

STATE OF MINNESOTA
COUNTY OF STEARNS

DISTRICT COURT
SEVENTH JUDICIAL DISTRICT

Case Type: Civil
(Consumer Protection)

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

Court File No. _____

Plaintiff,

vs.

Kris Schiffler d/b/a Shadys Long Shots,
Shady's Inc., Shadys Hometown Tavern and
Event Center, Inc., Shady's of Rice, Inc.,
Shadys Golden Eagle, Inc., and Shady's Silver
Spur, Inc.,

Defendants.

**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") brings this *Ex Parte* Motion for a Temporary Restraining Order and Temporary Injunction against Defendants Kris Schiffler d/b/a Shadys Long Shots, Shady's Inc., Shadys Hometown Tavern and Event Center, Inc., Shady's of Rice, Inc., Shadys Golden Eagle, Inc., and Shady's Silver Spur, Inc. (hereinafter, collectively "Shady's Taverns").

INTRODUCTION

In direct and knowing defiance of Governor Walz's Executive Order 20-56, which has the full force and effect of law during a declared peacetime emergency, Shady's Taverns have repeatedly publicly announced that they intend to re-open each of their six restaurant locations for on-premises consumption before June 1, 2020. In doing so, Shady's Taverns 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 new confirmed COVID-19 cases in Stearns County are drastically increasing. For at least one of their restaurants—Shady’s Hometown Tavern and Event Center—they are also doing so before public release of a plan by the State of Minnesota, which will specifically instruct restaurants, taverns, and bars about how they can safely phase to re-opening their establishments for on-premises consumption in the future. Accordingly, the Attorney General brings this action to enforce Executive Order 20-56 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 In the first week of this month, May 1-7, 2020, Minnesota’s Department of Health confirmed 4,106 new cases of COVID-19.² That weekly gain represents more than 25% of all cumulative confirmed infections in the entire state between

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>. (attached as Exhibit 1 to Pleggenkuhle Aff.)

² *Situation Update for Coronavirus Disease 2019*, MINN. DEPT. OF HEALTH, available at <https://www.health.state.mn.us/diseases/coronavirus/situation.html#cases1>. (attached as Exhibit 2 to Pleggenkuhle Aff.)

March 5 and May 15, 2020.³ In short, 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 May 17, 2020, there have been at least 15,668 confirmed cases of COVID-19, and COVID-19 has already caused at least 722 deaths.⁴ Public gatherings at bars and restaurants pose major health risks during this pandemic. For example, in one study publicized by the national Centers for Disease Control and Prevention (“CDC”), a significant viral outbreak occurred at a family gathering at a restaurant.⁵ Not only did the family members who attended the meal become ill, but other patrons unassociated with the reunion became sick.⁶ The researchers’ hypothesis indicates that the virus was spread simply through the air of the restaurant.⁷

Minnesota has had success in keeping its infection rate and mortality count relatively lower than some other areas, in part through its swift and decisive response in restricting social gatherings and in restricting social interactions at places of high interactivity, such as sit-down bar and restaurant spaces. 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

³ *Id.*

⁴ *Id.*

⁵ Lu et al., *COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China, 2020*, 26 EMERGING INFECTIOUS DISEASES 7 (July 2020), available at https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article. (Attached as Exhibit 3 to Pleggenkuhle Aff.)

