

**COURT OF COMMON PLEAS
ERIE COUNTY, OHIO**

LMV DEV SPE, LLC, DBA KALAHARI RESORTS & CONVENTIONS	:	Case No.
7000 Kalahari Drive	:	
Sandusky, Ohio 44870	:	Judge
	:	
v.	:	VERIFIED COMPLAINT for
	:	DECLARATORY JUDGMENT AND
AMY ACTON, in her official capacity	:	IMMEDIATE INJUNCTIVE RELIEF
<i>as Director of the Ohio Department of Health</i>	:	
246 N High Street	:	Exhibit 1: <i>Director's May 29, 2020 Order</i>
Columbus, Ohio 43215	:	<i>Closing Amusement and Water Parks</i>
	:	
and	:	Exhibit 2: <i>Entry and Order in Rock House</i>
	:	<i>Fitness v. Acton</i>
ERIE COUNTY GENERAL HEALTH DISTRICT	:	
420 Superior Street	:	Exhibit 3: <i>Memorandum in Opposition to</i>
Sandusky, Ohio 44870	:	<i>Motion for TRO in Hartman v. Acton</i>
	:	
Defendants.	:	Exhibit 4: <i>Defendant Amy Acton's</i>
	:	<i>Interrogatory Responses.</i>
	:	
	:	Exhibit 5: <i>Generally-Applicable Safety</i>
	:	<i>Protocols</i>
	:	
	:	Exhibit 6: <i>Affidavit of General Manager</i>
	:	<i>Brian Shanle</i>

Now comes Plaintiffs, and for their Complaint for Declaratory Judgment and Injunctive Relief, allege as follows:

INTRODUCTION

1. This is an action for declaratory judgment, and preliminary and permanent injunction, pursuant to Ohio Rev. Code Chapter 2721 and Ohio Rev. Code Chapter 2727, arising from Defendants' unconstitutional official conduct, policies, practices, regulations, restrictions, threats, intimidation, and/or harassment.

2. Defendants continue to obstruct rather than advance Ohioans' physical and mental health, all the while having continuously overinflated the risk of harm to the general public.

3. While the Ohio Department of Health and its Director, AMY ACTON, together with local health departments, including the ERIE COUNTY GENERAL HEALTH DISTRICT, maintain latitude to enforce

regulations that ameliorate the effects of a pandemic, that latitude remains subject to limitations imposed by both the Ohio Constitution.

4. The Ohio Department of Health, its Director, and county health departments claim the authority to criminalize and fine operation of safe amusement and water parks.

5. Through various orders and fiat, the Director of the Ohio Department of Health has arbitrarily criminalized all safe amusement and water park operations, without providing any process, venue, or judicial review to determine whether these Ohioans' businesses are in fact safe enough to warrant operation.

6. However, Plaintiffs remain entitled to due process, equal protection, and a government that abides by the doctrine of separation of powers with the attendant checks and balances.

7. The various orders and fiat of the Director of the Ohio Department of Health, together with their enforcement, violate those fundamental rights through the arbitrary imposition of excessive strict liability, together with criminal, civil, and equitable sanctions – unilaterally created by just one unelected individual within the bureaucracy of the State of Ohio – without due process, equal protection, or just compensation and *irrespective of safety*, and in violation of the doctrine of separation of powers.

8. As a direct and proximate result of the unconstitutional conduct, policies, practices, regulations, restrictions, threats, intimidation, and/or harassment of the Director of the Ohio Department of Health, together with enforcement efforts by local health departments Plaintiffs (as well as many others) face an imminent risk of criminal prosecution and extensive daily fines, and/or the decimation of their businesses, livelihoods, and economic security, as well as continued irreparable harm to their rights.

9. Further, the employees that Plaintiffs employ, the taxes that they pay to local governments, and the lives that their businesses otherwise improve all remain impaired.

10. This harm may only be remedied by a ruling from this Court, and Defendants must be immediately and permanently enjoined from imposing criminal, civil, or equitable sanctions on the safe operation of Ohio amusement and water parks including Plaintiffs.

PARTIES

11. Plaintiff LMV DEV SPE, LLC is a Delaware limited liability company, operating a Kalahari Resorts & Conventions located in Erie County, Ohio.

