The initial document is OSHA’s inquiry. The response letter and complaint also attached.

From: Lucero, Rita - OSHA <Lucero.Rita@dol.gov>
Sent: Tuesday, April 14, 2020 6:26 PM
To: Sweatt, Loren E. - OSHA <Sweatt.Loren.E@dol.gov>
Cc: Edens, Mandy - OSHA <Edens.Mandy@dol.gov>
Subject: RE: Smithfield Foods - Major employer in Sioux Falls - April 13, 2020 - Update

As requested

Media Inquiry:
Today we received a media inquiry from the BBC that was referred to Chicago’s OPA Scott Allen. Scott spoke to the reporter who was inquiring about Smithfield’s OSHA history. The reporter also wanted to know whether we are doing an inspection, but he has not yet answered her. We told him that we would let him know if we were going to open an inspection there.

As of this time, we have had no reports of hospitalizations at Smithfield.

If you need anything else tonight, please call my cell.

Rita M. Lucero
Acting Regional Administrator
OSHA, Region VIII
1244 Speer Blvd., Suite 551
Denver, CO 80204
Telephone: 720/264-6565
Email: lucero.rita@dol.gov
Can you send me the inquiry OSHA sent, please?

Hello — Update on Smithfield

Throughout the weekend the number of Covid-19 cases continued to rise and one recent news article says that 238 of Minnehaha’s 438 cases involve “individuals who work at Smithfield Foods”. The initial plan was that Smithfield close for three days but, the cases continued to climb throughout the weekend, initially prompting a 14-day shutdown — urged by the Governor Noem and Mayor TenHaken. The plant took an additional step to close the facility until further notice.

Several other news outlets have higher numbers for Smithfield Food employees infected with Covid-19. The US News says nearly 300 employees are infected.

Here is the news release that Smithfield issued:

https://www.smithfieldfoods.com/press-room/company-news smithfield-foods-to-close-sioux-falls-sd-plant-
 indefinitely-amid-covid-19

Here is the most recent story in the Argus Leader:

19-outbreak/2978385001/

State-wide we currently have 730 cases.

Here is the link to the US News Story:

plant-after-employees-test-positive-for-coronavirus

I will send an update on JBS later today.

I will update as I learn additional information.

Rita M. Lucero

Acting Regional Administrator
Begin forwarded message:

From: "Hauter, Nancy - OSHA" <Hauter.Nancy@dol.gov>
Date: September 11, 2020 at 6:23:25 PM EDT
To: "Edens, Mandy - OSHA" <Edens.Mandy@dol.gov>, "Sweatt, Loren E. - OSHA" <Sweatt.Loren.E@dol.gov>, "Kapust, Patrick - OSHA" <Kapust.Patrick@dol.gov>
Cc: "Zentner, Todd - OSHA" <Zentner.Todd@dol.gov>, "Rainwater, John - SOL" <Rainwater.John@DOL.GOV>, "Williams2, Timothy - SOL" <Williams2.Timothy@dol.gov>, "Baird, Edmund - SOL" <Baird.Edmund@dol.gov>
Subject: (b) 7(A)

All -

(b) 7(A)

Nancy
Megan,

My name is Todd Neeley and I’m a reporter with DTN in Omaha, Nebraska. We have been covering the outbreak of COVID-19 in meatpacking plants this year. This week Smithfield Foods’ plant in Sioux Falls, South Dakota, received an OSHA citation for allegedly not taking steps to protect workers at the plant in March. It was a full month before OSHA released COVID-19 guidelines for meatpackers. We are curious, why was the plant cited for activities a full month before OSHA sent out guidelines? I’ve enclosed a copy of the complaint. We would appreciate a response by 10 a.m. central on Friday. Thanks for your consideration.

Sincerely,

Todd Neeley
Staff Reporter, DTN/The Progressive Farmer

DTN
Office Phone: +402-255-8237
Mobile Phone: + 402-309-3720
Twitter: @toddneeleyDTN

9110 West Dodge Road
Omaha, NE 68114 USA
www.dtnpfoorn.com

NOTICE: This email message is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message.
Citation and Notification of Penalty

To:  
Smithfield Packaged Meats Corporation  
1400 North Weber Avenue  
Sioux Falls, SD 57103

Inspection Number: 1472736  
Inspection Date(s): 04/20/2020 - 09/02/2020  
Issuance Date: 09/08/2020

Inspection Site:  
1400 North Weber Avenue  
Sioux Falls, SD 57103

The violation described in this Citation and Notification of Penalty is alleged to have occurred on or about the day(s) the inspection was made unless otherwise indicated within the description given below.

This Citation and Notification of Penalty (this Citation) describes violations of the Occupational Safety and Health Act of 1970. The penalty listed herein is based on these violations. You must abate the violations referred to in this Citation by the dates listed and pay the penalties proposed, unless within 15 working days (excluding weekends and Federal holidays) from your receipt of this Citation and Notification of Penalty you either call to schedule an informal conference (see paragraph below) or you mail a notice of contest to the U.S. Department of Labor Area Office at the address shown above. Please refer to the enclosed booklet (OSHA 3000) which outlines your rights and responsibilities and which should be read in conjunction with this form. Issuance of this Citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless this Citation is affirmed by the Review Commission or a court.

Posting - The law requires that a copy of this Citation and Notification of Penalty be posted immediately in a prominent place at or near the location of the violation cited herein, or, if it is not practicable because of the nature of the employer's operations, where it will be readily observable by all affected employees. This Citation must remain posted until the violation cited herein has been abated, or for 3 working days (excluding weekends and Federal holidays), whichever is longer.

Informal Conference - An informal conference is not required. However, if you wish to have such a conference you may request one with the Area Director during the 15 working day contest period by calling 605-361-9566. During such an informal conference you may present any evidence or views which you believe would support an adjustment to the citation and/or penalty.
If you are considering a request for an informal conference to discuss any issues related to this Citation and Notification of Penalty, you must take care to schedule it early enough to allow time to contest after the informal conference, should you decide to do so. Please keep in mind that a written letter of intent to contest must be submitted to the Area Director within 15 working days of your receipt of this Citation. The running of this contest period is not interrupted by an informal conference.

If you decide to request an informal conference, please complete, remove and post the Notice to Employees next to this Citation and Notification of Penalty as soon as the time, date, and place of the informal conference have been determined. Be sure to bring to the conference any and all supporting documentation of existing conditions as well as any abatement steps taken thus far. If conditions warrant, we can enter into an informal settlement agreement which amicably resolves this matter without litigation or contest.

