SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 03/03/2021 TIME: 03:15:00 PM DEPT: C-66

JUDICIAL OFFICER PRESIDING: Kenneth J Medel
CLERK: Bernice Orihuela
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2020-00041316-CU-MC-CTL** CASE INIT.DATE: 11/12/2020
CASE TITLE: **640 Tenth LP vs. Newsom [E-FILE]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Misc Complaints - Other

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APPEARANCES

The Court, having taken the above-entitled matter under submission on 2/26/2021 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

See attached Order on Application for Preliminary Injunction.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

640 TENTH, LP dba COWBOY STAR RESTAURANT AND BUTCHER SHOP, a California Limited Partnership; O'FRANK, LLC dba HOME & AWAY ENCINITAS, a California Limited Liability Corporation; FIT ATHLETIC CLUB-SAN DIEGO, LLC, a California Limited Liability Corporation; CROSSFIT EAST VILLAGE CORPORATION dba BEAR REPUBLIC, a California Corporation for themselves individually and as representatives for all restaurants and gyms located in the County of San Diego,

Plaintiffs,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, XAVIER BECERRA, in his official capacity as Attorney General of California, SANDRA SHEWRY, in her official capacity as Acting Director of the California Department of Public Health, ERICA S. PAN, in her official capacity as Acting State Public Health Officer for the State of California; COUNTY OF SAN DIGO, a governmental entity; WILMA J. WOOTEN, in

Case No.: 37-2020-00041316-CU-MC-CTL

ORDER ON APPLICATION FOR PRELIMINARY INJUNCTION

Judge: Hon. Kenneth J. Medel
Dept.: 66

her official capacity as Public Health Officer, County of San Diego; and DOES 2 through 100, inclusive,

Defendant(s).

Plaintiffs' Application for Preliminary Injunction came before this Court for hearing on February 26, 2021 at 1:30 p.m. After considering oral argument and all the papers and evidence presented, the Court issues this ruling on the Application.

Requests for Judicial Notice

By Plaintiff: On February 2, 2021, Plaintiffs filed a Request for Judicial Notice of the (1) Second Amended Complaint and (2) Calm Ventures, LLC dba Pineapple Hill Saloon and Grill's Complaint for Declaratory and Injunctive Relief filed in U.S District Court for the Central District of California Case No. 20-CV-11501-JFW-PVC. The Request is GRANTED pursuant to Evidence Code section 452(d), which authorizes a court to take judicial notice of "[r]ecords of (1) any court of this state." A court is entitled to judicially notice documents of a case before it, its own record and files of another case pending before it. Saltares v. Kristovich (1970) 6 Cal.App.3d 504, 511.

On February 19, 2021, Plaintiffs filed a Request for Judicial Notice of (1) CISA Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response. The Court GRANTS this request under Evid. Code § 452(c), and (2) the Order in Gardina v. County of San Diego, San Diego Superior Court Case No. 37-2021-4087-CU-CR-NC attached as Exhibit "1" herein. The Court GRANTS this request under Evidence Code § 452(d). However, "matters of which judicial notice is taken are considered only for their existence, not for the truth of the matters asserted in them...." Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort (2001) 91 Cal. App. 4th 875.

By Defendants: Defendants request for judicial notice in support of opposition seeks judicial notice of two items. First is a digital video recording of the San Diego County Board of Supervisors meeting that occurred on November 17, 2020. The Court does not find sufficient statutory basis for judicial notice. Objection by Plaintiffs is SUSTAINED.

Second is the Reply Brief of County of San Diego and Dr. Wooten, filed in Midway Venture LLC, et. al. v. County of San Diego, et al., Fourth District Court of Appeal Case No. D078375. The Court GRANTS the motion under Evidence Code § 452(d). However, "matters of which judicial notice is taken are considered only for their existence, not for the truth of the matters asserted in them...." Lockley, *supra*, 91 Cal. App. 4th at 875. Objection by Plaintiffs is OVERRULED.

Plaintiffs Objections to Declaration of James Watt, MD, MPH: OVERRULED

History of Complaints

The original Complaint was filed on November 12, 2020 with the First Amended Complaint filed on November 16, 2020, adding class action allegations. The Court granted ex parte relief on December 2, 2020 to allow the filing of the Second Amended Complaint [SAC] on December 4, 2020.

Summary of Second Amended Complaint

Parties: Plaintiffs are two restaurants, 640 Tenth LP (Cowboy Star & Butcher Shop) and O'Frank LLC dba Home & Away Encinitas, and two gyms, Fit Athletic Club-San Diego, LLC; and Crossfit East Village Corporation dba Bear Republic. Defendants include Governor Gavin Newsom; California Attorney General Xavier Becerra; Sandra Shewry, Acting Director CA Dept. of Public Health; Erica Pan, Acting State Public Health Officer for California; County of San Diego and Wilma Wooten, County Public Health Officer.

General Allegations: On August 8, 2020, Governor Newsom released the Blueprint for a Safer Economy with its color-coded system designed to arrest the spread of the COVID-19 virus. Plaintiffs state that to manage the COVID pandemic Defendants must balance health concerns with concerns that Californians be able to provide for their families. Plaintiffs allege that, nevertheless, the implementation of the Blueprint has led to population lockdowns, business closures and restrictions, as well as restrictions on travel, association, assembly, and the pursuit of lawful, spiritual, political, economic and social ends. Plaintiff's describe the Blueprint as "sweeping" with no end in sight.

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Plaintiffs allege that Governor Newsom's Blueprint decisions do not take into account data and statistics regarding industries, mitigation efforts and opinions of local county public health officers. Further, Plaintiffs claim that the Governor and the California Department of Public Health [CDPH] continue to release new, complex, and ever-shifting rules, which has led to financial hardship and uncertainty for California businesses.

Plaintiffs allege irreparable harm to plaintiffs' businesses absent injunctive relief.

