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SUPERIOR COURT OF THE STATE OF CALIFORNIA
ALAMEDA COUNTY

KRISTINA EISENACHER, on behalf of herself
and other aggrieved employees,

Plaintiff,

v.

VITAS HOSPICE SERVICES, L.L.C.; VITAS
HEALTHCARE CORPORATION OF
CALIFORNIA; VITAS HEALTHCARE
CORPORATION, and DOES 1-100,

Defendants.

Case No.:

**COMPLAINT FOR (1) REPRESENTATIVE
ACTION FOR CIVIL PENALTIES
PURSUANT TO THE PRIVATE
ATTORNEYS GENERAL ACT ("PAGA"),
(2) RETALIATION; (3) PUBLIC NUISANCE;
(4) VIOLATIONS OF BUSINESS &
PROFESSIONS CODE §§ 17200, ET SEQ.;
(5) INTENTIONAL INFLICTION OF
EMOTIONAL DISTRESS; (6) NEGLIGENT
INFLICTION OF EMOTIONAL DISTRESS**

DEMAND FOR JURY TRIAL

COMPLAINT

1 Plaintiff Kristina Eisenacher (“Ms. Eisenacher” or “Plaintiff”), brings this action individually
2 and on behalf of herself and other current and former aggrieved employees against Defendants VITAS
3 Hospice Services, L.L.C., VITAS Healthcare Corporation, and VITAS Healthcare Corporation
4 California (collectively referred to in this Complaint as “VITAS” or “Defendants”) and alleges as
5 follows.

6 **INTRODUCTION**

7 1. In early 2020, a novel coronavirus (“Coronavirus”) developed into a pandemic and
8 public health emergency around the world, across the United States, and in California. Over six million
9 individuals have been diagnosed as COVID-19 positive as a result of the Coronavirus, and over three
10 hundred and fifty thousand people have died.

11 2. Since mid-March, public health officials in six counties in the California Bay Area had
12 issued public health orders requiring increasingly strict measures to protect its population, including
13 “stay-at-home” orders. By March 16, 2020, the public health officers of the counties of Alameda,
14 Contra Costa, Marin, San Francisco, San Mateo, and Santa Clara, with the City of Berkeley, each
15 issued legal orders directing their respective resident to shelter at home for three weeks (collectively
16 “Bay Area Shelter-In-Place Orders”). Three days later, on March 19, 2020, Governor Gavin Newsom
17 issued a state-wide shelter-in-place order (“California Shelter-In-Place Order”). On April 17, 2020, the
18 public health officers of Alameda, Contra Costa, Marin, San Francisco, San Mateo, and the City of
19 Berkeley, each issued an order requiring all individuals to wear face coverings outside of their home,
20 with certain exceptions. The Shelter-In-Place Orders and related directives have been extended on
21 numerous occasions and largely remain in effect to this day.

22 3. It was quickly determined by health officials worldwide that the immunocompromised
23 and elderly populations are at particularly high risk for contracting COVID-19 and suffering serious
24 complications, as are those with underlying health complications.

25 4. Given their congregate nature and resident population served, nursing homes, skilled
26 nursing facilities, board and care homes, and assisted living facilities (collectively “Long-Term Care
27 Facilities”) work as accelerators for the virus and have become hot spots for the spread of the disease,
28 with devastating consequences. Once COVID-19 is introduced into a Long-Term Care Facility, it has

1 the potential to result in high infection rates among residents, staff members, and visitors.

2 5. To wit, in late February of 2020, an outbreak of COVID-19 at a Long-Term Care
3 Facility in King County, Washington, resulted in eighty-one residents, thirty-four staff members, and
4 fourteen visitors with confirmed cases of Coronavirus. By April 17, 2020, at least 7,000 deaths
5 nationwide had been linked to nursing homes throughout the United States, accounting for about one-
6 fifth of deaths in the United States.

7 6. Defendant VITAS provides hospice services to patients residing in their own homes, in-
8 patient hospice units, assisted living facilities, skilled nursing facilities and hospitals unaffiliated with
9 VITAS and at their thirty-six in-patient units.

10 7. VITAS, the largest for-profit hospice chain in the United States, was well aware of the
11 government regulations aimed at mitigating the significant risk of spreading the infection to the most
12 vulnerable populations. VITAS touted its knowledge and compliance with such guidance on its
13 website, where it solicited patients with COVID-19. Despite such knowledge, and despite the risk,
14 VITAS has continued to require its Sales Representatives (“Sales Representative” refers to all VITAS
15 employees making in-person sales calls to Long-Term Care Facilities or hospitals in California) to
16 make in-person visits to Long-Term Care Facilities and hospitals to try to sell non-urgent hospice
17 services, even after the Bay Area Shelter-In-Place Orders and California Shelter-In-Place Orders came
18 into effect, by improperly declaring that **all** of its employees, including Sales Representatives such as
19 Plaintiff, are “essential” and not subject to any of these orders.

20 8. In direct violation of Bay Area and California Shelter-In-Place Orders, VITAS has
21 required and continues to require its Sales Representatives, to make in-person marketing and sales calls,
22 and bring food, drinks, and other marketing perks to healthcare facilities in an effort to win future
23 referrals for future hospice services—even when such facilities are on “lockdown” and have no
24 immediate need of hospice services for their patients. In one instance, when informed that a facility
25 was closed to vendors, including VITAS Sales Representatives, VITAS openly encouraged Sales
26 Representatives who skirted entry checkpoints at hospitals. Worse still, Sales Representatives were
27 instructed to visit multiple facilities in the course of a day, increasing the amount of potential exposure
28

1 for patients and healthcare workers. Indeed, despite the threat of COVID-19, Sales Representatives are
2 still required to make 10 in-person sales contacts per day.

3 9. As a result of Defendants' conduct, Plaintiff's and other similarly-situated Sales
4 Representatives' health and safety have been put in danger, as well as the health and safety of the
5 vulnerable patients and nursing home residents VITAS is forcing to be exposed unnecessarily through
6 its unlawful and unethical conduct.

7 10. When Plaintiff complained about the policies and the public health issues they
8 presented, VITAS retaliated against her, first putting her on unpaid leave and then refusing to send her
9 necessary leads or resources to make sales safely from her home.

10 11. Plaintiff brings this action to seek declaratory and injunctive relief, actual damages,
11 punitive damages and restitution, as well as civil penalties for repeated violations of multiple Labor
12 Code sections against herself and other VITAS Sales Representatives exposed to the conduct alleged
13 herein.

14 **PARTIES**

15 12. Plaintiff Kristina Eisenacher is and was a resident of San Mateo County and was
16 employed by Defendants VITAS as a Sales Representative. Ms. Eisenacher's sales territory included
17 facilities throughout the Bay Area.

18 13. Plaintiff seeks to represent all current and former employees of Defendants working as
19 Sales Representatives in California who suffered one or more of the alleged violations ("aggrieved
20 employees") from March 12, 2020, to the commencement of trial in this action ("the PAGA Period").

21 14. Defendant Vitas Healthcare Corporation, ("VITAS Healthcare") is a Delaware
22 corporation with its principal place of business at 201 S. Biscayne Boulevard, Miami, Florida, 33131.¹
23 At all times relevant hereto VITAS Healthcare and its wholly-owned subsidiaries owned and operated
24 VITAS for-profit hospices throughout the nation, including facilities in fourteen states (California,
25 Connecticut, Delaware, Florida, Georgia, Illinois, Kansas, Missouri, New Jersey, Ohio, Pennsylvania,
26 Texas, Virginia, and Wisconsin) and the District of Columbia. At all times relevant hereto, VITAS
27

28 ¹ Defendant VITAS Healthcare is itself a wholly owned subsidiary of Comfort Care Holdings Co., a Nevada corporation which is a wholly owned subsidiary of Chemed Corporation.

1 Healthcare conducted business in the state of California operating under its registered trademarks and
2 servicemarks “VITAS” and “Innovative Hospice Care.”

3 15. Defendant VITAS Hospice Services, L.L.C. (“VITAS Hospice”), a wholly-owned
4 subsidiary of VITAS Healthcare, is a Delaware limited-liability company with its principal place of
5 business at 255 East Fifth Street, Suite 1050, Cincinnati, Ohio 45202. At all times relevant hereto,
6 VITAS Hospice wholly-owned a number of regional and/or state subsidiaries that operated for-profit
7 hospices nationwide under the trademark “VITAS,” including Defendant VITAS Healthcare
8 Corporation of California. At all times relevant hereto, VITAS Hospice conducted business in the state
9 of California.

10 16. Defendant Vitas Healthcare Corporation of California (“VITAS California”), is a
11 Delaware corporation with its principal place of business at 201 S. Biscayne Boulevard, Miami, Florida
12 33131. At all times relevant hereto, VITAS was registered with the California Secretary of State and
13 conducted business in the state of California.

14 17. The true names of Defendants sued as Does 1-100 are unknown to Plaintiff. They are
15 sued pursuant to California Code of Civil Procedure section 474. Each of the fictitiously named Doe
16 Defendants is responsible in some manner for the conduct alleged herein, including, without limitation,
17 by way of conspiracy, aiding, abetting, furnishing the means for, and/or acting in capacities that create
18 agency, *respondeat superior*, and/or predecessor or successor-in-interest relationships with the other
19 Defendants. Plaintiff may seek to amend these pleadings as the identities of the Doe Defendants are
20 discovered, and to add additional facts and/or legal theories.

21 18. Whenever reference is made in this Complaint to any act, deed or conduct of the
22 Defendants, the allegation is that Defendants engaged in the act(s), deed(s), or conduct by or through
23 one or more of their officers, directors, agents, employees, and/or representatives who was/were
24 actively engaged in the management, direction, control, and/or transaction of the ordinary business and
25 affairs of the Defendants.

26 19. All of the actions described in this Complaint are part of, and in furtherance of, the
27 unlawful conduct alleged herein, and were authorized, ordered, and/or done by Defendants’ officers,
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agents, employees, or other representatives within the course and scope of their duties and employment, and/or with Defendants' actual, apparent, and/or ostensible authority.

JURISDICTION AND VENUE

20. This Court has jurisdiction over this matter because Defendant VITAS Healthcare, VITAS Hospice, and VITAS California, and each of them, maintain offices in California, regularly conduct business in California, and commit and continue to commit the unlawful acts alleged herein in California. Further, Defendant VITAS California it is a foreign corporation authorized to do business in California and registered with the California Secretary of State.

21. Venue is proper in this Court pursuant to California Code of Civil Procedure section 395(a) because no Defendant resides in the state and/or the county where they reside is unknown such that the action may be tried in this County as designated by Plaintiff.

FACTS

I. COVID-19—A Global Pandemic

22. On December 31, 2019, Chinese authorities alerted the World Health Organization ("W.H.O.") of pneumonia cases in Wuhan, China, with an unknown cause. The outbreak was identified as a new coronavirus ("COVID-19"). Symptoms include fever, dry cough, tiredness, and shortness of breath. It was known to cause respiratory failure and pneumonia.

23. Since the first reported case on December 31, 2019, COVID-19 has spread rapidly, quickly becoming a pandemic.² By January 30, 2020, W.H.O. declared the outbreak a "public health emergency of international concern" with more than 9,000 cases reported worldwide, including eighteen countries beyond China. By February 12, 2020, confirmed cases in China rose to 44,653, with 1,113 deaths. There were 393 confirmed cases reported outside of China, spread throughout twenty-four countries. By March 3, 2020, according to W.H.O., there are more than 90,000 cases of Coronavirus around the globe, causing approximately 3,000 deaths. By March 23, 2020, more than 300,000 cases reported from almost every country in the world. By April 7, 2020, at least 316 million people in at least forty-two states, three counties, nine cities, the District of Columbia, and Puerto Rico

² Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. Times (Apr. 28, 2020), <https://www.nytimes.com/article/coronavirus-timeline.html>.

1 were subject to stay-at-home orders.³

2 24. According to the W.H.O., “[a]round 1 out of every 6 people who gets COVID-19
3 becomes seriously ill and develops difficulty breathing. Older people, and those with underlying
4 medical problems like high blood pressure, heart problems or diabetes, are more likely to develop
5 serious illness.”⁴

6 25. As numbers rose around the world, an increasing number of countries issued
7 “lockdowns” or “quarantines” to halt the rapid spread of devastation, including the following:

- 8 a. On January 23, 2020, China placed Wuhan, a city of eleven million people, under
9 quarantine;
- 10 b. On March 10, 2020, Italy imposed a nationwide lockdown starting on March 12, 2020;
- 11 c. By March 18, 2020, Belgium, France, Spain, and Venezuela imposed nationwide
12 lockdowns to control the rapid spread of COVID-19; and
- 13 d. By March 26, 2020, Britain, New Zealand, and India (a country of 1.3 billion) imposed
14 nationwide lockdowns to control the rapid spread of COVID-19.

14 **II. Bay Area’s Efforts to “Flatten the Curve” in Response to Community Spread of** 15 **COVID-19 as the Number of Cases Rose in California and Across the United States**

16 26. On February 27, 2020, the Santa Clara County Public Health Department, identified its
17 first case of COVID-19 associated with probable community transmission (i.e., infection among
18 persons with no known exposure by travel or close contact with patients with COVID-19). At the time,
19 there were sixty cases nationwide.

20 27. On March 4, 2020, Governor Gavin Newsom issued a proclamation of a state of
21 emergency.⁵ The proclamation was based on 94,000 confirmed cases of COVID-19, resulting in more
22 than 3,000 deaths worldwide, including 129 confirmed cases of COVID-19 in the United States, with
23 fifty-three in California. Further, more than 9,400 Californians across forty-nine counties were at home
24 monitoring based on possible travel-based exposure to the virus. It was further based on the California
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26 ³ Denise Lu Meryosh, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. Times
27 (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>.

⁴ World Health Organization Q&A on Coronavirus (COVID-19) (Apr. 17, 2020), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>.

28 ⁵ EXEC. DEPT. STATE OF CAL., PROCLAMATION OF A STATE OF EMERGENCY (Mar. 4, 2020),
<https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>.