12. More specifically, Plaintiff's Sandusky operation consists of 890 Guest Rooms & Suites 173,000-square-foot indoor waterpark (over 4 acres), 77,000-square-foot outdoor waterpark, a convention center with 215,000 square feet of flexible meeting space for conventions and events, many dining options, including B-Lux Grill & Bar, Great Karoo Marketplace Buffet and Ivory Coast Restaurant, Safari Outdoor Adventure Park, features zip lining, rope adventures, climbing walls, and an animal park.

13. A substantially similar Kalahari Resorts & Conventions under common ownership located in Wisconsin Dells, Wisconsin has been open and operating safely since May 27, 2020.

14. Defendant AMY ACTON is, and has been at all times relevant to the facts at issue in this case, the Director of the Ohio Department of Health.

15. Defendant ERIE COUNTY GENERAL HEALTH DISTRICT is a county health district organized under Ohio Rev. Code Chapter 3709, charged with enforcing the Ohio Department of Health's Orders and empowered to make its own orders.

16. At all times relevant to the allegations in this Complaint, each and all of the acts of AMY ACTON alleged herein were undertaken in conformity with the regulations, customs, usages, policies, and practices of the State of Ohio and the Ohio Department of Health.

17. The actions of AMY ACTON described herein were either outside the scope of her respective office, or, if within the scope, undertaken in an arbitrary manner, grossly abusing the lawful powers of her office.

18. Defendants have personally undertaken and/or threaten to continue to personally undertake specific action so as to deprive and/or violate the constitutional rights of the Plaintiffs.

19. Defendant AMY ACTON is being sued herein in her official capacity.

FACTS

20. Ohio Rev. Code § 3701.13 delegates to the Director of the Ohio Department of Health, amongst other things, “ultimate authority in matters of quarantine and isolation” and authority “to make special orders.”

21. Ohio Rev. Code § 3701.352 mandates that “[n]o person shall violate any rule the director of health or department of health adopts or any order the director or department of health issues under this chapter to prevent a threat to the public caused by a pandemic, epidemic, or bioterrorism event.”

22. In turn, Ohio Rev. Code § 3701.99(C) provides that any violation of Ohio Rev. Code § 3701.352 constitutes a second-degree misdemeanor, thus, subjecting any person violating Ohio Rev. Code § 3701.352 to up to 90 days in jail and a \$750 fine, or both.

23. On March 22, 2020, AMY ACTON, in her capacity as the Director of the Ohio Department of Health, issued a *Director’s Stay at Home Order*, ordering that “non-essential businesses and operations must cease” and “effective at 11:59 pm on March 23, 2020, all persons are to stay at home or their place of residence unless they are engaged in Essential Activities, Essential Governmental Functions, or to operate Essential Businesses and Operations as set forth in this Order.”

24. Rather than defining the category articulated as “Essential Businesses and Operations,” the *Director’s Stay at Home Order* attempted to name “essential businesses and operations” over the course of three pages and 25 paragraphs.

25. While the standard of “essentiality” may initially appear clear, *i.e.*, “necessary for survival,” the *Director’s Stay at Home Order* included within the category of “essential”, *inter alia*, liquor, marijuana, dry cleaners, and the state lottery.

26. Amusement and Water Parks did not make the list of “essential businesses” within the *Director’s Stay at Home Order*.

27. On April 2, 2020, AMY ACTON renewed the *Director's Stay at Home Order*, with the issuance of the *Amended Director's Stay at Home Order*, which continued the closure of Ohio amusement and water parks.

28. On April 30, 2020 AMY ACTON renewed the *Director's Stay at Home Order*, with the issuance of the *Director's Stay Safe Ohio Order*, which continued the closure of Ohio amusement and water parks.

29. At approximately midnight on May 29, 2020 AMY ACTON renewed the closure of Amusement and Water Parks through issuance of *Director's Order*.

30. Specifically, ¶9 of the *Director's Order* indicates “the following businesses and operations are to remain closed until this Order is amended or rescinded: . . . (d) . . . All places of public amusement, whether indoors or outdoors, including, but not limited to, locations with amusement rides, . . . amusement parks, water parks, . . .”

31. The May 29, 2020 *Director's Order*, like those Orders before it, was issued by AMY ACTON without enabling legislation or administrative rulemaking.

