

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT

Case Type: Other Civil

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

Court File No. 19HA-CV-20-4167

Plaintiff,

vs.

Lionheart L.L.C. d/b/a Alibi Drinkery,

Defendant.

**MEMORANDUM OF LAW IN
SUPPORT OF THE STATE’S
EXPEDITED MOTION FOR
ORDER TO SHOW CAUSE
AND ORDER FOR CONTEMPT**

INTRODUCTION

The State of Minnesota, by its Attorney General, Keith Ellison, (the “State”), seeks an order to show cause and an order for contempt in order to secure compliance with the Temporary Injunction (“TI”) this Court issued on December 31, 2020. Defendant Lionheart L.L.C. d/b/a Alibi Drinkery (“Alibi”) was served with the Court’s TI Order at 8:42 a.m. on December 31, 2020, pursuant to Minnesota Rules of Civil Procedure, Rule 77.04 via the State of Minnesota e-filing and e-service system through its counsel of record. The Court granted the temporary injunction sought by the State, which required Defendant to comply with Governor Walz’s Executive Orders 20-99 and Executive Order 20-99 as modified by Executive Order 20-103 (“Modified Executive Order 20-99”), specifically temporarily prohibiting Defendant from offering indoor on premises consumption of food or beverages as well as allowing more than five members of the public inside its bar/restaurant at one time. Nevertheless, while the Court’s TRO was in effect, on December 30, 2020, Alibi announced it would be open for business at 11:00 a.m. on December 31, 2020. And after the TI went into effect and was served on Alibi Drinkery via counsel of record, Defendant did open for business at 11:00 a.m. on December 31,

2020. Defendant has continued to provide on-premises consumption of food and beverages (including alcoholic beverages) to the public as well as allow more than five members of the public inside its bar/restaurant at one time in total disregard for the Court’s TI. Moreover, it is clear to the State that Defendant will continue in this unlawful course of conduct absent this Court’s intervention.

PROCEDURAL AND FACTUAL BACKGROUND

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.”¹ 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.”² All on-premises consumption was prohibited, as was any occupancy above five members of the public waiting for their orders, until at least December 18, 2020 at 11:59 p.m.³

On December 16, 2020, Governor Walz issued Executive Order 20-103, which, in relevant part, extended Executive Order 20-99’s provisions, including Executive Order 20-99’s prohibition on indoor, on-premises consumption of food and beverage, and its enforcement

¹ Executive Order 20-99 ¶7.c.iii.A.

² *Id.* at ¶7.c.iii.A.1.

³ *Id.* at ¶7.c.iii.A.

