance with appropriate license requirements and agency rules and regulations. Notably, the first statute contained in the article, section 1275, begins with the following mandate: 'The state department shall adopt, amend, or repeal ... any reasonable rules and regulations as may be necessary or proper to carry out the purposes and intent of this chapter and to enable the state department to exercise the powers and perform the duties conferred upon it by this chapter, not inconsistent with any statute of this state.'" (*Id.*)

Here, Labor Code §§ 3600 *et seq.* establish similar standards, enforcement mechanism and regulatory authority for Cal/OSHA's oversight of employers operating within California. Cal/OSHA's oversight and enforcement of COVID-prevention protocols among California employers is clearly established by this statute, and *Alvarado* (among many other authorities) compels abstention under such circumstances. Plaintiffs even admit and acknowledge that the CDC, Cal/OSHA, and the Los Angeles County Health Department, among other expert administrative agencies, have issued guidance specifically relating to workplace safety protocols for employers to implement during COVID-19. (Complaint ¶¶ 40-45.) And, Cal/OSHA and the Los Angeles County Health Department have specifically exercised their authority and jurisdiction to review and inspect Ralphs's protocols. (See RFJN, Exhibits 1-5.)

2. In *Samura*, The Trial Court Erroneously Granted Injunctive Relief Under The UCL That Was An Improper Attempt At Regulatory Enforcement.

In *Samura*, the plaintiff sued Kaiser and others for injunctive relief, alleging that Kaiser's third-party liability provisions in service agreements violated the UCL.[1] (*Samura*, 17 Cal.App.4th at 1288-89.) Following a trial, the trial court granted the plaintiff injunctive relief, requiring Kaiser, among other things, to re-write and clarify in plain English the third-party liability provisions. (*Id.* at 1291.)

[1] These provisions provided that if a member received medical services under the service agreement for injuries caused by a third party, and the member recovered a settlement or judgment as compensation, the member would pay for the medical services from the settlement or judgment. (*Id.* at 1289.)

The *Samura* Court of Appeal reversed, concluding that the **trial court erred when it tried to enforce compliance** with the "regulatory guidelines and requirements of the Knox–Keene Act." (*Id.* at 1301.)

The Court stated as follows: "It is immaterial whether or not the challenged contract provisions and business practices comply with these portions of the Knox–Keene Act because the statutes do not define unlawful acts that may be enjoined under Business and Professions Code section 17200. In basing its order on these provisions, the *trial court assumed a regulatory power over Health Plan that the Legislature has entrusted exclusively to the Department of Corporations*. Samura unquestionably has certain remedies if the Department of Corporations fails to discharge its responsibilities under the Knox–Keene Act [citation], but the courts cannot assume general regulatory powers over health maintenance organizations through the guise of enforcing Business and Professions Code section 17200. [Citation.] To the extent that the order on appeal is based on portions of the Knox–Keene Act having a purely regulatory import, *it improperly invades the powers that the Legislature entrusted to the Department of Corporations*." (*Id.* at 1301–1302, fn. omitted (emphasis added).)

Here, Plaintiffs attempt exactly what the *Samura* court rejected. In their third cause of action, Plaintiffs specifically base their Business and Professions Code section 17200 claims that Ralphs purportedly "violated the requirements of LAPDH directives." (Complaint ¶ 78). In other words, Plaintiffs are trying to assume the "general regulatory powers" of the health agencies "through the guise of enforcing Business and Professions Code section 17200." (*Id.*).

3. In *California Grocers*, The Trial Court Erroneously Granted Injunctive Relief Under The UCL That Was An Inappropriate Exercise Of Judicial Authority.

In *California Grocers*, the California Grocers Association filed suit against Bank of America to challenge a $3 banking fee for a check processing service as a violation of the UCL. (*California Grocers*, 22 Cal.App.4th at 209–211.) The trial court found that the fee was unconscionably high, violated the covenant of good faith and fair dealing, and thus an unfair business practice under the UCL, and granted injunctive relief. (*Id.* at 212.) The Court of Appeal reversed, concluded that the fee was not unconscionable and that injunctive relief was "an inappropriate exercise of judicial authority."

(*Id.* at 215-217.) The Court explained that the case involved a question of economic policy, -- i.e., whether the service fees charged by banks were too high and should be regulated. The court stated that determining economic policy was primarily a legislative and not a judicial function. (*Id.* at 218.)

