STATE OF MINNESOTA
COUNTY OF POLK

IN DISTRICT COURT
NINTH JUDICIAL DISTRICT

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

Plaintiff,

vs.

Boardwalk Bar and Grill, LLC,

Defendant.

Court File No. 60-CV-20-2039

ORDER GRANTING TEMPORARY INJUNCTION

This matter came before the Court on December 18, 2020, for a hearing on the State's Motion for Temporary Injunction and Defendant's Motion to Dissolve the Ex Parte Temporary Restraining Order issued by the Polk County District Court on December 11, 2020.

Mr. Jason Pleggenkuhle and Mr. Noah Lewellen, Assistant Attorneys General, appeared on behalf of the State of Minnesota. Mr. Marshall Tanick and Mr. Michael Vanselow, Attorneys at Law, appeared on behalf of Defendant Boardwalk Bar and Grill.

The Court heard oral arguments and took the matter under advisement. After considering the submitted pleadings, counsel's arguments, the contents of the file and the law, the Court issues the following:

ORDER

1. The State's request for temporary injunction pursuant to Minnesota Rule of Civil Procedure 65.02 is **GRANTED**. The temporary restraining order is converted to a temporary injunction that shall remain effective pending a trial on the merits or further order of the Court.

2. Effective from the date of this Order, Defendant is prohibited from taking any action in violation of Executive Order 20-99 or any subsequent Executive Order.

3. Defendant shall fully comply with Executive Order 20-99 or any subsequent and applicable Executive Order that has been issued by the Governor, approved by the Executive Council, and filed in the Office of the Secretary of State in accordance with Minnesota Statutes.

4. Defendant's request to dissolve the Temporary Restraining Order is moot as Defendant's arguments were merged into opposition to the Temporary Injunction. Since the Court is granting Plaintiff's request for a Temporary Injunction,

Defendant's motion to dissolve the Temporary Restraining Order is, in effect, **DENIED**.

5. Defendant's request to consolidate the motion hearing with a trial on the merits pursuant to Minnesota Rule of Civil Procedure 65.02 is **DENIED**.

6. The attached memorandum explaining the Court's decision is incorporated herein by reference.

7. Under separate Order, the Court will set the matter on for a Telephone Scheduling Conference to assess the status of the case and to set applicable dates and deadlines.

BY THE COURT:

Rasmusson, Anne
Dec 22 2020 2:19 PM

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Hon. Anne M. Rasmusson
Judge of District Court

MEMORANDUM

Procedural Background

On March 13, 2020, Governor Tim Walz declared a peacetime emergency as a result of the COVID-19 pandemic and the State of Minnesota has remained in a peacetime state of emergency to date. Throughout this time, Governor Walz has issued a series of executive orders addressing the COVID-19 pandemic. On November 18, 2020, Governor Walz issued Executive Order 20-99, which is the executive order at issue in this case.

On December 11, 2020, the State of Minnesota, by and through the Minnesota Attorney General's Office, (hereinafter "Plaintiff") filed a Summons and Complaint against Boardwalk Bar and Grill, LLC (hereinafter "Defendant") alleging violations of Executive Order 20-99 and requesting various items of relief.

That same day, Plaintiff filed an ex parte Motion for a Temporary Restraining Order (hereinafter "TRO") and Temporary Injunction enjoining Defendant from all business operations that were in violation of Executive Order 20-99 (hereinafter "EO 20-99" for citation purposes only). Specifically, Plaintiff sought a TRO to stop Defendant from allowing on-premises dining in violation of Executive Order 20-99. The Court granted the request for a TRO and the case was set for hearing.

Defendant moves to dissolve the TRO and deny Plaintiff's request for a Temporary Injunction. Defendant argues that a Temporary Injunction is improper because Governor Walz failed to follow established statutory protocols, violated the separation of powers principle, and failed to meet the criteria for a Temporary Injunction in that this is a violation of equal protection and a taking under the law. Finally, Defendant requests consolidation of the pending motions with a decision on the merits pursuant to Minnesota Rule of Civil Procedure 65.02(c).

The case was heard on December 18, 2020.

Summary of Facts

I. Background of COVID-19

The 2019 novel coronavirus (hereinafter "COVID-19") is an infection and illness that had not previously been identified in humans. In the first few months of 2020, the COVID-19 pandemic began to sweep the United States. COVID-19 is particularly virulent and is easily spread from person-to-person. Tens of millions of individuals have been infected with COVID-19 throughout the world. Social distancing and face coverings have proven to be effective in reducing infection rates when combined with other measures that limit person-to-person interaction.

In early March 2020, cases in Minnesota began to increase. As of December 10, 2020, 367,218 Minnesotans have been diagnosed and 4,198 Minnesotans have died from this disease. Record numbers of new cases, hospitalizations and deaths were reported in Minnesota in November and December 2020.

While rural Minnesota initially had fewer cases of COVID-19, that situation has dramatically changed. By early December 2020, Polk County had a COVID-19 positivity rate of 12.9%, which was much higher than Minnesota's statewide average of 7.9% for the same period.

Polk County borders upon the State of North Dakota. The City of East Grand Forks is a sister city to Grand Forks, North Dakota. The two cities are located immediately across the river from one another. North Dakota has also recently experienced significant increases in COVID-19 infections. By the beginning of December 2020, North Dakota had the second-highest positivity rate in the nation.

Polk County is a primarily rural county with limited hospital infrastructure. In part, Polk County residents rely on the Grand Forks hospital system, which was at 95% capacity two weeks ago.

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 traced 448 COVID-19 outbreaks and 4,145 confirmed cases of COVID-19 to Minnesota bars and restaurants.

State officials assert that temporary restrictions on in-person dining are necessary to limit the spread of COVID-19 as much as possible.