Department of Public Health (“CDPH”)’s activation of its Medical and Health Coordination Center on January 24, 2020, and the California Office of Emergency Services activation of the State Operations Center on March 2, 2020.

28. On March 9, 2020, and March 11, 2020, the public health officers of Santa Clara and San Francisco Counties, respectively, issued orders prohibiting gatherings of 1,000 or more to limit the spread of COVID-19.⁶ On March 12, 2020, San Mateo County implemented a similar order in place prohibiting public or private gatherings of 250 people or more.⁷ By March 13, 2020, Bay Area Counties had orders in place prohibiting public or private gatherings of more than 100 people. The effective order in Santa Clara County further prohibited gatherings of more than thirty-five people unless mitigation measures were implemented.⁸

29. On March 12, 2020, Governor Gavin Newsom issued an order directing all residents to “heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures, to control the spread of COVID-19.”⁹ Pursuant to Government Code section 8567(a), the executive order has the force and effect of law.

30. On March 16, 2020, six Bay Area Counties—Alameda, Contra Costa, Marin, San Francisco, San Mateo, and Santa Clara—as well as the City of Berkeley, each issued legal orders directing their respective residents to shelter at home for three weeks beginning March 17 (collectively “Bay Area Shelter-In-Place Orders”).¹⁰ The Bay Area Shelter-In-Place Orders, drafted in cooperation,

⁶ SANTA CLARA CTY. PUB. HEALTH DEPT., ORDER OF HEALTH OFFICER (Mar. 9, 2020), <https://www.sccgov.org/sites/covid19/Documents/03-09-20-Health-Officer-Order.pdf>; CITY AND CTY. SAN FRANCISCO, DEPT. PUB. HEALTH, ORDER OF HEALTH OFFICER, NO. C19-05 (Mar. 11, 2020), <https://www.sfdph.org/dph/alerts/files/OrderProhibitingLargeGatherings-OrderC19-05-03112020.pdf>.

⁷ SAN MATEO CTY. HEALTH, PUB. HEALTH, POL’Y & PLAN., ORDER OF HEALTH OFFICER NO. C19-2 (Mar. 12, 2020), https://www.smchealth.org/sites/main/files/file-attachments/031220_english.pdf?1585787667.

⁸ SANTA CLARA CTY. PUB. HEALTH DEPT., ORDER OF HEALTH OFFICER (Mar. 13, 2020), <https://www.sccgov.org/sites/covid19/Documents/03-13-20-Health-Officer-Order.pdf>.

⁹ EXEC. DEPT. STATE OF CAL., Exec. Order No. N-25-20 (Mar. 12, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.12.20-EO-N-25-20-COVID-19.pdf>.

¹⁰ CTY. ALAMEDA, ORDER OF HEALTH OFFICER (Mar. 16, 2020), <https://www.acgov.org/documents/Final-Order-to-Shelter-In-Place.pdf>; CONTRA COSTA HEALTH SERVS., OFF. OF DIR, ORDER OF HEALTH OFFICER (Mar. 16, 2020), https://813dcad3-2b07-4f3f-a25e-23c48c566922.filesusr.com/ugd/84606e_1870398d90a14bc09ff09bc944fcf71e.pdf; CTY. MARIN, ORDER OF HEALTH OFFICER (Mar. 16, 2020), <https://coronavirus.marinhhs.org/sites/default/files/Files/Shelter%20in%20Place/Shelter%20in%20Plac>

were virtually identical other than particulars as to each county. Each of the Bay Area Shelter-In-Place-Orders limited activity, travel, and business functions to only the most essential needs.

31. Violation of any provision of the Bay Area Shelter-In-Place-Orders, “**constitutes an imminent threat to public health.**” Violations are also a misdemeanor punishable by a fine or jail time under California Health & Safety Code sections 120295, *et seq.* *Id.* ¶¶ 1, 11 (emphasis added).

32. The Bay Area Shelter-In-Place Orders cited to at least 258 confirmed cases and at least three deaths in the seven Bay Area jurisdictions jointly issuing the orders, with an increasing number of suspected cases of community transmission. The Bay Area Shelter-In-Place Orders were designed to slow the spread of the novel coronavirus and protect the community, including its most vulnerable members, and intended to “ensure that **the maximum number of people self-isolate in their places of residence to the maximum extent feasible**, while enabling essential services to continue.” *Id.* (emphasis supplied).

33. The Bay Area Shelter-In-Place Orders provide in relevant part:

All individuals currently living within [a Bay Area County] (the “County”) are ordered to shelter at their place of residence. To the extent individuals are using shared or outdoor spaces, they must at all times as reasonably possible maintain social distancing of at least six feet from any other person when they are outside their residence. All persons may leave their residences **only** for Essential Activities, Essential Governmental Functions, or to operate Essential Businesses, all as defined in Section 10...

All businesses with a facility in the County, except Essential Businesses as defined below in Section 10, are required to cease all activities at facilities located within the County except Minimum Basic Operations, as defined in Section 10. For clarity, **businesses may also continue operations consisting exclusively of employees or contractors performing activities at their own residences (i.e., working from home)**. All Essential Businesses are strongly encouraged to remain open. To the greatest extent feasible, **Essential Businesses shall comply with Social Distancing Requirements** as defined in Section 10 below, including but not limited to, when any customers are

[e%20Order%2016%20March%202020.pdf](#); CITY AND CTY. SAN FRANCISCO, DEPT. PUB. HEALTH, ORDER OF HEALTH OFFICER NO. C19-07 (Mar. 16, 2020), <https://www.sfdph.org/dph/alerts/files/HealthOrderC19-07-%20Shelter-in-Place.pdf>; PUB. HEALTH, POL’Y & PLAN., SAN MATEO CTY. HEALTH, PUB. HEALTH, POL’Y & PLAN., ORDER OF HEALTH OFFICER (Mar. 16, 2020), <https://www.smcgov.org/sites/smcgov.org/files/press-release/files/HO%20Order%20Shelter%20in%20Place%2020200316.pdf>; SANTA CLARA CTY. PUB. HEALTH DEPT., EMERGENCY OPERATIONS CTR., ORDER OF HEALTH OFFICER (Mar. 16, 2020), <https://www.sccgov.org/sites/covid19/Pages/order-health-officer-031620.aspx>; CTY. BERKELEY, ORDER OF HEALTH OFFICER (Mar. 16, 2020), <https://www.berkeleyside.com/wp-content/uploads/2020/03/city-of-berkeley-health-officer-order-to-shelter-in-place.pdf>.

standing in line.

Id. ¶ 2 (emphasis supplied).¹¹

34. The Bay Area Shelter-In-Place Orders further cautioned that “***people at high risk of severe illness from COVID-19 and people who are sick are urged to stay in their residence to the extent possible*** except as necessary to seek medical care.” *Id.* ¶ 10 (emphasis supplied).

35. For purposes of the order, Essential Activities for which residents may leave their residence include:

- i. To engage in activities or perform tasks essential to their health and safety, or to the health and safety of their family or household;
- ii. To obtain necessary services or supplies for themselves and their family or household members, or to deliver those services or supplies to others;
- iii. To engage in outdoor activity, provided the individuals comply with Social Distancing Requirements;
- iv. To perform work providing essential products and services at an Essential Business or to otherwise carry out activities specifically permitted in this Order, including Minimum Basic Operations; and
- v. To care for a family member or pet in another household.

Id.

36. On March 19, 2020, Governor Gavin Newsom issued the California Shelter-In-Place Order, an executive order requiring all California residents to stay at home or their place of residence, except as needed to maintain continuity of operations of certain specified federal critical infrastructure.¹² Allowances are made for when people need to leave their homes or places of residence to obtain necessities such as food, prescriptions, and health care. The California Shelter-In-Place Order further requires that when people need to leave their homes or places of residence, “they should at all times practice social distancing.”

37. The California Shelter-In-Place Order states that “essential businesses” include: Healthcare Operations and Essential Infrastructure, home-based care for seniors, adults, or children, residential facilities, and shelters for seniors, adults, and children.

¹¹ Section 10 provides a list of “Essential Businesses” which includes healthcare operations, residential facilities for seniors, and home-based care for seniors.

¹² EXEC. DEPT. STATE OF CAL., EXEC. ORDER NO. N-33-20 (Mar. 19, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf>.

38. Violation of the California Shelter-In-Place Order is a misdemeanor, punishable by a fine not to exceed one thousand dollars (\$1,000) or by imprisonment up to six months, or both, under the California Emergency Services Act, Govt. Code section 8655.

39. The California Shelter-In-Place Order further requires that when people need to leave their homes or places of residence, “they should at all times practice social distancing.”

40. On March 31, 2020, the public health officers of Alameda, Contra Costa, Marin, San Francisco, San Mateo, and Santa Clara Counties, and the City of Berkeley, each issued a revised shelter-in-place order (collectively “New Bay Area Shelter-In-Place Orders”).¹³ The New Bay Area Shelter-In-Place Orders extended the earlier Bay Area Shelter-In-Place Orders through May 3, 2020, and limited additional activities. At the time the New Bay Area Shelter-In-Place Orders were issued, there were at least 2,092 confirmed cases (up from 258 confirmed cases on March 15, 2020) and at least fifty-one deaths (up from three deaths on March 15, 2020), in the seven Bay Area jurisdictions jointly issuing the orders.

41. Failure to comply with any provision of the New Bay Area Shelter-In-Place-Orders, “*constitutes an imminent threat and menace to public health, constitutes a public nuisance*, and is punishable by fine, imprisonment, or both.” (Emphasis supplied). *Id.* ¶¶ 2.

42. Violation of the New Bay Area Shelter-In-Place-Orders is a misdemeanor punishable by a fine or jail time under California Health & Safety Code sections 120295, *et seq.*

¹³ CTY. ALAMEDA, ORDER OF HEALTH OFFICER NO. 20-04 (Mar. 31, 2020), <http://www.acphd.org/media/563688/health-officer-order-20-04-shelter-in-place-20200331.pdf>; CONTRA COSTA HEALTH SERVS., OFF. OF DIR., ORDER OF HEALTH OFFICER NO. HO-COVID19-03 (Mar. 31, 2020), <https://cchealth.org/coronavirus/pdf/2020-0331-Health-Officer-Order-COVID19.pdf>; CTY. MARIN, ORDER OF HEALTH OFFICER (Mar. 31, 2020), https://coronavirus.marinhhs.org/sites/default/files/2020-04/marin_final-superseding-shelter-in-place-order-accessible_0.pdf; CITY & CTY. SAN FRANCISCO, DEPT. PUB. HEALTH, ORDER OF HEALTH OFFICER NO. C19-07B TO SHELTER IN PLACE (Mar. 31, 2020), <https://www.sfdph.org/dph/alerts/files/HealthOfficerOrder-C19-07b-ShelterInPlace-03312020.pdf>; SAN MATEO CTY. HEALTH, PUB. HEALTH, POL’Y & PLAN., ORDER OF HEALTH OFFICER NO. C19-5B (revised) (Mar. 31, 2020), <https://www.smcgov.org/sites/smcgov.org/files/Final%203-31%20Order.pdf>; SANTA CLARA CTY. PUB. HEALTH DEPT., EMERGENCY OPERATIONS CTR. ORDER OF HEALTH OFFICER (Mar. 31, 2020), <https://www.sccgov.org/sites/covid19/Documents/03-31-20-Health-Officer-Order-to-Shelter-in-Place.pdf>; CTY. BERKELEY, ORDER OF HEALTH OFFICER (Mar. 31, 2020), https://www.cityofberkeley.info/uploadedFiles/Health_Human_Services/Public_Health/covid19/berkeley-shelter-in-place-order-2020-03-31.pdf.

43. The New Bay Area Orders heightened restrictions on the operation of Essential Businesses by adding the following language:

All Essential Businesses are strongly encouraged to remain open. But Essential Businesses are directed ***to maximize the number of employees who work from home***. Essential Businesses ***may only assign those employees who cannot perform their job duties from home to work outside the home***. All Essential Businesses ***shall prepare, post, and implement a Social Distancing Protocol*** at each of their facilities at which they are maintaining operations, as specified in Section 13.h... Essential Businesses ***must follow industry-specific guidance issued by the Health Officer*** related to COVID-19.

Id., ¶ 5 (emphasis supplied).

44. Under the New Bay Area Orders, each Essential Business must:

- a. Post a sign at each public entrance to its facility informing individuals to avoid entering if they have a cough or fever; maintain a minimum six-foot distance; sneeze or cough into a cloth, tissue, or elbow; and to not shake hands or engage in any unnecessary physical contact;
- b. Direct employees who can work from home to do so;
- c. Tell all employees not to come to work if sick;
- d. Conduct symptom checks before allowing employees to enter the workspace;
- e. Separate all desks and workstations by at least six feet;
- f. Limit the number of people who enter the facility to ensure that people in the facility can easily maintain a minimum six-foot distance at all times (except as required to complete an Essential Business activity);
- g. Frequently disinfect break rooms, bathrooms, and other common areas;
- h. Make disinfectant, hand sanitizer, and soap and water available to all employees; and
- i. If the facility is open to customers or other members of the public, implement additional measures to prevent crowds from gathering, keep people at least six feet apart, prevent unnecessary contact, and increase sanitization.

45. On April 17, 2020, the public health officers of Alameda, Contra Costa, Marin, San Francisco, San Mateo, and the City of Berkeley, each issued an order requiring all individuals to wear face coverings outside of their home, with certain exceptions.¹⁴

¹⁴ CTY. ALAMEDA, ORDER OF HEALTH OFFICER NO. 20-08 (Apr. 17, 2020), <http://www.acphd.org/media/569455/health-officer-order-20-08-face-coverings-2020.04.17.pdf>; CONTRA COSTA HEALTH SERVS., OFF. OF DIR., ORDER OF HEALTH OFFICER NO. HO-COVID19-08 (Apr. 17, 2020) https://813dcad3-2b07-4f3f-a25e-23c48c566922.filesusr.com/ugd/84606e_7aedf6a44a884872ad17824ef2855107.pdf; SAN MATEO CTY. HEALTH, PUB. HEALTH, POL'Y & PLAN., ORDER OF HEALTH OFFICER NO. C19-8 (Apr. 17, 2020), https://www.smchealth.org/sites/main/files/file-attachments/ho_order_c19-8_face_covering_20200417_copy.pdf?1587328957; CTY. MARIN, ORDER OF HEALTH OFFICER (Apr.

