SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY BANNON** **PART** **42**

Justice

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THE PEOPLE OF THE STATE OF NEW YORK BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Plaintiff,

- v -

AMAZON.COM INC., AMAZON.COM SALES, INC. and AMAZON.COM SERVICES LLC,

Defendants.

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INDEX NO. 450362/2021

MOTION DATE 07/14/2021, 07/14/2021, 07/14/2021

MOTION SEQ. NO. 002 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 58, 61, 71, 81, 82, 83, 84, 85, 86, 119, 122

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 55, 56, 59, 62, 72, 87, 120

were read on this motion to/for STAY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 63, 64, 65, 66, 67, 68, 69, 74, 75, 76, 77, 78, 79, 80, 88, 89, 90, 91, 92, 93, 94, 95, 96, 121

were read on this motion to/for DISCOVERY.

The motions are decided in accordance with the attached decision and order.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

10/12/2021
DATE

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**		
SEQ 002		**GRANTED**	X	**DENIED**		**GRANTED IN PART**		**OTHER**
SEQ 003		**GRANTED**	X	**DENIED**		**GRANTED IN PART**		**OTHER**
SEQ 004	X	**GRANTED**		**DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**		**REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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were read on this motion to/for DISCOVERY.

I. INTRODUCTION

The People of the State of New York by Letitia James, Attorney General of the State of New York, (the "plaintiff" or the "Attorney General") bring this action against Amazon.com, Inc., Amazon.com Sales, Inc., and Amazon.com Services, LLC, (collectively, the "defendants" or "Amazon") seeking to enforce provisions of the New York Labor Law relating to (1) health and safety conditions at Amazon's New York City facilities during the COVID-19 pandemic and (2) Amazon employees' anti-retaliation and whistleblower rights. In the amended complaint

filed on May 6, 2021, the Attorney General states claims pursuant to her express authority under New York Executive Law § 63(12) to remedy alleged violations of New York Labor Law §§ 200, 215, and 740. The Attorney General seeks various relief including permanent injunctions, backpay and emotional distress damages for certain affected employees, statutory disgorgement, and attorney's fees.

Amazon now moves pursuant to CPLR 2201 to stay this action pending resolution of three separate actions filed in the United States District Court for the Eastern District of New York (SEQ 003). Amazon further moves, pre-answer, to dismiss the amended complaint in its entirety pursuant to CPLR 3211(a)(2) and (a)(7) (SEQ 002). The Attorney General opposes Amazon's motions and moves to lift the automatic stay of disclosure imposed pursuant to CPLR 3214(b) (SEQ 004). Amazon opposes the Attorney General's motion.

For the following reasons, Amazon's motion for a stay of this action is denied, Amazon's motion to dismiss is denied, and the Attorney General's motion to lift the automatic stay of disclosure is granted.

II. BACKGROUND

A. Factual Background

The following allegations are drawn from the Attorney General's amended complaint, unless otherwise noted, and are assumed to be true solely for purposes of this motion. See Grassi & Co., CPAS, P.C. v Honka, 180 AD3d 564, 564–65 (1st Dept. 2020).

COVID-19 is a highly infectious respiratory disease caused by a novel coronavirus. The novel coronavirus spreads through person-to-person contact, primarily through respiratory droplets produced by infected persons. Spread is more likely when people are within six feet of

one another for more than 15 minutes over a 24-hour period. Even asymptomatic, pre-symptomatic, and mildly symptomatic people can spread the virus. Infection can result in extremely serious, long-term health complications and death.

The first confirmed case of COVID-19 in New York was reported on March 1, 2020. In the following weeks, cases and deaths due to COVID-19 in New York soared. Beginning in March 2020, in response to the outbreak, the New York State legislature amended the New York Executive Law ("Executive Law") to authorize then-Governor Andrew Cuomo to issue any directive necessary to confront the spread of COVID-19. Governor Cuomo issued a series of executive orders which, *inter alia*, declared a statewide disaster emergency, curtailed nonessential business operations, and authorized the Empire State Development Corporation ("ESD") to issue guidance defining which businesses were to be deemed essential and delineating safety requirements for such businesses. The ESD issued guidance that deemed "warehouse/distribution and fulfillment" as essential and, accordingly, did not require fulfillment and distribution centers to be closed or adhere to limitations on in-person work. The ESD required essential businesses to "comply with the guidance and directives for maintaining a clean and safe work environment issued by the Department of Health." In May 2020, Governor Cuomo issued an executive order authorizing a phased re-opening of nonessential businesses, provided that both essential and nonessential businesses were required to continue to operate "subject to the guidelines promulgated by the Department of Health."

In June 2020, the New York State Department of Health ("NYSDOH") issued a series of industry-specific minimum safety standards. The standards applicable to the wholesale trade sector incorporated by reference Centers for Disease Control ("CDC") cleaning and disinfection guidance issued in February 2020. This guidance provides, in relevant part, (1) that when a

person suspected of or confirmed to have COVID-19 has been in a facility, a business should close off areas that have been visited by ill persons, increase ventilation to the areas, and wait 24 hours or as long as practical before beginning cleaning; (2) that businesses should work with state and local health departments to implement a contact-tracing program that includes notification to all employees that may have been exposed to the virus; (3) that businesses should implement rules that facilitate social distancing; and (4) that businesses should encourage frequent hand-washing.

Amazon is an online retailer that distributes goods nationwide and has become increasingly omnipresent in recent years. Amazon maintains multiple business facilities within New York State, including a warehouse and distribution center in Staten Island ("JFK8") and a distribution center in Queens ("DBK1"). At its facilities, including JFK8 and DBK1, Amazon monitors productivity and time-off-task ("TOT") to assess worker performance. Such monitoring is typically accomplished utilizing technology from the digital scanners workers use to scan bins and packages for shipping. Workers who fail to meet certain productivity thresholds set by and known only to Amazon management may be subject to adverse consequences, including automatically generated discipline.

JFK8 and DBK1 were deemed essential businesses and were not required to close pursuant to Governor Cuomo's executive orders in the spring of 2020. Most workers at JFK8 and DBK1 continued to work on-site throughout the pandemic. However, JFK8 and DBK1 were subject to the NYSDOH requirements applicable to the wholesale trade industry listed above until June 2021.

The Attorney General commenced an investigation of Amazon focusing on the JFK8 and DBK1 facilities in late March 2020, after receiving complaints from current and former Amazon

employees alleging health and safety concerns related to the COVID-19 outbreak and retaliation for raising health and safety concerns to Amazon. The Attorney General's investigation allegedly revealed that (1) Amazon failed to comply with requirements for cleaning and disinfection when an infected worker had been present in its facilities, (2) Amazon failed to adequately identify and notify potential contacts of infected workers, and (3) Amazon prioritized its discipline and productivity policies, as well as productivity rates automated by line-speeds, over permitting employees sufficient time to engage in hygiene, sanitation, social-distancing, and necessary cleaning practices.

Specifically, the Attorney General found that Amazon almost never closed off any part of JFK8 for 24 hours even after being notified of a confirmed positive case by a worker at that facility within the prior seven days. Amazon also did not open outside doors or windows or use ventilating fans to increase ventilation in areas visited by an infected employee. Further, while Amazon has implemented a contact-tracing program, the Attorney General found that it was inadequate and departed from public health guidelines because it did not include an interview with the infected worker. Instead, until at least June 2020, the process relied on review of Amazon surveillance footage that could take up to 72 hours. Amazon employees were instructed not to disclose an infection with colleagues and to instead rely on the company's contact-tracing program.