**Right to Contest** — You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest proposed penalties and/or abatement dates without contesting the underlying violations. **Unless you inform the Area Director in writing that you intend to contest the citation and/or proposed penalty within 15 working days after receipt, the citation and the proposed penalty will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.**

**Penalty Payment** — Penalties are due within 15 working days of receipt of this notification unless contested. (See the enclosed booklet and the additional information provided related to the Debt Collection Act of 1982.) Make your check or money order payable to “DOL-OSHA”. Please indicate the Inspection Number on the remittance. You can also make your payment electronically on [www.pay.gov](http://www.pay.gov). On the left side of the pay.gov homepage, you will see an option to Search Public Forms. Type "OSHA" and click Go. From the results, click on **OSHA Penalty Payment Form**. The direct link is:

https://www.pay.gov/paygov/forms/formInstance.html?agencyFormId=53090334.

You will be required to enter your inspection number when making the payment. Payments can be made by credit card or Automated Clearing House (ACH) using your banking information. Payments of $25,000 or more require a Transaction ID, and also must be paid using ACH. If you require a Transaction ID, please contact the OSHA Debt Collection Team at (202) 693-2170.

OSHA does not agree to any restrictions or conditions or endorsements put on any check, money order, or electronic payment for less than the full amount due, and will process the payments as if these restrictions or conditions do not exist.

**Notification of Corrective Action** — For each violation which you do not contest, you must provide abatement certification to the Area Director of the OSHA office issuing the citation and identified above. This abatement certification is to be provided by letter within 10 calendar days after each abatement date. Abatement certification includes the date and method of abatement. If the citation indicates that the violation was corrected during the inspection, no abatement certification is required for that item. The abatement certification letter must be posted at the location where the violation appeared and the corrective action took place or employees must otherwise be effectively informed about abatement activities. A sample abatement certification letter is enclosed with this Citation. In addition, where the citation indicates that abatement documentation is necessary, evidence of the purchase or repair of equipment, photographs or video, receipts, training records, etc., verifying that abatement has occurred is required to be provided to the Area Director.

**Employer Discrimination Unlawful** — The law prohibits discrimination by an employer against an
employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he/she has been discriminated against may file a complaint no later than 30 days after the discrimination occurred with the U.S. Department of Labor Area Office at the address shown above.

**Employer Rights and Responsibilities** – The enclosed booklet (OSHA 3000) outlines additional employer rights and responsibilities and should be read in conjunction with this notification.

**Notice to Employees** – The law gives an employee or his/her representative the opportunity to object to any abatement date set for a violation if he/she believes the date to be unreasonable. The contest must be mailed to the U.S. Department of Labor Area Office at the address shown above and postmarked within 15 working days (excluding weekends and Federal holidays) of the receipt by the employer of this Citation and Notification of Penalty.

**Inspection Activity Data** – You should be aware that OSHA publishes information on its inspection and citation activity on the Internet under the provisions of the Electronic Freedom of Information Act. The information related to these alleged violations will be posted when our system indicates that you have received this citation. You are encouraged to review the information concerning your establishment at www.osha.gov. If you have any dispute with the accuracy of the information displayed, please contact this office.
NOTICE TO EMPLOYEES OF INFORMAL CONFERENCE

An informal conference has been scheduled with OSHA to discuss the citation issued on 09/08/2020. The conference will be held by telephone or at the OSHA office located at 4404 South Technology Drive, Sioux Falls, SD 57106 on ______________ at ______________. Employees and/or representatives of employees have a right to attend an informal conference.
CERTIFICATION OF CORRECTIVE ACTION WORKSHEET

Company Name: Smithfield Packaged Meats Corporation
Inspection Site: 1400 North Weber Avenue, Sioux Falls, SD 57103
Issuance Date: 09/08/2020

List the specific method of correction for each item on this citation in this package that does not read “Corrected During Inspection” and return to: U.S. Department of Labor – Occupational Safety and Health Administration, 4404 South Technology Drive, Sioux Falls, SD 57106

Citation Number _____ and Item Number _____ was corrected on ____________________________
By (Method of Abatement): ___________________________________________________________

Citation Number _____ and Item Number _____ was corrected on ____________________________
By (Method of Abatement): ___________________________________________________________

Citation Number _____ and Item Number _____ was corrected on ____________________________
By (Method of Abatement): ___________________________________________________________

Citation Number _____ and Item Number _____ was corrected on ____________________________
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Citation Number _____ and Item Number _____ was corrected on ____________________________
By (Method of Abatement): ___________________________________________________________

Citation Number _____ and Item Number _____ was corrected on ____________________________
By (Method of Abatement): ___________________________________________________________

I certify that the information contained in this document is accurate and that the affected employees and their representatives have been informed of the abatement.

__________________________________________
Signature

______________________________
Typed or Printed Name

______________________________
Date

______________________________
Title

NOTE: 29 USC 666(g) whoever knowingly makes any false statements, representation or certification in any application, record, plan or other documents filed or required to be maintained pursuant to the Act shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment of not more than 6 months or both.

POSTING: A copy of completed Corrective Action Worksheet should be posted for employee review.
Citation and Notification of Penalty

Company Name: Smithfield Packaged Meats Corporation
Inspection Site: 1400 North Weber Avenue, Sioux Falls, SD 57103

Citation 1 Item 1 Type of Violation: Serious

OSH ACT of 1970 Section 5(a)(1): The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were working in close proximity to each other and were exposed to SARS-CoV-2, the virus that causes Coronavirus Disease 2019 (COVID-19):

(a) Smithfield Packaged Meats Corporation at 1400 North Weber Avenue in Sioux Falls, SD 57103: On or about and at times prior to March 23, 2020, the employer did not develop or implement timely and effective measures to mitigate exposures to the hazard of SARS-CoV-2. Between March 22, 2020, and June 16, 2020, approximately 1,294 employees had tested positive for SARS-CoV-2. Of those employees, approximately 43 were hospitalized and four employees died of complications related to the virus.

