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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NORMA ZUNIGA, *individually, and as successor-in-interest to PEDRO ZUNIGA, Deceased,*

Plaintiff,

v.

SAFEWAY INC.; ALBERTSONS' COMPANIES, INC.; and DOES 1 through 100 inclusive,

Defendants.

Case No. 4:20-cv-04440-DMR

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: August 13, 2020
Time: 1:00 p.m.
Ctrm: 4
Complaint Filed: May 13, 2020

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TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA AND TO PLAINTIFF AND HER COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Defendant Safeway Inc. ("Safeway") and Defendant Albertsons Companies, Inc. ("Albertsons"), on August 13, 2020, at 1:00 p.m., or as soon thereafter as available, in the courtroom of the Honorable Donna M. Ryu, located at Courtroom 4, 3rd Floor, 450 at the Ronald V. Dellums Federal Building & United States Courthouse, 1301 Clay Street Oakland, CA 94612, will and hereby do move to dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and 9(b) on the following grounds.

(1) Plaintiff's alleged state law claims for "Negligence" (Count I), "Gross Negligence" (Count II), "Violations of the California Occupational Safety and Health Act of 1973 (Title 8, California Code of Regulations § 3203 and California Labor Code § 6400 et seq.)" (Count IV); "Fraudulent Concealment of Injury" (Count V), and "Wrongful Death" (Count VI) fail to state a claim as they are precluded by workers' compensation exclusivity. The Complaint fails to allege a cognizable exception to the workers compensation bar, and Plaintiff's deficient attempt to invoke a "fraudulent concealment" exception further fails for failure to plead with the required specificity under Rule 9(b).

(2) Plaintiff's federal claim for "Violations of Federal Occupational Safety and Health Act of 1970 (29 U.S. Code § 654)" fails to state a claim as there is no private right of action for a violation of federal OSHA and her claims for Federal OSHA violations would lie within the primary jurisdiction of OSHA.

(3) Each of Plaintiff's claims is further barred as preempted by the Labor Management Relations Act.

This Motion is based on this Notice of Motion and Motion and Memorandum of Points and Authorities, the Declaration of Penny Schumacher, the Request for Judicial Notice, and the pleadings and papers on file in this action, any other such matters upon which the Court may take judicial notice, the arguments of counsel, and any other matter that the Court may properly consider.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff Norma Zuniga ("Plaintiff") alleges she is the wife and alleged successor-in-interest to Pedro Zuniga ("Zuniga"), a former employee of Safeway. Plaintiff's claims all seek to recover for Zuniga's alleged on-the-job injury. *See* Compl. ¶74 (alleging that decedent Pedro Zuniga ("Zuniga") was "injured on the job" by contracting COVID-19 from coworkers.) Plaintiff bases these claims upon allegations that Safeway's workplace was allegedly not in compliance with federal and state guidance regarding the wearing of gloves and masks during March 2020. Because Plaintiff plainly alleges Zuniga was an employee working for Defendants at the time of his "on-the-job" injury, the Complaint fails to state a cause of action, as workers compensation is the exclusive remedy. *See* Cal. Lab. Code § 3602. Plaintiff's attempt to take her claims outside of the exclusive remedy provided by workers compensation fails, as Plaintiff's attempt to allege "fraudulent concealment" is deficient as a matter of law in meeting the high bar for establishing this narrow exception.

In addition, Plaintiff's attempt to plead a claim for violation of Federal OSHA is further barred by settled black-letter law confirming the absence of a private right of action to pursue such a claim. *Crane v. Conoco, Inc.*, 41 F.3d 547, 553 (9th Cir. 1994) ("OSHA violations do not themselves constitute a private cause of action for breach"); citing 29 U.S.C. § 653(b)(4); 35 ALR Fed. 461 § 2 ("The cases are consistent in holding that [OSHA] does not create a private right of action for violations of the Act or the regulations thereunder.")

Finally, this Court has federal question jurisdiction over all of Plaintiffs claims, each of which should be dismissed as preempted by the Labor Management Relations Act. Zuniga's employment was at all times covered by a collective bargaining agreement ("CBA") that addressed discipline, attendance, sick leave, and exemptions for "acts of god." Plaintiff's allegations regarding a disciplinary attendance policy that purportedly assigned "points" for COVID leave and caused an unsafe work environment are vigorously disputed (and inconsistent with the CBA), and will inherently require interpretation of the CBA terms that govern issues of discipline and leave. The Ninth Circuit and district courts within the Ninth Circuit have repeatedly held workplace safety claims completely preempted by the LMRA on facts such as these, where the underlying allegations require interpretation of governing CBA terms.

I. STATEMENT OF ALLEGED FACTS

A. Plaintiff Alleges Zuniga Suffered an On-the-Job Injury in the Course of Zuniga's Employment With Defendants.

The Complaint alleges the following facts concerning Zuniga's alleged on-the-job injury.

Plaintiff alleges she is the wife and alleged successor-in-interest to Zuniga, a former employee of Safeway. Compl. ¶¶ 1, 2.

Plaintiff alleges that Albertsons is the owner, parent company, and alter ego of Safeway, and that Zuniga was therefore "an employee of Defendants Safeway Inc. and Albertsons Companies, Inc." ("Albertsons"). Compl. ¶¶ 1, 6-7, 9, 34

Plaintiff's Complaint alleges Zuniga passed away from COVID-19 on April 13, 2020, and alleges Zuniga's death was proximately caused by Defendants' "negligent actions and inactions" regarding COVID 19 protections at Zuniga's workplace at the "Safeway Distribution Center in Tracy, California." Compl. ¶¶ 1, 29, 39, 40.

Plaintiff criticizes various alleged ***workplace*** acts and omission regarding workplace safety that she contends caused her husband to contract COVID 19, including:

- a workplace posting at the Distribution Center titled "Team Talk" that Plaintiff alleges is contrary to federal and state guidance. Compl. ¶ 26.
- timing of "safety measures at the Distribution Center" Compl. ¶ 31.
- whether Defendants satisfied a duty to "ensure that their facility operations were conducted and managed in such a manner so as to safeguard the safety and well-being of their employees" Compl. ¶ 38.
- Allegedly failing to "develop and implement policies and procedures designed to prevent an outbreak from occurring at the Distribution Center" Compl. ¶ 39(f).
- Allegedly failing to clean/disinfect "the work environment." Compl. ¶ 39(g)

`In sum, Plaintiff's predicate allegations for ***all*** of her claims concern a purported workplace injury allegedly suffered in the course of Zuniga's employment.

