

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

**GAVIN NEWSOM, Governor of the
State of California, and
CALIFORNIA DEPARTMENT OF
PUBLIC HEALTH, a department of
the State of California,**

Case No. _____

Petitioners,

v.

**MIDWAY VENTURE LLC dba
PACERS SHOWGIRLS/PACERS
SHOWGIRLS INTERNATIONAL, a
California limited liability company;
PETER BALOV, an individual; F-12
ENTERTAINMENT GROUP INC.
dba CHEETAHS, a Nevada
corporation; RICH BUONANTONY,
an individual,**

Respondents.

San Diego County Superior Court, Case No. 37-2020-00038194
Honorable Joel R. Wohlfeil (Civil: 619-450-7073)

**EMERGENCY APPLICATION FOR
TEMPORARY STAY**

**STAY REQUESTED: 12/16/2020
SUPERIOR COURT ORDER ENJOINING
ENFORCEMENT OF PUBLIC HEALTH
ORDERS**

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to rules 8.208 and 8.488 of the California Rules of Court, Petitioners Governor Gavin Newsom and California Department of Public Health hereby certify, through undersigned counsel, that there are no interested entities or persons that must be listed in this certificate.

Dated: December 18, 2020 Respectfully submitted,

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EMERGENCY APPLICATION FOR A TEMPORARY STAY

Governor Gavin Newsom and the California Department of Public Health (CDPH) seek an immediate stay of a December 16, 2020 order granting a preliminary injunction,¹ pending a ruling on their forthcoming petition for writ of supersedeas or other appropriate writ.

In the midst of the worst surge in the COVID-19 pandemic— at a time when California’s health care delivery system is on the brink of collapse and the Southern California Region has 0.0% capacity in its Intensive Care Units (ICUs)—a single trial court judge has unilaterally thwarted public efforts to avert that looming catastrophe, by issuing an injunction that allows all restaurants in San Diego County to reopen without any restriction, contrary to the orders and judgment of the State’s top health officials. Worse, that judge has done so on his own initiative—issuing an injunction that Plaintiffs below (two live adult entertainment establishments) did not seek.

The order in question stretches well beyond the controversy actually before the trial court, enjoining *all* enforcement of *all* State and local public health orders with respect to *all* San Diego County businesses providing restaurant service, regardless of whether they provide live adult entertainment. The trial court purported to afford this expansive relief, beyond the scope of the claims pleaded before it, by taking judicial notice that another department of the San Diego County Superior Court had *denied*

¹ A copy of this order is attached hereto as **Exhibit A**.

an ex parte application for a temporary restraining order sought by restaurants on a county-wide basis in a *separate* case.

This unsolicited order against enforcement of basic public health precautions necessary to reduce the spread of COVID-19, at a moment when hospitals in San Diego County and across the State are being overwhelmed, requires immediate action by this Court. Petitioners will seek review by filing a petition for writ of supersedeas or other appropriate writ as soon as possible. But because the order issuing the preliminary injunction—issued under a clear error of law and abuse of discretion—took effect immediately, and because it will cause irreparable harm to the residents of San Diego and of the State, in light of the critical public health issues at stake, a temporary stay is urgently needed.

AUTHORITY FOR THIS EMERGENCY APPLICATION

This is an extraordinary case that calls for an immediate stay before this Court has time to consider and act on any writ petition. In such urgent situations, applicable rules specifically give this Court the authority to grant a request for temporary stay pending the granting or denial of a forthcoming petition for writ of supersedeas or other appropriate writ. While a request for temporary stay may be typically presented as part of a writ petition, the rules provide that it may be made by a separate request like this one. (See Cal. R. Ct. 8.112(c)(2) [providing for a “separately filed request for temporary stay”].) This Court also has broad authority under Code of Civil Procedure section 923 and *People ex. rel. S.F. Bay etc. Com. v. Town of Emeryville* (1968)

69 Cal.2d 533, 539, to issue a stay order in aid of its appellate jurisdiction. Petitioners filed a notice of appeal on December 17, 2020.

Finally, this Court is authorized to grant a temporary stay immediately and before any opposition is filed, and it is respectfully requested that the Court do so here. (See 4th App.Dist.R. 1 [“The court may issue a stay or other order necessary to preserve the status quo or the court’s jurisdiction without opposition.”].)

This petition is supported by the below points and authorities describing the ongoing COVID-19 pandemic, its current impact on San Diego County in particular, and the other emergency circumstances necessitating an immediate stay of the trial court’s December 16, 2020 order granting preliminary injunction and enjoining enforcement of, in relevant part, the underlying “cease and desist orders, or any related orders including the State’s Regional Stay Home Order,” pending this Court’s review of the Governor and CDPH’s forthcoming writ petition.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Complaint and Temporary Restraining Order

Plaintiffs own and operate two adult entertainment establishments, known as Pacers and Cheetahs, located in San

Diego County. (Compl. ¶¶1-4.)² Both establishments have onsite restaurants. (*Id.* ¶ 15.) Having been closed since March 2020 in accordance with State and County health orders, Pacers and Cheetahs each reopened at some point in September 2020. (*Id.* ¶¶ 13, 22, 23.) Plaintiffs submitted reopening plans to the County of San Diego but proceeded to reopen prior to receiving the required approvals. (*Id.* ¶¶ 21-23.)

On August 28, 2020, the State revised its framework for reopening, replacing the prior monitoring list system with the Blueprint for a Safer Economy. (Order of the State Public Health Officer, Aug. 28, 2020.)³ The Blueprint places every county in the State in one of four tiers based on the COVID-19 transmission rates within the county. (*Id.*) The four tiers are the “minimal” or “yellow” tier, the “moderate” or “orange” tier, the “substantial” or “red” tier, and the “widespread” or “purple” tier. (*Id.*) A county’s tier is currently determined by two statistics: (1) the “adjusted case rate,” the 7-day average of daily COVID-19 cases per 100,000 residents as adjusted for number of tests performed, and

² A copy of the complaint is attached to this application as **Exhibit B**. Citations to other documents from the record below are provided for background purposes and are not reasonably disputed. Because of the urgency of this matter and the need for haste, those documents are not included with this request. The Governor and CDPH will provide copies of all necessary record documents in accordance with the applicable rules in connection with the forthcoming petition for writ of supersedeas.

³ Available at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID19CountyMonitoringOverview.aspx> (last visited Dec. 18, 2020).

(2) the “positivity rate,” the 7-day average rate of positive tests in the county. (*Id.*) Restrictions on businesses and activities vary by tier level, with greater restrictions in tiers with greater transmission and lower restrictions in tiers with lower transmission. (*Id.*) Restaurants were permitted to operate outdoors in Tier 1 and indoors in Tiers 2, 3, and 4, but performances were prohibited in all Tiers to avoid encouraging patrons to remain in settings that amounted to gatherings.

In October 2020, the County issued cease and desist letters directing Pacers and Cheetahs to come into compliance with State and local health orders directed at combating the ongoing COVID-19 public health crisis. (Compl. ¶¶ 25, 28; TRO App., 11-12.) At that time, these orders did not permit live entertainment to be conducted in San Diego County, indoors or outdoors, unless pursuant to guidance permitting up to three persons from unrelated households to engage in or observe live performance while gathered outside.⁴

Plaintiffs filed their Complaint on October 21, 2020, suing Governor Newsom, CDPH, the County, and the County’s Public Health Officer. Plaintiffs contended that Defendants’ “orders, actions, and directives” have enacted a “ban” on live adult entertainment that violates their rights of free expression, equal

⁴ Guidance for Private Gatherings, Oct. 9, 2020, available at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CDPH-Guidance-for-the-Prevention-of-COVID-19-Transmission-for-Gatherings-10-09.aspx> (last visited Dec. 18, 2020).

protection, and due process under the state and federal constitutions. (Complaint ¶¶ 5, 9, 29, 33.)

Plaintiffs sought a TRO, explaining, “Plaintiffs seek no more than to allow . . . socially distanced adult performances in their venues that [were] only allowed to operate as restaurants at 25% capacity” at the time the Complaint was filed. (TRO App. 5.) The trial court entered the TRO on November 6, 2020, temporarily enjoining Defendants “from enforcing the provisions [of] the cease and desist orders, or any other related orders, that prevent Plaintiffs from being allowed to provide adult entertainment subject to the least restrictive means to further Defendants’ response to control the spread of COVID.” (TRO, 2.) The trial court also issued an order to show cause why a preliminary injunction should not issue.

B. Updated Restaurant Guidance

On November 24, 2020, the State issued updated industry-specific guidance for restaurant operations based on the tier status of California counties (“Restaurant Guidance”). The updated Restaurant Guidance permits live performances with modifications, subject to the same guidance and restrictions applicable to all restaurants.⁵ The Restaurant Guidance permits restaurants to provide live performances indoors in Red Tier (Tier 2) counties, subject to certain conditions. In Purple Tier (Tier 1) counties, the Restaurant Guidance permits restaurants,

⁵ COVID-19 Industry Guidance: Restaurants, Nov. 24, 2020, also available at <https://files.covid19.ca.gov/pdf/guidance-dine-in-restaurants.pdf> (last visited Dec. 18, 2020).

including those offering live performances, to operate outdoors subject to certain conditions.

C. The Regional Stay at Home Order

Between October 20, 2020 and the present, the number of COVID-19 cases in California has spiked dramatically, increasing over 1300% from approximately 3,700 to over 53,000 positive tests recorded daily.⁶ Hospitalizations have similarly seen a dramatic increase, with admissions related to COVID-19 nearly quintupling in that same timeframe.⁷ ICUs across the state are at or nearing capacity,⁸ straining staff and resources,⁹ and

⁶ See Tracking COVID-19 in California—Coronavirus COVID-19 Response, <https://covid19.ca.gov/state-dashboard/>, Daily Cases and Deaths Table (showing a daily rate of 3,707 on October 20, 2020, and a daily rate of 53,711 on December 15, 2020) (last visited Dec. 18, 2020).

⁷ See *id.*, Impact on Hospitals and ICUs Table (showing hospitalized COVID-19 patients nearly quintupled from 3,077 on October 20 to 14,578 as of December 13).

⁸ Faith E. Pinho, et. al., *Hospital ICUs Full in Silicon Valley, Central Valley, as California Braces for More*, Los Angeles Times (Dec. 9, 2020), available at <https://www.latimes.com/california/story/2020-12-09/covid-hospitals-full> (last visited Dec. 18, 2020).

⁹ Rong-Gong Lin II, et al., *Hospitals Face Tough Choices as ICUs Fill Up With COVID-19 Patients*, Los Angeles Time (Dec. 8, 2020), available at <https://www.latimes.com/california/story/2020-12-08/california-icu-beds-fill-up-coronavirus-cases> (last visited Dec. 18, 2020); Blake Farmer, *As Hospitals Fill With COVID-19 Patients, Medical Reinforcements are Hard to Find*, NPR (Nov. 30, 2020), available at <https://www.npr.org/sections/health-shots/2020/11/30/938425863/as-hospitals-fill-with-covid-19-patients-medical-reinforcements-are-hard-to-find> (last visited Dec. 18, 2020).

(continued...)

threatening the lives of individuals who need urgent and life-saving medical care—whether for COVID-19 or for other serious illnesses such as heart attacks, strokes, and cancer treatments.

On December 3, 2020, in response to the continuing dramatic increase in COVID-19 infections and hospitalizations and the high risk that California hospitals would soon be overwhelmed, the Governor announced a Regional Stay at Home Order.¹⁰ The order divides the State into five regions, with each region comprising a group of geographically contiguous counties. Once a region’s ICU bed capacity drops below an availability rate of 15 percent, the terms of the order take effect the next day after that assessment is made, at 11:59 p.m., and remain in effect for at least three weeks.¹¹ When the order is in effect for a region, it requires the closure of restaurants (except for take-out and delivery); hair salons, barbershops, and nail salons; personal care services; museums, zoos, and aquariums; indoor movie theaters; wineries, bars, breweries, and distilleries; family entertainment centers; cardrooms and satellite wagering; live audience sports;

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¹⁰ Regional Stay at Home Order (Dec. 3, 2020), available at <https://www.gov.ca.gov/wp-content/uploads/2020/12/12.3.20-Stay-at-Home-Order-ICU-Scenario.pdf> (last visited Dec. 18, 2020). The order is described at <https://covid19.ca.gov/stay-home-except-for-essential-needs/#regional> (last visited Dec. 18, 2020).

¹¹ Supplement to Regional Stay at Home Order, (Dec. 6, 2020), available at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/supplement-regional-stay-at-home-order.aspx> (last visited Dec. 18, 2020).

and amusement parks.¹² Retail is allowed to remain open at 20 percent capacity, with the exception of grocery stores, which may operate at 35% capacity.¹³ After an initial three-week period, if the region’s ICU capacity is at or above 15 percent, the County will be assigned a tier under the Blueprint for a Safer Economy and the Blueprint’s guidance scheme will resume its application.¹⁴ The goal of the temporary Regional Stay at Home Order is to dramatically reduce interactions between persons from different households in order to reduce COVID-19 transmission rates.¹⁵

On December 5, 2020, the California Department of Public Health announced that the Southern California region, which includes San Diego County, had dropped below 15 percent ICU capacity, triggering the application of the Regional Stay at Home Order.¹⁶ The Order went into effect at 11:59 p.m. on December 6, 2020, and remains in effect until at least December 27. As of

¹² See About COVID-19 Restrictions, Regional Stay Home Order, Questions and Answers, “What Does the Regional Stay Home Order do?”, <https://covid19.ca.gov/stay-home-except-for-essential-needs/#regional-stay-home-order>, (last visited Dec. 18, 2020) for an updated list of affected sectors.

¹³ *Id.*

¹⁴ Regional Stay at Home Order (Dec. 3, 2020), available at <https://www.gov.ca.gov/wp-content/uploads/2020/12/12.3.20-Stay-at-Home-Order-ICU-Scenario.pdf> (last visited Dec. 18, 2020).

¹⁵ *Id.*

¹⁶ *State Officials Announce Latest COVID-19 Facts*, (Dec. 5, 2020), available at <https://www.cdph.ca.gov/Programs/OPA/Pages/NR20-324.aspx> (last visited Dec. 18, 2020).

December 17, 2020, the Southern California Region, home to nearly 20 million people, has exhausted its ICU capacity, with 0.0 percent of ICU beds available.¹⁷

In addition, San Diego County remains in the Purple Tier and subject to the updated restrictions under the Blueprint. After the Regional Stay at Home Order no longer applies to the Southern California Region, San Diego will be subject to restrictions under the Blueprint that are appropriate for its tier assignment at that time.

D. The Preliminary Injunction and Order

On December 16, 2020, the trial court issued its ruling on Plaintiffs' preliminary injunction application.

The trial court found that the matter was not mooted by the subsequent issuance of updated guidance for restaurants, despite the fact that the prohibition on performances had been lifted and Plaintiffs' businesses were permitted to operate to the same extent as all restaurants. Instead, the court issued an injunction that not only permitted Plaintiffs to operate indoors but that also exempted *all* restaurants in San Diego County from the Regional Stay at Home Order and other health restrictions—even though Plaintiffs did not seek such relief in the operative complaint, or indeed at any other time.

The trial court thus entered the following injunction:

¹⁷ See About COVID-19 Restrictions, Regional Stay Home Order, <https://covid19.ca.gov/stay-home-except-for-essential-needs/#regional-stay-home-order>, Map of ICU Availability (last visited Dec. 18, 2020).

Pending the trial of this case, Defendants, and each of them and their respective agents and assigns, and any governmental entity or law enforcement officer, are hereby ENJOINED from enforcing the provisions of the cease and desist order, or any related orders including the State's Regional Stay Home Order, that prevent 1) Plaintiffs from providing live adult entertainment; and 2) San Diego County businesses with restaurant service, such as Plaintiffs' establishments, from continuing to operate their respective businesses, subject to protocols that are no greater than is essential to further Defendants' response to control the spread of COVID.

The Court emphasizes that the reach of the preliminary injunction is limited to 1) Plaintiffs providing live adult entertainment; and 2) San Diego County businesses with restaurant service, such as Plaintiffs' establishments, providing restaurant service, subject to protocols that are no greater than is essential to further Defendants' response to control the spread of COVID.

This order becomes effective immediately.

(Ex. A, at 9.) At a hearing held on December 17, 2020, the trial court addressed a request by the County to clarify whether the injunction encompassed all restaurants in San Diego County. The trial court confirmed on the record that the injunction applies to all San Diego County businesses with restaurant service, and is not limited to Plaintiffs' businesses. (**Exhibit C**, Notice of Entry of Order re: Ex Parte Application by County Defendants for Clarification of the Scope of the Preliminary Injunction Issued by the Court on December 16, 2020.)

II. LEGAL STANDARD FOR EMERGENCY STAY

The legal standard for granting a writ of supersedeas, which is also appropriate on a Rule 8.112(c)(2) petition for a temporary

emergency stay pending review, requires a petitioner to establish that (a) he would suffer irreparable harm absent the stay, and (b) that the underlying appeal “raises substantial questions” on the merits. (See *Smith v. Selma Comm. Hosp.* (2010) 188 Cal. App. 4th 1, 18.)

III. THE UNDERLYING APPEAL RAISES SUBSTANTIAL QUESTIONS

A. The Trial Court Abused Its Discretion by Reaching Claims Not Before It

The Trial Court’s order granting relief that Plaintiffs did not seek, on causes of action Plaintiffs neither pleaded nor briefed, was a clear abuse of discretion. Plaintiffs sued the State Defendants and the County to enjoin enforcement of a prohibition on live entertainment at their adult entertainment establishments. Their pleadings did not challenge public health orders as generally applied to restaurants, did not seek class certification on behalf of restaurants, and did not ask the court to enjoin public health orders as they generally applied to restaurants in San Diego County. Instead, the gravamen of the complaint, and the focus of the TRO and the preliminary injunction briefing, was First Amendment issues specific to adult entertainment venues.

Plaintiffs are not entitled to relief on causes of action not pled. (*Griffin Dewatering Corp. v. N. Ins. Co. of New York* (2009) 176 Cal. App. 4th 172, 210, *as modified on denial of reh’g* (Aug. 28, 2009), *opinion supplemented on denial of reh’g*, No. G036896, 2009 WL 2659463 (Cal. Ct. App. Aug. 28, 2009) [“A plaintiff must recover, if at all, upon a cause of action set out in the complaint,

and not on some other cause of action which may be developed by the proofs.”].) The point of pleadings is to put defendants on notice of the claims made against them so they can adduce relevant evidence and mount a defense. Because Plaintiffs neither challenged those restrictions in the complaint nor raised such a challenge in their papers, Defendants were not on notice that they needed to defend their public health restrictions generally applicable to restaurants. Had Defendants been afforded notice that the rationality of the Order’s application to restaurants was in dispute, they could have (and would have) adduced evidence and legal argument to dispute such claims. Thus, it was a clear abuse of discretion for the court to reach beyond Plaintiffs’ case and enjoin the State Defendants in ways not relevant to Plaintiffs.

The court’s overreach is underlined by its reliance on facts (which were not properly before it) from an entirely different case to support its decision. In a separate action, *640 Tenth v. Newsom* (San Diego Sup. Ct., Case No. 37-2020-0041316-CU-MC-CTL), a putative class of San Diego county restaurants and gym owners challenged the generally applicable restrictions under the Blueprint on bars and restaurants. This putative class sought a temporary restraining order enjoining enforcement of the certain public health orders generally applicable to restaurants. The challenge to the restaurant restrictions in the Blueprint was fully briefed by the parties, and on November 23, 2020, the court in that case denied Plaintiffs’ request for a temporary restraining

order. (**Exhibit D**, *640 Tenth, LP v. Newsom*, Order on Application for Temporary Restraining Order (Nov. 23, 2020).)

Quite remarkably, the court in this case, lacking evidentiary support for its own order (because the relevant issues were not before the court), granted judicial notice of the *640 Tenth* order and relied on background facts from that order while ignoring the order’s express findings of fact supporting its conclusions. This extraordinary abuse of judicial notice¹⁸ allowed the trial court judge in this action to essentially second-guess—and, in fact, reverse—the decision denying the TRO application in *640 Tenth*, and grant the *640 Tenth* plaintiffs (who were not before the court in this action) the relief they had been denied in another courtroom on November 23.

B. The Trial Court Erred in Applying Heightened Scrutiny to A Generally Applicable Health Order

In reaching beyond the First Amendment issues before it, the trial court also erred in applying what is plainly heightened scrutiny to a generally applicable regulation of restaurants that can lay claim to no particular expressive rights, and whose challenges to the Order would therefore be subject to rational-basis review.¹⁹ While the standard used by the court in making

¹⁸ “While judicial notice is appropriate to establish the existence of the material in court records, judicial notice of the content of these records for the purpose of establishing truth of the content is distinctly improper.” (*Columbia Cas. Co. v. Nw. Nat’l Ins. Co.* (1991) 231 Cal.App.3d 457, 473.)

¹⁹ Even assuming arguendo that the right to engage in a chosen profession is implicated by the Orders, “all cases

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its ruling is not entirely clear, the Order does repeatedly invoke the heightened standard applicable to First Amendment rights. (Ex. A, at 6-7 [citing “intermediate [*United States v. O’Brien* (1968) 391 U.S. 467] standard]; 9 [“subject to protocols that are no greater than is essential”].) Yet, as numerous courts have recognized in reviewing the State’s public health orders as applied to similar businesses (such as gyms, restaurants, hotels, and hair salons), the appropriate standard of review is rational basis.²⁰ Indeed, another trial court judge in San Diego County Superior Court applied that standard just weeks ago in the *640 Tenth* case. (See Ex. D.)

(...continued)

recognizing such a right have deal[t] with a *complete prohibition* on the right to engage in a calling, and not [a] sort of brief interruption.” *Guzman v. Shewry* (9th Cir. 2009) 552 F.3d 941, 954 (internal citations and quotations omitted) (emphasis in original).

²⁰ See, e.g., *Best Supplement Guide, LLC v. Newsom*, No. 20-cv-00965 (E.D. Cal. May 22, 2020), 2020 WL 2615022, at *6 (holding that the State’s orders closing businesses “were enacted for a legitimate reason,” justifying the temporary restrictions on plaintiffs’ right to pursue the occupation of choice); *Six v. Newsom* (C.D. Cal, May 22, 2020) 462 F. Supp. 3d 1060, 1073 (professional musician’s claim alleging violation of supposed “right to earn a living” unlikely to succeed on the merits or even raise a serious question going to the merits); *McGhee v. City of Flagstaff, et al.*, (D. Ariz. May 8, 2020) No. CV-20-08081-PCT-GMS, 2020 WL 2308479, at *5 (rejecting substantive due process challenge to Arizona’s stay-at-home order).

C. The Trial Court Erred in its First Amendment Analysis

The trial court also erred in granting Plaintiffs the injunctive relief that *they did seek* – a preliminary injunction against state and local health orders restricting live adult entertainment—because the orders do not violate the First Amendment.

The Regional Stay at Home Order is a generally applicable law that does not offend the First Amendment simply because its enforcement may have incidental effects on some businesses that engage in protected conduct. (*Cohen v. Cowles Media Co.* (1991) 501 U.S. 663, 669). Generally applicable laws do not implicate the First Amendment unless “it was conduct with a significant expressive element that drew the legal remedy in the first place . . . or where a statute based on a non-expressive activity has the inevitable effect of singling out those engaged in expressive activity.” (*Arcara v. Cloud Books, Inc.* (1986) 478 U.S. 697, 706–07 [upholding enforcement of a generally applicable public health regulation against a bookstore].)

Here, even though adult entertainment venues may be engaging in protected expressive activity, such activity is not the “significant expressive element that drew the legal remedy in the first place.” (*Id.* at 706.) Rather, it is the threat to the Region’s healthcare delivery system and the need to restrict interactions to slow the spread of the virus that has led to the temporary closure of these types of businesses for certain operations. Also, it cannot be said that this generally applicable order has “the inevitable effect of singling out those engaged in expressive

activity,” because the Regional Stay at Home Order also requires the temporary closure of many other businesses, including restaurants without performances, hair and nail salons, indoor gyms, massage parlors, amusement parks, aquariums and numerous others. (*Id.* at 707.) “[W]here, as here, the government is regulating neither speech nor an incidental, non-expressive effect of speech,” the Court need not apply a First Amendment standard of review. (*Id.* at 708, O’Connor, J., concurring.) “Any other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences . . . would require analysis under the First Amendment.” (*Ibid.*) Indeed, it would threaten to lead to such results in this very case: unrelated San Diego businesses (barber shops, massage parlors, and so on) could seek to exempt themselves from the State’s public health orders by offering adult entertainment at their establishments.

Second, even if the First Amendment analysis applies to the Regional Stay at Home Order or the updated Restaurant Guidance, Defendants’ health orders meet that standard. “A time, place, and manner restriction on speech is valid if it: (a) is content neutral, (b) is narrowly tailored to serve a significant government interest, and (c) leaves open ample alternative channels for communication.” (*Klein v. San Diego County* (9th Cir. 2006) 463 F.3d 1029, 1034.) The COVID-19 measures at issue in the Complaint, as well as those that currently apply, are directed at promoting the safe and gradual reopening of the State in order to safeguard public health. The restrictions make no

reference to content and nothing in the record suggests that the State disagrees with Plaintiffs' message or that any Defendant has an animus toward live adult entertainment. (See, e.g., *Harvest Rock*, 2020 WL 5265564, at p. *3 [California's directives restricting activities based on the location and nature of the gathering were not content based].) "[A] facially neutral law does not become content-based simply because it may disproportionately affect speech on certain topics." (*McCullen v. Coakley* (2014) 573 U.S. 464, 480.) Rather, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." (*Id.*, internal quotation marks and citation omitted.)

IV. PUBLIC HEALTH AND SAFETY WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN IMMEDIATE STAY

The preliminary injunction order is breathtaking in scope and overreaches any relief sought by the Plaintiffs or briefed by the parties. With San Diego County in the midst of an unprecedented surge in hospitalizations and deaths, the Court's Order nullifies the Regional Stay at Home Order as applied to restaurants, eviscerates critical COVID-19 mitigation measures deemed necessary by the California Department of Public Health and the State Health Officer, and effectively permits all restaurants in San Diego to open for indoor dining according to the standards of their choosing. This places all residents of San Diego County at grave risk: with no current ICU capacity whatsoever in the Southern California region, the health care

system is on the verge of being overwhelmed and unable to deliver care not only to COVID patients but to all people requiring emergent or serious medical care. The trial court's order thus threatens "serious and widespread hardship" and jeopardizes "the essential necessities of life for tens of thousands of Californians." (*White v. Davis* (2003) 30 Cal.4th 528, 559.) Indeed, the trial court's order threatens life itself. Such threat to public health and safety, and to the preservation of human life, constitute irreparable harm.

A. The Regional Stay at Home Order is necessary to mitigate the ongoing surge in COVID-19 cases.

The trial court's order expressly enjoins enforcement of the Regional Stay at Home Order against all restaurants in San Diego County. That public health order is directly aimed at mitigating the public health emergency currently playing out in San Diego County, and across the entire State. Enjoining enforcement of that order cripples California's response to the pandemic just as it confronts an unprecedented surge in COVID-19 transmission that is overwhelming the state's hospital system.

The Regional Stay at Home Order takes effect in counties within regions of the state with critical shortages in ICU capacity in order to protect California's health care system. Transmission levels in the Region and in California have reached the point where escalating hospitalizations are jeopardizing the State's ability to deliver health care to Californians suffering from COVID-19 and from other serious and life-threatening illnesses. With no widely available vaccine or treatments, these public

health measures must be implemented now, or else San Diego County risks seeing hundreds of otherwise preventable deaths, not just from COVID-19 cases but from any cases resulting from an overwhelmed medical care system.

B. The State and San Diego County’s residents will experience irreparable harm if COVID-19 public health orders cannot be applied to restaurants.

The Preliminary Injunction enjoins the State from “enforcing the provisions of the cease and desist order, or any related orders including the State’s Regional Stay Home Order, that prevent . . . San Diego County businesses with restaurant service . . . from continuing to operate their respective businesses, subject to protocols that are no greater than is essential to further Defendants’ response to control the spread of COVID.” The language of the preliminary injunction thus covers the Restaurant Guidance, which describes required modifications to the operation of restaurants depending on the current epidemiological conditions in the county.²¹ For example, the Restaurant Guidance identifies under what conditions restaurants are permitted to return to indoor operations, and it proscribes certain required modifications such as capacity limitations and physical distancing of tables that are necessary to reduce the risk of transmission.

²¹ COVID-19 Industry Guidance: Restaurants, Nov. 24, 2020, also available at <https://files.covid19.ca.gov/pdf/guidance-dine-in-restaurants.pdf> (last visited Dec. 17, 2020).

By enjoining “related orders” from being enforced, the court appears to have enjoined the State from enforcing all or parts of its Restaurant Guidance. The terms of the injunction are vague and could be read to permit restaurants to resume indoor dining at full capacity.²² Indoor dining is a particularly high-risk activity. As CDPH epidemiologist Dr. James Watt explains:

The release of infectious particles into the air when someone speaks, coughs, sneezes, or sings, is a greater risk in indoor spaces because there is reduced ventilation and reduced dispersion of infectious particles. Restaurants and bars are considered high risk environments for transmission because they are indoor activities that create an environment that increases levels of community mixing of individuals outside of one’s own household. Restaurants and bars are settings where people from different households share the same space for prolonged periods of time. Further, eating and drinking requires removal of face coverings which

²² The order does not appear to be explicitly limited to the enforcement of “public health orders.” It is unclear what the reference to “any related orders” means. The order can therefore be interpreted to prohibit enforcement of any and all State and local laws, regulations, and orders that control the manner in which Plaintiffs and *any* restaurants in San Diego County can provide not just “live adult entertainment,” but also “restaurant service” in general. Numerous State and local laws, regulations, and orders—including those with no relation to the ongoing COVID-19 crisis—impact the ways in which restaurants can operate. (See, e.g., Cal. Labor Code § 6309 [requiring inspection of complaints charging serious violations of workplace health and safety requirements within three days, and inspection of imminent hazards on the same day].)

can increase the spread of infectious particles. Additionally, physical movement within the establishment, duration of time spent in the establishment, and the degree of social mixing among individuals and groups outside one's household may all be significant in these sectors, which substantially elevates the risk of transmission even where face coverings can be worn.

(Exhibit E, Declaration of Dr. James Watt, MD, MPH, in Support of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, executed and filed on November 30, 2020, in *Ghost Golf, Inc. v. Newsom*, No. 20CECG03170 (Fresno County Sup. Ct.)²³ ("Watt Decl.") ¶ 44; see also <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-of-Closure-of-Sectors-in-Response-to-COVID-19.aspx>).

Additionally, restaurants and bars pose specific challenges for contact tracing and notifying people when a COVID-19 exposure occurs. When a person is diagnosed with COVID-19 and reports eating or drinking at a restaurant or bar, it is very difficult to identify those people who may have been exposed so they can get care and get tested. (Ex. E, Watt Decl. ¶ 46.)

These risks are well-documented and there is "broad, factual, scientific, and legal support" for the State's approach to restaurants (Ex. D, 640 Tenth Order, at 24), including from the

²³ This declaration was submitted in support of the State Defendants' opposition to the preliminary injunction application in this litigation.

CDC. (See Ex. E, Watt Decl. ¶ 45, citing MMWR Sept 11, 2020 69 (36) [study finding, among other things, that going to locations with on-site eating and drinking was associated with COVID-19 test positivity and those who tested positive for COVID-19 were twice as likely to have dined at a restaurant than those who tested negative].)

