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12 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
13 IN AND FOR THE COUNTY OF MARICOPA

14 ALEXANDRA BOSIN and YURI
15 DIANA CABRERA VALLE,
16 individually and on behalf of all other
17 persons similarly situated,

18 Plaintiffs,

19 v.

20 PHOENIX CHILDREN'S
21 HOSPITAL, INC., and DOES I-X,

22 Defendants.

No. CV2021-016638

**DEFENDANT'S MOTION TO
DISMISS COMPLAINT FOR
FAILURE TO STATE CLAIMS**

(Oral Argument Requested)

Summary of Argument

23 Plaintiffs Alexandra Bosin and Yuri Diana Cabrera Valle allege Phoenix Children's
24 Hospital ("PCH") invaded their privacy and negligently disclosed medical information
25 about them. Plaintiffs premise their claims on an email a PCH employee sent to
26 unvaccinated employees outlining the steps the hospital expected them to follow to maintain
27 a safe environment for patients, employees, and visitors. While the email acknowledges
28 PCH granted the recipients a medical or religious exemption to the vaccine requirement,
the email does not indicate the basis for any employee's exemption. And the email reveals
no medical diagnosis, condition, or circumstance about any recipient. Still, Plaintiffs allege
PCH's email invaded their privacy by giving publicity to private facts and negligently
disclosing medical information.

1 Plaintiffs claim their vaccination status is a private fact or medical information. For
2 a group of employees working in an acute care children’s hospital in the midst of a global
3 pandemic that has killed more than 776,000 people in the United States, the disclosure of
4 an employee’s vaccination status to other unvaccinated co-workers is not sufficient
5 publicity to support an invasion of privacy claim. Similarly, Plaintiffs’ vaccination status
6 is not the type of patient medical information protected from disclosure by the negligence
7 claim they purport to state. As outlined more fully below, Plaintiffs’ Complaint fails to
8 state a claim under Ariz. R. Civ. P. 12(b)(6), and the Court should dismiss the Complaint
9 as a matter of law.

10 MEMORANDUM OF POINTS AND AUTHORITIES

11 I. Background

12 PCH is a non-profit pediatric healthcare system operating a large hospital and other
13 healthcare facilities in Maricopa County, Arizona. Compl. ¶ 1. To limit the potential spread
14 of COVID-19 to patients, their families, and employees, PCH required its workforce to
15 receive a COVID-19 vaccine. *Id.* ¶ 9. Consistent with applicable law, PCH has granted
16 exemptions to the vaccine requirement for employees with medical reasons or sincerely
17 held religious objections to the vaccine. *Id.* ¶ 9.

18 On October 15, 2021, PCH employee Holly Tomassini sent an email to 368
19 employees on behalf of Steve Schuster, Vice President of Employee & Physician Relations.
20 *Id.* ¶ 10. PCH intended to send the email to the recipients individually, but inadvertently
21 sent it as group email, allowing each recipient to identify the names of other recipients. *Id.*
22 ¶ 47. While hospital personnel attempted to recall the email, PCH subsequently
23 acknowledged that sending the email with all recipients visible was an administrative
24 oversight. *Id.* ¶ 46–47. The email began “[w]hen your request for an exemption to the
25 COVID-19 vaccine requirement was approved, you received a letter informing you that one
26 of the conditions you must follow as an unvaccinated employee is that you update your
27 health status in the Employee Portal . . . each day you physically report to a PCH job site.”

28 Exh. 1.

1 PCH sent the email to remind unvaccinated employees of their obligations and to
2 advise those employees of new consequences if they fail to update their health status on
3 multiple occasions. *Id.* Contrary to the Complaint’s intimations, the email did not divulge
4 any medical diagnosis, condition, or circumstance about any recipient. Compl. ¶ 10; **Exh.**
5 **1**. Further, it did not reveal whether any recipient was granted an exemption on the basis
6 of a sincerely held religious belief or a medical reason. **Exh. 1**. Rather, the email explained
7 why this daily screening requirement is justified: “[v]accinated individuals have lower
8 levels of transmission; lower levels of live virus when infected; and tend to clear the virus
9 much faster if they develop a breakthrough infection. Further, the likelihood of developing
10 a COVID infection after exposure is much lower for vaccinated individuals.” *Id.*

11 **II. Legal Standard**

12 In considering a motion to dismiss, a court must “assume the truth of the well-pled
13 factual allegations and indulge all reasonable inferences therefrom.” *Cullen v. Auto-Owners*
14 *Ins. Co.*, 218 Ariz. 417, 419 (2008). Dismissal under Rule 12(b)(6) is appropriate when a
15 plaintiff “would not be entitled to relief under any set of facts susceptible of proof.”
16 *Verduzco v. Am. Valet*, 240 Ariz. 221, 224 (App. 2016). On a Rule 12(b)(6) motion, “well-
17 pleaded material allegations of the complaint are taken as admitted, but conclusions of law
18 or unwarranted deductions of fact are not.” *Aldabbagh v. Ariz. Dep’t of Liquor Licenses &*
19 *Control*, 162 Ariz. 415, 417 (App. 1989).

20 On a motion to dismiss, the Court may consider documents that are a matter of public
21 record. *Strategic Development and Const., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz.
22 60, 64 (Ct. App. 2010). The Court may also consider a document that is central to the
23 claims stated in the complaint even if the document is not attached to the complaint. *Dunn*
24 *v. FastMed Urgent Care PC*, 245 Ariz. 35, 38–39 (Ct. App. 2018); *Strategic Development*
25 *and Const., LLC*, 224 Ariz. at 64.

26 Here, Plaintiffs’ claims hinge on an alleged unlawful disclosure of certain
27 information. In particular, the Complaint alleges that on “October 15, 2021, PCH employee
28 Holly Tomassini sent an email to 368 people . . . disclosing which PCH employees had

1 received a medical or religious exemption to the Vaccine Mandate.” Compl. ¶ 10. In
2 support of its Motion to Dismiss, PCH attaches a single document—the October 15, 2021
3 email from Ms. Tomassini. **Exh. 1**. PCH has redacted all names on the attached email
4 other than Ms. Tomassini and Mr. Schuster.¹

5 **III. Argument**

6 **A. Plaintiffs have not stated a claim against PCH for invasion of privacy.**

7 A claim for invasion of privacy by public disclosure of private facts requires
8 “publicity to a matter in another’s public life if the matter publicized ‘(a) would be highly
9 offensive to a reasonable person, and (b) is not of legitimate concern to the public.’” *Dyer*
10 *v. Dirty World, LLC*, No. CV-11-0074-PHX-SMM, 2011 WL 2173900, at *3 (D. Ariz. June
11 2, 2011) (quoting Rest. (Second) of Torts § 652D). While Arizona courts have not explicitly
12 endorsed the invasion of privacy claim via public disclosure of private facts, they have
13 generally adopted the Restatement approach to invasion of privacy claims. *Id.*; *see also*
14 *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 342 (1989) (adopting the
15 Restatement approach to a false light invasion of privacy claim).