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B. Plaintiff's Claims All Flow From Her Allegations Regarding Workplace Safety and Zuniga's Alleged On-the-Job Injury

Plaintiff alleges that Defendants' actions did not comply with federal OSHA and Food and Drug administration guidelines and OSHA statutory requirements.[1] Plaintiff alleges Zuniga consequently suffered an on-the-job injury, and passed away. *See* Compl. ¶74 (alleging that decedent Pedro Zuniga ("Zuniga") was "***injured on the job***" by contracting COVID-19 from coworkers.); and ¶36 (Zuniga's death was the "result of Defendant's failure to follow" state and federal guidelines to "provide for Their Distribution Center worker's health and safety.")

Based upon the foregoing allegations, Plaintiff's Complaint asserts six causes of action for: "(1) Negligence, (2) Gross Negligence, (3) Violations of Federal Occupational Safety and Health Act of 1970 (29 U.S. Code § 654); (4) Violations of the California Occupational Safety and Health Act of 1973 (Title 8, California Code of Regulations § 3203 and California Labor Code § 6400 *et seq.*); Fraudulent Concealment of Injury (California Labor Code § 3602(b)(2)); (6) Wrongful Death." Complaint, Caption, and ¶¶ 37-87.

II. LEGAL STANDARD

Fed. R. Civ. Proc. 8(a)(2) requires a pleading to present a "short and plain statement of the claim showing that the pleader is entitled to relief." Under Rule 12(b)(6), a defendant may move to dismiss a pleading for "failure to state a claim upon which relief can be granted." Dismissal is proper under Rule 12(b)(6) where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 969, 699 (9th Cir. 1988).

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[1] Defendants deny that there was any failure to take appropriate workplace safety precautions. To the contrary, Safeway's Tracy Distribution Center was inspected by California OSHA on April 15, 2020, and no violations were found. *See* Declaration of Penny Schumacher (Dkt. 1-2) ("Schumacher Decl.") at ¶ 7, Ex. B, June 9, 2020. The "Notice of No Violation After Inspection" ("Notice") stated that "[a]n inspection was conducted . . . at a place of employment located at 16900 West Schulte Road, Tracy on 04/15/20." The inspection concerned "Procedures and Policies for COVID 19." The inspection was initiated on April 15, 2020, and "[s]aid inspection was completed on 06/09/2020." *Id.* The Notice concluded that "It has been determined that no violation of any standard, rule, order or regulation set forth in Title 8, California Code of Regulations and Division 5 of the California Labor Code has been found as a result of this inspection."

"[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations and alterations omitted). This "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 555 U.S. 662, 678 (2009). A sufficiently-pled claim must be "plausible on its face." *Id.* A court "must take all of the factual allegations in the complaint as true," but should not give legal conclusions this assumption of veracity. *Iqbal*, 556 U.S. at 678.

In federal court, "Rule 9(b) requires that facts showing ***fraudulent concealment*** [as a purported exception to workers' compensation exclusivity], like other fraud claims, be pled with specificity." *Rodriguez v. United Airlines, Inc.*, 5 F.Supp.3d 1131, 1136 (N.D. Cal. 2013) (emphasis added), citing *Grant v. Aurora Loan Services Inc.*, 736 F.Supp.2d 1257, 1273 (C.D. Cal. 2010); *see also Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1103–06 (9th Cir. 2003). Mere conclusory allegations of fraud are insufficient. *Rodriguez*, 5 F. Supp. at 1136, citing *Moore v. Kayport Package Express*, 885 F.2d 531, 540 (9th Cir. 1989).

III. ARGUMENT

A. Plaintiff's Complaint Reveals The Complete Defense Of Workers' Compensation Immunity And Lacks Specific Facts To Meet The Legal Threshold For An Exception To That Immunity.

1. Plaintiff's Exclusive Forum for Redress is Provided by Workers Compensation

All of Plaintiff's claims all relate to an alleged on-the-job injury due to an alleged failure to provide a safe work place. See Compl. ¶74 (alleging that Mr. Zuniga was "injured on the job" by contracting COVID-19 from coworkers.) Plaintiff's allegations require dismissal of the Complaint, because any workplace injury claims have a specific, exclusive, and expeditious avenue of seeking redress—via workers compensation. The California Workers' Compensation Act provides the sole and exclusive means of recovery for any injuries arising out of and in the course of employment or occupational disease. The exclusive remedy of Workers Compensation applies to "any injury sustained by his employees arising out of and in the course of the employment . . . and this liability is 'in lieu of

any other liability whatsoever to any person." *Williams v. International Paper Co.*, 129 Cal. App. 3d 810, 816 (1982) (emphasis added), citing Labor Code §§ 3600-3601.

The rationale for this rule is "the 'presumed compensation bargain,' pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability." *Johnson v. CVS Pharmacy, Inc.*, No. C 10-03232 WHA, 2011 WL 4802952, at *6–7 (N.D. Cal. Oct. 11, 2011) (quoting *Fermino v. Fedco, Inc.*, 7 Cal. 4th 701, 708 (1994)). California provides that workers' compensation shall be the exclusive no-fault remedy for employees' claims against their employers for injuries incurred in the scope of their employment. Cal. Lab. Code § 3602 (where act applies, "the right to recover compensation is . . . the sole and exclusive remedy of the employee or his or her dependents against the employer"). *See also, Melendrez v. Ameron Int'l Corp.*, 240 Cal. App. 4th 632, 644 (2015) (California's act "requires that we liberally construe the [laws] 'in favor of awarding work[ers'] compensation, not in permitting civil litigation.'") (citing Cal. Lab. Code § 3202); *Nation v. Certainteed Corp.*, 84 Cal. App. 3d 813, 815-16 (1978) (It is a maxim of California labor law that jurisdiction to adjudicate the claims of employees injured during the course of and arising out of the employment relation is vested exclusively with the Workers' Compensation Appeals Board, in order to avoid independent suits by employees that would 'ultimately result in a breakdown in the system of compensation ...').

Zuniga is alleged to have been an employee of both Defendants and to have suffered an on-the-job injury. Under California law, the state's workers' compensation scheme provides the exclusive remedy for injuries caused by employer misconduct and sustained during the course of employment. *Jensen v. Amgen, Inc.,* 105 Cal. App. 4th 1322, 160 (2003); *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal.3d 148, 160 (1987); Cal. Lab. Code § 3600(a) ("Liability for the compensation provided . . . shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the court of the employment and for the death of the employee if the injury proximately causes death . . . "); *Migliori v. Boeing North Am., Inc.*, 97 F. Supp. 2d 1001, 1012 (C.D. Cal. 2000).

