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20CV-03605

United Farm Workers of America, et al. vs Foster Poultry Farms

Motion for Leave to File Brief in Excess of 15 pages

**The unopposed motion to file brief in excess of 15 pages is GRANTED.**

Order to Show Cause re Preliminary Injunction

**This is an action for injunctive relief seeking a court order requiring Foster Poultry Farms take a number of safety precautions calculated to prevent the spread of COVID-19 at its Livingston plant. On December 23, 2020, this Court [Hon. Proietti] adopted its tentative ruling which denied without prejudice the request for OSC re Preliminary Injunction and TRO with regard to the First Cause of Action for Public Nuisance, granted in part and denied in part the request for OSC re Preliminary Injunction and TRO with regard to the Second Cause of Action for Unfair Business Practices and issued an OSC re Preliminary Injunction and TRO 20 categories of specific safety precautions, and ordered Plaintiff's counsel to prepare an appropriate order. When the parties submitted briefing with regard to disputes concerning the wording of the order, this Court [Hon. Proietti] issued a December 30, 2020 Order ruling on the various disputes raised by the parties. Although a formal order incorporating the tentative ruling and modifications to the tentative ruling was never submitted or signed or served, Defendant filed a notice of appeal on January 4, 2021 that attached the Court's December 23, 2020 tentative ruling and December 30, 2020 order as the actions from which the appeal was being taken. On January 4, 2021, Defendant also filed a Notice of Stay asserting that "[b]ecause this Court's orders of December 23 and 30, 2020 impose mandatory injunctive relief, they are automatically stayed pending resolution of Foster Farms' appeal therefrom." The parties have briefed the application of an automatic stay and have briefed the OSC re preliminary injunction, and so this court will proceed to address the merits of the matters submitted to it for adjudication.**

First, this Court finds that the TRO it issued and the Preliminary Injunction that this tentative ruling will impose constitute an imposition of prohibitory, not mandatory relief, notwithstanding the mandatory “shall” language contained in the orders because the TRO and Preliminary Injunction only require Foster Poultry Farms to continue to do what it has represented in its papers and to various regulatory agencies that it is already doing, and therefore only seeks to preserve the status quo. Although the court adopted the wording of the TRO contained in its Tentative Ruling, Foster Poultry Farms essentially sought reconsideration of that order by requesting language modifications to nine of the twenty categories of safety precautions ordered, all of which were granted in this Court’s [Hon. Proietti] December 30, 2020 order. Thus, the injunctive relief that this court ordered conformed with and did not expand upon the procedures currently in practice. Accordingly, this court finds that there is no stay currently in effect, and that even if there were, such stay would expire on January 29, 2021 when the OSC becomes moot and the TRO expires. The court notes that there is no contention by either Plaintiffs or Defendant that Defendant Foster Poultry Farms is not currently complying with the provisions of the TRO issued on December 23, 2020 as modified by the December 30, 2020 Order, and Defendant Foster Farms does not object to the wording of any of the terms of the TRO issued on December 23, 2020 as modified by the December 30, 2020 Order.

Second, for the same reasons stated above that the injunctive relief ordered by this court is prohibitory and designed to preserve the status quo, not mandatory imposing new, novel, or additional requirements on Defendant Foster Poultry Farms, this Court finds that the doctrines of Primary Jurisdiction and Federal Preemption do not apply because there is nothing in the TRO this court issued or the Preliminary Injunction that this tentative ruling will order that will impose new, novel, or additional regulation on Defendant Foster Poultry Farms, other than to require that Defendant Foster Farms continues to do what it asserts that it is already doing. Anecdotal evidence provided by Plaintiffs suggests that the regulatory agencies are overwhelmed by the issues raised by the COVID-19 pandemic and are unable to inspect with the same regularity as was the practice prior to the pandemic. The requests for reconsideration/modification of the TRO filed with this court by Defendant Foster Poultry Farms on December 28, 2020 were resolved in favor of Defendant Foster Farms on December 30, 2020. If a change of circumstance occurs that supports exigent modification of a term of the Preliminary Injunction issued by this Tentative Ruling, this court should be able to resolve such issue as fast, or faster, than an administrative agency, especially given the anecdotal evidence that such agencies are overwhelmed by COVID-19 issues.

Third, in weighing the balance of hardship resulting from granting verses denial of a preliminary injunction, Foster Poultry Farms has made a credible and impressive showing on Pages 5:20-7:26 of Defendant’s Memorandum of Points and Authorities Responding to Order to Show Cause re Preliminary Injunction filed January 8, 2021 that some of the anecdotal evidence is untrue, and that Defendant Foster Poultry Farms is (1) providing face masks and tasking employees to monitor face mask compliance, (2) providing face shields, (3) enforcing social distancing, (4) installation of Plexiglas or other physical barriers, (5) providing huge outdoor break areas, (6) taking steps to ascertain the health of its workers, and (7) providing pay when quarantine becomes necessary. Since there is nothing in the papers filed with the court that Defendant Foster Farms intends to discontinue such efforts in the immediate future, there is no hardship in the issuance of a Preliminary Injunction requiring that those actions continue, especially

where a change in circumstances that supports exigent modification of a term of the Preliminary Injunction issued by this Tentative Ruling can be addressed promptly.

