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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CORBY KUCIEMBA, an individual; ROBERT KUCIEMBA, an individual,

Plaintiffs,

vs.

VICTORY WOODWORKS, INC., a Nevada corporation; DOES 1-20, inclusive,

Defendants.

Case No. 3:20-cv-09355-JCS

DEFENDANT VICTORY WOODWORKS, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM [FRCP 12(B)(6)]

Complaint Filed: October 23, 2020

Date: February 12, 2021[1]
Time: 9:30 a.m.
Department: Courtroom F – 15th Floor

[1] By filing this Motion in order to comply with the statutory deadline, Victory Woodworks is not consenting to the jurisdiction of the magistrate.

NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Friday, February 12, 2021, at 9:30 a.m., or as soon thereafter as counsel may be heard, in Courtroom F – 15th Floor before an Article III judge in the stead of Chief Magistrate Judge Joseph C. Spero of the above-entitled Court located at 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant Victory Woodworks, Inc. ("Victory" or "Defendant") will, and hereby does, move to dismiss Plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). As a matter of law, Plaintiffs Corby Kuciemba and Robert Kuciemba's Complaint fails to allege a claim for relief upon which relief can be granted against Defendant.

This motion is based on this notice of motion and motion, the memorandum of points and authorities, request for judicial notice, and declaration of William A. Bogdan filed herewith, all other papers on file in this action, and on any further briefs, authorities, or argument that may be presented before or at the hearing on this motion.

Dated: January 4, 2020

HINSHAW & CULBERTSON LLP

By: */s/ William Bogdan*
WILLIAM BOGDAN
MICHAEL MCCONATHY
Attorneys for Defendant
VICTORY WOODWORKS, INC.

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I. ISSUE PRESENTED

Where an employee files a claim for workers' compensation benefits for allegedly contracting COVID-19 in the course and scope of employment, the employer does not owe a duty to every person off-site who claims in a civil suit that the employee infected them with the virus.

II. INTRODUCTION

Victory Woodworks, Inc. files this motion to dismiss a suit by its employee Robert Kuciemba and his wife Corby Kuciemba for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Mrs. Kuciemba[2] alleges that she could not have contracted COVID-19 from any source other than her husband, and claims that Mr. Kuciemba could not have contracted COVID-19 from any source other than his employer's construction worksite.

By their claims of negligence, premises liability and loss of consortium, the Kuciembas seek to circumvent the exclusive remedy of California's workers' compensation system by alleging that Victory owed Mrs. Kuciemba a duty to prevent her from contracting the disease. However, Plaintiffs' allegations have an even more far-reaching effect: by her claim of public nuisance, Mrs. Kuciemba seeks to make every essential industry the insurer of any member of the public who believes they contracted COVID-19 from an employee of that industry. Neither plaintiff is owed a duty by Victory that permits redress through a civil action.

III. STATEMENT OF FACTS

Corby Kuciemba and her husband live on a residential block of contiguous homes bordering several retail complexes in Hercules, California. The City of Hercules has been under a Local Emergency Order because of COVID-19 since March 20, 2020. (Request for Judicial Notice Ex. B - Hercules Emergency Order)

Within walking distance of the Kuciemba home is a Rite Aid, Big Lots, Post Office, McDonald's, Home Depot and Lucky's Supermarket. (Request for Judicial Notice Ex. C - Google Maps). It is unclear whether Ms. Kuciemba is employed outside the home. Likewise, at the pleading stage it is impossible to determine where she went, who she met, or what protocols she or those she

[2] The complaint consistently refers to the plaintiff as "Mrs. Kuciemba," and out of respect we refer to her in that manner.

associated with followed during the relevant time period. There is no allegation that she has ever worked for Victory, or that she visited her husband's jobsite.

