

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF POLK

NINTH JUDICIAL DISTRICT

Case Type: Civil

State of Minnesota, by its Attorney General,
Keith Ellison,

Court File No. 60-CV-20-2039

Plaintiff,

vs.

Boardwalk Bar and Grill, LLC,

Defendant.

**MEMORANDUM IN SUPPORT OF THE
STATE'S *EX PARTE* MOTION FOR
TEMPORARY RESTRAINING ORDER
AND TEMPORARY INJUNCTION**

The State of Minnesota, by its Attorney General, Keith Ellison, (the "State"), pursuant to Minnesota Rules of Civil Procedure 6.04, 7.02(a), 65.01, and 65.02; Minnesota Statutes sections 8.31, subdivision 3, and Governor Tim Walz's Emergency Executive Order 20-99, brings this *Ex Parte* Motion for a Temporary Restraining Order and Temporary Injunction against Defendant Boardwalk Bar and Grill, LLC, (hereinafter "Boardwalk").

INTRODUCTION

In direct and knowing defiance of Governor Walz's Emergency Executive Order 20-99, which has the full force and effect of law during a declared peacetime emergency, Defendant Boardwalk Bar and Grill, LLC has admitted that its East Grand Forks bar/restaurant is open to the public for on premises consumption of food and beverages (including alcoholic beverages). In doing so, Defendant is not only violating the law but is also placing the public health and safety of its own community at risk to increased community spread of COVID-19 at a time when confirmed COVID-19 cases in Minnesota and Polk County where Defendant is located are drastically

increasing. Indeed, restaurants and bars like Boardwalk—where individuals, unmasked, congregate for extended periods while eating, drinking, and exhaling at an increased volume—present substantial public health risks and are particularly fertile environments for the community spread of COVID-19. Accordingly, the Attorney General brings this action to enforce Emergency Executive Order 20-99 as well as to protect public health and safety of all Minnesota residents.

FACTUAL BACKGROUND

I. COMMUNITY SPREAD OF COVID-19 REPRESENTS ONE OF THE GREATEST PUBLIC HEALTH EMERGENCIES IN MINNESOTA’S HISTORY.

Minnesota’s fight against the COVID-19 virus represents one of the greatest public health emergencies this state has handled in its 162-year history. In part, the magnitude of Minnesota’s response has been in reaction to the uniquely virulent characteristics of the disease: In one study, researchers found that a single infected person likely spread the virus to 53 other people during the course of a single choir rehearsal.¹ Minnesota is fighting the infection, but the virus continues to spread, and the need for emergency preventative measures remains in order to protect public health and safety.

COVID-19 kills people. In Minnesota alone, as of December 10, 2020, COVID-19 has already caused at least 4,198 deaths. 367,218 positive cases have been reported across the state with 25,862 of those positive cases reported in the first week of December alone.²

¹ Hammer et al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice—Skagit County, Washington, March 2020*, 69 MORBIDITY & MORTALITY WEEKLY R. 16, 606-10 (May 15, 2020), available at, <https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e6.htm>. Affidavit of Noah Lewellen (“Lewellen Aff.”), Exhibit 2.

² *Situation Update for COVID-19, Updated December 10, 2020*, MINN. DEPT. OF HEALTH, <https://www.health.state.mn.us/diseases/coronavirus/situation.html>. (Lewellen Aff., Ex. 3).

Minnesota is currently experiencing some of the highest numbers of COVID-19 cases since the beginning of the pandemic. For example, it took Minnesota over 6 months to record its first 100,000 positive COVID-19 cases, but only 41 days to add an additional 100,000 new cases. Just 16 days later, Minnesota logged another 100,000 positive cases. (Affidavit of Richard Danila (“Danila Aff.”) at ¶4.)

In the months of November and December of 2020, Minnesota has been recording record numbers of daily new cases, hospitalizations, intensive care unit admissions, and deaths. Surging COVID-19 cases are pushing Minnesota’s hospital system to a critical point.³ Due to unprecedented staffing shortages, many hospitals are diverting patients to other facilities and making difficult choices, like discharging patients that normally would have longer hospital stays. Hospitals are running out of critical care beds that are a necessity for COVID-19 patients experiencing severe symptoms.⁴

Minnesota’s neighboring states have been experiencing some of the highest number of cases per capita in the country.⁵ North Dakota has had the second-highest positivity rate in the nation over the past seven days according to the CDC.⁶ As of December 10, 2020, the CDC

³ Howatt, Glen, *New bar, restaurant and gym COVID-19 restrictions expected in Minnesota*, MINNEAPOLIS STAR TRIB. (Nov. 18, 2020), available at <https://www.startribune.com/new-bar-restaurant-and-gym-restrictions-expected-in-minn/573107051/>. (Lewellen Aff. Ex. 10.)