Among other methods, recognized and feasible means of abatement for this hazard include:

1. The implementation of proactive social distancing measures to ensure that employee work activities, on and off the production line, allow for at least a six-foot distance between workers and at times, and if a six-foot distance is unattainable, the use of barriers between work stations, in lunchrooms, in break areas, and other common areas such as classrooms and conference rooms. Examples of these measures include:

   a. Providing visual cues such as floor markings and/or signs to remind employees to remain six feet apart from each other. Areas where this would be most effective include areas such as time clocks, locker rooms, the symptom screening area, office areas, breakrooms, the cafeteria, equipment and supply areas and some production areas.

   b. Staggering shifts to minimize the number of employees entering or exiting the facility and accessing common areas simultaneously.

   c. Staggering break and meal times to minimize the number of employees in common areas at the same time.

   d. Expanding or providing additional space for employee use of breakrooms and cafeterias to ensure that employees have adequate room to practice social distancing.
Company Name: Smithfield Packaged Meats Corporation
Inspection Site: 1400 North Weber Avenue, Sioux Falls, SD 57103

- Modifying line speed to enable employees to stand farther apart.
- Modifying workstation orientation and/or arrangement so that employees do not work directly across from each other where feasible.
- Installing hardened plastic or other dividers between workstations where employees are not able to practice social distancing where feasible.
- Installing barriers in common areas where employees are not able to practice social distancing and in areas where employees with fixed workstations may interact with multiple employees on a routine basis (reception areas, security building, Human Resources customer service counter, areas were equipment/supplies are provided to employees, etc.).

2. Require employee use of protective measures including faceshields and/or face coverings where employees are not able to practice social distancing onsite.

3. The employer should work with state, local, tribal and/or territorial health officials to facilitate the identification of other exposed and potentially exposed employees at the facility.

4. Screening employees to determine if they are experiencing symptoms associated with being infected with SARS-CoV-2 prior to employees entering the facility. Screening should include:
   - Implementing federal, state, and local health officials’ guidance regarding evaluation of employee symptoms.
   - Ensuring employees understand the screening questions.
   - Ensuring written materials used during the screening process are available in languages that employees understand.

Abatement Note: Although each method is recognized to reduce employee exposure to this hazard, combined implementation of multiple methods is recognized to be most effective.

Abatement Note: Abatement documentation and certification are required for this item (See enclosed “Certification of Corrective Action Worksheet”).
Citation and Notification of Penalty

Company Name: Smithfield Packaged Meats Corporation
Inspection Site: 1400 North Weber Avenue, Sioux Falls, SD 57103

ABATEMENT DOCUMENTATION REQUIRED FOR THIS ITEM

Date By Which Violation Must be Abated: 09/29/2020
Proposed Penalty: $13494.00

Sheila Stanley
Area Director
Company Name: Smithfield Packaged Meats Corporation  
Inspection Site: 1400 North Weber Avenue, Sioux Falls, SD 57103  
Issuance Date: 09/08/2020

<table>
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<tr>
<th>Citation</th>
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<tr>
<td>1, Serious</td>
<td>$13494.00</td>
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</tbody>
</table>

**Summary of Penalties for Inspection Number 1472736**

To avoid additional charges, please remit payment promptly to this Area Office for the total amount of the uncontested penalties summarized above. Make your check or money order payable to: "DOL-OSHA". Please indicate OSHA's Inspection Number (indicated above) on the remittance. You can also make your payment electronically on www.pay.gov. On the left side of the pay.gov homepage, you will see an option to Search Public Forms. Type "OSHA" and click Go. From the results, click on OSHA Penalty Payment Form. The direct link is https://www.pay.gov/paygov/forms/formInstance.html?agencyFormId=53090334. You will be required to enter your inspection number when making the payment. Payments can be made by credit card or Automated Clearing House (ACH) using your banking information. Payments of $25,000 or more require a Transaction ID, and also must be paid using ACH. If you require a Transaction ID, please contact the OSHA Debt Collection Team at (202) 693-2170.

OSHA does not agree to any restrictions or conditions or endorsements put on any check, money order, or electronic payment for less than the full amount due, and will cash the check or money order as if these restrictions or conditions do not exist.

If a personal check is issued, it will be converted into an electronic fund transfer (EFT). This means that our bank will copy your check and use the account information on it to electronically debit your account for the amount of the check. The debit from your account will then usually occur within 24 hours and will be shown on your regular account statement. You will not receive your original check back. The bank will destroy your original check, but will keep a copy of it. If the EFT cannot be completed because of insufficient funds or closed account, the bank will attempt to make the transfer up to 2 times.
Pursuant to the Debt Collection Act of 1982 (Public Law 97-365) and regulations of the U.S. Department of Labor (29 CFR Part 20), the Occupational Safety and Health Administration is required to assess interest, delinquent charges, and administrative costs for the collection of delinquent penalty debts for violations of the Occupational Safety and Health Act.

**Interest:** Interest charges will be assessed at an annual rate determined by the Secretary of the Treasury on all penalty debt amounts not paid within one month (30 calendar days) of the date on which the debt amount becomes due and payable (penalty due date). The current interest rate is two percent (2%). Interest will accrue from the date on which the penalty amounts (as proposed or adjusted) become a final order of the Occupational Safety and Health Review Commission (that is, 15 working days from your receipt of the Citation and Notification of Penalty), unless you file a notice of contest. Interest charges will be waived if the full amount owed is paid within 30 calendar days of the final order.

**Delinquent Charges:** A debt is considered delinquent if it has not been paid within one month (30 calendar days) of the penalty due date or if a satisfactory payment arrangement has not been made. If the debt remains delinquent for more than 90 calendar days, a delinquent charge of six percent (6%) per annum will be assessed accruing from the date that the debt became delinquent.

**Administrative Costs:** Agencies of the Department of Labor are required to assess additional charges for the recovery of delinquent debts. These additional charges are administrative costs incurred by the Agency in its attempt to collect an unpaid debt. Administrative costs will be assessed for demand letters sent in an attempt to collect the unpaid debt.

Sheila Stanley
Area Director

Date: 9/8/2020
FYI

From: Sweatt, Loren E. - OSHA <sweatt.loren.e@dol.gov>
Sent: Tuesday, April 14, 2020 6:33 PM
To: Sweeney, Megan P - OPA <sweett.megan.p@dol.gov>
Subject: FW: Smithfield Foods - Major employer in Sioux Falls - April 13, 2020 - Update

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As requested

(b) 7(A)

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If you need anything else tonight, please call my cell.

Rita M. Lucero
Can you send me the inquiry OSHA sent, please?

From: Lucero, Rita - OSHA <Lucero.Rita@Dol.gov>
Sent: Monday, April 13, 2020 11:48 AM
To: Sweatt, Loren E. - OSHA <Sweatt.Loren.E@dol.gov>
Cc: Edens, Mandy - OSHA <Edens.Mandy@dol.gov>
Subject: Smithfield Foods - Major employer in Sioux Falls - April 13, 2020 - Update

Hello — Update on Smithfield

Throughout the weekend the number of Covid-19 cases continued to rise and one recent news article says that 238 of Minnehaha’s 438 cases involve “individuals who work at Smithfield Foods”. The initial plan was that Smithfield close for three days but, the cases continued to climb throughout the weekend, initially prompting a 14-day shutdown — urged by the Governor Noem and Mayor TenHaken. The plant took an additional step to close the facility until further notice.