Relief sought: Plaintiffs seeks Declaratory Relief under California Code of Civil Procedure (CCP) Section 1060 and Injunctive Relief under CCP Section 526. In support, the SAC includes causes of action alleged previously that allege that the Governor's closure orders and restrictions on indoor business operations and the Department of Public Health's implementation thereof exceed statutory authority granted by the Emergency Services Act [California Gov. Code §8550 et. seq.] Plaintiffs allege that the Emergency Services Act is unconstitutional and that all executive actions pursuant thereto violate the legislative "non-delegation" doctrine.

Plaintiffs contend that under the California Constitution decisions about COVID-19 policy must be made by the State Legislature. Since the Constitution empowers the Legislature alone to make fundamental policy determinations, Plaintiffs allege the Governor's Blueprint violates the separation of powers. Further, the actions of Governor Newsom and CDPH exceed statutory authority granted in the Emergency Services Act.

The SAC added new causes of action alleging that Defendants' Blueprint orders and restrictions are unconstitutional, violating substantive and procedural due process, the Equal Protection Clause and the Takings Clause of the United States Constitution. The orders are not constitutionally justified because they are not narrowly tailored to protect public health, and alternative measures exist. Plaintiff allege that the enforcement of Blueprint restrictions is arbitrary and capricious.

Finally, Plaintiffs claim that the Blueprint shifts the burden or response to COVID 19 to a limited class of persons and businesses and lacks any representative voices for those impacted.

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Factual Allegations

March 19, 2020: Governor Newsom issues a Stay at Home Order, prohibiting non-essential businesses from operating.

May 4, 2020: Governor Newsom issues Executive Order N-60-20, allowing the State to begin re-opening non-essential businesses in phases. The order authorizes the State Public Health Officer to decide which business would be open and under what conditions, granting executive authority to "take any action she deems necessary to protect public health in the face of the threat posed by COVID 19".

CDPH conditions include the requirement for businesses to submit written health and safety plans to local public health authorities. Restaurants are not permitted to reopen until after the Governor issues industry guidelines on May 12, 2020, then the CDPH will require county-specific clearance thereafter.

May 21, 2020: Restaurants are allowed to reopen subject to San Diego County's, Dr. Wooten's, Public Health Order.

June 2020: Gyms/fitness centers are not permitted to reopen until June 2020, and the CDPH requires county-specific clearance thereafter.

July 13, 2020: Governor Newsom's and CDPH's order closes indoor operation including restaurants and gyms/fitness centers.

August 28, 2020: Governor Newsom and CDPH announce a revised business regulatory scheme known as the Blueprint for a Safer Economy which replaces County Monitoring List. The Blueprint creates a color scheme assigned to each County (purple, red, orange, yellow) based on an assessed risk level for COVID-19 transmission. The assessment is based upon (1) 7-day average test positivity and (2) 7-day case average rates per 100K people. The rules vary in each color coding for different industry sectors. Of note to plaintiffs, there is no "green category" that would signify a return to normalcy.

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The Blueprint was an executive order and was not submitted to the State Assembly or Senate for legislative debate. Governor Newsom's actions, according to Plaintiffs, have, by and large, been initiated and implemented without legislative involvement.

September 22, 2020: Governor Newsom allows nail salons to reopen indoors, but does not lift restrictions on other personal care industry professionals.

October 20, 2020: Governor Newsom lifts restrictions on indoor operations for personal care industry but leaves in place similar restrictions on other industries.

September 30, 2020: Governor Newsom revises the criteria for assigning colors to counties. Assessments must also consider infection rates in disadvantaged communities.

The following is a summary of the tiers under the revised plan:

Purple: Counties with widespread risk of COVID transmission. No indoor operation for restaurants and gyms. Other restrictions were ordered as to other industries.

Red: Counties with substantial risk of COVID Transmission. Restaurants cannot operate indoors at greater than 25% capacity and may permit no more than 100 people. Gyms cannot operate indoors at more than 10% capacity. Other restrictions were ordered as to other industries.

Orange: Moderate risk of transmission. No indoor operations greater than 50%, no more than 200 people. Other restrictions, etc.

Yellow: Moderate risk. Prohibit indoor operations greater than 50% capacity. Gyms no more than 50%. Other restrictions etc.

Under the new plan, some counties were raised to a higher risk tier, others reduced to a lower risk tier. Businesses closed for indoor operations could "maybe" reopen if the county risk improved after three weeks at a less restrictive level. But there is no ability to skip over the next tier up even after three weeks of success at a less restrictive level.

Tier determination was based on test positivity and case rate per 100,000 people over seven days with a seven-day lag. The tier color for a county would be determined by whichever metric was higher between the case rate and the case positivity. If one metric was one color, and the other metric another, then the higher number between the two metrics would determine the tier level (color).

October 6, 2020: A new metric was introduced. To advance to next the less restrictive tier, a given county had to meet an equity metric or demonstrate targeted investments to eliminate disparities in COVID transmission, depending on the county's size.

November 2020: San Diego County was in the red tier: "case positivity" was in orange, but the "case rate" was in red. For the measurement period announced on November 3, the positivity rate dropped from 3.5 to 3.2% to the orange level, but the case rate increased from 6.5 to 7.0% to the purple level.

For the November 10 announcement, the positivity rate dropped to 2.6% or to the orange tier, but the case rate increased to 8.9%, which was also in the purple level, the most restrictive tier. San Diego County moved to the purple tier based on these two weeks of reporting. As a result, businesses, specifically restaurants and gyms, were given three days from Wednesday, November 11, to stop operating indoors.

