

**IN THE UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF MISSOURI**

RURAL COMMUNITY WORKERS ALLIANCE
and JANE DOE;

Plaintiffs,

v.

SMITHFIELD FOODS, INC. AND SMITHFIELD
FRESH MEATS CORP.,

Defendants.

Case No. 5:20-cv-06063-DGK

**PLAINTIFFS' SUGGESTIONS IN OPPOSITION TO LETTER INCLUDING REQUEST
FOR EXTENSION OF TIME TO RESPOND TO PLAINTIFFS' EMERGENCY
MOTION FOR A PRELIMINARY INJUNCTION**

The Court should deny Defendants' request for an extension of time to respond to Plaintiffs' Emergency Motion for a Preliminary Injunction ("Motion"), Dkt. No. 3.¹ Defendants seek to delay this Court's consideration of the Motion based on a forthcoming, but baseless, argument that the Occupational Safety and Health Administration ("OSHA") has "primary jurisdiction." But, even if OSHA were to act, and it has said it will not, that action would not impact Plaintiffs' state-law tort claims in this matter. Any delay risks further spread of the COVID-19 virus, both among workers at the Milan, Missouri plant and in the wider community.

Workers at Defendants' Milan, Missouri plant (the "Plant") have symptoms of COVID-19, and without prompt Court intervention, the virus will surely spread.² This is not idle

¹ Defendants have not formally moved for an extension of time to respond to Plaintiffs' Motion. But in their letter to the Court of April 24, 2020, Defendants appear to request that "the Court permit Smithfield to file its response [to Plaintiffs' Motion] on May 4, 2020." Dkt. No. 15, at 1.

² Defendants' claim that they "are not aware of any confirmed diagnoses of COVID-19," Dkt. No. 15, at 1, is dangerously misleading. As Plaintiffs explain, Defendants have "not implemented

speculation. Smithfield plants around the country are closing every day because of COVID-19.³ In this case, Plaintiffs do not request that the Court order the Plant closed. All they are asking is that if Defendants continue operating the Plant, they comply with basic requirements included in federal and state public health orders and guidance to prevent further spread in Milan and the surrounding region. Every day that the Plant continues to operate without making these changes substantially increases the likelihood of illness and even death, and yet further disruption of the nation's food supply chain.

Defendants' suggestion that the Court allow them to delay opposing Plaintiffs' Motion so they can raise a prudential primary jurisdiction claim runs counter to the doctrine. Primary jurisdiction "is to be invoked sparingly, as it often results in added expense and delay," which is particularly unacceptable here. *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934, 938 (8th Cir. 2005).

Moreover, a defendant moving to dismiss based on an agency's primary jurisdiction must "identif[y] a[] relevant proceeding[] to which" the court should defer, and there is not one here. *Curran v. Bayer Healthcare LLC*, No. 17 C 7930, 2019 WL 398685, at *3 (N.D. Ill. Jan. 31, 2019). Defendants contend that OSHA "is currently investigating and enforcing work place

any policies that allow [them] to contact trace or test workers who have symptoms." Complaint, Dkt. No. 1 ¶ 105.

³ Chicago Digital Team, *Kane County Health Department Closes St. Charles' Smithfield Foods Due to COVID-19 Concerns*, ABC7 (Apr. 25, 2020), <https://abc7chicago.com/amp/smithfield-foods-st-charles-closing-coronavirus-illinois/6129026/>; *Smithfield to close Illinois pork facility after workers test positive for virus*, Reuters (Apr. 24, 2020), <https://in.reuters.com/article/us-health-coronavirus-smithfield/smithfield-to-close-illinois-pork-facility-after-workers-test-positive-for-virus-idINKCN22636X?il=0>; see also Greg Barnes, *Two more processing plants identified as having coronavirus outbreaks*, North Carolina Health News (Apr. 24, 2020), <https://www.northcarolinahealthnews.org/2020/04/24/two-more-meat-processing-plants-identified-as-having-coronavirus-outbreaks/>.

safety issues concerning COVID-19 throughout the country.” Dkt. No. 15, at 1. But, in fact, OSHA is hardly performing any onsite inspections. Of particular import, it has classified meat packing jobs as “[m]edium exposure risk” for COVID-19—medical, postmortem, and laboratory workplaces were the only ones identified as “[h]igh and very high exposure risk jobs”—and directed its inspectors to “not normally” perform “on-site inspection[s]” for such medium risk jobs. OSHA, *Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)* (Apr. 13, 2020).⁴ OSHA may only issue a citation to “abate[]” a violation after an inspection. 29 U.S.C. § 658(a).⁵