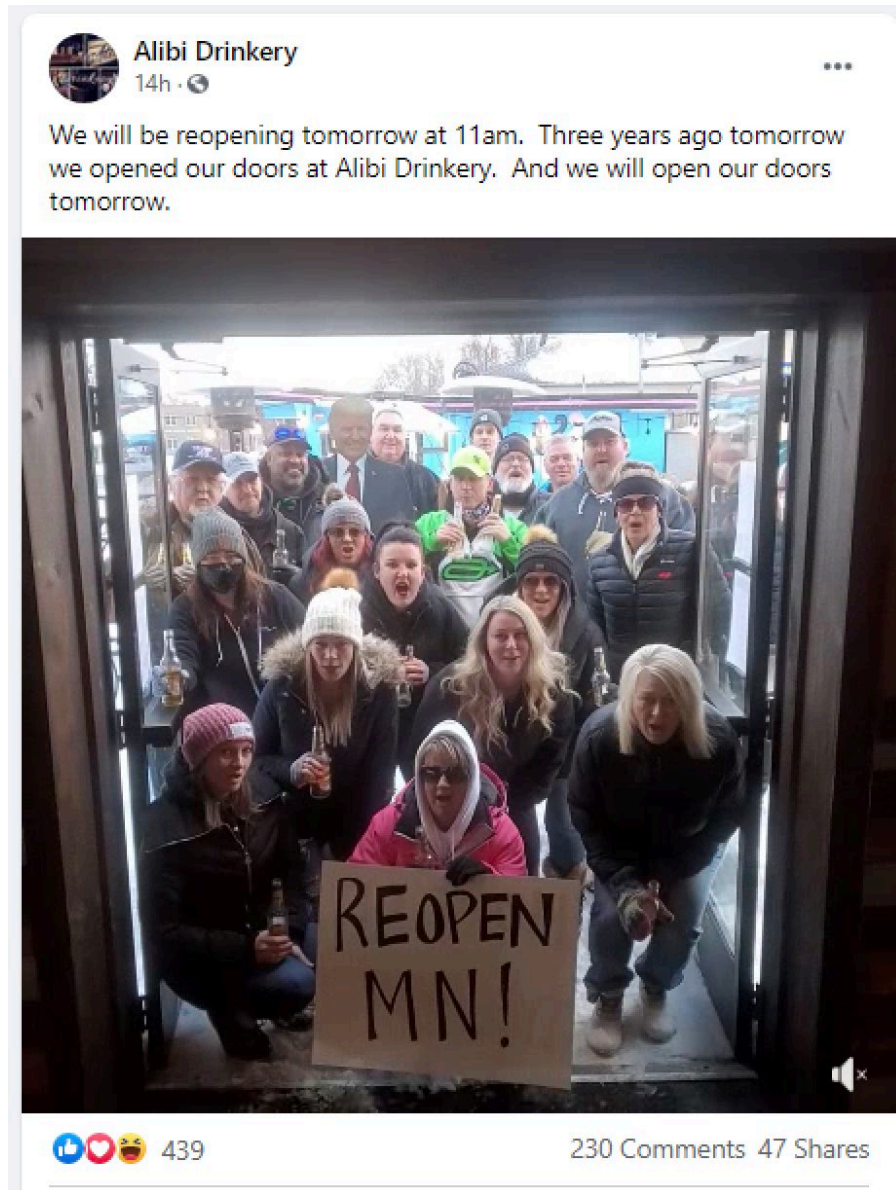
provisions to January 10, 2021.⁴ Executive Order 20-103 also modified Executive Order 20-99 by prohibiting *indoor* on-premises consumption of food and beverage at bars and restaurants like Defendant's from December 18, 2020 at 11:59 p.m. through January 10, 2021 at 11:59 p.m., but allowing for outdoor on-premises consumption.⁵

On, December 18, 2020, the Court granted the State's request for a temporary restraining order, thereby temporarily prohibiting Alibi from offering indoor, on premises consumption of food or beverages as well as allowing more than five members of the public inside its bar/restaurant at one time. On December 22, 2020, Defendant Alibi Drinkery through its counsel submitted a brief and supporting papers in opposition of the State's motion for a temporary restraining order and temporary injunction. In support of the opposition brief, owner Lisa Monet Zarza submitted an Affidavit in which she represented "Starting as of today, we have closed our doors." (Affidavit of Lisa Monet Zarza, ¶ 5). Counsel for Alibi Drinkery represented the same at a hearing held the same day before the Court.