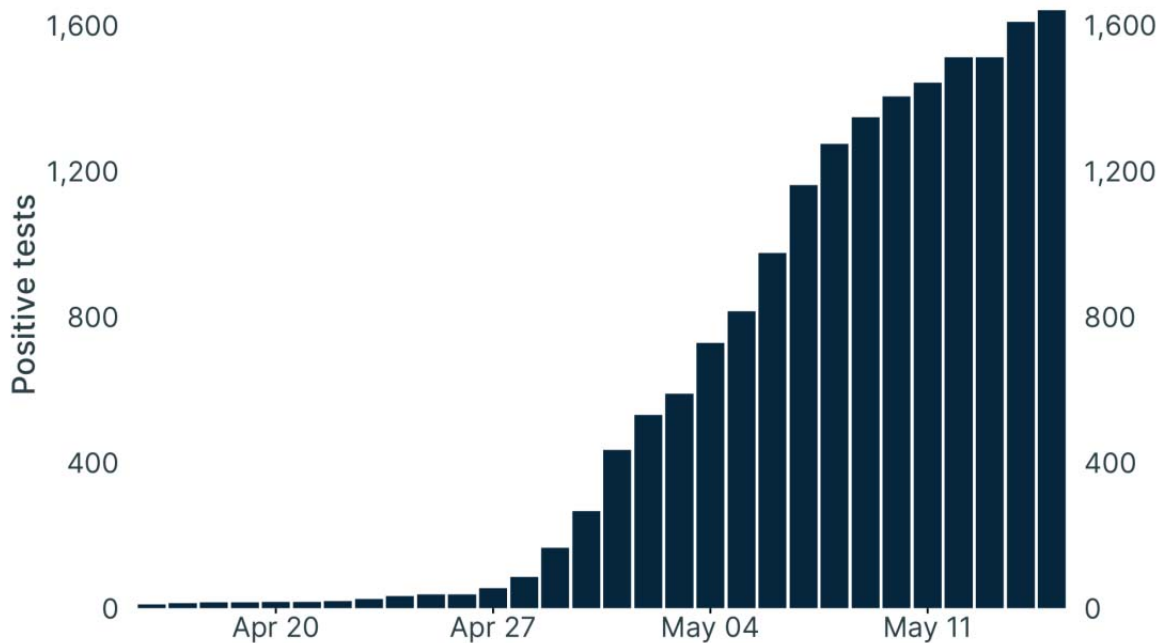
⁶ *Id.*

⁷ *Id.*

Governor, including in Stearns County and the surrounding area, which has been a hot spot for new COVID-19 cases. Indeed, as news reports have indicated, positive confirmed cases of COVID-19 have increased swiftly in Stearns County from just 55 in early May to 1,161 by May 7, 2020.⁸

Total COVID-19 cases in Stearns County, MN

Based solely on cases confirmed by the MN Department of Health. Due to limited testing, most COVID-19 cases are undiagnosed.



Source: Minnesota Department of Health. Graphic by David H. Montgomery | MPR News

MPRnews

According to another report, new COVID-19 cases in Stearns County increased by 454 percent over the first week of May, compared to a 95.5 percent increase for Minnesota as a whole over

⁸ Kristi Marohn, MPR NEWS, *Call to Investigate Poultry Plant as Stearns County COVID-19 Cases Rise* (May 7, 2020), available at <https://www.mprnews.org/story/2020/05/07/call-to-investigate-poultry-plant-as-stearns-county-covid19-cases-rise>. (attached as Exhibit 4 to Pleggenkuhle Aff.)

that same time period.⁹ Despite these troubling figures, Defendant Schiffler has publicly stated that “you have a better chance of getting eaten by a timber wolf or a grizzly bear than getting COVID-19.” (Grove Aff., Ex. C.)

II. GOVERNOR WALZ ISSUED EMERGENCY EXECUTIVE ORDERS TO TEMPORARILY CLOSE RESTAURANTS, BARS, AND TAVERNS 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-19.¹⁰ The peacetime emergency was most recently extended and approved by the Executive Council until at least June 12, 2020, pursuant to Executive Order 20-53.¹¹

In order to protect public health and safety by slowing the “community spread” of COVID-19, on March 16, 2020, Governor Walz issued Executive Order 20-04, which ordered the closure of bars, taverns, restaurants, and other places of public accommodation for on-premises consumption until March 27, 2020. (Pleggenkuhle Aff. Ex. 6.) Executive Order 20-04 encouraged temporarily closed bars, taverns, and restaurants to “offer food and beverage using delivery service, window service, walk-up service, drive-through service, or drive-up service.” (*Id.*) Subsequently, Executive Order 20-04’s closure of bars, taverns, and restaurants was

⁹ Phil McCausland, Jonathan Allen, & Cyrus Farivar, NBC NEWS, *Coronavirus Hot Spot in Minnesota Connected to Surge of Cases at Meatpacking Plant* (May 13, 2020), available at <https://www.nbcnews.com/news/us-news/coronavirus-hot-spot-minnesota-connected-surge-cases-meatpacking-plant-n1206176>. (attached as Exhibit 5 to Pleggenkuhle Aff.)

¹⁰ See Executive Order 20-01, available at <https://www.leg.state.mn.us/archive/execorders/20-01.pdf>.

¹¹ See Executive Order 20-53, available at <https://www.leg.state.mn.us/archive/execorders/20-53.pdf>.

extended by Executive Orders 20-18, 20-33, and 20-48. (Pleggenkuhle Aff. Exs. 7-9.) The Minnesota Legislature passed a bill signed by the Governor allowing bars and restaurants selling take-out food to also sell up to one bottle of wine or up to a six-pack of beer, cider, or hard seltzer with their food. *See* 2020 Minn. Laws ch. 75.

The temporary closure of bars, taverns, restaurants, and other places of public accommodation for on-premises consumption is necessary to protect public health and safety because these are establishments where people gather and linger and where close physical contact is expected, thereby posing a risk to public health. (*See, e.g.*, Pleggenkuhle Aff. Ex. 10 at p. 2.)