32. The May 29, 2020 *Director's Order* “shall remain in full force and effect until 11:59pm on July 1, 2020, unless the Director of the Ohio Department of Health rescinds or modifies this Order at a sooner time and date.” *Director's Order*, at p. 14.

33. To enforce the May 29, 2020 Order, the Ohio Department of Health and its enforcement agents rely upon Ohio Rev. Code § 3701.352 to punish any violation of “any order the director of or department of health issues” with subjection to “a misdemeanor of the second degree, which can include a fine of not more than \$750 or not more than 90 days in jail, or both.”

34. To enforce the May 29, 2020 Order, the Ohio Department of Health and its enforcement agents rely upon Ohio Rev. Code § 3701.56 for the proposition that “boards of health of a general or city health district . . . shall enforce quarantine and isolation orders.”

35. A true and accurate copy of the May 29, 2020 *Director's Order* is attached hereto as Exhibit 1.

36. Pursuant to both past *Orders* and Ohio Rev. Code § 3701.56, Defendant ERIE COUNTY GENERAL HEALTH DISTRICT maintains authority to enforce the criminalization of amusement park and water park operations against Plaintiffs.

37. The *Director's Stay Safe Ohio Order* is unconstitutional as applied to Plaintiffs, who are owners and operators of “amusement parks” and/or “water parks.”

38. Paragraph 9(d) of the *Director's Order* is unconstitutional on its face, insofar as it forbids the opening of “amusement parks” and/or “water parks” under safe circumstances.

39. Prior to the expiration of the *Director's Order*, *i.e.*, prior to July 1, 2020, Plaintiffs desire and intend to reopen their businesses thereby subjecting Plaintiffs and their agents to the immediate risk of criminal, civil, and equitable sanctions, pursuant to the penalties articulated in R.C. 3701.352 and R.C. 3701.99.

40. Venue is proper within this County and division because (i) Plaintiffs are situated within this county and the Defendants are regulating water parks and amusement parks, including Plaintiffs, within this county; and (ii) all of the claims asserted by Plaintiffs arose within this county.

First Cause of Action
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Vagueness and Separation of Powers

Article I, Sections 1, 2, 16, 19 and 20 and Article II, Section 1 of the Ohio Constitution

41. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

42. Through enactment of Ohio Rev. Code § 3701.13, the Ohio General Assembly delegated to the Ohio Department of Health, *inter alia*, “ultimate authority in matters of quarantine and isolation.”

43. In delegating “ultimate authority in matters of quarantine and isolation” to the Ohio Department of Health, the Ohio General Assembly has delegated legislative authority without an intelligible principle.

44. The vagueness concerns raised by the delegation of “ultimate authority” to the Ohio Department of Health is aggravated by the unilateral creation of strict liability crimes by the various orders issued by AMY ACTON.

45. “Without sufficient limitations, the delegation of authority can be deemed void for vagueness as allowing ad hoc decisions or giving unfettered discretion.” *Biener v. Calio*, 361 F.3d 206, 215-17 (3d Cir. 2004).

46. “A delegation of legislative authority offends due process when it is made to an unaccountable group of individuals and is unaccompanied by ‘discernible standards,’ such that the delegatee's action cannot be ‘measured for its fidelity to the legislative will.’” *Ctr. for Powell Crossing, LLC v. City of Powell, Ohio*, 173 F. Supp. 3d. 639, 675-79 (S.D. Ohio 2016).

47. “To pass muster under the void-for-vagueness doctrine, Ohio law dictates an ordinance must survive the tripartite analysis set forth in *Grayned*. The three aspects examined under *Grayned* are: (1) the ordinance must provide fair warning to the ordinary citizen of what conduct is proscribed, (2) the ordinance must preclude arbitrary, capricious, and discriminatory enforcement, and (3) the ordinance must not impinge constitutionally protected rights.” *Viviano v. City of Sandusky*, 2013-Ohio-2813, 991 N.E.2d 1263 (6th Dist. 2013).

48. “Ohio has always considered the right of property to be a *fundamental right*. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces.” *Norwood v. Horney*, 110 Ohio St.3d 353, at 361-62 (2006) (internal citations omitted).