Robert Kuciemba builds cabinets on construction projects, an industry deemed essential by the State of California and the City and County of San Francisco. (Request for Judicial Notice Ex. D- CCSF Order of the Health Officer [SFOHO]). On May 6, 2020 he started working for Victory Woodworks at a jobsite in San Francisco. (Ex. A Compl. ¶13) Prior to his separation from employment, Mr. Kuciemba was under the control of Victory eight hours per day, and free to do as he wished the remaining 16 hours per day.

On July 11 or 12, Mrs. Kuciemba began experiencing unidentified symptoms of the COVID-19 virus. (Compl. ¶18) Mr. Kuciemba, who by then was no longer working for Victory, began experiencing unidentified symptoms within the same timeframe. Both tested positive on July 16, 2020 and were eventually hospitalized. (Compl. ¶18)

Mr. Kuciemba is convinced that he became infected on the job (Compl. ¶17), and on that basis has filed a worker's compensation claim. (Request for Judicial Notice Ex. E - WCAB Application for Adjudication of Claim). Regardless of the source of his exposure, Plaintiffs allege that Mr. Kuciemba infected Mrs. Kuciemba. (Compl. ¶24). By implication, they do not believe it was Mrs. Kuciemba who infected her husband, or that Mrs. Kuciemba contracted the virus from any other source.

Mrs. Kuciemba has sued her husband's employer alleging that there were twelve things Victory could have done better in managing the jobsite. (Compl. ¶¶ 5, 21). As a result of allegedly exposing her husband to COVID-19, she claims Victory is liable to her on theories of negligence, negligence per se, premises liability and public nuisance. On that basis, she demands that Victory compensate her for lost wages, lost earning capacity, emotional distress, pain and suffering, loss of enjoyment of life and emotional distress. Though not separately itemized, she is apparently also seeking medical expenses stemming from at least one hospitalization stay. Mrs. Kuciemba further claims entitlement to punitive damages, interest, penalties and attorney's fees. Mr. Kuciemba has sued for loss of consortium.

IV. LEGAL ARGUMENT

A. Standard on Motion to Dismiss

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests for the legal sufficiency of the claims alleged in the complaint. *Ileto v. Glock Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). Under Fed. R. Civ. P. 8, which requires that a complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), a complaint may be dismissed under Fed. R. Civ. P. 12(b)(6) if the plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support a cognizable legal theory. *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013).

Though generally the factual allegations of the complaint must be assumed to be true, not everything in the complaint need necessarily be accepted as binding. Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" *See Id.*, at 678. The complaint must proffer sufficient facts to state a claim for relief that is plausible on its face. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, *supra*, 556 U.S. at 678. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not `show[n]'—`that the pleader is entitled to relief.'" *Id*. at 679 (quoting Fed. R. Civ. P. 8(a)(2)). Thus, where plaintiff is armed with nothing more than conclusions, the complaint will not serve to "unlock the doors of discovery." *Id*. at 678. "[I]t is within [the court's] wheelhouse to reject, as implausible, allegations that are too speculative to warrant further factual development." *Dahlia v. Rodriguez,* 735 F.3d 1060, 1076 (9th Cir. 2013).

"[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). The court need not accept as true "allegations that contradict matters properly subject to judicial notice." *In re Gilead Scis. Sec. Litig.*, 536 F.3d

1049, 1055 (9th Cir. 2008). "Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Id.* Determining whether the complaint states a plausible claim requires the court "to draw on its judicial experience and common sense." *Iqbal*, *supra*, 556 U.S. at 679.

B. Plaintiffs' Claims Are Subsumed by the Workers' Compensation Exclusive Remedy

All of Plaintiffs' varied claims find their genesis in the injury Mr. Kuciemba alleges he incurred on his jobsite. Mr. Kuciemba's filed a claim with the Workers' Compensation Appeals Board as a result. By alleging that he is entitled to benefits because he contracted COVID-19 in the course and scope of employment, his personal injury allegation is not the proper subject of a civil suit, and is covered by the workers' compensation exclusive remedy. Mrs. Kuciemba's claims as a result are barred as well, even though she was not employed by Victory.

