APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACKIE SALDANA; CELIA SALDANA; RICARDO SALDANA, JR.; MARIA SALDANA, as individuals and as successors and heirs to Ricardo Saldana, deceased, *Plaintiffs-Appellees*,	No. 20-56194 D.C. No. 2:20-cv-05631-FMO-MAA
v.	OPINION
GLENHAVEN HEALTHCARE LLC, a California corporation; CARAVAN OPERATIONS CORP., a California corporation; MATTHEW KARP, an individual; BENJAMIN KARP, an individual, *Defendants-Appellants.*	

Appeal from the United States District Court for the
Central District of California
Fernando M. Olguin, District Judge, Presiding

Argued and Submitted October 21, 2021
Pasadena, California

Filed February 22, 2022

Before: Ryan D. Nelson and Lawrence VanDyke, Circuit Judges, and Karen E. Schreier,* District Judge.

Opinion by Judge Schreier

SUMMARY**

Federal Subject Matter Jurisdiction

The panel affirmed the district court's order remanding a removed case to state court for lack of federal subject matter jurisdiction.

Relatives of Ricardo Saldana, who allegedly died from COVID-19 at Glenhaven Healthcare nursing home, sued Glenhaven and other defendants in California state court, alleging state-law causes of action based on the allegation that Glenhaven failed to adequately protect Saldana. Glenhaven removed the case to federal court.

Affirming the district court's order granting plaintiffs' motion to remand the case to state court, the panel rejected Glenhaven's argument that the district court had three grounds for federal

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* The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

jurisdiction. First, the panel held that the district court lacked jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442, because Glenhaven did not act under a federal officer or agency's directions when it complied with mandatory directives to nursing homes from the Centers for Medicare and Medicaid Services, the Centers for Disease Control and Prevention, and the Department of Health and Human Services. Glenhaven's status as a critical infrastructure entity did not establish that it acted as a federal officer or agency, or that it carried out a government duty.

Second, the panel held that plaintiffs' claims were not completely preempted by the Public Readiness and Emergency Preparedness Act, which provides immunity from suit when the HHS Secretary determines that a threat to health constitutes a public health emergency, but provides an exception to this immunity for an exclusive federal cause of action for willful misconduct. In March 2020, the Secretary issued a declaration under the PREP Act "to provide liability immunity for activities related to medical countermeasures against COVID-19." The panel held that the HHS Office of General Counsel's Advisory Opinion on complete preemption was not entitled to *Chevron* deference because it was an opinion on federal court jurisdiction. Instead, the panel applied the two-part test set forth in *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020). The panel concluded that in enacting the PREP Act, Congress did not intend to displace the non-willful misconduct claims brought by plaintiffs related to the public health emergency, nor did it provide substitute causes of action for plaintiffs' claims. Thus, the federal

statutory scheme was not so comprehensive that it entirely supplanted state law causes of action.

Third, the panel held that the district court did not have jurisdiction under the embedded federal question doctrine, under which federal jurisdiction over a state law claim will lie if a federal issue is necessarily raised, actually disputed, substantial, and capable of resolution in federal court without disrupting the federal-state balance approved by Congress.

COUNSEL

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Mark E. Reagan and Jeffrey Lin, Hooper Lundy & Bookman P.C., San Francisco, California, for Amici Curiae California Association of Health Facilities and American Health Care Association.

Eric M. Carlson, Justice in Aging, Los Angeles, California, for Amicus Curiae Justice in Aging.

OPINION

SCHREIER, District Judge:

Glenhaven Healthcare LLC, Caravan Operations Corp., Matthew Karp, and Benjamin Karp (collectively, Glenhaven) appeal the district court's order remanding this case to state court for lack of federal subject matter jurisdiction. We have jurisdiction under 28 U.S.C. § 1447(d), and affirm.[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

Ricardo Saldana was a resident of Glenhaven Healthcare nursing home from 2014 to 2020. Saldana died at the Glenhaven nursing home on April 13, 2020, allegedly from COVID-19. In June 2020, four of Saldana's relatives, Jackie Saldana, Celia Saldana, Ricardo Saldana, Jr., and Maria Saldana (the Saldanas), sued Glenhaven in California Superior Court for Los Angeles County. The Saldanas allege that Glenhaven failed to adequately protect Ricardo Saldana from the COVID-19 virus. The complaint states four state-law causes of action: elder abuse, willful misconduct, custodial negligence, and wrongful death.

Glenhaven removed the case to the United States District Court for the Central District of California in June 2020, and the Saldanas moved to remand the case to state court. The district court found that it did

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[1] We also **GRANT** the pending motions for judicial notice. Docket 18; Docket 22.

not have subject matter jurisdiction to hear the case and granted the Saldanas' motion to remand. Glenhaven appeals, arguing that the district court has three independent grounds for federal jurisdiction: federal officer removal, complete preemption of state law, and the presence of an imbedded federal question. We agree with the district court and affirm.

II. STANDARD OF REVIEW

We review questions of statutory construction and subject matter jurisdiction de novo. *City of Oakland v. BP PLC*, 969 F.3d 895, 903 (9th Cir. 2020). When the federal officer removal statute, 28 U.S.C. § 1442, is one ground for removal, § 1447(d) permits appellate review of a district court's entire remand order. *BP P.L.C. v. Mayor of Balt.*, 141 S. Ct. 1532, 1538 (2021). "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c).

III. DISCUSSION

A. Federal Officer Removal

1. Legal Standard

Under 28 U.S.C. § 1442(a)(1), the federal officer removal statute, an action commenced in state court may be removed to federal court when it is "against or directed to …. [t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to

any act under color of such office ….” The “basic purpose” of the statute “is to protect the Federal Government from the interference with its operations that would ensue were a State able, for example, to arrest and bring to trial in a State court for an alleged offense against the law of the State, officers and agents of the Government acting within the scope of their authority.” *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 150 (2007) (cleaned up). The federal officer removal statute is to be “liberally construed,” but “a liberal construction nonetheless can find limits in [the statute’s] language, context, history, and purposes.” *Id*. at 147.

To remove a state court action under the federal officer removal statute, a defendant must establish that “(a) it is a person within the meaning of the statute; (b) there is a causal nexus between its actions, taken pursuant to a federal officer’s directions, and plaintiff’s claims; and (c) it can assert a colorable federal defense.” *Stirling v. Minasian*, 955 F.3d 795, 800 (9th Cir. 2020) (quoting *Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1099 (9th Cir. 2018)). Here, the parties do not dispute that each defendant is a “person” under the statute. *See* 1 U.S.C. § 1 (“person” includes “corporations, companies, associations, firms, partnerships … as well as individuals”). Defendants seeking removal “still bear the burden of proving by a preponderance of the evidence that the colorable federal defense and causal nexus requirements for removal jurisdiction are factually supported.” *Lake v. Ohana Mil. Cmtys., LLC*, 14 F.4th 993, 1000 (9th Cir. 2021) (cleaned up).

2. Whether Glenhaven Acted Under a Federal Officer's Directions

To determine whether there was a causal nexus between Glenhaven's actions and the Saldanas' claims, the court first considers whether Glenhaven's actions were taken "pursuant to a federal officer's directions," *Stirling*, 955 F.3d at 800, or while "acting under that officer." 28 U.S.C. § 1442(a)(1). A person or entity who acts under a federal officer or agency is one "'who lawfully assist[s]' a federal officer 'in the performance of his official duty'" and is "authorized to act with or for [federal officers or agents] in affirmatively executing duties under … federal law." *Watson*, 551 U.S. at 143 (cleaned up). The relationship between a federal officer or agency and a person or entity "acting under" the officer or agency "typically involves subjection, guidance, or control." *Id*. at 152. But "simply *complying*" with a law or regulation is not enough to "bring a private person within the scope of the statute." *Id*. In *Watson* the Supreme Court stated:

> A private firm's compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase "acting under" a federal "official." And that is so even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored.

Id. at 153. "The upshot is that a highly regulated firm cannot find a statutory basis for removal in the fact of federal regulation alone." *Id*.

Glenhaven argues that the federal government "conscript[ed] … private entities like Glenhaven to join in the fight [against COVID-19] through detailed and specific mandatory directives to nursing homes on the use and allocation of PPE, the administration of COVID-19 testing, intervention protocols, and virtually every other aspect of the operations of nursing homes during the pandemic." Though it acknowledges that compliance with federal laws, regulations, and rules does not "by itself" bring a defendant under the federal officer removal statute, Glenhaven claims that the "unprecedent[ed] circumstances" of COVID-19 resulted in federal directives and operational control amounting to more than compliance with government regulations.

Glenhaven points to memoranda it received from the Centers for Medicare and Medicaid Services (CMS), the Centers for Disease Control and Prevention (CDC), and the Department of Health and Human Services (HHS) during the COVID-19 pandemic to show that the "federal government and its agencies … became hyper-involved in the operational activities of nursing facilities in response to the pandemic." But the agency communications Glenhaven relies on show nothing more than regulations and recommendations for nursing homes, covering topics such as COVID-19 testing, use and distribution of personal protective equipment, and best practices to reduce transmission within congregate living environments. For example, one CMS memo identifies what healthcare staff "should" do in response to the pandemic, and it states what CMS "expects," "encourages," "advise[s]," and "recommend[s]." Similarly, a CDC communication

cited by Glenhaven identifies "recommendations" and steps that healthcare centers "should" take. Another memorandum published by the California Department of Public Health states that the agency "ensure[s] compliance with state licensing laws and federal certification regulations" on behalf of CMS. *Licensing and Certification Program*, Cal. Dep't of Pub. Health (Dec. 17, 2020), https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/LandCProgramHome.aspx. Without more than government regulations and recommendations, Glenhaven has failed to establish that it was "acting under" a federal official, and it has not identified a duty of the federal government that it performed.

Glenhaven also claims that, as a nursing home, its designation as part of the national critical infrastructure necessarily means that it acted on behalf of a federal official or that it carried out a government duty. The Saldanas do not dispute that nursing homes, including Glenhaven, are part of the nation's critical infrastructure. Glenhaven relies on a memorandum from the Cybersecurity and Infrastructure Security Agency (CISA) stating that the list of critical infrastructure workers was developed as "guidance" to "help state and local jurisdictions and the private sector identify and manage their essential workforce while responding to COVID-19." *CISA Releases Guidance on Essential Critical Infrastructure Workers During COVID-19*, Cybersecurity & Infrastructure Sec. Agency (Oct. 25, 2021), https://www.cisa.gov/news/2020/03/19/cisa-releases-guidance-essential-critical-infrastructure-workers-during-covid-19. Notably, the memorandum also states that the national critical infrastructure

list "does not impose any mandates on state or local jurisdictions or private companies," such as Glenhaven. *Id*.