Plaintiffs allege that San Diego County's recent increases in case rates are not due to sector closures. According to plaintiffs, there was only a minimum COVID spread in the following sectors, considering the 9,646 total cases:

Restaurants/Bars: 7.4% of cases (714)

Retail: 6.6% of cases (636)

Places of Worship: 1.9% of cases (184)

K-12 Schools: 1.7% of cases (165)

Gyms: .4% of cases (39)

Plaintiffs contend that these sectors represent only a small percentage of overall cases. On November 10, 5.5% of 58,106 cases, or 3,192 cases, were reported that were associated with the confirmed community outbreaks from these sectors. Dr. Wilma Wooten, San Diego County's Chief County Health Department Officer, stated that "restaurants, gyms and other businesses restricted to 'no indoor operations' were not the cause of the case rate increase". She filed a Request for Adjudication on behalf of the County that was summarily denied.

Dr. Wooten stated that increases were found in worksites and in 20-29-year-olds. But this has had minimal impact on hospital capacity which remains steady. In the previous three weeks, 25-

30% of civilian hospital beds remained available. ICU beds were available at 30-40%, below rates considered problematic. More than 80% of hospitals had 21 days-worth of PPE. The County of San Diego bought hundreds of millions of medical grade gloves and secured contracts to provide for additional respirators.

Dr. Wooten stated at that time that penalizing sectors like restaurants and gyms for the case increase is wrong. "Closure of indoor restaurants during wintertime will move people into homes and encourage high risk gatherings. Closing indoor capability contradicts the "Blueprint for a Safer Economy". Further, the County has taken steps to complete outbreak assessments, enforce compliance, and to educate and engage the community.

Dr. Wooten pointed out that in San Diego County, there had been over 13,000 field inspections of restaurants to ensure that they were following the requirements of the Health Order. The County quadrupled staff to interview food handlers to ensure restaurant compliance and to investigate who among the food handlers had been exposed to COVID.

According to plaintiffs, despite the County determining that sectors such as restaurants and gyms should not be barred from indoor operations and thus informing the CDPH in the County's Request for Adjudication, the CDPH summarily denied the Adjudication without articulating a scientific or data-based justification.

Governor Newsom says he will continue to make changes under the authority vested in the governor by the Emergency Services Act.

Briefing and Argument on Application for Issuance of a Preliminary Injunction

Plaintiffs seek a preliminary injunction to allow Plaintiffs to resume indoor operations. Based on the supporting evidence and declarations, Plaintiffs argue that the approach taken by Governor Newsom and the Executive Department is not rational because it is based on political considerations instead of scientific data and analysis.

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(1) Plaintiffs claim that the defendants' actions have been irrational, arbitrary and capricious.

Plaintiffs argue that, even applying a stringent "deferential" standard, California's orders would still not survive judicial scrutiny. "They have no real or substantial relationship to curtailing disease spread and are plain, palpable invasions of individual rights." The policies are irrational because other industries where people are significantly mixing have been granted less or no limitations. There is little or no rational basis or data to support these distinctions.

Plaintiffs rely on a recent federal court order in Pennsylvania which found a shutdown order unconstitutional. County of Butler v. Wolf, (W.D. Pa. Sept. 14, 2020) 2020 WL 5510690 at 26. Plaintiffs also cite the New York case of DiMartile v. Cuomo, —— F.Supp.3d ——, 2020 WL 4558711 (N.D. NY 2020) where a New York trial court granted injunctive relief to a group of wedding planners who challenged New York's restrictions on gatherings exceeding 50 people.

(2) Plaintiffs claim that science and data support the safety of Plaintiffs indoor operations.

Plaintiffs contend that the California Blueprint for a Safer Economy and Regional Stay at Home orders have not taken into account the data and statistics as to particular industries' mitigation efforts, nor do they contemplate the analysis of the local County Public Health Officers/Directors. The statistical data does not support closure. Rather, per Plaintiffs, the data shows that restrictions have led to unprecedented increase in positive cases, hospitalizations and deaths from this virus. These indoor prohibitions against restaurants and gyms drove the public indoors to private residences where the spread increased. *See* Bhattacharya Decl. ¶ 48 ; Kaufman Decl. ¶ 19.

(3) Plaintiffs argue that world-renowned epidemiologists confirm restrictions are irrational and result in negative health outcomes.

Plaintiffs have provided the declarations of medical, epistemological and economic experts contending that industry lockdowns are not the proper manner of managing COVID-19. (*See* Declaration of Daniel Halperin, Ph.D., Jayanta Bhattacharya, M.D., Ph.D. and Sean G. Kaufman, CPH.) These experts assert that the medicine and science support that restaurants and gyms can

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operate safely indoors if they follow CDC, State and County guidelines. (Bhattacharya ¶¶ 17, 53-57' Halperin ¶¶ 24-25; Kaufman ¶¶ 20, 22-28).

Plaintiffs argue that Defendants provide no scientific evidence establishing the benefits to public health by prohibiting restaurants and gyms from indoor operation as compared to the economic, social and public health costs of these restrictions. (*See* Declaration of Bhattacharya, Halperin, Kaufman and Thornberg). There are also flaws in the testing data utilized. Also Defendants' actions have shown that prohibiting indoor dining and exercise increases the risk of indoor gatherings at homes or other uncontrolled environments where precautions are not taken, which signifies a higher risk of transmission.

Plaintiffs also cite to efforts taken by Plaintiff and class restaurants and gyms to promote safe operations and to implement protocols to support public health. (Declarations of Jon Weber, Ojala Washington, Scott Lutwak and Jonathan Frank). Such measures include social distancing, appropriate face coverings, sanitation, contact tracing and improved indoor circulation. (Id.)

(4) Plaintiffs argue that Defendants' restrictions constitute an inverse condemnation and constitutional taking, without compensation, by depriving restaurant owners of the entirety of the use and enjoyment of their properties.

According to Plaintiffs, the lack of a rational scientific basis supporting the State and County orders and restrictions infringes Plaintiffs' fundamental right to pursue common professions.

(5) Plaintiffs contend that hundreds and thousands of Californians will be irreparably harmed. Plaintiffs argue that the economic devastation of the industries in question is not in dispute. A significant number of restaurants and gyms will shutter their doors completely as they face an uncertain future. They will be unable to retrain employees and reopen due to lack of capital, already severely depleted due to lack of business, investing in patio space, and additional costs due to COVID. Thornberg Decl. ¶¶ 6-15. Plaintiffs also contend that allowing indoor operations will save lives.