II. Facts in this Case

On March 13, 2020, Governor Tim Walz declared a peacetime emergency as a result of the COVID-19 pandemic. The Executive Council of the State of Minnesota approved the peacetime emergency at its emergency meeting on March 16, 2020. This peacetime emergency has been extended every thirty days since the Governor's initial declaration. Governor Walz has issued a series of Executive Orders addressing the COVID-19 pandemic. On November 18, 2020, Governor Walz issued EO 20-99, which is the executive order at issue in this case.[1]

Executive Order 20-99 provides that restaurants, food courts, cafes, coffeehouses, bars, taverns, breweries, microbreweries, distilleries, brewer taprooms, micro distiller cocktail rooms, tasting rooms, wineries, cideries, clubhouses, dining clubs, tobacco

[1] On December 16, 2020 (two days prior to the hearing in this case), Governor Walz issued Executive Order 20-103, which specifically extended and modified Executive Order 20-99. The modifications in Executive Order 20-103 do not impact the Court's analysis in the present matter. Therefore, the Court in this decision will continue to reference Executive Order 20-99.

product shops, hookah bars, cigar bars, vaping lounges, 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 members of the public, except that those establishments may, and are encouraged to, offer food and beverage using delivery services, window service, walk-up service, drive-through service, or drive-up service. In offering food or beverage service under this paragraph, a Place of Public Accommodation may permit up to five members of the public at one time in the place of public accommodation for the purpose of picking up their food or beverage orders. See EO 20-99, at 11.

Defendant is a bar/restaurant/event center located in East Grand Forks, Polk County, Minnesota. Defendant has suffered serious financial losses as a result of COVID-19 and the state-wide lockdowns. Defendant has lost twenty employees and hundreds of thousands of dollars in lost income during the pandemic restrictions. Defendant has historically followed the various restrictions imposed on bars and restaurants since March 2020. Defendant was aware of Executive Order 20-99 and for a period of time followed the pandemic restrictions imposed on its business.

On December 9, 2020, Defendant publicized that it was going to open its business for dine-in services in violation of Executive Order 20-99. Later that day, Defendant did open for dine-in services and customers were observed eating and drinking at the business for several hours.

On December 10, 2020, the Minnesota Department of Health issued a Cease and Desist letter finding that Defendant was violating Executive Order 20-99 and ordering that it immediately stop providing on-premises consumption of food and beverages. Defendant declined and continued to open the business for in-person dining.

On December 11, 2020, Defendant was advised by email that the Plaintiff would bring a motion for a temporary restraining order regarding Defendant's actions. Defendant remained open for in-person dining that day.

Analysis

The parties present a number of arguments to the Court. Plaintiff is requesting that the Court issue a Temporary Injunction that requires Defendant to follow the terms of Executive Order 20-99 and subsequent orders, pending a trial on the merits. Defendant opposes that request and asks the Court to dissolve the TRO. As to the Temporary Injunction, Defendant argues first that, as a threshold matter, the Executive Order in question is unlawful because it does not follow the procedures set forth in Minn. Stat. § 12.31, subd. 2. Next, Defendant argues that Governor Walz unlawfully violated the separation of powers principle by inserting criminal and civil penalties within the Executive Order. Further, Defendant argues that the Temporary Injunction should be denied because Executive Order 20-99 violates in both the Equal Protection and Due Process provisions of the state and federal constitutions. Finally, Defendant requests the Court

consolidate the pending motions with a decision on the merits. Plaintiff opposes all of Defendant's claims and requests. The Court's analysis on each matter is set forth below.

I. Motion to Dissolve the TRO

There are two types of preliminary injunctive relief in Minnesota. A TRO is an immediate, ex parte order designed to either maintain a status quo or return to a status quo until such time that a hearing may be had where the other party may be heard. Prolife Minnesota v. Minnesota Pro-Life Committee, 632 N.W.2d 748, 753 (Minn. Ct. App. 2001) (discussing purpose of TRO). A Temporary Injunction allows a court to delve into the issues further and make a determination of whether a longer period of enjoinment is warranted pending a full trial on the merits. Metro. Sports Facilities Comm'n v. Minn. Twins P'ship, 638 N.W.2d 214, 220 (Minn. Ct. App. 2002) (discussing purpose of temporary injunction).

In order to obtain a TRO a plaintiff 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.

Plaintiff made a satisfactory showing of these two elements and the Court issued a TRO on December 11, 2020. Since this hearing deals with the Temporary Injunction (as the Court has already issued a TRO), it is moot to determine whether the TRO should be dissolved. The Court will either grant Plaintiff's Motion for a Temporary Injunction, thereby affirming the TRO, or the Court will deny Plaintiff's Motion for a Temporary Injunction and the matter is resolved by operation of law.

Therefore, Defendant's Motion to Dissolve the TRO is merged into its opposition to the temporary injunction, and the motion to dissolve becomes moot.

II. Lawfulness of Executive Order 20-99

The Minnesota Emergency Management Act (hereinafter "MEMA") is codified in Section 12.31 of the Minnesota Statutes. This statute gives the Governor the authority to act in peacetime emergencies. Through this authority, Governor Walz has issued a number of Executive Orders, including Executive Order 20-99. Defendant challenges Executive Order 20-99 as unlawful for two reasons. First, Defendant contends that Governor Walz failed to follow the procedures set forth in MEMA and, therefore, his actions are not lawfully authorized. Second, Defendant argues that Governor Walz

exercised an unconstitutional delegation of power and, as such, Executive Order 20-99 is invalid. The Court will analyze each argument below.

a. Compliance with MEMA

As summarized above, Defendant argues that Executive Order 20-99 is unlawful because Governor Walz did not follow MEMA's established protocols to extend executive orders in peacetime emergencies. Specifically, Defendant argues that the Legislature must approve any extension of an executive order past thirty (30) days, which Defendant claims did not occur in this instance.