46. On April 29, 2020, the public health officers of Alameda, Contra Costa, Marin, San Francisco, San Mateo, and Santa Clara Counties, and the City of Berkeley, each issued a revised shelter-in-place order (collectively “Third Bay Area Shelter-In-Place Orders”).¹⁵ The Third Bay Area Shelter-In-Place Orders extend the New Bay Area Shelter-In-Place Orders through May 3, 2020. At the time the Third Bay Area Shelter-In-Place Orders were issued, there were at least 7,273 confirmed cases (up from 258 confirmed cases on March 15, 2020) and at least 266 deaths (up from three deaths on March 15, 2020), in the seven Bay Area jurisdictions jointly issuing the orders.

47. The Third Bay Area Shelter-In-Place Orders continued to restrict most activity, travel, and governmental and business functions, but allowed a limited number of additional Essential Businesses and certain lower risk outdoor businesses to resume operating.

48. In addition, the Third Bay Area Shelter-In-Place Orders required that all businesses operating at facilities in the county must prepare or update, post, implement, and distribute to their personnel a Social Distancing Protocol for each of their facilities and abide by any industry-specific guidance issued by the Health Officer related to COVID-19. The Social Distancing Protocol must explain how the business is achieving the following:

17, 2020), <https://coronavirus.marinhhs.org/marin-public-health-order-face-coverings-41720>; CITY & CTY. SAN FRANCISCO, DEPT. PUB. HEALTH, ORDER OF HEALTH OFFICER GENERALLY REQUIRING FACE COVERINGS (Apr. 17, 2020), <https://www.sfdph.org/dph/alerts/files/OrderNoC19-12-RequiringFaceCovering-04172020.pdf>; CTY. BERKELEY, ORDER OF HEALTH OFFICER (Apr. 17, 2020), https://www.cityofberkeley.info/uploadedFiles/Health_Human_Services/Public_Health/covid19/PHO-Order-2020-04-17-masks.pdf.

¹⁵ CTY. ALAMEDA, ORDER OF HEALTH OFFICER NO. 20-10 (Apr. 29, 2020), <http://www.acphd.org/media/572718/health-officer-order-20-10-shelter-in-place-20200429.pdf>; CONTRA COSTA HEALTH SERVS., OFF. OF DIR., ORDER OF HEALTH OFFICER NO. HO-COVID19-09 (Apr. 29, 2020), https://813dcad3-2b07-4f3f-a25e-23c48c566922.filesusr.com/ugd/84606e_99711106d2074bab8ef27cc16643957e.pdf; CTY. MARIN, ORDER OF HEALTH OFFICER (Apr. 29, 2020), <https://coronavirus.marinhhs.org/marin-public-health-order-april-29-2020>; CITY & CTY. SAN FRANCISCO, DEPT. PUB. HEALTH, ORDER OF HEALTH OFFICER TO SHELTER IN PLACE (Apr. 29, 2020), <https://sf.gov/sites/default/files/2020-04/2020.04.29%20FINAL%20%28signed%29%20Health%20Officer%20Order%20C19-07c-%20Shelter%20in%20Place.pdf>; SAN MATEO CTY. HEALTH, PUB. HEALTH, POL’Y & PLAN., ORDER OF HEALTH OFFICER NO. C19-5C (Apr. 29, 2020), https://www.smchealth.org/sites/main/files/file-attachments/health_officer_order_revising_shelter_in_place_through_may_31_1.pdf?; SANTA CLARA CTY. PUB. HEALTH DEPT., EMERGENCY OPERATIONS CTR. ORDER OF HEALTH OFFICER (Apr. 29, 2020), <https://www.sccgov.org/sites/covid19/Documents/05-04-20-Health-Officer-Order.pdf>; CTY. BERKELEY, ORDER OF HEALTH OFFICER (Apr. 29, 2020), https://www.cityofberkeley.info/uploadedFiles/Health_Human_Services/Public_Health/covid19/shelter-in-place-health-officer-order-2020-04-29.pdf.

- a. Limiting the number of people who can enter into the facility at any one time to ensure that people in the facility can easily maintain a minimum six-foot distance from another at all times, except as required to complete Essential Business activity;
- b. Requiring face coverings to be worn by all persons entering the facility, other than those exempted from face covering requirements (*e.g.*, young children);
- c. Providing hand sanitizer, soap and water, or effective disinfectant at or near the entrance of the facility and in other appropriate areas for use by the public and personnel and in locations where there is high-frequency employee interaction with members of the public;
- d. Regularly disinfecting other high-touch surfaces;
- e. Posting a sign at the entrance of the facility informing all personnel and customers that they should: avoid entering the facility if they have any COVID-19 symptoms, maintain a minimum six-foot distance from one another, sneeze and cough directly into their own elbow, and not shake hands or engage in any unnecessary physical contact; and
- f. Any additional social distancing measures being implemented by the Center for Disease Control and Prevention.

49. Failure to comply with any provision of the Third Bay Area Shelter-In-Place-Orders, ***“constitutes an imminent threat and menace to public health, constitutes a public nuisance, and is punishable by fine, imprisonment, or both.”***

50. Violation of the Third Bay Area Shelter-In-Place-Orders is a misdemeanor punishable by a fine or jail time under California Health & Safety Code sections 120295, *et seq.*

51. Between May 15, 2020 and May 22, 2020, the public health officers of Alameda, Contra Costa, Marin, San Francisco and Santa Clara Counties, and the City of Berkeley, each issued a revised shelter-in-place order (collectively “Fourth Bay Area Shelter-In-Place Orders”).¹⁶

¹⁶ CTY. ALAMEDA, ORDER OF HEALTH OFFICER NO. 20-11 (May 18, 2020), <http://www.acphd.org/media/577582/alameda-county-health-officer-order-20-11-english.pdf>; CONTRA COSTA HEALTH SERVS., OFF. OF DIR., ORDER OF HEALTH OFFICER NO. HO-COVID19-04 (May 18, 2020), https://813dcad3-2b07-4f3f-a25e-23c48c566922.filesusr.com/ugd/84606e_cb75bdcabc5e74364a182e80fba1381df.pdf; CTY. MARIN, ORDER OF HEALTH OFFICER (May 15, 2020), <https://coronavirus.marinhhs.org/marin-public-health-order-may-15-2020>; CITY & CTY. SAN FRANCISCO, DEPT. PUB. HEALTH, ORDER OF HEALTH OFFICER NO. C19-07D TO SHELTER IN PLACE (May 17, 2020); CITY & CTY. SAN FRANCISCO, DEPT. PUB. HEALTH, ORDER OF HEALTH OFFICER NO. C19-07E TO SHELTER IN PLACE (May 22, 2020, updated June 1, 2020), <https://www.sfdph.org/dph/alerts/files/HealthOfficerOrder-C19-07e-Updated-ShelterInPlace-06012020.pdf>; SANTA CLARA CTY. PUB. HEALTH DEPT., EMERGENCY OPERATIONS CTR. ORDER OF HEALTH OFFICER (May 18, 2020), <https://www.sccgov.org/sites/covid19/Documents/05-18-20-Health-Officer-Order.pdf>; SAN MATEO CTY. HEALTH, PUB. HEALTH, POL’Y & PLAN., ORDER OF HEALTH OFFICER NO. C19-5D (May 15, 2020), https://www.smchealth.org/sites/main/files/file-attachments/ho_order_c19-5d_shelter_in_place_20200515.pdf?1589577658; CTY. BERKELEY, ORDER OF HEALTH OFFICER (May 18, 2020), https://www.cityofberkeley.info/uploadedFiles/Health_Human_Services/Public_Health/covid19/COB-health-order-n20-07-shelter-in-place.pdf.

1 52. The Fourth Bay Area Shelter-In-Place Orders extended the earlier Bay Area Shelter-In-
2 Place Orders. At the time the New Bay Area Shelter-In-Place Orders were issued, there were at least
3 9,660 confirmed cases (up from 2,092 confirmed cases on March 31, 2020) and at least 351 deaths (up
4 from 51 deaths on March 31, 2020), in the seven Bay Area jurisdictions jointly issuing the orders.

5 53. The Fourth Bay Area Shelter-In-Place Orders continue to restrict most activity, travel,
6 and governmental and business functions to essential needs, but allowed a limited number of additional
7 businesses and activities to resume operating, subject to specified conditions and safety precautions.
8 The Fourth Bay Area Shelter-In-Place Orders varied in the degree to which they loosened restrictions.
9 However, none of the Fourth Bay Area Shelter-In-Place Orders permitted non-essential employees who
10 could complete their work from home to stop sheltering in place, and under each Fourth Bay Area
11 Shelter-In-Place Order continues to require that all businesses implement and enforce social distancing
12 policies and that all persons observe social distancing at all times.

13 54. Failure to comply with any provision of the Fourth Bay Area Shelter-In-Place-Orders,
14 “***constitutes an imminent threat and menace to public health, constitutes a public nuisance***, and is
15 punishable by fine, imprisonment, or both.” *Id.* ¶ 2. (emphasis supplied).

16 55. Violation of the Fourth Bay Area Shelter-In-Place-Orders is a misdemeanor punishable
17 by a fine or jail time under California Health & Safety Code sections 120295, *et seq.*

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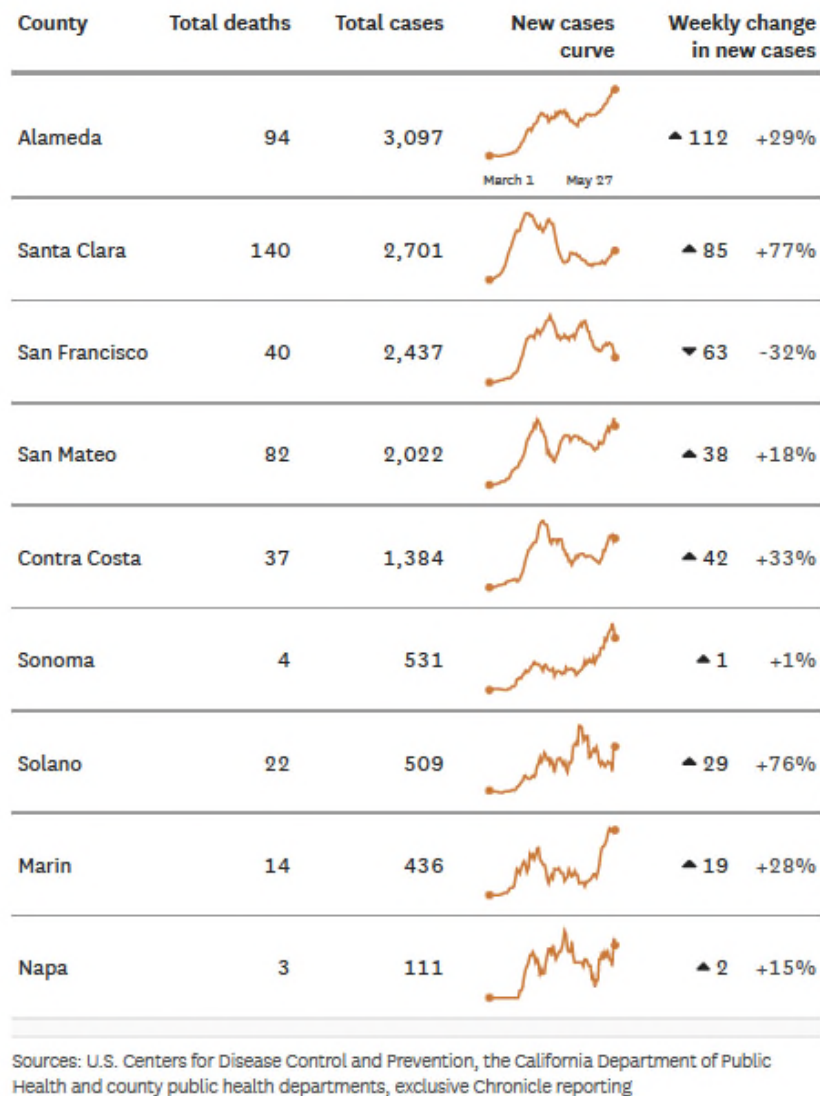
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56. As of May 28, 2020, the San Francisco Chronicle reported 13,228 confirmed cases of Coronavirus in the Bay Area, resulting in 436 deaths. At the same time, California had 103,869 cases, and 3,992 deaths and total confirmed cases in the United States reached 1,721,750 cases, resulting in 101,617 deaths.¹⁷



III. Special Considerations to Protect Those Most at Risk at Long-Term Care Facilities

57. It is widely known that older adults (often with underlying chronic medical conditions) are presumed to be at great risk of poor outcomes when infected with novel coronavirus, the virus that

¹⁷ Chronicle Digital Team, *San Francisco Coronavirus Tracker*, S.F. Chronicle (last visited May 28, 2020), <https://projects.sfchronicle.com/2020/coronavirus-map/>.

1 causes COVID-19. Given their congregate nature and resident population served, nursing homes,
2 skilled nursing facilities, and assisted living facilities (collectively “Long-Term Care Facilities”) work
3 as accelerators for the virus and have become hot spots for the spread of the disease, with devastating
4 consequences.

5 58. In late February of 2020, the introduction of COVID-19 into a Long-Term Care Facility
6 in King County, Washington, resulted in cases among eighty-one residents, thirty-four staff members,
7 and fourteen visitors, resulting in twenty-three deaths. Following the incident, the Center for Disease
8 Control (“CDC”) issued a report on its investigation of the outbreak. The report confirmed that “once
9 COVID-19 has been introduced in a long-term care facility, it has the potential to result in **high attack**
10 **rates among residents, staff members, and visitors.**”¹⁸ (Emphasis supplied).