⁴ *Id.*

⁵ *CDC COVID Data Tracker*, CDC (last visited Dec. 11, 2020), available at https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days. (Lewellen Aff. Ex. 11).

⁶ *Id.*

reported that North Dakota had 11,408 COVID-19 cases for every 100,000 people in the state—an infection rate of over 11 percent—nearly double that of Minnesota.⁷

In Polk County at least 35 individuals have passed away due to COVID-19 and 2,964 have tested positive.⁸ Moreover, in Polk County, the 14-day case rate per 10,000 people has jumped dramatically from 54.45 for the reporting period of October 4, 2020 to October 17, 2020, to 218.10 for the reporting period of November 15, 2020 to November 28, 2020.⁹ Indeed, according to one report Polk County presently has a COVID-19 positivity rate of 12.9%, which is far higher than Minnesota’s statewide average of 7.9%.¹⁰ Moreover, in Grand Forks, ND, where much of the hospital infrastructure upon which residents of Polk County rely is located, approximately 95% of hospital beds (18 of 19 beds) are occupied.¹¹ This is the deadly backdrop against which the Defendant has decided to defy an order intended to stem community spread of a virus and remain open to the public for on-site consumption of food and beverages (including alcoholic beverages).

COVID-19 can easily be spread through water droplets exhaled into the air by individuals not wearing face coverings. The on-premises consumption of food and beverages at bars and

⁷ *Id.* & Grove Aff. Ex. 2.

⁸ *See* Lewellen Aff. Ex. 3 (County level data).

⁹ 14-day COVID-19 Case Rate by County (updated 12/10/2020), *available at* <https://www.health.state.mn.us/diseases/coronavirus/stats/wschoo1.pdf> (Lewellen Aff. Ex. 12.)

¹⁰ Adler, Erin, *East Grand Forks bar defies cease-and-desist letter from Minnesota Department of Health*, STAR TRIBUNE (Dec. 10, 2020), *available at* <https://www.startribune.com/east-grand-forks-bar-defies-cease-and-desist-letter-from-minnesota-health-department/573363831/?refresh=true> (Lewellen Aff. Ex. 15.)

¹¹ Leatherby, Lauren, et al., *There’s No Place for Them to Go: I.C.U. Beds Near Capacity Across U.S.*, N.Y. TIMES (Dec. 9, 2020), *available at* <https://www.nytimes.com/interactive/2020/12/09/us/covid-hospitals-icu-capacity.html>. (Lewellen Aff. Ex. 13.); *see also* Grove Aff. Ex. 3.

restaurants in Minnesota continues to pose substantial risks to public health and safety. (Danila Aff. at ¶11.). Bars and restaurants pose a particularly high risk of COVID-19 transmission because they allow people to gather and congregate around people from different households to eat and drink without face coverings, often for extended periods of interaction. (*Id.*) Individuals cannot remain masked while they are eating and drinking, and many people leave their masks off in bars and restaurants while talking. (*Id.*) Bars and restaurants can be loud, leading to a larger volume of respiratory droplets in the air as people talk, raise their voices to be heard, or laugh. (*Id.*) Moreover, both the consumption of alcohol at these establishments and gathering with close friends or family can lower inhibitions and interfere with effective social distancing. (*Id.*) This is especially true at bars later at night when individuals are more prone to move about and mingle within these establishments. (*Id.*) All of these factors make bars and restaurants high risk for the easy transmission of COVID-19. (*Id.*)

For example, one study examined COVID-19 transmission in a bar during a St. Patrick's Day celebration in Vietnam. (*Id.* at ¶12, Ex. A.) The study found that it was likely that a single person spread the virus to 18 other people over the course of a single night, even though only 4 of the 18 reported being in close contact with the infectious individual. (*Id.*)

In another study publicized by the national Centers for Disease Control and Prevention ("CDC"), a significant viral outbreak occurred at a family gathering at a restaurant. (*Id.*, Ex. A.) Not only did the family members who attended the meal become ill, but other patrons unassociated with the reunion became sick. (*Id.*) The researchers' hypothesis indicates that the virus was spread simply through the air of the restaurant. (*Id.*)

In yet another study, an outbreak of three cases occurred at a restaurant where one of the people who got infected sat 21 feet away from the infector for only 5 minutes. (*Id.* at ¶ 12, Ex. A.)