The process for declaring a peacetime emergency in Minnesota is specifically detailed by statute. Upon declaring a peacetime emergency, the governor must immediately notify the majority and minority leaders of the Minnesota Senate and the speaker and majority and minority leaders of the Minnesota House of Representatives. Minn. Stat. § 12.31, subd. 2(a). A peacetime emergency must not be continued for more than five days, unless extended for up to thirty (30) days by resolution of the Executive Council. Id. An order, or proclamation declaring, continuing, or terminating an emergency must be given prompt and general publicity and filed with the Secretary of State. Id. The legislature may terminate a peacetime emergency extending beyond thirty (30) days by majority vote. Id. subd. 2(b). If the governor determines a need to extend the peacetime emergency declaration beyond thirty (30) days and the Legislature is not sitting in session, the governor must immediately issue a call for a special session convening both houses of the legislature. Id.

The Court disagrees with Defendant's reading of MEMA. Section 12.31, subd. 2 does not require action by the Legislature. Rather, the statute provides that the Legislature may terminate extensions beyond thirty (30) days, if it so desires. Minn. Stat. § 12.31, subd. 2. However, if the Legislature remains silent on the issue, the extension is valid, and the governor may continue to issue executive orders every thirty (30) days, ostensibly for as long a period as the emergency remains.

This Court is required to "give effect to the legislature's intent as express in the language of the statute." Goodyear Tire & Rubber Co. v. Dynamic Air, 702 N.W.2d 237, 242 (Minn. 2005). In doing so here, the legislature's intent concerning whether it must affirmatively approve an executive order is "clear from the unambiguous language of the statute." Slaab v. Diocese of St. Cloud, 853 N.W.2d 713, 716–17 (Minn. 2014). Put another way, the statute is clear. The Legislature is not required to affirmatively approve an executive order, but it is free to terminate an executive order if it wishes.

Here, the 91st Minnesota Legislature was in regular session for some of the pandemic and has held a number of special sessions since adjourning its regular session. In each Executive Order extending the peacetime emergency, the legislature in regular session did not terminate the Executive Order. In each subsequent Executive Order when

the legislature was not in session, Governor Walz called a special session and at no time did the Legislature terminate any Executive Order.[2]

Based on the foregoing, the Court declines Defendant's request to find that Executive Order 20-99 was unlawfully issued. Rather, the Court finds that Governor Walz complied with Minn. Stat. § 12.31, subd. 2 in each Executive Order, including Executive Order 20-99.

b. Separation of Powers

Defendant contends that Executive Order 20-199 is unconstitutional because Governor Walz overstepped his constitutional authority by violating the separation of powers principle. Specifically, Defendant asserts that the Governor may not issue executive orders that impose fines or penalties, as that is an impermissible delegation of authority that may only be constitutionally practiced by the legislative branch. Plaintiff disagrees, contending that Executive Order 20-99 does not violate the separation of powers principle, Governor Walz's restrictions on bars and restaurants is authorized by statute, and are within the Governor's authority.

The separation of powers principle is the foundation of American government and is enshrined not only in the U.S. Constitution,[3] but in Minnesota's Constitution:

> The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except in the instances expressly provided in this constitution.

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[2] Governor Walz initially issued EO 20-01 declaring a peacetime emergency on March 13, 2020, which was properly considered by the Executive Council and filed with the Secretary of State. Thereafter, Governor Walz issued EO 20-04, providing for the temporary closure of bars, restaurants, and other places of public accommodation on March 16, 2020. The Legislature was in session at that time and did not terminate EO 20-01's extension in EO 20-35 on April 13, 2020. Again in regular session, the Legislature did not terminate EO 20-53, which extended the peacetime emergency for another 30 days on May 13, 2020. Then, on June 12, 2020, Governor Walz issued EO 20-75, extending the peacetime emergency for another 30 days. The regular session of the 91st Legislature had adjourned, and Governor Walz called the 1st Special Session which convened on June 12, 2020 and adjourned sine die on June 19, 2020; the Legislature did not terminate EO 20-75. The 2nd Special Session convened on July 13, 2020 to address EO 20-78 which was another 30-day extension issued on that same day. The 2nd Special Session adjourned sine die on July 21, 2020 without terminating that EO The same is true for Executive Orders 20-83, 20-89, and 20-92, issued on August 12, September 11, and October 12, 2020, respectively, where the 3rd, 4th, and 5th Special Sessions declined to terminate the applicable EO, adjourning sine die on August 12, September 11, and October 15, 2020, respectively. Finally, the present EO 20-99 declaring another 30-day extension was issued on November 12, 2020, and the 6th Special Session convening and adjourning on the same day, did not terminate the same.

[3] When reading Articles I, II, and III of the U.S. Constitution, it is clear that the legislative, executive, and judicial branches were meant to be kept separate and distinct. See generally Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); see also The Federalist Nos. 47–51 (James Madison) (providing justification for why each branch of government should be separate, as well as how each branch may or may not "defend" itself from another branch).

Minn. Const. art. III, § 1.

The Minnesota Supreme Court has held this to mean that "the legislature . . . cannot delegate purely legislative power to any other body, person, board, or commission." Lee v. Demont, 36 N.W.2d 530, 538 (Minn. 1949).