11 59. On March 9, 2020, the San Mateo Health Officer issued an order restricting visitors to
12 Long-Term Care Facilities (“San Mateo Long-Term Facility Order”).¹⁹ Violation of the order
13 constitutes a misdemeanor punishable by fine, imprisonment, or both under California Health & Safety
14 Code sections 120295, *et seq.*

15 60. As stated in the San Mateo Long-Term Facility Order:

16 The virus that causes Coronavirus 2019 Disease (also known as COVID-
17 19) places residents at long term care facilities at high risk, especially given
18 that visitors to such facilities may have the virus but may not have
19 symptoms or may have mild symptoms. Such visitors can easily pass the
20 virus on to vulnerable residents. ***Because of this risk, and the need to***
protect these most vulnerable members of the community, this Order
restricts Unauthorized Visitors and Non-Essential Personnel from those
facilities.

21 *Id.* at 1 (emphasis supplied).

22 61. The San Mateo Long-Term Facility Order required certain long-term health care
23 facilities to exclude all unauthorized visitors and “employees, contractors, or members of the public
24

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26 ¹⁸ Temet M. McMichael, PhD, *et al.*, *COVID-19 in a Long-Term Care Facility – King County,*
27 *Washington, February 27–March 9, 2020*, 69 MORBIDITY & MORTALITY WEEKLY REPORT 339-342,
U.S. DEPT. OF HEALTH & HUMAN SVCS./CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 27,
2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6912e1-H.pdf>.

28 ¹⁹ SAN MATEO CTY. HEALTH, PUB. HEALTH, POL’Y & PLAN., ORDER OF THE HEALTH OFFICER NO.C19-1
(Mar. 11, 2020), [https://cmo.smcgov.org/sites/cmo.smcgov.org/files/0311_HO%20Order%20c19-1%20LTC%20200311%20\(003\).pdf](https://cmo.smcgov.org/sites/cmo.smcgov.org/files/0311_HO%20Order%20c19-1%20LTC%20200311%20(003).pdf).

1 *who do not perform treatment, maintenance, support, or administrative tasks deemed essential*” to
2 the facility. *Id.* ¶ 10(a) (emphasis supplied).

3 62. Unauthorized visitors and non-essential personnel were also ordered not to visit long-
4 term health care facilities, “except as permitted by this Order.” *Id.*

5 63. On March 11, 2020, the CDPH issued an All Facilities Letter (“AFL”) to “All Long-
6 Term Care Facilities” instructing facilities to “review and revise” how they interact with vendors and
7 agency staff and take necessary actions to prevent any potential transmissions.

8 64. On March 15, 2020, Governor Gavin Newsom called for home isolation for all seniors.
9 That same day he and issued an executive order that the Department of Social Services, the Division of
10 Occupational Safety and Health (“Cal-OSHA”) focus on individuals who are most vulnerable and on
11 the most serious health and safety issues at licensed facilities.²⁰ The following day, the CDPH issued a
12 COVID-19 guidance, “Self-Isolation for Older Adults and Those Who Have Elevated Risk.”²¹ The
13 guidance suggested that all individuals over sixty-five years of age and all individuals with serious
14 chronic medical conditions such as heart disease, diabetes, or lung disease, or a compromised immune
15 system, take steps to reduce the risk of infectious disease. They recommend that individuals remain at
16 home and practice social distancing.

17 65. On March 30, 2020, Governor Gavin Newsom issued an executive order authorizing the
18 Director of CDPH to waive licensing and staffing requirements for Long-Term Care Facilities.²² That
19 same day, CDPH issued an AFL to “Skilled Nursing Facilities,” regarding the suspension of certain
20 skilled nursing facility requirements. Under the AFL, skilled nursing homes are required to comply
21 with COVID-19 control guidelines from local public health departments and to make all reasonable
22

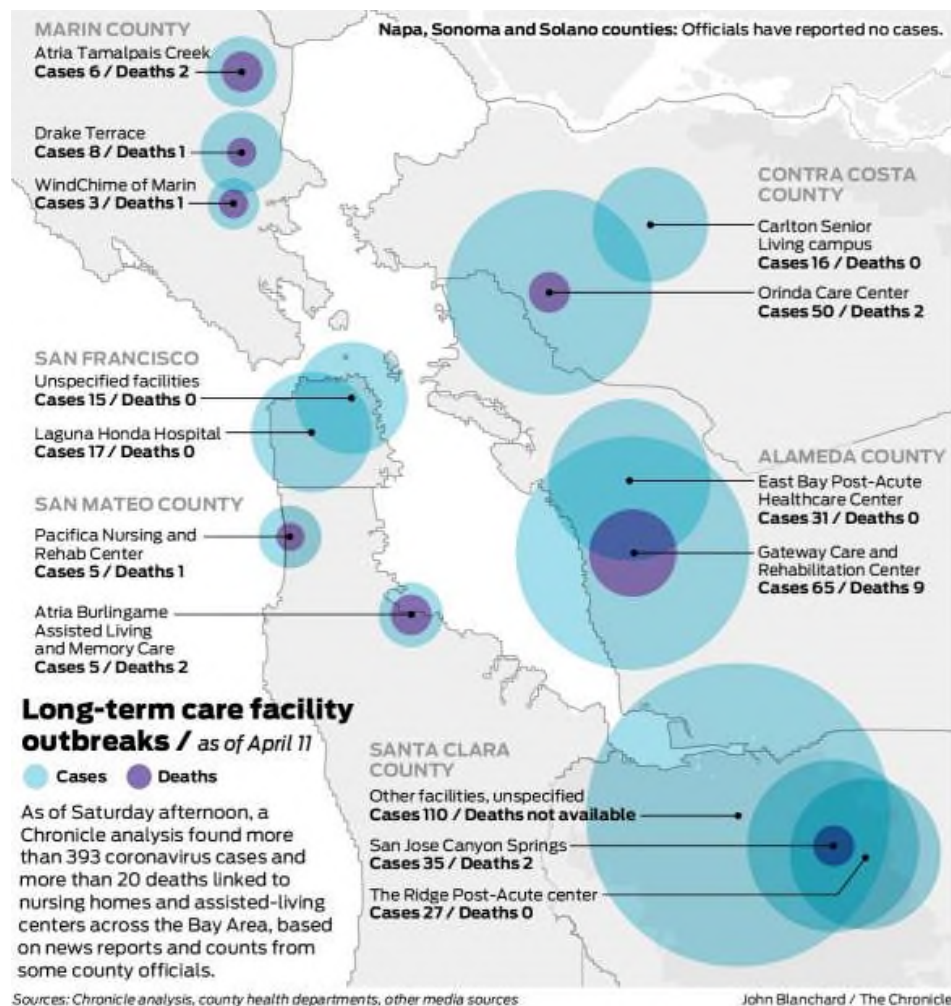
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24 ²⁰ EXEC. DEPT. STATE OF CAL., EXEC. ORDER. NO. N-27-20 (Mar. 15, 2020)
<https://www.gov.ca.gov/wp-content/uploads/2020/03/3.15.2020-COVID-19-Facilities.pdf> (last visited
25 Apr. 13, 2020).

26 ²¹ CAL. DEPT. OF PUB. HEALTH, COVID-19 PUBLIC HEALTH GUIDANCE: SELF-ISOLATION FOR OLDER
ADULTS AND THOSE WHO HAVE ELEVATED RISK (Mar. 16, 2020)
27 https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/Self_Isolation_Guidance_03.16.20.pdf (last visited Apr. 13, 2020).

28 ²² EXEC. DEPT. STATE OF CAL., EXEC. ORDER. NO. N-39-20 (Mar. 30, 2020)
<https://www.gov.ca.gov/wp-content/uploads/2020/03/3.30.20-EO-N-39-20-text.pdf> (last visited Apr.
13, 2020).

efforts to act in the best interest of their residents.²³ While the initial order also required skilled nursing facilities to accept patients with COVID-19, the CDPH clarified the following day that this did not apply where a facility was ill-equipped to accept COVID-19 patients.²⁴

66. Despite these early efforts and regulations, COVID-19 outbreaks in Long-Term Care Facilities in the Bay Area and nationally have continued to skyrocket. As of April 11, 2020, more than 3,933 Coronavirus cases, including twenty deaths, linked up to nursing homes and assisted living center in the Bay Area, including the following outbreaks:²⁵



The graphic has been corrected to reflect that it shows nursing homes and assisted living centers.

²³ Heidi W. Steinecker, *Suspension of Regulatory Enforcement of Specified Skilled Nursing Facility Requirements*, AFL 20-32, CAL. DEPT. OF PUBLIC HEALTH, (Mar. 30, 2020) <https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/AFL-20-32.aspx>.

²⁴ Heidi W. Steinecker, *Interim Guidance for Transfer of Residents with Suspected or Confirmed Coronavirus Disease*, AFL 20-33.1, CAL. DEPT. OF PUBLIC HEALTH (Apr. 24, 2020) <https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/AFL-20-33.aspx>.

²⁵ Jason Fagone et al., *Families Left in the Dark as Coronavirus Races Through Bay Area Nursing Homes*, S.F. CHRONICLE (Apr. 14, 2020), <https://www.sfchronicle.com/politics/article/Families-left-in-dark-as-coronavirus-races-15191179.php>.

67. Moreover, as of April 17, 2020, the New York Times counted at least 7,000 deaths nationwide were linked to nursing homes throughout the United States, accounting for about one-fifth of deaths in the United States.²⁶

68. As of June 12, 2020, the CDPH reported 11,070 Coronavirus cases, including twenty deaths, linked up to nursing homes and assisted living center in the Bay Area (including residents and health care workers).²⁷

IV. VITAS Has Willfully and Unnecessarily Exposed Seniors to COVID-19.

69. Hospice is a program designed to provide patients with palliative care (i.e., care designed to relieve pain, symptoms or stress of terminal illness) instead of curative care (i.e., care designed to cure an illness or condition). Hospice palliative care includes a comprehensive set of medical, social, psychological, emotional and spiritual services for terminally ill individuals.

70. VITAS is the largest for-profit hospice chain in the United States, and, according to its website, provides hospice services to patients residing in their own homes, in-patient hospice units, assisted living facilities, skilled nursing facilities, hospitals unaffiliated with VITAS and in its thirty-six in-patient units.

71. On information and belief, VITAS has fifteen offices in California, from which it employs over 1,000 healthcare and corporate professionals who handle more than 3,300 patients daily.²⁸

72. Beginning in March of 2020, the VITAS website promoted and advertised itself as an industry leader in providing care during the COVID-19 pandemic and adherent to safety regulations and guidance.

²⁶ Farah Stockman *et al.*, ‘They’re Death Pits’: Virus Claims at Least 7,000 Lives in U.S. Nursing Homes, N.Y. TIMES, (Apr. 17, 2020), <https://www.nytimes.com/2020/04/17/us/coronavirus-nursing-homes.html>.

²⁷ *Skilled Nursing Facilities: COVID-19*, CAL. DEPT. OF PUB. HEALTH, https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/SNFsCOVID_19.aspx (last updated June 9, 2020).

²⁸ *VITAS Healthcare Expands Hospice and Palliative Care Services in San Francisco, Introduces Virtual Reality Therapy*, VITAS HEALTHCARE (Sept. 25, 2019), <https://www.vitas.com/about-us/newsroom/vitas-expands-hospice-palliative-care-services-in-san-francisco-introduces-virtual-reality-therapy/>.

73. On March 5, 2020, the VITAS website published a post regarding VITAS Healthcare President and CEO Nick Westfall’s meeting with the United States Vice President Mike Pence and the White House Coronavirus Task Force Coordinator. As stated in the post, Westfall underscored how hospice and palliative care are “uniquely positioned” to meet the needs of patients at higher risk for COVID-19 and limit further transmission. During the meeting, Westfall stated that he was proud to fulfill the “obligation to be part of the ongoing solution to address this situation as a nation.” He applauded the administration for allowing VITAS to “advocate for the specific needs, access, and resources” needed to “safely care for our patients and prevent further spread of COVID-19.”²⁹

74. Sometime in March of 2020, the VITAS website added a page titled, “FAQs about Coronavirus (COVID-19) and Hospice,” (“FAQs”) to provide “up-to-date, easy-to-understand information on the virus, its impact, and our *revolving organizational response to the situation*,” about “*safety protocol for staff, patients, and families*.”³⁰ *Id.* (emphasis supplied).

75. In the FAQs, VITAS advertises its team members as “trained” and “prepared” to provide care, “should you refer a hospice-eligible patient who has COVID-19.” *Id.*

76. In the FAQs, VITAS solicits patients and referrals, stating that it is accepting patients with COVID-19, “[h]ospice-eligible patients with COVID-19 will be assessed based on hospice program supply of necessary PPE (N-95 mask, goggles or face shield, and gown) to ensure the safety of our staff, patients, and families.” *Id.*

77. In response to the question, “How will VITAS staff visit patients safely during the COVID-19 pandemic,” VITAS answers:

VITAS staff will continue to adhere to established screening protocols to assess the risks of infection spread through each patient encounter.

With the advent of COVID-19, these protocols continue to evolve as we strive to keep our patients, families and staff safe.

As always, care team members follow all universal safety precautions and incorporate ... *state/local health departments guidance* regarding personal

²⁹ VITAS Healthcare Meets with US Vice President Pence and COVID-19 Task Force, VITAS HEALTHCARE (Mar. 5, 2020), <https://www.vitas.com/about-us/newsroom/vitas-healthcare-meets-with-us-vice-president-pence-and-covid-19-task-force/>.

³⁰ FAQs About Coronavirus (COVID-19) and Hospice, VITAS HEALTHCARE, <https://www.vitas.com/family-and-caregiver-support/what-to-expect-from-hospice/faqs-about-coronavirus-and-hospice/> (last visited April. 2, 2020).

protective equipment (PPE). Appropriate PPE varies with each individual situation and may include gloves, masks, shields, and/or gowns.

We also ***follow protocols and mandates from the facilities we serve***, including nursing homes, assisted living communities, care homes for the elderly, etc.

Id. (emphasis supplied).