By enjoining the State’s enforcement of its Restaurant Guidance, the court has undermined all of the calibrated, sector-specific mitigation measures that the State has put into place to reduce the spread of COVID-19 in the restaurant setting. By lifting those measures and permitting indoor dining regardless of the epidemiological conditions and without modifications,²⁴ there is high risk that a restaurant could become a superspreader site.

The preliminary injunction order raises serious procedural and substantive questions about its appropriate scope. The order also prevents State and local health officials from taking the immediate, but temporary, actions that are urgently needed to mitigate the dire effects of the current public health crisis. For these reasons, an immediate temporary stay should issue, to

²⁴ The injunction does permit the State to enforce “protocols that are no greater than is essential to further Defendants’ response to control the spread of COVID.” (Ex. A, at 9.) However, it does not explain who determines which aspects of the State’s Guidance are “essential . . . to control the spread of COVID” or which specific aspects are essential or non-essential. In the view of the State’s public health officials, the mandatory provisions of the Guidance are essential, which is why CDPH and the Public Health Officer made them requirements.

allow the Court to resolve this issue of critical public importance
by extraordinary writ.

Dated: December 18, 2020 Respectfully submitted,

XAVIER BECERRA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
ANTHONY R. HAKL
Supervising Deputy Attorney General

/s/ P. Patty Li

P. PATTY LI
Deputy Attorney General
*Attorneys for Petitioners Governor Gavin
Newsom and California Department of
Public Health*

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Exhibit A

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

DATE: 12/16/2020

TIME: 02:57:00 PM

DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil

CLERK: Andrea Taylor

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2020-00038194-CU-CR-CTL** CASE INIT.DATE: 10/21/2020

CASE TITLE: **Midway Venture LLC vs County of San Diego [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Civil Rights

APPEARANCES

The Court, having taken the above-entitled matter under submission on 12/16/2020 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The Order to Show Cause (ROA # 1, 36, 38, 40, 49) for a Preliminary injunction by Plaintiffs MIDWAY VENTURE LLC dba PACERS SHOWGIRLS / PACERS SHOWGIRLS INTERNATIONAL, PETER BALOV, F - 12 ENTERTAINMENT GROUP INC. dba CHEETAHS, and RICH BUONANTONY ("Plaintiffs") against Defendants COUNTY OF SAN DIEGO, WILMA J. WOOTEN, in her official capacity as Public Health Officer, County of San Diego, GOVERNOR GAVIN NEWSOM, in his official capacity as the Governor of the State of California, and the CALIFORNIA DEPARTMENT OF PUBLIC HEALTH ("Defendants"), is GRANTED.

Pending the trial of this case, Defendants, and each of them and their respective agents and assigns, and any governmental entity or law enforcement officer, are hereby ENJOINED from enforcing the provisions of the cease and desist order, or any related orders including the State's Regional Stay Home Order, that prevent 1) Plaintiffs from providing live adult entertainment; and 2) San Diego County businesses with restaurant service, such as Plaintiffs' establishments, from continuing to operate their respective businesses, subject to protocols that are no greater than is essential to further Defendants' response to control the spread of COVID.

The Request (ROA # 29 at footnote 10) of Defendants Gavin Newsom, in his official capacity as Governor of California, and the California Department of Public Health (unless specified otherwise, collectively referred to as "the State") for judicial notice of the Watt Declaration, which was executed and filed on October 16, 2020, in Calvary Chapel of Ukiah v. Newsom, No.42:20-cv-01431-1CJMDMC (E.D. Cal. Oct. 16, 2020), as ECF No. 39, is GRANTED IN PART and DENIED IN PART. The Court takes judicial notice of the date on which the Watt Declaration was filed with the Court; otherwise, the Request is DENIED.

The evidentiary objections (ROA # 51) of Defendants COUNTY OF SAN DIEGO and WILMA J. WOOTEN (unless specified otherwise, collectively referred to as "the County") are OVERRULED. IN

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PART and SUSTAINED IN PART. The objections are OVERRULED except as follows: Nos. 3 – 5 are SUSTAINED.

Plaintiffs' evidentiary objections (ROA # 57) to the declaration of Brent Panas are OVERRULED; however, Panas' representation, at paragraph 5 ("On November 30, 2020, seventeen new community COVID-19 outbreaks were confirmed. For the seven-day period from November 24 through November 30, 2020, 81 community outbreaks were confirmed. The number of community outbreaks the County is experiencing and documenting remains far above the trigger of seven or more outbreaks in a seven-day period.") is vague and marginally relevant, if at all, to the limited issue before the Court; namely, whether Plaintiffs providing live adult entertainment **and** San Diego County businesses with restaurant service, such as Plaintiffs' establishments, subject to protocols, present any risk – much less a greater risk than before Governor Newsom issued his December 3, 2020 Regional Stay at Home Order - to the spread of COVID.

Plaintiffs' evidentiary objections (ROA # 58) to the declaration of Dr. James Watt are OVERRULED IN PART and SUSTAINED IN PART. Plaintiffs' general objection to Dr. Watt's declaration (attached as Exh. "F" to the declaration of Attorney Li – ROA # 55) is well taken. The State appears to have caused Dr. Watt's declaration to be filed on November 30, 2020, in Ghost Golf, Inc. v. Newsom, No. 20CECG03170 (Fresno County Sup. Ct.). The Court will nonetheless receive the evidence as a proffer of proof from counsel of the testimony of Dr. Watt if he were called and sworn to testify as a witness in this case. The balance of Plaintiffs' objections are, except as noted, SUSTAINED. Nos. 1, 4, 7, 8 and 9 are OVERRULED.

Plaintiffs' objection to the declaration of Chelsea Kuhn, filed by the State on December 15, 2020, is SUSTAINED.

The County's Request for judicial notice of the Court's November 23, 2020 Order (ROA # 50) in the San Diego County Superior Court case entitled 640 Tenth LP vs. Newsom, case 37-2020-00041316-CU-MC-CTL, is GRANTED.

Plaintiffs operate Pacers and Cheetahs, adult entertainment establishments within the meaning of San Diego Municipal Code ("SDMC") section 33.3601 et seq. under Nude Entertainment Business Permit number 2010022137 issued by the Chief of the San Diego Police Department. Complaint at par's 1 – 4. Closed for months after the pandemic arose, deprived of direction from Defendants, and left to guess how to re-open their establishments, Plaintiffs submitted a plan to the County which included the following restrictions:

- "- Stages to be located on two (2) foot platforms, fifteen (15) feet from any tables.
- Stages to be roped off with signs strictly advising patrons not to pass within the fifteen-foot buffer.
- Adult entertainers to perform one artist at a time per stage.
- All stage equipment to be sanitized after a performance.
- All performers to wear mask coverings while performing.
- The announcer and disc jockey ("DJ") to be located fifteen (15) feet from any tables, roped off and designated for one person at a time.

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- Audio stage to be sanitized and cleaned after every daily use.
- The announcer and DJ to wear a mask covering.
- The announcer and DJ to issue regular reminders to patrons that they are not to approach performers and they are to remain seated at their tables." Declarations of Jason P. Saccuzzo (ROA # 14), Trever Shamshoian (ROA # 15) and Rich Buonantony (ROA # 16).

Without objection from the County, Plaintiffs re-opened their establishments and provided indoor entertainment for approximately five weeks before receipt of Dr. Wooten's cease and desist letter. Declarations of Jason P. Saccuzzo (ROA # 14), Trever Shamshoian (ROA # 15) and Rich Buonantony (ROA # 16).

Facing financial ruin, Plaintiffs have filed this action to contest Dr. Wooten's cease and desist letter, or any related orders, which prevent them from continuing to operate their respective businesses, subject to protocols. Declarations of Jason P. Saccuzzo (ROA # 14), Trever Shamshoian (ROA # 15) and Rich Buonantony (ROA # 16).

On November 6, 2020, the Court, after consideration of the briefs, evidence and arguments of counsel, issued a temporary restraining order ("TRO") enjoining Defendants from enforcing the provisions of the cease and desist orders, or any related orders, to prevent Plaintiffs from being allowed to provide live adult entertainment, pending an order to show cause ("OSC") re the issuance of a preliminary injunction. ROA # 36, 38, 40, 49.

Since re-opening, Plaintiffs have "implemented and followed all provisions of the State of California Industry Guidance for restaurants, wineries and bars, including, but not limited to, individual control measures and screening, cleaning and disinfecting protocols, and physical distancing." Declarations of Trever Shamshoian (ROA # 44) and Rich Buonantony (# 45).

"No patron, staff member, or adult entertainer has been exposed to COVID-19" and "no COVID-19 cases" have been traced back to Pacers and Cheetahs." Plaintiffs have provided "a very safe place for live adult entertainment" and followed "both the letter and spirit of the TRO." Declarations of Trever Shamshoian (ROA # 44) and Rich Buonantony (# 45).

The testimony of Shamshoian (ROA # 44) and Buonantony (# 45) are consistent with the opinion testimony of Dr. Lawrence Mayer who states, at paragraph 3 of his declaration (ROA # 41):

"I have been asked to opine on the issue of whether a restaurant would increase the risk to its patrons or employees if a dancer performing on a stage were present if the dancer is 15 feet away from all patrons and suitably masked. There is no scientific evidence of increased risk to the patrons if dancing is allowed at a restaurant under those conditions."

Defendants have not submitted any evidence to refute the testimony of Shamshoian (ROA # 44), Buonantony (# 45) and Dr. Mayer (ROA # 41). The Court infers that, based on the declaration of Panis, the County possesses contact tracing data and has the power to produce such evidence to refute Plaintiffs' assertions that Plaintiffs providing live adult entertainment and San Diego County businesses with restaurant service, such as Plaintiffs' establishments, subject to protocols, do **not** present any risk – much less a greater risk than before Governor Newsom issued his December 3, 2020 Regional Stay at

Home Order - to the spread of COVID in San Diego County. Since the County could have produced "stronger evidence," the Court discounts the County's "weaker evidence." CACI 203.

Accordingly, the Court finds that Plaintiffs have been devoid of COVID, have done nothing to contribute to the spread of COVID, and have honored their representations to Dr. Joel Day and the County.

In their oppositions, Defendants note that, since the Court issued the TRO, Defendants have "changed the State's treatment of live performances held at restaurants, by authorizing such performances under the same conditions under which restaurants may operate." (emphasis added by the Court) Defendants assert that "This motion is therefore moot." (emphasis added by the Court) ROA # 54 at pages 10 – 11; ROA # 50 at page 2.

In Roman Catholic Diocese of Brooklyn v. Cuomo (November 25, 2020) - S. Ct. -; 2020 WL 6948354; 20 Cal. Daily Op. Serv. 11,976, Petitioners "filed § 1983 actions alleging that Governor's emergency Executive Order imposing occupancy restrictions on houses of worship during COVID-19 pandemic violated Free Exercise Clause." (Likewise, Plaintiffs' claims include three counts for Violation of 42 U. S. C. § 1983.) The Court enjoined Governor Cuomo from enforcing the Executive Order imposing restrictions on houses of worship.

The Court stated, in pertinent part:

"The dissenting opinions argue that we should withhold relief because the relevant circumstances have now changed. After the applicants asked this Court for relief, the Governor reclassified the areas in question from orange to yellow, and this change means that the applicants may hold services at 50% of their maximum occupancy. The dissents would deny relief at this time but allow the Diocese and Agudath Israel to renew their requests if this recent reclassification is reversed.

There is no justification for that proposed course of action. **It is clear that this matter is not moot.** See Federal Election Comm'n v. Wisconsin Right to Life, Inc. 551 U. S. 449, 462, 127 S. Ct. 2652, 128 L. Ed.2d 329 (2007); Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc. 528 U. S. 167, 189, 120 S. Ct. 693, 145 L. Ed.2d 610 (2000). **And injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange.** See, e.g., Susan B. Anthony List v. Driehaus 573 U. S. 149, 158, 134 S. Ct. 2334, 189 L. Ed.2d 246 (2014). **The Governor regularly changes the classification of particular areas without prior notice.** If that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained. At most Catholic churches, Mass is celebrated daily, and "Orthodox Jews pray in [Agudath Israel's] synagogues every day." Application No. 20A90, at 4. Moreover, if reclassification occurs late in a week, as has happened in the past, there may not be time for applicants to seek and obtain relief from this Court before another Sabbath passes. Thirteen days have gone by since the Diocese filed its application, and Agudath Israel's application was filed over a week ago. While we could presumably act more swiftly in the future, there is no guarantee that we could provide relief before another weekend passes. **The applicants have made the showing needed to obtain relief, and there is no reason why they should bear the risk of suffering further irreparable harm in the event of another reclassification.**" (emphasis added by the Court)

This record reflects that Defendants' latest "change" is consistent Plaintiffs' initial assertion that Defendants' "orders have undergone endless and bewildering changes." ROA # 13 at page 9.

Like the Supreme Court in Roman Catholic Diocese of Brooklyn v. Cuomo, the Court finds that

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Defendants' latest change does not render Plaintiffs' Application moot.

To avoid any confusion, the Court is deeply empathetic to the County and Dr. Wooten's dilemma in balancing their local responsibilities, based on the data in San Diego County, while subject to the State's threat "to withhold funding from counties that do not adhere to its guidance or enforce its orders." ROA # 50 at pages 3 – 4.

As Brent Panas, Chief of the County's COVID-19 Safe Reopening Compliance Team, declares "As the Governor and other State officials have made clear, local governments (including the County of San Diego) do not have authority to relax the State's COVID-19 public health restrictions and orders. While counties can adopt stricter requirements in their public health orders, they cannot affirmatively permit activities or business operations that violate the State's guidelines and orders." ROA # 52 at paragraph 6.

Nobody is in a better, more informed position to manage the local health conditions than Dr. Wooten. With full knowledge of current data, Dr. Wooten has purportedly represented 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.'" The Court's November 23, 2020 Order (ROA # 50), at page 7, in the San Diego County Superior Court case entitled 640 Tenth LP vs. Newsom, case no. 37-2020-00041316-CU-MC-CTL.

The Court infers from Dr. Wooten's purported representations that she does not consider businesses with restaurant service, such as Plaintiffs' establishments, to be responsible for the increase in the County's COVID cases. ROA # 50 at pages 5 – 6; ROA # 52 at paragraph 4. Given every opportunity, the County has provided the Court with no evidence that San Diego County businesses with restaurant service, such as Plaintiffs' establishments, who've implemented protocols as directed by the County, present any risk – much less a greater risk than before Governor Newsom issued his December 3, 2020 Regional Stay at Home Order - to the spread of COVID. ROA # 52 at paragraph 7.

The obvious question, from the Court's perspective, is, in the absence of evidence, why is the State's Regional Stay at Home Order limiting San Diego County restaurant businesses "to take-out, pick-up, or delivery" rational? ROA # 54 at pages 9 – 10.

In support of their position, the State attached the Declaration of Dr. James Watt, MD, MPH, in Support of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, executed and filed on November 30, 2020, in Ghost Golf, Inc. v. Newsom, No. 20CECG03170 (Fresno County Sup. Ct.). ROA # 55, Exh. F.

The Court does not question Dr. Watt's qualifications, as Chief of the Division of Communicable Disease Control of the Center for Infectious Diseases at the California Department of Public Health ("CDPH"), to form and express opinions on the subject of "COVID-19, short for coronavirus disease 2019." Paragraphs 2 – 15 of Dr. Watt's declaration. Dr. Watt's declaration provides a general overview of COVID-19 in California but says nothing to support restrictions, in addition to existing protocols, in San Diego County. Indeed, part of Dr. Watt's opinion testimony more corroborates than refutes the testimony of Shamshoian (ROA # 44), Buonantony (# 45) and Dr. Mayer (ROA # 41). See paragraphs 47 and 48 of Dr. Watt's declaration. Again, given every opportunity, the State has provided the Court with no evidence that San Diego County businesses with restaurant service, such as Plaintiffs' establishments,

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who've implemented protocols as directed by the County, present any risk – much less a greater risk than before Governor Newsom issued his December 3, 2020 Regional Stay at Home Order - to the spread of COVID.

In the absence of such evidence, Dr. Wooten's representation that "penalizing sectors like restaurants and gyms for the case increase is wrong" resonates with the Court.

The State argues that "When the defendant is a public official or agency, the court also considers the public interest. (Tahoe Keys Property Owners' Assn. v. State Water Resources Control Board (1994) 23 Cal. App. 4th 1459, 1472-73.)" ROA # 54 at page 10.

In Roman Catholic Diocese of Brooklyn v. Cuomo, the Court stated:

"*Public interest.* Finally, it has not been shown that granting the applications will harm the public. As noted, the State has not claimed that attendance at the applicants' services has resulted in the spread of the disease. And the State has not shown that public health would be imperiled if less restrictive measures were imposed.

Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. **But even in a pandemic, the Constitution cannot be put away and forgotten.** The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure." (emphasis added by the Court)

In his concurring opinion, Justice Gorsuch stated:

"Government is not free to disregard the First Amendment in times of crisis. At a minimum, the Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available. See Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 546, 113 S. Ct. 2217, 114 L. Ed.2d 472 (1993). Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles.

...

At the same time, the Governor has chosen to impose no capacity restrictions on certain businesses he considers "essential." And it turns out the businesses the Governor considers essential include hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents are all essential too. So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?"

True, the current case is not a Church case but, with Plaintiffs, the nature of their entertainment is entitled to First Amendment protection ("if only within the outer ambit of the First Amendment's protection.") City of Erie v. Pap's A.M. (2000) 529 U. S. 277, 289; Krontz v. City of San Diego (2006) 136 Cal. App. 4th 1126, 1132. Further, since the State and County's purpose in enacting the restrictions appear to be unrelated to suppressing Plaintiffs' expression, the restrictions "need only satisfy the "less

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stringent," intermediate O'Brien standard. E.g., Johnson, supra, at 403, 109 S. Ct. 2533." The Court's application of a more stringent test in ruling on Plaintiffs' Application for a Temporary Restraining Order is vacated. Ironically, the "restrictions such as the no-touch and six-foot rules" at issue in the Krontz case are very much not at issue in this case; to wit, see Plaintiffs' self-imposed restrictions to satisfy the County's protocols ("Stages to be located on two (2) foot platforms, fifteen (15) feet from any tables. - Stages to be roped off with signs strictly advising patrons not to pass within the fifteen-foot buffer.") Declarations of Jason P. Saccuzzo (ROA # 14), Trever Shamshoian (ROA # 15) and Rich Buonantony (ROA # 16).

Businesses with restaurant service, such as Plaintiffs' establishments, serve the public interest. These business establishments provide sustenance to and enliven the spirits of the community, while providing employers and employees with means to put food on the table and secure shelter, clothing, medical care, education and, of course, peace of mind for they and their families.

The State relies upon Jacobson v. Massachusetts (1905) 197 U. S. 11, 27 to assert that the "Challenged Orders Are a Permissible Exercise of the State's Emergency Powers." ROA # 54 at page 15. However, as Justice Gorsuch noted in his concurring opinion, "But Jacobson hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction." (emphasis added by the Court)

The State also asserts that "Restrictions on Live Entertainment Are Content-Neutral Time, Place, Manner Regulations that Survive Intermediate Scrutiny." "A time, place, and manner restriction on speech is valid if it: (a) is content neutral, (b) is narrowly tailored to serve a significant government interest, and (c) leaves open ample alternative channels for communication." (Klein v. San Diego County (9th Cir. 2006) 463 F. 3d 1029, 1034.)" ROA # 54 at page 15. However, shuttering Plaintiffs' establishments except "to take-out, pick-up, or delivery," in the absence of evidence to support the restrictions, is neither "neutral" nor "narrow." Defendants' characterization of Plaintiffs' establishments as restaurants or as non-essential does not dilute Plaintiffs' right to first amendment protection. ROA # 56 at page 8. Characterization of services as non-essential may be politically expedient but, in too many instances, is practically inconsistent and legally suspect; for example, houses of worship. The Court also questions whether "take-out, pick-up, or delivery" is consistent with the patrons' primary purpose in frequenting Pacers and Cheetahs, and therefore whether such restriction "leaves open ample alternative channels for communication" with the State and County.

In response to the Court's initial observation that "the County appears to have loosely, if not arbitrarily, enforced this prohibition" (ROA # 36 at page 4), the County asserts that "Plaintiffs have presented no evidence of selective enforcement of the Public Health Order by County Defendants, much less evidence of selective enforcement "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." [Murgia, supra, 15 Cal. 3d at 299, quoting Oyer, supra, 368 U. S. at 456.]" ROA # 50 at page 15.

In its opposition (ROA # 50), the County further asserts, at page 10:

"Contrary to Plaintiffs' contentions, County Defendants have in no way singled out Plaintiffs' establishments, or live adult entertainment in general, for enforcement activity under the Public Health Order. The 125 cease-and-desist letters, and seven Immediate Closure Orders, that County Defendants have issued through November 30, 2020, involved a wide array of business and other activities, including gyms, fitness centers, yoga studios, bars, restaurants, spas, fraternities and sororities, religious

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entities, and entertainment centers. [Panas decl., at ¶¶ 13 - 14, and Exhs. 4 - 5 thereto.] And with respect to live entertainment, Plaintiffs' businesses were not the only establishments that received a cease-and-desist letter from the County concerning live entertainment taking place in violation of the then- applicable State COVID-19 restrictions and the Public Health Order. [Panas decl., at ¶ 14.]

The Court cannot find, based on this record, that the County has arbitrarily enforced the prohibition of live entertainment indoors at bars and restaurants; however, the County's issuance of "cease-and-desist letters, and Immediate Closure Orders, to "a wide array of business and other activities, including gyms, fitness centers, yoga studios, bars, restaurants, spas, fraternities and sororities, religious entities, and entertainment centers" does little, if anything, to demonstrate any nexus between businesses with restaurant service, such as Plaintiffs' establishments, who've implemented protocols as directed by the County, **and** the spread of COVID.

Defendants rely upon the State's Regional Stay Home Order. ROA # 52 at par. 7; ROA # 55, Exh. "D." Upon review, the Court notes that the State has created a series of Regions, each of which consists of several counties. San Diego County is one of eleven counties (Imperial, Inyo, Los Angeles, Mono, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, Ventura) in the Southern California Region. The State apparently measures the "ICU bed capacity" in each Region and imposes restrictions to "gatherings of any size, closes operations except for critical infrastructure and retail, and requires 100% masking and physical distancing."

The Court questions whether there is a rational nexus between the percentage of ICU bed capacity throughout the Southern California Region **and** Plaintiffs providing live adult entertainment and businesses with restaurant service, such as Plaintiffs' establishments, in San Diego County. Defendants have presented no evidence that businesses with restaurant service, such as Plaintiffs' establishments, who've implemented protocols as directed by the County, have impacted ICU bed capacity throughout the Southern California Region (much less in San Diego County).

In Jamison v. department of Transportation (2016) 4 Cal. App. 5th 356, 361, 362, the Court stated:

"In deciding whether to issue a preliminary injunction, a trial court must evaluate two interrelated factors: (i) the likelihood that the party seeking the injunction will ultimately prevail on the merits of his [or her] claim, and (ii) the balance of harm presented, i.e., the comparative consequences of the issuance and non-issuance of the injunction. [Citations.] (Common Cause v. Board of Supervisors (1989) 49 Cal. 4th 432, 441, 442.) 'The trial court's determination must be guided by a "mix" of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction. [Citation.]' (Butt v. State of California (1992) 4 Cal. 4th 668, 678.) However, '[a] trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim.' (Ibid.)"

In Smith v. Adventist Health System / West (2010) 182 Cal. App. 4th 729, 749, the Court stated:

"A superior court must evaluate two interrelated factors when ruling on a request for a preliminary injunction: (1) the likelihood that the plaintiff will prevail on the merits at trial and (2) the interim harm that the plaintiff would be likely to sustain if the injunction were denied as compared to the harm that the defendant would be likely to suffer if the preliminary injunction were issued. (Cohen v. Board of Supervisors, supra, 40 Cal. 3d at p. 286.) Weighing these factors lies within the broad discretion of the superior court. (Ibid.; see pt. VI., post, for discussion of Butt v. State of California (1992) 4 Cal. 4th 668.)"

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Plaintiffs have made an adequate showing that they have exhausted their capital trying to comply with Defendants' "endless and bewildering" orders, have sustained significant, if not draconian, losses, and are fearful that their businesses may be closed permanently if Defendants' latest orders are not enjoined. ROA #'s 13 – 17. The Court finds that Plaintiffs' evidence and arguments is credible.

Defendants, on the other hand, have provided the Court with no evidence that Plaintiffs providing live adult entertainment and San Diego County businesses with restaurant service, such as Plaintiffs' establishments, who've implemented protocols as directed by the County, present any risk – much less a greater risk than before Governor Newsom issued his December 3, 2020 Regional Stay at Home Order - to the spread of COVID.

Further, Defendants have presented no evidence that Plaintiffs providing live adult entertainment and San Diego County businesses with restaurant service, such as Plaintiffs' establishments, who've implemented protocols as directed by the County, have impacted ICU bed capacity throughout the Southern California Region (much less in San Diego County).

The Court finds that, based on this record, 1) the harm to Plaintiffs if the preliminary injunction is denied is greater than the harm to Defendants if the preliminary is granted; and 2) it is likely that Plaintiffs will prevail on the merits of one or more of their claims.

Pending the trial of this case, Defendants, and each of them and their respective agents and assigns, and any governmental entity or law enforcement officer, are hereby ENJOINED from enforcing the provisions of the cease and desist order, or any related orders including the State's Regional Stay Home Order, that prevent 1) Plaintiffs from providing live adult entertainment; and 2) San Diego County businesses with restaurant service, such as Plaintiffs' establishments, from continuing to operate their respective businesses, subject to protocols that are no greater than is essential to further Defendants' response to control the spread of COVID,

The Court emphasizes that the reach of the preliminary injunction is limited to 1) Plaintiffs providing live adult entertainment; and 2) San Diego County businesses with restaurant service, such as Plaintiffs' establishments, providing restaurant service, subject to protocols that are no greater than is essential to further Defendants' response to control the spread of COVID.

This order becomes effective immediately.



Judge Joel R. Wohlfeil

Exhibit B

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18 Attorney for Plaintiffs,
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20 *dba* CHEETAHS and RICH BUONANTONY

21 SUPERIOR COURT OF THE STATE OF CALIFORNIA

22 IN AND FOR THE COUNTY OF SAN DIEGO

23 MIDWAY VENTURE LLC *dba* PACERS) Case No.: 37-2020-00038194-CU-CR-CT
24 SHOWGIRLS/PACERS SHOWGIRLS)
25 INTERNATIONAL, a California limited) **COMPLAINT FOR:**
26 liability company; PETER BALOV, an)
27 individual; F-12 ENTERTAINMENT GROUP) **(1) DECLARATORY AND INJUNCTIVE**
28 INC. *dba* CHEETAHS, a Nevada corporation,) **RELIEF; AND**
) **(2) VIOLATION OF 42 U.S.C. § 1983**
) **(COUNTS 1-3);**
) **(3) PETITION FOR WRIT OF MANDAMUS**
) **(CODE CIV. PROC. § 1085)**
Plaintiffs/Petitioners,)
vs.)
COUNTY OF SAN DIEGO, a governmental)
agency; WILMA J. WOOTEN, in her official)
capacity as Public Health Officer, County of San)
Diego; GOVERNOR GAVIN NEWSOM, in his)
official capacity as the Governor of the State of)
California; the CALIFORNIA DEPARTMENT)
OF PUBLIC HEALTH, a department of the)

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

10/21/2020 at 08:14:51 PM

Clerk of the Superior Court
By Ines Quirarte, Deputy Clerk

1 State of California; and DOES 1 through 100,)
2 inclusive,)
3 Defendants/Respondents.)
4

5 Plaintiffs/Petitioners alleges as follows:

6 **PARTIES AND VENUE**

7 1. At all times mentioned herein, Plaintiffs/Petitioners Midway Venture, LLC *dba*
8 Pacers Showgirls/Pacers Showgirls International (“Pacers”) has operated within the City of San
9 Diego, County of San Diego, as an adult entertainment establishment within the meaning of San
10 Diego Municipal Code (SDMC) section 33.3601 et seq. under Nude Entertainment Business
11 Permit number 2010022137 issued by the Chief of the San Diego Police Department.

12 2. Plaintiff/Petitioner Peter Balov, an individual, serves as the responsible managing
13 officer for Pacers and serves as the qualifier for Pacers’ Nude Entertainment Business Permit.

14 3. At all times mentioned herein, Plaintiffs/Petitioners F-12 Entertainment Group Inc.
15 *dba* Cheetahs (“Cheetahs”) has operated within the City of San Diego, County of San Diego; as
16 an adult entertainment establishment within the meaning of SDMC section 33.3601 et seq. under
17 a Nude Entertainment Business Permit issued by the Chief of the San Diego Police Department.

18 4. Plaintiff/Petitioner Rich Buonantony, an individual, serves as the responsible
19 managing officer for Cheetahs and serves as the qualifier for Cheetahs’ Nude Entertainment
20 Business Permit.

21 5. Defendant/Respondent the County of San Diego (the “County”) is and at all times
22 mentioned herein was a governmental agency operating in the State of California, County of San
23 Diego, City of San Diego, and is directly responsible for the orders, actions, and directives at issue
24 in this Complaint.

25 6. Defendant/Respondent Wilma J. Wooten (“Dr. Wooten”) is the County’s Public
26 Health Officer. Dr. Wooten signed the orders at issue in this Complaint and Plaintiffs are informed
27 and believe, and based thereon allege that Dr. Wooten is responsible for devising, enacting,
28 enforcing, and interpreting the orders and directives she issues in her official capacity with the

1 County, and that she is also responsible for interpreting the orders of the State of California
2 concerning the Covid-19 “stay-at-home” and closure orders as applicable to the City of San Diego
3 and the County.

4 7. Defendant/Respondent Governor Gavin Newsom (the “Governor”) is and at all
5 times mentioned herein the Governor of California. Plaintiffs are informed and believe, and based
6 thereon alleges that the Governor is responsible for issuing the executive orders upon which the
7 County and Dr. Wooten have relied upon in exercising their authority.

8 8. Plaintiffs are informed and believe that Defendant/Respondent the California
9 Department of Public Health (CDPH) is an executive branch of the State of California, which is
10 under the direction and control of the Governor, and is responsible for the policies upon which the
11 County and Dr. Wooten have relied upon in exercising their authority.

12 9. Plaintiffs/Petitioners are ignorant of the true names and capacities of
13 Defendants/Respondents sued herein as DOES 1 through 100, inclusive, and their involvement
14 with the orders, actions, and directives at issue in this Complaint, and therefore
15 Plaintiffs/Petitioners sue these Defendants/Respondents by such fictitious names.
16 Plaintiffs/Petitioners will amend the Complaint to allege the DOE Defendants/Respondents’ true
17 names, capacities, and involvement in this action when the information is ascertained. Plaintiffs
18 are informed and believe and based thereon allege that each of the DOE Defendants/Respondents
19 was responsible in some manner for orders, actions, and directives at issue in this Complaint. The
20 County, Dr. Wooten, the Governor, CDPH and DOES 1-100 may sometimes be referred to herein
21 collectively as “Defendants.”

22 10. The San Diego Superior Court is the appropriate venue for this action because
23 of the events, orders, actions, and directives at issue in this Complaint occurred within San Diego
24 County, and Defendants/Petitioners maintain offices, exercise their authority in their official
25 capacities, and will enforce the orders, actions, and directives at issue within San Diego County.