The Attorney General found that Amazon's productivity and TOT-monitoring practices severely hampered the safe practices related to hygiene, sanitation, and social-distancing necessary to prevent the spread of COVID-19 among employees. Employees are implicitly discouraged from taking additional time to engage in hygiene and sanitation practices throughout the day because they know it will negatively impact their productivity rates and could result in

discipline. Amazon claims that it "paused" its productivity-related discipline practices in March 2020. However, Amazon did not communicate this to its employees until July 2020. Productivity-related discipline practices resumed in October 2020, notwithstanding the continued danger posed by increasing rates of COVID-19 in New York at that time.

In addition to the foregoing deficiencies, the Attorney General's investigation also revealed instances of retaliation against employees who raised concerns about the safety of Amazon's facilities. Christian Smalls, a "process assistant" who had been promoted to a management position, and Derrick Palmer, "a process guide warehouse associate," were Amazon employees at JFK8 in March 2020. Both Smalls and Palmer had been employed by Amazon since 2015 and had a history of good work performance and positive feedback from their superiors. Smalls and Palmer, along with other Amazon employees, asked Amazon management on several occasions to close JFK8 to conduct proper cleaning and disinfection consistent with public health guidance. They also complained to management about inadequate contact tracing measures. Smalls and Palmer contacted the CDC to complain about Amazon's safety procedures at JFK8 and notified Amazon management of such contact.

On March 26, 2020, Smalls and Palmer both advised representatives of Amazon's Human Resources Department that they had been in close contact with an employee who represented she had tested positive for COVID-19 and who was last at JFK8 on March 24, 2020. On March 28, 2020, Amazon informed Smalls that he was being placed on mandatory quarantine. On March 30, 2020, Smalls and Palmer protested Amazon's pandemic response with other Amazon employees in front of the JFK8 building. That same evening, Amazon terminated Smalls for purportedly violating its quarantine order and social distancing requirements. On April 10, 2020, Amazon issued Palmer a "final" written warning for violating Amazon's social

distancing policy by appearing at the protest. No prior warnings had been issued to Palmer. The Attorney General contends that Amazon's actions towards Smalls and Palmer have created a chilling effect for other Amazon employees who now fear speaking up about their safety-related concerns at Amazon facilities.

While the amended complaint highlights no specific employee, it further avers that a number of employees at DBK1 raised similar concerns about health and safety to Amazon management in March 2020. On March 17, 2020, those DBK1 employees posted a petition online expressing frustration with the lack of protective measures and adherence to public health guidance at DBK1 as Amazon prioritized productivity and profit margins over employee safety. Amazon purportedly retaliated against employees who expressed such concerns by refusing to select them for preferred job assignments, assigning them non-preferred duties, and interrogating and criticizing them about their complaints.

According to the Attorney General, Amazon's response to the COVID-19 pandemic continues to be legally inadequate. Amazon requires employees to clean their own workstations and equipment but provides neither the training nor time for them to do so. Amazon does not close its facilities when infected employees are confirmed to have been there. While it closes individual workstations when an infection has been detected, it only does so for 90 minutes. Amazon also fails to implement social distancing and continues to monitor productivity and TOT without any automatic exemption for COVID-19-related hygiene and cleaning practices. At the same time, Amazon's profits have soared to over $213 billion during the pandemic alone. This increased sales volume amounts to approximately $30 million in additional profits from JFK8 and DBK1.

B. Procedural Background

On or about February 12, 2021, Amazon filed suit against the Attorney General in the United States District Court for the Eastern District of New York (the "Eastern District of New York") seeking declaratory and injunctive relief in a case captioned Amazon.com, Inc. v James, Index No. 1:21-cv767 (E.D.N.Y.) (the "EDNY declaratory action"). Amazon sought, *inter alia*, a declaration that the Attorney General's attempts to subject Amazon to state oversight of its workplace safety response to COVID-19 and claims of retaliation against workers who protested working conditions are preempted by federal law, namely, the Occupational Safety and Health Act (the "OSH Act") and the National Labor Relations Act (the "NLRA"). Amazon further sought an injunction preventing the Attorney General from exercising her regulatory authority over the same areas, again on the grounds of federal preemption.

Four days later, on February 16, 2021, the Attorney General commenced this action by filing of the summons and complaint. An amended complaint was filed on May 6, 2021. In the amended complaint, the Attorney General alleges that Amazon's inadequate disinfection and contact-tracing protocols, its failure to prioritize sanitation and social distancing policies, and its termination of employees who protested allegedly unsafe conditions at JFK8 and DBK1 violated New York Labor Law ("NYLL") §§ 200, 215, and 740. Those provisions of the NYLL relate to the obligations of New York businesses to adequately protect the health and safety of employees and to refrain from discrimination or retaliation against employees who complain about potential NYLL violations. The Attorney General asserts that she is expressly authorized to bring this lawsuit pursuant to Executive Law § 63(12), which empowers the Attorney General to seek injunctive and other relief against entities that "engage in repeated fraudulent or illegal acts or

otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business" in New York.

On February 17, 2021, Amazon removed this case to the United States District Court for the Southern District of New York (the "Southern District of New York") pursuant to 28 USC §§ 1331, 1332, 1367, and 1441. On March 3, 2021, the Attorney General moved to remand the case to state court. On the same date, Amazon moved to transfer the case to the Eastern District of New York. By decision and order dated July 26, 2021, the Southern District of New York (Rakoff, J.) granted the Attorney General's motion to remand and denied Amazon's motion as moot. People of the State of New York v Amazon.com, Inc., No. 21-cv-1417, 2021 WL 3140051 (S.D.N.Y. July 26, 2021). The court found that the claims in this action did not "arise under" federal law and that its exercise of federal jurisdiction was therefore impermissible.

Separately, the Attorney General moved to dismiss the EDNY declaratory action for lack of subject matter jurisdiction. By Decision and Order dated August 10, 2021, the Eastern District of New York (Cogan, J.) granted the Attorney General's motion to dismiss. Amazon.com, Inc. v James, No. 21-cv-767, 2021 WL 3516382 (E.D.N.Y. Aug. 10, 2021). The court further denied a motion for summary judgment filed by Amazon as moot. Id. While the Eastern District of New York found that subject matter jurisdiction did exist, it abstained from exercising that jurisdiction pursuant to Younger v Harris, 401 US 37 (1971), since Amazon's suit contravened "the longstanding public policy against federal court interference with state court proceedings." Younger v Harris, 401 US 37, 43–44 (1971). The court relied on the pendency of the instant action in reaching its decision.

III. DISCUSSION

A. Amazon's Motion to Stay this Action

Amazon has made separate motions to dismiss this action and to stay it. Because the issue of the stay is a threshold question, the court begins its analysis there, notwithstanding that the motion to stay was filed subsequent to Amazon's motion to dismiss.