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Opposition filed by State Defendants

The State Defendants emphasize the unprecedented public health crisis and argue that plaintiffs are not likely to prevail on the merits of their claims. Defendants argue that neither the California Constitution nor the United States Constitution permits courts to weigh competing scientific evidence where, as here, neither fundamental rights nor suspect classifications are at issue. "The State's public health orders need only be rationally based, and they clearly are."

The State also argues that the harm to the public as a result of dismantling a key portion of the State's COVID-19 response greatly outweighs the interim harm to Plaintiffs if the status quo is maintained. While recognizing the economic impact of this pandemic, the State argues that hospitalizations, debilitating after-effects, and deaths will only worsen if the State cannot take necessary steps to slow the spread of the virus.

(1) The State argues that Plaintiffs have no reasonable likelihood of prevailing on the merits. According to the State, the rational-basis review only requires the Court to consider whether the Blueprint and orders are "rationally related to a legitimate governmental interest." [citations omitted] (1) There is a legitimate interest in stemming the spread of COVID-19. (2) The challenged orders themselves articulate the rational basis for the Blueprint and its orders, which the State contends is sufficient to satisfy the standard.

"It is well understood that restaurants and gyms are environments that can facilitate the further spread of COVID-19. Restaurants bring together people from different households for extended periods of time, and require the removal of face coverings for eating and drinking. Similarly, fitness centers bring together persons from different households, to engage in activities that commonly involve heavy breathing in closed areas." The State also argues that "while Defendants do not need to do so to prevail", they have provided evidence to support rational basis for the restrictions, particularly in the declaration of James Watt, M.D.

At most, plaintiffs show a disagreement among medical experts about the proper response to the pandemic. Disagreement among experts is not equivalent to irrationality.

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(2) The State argues that plaintiffs lack any reasonable probability of prevailing with respect to the Equal Protection claim.

The State argues that the Equal Protection Clause only requires that "similarly circumstanced" persons be treated alike. While Plaintiffs cite other businesses subject to less severe restrictions, those other businesses are not similarly situated because of different risk factors and the ability to limit activities known to cause increased spread, among others. (Watt Decl. ¶ 80; *see also* SAC Ex. 5.) Plaintiffs have not identified any similarly situated restaurants or gyms that are treated differently than plaintiffs are under the Blueprint.

(3) The State argues that there is no probability of prevailing on the remaining claims in the Second Amended Complaint.

The State contends that plaintiffs do not meaningfully discuss their first, second, third, fourth, fifth, sixth, eighth, or tenth causes of action in their motion for preliminary injunction, and thus do not meet the burden of showing a reasonable probability of succeeding on their merits. With respect to the argument that the Governor exceeded authority under the ESA, this Court has already noted that "[c]ourts have consistently concluded that the California Emergency Services Act constitutes a valid exercise of the State's police powers", stating that "[t]his Court will not re-visit this authority." [Ruling on Temporary Restraining Order.]

Nor can plaintiffs prevail on their claim that the DPH exceeded its authority under the CDPCA. The Health and Safety Code grants public health officers the authority to combat the spread of infectious diseases separate and apart from the ESA.

The State argues that Plaintiffs cannot prevail on their claim that the State Defendants have violated the non-delegation doctrine. The doctrine applies "[o]nly in the event of a total abdication of [legislative] power, through failure either to render basic policy decisions or to assure that they are implemented as made." (Kugler v. Yocum (1968) 69 Cal.2d 371, 383-384) In this context, the Legislature's fundamental policy decision was to confer on the Governor authority to make orders under the ESA "necessary to carry out the provisions of this chapter." (Gov. Code, § 8567, subd. (a).)

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The State argues that the Plaintiffs have no reasonable probability of prevailing on their procedural due process claim because a notice and opportunity to be heard is not required when governmental decision is not directed or targeted at one or a few individuals.

The State argues that Plaintiffs have no reasonable probability of prevailing on their federal takings claim under the doctrine of necessity. A taking has not occurred because the State has not singled Plaintiffs out to bear a burden, but asked the entire public to share the burden of protecting public health.

(4) The State argues that the balance of harms favors the State.

According to the State, the harm to the public from dismantling a key portion of the State's COVID-19 response greatly outweighs any interim harms to Plaintiffs from maintaining the status quo. The State specifically disputes the opinion of Sean Kauffman who argues that allowing indoor operations can save more lives than closing such operations.

"Ultimately, although the State does not wish to minimize the economic impact to Plaintiffs caused by the current business restrictions and has designed the Blueprint to permit as much economic activity as possible in light of the current epidemiological conditions, that impact is far outweighed by the potential harm to public health that would be caused by an injunction that effectively dismantles a significant part of the State's COVID-19 response."

Opposition by the County Defendants

On the merits, the County joins in the State Defendants' opposition to Plaintiffs' motion for preliminary injunction.

The County Defendants make the following procedural arguments supporting denial of the preliminary injunction: (a) Plaintiffs failed to file and serve their motion timely, (b) the motion fails to apprise defendants of the relief Plaintiffs are seeking, and (c) Plaintiffs failed to notify the court of its past application for temporary restraining order as required by the rules of court. (The State makes the same objections in footnote 3 of its Opposition Brief)

County's Procedural Objections

The County complains that much of the evidence in support of the Preliminary Injunction was late. Plaintiffs' deadline for serving the motion was January 29, 2021, but they completed

service on February 3, 2021. Given the effective briefing and oral argument in this case, the Court does not find that plaintiff's delay is prejudicial to the County (or to the State).