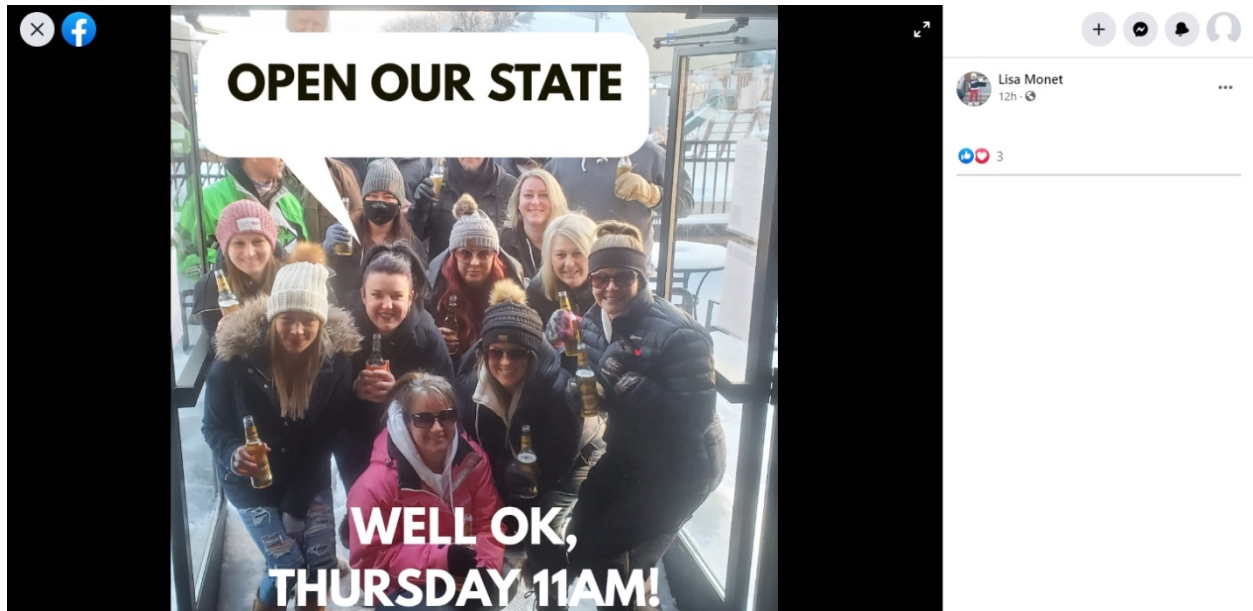
Despite the temporary restrictions in Executive Order 20-99 and 20-103 and a temporary restraining order ordering Alibi Drinkery to comply, on December 30, 2020, Defendant advertised on its public Facebook page "We will be reopening tomorrow at 11am. Three years ago tomorrow we opened our doors at Alibi Drinkery. And we will open our doors tomorrow." Attached as Exhibit B to Affidavit of Marie Siliciano ("Siliciano Aff.").

⁴ Executive Order 20-103 ¶1.

⁵ *Id.* at ¶7.vi.



Defendant owner Lisa Monet Zarza also posted a similar message on her personal Facebook page (Siliciano Aff., Exhibit C):



Just before 8:30 a.m. on December 31, 2020, the Attorney General’s Office called and e-mailed Mike Padden, counsel for Alibi Drinkery, indicating that his client had advertised that it would be opening in violation of the TRO and asked that he obtain confirmation from his client that they would not reopen in violation of the TRO. (Exhibit 1 to Third Affidavit of Elizabeth Odette (Odette Aff.)) At 8:42 a.m., the Court granted the State’s Motion for a Temporary Injunction issuing a Temporary Injunction ordering Defendant to comply with the Governor’s Executive Orders 20-99 and 20-103 and temporarily remain closed to indoor on-premises food and beverage consumption. The State sent Mr. Padden the order via email and again asked that he confirm that Alibi Drinkery would comply. (*Id.*). Mr. Padden responded that he would contact the State later in the afternoon, but the need to rectify Alibi’s behavior is immediate. Beginning on Thursday, December 31, 2020, at 11:00 a.m. and continuing as of the time of filing this motion, Alibi opened its bar/restaurant to the public for indoor on-premises consumption of food and beverages. The bar/restaurant was observed to be hosting mostly unmasked patrons at tables and the bar area providing food and beverage for indoor on-premises consumption. (Siliciano Aff. ¶¶ 2-3, Ex. A)





Thus, Defendant has continued to operate in direct violation and complete disregard for this Court's TI. As a result, the State brings this Expedited Motion for an Order to Show Cause and an Order for Contempt to ensure Defendant fully and completely complies with the Court's TI.