CPLR 2201 vests the court in which an action is pending with the discretion to "grant a stay of proceedings in a proper case, upon such terms as may be just." CPLR 2201; see Lauria v Kriss, 147 AD3d 575 (1st Dept. 2017); Simoni v Napoli, 101 AD3d 487 (1st Dept. 2012); Mourtil v Korman & Stein, P.C., 33 AD3d 898 (2nd Dept. 2006). An action pending in the New York State Supreme Court may be stayed, in certain instances, where related actions are pending in federal court. "In considering whether to stay an action pursuant to CPRL 2201 in favor of parallel federal proceedings, comity and judicial efficiency may warrant a stay where there is substantial overlap of claims and parties." Lauria v Kriss, supra at 790–91 (citation omitted).

Amazon points to three federal actions that it contends warrant the imposition of a stay of this proceeding. The first is the EDNY declaratory action. As discussed above, that action has been dismissed since the filing of the instant motion. Dismissal was premised on the federal court's finding that it should abstain from hearing the case pursuant to the Younger abstention doctrine. In reaching this conclusion, the federal court considered the pendency of this civil enforcement proceeding, among other things. See Amazon.com, Inc. v James, supra at *3–*6. In other words, the Eastern District of New York, like the Southern District of New York, agreed with the Attorney General that state court was the proper forum for the resolution of the issues presented in this case. See id.; People of the State of New York v Amazon.com, Inc., supra. Amazon is pursuing an appeal of the federal court's decision to the United States Court of

Appeals for the Second Circuit (the "Second Circuit"). Notwithstanding the appeal, in light of its dismissal and the grounds on which dismissal is based, the EDNY declaratory action cannot serve as a basis for a stay.

The second and third federal actions Amazon invokes were commenced by Smalls and Palmer, respectively, in the Eastern District of New York. In the case captioned Smalls v Amazon.com, Inc., Index No. 20-cv-5492 (E.D.N.Y.), Smalls asserts race and national origin-based discrimination and retaliation claims under 42 U.S.C. § 1981 ("Section 1981"), the New York State Human Rights Law (the "NYSHRL"), and the New York City Human Rights Law (the "NYCHRL"). Smalls seeks class certification on behalf of similarly situated workers. Smalls alleges in his complaint that Amazon's COVID-19 workplace safety policies subjected minority line workers to health threats that its overwhelmingly white managers were not subject to. Smalls highlights, for example, Amazon's allegedly deficient contact tracing regimen, poor health screening and cleaning protocols, and failure to prioritize measures such as social distancing to protect staff at JFK8. Smalls further alleges that his employment was terminated because he complained about the inadequacy of Amazon's COVID-19 policies. Smalls brings no claim pursuant to the NYLL.

On March 5, 2021, Amazon moved to dismiss Smalls' lawsuit on the grounds that his challenge to Amazon's COVID-19 policies is subject to the primary jurisdiction of the federal Occupational Safety and Health Administration ("OSHA") and that his retaliation claims are preempted by the NLRA and are within the exclusive jurisdiction of the National Labor Relations Board ("NLRB"). Amazon further contends that Smalls fails to plausibly allege a violation of Section 1981, the NYSHRL, or the NYCHRL. That motion remains pending in the Eastern District of New York.

The pendency of Smalls, a putative class action seeking damages and injunctive relief pursuant to Section 1981 and anti-discrimination statutes, does not warrant a stay of the Attorney General's civil enforcement action. While there may be overlapping factual issues related to the adequacy of Amazon's COVID-19 safety policies, the two actions are premised on separate statutory regimes that hold the respective plaintiffs to different standards of proof, offer different forms of relief, and are subject to different defenses. For example, unlike in Smalls, the Attorney General is not required to prove that Amazon's policies disproportionately impacted members of a protected class or that any Amazon employees were retaliated against because of their race or national origin in order to prevail on any of her claims. Moreover, a finding for or against Amazon in the Smalls action would not be dispositive of any of the Attorney General's claims in this action. Even if the federal court were to find that Smalls failed to state any race or national origin-based discrimination claim, the Attorney General could prevail on each of her NYLL-based claims. Cf. Uptown Healthcare Mgt., Inc. v Rivkin Radler LLP, 116 AD3d 631 (1st Dept. 2014) (trial court's imposition of a stay due to pendency of related federal action was appropriate where disposition of certain issues in federal action would be dispositive of state claims); Belopolsky v Renew Data Corp., 41 AD3d 322 (1st Dept. 2007) (trial court's imposition of a stay in subsequently filed action was appropriate where "the determination of the prior action may dispose of or limit issues which are involved in the subsequent action" [internal citations omitted]).

In the case captioned Palmer v Amazon.com, Inc., Index No. 20-cv-2468, Palmer, two of his Amazon colleagues, and their family members (together, the "Palmer plaintiffs") bring claims sounding in, *inter alia*, public nuisance, breach of the duty to provide a safe workplace codified in NYLL § 200 ("§ 200"), and failure to timely pay COVID-19 leave pursuant to NYLL

§ 191 ("§ 191"). The Palmer plaintiffs allege that Amazon's operations at JFK8 failed to comply with applicable workplace guidance related to the COVID-19 pandemic in virtually the same manner as is claimed by the Attorney General in this matter. Like the Attorney General, the Palmer plaintiffs suggest that Amazon's failure to adhere to the NYSDOH's minimum safety standards for the wholesale trade sector constitutes a violation of § 200. However, the Palmer plaintiffs do not bring any retaliation-based claims.

On November 2, 2020, the Eastern District of New York (Cogan, J.) granted Amazon's motion to dismiss the complaint in Palmer to the extent that the Palmer plaintiffs' public nuisance and § 200 claims were dismissed without prejudice pursuant to the doctrine of primary jurisdiction and their § 191 claims were dismissed with prejudice. Palmer v Amazon.com, Inc., 498 F Supp 3d 359 (E.D.N.Y. 2020). The court held, *inter alia*, that while the § 200 claim was not preempted by federal law, the primary jurisdiction doctrine applied, and the relevant factors weighed in favor of deferring to the expertise and discretion of OSHA. Id. at 368–71. The court further concluded that, to the extent the Palmer plaintiffs' § 200 claim was based on past injury, it was barred by the New York Workers' Compensation Law, that no § 200 claim based on future harm could be maintained, and that the Palmer plaintiffs' § 191 claims were subject to dismissal because COVID-19 leave does not constitute "wages" within the meaning of that statute. Id. at 374–77. The Palmer plaintiffs' appeal of the federal court's decision is currently pending before the Second Circuit.

There can be no dispute that the Palmer plaintiffs' § 200 claim and the Attorney General's analogous § 200 claim raise overlapping issues of law and fact. To be sure, the disposition of Amazon's motion to dismiss in this matter will necessarily require this court to consider the same arguments regarding federal preemption and primary jurisdiction that Amazon

made before the Eastern District of New York with respect to the Attorney General's § 200 claims. Nonetheless, Palmer and the pendency of the Palmer plaintiffs' appeal do not warrant the imposition of a stay in this matter.

As the court has described, this action involves additional, independent claims pursuant to the anti-retaliation and whistleblower provisions of the NYLL not raised in Palmer; § 200 is but one piece of the litigation, albeit a significant one. Moreover, the Attorney General is not a party to Palmer and is not bound by the federal court's ruling. Nor is this court required to adhere to the federal court's conclusions regarding state law, though the federal court's analysis is undoubtedly relevant for its persuasive authority. See Matter of Oneida Indian Nation of N.Y. v Pifer, 43 AD3d 579, 580–81 (3rd Dept. 2007) ("Federal court rulings on issues of state law are not binding on state courts."). The same would be true in reference to any forthcoming decision from the Second Circuit on the Palmer appeal. See Matter of 1616 Second Ave. Rest. v New York State Liq. Auth., 75 NY2d 158, 165 (1990) ("It is true that the decisions of the Federal Circuit Courts of Appeal are not binding on us."); Merrill Lynch, Pierce, Fenner & Smith v McLeod, 208 AD2d 81, 83 (1st Dept. 1995). Amazon does not argue otherwise. Accordingly, as Palmer neither involves all of the same parties nor has the ability to conclusively dispose of any issue in this case, it does not form the basis for a stay of this proceeding.