The County next argues that the Notice of the Application for Preliminary Injunction fails to properly identify the specific injunctive relief sought. The Notice suffers from the additional apparent typographical error that plaintiffs are seeking an ex parte TRO. Further, the notice improperly indicates that it is an Order to Show Cause, which would only be appropriate if the Court had previously granted the Temporary Restraining Order and set an Order to Show Cause requiring Defendants to show cause why a preliminary injunction should not issue. Since the Court did not grant a TRO, the correct notice would be that this is an Application for Preliminary Injunction.

The Court agrees with the County that the notice fails to specify what conduct Plaintiffs seek to enjoin. This notice is problematic because the motion papers are also vague as to what exactly plaintiffs are seeking as preliminary injunctive relief. In some places, the relief seems broad enough to include declaring the entire Blueprint scheme to be either unlawful or unconstitutional. In other documents, plaintiffs offer different requests.

Plaintiffs have submitted a Proposed Order which proposes that that defendants be enjoined from enforcing provisions of the Blueprint for a Safer Economy regime, or any other related orders, "that prevent Plaintiffs from operating at 25% indoor capacity under Tier 1, purple, and will be allowed to operate at increased capacity consistent with the capacity rates provided to retail and shopping malls and will be allowed to move into less restrictive tiers based on case positivity rate solely under the Blueprint for a Safer Economy or any related orders."

The Conclusion to Plaintiffs' Memorandum of Points & Authorities requests the following: "Plaintiffs respectfully request that this Court issue the requested preliminary injunction and Defendants should preliminarily enjoined pending trial from not allowing restaurants and gyms to operate indoors at least 25% capacity subject to the utilization of the recognized protocols they are already utilizing" [sic].

Based on all the papers, it appears that plaintiffs are requesting the narrow relief of being allowed to operate indoors consistent with retail business at 25% capacity.

Despite the problem with the notice, the Court has reached the merits of the injunction, as set forth below. However, the Court finds that the lack of specificity only adds to the complication of requesting Court injunctive relief.

Standard for Issuing a Preliminary Injunction

"[T]rial courts should evaluate two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." City of Tiburon v. Nw. Pac. R. Co. (1970) 4 Cal.App.3d 160, 179. The greater plaintiff's showing with respect to one of the factors, the less of a showing on the other to support an injunction. Butt v. State of Calif. (1992) 4Cal.4th 668, 678; Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc. (2001) 91 Cal.App.4th 678, 696.

Likelihood of Prevailing

Third Cause of Action: Governor's Closure Orders & Restrictions on Indoor Business Operations Exceed Statutory Authority (California Gov. Code §8550 et. seq.); Fourth Cause of Action: CDPH's Continuing Closure Orders and Restrictions on Indoor Business Operations Exceeds Statutory Authority (CA H§S 120100 et. seq.); Fifth Cause of Action: Governor's Claim to Broad Emergency Power Violates the Non-Delegation Doctrine; Sixth Cause of Action: The Department of Public Health's Claim to Broad Emergency Power Violates the Non-Delegation Doctrine (CA Constitution Art II, §3).

On November 23, 2020, this Court denied Plaintiff's Ex Parte Request for a Temporary Restraining Order. Based upon the allegations in the First Amended Complaint, the Court found that Plaintiffs had not shown a probability of prevailing on the merits of the claims nor that the balance of harms favored ex parte injunctive relief. Specifically, the Court found that the plaintiffs could not prevail on the allegations in the First Amended Complaint that the authority exercised by the Governor and the CDPH in the Blueprint is either illegal and/or unconstitutional.

The Court found that plaintiffs sought sweeping, broad judicial declarations from this Court that the entire Blueprint for a Safer Economy as well as all efforts to enforce the Blueprint by the California Department of Health and the San Diego County Department of Health, are unlawful, null and void. Also, Plaintiffs requested this Court to declare that the whole of the Emergency

Services Act (GC 8627) and the Public Health Act (H&S 120140 et. seq.) violate the non-delegation doctrine and the California Constitution, Article III, Section 3.

With respect to these identical allegations appearing in the Second Amended Complaint, the Court finds that nothing presented in the request for Preliminary Injunction demonstrates that Plaintiffs can prevail on their broad statutory and constitutional claims. The reasoning of the Court from its Order on the Request for Temporary Restraining Order is adopted and incorporated by reference herein.

As with the First Amended Complaint, the Court does not find a probability of prevailing on the prayer for relief in the Second Amended Complaint to declare that Governor Newson has exceeded his statutory authority in implementing his Blueprint for a Safer Economy by issuing orders shutting down or restricting indoor business operations. Nor can the Court find a probability of prevailing on the request in the prayer to declare the entire Blueprint for a Safer Economy unlawful and null and void, or that the County of San Diego and its agents' efforts to enforce the Blueprint for a Safer Economy are unlawful. The Court cannot find a probability of prevailing on issue that the Emergency Services Act, CA Govt. Code §8627 and/or the Public Health Act, Health & Safety Code §120140, violate the non-delegation doctrine and Article II, §3 of the California Constitution.

Seventh Cause of Action: Violation of 42 U.S.C. § 1983-14th Amendment Substantive Due Process

"The substantive component of the Due Process Clause forbids the government from depriving a person of life, liberty, or property in such a way that "interferes with rights implicit in the concept of ordered liberty." *See* Tandon v. Newsom, No. 20-CV-07108-LHK, 2021 WL 411375, at *16 (N.D. Cal. Feb. 5, 2021)

The right to earn a living is not a fundamental liberty interest that has been traditionally protected by the substantive component of the Due Process Clause and therefore the Court's review is narrow. Ibid. To be sure, "[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." Sagana v. Tenorio,

384 F.3d 731 (9th Cir. 2004) (quoting Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.Ed. 131 (1915)). Even so, neither the Supreme Court nor the Ninth Circuit "has ever held that the right to pursue work is a fundamental right," entitled to heightened constitutional scrutiny. Id. at 743. The judicial review that applies to laws infringing on non-fundamental rights is "a very narrow one." Id. The Court need only ask "whether the government could have had a legitimate reason for acting as it did." Id.