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I will update as I learn additional information.

Rita M. Lucero

Acting Regional Administrator
OSHA, Region VIII
1244 Speer Blvd., Suite 551
Denver, CO 80204
Telephone: 720/264-6565
Email: lucero.rita@dol.gov
Bob – For your approval

OUTLET: USA Today
REPORTER: Kyle Bagenstose

QUESTIONS
1. Our statistics (#s 1, 2, and 3 from Findings) suggest a significant gap between the number of meatpacking plants where workers have died from COVID-19 and the number of plants where inspections have been conducted. Can the agency explain those discrepancies?

2. Interviewees have criticized the agency’s use of “remote inspections” for COVID-19 matters at meatpacking plants. They say that video conferencing, fax, and email are inadequate to ensure safe conditions. Any comment?

3. Interviewees have noted that under existing OSHA guidance, healthcare facilities have been deemed priority for in-person OSHA inspections. Interviewees have offered that this is inadequate for meatpacking plants, given that they are subject to the Defense Production Act via executive order and are known to be superspreader facilities in line with nursing homes and prisons. Any comment? Early on, the most exposure would be those treating COVID patients. As we moved forward, we

4. Interviewees have criticized OSHA’s in-person inspections of meatpacking plants, including giving advance notice to employers, being too brief, and relying too much on employers’ guidance through the plants. Any comment?

5. In at least two plants, OSHA inspectors gave companies advance notice of their on-site inspections. In both instances, workers and their advocates say that prompted changes that didn’t last beyond the OSHA inspection. In a July hearing in federal court, a Pennsylvania inspector testified that she gave Maid-Rite Specialty Foods advance notice of an inspection for her own protection from the coronavirus. What has OSHA advised inspectors about alerting employers to inspections in advance during the pandemic?

6. Our calculations show that the agency has issued COVID-19 related violations to only three employers, totaling about $54,000: a JBS plant in Greeley, Colorado; Smithfield Foods in Sioux Falls, South Dakota; and Quality Sausage in Dallas, Texas. Is this accurate, and if so, why have so few workplaces been cited when so many workers have fallen ill or died?

7. What is the status of the inspection of the Noah’s Ark facility in Hastings, NE? (Please see our description in the Facilities portion.) Can the agency comment on the allegations that the plant continues to be an unsafe work place?
8. Through interviews and document reviews, we have come to understand that guidances released by OSHA in April stipulate that employers are able to determine whether or not an employee’s COVID-19 diagnosis is workplace related, and thus reportable to OSHA. The guidances create a “more likely than not” test for employers to make that determination. Is this accurate?

9. Interviewees have been critical of this approach, saying it places too much control in the hands of companies, bucks usual OSHA policy to have employers report illnesses and injuries and let area offices decide on workplace connectedness, and has ultimately led to an underreporting of legitimate workplace-connected COVID-19 cases. Any comment?

10. Through interviews and document reviews, it is our understanding that some unions have observed discrepancies between the number of employees sick with or dead from COVID-19 and the incidents recorded in employers’ 300 logs. Any comment? I think we’d need specific instances to comment.

11. It is our understanding that in a FAQ guidance released by OSHA in September, the agency informed employers they only had to report COVID-19 hospitalizations if they occurred within 24 hours of a workplace exposure. Deaths would only be reportable if they occurred within 30 days of a known exposure. Given that COVID-19’s incubation period typically begins several days after exposure, and that some individuals suffer a prolonged COVID-19 illness that can last months before death, this would appear to allow for a significant undercounting of employee hospitalizations and deaths. Is our reading of the FAQ accurate, and if so, any comment?

12. Our understanding is that in September, U.S. senators signed a letter to DOL Secretary Eugene Scalia (The “Sherrod Brown” letter) inquiring about the inspections of meat plants. The senators have apparently received no response. Is this accurate and any comment?

13. Interviewees have been critical about OSHA’s release of meatpacking safety guidelines in the spring, saying they are largely voluntarily and include language such as “when possible” and “if feasible.” They opined that OSHA should have crafted mandatory emergency standards instead to ensure bare minimum safety conditions were met. Any comment?

14. Interviewees were critical of OSHA’s reliance on the general duty clause to ensure worker protections, saying citations are difficult to defend in court and allow for unsafe conditions to continue while being litigated. Any comment?

15. Please comment on the allegations described at Seaboard Foods in Guymon, OK, as described in the Facilities section.

16. Please review the description of the Smithfield facility in Crete, NE in the Facilities section. In addition to any comment, how many employee COVID-19 deaths have been reported to OSHA by the facility? How many are being investigated? What are the status of those investigations?

17. Overall, interviews say the above allegations all culminate in an abdication of OSHA’s responsibility to protect meatpacking workers from COVID-19. What is the agency’s response?

FINDINGS

(b) 5
PROPOSED RESPONSE:

(b) 5
(b) 5
(b) 5
(b) 5
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.

PLAINTIFFS' SUGGESTIONS IN OPPOSITION TO SMITHFIELD'S EMERGENCY
MOTION TO DISMISS
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I. INTRODUCTION

Plaintiffs seek a straightforward and uncontroversial remedy: an order from this Court that pursuant to Missouri’s “stay at home” order, Defendants Smithfield Foods, Inc. and Smithfield Fresh Meats Corp. (together, “Smithfield”) must operate their Milan, Missouri plant (the “Plant”) consistent with Centers for Disease Control (“CDC”) guidance, including guidance issued by the CDC this weekend regarding the operation of slaughterhouses and meatpacking plants during the COVID-19 pandemic, Dkt. No. 29-5 (collectively, “CDC guidance”). Consistent with the purpose of that guidance, and with the support of a range of public health experts, Plaintiffs argue that Smithfield’s failure to comply with this guidance poses an urgent and ongoing threat to Plant workers, their community, and to the nation, including the food supply, which would be threatened further if the Plant experienced an outbreak like those that have emerged at other Smithfield plants.

Smithfield’s Motion to Dismiss (“Smithfield Br.”), Dkt. No. 29, does not argue that Plaintiffs have not pled the elements of their state law claims for public nuisance and breach of the duty to provide a reasonably safe workplace. Smithfield also does not argue they are somehow free to ignore Missouri’s “stay at home” order or the CDC guidance that it incorporates. Instead, Smithfield asks this Court to step back and wait to adjudicate this case and protect public health and safety because it is possible that the federal Occupational Safety and Health Administration (“OSHA”) or the Missouri Department of Health and Senior Services (“MDHSS”) may, at some future point, decide to step in.