On May 13, 2020, Governor Walz issued Executive Order 20-56, extending the closure of bars, taverns, restaurants, and other public accommodations for on premises consumption set forth in Executive Order 20-04 “until May 31, 2020 at 11:59 pm.” (*Id.* at ¶ 7.) Executive Order 20-56 further instructed the Commissioners of Health, Employment and Economic Development, and Labor and Industry “to develop a phased plan to achieve the limited and safe reopening of bars, restaurants, and other places of public accommodation beginning on June 1, 2020.” (*Id.*) The Order states that the Commissioners’ plan must be ready for presentation to the public no later than May 20, 2020. (*Id.*)

Executive Order 20-56 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. (*Id.* at pp. 2, 10-11.) Thus, pursuant to Minnesota Statutes section 12.32, Executive Order 20-56 has “the full force and effect of law” during the peacetime emergency. Paragraph Seven of Executive Order 20-56 took effect on May 17, 2020, at 11:59 p.m. (*Id.* at ¶ 2.) Moreover, Executive Order 20-56 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.) Moreover, “any business owner, manager, or supervisor who requires or encourages any of their employees, contractors, vendors, volunteers, or interns to violate [Executive Order 20-56] is guilty of a gross misdemeanor and upon conviction must be punished by a fine not to exceed \$3,000 or by imprisonment for not more than a year.” (*Id.*)

III. SHADY’S TAVERNS HAVE REPEATEDLY REPRESENTED THEY WILL VIOLATE EXECUTIVE ORDER 20-56 BY OPENING THEIR RESTAURANTS FOR ON-PREMISES CONSUMPTION BEFORE JUNE 1, 2020.

Shady’s Taverns have repeatedly publicly represented their intention to violate Executive Order 20-56 by opening their six restaurant locations in Minnesota for on-premises consumption before June 1, 2020.

On or about May 13, Schiffler was interviewed by television news channel KMSP Fox 9 and publicly announced that he would be opening all six of his Minnesota restaurants for on-premises consumption on May 18, 2020. (Grove Aff. Ex. A.) During the interview, Schiffler further stated he did not believe he would be held accountable for violating Executive Order 20-56:

We contacted our local sheriff’s department in every bar that we own. A couple of them are in different counties, so we spoke with them. The answer is, we get a call we have to show up and we have to send a report but the report pretty much dies on the table. I don’t think they’re going to do anything after that.

(*Id.*)

Similar public announcements were made on a number of the Facebook pages for Shady’s Taverns six Minnesota restaurants, including Shady’s Silver Spur located in Saint Martin:



(Id. Ex. B.) Shady's Hometown Tavern and Event Center located in Albany:



(Id.) And Shady's Railside located in Rice:



(*Id.*)

On May 15, 2020, an assistant attorney general with the Minnesota Attorney General's Office contacted Shady's Taverns' owner, Defendant Schiffler, and explained that re-opening Shady's Taverns' six Minnesota restaurants on May 18 for on-premises consumption would constitute a clear violation of Executive Order 20-56. (*Lewellen Aff.*, ¶ 3.) Schiffler acknowledged this, but nevertheless confirmed his intention and plan to open each of his six restaurants located in Minnesota on May 18. (*Id.*) Following this call, Schiffler obtained counsel, who again confirmed during a telephone call with the Attorney General's Office on May 16, 2020, that Shady's Taverns would be re-opening their Minnesota restaurants on May 18 for on-premises consumption. (*Pleggenkuhle Aff.* ¶ 3.) During this call, counsel also stated he would discuss the matter further with his clients. (*Id.*)

Later in the day on May 16, 2020, Defendant Schiffler posted a video on Facebook and stated in part:

We are going to try to open on [May] 20th. Governor Walz comes out with a new safety precaution plan that has taken him 8 weeks to get done. We hope that he gets that done. If he doesn't . . . it says he has to have it done, so we're assuming it's going to be done on [May] 20th. There's no promises on us being open on [June] 1st, so what we're planning on doing is we wanna open on [May] 20th.

Once we get that paperwork that says what we need to do to follow the orders, we will get that to our health inspectors and get them approved ASAP and we will try to open Wednesday, [May] 20th.

(Grove Aff. Ex. C.) Defendant Schiffler further stated that he felt “betrayed” by local law enforcement, who he claims told him that they would “step down” and not enforce Shady’s Taverns violations of Executive Order 20-56. (*Id.*)

Subsequently, after raising over \$160,000 on a GoFundMe online fundraiser, on May 17, 2020, Defendant Schiffler posted a new message on his personal Facebook account stating the following: “Shady’s Hometown Tavern in Albany will be open tomorrow, Monday May 18th at Noon!” (Grove Aff. Ex. D, E.)

ARGUMENT

I. A TEMPORARY RESTRAINING ORDER AND A TEMPORARY INJUNCTION ARE APPROPRIATE TO ENJOIN SHADY’S TAVERNS FROM VIOLATING EXECUTIVE ORDER 20-56.