78. On March 20, 2020, the VITAS website posted “COVID-19: VITAS Is Educated, Committed,” in which it solicits referrals from healthcare professionals for patients with COVID-19.³¹

79. The post encourages medical providers to “transition” their “vulnerable, COVID-susceptible, hospice-eligible patients to the home or preferred care setting” to relieve burdens on emergency departments and acute care/ICU beds.

80. In the post, VITAS claims to have “expertise” on COVID-19, and falsely states that it adheres to and stays up-to-date on local and state health departments guidelines, that VITAS participates in daily COVID-19 task force calls, and that VITAS offers regular internal employee communications regarding local/state health department updates. *Id.*

81. Despite these representations, however, and as described in greater detail below, VITAS has not changed its policies and practices requiring Sales Representatives to make cold sales and marketing calls, in-person, to hospitals and nursing homes without enforcing social distancing and without proper PPE.

V. VITAS’s Unlawful Conduct Endangers Its Employees and Public Health.

A. VITAS Policies Requiring Sales Representatives to Visit Health Facilities in Violation of Emergency Orders

82. In response to the public health crisis, Defendants increased the focus on Sales Representatives delivering food and other items to hospitals and nursing homes, in violation of state and local directives and in violation of institutional directives barring vendors during the Coronavirus crisis, all of which were intended to protect against the spread of COVID-19. Defendants have done so without providing appropriate PPE. Moreover, all such sales calls could have and should have been performed via telephone to avoid the unnecessary spread of COVID-19.

³¹ Joseph Shega, MD, *COVID-19: VITAS Is Educated, Committed and Ready*, VITAS HEALTHCARE (June 2, 2020), <https://www.vitas.com/for-healthcare-professionals/making-the-rounds/2020/march/amid-concern-around-covid-19-vitas-is-educated-committed-and-ready/>.

83. VITAS markets and sells its hospice and palliative care services, in part, through Sales Representatives, including Plaintiff. The job duties of Sales Representatives include visiting hospitals, doctors' offices, nursing homes, "boarding & care" facilities, senior living facilities and other healthcare providers to make marketing and sales calls in the hopes of gaining hospice referrals from facility administrators. Representatives are given a "territory" to cover that may include a variety of facilities, including hospitals, doctors' offices, and Long-Term Care Facilities. They are responsible for initiating and pursuing leads through developing sales messaging and strategies. These marketing activities may include delivering food or branded items to facilities, providing in-service presentations to staff, or initiating email campaigns.

84. According to a job posting for Sales Representatives other duties include: being a subject matter expert on Medicare Hospice Benefit, VITAS service offerings, disease-specific clinical criteria and evidence-based medicine; analyzing territory and developing call routing to establish correct targets, reach and frequency for maximal territory growth; developing sales messaging and strategies to align to the customers' needs to ensure hospice appropriate patients gain access to hospices services; maintaining professional and technical knowledge by reviewing professional publications, establishing personal networks, remaining current with changes in healthcare field in order to understand customer industry; leveraging provided resources and technology as a vehicle for success; leveraging sales tools on provided devices as customer visual aids and learning tools to grow knowledge (including effective professional verbal, written, and electronic communication); and applying coaching feedback from direct management to improve various skillsets.

85. There are approximately 200-250 Sales Representatives in California.

86. Despite significant risk of spreading an infection to the most vulnerable in the community, however, VITAS continues to send its Sales Representatives out into the field for marketing and sales calls that could and should have been handled remotely, and without appropriate PPE. In the wake of the Bay Area and California Shelter-In-Place Orders, President, and CEO of VITAS Healthcare Nick Westfall nonetheless unilaterally deemed **all** of its employees as "essential" and not subject to the state and local orders, including Sales Representatives making sales calls.

1 87. VITAS Sales Representatives have been continually pressured by the company to
2 continue to bring food, drinks, and other marketing perks to healthcare facilities in an effort to win
3 future referrals for their hospice services. Indeed, despite the threat of COVID-19, Sales
4 Representatives are still required to make ten in-person sales contacts per day. As noted above, on at
5 least one instance, when informed that a facility was closed to vendors, including VITAS Sales
6 Representatives, VITAS openly encouraged Sales Representatives who skirted entry checkpoints at
7 hospitals. Additionally, single representatives were instructed to visit multiple facilities in the course of
8 a day, increasing the amount of potential exposure for patients and healthcare workers. One such
9 representative continued these activities even after experiencing flu-like symptoms and failing to get
10 tested to determine the etymology of his illness. VITAS was aware of the representative's condition
11 and still required the representative to make in-person sales calls.

12 88. Sales Representatives have visited a health care facility with a known case of COVID
13 without using PPE, and then later visited multiple other facilities, again delivering food and other
14 promotional sales gifts without any use of PPE. These sales and marketing activities were carried out
15 with the knowledge and at the direction of VITAS managers. These activities were directly reported to
16 and applauded by VITAS management.

17 89. In fact, since the start of the pandemic, VITAS Sales Representatives have visited at
18 least twelve facilities in the Bay Area which are currently known to have confirmed cases of COVID-
19 19, including Atria Burlingame Assisted Living and Memory Care (San Mateo), Canyon Springs Post-
20 Acute (Santa Clara), Central Gardens (San Francisco), East Bay Post-Acute (Alameda), Jewish Home
21 D/P Skilled Nursing Facility (San Francisco), Kindred Transitional Care and Rehabilitation-Tunnell
22 Center (San Francisco), Los Altos Sub-Acute and Rehabilitation Center (Santa Clara), Pacifica Nursing
23 and Rehab Center (San Mateo), St. Anne's Home for the Aged (San Francisco), The Ridge Post-Acute
24 Center (Santa Clara), Valley House Rehabilitation Center (Santa Clara), and Vista Manor Nursing
25 Center (Santa Clara).

26 90. Initially, VITAS Sales Representatives were not given a directive to use and did not use
27 PPE while making sales calls to healthcare facilities despite the Bay Area and California Shelter-In-
28

1 Place Orders. To the extent a Sales Representative chose to use PPE, it was self-provided at the Sales
2 Representative's personal expense.

3 91. The PPE eventually provided to VITAS Sales Representatives, consisting of a VITAS-
4 branded bandana, remains wholly inadequate. To the extent a Sales Representatives chooses to use
5 additional PPE, it must be self-provided at the Sales Representative's personal expense.

6 92. Indeed, VITAS management encouraged Sales Representative to take photos of or with
7 facility administrators when making visits, including "selfies" from a close distance, and send them to
8 the rest of the sales team to incentivize other Sales Representatives to force their way into healthcare
9 institutions.

10 93. Further, top management, including VITAS Healthcare Senior VP of Sales, has initiated
11 and/or encouraged a national campaign for sales teams to send photos of Sales Representatives visiting
12 health facilities for publication and dissemination in a company-wide "strategy" presentation to
13 encourage other Sales Representatives to do the same.

14 94. By March 13, 2020, VITAS was informed by healthcare facilities, nursing homes,
15 and/or boarding care homes that only clinical staff could visit the facilities. Even so, VITAS continues
16 to send its Sales Representatives into these facilities.

17 **B. VITAS Retaliated Against Plaintiff for Her Request to Work From Home and**
18 **Complaints Regarding Public Safety.**

19 95. Plaintiff is a VITAS Sales Representative with territories in the Bay Area. As with all of
20 the Sales Representatives, Plaintiff was told to make in-person sales visits to the facilities in her
21 territory despite the state-wide, and local directives and orders.

22 96. While her fellow Sales Representatives continued to make risky in-person visits to
23 healthcare facilities at the instruction of VITAS's management, Ms. Eisenacher refused to do so. In
24 addition to concerns about spreading the COVID-19, Ms. Eisenacher has a history of respiratory
25 illness. As such, she is at greater risk of complications from the Coronavirus and COVID-19.

26 97. Furthermore, all essential elements of Ms. Eisenacher's job (i.e., hospice sales to
27 patients and hospitals presently in need of hospice care) can be performed by telephone and electronic
28 means from home.

1 98. Thus, on March 20, 2020, Ms. Eisenacher’s doctor recommended she work from home,
2 providing a note to VITAS explaining the medical necessity of her quarantine. This recommendation
3 was based in whole or in part on the well-recognized increased risk of developing Coronavirus and/or
4 COVID-19 as a result of exposure to persons confirmed or suspected to have Coronavirus and/or
5 COVID-19.

6 99. Despite the note from Ms. Eisenacher’s doctor, and contrary to the Bay Area and
7 California Shelter-In-Place Orders, as well as local and state guidelines for Long-Term Care Facilities
8 and other homes, VITAS management instructed Ms. Eisenacher to make in-person sales calls to
9 healthcare facilities. Specifically, Ms. Eisenacher was instructed to accompany her manager to sales
10 calls at a hospital emergency department on “lockdown” as well as at an office of a physician who
11 specializes in geriatrics, oncology, heart, and lung disease, among others.

12 100. When Ms. Eisenacher declined to make these visits, VITAS instructed Ms. Eisenacher
13 return to the doctor and obtain another note reversing their earlier medical instructions to quarantine at
14 home. Ms. Eisenacher returned to her doctor as ordered by her employer, incurring a cost of \$175 as a
15 result. However, Ms. Eisenacher’s doctor remained adamant that Ms. Eisenacher must work from her
16 home to protect her and others from the virus. When Ms. Eisenacher could not make in-person sales
17 calls, VITAS retaliated by putting her on unpaid medical leave.

18 101. After Ms. Eisenacher’s doctor declined to change the initial medical instruction to work
19 from home, VITAS told Ms. Eisenacher she could work from home temporarily. However, in further
20 retaliation, VITAS took measures to damage Ms. Eisenacher’s reputation, income and opportunity for
21 advancement in her career by withholding valuable sales leads and information necessary for her to
22 perform her job and make sales calls remotely, including contact information and training.
23 Specifically, after Ms. Eisenacher began working from home, VITAS has refused to provide her with
24 important leads and has instructed her not to make contact with any existing leads until she comes into
25 the office to get “swag” for personal distribution. Additionally, when Ms. Eisenacher managed to
26 obtain leads on her own, management instructed her not to call them.

27 102. Moreover, VITAS has not changed its policy requiring similarly-situated Sales
28 Representatives to make in-person sales calls in violation of the state and local directives. Her

colleagues continue to enter healthcare facilities daily, putting themselves, patients, and healthcare professionals at serious risk, and Ms. Eisenacher is currently on unpaid leave due to her refusal to make in-person sales calls.

C. VITAS Has a Robust Online Platform and Mobile App Which Would Have Enabled Plaintiff and Other Sales Representatives to Perform Their Work from Home.

103. On information and belief, there was and is no need for VITAS Sales Representatives to appear on-site at healthcare facilities to provide essential access to hospice treatment. In fact, VITAS touts its proprietary hospice referral system as, “the first live, two-way hospice referral system of its kind.”³² “Provided at no cost, our proprietary system is designed to interface with hospital and health system EMR technology, increasing the efficiency of your case managers and reducing the hospice response time. Instantly, VITAS knows you have a patient who is potentially appropriate for hospice services. Instantly, we can alert your VITAS admissions coordinator.” *Id.*

104. According to VITAS, the referral system also allows for “*seamless interoperability*” between VITAS and your referral source system, which is an “automated and rules-based transmission process with little to no staff intervention,” and a “shortened hospice referral response time.” *Id.* (emphasis supplied).

105. Further, in October of 2019, VITAS introduced a free redesigned mobile app for clinicians. As stated on the VITAS website, the mobile app permits clinicians to “Aim. Snap. Send. – Refer patients with advanced illness to hospice with a face sheet snapshot and a few taps.”³³ *Id.*

106. Using the VITAS mobile app, clinicians can refer and relay patient information “securely by phone to VITAS admissions coordinators – instantly” and without the need for a phone call or in-person meeting with the Sales Representative or coordinator. *Id.*

VI. VITAS’s Policies Are Unlawful

107. The California Labor Code requires that employers take steps to protect workers from any safety hazard, including exposure to extreme temperatures, a disorderly workspace, and infectious

³² *Interoperability for Streamlined Hospice Referrals*, VITAS HEALTHCARE, <https://www.vitas.com/for-healthcare-professionals/partner-organizations/interoperability-for-streamlined-hospice-referrals/> (last visited Apr. 2, 2020).

³³ *Clinicians: Download our FREE App*, VITAS HEALTHCARE, landing.vitas.com/download-vitas-referral-app/ (last visited Apr. 17, 2020).

diseases like COVID-19, which is widespread in the community. The Amazon policies described above are in violation of multiple provisions of the California Labor Code.

108. Under the California Labor Code, employers are required to take steps to protect workers exposed to infectious diseases like COVID-19, which is widespread in the community. The VITAS policy is in violation of each of the following provisions of the California Labor Code:

- a. Section 6400, requiring that every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein;
- b. Section 6401, requiring that every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful and shall do every other thing reasonably necessary to protect the life, safety, and health of employees;
- c. Section 6402, requiring that no employer shall require or permit an employee to go or be in any employment or place of employment which is not safe and healthful;
- d. Section 6403, requiring that no employer shall fail or neglect to provide and use reasonably adequate safety devices safeguards, adopt or use reasonably adequate methods and process, or to do every other thing reasonably necessary to protect the life, safety, and health of employees;
- e. Section 6404, requiring that no employer shall occupy or maintain any place of employment that is not safe and healthful; and
- f. Section 6407, requiring that every employer must comply with the occupational safety and health standards, with section 25910 of the Health and Safety Code, and with all rules, regulations, and orders pursuant to this division, which are applicable to his own actions and conduct.

109. General Industry Safety Orders propagated by Cal-OSHA establish minimum standards and apply to all employments and places of employment as defined by California Labor Code section 6303.³⁴

110. Safety Orders require certain employers with employees exposed to aerosol transmissible diseases (“ATD”) to have effective written safety plans, provide protective equipment as needed, and train employees on safety procedures.³⁵

111. The VITAS policy violates each of the following Occupational Safety and Health Standards set forth by Cal-OSHA in the California Code of Regulations, title 8:

³⁴ Cal. Code Regs. tit. 8, § 3202 (1974).