For the foregoing reasons, Amazon's motion for a stay pursuant to CPLR 2201 is denied.

B. Amazon's Motion to Dismiss[1]

Amazon seeks to dismiss the amended complaint in its entirety pursuant to CPLR 3211(a)(2) and (a)(7). Pursuant to CPLR 3211(a)(2), a party may move to dismiss a cause of

[1] On July 12, 2021, Amazon filed a subsequent motion to dismiss the Attorney General's § 200 claims for lack of subject matter jurisdiction (SEQ 005). Amazon argues in support of that motion that there is no longer a live and justiciable controversy with respect to Amazon's COVID-19 workplace safety measures because, *inter alia*, New

action on the ground that the court lacks subject matter jurisdiction, including where the cause of action is preempted by federal law. See, e.g., Klingsberg v Council of School Supervisors and Administrators—Local 1, 181 AD3d 949 (2nd Dept. 2020); Sharabani v Simon Property Group, Inc., 96 AD3d 24 (2nd Dept. 2012). CPLR 3211(a)(7) provides for dismissal of a cause of action where the plaintiff fails to plead a cognizable claim. On a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994).

i. NYLL § 200

NYLL § 200 requires workplaces to be "so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places." NYLL § 200(1). It further authorizes the New York State Labor Commissioner (the "NYS Labor Commissioner") to inspect workplaces and make enforceable findings when "a dangerous condition" exists. NYLL § 200(2). The Attorney General seeks to enforce § 200 pursuant to her authority under Executive Law § 63(12), which, as described above, empowers her to sue on behalf of New York citizens for "repeated fraudulent or illegal acts."

Amazon argues that the Attorney General's claim pursuant to § 200 is subject to dismissal because (a) the federal Occupational Safety and Health Act (the "OSH Act") preempts the § 200 claim, (b) OSHA has primary jurisdiction over the NYLL § 200 claim, (c) § 200 does

York's former Governor declared the COVID-19 emergency "over." The court does not address this subsequent motion in the instant decision and order and reserves decision on the same.

not authorize the Attorney General's claim, and (d) the Attorney General cannot give nonbinding guidance the force and effect of law consistent with the federal and New York administrative procedure acts and the Due Process Clauses of the United States Constitution and New York State Constitution. The court addresses each argument in turn.

a. OSH Act Preemption

"[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent." Allis-Chalmers Corp. v Lueck, 471 US 202, 208 (1985); see City of New York v Job-Lot Pushcart, 88 NY2d 163, 167 (1996) ("[T]he 'purpose of Congress is the ultimate touchstone' of preemption analysis." [quoting Retail Clerks v Schermerhorn, 375 US 96, 103 (1963)]). Accordingly, the court's preemption analysis turns on the determination whether Congress, in enacting the OSH Act, intended to preempt the Attorney General's action for injunctive relief and damages under § 200. Since the regulation of health and safety in the workplace is a traditional police power reserved to the States, (see City of New York v Job-Lot Pushcart, supra at 166), the court begins with the presumption that such a power "w[as] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," (Rice v Santa Fe El. Corp., 331 US 218, 229 [1947]; see Balbuena v IDR Realty LLC, 6 NY3d 338, 356 [2006]; City of New York v Job-Lot Pushcart, supra at 166–67).

Federal preemption may be by express provision or by inference, where "under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Crosby v National Foreign Trade Council, 530 US 363, 373 (2000) (alterations omitted) (citation omitted). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." Id. The United States

Supreme Court has held that "nonapproved state regulation of occupational safety and health issues for which a federal standard is in effect is impliedly preempted as in conflict with the full purposes and objects of the OSH Act." Gade v National Solid Wastes Management Ass'n, 505 US 88, 98–99 (1992). "[S]tate laws regulating the same issue as federal laws are not saved, even if they merely supplement the federal standard" and do not conflict with such standard. Id. at 100.

The OSH Act authorizes the United States Secretary of Labor (the "Secretary of Labor") to set mandatory occupational safety and health standards applicable to all businesses affecting interstate commerce. 29 U.S.C. § 651(b)(3). In so doing, the OSH Act manifests Congress's endeavor to "assure so far as possible every working man and woman in the Nation safe and healthful work conditions." 29 U.S.C. § 651(b). However, Congress did not intend federal regulation of the workplace to be "all encompassing." Gade v National Solid Wastes Management Ass'n, supra at 96; see Irwin v St. Joseph's Intercommunity Hosp., 236 AD2d 123, 126 (4th Dept. 1997). Accordingly, the OSH Act includes a jurisdictional savings clause that expressly provides, "[n]othing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title." 29 U.S.C. § 667(a). The OSH Act also provides that it does not "supersede or in any manner affect any workmen's compensation law or … enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4).

In addition to the foregoing provisions, Congress gave States the option of preempting federal regulation entirely. A state may "assume responsibility for development and

enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated" by submitting a "State plan for the development of such standards and their enforcement." 29 U.S.C. § 667(b). Put differently, even where a federal standard addressing an issue of worker safety is in effect, a state may supplant such standard pursuant to an approved state plan.

While New York submitted a plan that received the Secretary of Labor's approval in 1973, it withdrew the plan two years later. See Irwin v St. Joseph's Intercommunity Hosp., supra at 127. No approved plan currently exists for the State of New York. Accordingly, New York cannot avail itself of "reverse preemption" of any federal standards under the OSH Act. The relevant inquiry, then, is whether there exist any federal occupational safety and health standards governing the issue of COVID-19-related safety protocols in the workplace. If the answer is yes, as Amazon argues it is, then the OSH Act impliedly preempts the enforcement of state law requirements governing the same issue. However, statutory and common law tort claims would continue to be permissible pursuant to the Act. See 29 U.S.C. § 653(b)(4); Irwin v St. Joseph's Intercommunity Hosp., supra at 131.

The Eastern District of New York addressed Amazon's preemption argument in Palmer and found that the Palmer plaintiffs' § 200 claim was not preempted because it "does not conflict with an existing federal standard and the OSH Act's savings clause expressly excludes statutory tort law claims from preemption." Palmer v Amazon.com, Inc., supra at 374. When the Palmer decision was issued, OSHA had indicated that a handful of pre-existing standards related to recording workplace exposure to illness and bloodborne pathogens, as well as to use of personal protective equipment in certain industries, are applicable during the COVID-19 pandemic. However, the agency had not promulgated any federal standard directly addressing workplace

exposure to the novel coronavirus. Since November 2020, OSHA has issued a mandatory COVID-19 Emergency Temporary Standard ("ETS") applicable to healthcare workplace settings only. More recently, on September 9, 2021, President Biden announced that OSHA will issue another ETS requiring employers with more than 100 employees to ensure their workers are vaccinated against COVID-19 or tested on a weekly basis before coming to work. No vaccination-related ETS has been issued as of the date of this order.