"It cannot be that the federal government's mere designation of an industry as important—or even critical—is sufficient to federalize an entity's operations and confer federal jurisdiction." *Buljic v. Tyson Foods, Inc.*, 22 F.4th 730, 740 (8th Cir. 2021); *see also Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 406 (3d Cir. 2021). Thus, Glenhaven's status as a critical infrastructure entity does not establish that it acted under a federal officer or agency, or that it carried out a government duty.

Glenhaven has failed to substantiate its claims that it was conscripted to assist a federal officer or agency in performance of a government duty or that it was authorized to act for a federal officer. All that Glenhaven has demonstrated is that it operated as a private entity subject to government regulations, and that during the COVID-19 pandemic it received additional regulations and recommendations from federal agencies. Thus, Glenhaven was not "acting under" a federal officer or agency as contemplated by the federal officer removal statute. And because Glenhaven did not act under a federal officer, there is no causal nexus that allows removal under 28 U.S.C. § 1442.

B. Preemption Under the PREP Act

1. Legal Standard

Glenhaven argues that this case was properly removed to federal court because the Saldanas' claims are completely preempted by the Public Readiness and Emergency Preparedness (PREP) Act, 42 U.S.C. §§ 247d-6d, 247d-6e. "Complete preemption is 'really a jurisdictional rather than a preemption doctrine, as it confers exclusive federal jurisdiction in certain instances where Congress intended the scope of a federal law to be so broad as to entirely replace any state-law claim.'" *Dennis v. Hart*, 724 F.3d 1249, 1254 (9th Cir. 2013) (emphasis added) (quoting *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 945 (9th Cir. 2009)). Put another way, "[c]omplete preemption … applies only where a federal statutory scheme is so comprehensive that it entirely supplants state law causes of action." *Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 947 (9th Cir. 2014) (quoting *Dennis*, 724 F.3d at 1254). To determine whether a claim is completely preempted, the court asks whether Congress "(1) intended to displace a state-law cause of action, and (2) provided a substitute cause of action." *City of Oakland*, 969 F.3d at 906 (citing *Hansen v. Grp. Health Coop.*, 902 F.3d 1051, 1057 (9th Cir. 2018)). Complete preemption is "rare." *Hansen*, 902 F.3d at 1057 (quoting *Retail Prop. Tr.*, 768 F.3d at 947). The Supreme Court has identified only three complete preemption statutes: § 301 of the Labor Management Relations Act, § 502(a) of the Employee Retirement Income Security

Act of 1974 (ERISA), and §§ 85 and 86 of the National Bank Act. *City of Oakland*, 969 F.3d at 905-06.

Complete preemption is an exception to the well-pleaded complaint rule. *Id*. at 905. Under the well-pleaded complaint rule, a civil action arises under federal law for purposes of federal question jurisdiction when a federal question appears on the face of the complaint. *Id*. at 903 (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). Under the rule, removal must be based on the plaintiff's claims and cannot be based on a defendant's federal defense. *Id*. at 903-04. But the exception for complete preemption, the "artful-pleading doctrine[,] … allows removal where federal law completely preempts a plaintiff's state-law claim." *Id*. at 905 (quoting *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998)).

2. The PREP Act

Passed by Congress in 2005, the PREP Act provides that "a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure …." 42 U.S.C. § 247d-6d(a)(1). Both "covered countermeasure" and "covered person" are terms defined in the Act. *See* § 247d-6d(i)(1)-(2). The PREP Act is invoked when "the [HHS] Secretary makes a determination that a disease or other health condition or other threat to health constitutes a public health emergency, or that there is a credible risk that the disease, condition, or threat may in the future constitute such an emergency …." § 247d-6d(b)(1).

The Secretary "controls the scope of immunity through the declaration and amendments, within the confines of the PREP Act." *Maglioli*, 16 F.4th at 401. The Secretary's declaration "may specify[] the manufacture, testing, development, distribution, administration, or use of one or more covered countermeasures." § 247d-6d(b)(1). The PREP Act created the Covered Countermeasure Process Fund to compensate "eligible individuals for covered injuries directly caused by the administration or use of a covered countermeasure pursuant to such declaration …." § 247d-6e(a).

Section 247d-6d(d)(1) provides that "the sole exception to the immunity from suit and liability of covered … shall be for an exclusive Federal cause of action against a covered person for death or serious physical injury proximately caused by willful misconduct … by such covered person." Such an action "shall be filed and maintained only in the United States District Court for the District of Columbia." § 247d-6d(e)(1). The term "willful misconduct" is defined in the Act. § 247d-6d(c)(1)(A). An individual may not bring a suit under § 247d-6d(d)(1) unless the individual has exhausted the remedies available under § 247d-6e(a), the Covered Countermeasure Process Fund. § 247d-6e(d)(1).

In March 2020, the Secretary issued a declaration under the PREP Act "to provide liability immunity for activities related to medical countermeasures against COVID-19." Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg.

15,198, 15,198 (Mar. 17, 2020). The declaration provided immunity for covered persons for the use of covered measures, including "any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19 …." *Id*. at 15,202. The Secretary has issued subsequent amended declarations throughout the pandemic. *See* Seventh Amendment to Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 86 Fed. Reg. 14,462 (Mar. 16, 2021).

3. Whether the PREP Act is a Complete Preemption Statute

Glenhaven's complete preemption argument relies on the HHS Secretary's and the HHS Office of General Counsel's respective conclusions that the PREP Act is a complete preemption statute. Fifth Amendment to the Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 86 Fed. Reg. 7874 (Feb. 2, 2021); Dep't Health & Hum. Servs., General Counsel Advisory Opinion 21-01 (Jan. 8, 2021). But "[c]omplete preemption is really a jurisdictional rather than a preemption doctrine[.]" *Dennis*, 724 F.3d at 1254 (internal quotation omitted). And an agency's opinion on federal court jurisdiction is not entitled to *Chevron* deference. *Dandino, Inc. v. U.S. Dep't of Transp.*, 729 F.3d 917, 920 n.1 (9th Cir. 2013). Thus, Glenhaven's reliance on the Advisory Opinion is misplaced and not a sufficient basis to establish complete preemption and thus federal jurisdiction.

Instead of deferring to an opinion of the Office of General Counsel, this court applies the two-part test articulated in *City of Oakland*: (1) did Congress intend to displace a state-law cause of action and (2) did Congress provide a substitute cause of action? 969 F.3d at 906. Turning to the statute's text, the PREP Act states that it provides *immunity* under certain conditions for "covered person[s]" who use "covered countermeasure[s]." 42 U.S.C. § 247d-6d(a)(1). Subsection (d) is the only subsection that explicitly states that there shall be an "exclusive Federal cause of action," limited to claims against "covered persons" for "willful misconduct," as the terms are defined in the Act. § 247d-6d(d). The provision of one specifically defined exclusive federal cause of action undermines Glenhaven's argument that Congress intended the Act to completely preempt all state-law claims related to the pandemic. The text of the statute shows that Congress intended a federal claim only for willful misconduct claims and not claims for negligence and recklessness. § 247d-6d(c)(1)(B). An administrative compensation fund, not an exclusive federal cause of action, provides the only redress for claims brought under the Act, other than those alleging "willful misconduct." The PREP Act neither shows the intent of Congress to displace the non-willful misconduct claims brought by the Saldanas related to the public health emergency, nor does it provide substitute causes of action for their claims. Thus, under this court's two-part test, the PREP Act is not a complete preemption statute.

Glenhaven argues that the PREP Act may preempt one of the Saldanas' claims—the second cause of action under state law for willful misconduct.

Whether the claim is preempted by the PREP Act turns on whether any of the conduct alleged in the complaint fits the statute's definitions for such a claim. But finding that one claim *may* be preempted is different than finding that the "federal statutory scheme is so comprehensive that it *entirely supplants* state law causes of action," such as the Saldanas' other causes of action for elder abuse, custodial negligence, and wrongful death. *Retail Prop. Tr.*, 768 F.3d at 947 (emphasis added) (quoting *Dennis*, 724 F.3d at 1254); *see also Caterpillar*, 482 U.S. at 393 (distinguishing between complete preemption and raising a federal defense); *Toumajian v. Frailey*, 135 F.3d 648, 654 (9th Cir. 1998) (distinguishing between complete preemption and "conflict preemption" of a particular claim). Thus, the district court's remand order for lack of federal subject matter jurisdiction based upon complete preemption was proper.

C. Embedded Federal Question

Glenhaven argues that the district court has jurisdiction under the embedded federal question doctrine. Under this doctrine, "federal jurisdiction over a state law claim will lie if a federal issue is (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013). The well-pleaded complaint rule applies when determining whether the embedded federal question doctrine applies. *Cal. Shock Trauma Air Rescue v. State Comp. Ins. Fund*, 636 F.3d 538, 542 (9th Cir. 2011).

Here, the Saldanas' complaint states four causes of action: elder abuse, willful misconduct, custodial negligence, and wrongful death. The claims in the complaint are raised under California law and do not raise questions of federal law on the face of the complaint. Glenhaven seeks to raise a federal defense under the PREP Act, but a federal defense is not a sufficient basis to find embedded federal question jurisdiction. *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1090 (9th Cir. 2009).

Glenhaven argues that the Saldanas' willful misconduct claim raises a federal issue under the PREP Act. Glenhaven does not identify how a right or immunity created by the PREP Act must be an essential element of the willful misconduct claim as stated in the complaint. On its face, the issue is not a "substantial" part of the Saldanas' complaint because, according to the complaint, only some of the steps Glenhaven allegedly took, and did not take, may have involved a "covered person," under the PREP Act. Thus, remand is proper because the complaint does not present an embedded federal question.