4. In *Hambrick*, The Trial Court Properly Sustained A Demurrer Without Leave To Amend Under The Abstention Doctrine.

Another recent case, *Hambrick v. Healthcare Partners Medical Group, Inc.* ((2015) 238 Cal.App.4th 124, 152 ("*Hambrick*")), is also relevant. *Hambrick* also was a class action lawsuit brought against a professional medical corporation and related entities for operating as a health care service plan without obtaining the required regulatory license. The trial court's decision to sustain the demurrer under the doctrine of abstention was upheld on appeal, with the Court of Appeal agreeing that the trial court would be required to determine complex economic policy within the context of the managed health care system, a task properly left to the responsible administrative agency. (*Id.*)

5. In *California Correctional Supervisors*, The Court Held That The Judiciary Does Not Have Authority To Oversee Executive Decisions About Workplace Safety.

In *California Correctional Supervisors Organization, Inc. v. Department of Corrections* ((2002) 96 Cal.App.4th 824 ("*California Correctional Supervisors*") a labor organization sought a writ of mandate on behalf of correctional officers seeking on order requiring the department of corrections to abide by workplace safety requirements set forth in Labor Code § 6400 et seq. (*Id.* at 829.) In affirming the trial court's denial of the writ of mandate, the Court of Appeal recognized that the Labor Code "[does] not require an employer to take all conceivable steps to ensure safety, nor forbid an employer from adopting practices or methods which might conceivably result in harm to an employee. Particularly given the employment at issue herein, no guaranty of safety is possible. Room for discretion is required." (*Id.* at 831.) The Court also recognized "a pair of cases involving the need to furnish safety equipment, [in which] we have emphasized that these statutes do not vest the judiciary with the power

to act as an overseer of legislative and executive decisions about what is or is not reasonable safety in a given workplace." (*Id.*)

C. **Judicial Abstention Is Appropriate Here Because There Are Responsible Administrative Agencies Who Oversee Ralphs' Compliance With All Appropriate COVID-19 Response Measures.**

There are responsible administrative and law enforcement agencies that do have the technical expertise to oversee Ralphs's compliance with the various state and local regulatory provisions governing its response to the COVID-19 pandemic, and the authority to take effective enforcement action if its efforts fall short of those required to protect employee and public health. Under the circumstances, two related doctrines – those of judicial abstention and primary jurisdiction – support the conclusion that the preferable approach here is for the Court to defer to those agencies' expertise and authority. Indeed, a mandatory injunction is properly refused where, as here, an alternative remedy is available to the moving party." (See *Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 633-634 ("*Shoemaker*") [trial court abused its discretion in issuing mandatory preliminary injunction compelling county hospital to reinstate doctor to administrative positions, where doctor could pursue reinstatement through administrative procedures].)

The investigatory, inspection and enforcement efforts of public health agencies, such as Cal/OSHA and the County of Los Angeles Department of Public Health, as well as the availability of effective relief if they determine that Ralphs has failed to comply with any applicable local or state law or regulation, supports the conclusion that judicial intervention is not warranted, and the Court should abstain. While there is no ongoing investigation into Ralphs's policies or protocols at the Warehouse, two expert administrative agencies have inspected Ralphs's policies and done nothing more than offer some suggestions. Two anonymous complaints were made to Cal/OSHA about the Warehouse, Cal/OSHA investigated and then issued a **Notice of No Violation**. (See Request for Judicial Notice, Exhibits 1-4.) In addition the Los Angeles County Department of Public Health issued recommendations in June 2020 but has taken no further action. (See Request For Judicial Notice, Exhibit 5.) Under these facts and circumstances, of which the Court may take judicial notice, the doctrine of judicial abstention

clearly applies. This Court should follow *Alvarado* and the long line of authorities providing that courts should leave matters such as this for the expert administrative agencies that have been entrusted with them.

D. Plaintiffs' Entire Complaint Is Also Preempted by The Worker's Compensation Act.

The injuries and harms Plaintiffs allege in their Complaint are all work-related injuries and harms. Accordingly, their claims are pre-empted by the Worker's Compensation Act ("WCA"), establishing a second, independent ground to sustain the Demurrer as to the entire Complaint, without leave to amend. *(King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039 ("*King*"); *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800 ("*Vacanti*"); *South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291 ("*South Coast Framing*") .)