26 **FACTS COMMON TO ALL CAUSES OF ACTION AND WRIT**

27 11. It is well settled that adult oriented nude entertainment is recognized by both state
28 and federal courts as being protected by the First Amendment of the United States Constitution

1 and the California Constitution. The First Amendment protects the right of adult entertainment
2 establishments, adult entertainers and audience members to free expressive association and
3 performances, subject only to reasonable and clear regulations for the preservation of public health,
4 safety, welfare and morals. (*City of Erie v. Pap's A.M.* (2000) 529 U.S. 277, 289; *Tily B., Inc. v.*
5 *City of Newport Beach* (1998) 69 Cal.App.4th 1, 10; *Krontz v. City of San Diego* (2006) 136 Cal.
6 App. 4th 1126, 1135.)

7 12. Adult entertainment establishments within the City of San Diego, such as Pacers
8 and Cheetahs, that provide live nude entertainment are subject to a number of social distancing
9 requirements that pre-date the various federal, state, and local Covid-19 recommendations,
10 restrictions and orders that have been issued during the pandemic. Among other rules and
11 requirements, adult entertainers must stay six (6) feet or further from audience members while
12 performing nude entertainment. (SDMC § 33.3610(a).) Adult entertainers are also prohibited from
13 touching any member of the audience. (SDMC § 33.3610(b).) The failure of an adult entertainment
14 establishment to enforce these restrictions can have significant and dire consequences to the
15 operator of the adult entertainment establishment. (See *Coe v. City of San Diego* (2016) 3
16 Cal.App.5th 772, 784-785.) By the same token, adult entertainers must be licensed in the City and
17 County of San Diego, and the failure of an adult entertainer to follow the requirements of the
18 SDMC may result in the revocation of his or her license. Accordingly, well before the Covid-19
19 pandemic adult entertainment establishments and the adult entertainers within the City and County
20 of San Diego were already well accustomed to social distancing.

21 13. Consistent with the orders of the Governor Plaintiffs and the adult entertainers that
22 perform at their venues dutifully complied with the “stay-at-home” orders despite the significant
23 infringement upon their First Amendment rights and the significant economic consequences to
24 them by being prohibited from offering such performances. During this period, Plaintiffs patiently
25 waited for guidance from state and local officials regarding when they could reopen for live adult
26 performances.

27 14. On or about May 7, 2020, the Governor announced that he would begin modifying
28 the stay at home order to begin reopening California under what was described at the time as the

1 “Resilience Roadmap,” which set forth a four tiered system for reopening California. Dr. Wooten,
2 acting as the Health Officer for the County, would subsequently adopt and modify the State’s
3 restrictions and reopening plan through an ever changing series of health orders and
4 regulations. (https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community_epide
5 [miology/dc/2019-nCoV/health-order.html](https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community_epide_miology/dc/2019-nCoV/health-order.html).)

6 15. As of May 22, 2020, Dr. Wooten, acting as the Public Health Officer for the County
7 had issued a revised order concerning the reopening of “restaurants and bars,” among the other
8 businesses, venues, and facilities that were allowed to reopen. Because Plaintiffs had onsite
9 restaurants, in addition to their adult entertainment venues, Plaintiffs reached out to Dr. Wooten to
10 obtain clarification as to how the County’s orders would apply to adult entertainment within the
11 guidelines for reopening restaurants and bars. The “four-tier system” for reopening California
12 launched by the Governor did not address adult entertainment, nor did any of Dr. Wooten’s
13 published orders. In circular fashion, however, Dr. Wooten responded to Plaintiffs’ inquiry by
14 instructing Plaintiffs to follow “the guidance from the Governor’s Office and the California
15 Department of Public Health,” which provided no such guidance as related to adult entertainment.
16 This placed Plaintiffs in the difficult position of having to devise their own reopening plans, which
17 ultimately were based upon the reopening plans applicable to restaurants, churches, and other
18 facilities where people gathered, with the added requirements of SDMC as it relates to adult
19 entertainment.

20 16. On June 12, 2020, Dr. Wooten was specifically asked during a press conference if
21 live music would be allowed in restaurants and bars under the County’s orders. Dr. Wooten
22 explained that it was not because it “encourages people to get up and start dancing,” and Dr.
23 Wooten did not want people to engage in such activity. Shortly after the press-conference, Dr.
24 Wooten issued a revised order specifying that “[d]ance floors shall be closed and performances
25 such as musical or dance acts that encourage large gatherings shall be discontinued.” (See Order
26 of Health Officer and Emergency Regulation Effective June 16, 2020, at ¶ 13(g), **Exhibit “A”**
27 hereto.) Notably, however, the prohibition was facially inapplicable to adult entertainment as adult
28 entertainers are expressly prohibited from touching patrons.

1 17. Like many businesses and other venues, Plaintiffs sought to make sense of the
2 restrictions and closure orders, and to this end Pacers initially proposed a plan to reopen with only
3 outside activity. Consistent with the “Safe Reopening Plan” being enforced at the time, Pacers
4 applied for permission to operate outdoors, and to that end submitted a detailed plan to the County
5 and the San Diego Police Department, Permits & Licensing Unit seeking permission to operate
6 outside. Attached hereto as **Exhibit “B”** and incorporated herein by this reference is a true and
7 correct copy of Pacers’ submission of its plan to operate outside. Pacers, however, was told that
8 it could not operate outside, and fearing administrative or criminal action Pacers decided not to
9 reopen, despite having already rented tables and equipment for outside operations. Other adult
10 entertainment establishments, including Cheetahs, learned of the restriction and also decided not
11 to submit their own plans for reopening outside for fearing similar rejection. Significantly,
12 however, Plaintiffs are informed and believe, and based thereon allege that at the time of the
13 rejection of Pacers’ plan for outdoor adult performances, the County was allowing other businesses
14 and venues to operate outside, including but not limited to churches and other venues that draw
15 large groups of people.

16 18. On or about August 28, 2020, the Governor announced California’s new reopening
17 plan called the “The Blueprint for a Safer Economy” (hereinafter the “Blueprint”). The Blueprint,
18 which became effective August 31, 2020, set forth four color coded tiers: yellow, orange, red and
19 purple. Yellow indicates minimal Covid-19 spread and allows for nearly all businesses to reopen
20 indoor operations. Orange means that some in-door business operations can open with
21 modifications. Red means that some non-essential indoor business operations are closed. Purple
22 means there is widespread Covid-19 transmission in the county and nearly all businesses have to
23 keep indoor operations closed or severely limited. The Blueprint also provides a list of covered
24 activities and businesses. Notably, however, adult entertainment and adult entertainment
25 establishments are not listed on the Blueprint and to date no specific guidance has been given to
26 adult entertainers or to adult entertainment establishments regarding reopening. (See Blueprint for
27 a Safer Economy Activity and Business Tiers, **Exhibit “C”** hereto.)

28 //

1 19. The express restrictions on open dance floors and musical or dance acts remained
2 in Dr. Wooten’s order until August 22, 2020. (See Order of Health Officer and Emergency
3 Regulation Effective August 22, 2020, at ¶ 14(k), **Exhibit “D”** hereto.) These express restrictions,
4 however, were removed shortly after the Blueprint was published and after the County was
5 designated as falling into “Tier 2,” *i.e.*, the “Red Category.” Upon entering “Tier 2,” various
6 businesses arbitrarily designated “nonessential” were allowed to reopen with restrictions for inside
7 operations. (See Order of Health Officer and Emergency Regulation Effective September 1, 2020,
8 **Exhibit “E”** hereto.)

9 20. Plaintiffs are informed and believe, and based thereon allege that Dr. Wooten is
10 responsible for interpreting the orders of the Governor and CDPH, which gives her substantial
11 power and nearly unchecked discretion given the vagueness of the various orders of the Governor
12 and CDPH. Exercising this authority, Dr. Wooten’s orders have undergone endless and
13 bewildering changes, yet none of them even attempted to address adult entertainment. With no
14 guidance as to how adult entertainment establishments fit into the tier system or Dr. Wooten’s
15 various orders, Plaintiffs were again left guessing on how best to proceed with reopening.
16 Nonetheless, in an effort to avoid violating any of the vague and arbitrary orders at issue, Pacers
17 submitted its proposed plan to City and County officials, including Dr. Joel Day, who is leading
18 the City of San Diego Covid-19 response and recovery. Plaintiffs are informed and believe, and
19 based thereon allege that Dr. Day works closely with the County and Dr. Wooten. Under Pacers’
20 plan, as it pertained specifically to adult entertainment, Pacers proposed the following additional
21 restrictions above and beyond those already in place under the SDMC:

- 22 • Stages to be located on two (2) foot platforms, fifteen (15) feet from any tables.
- 23 • Stages to be roped off with signs strictly advising patrons not to pass within the
24 fifteen foot buffer.
- 25 • Adult entertainers to perform one artist at a time per stage.
- 26 • All stage equipment to be sanitized after a performance.
- 27 • All performers to wear mask coverings while performing.
- 28 • The announcer and disc jockey (“DJ”) to be located fifteen (15) feet from any

- 1 tables, roped off and designated for one person at a time.
- 2 • Audio stage to be sanitized and cleaned after every daily use.
- 3 • The announcer and DJ to wear a mask covering.
- 4 • The announcer and DJ to issue regular reminders to patrons that they are not to
- 5 approach performers and they are to remain seated at their tables.

6 21. After submitting its plan to Dr. Day and the County on or about August 20, 2020,
7 Pacers received no input or objection from the City or County, and based upon oral discussions
8 with County representatives, Pacers believed it had the County’s express, if not tacit approval, of
9 its plan to allow adult entertainment. Attached hereto as **Exhibit “F”** and incorporated herein by
10 this reference is a true and correct copy of Pacers’ reopening plan as outlined to Dr. Day on August
11 20, 2020, which Plaintiffs are informed and believe, and based thereon allege was communicated
12 to the County. As it is noteworthy, Pacers is informed and believes, and based thereon alleges that
13 its plan for reopening was subsequently adopted by many other adult entertainment establishments
14 in the city and county of San Diego.

15 22. After San Diego County officially moved into “Tier 2” and following the removal
16 of the restriction on dancing from Dr. Wooten’s orders, Pacers reopened for business inside on or
17 about September 3, 2020, under the plan it previously outlined to the City and County concerning
18 adult entertainment. After reopening Pacers received no complaints from the City or County, and
19 more importantly no Covid-19 cases can be tracked to Pacers’ reopening. As Pacers has done
20 throughout its long tenure in the City of San Diego, it served as a model for other adult
21 entertainment establishments and provided many adult performers – who had been unable to
22 perform for nearly six months – a venue to perform.

23 23. On or about September 18, 2020, Cheetahs reopened, complying with all of the
24 requirements of Dr. Wooten’s September 1, 2020 Health Order, cited above in paragraph 17, and,
25 like Pacers, no Covid-19 cases can be tracked to Cheetahs’ reopening.

26 24. On October 11, 2020, at approximately 10:00 p.m. as Pacers began to close as
27 required by the restrictions applicable to restaurants, a group of young men demanded to enter
28 Pacers. They were told, however, that Pacers was closing and no one was being admitted as

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1 required by Dr. Wooten’s orders requiring all restaurants to close at 10:00 p.m. These men were
2 unhappy with being told that they could not enter Pacers and they took it upon themselves to
3 attempt to bypass security in order to enter Pacers. After being thwarted in their efforts, the men
4 began to congregate outside of the parking lot of Pacers and nearby a vehicle owned by a member
5 of the Padres professional baseball team. While the events of what transpired next remain unclear,
6 words appear to have been exchanged between the group of men and the Padres ballplayer, which
7 escalated to a violent encounter where the Padres ballplayer suffered a stab wound to his back.
8 Pacers, as it has always done when contacted by the authorities, subsequently fully cooperated
9 with the investigation of the San Diego Police Department. Nonetheless, this incident resulted in
10 much negative media attention toward Pacers, which included false stories regarding the operation
11 of Pacers. Among other false news reports, it was reported that Pacers was allowing adult
12 entertainers to perform so-called “lap dances.” Ironically, this incident was caused in no little part
13 by the Covid-19 curfew restrictions as imposed by Dr. Wooten, which have resulted in much
14 frustration by members of the public concerning their loss of liberty and freedom, and in this
15 instance the ability to view live adult entertainment.

16 25. Apparently relying upon the false news reports referenced above, on October 14,
17 2020, Dr. Wooten, acting in her official capacity, issued a cease and desist order to Pacers
18 prohibiting Pacers from having any form of live entertainment. Dr. Wooten threatened that any
19 violation of the cease and desist order may result in criminal prosecution and monetary fines for
20 each violation. And, while Dr. Wooten acknowledged Pacers’ right to remain open solely as a
21 restaurant, Dr. Wooten warned that if there were any violations of her order prohibiting live adult
22 entertainment, she would issue an order closing Pacers entirely. Significantly, Dr. Wooten
23 performed no investigation into the truth of the news reports nor did Dr. Wooten contact Pacers to
24 discuss its operations before issuing the cease and desist order.

25 26. On October 15, 2020, Pacers respectfully wrote to Dr. Wooten seeking clarification
26 of the basis of her order prohibiting Pacers from continuing with adult entertainment. Pacers
27 further pointed out that her cease and desist order was based upon false news reports regarding the
28 activities of Pacers, and that Pacers had apparently been singled out because of the unfortunate

1 event that occurred on October 11th. Pacers made clear its desire to work with Dr. Wooten and
2 the County to arrive at clear guidance from the County that would allow for the continuation of
3 adult performances within San Diego County, as protected by the First Amendment. Pacers further
4 reiterated its desire to provide a safe environment for live adult entertainment. Again, however,
5 Dr. Wooten provided no clarification of her cease and desist order, nor have any exceptions been
6 provided that would allow adult performances to occur under the apparent orders of Dr. Wooten.

7 27. On October 16, 2020, Pacers received a visit from Brandon Posada of the County
8 of San Diego to verify that Pacers was in compliance with Dr. Wooten’s cease and desist order.
9 Consistent with Dr. Wooten’s order Pacers ceased all adult entertainment at its venue, which was
10 verified by Mr. Posada during his inspection. Mr. Posada further advised that the County intended
11 to closely monitor Pacers’ compliance with Dr. Wooten’s cease and desist order, and it was made
12 impliedly clear that any violation would result in swift punishment.

13 28. On October 20, 2020, Rich Buonantony was served with a cease and desist order
14 signed by Dr. Wooten, threatening criminal charges and closure of the business for having live
15 entertainment. (See **Exhibit “G”** hereto.)

16 29. As a consequence of Defendants’ orders to cease and desist from engaging in
17 activity protected by the First Amendment, Plaintiffs are and will continue to be threatened with
18 criminal and civil penalties, as well as suffer a denial of due process and their civil rights on the
19 basis of the enforcement of the challenged cease and desist orders if they exercise their protected
20 liberties similar to other venues in San Diego County that are being permitted, implicitly or tacitly,
21 to allow live performances. Indeed, there is in effect a complete ban on live adult entertainment
22 in the City and County of San Diego due to the directives of Dr. Wooten.

23 30. Plaintiffs are informed and believe, and based thereon allege that while the County
24 of San Diego has prohibited Pacers and Cheetahs (and presumably other adult entertainment
25 establishments) from allowing adult oriented performances under the restrictions outlined above,
26 the County of San Diego has allowed, implicitly or tacitly, restaurants and other venues to have
27 live music at locations such as the Inn at Rancho Bernardo, McP’s Irish Pub in Coronado, the Del
28 Mar Highlands Town Center, and Fluxx Nightclub to name just a few. Plaintiffs are also informed

1 and believe that the County has also allowed stand-up comedy at venues such as the Comedy
2 Palace and other comedy venues, as apparently these venues have the ear of council member Chris
3 Cate. By the same token, under the County’s reopening plan concerning “Tier 2,” the following
4 are allowed to remain open despite the possibility of far more contact among members of the public
5 than what is even conceivably possible under Plaintiffs’ reopening plan for adult entertainment:

- 6 • Places of worship. 25% capacity or 100 people, whichever is lower.
- 7 • Movie theaters. 25% capacity or 100 people, whichever is lower.
- 8 • Museums. 25% capacity.
- 9 • Gyms and fitness centers. 10% capacity.
- 10 • Dance studios. 10% capacity.
- 11 • Yoga studios. 10% capacity.
- 12 • Zoos and aquariums. 25% capacity.
- 13 • Hair salons and barbershops
- 14 • Nail salons
- 15 • Body waxing
- 16 • Tattoo parlors
- 17 • Piercing
- 18 • Skin care and cosmetology

19 31. The limitation on allowing adult entertainment is arbitrary and capricious, and is
20 discriminatory toward adult entertainment establishments and adult performers. From the
21 perspective of imposing restrictions to prevent the spread of Covid-19, Defendants have allowed
22 restaurants, churches, dance studios, yoga studios, and various personal service industries to
23 operate, while prohibiting Plaintiffs and adult performers from operating under much more
24 stringent safety protocols, and threatening Plaintiffs with “criminal” liability for attempting to do
25 so. The order smacks of unfairness.

26 32. Moreover, the financial and non-financial losses the Plaintiffs have suffered during
27 the period of time since issuance of the cease and desist orders have been substantial, and are the
28 direct result of the discriminatory, irrational, and unequal restrictions flowing from Dr. Wooters’s

1 overreaching construction of the orders of Governor Newsom and CDPH. Plaintiffs and all those
2 similarly situated are not viable without adult entertainment and unless the cease and desist orders
3 are immediately lifted, Plaintiffs may be required to close permanently. Plaintiffs are and will
4 continue to be threatened with criminal and civil penalties, as well as suffer a denial of due process
5 and their civil rights on the basis of the enforcement of the challenged cease and desist orders if
6 they exercise their protected freedoms and liberties similar to other venues in San Diego County
7 that are being permitted, implicitly or tacitly, to allow live performances. This will not only result
8 in significant losses to Plaintiffs, but also to the adult performers who rely on their ability to
9 perform at Plaintiffs' venues and members of the public that seek out adult themed entertainment
10 in a safe and regulated environment. Defendants' restrictions will in effect force adult entertainers
11 to perform outside the safety of regulated venues. Plaintiffs themselves have no adequate remedy
12 at law. No amount of money damages could adequately compensate the Plaintiffs for the
13 irreparable harm described herein, specifically the deprivation of constitutionally protected
14 fundamental rights.

15 **RELIEF SOUGHT BY PLAINTIFFS/PETITIONERS**

16 33. As set forth more fully below, based upon misinformation and an ever growing
17 tenancy to infringe upon the rights of the citizens of San Diego under the "Big Brother" mentality
18 of Defendants, there is little doubt that Defendants have become drunk on power and run amok
19 with their expansive and overly burdensome construction of the Covid-19 related restrictions that
20 trample on the liberties of Plaintiffs and the citizens of San Diego. Justice O'Scannlain in his
21 dissenting opinion in *Harvest Rock Church, Inc. v. Newsom* (9th Cir. 2020) --- F.3d ----2020 WL
22 5835219 encapsulates this sentiment in his observation that the Covid-19 restrictions are a
23 "complex morass," which are not content neutral in their application. The abuse of power must
24 be checked and the Orwellian rules that have been imposed under the guise of "protecting" against
25 transmission of Covid-19 must no longer be rubber stamped by the courts. Accordingly, Plaintiffs
26 seek, among other remedies: (1) equitable injunctive relief to enjoin the enforcement of the cease
27 and desist orders; (2) declaratory relief from this Court in declaring that the orders of the State and
28 County violate Plaintiffs' civil rights under: (a) 42 U.S.C. Section 1983 of the Federal Civil Rights

1 Act, (b) Due Process and (c) Equal Protection Clauses of the 5th and 14th Amendments, (d) the
2 First Amendment, and (e) Sections 1, 2, 7, 19, and 24 of Article 1 to the California Constitution;
3 (3) a writ of mandate compelling the County of San Diego to issue clear guidelines to allow for
4 adult entertainment; (4) attorney's fees and costs for the reasonable and necessary legal services
5 provided by Plaintiffs' counsel, where allowed by law; and (5) for such other and further relief as
6 the Court deems just and appropriate.

7 **FIRST CAUSE OF ACTION**

8 **DECLARATORY AND INJUNCTIVE RELIEF**

9 **(By Plaintiffs Against all Defendants and DOES 1 through 100)**

10 34. Plaintiffs re-allege and incorporate herein by this reference each of the allegations
11 of paragraphs 1 through 33, above.

12 35. By reason of the aforementioned acts, policies, procedures, and/or orders, created,
13 adopted, and enforced under color of law by Defendants and DOE 1 through 100, Plaintiffs have
14 been deprived of their First Amendment rights of free speech and free expressive association. The
15 restrictions that have been imposed upon Plaintiffs lack any rational basis, are arbitrary, capricious,
16 vague, overbroad, and are a palpable invasion of rights secured by fundamental law in violation of
17 the Equal Protection Clause of both the United States Constitution and California Constitution.
18 When the government treats an individual disparately as compared to similarly situated persons,
19 and that disparate treatment burdens a fundamental right, targets a suspect class, or has no rational
20 basis, such treatment plainly violates the equal protection guarantees of the Fourteenth
21 Amendment.

22 36. Plaintiffs, however, are informed and believe, and based thereon allege, that
23 Defendants and DOE 1 through 100 contend and believe that they are within their authority to
24 trample on Plaintiffs' Constitutional rights given the orders of Governor Newsom and given their
25 own claimed authority to prohibit all forms of adult entertainment, irrespective of the rights
26 afforded to Plaintiffs and all those similarly situated. As a result, an actual controversy has arisen
27 and now exists between Plaintiffs, on the one hand, and Defendants and DOE 1 through 100,
28 the other hand. Plaintiffs therefore seek a declaration of their right to allow adult them

1 performances to occur at their venues under the ridged guidelines previously submitted by
2 Plaintiffs to the County, or under those reasonable (and logical) rules and regulations Plaintiffs
3 and Defendants agree may be appropriate under the circumstances. Plaintiffs further seek a
4 declaration preventing Defendants from completely prohibiting all live adult entertainment and
5 requiring Defendants to provide clear guidance that would allow for live adult entertainment in the
6 City and County of San Diego.

7 37. Plaintiffs are informed and believe, and based thereon alleges, that Defendants
8 dispute Plaintiffs' contentions regarding Defendants' obligations as outlined above, and that
9 Defendants intend to continue violating Plaintiffs' rights absent a declaratory judgment and
10 injunction issued by this Court.

11 **SECOND CAUSE OF ACTION**

12 **VIOLATION OF 42 U.S.C. § 1983**

13 **(By Plaintiffs Against all Defendants and DOES 1 through 100)**

14 38. Plaintiffs re-allege and incorporate herein by this reference each of the allegations
15 of paragraphs 1 through 37, above.

16 39. 42 U.S.C. Section 1983 was enacted "to deter state actors from using the badge of
17 their authority to deprive individuals of their federally guaranteed rights and to provide relief to
18 victims if such deterrence fails." (*Modacure v. B&B Vehicle Processing, Inc.* (2018) 30 Cal. App. 4th
19 5th 690, 693, quoting *Wyatt v. Cole* (1992) 504 U.S. 158, 161.) "A claim under 42 United States
20 Code section 1983 may be based on a showing that the defendant, acting under color of state law,
21 deprived the plaintiff of a federally protected right." (*Id.* at 694.)

22 40. The acts and orders of Defendants and DOES 1 through 100 were and are being
23 performed under color of law and therefore constitute state action within the meaning of 42 U.S.C.
24 Section 1983. These actions violate Plaintiffs' civil rights as follows:

25 ***Count One – Violation of the Free Speech Clause of the First Amendment to the United***
26 ***States Constitution Applicable through the Fourteenth Amendment and Violation of Article 1,***
27 ***Section 2 of the California Constitution.***

28 41. Plaintiffs operate venues that provides adult themed entertainment to members of

1 the public in the form of adult oriented dance performances, and the presentation of recorded music
2 presented by DJs. All such entertainment is protected by the rights of free speech and free
3 expressive association. The cease and desist orders issued to Plaintiffs expressly prohibits this
4 type of speech and expressive conduct, and based upon the facts alleged above that other types of
5 live performances are permitted by Defendants, implicitly or tacitly, the limitations are predicated
6 upon the content of the speech and are presumptively unconstitutional. (*Reed v. Town of Gilbert*
7 (2015) 576 U.S. 155, 163-164.) Accordingly, the restrictions on adult performances found in the
8 challenged cease and desist orders comprise an unconstitutional content-based speech prohibition.

9 ***Count Two – Violation of the Equal Protection Clause of the Fourteenth Amendment to***
10 ***the United States Constitution and Violation of Article 1, Section 7 of the California Constitution.***

11 42. By reason of the aforementioned acts, policies, and/or orders, created, adopted, and
12 enforced under color of law by Defendants, Defendants have deprived Plaintiffs of the equal
13 protection of the law guaranteed under the Equal Protection Clause of the Fourteenth Amendment
14 to the United States Constitution and 42 U.S.C. § 1983, as well as the right to equal protection
15 under the California Constitution. As set forth in this Complaint, the applicable provisions of the
16 challenged cease and desist orders deprive Plaintiffs of their fundamental rights and freedoms by
17 forcing the continued prohibition on adult performances, yet providing exceptions for other
18 activity and conduct that is similar, if not identical, in its impact and effects as related to the
19 prevention of the spread of Covid-19. The challenged measures lack any rational basis, are
20 arbitrary, capricious, and vague, and are a palpable invasion of rights secured by fundamental law
21 in violation of the Equal Protection Clause.

22 ***Count Three – Violation of Plaintiffs’ Due Process Rights Compromise a Taking in***
23 ***Violation of the Fifth and Fourteenth Amendments to the United States Constitution and Violation***
24 ***of Article 1, Section 7 of the California Constitution.***

25 43. With no due process whatsoever, Defendants have denied Plaintiffs the right to
26 allow adult oriented performances at their venues and have taken away property rights and liberties
27 of Plaintiffs without due process of law. Defendants, to date, refuse to even answer Plaintiffs’
28 inquiries regarding the basis of the cease and desist orders and have instead acted as one might

1 expect a monarch might act in simply issuing an order with no justification, clarification, or
2 exceptions. Plaintiffs have a fundamental and protected interest in the use and enjoyment of their
3 venue. Plaintiffs have no adequate remedy at law and Plaintiffs, as well as members of the public,
4 will suffer serious and irreparable harm to their constitutional rights unless Defendants are
5 enjoined from the continuous implementation and enforcement of the cease and desist order, or
6 any other similar orders.

7 **THIRD CAUSE OF ACTION**

8 **WRIT OF MANDATE – CODE CIV. PROC. § 1085**

9 **(By Plaintiffs Against the County, Dr. Wooten, and DOES 1 through 100)**

10 44. Plaintiffs and Petitioners herein re-allege and incorporates herein by this reference
11 each of the allegations of paragraphs 1 through 43, above.

12 45. Pursuant to Code of Civil Procedure section 1085, “[a] writ of mandate may be
13 issued by any court to any . . . person, to compel the performance of an act which the law specially
14 enjoins, . . . and from which the party is unlawfully precluded by that inferior tribunal, corporation,
15 board, or person.” Here, the County, Dr. Wooten, and DOES 1 through 100 are infringing upon
16 Pacers’ constitutional rights, including, the freedom of speech and equal protection at its expense.
17 Moreover, Defendants/Respondents have arbitrarily and discriminatorily prevented
18 Plaintiffs/Petitioners from exercising their rights under the First Amendment under the guise of
19 the Covid-19 safety concerns. Consequently, Plaintiffs/Petitioners have suffered and continue to
20 suffer loss of liberty and economic losses.

21 46. Plaintiffs/Petitioners have no adequate remedy at law and will suffer serious and
22 irreparable harm to their constitutional rights unless Defendants/Respondents are enjoined from
23 the continuous implementation and enforcement of the cease and desist order, or any other order
24 they may claim gives them the right to prevent adult entertainment at Plaintiffs’ venues.

25 ////
26 ////
27 ////
28 ////

1 **PRAYER**

2 **WHEREFORE**, Plaintiffs pray for judgment against Defendants as follows:

3 On the First Cause of Action:

4 1. For a determination of the rights and obligations of Plaintiffs as it relates to all
5 issues encompassed by the dispute alleged above, and that the Court issue a declaration finding as
6 follows:

7 (a) Plaintiffs are entitled to permit live adult entertainment under the reasonable
8 restrictions outlined by Plaintiffs above;

9 (b) Defendants are enjoined from completely prohibiting live adult
10 entertainment; and

11 (c) Recognizing that Plaintiffs' Constitutional rights to free speech and free
12 expressive conduct are not eliminated due to the Covid-19 related restrictions and pandemic.

13 2. All appropriate orders to carry out the Court's declaration of the rights of the
14 parties, including injunctive relief.

15 On the Second Cause of Action:

16 1. Declare the provisions of the cease and desist orders, or any other related orders, to
17 be violative of the aforementioned United States and California Constitutional provisions.

18 2. For the issuance of a Temporary Restraining Order and/or preliminary injunction
19 restraining and preventing any governmental entity or law enforcement officer from applying and
20 enforcing the provisions the cease and desist orders, or any other related orders, that prevent
21 Plaintiffs from being allowed to provide live adult entertainment under the restrictions outlined
22 above, and finding that Plaintiffs are exempt from all of the requirements of the cease and desist
23 orders.

24 3. For the issuance of a Permanent Injunction restraining and preventing any
25 governmental entity or law enforcement officer from applying and enforcing the provisions of the
26 cease and desist orders, or any other related orders, that prevent Plaintiffs from being allowed to
27 provide live adult entertainment under the restrictions outlined above, and finding that Plaintiffs
28 are exempt from all of the requirements of the cease and desist orders.

- 1 4. Award Plaintiffs any and all attorney's fees and costs as authorized by law.
2 5. Award Plaintiffs any and all actual, consequential, and special damages to which
3 Plaintiffs are entitled.

4 On the Third Cause of Action (Writ of Mandate):

- 5 1. A peremptory writ of mandate issued under Code of Civil Procedure section 1085
6 compelling Defendant/Respondents to set aside their cease and desist orders, and to allow for live
7 adult entertainment.
8 2. Plaintiffs/Petitioners recover their attorney's fees, expenses and costs in this action.
9 3. Plaintiffs/Petitioners recover damages.

10 On All Causes of Action:

- 11 1. For injunctive relief.
12 2. For costs of suit and attorney's fees.
13 3. For such other and future relief as the court finds just and reasonable.

14
15 Dated: October 21, 2020

VIVOLI SACCUZZO, LLP

16
17 By: /s/ Jason P. Saccuzzo
18 JASON P. SACCUZZO
19 Attorneys for Plaintiffs,
20 MIDWAY VENTURE LLC dba PACERS
SHOWGIRLS/PACERS SHOWGIRLS
INTERNATIONAL, and PETER BALOV

21 Dated: October 21, 2020

LAW OFFICE OF STEVE HOFFMAN

22
23 By: /s/ Steve Hoffman
24 STEVE HOFFMAN
25 Attorneys for Plaintiffs,
26 F-12 ENTERTAINMENT GROUP INC.
27 dba CHEETAHS and RICH BUONANTONY
28

document received by the CA 4th District Court of Appeal Division 1.