A. Shady’s Taverns Have Repeatedly Represented They Will Violate Executive Order 20-56 by Re-Opening before June 1, 2020, Necessitating Temporary Injunctive Relief.

Temporary injunctive relief should be issued upon a showing by the State that Shady’s Taverns “is about to violate” Executive Order 20-56 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.”).¹²

¹² 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 (Footnote Continued on Next Page))

Here, the State brings this law enforcement action against Shady’s Taverns to “prevent and restrain” its promised violations of Executive Order 20-56, by re-opening its six Minnesota restaurants for on-premises consumption before June 1, 2020. See Minn. Stat. § 8.31, subd. 3 (providing “the courts of this state are vested with jurisdiction to prevent and restrain violations”). Order 20-56 expressly provides that it can be enforced by the Minnesota Attorney General’s Office (“AGO”) 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) Shady’s Taverns violated, is violating, or “is about to” violate Executive Order 20-56; and (2) the injunctive relief sought by the State would fulfill the purpose of the statute and Order.

As described above, Shady’s Taverns have repeatedly, publicly announced that they will knowingly violate Executive Order 20-56 by re-opening their bars, taverns, and restaurants before June 1, 2020 for on-premises consumption. (Grove Aff. Exs. A-D.) Even when informed

(Footnote Continued from Previous Page)

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 Shady’s Taverns cannot legitimately dispute that they own and operate bars, taverns, and/or restaurants that are subject to Executive Order 20-56, 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 . . . threatened violation.” See Minn. Stat. § 8.31, subd. 3.

by an assistant attorney general that doing so would constitute a clear violation of the Order and describing the ramifications of such violation, Shady's Taverns insisted that they would re-open on May 18, later indicated they planned to do so on May 20, and then reverted back to committing to re-opening at least one of their restaurants on May 18, 2020 at noon. (Lewellen Aff. ¶ 3; Grove Aff. Ex. A-D.) Consequently, the Court should temporarily enjoin Shady's Taverns from violating the Executive Order and threatening public health and safety by re-opening their bars and restaurants for on-premises consumption as they have represented.

Lastly, the temporary injunctive relief the State requests undoubtedly would fulfill the purposes of Executive Order 20-56 by protecting public health and safety and slowing the community spread of COVID-19 until a thoughtful plan of action for safely re-opening is announced and implemented by the State of Minnesota. *See, e.g., Philip Morris*, 551 N.W.2d at 495-96. The express purpose of Executive Order 20-56 is to protect the public from public health risks, while “carefully consider[ing] and prepar[ing] for the reopening of such businesses.” (Pleggenkühle Aff. Ex. 10 at p. 2.) Accordingly, the court should grant the State's motion for temporary injunctive relief preventing Shady's Taverns from violating Executive Order 20-56 and re-opening their restaurants for on-premises consumption before June 1, 2020, or the date allowed by any future executive orders. (*See id.* Ex. 10.)

B. Temporary Injunctive Relief is Necessary Before Shady's Taverns 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 Shady's Taverns 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 Shady's Taverns can be heard in opposition to the State's request for temporary injunctive relief authorized by Minnesota Statutes section 8.31 and Executive Order 20-56. Shady's Taverns have consistently represented, including to the AGO, that they will re-open for on-premises consumption before June 1, 2020. (Grove Aff. Exs. A-D; Lewellen Aff. ¶ 3; Pleggenkuhle Aff. ¶ 3.) Shady's Taverns re-opening of at least one of their six bars and restaurants on May 18, will occur before they receive, let alone implement, the plan requirements that the State of Minnesota will announce on or before May 20, 2020, to ensure re-opening of bars and restaurants are done safely and in a manner that does not pose unnecessary risks to public health and safety. Moreover, such safety plans will, consistent with Executive Order 20-56, provide for a phased re-opening for bars, taverns, and restaurants beginning *at the earliest* on June 1, 2020. Indeed, if Shady's Taverns are permitted to defy Executive Order 20-56 and re-open at their whim, it will unreasonably put their 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.

The State has met all required elements for a TRO enjoining Shady's Taverns from violating Executive Order 20-56 and re-opening for on-premises consumption on May 18, 2020. Accordingly, the Court should grant the State's Motion for a TRO and schedule a TI hearing at

the earliest practical time.¹³ 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 time...and when the motion comes on for hearing, the party who obtained the [TRO] shall proceed with the application for a temporary injunction.”)

C. The State is Likely to Succeed on the Merits of its Case.

As discussed *supra* the State has established that Shady’s Taverns is about to violate Executive Order 20-56. Thus, the State has established that it is likely to succeed on the merits of its claims.

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 relief it seeks, as detailed in its accompanying proposed order.

Dated: May 17, 2020

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¹³ 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.”).

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 (2019).

/s/ Jason Pleggenkuhle
JASON PLEGGENKUHLE