1. In *King*, The California Supreme Court Affirmed That The WCA Provides The Exclusive Remedy For Workplace Injuries.

In *King*, an employee sued his employer and doctor for negligence in treatment he received for a workplace injury. (*King,* 5 Cal.5th at 1050.) The employer demurred on the ground that the plaintiff's claims were preempted by the worker's compensation laws, which provided the exclusive remedy for the injuries he suffered on the job. The trial court sustained the demurrer without leave to amend. The Court of Appeal affirmed the order sustaining the demurrer but reversed the denial of leave to amend. (*Id.*) The California Supreme Court reinstated the trial court's order in full, concluding that the Court of Appeal had erred in allowing leave to amend.

The *King* Court noted that "to give effect to the compensation bargain underlying the system, *the WCA generally limits an employee's remedies against an employer for work-related injuries to those remedies provided by the statute itself*. Labor Code section 3600, subdivision (a) provides that workers' compensation liability 'shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment ... in those cases where the ... conditions of compensation concur.' Subject to certain enumerated exceptions not relevant here, this liability is "in lieu of any other liability whatsoever.' (Lab. Code, § 3600, subd. (a).)

Labor Code section 3602 underscores the point: 'Where the conditions of compensation ... concur, the right to recover such compensation is ... the *sole and exclusive remedy of the employee ... against the employer*....' (*Id.*, § 3602, subd. (a).)" (*King*, 5 Cal.5th at 1051.)

The California Supreme Court concluded that "these established principles lead to a straightforward answer here. The Kings seek to recover for injuries that arose during the treatment of King's industrial injury and in the course of the workers' compensation claims process. Because the Kings allege injuries that are derivative of a compensable workplace injury, their claims fall within the scope of the workers' compensation bargain and are therefore compensable within the workers' compensation system. *(King*, 5 Cal.5th at 1052.) *King* reaffirms the long line of authorities in California holding that the WCA is the exclusive remedy for all work place injuries – for employees and for their dependents. (*Id.*; see also Lab. Code §§ 3602 *et seq.*, 6308.)

2. Plaintiffs Have No Private Right Of Action Under PAGA Against Ralphs.

To the extent Plaintiffs claim to be acting in the public interest, they have not complied with the requirements of PAGA. Procedurally, an alleged PAGA violation based on workplace safety requires notice to Cal/OSHA, which Plaintiffs have not alleged to have given. (Lab. Code § 2699.3(b)(1).) Where the alleged Labor Code violations relate to occupational health and safety standards (Lab. Code §§ 6300 et seq.), a copy of the aggrieved employee's notice must also be filed online with the Division of Occupational Safety and Health ("Division"). The Division must then inspect or investigate the alleged violation as required by law. (Lab. Code § 2699.3(b)(1).)

Proper notice is a "condition" of a PAGA suit. (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 545.) Plaintiffs have not alleged statutory compliance with PAGA suit requirements, nor can they. Even if Plaintiffs could amend to allege notice to Cal/OSHA, amendment would be futile as the claim cannot proceed against Ralphs. After receiving notice, Cal/OSHA Cal/OSHA has a statutorily-set amount of time to investigate the noticed claim and issue a citation. (Labor Code § 6317.) If a citation is issued, the aggrieved employee has no private right of action because the agency has assumed jurisdiction.

If Cal/OSHA failed to issue a citation after receiving notice, Plaintiffs' claim is not with Ralphs, but with Cal/OSHA. In such an action, the superior court shall follow precedents of the Occupational Safety and Health Appeals Board. If the court finds that the division should have issued a citation and orders the division to issue a citation, then the aggrieved employee may not commence a civil action pursuant to Section 2699. But if the court finds a citation should have issued and orders the Division to do so, no action can be maintained under section 2699. (Lab. Coe § 2699.3(b)(2)(A)(ii).)

E. **Plaintiffs' Unfair Competition Claim Is Barred Because They May Not Seek Disgorgement Of Profits That Were Not Received From Them Or To Which They Have No Ownership Interest.**

Plaintiffs allege that Ralphs "gained an unfair advantage over other businesses who took steps to comply with LADPH and other authorities' directives … made illegal profits at Plaintiffs' and the community's expense", and, as a result, "Plaintiffs are entitled to restitution. " (Complaint ¶ 80.) Importantly, Plaintiffs do not and cannot allege a specific damage as a result of Ralphs' purportedly unfair competitive advantage, and as a result, the claim is fatally flawed.