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County of San Diego

NICK MACCHIONE, FACHE
AGENCY DIRECTOR

HEALTH AND HUMAN SERVICES AGENCY
PUBLIC HEALTH SERVICES
3851 ROSECRANS STREET, MAIL STOP P-578
SAN DIEGO, CA 92110-3134
(619) 531-5800 • FAX (619) 542-4186

WILMA J. WOOTEN, M.D.
PUBLIC HEALTH OFFICER

ORDER OF THE HEALTH OFFICER AND EMERGENCY REGULATIONS (Effective June 16, 2020)

Pursuant to California Health and Safety Code sections 101040, 120175, and 120175.5 (b) the Health Officer of the County of San Diego (Health Officer) **ORDERS AS FOLLOWS:**

Effective 12:00 a.m. on Tuesday, June 16, 2020 and continuing until further notice, the following will be in effect for San Diego County (county):

1. All persons are to remain in their homes or at their place of residence, except for employees or customers travelling to and from essential businesses, reopened businesses, or essential activities as defined in section 21, below, or to participate in individual or family outdoor activity as allowed by this Order.
2. All public or private "gatherings," as defined in section 21 below, are prohibited.
3. All businesses not meeting the definition of essential business or reopened business in section 21 below are referred to in this Order as "non-essential businesses" and shall be and remain closed for the duration of this Order. All essential businesses and reopened businesses must comply with the requirements of this Order. Notwithstanding the foregoing, any business may remain open if its employees and owners can provide its services from home, including by telecommuting, without direct contact with the public.
4. All public, charter and private schools may hold classes or school business operations on the school campus, provided the school complies with the measures contained in the State COVID-19 Industry Guidance: Schools and School-Based Programs issued by the CDPH (including the face covering requirements contained therein), also incorporating where feasible the guidelines provided in Stronger Together: A Guidebook for the Safe Reopening

EXHIBIT
A

Document received by the CA 4th District Court of Appeal Division 1.

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of California's Public Schools issued by the California Department of Education. Each school shall complete and post a document detailing the actions the school is taking to comply with the CDPH Industry Guidance measures after considering the CDE Guidelines noted above. Colleges and Universities shall not hold classes or other school activities where students gather on the school campus, except for research-related activities in colleges and universities and where necessary to train students who will serve as essential workers.

5. Child daycare and child care providers shall operate in compliance with the measures set forth in State COVID-19 Updated Guidance: Child Care Programs and Providers and shall prepare and post a Safe Reopening Plan pursuant to section 11, below.
6. "Non-essential personnel," as defined in section 21 below, are prohibited from entry into any hospital or long-term care facility. All essential personnel who are COVID-19 positive or show any potential signs or symptoms of COVID-19 are strictly prohibited from entry into hospitals or long-term care facilities. Notwithstanding the foregoing, individuals requiring medical care for COVID-19 or related conditions may be admitted to hospitals or other medical facilities if the hospital or medical facility is appropriate for treating COVID-19 and has adequate precautions in place to protect its patients, medical personnel and staff.
7. Hospitals and healthcare providers, including dentists shall:
 - a. Take measures to preserve and prioritize resources; and,
 - b. May authorize and perform non-emergent or elective surgeries or procedures based on their determination of clinical need and supply capacity, and where consistent with State guidance.
 - c. Nothing in this Order shall prevent physicians and other healthcare providers from conducting routine preventive care provided it conforms to any applicable State guidance.
 - d. Nothing in this Order shall prevent dentists or dental hygienists from conducting routine preventive care provided it conforms to any applicable State guidance.
8. Hospitals, healthcare providers, and commercial testing laboratories shall report all COVID-19 test results to the Public Health Officer immediately after such results are received.
9. All persons two year old or older who are present in the county shall have possession of a face covering described in California Department of Public Health Face Covering Guidance issued

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on April 1, 2020, (available at: <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Face-Coverings-Guidance.aspx>), when they leave their home or place of residence and shall wear the face covering whenever they are within six feet of another person who is not a member of their family or household. Persons with a medical or mental health condition, or developmental disability that prevents wearing a face covering shall be exempt from this requirement.

10. All essential businesses that allow members of the public to enter a facility must prepare and post a “Social Distancing and Sanitation Protocol” on the form available at: <https://www.sandiegocounty>

[.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/covid19/SOCIAL_DISTANCING AND SANITATION PROTOCOL 04022020 V1.pdf](https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/covid19/SOCIAL_DISTANCING_AND_SANITATION_PROTOCOL_04022020_V1.pdf)), or on a form required by another governmental entity requiring substantially similar information, for each of their facilities open to the public in the county. The Social Distancing and Sanitation Protocol must be posted at or near the entrance of the relevant facility, and shall be easily viewable by the public and employees. A copy of the Social Distancing and Sanitation Protocol must also be provided to each employee performing work at the facility. All essential businesses shall implement the Social Distancing and Sanitation Protocol and provide evidence of its implementation to any authority enforcing this Order upon demand. The Social Distancing and Sanitation Protocol must ensure all required measures are implemented and must identify and require measures necessary to implement social distancing are implemented at each facility that will ensure social distancing and sanitation at that particular facility. If the measures identified and implemented are not effective in maintaining proper social distancing and sanitation, the business shall promptly modify its Social Distancing and Sanitation Protocols to ensure proper social distancing and sanitation. Any business that fails to successfully implement social distancing and sanitation may be required to close.

11. All reopened businesses, with the exception of restaurants, bars, wineries and breweries which do not limit services to take-out or delivery, must prepare and post a “Safe Reopening Plan” on the form available at: https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/covid19/Community_Sector_Support/BusinessesandEmployers/SafeReopeningPlanTemplate.pdf for each of their facilities in the county. Restaurants bars, wineries and breweries which do not limit services to take-out or delivery, must prepare and post a “COVID-19 Restaurant Operating Protocol” on the form available at https://www.sandiegocounty.gov/content/dam/sdc/deh/fhd/food/pdf/covid19sdrestaurantoperatingprotocol_en.pdf for each restaurant in the county. The Safe Reopening Plan or COVID-19 Restaurant Operating Protocol must be posted at or near the entrance of the relevant facility,

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and shall be easily viewable by the public and employees. A copy of the Safe Reopening Plan or COVID-19 Restaurant Operating Protocol must also be provided to each employee performing work at the facility. All reopened businesses shall implement the Safe Reopening Plan or COVID-19 Restaurant Operating Protocol and provide evidence of its implementation to any authority enforcing this Order upon demand. The Safe Reopening Plan or COVID-19 Restaurant Operating Protocol must ensure all required measures are implemented. If the measures identified and implemented are not effective in maintaining proper social distancing and sanitation, the business shall promptly modify its Safe Reopening Plan or COVID-19 Restaurant Operating Protocol to ensure proper social distancing and sanitation. Any business that fails to comply with its Safe Reopening Plan or COVID-19 Restaurant Operating Protocol shall immediately close.

12. When the State of California has issued an industry guidance with mandatory and/or suggested measures to be implemented by a particular type of business or industry, a reopened business must include all mandatory measures as part of its Safe Reopening Plan. The reopened business shall include all suggested measures necessary to maintain proper sanitation, employee screening, social distancing and facial coverings. Any mandatory measures required by this Order must also be included in the Safe Reopening Plan.

13. All restaurants, bars, wineries and breweries shall also be required to ensure their customers comply with all of the following measures and shall immediately close if they are not able to do so:

- a. Customers shall not stand in the restaurant, bar, winery or brewery except in the reception area while waiting for a table or to pick up take-out food. If customers cannot be socially distanced in the reception area they shall wait in their cars or outside of the restaurant in a line with six feet between each customer.
- b. Discontinue open seating. All members of the party must be present before seating and the host must bring the entire party to the table at one time. The customers allowed at a table are limited to members of a single household or customers who have asked to be seated together at the time a table is requested.
- c. No food or beverages shall be served to or consumed by a customer who is not seated at a table designated by the restaurant for dining.
- d. Discontinue seating customers and/or groups at bar counters, sushi preparation bars, etc. where they cannot maintain at least six feet of distance from employee work areas/stations. Install physical barriers or partitions in areas where maintaining a physical distance of six feet is difficult.

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- e. Notwithstanding section 9, above, customers are not required to wear face coverings while at a table. However, customers not sitting at a table shall wear face coverings whenever they may come within 6 feet of another person.
- f. Tables designated for dining shall be six feet apart, or separated by barriers or partitions that extend above the heads of customers while seated. Customer shall not be allowed to bring additional chairs to the table that interfere with the six foot separation.
- g. Dance floors shall be closed and performances such as musical or dance acts that encourage large gatherings shall be discontinued.
- h. Any customer that refuses to comply with this section shall be subject to enforcement per Health and Safety Code section 120295.

14. Places of Worship – Religious services and cultural ceremonial activities may be conducted in conformance with the State Guidance pursuant to sections 11 and 12, above. Given the high risk of this activity, outdoor ceremonies are encouraged and vulnerable members of the population (over 65 years old, compromised immune system or underlying condition) are strongly encouraged to participate through streaming or some other form of remote technology. Outdoor services and cultural ceremonial activities may be conducted provided all persons practice social distancing as defined in section 21e, below.

15. Each essential business and reopened business shall:

- a. Require all employees/on-site contractors (hereinafter referred to as employees) to have possession of face coverings and wear them as described in section 9 above when in the business facility; and,
- b. Shall conduct temperature screening of all employees and prohibit employees with a temperature of 100 degrees or more, or employees exhibiting COVID-19 symptoms as described by the Centers for Disease Control and Prevention, or employees who have been exposed to a person who has tested positive for COVID-19 from entering the workplace.

16. Outdoor Recreation

- a. Each public park and recreation area or facility, shall operate in compliance with the measures set forth in the State COVID-19 Industry Guidance: Campgrounds, RV Parks and Outdoor Recreation. The operator of the park shall prepare a Safe Reopening Plan pursuant to section 11, above, indicating how the park or recreation facility will implement the required measures. Any park or recreation area/facility at which the Protocol requirements cannot be effectively implemented may be required to close.
- b. Outdoor recreation instruction and day camps that comply with the State COVID-19

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Industry Guidance: Day Camps, may be conducted in park and recreation areas/facilities.

- c. Swimming pools owned or operated by a Homeowners' Association, Condominium or Apartment complex may be open provided the owner or operator completes and posts a Safe Reopening Plan that shows conformance with the requirements of this Order and with the swimming pool/aquatic venues requirements of the State COVID-19 Industry Guidance on Fitness Facilities.

17. All essential businesses and reopened businesses that remain in operation in accordance with the Order shall make every effort to use telecommuting for their workforces.

18. A strong recommendation is made that all persons who are 65 years old or older, have a chronic underlying condition, or have a compromised immune system self-quarantine themselves at home or other suitable location.

19. All persons arriving in the county from international locations identified on the Centers for Disease Control and Prevention (CDC) Warning Level 2 or 3 Travel Advisory (available at: <https://wwwnc.cdc.gov/travel/notices>) shall be subject to 14-day home or other suitable location quarantine and self-monitoring.

20. Persons who have been diagnosed with COVID-19, or who are likely to have COVID-19, shall comply with the Order of the Health Officer titled: "Isolation of All Persons with or Likely to have COVID-19", or as subsequently amended. Persons who have a close contact with a person who either has COVID-19, or is likely to have COVID-19, shall comply with the Order of the Health Officer titled: "Quarantine of Persons Exposed to COVID-19," or as subsequently amended. Both orders are available at: https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community_epidemiology/dc/2019-nCoV/health-order.html. If a more specific isolation or quarantine order is issued to a person, that order shall be followed.

21. For purposes of this Order:

- a. "Essential business" is any business or activity (or a business/activity that employs/utilizes workers) designated by the State Public Health Officer as "Essential Critical Infrastructure Workers" set forth in: <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>) as that list may be updated from time-to-time, and

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referenced in Executive Order N-33-20 issued by the Governor of the State of California. For the purposes of this Order, the following businesses in the Food and Agriculture Sector are considered “groceries” or “other retail that sells food and beverages”: grocery stores, corner stores and convenience stores, liquor stores that sell food, farmer’s markets, food banks, farm and produce stands, supermarkets, big box stores that sell groceries and essentials, or similar business that sell food so long as the store has a current permit related to the sale of food and/or beverages from the San Diego County Department of Environmental Health.

- b. “Gathering” is any event or convening that brings together more than one person in a single room or single indoor or outdoor space at the same time. A gathering does not include:
 - i. A gathering consisting only of members of a single family or household.
 - ii. Operations at airports, public transportation or other spaces where persons in transit are able to practice social distancing.
 - iii. Operations at essential businesses as defined in section 21a above and reopened businesses as defined in 21f below and where the other requirements set forth in this Order are followed.
- c. “Long term care facility” is a facility serving adults that require assistance with activities of daily living, including a skilled nursing facility, and that is licensed by the California Department of Community Care and Licensing, or the California Department of Public Health.
- d. “Non-essential personnel” are employees, contractors, or members of the public who do not perform treatment, maintenance, support, or administrative tasks deemed essential to the healthcare mission of the long-term care facility or hospital. Non-essential personnel do not include first responders, nor State, federal, or local officials, investigators, or medical personnel carrying out lawful duties. Non-essential personnel do not include visitors to hospitals and long-term care facilities who are granted entry by the facility’s director, or designee, because they are family or friends who are visiting a resident in an end of life or similar situation, are parents or guardians visiting a child who is a patient, or because of any other circumstances deemed appropriate by the facility director, or designee, and where appropriate precautions by the facility that follow federal, State, and local public health guidance regarding COVID-19 are followed.
- e. “Social distancing” is maintaining a six-foot separation from all persons except for household members, first responders and medical providers or employees conducting temperature screenings.
- f. “Reopened business” is a business that is not an essential business as stated in section

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21a above, and has reopened in conformance with the State of California’s Resilience Roadmap (available at: <https://covid19.ca.gov/roadmap/>), as may be subsequently amended as indicated by the posting of a new State COVID-19 INDUSTRY GUIDANCE for the business. A reopened business may open when the State has posted the applicable COVID-19 INDUSTRY GUIDANCE, the Public Health Officer has posted an acknowledgement of the reopened status on the County of San Diego Coronavirus website and the business has complied with the requirements of this Order.

22. Hotels and lodging establishments may be open for all guests, including tourists and leisure guests, provided they comply with the State COVID-19 Industry Guidance: Hotels, Lodging and Short Term Rentals and complete and post a Safe Reopening Plan pursuant to section 11, above.

23. This Order is issued as a result of the World Health Organization’s declaration of a worldwide pandemic of COVID-19 disease, also known as “novel coronavirus.”

24. This Order is issued based on scientific evidence regarding the most effective approaches to slow the transmission of communicable diseases generally and COVID-19 specifically, as well as best practices as currently known and available to protect vulnerable members of the public from avoidable risk of serious illness or death resulting from exposure to COVID-19. The age, condition, and health of a significant portion of the population of the county places it at risk for serious health complications, including death, from COVID-19. Although most individuals who contract COVID-19 do not become seriously ill, persons with mild symptoms and asymptomatic persons with COVID-19 may place other vulnerable members of the public—such as older adults, and those with underlying health conditions—at significant risk.

25. The actions required by this Order are necessary to reduce the number of individuals who will be exposed to COVID-19, and will thereby slow the spread of COVID-19 in the county. By reducing the spread of COVID-19, this Order will help preserve critical and limited healthcare capacity in the county and will save lives.

26. This Order is issued in accordance with, and incorporates by reference: a) the Declaration of Local Health Emergency issued by the Health Officer on February 14, 2020; b) the Proclamation of Local Emergency issued by the County Director of Emergency Services on February 14, 2020; c) the action of the County Board of Supervisors to ratify and continue

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both the local health emergency and local emergency on February 19, 2020; d) the Proclamation of a State of Emergency issued by the Governor of the State of California on March 4, 2020; e) Executive Order N-25-20 issued by the Governor of the State of California on March 12, 2020 which orders that “All residents are to heed any orders and guidance of state and local health officials, including but not limited to the imposition of social distancing measures, to control COVID-19”; f) Proclamation 9984 regarding COVID-19 issued by the President of the United States on March 11, 2020; g) Executive Order N-33-20 issued by the Governor of the State of California on March 19, 2020; h) the “Interim Additional Guidance for Infection Prevention and Control for Patients with Suspected or Confirmed COVID-19 in Nursing Homes” issued by the CDC; i) COVID-19 guidance issued by the California Department of Public Health on including, but not limited to the Face Coverings Guidance issued on April 1, 2020; and j) the State of California’s “Resilience Roadmap.”

27. This Order is issued to prevent circumstances often present in gatherings that may exacerbate the spread of COVID-19, such as: 1) the increased likelihood that gatherings will attract people from a broad geographic area; 2) the prolonged time period in which large numbers of people are in close proximity; 3) the difficulty in tracing exposure when large numbers of people attend a single event or are at a single location; and 4) the inability to ensure that such persons follow adequate hygienic practices.
28. This Order is issued to provide additional opportunities for recreational activities while also requiring additional protections from the spread of COVID-19 to the public who are taking advantage of these opportunities for recreational activities. And providing additional protections for employees of essential businesses or reopened business and their customers/clients by increasing facial covering requirements and health checks and temperature screening.
29. This Order is issued to protect the public health as businesses are allowed to reopen by requiring businesses to implement procedures necessary to ensure their employees and customers comply with social distancing, sanitation and screening practices.
30. This Order comes after the release of substantial guidance from the Health Officer, the California Department of Public Health, the CDC, and other public health officials throughout the United States and around the world.
31. Pursuant to Health and Safety Code section 120175.5 (b) all governmental entities in the county shall take necessary measures within the governmental entity’s control to ensure

compliance with this Order and to disseminate this Order to venues or locations within the entity's jurisdiction where gatherings may occur.

- 32. Violation of this Order is subject to fine, imprisonment, or both. (California Health and Safety Code section 120295.)
- 33. To the extent necessary, this Order may be enforced by the Sheriff or chiefs of police pursuant to Government Code sections 26602 and 41601 and Health and Safety Code section 101029.
- 34. Once this Order takes effect it shall supersede the Order of the Health Officer and Emergency Regulations dated June 8, 2020.

IT IS SO ORDERED:

Date: June 15, 2020



Wilma J. Wooten, M.D., M.P.H.
Public Health Officer
County of San Diego

EMERGENCY REGULATIONS

As Director of Emergency Services for the County of San Diego, I am authorized to promulgate regulations for the protection of life and property pursuant to Government Code Section 8634 and San Diego County Code section 31.103. The following shall be in effect for the duration of the Health Officer Order issued above which is incorporated in its entirety by reference:

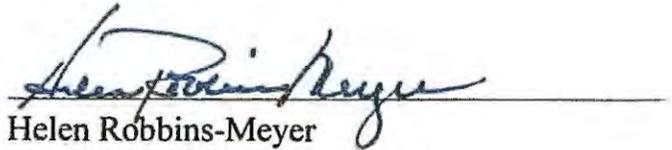
The Health Officer Order shall be promulgated as a regulation for the protection of life and property.

Any person who violates or who refuses or willfully neglects to obey this regulation is subject to

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Any person who violates or who refuses or willfully neglects to obey this regulation is subject to fine, imprisonment, or both. (Government Code section 8665.)

Date: June 15, 2020



Helen Robbins-Meyer
Chief Administrative Officer
Director of Emergency Services
County of San Diego

Pacers Main Parking Lot

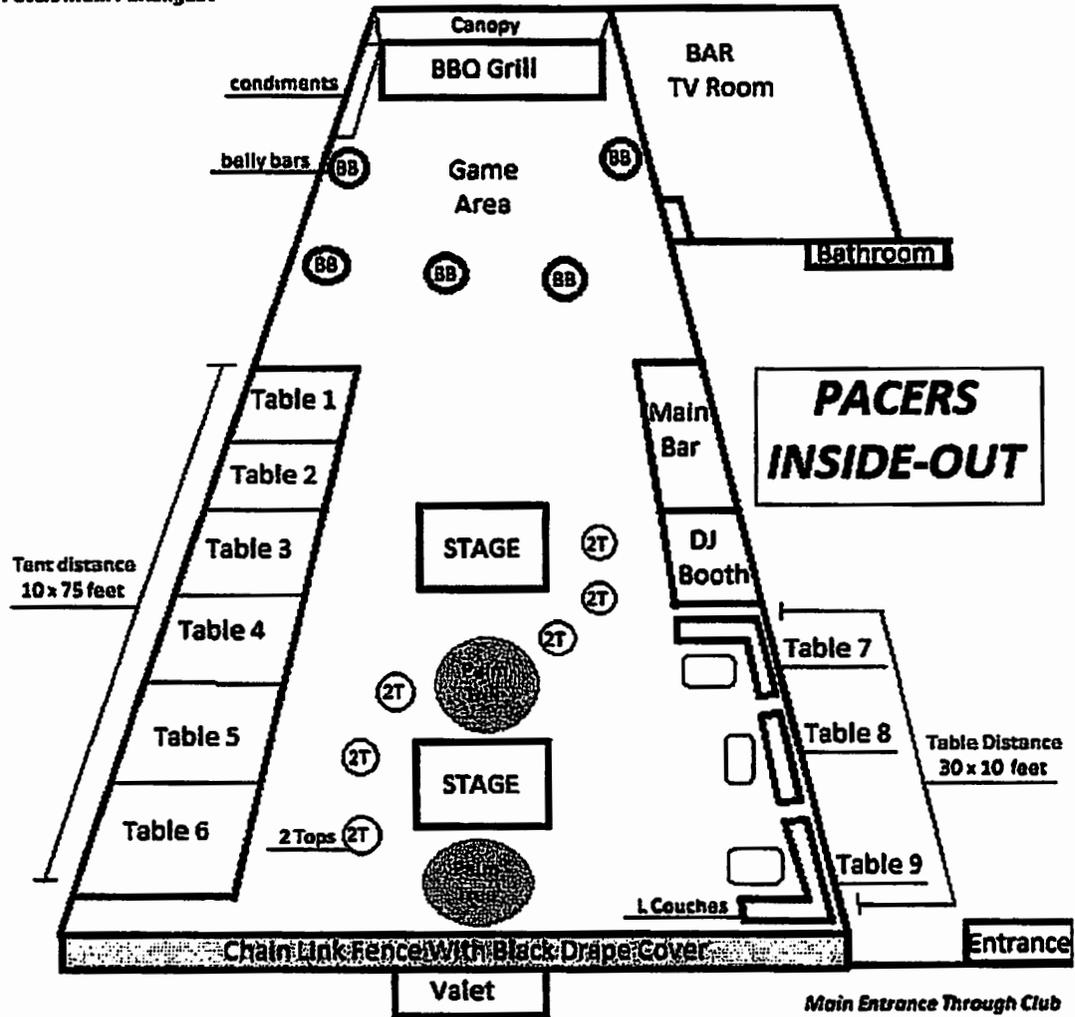


EXHIBIT
B

Blueprint for a Safer Economy

Activity and Business Tiers

SECTORS	Widespread Tier 1	Substantial Tier 2	Moderate Tier 3	Minimal Tier 4
Critical Infrastructure	Open with modifications	Open with modifications	Open with modifications	Open with modifications
Limited Services	Open with modifications	Open with modifications	Open with modifications	Open with modifications
Outdoor Playgrounds & Outdoor Recreational Facilities**	Open with modifications	Open with modifications	Open with modifications	Open with modifications
Hair Salons & Barbershops	Open Indoors with modifications	Open indoors with modifications	Open indoors with modifications	Open indoors with modifications
All Retail (including critical infrastructure, except standalone grocers)	Open Indoors with modifications • Max 25% capacity	Open Indoors with modifications • Max 50% capacity	Open Indoors with modifications	Open Indoors with modifications



SECTORS	Widespread Tier 1	Substantial Tier 2	Moderate Tier 3	Minimal Tier 4
Shopping Centers (Malls, Destination Centers, Swap Meets)	Open Indoors with modifications <ul style="list-style-type: none"> • Max 25% capacity • Closed common areas • Closed food courts 	Open indoors with modifications <ul style="list-style-type: none"> • Max 50% capacity • Closed common areas • Reduced capacity food courts (see restaurants) 	Open indoors with modifications <ul style="list-style-type: none"> • Closed common areas • Reduced capacity food courts (see restaurants) 	Open Indoors with modifications <ul style="list-style-type: none"> • Reduced capacity food courts (see restaurants)
Personal Care Services***	Open Indoors with modifications	Open indoors with modifications	Open indoors with modifications	Open indoors with modifications
Museums, Zoos, and Aquariums	Outdoor Only with modifications	Open indoors with modifications <ul style="list-style-type: none"> • Indoor activities max 25% capacity 	Open indoors with modifications <ul style="list-style-type: none"> • Indoor activities max 50% capacity 	Open indoors with modifications
Places of Worship	Outdoor Only with modifications	Open indoors with modifications <ul style="list-style-type: none"> • Max 25% capacity or 100 people, whichever is fewer 	Open indoors with modifications <ul style="list-style-type: none"> • Max 50% capacity or 200 people, whichever is fewer 	Open indoors with modifications <ul style="list-style-type: none"> • Max 50% capacity
Movie Theaters	Outdoor Only with modifications	Open Indoors with modifications <ul style="list-style-type: none"> • Max 25% capacity or 100 people, whichever is fewer 	Open indoors with modifications <ul style="list-style-type: none"> • Max 50% capacity or 200 people, whichever is fewer 	Open indoors with modifications <ul style="list-style-type: none"> • Max 50% capacity

SECTORS	Widespread Tier 1	Substantial Tier 2	Moderate Tier 3	Minimal Tier 4
Hotels and Lodging	Open with modifications	Open with modifications <ul style="list-style-type: none"> +Fitness centers (+10%) 	Open with modifications <ul style="list-style-type: none"> +Fitness centers (+25%) +Indoor pools 	Open with modifications <ul style="list-style-type: none"> +Fitness Centers (50%) +Spa facilities etc.
Gyms and Fitness Centers	Outdoor Only with modifications	Open indoors with modifications <ul style="list-style-type: none"> Max 10% capacity +Climbing walls 	Open indoors with modifications <ul style="list-style-type: none"> Max 25% capacity +Indoor pools 	Open indoors with modifications <ul style="list-style-type: none"> +Saunas +Steam rooms Max 50% capacity
Restaurants	Outdoor Only with modifications	Open indoors with modifications <ul style="list-style-type: none"> Max 25% capacity or 100 people, whichever is fewer 	Open indoors with modifications <ul style="list-style-type: none"> Max 50% capacity or 200 people, whichever is fewer 	Open indoors with modifications <ul style="list-style-type: none"> Max 50% capacity
Wineries	Outdoor Only with modifications	Outdoor Only with modifications	Open indoors with modifications <ul style="list-style-type: none"> Max 25% capacity indoors, or 100 people, whichever is fewer 	Open indoors with modifications <ul style="list-style-type: none"> Max 50% capacity or 200 people indoors, whichever is fewer

SECTORS	Widespread Tier 1	Substantial Tier 2	Moderate Tier 3	Minimal Tier 4
Bars, Breweries, and Distilleries (where no meal provided) (follow restaurants where meal is provided)	Closed	Closed	Open Outdoors with modifications	Open indoors with modifications <ul style="list-style-type: none"> • Max 50% capacity
Family Entertainment Centers	Outdoor Only with modifications e.g. <ul style="list-style-type: none"> • Kart Racing • Mini Golf • Batting Cages 	Outdoor Only with modifications e.g. <ul style="list-style-type: none"> • Kart Racing • Mini Golf • Batting Cages 	Open Indoors for naturally distanced activities with modifications <ul style="list-style-type: none"> • Max 25% capacity • Bowling Alleys 	Open indoors for activities with increased risk of proximity and mixing with modifications <ul style="list-style-type: none"> • Max 50% capacity • Arcade Games • Ice and roller skating • Indoor playgrounds
Cardrooms, Satellite Wagering	Outdoor Only with modifications	Outdoor Only with modifications	Open indoors with modifications <ul style="list-style-type: none"> • Max 25% capacity 	Open indoors with modifications <ul style="list-style-type: none"> • Max 50% capacity
Offices	Remote	Remote	Open indoors with modifications <ul style="list-style-type: none"> • Encourage telework 	Open indoors with modifications <ul style="list-style-type: none"> • Encourage telework
Professional Sports	Open <ul style="list-style-type: none"> • Without live audiences • With modifications 	Open <ul style="list-style-type: none"> • Without live audiences • With modifications 	Open <ul style="list-style-type: none"> • Without live audiences • With modifications 	Open <ul style="list-style-type: none"> • Without live audiences • With modifications

SECTORS	Widespread Tier 1	Substantial Tier 2	Moderate Tier 3	Minimal Tier 4
Live Audience Sports***	Closed	Closed	Outdoors Only <ul style="list-style-type: none"> • Max 20% • Regional visitors (120 miles) • Advanced reservations only • Assigned seating only • In-seat concessions only (No concourse sales) 	Outdoors Only <ul style="list-style-type: none"> • Max 25% • Regional visitors (120 miles) • Advanced reservations only • Assigned seating only • In-seat concessions only (No concourse sales)
Amusement Parks***	Closed	Closed	Smaller Parks Open <ul style="list-style-type: none"> • 25% capacity or 500 people, whichever is fewer • Outdoor attractions only • In-county visitors only • Advanced reservations only 	Larger Parks Open <ul style="list-style-type: none"> • 25% capacity • Advanced reservations only

** Outdoor playgrounds and outdoor recreational facilities updated September 28, 2020

*** Personal care services, live audience professional sports and amusement parks updated October 20, 2020

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County of San Diego

HEALTH AND HUMAN SERVICES AGENCY
PUBLIC HEALTH SERVICES

ORDER OF THE HEALTH OFFICER AND EMERGENCY REGULATIONS (Effective August 22, 2020)

Pursuant to California Health and Safety Code sections 101040, 120175, and 120175.5 (b) the Health Officer of the County of San Diego (Health Officer) **ORDERS AS FOLLOWS:**

Effective 12:00 a.m. on **Saturday, August 22, 2020** and continuing until further notice, the following will be in effect for San Diego County (county):

1. All persons are to remain in their homes or at their place of residence, except for employees or customers traveling to and from essential businesses, reopened businesses, or essential activities as defined in section 22, below, or to participate in individual or family outdoor activity as allowed by this Order.
2. All public or private "gatherings," as defined in section 22 below, are prohibited.
3. All businesses not meeting the definition of essential business or reopened business in section 22 below are referred to in this Order as "non-essential businesses" and shall be and remain closed for the duration of this Order. All essential businesses and reopened businesses must comply with the requirements of this Order. Notwithstanding the foregoing, any business may remain open if its employees and owners can provide its services from home, including by telecommuting, without direct contact with the public.
4. **All public, charter, and private schools may hold classes and other school activities only under circumstances permitted by the State and in compliance with the COVID-19 Industry Guidance: Schools and School - Based Programs, and as may be updated or superseded by further State guidance. Institutions of higher education may hold classes or other school activities only under circumstances permitted by the State and in compliance with the COVID - 19 Industry Guidance: Institutions of Higher Education and as may be updated or superseded**

Document received by the CA 4th District Court of Appeal Division 1.



by further State guidance.