An outbreak is generally defined as multiple cases of illness related by time and place in which an epidemiologic investigation suggests person-to-person transmission or contamination occurred. (*Id.* at ¶ 10.) It is challenging to document the full scope of any COVID-19 outbreak, by what is known as secondary and tertiary transmission of COVID-19. (*Id.*) This is because a person may have COVID-19 and be asymptomatic or experience mild symptoms and never get tested, but still be able to infect others. (*Id.*) And importantly, the contact tracing process relies on truthful and accurate self-reporting from persons infected or exposed to the virus. (*Id.*) If a person exposed to the virus does not fully disclose their symptoms, activities, or contacts, then the total numbers related to an outbreak will be underreported. (*Id.*) Because of these challenges, the total impact of outbreaks in Minnesota will never be fully known. (*Id.*) Instead, these documented outbreaks represent just the tip of the iceberg of transmission and there are likely many more cases from the outbreak source that haven't been identified. (*Id.*)

Minnesota Department of Health's contact tracing investigations have shown that apart from long term care settings, bars and restaurants are among the settings most frequently associated with COVID-19 outbreaks in Minnesota. Specifically, the Minnesota Department of Health has already traced 448 COVID-19 outbreaks and 4,145 confirmed cases of COVID-19 to bars and restaurants in Minnesota. (*Id.* at ¶13.)

Minnesota has had success in keeping its infection rate and mortality count relatively lower than some other areas, in part through its outreach to educate Minnesotans on the restrictions in place, and in part by placing certain restrictions on activities that are more likely to result in spread of the virus like large events and fully occupied bars or restaurants with people from different households congregating in close proximity. Nevertheless, Minnesota is currently experiencing some of the highest numbers of COVID-19 cases since the beginning of the pandemic.

Minnesota's attempts to slow the spread of COVID-19 are an attempt to protect the health and safety of its residents. These efforts have been deemed necessary by the Governor, including in Polk County.

II. GOVERNOR WALZ ISSUED EMERGENCY EXECUTIVE ORDER 20-99, WHICH TEMPORARILY CLOSES BARS AND RESTAURANTS FOR ON-PREMISES CONSUMPTION, IN ORDER TO LIMIT COMMUNITY SPREAD OF COVID-19.

On March 13, 2020, Governor Tim Walz declared a peacetime emergency as a result of the COVID-19 pandemic. At its emergency meeting on March 16, the Executive Council of the State of Minnesota approved the peacetime emergency to protect Minnesotans from COVID-19.¹² The peacetime emergency was most recently extended and approved by the Executive Council until at least through December 14, 2020, pursuant to Executive Order 20-97.¹³

In order to protect public health and safety by slowing the “community spread” of COVID-19, on November 18, 2020, Governor Walz issued Executive Order 20-99, which, in relevant part, orders that “restaurants, . . . bars, . . . and other Places of Public Accommodation offering food, beverages (including alcoholic beverages), or tobacco products for on-premises consumption are closed to ingress, egress, use, and occupancy by member of the public, except as set forth below.”¹⁴ Executive Order 20-99 goes on to specify that restaurants and bars may “permit up to five members of the public at one time . . . for the purpose of picking up their food or beverage orders.”¹⁵ Thus,

¹² See Executive Order 20-99 at 2, available at <https://www.leg.mn.gov/archive/execorders/20-99.pdf>. (Lewellen Aff. Ex. 7.)

¹³ See Executive Order 20-97, available at <https://www.leg.mn.gov/archive/execorders/20-97.pdf>. (Lewellen Aff. Ex. 6.)

¹⁴ Executive Order 20-99 ¶7.c.iii.A. (Lewellen Aff. Ex. 7.)

¹⁵ *Id.* at ¶7.c.iii.A.1.

on-premises consumption is temporarily prohibited, as is any occupancy above five members of the public waiting for their to-go orders, until at least December 18, 2020 at 11:59 p.m.¹⁶

Executive Order 20-99 was promulgated by the Governor under the authority of Minnesota Statutes section 12.21, subdivision 3, clause (1), was approved by the Executive Council, and filed in the Office of the Secretary of State.¹⁷ Thus, pursuant to Minnesota Statutes section 12.32, Executive Order 20-99 has the full force and effect of law during the peacetime emergency. Moreover, Executive Order 20-99 authorizes the Attorney General to enforce its provisions and seek any relief available pursuant to Minnesota Statutes section 8.31, “including civil penalties up to \$25,000 per occurrence from businesses and injunctive relief.” (*Id.* at ¶ 10.)