A defendant in an action under the unfair competition statute cannot be ordered to disgorge profits to an individual plaintiff if those profits were not taken from the plaintiff or if the plaintiff does not otherwise have an ownership interest in those profits, because disgorgement of profits in the absence of an ownership interest by the plaintiff goes beyond the restitution that is authorized by the statute (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134, 1144–1148 ("*Korea Supply Co.*").) In *Korea Supply Co.*, the plaintiff sued a competitor after losing a lucrative contract to provide the Republic of Korea with military radar systems, alleging that the competitor had extended bribes and sexual favors to key Korean officials. The trial court sustained the demurrer to all claims, including causes of action for conspiracy, intentional interference with prospective economic advantage, and unfair competition. The court of appeal reversed, finding that the plaintiff had sufficiently stated causes of action for intentional interference with prospective economic advantage and statutory unfair competition.at

The California Supreme Court reversed on the ground that an individual plaintiff in an action under the unfair competition statute may not seek disgorgement of profits if the disgorgement sought does not represent restitution of money or property in which the plaintiff has an ownership interest. (*Id.*) The Court specifically rejected the plaintiff's claim that the disgorgement of profits that the defendant obtained from the illegally-procured contract was a type of restitution. The money was not paid by the plaintiff, nor was it money that the plaintiff had any proprietary interest in. (*Id.* at 1149–1150).

Further, in *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal. App. 4th 997, the plaintiff brought a class action and sought disgorgement of profits under Bus. & Prof. Code § 17200, alleging that the defendant issued biased stock research reports that allegedly contained exaggerated or unwarranted claims regarding certain stocks, effectively depriving holders of those stocks of a sound basis for evaluating their investments. The trial court held that the plaintiff could not recover disgorgement of profits because defendant did not obtain those profits from the plaintiff class, and in the absence of an injury that could be remedied under the statutory remedies available, sustained the defendant's demurrer with leave to amend. The court of appeal affirmed, relying on *Korea Supply Co.*, and held that *nonrestitutionary disgorgement of profits is not available as a remedy under the unfair competition statute, even if the suit is brought as a class action*. (*Id.* at 1016–1020).

Plaintiffs make a claim for restitution of profits that were never taken from them and to which they never had an ownership interest. The foregoing authorities clearly bar Plaintiffs' 17200 claim.

F. **Plaintiffs' Declaratory Relief Claim Is Uncertain.**

Ralphs specially demurs to the second cause of action for Declaratory Relief on the grounds that it is uncertain. Code Civ. Proc. § 430.10(f). A demurrer for uncertainty will be sustained where the complaint is so bad that defendant cannot reasonably respond — i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her. *Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616. The Complaint is not clear as to what the actual dispute is between Plaintiffs and Ralphs. Specifically, the actual controversy that exists between Ralphs and Plaintiffs "relating to the rights and duties of the parties"

has not been adequately stated. (See Complaint ¶ 72.) Further, it still is not clear what "violations" that Plaintiffs "contend Defendants have committed and continues to commit". (Complaint ¶ 73.)

To the extent that Plaintiffs have alleged a declaratory relief claims that is not preempted and which this Court should not leave in the trusted hands of administrative agencies like Cal/OSHA and the County Health department, Plaintiffs must be required to more specifically state what the controversy is that requires adjudication by this Court.

IV. CONCLUSION

Plaintiffs cannot state a viable cause of action because the doctrines of judicial abstention and preemption both mandate dismissal of their claims. Plaintiffs have administrative remedies available to them through Cal/OSHA and the County Health department, and they are free to pursue those remedies. This Court, however, is not the proper forum to determine the appropriateness and quality of Ralphs's response to the COVID-19 pandemic, and this demurrer should be sustained without leave to amend.

Dated: August 14, 2020

BURKHALTER KESSLER CLEMENT & GEORGE LLP

By: */s/Michael Oberbeck*
Daniel J. Kessler, Esq.
Michael Oberbeck, Esq.
Attorneys for Defendants Ralphs Grocery Company and Food 4 Less of California, Inc.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 years and not a party to the within action; my business address is 2020 Main Street, Suite 600, Irvine, California 92614.

On **August 14, 2020** I caused the foregoing document described as:

DEFENDANT RALPHS GROCERY COMPANY'S NOTICE OF DEMURRER AND DEMURRER TO PLAINTIFFS' COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[X] By electronic service (via electronic filing service provider). I caused the document or documents to be electronically transmitted to Case Anywhere, an electronic filing service provider, at www.caseanywhere.com pursuant to the Court's Electronic Case Management Order governing the matter titled Henry Ephriam et al. v. Ralphs Grocery Company, et al., LASC Case No.: 20STCV25845 mandating electronic service. The transmission was reported as complete and without error to the addresses as stated on the attached service list.

Executed on **August 14, 2020** at **Irvine, California**.

/s/Francine Villeta
FRANCINE VILLETA

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