IV. CONCLUSION

Glenhaven did not act under a federal officer or carry out a federal duty when it provided care to Ricardo Saldana. The PREP Act does not completely preempt the Saldanas' claims, and the possible preemption of one claim cannot be determined by this court or the district court. And there is no embedded federal question in the Saldanas' complaint. Thus, the district court lacked subject matter jurisdiction, and the suit was properly remanded to state court.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 20-5631 FMO (MAAx)**
Date **October 14, 2020**
Title **Jackie Saldana, *et al.* v. Glenhaven Healthcare LLC, *et al.***

Present: The Honorable Fernando M. Olguin, United States District Judge

Vanessa Figueroa	None	None
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorney Present for Plaintiff(s):	Attorney Present for Defendant(s):
None Present	None Present

Proceedings: **(In Chambers) Order Re: Motion to Remand**

Having reviewed and considered all the briefing filed with respect to plaintiffs' Motion to Remand (Dkt. 11, "Motion"), the court concludes that oral argument is not necessary to resolve the Motion, *see* Fed. R. Civ. P. 78(b); Local Rule 7-15; *Willis v. Pac. Mar. Ass'n*, 244 F.3d 675, 684 n. 2 (9th Cir. 2001), and orders as follows.

BACKGROUND

On June 10, 2020, plaintiffs Jackie Saldana, Celia Saldana, Ricardo Saldana, Jr., and Maria Saldana, individually and as successors and heirs of Ricardo Saldana ("Saldana"), deceased ("plaintiffs") filed a First Amended Complaint ("FAC") in the Los Angeles County Superior Court ("state court") against defendants Glenhaven Healthcare LLC ("Glenhaven"), Caravan Operations Corp., Matthew Karp, and Benjamin Karp (collectively, "defendants"). (*See* Dkt. 3, Notice of Removal ("NOR") at ¶ 1); (Dkt. 3-7, FAC). Plaintiffs allege that defendants improperly and inadequately protected Saldana from the COVID-19 virus during the coronavirus pandemic. (*See* Dkt. 3-7, FAC at ¶¶ 20-35). Saldana was an elderly resident of Glenhaven's nursing home in Glendale, California. (*See id.* at ¶ 20). Plaintiffs allege that although California and Los Angeles declared a state of emergency in early March 2020, Glenhaven not only failed to implement appropriate safety measures, but "stopp[ed] its staff from protecting themselves and the residents" from the coronavirus. (*Id.* at ¶ 25). For instance, supervisors at Glenhaven told staff that they could not wear their own masks, even when employees indicated that they had been sick. (*See id.* at ¶ 26). And when the local fire department provided boxes of masks to the facility, a Glenhaven supervisor locked them away rather than distributing them to employees. (*See id.* at ¶ 27). Glenhaven supervisors also did not disclose that one of its nurses had previously worked at a facility that was shut down because of uncontrolled COVID-19 infections and that the nurse had been exposed to the virus. (*See id.* at ¶ 28). Instead,

supervisors downplayed the virus and "compared [it] to the flu." (*Id.* at ¶ 29). Finally, in late March 2020, Glenhaven placed a resident who had shared a room with a COVID-19 positive resident in Saldana's room. (*See id.* at ¶ 34). Saldana subsequently began to develop a fever and other symptoms of the virus, and ultimately died on April 13, 2020, from the coronavirus. (*See id.* at ¶ 35). Plaintiffs' FAC asserts four state law claims: (1) elder abuse; (2) willful misconduct; (3) custodial negligence; and (4) wrongful death. (*See id.* at ¶¶ 36-61).

On June 24, 2020, defendants removed the action on the basis of federal question jurisdiction pursuant to 28 U.S.C. § 1331 and the federal officer removal statute, 28 U.S.C. § 1442(a)(1). (*See* Dkt. 3, NOR at ¶ 6). Having reviewed and considered all the briefing filed with respect to plaintiffs' Motion (Dkt. 11), the court concludes that this action must be remanded to the state court for lack of subject matter jurisdiction. *See* 28 U.S.C. § 1447(c).

LEGAL STANDARD

Removal of a civil action from the state court where it was filed is proper if the action might have originally been brought in federal court. *See* 28 U.S.C. § 1441(a) ("Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court[.]"). "The burden of establishing federal jurisdiction is upon the party seeking removal[.]" *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir. 1988); *see*

Abrego Abrego v. The Dow Chemical Co., 443 F.3d 676, 684 (9th Cir. 2006) (*per curiam*) (noting the "longstanding, near-canonical rule that the burden on removal rests with the removing defendant"). As such, any doubts are resolved in favor of remand. *See Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) ("We strictly construe the removal statute against removal jurisdiction."). Indeed, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). In general, under the "well-pleaded complaint" rule, courts look to the complaint to determine whether an action falls within the bounds of federal question jurisdiction. *See Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 944 (9th Cir. 2009).

DISCUSSION

I. SUBJECT MATTER JURISDICTION.

Defendants contend that federal question jurisdiction exists in this action because plaintiffs' claims arise under a federal statute, namely The Public Readiness and Emergency Preparedness Act, ("PREP Act"), 42 U.S.C. §§ 247d-6d, 247-6e. (*See* Dkt. 3, NOR at ¶¶ 6, 9-11). Defendants argue that the PREP Act completely preempts plaintiffs' state-law claims, and even if it did not, federal question jurisdiction exists because the claims raise a federal issue.[1] (*Id.* at ¶ 18). With respect to complete

[1] The court notes that the allegations in the FAC do not support a claim that Saldana's death resulted from defendants' administration to or use by Saldana of a covered countermeasure. (*See, generally*, Dkt. 3-7, FAC); (*see also*

preemption, the PREP Act is "not one of the three statutes that the Supreme Court has determined has extraordinary preemptive force." *See City of Oakland v. BP PLC*, 969 F.3d 895, 907 (9th Cir. 2020); *Martin v. Serrano Post Acute LLC*, 2020 WL 5422949, *1-2 (C.D. Cal. 2020) (finding that PREP Act did not preempt plaintiffs' state law claims relating to defendants' alleged "fail[ure] to take proper precautions to prevent the spread of COVID-19 in the [nursing] facility, and fail[ure] to react properly to the infections that became present in the facility[,]" which led to decedent's death from COVID-19). Moreover, defendants "make a lengthy argument in favor of their immunity under the PREP Act, but mere immunity against state law or preemption of state law is not the equivalent of complete preemption and does nor provide removal jurisdiction."[2] *Martin*, 2020 WL 5422949, at *2; *see also Caterpillar Inc. v. Williams*, 482 U.S. 386, 393, 107 S.Ct. 2425, 2430 (1987) ("[I]t is now settled law that a case may *not* be removed to federal court on the basis of a federal

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Dkt. 20, Plaintiffs' Reply to Defendants' Opposition to Motion to Remand at 5).

[2] As the court in *Martin* succinctly put it: "It is largely irrelevant that federal courts have exclusive jurisdiction under the PREP Act because none of the claims in the complaint, on its face, are brought under that Act. If Defendants believe that some or all of Plaintiffs' state law claims are barred by the PREP Act, the appropriate response is to file a demurrer in state court. If the state court dismisses the state law claims, Plaintiffs could then decide if they wish to file claims under the PREP Act in the District of the District of Columbia, the court with exclusive jurisdiction over such claims." *Martin*, 2020 WL 5422949, at *2 (citing 42 U.S.C. § 247d-6d(e)(1)).

defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint[.]") (emphasis in original). Accordingly, the court finds that the PREP Act does not confer federal question jurisdiction.[3]

Defendants also contend that removal is warranted under the federal officer removal statute, 28 U.S.C. § 1442(a)(1).[4] (*See* Dkt. 3, NOR at ¶¶ 20-43); (Dkt. 18, Opp. at 16-23). Although the federal officer removal statute must be "liberally construed[,]" *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 147, 127 S.Ct. 2301, 2305 (2007) (internal quotation marks omitted), the court finds that it does not confer jurisdiction in this instance. Defendants argue that "in taking steps to prevent the spread of COVID-19, [they] did so in compliance with CDC and CMS directives, which were aimed at helping achieve

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[3] Nor does federal question jurisdiction exist based on defendants' contention that plaintiffs' state-law claims present a substantial, embedded question of federal law. (*See* Dkt. 18, Defendants['] Opposition to Motion to Remand ("Opp.") at 4-9; Dkt. 3, NOR at ¶¶ 18-19); *see Martin*, 2020 WL 5422949, at *3 ("Defendants [ ] make no attempt to show that this particular case raises substantial questions important to the federal system as a whole, and it is clear that it does not.") (internal quotation marks omitted).

[4] Under the federal officer removal statute, a case may be removed by "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue." 28 U.S.C. § 1442(a)(1).

the federal government's efforts at stopping or limiting the spread of COVID-19." (Dkt. 18, Opp. at 17). However, "[t]he directions Defendants point to are general regulations and public directives regarding the provision of medical services[,]" which are insufficient. *Martin*, 2020 WL 5422949, at *1; *see Watson*, 551 U.S. at 153, 147 U.S. at 2308 ("A private firm's compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase 'acting under' a federal 'official.' And that is so even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored.").

II. FEES AND COSTS.

Plaintiffs seek attorney's fees and costs for defendants' "frivolous" removal. (*See* Dkt. 11, Motion at 29-30); 28 U.S.C. § 1447(c). Plaintiffs' request is denied as the court finds that defendants did not lack an "objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141, 126 S.Ct. 704, 711 (2005) ("Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied.")

This order is not intended for publication. Nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.

CONCLUSION

Based on the foregoing, IT IS ORDERED that:

1. Plaintiffs' Motion to Remand (**Document No. 11**) is **granted in part** and **denied in part**.

2. The above-captioned action shall be **remanded** to the Superior Court of the State of California for the County of Los Angeles, 111 N. Hill St., Los Angeles, CA 90012, for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1447(c). Plaintiffs' request for attorney's fees is **denied**.

3. The Clerk shall send a certified copy of this Order to the state court.

4. Except as set forth in this Order, all pending motions are denied as moot.

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APPENDIX C

FILED

APR 18 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACKIE SALDANA; CELIA SALDANA; RICARDO SALDANA, Jr.; MARIA SALDANA, as individuals and as successors and heirs to Ricardo Saldana, deceased,	No. 20-56194 D.C. No. 2:20-cv-05631-FMO-MAA Central District of California, Los Angeles
Plaintiffs-Appellees,	
v.	ORDER
GLENHAVEN HEALTHCARE LLC, a California corporation; CARAVAN OPERATIONS CORP., a California corporation; MATTHEW KARP, an individual; BENJAMIN KARP, an individual,	
Defendants-Appellants.	