This principle provides immunity for the employer of an injured worker arising out of a workplace injury or death. Cal. Lab. Code 3602(a); *Shoemaker v. Myers*, 52 Cal.3d 1, 15 (1990) (basis for workers' compensation and the exclusive remedy provision is an injury sustained during and arising out of the course of employment); *Soil Engineering Construction, Inc. v. Sup. Ct.*, 136 Cal. App. 3d 329, 332-33 (1982) (any action by any person that arises from an injury to an employee sustained in the course of the employment is barred by the exclusive remedy principle.) Where the claimed injury allegedly arises from the workplace, the employer's potential liability to pay worker's compensation is "in lieu of any other liability whatsoever to any person." Cal. Lab. Code § 3600(a); *Williams v. Schwartz*, 61 Cal. App. 3d 628, 634 (1976). The immunity applies to an action for damages arising from the industrial injury on any theory (*i.e.*, it applies to all of Plaintiff's claims asserted here). *Salin v. Pacific Gas & Elec. Co.*, 136 Cal. App. 3d 185, 190-193 (1982).

2. Alleged Coronavirus Injuries/Death Are Covered by Workers Compensation Exclusivity.

The rule of workers compensation exclusivity is not any different for the contraction of Coronavirus in the workplace and any resulting harm. To wit, the State of California has established that COVID injuries and death are to be processed via workers compensation. See Executive Order N-62-20 ("An accepted claim for the COVID-19-related illness referenced in Paragraph 1 shall be eligible for all benefits applicable under the workers' compensation laws of this state, including full hospital, surgical, medical treatment, disability indemnity, and death benefits, and shall be subject to those laws including Labor Code sections 4663 and 4664, except as otherwise provided in this Order.") The Order further defines a rebuttable presumption for issuing award, namely that "any COVID-19-related illness of an employee shall be presumed to arise out of and in the course of the employment for purposes of awarding workers' compensation benefits" where certain enumerated conditions are satisfied. In short, there is nothing regarding the novel COVID 19 pandemic that takes such workplace injuries out of the workers compensation system, and the state has taken explicit executive action to confirm that workers compensation is the available and appropriate forum for redress.

Safeway denies that there was any failure to take appropriate workplace safety precautions. To the contrary, Safeway's Tracy Distribution Center was inspected by California OSHA on April 15, 2020 regarding procedures and policies for COVID, and no violations were found. That inspection was initiated on April 15, 2020, and completed on 06/09/2020." Schumacher Decl. ¶ 7 Ex., B. The Notice concluded that "It has been determined that no violation of any standard, rule, order or regulation set forth in Title 8, California Code of Regulations and Division 5 of the California Labor Code has been found as a result of this inspection." *Id.* In addition, the allegations in the Complaint that Safeway was out of compliance with federal regulations via its March 20, 2020 workplace posting regarding recommended PPE (use of masks) are demonstrably false. (Compl. ¶ 26.) As of March 20, 2020, both the CDC and the State of California's official guidance did not recommend wearing masks. Request for Judicial Notice, Dkt. 1-3("RJN"), Exs. A; Supplemental Request for Judicial Notice ("Supp. RJN"), Ex. F. At that time, California's guidance to the general public, while it suggested social distancing, washing hands, and sanitizing surfaces, the guidance did not advise wearing masks or gloves. *Id*. In fact, to the extent the guidance mentioned masks and gloves at all, it was to advise the public not to "Stockpile masks or gloves." *Id.* The California guidance to the general public regarding masks did not change until April 17, 2020. Supp. RJN, Ex. G.

Similarly, as of March 20, 2020, Cal OSHA's Interim Guidelines for General Industry on COVID-19 did not recommend masks for distribution workers. RJN, Ex. D. To the contrary, the notice stated that "surgical and other non-respirator face masks do not protect persons from airborne infectious disease and cannot be relied upon for novel pathogens. They do not prevent inhalation of virus particles because they do not seal to the person's face and are not tested to the efficiency of respirators." *Id.* It was not until May 14, 2020 that Cal OSHA advised that employers should "Provide employees with cloth face covers or encourage employees to use their own face covers for use whenever employees may be in workplaces with other persons." RJN, Ex. E.

Similarly, as of March 20, 2020, the U.S. Centers for Disease Control ("CDC") was advising against wearing masks, except as to health care workers and "people who have COVID-19 and are showing symptoms." RJN, Ex. A. The CDC advised that healthy people should don masks only when

taking care of someone who was ill with the new coronavirus. *Id.* It was not until April 3, 2020, that the CDC changed course and advised the wearing of face coverings when in public RJN, Ex. B. These are all government issued guidance subject to judicial notice. *See generally,* RJN and Suipp. RJN.

Regardless, if Plaintiff believes Zuniga's injuries were the result of a workplace injury or dereliction of workplace safety obligations, her exclusive remedy remains in workers compensation.

3. Plaintiff's Allegations of Intentional and Fraudulent Concealment Do Not Take Her Claim Outside of the Exclusive Workers Compensation Remedies.

Plaintiff's allegations cannot meet the high bar set to reach the exceedingly narrow workers compensation exclusivity exception for fraudulent concealment. Plaintiff attempts to invoke the exception by alleging that Defendants intentionally "concealed the knowledge of the COVID outbreak" at Zuniga's workplace, and vague and abstract allegations that Defendants concealed Zuniga's exposure to COVID. (Compl. ¶¶ 75-76). Safeway denies these allegations. But even on their face, these allegations still require Plaintiff to utilize the Workers Compensation system that is specifically designated for redressing alleged workplace injuries.

a. For Public Policy Reasons to Protect the Integrity of the Workers Compensation System, Even Intentional, Deceitful, Knowing and Intentional Concealment of Workplace Hazards Is Insufficient to Avoid Workers' Compensation Exclusivity.

The Workers Compensation exclusivity rule sweeps broadly and applies to not only allegedly negligent and grossly negligent acts, but also to allegedly intentional acts. California courts have repeatedly confirmed that the reason for such a sweeping rule, is that permitting allegedly "intentional" acts to fall outside the exclusive remedies of workers compensation would undermine the entire system, as the exception would swallow the rule. For important policy reasons relating to the integrity of the workers compensation system, this applies even where the employer is alleged to have specifically known of egregious workplace dangers, and allegedly concealed that information from the worker (i.e., precisely what is alleged here by Plaintiff—and vigorously denied by Defendants). This policy rationale has been aptly articulated by the appellate court in *Stalnaker v. Boeing Co.*, 186 Cal. App. 3d 1291, 1299-1300 (1986):

> "It is not uncommon for an employer to 'put his mind' to the existence of a danger to an employee and nevertheless fail to take corrective action. In many of these cases, ***the employer does not warn the employee of the risk***. Such conduct may be characterized as ***intentional or even deceitful***. Yet if an action at law were allowed as a remedy, many cases cognizable under workers' compensation would also be prosecuted outside that system. The focus of the inquiry in a case involving work-related injury would often be not whether the injury arose out of and in the course of employment, but ***the state of knowledge of the employer and the employee regarding the dangerous condition which caused the injury. Such a result would undermine the underlying premise upon which the workers' compensation system is based***. That system balances the advantage to the employer of immunity from liability at law against the detriment of relatively swift and certain compensation payments. Conversely, while the employee receives expeditious compensation, he surrenders his right to a potentially larger recovery in a common law action for the negligence or willful misconduct of his employer. This balance would be significantly disturbed if we were to hold, as plaintiff urges, that any misconduct of an employer ***which may be characterized as intentional*** warrants an action at law for damages. It seems clear that section 4553 is the sole remedy for additional compensation against an employer whose employee is injured in the first instance as the result of a ***deliberate failure*** to assure that the physical environment of the work place is safe."