Defendant asserts that the imposition of fines and penalties in Executive Order 20-99 for non-compliance is a purely legislative action. However, the Court disagrees. Purely legislative power is "the authority to make a complete law." Lee, 36 N.W.2d at 538–39. Here, the Legislature has intended that MEMA provides the Governor with broad authority during a state of emergency. Minn. Stat. § 12.31, subd. 1. The Legislature may delegate authority if it gives "reasonably clear policy or standard of action." Id. This is clearly achieved by first granting the Governor general authority to act under Minn. Stat. § 12.21, next by granting the Governor specific peacetime emergency power in MEMA (Minn. Stat. § 12.31), and finally by providing that:

> Orders and rules promulgated by the governor under authority of section 12.21, subdivision 3, clause (1), when approved by the Executive Council and filed in the Office of the Secretary of State, have, during a national security emergency, peacetime emergency, or energy supply emergency, **the full force and effect of law**. Rules and ordinances of any agency or political subdivision of the state inconsistent with the provisions of this chapter or with any order or rule having the force and effect of law issued under the authority of this chapter, is suspended during the period of time and to the extent that the emergency exists.

Minn. Stat. § 12.32 (emphasis added).

The Legislature here has chosen to delegate authority to the Governor and it is well within its constitutional authority to do so "in order to facilitate the administration of laws as the complexity of economic and governmental conditions increase." Anderson v. Comm'r of Highways, 126 N.W.2d 778, 780–81 (Minn. 1964). It has done so clearly by setting out the occasions during which a peacetime emergency may be invoked and requiring that (1) life and property must be endangered and (2) local government resources must be inadequate to handle the situation. Minn. Stat. § 12.31, subd. 2. As the Anderson court put it, "it is impossible for the legislature to deal directly with the many details in the varied and complex conditions on which it legislates." 126 N.W.2d at 781.

Based on the foregoing, the Court finds that MEMA does not violate the separation of powers principle and, therefore, the imposition of restrictions through Executive Order 20-99 is constitutional in that regard.

III. Legal Standard for Temporary Injunction

The parties disagree as to the proper legal standard for assessing the appropriateness of a temporary injunction. Defendant contends that the Court must apply the Dahlberg factors. Dahlberg Bros. Inc. v. Ford Motor Co., 137 N.W.2d 314, 321-22 (Minn. 1965). Plaintiff disagrees, contending that a Dahlberg analysis is unnecessary and the Court must only consider whether Defendant has violated or is about to violate Executive Order 20-99. State v. Minnesota Sch. of Bus., Inc., 899 N.W.2d 467, 472 (Minn. 2017) (an injunction sought under Minn. Stat. § 8.31, subd. 3 does not require an analysis of the Dahlberg factors) and State ex. rel. Hatch v. Cross Country Bank, Inc., 703 N.W.2d 562, 573 (Minn. App. 2005) (the district court need only consider whether the statutes were violated or about to be violated and whether injunctive relief fulfilled the legislative purpose).

The Court agrees with Plaintiff that generally, a district court must consider the Dahlberg factors, except when a statute provides for injunctive relief. Wadena Implement Co. v. Deere & Co., 480 N.W.2d 383, 388-89 (Minn. App. 1992). In this case, Executive Order 20-99 provides that the Attorney General may "seek any civil relief available pursuant to Minnesota Statutes 2020, section 8.31, for violations or threatened violations of this Executive Order * * *. " Executive Order 20-99. The Attorney General may "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. In short, the applicable statute in this case provides for injunctive relief and, as such, Dahlberg would not apply.

However, if the parties dispute the applicability of the underlying statute, statutory entitlement to a temporary injunction is not automatic and the trial court must consider the Dahlberg factors. State by Ulland v. International Ass'n of Entrepreneurs of America, 527 N.W.2d 133, 137 (Minn. App. 1995) *citing* Pacific Equip. & Irrigation, Inc. v. Toro Co., 519 N.W.2d 911, 918 (Minn. App. 1994). The cases cited by Plaintiff are distinguishable in that either a permanent injunction was denied or there was no dispute over statutory applicability. Minnesota School of Business at 471 and Cross Country at 573.

In this case, there is statutory authority providing for injunctive relief. However, as detailed herein, Defendant challenges both the Executive Order and the authority under Minnesota Statute § 8.31 to sue for injunctive relief. Since this is a situation where the parties dispute the applicability of the underlying statute, similar to Ulland and Pacific Equip., the Court will analyze the Dahlberg factors.

a. Dahlberg Analysis

In considering the propriety of a temporary injunction, the Court must consider:

1. The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief;

2. The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial;
3. The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief;
4. The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in state and federal statutes; and,
5. The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

Dahlberg Bros. Inc. v. Ford Motor Co., 137 N.W.2d 314, 321-22 (Minn. 1965). Each factor is analyzed below.

i. Nature and Background of the Parties' Relationship

The first Dahlberg factor requires the Court to examine "[t]he nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief." Dahlberg Bros., 137 N.W.2d at 321. There is no dispute that Defendant has been operating a business in the City of East Grand Forks for over 11 years and during that time Defendant has employed a significant number of individuals and has been a major contributor of sales and incomes taxes. There is also no dispute that for several days Defendant opened its business to in-person dining, an act prohibited by Executive Order 20-99.

When the parties' background and relationship is that of regulator and non-complaint regulated entity, the factor favors the regulator. Swanson v. CashCall, Inc., Nos. A13-2086, A14-0028, 2014 WL 4056028, *5 (Minn. App. Aug. 18, 2014), rev. denied (Minn. Nov. 17, 2015). In this case, Plaintiff is the regulator and Defendant is the regulated entity.