49. And these “venerable rights associated with property” are not confined to the mere ownership of property: “[t]he rights related to property, i.e., to *acquire, use, enjoy*, and dispose of property, are among the most revered in our law and traditions.” *Norwood v. Horney*, 110 Ohio St.3d 353, at 361-62 (2006)

50. In sum, “the free use of property is guaranteed by Section 19, Article I of the Ohio Constitution.” *State v. Cline*, 125 N.E.2d 222, 69 Ohio Law Abs. 305.

51. More specifically, Ohio businesses “have a constitutionally protected property interest” in freedom “from unreasonable and arbitrary interference from the government.” *Mariemont Apartment Association v. Village of Mariemont*, 2007-Ohio-173, at ¶40-42.

52. In *Norwood v. Horney*, 2006-Ohio-3799, at ¶ 83, the Ohio Supreme Court explained that “[i]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to police [officers], judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application”).

53. “Though the degree of review for vagueness is not described with specificity, if the enactment ‘threatens to inhibit the exercise of constitutionally protected rights,’ (such as property rights in Ohio), a more stringent vagueness test is to be applied.” *Yoder v. City of Bowling Green, Ohio*, No. 3:17 CV 2321, 2019 WL 415254, at 4-5 (N.D. Ohio Feb. 1, 2019), citing *Norwood*, 110 Ohio St.3d at 379.

54. Because there is no means of exercising judicial review over any order issued by AMY ACTON purportedly under the authority of Ohio Rev. Code § 3701.13, that delegation is impermissibly vague.

55. The vague delegation, both on its own and in combination with the various orders issued by AMY ACTON, has violated, continues to violate, and will further violate Plaintiffs’ rights.

56. AMY ACTON has already conceded, and in fact repeatedly claimed that “Dr. Acton’s generally-applicable orders are legislative acts,” and “general policy decisions.” See *Hartman v. Acton*, Case No. 2:20-cv-1952 (S.D. Ohio 2020), *Memorandum in Opposition to Motion for TRO* (Doc. 4, PageID#71, 79, 80 & 81 (“the Amended Order is a legislative act of general application.... A State can make general policy decisions...”).

57. A true and accurate copy of the *Memorandum in Opposition to Motion for TRO* is attached hereto as Exhibit 2.

58. AMY ACTON and her attorneys have framed her as a policymaker, explaining that “Dr. Acton weighed the danger from the spread of Covid-19 with the need of Ohioans to obtain necessary goods and services.” *Memorandum in Opposition to Motion for TRO*, at PageID#80.

59. AMY ACTON and her attorneys have claimed that all Ohio businesses “take their business-operation rights subject to those restrictions” that may be imposed by Acton, no matter what those restrictions may be. *Memorandum in Opposition to Motion for TRO*, at PageID#83.

60. AMY ACTON and her attorneys have claimed that the Ohio Department of Health may usurp the function of the Ohio General Assembly by creating strict liability criminal penalties, *i.e.*, disobedience with any order issued by AMY ACTON, including, without limitation, the *Director’s Stay at Home Order*, the *Amended Director’s Stay at Home Order*, and the *Director’s Stay Safe Ohio Order*, and the May 29, 2020 *Director’s Order*.

61. One of two conclusions is necessarily true: either (i) the General Assembly’s delegation of authority to the Ohio Department of Health in Ohio Rev. Code § 3701.13 is too broad or vague; or (ii) the Ohio Department of Health’s exercise of the delegated authority is too broad. Under either conclusion, the *Director’s Order*, in criminalizing the operation of amusement parks and water parks, violates the separation of powers guarantees to which Plaintiffs are entitled.

62. At the time of this filing, just one Ohio Court has adjudicated the merits of the Orders criminalizing businesses issued by Director of the Ohio Department of Health.

63. The aforesaid Court determined the criminal penalties flowing from such orders to be impermissibly unconstitutional and otherwise unlawful. See *Rock House Fitness, Inc. v. Acton*, Case No. 20CV000631 (Lake Cty. C.P. 5-20-2020)(Decision attached).

64. In *Rock House Fitness*, the Court explained that “[t]he director has quarantined the entire people of the state of Ohio, for much more than 14 days. The director has no statutory authority to close all businesses . . . She has acted in an impermissibly arbitrary, unreasonable, and oppressive manner and without any procedural safeguards . . . Fundamental liberties to own and use property and earn a living are at stake and are violated [Acton’s] actions . . . and there is no administrative appeal process within the department of health regulation for this taking.” *Id.*, at ¶¶26, 31, 34.