16 A claim for public disclosure of private facts requires disclosure to the larger public,
17 not simply an internal list of employees. It also requires the disclosure to be highly
18 offensive to a reasonable person. Plaintiffs cannot show an alleged disclosure of their
19 vaccination status to other unvaccinated co-workers meets those standards. Plaintiffs
20 further cannot show the email discloses private information about either of them or that
21 sharing their vaccination status with other employees working at a pediatric hospital during
22 the COVID-19 pandemic is not of legitimate public concern.

23 **1. The alleged email was not the subject of publicity.**

24 An internal employee communication to co-workers does not constitute the type of
25 public disclosure needed for this tort. *See Strand v. John C. Lincoln Health Network, Inc.*,
26 No. CV-10-02112-PHX-NVW, 2011 WL 1253408, at *5 (D. Ariz. Mar. 31, 2011).

27 ¹ If the Court requests it, PCH will produce a true and accurate copy of the email for an *in*
28 *camera* inspection, but undersigned counsel notes that no information from the email has
been redacted other than the names of the recipients.

1 According to the Restatement, publicity “means that the matter is made public, by
2 communicating it to the public at large, or to so many persons that the matter must be
3 regarded as substantially certain to become one of public knowledge.” *Howard v. Ryder*
4 *Truck Rental, Inc.*, No. 2:10-CV-1473-HRH, 2012 WL 12882374, at *16 (D. Ariz. Feb. 9,
5 2012), *aff’d*, 561 F. App’x 588 (9th Cir. 2014) (quoting Rest. (Second) of Torts § 652D
6 cmt. a). The Court of Appeals has previously noted that a claim for invasion of privacy
7 based on public disclosure of private facts “concern the interest of reputation” and help
8 protect “against the invasion of one’s reputational interest.” *Rutledge v. Phoenix*
9 *Newspapers, Inc.*, 148 Ariz. 555, 557 (Ct. App. 1986) (quoting the seminal law review
10 article William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 422 (1960)), *overruled on other*
11 *grounds by Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 340 (1989).

12 While Arizona courts have not ruled on a similar public disclosure of private facts
13 case, courts applying Arizona law and other jurisdictions have found internal workplace
14 communications do not establish the requisite publicity needed for this type of invasion of
15 privacy claim. *See Strand*, No. CV-10-02112-PHX-NVW, 2011 WL 1253408, at *5
16 (concluding that there was no publicity when the defendant hospital allegedly disclosed
17 private medical information, e.g., a latex allergy, to other hospital employees); *E.E.O.C. v.*
18 *C.R. England, Inc.*, 644 F.3d 1028, 1054 (10th Cir. 2011) (disclosure of an employee’s
19 HIV-positive status to a potential trainee and other employees was not publicity); *Wells v.*
20 *Thomas*, 569 F. Supp. 426, 437 (E.D. Pa. 1983) (finding no publicity when the defendant
21 was accused of disclosing the plaintiff’s private information to a community of employees
22 attending staff meetings and to other employees who made inquiries about the plaintiff).

23 Depending on the alleged facts, some courts in other jurisdictions have determined
24 otherwise. For example, in *Hillman v. Columbia County*, a Wisconsin appellate court found
25 an employer’s disclosure of a jail employee’s sexually transmitted disease to his or her co-
26 workers and inmates at the jail to be sufficient publicity to state a claim public disclosure
27 of private facts. 164 Wis. 2d 376, 394, 474 N.W.2d 913, 920 (Ct. App. 1991). Similarly,
28 in *Miller v. Motorola, Inc.*, an Illinois appellate court ruled that an employer’s disclosure of

1 plaintiff's mastectomy surgery to fellow employees sufficed to state the invasion of privacy
2 claim. 202 Ill. App. 3d 976, 981, 560 N.E.2d 900, 903 (1990). Cases such as the foregoing,
3 however, involve the disclosure of a specific employee's particular medical diagnosis or
4 condition that a reasonable person might wish to keep private.

5 In contrast to the preceding cases, here the alleged "private information" is an
6 employee's vaccination status. Nothing more. Plaintiffs work for an acute care hospital
7 serving pediatric patients. Many patients are immunocompromised; many patients are
8 between the ages of five and eleven and were not eligible for a vaccine until October 29,
9 2021—two weeks after the email on which Plaintiffs base their claim.² Other patients, those
10 under five years old, are not yet eligible for a vaccine. For a group of employees working
11 in this environment in the midst of a global pandemic that has killed more than 776,000³
12 people in the United States, the disclosure of an employee's vaccination status to other
13 unvaccinated co-workers is not sufficient publicity to support an invasion of privacy claim.

14 Plaintiffs allege that PCH disclosed their vaccination status because the October 15,
15 2021 email was sent to 368 employees with recipient addresses visible. Compl. ¶¶ 10, 32.
16 Plaintiffs' Complaint does not include any allegations suggesting PCH communicated the
17 email and recipient list to the public at large, or that PCH sent the email to so many persons
18 that it is substantially certain that the email's content would become public knowledge. In
19 fact, Plaintiffs do not even allege that PCH sent the email to any person who is not an
20 employee of the hospital.

21 To the extent Plaintiffs contend Paragraph 11 of the Complaint rescues their claim,
22 it is an unwarranted deduction of fact that the Court may disregard when ruling on a motion
23 to dismiss. Compl. ¶ 11; *Aldabbagh v. Ariz. Dep't of Liquor Licenses & Control*, 162 Ariz.
24 415, 417 (App. 1989). Indeed, the paragraph, which suggests information about the

25 ² *FDA Authorizes Pfizer-BioNTech COVID-19 Vaccine for Emergency Use in Children 5*
26 *through 11 Years of Age*, U.S. FOOD & DRUG ADMIN. (Oct. 29, 2021),
27 <https://www.fda.gov/news-events/press-announcements/fda-authorizes-pfizer-biontech-co-vid-19-vaccine-emergency-use-children-5-through-11-years-age>.

28 ³ Data is of November 29, 2021. *Daily Updates of Totals by Week and State*, CTRS. FOR
DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm>
(last visited Nov. 29, 2021).

1 unvaccinated employees was later posted on social media, attributes no act or omission to
2 PCH. Compl. ¶ 11. Two clues reveal why that allegation is an unwarranted deduction of
3 fact. First, Plaintiffs’ invocation of “upon information and belief” signals Plaintiffs’
4 uncertainty and absence of facts showing that PCH posted the list on social media or
5 otherwise circulated the list. *See id.* Second, drafting the allegation in the passive voice
6 indicates the absence of facts attributable to PCH. *See id.*

7 Plaintiffs have not shown that PCH sought or gave publicity to their unvaccinated
8 status. Without such facts, the public disclosure of private facts claim cannot stand.

9 2. The email is not highly offensive to a reasonable person.