Many cases upholding restrictions in California have done so under the test articulated in Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 37, 25 S.Ct. 358, 49 L.Ed. 643 (1905). Under Jacobson, "When a state exercises its police powers to enact emergency health measures, courts will uphold them unless (1) the measures have no real or substantial relation to public health, or (2) the measures are "beyond all question" a "plain, palpable invasion of rights secured by fundamental law."

The Court does not see the Jacobson case as articulating any standard other than "rational basis". Justice Gorsuch in a concurring opinion, recognized that Jacobsen, which predated the current "tiers of scrutiny" used in constitutional analysis, really only applied a "rational basis" of review. "Rational basis review is the test this Court 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." Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70 (2020); *See also* Culinary Studios, Inc. v. Newsom, No. 1:20-CV-1340 AWI EPG, 2021 WL 427115, at *12 (E.D. Cal. Feb. 8, 2021) ["Based on the recent U.S. Supreme Court precedent of Roman Catholic Diocese of Brooklyn, the concurrence of Justice Gorsuch, and even the concurring opinion (in South Bay United) and dissenting opinion (in Roman Catholic Diocese) of Chief Justice Roberts, normal constitutional standards of review should apply, not a separate "Jacobson standard."]

There is really no issue here as to whether the State has a legitimate interest in stemming the spread of COVID-19. The U.S. Supreme Court has even found this interest to be compelling. *See* Roman Catholic Diocese of Brooklyn v. Cuomo (2020) 141 S.Ct. 63, 67 [per curiam].) The Court notes that some of Plaintiffs' experts have opined that the risk of the pandemic itself is not as grave

as it is purported to be. For example, Mr. Sean Kaufman states, "when the risk is legitimate, people will want to hide and not have to be told to", [Paragraph 32]. Others, including Mr. Kaufman, contend that deaths have been exaggerated by not differentiating as to those succumbing to comorbidities. *See also* declaration of Dr. Jayanta Bhattacharya, M.D., Ph.D. Despite some of these opinions, plaintiffs appear to concede that the government has a legitimate or even compelling interest in fighting the pandemic.

The real issue here is whether the Blueprint and orders are "rationally related" to that legitimate governmental interest. Ball v. Massanari (9th Cir. 2001) 254 F.3d 817, 823. "The law in question needs only some rational relation to a legitimate state interest." Lockary v. Kayfetz, 917 F.2d 1150, 1155 (9th Cir. 1990). "Under rational-basis review, '[t]he burden falls on the party seeking to disprove the rationality of the relationship between the classification and the purpose.'" U.S. v. Navarro (9th Cir. 2015) 800 F.3d 1104, 1113 [citation omitted]. "[A] classification is valid 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* [quoting FCC v. Beach Commc'ns, Inc. (1993) 508 U.S. 307, 313]. "This inquiry is not a 'license for courts to judge the wisdom, fairness, or logic of legislative choices'; if we find a 'plausible reason for [California's] action, our inquiry is at an end." Fowler Packing Co., Inc. v. Lanier (9th Cir. 2016) 844 F.3d 809, 815.

The State's Orders and other judicially noticeable documents lay out a rationale for the Blueprint that is plainly related to the legitimate interest in curbing the spread of a deadly disease. The plain language of the State's Orders lay out a rationale that is plausible and plainly related to the compelling state interest in curbing the spread of a deadly disease. This is sufficient to satisfy rational basis review. The Blueprint imposes restrictions on sectors and activities based on an assessment of the transmission risk that they pose, as well as the extent to which COVID-19 has spread in the community. The restrictions are plainly designed to reduce the spread of the disease.

Restaurants and gyms are environments that can facilitate the further spread of COVID-19. Restaurants bring together people from different households for extended periods of time, and require the removal of face coverings for eating and drinking. Similarly, fitness centers bring

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together persons from different households, to engage in activities that commonly involve heavy breathing in closed areas.

Restaurants and bars are high-risk environments for transmission because people from different households share the same space for prolonged periods of time, without face coverings, to eat and drink. (Watt Decl. ¶ 44.) Gyms and fitness centers are also high risk environments because exercise increases respiration, which results in "more opportunity for a gym user to inhale virus particles or to come into contact with virus shed." (Watt Decl.¶¶ 47-50.) Moreover, people from different households mix in gyms, often multiple times per week, and the use of face coverings is difficult due to intense breathing and sweating. (*Id.*) Both restaurants and gyms are sites of documented transmission, and were among the first locations with identified spread of the virus. (Watt Decl. ¶¶ 45, 51.)

Consider the declaration of Dr. Daniel Halperin, offered in support of the preliminary injunction. He states at paragraph 13: "Based on my personal knowledge and review of relevant studies, the risk of Covid-19 transmission is vastly lower outdoors than indoors, over 19 times more so according to a December 2020 meta-analysis." If that statement is true, how could indoor restrictions on indoor gatherings not be rational? Dr. Halperin opines that indoor transmission can be reduced considerably through various measures, but the indoor restriction itself would be rational given the risks conceded.

In support of their motion, plaintiffs provide declarations from various experts. The Court has read and considered the declarations. Many declarations question the connection between indoor dining or indoor fitness and disease transmission. For example, epidemiologist Dr. Daniel Halperin states that California has no or very little contact tracing date or other evidence to show that indoor dining at restaurants or indoor fitness activities have contributed significantly to the spread of COVID-19. Dr. Ayanta Bhattacharya, M.D., Ph.D. states in paragraph 23, "I am unaware of any scientific peer-reviewed study that finds *outdoor* dining poses a high risk of transmission" [emphasis supplied]. He states: "To my knowledge, the data available at state public health websites do not contain any epidemiological or other evidence that shows that prohibiting indoor dining or outdoor dining and indoor exercise in a city the size of San Diego has any relationship

whatsoever to avoiding circumstances that create a serious health risk as claimed by California, its governor and CDPH."