No law or doctrine prohibits this Court from addressing the urgent risks posed by Smithfield’s operation of the Plant in a manner inconsistent with CDC guidance. Missouri courts have long allowed private plaintiffs to go to court to seek abatement of public nuisances that may cause harm to the public health, Scheurich v. Sw. Missouri Light Co., 84 S.W. 1003, 1007 (Mo. 1
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Ct. App. 1905), and to seek injunctions for breaches of the duty to provide a reasonably safe workplace, *Smith v. W. Elec. Co.*, 643 S.W.2d 10, 13 (Mo. Ct. App. 1982). This case is consistent with those bedrock principles of Missouri tort law. The doctrines of primary jurisdiction and *Burford* abstention do nothing to change that tradition.

There is also nothing to wait for. OSHA and MDHSS have already acted by pointing to the CDC guidelines as the standards that employers should follow to prevent further spread of COVID-19. Those standards have recently become even more specific and undeniable pursuant to recommendations issued by CDC and OSHA to protect workers at poultry and meat processing facilities from the disease. *See Dkt. No. 29-5.*¹ Plaintiffs allege that Smithfield's failure to follow those guidelines violates Missouri common law and requires injunctive relief. The Court need not defer to agencies who have said all they need to say on this matter to resolve Plaintiffs’ claims. This is all the more true because neither OSHA nor the MDHSS is engaged in enforcement of the CDC guidance within the Milan plant and OSHA and Missouri’s public statements establish they will not enforce these essential rules.

This litigation and the Court’s Order of April 26, which required Smithfield to comply with CDC guidance pending a hearing on Plaintiffs’ motion for a preliminary injunction, *see Dkt. No. 20*, have already resulted in concrete improvements at the Milan Plant. New social distancing protocols and mask-wearing requirements, announced for the first time on April 27, are already making workers and the surrounding community safer than they were before. Supplemental Declaration of Jane Doe (“Second Doe Decl.”) ¶¶ 6-8. These changes also put the

¹ Importantly, this new guidance calls for many of the same reforms recommended in Dr. Robert Harrison’s declaration in support of Plaintiffs’ Motion for Preliminary Injunction. Dkt. No. 3-4.
lie to Smithfield’s prior representations to the Court that they were already in compliance when Plaintiffs filed suit. Smithfield Br. 3.

There remains much more that Smithfield must do to comply with the CDC guidance and ensure the Plant can remain open without the disastrous spread of COVID-19 that has forced other plants to close. Dismissing this action now in hopes of enforcement by OSHA and/or MDHSS, when both have indicated enforcement action is not forthcoming, undermines basic rights and threatens the safety of the Nation. Neither law nor logic suggests such a result.

II. FACTUAL BACKGROUND

Smithfield’s argument that the Court need not order the requested relief because, so far, there are no *confirmed* cases of COVID-19 among workers at the Plant and relatively low numbers of cases in surrounding counties compared to other parts of the state misses the point. Smithfield Br. 3-4. Most importantly, “confirmed cases” is a peculiar standard on which to rely, because workers have already shown symptoms, Dkt. No. 3-5 ¶ 4 (“First Doe Decl.”) (identifying at least 8 workers with symptoms), and Smithfield continues to refuse to offer the workers testing, Second Doe Decl. ¶ 13. A public health and slaughterhouse expert explains to the Court that without the relief requested here, spread of the disease in the Plant is “inevitable.” E.g., Declaration of Dr. Melissa Perry (“Perry Decl.”) ¶¶ 9-10, 32.

Without Court intervention, Milan will likely join a long line of slaughterhouses around the country to become the source of a virus cluster. This morning, Smithfield’s packing facility in Clinton, North Carolina reported two new positive cases.² Just this past Monday, Crete, Nebraska officials stated Smithfield’s plant there would be closed because of an outbreak

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(although it now appears Smithfield may be keeping that plant open despite the health and safety concerns). 3 Last week, a report examining meat and poultry plants determined that 150 such plants are located in counties that have an infection rate higher than 75% of the United States. 4 Plaintiffs filed this suit seeking solely injunctive relief to bring the Plant into compliance with existing public health guidance so that it could remain in operation, and so that the residents of the surrounding counties would not join the list of other rural areas that have turned into COVID-19 hot spots because they are home to meat processing facilities.

Plaintiffs’ efforts to enforce Missouri law appear to be working already. In response to the suit, this Court Ordered Smithfield on April 26 to “comply with all guidance from CDC and other public authorities.” Dkt. No. 20, at 3. Then, on April 27, a new sign appeared in the plant stating that masks must be worn at all times. Second Declaration of Axel Fuentes ("Fuentes Decl.") ¶¶ 4-5 & Ex. A. That same day, another new sign provided an updated protocol for clock-in and clock-out procedures to permit greater social distancing. Id ¶ 6; Second Doe Decl. ¶ 7.

However, Smithfield’s Milan workers remain without some basic protections. They continue to stand shoulder-to-shoulder on the line. Second Doe Decl. ¶ 5. Hallways, restrooms, and break areas remain crowded, with workers “regularly closer than 6-feet apart.” Id. ¶ 9. Smithfield has failed to provide handwashing breaks or allow workers to step off the line to blow

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4 Kyle Bagenstose, Sky Chadde & Matt Wynn, Coronavirus at meatpacking plants worse than first thought, USA TODAY investigation finds: Coronavirus closed Smithfield and JBS meatpacking plants. Many more are at risk. Operators may have to choose between worker health or meat in stores, USA TODAY (Apr. 22, 2020), https://www.usatoday.com/in-depth/news/investigations/2020/04/22/meat-packing-plants-covid-may-force-choice-worker-health-food/2995232001/.
their noses. *Id.* ¶ 10. Smithfield’s actual enforcement of its stated mask policy appears nonexistent. *Id.* ¶¶ 3-4. Smithfield provides no paid sick leave and encourages workers to come in sick. *Id.* ¶¶ 12, 15. And Smithfield has not provided for testing or any system of contact tracing. *Id.* ¶ 13. These facts remain contrary to what Dr. Robert Harrison, Dr. Melissa Perry, and the CDC explain is necessary to keep the Plant from becoming an incubator for disease. See Declaration of Dr. Robert Harrison (“Harrison Decl.), Dkt. No. 3-4. In fact, Dr. Perry explains that immediately correcting these conditions is both practical and essential. Perry Decl. ¶¶ 8-32.

**III. ARGUMENT**

A. The Court Should Not Exercise Its Discretion to Apply the Primary Jurisdiction Doctrine Where the Relevant Federal Guidance Has Already Been Issued and the Only Question Is Its Enforcement, Which OSHA Has Disclaimed.