Because Defendant is a non-compliant regulated entity, this factor favors Plaintiff.

ii. Balance of Harms

Under the second Dahlberg factor, the Court must consider "[t]he harm suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial." Dahlberg Bros., 137 N.W.2d at 321. This is commonly referred to as a balance of harms analysis and, while this Court must look to harm suffered both parties, there is a specific burden on the party requesting the injunction. In order to succeed in its request for an injunction, Plaintiff must show an injury that is "real, substantial and irreparable." Indep. Sch. Dist. No. 35, Marshall County v. Engelstad, 144 N.W.2d 245, 248 (Minn. 1966). More specifically, the party seeking the injunction must show that a legal remedy (e.g. monetary damages) is not adequate and that the injunction is necessary to prevent great and irreparable injury. AMF Pinspotters, Inc. v. Harkins Bowling, Inc., 110 N.W.2d 351 (Minn. 1961) and North Central Public Service Co., v. Village of Circle Pines, 224 N.W.2d 741, 746 (Minn. 1974).

In this case there is no dispute that Executive Order 20-99 imposes harm on Defendant. This Court understands the consequential financial losses suffered by Defendant by being closed to in-person dining during a holiday season that would typically generate significant income. This situation is likely exacerbated when restaurants right across the river remain open to in-person dining. The economic loss is felt not only by Defendant, but by the numerous staff members employed by (or formerly employed by) the facility. Outdoor dining in northwest Minnesota during December and January is not a viable option for recovering any noteworthy income. There is no question that Defendant, and many bars and restaurants like Defendant, bear a significant emotional and financial burden by being closed to in-person dining. The burden borne by Defendant, as businesses like Defendant, is higher than what most people are asked to bear.

Yet, as detailed herein, the parties also agree that COVID-19 is a public health emergency. The infection rates continued to significantly increase in December 2020, particularly in Polk County, Minnesota. The Minnesota Department of Health has confirmed that allowing in-person dining creates a significant risk of increasing the spread of COVID-19. This risk is higher than that in other types of in-person transactions. The evidence is persuasive that if Defendant remains open to in-person dining, the health and safety of Minnesotans is at increased risk. The Court finds that the harm of increased community spread from Defendant's non-compliance presents a real and substantial harm. Increased infections imposes stress on local hospitals, limits the availability of healthcare (especially in rural areas), creates an ongoing financial drain on the economy, and has a negative ripple effect on other community activities (e.g. keeping schools open).

Defendant's actions present a threat to the health and safety of Minnesotans. A monetary fine is not a realistic remedy in this situation. The harm suffered by Defendant and its employees, while significant, is less than the irreparable injury and harm that would be suffered by the public as a whole if Executive Order 20-99 didn't apply to Defendant.

This factor weighs in favor of Plaintiff.

iii. Likelihood of Success on the Merits

Under the third Dahlberg factor, the Court must consider "[t]he likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief." Dahlberg Bros., 137 N.W.2d at 321. In more general terms, the Court must determine each party's likelihood of success on the merits.

Defendant raises two arguments as to why Plaintiff's claims will not succeed on the merits - an Equal Protection claim under the Fourteenth Amendment and a takings claim under the Fifth Amendment (and its applicability through the Fourteenth Amendment). The Court will analyze each factor below.

1. Equal Protection Claim

Defendant contends that Executive Order 20-99 violates the Equal Protection Clause because the restrictions have no rational basis and enforcement is arbitrary and capricious. Defendant argues that restricting its business while allowing in-person dining at airport or casino restaurants is arbitrary (without reason). Defendant also contends that it is without reason to allow people into convenience stores, retail stores, and other businesses, but not restaurants. Defendant asserts that all indoor businesses where people are allowed to gather should be treated the same. Finally, Defendant asserts that it could minimize any risk by taking a variety of protective measures.

The Fourteenth Amendment to the U.S. Constitution states, in pertinent part, that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. This is "essentially a direction that all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985); see also Minn. Const. art. I § 2. While the concept of treating similarly situated people alike seems straightforward, the legal application is more complicated. For example, what makes (or does not make) people similarly situated? Once the proper legal standard is determined it is easier to apply this legal principle.

There is a sliding scale of judicial scrutiny applied in cases that, like this case, challenge constitutional rights. That scale ranges from "rational basis" scrutiny at the lowest end,[4] to "intermediate scrutiny,"[5] to "strict scrutiny" at the most severe end.[6] Determining the proper scrutiny is important because a rational basis review places the burden on the Defendant, whereas the higher levels place the burden on Plaintiff. See Heller v. Doe, 509 U.S. 312, 320 (1993) ("A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification."); see also FCC v. Beach Comm, Inc., 508 U.S. 307, 315 (1993) ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.").

Initially the parties disagreed as to the proper standard of analysis. The State argued that the rational basis review set forth in Jacobson v. Commonwealth of

[4] A court applies rational basis review to determine whether a law is rationally related to a legitimate government interest, whether real or hypothetical. Washington v. Glucksburg, 521 U.S. 702, 728 (1997). This test is most often used when a fundamental right is not being challenged. See Thomas B. Nauchbar, *The Rationality of Rational Basis Review*, 102 U. Va. L. Rev. 1627 (2016).

[5] A court applies intermediate scrutiny to determine whether a law furthers an important government interest and by means that are substantially related to that interest. Craig v. Boren, 429 U.S. 190 (1976). This test is often used when dealing with gender discrimination and certain free speech issues. See Note, *Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny's Compelling- and Important-Interest Inquiries*, 129 Harv. L. Rev. 1406 (2016); Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in Forst Amendment Jurisprudence*, 2007 Univ. Ill. L. Rev. 783 (2007).

[6] A court applies strict scrutiny to determine whether a law serves a compelling state interest by the least restrictive means that are narrowly tailored to achieve that purpose, most often associated with Equal Protection claims involving racial classifications or fundamental constitutional rights. Fisher v. Univ. of Texas, 570 U.S. 297, 307–08 (2013); see also Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1273 (2004) (identifying the three primary tiers of judicial scrutiny and their corresponding tests).