³⁵ Cal. Code Regs. tit. 8, § 5199 (2009).

- a. Section 3203, requiring that all employers have an Illness Prevention Program (IPP) to protect employees from workplace hazards. Which required VITAS to determine if COVID-19 was a workplace hazard and, given that it was and is, implement measures to prevent or reduce infection hazards and provide training thereon;
- b. Section 3380, requiring that employers conduct a hazard assessment to determine if COVID-19 was a hazard in the workplace necessitating the use of PPE and given that it was and is, provide exposed employees with properly fitting PPE;
- c. Section 5144, requiring that employers take minimum steps to ensure safe and effective use of respirators required in the workplace due to the hazard caused by COVID-19;
- d. Section 5199, requiring employers covered by the ATD General Industry Safety Standard to protect employees from airborne infectious diseases such as COVID-19 and pathogens transmitted by aerosol. VITAS, a hospice facility, is covered under the ATD standard. Given the outbreak of COVID-19, a highly contagious novel virus whose method of transmission is not entirely known, under the ATD VITAS was required to implement safety procedures including:
 - i. To have a written ATD Exposure Control Plan (“ECP”) and provide PPE and other precautions for employees entering facilities where known or suspected COVID-19 patients were present;
 - ii. To follow local health authorities and recommendations for heightened protections of COVID-19; and
 - iii. To follow the highest level of safety precautions given that COVID-19 is a novel or unknown pathogen for which there is no evidence to rule out with reasonable certainty the possibility that the pathogen is transmissible through the dissemination of airborne droplet nuclei, small particle aerosols, or dust particles containing the novel or unknown pathogen, requires the highest level of safety precautions; and
- e. Section 8414, requiring that employers provide employees who are exposed to hazards in the workplace, which cannot be eliminated through engineering and administrative controls are not effective in eliminating the hazards, with PPE including head protection, hand protection, and body protection.

112. The VITAS policy requiring Plaintiff and other similarly-situated Sales Representatives to enter health facilities and/or Long-Term Care Facilities without being directed to use or provided PPE, and without practicing social distancing, constitutes an unreasonably hazardous work environment. This is especially true here, where facilities are treating confirmed and/or suspected COVID-19 patients.

113. Further, VITAS, a hospice service, violated California law by failing to prepare and implement an ATD policy.

114. As described above, VITAS, a hospice provider, was subject to a number of local and state recommendations by health authorities and related to COVID-19, collectively requiring VITAS to prohibit or restrict non-essential employees from healthcare facilities and to at all times mitigate the

1 risk of transmission by providing PPE and practicing social distancing guidelines, including, but not
2 limited to San Mateo’s Long-Term Facility Order, violation of which is a misdemeanor punishable by a
3 fine or jail time under California Health & Safety Code sections 120295, *et seq.* and the CDPH AFLs to
4 Long-Term Care Facilities, including hospice agencies and skilled nursing facilities.

5 115. The VITAS policy, which requires Plaintiff and other similarly situated Sales
6 Representatives to leave their place of shelter or residence to perform non-essential work, requires
7 Plaintiff and other similarly situated Sales Representatives to violate local and state orders to shelter-in-
8 place, including, but not limited to:

- 9 a. New Bay Area Shelter-In-Place Orders, violation of which is a misdemeanor punishable
10 by a fine or jail time under California Health & Safety Code sections 120295, *et seq.*; and
11 b. California Shelter-In-Place Order, violation of which is a misdemeanor, punishable by a
12 fine not to exceed one thousand dollars (\$1,000) or by imprisonment up to six months,
or both, under the California Emergency Services Act, Gov. Code section 8655.

13 116. This is not the first instance of VITAS skirting the law. In 2017, Chemed Corporation
14 and various wholly-owned subsidiaries, including VITAS Hospice, VITAS Healthcare, and VITAS
15 California agreed to pay \$75 million – the largest amount ever recovered under the False Claims Act
16 from a provider of hospice services, related to allegations that VITAS billed for patients who were not
17 terminally ill and incentivized employees to submit false claims without regard to their client’s
18 qualification and benefit. On October 30, 2017, VITAS entered into a corporate integrity agreement
19 (“CIA”), which was in effect at all times relevant hereto (through October 30, 2023).³⁶

20 **CAUSES OF ACTION**

21 **COUNT ONE**

22 **PUBLIC NUISANCE**

23 ***Civ. Code §§ 3479, 3480, 3491, 3493; Code Civ. Proc. §§ 526, 731***
(Individually Against All Defendants)

24 117. Plaintiff hereby incorporates and realleges each and every paragraph of this Complaint
25 as if the same were set forth at length herein.

26
27 ³⁶OFF. OF PUB. AFF., U.S. DEPT. OF JUST., *Chemed Corp. and Vitas Hospice Services Agree to Pay \$75*
28 *Million to Resolve False Claim Act Allegations Relating to Billing for Ineligible Patients and Inflated*
Levels of Care, Press Release No. 17-1220, (Oct. 30, 2017), <https://www.justice.gov/opa/pr/chemed-corp-and-vitas-hospice-services-agree-pay-75-million-resolve-false-claims-act>.

1 118. California Civil Code section 3479 provides that “[a]nything which is injurious to
2 health...or is indecent or offensive to the sense, or an obstruction to the free use of property, so as to
3 interfere with the comfortable enjoyment of life or property...is a nuisance.”

4 119. California Civil Code section 3480 defines a “public nuisance” as “one which affects at
5 the same time an entire community or neighborhood, or any considerable number of persons, although
6 the extent of the annoyance or damage inflicted upon individuals may be unequal.”

7 120. Beginning in March 2020, and continuing to the present time, Defendant VITAS created
8 a condition that was harmful to public health by adopting and implementing systemic policies, practices
9 and procedures which required its Sales Representatives to continue to perform in-person visits to
10 healthcare facilities, including but not limited to nursing facilities, hospitals, in-patient care providers,
11 residential care facilities, and acute providers.

12 121. VITAS’s conduct, as alleged in this Complaint, constitutes a nuisance within the
13 meaning of Civ. Code section 3479 in that it is harmful to health.

14 122. More specifically, VITAS’s policies have caused its Sales Representatives healthcare
15 providers, staff, patients, and countless others to be needlessly exposed to individuals known or
16 suspected to have Coronavirus or COVID-19, and/or individuals who have been in close contact with
17 individuals known or suspected to have Coronavirus or COVID-19.

18 123. VITAS’s failure to comply with minimum basic health and safety standards in its
19 workplace, including public health standards necessary to stop the spread of COVID-19, is causing, or
20 is reasonably certain to cause, community spread of the diseases.

21 124. This community spread is not and will not be limited to VITAS Sales Representatives.
22 Infected VITAS Sales Representatives who continue to visit Long-Term Care Facilities, hospitals, in-
23 patient care providers, residential care facilities, and acute providers will interact with staff, healthcare
24 providers, and patients, many of whom are likely to be high risk.

25 125. In addition, Sales Representatives will go home to interact with their families and other
26 members of the public as they undertake their day-to-day activities, like grocery shopping.

1 126. Thus, increased community spread through VITAS Sales Representatives will cause
2 increased community spread throughout each facility its Sales Representatives visit and the surrounding
3 communities.

4 127. This community spread will result in disease and possibly death. It will also stress
5 healthcare resources and cause financial harm.

6 128. Defendants' actions create a nuisance to Plaintiff as well as a public nuisance because
7 they affect the entire workforce and community at the same time and affect "a considerable number of
8 persons although the extent of the annoyance or damage inflicted upon individuals may be unequal."
9 Civil Code §§ 3479-3480.

10 129. The seriousness of harm outweighs any social utility of VITAS's conduct as alleged
11 herein.

12 130. VITAS's conduct as alleged herein would offend a reasonable person.

13 131. As alleged herein, VITAS's policies are and were in violations of all Bay Area Shelter-
14 In-Place Orders, the California Shelter-In-Place Order as well as other state and local guidelines and
15 regulations relating to COVID-19, by, *inter alia*:

- 16 a. Continuing to assign Plaintiff and other Sales Representatives to visit healthcare
17 facilities, including but not limited to nursing homes, hospitals, in-patient care providers,
18 residential care facilities and acute providers, despite restrictions on visitation;
- 19 b. Continuing to assign Plaintiff and other Sales Representatives to perform in-person
20 visits at more than one healthcare facility, including but not limited to nursing homes,
21 hospitals, in-patient care providers, residential care facilities, and acute providers,
22 despite restrictions on visitation;
- 23 c. Misclassifying Plaintiff and other Sales Representatives as "essential";
- 24 d. Failing to provide adequate PPE to Plaintiff and other Sales Representatives;
- 25 e. Failing to instruct Plaintiff and other Sales Representatives to maintain Social
26 Distancing Protocol at all times;
- 27 f. Failing to screen Plaintiff and other Sales Representatives for Coronavirus and/or
28 COVID-19 symptoms before visiting healthcare facilities, including but not limited to

nursing homes, hospitals, in-patient care providers, residential care facilities, and acute providers.

132. As such, VITAS's conduct constituted and continues to constitute a nuisance *per se* under the New Bay Area Shelter-In-Place Orders, Third Bay Area Shelter-In-Place Orders, and Fourth Bay Area Shelter-In-Place Orders, which specifically provide that the failure to comply with any provision of the orders "***constitutes an imminent threat and menace to public health***" and "***constitutes a public nuisance.***"

133. Pursuant to Civil Code section 3493, Plaintiff has standing to maintain an action for public nuisance because the nuisance is especially injurious to Plaintiff because she is directly subjected to the dangerous working conditions maintained by VITAS.

134. As a direct result of VITAS's policies requiring that Plaintiff be exposed to COVID-19 and/or Coronavirus, an actual and unnecessary hazard given transmission rates of Coronavirus, Plaintiff has incurred monetary damages, including but not limited to loss of income and medical expenses as set forth above.

135. As a direct result of VITAS's policies, requiring that Plaintiff be exposed to COVID-19 and/or Coronavirus an actual and unnecessary hazard given transmission rates of Coronavirus, Plaintiff has suffered from mental and emotional distress including but not limited to, fear, anxiety, discomfort, and annoyance, regarding the additional risk of serious illness to herself and others. Further, the emotional distress caused by VITAS's policies has resulted in an exacerbation of pre-existing medical conditions, requiring Plaintiff to incur an additional loss of income and medical expenses. Moreover, the exacerbation of such pre-existing conditions only further increases her risk of serious illness should she contract Coronavirus, require her to quarantine even as counties in the Bay Area loosen their orders to shelter-in-place.

136. The Conduct of Defendants VITAS, and each of them, was despicable and amounted to malice, oppression, or fraud. Pursuant to Civil Code section 3295, Plaintiff is entitled to recover punitive damages from each of the VITAS Defendants according to proof at trial.

137. Plaintiff therefore, requests a declaration that VITAS, as it is presently operating, constitutes a public nuisance, injunctive relief to abate the nuisance, and for actual and punitive damages according to proof at trial.

COUNT TWO

**Pursuant to the Private Attorney General Act (“PAGA”)
Seeking Civil Penalties Under Labor Code §§ 2698, *et seq.*
(Individually and on Behalf of All Other Aggrieved Employees Against All Defendants)**

138. Plaintiff hereby incorporates and realleges each and every preceding paragraph of this Complaint as if the same were set forth at length herein.

139. Plaintiff asserts claims for civil penalties as a representative of the State of California, as authorized by the Private Attorneys General Act (“PAGA”), Labor Code sections 2698, *et seq.*, and to the extent permitted by law, on behalf of the aggrieved employees who held the positions identified and suffered one or more of the violations alleged.

140. Plaintiff is an “aggrieved employee” within the meaning of Labor Code section 2699(c), and is a proper representative to bring a civil action on behalf of herself and other current and former employees of VITAS pursuant to the procedures specified in Labor Code section 2699.3, because Plaintiff was employed by VITAS and one or more of the alleged violations of Labor Code section 1197.5 was against her.

141. Plaintiff seeks to represent all current and former employees of Defendants working as Sales Representatives who suffered one or more of the alleged violations (“aggrieved employees”) during the time period of March 12, 2020, until the commencement of trial in the matter (“the PAGA Period”).

142. Written notice of the alleged violations was provided by Plaintiff to the Division of Occupational Safety and Health (“DOSH”) via online submission on April 29, 2020, and by certified mail to VITAS, with a copy to the Labor and Workforce Development Agency (“LWDA”)(hereinafter “PAGA Notice”).

143. Under Labor Code section 6309, DOSH is required to investigate a complaint from an employee no later than ***three working days of an allegation of a serious violation or fourteen calendar days after an allegation of a non-serious violation.*** (Emphasis added.)

1 144. DOSH is required to “inform the complainant, whenever his or her identity is known, of
2 any action taken by the division in regard to the subject matter of the complaint, and the reasons for the
3 action, within 14 calendar days of taking any action.”

4 145. If no investigation or inspection occurs, the aggrieved employee may commence a
5 private right of action under Labor Code section 2699.3(b)(3)(B).

6 146. More than the required statutory time has passed since the postmark date of Plaintiff’s
7 letter, and, as of the date of filing of this Complaint, DOSH has failed to complete an investigation or
8 otherwise respond to Plaintiff’s PAGA Notice.

9 147. More than thirty-three (“33”) calendar days have passed since the postmark date of
10 Plaintiff’s letter, and, as of the date of filing of this Complaint, Defendant has not provided any notice
11 of cure.

12 148. Plaintiff has therefore complied with the prerequisites set forth in California Labor Code
13 section 2699.3 for commencing a representative action.

14 149. The PAGA Notice included the specific provisions of the Labor Code alleged to have
15 been violated, including the facts and theories to support the alleged violations. The PAGA Notice
16 alleged violations of California Labor Codes sections 6400, 6401, 6402, 6403, 6404, and 6407, and
17 Occupational Safety and Health Standards set forth by Cal-OSHA in the California Code of
18 Regulations, title 8, and specifically sections 3203, 3380, 5144, and 5199. Such allegations are further
19 set forth in paragraphs 124 through 130 of this Complaint, and in the PAGA Notice, attached hereto as
20 Exhibit A, and incorporated herein by reference.