65. Further, the *Rock House Fitness* court rejected the notion that “one unelected individual could exercise such unfettered power to force everyone to obey impermissibly, vague, arbitrary, and unreasonable rules that the Director devised and revised, modified and reversed, whenever and as she pleases, without any legislative guidance.” *Id.*, at ¶37. The Court then enjoined Director Acton and the local health department “from imposing or enforcing penalties solely for noncompliance with the director’s order.” *Id.*, at ¶37.

66. In order to prevent the continued violation of Plaintiffs’ constitutional rights by Defendants, it is appropriate and proper that a declaratory judgment be issued, declaring unconstitutional the *Director’s Stay at Home Order*, the *Amended Director’s Stay at Home Order*, the *Director’s Stay Safe Ohio Order*, and/or the *May 29, 2020 Director’s Order*, as such orders are imposed pursuant to vague and unfettered enforcement authority that creates the crime of operating an amusement park or water park and violates the doctrine of separation of powers.

67. It is further appropriate and hereby requested that preliminary and permanent injunctions issue prohibiting the Defendants from enforcing the *Director’s Stay at Home Order*, the *Amended Director’s Stay at Home Order*, the *Director’s Stay Safe Ohio Order* and/or the *May 29, 2020 Director’s Order* against Plaintiffs.

68. It is further appropriate and hereby requested that preliminary and permanent injunctions issue enjoining Defendants and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the injunction, from engaging in any

further official conduct that threatens, attempts to threaten, and/or actually interferes with Plaintiffs' occupation and operation of their private property despite their disfavored identity.

Second Cause of Action
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF
Deprivation of Property Rights without Equal Protection and Due Process / Takings
Article I, Sections 1, 2, 16, 19 and 20 of the Ohio Constitution

69. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

70. “[T]he Ohio Constitution is more protective of private property rights than its federal counterpart [and] the Ohio Supreme Court insists upon a more stringent Equal Protection analysis.” *Yoder v. City of Bowling Green*, Ohio, No. 3:17 CV 2321, 2019 WL 415254, at p. 4-5 (N.D. Ohio Feb. 1, 2019), citing *Norwood* and Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 198 (2018), at 16 (“Nothing compels the state courts to imitate federal interpretations of the liberty and property guarantees in the U.S. Constitution when it comes to the rights guarantees in their own constitutions”).

71. On Equal Protection and Due Process, Article I, Section 2 of the Ohio Constitution provides that “[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit...”

72. In *State v. Mole*, the Ohio Supreme Court indicated that the Ohio Constitution’s equal protection guarantees can be applied to provide greater protection than their federal counterparts: “Although this court previously recognized that the Equal Protection Clauses of the United States Constitution and the Ohio Constitution are substantively equivalent and that the same review is required, we also have made clear that the Ohio Constitution is a document of independent force.” *State v. Mole*, 2016-Ohio-5124, ¶¶ 14, citing *Arnold v. Cleveland*, 67 Ohio St.3d 35, 42 (1993).

Equal Protection and Substantive Due Process

73. Nowhere is this “independent force” of Ohio’s equal protection clause more relevant than with *protection of private property rights*, since those rights are “fundamental rights” in Ohio but not so pursuant to federal constitutional precedent.

74. A regulation of property violates the Ohio Constitution’s guarantees of Due Process and Equal Protection when it is “arbitrary,” “unduly oppressive upon individuals,” not “necessary for the public welfare,” or fails to *substantially* advance a legitimate interest *through a substantial relationship to it*. See *Direct Plumbing Supply v. City of Dayton*, 138 Ohio St. 540 (1941); *Olds v. Klotz*, 131 Ohio St. 447, 451 (1936); *City of Cincinnati v. Correll*, 141 Ohio St. 535, 539 (1943).

75. Pursuant to the foregoing standards, the Ohio Supreme Court recently applied exacting scrutiny to invalidate an Ottawa Hills zoning restriction, due to its “disparate treatment” of homeowners. *Boice v. Village of Ottawa Hills*, 137 Ohio St.3d 412, 999 N.E.2d 649, 2013-Ohio-4769 ¶¶17-19 (observing that “there was disparate treatment of the residents in the village when it came to permitting houses to be built on lots smaller than 35,000 square feet,” that the land use at issue involved a *de minimus* difference, and that other similarly situated houses were “grandfathered in.”).