Primary jurisdiction “is to be ‘invoked sparingly, as it often results in added expense and delay.’” *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934, 938 (8th Cir. 2005) (quoting *Red Lake Bank of Chippewa Indians v. Barlow*, 846 F.2d 474, 477 (8th Cir. 1988)). The district court should dismiss a case and refer a matter to a federal agency pursuant to the primary jurisdiction doctrine only where “the parties would not be unfairly disadvantaged.” *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993). This is not such a case.

Here, Jane Doe and her coworkers, including many Rural Community Workers Alliance (“RCWA”) members, as well as the communities where they live, have already benefitted from the changes instituted at the Plant in response to this Court’s Order. Plaintiffs would be unfairly disadvantaged if the Court withdrew its supervisory presence, which ensures that Smithfield will continue complying with applicable OSHA and CDC guidance. This is particularly the case where Smithfield relies entirely on an “informal” letter they have received from OSHA, that cannot and—based on OSHA’s statements—will not result in federal enforcement. Declaration
of Dr. David Michaels ("Michaels Decl.") ¶¶ 13-14; Declaration of Ann Rosenthal ("Rosenthal Decl.") ¶ 12-14.

1. Plaintiffs’ Claims Do Not Involve OSHA Expertise.

The Eighth Circuit explains that a core objective of this prudential doctrine is to take advantage of “agency expertise,” Alpharma, 411 F.3d at 938, but here, Plaintiffs ask the Court to consider claims that call for judicial, not administrative, resolution. Plaintiffs’ public nuisance claims seek a remedy against business operations that cause a harm to the public generally. OSHA’s jurisdiction focuses on the workplace. It has no authority to promulgate standards to protect the general public. Steel Inst. of N.Y. v. City of New York, 716 F.3d 31, 33 (2d Cir. 2013) ("the Act does not protect the general public, but applies only to employers and employees in workplaces"); accord Michaels Decl. ¶ 8; Rosenthal Decl. ¶ 5. And although Missouri’s cause of action for violation of the right to a safe workplace certainly relates to occupational safety, that claim has long formed the basis for injunctive relief in court, even subsequent to the creation of OSHA in 1970. See, e.g., Smith v. W. Elec. Co., 643 S.W.2d 10, 12-13 (Mo. App. 1982).5 Plaintiffs bring claims under state common law doctrines that OSHA’s regulatory scheme does not displace, and there is no reason for this Court to defer to the primary jurisdiction of OSHA before resolving those claims. See 29 U.S.C. § 653(b)(4); United Steelworkers of America v. Marshall, 647 F.2d 1189, 1235-36 (D.C. Cir. 1980) (OSHA leaves “state schemes wholly intact as a legal matter”). In fact, primary jurisdiction is not applicable where plaintiffs do not seek to

5 The Missouri court expressly rejected an argument that it should defer and allow OSHA to address the problem because it could not identify an “OSHA standard which would appear to cover tobacco smoke.” Smith, 643 S.W.2d at 14. Similarly, OSHA “has not adopted a specific standard that protects employees from the risks of infectious disease like COVID-19.” Michaels Decl. ¶ 10.
enforce a federal statute or regulation but bring “an independent state law cause of action for negligence and strict liability.” Ryan v. Chemlawn Corp., 935 F.2d 129, 132 (7th Cir. 1991).

Allowing Plaintiffs claims to proceed will also further national “consistency”—the other rationale for primary jurisdiction—because any relevant OSHA activity has already occurred, and the Court already has the benefit of the agency’s “expertise.” See Alpharma, 411 F.3d at 938. In particular, OSHA, in conjunction with the CDC, has published detailed guidelines on how to mitigate the spread of COVID-19 in meat processing facilities. Dkt. No. 29-5 (guidance). Plaintiffs simply request that the Court require Smithfield to comply with those guidelines, as Drs. Harrison and Perry recommend. Eighth Circuit precedent instructs that courts should not defer to agencies under the primary jurisdiction doctrine when the court is asked to analyze what an agency has already done, not substitute its judgment as to what an agency might or should do in the future. Alpharma, 411 F.3d at 939 (“The question of whether Pennfield’s BMD has been approved as safe and effective is much different from the question of whether Pennfield’s BMD should be approved as safe and effective, and it is only the latter that requires the FDA’s scientific expertise.”); see also Illinois Pub. Interest Research Grp. v. PMC, Inc. Through PMC Specialties Grp., 835 F. Supp. 1070, 1076 (N.D. Ill. 1993) (declining to defer to agency’s primary jurisdiction where the court was not being asked to set standards but merely “to enforce existing standards”); Segedie v. Hain Celestial Grp., Inc., No. 14-5029, 2015 WL 2168374, at *13 (S.D.N.Y. May 7, 2015) (declining to defer to agency’s primary jurisdiction where the “claims seek to hold Defendant to existing regulations, not proposed regulations”).

2. There Are No Relevant OSHA Proceedings.

Further, there is no administrative activity to which the Court could defer—as is necessary for the primary jurisdiction doctrine to apply. See, e.g., Natural Res. Def. Council v.
Metro. Water Reclamation Dist. of Greater Chi., No. 11-02937, 2016 WL 1298124, at *4 (N.D. Ill. Mar. 31, 2016) (holding primary jurisdiction doctrine does not apply because defendant did “not identify with precision any relevant proceedings to which this Court should defer for the resolution of the question presented.”). Smithfield argues that an April 22 letter from OSHA’s regional administrator suggests that “OSHA is already in the process of exercising its jurisdiction at the Plant.” Smithfield Br. 1. But that letter responds to a specific workplace injury that occurred on April 15 and says nothing about COVID-19. Dkt. No. 29-2. The sole reference to the virus appears in a generic COVID-19 questionnaire following a more specific questionnaire addressing the April 15 incident. Id.