California Labor Code § 3600 provides that an employer's liability for an injury to an employee in the course and scope of employment is "in lieu of any other liability whatsoever to *any person*. . . ." (emphasis supplied.) Labor Code § 3601(a), provides that "Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is ... the exclusive remedy for injury or death of an employee against the employer...." Moreover, Labor Code § 5300(a), declares that proceedings "for the recovery of compensation, or concerning any right or liability arising out of or incidental thereto" shall be instituted before the Workers' Compensation Appeals Board and not elsewhere.

Despite the fact that Ms. Kuciemba was never employed by Victory, all civil claims she asserts which are derivative of her husband's workers' compensation claim are barred by the exclusive remedy, even though she alleges an independent injury separate from that suffered by her husband. California courts have repeatedly held that the employer cannot be held liable for collateral damages to third persons whose rights at common law were derivative from those of the injured employee.

In *Williams v. R. J. Schwartz*, 61 Cal.App. 3d 628 (1976), Mr. Williams was killed in the course and scope of employment with R. J. Schwartz. The bridge where his logging truck was parked collapsed, causing him to fall, followed closely by the truck which ultimately crushed him. All these

events took place in full view of his wife, who after receiving workers' compensation benefits from her husband's employer for his death, filed a civil suit against that company seeking a separate recovery for her own mental anguish as a result of witnessing the accident, on the theory that the employer negligently inflicted emotional distress on her under *Dillon v. Legg*, 68 Cal.2d 728 (1968).

The trial court in *Williams* granted the employer's demurrer on grounds that the exclusive remedy barred her claim, and the court of appeals affirmed. The appellate court acknowledged that a negligent infliction claim is not one where a wife seeks to redress an injury principally incurred by the husband. Rather, it is personal to the wife for her own injury imposed on her by the employer, which is not merely collateral to her husband's injury. As a result, "the loss is hers alone." *Williams*, *supra*, at 632 [citation and brackets omitted.] However, despite her independent injury, the wife's claim was derivative of her husband's injury and therefore subsumed by her husband's workers' compensation claim.

The California workers' compensation scheme precludes not only so-called derivative actions, but "any other liability whatsoever to any person ... for any injury sustained by [an employee] arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death ...." (Lab. Code § 3600.)" *Id*. at 632. As such "When an employee's injuries or death are compensable under the Workmen's Compensation Act, the right of the employee or his dependents, as the case may be, to recover such compensation is the exclusive remedy against the employer." *Id*. at 633. "In the most explicit terms, § 3600 declares the exclusive character of the employer's workmen's compensation liability in lieu of any *other* liability to *any* person." *Id*. [citations omitted; emphasis in original].

Though the issue of civil liability for negligent infliction imposed by the employer on a spouse was a new one for the court in *Williams*, it did not view its holding as novel: the workers' compensation system was always intended to encompass such claims. That a wife's injury is precluded by the workers' compensation scheme is part of the *quid pro quo* of the legislative scheme which imposes reciprocal concessions upon both the employer and employee, while withdrawing from each certain rights and defenses available at common law:

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> [T]he employer assumes liability without fault, receiving relief from some elements of damage available at common law; the employee gains relatively unconditional protection for impairment of his earning capacity, surrendering his common law right to elements of damage unrelated to earning capacity; the work-connected injury engenders a single remedy against the employer, exclusively cognizable by the compensation agency and not divisible into separate elements of damage available from separate tribunals.

Id. at 633.