The Attorney General contends that OSHA's increasing involvement in regulating workplace risks specific to COVID-19 should not alter the federal court's preemption analysis. At this juncture, the court agrees. OSHA's only existing COVID-19-related ETS explicitly limits itself to regulating healthcare settings. Moreover, OSHA's advisory recommendations applicable to other workplace settings do not constitute "occupational health and safety standards" within the meaning of the OSH Act, which defines such standards as those "which *require*[] conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8) (emphasis added). Accordingly, there is no existing federal standard governing the specific workplace hazard of COVID-19 or other airborne infectious illness at a warehouse or distribution center, or at any analogous setting. As such, New York cannot be preempted from promulgating requirements in this area.

Additionally, the OSH Act precludes statutory tort claims such as § 200 from preemption. Palmer v Amazon.com, Inc., supra at 374. While the proposed relief the Attorney General seeks in connection with § 200 may "create a regulatory scheme that is in tension with the OSH Act's purposes, 'Congress intended State law statutory and common-law duties, rights and liabilities to

survive, and ... was willing to tolerate any tension that resulted.'" Id. (quoting People v Pymm, 76 NY2d 511, 523–24 [1990]).

For the foregoing reasons, the court concludes that the OSH Act does not preempt the Attorney General's § 200 claims.

b. Primary Jurisdiction

"The doctrine of primary jurisdiction provides that where the courts and an administrative agency have concurrent jurisdiction over a dispute involving issues beyond the conventional experience of judges ... the court will stay its hand until the agency has applied its expertise to the salient questions." Flacke v Onondoga Landfill Sys., 69 NY2d 355, 362, (1987) (internal quotation marks omitted); see Sohn v Calderon, 78 NY2d 755, 768 (1991). The doctrine applies "'where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.'" Staatsburg Water Co. v Staatsburg Fire Dist., 72 NY2d 147, 156 (1988) (quoting United States v Western Pacific R. Co., 352 US 59, 64 [1956]); see Katz 737 v Cohen, 104 AD3d 144, 150 (1st Dept. 2012) ("[T]he doctrine of primary jurisdiction enjoins courts sharing 'concurrent jurisdiction to refrain from adjudicating disputes within an administrative agency's authority, particularly where the agency's specialized experience and technical expertise is involved.'" [quoting Sohn v Calderon, supra at 768]).

OSHA is a federal agency within the Department of Labor to which the Secretary of Labor has delegated certain of his statutory responsibilities under the OSH Act. In practice, OSHA sets and enforces mandatory workplace safety and health standards promulgated pursuant

to 29 USC § 655. OSHA also enforces the general duty clause of the OSH Act, which is not an OSHA "standard" but requires employers to keep their workplaces free of serious, recognized hazards, (29 USC § 654[a]), in the absence of a specific standard applicable to such hazards.

The OSH Act empowers employees who "believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists," to request an inspection by giving notice to the Secretary of Labor or his authorized representative. 29 USC § 657(f)(1). Upon receipt of such a request, if the Secretary of Labor determines there are reasonable grounds to believe a violation or danger exists, he "shall make a special inspection … to determine if such violation or danger exists." Id. If, upon inspection or investigation, the Secretary of Labor believes an employer has violated specific OSH Act standards or the general duty clause, it "shall with reasonable promptness issue a citation [in writing] to the employer," (29 USC § 658), and notify the employer of the assessment of any penalty, (29 USC § 659). The OSH Act authorizes the imposition of civil fines between $5,000 and $70,000 as well as criminal penalties including imprisonment. 29 USC § 666. OSHA exercises the foregoing investigatory and enforcement powers on the Secretary of Labor's behalf. OSHA's enforcement actions are subject to review by the Occupational Safety and Health Review Commission (the "Commission"), (29 USC § 659[c]), and the Commission's decisions are subject to review by federal courts of appeal, (29 USC § 660).

In late 2020, Amazon successfully argued before the Eastern District of New York that the application of the primary jurisdiction doctrine to the Palmer plaintiffs' § 200 claim compelled dismissal of that claim in deference to OSHA's expertise. Initially, the federal court found that OSHA's decision to rely on optional guidance and existing standards in addressing workplace safety rather than promulgating standards specific to COVID-19 "does not mean …

that OSHA has abdicated its responsibilities during the pandemic. Rather, the agency has exercised its discretion in determining how to proceed in the face of an evolving pandemic fraught with uncertainty." Palmer v Amazon.com, Inc., supra at 369. OSHA continued to exercise its enforcement authority during the pandemic; as of the date of the federal court's decision, OSHA had received nearly 10,000 COVID-19-related complaints, including approximately 200 from the general warehousing and storage industry, opened over 1,000 federal inspections, and issued approximately 150 citations. Id.

In the federal court's view, the Palmer plaintiffs' § 200 claim, pursuant to which they sought both damages and injunctive relief, required OSHA's technical and policy expertise. The Palmer plaintiffs, in effect, were asking the federal court to "analyze how Amazon's employment practices and policies impact transmission of a poorly understood disease in JFK8, determine whether those policies create an unsafe workplace or otherwise violate state and federal guidance and standards, and implement and oversee new workplace policies." Id. at 370. Given the challenges inherent in deciding the adequacy of safety measures during the COVID-19 pandemic, the risk of courts imposing inconsistent and costly regulatory schemes, and the need for technical and policy expertise in public health and workplace safety to address an evolving situation, the federal court concluded that OSHA, and not the courts, was best equipped to assess the Palmer plaintiffs' complaints. Id. The federal court reasoned that "[a] determination by OSHA" as to the sufficiency of Amazon's workplace policies "would be more flexible and could ensure uniformity." Id.

Nearly a year has passed since the federal court rendered its decision. In that time, the United States has greatly expanded its arsenal of tools to fight the spread of COVID-19, most notably through the introduction of multiple highly effective vaccines. The vaccines were

introduced in late 2020 and have since been widely administered in the State of New York. In connection with declining rates of infection and hospitalization, New York loosened restrictions and prohibitions aimed to slow the spread of COVID-19 in June 2021. However, the absence of restrictions along with new, more infectious COVID-19 variants and low rates of vaccination in certain groups has reversed some of the progress New York has made. Rates of infection and hospitalization have begun to climb again. Businesses have re-imposed masking requirements and the return to nonessential, in-person work has been delayed. Moreover, new evidence about the ability of vaccinated individuals to spread COVID-19, uncertainty about the duration of immunity conferred by the vaccines, and indications that the novel delta variant is substantially more infectious and transmissible than prior COVID-19 variants cast doubt on whether a return to "normalcy" is truly possible now or in the near future.

In sum, while much has changed since the federal court's decision, much remains the same. We continue to be in the midst of "an evolving pandemic fraught with uncertainty." Palmer v Amazon.com, Inc., supra at 369. Additionally, while OSHA has promulgated an ETS applicable to healthcare settings, it has otherwise continued to manage COVID-19 workplace safety concerns through the issuance of informal guidance and select enforcement actions. OSHA's investigations have been largely directed towards health and emergency care facilities. Amazon has not identified any complaints filed with OSHA concerning working conditions at JFK8 and DBK1. Nor has Amazon made any allegation that OSHA is investigating or has ever investigated Amazon's response to the COVID-19 pandemic. Thus, while the federal court's decision expressly contemplated the application of OSHA's expertise in addressing the sufficiency of Amazon's workplace safety policies in the COVID-19 era, OSHA has yet to weigh in on the type of concerns described in Palmer and the instant enforcement action.