5. Child daycare and child care providers shall operate in compliance with the measures set forth in State COVID-19 Updated Guidance: Child Care Programs and Providers and shall prepare and post a Safe Reopening Plan pursuant to section 11, below.
6. “Non-essential personnel,” as defined in section 22 below, are prohibited from entry into any hospital or long-term care facility. All essential personnel who are COVID-19 positive or show any potential signs or symptoms of COVID-19 are strictly prohibited from entry into hospitals or long-term care facilities. Notwithstanding the foregoing, individuals requiring medical care for COVID-19 or related conditions may be admitted to hospitals or other medical facilities if the hospital or medical facility is appropriate for treating COVID-19 and has adequate precautions in place to protect its patients, medical personnel and staff.
7. Hospitals and [healthcare providers](#), including dentists shall:
 - a. Take measures to preserve and prioritize resources; and,
 - b. May authorize and perform non-emergent or elective surgeries or procedures based on their determination of clinical need and supply capacity, and where consistent with State guidance.
 - c. Nothing in this Order shall prevent physicians and other healthcare providers from conducting routine preventive care provided it conforms to any applicable State guidance.
 - d. Nothing in this Order shall prevent dentists or dental hygienists from conducting routine preventive care provided it conforms to any applicable State guidance.
8. Hospitals, healthcare providers, pharmacies and commercial testing laboratories shall report all COVID-19 test results to the Public Health Officer immediately after such results are received.
9. All persons two years of age or older who are present in the county shall have possession of a face covering when they leave their home or place of residence and shall wear the face covering as described and required in California Department of Public Health Face Covering Guidance issued on June 18, 2020, (available at: https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Guidance-for-Face-Coverings_06-18-2020.pdf).

10. All essential businesses that allow members of the public to enter a facility must prepare and post a “Social Distancing and Sanitation Protocol” on the form available at: https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/covid19/SOCIAL_DISTANCING_AND_SANITATION_PROTOCOL_04022020_V1.pdf), or on a form required by another governmental entity requiring substantially similar information, for each of their facilities open to the public in the county. The Social Distancing and Sanitation Protocol must be posted at or near the entrance of the relevant facility, and shall be easily viewable by the public and employees. A copy of the Social Distancing and Sanitation Protocol must also be provided to each employee performing work at the facility. All essential businesses shall implement the Social Distancing and Sanitation Protocol and provide evidence of its implementation to any authority enforcing this Order upon demand. The Social Distancing and Sanitation Protocol must ensure all required measures are implemented and must identify and require measures necessary to implement social distancing are implemented at each facility that will ensure social distancing and sanitation at that particular facility. If the measures identified and implemented are not effective in maintaining proper social distancing and sanitation, the business shall promptly modify its Social Distancing and Sanitation Protocols to ensure proper social distancing and sanitation. Any business that fails to successfully implement social distancing and sanitation may be required to close.

11. All reopened businesses, with the exception of restaurants, bars, wineries, distilleries and breweries which do not limit services to take-out or delivery, must prepare and post a “Safe Reopening Plan” on the form available at: https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/covid19/Community_Sector_Support/BusinessesandEmployers/SafeReopeningPlanTemplate.pdf for each of their facilities in the county. Restaurants bars, wineries, distilleries and breweries which do not limit services to take-out or delivery, must prepare and post a “COVID-19 Restaurant Operating Protocol” on the form available at https://www.sandiegocounty.gov/content/dam/sdc/deh/fhd/food/pdf/covid19sdrestaurantoperatingprotocol_en.pdf for each restaurant in the county. The Safe Reopening Plan or COVID-19 Restaurant Operating Protocol must be posted at or near the entrance of the relevant facility, and shall be easily viewable by the public and employees. A copy of the Safe Reopening Plan or COVID-19 Restaurant Operating Protocol must also be provided to each employee performing work at the facility. All reopened businesses shall implement the Safe Reopening Plan or COVID-19 Restaurant Operating Protocol and provide evidence of its implementation to any authority enforcing this Order upon demand. The Safe Reopening Plan or COVID-19 Restaurant Operating Protocol must ensure all required measures are implemented. If the

measures identified and implemented are not effective in maintaining proper social distancing and sanitation, the business shall promptly modify its Safe Reopening Plan or COVID-19 Restaurant Operating Protocol to ensure proper social distancing and sanitation. Any business that fails to comply with its Safe Reopening Plan or COVID-19 Restaurant Operating Protocol shall immediately close.

12. When the State of California has issued an [industry guidance](#), or any subsequent amendments thereto, with mandatory and/or suggested measures to be implemented by a particular type of business or industry, a reopened business must include in its Safe Reopening Plan all of the industry guidance mandatory measures, including, but not limited to, all of the requirements and guidance set forth in the Statewide Public Health Officer Order, issued by the California Department of Health Services on July 13, 2020, all portions of which are operative in San Diego County effective immediately, and available at <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/SHO%20Order%20Dimming%20Entire%20State%207-13-2020.pdf>. The reopened business shall include all suggested measures necessary to maintain proper sanitation, employee screening, social distancing and facial coverings. Any mandatory measures required by this Order must also be included in the Safe Reopening Plan.

13. All brewpubs, breweries, bars and pubs shall close unless they comply with section 14c, below, in which case they shall comply with all other requirements in this section and section 14 below. All other restaurants, bars, wineries, distilleries and breweries shall close indoor service in conformance with the requirements set forth in the Statewide Public Health Officer Order, issued by the California Department of Health Services on July 13, 2020, all portions of which are operative in San Diego County effective immediately, and available at <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/SHO%20Order%20Dimming%20Entire%20State%207-13-2020.pdf>, and shall be closed from 10:00 p.m. until 5:00 a.m. every day. Guests already in the facility at 10:00 p.m. may remain in the facility until 11:00 p.m. Only staff needed to close, open or clean shall be in the facility between the hours of 11:00 p.m. and 5:00 a.m.

14. All restaurants, bars, wineries and breweries shall also be required to ensure their customers comply with all of the following measures and shall immediately close if they are not able to do so:

- a. No food or beverages shall be served to or consumed by a customer who is not seated at a table designated by the restaurant for dining.

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- b. The bar area of a restaurant may be used only for table service of meals.
- c. Alcoholic drinks shall only be served as part of a meal and must be sold and served in the same transaction as the meal. All meals shall be served by a food operator permitted by the San Diego County Department of Environmental Health. This restriction shall not be applicable to outdoor service of wine at a winery or spirits at a distillery.
- d. Customers shall not stand in the restaurant, bar, winery, distillery or brewery except in the reception area while waiting for a table or to pick up take-out food. If customers cannot be socially distanced in the reception area they shall wait in their cars or outside of the restaurant in a line with six feet between each customer.
- e. Discontinue open seating. All members of the party must be present before seating and the host must bring the entire party to the table at one time. The customers allowed at a table are limited to members of a single household or customers who have asked to be seated together at the time a table is requested.
- f. Discontinue seating customers and/or groups at bar counters, sushi preparation bars, etc. where they cannot maintain at least six feet of distance from employee work areas/stations. Install physical barriers or partitions in areas where maintaining a physical distance of six feet is difficult.
- g. Customers are not required to wear face coverings while at a table with members of the same household. Customers at a table with non-household members are not required to wear face coverings when eating and drinking. Customers are required to wear face coverings at all other times in conformance with paragraph 9, above.
- h. Tables designated for dining shall be six feet apart, or separated by barriers or partitions that extend above the heads of customers while seated. Customer shall not be allowed to bring additional chairs to the table that interfere with the six foot separation.
- i. Self-serve food or drink options, such as buffets, salad bars, and drink stations are not allowed.
- j. Shared entertainment items such as board games, arcade games and vending machines are prohibited and customers shall not have access to game and entertainment areas such as pool tables or darts.
- k. Dance floors shall be closed and live performances such as musical or dance acts shall be discontinued.
- l. Any customer that refuses to comply with this section shall be subject to enforcement per Health and Safety Code section 120295.

15. Places of Worship – Religious services and cultural ceremonial activities (including wedding ceremonies but not receptions) may be conducted in conformance with the State Guidance pursuant to sections 11 and 12, above. Given the high risk of this activity, vulnerable members

of the population (over 65 years old, compromised immune system or underlying condition) are strongly encouraged to participate through streaming or some other form of remote technology. Outdoor services and cultural ceremonial activities may be conducted provided all persons practice social distancing as defined in section 22e, below.

16. Each essential business and reopened business shall:

- a. Require all employees/on-site contractors (hereinafter referred to as employees) to have possession of face coverings and wear them as described in section 9 above when in the business facility; and,
- b. **Require** temperature screening of all employees and prohibit entry to the workplace of employees with a temperature of 100 degrees or more, employees exhibiting COVID-19 symptoms as described by the Centers for Disease Control and Prevention, or employees who have recently been exposed to a person who has tested positive for COVID-19 (either directly or through a breach of Personal Protective Equipment in the case of healthcare workers/first responders); and
- c. Take all of the following actions if an employer becomes aware that an employee is diagnosed with COVID-19:
 - i. Promptly notify the County Department of Public Health that there is an employee diagnosed with COVID-19, together with the name, date of birth, and contact information of the employee.
 - ii. Cooperate with the County Department of Public Health's COVID-19 response team to identify and provide contact information for any persons exposed by the employee at the workplace.
 - iii. Provide notice of the exposure to any employees, and contractors (who regularly work at the workplace), who may have been exposed to COVID-19, as stated in the State's COVID-19 Employer Playbook for a Safe Reopening, available at {<https://files.covid19.ca.gov/pdf/employer-playbook-for-safe-reopening--en.pdf>}.

17. Outdoor Recreation

- a. Each public park and recreation area or facility, shall operate in compliance with the measures set forth in the State COVID-19 Industry Guidance: Campgrounds, RV Parks and Outdoor Recreation. The operator of the park shall prepare a Safe Reopening Plan pursuant to section 11, above, indicating how the park or recreation facility will implement the required measures. Any park or recreation area/facility at which the Protocol requirements cannot be effectively implemented may be required to close.

- b. Outdoor recreation instruction and day camps that comply with the State COVID-19 Industry Guidance: Day Camps, may be conducted in park and recreation areas/facilities.
 - c. Swimming pools owned or operated by a Homeowners' Association, Condominium or Apartment complex may be open provided the owner or operator completes and posts a Safe Reopening Plan that shows conformance with the requirements of this Order and with the swimming pool/aquatic venues requirements of the State COVID-19 Industry Guidance on Fitness Facilities.
18. All essential businesses and reopened businesses that remain in operation in accordance with the Order shall make every effort to use telecommuting for their workforces.
19. A strong recommendation is made that all persons who are 65 years old or older, have a chronic underlying condition, or have a compromised immune system self-quarantine themselves at home or other suitable location.
20. All persons arriving in the county from international locations identified on the Centers for Disease Control and Prevention (CDC) Warning Level 2 or 3 Travel Advisory (available at: <https://wwwnc.cdc.gov/travel/notices>) shall be subject to 14-day home or other suitable location quarantine and self-monitoring.
21. Persons who have been diagnosed with COVID-19, or who are likely to have COVID-19, shall comply with the Order of the Health Officer titled: "Isolation of All Persons with or Likely to have COVID-19", or as subsequently amended. Persons who have a close contact with a person who either has COVID-19, or is likely to have COVID-19, shall comply with the Order of the Health Officer titled: "Quarantine of Persons Exposed to COVID-19," or as subsequently amended. Both orders are available at: https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community_epidemiology/dc/2019-nCoV/health-order.html. If a more specific isolation or quarantine order is issued to a person, that order shall be followed.
22. For purposes of this Order:
- a. "Essential business" is any business or activity (or a business/activity that employs/utilizes workers) designated by the State Public Health Officer as "Essential Critical Infrastructure Workers" set forth in: <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>) as that list may be updated from time-to-time, and referenced in Executive Order N-33-20 issued by the Governor of the State of

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California. For the purposes of this Order, the following businesses in the Food and Agriculture Sector are considered “groceries” or “other retail that sells food and beverages”: grocery stores, corner stores and convenience stores, liquor stores that sell food, farmer’s markets, food banks, farm and produce stands, supermarkets, big box stores that sell groceries and essentials, or similar business that sell food so long as the store has a current permit related to the sale of food and/or beverages from the San Diego County Department of Environmental Health.

- b. “Gathering” is any event or convening that brings together more than one person in a single room or single indoor or outdoor space at the same time. A gathering does not include:
 - i. A gathering consisting only of members of a single family or household.
 - ii. Operations at airports, public transportation or other spaces where persons in transit are able to practice social distancing.
 - iii. Operations at essential businesses as defined in section 22a above and reopened businesses as defined in 22f below and where the other requirements set forth in this Order are followed.
- c. “Long term care facility” is a facility serving adults that require assistance with activities of daily living, including a skilled nursing facility, and that is licensed by the California Department of Community Care and Licensing, or the California Department of Public Health.
- d. “Non-essential personnel” are employees, contractors, or members of the public who do not perform treatment, maintenance, support, or administrative tasks deemed essential to the healthcare mission of the long-term care facility or hospital. Non-essential personnel do not include first responders, nor State, federal, or local officials, investigators, or medical personnel carrying out lawful duties. Non-essential personnel do not include visitors to hospitals and long-term care facilities who are granted entry by the facility’s director, or designee, because they are family or friends who are visiting a resident in an end of life or similar situation, are parents or guardians visiting a child who is a patient, or because of any other circumstances deemed appropriate by the facility director, or designee, and where appropriate precautions by the facility that follow federal, State, and local public health guidance regarding COVID-19 are followed.
- e. “Social distancing” is maintaining a six-foot separation from all persons except for household members, first responders and medical providers or employees conducting temperature screenings.
- f. “Reopened business” is a business that is not an essential business as stated in section

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22a above, and has reopened in conformance with the State of California’s Resilience Roadmap (available at: <https://covid19.ca.gov/roadmap-counties/>) and the Statewide Public Health Officer Order, issued by the California Department of Health Services on July 13, 2020, all portions of which are operative in San Diego County effective immediately, and available at <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/SHO%20Order%20Dimming%20Entire%20State%207-13-2020.pdf>}. A reopened business may open when the State has posted the applicable COVID-19 INDUSTRY GUIDANCE, the Public Health Officer has posted an acknowledgement of the reopened status on the County of San Diego Coronavirus website and the business has complied with the requirements of this Order.

23. Hotels and lodging establishments may be open for all guests, including tourists and leisure guests, provided they comply with the State COVID-19 Industry Guidance: Hotels, Lodging and Short Term Rentals and complete and post a Safe Reopening Plan pursuant to section 11, above.
24. This Order is issued as a result of the World Health Organization’s declaration of a worldwide pandemic of COVID-19 disease, also known as “novel coronavirus.”
25. This Order is issued based on scientific evidence regarding the most effective approaches to slow the transmission of communicable diseases generally and COVID-19 specifically, as well as best practices as currently known and available to protect vulnerable members of the public from avoidable risk of serious illness or death resulting from exposure to COVID-19. The age, condition, and health of a significant portion of the population of the county places it at risk for serious health complications, including death, from COVID-19. Although most individuals who contract COVID-19 do not become seriously ill, persons with mild symptoms and asymptomatic persons with COVID-19 may place other vulnerable members of the public—such as older adults, and those with underlying health conditions—at significant risk.
26. The actions required by this Order are necessary to reduce the number of individuals who will be exposed to COVID-19, and will thereby slow the spread of COVID-19 in the county. By reducing the spread of COVID-19, this Order will help preserve critical and limited healthcare capacity in the county and will save lives.
27. This Order is issued in accordance with, and incorporates by reference: a) the Declaration of Local Health Emergency issued by the Health Officer on February 14, 2020; b) the

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Proclamation of Local Emergency issued by the County Director of Emergency Services on February 14, 2020; c) the action of the County Board of Supervisors to ratify and continue both the local health emergency and local emergency on February 19, 2020; d) the Proclamation of a State of Emergency issued by the Governor of the State of California on March 4, 2020; e) Executive Order N-25-20 issued by the Governor of the State of California on March 12, 2020 which orders that “All residents are to heed any orders and guidance of state and local health officials, including but not limited to the imposition of social distancing measures, to control COVID-19”; f) Proclamation 9984 regarding COVID-19 issued by the President of the United States on March 11, 2020; g) Executive Order N-33-20 issued by the Governor of the State of California on March 19, 2020; h) the “Interim Additional Guidance for Infection Prevention and Control for Patients with Suspected or Confirmed COVID-19 in Nursing Homes” issued by the CDC; i) COVID-19 guidance issued by the California Department of Public Health on including, but not limited to the Face Coverings Guidance issued on April 1, 2020; and j) the State of California’s “Resilience Roadmap.”

28. This Order is issued to prevent circumstances often present in gatherings that may exacerbate the spread of COVID-19, such as: 1) the increased likelihood that gatherings will attract people from a broad geographic area; 2) the prolonged time period in which large numbers of people are in close proximity; 3) the difficulty in tracing exposure when large numbers of people attend a single event or are at a single location; and 4) the inability to ensure that such persons follow adequate hygienic practices.
29. This Order is issued to provide additional opportunities for recreational activities while also requiring additional protections from the spread of COVID-19 to the public who are taking advantage of these opportunities for recreational activities. And providing additional protections for employees of essential businesses or reopened business and their customers/clients by increasing facial covering requirements and health checks and temperature screening.
30. This Order is issued to protect the public health as businesses are allowed to reopen by requiring businesses to implement procedures necessary to ensure their employees and customers comply with social distancing, sanitation and screening practices.
31. This Order comes after the release of substantial guidance from the Health Officer, the California Department of Public Health, the CDC, and other public health officials throughout the United States and around the world.

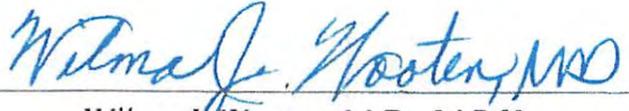
SUPERSEDED

32. The statement of facts and circumstances set forth as justification for each Guidance issued by the California Department of Health Services that is referenced in this Order are hereby accepted and incorporated by reference into this Order.
33. Pursuant to Health and Safety Code section 120175.5 (b) all governmental entities in the county shall take necessary measures within the governmental entity's control to ensure compliance with this Order and to disseminate this Order to venues or locations within the entity's jurisdiction where gatherings may occur.
34. Violation of this Order is subject to fine, imprisonment, or both. (California Health and Safety Code section 120295.)
35. To the extent necessary, this Order may be enforced by the Sheriff or chiefs of police pursuant to Government Code sections 26602 and 41601 and Health and Safety Code section 101029.

36. Once this Order takes effect it shall supersede the Order of the Health Officer and Emergency Regulations dated August 7, 2020.

IT IS SO ORDERED:

Date: August 21, 2020



Wilma J. Wooten, M.D., M.P.H.
Public Health Officer
County of San Diego

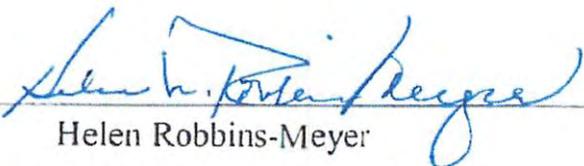
EMERGENCY REGULATIONS

As Director of Emergency Services for the County of San Diego, I am authorized to promulgate regulations for the protection of life and property pursuant to Government Code Section 8634 and San Diego County Code section 31.103. The following shall be in effect for the duration of the Health Officer Order issued above which is incorporated in its entirety by reference:

The Health Officer Order shall be promulgated as a regulation for the protection of life and property.

Any person who violates or who refuses or willfully neglects to obey this regulation is subject to fine, imprisonment, or both. (Government Code section 8665.)

Date: August 21, 2020



Helen Robbins-Meyer
Director of Emergency Services
County of San Diego

SUPERSEDED



County of San Diego

HEALTH AND HUMAN SERVICES AGENCY
PUBLIC HEALTH SERVICES

ORDER OF THE HEALTH OFFICER AND EMERGENCY REGULATIONS (Effective September 1, 2020)

Pursuant to California Health and Safety Code sections 101040, 120175, and 120175.5 (b) the Health Officer of the County of San Diego (Health Officer) **ORDERS AS FOLLOWS:**

Effective 12:01 a.m. on Tuesday, September 1, 2020 and continuing until further notice, the following will be in effect for San Diego County (county):

1. All persons are to remain in their homes or at their place of residence, except for employees or customers traveling to and from essential businesses or reopened businesses as defined in sections 10 and 11, below, or to participate in individual or family outdoor activity as allowed by this Order.
2. All public or private “gatherings,” as defined in section 15 below, are prohibited.
3. All public, charter, and private schools may hold classes and other school activities only under circumstances permitted by the State and in compliance with the [COVID-19 Industry Guidance: Schools and School - Based Programs](#), and as may be updated or superseded by further State guidance. Institutions of higher education may hold classes or other school activities only under circumstances permitted by the State and in compliance with the [COVID - 19 Industry Guidance: Institutions of Higher Education](#) and as may be updated or superseded by further State guidance.
4. Child daycare and child care providers shall operate in compliance with the measures set forth in State [COVID-19 Updated Guidance: Child Care Programs and Providers](#) and shall prepare and post a Safe Reopening Plan pursuant to section 11c, below.
5. “Non-essential personnel,” as defined in section 15b below, are prohibited from entry into any hospital or long-term care facility. All essential personnel who are COVID-19 positive or



document received by the CA 4th District Court of Appeal Division 1.

show any potential signs or symptoms of COVID-19 are strictly prohibited from entry into hospitals or long-term care facilities. Notwithstanding the foregoing, individuals requiring medical care for COVID-19 or related conditions may be admitted to hospitals or other medical facilities if the hospital or medical facility is appropriate for treating COVID-19 and has adequate precautions in place to protect its patients, medical personnel and staff.

6. Hospitals and healthcare providers, including dentists shall:
 - a. Take measures to preserve and prioritize resources; and,
 - b. May authorize and perform non-emergent or elective surgeries or procedures based on their determination of clinical need and supply capacity, and where consistent with State guidance.
 - c. Nothing in this Order shall prevent physicians and other healthcare providers from conducting routine preventive care provided it conforms to any applicable State guidance.
 - d. Nothing in this Order shall prevent dentists or dental hygienists from conducting routine preventive care provided it conforms to any applicable State guidance.
7. Hospitals, healthcare providers, pharmacies and commercial testing laboratories shall report all COVID-19 test results to the Public Health Officer immediately after such results are received.
8. Face coverings shall be worn as described and required in California Department of Public Health Face Covering Guidance issued on June 18, 2020, (available at: https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Guidance-for-Face-Coverings_06-18-2020.pdf).
9. All businesses not meeting the definition of essential business or reopened business in section 10 and 11 below are referred to in this Order as “non-essential businesses” and shall be and remain closed for the duration of this Order. All essential businesses and reopened businesses must comply with the requirements of this Order. Notwithstanding the foregoing, any business may remain open if its employees and owners can provide its services from home, including by telecommuting, without direct contact with the public.

10. ESSENTIAL BUSINESSES

- a. “Essential business” is any business or activity (or a business/activity that employs/utilizes workers) designated by the State Public Health Officer as “Essential

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Critical Infrastructure Workers” set forth in: <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>) as that list may be updated from time-to-time, and referenced in Executive Order N-33-20 issued by the Governor of the State of California.

- b. All essential businesses that allow members of the public to enter a facility must prepare and post a “Social Distancing and Sanitation Protocol” on the form available at: https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/covid19/SOCIAL_DISTANCING_AND_SANITATION_PROTOCOL_04022020_V1.pdf), or on a form required by another governmental entity requiring substantially similar information, for each of their facilities open to the public in the county. The Social Distancing and Sanitation Protocol must be posted at or near the entrance of the relevant facility, and shall be easily viewable by the public and employees. A copy of the Social Distancing and Sanitation Protocol must also be provided to each employee performing work at the facility. All essential businesses shall implement the Social Distancing and Sanitation Protocol and provide evidence of its implementation to any authority enforcing this Order upon demand. The Social Distancing and Sanitation Protocol must describe all measures required in section c below. Any business that fails to prepare and successfully implement a Social Distancing and Sanitation Protocol shall immediately close.
- c. When the State of California has issued an industry guidance, or any subsequent amendments thereto, with mandatory or suggested restrictions and/or measures to be implemented by a particular sector of essential business, every essential business in that sector must comply with the guidance and shall include in its Social Distancing and Sanitation Protocol (prepared pursuant to section d, below) all of the measures listed in the industry guidance. Any mandatory measures required by this Order must also be included in a Social Distancing and Sanitation Protocol.

11. REOPENED BUSINESSES

- a. “Reopened business” is a business that is not an essential business as defined in section 10a above, and has reopened in conformance with the State of California’s Plan for Reducing COVID-19 and Adjusting Permitted Sector Activities to Keep Californians Healthy and Safe (available at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID19CountyMonitoringOverview.aspx>

Statewide Public Health Officer Order, issued by the California Department of Health Services on August 28, 2020, all portions of which are operative in San Diego County

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effective immediately, and available at { https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/8-28-20_Order-Plan-Reducing-COVID19-Adjusting-Permitted-Sectors-Signed.pdf}. A

reopened business may open when the Public Health Officer has posted an acknowledgement of the reopened status on the County of San Diego Coronavirus website and the business has complied with the requirements of this Order.

- b. The State of California’s Blueprint for a Safer Economy establishes a four tier system for reopening business sectors. Those business sectors listed in the “Substantial/Tier2” column of the [Activities and Business Tiers](#) chart are allowed to reopen under the conditions set forth in the chart.

- i. Every business in the following sectors listed in the [Activities and Business Tiers](#) shall require all customers who receive services indoors or use indoor facilities to sign in with their name and telephone number:

1. Hair Salons & Barbershops
2. Personal Care Services
3. Gyms & Fitness Centers
4. Restaurants, Wineries, Bars, Breweries, and Distilleries (where meal is provided) as required in section g below.

- c. All reopened businesses, with the exception of restaurants, bars, wineries, distilleries and breweries which do not limit services to take-out or delivery, must prepare and post a “Safe Reopening Plan” on the form available at: https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/covid19/Community_Sector_Support/BusinessesandEmployers/SafeReopeningPlan_Template.pdf for each of their facilities in the county. Restaurants bars, wineries, distilleries and breweries which do not limit services to take-out or delivery, must prepare and post a “COVID-19 Restaurant Operating Protocol” on the form found at https://www.sandiegocounty.gov/content/dam/sdc/deh/fhd/food/pdf/covid19sdrestaurantoperatingprotocol_en.pdf for each restaurant in the county.

- d. The Safe Reopening Plan or COVID-19 Restaurant Operating Protocol must be posted at or near the entrance of the relevant facility, and shall be easily viewable by the public and employees. A copy of the Safe Reopening Plan or COVID-19 Restaurant Operating Protocol must also be provided to each employee performing work at the facility. All reopened businesses shall implement the Safe Reopening Plan or COVID-19 Restaurant Operating Protocol and provide evidence of its implementation to any authority enforcing this Order upon demand. The Safe Reopening Plan or COVID-19 Restaurant Operating Protocol must describe all measures required in section e, below.

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Any business that fails to prepare and comply with its Safe Reopening Plan or COVID-19 Restaurant Operating Protocol shall immediately close.

- e. When the State of California has issued an industry guidance, or any subsequent amendments thereto, with mandatory or suggested restrictions and/or measures to be implemented by a particular sector of reopened business, every reopened business in that sector must comply with the guidance and shall include in its Safe Reopening Plan or COVID-19 Restaurant Operating Protocol (prepared pursuant to section c, above) all of the measures listed in the industry guidance. Any mandatory measures required by this Order must also be included in a Social Distancing and Sanitation Protocol.
 - f. All restaurants, bars, wineries, distilleries and breweries shall be closed from 10:00 p.m. until 5:00 a.m. every day. Guests already in the facility at 10:00 p.m. may remain in the facility until 11:00 p.m. Only staff needed to close, open or clean shall be in the facility between the hours of 11:00 p.m. and 5:00 a.m.
 - g. All restaurants, bars, wineries, distilleries and breweries which are allowed to provide indoor service pursuant to the State of California Dine-in Restaurant Guidance shall comply with the following additional requirements applicable only to persons dining indoors:
 - i. Limiting persons sitting at a table to members of the same household is strongly encouraged.
 - ii. The restaurant shall obtain the name of each guest seated at a table and the telephone number of at least one guest and shall maintain the list of names and telephone numbers for three weeks.
 - iii. Guests will be required to wear face coverings at all times while in the facility, including when seated at a table before the meal is served and after the meal is finished
12. Each essential business and reopened business shall take all of the following actions if an employer becomes aware that an employee is diagnosed with COVID-19:
- i. Promptly notify the County Department of Public Health that there is an employee diagnosed with COVID-19, together with the name, date of birth, and contact information of the employee.
 - ii. Cooperate with the County Department of Public Health's COVID-19 response team to identify and provide contact information for any persons exposed by the employee at the workplace.
 - iii. Provide notice of the exposure to any employees, and contractors (who regularly work at the workplace), who may have been exposed to COVID-19, as stated in the State's COVID-19 Employer Playbook for a Safe

Reopening, available at {<https://files.covid19.ca.gov/pdf/employer-playbook-for-safe-reopening--en.pdf>}.

13. Outdoor Recreation

- a. Each public park and recreation area or facility, shall operate in compliance with the measures set forth in the [State COVID-19 Industry Guidance: Campgrounds, RV Parks and Outdoor Recreation](#). The operator of the park shall prepare a Safe Reopening Plan pursuant to section 11, above, indicating how the park or recreation facility will implement the required measures. Any park or recreation area/facility at which the Protocol requirements cannot be effectively implemented may be required to close.
- b. Outdoor recreation instruction and day camps that comply with the State COVID-19 Industry Guidance: Day Camps, may be conducted in park and recreation areas/facilities.

14. Persons who have been diagnosed with COVID-19, or who are likely to have COVID-19, shall comply with the Order of the Health Officer titled: “Isolation of All Persons with or Likely to have COVID-19”, or as subsequently amended. Persons who have a close contact with a person who either has COVID-19, or is likely to have COVID-19, shall comply with the Order of the Health Officer titled: “Quarantine of Persons Exposed to COVID-19,” or as subsequently amended. Both orders are available at: https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community_epidemiology/dc/2019-nCoV/health-order.html. If a more specific isolation or quarantine order is issued to a person, that order shall be followed.

15. For purposes of this Order:

- a. “Gathering” is any event or convening that brings together more than one person in a single room or single indoor or outdoor space at the same time. A gathering does not include:
 - i. A gathering consisting only of members of a single family or household.
 - ii. Operations at airports, public transportation or other spaces where persons in transit are able to practice social distancing.
 - iii. Operations at essential businesses as defined in section 15a above and reopened businesses as defined in 15f below and where the other requirements set forth in this Order are followed.
 - iv. A religious service or cultural ceremony including a wedding ceremony which is allowed provided [the State Guidance on Places of Worship and Providers of Religious Services and Cultural Ceremonies](#) is followed.

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However a wedding reception is a gathering and is not allowed.

- v. Outdoor protests in which participants maintain social distancing and wear face coverings at all times.
- b. “Non-essential personnel” are employees, contractors, or members of the public who do not perform treatment, maintenance, support, or administrative tasks deemed essential to the healthcare mission of the long-term care facility or hospital. Non-essential personnel do not include first responders, nor State, federal, or local officials, investigators, or medical personnel carrying out lawful duties. Non-essential personnel do not include visitors to hospitals and long-term care facilities who are granted entry by the facility’s director, or designee, because they are family or friends who are visiting a resident in an end of life or similar situation, are parents or guardians visiting a child who is a patient, or because of any other circumstances deemed appropriate by the facility director, or designee, and where appropriate precautions by the facility that follow federal, State, and local public health guidance regarding COVID-19 are followed.
- c. “Social distancing” is maintaining a six-foot separation from all persons except for household members, first responders and medical providers or employees conducting temperature screenings.

16. This Order is issued as a result of the World Health Organization’s declaration of a worldwide pandemic of COVID-19 disease, also known as “novel coronavirus.”