Id. (emphasis added).

Essentially all workplace injuries—even those resulting from an employer's "serious and willful misconduct," Cal. Lab. Code § 4553—are encompassed within workers' compensation exclusivity provision. There is no general "intentional tort exception" to workers' compensation exclusivity. Even injuries caused by an employer's "serious and willful misconduct" are explicitly governed by workers' compensation exclusivity. Cal. Lab. Code § 4553; *see also Gunnell v. Metrocolor Labs., Inc.*, 92 Cal. App. 4th 710, 722 (2001) (finding the Act remained the exclusive employee remedy "notwithstanding an employer's knowing failure to assure that the workplace is safe or the employer's ***fraud, deceit, or concealment of a dangerous condition***") (internal citations omitted) (emphasis added).

Plaintiff alleges that Safeway concealed COVID risks of a workplace outbreak from Zuniga, and this lack of knowledge of dangerous conditions exposed Plaintiff to COVID, causing him to contract the illness. Safeway denies these allegations, and the Complaint itself is contradictory on the issue. For example, the Complaint alleges Plaintiff was aware of the allegedly dangerous conditions and complained about it: "By mid-March, 2020, employees at the Distribution Center, including Pedro, began complaining to their supervisors about the dangerous working conditions and their fears associated with the same." (Compl. ¶ 28.) Regardless, courts have repeatedly confirmed—for the policy

reasons identified above relating to the integrity of the Workers Compensation system—these types of allegations do not establish an exception to Workers Compensation exclusivity.

b. Concealment of Workplace Hazards Is Insufficient; Plaintiff Must Allege With Specificity Concealment of Zuniga's Injury, Which Plaintiff Has Failed to Do.

The allegedly fraudulent concealment of workplace hazards and exposure (even in the extreme, as discussed below), are insufficient to establish the vary narrow fraudulent concealment of injury exception. The three "essential elements" for pleading fraudulent concealment are: (1) the employer knew that the ***plaintiff*** had suffered a work-related injury; (2) the employer concealed that knowledge from the plaintiff; and (3) the injury was aggravated as a result of such concealment. *Johns-Manville v. Superior Court,* 27 Cal.3d 465 (1980). Even when this is shown, the original injury (e.g., here, the alleged contraction of Coronavirus) is still subject to workers compensation exclusivity—and it is only the exacerbation of injury from the lack of knowledge of the injury that can be separately pursued. *Id.*

Here, Plaintiff has not pleaded with the required specificity a concealment of Zuniga's "injury" from Zuniga (*e.g.*, his contraction of COVID), and cannot plead such concealment, as Defendants would not and did not know of Plaintiff's injury prior to Plaintiff's own knowledge. To the contrary, the allegations on their face do not show Defendants' prior knowledge of Zuniga's injury and concealment of that injury from Zuniga.

What Plaintiff instead alleges in conclusory fashion is that Defendants allegedly concealed a workplace environmental hazard of COVID of ***other*** employees with COVID symptoms. That allegation is not only false, but is insufficient as a matter of law to establish fraudulent concealment of ***Zuniga's*** injury. Plaintiff alleges broadly that "By virtue of the fact that employees were exhibiting recognized signs and symptoms of infection while at the Distribution Center, Defendants knew that there was an outbreak at the Distribution Center, and that many of their employees, including Decedent, had suffered job related injuries in the form of COVID 19 exposure, contraction, and infections.") Compl. ¶75. But these allegations of knowledge of other employee's symptoms (which Safeway denies) even on their face cannot make out fraudulent concealment of ***Zuniga's*** injury, as addressed further below.

Moreover the knowledge Plaintiff alleges Defendants possessed was of publicly-exhibited ***symptoms*** of workers"— of which the employees would also be aware (*i.e.,* the Complaint itself alleges these were "***recognized*** signs and symptoms.") And Plaintiff in fact pleads that Decedent ***did*** recognize his own signs and symptoms: "On April 1, 2020, after experiencing a fever and other symptoms, Decedent received a COVID-19 test, which came back positive a few days later." There is no allegation that Defendants had knowledge of Zuniga's symptoms before Zuniga did, or that Defendants knew of the test result or diagnosis before Zuniga knew of it.

Plaintiff's own allegations clearly demonstrate that permitting amendment of the Complaint to revive the fraudulent concealment claim would be futile. Pleading this exception requires much more than simply alleging something general about how Defendants knew of the dangers of COVID exposure at the workplace and outbreaks (e.g., that other workers had COVID and presented a COVID ***exposure*** risks) and failed to warn or protect Decedent, as confirmed by numerous controlling authorities discussed in more detail below. *See, e.g., Lazo v. Mobil Oil Refining Corporation*, 2014 WL 12596424 *3 (C.D. Cal. May 30, 2014) ("Knowledge of risk does not equate to knowledge of injury, and the former is inadequate to support Plaintiffs' claim."). Nor is it sufficient to generically allege Defendants somehow (via some unexplained omniscience) ***knew*** that Zuniga was COVID positive before he himself knew (an illness that requires a positive test to confirm). Nor is it sufficient to assert generically that Defendants somehow "had knowledge" Zuniga "contracted" COVID simply because of his alleged workplace exposure to employees with COVID. *Rodriguez v. United Airlines, Inc*., 2013 WL 6199275 (N.D. Cal. Nov. 27, 2013) (plaintiffs "are conflating ***knowledge of exposure*** with knowledge of injury, which is insufficient to support a § 3602(b)(2) claim as a matter of law.")

As noted above, allegations of "fraudulent concealment" require specificity under Rule 9(b). *Rodriguez v. United Airlines, Inc.*, 5 F.Supp.3d 1131, 1136 (N.D. Cal. 2013). To satisfy Rule 9(b), Plaintiff must include "the who, what, when, where and how" of the alleged fraud. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). "By requiring the plaintiff to allege the who, what, where, and when of the alleged fraud, the rule requires the plaintiff to conduct a pre-complaint investigation in sufficient depth to assure that the charge of fraud is ***responsible and supported, rather***

than defamatory and extortionate." *Ackerman v. Northwestern Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999).