Before: R. NELSON and VANDYKE, Circuit Judges, and SCHREIER,[1] District Judge.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote. Fed. R. App. P. 35. The panel unanimously votes to deny the petition for panel rehearing and for rehearing en banc. Rehearing is DENIED.

[1] The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota, sitting by designation.

APPENDIX D

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JACKIE SALDANA, CELIA SALDANA, RICARDO SALDANA JR., and MARIA SALDANA, as individuals and as successors and heirs of RICARDO SALDANA, deceased,	Case No.: 20STCV19417
Plaintiffs,	**COMPLAINT AND DEMAND FOR JURY TRIAL**
vs.	1. Elder Abuse;
GLENHAVEN HEALTHCARE LLC, a	2. Willful Misconduct;
	3. Negligence; and
	4. Wrongful Death.

California corporation;
CARAVAN OPERATIONS
CORP., a California corporation;
MATTHEW KARP, an individual;
BENJAMIN KARP, an individual,
and DOES 1 through 100, inclusive,
Defendants.

Plaintiffs allege with respect to their own acts and on information and belief with respect to all other matters:

GENERAL ALLEGATIONS

1.

INTRODUCTION

1. This is a case about profits over people. The Saldana family trusted the Glenhaven Healthcare nursing home to care for and protect Ricardo Saldana. Glenhaven grossly betrayed their trust. During the midst of the deadly coronavirus pandemic, Glenhaven intentionally concealed that a working staff member had been heavily exposed to the coronavirus while prohibiting its staff members from wearing masks and gloves. As a result, roughly ten patients, including Ricardo Saldana, were infected with the coronavirus and died.

2. Ricardo Saldana's wife and children bring this action against Glenhaven for Ricardo's wrongful death. Glenhaven took intentional and cruel actions in its response, and lack thereof, to the coronavirus until it was too late. It failed to provide any protective

equipment such as masks to employees, prohibited employees from bringing or wearing their own protective equipment, and went so far as to lock up protective equipment that the local fire department delivered. Glenhaven took no precautions to identify or isolate employees or residents infected with or exposed to the virus. To the contrary, it concealed its knowledge that an employee had been exposed to the virus for roughly two weeks and had the employee interact with other employees and residents. Similarly, it moved a resident who was exposed to the virus into Ricardo's room without telling Ricardo or his family.

3. Glenhaven sought to avoid scrutiny from local regulators, to save money, and to minimize the knowledge of existence of the virus to the residents and employees until it was too late. As a result, the virus ran rampant through Glenhaven's facility, infecting residents and employees.

2.

THE PARTIES

4. Decedent Ricardo Saldana ("Ricardo") resided, at all times herein mentioned, in Los Angeles County. While alive, Ricardo lived for the last approximately six years of his life in the Glenhaven Healthcare nursing home in Glendale, California. He died from the coronavirus on or about April 13, 2020.

5. Plaintiff Celia Saldana ("Celia") resides, now and at all times herein mentioned, in Los Angeles County. Ricardo is Celia's late husband.

6. Plaintiff Jackie Saldana ("Jackie") resides, now and at all times herein mentioned, in Los Angeles County. Ricardo was Jackie's father.

7. Plaintiff Ricardo Saldana Jr. ("Ricardo Jr.") resides, now and at all times herein mentioned, in Los Angeles County. Ricardo was Ricardo Jr.'s father.

8. Plaintiff Maria Saldana ("Maria") resides, now and at all times herein mentioned, in Los Angeles County. Ricardo was Maria's father.

9. Ricardo has no other living immediate relatives other than Celia, Jackie, Ricardo Jr. and Maria (collectively the "Plaintiffs"). Plaintiffs are the successors in interest to the Decedent Ricardo Saldana and with this complaint is an executed affidavit in compliance with CCP § 377.32, and thereby proceeds as successor in interest to the claims of Decedent Ricardo Saldana as stated herein, and brings this action as individuals as such. See Declaration of Jackie Saldana attached as Exhibit 1. Plaintiffs brings this combined survival action on behalf of Ricardo's estate and also this wrongful death action under the provisions of Code of Civil Procedure § 377.60 which provides that Plaintiffs, as the personal representative of the Decedent, may bring this wrongful death action on behalf of the decedent's heirs: "A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by … by the decedent's personal representative on their behalf."

10. Defendant Glenhaven Healthcare, LLC ("Glenhaven") is, and at all relevant times was, a

corporation duly organized and existing under and by virtue of the laws of the State of California and authorized to transact and transacting business in the State of California, with its headquarters in the County of Los Angeles.

11. Defendant Caravan Operations Corp. ("Caravan") is, and at all relevant times was, a corporation duly organized and existing under and by virtue of the laws of the State of California and authorized to transact and transacting business in the State of California, with its headquarters in the County of Los Angeles.

12. Defendant Matthew Karp is, and at all relevant times was, a resident of the County of Los Angeles.

13. Defendant Benjamin Karp is, and at all relevant times was, a resident of the County of Los Angeles.

14. Upon information and belief, Matthew Karp and Benjamin Karp are the sole owners of Caravan and Glenhaven. There exists, and at all times mentioned existed, a unity of interest and ownership between Defendants Matthew Karp, Benjamin Karp, Caravan and Glenhaven such that any individuality and separateness between them has ceased, and defendant Caravan and Glenhaven are the alter ego of each other defendant that Caravan and Glenhaven are, and at all times herein mentioned were, a mere shell, instrumentality, and conduit through which defendants Matthew Karp and Benjamin Karp carried on their nursing home business. These

Defendants intermingle monies and do not respect the corporate formalities necessary to operate as separate entities. As a result, these defendants are collectively referred to herein as "Glenhaven."

15. Adherence to the fiction of the separate existence of defendants as entities distinct from each other would permit an abuse of the corporate privilege and would promote injustice by protecting Defendants Caravan, Matthew Karp, and Benjamin Karp from prosecution for the wrongful acts committed by them under the name Glenhaven.

16. Additionally, Plaintiffs are informed and believe that Defendants were in a joint venture to provide nursing home services that are the subject of this lawsuit. They combined their property, skill, and knowledge with the intent to carry out a single business undertaking. Each of the Defendants has an ownership interest in the business and joint control over the business and share the profits and losses of the business.

17. The true names and capacities, whether individual, corporate, associate or otherwise, of Defendants named herein as Does 1 through 100, inclusive, are unknown to plaintiff, who therefore sues said Defendants by such fictitious names. Each of the Defendants named herein as a Doe is responsible in some manner for the events and happenings hereinafter referred to, and some of plaintiff's damages as herein alleged were proximately caused by such defendants. Plaintiffs will seek leave to amend this complaint to show said

Defendants' true names and capacities when the same have been ascertained.

18. The true names and capacities, whether individual, corporate, associate or otherwise, of Defendants named herein as Does 1 through 100, inclusive, are unknown to plaintiffs, who therefore sue said defendants by such fictitious names. Each of the Defendants named herein as a Doe is responsible in some manner for the events and happenings hereinafter referred to, and some of plaintiffs' damages as herein alleged were proximately caused by such defendants. Plaintiffs will seek leave to amend this complaint to show said Defendants' true names and capacities when the same have been ascertained.

19. At all times mentioned herein, each of the Defendants was the agent or employee of each of the other Defendants, or an independent contractor, or joint venturer, and in doing the things herein alleged, each such Defendant was acting within the purpose and scope of said agency and/or employment and with the permission and consent of each other Defendant.

3.

FACTUAL BACKGROUND

20. Ricardo Saldana was an elderly resident of Glenhaven's nursing home in Glendale, California. In May of 2014, he suffered from a stroke and was admitted to Verdugo Hills Hospital. After a couple of weeks in the hospital he stabilized and Verdugo Hills discharged him to Elms Convalescent Hospital, a

skilled nursing facility. In or about 2017 or 2018, Elms Convalescent Hospital was acquired by Glenhaven.

21. At all times relevant, Ricardo had impairments that required total care. He was in the custody of Glenhaven and wholly dependent upon Glenhaven for all activities of daily life, including food and feeding, clothing, laundry, hydration, hygiene, mobility, medication, and treatments. He was also totally dependent upon Glenhaven for nursing care to assess changes in his condition, to report changes in his condition to the attending physician, and when appropriate to arrange for him to be transferred to a hospital.

22. At all times mentioned, Glenhaven accepted the responsibility to provide such caretaking and custodial services and had custody of Ricardo. Each of these services are services which a nursing facility operator is required by law to provide. (Health & Safety C. § 1418.6; 22 CCR. §§ 72301, 72303, 72527(a)(3), 72527(a)(12).) Despite Ricardo's impairments and need for assistance, up until March of 2020 he was stable and still able to interact with his wife Celia and children, Jackie, Maria and Ricardo Jr.

23. On January 20, 2020, the first case of coronavirus infection in the United States appeared. By March 4, 2020, the virus spread to such an extent and posed such a danger that California's Governor, Gavin Newsom, declared a state of emergency in California. On the same day, the Los Angeles County Board of Supervisors and the Los Angeles County

Department of Public Health similarly declared a local and public health emergency in the County of Los Angeles.

24. The elderly and particularly those with underlying health problems are most vulnerable to the coronavirus. In late February, a coronavirus outbreak at a nursing home in Washington infected two-thirds of its residents and killed 37 people. The media widely covered this story. It became quickly apparent that nursing homes needed to promptly take reasonable measures to protect their patients from exposure to the coronavirus. Such measures include testing of residents and employees, restricting visitors, requiring employees to use face masks, gloves, and gowns, and isolating employees and residents who are suspected or known carriers of the virus.

25. At the same time that California and Los Angeles County were declaring a state of emergency, Glenhaven failed to implement appropriate safety measures. To the contrary, Glenhaven's leadership was stopping its staff from protecting themselves and the residents. Glenhaven was primarily operated by two people. Carrie Marks ("Marks") is the head administrator of the facility and Marco Gary ("Gary") heads the department of staff development and is himself a nurse. Both of these individuals have the ability to hire and fire staff and Marks is an employee of both Glenhaven and Caravan.