10 Even if PCH publicly disclosed employee information, which it did not, the
11 disclosure was not highly offensive to a reasonable person. “It is only when the publicity
12 given to him is such that a reasonable person would feel justified in feeling seriously
13 aggrieved by it, that the cause of action arises.” Rest. (Second) of Torts § 652D cmt. c. As
14 the Court of Appeals previously found, this particular variety of an invasion of privacy
15 claim addresses the reputational interests of a person. Professor Prosser framed this variety
16 of the tort as “[p]ublic disclosure of embarrassing private facts about the plaintiff.” William
17 L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 389 (1960), quoted in *Rutledge*, 148 Ariz. at 556
18 n.2, *overruled on other grounds Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335,
19 340 (1989).

20 Here, PCH sent an email with COVID-19 safety precautions to employees who had
21 received an exemption from the vaccine requirement. **Exh. 1**. Plaintiffs claim that the
22 email revealed their vaccination status to other recipients of the email. Compl. ¶ 10.
23 Crediting Plaintiffs’ allegations, PCH’s disclosure was to unvaccinated employees who,
24 like Plaintiffs, received an exemption to the vaccine requirement. Whether the disclosure
25 was “highly offensive” turns on whether a reasonable person would view the disclosure to
26 be offensive or embarrassing under these circumstances.

27 Plaintiffs claim that “[r]evealing a person’s vaccination and exemption status
28 without their consent is highly offensive . . . because vaccination status is personal medical

1 information.” Compl. ¶ 33. Even if a person’s unvaccinated status can constitute personal
2 medical information, the disclosure of some types of employee medical information is not
3 highly offensive as a matter of law. *See, e.g., Strand*, No. CV-10-02112-PHX-NVW, 2011
4 WL 1253408, at *5 (disclosing an employee’s latex allergy is not highly offensive as a
5 matter of law); *Mark v. City of Hattiesburg*, No. 2016-CA-01638-COA, 2019 WL 125656,
6 at *6 (Miss. Ct. App. Jan. 8, 2019), *cert. granted sub nom. Mark v. Dupree*, 276 So. 3d 658
7 (Miss. 2019), and *aff’d*, 289 So. 3d 294 (Miss. 2020) (finding that the disclosure of an
8 employee’s medical leave form which included information about her breast cancer
9 diagnosis and surgery would not be highly offensive to a reasonable person); *Nelson v.*
10 *Glynn-Brunswick Hosp. Auth.*, 257 Ga. App. 571, 578, 571 S.E.2d 557, 563 (2002) (holding
11 that the disclosure of a physician’s hepatitis C diagnosis to others in the health organization
12 he worked for should be evaluated based on whether it would be highly offensive to a
13 reasonable health care professional, and determining that it would not be).

14 Second, Plaintiffs describe the disclosure as highly offensive because of the alleged
15 criticism that unvaccinated persons may face in the public or in hospital settings. Compl.
16 ¶¶ 33–39. Who has criticized Plaintiffs for being unvaccinated? The Complaint does not
17 supply an answer. Plaintiffs’ musings about media-reported censures of unidentified
18 unvaccinated persons have no connection to any PCH employee, let alone either Plaintiff.
19 At best, Plaintiffs speculate they might be criticized in the future.

20 If Plaintiffs contend the disclosure was offensive because vaccinated employees may
21 criticize Plaintiffs, then the Complaint is deficient. Plaintiffs have not alleged that the PCH
22 shared the email with a group of vaccinated employees. If Plaintiffs counter that other
23 unvaccinated employees might criticize their fellow unvaccinated workers, then Plaintiffs
24 are plowing in fields where reason does not govern.

25 More telling is what the Complaint omits. There is no allegation that PCH or any of
26 its agents treated Plaintiff with scorn or subjected either of them to criticism. To the
27 contrary, the allegations of the aggrieved are other recipients sharing their disappointment
28 that his or her name appeared as a recipient along with other co-workers on the email.

1 According to the Complaint, some recipients took offense, believing their
2 vaccination status is private health information protected by the Health Insurance Portability
3 and Accountability Act of 1996 (“HIPAA”). That notion is misguided.

4 The Privacy Rule generally does not regulate . . . the ability of a covered entity
5 . . . to require its workforce members to provide documentation of their
6 vaccination against COVID-19 or to disclose whether they have been
7 vaccinated to their employer, other workforce members, patients, or members
8 of the public.

9 *HIPAA, COVID-19 Vaccination, and the Workplace*, U.S. DEP’T HEALTH & HUMAN
10 SERVS., [https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-covid-19-](https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-covid-19-vaccination-workplace/index.html)
11 [vaccination-workplace/index.html](https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-covid-19-vaccination-workplace/index.html) (last visited Dec. 1, 2021). In short, an employee’s
12 vaccination status is not protected health information under HIPAA. 45 C.F.R. § 160.103
13 (excluding from the definition of “protected health information” that information which is
14 held “[i]n employment records held by a covered entity in its role as employer”).

15 Finally, an objective assessment of whether the disclosure was highly offensive
16 would account for the increasingly visible nature of COVID-19 vaccination status. As the
17 world adapts to the ongoing pandemic, and hospitals and other employers take precautions
18 to protect employees, patients, and other visitors, it is reasonable to expect that unvaccinated
19 employees will have distinct requirements from vaccinated employees. In recent months
20 the federal government has issued several different mandates requiring certain employers
21 to implement vaccine mandates in one form or another. These regulatory actions, if they
22 become effective, will likely require employers to make visible distinctions between
23 vaccinated and unvaccinated employees. For example, under President Biden’s Executive
24 Order governing federal contractors, the current regulatory guidance mandates vaccines and
25 directs contractors to post signage on safety protocols for vaccinated and unvaccinated
26 individuals. The sample signage directs unvaccinated employees, but not fully vaccinated
27 employees, to wear masks and social distance. *Federal Contractors*, SAFER FED.
28 WORKFORCE TASK FORCE, <https://www.saferfederalworkforce.gov/faq/contractors/> (last
visited Dec. 1, 2021) (see question 2 under “Vaccination and Safety Protocols”).

1 **3. A hospital employee’s vaccination status is a matter of legitimate**
2 **concern.**

3 Even if Plaintiffs establish that PCH gave publicity to their unvaccinated status and
4 that status is a private fact, PCH respectfully submits its employees’ vaccination status is of
5 legitimate interest to its workforce. “When the subject-matter of the publicity is of
6 legitimate public concern, there is no invasion of privacy.” Rest. (Second) of Torts § 652D
7 cmt. d. Courts have found private published facts that are connected to public health and
8 safety to be of legitimate public concern. *See, e.g., Veilleux v. Nat’l Broad. Co.*, 206 F.3d
9 92, 132–34 (1st Cir. 2000) (holding that broadcasting an individual interstate truck driver’s
10 drug test results was sufficiently linked to highway safety to be of legitimate public
11 concern).