That presents the question as to what "specific" facts Plaintiff has alleged as to Defendants' purported ***actual*** knowledge and concealment of injury (that he had COVID) from Zuniga. There is none. There is no allegation that Safeway observed Plaintiff exhibiting symptoms of COVID 19 that he himself did not first experience and perceive and somehow concealed them from Plaintiff. Likewise, Plaintiff does not allege that Defendants performed a COVID test on Plaintiff in order to come on the premises and then concealed the result (e.g. concealed the injury). Rather, the Complaint alleges purported concealment of the environmental hazards (e.g., that there was an alleged broad workplace COVID outbreak that presented workplace "exposure" risks). *See* Compl. ¶76. But this allegation of purported concealment of environmental COVID risks or ***exposure*** is (under well-settled law) subject to dismissal at the pleading stage because it simply does not make out a fraudulent concealment of ***injury*** exception. Courts have repeatedly rejected these types of attempts to plead around workers compensation exclusivity and explained that these types of allegations confuse concealment of risk and workplace hazards, as opposed to concealment of injury.

For example, in *Lazo v. Mobil Oil Ref. Corp*., No. CV 14-1072 ABC (JCX), 2014 WL 12596483, at *2-3 (C.D. Cal. Mar. 17, 2014), the plaintiff alleged the decedent employee "was exposed to toxic chemicals during his employment with Defendants, and that this exposure caused his health to deteriorate, leading to acute myeloid leukemia ("AML")," leading to his death. The court rejected the plaintiff's attempt to plead the fraudulent concealment exception: "Plaintiffs' fraudulent concealment argument is premised on the allegations that Defendants knew Decedent was exposed to toxic fumes, and that Defendants were aware of the risks these chemicals posed. But ***knowledge of risk does not equate to knowledge of injury, and the former is inadequate to support Plaintiffs' claim***." *Id.* (emphasis added).

The *Lazo* court went on to discuss the allegations that the employer had knowledge of blood tests showing "physical precursors to AML, including a compromised immune system—in part manifested by deficient red and white blood count and mutated cells—and dermal barrier." Even in this

circumstance, where it is alleged that the employer had unilateral knowledge of an employee'ssymptoms, the court explained this was still insufficient:

> It may seem like hair-splitting to distinguish between mere suspicious blood tests without a resulting diagnosis on one hand and ***actual knowledge of an illness*** on the other, but that is ***what the law requires***, and logically, an employer cannot fraudulently conceal an employee's illness unless it actually knows that the employee has that illness. ***Even constructive knowledge does not satisfy this knowledge requirement; only actual knowledge does***. *Hughes Aircraft Co. v. Superior Court*, 44 Cal. App. 4th 1790, 1797 (1996) ("The first consideration [to establish liability under § 3602(b)(2)] is whether ... Hughes[had] actual prior knowledge of plaintiffs' injuries. Only if the answer is yes would the court consider whether the employer concealed those injuries and their relationship to the work environment from plaintiffs. It is not enough for plaintiffs to rely on evidence from which a trier of fact might conclude Hughes should have known of plaintiffs' injuries before they were reported; only evidence of actual knowledge would raise an issue of fact ...").

Lazo v. Mobil Oil Ref. Corp., 2014 WL 12596424 at *3 (May 30, 2014)

The court held that the allegations of fraudulent concealment failed at the pleading state, and the workers' compensation system was Plaintiff's exclusive remedy and that the tort claims were not actionable.

In *Stalnaker v. Boeing Company*, 186 Cal. App. 3d 1291, 1299-1300 (1986), the court similarly rejected application of the concealment exception. There, the widow and two minor children of the employee brought a personal injury action based on the fatal injury suffered by the employee whose job duties involved clearing unexploded ordnance and other debris from a former army hand grenade range. The Complaint alleged that the employer "knew that unexploded ordnance lay beneath the range's surface, and that despite that knowledge and its awareness of the potential for death or injury, it sent Stalnaker [the decedent employee] onto the range, without any special training or protective clothing or apparatus that would prevent death or injury." The complaint also alleged "that Stalnaker was not warned of the potential hazards of the range, and that BSI ***withheld this warning because it feared that if informed of the risk, no employee would have performed the work***." The court rejected the argument, finding that the fraudulent concealment of workplace hazards - even fraudulent and deceitful in the extreme - were not a concealment of "injury" and remained subject to workers compensation for statutory and public policy reasons:

> "This balance would be significantly disturbed if we were to hold, as plaintiff urges, that any misconduct of an employer which may be characterized as intentional warrants an action at law

> for damages. It seems clear that section 4553 is the sole remedy for additional compensation against an employer whose employee is injured in the first instance as the result of a ***deliberate failure to assure that the physical environment of the work place is safe***."

Id.

The courts very clearly and consistently have ruled that fraudulent concealment requires an employer to have actual knowledge of a specific injury; knowledge of risk of injury is not sufficient. In *Williams v. International Paper Co.*, 129 Cal. App. 3d 810 (1982), the plaintiff alleged the employer's "conduct consisted of deliberately operating a dangerous plant, knowing that an explosion was substantially certain to occur and that plaintiff or another employee was substantially certain to be killed or injured." That conduct, he asserts, constitutes an intentional act." The court noted that the facts in the record show that defendant's work place at which plaintiff was stationed was indeed dangerous. Some employees referred to it as a "bomb." Nonetheless, the claim was subject to the exclusive remedies provided by workers compensation.

Similarly, in *Rodriguez v. United Airlines, Inc.*, 5 F.Supp.3d 1131 (N.D. Cal. 2013), the plaintiffs alleged that the employer fraudulently concealed serious environmental workplace risks that resulted in injury. Specifically, Plaintiffs alleged that "United knowingly exposed plaintiffs to levels of hexavalent chromium dust that United knew was causing them injuries" and that this was sufficient to "allege United's knowledge of plaintiffs' injuries long before plaintiffs reported their own symptoms to their supervisors—and that in any event, plaintiffs did not know that their injuries were caused by exposure to hexavalent chromium." The court found the claim was subject to dismissal on the pleadings, and subject to workers compensation exclusivity:

> Plaintiffs have not alleged the requisite elements of the § 3602(b)(2) exception—that United knew of each plaintiff's workplace injury, that United concealed that knowledge from each plaintiff, and that the concealment aggravated the injury. Moreover, they are conflating knowledge of exposure with knowledge of injury, which is insufficient to support a § 3602(b)(2) claim as a matter of law.

Id. See also, Vuillemainroy v. Am. Rock & Asphalt, 70 Cal. App. 4th 1280, 1285 (1999) ("It is an expected part of the compensation bargain that industrial injury will result from an employer's violation of health and safety, environmental and similar regulations.") Workers compensation is still the exclusive remedy; that is so "[e]ven if the employer . . . ***deliberately failed*** to correct known safety violations." *Vuillemainroy*,

70 Cal. App. 4th at 1286 (emphasis added). Any broader interpretation would frustrate the goals of workers' compensation and "open[] a Pandora's box." (emphasis added).