Similarly, a spouse's claim for loss of consortium is subsumed within the statutory scheme. As with a negligent infliction claim, loss of consortium is recognized as "an independent form of mental suffering and involves a deprivation of interests which are personal to the spouse who brings suit and not merely collateral to those of the other spouse." *Id*. at 632. So wide reaching is the exclusive remedy that a wife's loss of consortium claim is subsumed even where the husband is permitted to file a civil suit for his injury. In *Lefiell Manufacturing Company v. Superior Court*, 55 Cal.4th 275 (2012), notwithstanding the availability of a civil action at law to a worker under the power press exception to the exclusive remedy, the court found the employee's workplace injury was still compensable under the workers' compensation system as well. *Id* at 286. Because the availability of a civil remedy did not take the employee's case out of the workers' compensation system, the spouse's loss of consortium claim was barred by the exclusive remedy. *Id*. at 289.

That Mrs. Kuciemba's personal injury claim and Mr. Kuciemba's resulting loss of consortium claim are both barred by the exclusive remedy is confirmed by the decision in *Salin v. Pacific Gas & Electric Co.*, 136 Cal.App. 3d 185 (1982), rev'w denied 12/1/82. In that action, Mr. Salin's job was allegedly so oppressively stressful that he became psychotically depressed to the point of insanity, which drove him to murder his two daughters and attempt suicide. After filing a workers' compensation claim for his own injuries, Mr. Salin filed a wrongful death civil action, claiming that he stood in the position of a non-employee third party who had suffered injury and damages as a result of the tortious act of PG&E.

In line with decisions establishing that "where, following a work-related injury or death, conditions of compensation exist, third parties who have suffered prejudice or damages by virtue of

1 such injury or death are barred from recovery against the employer," the court rejected Salin's claim.
2 *Id*. at 191. As the court observed, "It follows that had plaintiff's daughters survived the injuries he had
3 inflicted upon them, or had otherwise been damaged due to his employment-related mental condition,
4 *they* would have had no cause of action against PG&E." *Id*. at 192 (emphasis in original). Because he
5 stood in the shoes of his daughters as heir and personal representative, Salin only had such rights as
6 his daughters would have had if they had survived. As a result, Salin's only remedy was within the
7 workers' compensation system.

8 Though Mrs. Kuciemba's injury is separate from her husband's, her causes of action are
9 indivisible from the illness he incurred in the course and scope of employment. She is seeking to
10 recover compensatory damages through theories of negligence, premises liability and nuisance that
11 arose because of an injury to her husband at work: she was injured only because he was injured. Thus,
12 her claims, and the claim of Mr. Kuciemba for his loss of consortium, are barred by the exclusive
13 remedy.

14 **C. Application of the Primary Jurisdiction Doctrine**

15 Though all of Plaintiffs' claims are subsumed by the exclusive remedy, the cause of action for
16 public nuisance warrants separate mention. As with the negligence claims, Mrs. Kuciemba demands
17 compensatory damages for the conditions that led to her husband's injury, which have in turn caused
18 her injury. (See Compl. ⁋⁋ 41, 54-55.) Victory's worksite was not open to the public, and it conducted
19 all its operations protected from outsiders. Her nuisance cause of action is nothing more than a personal
20 injury claim precluded by the exclusive remedy.

21 Even more troubling is her demand that through injunctive relief, this court must develop,
22 administer and monitor a COVID-19 safety program at a construction site. Such supervision is
23 allegedly necessary because the Center for Disease Control, OSHA, the State of California and the
24 City and County of San Francisco have all failed dismally in their efforts to protect the public (Compl.
25 ⁋47.) Somehow this Court, itself already stretched to its limits by the pandemic, is to exercise judgment
26 superior to these expert regulatory bodies as to how the public health may be maintained and
27 controlled. This is the province of the Legislature and regulatory bodies, which have not only the
28 expertise and funding for the task, but the broader perspective to be able to address a world-wide

1 problem.

2 Any public nuisance claim under the circumstances warrants the application of the primary
3 jurisdiction doctrine. More than a century ago, the U.S. Supreme Court recognized that state and local
4 health authorities have unique competence to develop and implement strategies to combat "an
5 epidemic of disease which threatens the safety of its members." *Jacobson v. Commonwealth of*
6 *Massachusetts*, 197 U.S. 25, 27 (1905). Where public health authorities are granted primary
7 responsibility to combat an "epidemic that imperil[s] an entire population," then "it is no part of the
8 function of a court . . . to determine which one of two modes [is] likely to be the most effective for the
9 protection of the public against disease." *Id*. at 30-31.