26. Through March of 2020, Glenhaven did not provide employees with any personal protective equipment ("PPE"). On a number of occasions,

members of the nursing staff brought their own masks and bandanas to wear while working because of their concerns for the virus. Gary told such staff members to take off their masks and bandanas and that they were not allowed. When Gary told one nurse that she was not allowed to wear a mask, she told him that she was sick and needed to wear a mask to protect the patients and employees. Despite her pleading, and her illness, Gary responded that she was not allowed to wear a mask.

27. Employees questioned Gary and Marks about this policy. They responded that the protective items were not necessary because no one would get sick. In mid-March of 2020, the local fire department even delivered boxes of masks to the facility. Instead of distributing the masks to staff, Marks locked the masks in a cabinet and would not allow employees to use them.

28. Around the same time, Susana San Andreas, a nurse working at Glenhaven, advised Marks that she had also been working at a facility in Burbank which was being shut down because of uncontrolled COVID-19 infections and that residents there exposed her to the virus. Glenhaven did not tell any of the staff about San Andreas' exposure and continued to allow San Andreas to work at Glenhaven.

29. Roughly a week later, Marks held a staff meeting at Glenhaven. Marks downplayed the virus and reassured the staff that no one was getting sick. She compared the coronavirus to the flu. She did not mention San Andreas' exposure.

30. Around this time, a staff member at Glenhaven called Jackie and told her about her concerns for Ricardo because Glenhaven was not allowing staff to wear masks. She begged Jackie to contact the government regulators. Jackie called the Department of Public Health and reported the situation.

31. Approximately a week later, on or about April 1, 2020, Marks held a second in-service at Glenhaven where she told staff that a nurse had been exposed to the virus. She also said that she and the rest of the supervisors would no longer hide anything. She advised staff that Glenhaven would start allowing masks to be worn, but only masks provided by Glenhaven. Following the meeting, Glenhaven provided paper surgical masks to the staff but only permitted each staff member to use one mask per eight-hour shift.

32. Even through April of 2020 as Glenhaven began to provide first paper masks and then other items such as disposable gowns, supply continued to be a problem. Glenhaven frequently ran out of masks and gowns forcing staff to finish out hours of their shifts without clean equipment rather than purchasing additional equipment for the facility.

33. Even though Glenhaven had begun to implement some safety measures in early April, the virus had already spread through the staff and residents. It was not until on or about April 7th through on or about April 9th that the facility began to test staff and patients. Before that, Glenhaven knew that it had staff and residents who were both

exposed to the virus and who also carried the virus yet it was not testing people. Glenhaven was not doing so specifically for fear that there would be positive results which it would then need to report. The testing that was conducted did in fact identify people with the virus.

34. Despite its awareness of the virus in the facility and minor steps that it took to address the spread, the leadership at Glenhaven still did not implement an effective policy for isolating proven or suspected carriers of the coronavirus. As a result, Glenhaven transferred a resident who had shared a room with a COVID-19 positive resident to a two bed room with Ricardo in late March.

35. Prior to this move, Ricardo did not show any signs or symptoms. Once the other person was moved into the room with Ricardo, he began to develop a fever and other symptoms of the coronavirus. Ricardo's condition continued to degrade and the staff attempted to treat the condition with medication which was known at the time to be contra-indicated for coronavirus. Ultimately, Ricardo died on April 13, 2020 from the coronavirus.

4.

FIRST CAUSE OF ACTION

(ELDER ABUSE)

PLAINTIFFS FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS AND DOES 1

THROUGH 100, INCLUSIVE, AND EACH OF THEM, FOR ELDER ABUSE, ALLEGE:

36. Plaintiffs incorporate by reference each and every paragraph of the General Allegations as though set forth in full in this cause of action.

37. Ricardo was at all times elderly within the meaning of Welf. & Inst. C. § 15610.27 owing to the fact that he resided in the State of California, and was over the age of 65.

38. At all times mentioned, each of the defendants had care or custody of the Ricardo.

39. By virtue of the foregoing, Defendants and each of them have failed to protect Ricardo from health and safety hazards and committed neglect as defined at Welf. & Inst. Code § 15610.57.

40. During the aforesaid periods during which Defendants and each of them had care or custody of the Deceased, he was intentionally and/or recklessly exposed to the coronavirus and not provided with basic necessary custodial care such as feeding or bathing by Glenhaven employees in appropriate protective equipment.

41. By virtue of the foregoing, at all times during their care and treatment of the Deceased, Defendants have acted with recklessness.

42. By virtue of the foregoing, in addition to pre-death pain and suffering damages under Welf. & Inst. Code § 15657, Plaintiffs are entitled to

attorneys' fees unilaterally to them, under the same provision of law.

43. Defendants' conduct described herein was intended by the defendants to cause injury to plaintiffs or was despicable conduct carried on by the Defendants with a willful and conscious disregard of the rights of Plaintiffs, or subjected Plaintiffs to cruel and unjust hardship in conscious disregard of Plaintiffs' rights, or was an intentional misrepresentation, deceit, or concealment of a material fact known to the defendants with the intention to deprive Plaintiffs of property, legal rights or to otherwise cause injury, such as to constitute malice, oppression or fraud under California Civil Code section 3294, thereby entitling Plaintiffs to punitive damages in an amount appropriate to punish or set an example of Defendants.

44. Defendants' conduct described herein was undertaken by the corporate Defendants' officers or managing agents, identified herein as DOES 1 through 100, inclusive, who were responsible for claims supervision and operations, underwriting, communications and/or decisions. The aforementioned conduct of said managing agents and individuals was therefore undertaken on behalf of the corporate Defendants. Said corporate Defendants further had advance knowledge of the actions and conduct of said individuals whose action and conduct were ratified, authorized, and approved by managing agents whose precise identities are unknown to Plaintiffs at this time and are therefore identified and designated herein as DOES 1 through 100.

5.

SECOND CAUSE OF ACTION

(Willful Misconduct)

PLAINTIFFS FOR A SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS AND DOES 1 THROUGH 100, INCLUSIVE, AND EACH OF THEM, FOR WILFUL MISCONDUCT, ALLEGE:

45. Plaintiffs incorporate by reference each and every paragraph of the General Allegations as though set forth in full in this cause of action.

46. At all times during the periods of their care of Ricardo, each defendant knew or should have known that their failure to comply with the standard of care, by providing care in which healthcare providers lacked appropriate safety equipment, and by not employing reasonable custodial policies for isolating COVID positive residents, all posed a peril to the Deceased.

47. At all times mentioned during the periods of their care of the Deceased, each defendant knew or should have known that the peril posed by their failure to their failure to comply with the standard of care, by providing care which a health care providers in appropriate safety equipment and employing reasonable custodial policies for isolating COVID positive residents, exposed Ricardo to the high probability of his injury or death.

48. At all times mentioned above Defendants, and each of them, knowingly disregarded the aforesaid peril and high probability of injury and in doing so failed to comply with their duties under the standard of care as set forth above, as follows:

(a) Forbidding staff from wearing appropriate PPE;

(b) Failing to provide staff with PPE;

(c) Failing to provide staff with adequate PPE;

(d) Failing to isolate suspected or identified COVID-19 carriers from staff or residents; and

(e) Failing to disclose known or suspected COVID-19 carriers to staff and/or residents.

49. Defendants had made certain financial and budgetary decisions—at the highest corporate levels—regarding their operation based solely on the need to enhance the profitability of their operation. Among these decisions was the decision to limit its purchase of PPE such that it could not meet the needs of its residents, including Ricardo. As a foreseen and predictable result of these cut-backs, residents and patients — including Deceased—were exposed to the coronavirus. These changes were knowingly in violation of basic and humane care responsibilities.

50. By virtue of the foregoing, Defendants and each of them have acted in conscious disregard of the probability of injury to the Deceased, and because he was helpless to protect himself from exposure to the virus and Defendants failure and refusal to provide

such basic care and services is despicable. Accordingly, Defendants have each acted with malice.

51. By virtue of the foregoing, Defendants and each of them have acted despicably, and have subjected the Deceased to cruel and unjust hardship in conscious disregard of his rights and safety. Accordingly, Defendants have each acted with oppression.

52. By virtue of the foregoing, punitive damages should be assessed against Defendants and each of them, in a sum according to proof at trial.

6.

THIRD CAUSE OF ACTION

(Negligence)

PLAINTIFFS, INDIVIDUALLY, FOR A THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS AND DOES 1 THROUGH 100, INCLUSIVE, AND EACH OF THEM, FOR NEGLIGENCE, ALLEGE:

53. Plaintiffs refer to each and every paragraph above and incorporate those paragraphs as though set forth in full in this cause of action.

54. Deceased was admitted as a resident at Glenhaven, located at 212 W Chevy Chase Dr, Glendale, CA 91204, for approximately the last six years of his life.

55. By virtue of the foregoing, Defendants and each of them owed a duty of ordinary care to the Deceased, to use that degree of care and skill that a reasonably prudent person would use, and to use that degree of care that a reasonably prudent nursing home would owe given its knowledge, training, expertise and skill.

56. Defendants and each of them breached the aforesaid duty of care by failing to implement policies, procedures, and safety measures necessary to prevent Ricardo's exposure to the coronavirus and by failing to provide appropriate treatment once he was infected by the virus.

57. As a direct and legal result of the foregoing, the Deceased was injured in a sum according to proof at trial.

7.

FOURTH CAUSE OF ACTION

(Wrongful Death)

PLAINTIFFS FOR A FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS AND DOES 1 THROUGH 100, INCLUSIVE, AND EACH OF THEM, FOR WRONGFUL DEATH, ALLEGE:

58. Plaintiffs incorporate by reference each and every of the foregoing paragraphs as though set forth in full in this cause of action.

59. As a direct and proximate result of the foregoing, Ricardo Saldana died and his heirs represented by Plaintiffs, have been deprived of his care, comfort and society to their general damages according to proof.

WHEREFORE, Plaintiffs pray for judgment against Defendants, and each of them, as follows:

- AS TO THE FIRST CAUSE OF ACTION:

1. For special and general damages according to proof at the time of trial;

2. For punitive damages;

3. For attorney's fees and litigation costs;

4. For costs of suit incurred herein; and

5. For such other and further relief as the Court deems just and proper.

- AS TO THE SECOND CAUSE OF ACTION:

6. For special and general damages according to proof at the time of trial;

7. For punitive damages;

8. For costs of suit incurred herein; and

9. For such other and further relief as the Court deems just and proper.

- AS TO THE THIRD CAUSE OF ACTION:

10. For special and general damages according to proof at the time of trial;

11. For costs of suit incurred herein; and

12. For such other and further relief as the Court deems just and proper.

- AS TO THE FOURTH CAUSE OF ACTION:

13. For general damages including loss of care, comfort and society of the deceased;

14. For costs of suit incurred herein; and

15. For such other and further relief as the Court deems just and proper.

Dated this 21st day of May 2020, at Claremont, California.