76. In *State ex rel. Pizza v. Rezcallah*, 84 Ohio St.3d 116, 702 N.E.2d 81, 1998-Ohio-313, the Ohio Supreme Court explained that “the free use of property guaranteed by the Ohio Constitution can be invaded by an exercise of the police power only when the restriction thereof bears a *substantial relationship* to the public health, morals and safety.”

77. “Ohio courts, interpreting the Ohio Constitution, apply something higher than rational basis review, but less than strict scrutiny to cases involving property rights.” *Yoder v. City of Bowling Green, Ohio*, No. 3:17 CV 2321, 2019 WL 415254, at 3–6 (N.D. Ohio Feb. 1, 2019)(“[t]he dwelling limit is impermissibly arbitrary, oppressive, and untailored . . . Within the regulations, the City claims to be effectuating a governmental interest in limiting population density. * * * But the City’s dwelling limit only focuses on the

type of relationship between those living together in a home, and as such, is both over- and under-inclusive with respect to either of these interests. The Court thus concludes the dwelling limit is an ‘unreasonable and arbitrary’ restriction on the issue of property, and does not bear a “substantial relationship” to its avowed goals”), citing *Norwood v. Horney*, 110 Ohio St.3d 353, 361-62 (2006); *Mariemont Apartment Ass’n v. Village of Mariemont*, 2007 WL 120727, at 7 (Ohio Ct. App.) (homeowners “have a constitutionally protected property interest in running their residential leasing businesses free from unreasonable and arbitrary interference from the government” under the Due Process Clause); *State ex rel. Pizza v. Rezcallah*, 84 Ohio St. 3d 116, 128 (1998); *Boice v. Ottawa Hills*, 137 Ohio St. 3d 412, 416-17 (2013) (invalidating zoning regulation requiring lots of a certain size because of “disparate treatment of the residents in the village when it came to permitting houses to be built on lots smaller than 35,000 square feet,” a *de minimis* difference between prohibited and permitted, and other similarly situated houses were “grandfathered in” . . . “It was clearly arbitrary for the village to single this lot out for a denial of the grandfathering-in treatment enjoyed by similar lots in the same neighborhood!”).

78. No classification may be arbitrary: “the attempted classification ‘must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.’ *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124 ¶¶12-29.

79. “Discrimination of an unusual character especially suggest[s] careful consideration to determine whether they are obnoxious to the constitutional provision.” *Id.*

80. Otherwise put, “classifications must have a reasonable basis and may not ‘subject individuals to an arbitrary exercise of power.’” *Id.*, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 288 (1992).

81. “A statutory classification violates equal protection if it treats similarly situated individuals differently based upon an illogical and arbitrary basis.” *Mariemont Apartment Association v. Village of*

Mariemont, 2007-Ohio-173, at ¶28, citing *Adamsky v. Buckeye Local School Dist.*, 73 Ohio St.3d 360, at 362, 1995-Ohio-298.

82. The face of the May 29, 2020 *Director's Order* articulates no clear governmental interest, other than the intimation that the Order is for the purpose of safety. See p. 1.

83. The *Director's Stay Safe Ohio Order* is overbroad, underinclusive, and untailed with respect to the foregoing governmental interest.

84. In selectively singling out and disfavoring several industries, including Ohio amusement parks and water parks, on the basis of their *identity*, rather than their *safety*, the *Director's Stay Safe Ohio Order* fails to provide any basis whatsoever for its disparate treatment.

85. There is no basis in law or fact for the disparate treatment of amusement parks or water parks.

86. The *Director's Order* fails to articulate any basis for disparate treatment of amusement parks or water parks, with reference to the foregoing governmental interest or any governmental interest at all.

87. Disparate prohibition of the operation of amusement parks and water parks is arbitrary.

88. Plaintiffs are willing and able to abide by the safety regulations mandated by the *Director's Stay Safe Ohio Order*, including but not limited to ¶8 (requiring facial masks), ¶16 (requiring “Social Distancing Requirements”); ¶21(a) (requiring certain safety protocols of “manufacturing, distribution, & construction” employers); ¶21(b) (requiring certain safety protocols of “consumer, retail & services” employers); ¶21(c) (requiring certain safety protocols of “general office environments” employers).