As noted above, workers' compensation is the sole remedy for an employee injured by an employer's failure to provide a safe workplace. *Spratley v. Winchell Donut House, Inc.*, 188 Cal App. 3d 1408, 1412 (1987). This is not limited to tort claims; the statutory claims (e.g. Cal. OSHA, Section 6400) do not fall outside of the broad workers compensation exclusivity rule. *Stiefel v. Bechtel Cor*p, 497 F. Supp. 2d 1138, 1152 (S.D. Cal 2007) (no private right of action for Cal OSHA, Labor Code §6400 claims, and tort-based claims for on on-the-job injuries). Accordingly, all of Plaintiff's claims are barred by the workers compensation exclusivity rule, and are subject to the exclusive jurisdiction of the workers compensation system.

B. There Is No Private Right Of Action For An Alleged Federal OSHA Violation.

Plaintiff's third cause of action is expressly brought under federal law and alleges "Violations of Federal Occupational Safety and Health Act of 1970 (29 U.S.C. Code § 654)." Compl. ¶¶ 55-62. Plaintiff alleges "Section 5 of the Occupational Safety and Health Act of 1970 sets forth the basic duties owed by an employer to its employees." Compl. ¶ 56. Plaintiff further alleges that Defendants "breached their duty of care owed to Decedent pursuant to Section 5 of the Occupational Safe[ty] and Health Act of 1970 by . . . failing to comply with Federal . . . OSHA guidelines" and failing to "implement an Infection Disease Preparedness and Response Plan," in accordance with Federal OSHA publications. Compl. ¶ 57.

In addition, Plaintiff alleges throughout her Complaint that Defendants purportedly failed to comply with federal law and federal guidelines. Specifically, Plaintiff alleges Defendants purportedly failed to comply with Federal U.S. Department of Labor Occupational Safety and Health Administration OSHA ("OSHA) guidelines; failed to comply with "Guidance on Preparing Workplaces for COVID-19" issued by Federal OSHA; failed to implement an "Infection Disease Preparedness and Response Plan" as identified by Federal OSHA; failed to "implement, promote, and enforce social distancing guidelines promulgated by the . . . federal" government; failed to follow "specific guidelines" from "federal agencies;" and violated OSHA's statutory requirements. Compl. 23, 38, 39, 45-47, 49, 55-57, 63, 67, 73,

83. These core allegations of purported violations of federal law and federal guidelines form the basis for all of Plaintiff's causes of action. *Id.*

Plaintiff's claim for alleged violations of Federal OSHA are not actionable because there is no private right of action provided by Federal OSHA. *See, e.g., Macias v. Waste Management of Alameda County,* 2014 WL 334206 (N.D. Cal. Jan. 29, 2014) (noting that "[t]he action was commenced here on the basis of federal-question jurisdiction in light of allegations that defendants violated federal OSHA laws," and ordering dismissal of "the first claim for violations of federal OSHA" as federal law does not provide a "private right of action.").

Not only are the OSHA claims not actionable, but permitting them to proceed would fundamentally contradict the primary jurisdiction doctrine because the congressionally recognized purpose of OSHA is to make and enforce federal workplace safety laws. In this circumstances, the primary jurisdiction doctrine teaches that the enforcement agency, not the courts, should adjudicate alleged violations of the Act because the agency possesses the appropriate subject matter expertise. . "'Essentially, the [primary jurisdiction] doctrine creates a workable relationship between the courts and administrative agencies wherein, in appropriate circumstances, the courts can have the benefit of the agency's views on issues within the agency's competence.'" *Ferrare v. IDT Energy, Inc.*, No. 14-cv-4658, 2015 WL 3622883, at *3 (E.D. Pa. June 10, 2015) (citations omitted). Primary jurisdiction for an administrative agency exists when "the dispute involves issues that are clearly better resolved in the first instance by the administrative agency charged with regulating the subject matter of the dispute." *See Rural Cmty. Workers v. Smithfield Foods, Inc.*, No. 5:20-cv-06063, 2020 WL 2145350, at *8 (W.D. Mo. May 5, 2020) ("Plaintiffs' claims both succeed or fail on the determination of whether the Plant is complying with the Joint Guidance. Due to its expertise and experience with workplace regulation, OSHA (in coordination with the USDA per the Executive Order) is better positioned to make this determination than the Court is. Indeed, this determination goes to the heart of OSHA's special competence: its mission includes 'enforcing' occupational safety and health standards.").

C. Plaintiff's Claims Must Be Dismissed As Completely Preempted Under The Labor Management Relations Act.

Zuniga's employment was at all times covered by a CBA, which addressed key disputed issues at the heart of Plaintiff's factual allegations. The CBA addressed discipline and the awarding of points for certain attendance events and not others, provided for additional unspecified leaves, provided for sick leave, and provided unspecified exceptions for "acts of god." As discussed below, Plaintiff's disputed allegations that Defendants' points and discipline system operated to cause an unsafe workplace are disputed and will require interpretation of the governing CBA. The Ninth Circuit and district courts within the Ninth Circuit have repeatedly found workplace safety claims preempted on analogous allegations requiring interpretation of governing CBAs.

1. The LMRA Broadly Preempts Claims Requiring Interpretation of CBAs.

Section 301 of the LMRA provides federal jurisdiction over "suits for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185(a). "The preemptive force of section 301 is so powerful as to displace entirely any state claim [1] based on a collective bargaining agreement, and [2] any state claim whose outcome depends on analysis of the terms of the agreement." *Young v. Anthony Fish Grottos, Inc*., 830 F.2d 993, 997 (9th Cir. 1987) (citations omitted) (emphasis added); *see also, Curtis v. Irwin*, 913 F.3d 1146, 1152 (9th Cir. 2019) ("Section 301 has such extraordinary pre-emptive power that it converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.") (citations and quotations omitted).The Ninth Circuit has clarified that the LMRA preempts claims in two respects. First, if the claim involves a right that exists because of the CBA rather than state law, the "claim is preempted and [the court's] analysis ends there." *Burnside v. Kiewit*, 491 F.3d 1053,1059 (9th Cir. 2007); *Curtis v. Irwin*, 913 F.3d 1146, 1152 (9th Cir. 2019); *Kobold v. Good Samaritan Reg'l Med. Ctr*., 832 F.3d 1024, 1032 (9th Cir. 2016)). Second, if the claim requires the Court to interpret a CBA or is "substantially dependent on analysis of a collective-bargaining agreement," the claim is preempted, even if based on state law. *Burnside*, 491 F.3d at 1059; *Curtis*, 913 F.3d at 1152.