12 Here, the matter of legitimate public concern is public health and safety amid the
13 COVID-19 pandemic. PCH is a pediatric hospital. Whether employees in this setting are
14 vaccinated is of legitimate public concern, particularly when the hospital, patients, families,
15 and fellow employees have a heightened interest in preventing the spread of COVID-19.
16 Members of the public take their children to PCH seeking treatment for injuries and
17 illnesses. Whether the public has a right to know the vaccination status of hospital
18 employees is of no moment here. There is no allegation in the Complaint that PCH revealed
19 to the public at large Plaintiffs’ vaccination status.

20 PCH has a legitimate interest in knowing the vaccination status of its employees.
21 And, if in the course of tracking that information, PCH revealed Plaintiffs’ vaccine status
22 to other unvaccinated employees, PCH and its employees retain a legitimate interest in
23 knowing and sharing such information, even if the sharing was not intended. Armed with
24 such information, PCH and its workforce can work together to help ensure unvaccinated
25 workers are taking the appropriate safety precautions to prevent the spread of the disease.
26 As such, even if Plaintiffs demonstrate that the October 15, 2021 email gave publicity to
27 their private facts, their claim still fails because the contents of the email were of a legitimate
28 concern among the PCH staff to whom it was sent.

1 **B. Plaintiffs fail to state negligent disclosure of medical information claim.**

2 Plaintiffs’ second claim misinterprets Arizona and federal law concerning private
3 medical information. Plaintiffs rely on Arizona case law establishing a negligent disclosure
4 of medical information cause of action, despite the fact that this claim pertains to patient,
5 not employee, medical information. Plaintiffs also cite regulations under the Americans
6 with Disabilities Act (“ADA”), but those regulations require employers to maintain the
7 confidentiality of employee medical information obtained pursuant to a medical
8 examination or disability-related inquiry. Requesting employee vaccination status is not a
9 medical examination or disability-related inquiry.

10 Plaintiffs claim PCH negligently disclosed their medical information—a cause of
11 action recognized in *Shepherd v. Costco Wholesale Corp.*, 250 Ariz. 511, 512, 482 P.3d
12 390, 391 (2021); Compl. ¶ 42. The cause of action recognized in *Shepherd*, however,
13 concerns the negligent disclosure of patient medical information; it does not apply to
14 employee medical information.

15 The negligent disclosure of medical information cause of action recognized in
16 *Shepherd* hinges on Arizona’s medical records statute and HIPAA, the federal law
17 governing private health information. Arizona’s statute defines medical records as “all
18 communications related to a *patient’s* physical or mental health or condition that are
19 recorded in any form or medium and that are maintained for purposes of *patient diagnosis*
20 *or treatment*, including medical records that are prepared by a health care provider or by
21 other providers.” Ariz. Rev. Stat. Ann. § 12-2291 (emphasis added). Similarly, as noted
22 above, HIPAA’s privacy rule does not govern a covered entity in its capacity as an
23 employer. 45 C.F.R. § 160.103. Further, the U.S. Department of Health and Human
24 Services has advised HIPAA does not regulate a “covered entity . . . to require its workforce
25 members . . . to disclose whether they have been vaccinated to their employer, other
26 workforce members, patients, or members of the public.” *See* full citation at p. 9 *supra*.

27 In this case, the information allegedly disclosed related to *employee* medical
28 conditions, not patient medical conditions. Indeed, neither Plaintiff alleges that she is a

1 PCH patient. Nor does either Plaintiff allege that the questioned email is a record covered
2 by the state’s medical records statute. PCH did not maintain a list of unvaccinated
3 employees for the purpose of patient diagnosis or treatment, but rather to aid PCH’s patient
4 and employee health and safety efforts. Accordingly, Plaintiffs have not alleged facts
5 sufficient to plead a claim against PCH for the negligent disclosure of medical information.

6 **1. Plaintiffs’ negligence per se argument fails.**

7 Plaintiffs claim that PCH’s actions were negligent per se because “Defendants’
8 disclosure . . . violates the ADA and other applicable law.” Compl. ¶ 43. To the extent
9 “other applicable law” refers to Arizona law governing the confidentiality of medical
10 records, Plaintiffs have not stated a claim. As discussed above, Ariz. Rev. Stat. Ann. § 12-
11 2291 applies only to patient records, so Plaintiffs cannot rely on that statute in their case
12 about employee information. Similarly, invoking HIPAA does not suffice as an employer’s
13 records about its employees are not covered by the rule.

14 Without recourse to those laws, Plaintiffs cite ADA regulations to justify their
15 negligence per se claim. Plaintiffs cite 29 C.F.R. §§ 1630.14(c)(1) and 1630.14(c)(2) to
16 claim that PCH should have treated their vaccination and exempt status private because it
17 was confidential medical information collected pursuant to an employer medical
18 examination or inquiry. Compl. ¶ 44. This is an incorrect statement of the law.

19 Under 29 C.F.R. § 1630.14(c), an employer can require an employee to undergo a
20 medical examination or disability-related inquiry “that is job-related and consistent with
21 business necessity.” If the employer does require such an examination or inquiry, however,
22 the information it obtains “shall be collected and maintained on separate forms and in
23 separate medical files and be treated as a confidential medical record.” 29 C.F.R. §
24 1630.14(c)(1). While Plaintiffs rely on those regulations, asking an employee his or her
25 vaccination status is not a medical examination or disability-related inquiry that triggers
26 confidential treatment.

27 Under the ADA, an employer “shall not require a medical examination and shall not
28 make inquiries of an employee as to whether such employee is an individual with a

1 disability or as to the nature or severity of the disability, unless such examination or inquiry
2 is shown to be job-related and consistent with business necessity.” 42 U.S.C. §
3 12112(4)(A). A medical examination is an inquiry designed to elicit whether an employee
4 has any disabilities or other impairments which may limit their ability to perform their
5 required job duties. *Id.* A request for employee vaccination status is not a medical
6 examination or disability-related inquiry, because asking an employee for his or her
7 vaccination status does not elicit information about whether he or she has a disability or
8 impairments that impact his or her ability to perform a job. *See* 29 C.F.R. § 1630.14(c).

9 The foregoing analysis is not novel or without support. In fact, the EEOC agrees.
10 Since the onset of the pandemic, the EEOC has released and periodically updated Technical
11 Assistance Questions and Answers to address the evolving questions that employers have
12 around ADA compliance in the pandemic-era workplace. U.S. Equal Employment
13 Opportunity Comm’n, *What You Should Know About COVID-19 and the ADA, The*
14 *Rehabilitation Act, and Other EEO Laws* (Technical Assistance Question and Answers, last
15 updated Nov. 17, 2021). In this Technical Assistance, the EEOC posed the following
16 question: “Does the ADA prevent an employer from inquiring about or requesting
17 documentation or other confirmation that an employee obtained a COVID-19 vaccination?”

18 *Id.* § K.9. The EEOC answered:

19 No. When an employer asks employees whether they obtained a COVID-19
20 vaccination, the employer is not asking the employee a question that is likely
21 to disclose the existence of a disability; there are many reasons an employee
22 may not show documentation or other confirmation of vaccination besides
23 having a disability. Therefore, requesting documentation or other
24 confirmation of vaccination is *not* a disability-related inquiry under the ADA,
25 and the ADA’s rules about making such inquiries do *not* apply.