17. This Order is issued based on scientific evidence regarding the most effective approaches to slow the transmission of communicable diseases generally and COVID-19 specifically, as well as best practices as currently known and available to protect vulnerable members of the public from avoidable risk of serious illness or death resulting from exposure to COVID-19. The age, condition, and health of a significant portion of the population of the county places it at risk for serious health complications, including death, from COVID-19. Although most individuals who contract COVID-19 do not become seriously ill, persons with mild symptoms and asymptomatic persons with COVID-19 may place other vulnerable members of the public—such as older adults, and those with underlying health conditions—at significant risk.

18. The actions required by this Order are necessary to reduce the number of individuals who will be exposed to COVID-19, and will thereby slow the spread of COVID-19 in the county. By reducing the spread of COVID-19, this Order will help preserve critical and limited healthcare capacity in the county and will save lives.

19. This Order is issued in accordance with, and incorporates by reference: a) the Declaration of Local Health Emergency issued by the Health Officer on February 14, 2020; b) the Proclamation of Local Emergency issued by the County Director of Emergency Services on February 14, 2020; c) the action of the County Board of Supervisors to ratify and continue both the local health emergency and local emergency on February 19, 2020; d) the Proclamation of a State of Emergency issued by the Governor of the State of California on March 4, 2020; e) Executive Order N-25-20 issued by the Governor of the State of California on March 12, 2020 which orders that “All residents are to heed any orders and guidance of state and local health officials, including but not limited to the imposition of social distancing measures, to control COVID-19”; f) Proclamation 9984 regarding COVID-19 issued by the President of the United States on March 11, 2020; g) Executive Order N-33-20 issued by the Governor of the State of California on March 19, 2020; h) the “Interim Additional Guidance for Infection Prevention and Control for Patients with Suspected or Confirmed COVID-19 in Nursing Homes” issued by the CDC; i) COVID-19 guidance issued by the California Department of Public Health on including, but not limited to the Face Coverings Guidance issued on April 1, 2020; j) the State of California’s “Resilience Roadmap;” the State of California’s Plan for Reducing COVID-19 and Adjusting Permitted Sector Activities to Keep Californians Healthy and Safe; and, the California Statewide Public Health Officer Order dated August 28, 2020.
20. This Order is issued to prevent circumstances often present in gatherings that may exacerbate the spread of COVID-19, such as: 1) the increased likelihood that gatherings will attract people from a broad geographic area; 2) the prolonged time period in which large numbers of people are in close proximity; 3) the difficulty in tracing exposure when large numbers of people attend a single event or are at a single location; and 4) the inability to ensure that such persons follow adequate hygienic practices.
21. This Order is issued to provide additional opportunities for recreational activities while also requiring additional protections from the spread of COVID-19 to the public who are taking advantage of these opportunities for recreational activities. And providing additional protections for employees of essential businesses or reopened business and their customers/clients.
22. This Order is issued to protect the public health as businesses are allowed to reopen by requiring businesses to implement procedures necessary to ensure their employees and

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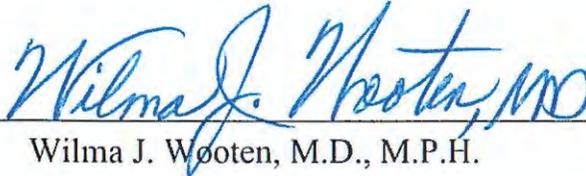
customers comply with social distancing, sanitation and screening practices.

23. This Order comes after the release of substantial guidance from the Health Officer, the California Department of Public Health, the CDC, and other public health officials throughout the United States and around the world.
24. The statement of facts and circumstances set forth as justification for each Guidance issued by the California Department of Health Services that is referenced in this Order are hereby accepted and incorporated by reference into this Order.
25. Pursuant to Health and Safety Code section 120175.5 (b) all governmental entities in the county shall take necessary measures within the governmental entity's control to ensure compliance with this Order and to disseminate this Order to venues or locations within the entity's jurisdiction where gatherings may occur.
26. Violation of this Order is subject to fine, imprisonment, or both. (California Health and Safety Code section 120295.)
27. To the extent necessary, this Order may be enforced by the Sheriff or chiefs of police pursuant to Government Code sections 26602 and 41601 and Health and Safety Code section 101029.

28. Once this Order takes effect it shall supersede the Order of the Health Officer and Emergency Regulations dated August 7, 2020.

IT IS SO ORDERED:

Date: August 31, 2020



Wilma J. Wooten, M.D., M.P.H.
Public Health Officer
County of San Diego

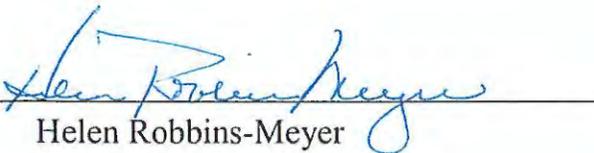
EMERGENCY REGULATIONS

As Director of Emergency Services for the County of San Diego, I am authorized to promulgate regulations for the protection of life and property pursuant to Government Code Section 8634 and San Diego County Code section 31.103. The following shall be in effect for the duration of the Health Officer Order issued above which is incorporated in its entirety by reference:

The Health Officer Order shall be promulgated as a regulation for the protection of life and property.

Any person who violates or who refuses or willfully neglects to obey this regulation is subject to fine, imprisonment, or both. (Government Code section 8665.)

Date: August 31, 2020



Helen Robbins-Meyer
Chief Administrative Officer
Director of Emergency Services
County of San Diego

From: Trever <trever.shamsholian@midwayclub.net>
Sent: Thursday, August 20, 2020 3:04 PM
To: DayJ@sandiego.gov; Jason Saccuzzo
Subject: Pacers Midway Bar and Grill

Good Afternoon Dr. Day,

Thank you for keeping in contact with us while we continue to work with the City of San Diego (the "City") toward a plan that will address *all* legitimate concerns regarding our reopening plan. To that end, we attempted to reach you by phone last week, but your voice mail was full. We assume you have been very busy fielding questions, so we are writing this email to pick-up on our conversation and gather more information regarding what we need to do to gain the City's approval to resume our normal services.

As we discussed over the last week, Midway Venture, LLC *dba* Pacers ("Pacers") has done everything possible to comply with both the letter and spirit of the CDC guidelines, and the guidelines of the City for reopening. In fact, I would respectfully submit that we have gone above and beyond the applicable guidelines, and the safety of our patrons, staff, and adult entertainers is our paramount concern. Below is a list of what we have implemented to keep our patrons, staff, and adult entertainers safe:

1. Mandatory Masks and Gloves for staff.
2. Temperature checks for staff and guests before entering the premises.
3. Mandatory masks for guests unless seated for dining.
4. All tables have clean linens and wiped down then replaced after customers use.
5. All cups, plates, utensils and condiments are disposable.
6. Tables are all placed 6ft apart.
7. All line areas are marked with 6 foot markers.
8. Occupancy limited per CDC guideline

As it relates to adult entertainment, below are the additional precautions that we identified in our plan to be implemented:

1. Stages located on 2 foot platforms, located 15 feet away from any tables.
2. Stages are also roped off with signs strictly advising all guests to not pass the designated area as well as not gather around the stages.
3. Strict policy of only 1 artist performer per stage. Never allowing more than one performer on stage at a time.
4. All stage equipment is sanitized and cleaned after each artist performance.



5. All performances are monitored with strict dress code including mandatory mask coverings while performing.
6. Audio stage for MC is located 15 feet from any tables, roped off and designated for 1 person only.
7. Audio stage is sanitized and cleaned after every daily use.
8. MC is required to wear mandatory face mask.
9. Our designated MC's main duties are to consistently remind guests of our strict guidelines and notifying guests to consistently follow our guidelines.

For a better understanding of our outdoor venue layout please see the diagram below, which we previously submitted to the City with our opening plans to gain a permit to reopen. Notably, there was no mention by the City that performances by individual adult entertainers would be prohibited if they followed the foregoing guidelines.

Again, we would respectfully submit that we have *gone above and beyond* virtually all other establishments in the City, and that we have implemented policies that are *far* stricter than the ones recommended by the CDC. Unfortunately, however, we have been subjected to what would appear to be arbitrary and selective enforcement. Last week you advised that "no outdoor performances are allowed in the city," yet churches (for example), exercising their 1st Amendment rights, were allowed to reopen outside for services, which would include signing and preaching in front of crowds. As it relates to health and safety, there can be no legitimate distinction between an adult entertainer performing *alone* on a stage in front of a group of patrons exercising social distancing (and other precautions) and a pastor giving a sermon to a group of churchgoers. Indeed, adult entertainment establishments, such as Pacers, are similarly situated as churches in that like churches, adult entertainment establishments have rights under the 1st Amendment.

Churches are just one example of other organizations that have been allowed to engage in conduct that has been prohibited among adult entertainment establishments such as Pacers. Due to that disparate treatment we decided to spend the following days observing other activities, venues, and businesses within the City to see if the statement "no performers" was in fact being enforced by City law enforcement, and the amount of contradicting proof we gathered to date is staggering.

For example, last week we gathered photo/video footage of numerous forms of entertainment/performances around the City that, with law enforcement nearby, was allowed to occur. These activities were not prevented, and the footage we gathered ranges from live bands at local restaurant-bars, individual guitarists, live DJs, outdoor gaming and rides at Belmont Park, a massive indoor pool with hundreds of unmasked children and adults at Plunge Mission Beach etc. The most concerning evidence that we have found is that there is in fact other similar adult entertainment establishments in Orange County that have copied our outdoor layout and is fully functioning with performers without any prohibitions by the county. As such, we must know whether this is in fact a statewide and/or citywide mandate that you claim. If this is not a statewide or citywide prohibition, then why is Pacers being singled out for disparate treatment? We can logically arrive at only one answer. It would seem to be that there is a hostility

against the First Amendment protected performances of adult entertainers, despite the fact that these performances would be conducted in full compliance with all applicable social distancing guidelines as stated above. The fact that some would object to these performances on moral grounds is not grounds to prevent them under the guise of attempting to limit the spread of COVID-19.

It is without question that our operation has done much more than most to keep our customers safe and it seems that we are being unfairly restricted regardless of us having full legal compliance to operate as an outdoor dining establishment. As you know, we are getting closer to Phase 3 in the county and records of positive cases has maintained under the minimum amount to be moved off the watch list. This is great news for us to re-open indoors however we would still like to be treated with the same legal fairness as any other restaurant establishment.

With that said when we were first approved by the City to permit our outdoor dining, we had submitted our attached diagram with plans of operation and were cleared to operate. We were never told that outdoor individual performances on our private property would be restricted. Had we been notified of any rules regarding individual performances we would have reconsidered our outdoor plans. Those plans costed us \$6,000 in weekly rentals, plus employee wages that ended up eating because on the very first day of outdoor services that we were unable to have any entertainment. This has had a very negative effect on the morale of our employees and diminished any uplifting hopes to reopen. Any potential income for our employees and the performers who perform at Pacers to provide income for their families was quickly taken away on the first day of service, resulting in us having to close the operation within the first few days. As you can see this is a devastating blow to us in a time when we need all the revenue we can get.

Accordingly, I am writing you today because we were told by the SDPD that we would be cleared for outdoor performances so long as **you** give us the approval. We know times have been stressful and our employees' families are depending on us. Rather than us pointing fingers at so many other establishments who seem to be operating the same way without regulation, and creating more harm than good. We are asking you for approval. We have done everything we could to exceed expectations. We hope that this email finds you well and any further information, documentation and continued dialogue is greatly appreciated.

Have a great day, we look forward to hearing from you.



County of San Diego

Richard Buonantony
Jaguars/Cheetah's
P.O. Box 777794
Henderson, NV 89077

Re: CEASE AND DESIST HEALTH ORDER VIOLATIONS

Dear Mr. Buonantony,

Pursuant to the Order of the California Public Health Officer, issued on August 28, 2020, and as incorporated by the Health Officer Order and Emergency Regulations in effect throughout San Diego County, restaurants may operate in compliance with applicable industry guidance. Based on the current tier status in the San Diego County, restaurants may operate in-person dining, and may operate indoors at 25% capacity. *COVID-19 Industry Guidance: Dine-In Restaurants*, published by the California Department of Public Health and CalOSHA, states that restaurants must discontinue live entertainment.

It has been documented during a recent inspection by the San Diego Police Department of Cheetah's, located at 8105 Clairemont Mesa Boulevard in San Diego, that your establishment is putting on live entertainment in violation of the Order of the State Health Officer and the County Order of the Health Officer and Emergency Regulations.

I appreciate the impact these restrictions have on your business. However, as the responsible party for your facility, it is your duty to ensure that the Orders' are complied with. If you do not comply, we will take actions necessary to enforce the Orders. Failure to comply may result in criminal misdemeanor citations with a \$1,000 fine for *each* violation. In addition, if violations continue, I may issue an order closing this facility.

Date: October 20, 2020


Wilma J. Wooten, M.D., M.P.H.
Public Health Officer
County of San Diego

cc: City of San Diego

Document received by the CA 4th District Court of Appeal Division 1.



Exhibit C

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12 dba CHEETAHS and RICH BUONANTONY

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 IN AND FOR THE COUNTY OF SAN DIEGO

15 MIDWAY VENTURE LLC dba PACERS) Case No.: 37-2020-00038194-CU-CR-CTH
16 SHOWGIRLS/PACERS SHOWGIRLS)
INTERNATIONAL, a California limited) [Assigned for All Purposes to Hon. Joel R
17 liability company; PETER BALOV, an) Wohlfeil, Dept. C-73]
individual; F-12 ENTERTAINMENT GROUP)
18 INC. dba CHEETAHS, a Nevada corporation,) **NOTICE OF ENTRY OF ORDER RE EX**
and RICH BUONANTONY, an individual.) **PARTE APPLICATION BY COUNTY**

19 Plaintiffs/Petitioners,) **DEFENDANTS FOR: 1. ORDER**
20) **SHORTENING THE TIME IN WHICH**
vs.) **THE APPLICATION MY BE HEARD;**
21) **CLARIFICATION OF THE SCOPE OF**

22 COUNTY OF SAN DIEGO, a governmental) **THE PRELIMINARY INJUNCTION**
agency; WILMA J. WOOTEN, in her official) **ISSUED BY THE COURT ON**
23 capacity as Public Health Officer, County of San) **DECEMBER 16, 2020**

24 Diego; GOVERNOR GAVIN NEWSOM, in his) Date: December 17, 2020
official capacity as the Governor of the State of) Time: 2:30 p.m.
25 California; the CALIFORNIA DEPARTMENT) Dept.: C-73
OF PUBLIC HEALTH, a department of the)

26 State of California; and DOES 1 through 100,) Action Filed: October 21,2020
inclusive,) Trial Date: Not Set
27)

28 Defendants/Respondents.)
_____)

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, AND TO THE**
2 **COURT CLERK:**

3 **PLEASE TAKE NOTICE** that on **December 17, 2020**, at **2:30 p.m.** the Ex Parte
4 Application (the “Application”) by Defendant County of San Diego and Wilma J. Wooten
5 (collectively the “County”) for: (1) an Order Shortening the Time in which the Application may
6 be heard; and (2) granting Clarification of the Scope of the Preliminary Injunction Issued by This
7 Court on December 16, 2020, came on for hearing in Department C-73, the Honorable Joel R.
8 Wohlfeil, Presiding. Plaintiffs, Midway Venture LLC *dba* Pacers Showgirls/Pacers Showgirls
9 International and Peter Balov, were represented by Jason P. Saccuzzo of Vivoli Saccuzzo, LLP.
10 Plaintiffs F-12 Entertainment Group Inc. *dba* Cheetahs and Rich Buonantony were represented by
11 Steve Hoffman of the Law Office of Steve Hoffman. Defendants Gavin Newsom, in his official
12 capacity as Governor of California, and the California Department of Public Health were
13 represented by P. Patty Li Deputy Attorney General.

14 **After reviewing the County’s Application and listening to oral argument of counsel,**
15 **the Court ruled as follows:**

16 (1) The Court **GRANTED** the County’s request to hear the Application on shortened
17 notice.

18 (2) The Court **GRANTED** the County’s request for clarification of the Scope of the
19 Preliminary Injunction Issued by This Court on December 16, 2020 (the “Injunction”). The Court
20 clarified that the Injunction applies to all San Diego County businesses with restaurant service.
21 The Injunction is **not** limited to Plaintiffs’ venues.

22
23 Dated: December 17, 2020

VIVOLI SACCUZZO, LLP

24
25 By: /s/ Jason P. Saccuzzo

JASON P. SACCUZZO

Attorneys for Plaintiffs,

MIDWAY VENTURE LLC *dba* PACERS

SHOWGIRLS/PACERS SHOWGIRLS

INTERNATIONAL, and PETER BALOV

Exhibit D

FILED
Clerk of the Superior Court

NOV 23 2020

By: S. Goodrich, Deputy

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**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 DIEGO, a governmental entity; WILMA J. WOOTEN, in

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

**ORDER ON APPLICATION FOR
TEMPORARY RESTRAINING ORDER**

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

1 her official capacity as Public Health Officer,
2 County of San Diego; and DOES 2 through
3 100, inclusive,

4 Defendant(s).

5
6 The Court GRANTS Plaintiffs' Request for Judicial Notice of Exhibits 23 through 24 to the
7 accompanying Appendix of Exhibits in support of their Ex Parte Application for a TRO. Pursuant
8 to Evidence Code Section 452(d), the Court GRANTS judicial notice of:

9 1. 11/2/20 Tentative Decision Following Court Trial in the case of *James Gallagher and*
10 *Kevin Kiley v. Gavin Newsom*, Superior Court of California, County of Sutter, Case No. CVCS20-
11 0912 .

12 2. 11/6/20 Temporary Restraining Order Pending OSC RE: Issuance of a Preliminary
13 Injunction in the case of *Midway Venture LLC et al v. County of San Diego*, Superior Court of
14 California, County of San Diego, Case No. 37-2020-00038194-CU-CR-CTL.

15 The Court DENIES Defendants' Request at oral argument to take Judicial Notice of
16 statements allegedly made by Dr. Wooten at a Board of Supervisors Meeting on November 17,
17 2020.

18 Plaintiffs' Ex Parte Application for a TRO Pending OSC re Issuance of Preliminary
19 Injunction came before this Court for hearing on Friday, November 20, 2020 at 1:30 p.m. The
20 Court had continued the hearing twice in order to properly review moving and opposition briefs and
21 evidence.

22 Plaintiffs filed their Original Complaint on November 12, 2020. A First Amended
23 Complaint was filed on November 16, 2020. The First Amended Complaint now alleges class
24 action relief.

25 The named Plaintiffs in both the Complaint and First Amended Complaint are two
26 restaurants and two gyms: 640 Tenth LP (Cowboy Star & Butcher Shop); O'Frank LLC dba Home
27 & Away Encinitas; Fit Athletic Club-San Diego, LLC; and Crossfit East Village Corporation dba
28 Bear Republic. The First Amended Complaint alleges that Plaintiffs bring this action on behalf of

1 themselves and a proposed Plaintiff class of all restaurants and gyms located in the County of San
2 Diego in existence as of the original filing of this Complaint up to present.

3 The named Defendants include Governor Gavin Newsom, California Attorney General
4 Xavier Becerra; Sandra Shewry, Acting Director of the CA Dept. of Public Health; Erica Pan,
5 Acting State Public Health Officer for CA; County of San Diego; and Wilma Wooten, County
6 Public Health Officer.

7 The Complaint and First Amended Complaint seek Declaratory Relief pursuant to
8 California Code of Civil Procedure (CCP) Section 1060 and Injunctive Relief based upon CCP
9 Section 526. Plaintiffs allege in their Introduction that the current COVID pandemic requires the
10 Defendants to balance health concerns with concerns that Californians be able to provide for their
11 families. According to Plaintiffs, Governor Newsom has issued orders shutting down industry and
12 has imposed restrictions on businesses while the State Assembly and State Senate have remained
13 silent on the Governor's alleged unprecedented exercise of power.

14 Specifically, on August 28, 2020, Governor Newsom issued a "Blueprint for a Safer
15 Economy", with a color-coded system and corresponding restrictions applying to all sectors of the
16 economy. Plaintiffs allege that business owners were left without a represented voice in this
17 decision-making process. Plaintiffs and others are struggling to survive with restrictions on indoor
18 services. Plaintiffs allege that the Blueprint has no green category representing a terminus for this
19 state of emergency, or an end to the Blueprint. "There is no end in sight".

20 Plaintiffs allege that "one-man-rule", namely by the Governor's rule alone, violates the
21 separation of powers. Plaintiffs argue that the California Constitution states that only the legislature
22 can make these kinds of decisions. Therefore, according to Plaintiffs, Governor Newsom and the
23 California Department of Public Health [CDPH] are exceeding statutory authority.

24 **Factual Allegations in Complaint and First Amended Complaint**

25 The following are the factual allegations contained in the First Amended Complaint: On
26 March 4, 2020, Governor Newsom declared a "State of Emergency" followed by a Stay-at-Home
27 Order on March 19, which included an indefinite prohibition on operating "non-essential
28 businesses."

1 Until May 4, 2020, all non-essential businesses were closed. Then, an Executive Order
2 allowed the reopening of non-essential businesses in phases. Per Executive Order, the State Public
3 Health Officer was given authority to determine which businesses could open and under what
4 conditions. The CDPH therefore imposed conditions for re-opening, including requiring businesses
5 to submit written health and safety plans to local public health authorities.

6 Restaurants were not permitted to open until Governor Newsom released industry guidelines
7 on May 12, 2020. The CDPH required County clearance thereafter. On May 21, 2020, San Diego
8 restaurants were allowed to reopen subject to San Diego County and Dr. Wooten's Public Health
9 Order. Gyms were not permitted to reopen until June 2020 and a CDPH clearance was required
10 first.

11 On July 13, 2020, Governor Newsom and CDPH ordered closure of indoor operations for
12 multiple industries, including restaurants and gyms, on the State's County Monitoring List. On
13 August 28, 2020, Governor Newsom and CDPH announced a revised regulatory regime entitled the
14 "Blueprint for a Safer Economy" [hereinafter "Blueprint"], which replaced the County Monitoring
15 List.

16 Based on the Blueprint, each County was assigned a color (purple, red, orange, yellow)
17 corresponding to an assessed risk level based on a seven-day average of positive percentages and
18 average rates of 100,000 people. The rules varied among different businesses.

19 The Blueprint plans were not submitted to the State Assembly or to the State Senate and
20 neither chamber voted on the criteria and regulations. According to Governor Newsom, there was
21 no green category because "we would not be returning to normal for a long time". "California has
22 to adapt to a new reality. I will continue to regulate by emergency order until there is a vaccine."
23 In the Complaint, Plaintiffs provided examples of Governor Newsom's continued changes in policy
24 without legislative involvement. For example, on September 22, 2020, nail salons were allowed to
25 reopen indoors, but not other personal-care industry professionals. On October 20, Governor
26 Newsom lifted restrictions on indoor operations for personal care industry, but not other industries

27 ///

28 ///

1 On September 30, Governor Newsom revised criteria regarding the tier colors. At that time,
2 the CDPH was required to also consider infection rates in disadvantaged communities. The
3 following is a summary of the tiers:

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

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

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

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

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

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

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

26 ///

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1 Until the last two weeks, San Diego County was in the red tier: the “case positivity” was in
2 orange, but the “case rate” was in red. For the measurement period announced on November 3, the
3 positivity rate dropped from 3.5 to 3.2% to the orange level, but the case rate increase 6.5 to 7.0%
4 to the purple level.

5 For the November 10 announcement, the positivity rate dropped to 2.6% or to the orange
6 tier, but the case rate increased to 8.9%, which was also in the purple level, the most restrictive tier.
7 San Diego County moved to the purple tier based on these two weeks of reporting. As a result,
8 businesses, specifically restaurants and gyms, were given three days from Wednesday, November
9 11, to stop operating indoors.

10 Plaintiffs allege that San Diego County’s recent increases in case rates are not due to sector
11 closures. According to Plaintiffs, there is a minimum COVID spread in these sectors.

12 Restaurants/Bars: 7.4% of cases (714/9,646)

13 Retail: 6.6% of cases (636/9,646)

14 Places of Worship: 1.9% of cases (184/9,646)

15 K-12 Schools: 1.7% of cases (165/9646)

16 Gyms: .4% of cases (39/9646)

17 Plaintiffs contend that these sectors represent only a small percentage of overall cases. 5.5%
18 of 58,106 cases reported on November 10 or 3,192 from these sectors were associated with the
19 confirmed community outbreaks. Dr. Wilma Wooten, San Diego County’s Chief County Health
20 Department Officer, stated that “restaurants, gyms and other businesses restricted to ‘no indoor
21 operations’ were not the cause of the case rate increase”.

22 Plaintiffs allege that increases are rather found in worksites and in 20-29-year-olds. But this
23 has had minimal impact on hospital capacity which remains steady. In the previous three weeks, 23
24 30% of civilian hospital beds have remained available. ICU beds were available at 30-40%, below
25 rates considered problematic. More than 80% of hospitals had 21 days-worth of PPE. The County
26 of San Diego bought hundreds of millions of medical grade gloves and have secured contracts to
27 provide for additional respirators.

28 ///

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

6 In San Diego County, there have been over 13,000 field inspections of restaurants to ensure
7 that they are following the requirements of the Health Order. The County has quadrupled staff to
8 interview food handlers to ensure restaurant compliance and to investigate who among the food
9 handlers has been exposed to COVID.

10 According to Plaintiffs, despite the County determining that sectors such as restaurants and
11 bars should not be barred from indoor operations and telling this to the CDPH in a Request for
12 Adjudication, the CDPH summarily denied the Adjudication without articulating a scientific or
13 data-based justification.

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

16 In Declarations from each named Defendant, Plaintiffs identify significant deleterious
17 financial impacts on their business, on employees, and on them personally. Plaintiffs seek both
18 declaratory and injunctive relief.

19 Legal Claims: Counts: The following represent the legal counts or causes of action
20 articulated in Plaintiffs' First Amended Complaint:

21 1. Governor's Continuing Industry Closure Orders & Restrictions on Indoor Business
22 Operations Exceed Statutory Authority (GC 8550 et. seq.)

23 Plaintiffs allege that Governor Newsom lacked the Constitutional and statutory authority to
24 adopt the Blueprint and to impose industry-wide restrictions. According to Plaintiffs, under the
25 California Emergency Services Act, the Governor may declare a State of Emergency if the
26 Governor declares that conditions exist presenting extreme peril to the safety of persons and
27 property within the state. (Government Code 8558, hereinafter "GC") An Emergency Declaration
28 may continue as long as conditions threatening public health exist, with no time limit. However, the

1 Governor is urged to terminate the declaration of state of emergency “at the earliest possible date
2 that conditions warrant”. Moreover, the Legislature may terminate the declaration of emergency
3 through concurrent resolution. GC 8629.

4 Plaintiffs allege that the Governor’s Blueprint lacks a path to a “green” tier; in other words,
5 identification of criteria that would allow a return to pre-pandemic conditions. They allege that
6 neither the Governor nor the CDPH has articulated a plan to rescind the state of emergency. Thus,
7 Plaintiffs allege, the Plan could not lead to terminating the state of emergency at the earliest
8 possible date, which according to the First Amended Complaint, is in violation of GC 8629.

9 Plaintiffs allege that the Emergency Powers granted to the Governor by the legislature are not
10 limitless. During a State of Emergency, the Governor may direct state personnel and resources to
11 respond to the emergency (GC 8628 and 8628.5); exercise complete authority over state agencies
12 and use police power to effectuate purposes (GC 8627); promulgate, issue, and enforce orders and
13 regulations necessary with the force of law (violation of which is a misdemeanor) (GC 8567). The
14 provisions give authority to direct state resources to respond to the emergency, including police
15 powers properly vested in Executive Branch.

16 But, Plaintiffs assert, the purpose of GC 8627 is not to enlarge executive powers. According
17 to Plaintiffs, the Governor can only consolidate executive power otherwise distributed to other
18 executive agencies or officials. The Governor is allowed to coordinate the executive branch as to
19 powers already granted to any executive agency. But, Plaintiffs allege, there is no authority to take
20 actions not authorized by Constitution or statute.

21 Plaintiffs allege that while the Emergency Services Act authorizes the Governor to direct
22 agencies to follow preexisting authorities directed to a specific business which is violating
23 established preexisting rules, it does not confer on the Governor freestanding and unchained
24 authority to close-down and restrict industry. No statute or constitutional provision allows the
25 Governor to shut down the State’s economy and decide which business may open and which may
26 close on an ongoing and indefinite basis. Therefore, Plaintiffs allege Governor Newsom’s actions
27 are *ultra vires* (beyond legal authority) and exceed his statutory authority.

28 ///

Document received by the CA 4th District Court of Appeal Division I.

1 Plaintiffs allege that they have suffered and will suffer irreparable harm without the Court declaring
2 the Newsom Blueprint unlawful and without an injunction prohibiting Defendants from enforcing
3 restrictions on indoor operations.

4 2. California Department of Health's Closure Orders Exceed Statutory Authority (Health &
5 Safety Code 120100, et. seq.)

6 Plaintiffs contend that the CDPH lacks statutory authority to adopt the Blueprint and lacks
7 the authority to impose industry-wide restrictions on California business operations.

8 They claim that while the Legislature granted the CDPH authority to respond to public health
9 threats, its authority is not limitless. The California Health and Safety Code [hereinafter "H&S"]
10 gives the CDPH authority to "quarantine, isolate, inspect, and disinfect persons and places to
11 protect or preserve public health." (H&S 120145 et. seq. 120130(d)); promulgate regulations
12 regarding isolation or quarantine (H&S 120130(c)); establish places for quarantine or isolation
13 (H&S 120135); destroy property if it cannot be disinfected (H&S 120150); take measures necessary
14 to ascertain nature of disease and prevent its spread such as taking control of the body of a living
15 person or the corpse of a dead person (H&S 120140).

16 But, Plaintiffs assert, the Blueprint industry closure and business restriction orders do not
17 fall under the authority to quarantine, etc., or to make regulations regarding isolation, etc., or to
18 establish places for quarantine, etc., or to destroy property that cannot be disinfected. According to
19 Plaintiffs, the Health and Safety Code gives no open-ended authority to permit the CDPH to shut
20 down the economy or restrict lawful business operations. Therefore, the CDPH Blueprint industry
21 closure and business restriction orders exceed statutory authority.

22 3. Governor's Claim to Broad Emergency Powers Violates the Non-Delegation Doctrine
23 (California Constitution Art III, Section 3)

24 Governor Newsom, the Amended Complaint alleges, usurped the Legislature's core
25 function in violation of the separation of powers. Only the Legislature may make law. The
26 Legislature may not delegate lawmaking power and must make fundamental policy decisions for
27 state. The Executive Branch cannot make fundamental policy decisions.

28 ///

1 Under the California Constitution, Article III, Paragraph 4: “The powers of state government are
2 legislative, executive, and judicial. Persons charged with exercise of one power may not exercise
3 the others except as permitted by this Constitution.” The Governor only has the authority given by
4 the Constitution.

5 Plaintiffs allege that the Governor interprets the Emergency Services Act as giving him
6 unfettered power to regulate private conduct “however he deems necessary”, and without
7 procedural, substantive or temporal constraints on his authority. Under this assumed authority, the
8 Governor issues orders shutting down, reopening and restricting businesses which violates the
9 owners right to carry on business. Plaintiffs claim that the Governor assumes that he has this power
10 as long as he can connect it to COVID. He assumes he is entitled to the full panoply of “legislative”
11 options available to the Legislature should it address the pandemic.