89. Plaintiffs are willing and able to abide by the safety regulations mandated by the May 29, 2020 *Director's Order*, including but not limited to ¶2 (“Social Distancing Requirements”), ¶7 (requiring facial coverings/masks), ¶11 (requiring “Social Distancing Requirements”), ¶12 (identifying “general” safety regulations for “businesses/employers”), ¶13 (requiring certain safety protocols of “manufacturing, distribution, & construction” employers); ¶14 (requiring certain safety protocols of “consumer, retail & services” employers); ¶15 (requiring certain safety protocols of “general office environments” employers).

90. In addition, Plaintiffs are able to abide by all applicable mandatory “Responsible RestartOhio” regulations regarding “Local and Public Pools and Aquatic Centers,” “Canoe Liveries and Recreational Paddling,” “Restaurants and Bars,” and “Day Spas.” See *Exhibit 5*.

91. In addition, Plaintiffs are able to abide by all applicable mandatory “Responsible RestartOhio” regulations proposed by the Travel and Tourism Committee.

92. Unlike many retail establishments and other workplaces permitted to open, Plaintiffs’ water parks and amusement parks are accessible only to those who have previously purchased tickets.

93. Unlike many retail establishments and other workplaces permitted to open, Plaintiffs’ water parks and amusement parks are able to carefully control access to their facilities through admissions policies.

94. Unlike many retail establishments and other workplaces permitted to open, Plaintiffs’ water parks and amusement parks include exceptionally large multi-acre outdoor spaces capable of effectuating social distancing.

95. Plaintiffs’ facilities exceed 11 acres.

96. There is no factor inherent in the operation of an amusement or water park that provides a unique threat of spreading any particular pandemic above and beyond factors inherent in the operation of any other permitted business.

Equal Protection and Procedural Due Process

97. While the State has afforded a hearing on safety to some, it has afforded no such hearings to Plaintiffs.

98. A procedural due process limitation, unlike its substantive counterpart, does not require that the government refrain from making a substantive choice to infringe upon a person’s life, liberty, or property interest. It simply requires that the government provide ‘due process’ before or after making such a decision.

99. The goal is to minimize the risk of substantive error, to assure fairness in the decision-making process, and to assure that the individual affected has a participatory role in the process. The touchstone

of procedural due process is the fundamental requirement that an individual be given the opportunity to be heard ‘in a meaningful manner.’” *Howard v. Grinage*, 82 F.3d 1343, 1349 (6th Cir. 1996), citing *Loudermill v. Cleveland Bd. of Educ.*, 721 F.2d 550, 563 (6th Cir.1983), *aff’d*, 470 U.S. 532 (1985).

100. Interests in operating a business or earning a living are more than sufficient to invoke procedural due process guarantees. *Johnson v. Morales*, 946 F.3d 911, 935–37 (6th Cir. 2020)(“Johnson’s interest in her business license is enough to invoke due process protection”).

101. “There is no dispute that *never* providing an opportunity to challenge a permit revocation violates due process. Thus, the revocation of [the right to remain in business] without a pre-deprivation hearing or a post-deprivation hearing violated due process.” *United Pet Supply, Inc. v. City of Chattanooga, Tenn.*, 768 F.3d 464, 488 (6th Cir. 2014).

102. Even when such property interests are deprived in an “emergency situation,” government must provide an “adequate post-deprivation process.” *United Pet Supply*, 768 F.3d at 486.

103. These safeguards for liberty are so beyond objection that “[n]o reasonable officer could believe that revoking a permit to do business without providing any pre-deprivation or post-deprivation remedy [is] constitutional.” *Id.*, at 488.

104. Putting an Ohioan out of business without any opportunity for a hearing “is one of the rare situations where the unconstitutionality of the application of a statute to a situation is plainly obvious” such that “a clearly established right” is violated, and even qualified immunity is to be denied. *Id.*, at 489.

105. The fundamental requirement of due process is the opportunity to be heard and it is an “opportunity which must be granted at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

106. *Further*, even when the “the government has a substantial interest in ensuring the safety of its citizens,” a postdeprivation hearing is still required. See *Johnson v. Morales*, 946 F.3d 911, at 923 (6th Cir. 2020).