26 *Id.* (emphasis added).

27 Here, PCH requested confirmation of employee vaccination to determine whether
28 employees met its COVID-19 vaccine requirement. Compl. ¶ 9. According to the EEOC,
29 PCH did not conduct a medical examination or disability-related inquiry of its employees
30 when it requested confirmation of vaccination. As such, the ADA regulations concerning
31 the confidentiality of medical examination or inquiry records do not apply.

1 As Plaintiffs will surely note, the same EEOC Technical Assistance specifies that
2 information and documentation about an employee's vaccine is confidential medical
3 information. See Technical Assistance §§ K.4, K.9. But that guidance does not
4 affirmatively state that one's vaccine status is confidential medical information. Consider
5 the purpose and context of that guidance. To evaluate the propriety of a medical exemption
6 to a vaccine requirement, an employer necessarily needs to collect medical information
7 about an employee, e.g., contraindications to a vaccine or immunocompromised status.
8 That information, coming from the employee or a licensed health care provider, of course
9 is medical information about the employee, and as the EEOC suggests, it should be kept
10 confidential.

11 But it is not the type of information described in the challenged PCH email. Again,
12 there is no medical information about any employee in that email. Moreover, the email
13 does not reveal whether Plaintiffs received a medical or religious exemption, a fact
14 preserved in the carefully crafted allegations of the Complaint. See Paragraph 12, stating
15 that one Plaintiff received a medical exemption and the other a religious exemption without
16 specifying which Plaintiff received which exemption. In short, while the EEOC's guidance
17 directs employers to preserve medical information about employees confidential, it does
18 not mandate that employees' mere vaccination status with nothing more is confidential
19 medical information.

20 Plaintiffs' negligence per se claim flounders in search of a governing standard.
21 Plaintiffs rely on (1) the Arizona *Shepherd v. Costco Wholesale Corp.* case concerning the
22 privacy of patient medical records, and (2) the ADA regulations governing information
23 obtained through a medical examination or inquiry. Compl. ¶¶ 42–44; *Shepherd*, 250 Ariz.
24 at 512, 482 P.3d at 391; 29 C.F.R. § 1630.14(c)(1)–(2). Neither the *Shepherd* case nor the
25 ADA regulations applies because, at best, the email constitutes employee information not
26 obtained through a medical examination or disability-related inquiry. Accordingly,
27 Plaintiffs have not stated a claim for negligence per se.
28

1 **2. Plaintiffs have not alleged facts showing PCH was negligent.**

2 Plaintiffs plead that in the alternative, PCH’s actions were “simple negligence”
3 because “[n]o reasonable employer would release such information to the public.” Compl.
4 ¶ 45. “To establish a claim for negligence, a plaintiff must prove the existence of a duty of
5 the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by the
6 breach.” *Brookover v. Roberts Enterprises, Inc.*, 215 Ariz. 52, 55, 156 P.3d 1157, 1160 (Ct.
7 App. 2007) (citing *Boyle v. City of Phoenix*, 115 Ariz. 106, 107, 563 P.2d 905, 906 (1977)).
8 To prove that PCH was negligent, Plaintiffs must establish that PCH had a duty to not
9 disclose the information communicated through the October 15, 2021 email, that PCH
10 breached that duty by sending the email to the recipients, and that the breach caused
11 Plaintiffs damages.

12 First, PCH did not owe Plaintiffs a duty to not disclose the information in the email.
13 As discussed above, employee vaccination status does not constitute patient medical records
14 under Arizona law and is not employee information obtained pursuant to a medical
15 examination or inquiry under the ADA. *See Shepherd*, 250 Ariz. at 512, 482 P.3d at 391;
16 29 C.F.R. § 1630.14(c)(1)–(2). Thus, Plaintiffs have not included any facts sufficient to
17 establish that PCH had a duty not to disclose their information. Second, Plaintiffs allege
18 that PCH breached its duty by disclosing the information “to the public.” Compl. ¶ 45.
19 PCH, however, did not disclose any information to the public. Rather, PCH sent the email
20 that forms the basis for this complaint to an internal group of employees.

21 Even if PCH breached its duty not to disclose Plaintiffs’ information—which it did
22 not—PCH was not the cause of Plaintiffs’ claimed damages. Plaintiffs claim to have
23 suffered emotional distress, humiliation, inconvenience, and anxiety; financial losses; and
24 impairment/injury to reputation and standing in the community. Compl. ¶ 40. Plaintiffs
25 claim that individuals who object to vaccination are subject to contempt and ridicule and
26 refer to newspaper articles about society treating unvaccinated individuals differently;
27 doctors running out of compassion for unvaccinated patients; and scorn from the general
28 public about impact of individual decisions to remain unvaccinated on the length of the

1 pandemic. Compl. ¶¶ 33–39. Plaintiffs’ alleged damages stem from the treatment one or
2 both of them suggest they may receive now or in the future from the public, not PCH.
3 Tellingly, no allegation in the Complaint asserts PCH or any of its agents subjected either
4 Plaintiff to scorn or ridicule for seeking and obtaining an exemption from the vaccine
5 mandate.

6 Finally, PCH disputes Plaintiffs’ claim that they have suffered any damages as a
7 result of the email. The disclosure of Plaintiffs’ status to other unvaccinated co-workers
8 would not reasonably result in the alleged damages. Accordingly, Plaintiffs have failed to
9 state a claim for negligent disclosure of medical information.

10 **IV. Conclusion**

11 Based on the foregoing, Plaintiffs’ invasion of privacy and negligence claims against
12 PCH fail as a matter of law. Defendant PCH respectfully requests that the Court dismiss
13 Plaintiffs’ Complaint with prejudice and award PCH its costs and fees.

14 **CERTIFICATION**

15 Pursuant to Rules 7.1(h) and 12(j), counsel for Phoenix Children’s Hospital (“PCH”)
16 hereby certifies that they conferred with Plaintiffs’ counsel by email and telephone on
17 November 29, 2021 to discuss Defendant’s Motion to Dismiss for Failure to State Claims.
18 PCH’s counsel described the issues to be raised in the Motion to Dismiss but, after good
19 faith discussion, the parties were unable to resolve the disagreement.