21 150. Labor Code sections 2698 *et seq.*, grant California employees the right to bring a civil
22 action for violation of any provision of the Labor Code on behalf of themselves and other current or
23 former employees in order to recover civil penalties. In passing PAGA, the California Legislature
24 “declared that adequate financing of labor law enforcement was necessary to achieve maximum
25 compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined
26 and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in
27 the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil
28 penalties for Labor Code violations.” *Arias v. Super. Ct.*, 46 Cal. 4th 969, 980 (2009).

151. PAGA permits aggrieved employees to collect the civil penalties authorized by law and normally collectible by the California Labor and Workforce Development Agency. To address violations for which no penalty had been established, section 2699(f) creates a private right of action for aggrieved employees and a default penalty in the amount of \$100 for each aggrieved employee per pay period for the initial violation, and \$200 for each aggrieved employee per pay period for each subsequent violation. *See* Lab. Code § 2699(f). Plaintiff hereby seeks to collect civil penalties for the Labor Code violations described herein.

152. Labor Code sections 6300 *et seq.* authorize the enforcement of effective standards to maintain safe and healthy work environments.

153. Labor Code section 6317 requires DOSH to issue a citation with reasonable promptness against an employers who has violated any standard, rule, order, or regulation, where the violation is serious, repeated, willful or arises from a failure to abate, and to prepare and maintain records capable of supplying an inspector with previous citations and notices issued to an employer.

154. Labor Code sections 6428-6430 require DOSH to impose civil penalties for serious, willful, or repeat violations or where an employer fails to correct violations in a timely manner.

155. Labor Code section 2699(g) further provides that any employee who prevails in an action for civil penalties is entitled to an award of reasonable attorney's fees and costs. Plaintiff also seek to recover attorneys' fees and costs.

COUNT THREE

RETALIATION IN VIOLATION OF CALIFORNIA LABOR CODE

Labor Code §§ 6310, et seq.
(Individually Against All Defendants)

156. Plaintiff hereby incorporates and realleges each and every paragraph of this Complaint as if the same were set forth at length herein.

157. Labor Code section 6310 prohibits employers from discriminating or retaliating against any employee because the employee has informed their employer about unsafe working conditions.

158. Plaintiff is informed and believes and thereon alleges that VITAS willfully and/or with reckless indifference violated Labor Code section 6310 by retaliating against Plaintiff for complaining of unsafe working conditions.

1 159. As set forth above, VITAS retaliated against Plaintiff by refusing to fully accommodate
2 her by allowing her to work from home, refusing sales leads, interfering with her ability to pursue sales
3 leads, revoking access to sales territory and/or forcing them to take paid or unpaid leave because
4 Plaintiff complained to VITAS of unsafe working conditions.

5 160. The unlawful conduct of Defendants, as alleged above, directly and proximately caused
6 Plaintiff to suffer and continue to suffer, special damages including but not limited to past and future
7 loss of income, benefits, and other damages to be proven at the time of trial.

8 161. Pursuant to Labor Code section 6310, Defendants are liable for statutory damages,
9 including reimbursement for lost wages and work benefits.

10 162. As a direct and proximate result of the unlawful conduct of Defendants, and each of
11 them, Plaintiff has suffered general damages including, but not limited to, shock, embarrassment,
12 physical distress, and injury, humiliation, emotional distress, stress, and other damages to be proven at
13 the time of trial.

14 163. Defendants' conduct described herein was undertaken, authorized and/or ratified by
15 Defendants' officers, directors and/or managing agents. The aforementioned conduct of said officers,
16 directors and/or managing agents and individuals was therefore undertaken on behalf of Defendants.
17 Defendants further had advanced knowledge of the actions and conduct of said individuals whose
18 actions and conduct were ratified, authorized, and approved by VITAS officers, directors, and/or
19 managing agents.

20 164. Defendants committed the acts herein alleged maliciously, fraudulently, and
21 oppressively in conscious disregard for Plaintiff's rights, and Plaintiff is entitled to recover punitive
22 damages from Defendants in an amount according to proof presented at trial.

23 165. As alleged above, Defendants ratified the unlawful conduct of its employees, and are
24 therefore liable for their conduct. Pursuant to Civil Code section 3294, Defendants are liable for
25 punitive damages.

26 166. As a result of the conduct of Defendants, and each of them, Plaintiff was forced to
27 retain an attorney in order to protect her rights.
28

167. Plaintiff hereby seeks declaratory and injunctive relief, as well as actual, exemplary, and punitive damages, as well as reasonable attorneys' fees and costs pursuant to Labor Code section 2699, subdivision (g)(1).

COUNT FOUR

RETALIATION IN VIOLATION OF LABOR CODE
Labor Code § 1102.5
(Individually Against All Defendants)

168. Plaintiff hereby incorporates and realleges each and every preceding paragraph of this Complaint as if the same were set forth at length herein.

169. Labor Code section 1102.5(c) provides, in part, that “[a]n employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with local, state, or federal rule or regulation.”

170. Defendants retaliated and continue to retaliate against Plaintiff for refusing to violate the state and local public health directives as described herein by refusing to fully accommodate employees by allowing them to work from home, refusing sales leads, interfering with the ability to pursue sales leads, revoking access to sales territory and/or forcing her to take paid or unpaid leave.

171. As a direct and proximate result of Defendants' conduct, Plaintiff has suffered damages, including, but not limited to, lost past and future wages and benefits in amounts to be proven at trial.

172. In doing the things herein alleged, Defendants are guilty of oppression, fraud, and malice in that they, among other things, acted with a willful and conscious disregard for Plaintiff's rights, and public health. Insofar as the things alleged were attributable to employees of Defendants, said employees were employed with a conscious disregard for the rights of others and/or Defendants authorized or ratified the wrongful conduct and/or there was advance knowledge, conscious disregard, authorization, ratification, or act of oppression, fraud, or malice on the part of an officer, director or managing agent of Defendants.

173. Plaintiff hereby seeks declaratory and injunctive relief, as well as actual, exemplary, and punitive damages, and attorneys' fees and costs.

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COUNT FIVE

VIOLATIONS OF THE UNFAIR COMPETITION LAW

Bus. & Prof. Code §§ 17200, et seq.
(Individually Against All Defendants)

174. Plaintiff hereby incorporates and realleges each and every paragraph of this Complaint as if the same were set forth at length herein.

175. VITAS, the largest for-profit hospice chain in the United States, was well aware of the significant risk COVID-19 posed to patients, staff, and visitors at the Long-Term Care Facilities where it provided care or visited.

176. A self-declared “expert” on COVID-19 safety in Long-Term Care Facilities, VITAS promoted, represented and advertised itself to the public as in compliance with such guidelines on its website in order to obtain new patients. Nonetheless, VITAS continues to require its Sales Representatives to visit healthcare facilities in an effort to win future referrals for their hospice services without PPE and without practicing social distancing. Moreover, VITAS continues to encourage and pressure its Sales Representatives to ignore facility administrator’s requests that they not enter the facility or adhere to particular visitation guidelines.

177. VITAS, which offered client referrals which could be made, “at the touch of the button,” had all of the technology in place necessary to facilitate Sales Representatives, themselves subject to shelter-in-place orders, to respond to client referrals without leaving their homes, and without violating state and local health and safety guidelines. Nonetheless, VITAS improperly and fraudulently misclassified all of its employees, including all Sales Representatives, as “essential” in order to require them to continue to work outside their homes and make unnecessary marketing and sales calls.

178. VITAS’s conduct was unlawful, unfair and fraudulent. VITAS’s conduct violated multiple laws, including, but not limited to, the following:

- a. Requiring their employees to continue to visit healthcare facilities, including but not limited to nursing homes, hospitals, in-patient care providers, residential care facilities, and acute care providers in violation of Health & Safety Code sections 120295, *et seq.*;
- b. Providing policies during the COVID-19 pandemic which violated worker safety standards under Cal-OSHA under the general duty clause, sections (5)(a);
- c. Providing policies during the COVID-19 pandemic which violated worker safety standards promulgated by Cal-OSHA in violation of Labor Code sections 6400, *et seq.*; and

1 d. Failing to disclose to Plaintiff and similarly-situated employees the true basis for these
2 policies.

3 179. VITAS's conduct was unfair. Any purported utility of the conduct alleged herein is far
4 outweighed by the gravity of the harm caused. Defendants' conduct offends established public policy,
5 as set forth in the state and local mandates. Defendants' actions prioritize profits over public health
6 and, as a result, are immoral, unethical, oppressive, unscrupulous and/or substantially injurious to
7 Plaintiff, other employees and the public.

8 180. VITAS's conduct was fraudulent because Defendants falsely represented that they were
9 complying with local and state orders, and by falsely representing that Sales Representatives were
10 essential workers pursuant to these orders simply because VITAS also provides hospice care. Such
11 conduct is likely to deceive VITAS's employees and the public.

12 181. Plaintiff suffered an injury in fact and lost money because of VITAS's unlawful, unfair
13 and fraudulent conduct. Her sales activities were interrupted by VITAS's attempts to force her to make
14 in-person, non-essential sales calls at health care facilities in violation of state and local laws relating to
15 the COVID-19 pandemic, and by Defendants' retaliatory conduct as alleged herein. Additionally,
16 Plaintiff lost money and suffered an injury in fact after Defendants ordered her to return to her medical
17 provider at her own cost to ask her physician to change his/her opinion that it was safe to return to
18 work. The physician refused to do so, but Plaintiff had to pay out of pocket because of Defendants'
19 unlawful acts.

20 182. Plaintiff therefore seeks declaratory and injunctive relief prohibiting the conduct alleged
21 herein, disgorgement of profits, and restitution.

22 **COUNT SIX**

23 **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (Individually Against All Defendants)**

24 183. Plaintiff hereby incorporates and realleges each and every paragraph of this Complaint
25 as if the same were set forth at length herein.

26 184. VITAS's conduct alleged herein was appalling, extreme and outrageous. In doing the
27 conduct alleged herein, VITAS intended to cause Plaintiff emotional distress or acted with reckless
28

disregard for the probability that Plaintiff would suffer emotional distress, knowing that Plaintiff was present when the conduct occurred.

185. As an actual and proximate result of VITAS's conduct, Plaintiff suffered grief, anguish, humiliation, mental suffering, and severe emotional distress in an amount to be proven at trial.

186. The Conduct of Defendants VITAS, and each of them, was despicable and amounted to malice, oppression, or fraud. Pursuant to Civil Code section 3295, Plaintiff is entitled to recover punitive damages from each of the VITAS Defendants according to proof at trial.

COUNT SEVEN

NEGLIGENCE (Individually Against All Defendants)

187. Plaintiff hereby incorporates and realleges each and every paragraph of this Complaint as if the same were set forth at length herein.

188. At all times relevant to this Complaint, Defendants VITAS, and each of them, were required to comply with the California Shelter-In-Place Order, Bay Area Shelter-In-Place Orders, and all Directives issued by SFPDH.

189. One of the primary purposes of such orders was to minimize the risk of the spread of COVID-19, among the community and those most at risk.

190. Plaintiff alleges that Defendants' conduct as alleged herein caused her to suffer serious emotional distress. Plaintiff, in fact did suffer serious emotional distress, and Defendants' negligence was a substantial factor in causing the same. Emotional distress suffered by Plaintiff includes suffering, anguish, fright, nervousness, grief, anxiety, worry, shock, humiliation, and shame.

191. The emotional distress alleged herein would cause distress to an ordinary and reasonable person, as ordinary and reasonable people in Plaintiff's position would be unable to cope with the distress caused by Defendants' actions.

192. Defendants VITAS, and each of them, had a duty to any person who might foreseeably be exposed to COVID-19 at its Essential Business to use care in enforcing its Social Distancing Policy, which includes compliance with each Order. Here, it is reasonably foreseeable that Defendants' conduct would, indeed, cause Plaintiff's emotional distress.

1 193. As set forth above, Defendants, and each of them, breached said duty to Plaintiff by
2 failing to comply with the Bay Area Shelter-In-Place Orders and the California Shelter-In-Place Order
3 by, *inter alia*: Continuing to assign Plaintiff and other Sales Representatives to visit healthcare
4 facilities, including but not limited to nursing homes, hospitals, in-patient care providers, residential
5 care facilities and acute providers, despite restrictions on visitation;

- 6 a. Continuing to assign Plaintiff and other Sales Representatives to perform in-person
7 visits at more than one healthcare facility, including but not limited to nursing homes,
8 hospitals, in-patient care providers, residential care facilities, and acute providers,
9 despite restrictions on visitation;
- 10 b. Misclassifying Plaintiff and other Sales Representatives as “essential”;
- 11 c. Failing to provide adequate PPE to Plaintiff and other Sales Representatives;
- 12 d. Failing to instruct Plaintiff and other Sales Representatives to maintain Social
13 Distancing Protocol at all times;
- 14 e. Failing to screen Plaintiff and other Sales Representatives for Coronavirus and/or
15 COVID-19 symptoms before visiting healthcare facilities, including but not limited to
16 nursing homes, hospitals, in-patient care providers, residential care facilities, and acute
17 providers;
- 18 f. Retaliating against Plaintiff for requesting to work from home and complaining about
19 the public safety hazard.

20 194. As a direct and proximate result, Plaintiff suffered and continues to suffer serious
21 emotional distress, including but not limited to debilitating anxiety, fright, flashbacks, worry, grief,
22 sadness, fear, loss of sleep, depression, headaches, embarrassment, low self-esteem, and a feeling of
23 powerlessness.

24 195. Further, the emotional distress caused by VITAS’s policies has resulted in an
25 exacerbation of pre-existing medical conditions, requiring Plaintiff to incur an additional loss of income
26 and medical expenses.

27 196. Defendants’ conduct was a substantial factor in causing Plaintiff’s serious emotional
28 distress, where Plaintiff did not suffer the aforementioned problems described prior to VITAS’s

1 Policies requiring Plaintiff to risk exposure to Coronavirus and/or COVID-19 and VITAS's retaliation
2 for Plaintiff's refusal to do so.