ARGUMENT

I. THE COURT SHOULD ISSUE AN ORDER TO SHOW CAUSE THAT DEFENDANT, BY AND THROUGH ITS OWNER AND MANAGER LISA MONET ZARZA, APPEAR BEFORE IT TO ANSWER WHY AN ORDER FOR CONTEMPT SHOULD NOT BE ISSUED.

Flagrant disobedience for a court's order occurring outside the presence of the court, and of which the court does not have personal knowledge, is "constructive contempt." Minn. Stat. § 588.01, subd. 3.⁶ Section 588.01, subdivision 3 defines "constructive" contempt to include a number of acts or omissions, including: "disobedience of any lawful judgment, *order* or process of the court." *Id.* § 588.01, subd. 3(3) (emphasis added.). Following submission to the Court of

⁶ Whether civil contempt has occurred is evaluated using the preponderance-of-the-evidence standard. *Emery Air Freight Corp. v. Local 544*, 379 N.W.2d 539, 543 (Minn. App. 1985).

an affidavit of the facts constituting a constructive contempt, the Court may issue an arrest warrant or an order to show cause⁷ requiring the disobedient party to appear before it. *Id.* § 588.04(a); *see also* Minn. R. Gen. P. 116 (providing for orders to show cause “where a statute . . . provides that such an order may be issued or where the court deems it necessary to require the party to appear in person at the hearing”). When the disobedient party is brought or appears before the Court, “the court or officer shall investigate the charge by examining the person and the witnesses for and against the person.” Minn. Stat. § 588.09.

With this motion, the State has filed an affidavit—the Third Affidavit of Elizabeth Odette and the Affidavit of Marie Siliciano—that details the facts of Defendant’s contemptuous disobedience of the TI filed and served by the Court on December 31, 2020. Accordingly, this Court should issue the State’s proposed Order to Show Cause and require Defendant’s owner, officer, manager, and registered agent, Lisa Monet Zarza, to appear before the Court on the earliest available hearing date available.⁸ so that the Court may examine Defendant, investigate Defendant’s ongoing conduct in violation of the TI, and thereafter issue an appropriate Order for Contempt to ensure that Defendant ceases its unlawful conduct and fully complies with the TI.

II. FOLLOWING THE SECTION 588.09 HEARING, THE COURT SHOULD ISSUE AN ORDER FOR CONTEMPT TO ENSURE FUTURE COMPLIANCE WITH ITS ORDER.

Upon the evidence taken at the Order to Show Cause hearing pursuant to section 588.09:

the court or officer shall determine the guilt or innocence of the person proceeded against and, if the person is adjudged guilty of the contempt charged, the person

⁷ An order to show cause may be served by a sheriff or other officer in the same manner as a summons in an action. Minn. Stat. § 588.04(a).

⁸ The State encourages the Court to take expeditious action on its Motion due to Defendant’s ongoing disregard of the Court’s lawful TI and the resultant irreparable harm to the public’s health and safety that is continuing to flow while Defendant remains in contempt. Accordingly, the State will make itself available to appear sooner than January 5, 2021 at 11:00 a.m. should the Court be available to hear the Motion before that time.

shall be punished by a fine of not more than \$250, or by imprisonment in the county jail, workhouse, or work farm for not more than six months, or by both.

Minn. Stat. § 588.10; *see also* Minn. Stat. § 588.04(a) (providing the Court “may commit the [contemnor] to jail, impose a fine, or both, and make such order thereupon as the case may require”); Minn. Stat. § 588.02 (providing that for constructive contempt, “it must appear that the right or remedy of a party to an action . . . was defeated or prejudiced by [the contemnor] before the contempt can be punished by imprisonment or by a fine exceeding \$50.”).