The Ninth Circuit has recently reaffirmed that "federal preemption under § 301 'is an essential component of federal labor policy' for three reasons." *Curtis*, 913 F.3d at 1152 (citations omitted). ***First***, "a collective bargaining agreement is more than just a contract; it is an effort to erect a system of industrial self-government. Thus, a CBA is part of the "continuous collective bargaining process." *Curtis*, 913 F.3d at 1152. "***Second***, because the CBA is designed to govern the entire employment relationship, including disputes which the drafters may not have anticipated, it calls into being a new common law—the common law of a particular industry or of a particular plant." *Id*. "Accordingly, the labor arbitrator is usually the appropriate adjudicator for CBA disputes because he was chosen due to the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment." *Id*. "***Third***, grievance and arbitration procedures provide certain procedural benefits, including a more prompt and orderly settlement of CBA disputes than that offered by the ordinary judicial process." *Id*.

2. Plaintiff's Allegations Address Concepts Extensively Governed by the Terms and Conditions of the CBA that Governed Zuniga's Employment.

The terms and conditions of Zuniga's employment was governed by a CBA between Safeway and Zuniga's collective bargaining representative, Teamsters Local 439 ("Teamsters"), applicable to Zuniga. (Schumacher Decl.") ¶ 6, Ex. A.).

Plaintiff's claims are preempted under the LMRA because they require interpretation of multiple provisions of the CBA that at all times governed Zuniga's employment and apply to Plaintiff's factual allegations in support of her alleged theory of liability. Plaintiff alleges that Defendants failed to "ensure that their facility operations were conducted and managed in such a manner so as to safeguard the safety and well-being of their employees, including [Zuniga]." (Compl. ¶ 47). Plaintiff alleges that this violated the duty to provide a safe workplace as required by California Labor Code Section 6400. *See generally,* Compl., Fourth Cause of Action, ¶ 66. Plaintiff further alleges Defendants failed to establish an "effective injury prevention program." *See generally,* Compl., ¶¶ 66, 67. Plaintiff also alleges purported fear of discipline created a workplace safety issue, "including the potential for accruing 'points' which

could lead to termination," and that this points system resulted in Defendants "taking adverse employment actions against employees due to attendance issues . . . ." Compl. ¶¶ 28. 39(p).

The CBA has collectively bargained provisions that pertain to each of Plaintiff's allegations regarding workplace safety, sick leave, discipline, and attendance 'points." Schumacher Decl., ¶ 6, Ex. A.

The CBA provides a "points" system that addresses leaves of absence, but Safeway disputes Plaintiff's apparent interpretation. Plaintiff's allegations that COVID leaves would lead to "points" and discipline therefore raises disputed issues of interpretation regarding the relevant CBA provisions and associated shop practice. The CBA contains a "points" system for attendance, but differentiates between "excused" and "unexcused absences." The CBA provides that "Illness/injury/personal. Points shall be charged for all absences, as set forth in Sections B & C . . . ." In turn, Section B identifies ***excused*** absences:

> The excused category includes the following: 1. Occupational Injury, . . . 9. Any other leaves of absence specified in the union contract (when requested beforehand in writing and granted), 10. Any period of absence qualifying for FMLA benefits, 11. Any non-occupational illness or injury which requires hospital admission overnight stay and is validated by proof of admission, 12. Sickness - as accrued, up to a maximum of forty (40) hours paid sick leave per year.

Schumacher Decl., Ex. A, Teamsters CBA, Ex. C, p. 73-74. In contrast, "Unexcused absences" are: "1. Any absence not covered above. 2. A tardy of three (3) or more minutes." *Id.*

Here, to resolve whether COVID illnesses truly are subject to "points" or threat of "discipline" as alleged by Plaintiff, the Court would have to interpret these CBA provisions. For example, Is a COVID illness within the scope of the CBA provision excusing leaves for "Occupational Injury" and therefore excused, even if non-occupationally acquired? Does a COVID illness meet the CBA standard for excused absences as a FMLA qualifying period of absence? Is COVID leave simply "Sickness" subject to 40 hours paid sick leave?[2] Or is a COVID illness "other leaves specified in the contract"?

[2] The CBA contains provisions entitling employees to paid sick leave well in excess of the amounts provided by state law. Those provisions further provide that "Unused sick leave benefits in any one-(1) year shall accumulate from year to year to a maximum of thirty-six (36) days . . . ." Schumacher Decl, Ex. A, Teamsters CBA, Article XIII, p. 10.

For example, in addition to express sick leave provisions, the CBA addresses other, additional and undefined leaves of absence:

> The Company may, at its discretion, grant a leave of absence for personal reasons in thirty (30) day increments and/or consistent with State and Federal law. The employee shall be given a written notice of the terms and conditions of any such leave of absence granted if requested by the employee.

Schumacher Decl., Ex. A, Teamsters CBA, Article XVI, p. 12.

In addition, the CBA provides that Acts of God or "such other emergency beyond the Company's control" may impact or alter CBA commitments:

> In the event operations cannot commence or continue when so recommended by civil authorities, or public utilities fail to supply electricity, water or gas, or there is a failure in the public utilities, sewer system, or the interruption of work is caused by a computer failure, an Act of God, or such other emergency beyond the Company's control, the guarantees provided in this agreement shall not be applicable.

Schumacher Decl., Ex. A, Teamsters CBA, Article XX, p. 17.

The CBA also addresses other key subject matter at the heart of Plaintiff's claims, such as the wearing of protective equipment:

> Management may assign equipment to assist you in the performance of your duties. When issued a piece of equipment, you are expected to use that equipment unless directed otherwise. You are not allowed to personalize or modify the equipment in any way.

Schumacher Decl., Ex. A, Teamsters CBA, Exhibit D, p. 75. *See also, Id.*, p. 49 ("The employee shall furnish all tools necessary to perform his/her normal duties with the exception of specialized tools which shall be furnished by the Company.") In addition, the CBA contains a broad management rights provision reserving rights of the Company not specifically limited by the terms of the CBA. *Id,* p. 4.

3. Plaintiff's Claims All Relate To Issues And Policies Of Workplace Safety That Are Governed By Multiple CBA Terms That Require Interpretation.

Section 301 of the LMRA is construed quite broadly to cover state-law actions that do not allege a breach of the CBA, but nonetheless require *interpretation* of labor agreements. *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985) ("When resolution of a state law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, or dismissed as preempted by federal labor-contract law.") (internal

citations omitted) (emphasis added); *see also Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 861 (9th Cir. 2001) (when resolution of a claim brought under state law is "substantially dependent on analysis" of a collective-bargaining agreement, the claim is preempted by Section 301) (citing *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987)); *Hyles v. Mensing*, 849 F.2d 1213, 1215-1216 (9th Cir. 1988); *Young*, 830 F.2d at 997, 999; *Raphael v. Tesoro Refining & Marketing Co., LLC*, No. 2:15–cv–02862–ODW (Ex), 2015 WL 3970293, *6–7 (C.D. Cal. June 30, 2015) ("To further the goal of uniform interpretation of labor contracts, the preemptive effect of § 301 has been extended beyond suits that allege the violation of a collective bargaining agreement . . . ***[a] state law claim will be preempted if it is so "inextricably intertwined" with the terms of a labor contract that its resolution will require judicial interpretation of those terms***.) (citing *Allis Chalmers Corp.* at 210–11) (emphasis added). Further, the collective-bargaining agreement may include implied terms based on the parties' practice, usage, and custom. *Curtis,* 913 F.3d at 1152; *Consolidated Rail Corp. v. Railway Labor Execs.' Ass'n*, 491 U.S. 299, 311 (1989).