LAW OFFICES OF
SCOTT GLOVSKY, APC
By: /s/ Scott C. Glovsky
SCOTT C. GLOVSKY
ARI DYBNIS
Attorneys for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury.

DATED: May 21, 2020

LAW OFFICES OF
SCOTT GLOVSKY, APC
By: /s/ Scott C. Glovsky
SCOTT C. GLOVSKY
ARI DYBNIS
Attorneys for Plaintiffs

APPENDIX E

United States Code
Title 42. The Public Health and Welfare

42 U.S.C. § 247d-6d

§ 247d-6d. Targeted liability protections for pandemic and epidemic products and security countermeasures

(a) Liability protections

(1) In general

Subject to the other provisions of this section, a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration under subsection (b) has been issued with respect to such countermeasure.

(2) Scope of claims for loss

(A) Loss

For purposes of this section, the term "loss" means any type of loss, including—

(i) death;

(ii) physical, mental, or emotional injury, illness, disability, or condition;

(iii) fear of physical, mental, or emotional injury, illness, disability, or condition, including any need for medical monitoring; and

(iv) loss of or damage to property, including business interruption loss.

Each of clauses (i) through (iv) applies without regard to the date of the occurrence, presentation, or discovery of the loss described in the clause.

(B) Scope

The immunity under paragraph (1) applies to any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure, including a causal relationship with the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, or use of such countermeasure.

(3) Certain conditions

Subject to the other provisions of this section, immunity under paragraph (1) with respect to a covered countermeasure applies only if—

(A) the countermeasure was administered or used during the effective period of the declaration that was issued under subsection (b) with respect to the countermeasure;

(B) the countermeasure was administered or used for the category or categories of diseases, health conditions, or threats to health specified in the declaration; and

(C) in addition, in the case of a covered person who is a program planner or qualified person with respect to the administration or use of the countermeasure, the countermeasure was administered to or used by an individual who—

(i) was in a population specified by the declaration; and

(ii) was at the time of administration physically present in a geographic area specified by the declaration or had a connection to such area specified in the declaration.

(4) Applicability of certain conditions

With respect to immunity under paragraph (1) and subject to the other provisions of this section:

(A) In the case of a covered person who is a manufacturer or distributor of the covered countermeasure involved, the immunity applies without regard to whether such countermeasure was administered to or used by an individual in accordance with the conditions described in paragraph (3)(C).

(B) In the case of a covered person who is a program planner or qualified person with respect to the administration or use of the covered countermeasure, the scope of immunity includes

circumstances in which the countermeasure was administered to or used by an individual in circumstances in which the covered person reasonably could have believed that the countermeasure was administered or used in accordance with the conditions described in paragraph (3)(C).

(5) Effect of distribution method

The provisions of this section apply to a covered countermeasure regardless of whether such countermeasure is obtained by donation, commercial sale, or any other means of distribution, except to the extent that, under paragraph (2)(E) of subsection (b), the declaration under such subsection provides that subsection (a) applies only to covered countermeasures obtained through a particular means of distribution.

(6) Rebuttable presumption

For purposes of paragraph (1), there shall be a rebuttable presumption that any administration or use, during the effective period of the emergency declaration by the Secretary under subsection (b), of a covered countermeasure shall have been for the category or categories of diseases, health conditions, or threats to health with respect to which such declaration was issued.

(b) Declaration by Secretary

(1) Authority to issue declaration

Subject to paragraph (2), if the Secretary makes a determination that a disease or other health condition or other threat to health constitutes a public health emergency, or that there is a credible risk that the disease, condition, or threat may in the future constitute such an emergency, the Secretary may make a declaration, through publication in the Federal Register, recommending, under conditions as the Secretary may specify, the manufacture, testing, development, distribution, administration, or use of one or more covered countermeasures, and stating that subsection (a) is in effect with respect to the activities so recommended.

(2) Contents

In issuing a declaration under paragraph (1), the Secretary shall identify, for each covered countermeasure specified in the declaration—

(A) the category or categories of diseases, health conditions, or threats to health for which the Secretary recommends the administration or use of the countermeasure;

(B) the period or periods during which, including as modified by paragraph (3), subsection (a) is in effect, which period or periods may be designated by dates, or by milestones or other description of events, including factors specified in paragraph (6);

(C) the population or populations of individuals for which subsection (a) is in effect with respect to the administration or use of the countermeasure

(which may be a specification that such subsection applies without geographic limitation to all individuals);

(D) the geographic area or areas for which subsection (a) is in effect with respect to the administration or use of the countermeasure (which may be a specification that such subsection applies without geographic limitation), including, with respect to individuals in the populations identified under subparagraph (C), a specification, as determined appropriate by the Secretary, of whether the declaration applies only to individuals physically present in such areas or whether in addition the declaration applies to individuals who have a connection to such areas, which connection is described in the declaration; and

(E) whether subsection (a) is effective only to a particular means of distribution as provided in subsection (a)(5) for obtaining the countermeasure, and if so, the particular means to which such subsection is effective.

(3) Effective period of declaration

(A) Flexibility of period

The Secretary may, in describing periods under paragraph (2)(B), have different periods for different covered persons to address different logistical, practical or other differences in responsibilities.

(B) Additional time to be specified

In each declaration under paragraph (1), the Secretary, after consulting, to the extent the Secretary deems appropriate, with the manufacturer of the covered countermeasure, shall also specify a date that is after the ending date specified under paragraph (2)(B) and that allows what the Secretary determines is—

(i) a reasonable period for the manufacturer to arrange for disposition of the covered countermeasure, including the return of such product to the manufacturer; and

(ii) a reasonable period for covered persons to take such other actions as may be appropriate to limit administration or use of the covered countermeasure.

(C) Additional period for certain strategic national stockpile countermeasures

With respect to a covered countermeasure that is in the stockpile under section 247d-6b of this title, if such countermeasure was the subject of a declaration under paragraph (1) at the time that it was obtained for the stockpile, the effective period of such declaration shall include a period when the countermeasure is administered or used pursuant to a distribution or release from the stockpile.

(4) Amendments to declaration

The Secretary may through publication in the Federal Register amend any portion of a declaration

under paragraph (1). Such an amendment shall not retroactively limit the applicability of subsection (a) with respect to the administration or use of the covered countermeasure involved.

(5) Certain disclosures

In publishing a declaration under paragraph (1) in the Federal Register, the Secretary is not required to disclose any matter described in section 552(b) of Title 5.

(6) Factors to be considered

In deciding whether and under what circumstances or conditions to issue a declaration under paragraph (1) with respect to a covered countermeasure, the Secretary shall consider the desirability of encouraging the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of such countermeasure.

(7) Judicial review

No court of the United States, or of any State, shall have subject matter jurisdiction to review, whether by mandamus or otherwise, any action by the Secretary under this subsection.

(8) Preemption of State law

During the effective period of a declaration under subsection (b), or at any time with respect to conduct

undertaken in accordance with such declaration, no State or political subdivision of a State may establish, enforce, or continue in effect with respect to a covered countermeasure any provision of law or legal requirement that—

(A) is different from, or is in conflict with, any requirement applicable under this section; and

(B) relates to the design, development, clinical testing or investigation, formulation, manufacture, distribution, sale, donation, purchase, marketing, promotion, packaging, labeling, licensing, use, any other aspect of safety or efficacy, or the prescribing, dispensing, or administration by qualified persons of the covered countermeasure, or to any matter included in a requirement applicable to the covered countermeasure under this section or any other provision of this chapter, or under the Federal Food, Drug, and Cosmetic Act.

(9) Report to Congress

Within 30 days after making a declaration under paragraph (1), the Secretary shall submit to the appropriate committees of the Congress a report that provides an explanation of the reasons for issuing the declaration and the reasons underlying the determinations of the Secretary with respect to paragraph (2). Within 30 days after making an amendment under paragraph (4), the Secretary shall submit to such committees a report that provides the reasons underlying the determination of the Secretary to make the amendment.

(c) Definition of willful misconduct

(1) Definition

(A) In general

Except as the meaning of such term is further restricted pursuant to paragraph (2), the term "willful misconduct" shall, for purposes of subsection (d), denote an act or omission that is taken—

(i) intentionally to achieve a wrongful purpose;

(ii) knowingly without legal or factual justification; and

(iii) in disregard of a known or obvious risk that is so great as to make it highly probable that the harm will outweigh the benefit.

(B) Rule of construction

The criterion stated in subparagraph (A) shall be construed as establishing a standard for liability that is more stringent than a standard of negligence in any form or recklessness.

(2) Authority to promulgate regulatory definition

(A) In general

The Secretary, in consultation with the Attorney General, shall promulgate regulations, which may be promulgated through interim final rules, that further restrict the scope of actions or omissions by

a covered person that may qualify as "willful misconduct" for purposes of subsection (d).

(B) Factors to be considered

In promulgating the regulations under this paragraph, the Secretary, in consultation with the Attorney General, shall consider the need to define the scope of permissible civil actions under subsection (d) in a way that will not adversely affect the public health.

(C) Temporal scope of regulations

The regulations under this paragraph may specify the temporal effect that they shall be given for purposes of subsection (d).

(D) Initial rulemaking

Within 180 days after December 30, 2005, the Secretary, in consultation with the Attorney General, shall commence and complete an initial rulemaking process under this paragraph.

(3) Proof of willful misconduct

In an action under subsection (d), the plaintiff shall have the burden of proving by clear and convincing evidence willful misconduct by each covered person sued and that such willful misconduct caused death or serious physical injury.

(4) Defense for acts or omissions taken pursuant to Secretary's declaration

Notwithstanding any other provision of law, a program planner or qualified person shall not have engaged in "willful misconduct" as a matter of law where such program planner or qualified person acted consistent with applicable directions, guidelines, or recommendations by the Secretary regarding the administration or use of a covered countermeasure that is specified in the declaration under subsection (b), provided either the Secretary, or a State or local health authority, was provided with notice of information regarding serious physical injury or death from the administration or use of a covered countermeasure that is material to the plaintiff's alleged loss within 7 days of the actual discovery of such information by such program planner or qualified person.