3 197. The Bay Area Shelter-In-Place Orders and the California Shelter-In-place Orders were
4 implemented by the State of California and local jurisdictions to protect individuals from the type of
5 injury Plaintiff suffered. Plaintiff was the class of persons intended to be protected by these laws. As
6 such, VITAS' conduct constitutes negligence *per se*.

7 198. The conduct of Defendants VITAS, and each of them, was despicable and amounted to
8 malice, oppression, or fraud. Pursuant to Civil Code section 3295, Plaintiff is entitled to recover
9 punitive damages from each of the VITAS Defendants according to proof at trial.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiff, in her individual and representative capacity, prays for relief and
12 judgment against Defendants as follows:

- 13 a. Awarding Plaintiff actual, punitive and exemplary damages;
14 b. Awarding civil penalties in the maximum amount allowed by law;
15 c. Awarding restitution and/or disgorgement and other such equitable relief as the Court deems
16 proper;
17 d. Issuing a declaration that Defendants' conduct as alleged herein is unlawful;
18 e. Enjoining Defendant from continuing to engage in illegal and unsafe work practices;
19 f. Awarding pre-judgment and post-judgment interest at the maximum rate permitted by law;
20 g. Awarding litigation costs and expenses, including, but not limited to, reasonable attorneys'
21 fees, to Plaintiff and the aggrieved employees pursuant to Code of Civil Procedure section
22 1021.5, Labor Code section 2699, subdivision (g)(1), and any other statutory or other basis;
23 and
24 h. Affording Plaintiff with such further and other relief as deemed just and proper by the Court
25 in law or equity.

26 **DEMAND FOR JURY TRIAL**

27 Plaintiff hereby demands a jury trial in this action for all claims so triable.

28 Date: June 16, 2020

/s/ Jennie Lee Anderson
Jennie Lee Anderson (SBN 203586)
Audrey Siegel (SBN 286771)

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Kay Van Wey (*pro hac vice* anticipated)

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Attorneys for Plaintiff

EXHIBIT A

ANDRUS ANDERSON LLP

April 29, 2020

Via Online Filing

Division of Occupational Safe and Health
Fremont Office
39141 Civic Center Dr., Suite 310
Fremont, CA 94538

Via Certified U.S. Mail

VITAS Healthcare Corporation
201 S. Biscayne Blvd., Suite 400
Miami, FL 33131
Tracking Nos. 7018 1830 0000 2078 3042

VITAS Hospice Services, L.L.C.
255 East Fifth St., Suite 1050
Cincinnati, OH 45202
Tracking Nos. 7018 1830 0000 2078 3127

VITAS Healthcare Corporation of California
c/o CSC – Lawyers Incorporating Service
2710 Gateway Oaks Drive, Suite 150N
Sacramento, CA 95833
Tracking No. 7018 1830 0000 2078 3134

VITAS Healthcare Corporation of California
255 East Fifth St., Suite 1050
Cincinnati, OH 45202
Tracking Nos. 7018 1830 0000 2078 3110

Re: Notice of Alleged Violations of California Labor Code

Dear Sir or Madam:

This letter is intended to serve as notice of an alleged violation of Cal. Labor Code §§ 6400, 6401, 6402, 6403, 6404, and 6407 by aggrieved employee Kristina Eisenacher and other similarly situated. I am submitting this notice on behalf of Ms. Eisenacher, whom I represent.

Pursuant to Cal. Labor Code § 2699.3(b)(1), Ms. Kristina Eisenacher is providing this notice, by and through her representative attorneys, to the Division of Occupational Safety and Health (“Cal-Osha”) and VITAS Healthcare Corporation of California, VITAS Hospice, L.L.C., and VITAS Healthcare Corporation (collectively “VITAS”). A copy is provided to the Labor and Workforce Development Agency.

Ms. Eisenacher is alleging that VITAS violated §§ 6400, 6401, 6402, 6403, 6404, and 6407 of the California Labor Code. These allegations are based upon the following facts:

Ms. Eisenacher, a resident of San Mateo, is employed as a Customer Sales Representative for VITAS in the Milpitas, California office. VITAS provides hospice services to patients residing in their own homes, inpatient hospice units, assisted living facilities, skilled nursing facilities, hospitals unaffiliated with VITAS, and thirty-six patient units.

The Job duties of Sales Representatives usually include visiting hospitals, doctor’s offices, nursing homes, “boarding & care” facilities, senior living facilities, and other healthcare providers to make sales calls in the hopes of gaining hospice referrals from facility administrators. There are Sales Representatives throughout California.

Since the beginning of 2020, a novel coronavirus became of significant concern around the World, across the United States and in California. Hundreds of thousands of individuals have been diagnosed as COVID-19 positive as a result of the coronavirus, and hundreds of thousands of people have died.

The virus spreads from person-to-person, likely through close contact, and small and large respiratory droplets and possibly particles that may strike the mucous membranes of the eyes, nose or mouth, or may be breathed into the nose or mouth. Common signs and symptoms of COVID-19 include fever, cough and difficulty breathing. However, the time from exposure to symptom onset ranges from two to 14 days, and many people are contagious even without exhibiting symptoms.

It was quickly determined by health officials in California and worldwide that the immunocompromised and those with underlying conditions are at a particularly high risk for contracting Covid-19 and suffering serious complications, as are those with underlying health complications. In addition, given their congregate nature and resident population served, nursing homes, skilled nursing facilities, and assisted living facilities (collectively “Long-Term Care Facilities”) work as accelerators for the virus and have become hot spots for the spread of the disease, with devastating consequences. Once COVID-19 has been introduced in a Long-Term Care Facility, it has the potential to result in high attack rates among residents, staff members, and visitors. By mid-March, in order to protect those most vulnerable, local, state and federal public health officials and agencies each issued orders to stop the spread of COVID-19.¹

¹ See, e.g., San Mateo, Cal., Order of the Health Officer No.c19-1 (Mar. 11, 2020), *available at* [https://cmo.smcgov.org/sites/cmo.smcgov.org/files/0311_HO%20Order%20c19-1%20LTC%20200311%20\(003\).pdf](https://cmo.smcgov.org/sites/cmo.smcgov.org/files/0311_HO%20Order%20c19-1%20LTC%20200311%20(003).pdf);

Alameda, Cal., Order of Health Officer (Mar. 16, 2020), *available at*

<https://www.acgov.org/documents/Final-Order-to-Shelter-In-Place.pdf>;

Contra Costa, Cal., Order of Health Officer (Mar. 16, 2020), *available at* https://813dcad3-2b07-4f3f-a25e-23c48c566922.filesusr.com/ugd/84606e_1870398d90a14bc09ff09bc944fcf71e.pdf;

Marin, Cal., Order of Health Officer (Mar. 16, 2020), *available at*

<https://coronavirus.marinhhs.org/sites/default/files/Files/Shelter%20in%20Place/Shelter%20in%20Place%20Order%2016%20March%202020.pdf>;

San Francisco, Cal., Order of Health Officer No. C19-07 (Mar. 16, 2020), *available at*

<https://www.sfdph.org/dph/alerts/files/HealthOrderC19-07-%20Shelter-in-Place.pdf>;

San Mateo, Cal., Order of Health Officer (Mar. 16, 2020), *available at*

<https://www.smcgov.org/sites/smcgov.org/files/press-release/files/HO%20Order%20Shelter%20in%20Place%20200316.pdf>;

Santa Clara, Cal., Order of Health Officer (Mar. 16, 2020), *available at*

<https://www.sccgov.org/sites/covid19/Pages/order-health-officer-031620.aspx>;

Berkeley, Cal., Order of Health Officer (Mar. 16, 2020), *available at*

<https://www.berkeleyside.com/wp-content/uploads/2020/03/city-of-berkeley-health-officer-order-to-shelter-in-place.pdf>;

Cal. Exec. Order No. N-33-22 (Mar. 19, 2020), *available at* <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf>;

Despite public health orders, and despite the significant risk of spreading infection to its employees as well as the most vulnerable in the community, VITAS continues to send its Sales Representatives “into the field” to bring food, drinks, and other sales perks to hospitals and Long-Term Care Facilities in an effort to win future referrals for their hospice services, in violation of Cal-OSHA and local health orders. VITAS Sales Representatives were and are not supplied with or given a directive to use personal protective equipment (“PPE”) while making sales calls to hospitals and Long-Term Care Facilities, and were and are not instructed to follow social distancing protocols. Although by March 13, 2020, VITAS was informed by hospitals and Long-Term Care Facilities healthcare facilities that only clinical staff could visit the facilities, VITAS continued to encourage and direct its Sales Representatives to make in-person visits.

Workplace safety and health regulations in California require employers to take steps to protect workers exposed to infectious diseases like COVID-19, which is widespread in the community. Indeed, Cal/OSHA posted guidance to help employers comply with such requirements for both the general workforce and for healthcare facilities.² Ms. Eisenacher asserts that, based on the above facts, VITAS, her employer, acted in and continues to act in violation of each of the following provisions of the California Labor Code:

- a. Section 6400, requiring that every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein.

Alameda, Cal., Order of Health Officer No. 20-04 (Mar. 31, 2020), *available at* <http://www.acphd.org/media/563688/health-officer-order-20-04-shelter-in-place-20200331.pdf>;

Contra Costa, Cal., Order of Health Officer No. HO-COVID19-03 (Mar. 31, 2020), *available at* <https://cchealth.org/coronavirus/pdf/2020-0331-Health-Officer-Order-COVID19.pdf>;

Marin, Cal., Order of Health Officer (Mar. 31, 2020), *available at* https://coronavirus.marinhhs.org/sites/default/files/2020-04/marin_final-superseding-shelter-in-place-order-accessible_0.pdf;

San Francisco, Cal., Order of Health Officer to Shelter in Place (Mar. 31, 2020), *available at* <https://www.sfdph.org/dph/alerts/files/HealthOfficerOrder-C19-07b-ShelterInPlace-03312020.pdf>;

San Mateo, Cal., Order of Health Officer No. c19-5b (revised) (Mar. 31, 2020), *available at* <https://www.smcgov.org/sites/smcgov.org/files/Final%203-31%20Order.pdf>;

Santa Clara, Cal., Order of Health Officer (Mar. 31, 2020), *available at* <https://www.sccgov.org/sites/covid19/Pages/order-health-officer-033120.aspx>;

Berkeley, Cal., Order of Health Officer (Mar. 31, 2020), *available at* https://www.cityofberkeley.info/uploadedFiles/Health_Human_Services/Public_Health/covid19/berkeley-shelter-in-place-order-2020-03-31.pdf.

² Cal-OSHA, *Guidance on Requirements to Protect Workers from Coronavirus* (March 2020) <https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html> (last visited April 14, 2020); Cal-OSHA, *Interim Guidance for Protecting Workers at Skilled Nursing and Long-term Care Facilities* (updated Apr. 5, 2020) <https://www.dir.ca.gov/dosh/Coronavirus/Skilled-Nursing.html> (last visited April 24, 2020).

- b. Section 6401, requiring that every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful and shall do every other thing reasonably necessary to protect the life, safety, and health of employees.
- c. Section 6402, requiring that no employer shall require or permit an employee to go or be in any employment or place of employment which is not safe and healthful.
- d. Section 6403, requiring that no employer shall fail or neglect to provide and use reasonably adequate safety devices safeguards, adopt or use reasonably adequate methods and process, or to do every other thing reasonably necessary to protect the life, safety, and health of employees.
- e. Section 6404, requiring that no employer shall occupy or maintain any place of employment that is not safe and healthful.
- f. Section 6407, requiring that every employer must comply with the occupational safety and health standards, with section 25910 of the Health and Safety Code, and with all rules, regulations, and orders pursuant to this division which are applicable to his own actions and conduct.

In support of her claim that VITAS acted in and continues to act in violation of Cal. Labor Code section 6407, Eisenacher asserts that, based on the above facts, VITAS, acted and is continuing to act in violation of each of the following Occupational Safety and Health Standards set forth by Cal-OSHA in the California Code of Regulations, title 8:

- a. Section 3203, requiring that all employers have an Illness Prevention Program (IPP) to protect employees from workplace hazards. Which required VITAS to determine if COVID-19 was a workplace hazard and, given that it was and is, implement measures to prevent or reduce infection hazards and provide training thereon.
- b. Section 3380, requiring that employers conduct a hazard assessment to determine if COVID-19 was a hazard in the workplace necessitating the use of PPE and given that it was and is, provide exposed employees with properly fitting PPE.
- c. Section 5144, requiring that employers take minimum steps to ensure safe and effective use of respirators required in the workplace due to the hazard caused by COVID-19.
- d. Section 5199, requiring employers covered by the Aerosol Transmissible Diseases (“ATD”) General Industry Safety Standard to protect employees from airborne infectious diseases such as COVID-19 and pathogens transmitted by aerosol. VITAS, a hospice facility, is covered under the ATD standard. Given the outbreak of COVID-19, a highly contagious novel virus whose method of transmission is not entirely known, under the ATD VITAS was required to implement safety procedures including:
 - i. To have a written ATD Exposure Control Plan (“ECP”) and provide PPE and other precautions for employees entering facilities where known or suspected COVID-19 patients were present;
 - ii. To follow local health authorities and recommendations for heightened protections of COVID-19; and
 - iii. To follow the highest level of safety precautions given that COVID-19 is a novel or unknown pathogen for which there is no evidence to rule out with reasonable

April 29, 2020

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certainty the possibility that the pathogen is transmissible through dissemination of airborne droplet nuclei, small particle aerosols, or dust particles containing the novel or unknown pathogen, requires the highest level of safety precautions.

This notice is provided to enable my client to proceed with claims for civil penalties pursuant to the Private Attorneys General Act ("PAGA"), Cal. Labor Code Sections 2698-2699.5, *et seq.*, on behalf of herself and all other aggrieved VITAS employees if Cal-OSHA declines to issue a citation or declines to investigate and the violations are not cured.

Sincerely,

/s/ Jennie Anderson

Jennie Lee Anderson

cc: Labor and Workforce Development Agency (via online submission)