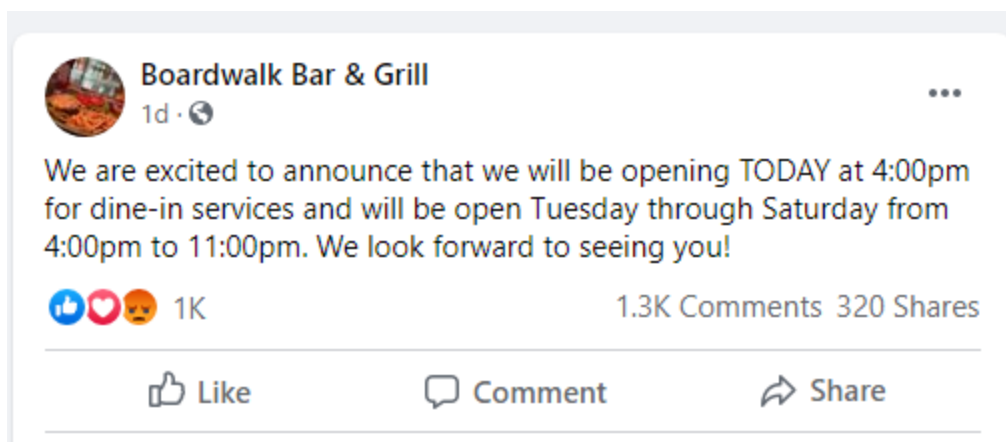
III. DEFENDANT BOARDWALK BAR AND GRILL, LLC HAS VIOLATED AND IS CONTINUING TO VIOLATE EMERGENCY EXECUTIVE ORDER 20-99.

Beginning on December 9, 2020 and continuing as of the date of this memorandum, Defendant Boardwalk Bar and Grill, LLC, which owns and operates a bar/restaurant in East Grand Forks, has opened to ingress, egress, use, and occupancy by more than five members of the public, as well as for the on-premises consumption of food and beverages (including alcoholic beverages), in direct violation of Emergency Executive Order 20-99.

On December 9, 2020 at 9:51 a.m., Defendant posted the following on its public Facebook account:

¹⁶ Executive Order 20-99 also encourages restaurants and bars to “offer food and beverage using delivery services, window service, walk-up service, drive-through service, or drive-up service,” while these temporary restrictions are in place.

¹⁷ *Id.* at 3.



(Affidavit of Nina Grove, Ex. 1.)

Subsequently, officers with the East Grand Forks Police Department arrived at Defendant's bar/restaurant at 3:57 p.m. on December 9, 2020, and observed members of the public entering the restaurant. (Lewellen Aff. Ex. 1.) Upon entering the bar/restaurant, the officers observed people seated at several tables, with alcoholic beverages in front of them. (*Id.*) The officers provided Defendant a copy of Executive Order 20-99. (*Id.*) The officers informed Defendant's owner and/or manager, Jane Moss, that Defendant's bar/restaurant was open in violation of Emergency Executive Order 20-99, and Ms. Moss indicated to the officers that she understood this. (*Id.*) While the officers were present at the bar/restaurant, they observed additional members of the public entering the bar/restaurant for on-site consumption. (*Id.*)

Subsequently, at 8:03 p.m. on December 9, 2020, an East Grand Forks Police Department officer drove by Defendant's bar/restaurant and observed that it was very full with customers. (*Id.*) This same officer drove by the bar/restaurant again at 9:51 p.m. and observed that there was still substantial business at the bar/restaurant. (*Id.*) This same officer drove by the bar/restaurant a

third time at 11:01 p.m. and noted that there were still approximately three customers still inside the bar/restaurant. (*Id.*)

On December 10, 2020, the Minnesota Department of Health issued a Cease and Desist letter to Defendant pursuant to Minnesota Statutes section 144.99, subdivision 6, finding that its conduct violated Emergency Executive Order 20-99 and ordering that it cease and desist from operating as a bar/restaurant providing on-premises consumption of food or beverages. (Lewellen Aff. Ex. 14.) Nevertheless, Defendant publicly represented that despite receiving the Cease and Desist letter, it would continue to remain open for on-premises consumption of food and beverages in violation of Executive Order 20-99. (Lewellen Aff. Ex. 15.) Thus, despite being repeatedly warned that its conduct was in clear violation of Emergency Executive Order 20-99, Defendant continued (and is continuing) to operate and allow on-site consumption of food and beverages at its restaurant jeopardizing the health and safety of the public.

Governor Walz's Emergency Executive Order 20-99 was issued to slow the community spread of COVID-19 and thereby protect public health and safety. (Danila Aff., ¶ 14.) This includes, in part, requiring settings that are especially high risk for the easy transmission of COVID-19 from person to person and out into the community to temporarily close to on-premises dining and restrict entry by members of the public to protect the public's health and safety. Without such restrictions, the dangerous public health emergency Minnesota is currently facing would continue to worsen threatening the health, safety, and lives of Minnesotans. Attorney General Keith Ellison has authority to enforce Executive Order 20-99 and brings this action to enjoin and remediate Defendant's violations described herein.