The purpose of the Court’s civil contempt power is to provide it “with the means to enforce its orders.” *Erickson v. Erickson*, 385 N.W.2d 301, 304 (Minn. 1986). A court’s order and findings of civil contempt should be designed to induce future compliance. *Mahady v. Mahady*, 448 N.W.2d 888, 890 (Minn. App. 1989) (recognizing “civil contempt is said to give the contemnor the keys to the jail cell, because compliance with the order allows him to purge himself and end the sanction.”). A district court has “inherently broad discretion” to hold a person in contempt if that person acted “contumaciously, in bad faith, and out of disrespect for the judicial process.” *Erickson*, 385 N.W.2d at 304 (citation omitted). And the Minnesota Supreme Court has recognized that:

If the duty [to be performed] is one specifically defined by a proper decree of the court, it must be free to compel performance by methods which are speedy, efficient, and sufficiently flexible to meet the problem at hand.

Hopp v. Hopp, 156 N.W.2d 212, 216 (Minn. 1968) (stating further that the judge’s responsibilities should not be frustrated by “delay and formalism”).

Additionally, a court’s contempt power exists independent of the statutory authority provided in Minnesota Statutes Chapter 588. *In re Cary*, 165 Minn. 203, 206 N.W. 402 (1925); *accord State v. Sports & Health Club, Inc.*, 392 N.W.2d 329, 336 (Minn. App. 1986) (“The power to punish for contempt is an inherent power of constitutionally created courts in

Minnesota” and “exists independent of the contempt statutes”). Thus, for example, the trial court has broad discretion to impose fines larger than the limits set by Chapter 588 “to induce compliance with its lawful order.” *Sports & Health Club, Inc.*, 392 N.W.2d at 336. That discretion includes holding even nonparties in contempt when such nonparties flagrantly disregard court orders. *Bowman v. Bowman*, 493 N.W.2d 141, 144 (Minn. Ct. App. 1992) (holding that corporate officer of nonparty corporation that ignored a lawful subpoena could be held in contempt and upholding an award of attorney fees).

Thus, as described more fully below, upon finding Defendant’s conduct constitutes constructive civil contempt, the Court has broad and flexible contempt powers to induce compliance with its TI, which includes the imposition of monetary fines for each occurrence of violations of its order,⁹ conditional confinement until compliance assured,¹⁰ as well as indemnity and the payment of costs and attorney fees incurred by the State.¹¹

A. Defendant’s Purposeful Disobedience of the Court’s TI Constitutes Constructive Civil Contempt.

Defendant and its officers have knowingly disobeyed this Court’s TI.¹² The TI granted the State’s requested temporary injunction, which temporarily prohibits Alibi from offering

⁹ See, e.g., Minn. Stat. § 645.24; *Sports & Health Club, Inc.*, 392 N.W.2d at 336-37.

¹⁰ See, e.g., Minn. Stat. § 588.12.

¹¹ See, e.g., Minn. Stat. § 588.11.

¹² The Court’s contempt power extends to corporate officers who have notice of the court’s order and authority to comply with it. See, e.g., *Chicago Truck Drivers v. Brotherhood Labor Leasing*, 207 F.3d 500, 507 (8th Cir. 2000) (stating: “It is well-settled that a court’s contempt power extends to non-parties who have notice of the court’s order and the responsibility to comply with it” and recognizing a non-party may be held in contempt if he abets the defendant or is legally identified with the defendant); *Paisley Park Enters., Inc. v. Boxill*, 2019 WL 2710703 at * (D. Minn. June 28, 2019) (Magistrate Judge report and recommendation recognizing that “[b]ecause a court order against a business entity is binding upon the

indoor, on premises consumption of food or beverages as well as allowing more than five members of the public inside its bar/restaurant at one time.

The TI was served on Defendant via the Minnesota Court's e-filing and e-service system through its counsel of record at 8:42 a.m. on December 31, 2020. The State emailed defense counsel the TI shortly thereafter. Odette 3rd Aff., Exhibit 2. Nevertheless, Alibi Drinkery opened to the public for indoor on-premises consumption of food and beverages starting at 11:00 a.m. on December 31, 2020 and continuing as of the time of this filing. (Siliciano Aff., ¶¶ 2-3, Exhibits A-C). Thus, the State has established by a preponderance of the evidence that Defendant has contemptuously disobeyed the Court's lawful TI, requiring the Court's issuance of an Order for Contempt to ensure future compliance. *See* Minn. Stat. § 558.01, subd. 3(3) (providing that disobedience of a lawful court order constitutes constructive civil contempt).