Massachusetts applied to this analysis. 197 U.S. 11 (1905). Defendant initially asserted that strict scrutiny should apply here, based on its reading of Roman Cath. Dioc. of Brooklyn v. Cuomo, 590 U.S. ___, ___ S.Ct. ___, 2020 WL 6948354, *1 (Nov. 25, 2020). However, at oral argument, Defendant agreed that rational basis review was appropriate in this instance.[7] The Court agrees, the rational basis review is appropriate and the burden is on Defendant to show that there is no rational basis for the restrictions implemented by Executive Order 20-99. Heller, 509 U.S. at 320; Beach Comm., 508 U.S. at 315.In other words, this Court must determine whether Executive Order 20-99 is rationally related to a legitimate government interest.

Typically, a challenge to government action survives Equal Protection as long as it "is rationally related to a legitimate governmental purpose." Scott v. Minneapolis Police Relief Ass'n, Inc., 615 N.W.2d 66, 74 (Minn. 2000). Specifically, in terms of public health restrictions during a pandemic, most[8] state action is vulnerable 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 U.S. Supreme Court noted in Jacobson—which dealt with an unsuccessful challenge to compelled vaccinations during the smallpox outbreak in the early 1900s—that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." Id. at 27.

Here, the Court finds a clear rational relationship between Executive Order 20-99 and the legitimate government interest of protecting public health. Executive Order 20-99 temporarily restricts on-premises dining to limit the spread of COVID-19. Thus, considerable deference should be afforded to the executive branch here, as courts should not "second-guess the wisdom or efficacy of the measures." Rutledge, 956 F.3d at 1028.

This is an important concept – it is not for this Court to second guess the measures put into place by Executive Order 20-99. Rather, the Court must look to determine whether there is a rational basis for those measures. Therefore, Defendant's argument that there are other protective measures it could take is not persuasive. Rather, the Court

[7] The Court notes that Defendant raised the issue of whether the Jacobson standard applies to prohibitions during the COVID-19 pandemic, citing to the U.S. Supreme Court's recent decision in Roman Cath. Dioc., 2020 WL 6948354 at *5. While the Court does not consider that case to be persuasive as its application involves First Amendment rights, the Court does acknowledge that the U.S. Supreme Court seemed to balk at a Jacobson analysis in that case, irrespective of the rights in issue there. However, the Supreme Court ultimately affirmed that "[r]ational basis review [as found in Jacobson] is the test . . . [that] *normally* applies to Fourteenth Amendment challenges, so long as they do not involve suspect classifications based on race or some other ground, or a claim of fundamental right." Id. at *5 (emphasis in original). Typically, economic regulations are not treated as a fundamental right and thus a rational basis review is appropriate. Romer v. Evans, 517 U.S. 620, 635 (1996); see also In re Rutledge, 956 F.3d 1018, 1027–28 (8th Cir. 2020) (recognizing the Jacobson standard applies to emergency measures taken in response to the COVID-19 pandemic and that courts must take care not to "second-guess the state's policy choices in crafting emergency public health measures").

[8] See note 7, supra.

must look at the imposed restrictions and decide if those restrictions have a rational relationship to protecting public health.

Defendant argues that all businesses with indoor service should be treated the same. However, that is not the proper legal argument for the Court. Rather, the issues is whether the restrictions placed against in-person dining are rationally related to slowing the spread of COVID-19. In this case, many of Defendant's issues are addressed in the text of Executive Order 20-99 itself. In pages one through three of Executive Order 20-99, Governor Walz explains the science, data and reasoning for the specific restrictions and he connects that information with the restrictions imposed in the executive order. Specifically, he references the increase in community spread of COVID-19 and the need to limit further spread. EC 20-99, pages 1-2. The Minnesota Department of Health has traced a number of significant outbreaks to bars and restaurants. EO 20-99, page 2. There are fewer outbreaks in retail settings. EO 20-99, page 3. Restrictions on activities within tribal reservations are left to tribal authorities. EO 20-99, pages 9-10.

Further, this Court finds that there is a difference between in-person dining at a local restaurant compared to an airport restaurant that is limited to serving individuals confined to a secure area, many of who are unable to leave the premises to eat. Additionally, there is a difference between a local restaurant and restaurants located on tribal land that are subject to the authority and decision making of tribal leadership.

Defendant, like many other individuals, disagrees with the reasons set forth by Governor Walz. However, the Court does not consider whether there are alternative options other than those specific restrictions of Executive Order 20-99. Rather, the Court must simply determine whether there is a rational basis between the restrictions and the legitimate state interest of reducing the spread of COVID-19.

The Court finds that there is a rational basis between the restrictions against Defendant as articulated in Executive Order 20-99 and the legitimate state interests of reducing the spread of COVID-19. As such, this Court finds Petitioner is likely to succeed on the merits of this equal protection claim.

2. Due Process Violation—Takings Claim

Defendant argues that a Temporary Injunction is an unlawful taking within the meaning of the Fifth Amendment to the Constitution and Article I, § 13 of the Minnesota Constitution. Defendant argues that the restrictions imposed by Executive Order 20-99 are both a regulatory and a categorical taking. Plaintiff asserts that temporary injunctions aimed at public safety measures do not amount to unlawful takings.

The Fifth Amendment provides, in the pertinent part, that "[no] private property [shall] taken for public use, without just compensation." U.S. Const. amend. V. This portion (among others) of the Fifth Amendment is made wholly applicable to the states through the Due Process Clause of the Fourteenth Amendment. Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896).

The Minnesota Constitution states that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured." Minn. Const. art. I, § 13.