ARGUMENT

I. A TEMPORARY RESTRAINING ORDER AND A TEMPORARY INJUNCTION ARE APPROPRIATE TO ENJOIN BOARDWALK BAR AND GRILL, LLC FROM FURTHER VIOLATING EXECUTIVE ORDER 20-99.

Temporary injunctive relief should be issued upon a showing by the State that Defendant “has violated, or is about to violate” Executive Order 20-99 and when injunctive relief would fulfill the purpose of the Order. *See State v. Cross Country Bank, Inc.*, 703 N.W.2d 562, 572 (Minn. Ct. App. 2005) (quoting *Wadena Implement Co. v. Deere & Co., Inc.*, 480 N.W.2d 383, 389 (Minn. Ct. App. 1992)); *accord State v. Minn. School of Business, Inc.*, 899 N.W.2d 467, 471-72 (Minn. 2017) (recognizing “[t]he conditions that must be met to grant a statutory injunction are determined by the text of the statute authorizing the injunction.”).¹⁸

Here, the State brings this law enforcement action against Defendant to “prevent and restrain” its ongoing violations of Executive Order 20-99, by remaining open to the public for on-site consumption of food or beverages. *See* Minn. Stat. § 8.31, subd. 3 (providing “the courts of this state are vested with jurisdiction to prevent and restrain violations”). Executive Order 20-99 expressly provides that it can be enforced by the Minnesota Attorney General’s Office (“AGO”)

¹⁸ Only when a law does not provide for injunctive relief are courts to evaluate the *Dahlberg* factors to determine whether sufficient grounds exist to issue a TRO or temporary injunction. *Cross Country Bank*, 703 N.W.2d at 573 (when statutes specifically provide for injunctive relief court is “not required to make findings on the *Dahlberg* factors to enjoin violation of the statute.”). Where a party “legitimately disputes” the applicability of the underlying statute authorizing injunctive relief, a district court “is not required” to grant a temporary injunction without consideration of the *Dahlberg* factors. *See State v. Int’l Assoc. of Entrepreneurs of Am.*, 527 N.W.2d 133, 137 (Minn. App. 1995) (citing *Pac. Equip. & Irrigation, Inc. v. Toro Co.*, 519 N.W.2d 911, 918 (Minn. App. 1994)). This narrow exception, however, has no application to this case because Defendant cannot legitimately dispute that it owns and operates a bar/restaurant that is subject to Executive Order 20-99, which may be enforced by the Attorney General pursuant to Minnesota Statutes section 8.31 and statutorily authorizes the Attorney General to, among other things, “sue for and have injunctive relief . . . against any . . . violation or threatened violation.” *See* Minn. Stat. § 8.31, subd. 3.

pursuant to Minnesota Statutes section 8.31. Section 8.31 authorizes the AGO to “sue for and have injunctive relief in any court of competent jurisdiction against any such *violation or threatened violation* without abridging the penalties provided by law.” Minn. Stat. § 8.31, subd. 3 (emphasis added); *accord Minn. School of Business, Inc.*, 899 N.W.2d at 472. Accordingly, the State is entitled to a temporary restraining order (TRO) and temporary injunction (TI) by showing that: (1) Defendant violated, is violating, or “is about to” violate Executive Order 20-99; and (2) the injunctive relief sought by the State would fulfill the purpose of the statute and Order.

As described above, Defendant has acknowledged that it has violated, and will continue to violate Executive Order 20-99 by continuing to serve food and beverages for on-premises consumption and not restrict its public capacity to five people. (See Lewellen Aff. Exs. 1, 15.) Even when informed by local law enforcement that its conduct constituted a clear violation of the Order and describing the ramifications of such violation, including fines and other penalties, Defendant has not come into compliance with Executive Order 20-99’s temporary restrictions. Consequently, the Court should temporarily enjoin Defendant from violating the Executive Order and threatening public health and safety by offering on-premises consumption of food and beverages, and permitting more than five members of the public to enter the establishment at one time, as Defendant has been doing since at least December 9, 2020.

Lastly, the temporary injunctive relief the State requests undoubtedly would fulfill the purposes of Executive Order 20-99. It would protect public health and safety, and help slow the community spread of COVID-19, hospitalizations, intensive care unit admissions, and deaths related to COVID-19 by preventing congregation in a bar/restaurant when community spread of COVID-19, test positivity rate, and new COVID-19 cases are at some of their highest levels in Minnesota since the beginning of the pandemic. The purpose of Executive Order 20-99 is to

protect the public from public health risks, to “safely bridge the gap to more permanent solutions to this pandemic,” which include the state-wide rollout of FDA approved vaccines. (Executive Order 20-99 at 3.) Accordingly, the court should grant the State’s motion for temporary injunctive relief preventing Defendant from further violating Executive Order 20-99.