This is by no means a criticism of OSHA. As the federal court rightly observed, OSHA has exercised its discretion in determining how best to proceed in the face of a novel, constantly evolving, and poorly understood new workplace hazard. See In re American Federation of Labor & Congress of Industrial Organizations, 2020 WL 3125324 at *1 (D.C. Cir. June 11, 2020). OSHA has made the eminently reasonable decision to direct its limited resources to the protection of healthcare and emergency care workers on the front lines of the fight against COVID-19. Nonetheless, well over a year has passed since New York's first confirmed COVID-19 case. Amazon's proposition that the circumstances of the COVID-19 pandemic are "improving" to a degree that would obviate the need for any of the safety measures that the Attorney General seeks is debatable, at best. At this time, it cannot be denied that workers at JFK8 and DBK1 remain at risk. In the absence of OSHA's application of its expertise to the question of the appropriateness of Amazon's workplace safety measures, the Attorney General's § 200 claim must be permitted to proceed.

In reaching this conclusion, the court is mindful of the difficulties inherent in assessing the reasonableness of workplace safety standards designed to combat a novel and evolving risk like COVID-19. But courts, as well as jurors, are frequently tasked with applying legal standards to highly specialized and technical areas of fact they are not themselves expert in. In such cases, courts and jurors commonly rely on those with demonstrated expertise in their fields to assist them in reaching conclusions about a particular claim. They are able to do so even where experts may disagree or where the subject of the expert testimony involves partially unresolved questions of science and medicine.

Here, the Attorney General asks the court to determine the appropriateness of Amazon's workplace safety protocol, with NYSDOH and CDC guidance as the suggested minimum

standard for "reasonable and adequate protection" under § 200. The court need not have independent expertise in infectious disease transmission or workplace safety to apply the law, which is a codification of the common-law duty to exercise reasonable care, (see Ross v Curti-Palmer Hydro-Elec. Co., 81 NY2d 494, 505–06 [1993]), to the Attorney General's evidence and arguments. Indeed, it would render § 200 toothless to prevent the Attorney General from suing to obtain relief for workers subject to a serious hazard simply because the court lacks expertise in the hazard and is not a dedicated workplace safety agency like OSHA. It would also dramatically undercut the state's police powers over health and safety issues. Such an outcome would be particularly dangerous during an ongoing pandemic.

Similarly, that the expert guidelines promulgated by agencies such as the CDC and NYSDOH may be imperfect or evolve over time as more is learned about the novel coronavirus does not counsel this court to decline to exercise its jurisdiction. To be sure, the uncertainty surrounding the virus considerably complicates the Attorney General's claims, particularly those that are forward-looking. However, to wait until the situation stabilizes and experts agree on a set of safety standards applicable to warehouse settings in the long-term is both unrealistic and, again, dangerous.

The caselaw cited by Amazon is largely inapposite and does not counsel a different conclusion. Recent Supreme Court decisions addressed to restrictions on houses of worship during the pandemic were premised on First Amendment considerations not present here. See Roman Catholic Diocese of Brooklyn v Cuomo, 141 S Ct 63 (2020) (per curiam); S. Bay United Pentecostal Church v. Newsom, 140 S Ct 1613 (2020). In In re American Federation of Labor and Congress of Industrial Organization, the federal appellate court gave deference to OSHA's decision to not issue an ETS and did not discuss primary jurisdiction. See In re American

Federation of Labor and Congress of Industrial Organization, No. 20-1158, 2020 WL 3125324 (D.C. Cir. June 11, 2020). Finally, other out-of-state cases cited by Amazon involved defendants whose conduct was already being investigated by OSHA. See Rural Cmty. Workers All. v Smithfield Foods, Inc., 459 F Supp 3d 1228 (W.D. Mo. 2020); Brent v AmazonFresh LLC, No. CGC-20-584828, Slip Op. (Cal. Super. Ct. Jul. 27, 2020).

In sum, there is insufficient reason to warrant any further delay in addressing a serious and deadly hazard to workers at JFK8 and DBK1. The court declines to extend the Eastern District of New York's holding on the issue of primary jurisdiction in Palmer to the Attorney General's § 200 claim.

c. The Attorney General's Authority to Seek Injunctive Relief

NYLL § 21(1) provides, in relevant part, that the Commissioner of Labor shall enforce all provisions of the NYLL, including § 200. NYLL § 200(2) empowers the Commissioner of Labor, if he makes a finding that any "machinery, equipment, or device" or "any area" to which the NYLL applies is in "dangerous condition" to post a notice in such area warning all persons of the danger. The Commissioner may "prohibit further work in or occupancy of such area until the dangerous condition is corrected and the notice removed." Furthermore, "[w]henever a notice is attached or posted as provided in [NYLL § 200(2)], the attorney general may institute a proceeding to enjoin the use of such machinery, equipment, or device or to enjoin further work in or occupancy of such area." NYLL § 200(3).

Amazon contends that, because NYLL § 200(3) authorizes the Attorney General to initiate a lawsuit whenever the Commissioner of Labor has posted a notice of a "dangerous condition," the Attorney General cannot initiate a lawsuit to enforce § 200 under any other circumstance. Amazon's argument imposes an artificial constraint on the Attorney General's

authority pursuant to Executive Law § 63(12), which "provide[s] particular remedies and standing in a public officer to seek redress on behalf of the State and others" for recognized wrongs existing apart from that statute. State of New York v Cortelle Corp., 38 NY2d 83, 86 (1975); see People ex rel. Schneiderman v Credit Suisse Securities (USA) LLC, 145 AD3d 533, 535 (1st Dept. 2016). Nothing in NYLL § 200(3) limits the Attorney General's power conferred by Executive Law § 63(12) to bring a proceeding for the relief authorized therein, including, *inter alia*, injunctive relief enjoining the continuance of illegal acts, even where the underlying statute does not expressly provide for such relief. See State of New York v Ford Motor Co., 74 NY2d 495, 502 (1989) (application by Attorney General for remedial order under Executive Law § 63[12] is addressed to the sound discretion of the court); State of New York v Princess Prestige Co., Inc., 42 NY2d 104, 107 (1977) (Attorney General could obtain relief under Executive Law § 63[12] even though underlying statute did not provide for such relief); State of New York v Frink America, Inc., 2 AD2d 1379, 1380–81 (4th Dept. 2003) (NYLL did not provide exclusive remedy precluding Attorney General's suit pursuant to Executive Law § 63[12]).

Furthermore, the court is not persuaded by Amazon's argument that § 200 "applies only to *physical* dangers in the workplace, not unseen and ubiquitous biological threats such as COVID-19." Amazon's argument is unsupported by any controlling authority and is belied by the plain language of the statute, which codifies the common law duty of an employer to exercise reasonable care in providing a safe place to work and "appl[ies] to all work places." Paradise v Lehrer, McGovern & Bovis, Inc., 267 AD2d 132, 134 (1st Dept. 1999). There is no sound basis for the adoption of Amazon's narrow interpretation of § 200 to eliminate an employer's duty to address the danger novel and unprecedented hazards such as COVID-19 expose workers to.