Here Plaintiff alleges Defendants violated Section 6400 of the California Labor Code by failing to "ensure that their facility operations were conducted and managed in such a manner so as to safeguard the safety and well-being of their employees;" and failed to establish an "effective injury prevention program." (Compl. ¶ 47, 66-67). Plaintiff appears to base this allegation in part upon alleged discipline for absences, the alleged failure to provide protective equipment, and the availability of sick leave. Each of those concepts are addressed by the CBA and would require interpretation of its terms.

For example, in addressing the availability of sick leave, the CBA provides not only for sick leave, but the availability of other (undefined) leave. The Court would need to interpret whether the additional leave provisions permitted further COVID sick leave, and whether such leave was excused leave—contrary to Plaintiff's allegations that such leave was subject to "points." Schumacher Decl., Ex. A, Teamsters CBA, Article XVI, p. 12.

The CBA also provides that the terms may be altered in the event of national emergencies or acts of god. Schumacher Decl., Ex. A, Teamsters CBA, Article XX, p. 17. The Court would need to interpret whether that provision applies to a COVID pandemic, and then evaluate Union/Employer shop practice

to determine what bargaining/alternative provisions were bargained and/or put in place to respond to respond to the COVID emergency, including as to workplace safety and treatment of absences from work.

Plaintiff alleges the threat of "points" or discipline for absences contributed to an unsafe work environment. The CBA also provides for progressive discipline, but identifies absences differently (differentiating between excused and unexcused absences), with certain absences categorized as excused, such as those for "occupational injury," FMLA leaves, non-occupational leaves of certain types, and "other" leaves provided by contract categorized as excused. In resolving Plaintiff's allegations regarding purported availability of discipline and "points" for COVID leave, the Court would need to interpret CBA terms as to whether COVID leave was excused or unexcused under the terms of the CBA. Schumacher Decl., Ex. A, Teamsters CBA, Ex. C, p. 73. Moreover, the Court would not only need to interpret the terms of the CBA regarding the availability of such discipline, but also shop practice regarding the actual imposition (or non-imposition) of such discipline during the COVID crisis for COVID related illness/absences. *Curtis,* 913 F.3d at 1152 (shop practice part of the CBA for purposes of LMRA preemption); *Consolidated Rail Corp. v. Railway Labor Execs.' Ass'n*, 491 U.S. 299, 311 (1989) (same); *Marquez v. Toll Glob. Forwarding*, 804 F. App'x 679, 681 (9th Cir. 2020) (labor code claim preempted under the LMRA: "Under longstanding labor law principles ... the practices of the industry and the shop ... [are] equally a part of the [CBA] although not expressed in it.")

Because Plaintiff's claims necessarily implicate multiple CBA provisions and shop practice that the Court will be called to interpret, Plaintiff's claims are "preempted" by Section 301 of the LMRA, and this matter is properly removable to this Court pursuant to 28 U.S.C. § 1441.

Plaintiff cannot avoid preemption by styling these claims as separate state or federal law claims. Courts within the Ninth Circuit have repeatedly found workplace safety claims (including claims brought under Labor Code Section 6400, as here) preempted where they implicate CBA terms. *See, e.g. Brown v. Brotman Medical Center, Inc.,* 571 Fed. Appx. 572 (9th Cir. 2014) (holding that plaintiff's workplace safety claim under California Labor Code 6400 was preempted under the LMRA where CBA terms pertaining to workplace safety and management rights would need to be interpreted). In *Brown*,

the Ninth Circuit noted that Section 6400 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." *Id.* at 575-76. "Rather, § 6400 gives employers room for discretion in their decisions about workplace safety." *Id.* The Ninth Circuit noted that Plaintiff's claim therefore focused on "general decisions that [the employer] made in setting up its workplace," and that those decisions were subject to the CBA's management rights provision regarding workplace safety, which the court would be required to interpret. *Id.* (finding the Section 6400 claim preempted under the LMRA). *See also, Burnette v. Godshall*, 828 F. Supp. 1439 (N.D. Cal. 1993) (Section 6400 claim concerning failure to provide safe workplace preempted by the LMRA where claim would require interpretation of the CBA, including discipline provisions (as here) relevant to Plaintiff's claim theory).

4. Plaintiff Has Not Pleaded Exhaustion of the CBA Grievance and Arbitration Procedures.

The exhaustion of contractual grievance/arbitration procedures is the cornerstone of Section 301 jurisprudence. It is well established that where collectively-bargained grievance procedures are the exclusive and final remedy for breach of a CBA, a plaintiff may not sue under Section 301 until he has completed those procedures. Because Plaintiff has not alleged exhaustion of the grievance and arbitration mechanisms set forth in the CBA, the claim is not only completely preempted under Section 301, it must be dismissed for failure to exhaust the mandatory CBA grievance process. *See Hines v. Anchor Freight, Inc.*, 424 U.S. 554, 563 (1976) (unless an employee attempted to utilize the contractual procedures for settling his dispute with the employer, his independent suit against the employer must be dismissed); *Parker v. Cherne Contracting Corp.*, 2019 WL 359989 (N.D. Cal. Jan. 29, 2019) (granting motion to dismiss completely preempted claims where "Plaintiff has not alleged that she has exhausted the grievance procedures" of the CBA). Accordingly, the Court should dismiss Plaintiff's Complaint in its entirety. S*ee, Busey v. P.W. Supermarkets, Inc.*, 368 F. Supp. 2d 1045, 1054-55 (N.D. Cal. 2005) (holding where the plaintiff failed to allege exhaustion of the grievance and arbitration process in the CBA, his preempted Section 301 claims must be dismissed).

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully requests the Court grant the Motion in its entirety. Plaintiffs' claims are explicitly and unambiguously based on an alleged workplace injury, and have an exclusive and proper forum in the workers compensation system. All of Plaintiff's claims in tort and statute are therefore barred by workers compensation exclusivity. Plaintiff's attempt to plead a violation of federal OSHA is further barred by black letter law holding that there is no private right of action to pursue a federal OSHA violation. Finally, Plaintiff's allegations regarding discipline and work will require interpretation of numerous governing terms of the CBA that at all relevant times governed Zuniga's employment.

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Respectfully submitted,

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