(5) Exclusion for regulated activity of manufacturer or distributor

(A) In general

If an act or omission by a manufacturer or distributor with respect to a covered countermeasure, which act or omission is alleged under subsection (e)(3)(A) to constitute willful misconduct, is subject to regulation by this chapter or by the Federal Food, Drug, and Cosmetic Act, such act or omission shall not constitute "willful misconduct" for purposes of subsection (d) if—

(i) neither the Secretary nor the Attorney General has initiated an enforcement action with respect to such act or omission; or

(ii) such an enforcement action has been initiated and the action has been terminated or finally resolved without a covered remedy.

Any action or proceeding under subsection (d) shall be stayed during the pendency of such an enforcement action.

(B) Definitions

For purposes of this paragraph, the following terms have the following meanings:

(i) Enforcement action

The term "enforcement action" means a criminal prosecution, an action seeking an injunction, a seizure action, a civil monetary proceeding based on willful misconduct, a mandatory recall of a product because voluntary recall was refused, a proceeding to compel repair or replacement of a product, a termination of an exemption under section 505(i) or 520(g) of the Federal Food, Drug, and Cosmetic Act, a debarment proceeding, an investigator disqualification proceeding where an investigator is an employee or agent of the manufacturer, a revocation, based on willful misconduct, of an authorization under section 564 of such Act, or a suspension or withdrawal, based on willful misconduct, of an approval or clearance under chapter V of such Act or of a licensure under section 262 of this title.

(ii) Covered remedy

The term "covered remedy" means an outcome—

(I) that is a criminal conviction, an injunction, or a condemnation, a civil monetary payment, a product recall, a repair or replacement of a product, a termination of an exemption under section 505(i) or 520(g) of the Federal Food, Drug, and Cosmetic Act, a debarment, an investigator disqualification, a revocation of an authorization under section 564 of such Act, or a suspension or withdrawal of an approval or clearance under chapter 51 of such Act or of a licensure under section 262 of this title; and

(II) that results from a final determination by a court or from a final agency action.

(iii) Final

The terms "final" and "finally"—

(I) with respect to a court determination, or to a final resolution of an enforcement action that is a court determination, mean a judgment from which an appeal of right cannot be taken or a voluntary or stipulated dismissal; and

(II) with respect to an agency action, or to a final resolution of an enforcement action that is an agency action, mean an order that is not subject to further review within the agency and that has not been reversed, vacated, enjoined, or otherwise nullified by a final court determination or a voluntary or stipulated dismissal.

(C) Rules of construction

(i) In general

Nothing in this paragraph shall be construed—

(I) to affect the interpretation of any provision of the Federal Food, Drug, and Cosmetic Act, of this chapter, or of any other applicable statute or regulation; or

(II) to impair, delay, alter, or affect the authority, including the enforcement discretion, of the United States, of the Secretary, of the Attorney General, or of any other official with respect to any administrative or court proceeding under this chapter, under the Federal Food, Drug, and Cosmetic Act, under Title 18, or under any other applicable statute or regulation.

(ii) Mandatory recalls

A mandatory recall called for in the declaration is not a Food and Drug Administration enforcement action.

(d) Exception to immunity of covered persons

(1) In general

Subject to subsection (f), the sole exception to the immunity from suit and liability of covered persons set forth in subsection (a) shall be for an exclusive Federal cause of action against a covered person for death or serious physical injury proximately caused

by willful misconduct, as defined pursuant to subsection (c), by such covered person. For purposes of section 2679(b)(2)(B) of Title 28, such a cause of action is not an action brought for violation of a statute of the United States under which an action against an individual is otherwise authorized.

(2) Persons who can sue

An action under this subsection may be brought for wrongful death or serious physical injury by any person who suffers such injury or by any representative of such a person.

(e) Procedures for suit

(1) Exclusive Federal jurisdiction

Any action under subsection (d) shall be filed and maintained only in the United States District Court for the District of Columbia.

(2) Governing law

The substantive law for decision in an action under subsection (d) shall be derived from the law, including choice of law principles, of the State in which the alleged willful misconduct occurred, unless such law is inconsistent with or preempted by Federal law, including provisions of this section.

(3) Pleading with particularity

In an action under subsection (d), the complaint shall plead with particularity each element of the plaintiff's claim, including—

(A) each act or omission, by each covered person sued, that is alleged to constitute willful misconduct relating to the covered countermeasure administered to or used by the person on whose behalf the complaint was filed;

(B) facts supporting the allegation that such alleged willful misconduct proximately caused the injury claimed; and

(C) facts supporting the allegation that the person on whose behalf the complaint was filed suffered death or serious physical injury.

(4) Verification, certification, and medical records

(A) In general

In an action under subsection (d), the plaintiff shall verify the complaint in the manner stated in subparagraph (B) and shall file with the complaint the materials described in subparagraph (C). A complaint that does not substantially comply with subparagraphs (B) and (C) shall not be accepted for filing and shall not stop the running of the statute of limitations.

(B) Verification requirement

(i) In general

The complaint shall include a verification, made by affidavit of the plaintiff under oath, stating that the pleading is true to the knowledge of the deponent, except as to matters specifically identified as being alleged on information and

belief, and that as to those matters the plaintiff believes it to be true.

(ii) Identification of matters alleged upon information and belief

Any matter that is not specifically identified as being alleged upon the information and belief of the plaintiff, shall be regarded for all purposes, including a criminal prosecution, as having been made upon the knowledge of the plaintiff.

(C) Materials required

In an action under subsection (d), the plaintiff shall file with the complaint—

(i) an affidavit, by a physician who did not treat the person on whose behalf the complaint was filed, certifying, and explaining the basis for such physician's belief, that such person suffered the serious physical injury or death alleged in the complaint and that such injury or death was proximately caused by the administration or use of a covered countermeasure; and

(ii) certified medical records documenting such injury or death and such proximate causal connection.

(5) Three-judge court

Any action under subsection (d) shall be assigned initially to a panel of three judges. Such panel shall have jurisdiction over such action for purposes of considering motions to dismiss, motions for

summary judgment, and matters related thereto. If such panel has denied such motions, or if the time for filing such motions has expired, such panel shall refer the action to the chief judge for assignment for further proceedings, including any trial. Section 1253 of Title 28 and paragraph (3) of subsection (b) of section 2284 of Title 28 shall not apply to actions under subsection (d).

(6) Civil discovery

(A) Timing

In an action under subsection (d), no discovery shall be allowed—

(i) before each covered person sued has had a reasonable opportunity to file a motion to dismiss;

(ii) in the event such a motion is filed, before the court has ruled on such motion; and

(iii) in the event a covered person files an interlocutory appeal from the denial of such a motion, before the court of appeals has ruled on such appeal.

(B) Standard

Notwithstanding any other provision of law, the court in an action under subsection (d) shall permit discovery only with respect to matters directly related to material issues contested in such action, and the court shall compel a response to a discovery request (including a request for

admission, an interrogatory, a request for production of documents, or any other form of discovery request) under Rule 37, Federal Rules of Civil Procedure, only if the court finds that the requesting party needs the information sought to prove or defend as to a material issue contested in such action and that the likely benefits of a response to such request equal or exceed the burden or cost for the responding party of providing such response.

(7) Reduction in award of damages for collateral source benefits

(A) In general

In an action under subsection (d), the amount of an award of damages that would otherwise be made to a plaintiff shall be reduced by the amount of collateral source benefits to such plaintiff.

(B) Provider of collateral source benefits not to have lien or subrogation

No provider of collateral source benefits shall recover any amount against the plaintiff or receive any lien or credit against the plaintiff's recovery or be equitably or legally subrogated to the right of the plaintiff in an action under subsection (d).

(C) Collateral source benefit defined

For purposes of this paragraph, the term "collateral source benefit" means any amount paid or to be paid in the future to or on behalf of the plaintiff, or any service, product, or other benefit

provided or to be provided in the future to or on behalf of the plaintiff, as a result of the injury or wrongful death, pursuant to—

(i) any State or Federal health, sickness, income-disability, accident, or workers' compensation law;

(ii) any health, sickness, income-disability, or accident insurance that provides health benefits or income-disability coverage;

(iii) any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or income disability benefits; or

(iv) any other publicly or privately funded program.

(8) Noneconomic damages

In an action under subsection (d), any noneconomic damages may be awarded only in an amount directly proportional to the percentage of responsibility of a defendant for the harm to the plaintiff. For purposes of this paragraph, the term "noneconomic damages" means damages for losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, hedonic damages, injury to reputation, and any other nonpecuniary losses.

(9) Rule 11 sanctions

Whenever a district court of the United States determines that there has been a violation of Rule 11 of the Federal Rules of Civil Procedure in an action under subsection (d), the court shall impose upon the attorney, law firm, or parties that have violated Rule 11 or are responsible for the violation, an appropriate sanction, which may include an order to pay the other party or parties for the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is the subject of the violation, including a reasonable attorney's fee. Such sanction shall be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and to compensate the party or parties injured by such conduct.

(10) Interlocutory appeal

The United States Court of Appeals for the District of Columbia Circuit shall have jurisdiction of an interlocutory appeal by a covered person taken within 30 days of an order denying a motion to dismiss or a motion for summary judgment based on an assertion of the immunity from suit conferred by subsection (a) or based on an assertion of the exclusion under subsection (c)(5).

(f) Actions by and against the United States

Nothing in this section shall be construed to abrogate or limit any right, remedy, or authority that the United States or any agency thereof may possess under any other provision of law or to waive sovereign immunity or to abrogate or limit any defense or

protection available to the United States or its agencies, instrumentalities, officers, or employees under any other law, including any provision of chapter 171 of Title 28 (relating to tort claims procedure).

(g) Severability

If any provision of this section, or the application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this section and the application of such remainder to any person or circumstance shall not be affected thereby.

(h) Rule of construction concerning National Vaccine Injury Compensation Program

Nothing in this section, or any amendment made by the Public Readiness and Emergency Preparedness Act, shall be construed to affect the National Vaccine Injury Compensation Program under subchapter XIX of this chapter.