II. TEMPORARY INJUNCTIVE RELIEF IS NECESSARY EVEN ASSUMING *ARGUENDO* THAT THE *DAHLBERG* FACTORS WERE APPLICABLE HERE.

In any event, even assuming *arguendo* that the *Dahlberg* factors apply to the State’s motion, such factors all weigh strongly in favor in granting the temporary restraining order and temporary injunctive relief sought by the State. Each of the following factors weigh in favor of the State: (1) relationship between the parties; (2) relative harm to the parties if injunctive relief is granted or denied; (3) the party’s likelihood of success on the merits; (4) any public interest or public policy involved; and (5) the administrative burdens involved in judicial supervision and enforcement. *Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965).

A. Relationship of the Parties.

The first *Dahlberg* factor—“the nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief”—weighs heavily in favor of the State. *Dahlberg Bros.*, 137 N.W.2d at 321. Executive Order 20-99 empowers the Attorney General’s Office to take action against bars or restaurants that are operating in violation of the Order. As the chief legal officer for the State of Minnesota, the Attorney General has authority to file a civil enforcement action seeking injunctive relief (among other remedies) to secure compliance with Emergency Executive Order 20-99. *See* Minn. Stat. § 8.31, subs. 3, 3a; Executive Order 20-99 at ¶ 11. Defendant has been repeatedly violating the Order since at least December 9, 2020, including but not limited to by opening to the public for on-premises consumption of food and beverages. Because the background and relationship of the parties is that

of regulator and non-compliant regulated entity, the first *Dahlberg* factor heavily favors granting the State's requested relief. *State ex rel. Swanson v. CashCall, Inc.*, Nos. A13-2086, A14-0028, 2014 WL 4056028, *5 (Minn. App. Aug. 18, 2014), *review denied* (Minn. Nov. 17, 2015).

B. Minnesotans will be Threatened with Real, Substantial, and Irreparable Injury Absent a Temporary Injunction.

The second *Dahlberg* factor requires the Court to balance the harms to be suffered if the temporary injunction is granted with the harms to be suffered if it is denied. *Dahlberg Bros.*, 137 N.W.2d at 321; *see also Indep. Sch. Dist. No. 35, Marshall County v. Engelstad*, 144 N.W.2d 245, 248 (Minn. 1966) (“There must be threatened injury which is real, substantial, and irreparable.”); *Cramond v. Am. Fed. of Labor & Congress of Indus. Organizations*, 126 N.W.2d 252, 256 (Minn. 1964) (recognizing irreparable injury may occur where the actions of an adverse party may render the relief sought by the other party “ineffectual”).

Here, Minnesotans will be threatened with real, substantial, and irreparable harms for which a future payment of money is not a “realistic remedy” if the Court does not grant the State's requested temporary injunctive relief. Minnesota is currently experiencing an alarming surge in COVID-19 cases, including the record high daily case numbers received this month and increasing reported deaths. Defendant's conduct risks further increasing the rate of community spread in Minnesota. Emergency Executive Order 20-99 was thoughtfully conceived by public health professionals to address the specific and deadly exigencies posed by the public health crisis facing our State. (*See Danila Aff.* at ¶¶7-9.) The Order seeks to restrict only that behavior most tied to outbreaks in Minnesota, even as infections grow dangerously higher. (*Id.*) The virus appears to spread most easily between people indoors for extended periods of time, (*Id.* at ¶ 9), and those situations are precisely what Defendant's conduct will foster. Compliance with the Order is critical to slowing the spread of COVID-19 and protecting the capacity of Minnesota's health system.

Payment of money is not a realistic remedy in this situation, not only for members of the public who could become infected, but for the public as a whole. Such harm also far outweighs any interest Defendant may have in temporarily closing to the public for on-site consumption for four weeks (*e.g.*, until December 18, 2020). Because the public health and safety of Minnesotans are threatened by Defendant's unlawful actions absent a temporary restraining order and temporary injunction, this factor weighs strongly in favor of the State.

C. The State is Likely to Succeed on the Merits of Its Claims.

The State is likely to succeed on the merits of its claims because Defendant has admitted that it intends and has remained open to the public in clear violation of Executive Order 20-99.