10 As recently noted by one court, workplace safety and public health concerns created by
11 COVID-19 are not only outside the conventional experience of judges, but go "to the very heart of
12 [public health agencies'] special competence." *Rural Cmty. Workers All. v. Smithfield Foods*, 2020
13 WL 2145350 at *8-9 (W.D. Mo May 5, 2020) (worker's public nuisance claim dismissed based on
14 primary jurisdiction of OSHA and USDA's extensive regulatory control over meatpacking plants.) It
15 is the duty of these regulatory bodies, possessing superior expertise and resources, to ensure uniform
16 and consistent enforcement of COVID-19 safety requirements. Accord, *Klein v. Chevron U.S.A.* 202
17 Cal App. 4th 1342, 1362 ("A trial court may abstain from adjudicating a suit that seeks equitable
18 remedies if granting the requested relief would require the trial court to assume the functions of an
19 administrative agency, or to interfere with the functions of an administrative agency.")

20 A uniform, effective program to confront this virus is not served by multiple judicial districts
21 assuming responsibility for what is a global problem. Were Ms. Kuciemba's nuisance claim to
22 succeed, every essential business – be it a construction site, supermarket, or hospital – which has the
23 misfortune of having an employee fall ill with COVID-19 could be subject to a claim, not only by that
24 employee's spouse, neighbor, or bus driver, but by any and every member of the public. Moreover,
25 each of those claims would be subject to a patchwork of judicially-created mandates.

26 **D. California Does Not Recognize "Take-home" Liability for Biological Pathogens**

27 Even if the exclusive remedy does not subsume all their civil claims, Plaintiffs still cannot
28 establish that Victory owes a duty to keep everyone that employee comes in contact with free from

1 COVID-19. Never has California authorized a civil suit against an employer by the spouse of a worker
2 who becomes infected by a disease that the worker contracted on the jobsite. A household member
3 may have a cause of action if an illness results from contact with a hazardous product originating on
4 the jobsite, but that claim exists regardless of whether the worker has incurred an injury.

5 In *Kesner v. Superior Court*, 1 Cal.5th 1132 (2016), the nephew of a worker involved in the
6 manufacture of asbestos brake shoes died of mesothelioma. The uncle, who apparently did not contract
7 mesothelioma, testified that his nephew would spend the night at the uncle's house and would
8 roughhouse with or sleep close to his uncle. The nephew's successor in interest sued the uncle's
9 employer for exposing the nephew to asbestos fibers carried home on his uncle's clothes.

10 Confronted with the issue of whether the employer owed the nephew a duty, the California
11 Supreme Court had no occasion to address whether the worker's compensation exclusive remedy
12 barred the claim. Mesothelioma is not an infectious disease, and the fact that the nephew contracted
13 that illness had nothing to do with whether or not his uncle also contracted the disease on the jobsite.

14 Rather, the Supreme Court in *Kesner* faced a much different question. At issue was whether a
15 company that uses a hazardous product as part of its commercial enterprise, and allows that product
16 to be conveyed off-site by an employee, owed a duty to protect those in the employee's household
17 from harm. The Supreme Court found that a such a duty was consistent with precedent recognizing
18 "liability for harm caused by substances that escape an owner's property" where the company fails to
19 exercise reasonable care in its use of asbestos-containing materials. *Id*. at 1159.

20 In re-acknowledging that duty, the Supreme Court made a key finding distinguishing that case
21 from the *Kuciemba* suit: it was not the contact with the worker that allegedly caused the mesothelioma,
22 but rather the household's contact with asbestos fibers, a hazardous product, that the employer used in
23 its manufacturing process and was required to restrict to the jobsite. "It is not [the household's] contact
24 with [the employee] that allegedly caused [] mesothelioma, but rather [the household's] contact with
25 *asbestos fibers that [the employer] used on its property*." *Id*. (emphasis in original.)