Finally, contrary to Amazon's contentions, the Attorney General adequately pleads violations of § 200 with respect to both JFK8 and DBK1. That some of the Attorney General's claims regarding JFK8 contain a greater number of factual allegations than those addressed to DBK1 does not alter this assessment.

For the foregoing reasons, the Attorney General's § 200 claim is not subject to dismissal on the grounds that the Attorney General lacks authority to seek relief pursuant to that statute or otherwise fails to state a claim.

d. Administrative Procedure and Due Process

Amazon avers, lastly, that even if the court were to reject its prior arguments, as the court has done, the Attorney General's § 200 claim fails because "it cannot give nonbinding guidance the force and effect of law consistent with the federal and New York administrative procedure acts and the U.S. Constitution's and New York Constitution's Due Process Clauses." Specifically, Amazon takes issue with the Attorney General's references in the amended complaint to CDC guidance on cleaning, hygiene, and notification to employees of potential COVID-19 exposure, as well as NYSDOH guidance that incorporates the CDC guidance by reference. All parties agree that such guidance lacks the force and effect of law. See Perez v Mortgage Bankers Ass'n, 575 US 92, 97 (2015) (federal interpretive rules not promulgated pursuant to the Administrative Procedure Act are not binding); N.Y. A.P.A. Law § 102(2)(b)(iv) (interpretive statements "have no legal effect but are merely explanatory"). Therefore, Amazon contends, it cannot be penalized for failing to comply.

Amazon's argument would warrant greater attention if the Attorney General were seeking relief for violations of CDC and NYSDOH guidance. She is not. Instead, the Attorney General sues Amazon for violation of the standard codified by § 200. She is required only to

allege that Amazon failed to provide "reasonable and adequate" protection to its workers at JFK8 and DBK1. That the Attorney General asserts that CDC and NYSDOH guidance should inform what is "reasonable and adequate" does not invalidate her § 200 claim any more than the introduction of expert opinion on the proper course of medical treatment would invalidate a medical malpractice claim. The finder of fact is not required to accept all parts of the guidance as dispositive of the issue. Moreover, he or she may consider the nonbinding nature of the guidance in determining the appropriateness of Amazon's conduct. Amazon's assertion that the Attorney General seeks to impose requirements on Amazon that go beyond the guidance would similarly be among the factors relevant to the "reasonable and adequate" standard.

Accordingly, the Attorney General's § 200 claim is not subject to dismissal because the amended complaint references CDC and NYSDOH guidance.

ii. NYLL §§ 215 and 740

NYLL § 215 ("§ 215") provides, in relevant part, that no employer "shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee (i) because such employee has made a complaint to his or her employer … or any other person, that the employer has engaged in conduct that the employee, reasonably and in good faith, believes violates any provision of [the NYLL]." NYLL § 740 ("§ 740," and together with "§ 215," the "NYLL anti-retaliation provisions") similarly prohibits an employer from, *inter alia*, taking "any retaliatory personnel action against an employee because such employee … discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety." NYLL § 740(2)(a). "Retaliatory personnel action" is defined as "the discharge, suspension or demotion of an employee, or other

adverse employment action taken against an employee in the terms and conditions of employment." NYLL § 740(1)(e).

Amazon contends that the Attorney General's claims pursuant to the NYLL anti-retaliation provisions are subject to dismissal because (a) they are preempted by the NLRA, (b) the Attorney General's § 740 claim fails to allege that Amazon employees complained about any actual violation of a "[l]aw, rule or regulation," and (c) the amended complaint otherwise fails to plausibly claim that Amazon disciplined its employees for retaliatory reasons, as required to state a violation of the NYLL anti-retaliation provisions. The court addresses each argument in turn.

a. NLRA Preemption

Like the OSH Act, the NLRA does not contain any provision expressly preempting state law. Still, as in the court's prior preemption analysis, "the purpose of Congress is the ultimate touchstone." City of New York v Job-Lot Pushcart, supra at 167 (internal quotation marks omitted) (citation omitted). The Attorney General's NYLL claims will be sustained unless they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Crosby v National Foreign Trade Council, supra at 373 (alterations omitted) (citation omitted).

Amazon avers that the NLRA preempts the Attorney General's claims under San Diego Building Trades Council v Garmon, 359 US 236 (1959). So-called Garmon preemption requires preemption "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8." Id. at 244. § 7 of the NLRA codifies the right of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or

other mutual aid or protection." 29 USC § 157. § 8 of the NLRA prohibits employers from, *inter alia*, interfering with their employees' exercise of their § 7 rights. 29 USC § 158. The doctrine of Garmon preemption is intended to "protect[] the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA." Metropolitan Life Ins. Co. v Massachusetts, 471 US 724, 749 (1985). "Thus, the Garmon rule can be stated quite elegantly: 'States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.'" Healthcare Ass'n of New York State, Inc. v Pataki, 471 F3d 87, 95 (2d Cir. 2006) (quoting Wis. Dep't of Indus., Labor & Human Relations v Gould Inc., 475 U.S. 282, 286 [1986]).

However, Garmon preemption "should not be applied inflexibly in circumstances where the State has a substantial interest in regulation of the conduct ... and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." Helmsley-Spear, Inc. v Fishman, 11 NY3d 470, 476 (2008) (internal quotation marks omitted); see Sears, Roebuck & Co. v San Diego Cty. Dist. Council of Carpenters, 436 US 180 (1978). Thus, where conduct falls within the scope of Garmon preemption, "state regulations or causes of action may still be maintained 'if the behavior is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility.'" Helmsley-Spear, Inc. v Fishman, supra at 474 (quoting Belknap, Inc. v Hale, 463 US 491, 498 [1983]); see Sears, Roebuck & Co. v San Diego Cty. Dist. Council of Carpenters, supra at 195; Suarez v Gallo Wine Distribs., LLC, 32 AD3d 737, 738 (1st Dept. 2006). "In such cases, 'the state's interest in controlling or remedying the effects of the conduct is balanced against both the interference with the [NLRB's] ability to adjudicate controversies committed to it by the [NLRA], and the risk that the state will

sanction conduct that the [NLRA] protects.'" Helmsley-Spear, Inc. v Fishman, supra at 474 (quoting Belknap, Inc. v Hale, supra at 498-99).

The Attorney General alleges that Amazon employees at JFK8 and DBK1 engaged in concerted activities, including organized protest, to raise concerns about working conditions at those facilities with Amazon, their supervisors, and the CDC. The Attorney General further alleges that Amazon retaliated against the complaining employees because the employees contended that health and safety measures at JFK8 and DBK1 were insufficient to adequately protect workers from the risk of exposure to COVID-19 on the job. The gravamen of the Attorney General's allegations in this regard is that the NYLL anti-retaliation provisions were violated because Amazon workers asserted perceived violations of § 200, and not because they engaged in concerted activities protected by the NLRA. Indeed, whether Amazon workers engaged in any activity protected by the NLRA is irrelevant to success of the Attorney General's claims. Accordingly, "[a]lthough the arguable federal violation and the state tort arose in the same factual setting, the respective controversies presented to the state and federal forums would not have been the same." Sears, Roebuck & Co. v San Diego Cty. Dist. Council of Carpenters, supra at 198.