Contrary to Defendant's claims, any suggestion that Emergency Executive Order 20-99 lacks the force and effect of law is meritless. Minn. Stat. § 12.32. Likewise, any suggestion by Defendant that Executive Order 20-99 is unconstitutional is specious. Efforts to invalidate executive orders issued during a public health crisis like the present one are evaluated under the framework of *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905). Under this framework, courts give significant deference to the emergency measures instituted during a public health crisis. "The Constitution does not compel courts to turn a blind eye to the realities of the COVID-19 crisis." *Cassell v. Snyders*, 20 C 50153, 2020 WL 2112374, at *6 (N.D. Ill. May 3, 2020) (citing *Jacobson*, 197 U.S. at 27).¹⁹

¹⁹ Moreover, nothing in *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, No. 20A87, 2020 WL 6948354, 592 U.S. --- (Nov. 25, 2020) abrogates, overrules, or otherwise limits the application of *Jacobson* here. The Eighth Circuit (and numerous other federal courts) have confirmed that *Jacobson* applies to emergency orders issued to combat COVID-19. *See In re Rutledge*, 956 F.3d 1018, 1027 (8th Cir. 2020). Indeed, the *Roman Catholic* majority did not discuss *Jacobson*, much less overrule or otherwise limit its application and the constitutional issues at play in *Roman Catholic* are easily distinguishable from the case at bar. Thus, any attempted suggestion to the contrary by Defendant is wrong as a matter of law.

Under *Jacobson*, state action is susceptible to constitutional challenge only if: (1) it has no real or substantial relation to the object of protecting the public health, safety, or morals; or (2) “is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.” *Jacobson*, 197 U.S. at 31. The heightened deference courts apply during public health emergencies is rooted in the fact that “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Id.* at 27.

Thus, the temporary executive actions the Governor has taken in response to the COVID-19 emergency are entitled to substantial judicial deference and courts may not “second-guess the wisdom or efficacy of the measures.” *Rutledge*, 956 F.3d at 1028 (internal quotations omitted). Courts throughout the country have applied *Jacobson* in upholding a variety of executive orders to combat the COVID-19 pandemic, including measures similar to those contained in Executive Order 20-99.²⁰ Indeed, in *Stearns and Wabasha Counties*, district courts have held that the State was likely to succeed on the merits against (1) a similarly defiant restaurant that refused to comply

²⁰ See, e.g., *Calvary Chapel Dayton Valley v. Sisolak*, No. 320-CV-00303, 2020 WL 4260438, at *2-3 (D. Nev. June 11, 2020); *Best Supplement Guide, LLC v. Newsom*, No. 220-CV-00965-JAM/CKD, 2020 WL 2615022, at *3 (E.D. Cal. May 22, 2020) (applying *Jacobson* to reject First and Fourteenth Amendment challenges to California’s executive orders closing gyms, and collecting cases); *Henry v. DeSantis*, No. 20-CV-80729, 2020 WL 2479447, at *6 (S.D. Fla. May 14, 2020) (rejecting First and Fourteenth Amendment challenges to Florida’s executive order closing bars and restaurants); *Friends of Danny DeVito v. Wolf*, No. 68 MM 2020, 2020 WL 1847100, at *16 (Pa. Apr. 13, 2020) (applying *Jacobson* framework in affirming constitutionality of Pennsylvania’s stay-at-home order); *Commcan, Inc. et al. v. Baker*, No. 2084CV00808-BLS2, 2020 WL 1903822, at *6 (Mass. Super. Apr. 16, 2020) (rejecting Equal Protection challenge to executive order closing legal marijuana dispensaries but leaving other businesses open); *Talleywhacker, Inc. v. Cooper*, 2020 WL 3051207 (E.D.N.C.) (denying strip club that also served alcohol and food motion for temporary and rejecting claims under the First, Fifth, and Fourteenth Amendments); *Amato v. Elicker*, 2020 WL 2542788 (D. Conn.) (denying restaurants motion for temporary injunction from bar/restaurant closure order and rejecting First Amendment claims); *McCarthy v. Cuomo*, 2020 WL 3286530 (E.D.N.Y.) (denying strip club/bar/restaurant’s motion for a temporary injunction and rejecting First and Fifth Amendment claims).

with the Governor's Executive Orders early in the pandemic, and (2) a defiant gym that refused to comply with Executive Order 20-99. Both courts granted the State's motion for temporary injunctive relief. (Lewellen Aff., Ex. 8.)

Executive Order 20-99 has a clear connection to the protection of Minnesotans' health and safety, as shown in both the clear language of the Order and in the data on where COVID-19 spreads most readily. Neither requirement is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."

The State has requested that Defendant comply with Executive Order 20-99. The State's requests, however, have been explicitly rejected. Because the Order has the force and effect of law, passes constitutional muster, and is being openly violated by Defendant, the third *Dahlberg* factor weighs in favor of granting the State's requested injunctive relief.

D. The Public Interest and Public Policies Strongly Weigh in Favor of the Temporary Injunction.

The fourth *Dahlberg* factor requires consideration of any public interest or public policy expressed in applicable statutes. *Dahlberg Bros.*, 137 N.W.2d at 321-22. As discussed above, the Governor issued Executive Order 20-99 to slow the spread of a deadly infectious disease. Defendant has violated these safety restrictions by remaining open to the public for on-site consumption beginning on December 9, 2020 and continuing as of the date of this memorandum. Public policy clearly weighs in favor of temporary injunctive relief that requires Defendant to

temporarily close to the public for on-site consumption in accordance with Executive Order 20-99.