26 The employee's clothing was merely a vector to carry the fibers. As a result, the nephew did
27 not catch mesothelioma through respiratory transmission from his uncle; the nephew caught the
28 disease from inhaling asbestos, a product that the employer was duty bound to restrict to the premises,

1 based on 40 years of government regulation and 80 years of industry knowledge. *Id*. at 1147.
2 The California Supreme Court in *Kesner* did not create a new duty: commercial use of asbestos
3 in business or on one's property already fell within the general duty to exercise ordinary care in one's
4 activities under Cal. Civ. Code §1717. Thus, the Court viewed the issue not as whether to create a new
5 duty, but rather whether an exception to an already existing duty should be established. *Id*. at 1143.
6 As demonstrated by the *Kesner* decision, foreseeability alone does not establish duty. *Id*. at
7 1148-1151. "A judicial conclusion that a duty is present or absent is merely a shorthand statement ...
8 rather than an aid to analysis.... `[D]uty,' is not sacrosanct in itself, but only an expression of the sum
9 total of those considerations of policy which lead the law to say that the particular plaintiff is entitled
10 to protection." *Dillon, supra,* 68 Cal.2d at 734. "Courts, however, have invoked the concept of duty
11 to limit generally "the otherwise potentially infinite liability which would follow from every negligent
12 act . . ." *Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 750, quoting *Dillon,* 68 Cal.2d at p.
13 739.
14 Here, the Kuciembas are requesting the court to fashion a new duty: the duty to protect non-
15 employees by guaranteeing that a worker will arrive home COVID-free. No employer can guarantee
16 that any employee will enter or leave its premises uninfected. Nowhere in the San Francisco Order of
17 the Health Officer, referred to repeatedly in Plaintiffs' complaint, does it state that use of the
18 recommended best practices will provide all workers with immunity from COVID-19. Short of
19 isolating at home and not participating in any essential industry, only a vaccine could produce such
20 result.
21 Rather, the San Francisco Order is merely "best practices regarding the most effective
22 approaches to slow the transmission of communicable diseases . . ." (Ex. D SFOHO p.5 §9) As best
23 practices, essential industries are expected to comply with the social distancing and other
24 recommendations "except to the extent necessary to carry out the work the Essential Business."
25 (SFOHO p.18 §16k) The Order of the Health Officer nonetheless acknowledges that transmission of
26 the disease may take place by those who are asymptomatic. (SFOHO p.6 §9)
27 One of the California Supreme Court's motivations for refusing to create an exception to the
28 duty to protect non-workers from asbestos was the fact that "commercial users of asbestos benefitted

1 financially from their use of asbestos." *Kesner*, 1 Cal.5th at 1151. In contrast, there is no commercial
2 viability in the COVID-19 virus: it is not used in the commercial process, nor is it a byproduct of any
3 industry.

4 The fact that asbestos comes from an identifiable source also came into play. "Indeed, liability
5 for harm caused by substances that escape an owner's property is well established in California law."
6 *Id.* at 1159. The Supreme Court recognized there are some natural substances, such as soil, animals,
7 or fires, for which someone who controls a property may be responsible, but those must originate on
8 the property for liability to be established. A fire originating off-site, or someone else's wandering
9 cow, which happens to pass through a person's property does not make that property owner liable.
10 These calamities, like asbestos, have an identifiable source.

11 Unlike the asbestos in *Kesner*, the virus did not originate on the construction site. Someone
12 had to bring the virus to the property, quite likely someone who was asymptomatic. Moreover, asbestos
13 is of an industrial origin. The overwhelming odds are that any person suffering from mesothelioma
14 did not contract it while drinking coffee in a café, riding on a BART train, or singing in a church choir.
15 With COVID-19, everything a worker does during the two-thirds of the day spent off site, and what
16 other household members do twenty-four hours a day, is likely, if not more likely, to be a source of
17 infection.