Moreover, the April 22 letter represents an inquiry, not an inspection, and does not suggest an inspection is imminent. It is conceivable that under OSHA’s regulatory regime this written exchange of information, called an investigation, could lead OSHA to request an in-person inspection. Michaels Decl. ¶¶ 15-16. However, the interim guidance OSHA has issued for its administrators during the pandemic makes this unlikely; OSHA has expressly stated its policy is not to inspect meat packing plants. Michaels Decl. ¶¶ 13-14; Rosenthal Decl. ¶ 13; see also Dkt. No. 29-4 (guidance). An inspection is a prerequisite to any OSHA action that could require a workplace to abate unsafe conditions. 29 U.S.C. § 658(a); see also Michaels Decl. ¶ 15; Rosenthal Decl. ¶ 14. Furthermore, if such an inspection did occur, it could in turn lead to a

6 Indeed, Dr. Michaels, the longest serving head of OSHA in its history, and a current scholar on its practices states that throughout the crisis “OSHA has failed to enforce any of its limited requirements that could conceivably protect meatpacking workers from illness.” Michaels Decl. ¶ 8; see also id. ¶¶ 10, 12 (explaining OSHA’s only potentially applicable standards leave their implementation to the discretion of the employer and that OSHA has not taken any steps to make them mandatory in response to COVID-19). See also Rosenthal Decl. ¶¶ 10-12 (stating substantially the same).
citation issued anytime in the next six months, which would then be reviewable by the independent Occupational Safety and Health Review Commission before it could be enforced. 29 U.S.C. § 658(c), 659(c); see also Michaels Decl. ¶¶ 16-17; Rosenthal Decl. ¶¶ 15-17.

Dr. Michaels and Anne Rosenthal, both of whom served long stints within high levels of OSHA, are of the opinion that written investigation letters like the one sent to Smithfield on April 22 rarely, if ever, lead to citations, enforcement actions, or penalties, particularly in light of OSHA’s stated non-enforcement policy against meat packing plants. Michaels Decl. ¶¶ 13-16. Rosenthal Decl. ¶¶ 11-3. Michaels and Rosenthal also opine that even if the letter did lead to an inspection and to any kind of enforcement on a reasonable timeline, none of the specific OSHA standards spelled out on page 13 of Smithfield’s motion would be sufficiently strong to allow OSHA to enforce the CDC guidelines, even the guidelines that OSHA has helped to promulgate. Michaels Decl. ¶¶ 10-12; Rosenthal Decl. ¶¶ 8-9.

Smithfield argues that the Department of Labor could seek an emergency injunction to enforce OSHA standards even absent an inspection, but that argument is belied by statute and Supreme Court and Eighth Circuit law. 29 U.S.C. § 662(c) (noting that the Secretary of Labor will request an injunction only in response to a recommendation from an in-person inspector); Whirlpool Corp. v. Marshall, 445 U.S. 1, 8-9 (1980) (explaining that OSHA’s emergency injunction process begins with an inspection); N.L.R.B. v. Tamara Foods, Inc., 692 F.2d 1171, 1181 (8th Cir. 1982) (same). Furthermore, Smithfield points to no case where this power was actually used. Plaintiffs could locate only two in the entire country, neither of which was decided in the past 25 years. Reich v. Dayton Tire, a Div. of Bridgestone/Firestone, Inc., 853 F. Supp. 376, 378-79 (W.D. Okla. 1994) (Secretary issued request for injunction following multiple inspections over an eleven-month period); Marshall v. Daniel Const. Co., Inc., 563 F.2d 707,
710-15 (5th Cir. 1977) (noting that employee’s right under OSH Act is limited to requesting an inspection, and inspector’s right is limited to recommending that the Secretary seek an emergency injunction from the court in the event that dangerous conditions are found).  

Finally, Smithfield attempts to frighten this Court with claims that the injunctive relief Plaintiffs are seeking is “truly unprecedented” because it gives Plaintiffs’ experts too much control over crafting a remedy. Smithfield Br. 14. Although some courts have declined to issue preliminary injunctive relief responding to emergency conditions caused by COVID-19, many other courts have granted such relief, even when it required detailed changes to facility operations recommended by plaintiffs and their experts. See, e.g., Fraihat v. U.S. Immigration & Customs Enf’t, No. 19-1546, 2020 WL 1932570, at *21-*29 (C.D. Cal. Apr. 20, 2020) (granting preliminary injunction mandating that ICE revisit custody determinations, including considering release for all persons in ICE detention whose age or health conditions place them at increased risk due to the COVID-19 pandemic); Esshaki v. Whitmer, No. 20-10831-, 2020 WL 1910154, at ________________

7 Last night, the President issued an Executive Order stating that the United States Department of Agriculture (“USDA”) would be protecting worker health and safety at meat packing plants. See “Executive Order on Delegating Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19,” The White House (April 28, 2020), https://www.whitehouse.gov/presidential-actions/executive-order-delegating-authority-dpa-respect-food-supply-chain-resources-national-emergency-caused-outbreak-covid-19/. This order does not impact these proceedings. Importantly, twice in the last six months USDA expressly disclaimed that its Food Safety and Inspection Service, which is its division that works in the plants, has any role to play in worker safety and thus any expertise on how to protect workers. USDA Brief, UFCW v. USDA, No. 19-2660, Dkt. No. 16, at 29 (D. Minn.) (“[N]or are issues of workplace safety reasonably related to FSIS’s food safety mission” (citing Dawkins ex rel. Estate of Dawkins v. United States, 226 F. Supp. 2d 750, 757 (M.D.N.C. 2002)); USDA Reply, UFCW v. USDA, No. 19-2660, Dkt. No. 24, at 15 (D. Minn.) (“[W]orker safety falls outside FSIS’s regulatory authority” and therefore USDA defers to OSHA). Moreover, the Executive Order references OSHA guidance—not USDA promulgating any new standard—confirming that the Court already has before it whatever expertise the government can provide.

Here, where Plaintiffs’ experts’ recommendations track closely if not completely CDC guidance, including recent guidance specific to the meat processing industry, Court action will not be radical. Plaintiffs merely request the Court extend the Order it already issued and allow an inspection by Plaintiffs’ designated expert to determine whether the guidelines are being followed and if additional measures may be necessary given the particular feature of the Plant. In light of the certain crisis that will result if Smithfield continues to delay protecting its workers, it is Smithfield’s request the Court decline to act that is extraordinary. *See generally Perry Decl.*

**B. The Court Should Not Exercise Its Discretion to Defer to State and County Health Departments That Expressly Embrace the Same CDC Guidance Plaintiffs Seek to Enforce.**