12 Beyond the Governor’s alleged abuse of power, Plaintiffs allege that the Legislature failed
13 to decide fundamental state policy, to provide required guidance as to how the Governor should
14 exercise emergency powers, and to provide safeguards against arbitrary decisions.

15 4. CDPH’s Claim to Broad Emergency Power Violates the Non-Delegation Doctrine (Art. III,
16 section 3)

17 The same recitations and reasons that are set forth in Count 3 as to the Governor are set
18 forth as the basis for Count 4 as to the CDPH and are incorporated by reference here.

19 Prayer in the Amended Complaint: The Amended Complaint seeks the following relief
20 from this Court based on the Causes of Action described above:

- 21 1. To declare Governor Newsom has exceeded his statutory authority in implementing his
22 Blueprint for a Safer Economy.
- 23 2. To declare that the CDPH has exceeded its statutory authority by issuing orders shutting
24 down or restricting indoor business operations.
- 25 3. To declare that the Defendants’ Blueprint for a Safer Economy is unlawful and null and
26 void.
- 27 4. To declare unlawful, the efforts of the County of San Diego and its agents to enforce the
28 Blueprint for a Safer Economy.

- 1 5. In the alternative, to declare the Emergency Services Act (GC 8627) and Public Health
- 2 Act (H&S 120140 et. seq.) both violate the non-delegation doctrine and the California
- 3 Constitution III, Section 3.
- 4 6. To grant a permanent injunction against Defendants and their agents from enforcing the
- 5 Blueprint for a Safer Economy or any other shutdown orders against Plaintiffs without
- 6 the requirement of paying a bond.
- 7 7. To enter Judgment for Plaintiffs and against Defendants for Deprivation of Rights.
- 8 8. To award Plaintiffs costs and attorneys' fees under CCP Section 1021.5.
- 9 9. To order such relief that the Court deems just and proper.

10 **Temporary Restraining Order**

11 In accordance with this First Amended Complaint, Plaintiffs now seek an ex parte
12 temporary restraining order to temporarily enjoin Defendants from enforcing the provisions of the
13 Blueprint for a Safer Economy, or any other related orders, that prevent Plaintiffs, and all
14 businesses within the County of San Diego that fall under the same category of industry, from
15 operating under the restrictions representing the "Tier 2" or Purple Tier under that Blueprint
16 regime.

17 Plaintiffs contend that defendants have enacted a policy regime that will cause irreparable
18 harm to small business owners operating restaurants and gyms in the County of San Diego, unless
19 injunctive relief is granted.

20 Further, Plaintiffs request a hearing on an Order to Show Cause regarding a Preliminary
21 Injunction defined as follows: "Defendants shall show cause, if any exists, why a preliminary
22 injunction should not issue pending trial, enjoining all Defendants from continuing to implement
23 and enforce all rules promulgated under the Blueprint for a Safer Economy regime."

24 Plaintiffs make the following arguments in their Ex Parte Application:

25 (1) Defendants' policy is arbitrary and capricious as to Plaintiffs. Plaintiffs argue that
26 the methodology employed in the "Tier Framework" does not take into account the source of
27 COVID-19 infections. "Defendants do not differentiate between those economic activities actually
28 contributing to the spread of COVID-19 and those presumed to contribute, instead grouping such

1 activities into broad categories (i.e., ‘All Retail’ or ‘Family Entertainment Centers’) and imposing
2 limits as to each based on overall rates of infection.” The methodology employed by Defendants in
3 making their Tier Assessments bears no relation to the actual risk posed by Plaintiffs’ industries if
4 they should remain open at their current capacity. Defendants have imposed more restrictive
5 measures than necessary that will inevitably lead to substantial loss of revenue for Plaintiffs and
6 likely closure of Plaintiff businesses (see Declarations of Weber, Washington, Lutwak and Frank)
7 despite there being no evidence that these measures will result in a decreased rate of infection.

8 (2) Plaintiffs claim that Irreparable harm exists. Plaintiffs and many other restaurants
9 and gyms face financial ruin, permanent closure and the loss of thousands of jobs for their
10 employees. (See Declarations of Weber, Washington, Lutwak and Frank.)

11 (3) Plaintiffs claim there is probability of success on the merits. Consistent with
12 Plaintiffs’ Complaint and the First Amended Complaint as summarized above, Plaintiffs argue that
13 the “continuing business closures” exceed the authority granted under the Emergency Services Act,
14 California GC 8558 et seq. The statute urges the Governor to terminate the state of emergency “at
15 the earliest possible date that conditions warrant” and the Legislature may terminate an emergency
16 through a concurrent resolution. GC 8629. Plaintiffs argue that the Governor’s Blueprint regime
17 explicitly fails to lay out a path to a “green” tier, and thus does not lay out an obvious plan to
18 rescind the state of emergency. Thus, “the Blueprint regime as laid out by Governor Newsom
19 without a “green” tier could not lead to “termination of a state emergency at the earliest possible
20 date,” in violation of GC 8629.”

21 (4) Plaintiffs claim that the Governor’s Blueprint also violates the purpose of the
22 Emergency Services Act, which allows the Governor to exercise police powers already properly
23 vested in the executive branch. “The purpose of GC 8627 is not to enlarge executive powers, but to
24 consolidate executive power in the hands of the Governor, so that he can take any action that is
25 otherwise distributed to other executive agencies or officials. In other words, the Emergency
26 Services Act allows the Governor to coordinate all aspects of the executive branch of the State and
27 to exercise all powers already granted to any executive agency of the state. It does not grant the
28 Governor the authority to take actions not otherwise authorized by the California Constitution or by

1 statute. The shutdown of industry is beyond the authority of the Act. Executive authority is limited
2 to what the legislature has granted to the CDPH, which is authorized to “quarantine, isolate, inspect,
3 and disinfect persons...[and] places...[if] the action is necessary to protect or preserve the public
4 health.” H&S 120145. See also H&S 120130(d). Industry closure, conversely, is not part of this
5 grant of authority.

6 (5) Finally, Plaintiffs assert that the Defendants’ claimed entitlement to broad
7 emergency powers violates the Non-Delegation Doctrine. Plaintiffs claim that the Blueprint and its
8 enforcement by Defendants represent an unlawful delegation of Legislative authority and power.

9 **Opposition From the State**

10 The State Attorney General’s Office filed an Opposition on behalf of Defendants Gavin
11 Newsom, Governor; Xavier Becerra, Attorney General; Sandra Shewry, Acting Director,
12 Department of Public Health; Erica S. Pan, Acting State Public Health Officer.

13 The State Defendants oppose Plaintiffs’ TRO application because “it will disrupt the State’s
14 health-based, data-driven reopening framework designed to slow the spread of COVID-19,
15 particularly in the midst of an unprecedented surge of the virus, and because Plaintiffs’ legal claims
16 lack merit.” The State begins by highlighting where we are with respect to the pandemic in the
17 United States and the escalating numbers of positive infections, topping 100,000 daily cases since
18 November 4. While recognizing that stricter COVID-19 directives are burdensome, the State
19 contends that “these measures, supported by the overwhelming weight of scientific authority, are
20 critical to limit the spread of COVID-19.”

21 The State contends that the Application for a TRO should be denied because “Plaintiffs are
22 not likely to succeed on the merits of their claims, nor have they demonstrated irreparable harm that
23 could outweigh the harm to State Defendants that would result from dismantling their ability to take
24 steps to stem the spread of COVID-19.”

25 First, the State argues that Plaintiffs are not likely to succeed on the merits because the
26 Emergency Services Act does not violate the Non-Delegation Doctrine nor the principal of
27 separation of powers. During an emergency, such as a global deadly pandemic, the Emergency
28 Services Act authorizes the Governor to exercise all police power vested in the State by the

1 Constitution and by state law, including the power to issue any orders necessary to mitigate the
2 effects of an epidemic. (GC 8550).

3 According to defendants, the separation of powers does not require a “hermetic sealing” of
4 government branches from one another.

5 The State argues that the non-delegation doctrine applies only in the total abdication of
6 legislative power which is not the factual scenario presented. By enacting the Emergency Services
7 Act, the Legislature made the fundamental policy decision to confer on the Governor the authority
8 to make orders “necessary to carry out the provisions of this chapter.” (GC 8567, subd. (a).) The
9 Governor’s use of emergency powers at this time of a worsening deadly pandemic is eminently
10 appropriate and crucially important.

11 Nor has the Department of Public Health exceeded its statutory authority, derived from the
12 Health and Safety Code, in issuing public health directives. The Department of Public Health has
13 valid authority per the Legislature to take the measures that are reasonably necessary in its
14 judgment to combat pandemics such as COVID-19. The judicial branch is not the overseer of the
15 administrative exercise of this power granted by the Legislature.

16 Third, defendants argue that Plaintiffs’ attempt to substitute their own judgment for the
17 judgment of the state’s public health officials is irrelevant and contrary to law. The health orders
18 and determination that the State’s top public health officials have made in order to combat the
19 pandemic are within their lawful discretion and should not be second-guessed by the Court. The
20 State’s Blueprint framework is based on “data-driven, scientific determinations”. Defendants rely
21 on the declaration of Dr. Michael A. Soto, originally submitted in another case, to validate the
22 science of the framework. Defendants assert that, contrary to Plaintiffs’ expert, Hubert A. Allen,
23 Jr., there is scientific, epidemiological data in support of the State regulations as to restaurants and
24 fitness facilities.

25 Defendants argue that the balance of harm tips strongly against granting the injunctive relief
26 requested. The purple tier is not an outright prohibition on the operation of business like restaurants
27 and gyms, but only imposes restrictions on them. While the restrictions pose burdens to businesses
28 such as Plaintiffs, defendants argue that Plaintiffs have not demonstrated economic harm to their

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1 businesses that is so immediate or irreparable as to justify the court's extraordinary intervention.
2 Without minimizing impacts to the Plaintiffs, Defendants believe that the harm to Plaintiffs is
3 outweighed by potential harm to public health from an injunction that effectively dismantles a
4 significant portion of the state's COVID-19 response.

5 **Standard for Temporary Restraining Orders**

6 The parties do not dispute the standards the Court is to apply in evaluating temporary
7 injunctive relief. The Court has broad discretion in ruling on an application for a TRO or
8 Preliminary Injunction. In so ruling, the Court must balance two inter-related factors: (1) "the
9 interim harm that the plaintiff would be likely to sustain if the injunction were denied as compared
10 to the harm the defendant would be likely to suffer if the preliminary injunction were issued,"
11 Smith v. Adventist Health System/West (2010) 182 Cal.App.4th 729, 749; and (2) whether there is
12 "some possibility" that plaintiff will ultimately prevail on the merits of the claim. Jamison v.
13 Department of Transportation (2016) 4 Cal.App.5th 356, 362 ("[a] trial court may not grant a
14 preliminary injunction, regardless of the balance of interim harm, unless there is some possibility
15 that the plaintiff would ultimately prevail on the merits of the claim.") (internal quotations omitted)
16 The greater plaintiff's showing with respect to one of the factors, the less of a showing on the other
17 to support an injunction. Butt v. State of Calif. (1992) 4Cal.4th 668, 678; Pleasant Hill Bayshore
18 Disposal, Inc. v. Chip-It Recycling, Inc. (2001) 91 Cal.App.4th 678, 696.

19 **Balance of Harm**

20 The Court finds that there is no question that movement to the Purple Tier will have a
21 negative impact on Plaintiffs and similarly situated businesses. The Court accepts the harm as
22 described in the declarations of Ojala Washington, Jon Weber, Scott Lutwak and Jonathan Frank.
23 The Court understands the specific hardship of Cowboy Star Restaurant and Fit Gym that may not
24 be able to expand to outdoor operations. And there are real economic consequences to workers in
25 these businesses whose employment is threatened.

26 The role of the Court for purposes of injunctive relief is to balance this very real impact with
27 the impact that the defendants will likely suffer. The defendants here represent the State and the
28 public. As of the date of this hearing, the COVID-19 pandemic has now infected over 11.1 million

1 Americans and over a quarter of a million have lost their lives. As the Governor has moved San
2 Diego County into the Purple Tier, the United States has seen the worst daily infection rates over
3 the course of the pandemic, with the number of positive infections topping 100,000 per day in all
4 but one day from November 4 through November 16. The rate of increase in cases presently is
5 greater than at any other time in the course of the pandemic. Hospitalizations continue to climb.
6 The Court takes judicial notice of and accepts these statistics from the Opposition brief.
7 The design of the Blueprint at issue in this litigation is the reduction of community spread. As
8 stated by Dr. Soto, “The basic idea behind the California Blueprint is set forth in a declaration by
9 Dr. James Watt, Chief of the Division of Communicable Disease Control of the Center for
10 Infectious Diseases at the California Department of Public Health, which I have reviewed follows:
11 ‘By reducing community spread, we can decrease death and disability in our community....’”
12 (Soto Declaration, page 5).

13 “Reducing community spread turns on primarily on three factors: (1) prevalence of COVID-
14 19 in the community (the proportion of individuals infected at time), (2) the number of interactions
15 between people during which the pathogen can be transmitted, and (3) the average likelihood of
16 transmission per interaction. The goal of non-pharmaceutical interventions (NPIs) is to minimize
17 the second and third factors. *Stay at home orders and restaurant closures*, for instances, reduce the
18 number of interactions (factor 2). The use of masks, hygiene, and frequent handwashing reduce the
19 likelihood of transmission (factor 3). The key point is that when the prevalence (factor 1) is low,
20 factors 2 and 3 can be relaxed while maintaining $R_t < 1.0$.” [Soto Declaration, page 5, emphasis
21 added]. Thus, “closures” or other restrictions on businesses are an important factor to reduce the
22 number of interactions and, in turn, reduce community spread.

23 In the Court’s mind, the impact on public health of dismantling a portion of the state’s
24 COVID-19 response designed to reduce community spread outweighs the economic harm to
25 Plaintiffs at least pending further examination of these issues in any upcoming hearing on
26 preliminary injunction.

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1 Probability of Success

2 The second factor for this Court to consider is whether there is the probability of prevailing,
3 defined as “some possibility” that plaintiff will ultimately prevail on the merits of the claim.
4 Jamison v. Department of Transportation (2016) 4 Cal.App.5th 356, 362 (“[a] trial court may not
5 grant a preliminary injunction, regardless of the balance of interim harm, unless there is some
6 possibility that the plaintiff would ultimately prevail on the merits of the claim.”)

7 Plaintiffs seek a TRO regarding *one* Blueprint decision by the CDPH, in *one* California
8 County, requiring indoor operations to temporarily cease in restaurants and gyms. The rationale for
9 granting that specific request, as set forth in the Complaint and First Amended Complaint, is that
10 the authority exercised by the Governor and the CDPH in the Blueprint is either illegal and/or
11 unconstitutional. As explained below, the Court cannot make a finding of probability of prevailing
12 on these underlying claims. Thus, the Court does not find a probability of prevailing on the specific
13 relief sought in the injunction.

14 The main thrust of both the Complaint and the First Amended Complaint is that the
15 Governor, through his various Blueprint orders, is usurping a legislative function and violating the
16 principal of separation of powers. The Complaint asserts similarly that the State and County
17 Government Health agencies are acting beyond their statutory authority by generally enforcing the
18 Governor’s Blueprint orders. The prayer for relief in the First Amended Complaint, therefore, seeks
19 sweeping, broad judicial declarations from this Court that the *entire* Blueprint for a Safer Economy
20 as well as *all* efforts to enforce the Blueprint by the California Department of Health and the San
21 Diego County Department of Health are unlawful, null and void. In the alternative, Plaintiffs ask
22 this Court to declare that the *whole* of the Emergency Services Act (GC 8627) and the Public
23 Health Act (H&S 120140 et. seq.) violate the non-delegation doctrine and the California
24 Constitution, Article III, Section 3.

25 Whether the Emergency Services Act Violates the California Constitution

26 Courts have consistently concluded the California Emergency Services Act constitutes a
27 valid exercise of the State's police powers. This Court will not re-visit this authority. See
28 California Correctional Peace Officers Assn. v. Schwarzenegger (2008) 163 Cal.App.4th 802, 811

1 see also Macias v. State of California (1995) 10 Cal.4th 844, 854; Farmers Ins. Exchange v. State of
2 California (1985) 175 Cal.App.3d 494, 501–502. Neither the law nor the evidence before the Court
3 at this preliminary stage, gives rise to a finding of a reasonable possibility of prevailing on the
4 claim that the California Emergency Services Act is unconstitutional.

5 Nor does the Court find that Plaintiffs have a likelihood of prevailing on their argument that
6 the authority rendered to the governor in the Emergency Services Act is an improper delegation of
7 legislative power. The doctrine of “non-delegation”, simply stated, is that “the power to change a
8 law of the state is necessarily legislative in character, and is vested exclusively in the legislature,
9 and cannot be delegated by it.” See Kugler v. Yocum, (1968) 69 Cal. 2d 371, 375.

10 By enacting the Emergency Services Act, the Legislature did not abdicate legislative power,
11 but granted the powers to the governor in emergency situations to issue *necessary* orders and
12 regulations for the duration of the emergency. Government Code Section 8550 provides: “*To*
13 *ensure that preparations within the state will be adequate to deal with such emergencies*, it is
14 hereby found and declared to be *necessary*...” The Legislature determined that the effective
15 response in emergencies requires coordinated action by the executive.

16 Government Code Section 8267 provides that the governor “shall promulgate, issue, and
17 enforce such orders and regulations as he deems necessary, in accordance with the provisions of
18 Section 8567. That section provides “(a) The Governor may make, amend, and rescind orders and
19 regulations necessary to carry out the provisions of this chapter. The orders and regulations shall
20 have the force and effect of law.” Orders and regulations are different and distinct from legislation.
21 By the terms of the Act, the orders are only effective as necessary during the state of emergency.
22 See GC 8629 [“All of the powers granted to the Governor by this chapter with respect to a state of
23 emergency shall terminate when the state of emergency has been terminated by proclamation of the
24 Governor or by concurrent resolution of the Legislature declaring it at an end.”] The Legislature did
25 not abdicate its function but actually retained it in the Act through its power to terminate the state of
26 emergency, if necessary.

27 In short, there is nothing in the Act that is an improper delegation by the Legislature to the
28 governor of authority reserved to the Legislature.

1 **Whether the Governor's Actions re the Blueprint for Safer Economy are Outside Authority**

2 **Granted in the Emergency Services Act**

3 The Act specifies its purpose: "The state has long recognized its responsibility to mitigate
4 the effects of natural, manmade, or war-caused emergencies that result in conditions of disaster or
5 in extreme peril to life, property, and the resources of the state, and generally to protect the health
6 and safety and preserve the lives and property of the people of the state." Under the Emergency
7 Services Act, the Governor has authority to proclaim a state of emergency "in conditions of . . .
8 extreme peril to life, property, and the resources of the state" so as to "mitigate the effects of [the
9 emergency]" in order to "protect the health and safety and preserve the lives and property of the
10 people of the state." (GC § 8550; § 8625; granting the Governor authority to proclaim a state of
11 emergency.)

12 There is no question that the global health threat posed by the COVID-19 pandemic is a
13 state of emergency that falls within the Emergency Services Act. (GC 8558; defining state of
14 emergency to include epidemics.)

15 The Act confers broad discretionary powers to deal with such emergencies. (GC 8550)
16 Section 8571 states: "During...a state of emergency, the Governor may suspend any regulatory
17 statute...." Section 8627 states "The Governor shall, to the extent he deems necessary, have
18 complete authority over all agencies of the state government and the right to exercise within the
19 area designated all police power vested in the state....in order to effectuate the purposes of this
20 chapter. Police powers are rooted in the law of necessity. Thus, in an emergency, the scope of
21 permissible regulation may increase." (Macias v. State of California (1995) 10 Cal.4th 844, 854;
22 Martin v. Municipal Court (1983) 148 Cal.App.3d 693-698.)

23 **(1) Whether the Blueprint violates the ESA because it does not state when it**
24 **terminates**

25 Consistent with "necessity", the Act explicitly does not delegate emergency powers of
26 potentially infinite duration. Rather, it requires the Governor to end the state of emergency as soon
27 as reasonably possible. Further, the Act places the duration of the emergency within the

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1 Legislature's control by providing that the Governor's powers under a state of emergency also
2 terminate "by concurrent resolution of the Legislature declaring it at an end." (GC 8629)

3 Plaintiffs argue that the Governor's actions run afoul of the provision in the Act that the
4 emergency be terminated "at the earliest possible date that conditions warrant." GC 8629.

5 According to Plaintiffs, the Governor's Blueprint explicitly fails to lay out a path to a
6 "green" tier, and thus does not lay out an obvious plan to rescind the state of emergency. Thus, "the
7 Blueprint regime as laid out by Governor Newsom without a 'green' tier could not lead to
8 'termination of a state emergency at the earliest possible date,' in violation of Cal. Gov't Code §
9 8629."

10 The Court first notes that no argument has been presented that current conditions actually
11 warrant a termination of the State of Emergency. Nor have Plaintiffs shown that conditions warrant
12 the termination of the declaration of emergency. Nor could such an argument be reasonably set
13 forth given the dire factual circumstances of the pandemic as set forth above. It is not lost on any
14 party to this case, nor to the Court, that the state of emergency requires government action.

15 Plaintiffs' argument is that there is no safeguard in the actual Blueprint to allow for early
16 termination. However, nothing in the Act itself requires the governor to explicitly set forth when the
17 emergency declaration will end. Nothing in the Act precludes the Governor from explicitly
18 indicating what will trigger termination, but nothing in the Act requires the Governor to do so.
19 Given that circumstances in a pandemic may mutate, evolve, or unexpectedly worsen, there may be
20 good reasons why the Governor is not required to articulate explicit emergency termination
21 triggers.

22 In short, there is no probability of prevailing on the issue that Blueprint violates the Act
23 simply because it does not specify when the emergency declaration will end. The Court does not
24 read into the statute such a requirement.

25 **(2) Whether the Blueprint goes beyond powers granted to the Governor under the**

26 **ESA**

27 Plaintiffs argue that the Governor's Blueprint impermissibly violates the purpose of the
28 State Emergency Act, which only allows the governor to exercise police powers already properly

1 vested in the Executive Branch. According to Plaintiffs, “The purpose of Cal. Gov’t Code § 8627
2 is not to enlarge executive powers, but to consolidate executive power in the hands of the Governor,
3 so that he can take any action that is otherwise distributed to other executive agencies or officials. It
4 does not grant the Governor the authority to take actions not otherwise authorized by the California
5 Constitution or by statute.”

6 The Court does not find a probability or reasonable possibility of prevailing on this claim.
7 Plaintiffs concede that the Emergency Services Act allows the Governor to coordinate all aspects of
8 the executive branch of the state and to exercise all powers already granted to any executive agency
9 of the state. In granting “complete authority over all agencies of the state government”, the Act
10 consolidates in the governor all authority statutorily granted to those agencies. One agency that the
11 Governor has authority over is the Department of Public Health, which has specific authority to
12 respond to public health threats, including epidemiological events. The California Health and
13 Safety Code empowers the California Department of Health (and thus the Governor under the ESA)
14 to “take measures as are necessary to . . . prevent [the] spread” of “any infectious. . . disease.”

15 Under the ESA, these powers under the Health and Safety Code become the governor’s
16 powers. Government Code Section 8627 bestows broad authority on the governor to “make, amend
17 and rescind orders and regulations” necessary to the Act. The Blueprint for Safer Economy is such
18 an order taken to “prevent the spread of any infectious disease.”

19 **(3) Whether the Governor or California Department of Health is exceeding authority**
20 **under the California Health and Safety Code**

21 As stated above, the Health and Safety Code grants public health officers the authority to
22 combat the spread of infectious diseases. Health and Safety Code section 120140 empowers CDPH
23 to “take measures *as are necessary* to . . . prevent [the] spread” of “any infectious...disease.” (See
24 also H &S 120130, empowering DPH to “adopt and enforce regulations requiring strict or modified
25 isolation, or quarantine, for any of the contagious, infectious, or communicable diseases, if in the
26 opinion of the department, the action is necessary for the protection of the public health”; (H&S

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1 120145, giving DPH the power to “quarantine, isolate, inspect, and disinfect persons, animals,
2 houses, rooms, other property, places, cities, or localities, whenever in its judgment the action is
3 necessary to protect or preserve the public health.”)

4 Plaintiffs argue that “industry closure” is not part of that grant of authority. First, the Court
5 does not view the exercise of power here as “industry closure”. This argument confuses impact with
6 the actual exercise of power. The “Blueprint for a Safer Economy” directs the degrees to which
7 different kinds of business and institutions can remain open in the county. (Office of Governor
8 Newsom, *Governor Newsom Announces New Immediate Actions to Curb COVID-19 Transmission*
9 (Nov. 16, 2020) [“*Nov. 16 Announcement*”], available online at <https://gov.ca.gov>.) In the “red
10 tier”, Plaintiffs could lawfully operate their businesses indoors, albeit subject to strict limits on the
11 numbers of customers in the venues, and to other safety protocols. (See State, *Blueprint for a Safer*
12 *Economy: Activity and Business Tiers*, available online at <https://www.cdph.ca.gov>)

13 Under the more restrictive purple tier, Plaintiffs and businesses like them may continue to
14 serve their customers, but only outdoors or remotely. (*Activity and Tiers, supra.*) Restaurants may
15 offer food and beverages to customers outdoors or for take-out. (*Ibid.*) Fitness facilities may operate
16 outdoors and/or offer online exercise classes. (*Ibid.*)

17 While business may suffer adverse consequences as a result of the action, the actions are not
18 “industry closures”. Even so, the Governor and CDPH have the power to take “necessary actions”
19 to prevent the spread. The health orders underlying the Blueprint are valid exercises of the statutory
20 authority of DPH, as intended by the Legislature:

21 It is the prerogative of the Legislature to prescribe the powers and authority of an
22 executive agency created to deal with a specific public problem such as public
23 health. The manner in which this authority is exercised is a matter of administrative
24 discretion. The wisdom or effectiveness of the exercise of either legislative or
25 administrative discretion is judged essentially by the political process. In short, the
26 judicial branch of the government is not the overseer of the other two.

25 Zetterberg v. State Dept. of Public Health (1974) 43 Cal.App.3d 657, 662.

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1 **(4) Criticisms of the Methodology for Including Restaurants and Gyms in the move**
2 **from “Red” to “Purple”**

3 Plaintiffs criticize the State’s specific decision of temporarily restricting San Diego County
4 restaurants and gyms from indoor operations by virtue of the move from “red” tier to “purple” tier.
5 Plaintiffs argue that defendants must evaluate the current level of spread within each business
6 sector, such as restaurants and gyms, in each County, rather than, as Defendants have done, develop
7 a general statewide framework targeted at slowing community spread across sectors based on the
8 current epidemiological conditions prevailing in a county, as described by Dr. Michael Soto in his
9 declaration.

10 Plaintiffs offer the declaration of Mr. Hubert Allen, a statistician in public health with a
11 master’s degree in Biostatistics from Johns Hopkins University, as support for the “individualized
12 analysis of each business sector within a given county” approach. Plaintiffs also quote from County
13 Public Health Officer Dr. Wilma Wooten who analyzed current local data concerning the pandemic,
14 including the status of restaurants and gyms. At the time of her Request for Adjudication, Dr.
15 Wooten offered the data to show that San Diego County gyms and restaurants operating indoors
16 under Red Tier did not cause or significantly contribute to the recent spike in COVID cases;
17 therefore, in Dr. Wooten’s judgment at that particular time, it was safe to allow those sectors to
18 continue inside operations. The Court finds that both Mr. Allen and Dr. Wooten make rational and
19 credible points.

20 On the other hand, Dr. Soto provides significant scientific and epidemiological support for
21 the state’s general approach to, and implementation of, the Blueprint. The State also cited an
22 epidemiological study that lends scientific credence to the particular concern about restaurants and
23 gyms as places at higher risk of increasing the spread of infection. [Declaration of Dr. Soto and the
24 epidemiological article Chang, S. et al. Mobility Network Models of COVID-19 Explain Inequities
25 and Inform Reopening. Nature <https://doi.org/10.1038/s41586-020-2923-3> (2020)]

26 Plaintiffs are asking to substitute their methodology (based upon analysis of two sectors in
27 one county) for the methodology of the entire Blueprint. Importantly, the Court’s function is not to
28 decide between two rational scientific or epidemiological arguments and decide which one the

1 Court prefers. Only if there is no rational basis for the action taken would the Court intervene.
2 Particularly where governments “act in areas fraught with medical and scientific uncertainties,”
3 courts should be cautious not to rewrite the validly issued guidance and orders of the State’s Public
4 Health officials. (Marshall v. U.S. (1974) 414 U.S. 417, 427 [94 S.Ct. 700, 706, 38 L.Ed.2d 618];
5 see also South Bay, supra, 140 S.Ct. at pp. 1613-14 (Roberts, C.J., concurring).

6 Plaintiffs emphasize that the State never explained its *specific* rationale behind requiring
7 San Diego County gyms and restaurants to terminate inside operations when challenged by the
8 opinions and data presented by County Health Officer, Dr. Wooten, in her Request for
9 Adjudication. It is true that the State never submitted in its brief, nor was able to articulate at oral
10 argument, the *specific* rationale behind the State’s rejection of Dr. Wooten’s scientific argument
11 and Adjudication request. However, the State has provided evidence in Opposition to the TRO
12 request that addressed the broad factual, scientific, and legal support for the approach taken by the
13 Blueprint, including its focus on, and concern about restaurants and gyms. For example, the
14 epidemiological study concludes:

15 On average across metro areas, full-service restaurants, gyms, hotels, cafes, religious
16 organizations, and limited-service restaurants produced the largest predicted
17 increases in infections when reopened (ED Figure 5d). Reopening full-service
18 restaurants was particularly risky.

19 [Epidemiological Article, p. 2]

20 Further, while there may be evidence that shows a current minimal COVID-19 spread in the
21 restaurants and gyms of San Diego County, that does not necessarily mean that restrictions in these
22 sectors going forward are unwarranted. Based on the State’s evidence and given the acceleration of
23 the pandemic, the State’s order to temporarily prohibit San Diego County restaurants and bars from
24 indoor operations under the purple tier appears to have general support in science and reason. This
25 undermines a finding at this time that the State order in question is “arbitrary and capricious.”

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Conclusion

Based on the above, the Court DENIES the Application for Temporary Restraining Order.
The Court sets a Status Conference for December 2, 2020 at 8:30 a.m. to discuss the setting of a Preliminary Injunction Hearing and briefing schedule.

Dated: November 23, 2020


KENNETH J. MEDEL
Judge of the Superior Court

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Exhibit E

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF FRESNO

12 **GHOST GOLF, INC., DARYN COLEMAN,
13 SOL Y LUNA MEXICAN CUISINE, and
14 NIEVES RUBIO,**

15 Plaintiffs,

16 v.

17 **GAVIN NEWSOM, in his official capacity
as Governor of California, XAVIER
18 BECERRA, in his official capacity as
Attorney General of California, SANDRA
19 SHEWRY, in her official capacity as Acting
Director of the California Department of
20 Public Health, ERICA S. PAN, in her
official capacity as Acting State Public
21 Health Officer,**

22 Defendants.

Case No. 20CECG03170

**DECLARATION OF DR. JAMES WATT,
MD, MPH, IN SUPPORT OF
DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION**

Date: December 15, 2020
Time: 3:30 p.m.
Dept: 501
Judge: The Hon. D. Tyler Tharpe
Trial Date: None Set

Action Filed: October 26, 2020

**(Exempt from Filing Fees:
Gov. Code, § 6103.)**

1 I, James Watt, MD, MPH, declare as follows:

2 1. I am over the age of 18 years and a U.S. citizen. I make this declaration in support of
3 defendants' concurrently filed opposition to plaintiffs' motion for a preliminary injunction in this
4 action. Except as otherwise noted, I have personal knowledge of the facts set forth below and, if
5 called as a witness, could and would testify competently thereto.