B. A Contempt Order Imposing Fines Until Compliance is Assured is Necessary to Induce Future Compliance.

Because Defendant's unlawful and ongoing conduct constitutes civil constructive contempt, the Court has broad and flexible authority to issue a Contempt Order to induce future compliance with its TI, including but not limited to: (1) the imposition of monetary sanctions, including fines for each and every violation of the TI, indemnity, and the payment of the costs and attorney's fees incurred by the State in bringing this Motion; (2) imprisonment until compliance is assured; or (3) both. Because Defendant's conduct flagrantly violates this Court's TI, the State is requesting that the Court impose a substantial fine for each day Defendant

shareholders, officers, and agents who are in a position to carry out acts on behalf of the business, the Court's contempt power also extends to persons associated with the business who have notice of the court's order and the responsibility to comply with it. This is particularly true when a single person is the sole officer, shareholder, and agent of the business entity.”), *report and recommendation adopted*, No. 17-CV-121, 2019 WL 4080782 (D. Minn. Aug. 29, 2019).

remains in violation, designed to discourage future contempt, and attorney's fees incurred by the State.¹³

To impose a fine greater than \$50 or impose imprisonment for civil constructive attempt, “it must appear that [the State's] right or remedy to [its] action or special proceeding was defeated or prejudiced” by Defendant's contempt. Minn. Stat. § 588.02. Here, this is easily established. The temporary injunctive relief the State secured in its motion for TI has been prevented through Defendant's willful noncompliance with the TI. Each day that Defendant opens for on-premises dining in violation of the TI and Modified Executive Order 20-99, the State is not only being prejudiced but the health and safety of Minnesotans is being irreparably harmed. Thus, significant monetary sanctions in excess of \$250 as well as fees are options the Court may impose to secure future compliance of the TI.

Court-imposed fines may exceed \$250 per day of violation. Although Minn. Stat. § 588.10 provides that fines may not exceed \$250, the Court has inherent authority to craft a larger fine for each and every occurrence of a violation in order to induce compliance. *See, e.g., Sports & Health Club, Inc.*, 392 N.W.2d at 336-37 (upholding trial court's imposition of \$300 fine per day until contemnor complies with order did not violate section 588.10); *see also* Minn. Stat. § 645.24 (providing that when a penalty is provided for the violation of a law, such penalty “shall be construed to be for each such violation”). Thus, in its Contempt Order the Court may exercise its discretion by imposing a daily fine greater than \$250 per day in order to induce compliance with its TI.¹⁴

¹³ While confinement is a possible remedy available to the Court, the State does not ask that such drastic measures be taken immediately.

¹⁴ Chapter 588 further provides that a court may order the person guilty of contempt to indemnify the aggrieved party for actual losses or injury caused by the contempt and to satisfy

While it is solely within the Court’s discretion to determine the appropriate penalty to impose in any contempt order, the State is concerned whether a small monetary fine will be sufficient to induce compliance in this case. Each day Defendant remains unlawfully open for on-premises dining in violation of the TI and Modified Executive Order 20-99, Defendant profits, and it may view a small monetary sanction from the Court as little more than a tax it must pay to continue engaging in its illegal practices in total disregard for the Court’s TI. The State thus asks that the Court exercise its discretion and levy a substantial fine on Defendant for each additional day Defendant remains open for indoor on-premises consumption of food and beverages.