Even assuming, *arguendo*, that the Attorney General's claims required this court to exercise jurisdiction over conduct protected by the NLRA, they would be exempt from Garmon preemption under the local interest exception described above. It is well-settled that the States' police powers over occupational health and safety issues such as those raised in this action are entitled to a high degree of deference in the context of federal preemption questions. See City of New York v Job-Lot Pushcart, supra at 166-67; see also Rice v Santa Fe El. Corp., supra at 229; Balbuena v IDR Realty LLC, supra at 356. To that end, "there is no suggestion in the legislative

history of the [NLRA] that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization. To the contrary, …Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety." Metropolitan Life Ins. Co. v Massachusetts, supra at 756.

The adjudication of the Attorney General's claims would not interfere with any existing or possible proceeding before the NLRB. For the reasons the court has explained, the controversy presented here is not *identical* to the controversy presented to the NLRB in a related proceeding, described by Amazon, wherein an Amazon employee alleged that he engaged in protected concerted activity by advocating with a group of co-workers for greater COVID-19 safety protections at JFK8. See Sears, Roebuck & Co. v San Diego Cty. Dist. Council of Carpenters, supra at 197. Nor is it identical to any controversy that could have been, but was not, presented to the NLRB. Similarly, the adjudication of the Attorney General's claims will not interfere with the NLRA's protections and prohibitions because they are unrelated to the processes of bargaining or self-organization. See Metropolitan Life Ins. Co. v Massachusetts, supra at 756.

For the foregoing reasons, Garmon preemption does not require dismissal of the Attorney General's claims pursuant to the NYLL anti-retaliation provisions.

b. Prerequisites for § 740 Claim

A prohibited retaliatory discharge under § 740 "is triggered only by a violation of a law, rule or regulation that creates and presents a substantial and specific danger to the public health and safety." Villarin v Rabbi Haskel Lookstein Sch., 96 AD3d 1, 5 (1st Dept. 2012). Within the meaning of the statute, a "[l]aw, rule or regulation" is "any duly enacted statute or ordinance or

any rule or regulation promulgated pursuant to any federal, state or local statute or ordinance." NYLL § 740(1)(c).

Amazon claims that because the Attorney General's claims reference CDC guidance, which does not constitute a law, rule or regulation under the NYLL, she fails to state a cause of action for violation of § 740. As the court has explained, however, the Attorney General does not seek relief arising from Amazon's failure to adhere to nonbinding guidance. Rather, the Attorney General alleges that Amazon's failure to implement "reasonable and adequate" measures for social distancing, sanitation, contact tracing, and employee productivity violated the independent requirements of § 200. She further claims that Amazon employees made complaints about Amazon's health and safety practices related to COVID-19 and subsequently became subject to retaliatory personnel actions within the meaning of § 740. Put differently, the Attorney General contends that Amazon employees complained about a perceived violation of § 200, which they believed created a serious threat to public health and safety, and were retaliated against for doing so. This is sufficient to state a claim pursuant to § 740.

c. Failure to State a Claim

Lastly, Amazon avers that the Attorney General fails to state claims sounding in violation of the NYLL anti-retaliation provisions because the amended complaint "identifies a legitimate and sufficient basis for Amazon's decision to terminate [Smalls]" and issue written discipline to Palmer. Amazon further contends that the retaliation-based claims applicable to unidentified workers at DBK1 are insufficiently detailed.

Affording the amended complaint a liberal construction, accepting the facts alleged as true, and according the Attorney General the benefit of every possible favorable inference, (see Leon v Martinez, supra at 87–88; Grassi & Co., CPAS, P.C. v Honka, supra at 564–65), the court

concludes that the amended complaint sufficiently states claims based on Amazon's alleged violation of the NYLL anti-retaliation provisions. Amazon's assertion that Smalls was terminated because he violated Amazon's quarantine order and social distancing requirements, and not because he participated in an outdoor protest against Amazon's health and safety policies, as alleged in the amended complaint, highlights an issue of fact not appropriately resolved on a motion pursuant to CPLR 3211(a)(7). See Grassi & Co., CPAS, P.C. v Honka, supra at 565 (fact-based determinations are premature on motion to dismiss for failure to state a claim). Amazon's insistence that Smalls understood that the quarantine order prevented him from participating in an outdoor protest based on extraneous evidence such as Smalls' statements to PIX11 News itself demonstrates the existence of questions that cannot be determined on the face of the amended complaint. Similarly, that Amazon told Palmer he was receiving a final written warning due to purported violations of Amazon's social distancing policies is not dispositive of the Attorney General's claims. The amended complaint alleges that Palmer's receipt of written discipline was out of line with Amazon's usual practice and occurred immediately following his repeated complaints about health and safety conditions. This sufficiently raises an inference of retaliation under the NYLL anti-retaliation provisions and survives a pre-answer motion to dismiss.

While the amended complaint does not identify by name the specific employees whose activities form the basis of the Attorney General's claims with respect to DBK1, it provides sufficient details at this phase of the proceedings to state a claim of retaliation against those employees. Specifically, the Attorney General alleges that DBK1 employees raised concerns about Amazon's response to the COVID-19 pandemic to multiple DBK1 managers and publicly posted a petition online, and that Amazon retaliated by refusing to select them for preferred job

assignments, assigning them non-preferred duties, and interrogating and criticizing them about their complaints. To be sure, far more factual detail will be required in order for the Attorney General to ultimately prevail on her claims. At this juncture, however, she adequately puts Amazon on notice of the allegations against it and provides enough factual information to survive Amazon's motion to dismiss.

C. The Attorney General's Motion to Lift the Automatic Stay of Discovery

CPLR 3214(b) provides that "[s]ervice of a notice of motion under [CPLR] 3211 … stays disclosure until determination of the motion unless the court orders otherwise." The Attorney General moves to lift the automatic stay imposed by that provision. To the extent the Attorney General's application is premised on the pendency of Amazon's first motion to dismiss the amended complaint pursuant to CPLR 3211, decided herein, the application has been rendered moot.

Nonetheless, subsequent to the submission the Attorney General's motion, Amazon filed a second notice of motion which, in effect, seeks to dismiss the Attorney General's § 200 claim pursuant to CPLR 3211(a)(2) for lack of subject matter jurisdiction (SEQ 005). Amazon presents grounds for dismissal, namely, mootness and non-justiciability, that it claims were not available when it filed its first motion to dismiss. Insofar as Amazon intends to invoke an automatic stay pending resolution of its second, partial motion to dismiss, the Attorney General's motion is deemed directed at such a stay. For the reasons discussed herein and in the Attorney General's moving papers, the motion is granted, and discovery shall proceed.

IV. CONCLUSION

Accordingly, it is

ORDERED that the defendants' motion pursuant to CPLR 2201 to stay this action pending resolution of three separate actions filed in the United States District Court for the Eastern District of New York (SEQ 003) is denied; and it is further

ORDERED that the defendants' motion pursuant to CPLR 3211(a)(2) and (a)(7) to dismiss the amended complaint in its entirety (SEQ 002) is denied; and it is further

ORDERED that the plaintiff's motion to lift the automatic stay of disclosure imposed pursuant to CPLR 3214(b), to the extent it is not rendered academic by the issuance of this Decision and Order, is granted; and it is further

ORDERED that the defendants shall file an answer to the amended complaint by October 21, 2021; and it is further

ORDERED that the parties shall confer, commence discovery and appear for a remote preliminary conference on December 3, 2021, at 3:00 p.m.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

DATED: October 12, 2021