Since 2006, courts have favored a very broad interpretation of "public use" concerning private property. See Kelo v. City of New London, 545 U.S. 469 (2006) (holding that private property may be taken for public use by a private company for purposes that will purportedly provide economic benefit the community).[9]

The Court will analyze each of Defendant's arguments below.

i. Categorical Taking

A categorical taking occurs when government action results in the deprivation of all economically beneficial uses of property. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992)(emphasis added). There is no categorical taking in this case because Executive Order 20-99 prohibits only on-premises dining. Defendant is allowed to provide take-out services (and has done so), as well as outdoor dining. The Court has already noted the realities of outdoor dining in northwest Minnesota in December and January. The Court also recognizes that Defendant's income from take-out orders is less than the income it would earn with in-person dining. However, Executive Order 20-99 has not deprived Defendant of all economically beneficial uses of the property.

Moreover, in order to succeed with a categorical taking claim, Defendant would need to show that the action was more than temporary and left the property valueless. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330 (2002) (holding that a categorical taking did not occur during a 32-month moratorium on building development). In this case the restrictions are temporary and there is no evidence that Defendant's property has become or will become valueless.

Since Defendant is able to retain some (albeit significantly reduced) economic benefit from its business operations under the temporary restrictions of Executive Order 20-99, Defendant's claim of a categorical taking is denied.

ii. Regulatory Taking

A regulatory taking occurs when a restriction, put in place to further a legitimate government interest, passes a point where use is reduced enough to constitute an exercise of eminent domain. Penn. Coal Co. v. Mahon, 260 U.S. 393 (1922). A court must apply a three-part test in deciding whether a regulatory taking as occurred: (1) the economic impact of the regulation on the person suffering the loss; (2) the extent to which

[9] However, Minnesota does not allow this specific type of public use taking, passing a law in the wake of the Kelo decision (among other states). See Minn. Stat. § 117.025, subd. 11(b) ("The public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health, do not by themselves constitute a public use or public purpose.").

the regulation interferes with distinct investment backed expectations; and (3) the character of the government action to assess whether the complained of regulatory action is a taking. Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

First, neither party disputes that Executive Order 20-99 places an adverse economic impact on Defendant's business. The Executive Order itself realizes that fact, as does this Court. However, to rise to the level of a regulatory taking, that impact must be "interference" that is equivalent to a "physical invasion," not "interference [that] arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Id. Here, while Executive Order 20-99 certainly results in a negative impact, is does not "invade" the property by temporarily restricting on-premises dining.

Second, the extent to which the regulation interferes with distinct investment backed expectations does not outweigh the regulatory function of Executive Order 20-99. Put another way, there is still sufficient business use, even with the on-premises dining prohibitions, so as to balance public safety with Defendant's business operations. The Court recognizes that Defendant is in a unique position because of its location on the border of North Dakota (where there are no restrictions on in-person dining concerning bar/restaurants and rapidly expanding numbers of COVID 19 cases), however, "[g]overnment hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law." Id. (quoting Penn. Coal Co., 260 U.S. at 413)). Said another way, the fact that Defendant's business environment is different than a similar business located well within the border of the State is not sufficient to become a taking under the law.

Third, the Court must assess the character of the government action to determine whether the complained of regulatory action is a taking. To make this showing, there must be interference "with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes" in the first place. Id. at 125. This typically occurs in zoning laws and regulations where "'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land." Id. (quoting Nectow v. Cambridge, 277 U.S. 183, 188 (1928)). In these case, the Supreme Court has upheld these land uses even though they "destroyed or adversely affected recognized real property interests." Id.; see also Euclid v. Ambler Realty Co., 272 U. S. 365 (1026) (prohibition of industrial use); Gorieb v. Fox, 274 U. S. 603, 274 U. S. 608 (1927) (requirement that portions of parcels be left unbuilt); Welch v. Swasey, 214 U. S. 91 (1909) (height restriction). These have all "been viewed as permissible governmental action even when prohibiting the most beneficial use of the property." Penn. Cent. Transp. Co., 438 U.S. at 125. As well, there are instances where the zoning at issue is particularized to a specific person. For example, in Miller v. Schoene, the Supreme Court upheld a state statute that required a property to cut down certain trees on his property because they would interfere entomologically with a number of apple trees on nearby properties. 276 U.S. 272 (1928). The Court reasoned that:

> [T]he State might properly make "a choice between the preservation of one class of property and that of the other," and, since the apple industry was

> important in the State involved, concluded that the State had not exceeded "its constitutional powers by deciding upon the destruction of one class of property [without compensation] in order to save another which, in the judgment of the legislature, is of greater value to the public."

Penn. Cent. Transp. Co., 438 U.S. at 126 (quoting Miller, 276 U.S. at 279). Further, the Supreme Court did not render unconstitutional a state law preventing a plaintiff "from continuing his otherwise lawful business of operating a brickyard in a particular physical community on the ground that the legislature had reasonably concluded that the presence of the brickyard was inconsistent with neighboring uses." Id. (citing Hadacheck v. Sebastian, 239 U.S. 394 (1915)).

Here, the aim of Executive Order 20-99 is to limit the spread of COVID-19 through temporary restrictions on some of Defendant's business operations. While these restrictions are significant to Defendant, the restrictions do not rise to the level of interfering with what could be a property interest because the restrictions are purely based on public safety measures.