Certified Public Health Professional, Sean Kaufman takes a broader view and opines that there is no rational basis for the "sweeping breadth and scope of...the closure mandate." "Indeed, as more time passes, and California's restrictions become more onerous—not less—those restrictions have also become increasingly untethered to any scientific basis." (paragraph 14) His opinion goes beyond the question of restaurants and gyms to address the State's policy regarding schools. He argues that the State's motivation to "eliminate all risk to all individuals from contracting SARS-CoV-2" is unwarranted. "The balance between liberty and public health favors liberty." Declarations also point to the lack of data supporting the closure order. For example, Mr. Hubert Allen asks: "Is there specific evidence that the limiting of restaurant business activities from Tier 2, at 25% indoor capacity and gyms at 10% indoor capacity, into the higher risk Tier 1, which closes all indoor dining and operations, actually produces the intended outcome of dramatically reducing community spread? In the denied adjudication reasoning by San Diego County's Public Health Officer, the State of California provided no hard data or statistical analysis on the benefits of this restricting move to restaurants and gyms."

Many of the declarations argue that indoor risk can be mitigated. Biostatistician Hubert Allen asks the ultimate question: "What are effective methods of controlling community spread of COVID-19?" (paragraph 3) In his opinion, the California Risk Tier System and trigger definitions are "too simple and too blunt as deliberating instruments. There is no effort to conduct a comprehensive risk-benefit analysis."

Dr. Daniel Halperin, an epidemiologist, acknowledges that indoor transmission is vastly higher than outdoors, but opines that "when weather or other factors preclude holding activities outdoors", the risk can be reduced through various measures including appropriate air ventilation, social distancing, sanitation, wearing of masks and erection of physical barriers such as cleanable transparent shields. "Nor does the State of California provide any evidence that indoor dining cannot be conducted in a safe manner through use of effective prevention measures . . ." He outlines how dining can be conducted safely and critiques studies that show connection between

indoor dining and infection. "My analysis of the various, relevant epidemiological evidence suggests that indoor dining and indoor exercise -- as long as certain basic precautions are taken -- can be conducted at a level of safety similar to other, permitted activities." Likewise, Mr. Kaufman argues that "targeted" measures should be used.

Dr. Jayanta Bhattacharya, M.D., Ph. D. argues that reductions in case growth may be achievable with less restrictive interventions. [paragraph 9] Social distancing, the spacing of tables, mask-wearing (when not eating), and frequent sanitization of surfaces and other actions are well within the capability of the San Diego County restaurants." "Indoor fitness can occur if precautionary measures including, but not limited to, social distancing and mask-wearing by employees and by patrons are observed." Dr. Bhattacharya argues for an approach that "devotes overwhelming resources to shielding the vulnerable who face the highest mortality risk – especially the elderly – from COVID-19 infection."

Experts, such as Dr. Halperin also indicate that prohibition of certain regulated activities such as restaurants and gyms may actually lead to riskier behaviors, including more private gatherings, that are unregulated. Some experts attempt to attribute the rise in infections to the closure of the restaurants and contrast the state's policies with the state of Florida, for example, that took a drastically different approach. The Court does not find that the graphs and argument offered regarding the rise in statistics to be persuasive, given that the rise may be attributable to other causes.

While the declarations may show that the policy itself is ineffective or that there may be safe alternatives to allow indoor dining and indoor exercise, the opinions do not establish that the policy itself lacks a plausible connection to the legitimate end of stemming the spread of this respiratory disease. There is disagreement among medical experts about the proper response to the pandemic. Effectiveness of a certain policy may be debated, but the question is limited to whether there is a rational basis for the policy.

For a policy to be rational, the government's action does not have to be effective or advance its stated purposes. The sole question is whether the government could have had a legitimate reason for acting as it did." Culinary Studios, Inc. v. Newsom, No. 1:20-CV-1340 AWI EPG, 2021 WL

427115, at *18 (E.D. Cal. Feb. 8, 2021) and cases cited therein. Given the scientific disputes, the Court must defer to the judgment made by the state public health officials responding to public health emergencies, and the general deference due in the face of scientific uncertainty. (Roman Catholic Diocese of Brooklyn v. Cuomo, *supra,* 141 S.Ct. at p. 67; Marshall v. United States (1974) 414 U.S. 417, 427).

Perhaps Mr. Kaufman summarized the issue best when, at paragraph 24 of his declaration, he characterized the role of the Court in this case. "As an elected official, a judge must be presented with information allowing him or her to serve to the best of his or her abilities and in accordance with the law. Rather than a united approach, the court here will receive information from each side that is directly contradictory. This leaves the judge in a very precarious situation. What information do I choose to base my decision on?" This is precisely the dilemma the Court faces.

As United States Supreme Court Chief Justice Roberts stated in a recent concurring opinion: "[w]hen [public] officials 'undertake to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'" South Bay, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (quoting Marshall v. United States, 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974)). "Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." Id. (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 545, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985)).

Eighth Cause of Action: Violation of Procedural Due Process, 42 U.S.C. §1983, 14th Amendment

"[G]overnmental decisions which affect large areas and are not directed at one or a few individuals do not give rise to the . . . requirements of individual notice and hearing; general notice as provided by law is sufficient." *See* Culinary Studios, Inc. v. Newsom (E.D. Cal., Feb. 8, 2021, No. 1:20-CV-1340 AWI EPG) 2021 WL 427115, at *4 and cases cited therein. (*See* Halverson v. Skagit County (9th Cir. 1994) 42 F.3d 1257, 1260-61, *as amended on denial of reh'g* [Feb. 9, 1995]; Best Supplement Guide, LLC v. Newsom, 2020 WL 2615022, at *5 [rejecting similar procedural due process claim challenging California's stay-at-home orders with respect to fitness

centers]; *see also* Cinevision Corp. v. City of Burbank (9th Cir. 1984) 745 F.2d 560, 579. The Blueprint applies to all businesses in the State, even if the precise protocols differ across businesses depending on the nature of the business, pandemic conditions in the local county, and other local factors.