The State wishes to strongly emphasize that it is its sincere hope that the Court’s contempt remedy in this matter will resolve the issue immediately. The State is not eager to impose additional hardships on businesses during an already-difficult year. Nevertheless, the lawful orders of this Court as well as all other courts throughout Minnesota must be respected and complied with. Indeed, as the United States Supreme Court has recognized, without the court’s contempt power to ensure this is the case, the judicial power of Minnesota’s courts “would be a mere mockery.” *United States v. United Mine Workers*, 330 U.S. 258, 290 n. 56 (1947) (“If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the ‘judicial power of the United States’ would be a mere mockery.”).

the party’s costs and expenses, including reasonable attorney fees incurred in the prosecution of such contempt. Minn. Stat. § 588.11; *Hanson v. Thorn*, 636 N.W.2d 591, 593-94 (Minn. Ct App. 2001) (attorney fees themselves support a finding of actual loss or injury for the purpose of Minn. Stat. § 588.11).

Here, it is apparent that absent the Court's intervention and reasoned exercise of its discretionary contempt powers, Defendant will continue to willfully defy the Court's TI and the temporary restrictions of Modified Executive Order 20-99, which are in place to slow the spread of a deadly pandemic. The Court should issue a Contempt Order that secures future compliance with its TI and Modified Executive Order 20-99 to prevent any future irreparable harm and to protect the health and safety of Minnesotans.

III. AN EXPEDITED HEARING IS REQUIRED TO PROTECT THE HEALTH AND SAFETY OF MINNESOTANS.

Although Minnesota General Rule of Practice 115.03 usually requires dispositive motions like the State's Motion for Contempt to be filed at least 28 days before the hearing, Rule 115.07 encourages the Court to "waive or modify" the timing requirements when "irreparable harm will result absent immediate action by the court," or if "the interest of justice otherwise require." Defendant's brazen conduct necessitates an immediate response.

By granting the TI, this Court has already found that Alibi Drinkery's actions are both "against the law and harmful." Further, the Court has found that "their blatant and intentional defiance of the law is directly promoting the spread of Covid-19, exposing their customers and employees to disease" and that irreparable harm will result unless Defendant is temporarily enjoined from opening for indoor on-premises dining in violation of Emergency Executive Order 20-99. TI at 3. Nevertheless, Defendant has reopened for indoor, on-premises dining in clear violation of Executive Order 20-99 and the TI.

Defendant's contemptuous conduct must be remedied immediately. The threat that COVID-19 poses to Minnesotans cannot be overstated. Defendant's continued willful violation of both Modified Executive Order 20-99 and this Court's TI should not provide Defendant with an extension to continue disobeying the law. *See Hopp*, 156 N.W.2d at 216 (stating that the

judge's responsibilities should not be frustrated by "delay and formalism"). Accordingly, the State respectfully requests that the Court waive or modify the time requirements normally applicable under Rule 115 to this motion so that it may be heard and ruled on as expeditiously as possible.

CONCLUSION

For all of the above reasons, the State respectfully requests that the Court: grants its proposed Order to Show Cause; sets a hearing on the Order to Show Cause on January 5, 2021 at 11:00 a.m.; and following this hearing, enters an appropriate Order for Contempt that imposes sufficient sanctions to ensure Defendant's future compliance with the Court's TI.

Dated: December 31, 2020

KEITH ELLISON
Attorney General
State of Minnesota

/s/ Elizabeth Odette
ELIZABETH ODETTE
Assistant Attorney General
Atty. Reg. No. 0340698

JASON PLEGGENKUHLE
Assistant Attorney General
Atty. Reg. No. 0391772

NOAH LEWELLEN
Assistant Attorney General
Atty. Reg. No. 0397556

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2130
Telephone: (651) 728-7208
Telephone: (651) 757-1147
Telephone: (651) 724-9945
elizabeth.odette@ag.state.mn.us
jason.pleggenkuhle@ag.state.mn.us
noah.lewellen@ag.state.mn.us

Attorneys for Plaintiff, State of Minnesota

MINN. STAT. § 549.211
ACKNOWLEDGMENT

The party on whose behalf the attached document is served acknowledges through its undersigned counsel that sanctions may be imposed pursuant to Minn. Stat. § 549.211.

Dated: December 31, 2020

/s/ **Elizabeth Odette**
ELIZABETH ODETTE