Put another way, a regulatory taking does not occur when legitimate government zoning action occurs. Id. at 124–126 Although zoning is typically thought of as land use planning for atheistic or utility purposes, the Supreme Court has made clear that public safety issues affect zoning and, when implemented for that purpose, those public safety decisions do not amount to a regulatory taking. The Minnesota Supreme Court has come to the same conclusion. See Zeman v. City of Minneapolis, 552 N.W.2d 548, 554 (Minn. 1996) ("[I]n cases involving a regulation aimed at the protection of public health and safety" consideration of the character of the governmental action "becomes paramount"). Likewise, when considering COVID-19 related restrictions, other Minnesota district courts have reached the same judgment, as have courts from other jurisdictions. See State v. Schiffler, No. 73-CV-20-3556, at 19–27 (Stearns Co. Dist. Ct. Jun. 2, 2020); Buzzell v. Walz, No. 62-CV-20-3623, at 4–6 (Ramsey Co. Dist. Ct. Sep. 1, 2020); see also Oregon Rest. & Lodging Ass'n v. Brown, 2020 WL 6905319, at *5 (D. Or. Nov. 24, 2020); TJM 64, Inc. v. Harris, 2020 WL 4352756, at *5 (W.D. Tenn. Jul. 29, 2020); Lebanon Valley Auto Racing Corp. v. Cuomo, 2020 WL 4596921, at *7 (N.D.N.Y. Aug. 11, 2020).

Based on the foregoing, the Court does not find that Executive Order 20-99 constitutes a regulatory taking.

iii. Summary of Due Process Violation

The Court finds that Executive Order 20-99 does not amount to either a regulatory taking or a categorical taking.

3. Conclusion as to the Success on the Merits Factor

Because Defendant is unable to making a showing that Executive Order 20-99 poses an Equal Protection or Due Process violation, Defendant does not meet the burden

of proving that Executive Order 20-99 is not rationally related to a legitimate governmental purpose. As such, Plaintiff is likely to succeed on the merits of its claim and this factor weighs in its favor.

iv. Public Interest and Policy Considerations

The fourth Dahlberg factor requires the Court to consider the public interest or public policy expressed by state or federal law. Dahlberg Bros., 137 N.W.2d at 321-22. As detailed herein, Governor Walz lawfully issued Executive Order 20-99 to slow the community spread of COVID-19. Executive Order 20-99 requires restaurants and bars to remain closed for in-person dining. Defendant wishes to open for in-person dining in violation of the Executive Order. Defendant has reason to be frustrated and worried about the impact of Executive Order 20-99. While the Court understands Defendant's position, the Court must analyze the situation under the parameters of the law.

Certainly restaurant owners and employees are part of the public and, as part of these proceedings, they are being asked to bear a significant burden. However, Defendant's argument that there is no legislative intent on the public policy of COVID-19 is incorrect. The Legislature has had the opportunity on many occasions to terminate Governor's Walz's various executive orders extending the peacetime emergency and have not done so. This can be seen as an endorsement of the public policy purposes set forth in the preambles to Executive Order 20-99 and other related executive orders. Moreover, on numerous occasions, the Legislature has passed laws related to funding during the COVID-19 pandemic, altering continuity of government, relief to individuals, and overall planning in the wake of the pandemic. This has been well documented and the Court is convinced that the Legislature is not only fully aware of the magnitude of the pandemic, but is increasingly concerned with measures to slow its spread in Minnesota.

This Court has found that Governor Walz's actions are lawful and, while the Court understands Defendant's opposition to the restrictions, Defendant must still follow the law.

This factor favors Plaintiff's request for a temporary injunction.

v. Administrative Burden upon the Court

Finally, the Court must consider the last Dahlberg factor, which is "[t]he administrative burdens involved in judicial supervision and enforcement of the temporary decree." Dahlberg Bros., 137 N.W.2d at 322. In other words, the Court must examine this factor only as to the administrative burden resulting from enforcement of the temporary injunction (and not the administrative burden associated with denying the temporary injunction). Issuing a temporary injunction imposes no administrative burden on the Court, as issuing the temporary injunction simply requires Defendant to conform its conduct to that of other bars and restaurants in the State of Minnesota.

This factor favors Plaintiff.

vi. Summary of Dahlberg factors

Since all five of the Dahlberg factors favor Plaintiff, the Court will grant temporary injunctive relief against Defendant.

IV. Consolidation Request

Defendant asks the Court to consolidate the pending motions with a decision on the merits pursuant to Minnesota Rule of Civil Procedure 65.02(c). Specifically, "[b]efore or after the commencement of the hearing on a motion for a temporary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing on the motion." Minn. R. Civ. P. 65.02. Plaintiff opposes Defendant's request arguing that it requests more than injunctive relief. Plaintiff is requesting restitution and/or disgorgement, civil penalties and an award of costs and fees. Plaintiff argues discovery is necessary to determine the scope of applicable remedies.

The Court finds that it would be inappropriate to consolidate the motions with a trial on the merits. The parties are entitled to complete the discovery process, to call witnesses to testify and to present additional documentary evidence. As such, Defendant's request to consolidate is denied.

Conclusion

This case highlights the widespread impact that COVID-19 has had on our businesses, communities, and homes. Leaders on a local, state, and federal level have been required to make difficult decisions in a constantly changing landscape. The impact of these decisions help a portion of our society while imposing devastating impacts on others.

There are no winners in this case. While the Court has determined that a Temporary Injunction is appropriate to impose the restrictions detailed in Executive Order 20-99, the State acknowledges that it takes no joy in this enforcement action. The parties in this case understand the impossible choices that must be made and the emotional and financial toll imposed by these choices.

Reasonable minds can, and do, disagree as to the decisions made by our leaders. However, Minnesota law provides the Governor with broad authority during peacetime emergencies. Governor Walz acted within his authority when he issued Executive Order 20-99. The Minnesota Legislature has the authority to terminate the peacetime emergency and has not done so. The temporary restrictions imposed by Executive Order 20-99 protect the legitimate state interest of protecting public health by limiting the spread of COVID-19.

AMR