18 Though an employer's goal may be to avoid having any worker exposed to the virus, that goal
19 does not equate to a duty to render every employee COVID-free, particularly when those with the
20 disease often show no symptoms. All the employer can do, and all that the SF Health Order requires
21 the employer to do, is minimize the potential that an employee will be exposed to the virus. What the
22 employer can't do, and what it has no duty to do, is control the actions of relatives off-site who may
23 interact with (and possibly infect) the worker who returns home at the end of the day.

24 The nature of infectious diseases is radically different from asbestos. Every winter, millions of
25 people worldwide get the flu. Some people take no precautions and get the flu. Some people get a flu
26 shot, but get the flu. Some people get inoculated, wash their hands a lot, and wear a mask, yet still get
27 the flu. Despite more than 100 years' experience with influenza and knowing how it is spread, people
28 still get the flu despite the best efforts of individuals, industry, and healthcare practitioners. Never has

an employer in California been held liable to an infected spouse who caught the flu from her husband who brought it home from work.

In comparison, our nation's experience with the effects of COVID-19 is in its infancy; our limited understanding of the disease has only recently developed. Short of vaccination, to date isolation appears to be the most effective manner by which to avoid the disease.

Compare this to asbestos where there are documented preventative measures to prevent the escape of fibers from the jobsite, e.g. disposable Tyvek suits, changing rooms, showers, separate lockers, on-site laundry, etc. *See Id,* at 1152. For workers in essential industries, the only way to guarantee that a person with COVID-19 not leave the site would be to require all employees to actually live on site. While the creation of such a bubble may be financially viable for the professional athletes of the NBA, it is not an option for hourly workers with families.

Instead, essential industries do the best they can. As evidenced by the one industry most militant about COVID-19 precautions, hospitals despite their best efforts still cannot prevent doctors and nurses from succumbing to the disease.

Though the Supreme Court did not address the issue of public nuisance, the holding in *Kesner* is instructive on that issue as well. Despite the fact that the duty to control asbestos has had a long history, the Court was cognizant that applying that duty in the context of off-site exposure could open the floodgates for suits by any person who might come in contact with asbestos originating with the employer. Despite the threat of asbestos fibers to anyone who comes in contact with a worker, the court declined to create a public nuisance-like cause of action for everyone encountering asbestos off-site. Instead, the California Supreme Court limited recovery only to those within the household of the worker, despite scores of others potentially exposed who might have been just as likely as household members to contract an asbestos-related disease.

In sum, asbestos is a manufactured product fashioned purposefully by industry for financial gain. COVID-19 is a virus which suddenly evolved through a mishap of nature and benefits no one. Asbestos and its health effects have been studied for over a century, and industry has developed a myriad of effective preventative measures to contain the product, as evidenced by the ever-dwindling number of patients with asbestos-related diseases. COVID-19 remains a mystery, addressed by our

best guesses of what might be effective, as evidenced by the dramatically increasing number of cases on a daily basis. There is nothing in the California Supreme Court's opinion in *Kesner* to suggest that a virus, secreted into the worksite through no act of the employer, should be treated the same as a hazardous industrial product used for profit.

V. CONCLUSION

Mr. Kuciemba believes he was exposed to a virus at work. Mrs. Kuciemba believes she was exposed to a virus at home as a result of Mr. Kuciemba's exposure to a virus at work. All roads lead to the injury Mr. Kuciemba sustained in the course and scope of employment. As such, his injury, his wife's injury, and his injury from his wife's injury, fall within the exclusive remedy doctrine. Victory Woodworks owes neither Mrs. Kuciemba nor Mr. Kuciemba any duty which would subject the company to civil liability.

Dated: January 4, 2021

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