20 RESPECTFULLY SUBMITTED this 1st day of December 2021.

21 SNELL & WILMER L.L.P.

22
23 By: /s/ John F. Lomax, Jr.
24 John F. Lomax, Jr. (#020224)
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Attorneys for Defendant

1 ORIGINAL electronically filed via TurboCourt
this 1st day of December 2021

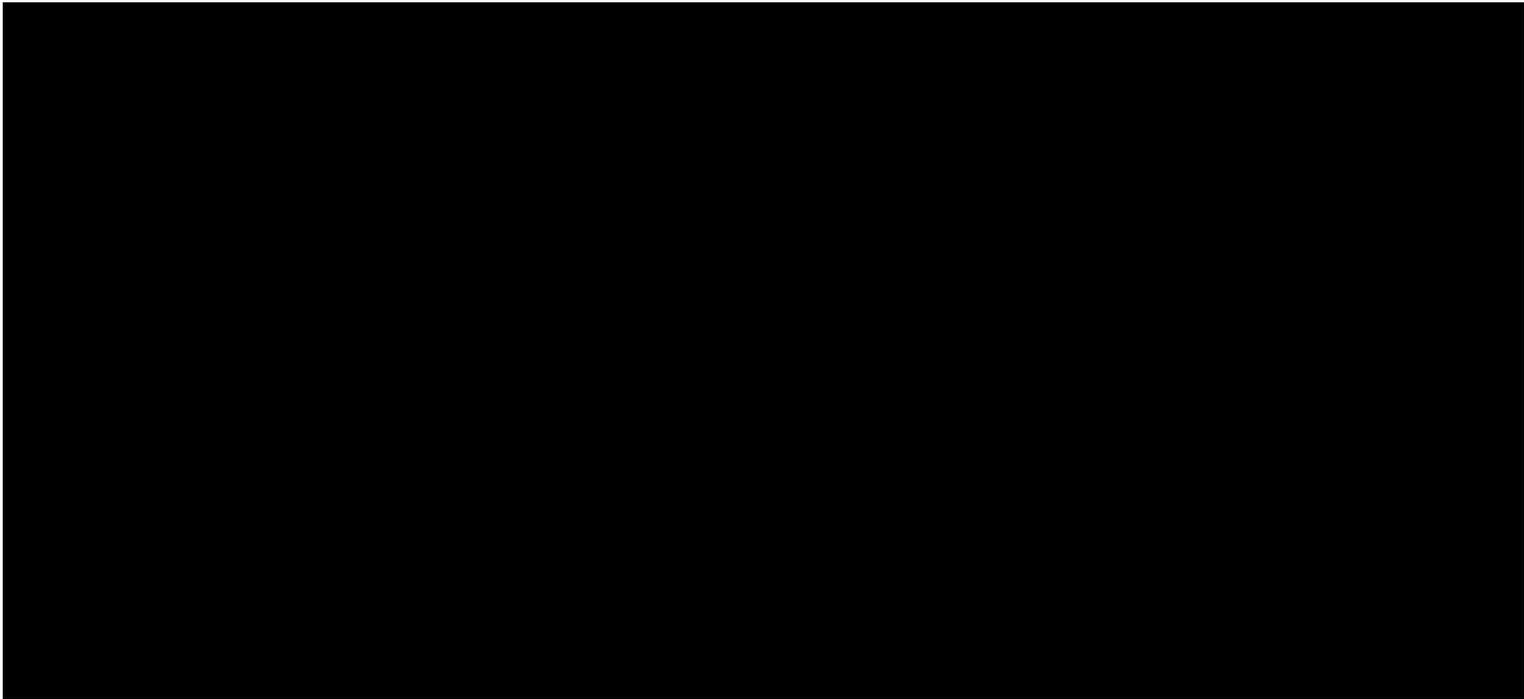
2
3 COPIES of the foregoing mailed this 1st
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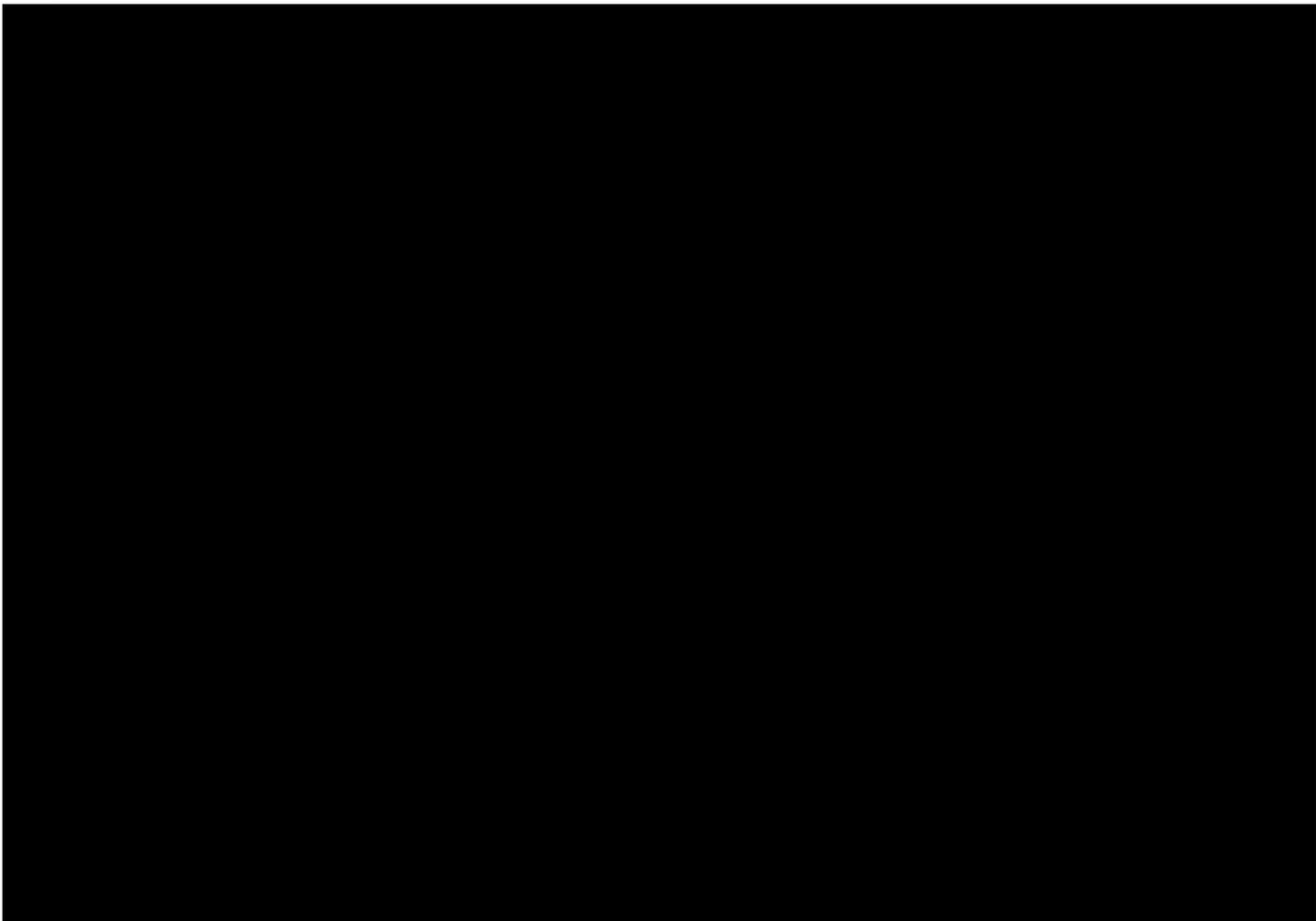
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14 /s/ Leslie Boone
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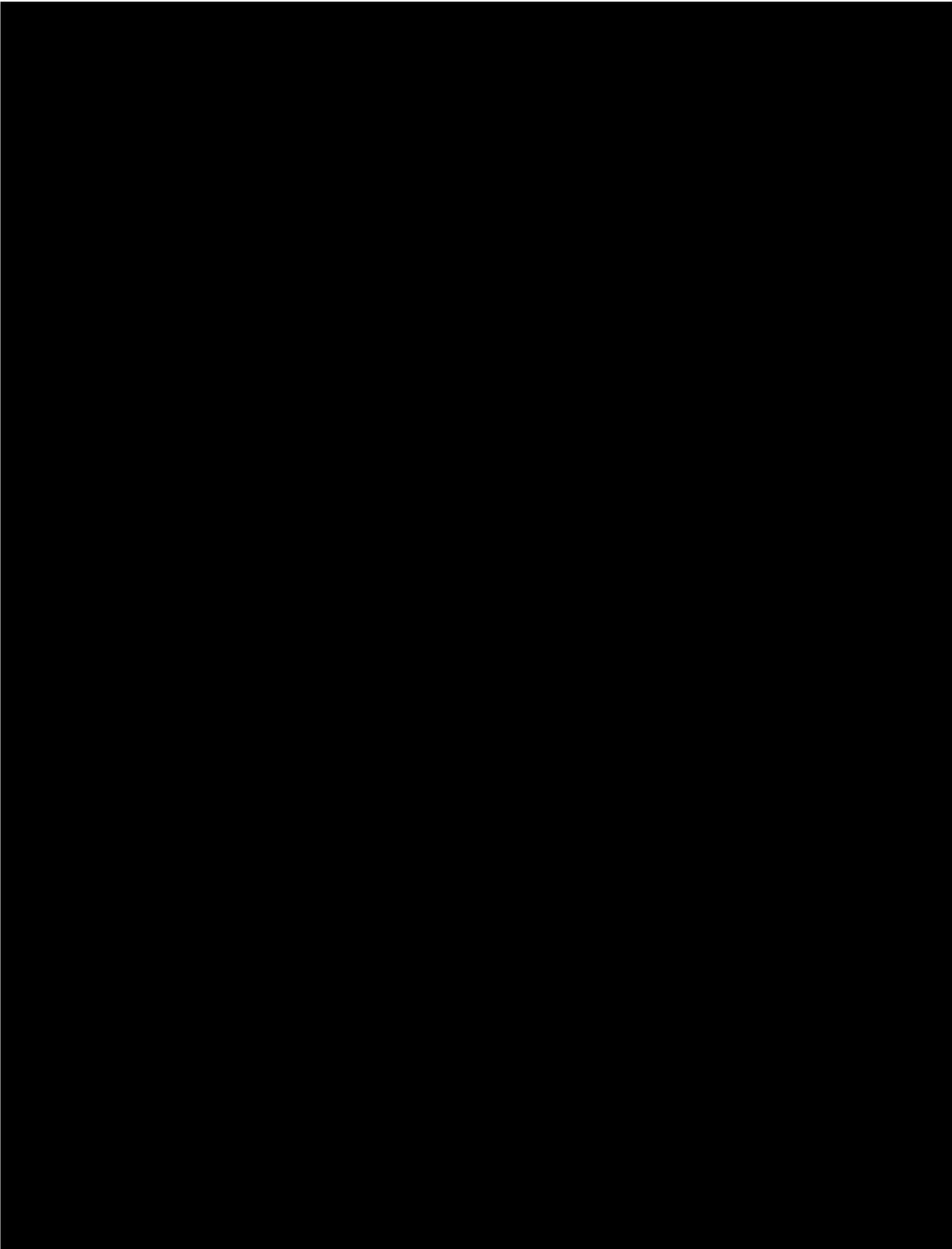