Furthermore, even if Plaintiffs’ claims were not emergent, the wait for OSHA to act would likely be years. If an investigation were to be scheduled, OSHA has six months to issue a citation from the date of inspection, 29 U.S.C. § 658(c). Should OSHA issue a citation, Defendants would have fifteen days to respond, and, if they objected to the citation, no action would be required of them until a final decision by the independent Occupational Safety and Health Review Commission, *id.* § 659(c). That commission regularly takes years to issue decisions. *See, e.g., Sec. of Labor v. Science App. Int’l Corp.*, OSHRC Dkt. No. 14-1668 (Apr. 16, 2020) (decision on wrongful death citation, almost exactly six years after the fact).

The nature of Plaintiffs’ state law claims also makes the primary jurisdiction doctrine inapplicable. *See State ex rel. Schmitt v. Henson*, No. ED 107970, 2020 WL 1862001, at *4 (Mo.

⁴ <https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19#attach2>.

⁵ Thus, that by April 28 Defendants “intend[] to cooperate fully with” a written request from OSHA that Defendants identify the conditions at the Milan Plant does not suggest any agency action is forthcoming. Dkt. No. 15, at 1. Further, that Defendants can respond to OSHA by April 28 disproves their claim they need additional time to investigate Plaintiffs’ contentions. There is no reason Defendants cannot provide the Court the information they are already collecting.

Ct. App. Apr. 14, 2020) (describing Missouri public nuisance law); *Smith v. W. Elec. Co.*, 643 S.W.2d 10, 12-13 (Mo. Ct. App. 1982) (identifying Missouri’s right to a safe workplace). Courts have observed that where, as here, plaintiffs “allege[] state common law causes of action and remedies that are not dependent on any provisions [of a statute enforced by a federal agency],” primary jurisdiction is inapplicable. *Ryan v. Chemlawn Corp.*, 935 F.2d 129, 132 (7th Cir. 1991). OSHA is actually prohibited from “secur[ing] the safety of the general public,” which is precisely what Plaintiffs seek to protect through their public nuisance claim. *Steel Inst. v. City of New York*, 716 F.3d 31, 41 (2d Cir. 2013). The Occupational Health and Safety Act also includes a savings clause that permits private parties to pursue tort claims in court independent of OSHA. 29 U.S.C. § 653(b)(4); *Schweiss v. Chrysler Motors Corp.*, 922 F.2d 473, 474 (8th Cir. 1990). Deferring resolution of Plaintiffs’ tort claims is not what the governing statute or doctrine of “primary jurisdiction” intended.

Finally, the Eighth Circuit has explained the purpose of deferring to an agency under the primary jurisdiction doctrine is to ensure “consistency” in regulation or to take advantage of “agency expertise,” *Alpharma*, 411 F.3d at 938, but neither consideration would be advanced by delay here. OSHA has deferred to a different federal agency, the Centers for Disease Control (“CDC”), suggesting that CDC guidelines should inform employers in developing workplace safety policies to protect against COVID-19. *Interim Enforcement Response Plan for Coronavirus Disease 2019, supra* (“The most current CDC guidance should be consulted in assessing potential workplace hazards and to evaluate the adequacy of an employer’s protective measures for workers.”). Defendants’ refusal to adhere to the CDC guidelines is the foundation of Plaintiffs’ claims, Complaint ¶¶ 62-107, because Missouri’s “stay-at-home order” incorporates the CDC guidelines and establishes the standard of care Defendants are violating in

this case, *id.* ¶¶ 57-61. Providing Plaintiffs’ requested relief would further, not hamper, consistency. For these reasons too, OSHA’s expertise also does not appear to bear meaningfully on what is needed to protect the Plant’s workers and Milan. Indeed, it was the *CDC*, not OSHA, that issued guidance relating to reopening Defendants’ South Dakota plant following the tragic spread of COVID-19 in that workplace and the community beyond.⁶

This Court should not grant Defendants’ request to delay by a week their response to Plaintiffs’ Motion. Defendants’ claim of primary jurisdiction is frivolous and founded in the erroneous suggestion that OSHA can or will address the concerns raised in Plaintiffs’ Complaint. Delay will only place public safety at risk.

Respectfully Submitted,

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⁶ Konstantin Toropin & Theresa Waldrop, *CDC issues recommendations for closed South Dakota Smithfield plant following coronavirus outbreak*, CNN (Apr. 23, 2020), <https://www.cnn.com/2020/04/23/us/cdc-report-smithfield-plant-south-dakota/index.html>.

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** motion to appear pro hac vice pending*