Fourth, while Plaintiff's have yet to meet their burden that a public nuisance exists, given credible evidence by Defendant Foster Poultry Farms that their worker infection rate is significantly below infection rate for Merced County, Plaintiffs have demonstrated sufficient potential harm to justify a preliminary injunction in regard to their unfair business practices claim. Plaintiffs have provided anecdotal evidence that new variants of the COVID-19 virus greatly increase the risk of infection and thereby increase the potential harm that would result if Defendant Foster Farms were to discontinue its current practices. Given the slight harm in granting a preliminary injunction and the potential catastrophic loss to Plaintiffs, Defendant, and the Public in general if COVID-19 were to spread throughout the Foster Poultry Farms Livingston Plant, this court issues the following Preliminary Injunction, effective January 29, 2021:

1. Defendant Foster Poultry Farms shall require all workers to wear face coverings; Foster Farms shall supply face masks to workers in addition to their normal PPE; Defendant Foster Poultry Farms shall actively monitor worker compliance with the official face mask policy of Defendant Foster Poultry Farms, and Foster Poultry Farms shall warn or provide other appropriate discipline to employees that fail to wear masks in accordance with the official policy of Defendant Foster Poultry Farms;
2. Where social distancing is not practicable, Defendant Foster Poultry Farms shall require employees to wear face shields and provide employees with face shields and Foster Poultry Farms shall warn or provide other appropriate discipline to employees that fail to wear face shields where social distancing is not practicable;
3. Defendant Foster Poultry Farms shall comply with USDA requirements regarding Good Manufacturing Practices (GMP) and Hazard Critical Control Point (HACCP) plans, Defendant Foster Poultry Farms shall actively monitor compliance with such plans, and Defendant Foster Poultry Farms shall warn or provide other appropriate discipline to employees that fail comply with such plans;
4. Defendant Foster Poultry Farms shall Install physical dividers in break rooms and workplace areas where social distancing is difficult to maintain, including production lines where possible;
5. Defendant Foster Poultry Farms shall install additional break areas to facilitate social distancing;
6. Defendant Foster Poultry Farms shall install handwashing and sanitizing stations throughout the complex;
7. Defendant Foster Poultry Farms shall implement enhanced cleaning protocols, including requiring continuous cleaning of breakrooms and other common areas, Defendant Foster Poultry Farms shall actively monitor compliance such enhanced cleaning protocols, and Defendant Foster Poultry Farms shall warn or provide other appropriate discipline to employees that fail comply with such enhanced cleaning protocols;
8. Defendant Foster Poultry Farms shall implement changed operational schedules, including by staggering employee meal times, break times, and start times;
9. To the extent required by state or federal law, Defendant Foster Poultry Farms shall Implement a travel policy requiring workers who have traveled internationally or domestically to quarantine;
10. Defendant Foster Poultry Farms shall conduct health screenings for all outside visitors and workers, including questioning concerning COVID-19 symptoms,

before permitting them to enter the complex; Defendant Foster Poultry Farms shall actively monitor compliance with such screening procedures, and Defendant Foster Poultry Farms shall warn or provide other appropriate discipline to employees charged with conducting health screening who fail to conduct health screenings in accordance with Company policy; and shall warn or provide other appropriate discipline or otherwise exclude employees who refuse to participate in or fail to cooperate with health screenings;

11. Defendant Foster Poultry Farms shall implement and enforce attendance policies aimed at preventing infected workers from coming to Livingston; Defendant Foster Poultry Farms shall actively monitor compliance with such policies, and Defendant Foster Poultry Farms shall warn or provide other appropriate discipline or otherwise exclude from the workplace employees that fail to comply with such policies;
12. Defendant Foster Poultry Farms shall implement a comprehensive investigation and close contact process for all known COVID-19 cases.
13. Defendant Foster Poultry Farms shall implement public health return to work criteria for employees exposed to COVID-19 or diagnosed with COVID-19.
14. Defendant Foster Poultry Farms shall post educational materials concerning COVID-19 mitigation throughout the worksite;
15. Defendant Foster Poultry Farms shall conduct formal training on COVID-19 hazard and mitigation in multiple languages, Defendant Foster Poultry Farms shall actively monitor compliance with such training, and Defendant Foster Poultry Farms shall warn or provide other appropriate discipline to employees charged with providing or receiving training that fail to provide or receive training;
16. Defendant Foster Poultry Farms shall allow employees whose job duties permit to work remotely;
17. Defendant Foster Poultry Farms shall promote social distancing by cohorting (grouping together) employees to reduce exposure, including by changing shift rotations;
18. Defendant Foster Poultry Farms shall control and monitor vendor access to its facilities;
19. Defendant Foster Poultry Farms shall implement an ongoing COVID-19 testing protocol to monitor employees for COVID-19, Defendant Foster Poultry Farms shall actively monitor compliance with such protocols, and, to the extent allowed by the law, will require employees to participate in the ongoing testing protocol;
20. Defendant Foster Poultry Farms management shall insure that all employees be informed of testing requirements, outbreaks that occur, areas affected, and trained on safety requirements in English, Spanish, and Punjabi, working with the union as applicable.

The court has recently received a Notice of Intent to Provide Oral Testimony by Defendant Foster Poultry Farms and an objection to the presentation of Oral Testimony by Plaintiff. At the hearing, Defendant should be prepared to address why such evidence could not be reduced to a written declaration and submitted in advance of the hearing so that Plaintiff would have an opportunity to submit responsive declarations. Defendant should also be prepared to provide an offer of proof of what such oral testimony will establish and how it is material to the issues before the court.

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