(i) Definitions

In this section:

(1) Covered countermeasure

The term "covered countermeasure" means—

(A) a qualified pandemic or epidemic product (as defined in paragraph (7));

(B) a security countermeasure (as defined in section 247d-6b(c)(1)(B) of this title);

(C) a drug (as such term is defined in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(g)(1)),2 biological product (as such term is defined by section 262(i) of this title), or device (as such term is defined by section 201(h) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 321(h)) that is authorized for emergency use in accordance with section 564, 564A, or 564B of the Federal Food, Drug, and Cosmetic Act; or

(D) a respiratory protective device that is approved by the National Institute for Occupational Safety and Health under part 84 of title 42, Code of Federal Regulations (or any successor regulations), and that the Secretary determines to be a priority for use during a public health emergency declared under section 247d of this title.

(2) Covered person

The term "covered person", when used with respect to the administration or use of a covered countermeasure, means—

(A) the United States; or

(B) a person or entity that is—

(i) a manufacturer of such countermeasure;

(ii) a distributor of such countermeasure;

(iii) a program planner of such countermeasure;

(iv) a qualified person who prescribed, administered, or dispensed such countermeasure; or

(v) an official, agent, or employee of a person or entity described in clause (i), (ii), (iii), or (iv).

(3) Distributor

The term "distributor" means a person or entity engaged in the distribution of drugs, biologics, or devices, including but not limited to manufacturers; repackers; common carriers; contract carriers; air carriers; own-label distributors; private-label distributors; jobbers; brokers; warehouses, and wholesale drug warehouses; independent wholesale drug traders; and retail pharmacies.

(4) Manufacturer

The term "manufacturer" includes—

(A) a contractor or subcontractor of a manufacturer;

(B) a supplier or licenser of any product, intellectual property, service, research tool, or component or other article used in the design, development, clinical testing, investigation, or manufacturing of a covered countermeasure; and

(C) any or all of the parents, subsidiaries, affiliates, successors, and assigns of a manufacturer.

(5) Person

The term "person" includes an individual, partnership, corporation, association, entity, or public or private corporation, including a Federal, State, or local government agency or department.

(6) Program planner

The term "program planner" means a State or local government, including an Indian tribe, a person employed by the State or local government, or other person who supervised or administered a program with respect to the administration, dispensing, distribution, provision, or use of a security countermeasure or a qualified pandemic or epidemic product, including a person who has established requirements, provided policy guidance, or supplied technical or scientific advice or assistance or provides a facility to administer or use a covered countermeasure in accordance with a declaration under subsection (b).

(7) Qualified pandemic or epidemic product

The term "qualified pandemic or epidemic product" means a drug (as such term is defined in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(g)(1)),2 biological product (as such term is defined by section 262(i) of this title), or device (as such term is defined by section 201(h) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 321(h))2 that is—

(A)

(i) a product manufactured, used, designed, developed, modified, licensed, or procured—

(I) to diagnose, mitigate, prevent, treat, or cure a pandemic or epidemic; or

(II) to limit the harm such pandemic or epidemic might otherwise cause;

(ii) a product manufactured, used, designed, developed, modified, licensed, or procured to diagnose, mitigate, prevent, treat, or cure a serious or life-threatening disease or condition caused by a product described in clause (i); or

(iii) a product or technology intended to enhance the use or effect of a drug, biological product, or device described in clause (i) or (ii); and

(B)

(i) approved or cleared under chapter V of the Federal Food, Drug, and Cosmetic Act or licensed under section 262 of this title;

(ii) the object of research for possible use as described by subparagraph (A) and is the subject of an exemption under section 505(i) or 520(g) of the Federal Food, Drug, and Cosmetic Act; or

(iii) authorized for emergency use in accordance with section 564, 564A, or 564B of the Federal Food, Drug, and Cosmetic Act.

(8) Qualified person

The term "qualified person", when used with respect to the administration or use of a covered countermeasure, means—

(A) a licensed health professional or other individual who is authorized to prescribe, administer, or dispense such countermeasures under the law of the State in which the countermeasure was prescribed, administered, or dispensed; or

(B) a person within a category of persons so identified in a declaration by the Secretary under subsection (b).

(9) Security countermeasure

The term "security countermeasure" has the meaning given such term in section 247d-6b(c)(1)(B) of this title.

(10) Serious physical injury

The term "serious physical injury" means an injury that—

(A) is life threatening;

(B) results in permanent impairment of a body function or permanent damage to a body structure; or

(C) necessitates medical or surgical intervention to preclude permanent impairment of a body function or permanent damage to a body structure.

APPENDIX F

United States Code
Title 42. The Public Health and Welfare

42 U.S.C. § 247d-6e

§ 247d-6e. Covered countermeasure process

(a) Establishment of Fund

Upon the issuance by the Secretary of a declaration under section 247d-6d(b) of this title, there is hereby established in the Treasury an emergency fund designated as the "Covered Countermeasure Process Fund" for purposes of providing timely, uniform, and adequate compensation to eligible individuals for covered injuries directly caused by the administration or use of a covered countermeasure pursuant to such declaration, which Fund shall consist of such amounts designated as emergency appropriations under section 402 of H. Con. Res. 95 of the 109th Congress, this emergency designation shall remain in effect through October 1, 2006.

(b) Payment of compensation

(1) In general

If the Secretary issues a declaration under 247d-6d(b) of this title, the Secretary shall, after amounts have by law been provided for the Fund under subsection (a), provide compensation to an eligible individual for a covered injury directly caused by the administration or use of a covered countermeasure pursuant to such declaration.

(2) Elements of compensation

The compensation that shall be provided pursuant to paragraph (1) shall have the same elements, and be in the same amount, as is prescribed by sections 239c, 239d, and 239e of this title in the case of certain individuals injured as a result of administration of certain countermeasures against smallpox, except that section 239e(a)(2)(B) of this title shall not apply.

(3) Rule of construction

Neither reasonable and necessary medical benefits nor lifetime total benefits for lost employment income due to permanent and total disability shall be limited by section 239e of this title.

(4) Determination of eligibility and compensation

Except as provided in this section, the procedures for determining, and for reviewing a determination of, whether an individual is an eligible individual, whether such individual has sustained a covered injury, whether compensation may be available under this section, and the amount of such compensation shall be those stated in section 239a of this title (other than in subsection (d)(2) of such section), in regulations issued pursuant to that section, and in such additional or alternate regulations as the Secretary may promulgate for purposes of this section. In making determinations under this section, other than those described in paragraph (5)(A) as to the direct causation of a covered injury, the Secretary may only make such

determination based on compelling, reliable, valid, medical and scientific evidence.

(5) Covered countermeasure injury table

(A) In general

The Secretary shall by regulation establish a table identifying covered injuries that shall be presumed to be directly caused by the administration or use of a covered countermeasure and the time period in which the first symptom or manifestation of onset of each such adverse effect must manifest in order for such presumption to apply. The Secretary may only identify such covered injuries, for purpose of inclusion on the table, where the Secretary determines, based on compelling, reliable, valid, medical and scientific evidence that administration or use of the covered countermeasure directly caused such covered injury.

(B) Amendments

The provisions of section 239b of this title (other than a provision of subsection (a)(2) of such section that relates to accidental vaccinia inoculation) shall apply to the table established under this section.

(C) Judicial review

No court of the United States, or of any State, shall have subject matter jurisdiction to review, whether by mandamus or otherwise, any action by the Secretary under this paragraph.

(6) Meanings of terms

In applying sections 239a, 239b, 239c, 239d, and 239e of this title for purposes of this section—

(A) the terms "vaccine" and "smallpox vaccine" shall be deemed to mean a covered countermeasure;

(B) the terms "smallpox vaccine injury table" and "table established under section 239b of this title" shall be deemed to refer to the table established under paragraph (4); and

(C) other terms used in those sections shall have the meanings given to such terms by this section.

(c) Voluntary program

The Secretary shall ensure that a State, local, or Department of Health and Human Services plan to administer or use a covered countermeasure is consistent with any declaration under 247d-6d of this title and any applicable guidelines of the Centers for Disease Control and Prevention and that potential participants are educated with respect to contraindications, the voluntary nature of the program, and the availability of potential benefits and compensation under this part.

(d) Exhaustion; exclusivity; election

(1) Exhaustion

Subject to paragraph (5), a covered individual may not bring a civil action under section 247d-6d(d) of

this title against a covered person (as such term is defined in section 247d-6d(i)(2) of this title) unless such individual has exhausted such remedies as are available under subsection (a), except that if amounts have not by law been provided for the Fund under subsection (a), or if the Secretary fails to make a final determination on a request for benefits or compensation filed in accordance with the requirements of this section within 240 days after such request was filed, the individual may seek any remedy that may be available under section 247d-6d(d) of this title.

(2) Tolling of statute of limitations

The time limit for filing a civil action under section 247d-6d(d) of this title for an injury or death shall be tolled during the pendency of a claim for compensation under subsection (a).

(3) Rule of construction

This section shall not be construed as superseding or otherwise affecting the application of a requirement, under chapter 171 of Title 28, to exhaust administrative remedies.

(4) Exclusivity

The remedy provided by subsection (a) shall be exclusive of any other civil action or proceeding for any claim or suit this section encompasses, except for a proceeding under section 247d-6d of this title.

(5) Election

If under subsection (a) the Secretary determines that a covered individual qualifies for compensation, the individual has an election to accept the compensation or to bring an action under section 247d-6d(d) of this title. If such individual elects to accept the compensation, the individual may not bring such an action.

(e) Definitions

For purposes of this section, the following terms shall have the following meanings:

(1) Covered countermeasure

The term "covered countermeasure" has the meaning given such term in section 247d-6d of this title.

(2) Covered individual

The term "covered individual", with respect to administration or use of a covered countermeasure pursuant to a declaration, means an individual—

(A) who is in a population specified in such declaration, and with respect to whom the administration or use of the covered countermeasure satisfies the other specifications of such declaration; or

(B) who uses the covered countermeasure, or to whom the covered countermeasure is administered, in a good faith belief that the individual is in the category described by subparagraph (A).

(3) Covered injury

The term "covered injury" means serious physical injury or death.

(4) Declaration

The term "declaration" means a declaration under section 247d-6d(b) of this title.

(5) Eligible individual

The term "eligible individual" means an individual who is determined, in accordance with subsection (b), to be a covered individual who sustains a covered injury.