Ninth Cause of Action: Violation of Equal Protection, 42 U.S.C. §1983, 14th Amendment

The Equal Protection Clause demands that no state shall deny to any person the equal protection of the laws. (City of Cleburne v. Cleburne Living Ctr, Inc. (1985) 473 U.S. 432, 439.) This requires that "all persons similarly circumstanced shall be treated alike." (*Plyler v. Doe* (1982) 457 U.S. 202, 216.) Absent a fundamental right, state action "is presumed to be valid" and will be upheld if it "is rationally related to a legitimate [government] interest." (*United States v. Harding* (9th Cir. 1992) 971 F.2d 410, 412 [quoting *Cleburne, supra,* at p. 440].)

Cases have consistently held that business owners are not a suspect class, entitled to heightened review. Other cases interpreting COVID restrictions have applied the rational basis review. Tandon v. Newsom, No. 20-CV-07108-LHK, 2021 WL 411375, at *16–17 (N.D. Cal. Feb. 5, 2021) and cases cited therein. Plaintiffs appear to concede that the rational-basis standard applies. (*See* Motion at pp. 4-5.)

Because Plaintiffs are not part of a suspect class, the Court must apply rational basis review to determine whether the restrictions are rationally related to a legitimate government interest. Tandon, *supra,* citing Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008). Regulations "must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Heller v. Doe by Doe, 509 U.S. 312, 320 (1993). The "burden is on [Plaintiffs] to negat[e] every conceivable basis which might support [the classification]." Id. (quotation omitted). Thus, courts must uphold the classification as long as it "find[s] some footing in the realities of the subject addressed by legislation." Id. at 321.

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As noted by the Court in Tandon, under these deferential standards, every court considering Equal Protection challenges brought by business owners to COVID-related restrictions has upheld the restrictions. Plaintiffs do not cite a single case to the contrary. *See* Tandon, 20.

Plaintiffs concede that there is a compelling interest (as discussed above). The focus is on whether there is a rational basis for the Blueprint's classification of businesses. Plaintiffs cite to other businesses, such as retail, that are subject to less severe restrictions. Further, plaintiffs argue that less restrictive measures as to airport and movie studio restaurants render restrictions on plaintiffs irrational. However, there are plausible explanations for the differing treatment. There are differences in the ability to wear face coverings at all time, to limit the amount of mixing among people from different households and communities, and to limit activities known to cause increased spread. (Watt Decl. ¶ 80; *see also* SAC Ex. 5.)

Tenth Cause of Action: Federal Takings Claim, 42 U.S.C. §1983, Fifth Amendment

"The Fifth Amendment's Takings Clause prohibits the taking of 'private property . . . for public use, without just compensation.'" Sierra Med. Servs. Alliance v. Kent, 883 F.3d 1216, 1223 (9th Cir. 2018) (quoting U.S. Const. amend. V). "A Takings Clause claim requires proof that the plaintiff 'possess a 'property interest' that is constitutionally protected.'" Id. (quoting Turnacliff v. Westly, 546 F.3d 1113, 1118 (9th Cir. 2008)).

The Court first notes that injunctive relief is not available for a taking. "Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984); In re Nat'l Sec. Agency Telecomm. Records Litig., 669 F.3d 928, 932 (9th Cir. 2011); *see also* Xponential Fitness v. Arizona, 2020 U.S. Dist. LEXIS 123379, *27 (D. Ariz. July 14, 2020); Bridge Aina Le'a, LLC v. State of Hawaii Land Use Comm'n, 125 F.Supp.3d 1051, 1066 (D. Haw. 2015). That is, "[a]s long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking." Knick v. Township of Scott, Pa., 139 S. Ct. 2162, 2176 (2019).

Even so, the Court does not find a probability of prevailing on the issue of whether there has been a taking. Based on the evidence presented, the Court cannot conclude that the state has singled Plaintiffs out to bear a burden, but rather, has implemented policies applying to the entire public. Even if the restrictions constituted a taking, the U.S. Supreme Court "has consistently held that the doctrine of necessity" applies, which obviates the need for compensation under the Takings Clause, "when there is an imminent danger and an actual emergency giving rise to actual necessity." (TrinCo Inv. Co. v. United States (Fed. Cir. 2013) 722 F.3d 1375, 1378; *see also* United States v. Caltex (1952) 344 U.S. 149, 151–56.) Even if the Blueprint and associated orders had caused a "taking" that would implicate the Fifth Amendment, such "imminent danger" and "actual emergency" are present here.

Balance of Harms

There is no question that movement to the Purple Tier will have a negative impact on plaintiffs and similarly situated businesses. The Court accepts the harm as described in the declarations of Ojala Washington, Jon Weber, Scott Lutwak and Jonathan Frank, all associated with the Plaintiff restaurants and gyms. The Court understands the specific hardship of Cowboy Star Restaurant and Fit Gym that they may not be able to expand to outdoor operations. And there are real economic consequences to workers in these businesses whose employment is threatened. These sentiments are also expressed in the declaration of Christopher Thornberg, Plaintiffs economist consultant, who describes the loss at the industry level as a whole.

The role of the Court for purposes of injunctive relief is to balance this very real impact against the impact that the Defendants will likely suffer. The Defendants here represent the State and the public. As of the date of this hearing, the COVID-19 pandemic has now infected over 28.7 million Americans and over a half million have lost their lives. While the infection rates are falling and vaccinations are increasing, these statistics are significant.

Here, an injunction would not be in the public interest. This conclusion is consistent with the multiple California Courts that have reviewed injunctive relief in the time of COVID. *See, e.g.,* Tandon v. Newsom, No. 20-CV-07108-LHK, 2021 WL 411375, at *41–44 (N.D. Cal. Feb. 5, 2021).

Conclusion

Based on the above, the Court DENIES the Application for Preliminary Injunction.

Dated: March 3, 2021

Kenneth J Medel

KENNETH J. MEDEL
Judge of the Superior Court