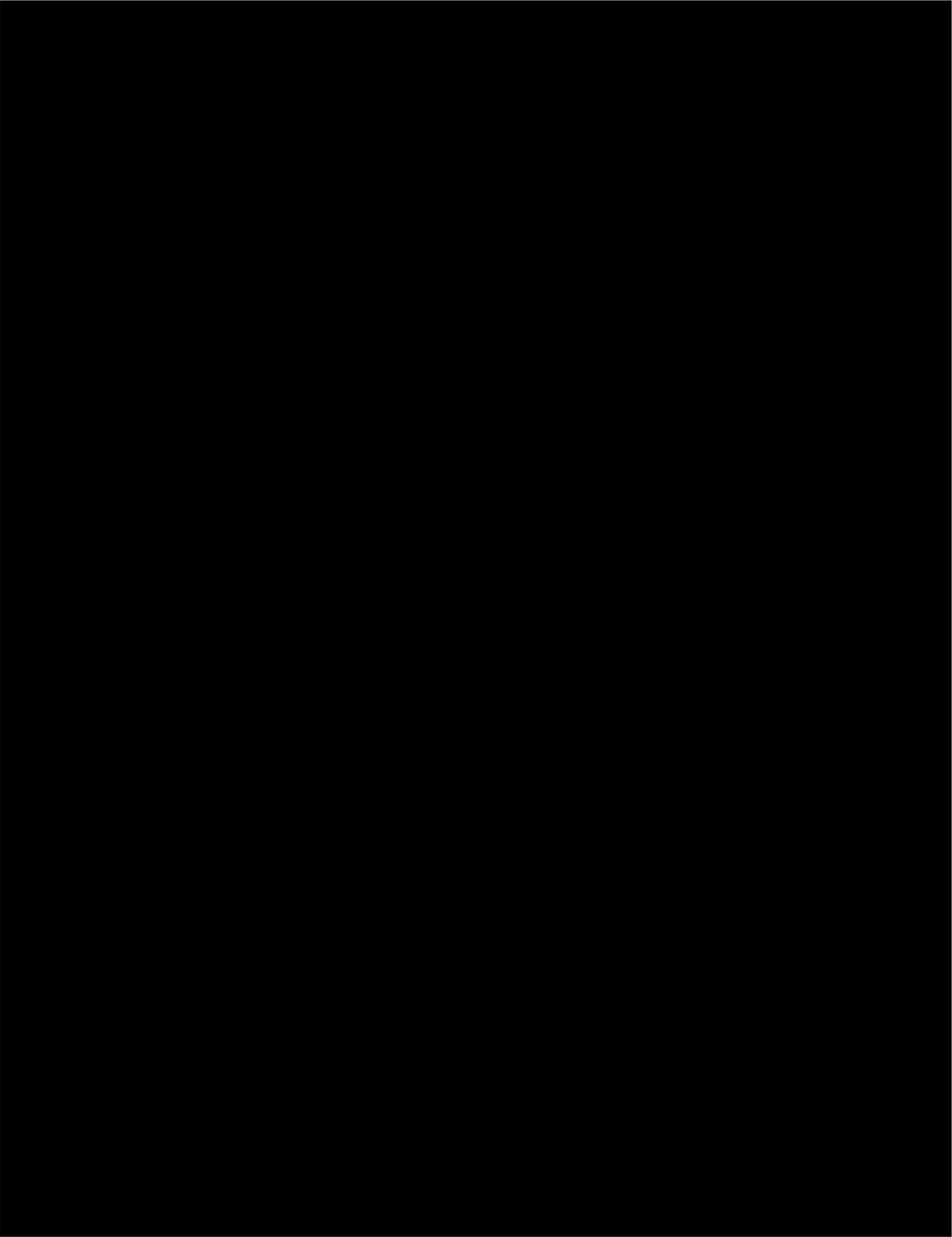
From: Tomassini, Holly <htomassini@phoenixchildrens.com>