E. The State's Requested Temporary Injunctive Relief Poses No Administrative Burdens on The Court.

Finally, the Court must consider the administrative burdens a temporary injunction may impose upon the Court. *Dahlberg Bros.*, 137 N.W.2d at 322. Here, issuing a temporary injunction will impose no administrative burdens on the Court because all the State requests is that Defendant obey the Governor's Executive Order 20-99. Indeed, the State only requests that Defendant conform its conduct to that of all other restaurants and bars throughout Minnesota. For this reason, this final *Dahlberg* factor also fully favors granting the State's requested temporary injunctive relief.

III. TEMPORARY INJUNCTIVE RELIEF IS NECESSARY BEFORE DEFENDANT CAN BE HEARD IN OPPOSITION, NECESSITATING AN *EX PARTE* TRO.

The function of a TRO and TI is to preserve the status quo until the matter is adjudicated on the merits. *Prolife Minnesota v. Minnesota Pro-Life Committee*, 632 N.W.2d 748, 753 (Minn. Ct. App. 2001) (discussing purpose of TRO); *Metro. Sports Facilities Comm'n v. Minn. Twins P'ship*, 638 N.W.2d 214, 220 (Minn. App. 2002) (discussing purpose of temporary injunction). In order to obtain temporary injunctive relief before Defendant can be heard in opposition (*i.e.* an *ex parte* TRO), the State must show that:

- (1) It clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and
- (2) the applicant's attorney states to the court in writing the efforts, if any, which have been made to give notice or the reasons supporting the claim that notice should not be required.

Minn. R. Civ. P. 65.01.

Immediate and irreparable injury will result if the State is required to wait until Defendant can be fully heard in opposition to the State's request for temporary injunctive relief authorized by Minnesota Statutes section 8.31 and Executive Order 20-99. Since at least December 9, 2020, Defendant has been violating, and is continuing to violate Executive Order 20-99. Indeed, if Defendant is permitted to continue to defy Executive Order 20-99 and remain open at its whim, it will unreasonably put its own community's health and safety at risk in a county and surrounding area that has seen a drastic increase in new COVID-19 cases due to community spread.

Given Defendant's ongoing and defiant violations of Executive Order 20-99, there is insufficient time to provide Defendant the ability to negotiate a time for a hearing or fully respond in writing. Nevertheless, the Minnesota Attorney General's Office has given/attempted to give notice of its motion to Defendant and does not oppose Defendant appearing for hearing so long as the State's Motion is heard expeditiously and in manner that does not prevent effective temporary relief and restoration of the status quo (i.e., compliance with Executive Order 20-99).

The State has met all required elements for a TRO enjoining Defendant from violating Executive Order 20-99 by providing for on-premises consumption of food and beverages and allowing more than five members of the public in its restaurant at one time. Accordingly, the Court should grant the State's Motion for a TRO and schedule a TI hearing at the earliest practical time.²¹ Minn. R. Civ. P. 65.01 (If a TRO is granted without notice to an opposing party, "the motion for a temporary injunction shall be set down for hearing at the earliest practicable

²¹ Despite the requirements for security set forth in Minn. R. Civ. P. 65.03(a) and Minn. Stat. § 570.041, subd. 1, the State is entitled to temporary injunctive relief without the giving of a security or bond. *See* Minn. Stat. § 574.18 ("No undertaking or bond need be given upon any appeal or other proceeding instituted in favor of the state . . ."); *State v. Nelson*, 189 Minn. 87, 89-90, 248 N.W. 751, 752 (1933) (recognizing the term "proceeding" includes "every proceeding before a competent court in the due course of the proper administration of justice and which is to result in any determination.").

time...and when the motion comes on for hearing, the party who obtained the [TRO] shall proceed with the application for a temporary injunction.”)

CONCLUSION

For all of the above reasons, the State respectfully requests that the Court grant its *Ex Parte* Motion for a Temporary Restraining Order and Temporary Injunction and award the State the entirety of the temporary relief it seeks, as detailed in its accompanying proposed order.

Dated: December 11, 2020

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MINN. STAT. § 549.211 ACKNOWLEDGMENT

The party on whose behalf the attached document is served acknowledges through its undersigned counsel that sanctions, including reasonable attorney fees and other expenses, may be awarded to the opposite party or parties pursuant to Minn. Stat. § 549.211 (2020).

/s/ Jason Pleggenkuhle
JASON PLEGGENKUHLE