With its primary jurisdiction argument, Smithfield suggests that the workplace safety issues at stake in this case are so uniquely committed to the expertise of federal OSHA that this Court should dismiss the matter and defer to OSHA. With its *Burford* abstention argument, Smithfield makes the entirely contradictory suggestion that the matters at stake here are so bound up with the *state* public health regulatory scheme that the federal courts should defer to the State of Missouri, its agencies, and its courts in this matter. Smithfield’s self-defeating *Burford* argument provides no basis to dismiss Plaintiffs’ claims.
With respect to Burford abstention, the Supreme Court has instructed that “federal courts have a strict duty to exercise the jurisdiction conferred upon them by Congress” and may decline to do so only “under exceptional circumstances.” Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996) (citations and internal quotations omitted). The Eighth Circuit has likewise stated “Burford abstention applies when a state has established a complex regulatory scheme supervised by state courts and serving important state interests, and when resolution of the case demands specialized knowledge and the application of complicated state laws.” Bilden v. United Equitable Ins. Co., 921 F.2d 822, 825 (8th Cir. 1990). Burford applies only where the state has developed a centralized “system of thorough judicial review” specific to the complex regulatory scheme at issue. Burford v. Sun Oil Co., 319 U.S. 315, 325 (1943); see also United States v. Morros, 268 F.3d 695, 705 (9th Cir. 2001) (applying Burford abstention only when a state has consolidated all disputes regarding the regulatory scheme at issue into a single, designated court). This balancing of interests “only rarely favors abstention.” Quackenbush, 517 U.S. at 728. Where, as here, federal court jurisdiction is conferred by diversity of citizenship, even if there were “difficult or uncertain” questions of state law (and there are not) the Supreme Court has made clear that Burford supplies no basis to relinquish the jurisdiction Congress has conferred. Meredith v. City of Winter Haven, 320 U.S. 228, 234 (1943).

In lieu of actually meeting the doctrine, Smithfield suggests vaguely that “this matter should be handled by state and county public health agencies.” Smithfield Br. 17. But the fact that state and local health agencies have the authority, in theory, to enforce public health rules does not amount to a centralized “system for thorough judicial review” of disputes relating to the common law rights that Plaintiffs assert here. Instead, to enforce their rights, Plaintiffs must rely on their time-honored ability to petition a court, including a federal court where federal
jurisdiction otherwise lies. See, e.g., Jackson v. City of Blue Springs, 904 S.W.2d 324, 329 (Mo. App. 1995); K.C. 1986 Ltd. P'ship v. Reade Mfg., 33 F. Supp. 2d 1143, 1156 (W.D. Mo. 1998). The alternative to federal courts exercising their jurisdiction over cases like these is that these cases will go to state court where they are just as likely to be heard by courts without public health expertise in these matters and just as likely to yield inconsistent outcomes. Compare Burford, 319 U.S. at 326 (“To prevent the confusion of multiple review of the same general issues, the [Texas] legislature provided for concentration of all direct review of the Commission's orders in the State district courts of Travis County.”).

Furthermore, although state courts may have jurisdiction to hear Plaintiffs’ claims, Burford abstention is only appropriate “[w]here timely and adequate state-court review is available.” New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989); Univ. of Maryland at Baltimore v. Peat Marwick Main & Co., 923 F.2d 265, 271 (3d Cir. 1991). In this case, remanding this issue to state court would require delay that Plaintiffs and the public generally cannot afford.

The Court’s exercise of its jurisdiction here likewise “would [not] disrupt a state administrative process.” Heartland Hosp. v. Stangler, 792 F. Supp. 670, 672 (W.D. Mo. 1992) (quoting Cty of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959)). It may be true that public health agencies in Missouri have expertise regarding public health matters and have a responsibility for exercising public enforcement. But the “exceptional circumstances” warranting abstention apply only where the party seeking abstention can point to a specific state administrative process that will be disrupted by the federal proceedings. Caranchini v. Kozeny &
McCubbin, LLC, No. 11-0464, 2011 WL 5921364, at *5 (W.D. Mo. Nov. 28, 2011) (Kays, J.). Smithfield identifies no such process here.8

Assuming there was a special forum to which the Court could defer (and there is not), there is also no reason to defer as nothing in Missouri’s law of public nuisance or its right to a safe workplace tort is “particularly complicated,” and the Court’s exercise of its jurisdiction here would not frustrate Missouri’s interest in managing public health issues. Doe v. McCulloch, 835 F.3d 785, 788 (8th Cir. 2016) (declining to apply Burford abstention to question of Missouri state law). Aside from general principles of Missouri tort law, the only state law at issue here is the “stay at home” order issued by the Governor in March. That already-promulgated order provides a relatively straightforward mandate. It includes multiple references to “CDC guidance,” Dkt. No. 29-1 (“stay at home” order), and makes the same recommendations regarding social distancing, even for essential businesses that must remain open, that the CDC and OSHA have emphasized in their guidance documents, including guidance documents specific to the meat processing industry, see Dkt. No. 29-4. An established state regime that actually relies on federal guidance, which is what Plaintiffs seek to enforce, is not a basis for Burford abstention.

Smithfield seeks to manufacture a complex question by pointing to language in the “stay at home” order that designates meatpacking Plants as essential operations that should stay open

8 It bears mentioning that Missouri’s attorney general saw no need to oforgo litigation or even to litigate in state court because of the “active[] involve[ment]” of state and local public health agencies, See Smithfield Br. 17. He filed a lawsuit in federal district court against the People’s Republic of China, asserting Missouri common law claims of public nuisance. Missouri v. The People’s Republic of China, No. 20-99, Compl., Dkt. No. 1 (E.D. Mo.). The chief law enforcement officer of the state properly concluded that the federal interests in “in affording foreign litigants a neutral forum for the adjudication of state law claims against them” outweigh any state law interests regarding coherent application of its public nuisance doctrine. See Cleveland Hous. Renewal Project v. Deutsche Bank Tr. Co., 621 F.3d 554, 568 (6th Cir. 2010).
and suggesting Plaintiffs’ request that Smithfield provide for social distancing would prevent Smithfield from operating. Smithfield Br. 17. Not so. Plaintiffs do not seek to close the Plant. Smithfield and its workers can continue operations while complying with social distancing requirements. In fact, that may be the only way that Smithfield can operate the Plant safely. Dr. Perry, an occupational health and safety professor and past president of the American College of Epidemiology, states that in her professional opinion, workers on meat production lines must stand at least six feet apart in order to perform their jobs safely during the current pandemic. If they do not, disease will spread in the Plant and into the surrounding community. Perry Decl. ¶¶ 9-13 (“Without social distancing, it is my expert opinion that the spread of COVID-19 in slaughterhouses and meat packing plants is inevitable.”). Requiring social distancing in this case, therefore, would not be “disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern,” Wolfson v. Mutual Benefit Life Ins., 51 F.3d 141, 144 (8th Cir. 1995). Smithfield fails “to prove that the exercise of federal jurisdiction would in any way frustrate the state’s interests on the facts of this case” as is necessary for Burford abstention. Melahn v. Pennock Ins., Inc., 965 F.2d 1497, 1507 (8th Cir. 1992).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Smithfield’s motion to dismiss.
April 29, 2020

Respectfully Submitted,

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