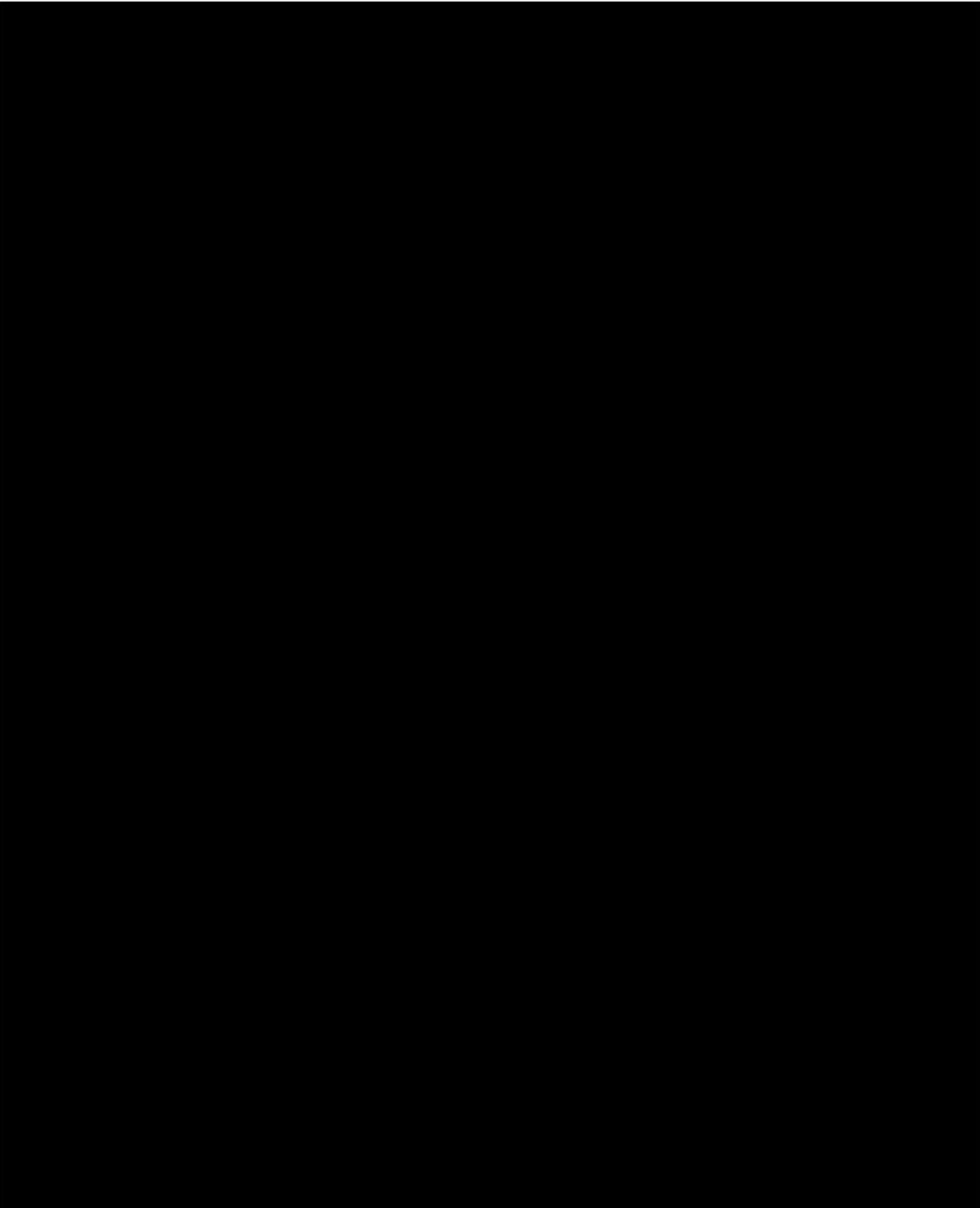
Sent: Friday, October 15, 2021 1:31 PM

To: [Redacted]









Cc: Schuster, Steve <sschuster@phoenixchildrens.com>

Subject: PCH Policy RE: Employees with a COVID Vaccination Exemption

Importance: High

Please read this important Communication from Steve Schuster, VP Employee & Physician Relations:

When your request for an exemption to the COVID-19 vaccine requirement was approved, you received a letter informing you that one of the conditions you must follow as an unvaccinated employee is that you update your health status in the Employee Portal (including your temperature), each day you physically report to a PCH job site. * **You were also advised that failure to comply with this requirement could result in corrective action, up to and including termination.**

We carefully considered our COVID-related protocols based on many factors, including patient and staff safety. Requiring unvaccinated staff to report their health status and temperature daily is justified for many reasons. Vaccinated individuals have lower levels of transmission; lower levels of live virus when infected; and tend to clear the virus much faster if they develop a breakthrough infection. Further, the likelihood of developing a COVID infection after exposure is much lower for vaccinated individuals. Vaccinated employees are not required to take all the same steps as unvaccinated employees because the risk they present to others (patients, family members and co-workers) is lower.

Since this requirement went into effect, the failure to log one's health status/temperature into the Employee Portal has not had consequences attached to it.

Beginning Monday, October 18 however, Phoenix Children's will begin to enforce this expectation as follows:

- Each time you fail to update your health status/temperature in the Employee Portal on a day you physically report to work at a PCH job site, you will be charged with an "occurrence".
- A total of six (6) occurrences within a 3-month period of time will be considered excessive and will result in the initiation of formal corrective action (see below).
- Once corrective action begins, each subsequent "occurrence" within a 3-month period of time will result in advancement to the next level of corrective action.
- For the purpose of this guideline, the 3-month period of time will run from the date of the previous "occurrence".
- The levels of corrective action to be applied to this expectation are as follows:
 - 6th Occurrence - Written Counseling
 - 7th Occurrence - Written Warning
 - 8th Occurrence - Final Written Warning
 - 9th Occurrence - Termination
- If you do not have any "occurrences" for a period of 3-months, all prior "occurrences" will fall-off your record.
- Any "occurrences" related to this requirement will not impact an employee's record under the Timekeeping (HR Policy 301) or Attendance (HR Policy 407) policies.

Attached is the Guideline document reflecting these requirements.

**** Except on days when they physically report to a PCH work site, remote-work employees will not be expected to meet this requirement.***