6 **Background and Experience**

7 2. I am currently employed as the Chief of the Division of Communicable Disease
8 Control of the Center for Infectious Diseases at the California Department of Public Health
9 (CDPH). I held this role from 2010 until 2019, then returned to the role on July 13, 2020, after a
10 six-and-a-half-month stint as CDPH's Acting Deputy Director of the Center for Infectious
11 Diseases and Interim State Epidemiologist.

12 3. I received my Bachelor of Science degree in Biology and a Bachelor of Arts degree in
13 German Studies at Stanford University. I received my Medical Degree from the University of
14 California, San Diego, and I completed my residency in pediatrics at Oakland Children's Hospital
15 in 1993. I received a Master's Degree in Public Health from the University of California,
16 Berkeley, in 1995. I hold a California medical license and a California Medical Board
17 certification in pediatrics.

18 4. In 1996, after completing my formal schooling, I joined the California Department of
19 Health Services (CDHS) as a contract Public Health Medical Officer II. (CDHS later was
20 reorganized and became two agencies, the California Department of Health Care Services
21 (DHCS) and the CDPH.) Three years later, I joined the federal Centers for Disease Control and
22 Prevention (CDC) as an Epidemic Intelligence Service Officer in the Respiratory Diseases
23 Branch. I held that role until 2001, when I became an Assistant Scientist in the School of Public
24 Health at Johns Hopkins University. In 2006, I returned to CDPH, where I have been employed
25 since.

26 5. In addition to my role at CDPH, I am an Associate at the Johns Hopkins Bloomberg
27 School of Public Health and a Clinical Professor at the University of California, San Francisco,
28

1 School of Medicine. In these positions, I teach graduate students in public-health schools and
2 medical schools about communicable disease control, and I also mentor graduate students.

3 6. During my career, I have published over 60 scientific peer-reviewed papers focused
4 on infectious diseases. As a physician scientist, my research has focused on the diverse challenges
5 that we face in preventing infectious diseases, including emerging infections, and vaccine safety
6 and efficacy.

7 7. I have provided international consultation to address infectious diseases in many
8 regions of the world. I have served on a variety of advisory panels on communicable disease
9 control, including at the CDC and the World Health Organization (WHO).

10 8. My professional accomplishments have been recognized through honors and awards
11 including the U.S. Public Health Service Achievement Medal in 2000, the National Center for
12 Infectious Diseases Honor Award in 2001, and Outstanding Achievement Awards from the
13 CDPH in 2015 and 2016.

14 **The California Department of Public Health**

15 9. CDPH is one of 17 departments and offices within the California Health and Human
16 Services Agency (CHHS). CDPH's fundamental responsibilities include infectious disease
17 control and prevention, food safety, environmental health, laboratory services, patient safety,
18 emergency preparedness, chronic disease prevention and health promotion, family health, health
19 equity, and vital records and statistics. CDPH's mission is to advance the health and well-being of
20 California's diverse people and communities.

21 10. CDPH's Center for Infectious Diseases protects California's population from the
22 threat of preventable infectious diseases and assists those living with an infectious disease in
23 securing prompt and appropriate access to healthcare, medications, and associated support
24 services. The Division of Communicable Disease Control works to promptly identify, prevent,
25 and control infectious diseases that pose a threat to public health, including emerging and re-
26 emerging infectious diseases, vaccine-preventable agents, bacterial toxins, bioterrorism, and
27 pandemics.

28

1 11. When I returned to CDPH in 2006, I became a Public Health Medical Officer III
2 (Epidemiology) in the Center for Infectious Diseases. I became the Chief of the Center for
3 Infectious Disease’s Tuberculosis Control Branch in 2008, then became the Chief of the Division
4 of Communicable Disease Control, my current role, in 2010.

5 12. In my position as Chief of the Division of Communicable Disease Control, I am
6 responsible for control and prevention of the various infectious diseases that affect Californians,
7 as well as for the State laboratories that support those efforts. After serving in this role from 2010
8 through December 2019, I temporarily served as the Acting Deputy Director of CDPH’s Center
9 for Infectious Diseases (and correspondingly as the Interim State Epidemiologist) from January
10 2020 until July 12, 2020.

11 13. In my temporary role as the Acting Deputy Director of CDPH’s Center for Infectious
12 Diseases and the Interim State Epidemiologist, I coordinated CDPH’s epidemiologic response to
13 disease outbreaks and emerging health threats and was very involved in the CDPH’s response to
14 the COVID-19 pandemic. Among my roles was to oversee analysis of statewide data on COVID-
15 19 cases and trends in disease activity.

16 14. After returning to my position as Chief of the Division of Communicable Disease
17 Control on July 13, 2020, I have continued to be very involved in the CDPH’s response to the
18 COVID-19 pandemic. Between January 2020 and the present, I have been working full time for
19 approximately 60-70 hours per week to address the pandemic.

20 **The Novel Coronavirus and COVID-19**

21 15. COVID-19, short for “coronavirus disease 2019,” is the official name given by the
22 World Health Organization (WHO) to the disease caused by the “novel,” or newly identified,
23 coronavirus SARS-CoV-2. Prior to late 2019, this novel coronavirus had not been seen in
24 humans.

25 16. Since January 2020, I have monitored emerging research related to COVID-19.

26 17. Because SARS-CoV-2 is so recently identified, it has been studied for a very short
27 period of time in relation to other disease-causing viruses, and much about SARS-CoV-2 remains
28 unknown. Many scientists have begun studying the virus since it was identified, and many

1 clinical trials have been undertaken, but there has been insufficient time for completion, analysis,
2 and peer review of many of these studies and trials.

3 18. During the short time that SARS-CoV-2 has been identified as a human pathogen, as
4 teams of scientists have released studies and data, scientific knowledge and understanding have
5 rapidly changed. In some cases, guidance to the public has shifted in accordance with these shifts
6 in understanding. For example, guidance about the use of face coverings is based on emerging
7 evidence about pre-symptomatic (occurring before an infected person becomes symptomatic) and
8 asymptomatic (occurring even if an infected person never shows symptoms) transmission of the
9 virus.

10 19. While there is much that remains unclear and uncertain about the novel coronavirus,
11 there are some areas where there is a consensus among scientists about certain characteristics or
12 features of the virus, as described below.

13 **A. Symptoms, Morbidity, and Mortality of COVID-19**

14 20. People infected with the COVID-19 virus have reported a wide range of symptoms,
15 from none at all or mild symptoms to severe and life-threatening illness. Common symptoms
16 include fever, body ache, dry cough, fatigue, chills, and headache. In some people, COVID-19
17 causes more severe symptoms like high fever, severe cough, and shortness of breath, which often
18 indicates pneumonia. Some of those infected with COVID-19 experience neurological symptoms
19 gastrointestinal symptoms, or both. Specific neurological symptoms seen in people with COVID-
20 19 include loss of smell, inability to taste, muscle weakness, tingling or numbness in the hands
21 and feet, dizziness, confusion, delirium, seizures, and stroke.

22 21. The virus can cause severe disease and death in individuals of any age. Older adults
23 and people of any age who have serious underlying medical conditions are at higher risk for
24 severe illness or death from COVID-19.

25 22. Some data suggest that there may be serious lingering effects for some of those who
26 recover from COVID-19, and that even those who are asymptomatic or have mild illness may
27 suffer from lingering long-term effects. See DeeDee Stiepan, “Long-term symptoms,
28

1 complications of COVID-19,” Mayo Clinic (Aug. 3, 2020), which can be found at
2 <https://newsnetwork.mayoclinic.org/discussion/long-term-symptoms-complications-of-covid-19/>.

3 **B. Treatment for COVID-19**

4 23. There is currently no cure for COVID-19. A number of potential treatments have
5 been developed and are under investigation. Some of these treatments may reduce the severity of
6 COVID-19 in some individuals. Vaccines are under development, and an understanding of how
7 long immunity lasts after infection is still under investigation.

8 **C. Transmission of SARS-CoV-2**

9 24. There is widespread consensus among epidemiologists that SARS-CoV-2 can spread
10 quickly. Planning scenarios published by the CDC estimate that, on average, a person with
11 COVID-19 goes on to infect between 2-4 people, with a best estimate of 2.5. See
12 <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html>. The number of
13 additional persons infected per case, sometimes connoted as “R,” is a critical measure of the
14 transmissibility of a pathogen. Measures to control the spread of COVID-19 have reduced the
15 effective value of R. See <https://calcat.covid19.ca.gov/cacovidmodels/>.

16 25. If the value of R is greater than 1, COVID-19 will spread exponentially. The higher
17 the value of R, the faster the spread of the virus. For example, if the value of R is 2, one
18 individual will spread the virus to two people, who in turn will spread it to two others each; those
19 four will spread the virus to eight others; those eight will spread the virus to 16; and so on. As a
20 result, after 10 transmission cycles, one person could be responsible for 1,024 other people
21 contracting the virus. See, e.g., Natsuko Imai, et al., “Report 3: Transmissibility of 2019 -n-CoV,”
22 WHO Collaborating Centre for Infectious Disease Modelling, MRC Centre for Global Infectious
23 Disease Analysis, Adbul Latif Jameel Institute for Disease and Emergency Analytics, J-IDEA,
24 Imperial College London, UK (Jan. 25, 2020), available online at
25 [https://www.imperial.ac.uk/media/imperial-college/medicine/mrc-gida/2020-01-25-COVID19-](https://www.imperial.ac.uk/media/imperial-college/medicine/mrc-gida/2020-01-25-COVID19-Report-3.pdf)
26 [Report-3.pdf](https://www.imperial.ac.uk/media/imperial-college/medicine/mrc-gida/2020-01-25-COVID19-Report-3.pdf). See also Thomas V. Inglesby, MD, “Public Health Measures and the Reproduction
27 Number of SARS-CoV-2,” JAMA Insights (May 1, 2020), available online at
28 <https://jamanetwork.com/journals/jama/fullarticle/2765665>.

1 26. While all of the mechanisms by which COVID-19 spreads are not yet clear, there is
2 consensus among epidemiologists that the most common mode of transmission of SARS-CoV-2
3 is from person to person, through respiratory particles such as those that are produced when an
4 infected person coughs or sneezes or projects his or her voice through speaking, singing, and
5 other vocalization. These particles can land in the mouths, noses, or eyes of people who are
6 nearby or possibly can be inhaled into their lungs. See [https://www.who.int/news-room/q-a-
7 detail/q-a-how-is-covid-19-transmitted](https://www.who.int/news-room/q-a-detail/q-a-how-is-covid-19-transmitted).

8 27. Some evidence exists that SARS-CoV-2 might also be spread through aerosol
9 transmission, that is, through smaller particles (of less than 5 microns) emitting from an infected
10 person, including through speaking, singing, and other vocalization, that can travel farther than
11 respiratory droplets. See <https://apps.who.int/iris/rest/bitstreams/1286634/retrieve>.

12 28. Studies show that SARS-CoV-2 can live on certain surfaces for a period of time,
13 suggesting that fomite transmission (through touching a surface where the live virus is present) is
14 possible. Fomite transmission presently is not believed to be a common method by which
15 individuals can be infected by the virus. See [https://www.cdc.gov/coronavirus/2019-
16 ncov/prevent-getting-sick/how-covid-spreads.html](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html).

17 29. There is broad consensus that people who are not experiencing symptoms can still
18 spread SARS-CoV-2. See “Transmission of SARS-CoV-2: implications for infection prevention
19 precautions,” WHO Scientific Brief (Jul. 9, 2020), available at [https://www.who.int/news-
20 room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-
21 precautions](https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions).

22 30. Multiple studies provide evidence for asymptomatic and pre-symptomatic
23 transmission, examples of which include those set forth below.

24 i. An article in the journal Nature Medicine reporting an investigation of 94
25 patients with COVID-19 found that that 44 percent of secondary cases were infected before the
26 index case developed symptoms. Xi He, et al., “Temporal dynamics of viral shedding and
27 transmissibility of COVID-19,” Nature Medicine, vol. 26 (Apr. 15, 2020), pp. 672-675, available
28 at www.nature.com/articles/s41591-020-0869-5.

1 ii. Asymptomatic spread also has been documented in skilled nursing facilities and
2 cited as an important reason for extensive spread. For example, a report in The New England
3 Journal of Medicine found that over 27 of 48—over 56 percent—of patients with COVID-19
4 were asymptomatic. M. Gandhi, et al., “Asymptomatic Transmission, the Achilles Heel of
5 Current Strategies to Control Covid-19,” The New England Journal of Medicine 382:2158 (May
6 28, 2020), available online at <https://www.nejm.org/doi/full/10.1056/NEJMe2009758>.

7 iii. A report from CDC found evidence of transmission prior to symptoms in
8 Singapore and described other investigations that have confirmed similar findings. Wycliffe E.
9 Wei, et al., “Presymptomatic Transmission of SARS-CoV-2- Singapore, January 23-March 16,
10 2020,” CDC Morbidity and Mortality Weekly Report, vol. 69 (Apr. 1, 2020), available online at
11 <https://www.cdc.gov/mmwr/volumes/69/wr/mm6914e1.htm>. See also Nathan W. Furukawa, et
12 al., “Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2
13 while Presymptomatic or Asymptomatic,” Emerging Infectious Diseases, vol. 26, no. 7 (July
14 2020), available at https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article.

15 31. The fact that SARS-CoV-2 can be spread by individuals who are pre-symptomatic or
16 asymptomatic is one of the aspects of the COVID-19 that makes it difficult to control. Individuals
17 without symptoms are generally unaware they are infected and are thus less likely to be taking
18 steps to avoid transmission of the virus. Therefore, individuals who themselves may have been
19 unknowingly infected by others can themselves become unknowing transmitters of the virus.

20 32. Not all exposures to SARS-CoV-2 will cause an infection; an infection will take place
21 only where there is a sufficient dose of the virus to overcome the body’s defenses. Therefore, it is
22 important to take steps to limit interactions where conditions support exposure to higher viral
23 doses.

1 **D. Community Spread of COVID-19**

2 33. An area experiences community spread when residents are becoming infected with
3 the virus in community settings, and it is not possible to identify the source of exposure in some
4 cases.

5 34. A state of emergency due to COVID-19 was declared in California on March 4, 2020,
6 and COVID-19 was declared a global pandemic by the WHO on March 11, 2020. COVID-19 has
7 been spreading in the community (community spread) in most California counties since then.

8 35. Leaving a home that is free of COVID-19 and interacting with others outside the
9 home when COVID-19 is being transmitted in the community increases individuals' risk of
10 contracting the disease. The more individuals interact with others in the community, the more
11 likely that COVID-19 will spread.

12 **Activities with Increased Risk of Transmission COVID-19**

13 **A. Gatherings**

14 36. There is broad consensus among epidemiologists that transmission (and thus spread)
15 of the novel coronavirus is more likely when people are in close proximity to one another,
16 particularly when they are within about six feet of each other. Greater physical distance between
17 people can increase the possibility of dispersion of the virus and reduce the viral dose that people
18 may be exposed to.

19 37. While keeping six feet of separation between individuals and wearing cloth face
20 coverings can reduce the risk of disease transmission, such distancing does not eliminate the risk
21 of transmission altogether. As a consequence, any gathering increases the risk of individual and
22 community transmission of COVID-19, and the risk increases commensurately with the size of
23 the group (other factors being equal).

24 38. Gatherings where individuals are in close proximity to others are especially risky
25 because, as noted above, COVID-19 can be spread by people who are not showing symptoms,
26 and therefore individuals who are present will not know from mere observation whether others in
27 close proximity are more or less likely to be carrying the virus.

1 39. A basic epidemiologic concept that is widely accepted is that any gathering of people
2 increases the risk of individual and community transmission. See first FAQ under “COVID-19
3 Risk” at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/faq.html>.

4 40. This conclusion is supported by experience in California. In the County Monitoring
5 data step 2 submitted to the State on July 17, 2020, by California counties experiencing increases
6 in their COVID-19 virus cases, at least 23 of the 30 reporting counties identified social gatherings
7 as a cause of the rise in cases. See
8 [https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CountyMonitoringDataStep2.aspx)
9 [19/CountyMonitoringDataStep2.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CountyMonitoringDataStep2.aspx) (July 17, 2020).

10 41. The more people that gather, the higher the likelihood that an infected person will be
11 present. Also, the larger the gathering, the higher the number of people who may be secondarily
12 infected by that already infected person. Importantly, the more people who are infected at a large
13 gathering, the faster the exponential spread of the virus will be (as described above). If these
14 infected people travel, they may spread disease to other communities or counties that they visit.
15 This spread could fan out into different parts of the state, jeopardizing the hard work to contain
16 COVID-19 that is going on in many communities and placing a further strain on hospitals and
17 other resources across the state, not to mention the economic and human costs of illnesses and
18 deaths.

19 42. Evidence indicates the risk of transmission at a gathering increases when individuals
20 are in close proximity to one another for an extended period. The risk of transmission increases
21 with both the length of time the gathering lasts and the proximity of people to each other at the
22 gathering. The longer and closer an infected person producing respiratory particles with virus
23 (e.g., by breathing, singing, chanting, talking, laughing, coughing, or sneezing) is exposed to
24 others, the more uninfected persons will be exposed.

25 **B. Indoor Gatherings**

26 43. Evidence shows that the risk of transmission of the COVID 19 virus is much higher
27 when the gathering takes place indoors rather than outdoors. Indoors, there is limited ventilation,
28 which allows the virus to accumulate into doses large enough to overcome the immune system.

1 The case studies addressing super-spreading incidents in indoor settings include those set forth
2 below.

3 i. In a published (but not peer-reviewed) study by Hiroshi Nishiura, et al.,
4 examining 110 cases of the COVID-19 virus, the authors found that among the 27 primary cases
5 within the group who generated secondary cases, the odds that a primary case transmitted
6 COVID-19 in a closed environment was 18.7 times greater compared to an open-air environment.
7 The authors found it “plausible that closed environments contribute to secondary transmission of
8 COVID-19 and promote super-spreader events.” See “Closed environments facilitate secondary
9 transmission of coronavirus disease 2019 (COVID-19),” available at
10 <https://www.medrxiv.org/content/10.1101/2020.02.28.20029272v2.full.pdf>.

11 ii. Another published study of cases reported by the local Municipal Health
12 Commissions of 320 municipalities in China between January 4, 2020, and February 11, 2020,
13 states that all but one of the 318 outbreaks (involving 1245 confirmed cases), and every outbreak
14 causing three or more infections, involved a transmission in an indoor environment. See Hu Qian
15 et al., “Indoor transmission of SARS-CoV-2” [pre-print] published in medRxiv on April 4, 2020,
16 and can be found at <https://onlinelibrary.wiley.com/doi/10.1111/ina.12766>.

17 **C. Gatherings in Restaurants and Bars**

18 44. The science of disease transmission and recent studies have shown that transmission
19 is greater in indoor settings. The release of infectious particles into the air when someone speaks
20 coughs, sneezes, or sings, is a greater risk in indoor spaces because there is reduced ventilation
21 and reduced dispersion of infectious particles. Restaurants and bars are considered high risk
22 environments for transmission because they are settings where people from different households
23 share the same space for prolonged periods of time. Further, eating and drinking require removal
24 of face coverings which can increase the spread of infectious particles. Additionally, physical
25 movement within the establishment, duration of time spent in the establishment, and the degree of
26 social mixing among individuals and groups outside one’s household may all be significant in
27 these sectors, which substantially elevates the risk of transmission even where face coverings can
28 be worn.

1 activities and to focus more restrictive measures, at a county-by-county level, on the geographic
2 areas that are currently experiencing elevated rates of infection and hospitalization.

3 54. Where community spread has been reduced in certain geographical areas, or in areas
4 that are less susceptible to being overwhelmed by a potential community spread, and that have
5 demonstrated the ability to test and trace in accordance with relevant guidelines, public health
6 measures may be relaxed to allow more activities to take place.

7 **B. The Stay-at-Home Order**

8 55. On March 19, 2020, Governor Newsom and California’s Public Health Officer (PHO)
9 issued Executive Order N-33-20 and a corresponding Public Health Order directing individuals
10 living in California generally to stay home or at their place of residence except as needed to
11 maintain continuity of operations of the 16 infrastructure sectors identified as critical by the
12 federal government (outlined at [https://www.cisa.gov/identifying-critical-infrastructure-during-](https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19)
13 [covid-19](https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19)). The State’s PHO thereafter designated a supplemental list of “essential critical
14 infrastructure workers” in California who were exempted from the stay-at-home order.

15 **C. The April 2020 Reopening Plan**

16 56. In April 2020, after the stay-at-home orders had slowed the spread of COVID-19,
17 State officials and experts developed a four-stage reopening plan, sometimes called the
18 “resilience roadmap,” based on the relative risks of resuming various activities. This plan was
19 announced by the Governor and the PHO on April 28, 2020.

20 57. On May 4, 2020, the PHO issued a “California pandemic roadmap” describing the
21 four stages of the State’s reopening plan. The pandemic roadmap identifies the following four
22 stages: safety and preparation (stage 1), reopening of lower-risk workplaces and other spaces
23 (stage 2), reopening of higher-risk workplaces and other spaces (stage 3), and last an easing of
24 final restrictions leading to the end of the Stay-at-Home order (stage 4). This roadmap provided
25 for a staged and flexible reopening under which lower-risk businesses and activities that could be
26 modified and reopened without inordinate risk would be the first to reopen, and they would be
27 followed by other, higher-risk businesses and activities, such as limited personal care and
28 recreational venues (with workplace modifications) in stage 3.

1 58. On May 7, 2020, the PHO announced that statewide data supported the gradual
2 movement of the State into stage 2 of the roadmap. The PHO indicated that she would
3 progressively designate sectors, establishments, and activities that could reopen with certain
4 modifications, based on public health and safety needs and at a pace designed to protect public
5 health and safety.

6 59. The staged reopening outlined in the reopening plan and subsequent guidance was
7 intended to, and has, varied between and among counties, depending on their rates of infection
8 and medical capacities. Regions with low infection rates generally started moving through
9 reopening stages more rapidly than regions with higher infection rates. However, in areas that
10 experienced an increased infection rate and reduced medical capacity, the State slowed aspects of
11 the opening process or reinstated the stay-at-home order. See

12 [https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-19-County-Variance-](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-19-County-Variance-Attestation-Memo.aspx)
13 [Attestation-Memo.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-19-County-Variance-Attestation-Memo.aspx).

14 **D. The July 1, 2020, Guidance**

15 60. Unfortunately, during the month of June 2020, many parts of California experienced a
16 spike in cases and hospitalizations. These higher levels of community spread increased the
17 likelihood of infection among individuals at high risk of serious outcomes from COVID-19,
18 including the elderly and those with underlying health conditions who might live or otherwise
19 interact with an infected individual. In addition, the higher levels increased the likelihood of
20 COVID-19 transmission in congregate settings such as nursing homes, homeless shelters, jails
21 and prisons. Infection of vulnerable populations in these settings can be catastrophic, leading to
22 high rates of morbidity and mortality of residents and high strain on the hospital delivery system

23 61. To combat this increased spread, on July 1, 2020 the State issued new guidance
24 restricting many activities.

25 62. In particular, the July 1, 2020, guidance provided that, in Counties on the County
26 Monitoring List due disease transmission rate, hospitalization rate, and hospital capacity “all
27 brewpubs, breweries, bars, and pubs” must close, both indoors and outdoors, unless they are
28 offering sit down, dine-in meals as described under the actions section of the State’s prior June

1 28, 2020, guidance. See [https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-on-Closure-of-Sectors-in-Response-to-COVID-19.aspx)
2 19/Guidance-on-Closure-of-Sectors-in-Response-to-COVID-19.aspx.

3 63. The July 1 guidance also instructed counties on the County Monitoring List for three
4 consecutive days or more to close indoor (but not outdoor) operations for certain sectors that
5 promote the mixing of populations beyond households and make adherence to physical distancing
6 with face coverings difficult, including:

- 7 Dine-in Restaurants
- 8 Wineries and Tasting Rooms
- 9 Movie Theaters
- 10 Family Entertainment Centers
- 11 Zoos and Museums
- 12 Cardrooms

13 64. The guidance explained the new restrictions were focused on sectors in which
14 activities indoors “operate at the highest risk level of all sectors allowed to open so far” and
15 “create an environment that increases levels of community mixing of individuals outside of one’s
16 own household.” As the guidance explained:

17 [t]hese sectors, foundationally, are settings where groups convene and may mix with
18 others for prolonged periods of time without appropriate protective equipment, such
19 as a face covering. For example, it is difficult to consistently wear a face covering in a
20 restaurant. Additionally, physical movement within the establishment, duration of
21 time spent in the establishment, and the degree of social mixing among individuals
22 and groups outside one’s household are all significant in these sectors, which
23 substantially elevates the risk of transmission even where face coverings can be worn.

24 65. In explaining why bars, pubs, and breweries not serving food were closed entirely, the
25 July 1 guidance also observed that “alcohol consumption slows brain activity, reduces inhibition,
26 and impairs judgment, factors which contribute to reduced compliance with recommended core
27 personal protective measures, such as the mandatory use of face coverings and maintaining six
28 feet of distance from people outside of one’s own household.”

29 66. Finally, the July 1 guidance explained why it imposed greater restrictions on indoor
30 activities:

31 The science of disease transmission and recent studies have shown that transmission
32 is greater in indoor settings due to the release of infectious particles into the air when
33 someone speaks, coughs, sneezes, or sings, which is exacerbated in indoor spaces
34 particularly when lacking appropriate ventilation.

1 **E. The July 13, 2020, Guidance**

2 67. The rate of COVID-19 infections and hospitalizations generally continued to increase
3 in counties on the County Monitoring List after the July 1, 2020 guidance was issued.

4 68. On July 13, 2020, based on the continued worsening circumstances in those counties,
5 the State and CDPH issued additional guidance applicable to those counties.

6 69. This guidance extended the ban on both inside and outside operation of bars, pubs,
7 and breweries not serving food to the entire state. The guidance also temporarily barred the
8 following activities indoors throughout the state:

- 9 Dine-in restaurants
- 10 Wineries and tasting rooms
- 11 Movie theaters
- 12 Family entertainment centers (for example: bowling alleys, miniature golf, batting
 cages and arcades)
- 13 Zoos and museums
- Cardrooms

14 Finally, the guidance temporarily required counties on the County Monitoring List to
15 temporarily close certain indoor activities, this time including worship services:

- 16 Gyms and fitness centers
- 17 Places of worship and cultural ceremonies like weddings and funerals
- 18 Offices for non-critical infrastructure sectors
- 19 Personal care services, (like nail salons, body waxing)
- 20 Hair salons and barbershops
- Shopping malls

21 See Statewide Public Health Officer Order, July 13, 2020.

22 **F. The Blueprint for a Safer Economy**

23 70. The restrictions imposed in July 2020 successfully reduced the rate of infection
24 throughout California, and on August 31, 2020 the State released a new plan for relaxing
25 restrictions, the “Blueprint for a Safer Economy.”

26 71. The Blueprint creates four tiers (purple to yellow, in order of decreasing restrictions)
27 wherein geographic areas with similar infection rates are grouped together. The Blueprint built
28 on the statewide roadmap process but refined the approach to make it more user friendly and
uniquely applicable to specific communities and the level of transmission that community was

1 facing in real time. Counties can move between tiers once they establish the required decrease
2 in (1) case numbers, (2) positivity rate and (3) equity metrics for disproportionately impacted
3 populations, continuously for two weeks.

4 72. The Blueprint provides progressively more relaxed restrictions on various activities as
5 the counties move through the tiers. The main distinctions between the restrictions imposed on
6 activities in different tiers remain size of gathering, length of personal interaction, and whether an
7 activity is done indoors or outdoors.

8 **G. Limited Stay at Home Order**

9 73. Due to an unprecedented rate of increase in COVID-19 cases in California of about
10 50 percent during the first week of November, the State Public Health Officer issued a Limited
11 Stay at Home Order requiring that all gatherings with members of other households and all
12 activities conducted outside the residence, lodging, or temporary accommodation with members
13 of other households cease between 10:00 p.m. and 5:00 a.m. with few exceptions. These actions
14 are intended: 1) to help reduce community spread in counties under Tier One (Purple) of
15 California's Blueprint for a Safer Economy, 2) to protect individuals at higher risk of severe
16 illness or death from COVID-19, and 3) to prevent the state's health care delivery system from
17 becoming overwhelmed. Reducing movement and mixing of individual Californians during this
18 time is critical to decreasing transmission, hospitalizations, and deaths. See Statewide Public
19 Health Officer Order, November 19, 2020.

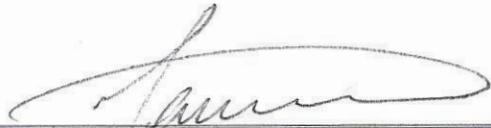
20 **Relative Risks**

21 74. COVID-19, an epidemic that has killed more than 270,520 Americans and 19,121
22 Californians (as of November 30, 2020), is severe and justifies extraordinary measures to protect
23 the public health, including the current restrictions. Whenever people gather, there is an
24 increased risk of COVID-19 transmission, and many factors affect the degree of risk. Therefore,
25 the State has developed requirements for different settings, including restaurants, bars, and other
26 indoor venues, based on the disease transmission tiers of each county. It is very likely that
27 without those measures, many more would have died. Based on my experience, knowledge and
28 review of the relevant literature, a more hands-off approach would result in more deaths and

1 severe COVID-19 cases. In addition, COVID-19 has impacted the availability of hospital beds in
2 areas with extensive transmission. Due to the impact of large numbers of COVID-19 cases being
3 hospitalized, persons needing hospitalization for other reasons could have more complications if
4 they must be sent long distances due to lack of hospital beds. By slowing the spread of COVID-
5 19, the State has been able to reduce the number of cases while new treatments and vaccines are
6 being developed.

7 75. While California's cases have recently risen, they are still lower than many states, and
8 most hospitals have not yet been overwhelmed as in other states. The lower infection rate and
9 lower burden placed on California hospitals followed the interventions occurring in California
10 that were not in place recently in many of these other states.

11
12 I declare under penalty of perjury under the laws of the State of California that the
13 foregoing is true and correct. Executed this 30th day of November, 2020, in Albany, California.

14
15 
16 _____
17 James Watt, MD, MPH
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DECLARATION OF SERVICE

Case Name: **Midway Venture, LLC, et al. v. County of San Diego, et al.**

Case No.: **37-2020-00038194**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On December 18, 2020, I served the attached **EMERGENCY APPLICATION FOR TEMPORARY STAY** to the following by causing to be delivered a true copy thereof to the following person(s) at the address(es) as follows:

TIMOTHY M. WHITE
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Served via electronic mail and personal (messenger delivery) service.

The Honorable Joel R. Wohlfeil
San Diego County Superior Court
Central Courthouse - Hall of Justice
330 W. Broadway
Department 73
San Diego, CA 92101
Served via personal (messenger delivery) service.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 18, 2020, at San Francisco, California.

Robert Hallsey
Declarant

/s/ Robert Hallsey
Signature

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