107. *Finally*, in requiring a postdeprivation hearing, at least with respect to the decimation of one's business and livelihood, it matters not that the deprivation may be only "temporary" in nature. *Fuentes v. Shevin*, 407 U.S. 67, at 84–85 ("[I]t is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment.").

108. "Due process of law requires that plaintiffs be afforded a *prompt* hearing before a neutral judicial or administrative officer." *Krimstock v. Kelly*, 464 F.3d 246, 255 (2d Cir. 2006)(25 day delay for post-deprivation hearing unconstitutional); see also *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 (1993)("the Due Process Clause requires ... an opportunity for some kind of predeprivation or *prompt* post-deprivation hearing at which some showing of the probable validity of the deprivation must be made").

109. Because "burden-shifting can be a problem of constitutional dimension in the civil context," *Johnson v. Morales*, 946 F.3d 911, 916–40 (6th Cir. 2020), the Ohio Constitution requires, in this context, that the State carry the burden of proving why any appealing amusement or water park must remain closed.

110. The Ohio Department of Health is required to supply Ohioans who own businesses it has closed with a prompt hearing where the burden is on the Department to justify its decision mandated full closure of those Ohioans' businesses, particularly when the May 29, 2020 *Director's Order* closes just a handful of businesses, i.e. those identified in Paragraph 9 on Page 4 of the Order.

111. The Ohio Department of Health is required to supply Ohioans who own businesses it has closed with hardship relief, such as narrowing its closure order so as to permit limited safe operations.

112. The Ohio Department of Health has entirely ignored these clear and important safeguards in imposing its "Orders" indefinitely closing Plaintiffs' businesses, even though the Orders have been renewed and carried on for over two months at the time of this filing, and even though county health departments alone have been privileged to receive hearings.

113. In an unknown and unknowable but not insignificant number of cases, such as Plaintiffs' case, the Ohio Department of Health would be unable to justify forbidding Plaintiffs from reopening on, at minimum, a limited basis on the same safety terms as other open businesses.

114. With each passing day and week that Plaintiffs' businesses remain closed, additional irreparable harm is inflicted on the Plaintiffs' many employees and affiliates, surrounding businesses, and local governments.

115. Neither the May 29, 2020 *Director's Order* nor any other law or rule entitles Plaintiffs or others to any hearing where they can explain these factors to a neutral decisionmaker with the power to lift or amend the closure of their business.

116. The Ohio Supreme Court has expressed that due process requires all inferences to be drawn in favor of *the Ohio property owner rather than against them*.

117. Plaintiffs face irreparable harm in the form of permanent closure and failure of their business and/or criminal, civil, and equitable penalties.

118. Plaintiffs have suffered and continues to suffer actual and nominal damages due to the State's failure to supply a hearing, including but not limited to the total deprivation of all or nearly all gross business revenue and personal financial harm.

Takings

119. Plaintiffs hereby incorporates by reference the allegations in the foregoing paragraphs as if set forth fully herein.

120. The ongoing closure of Plaintiffs' operations, through unequal, unilateral, and unexplained administrative action with no end date, has taken Plaintiffs' property without due process or just compensation.

121. The threatened imposition of fines on Plaintiffs or physical closure of Plaintiffs' property threatens both impermissible takings and impermissible monetary exactions.

122. The State has forced Plaintiffs to bear a burden that should be borne by the public at large, rather than by the few who businesses who remain subject to Defendants' forced closure.

Conclusion

123. Because Defendants claim in paragraph 1 of the *Director's Order* issued on May 29, 2020, that "if the situation deteriorates additional targeted restrictions will need to be made," any permission to operate issued to Plaintiffs by Defendants fails to moot Plaintiffs' claims.

124. The *Director's Order* is entitled to no deference and no presumption of constitutionality, because it is neither a statute duly enacted by the Ohio General Assembly nor an administrative rule enacted through the Notice and Comment rulemaking procedures required by R.C. 119.

125. Nearly every prediction made by Defendants and their attorneys to justify their arbitrary policymaking during the pandemic has been proven false.

126. Defendants' safety concerns regarding Plaintiffs' businesses are speculative; however, the harm to Plaintiffs and their surrounding community is tangible, concrete, and ongoing.

127. In addressing the closure of Plaintiffs' businesses, "every day counts," said Melinda Huntley, executive director of the Ohio Travel Association, in an interview last week. "Every day we're losing more jobs, some permanently." She said many attractions depend on a short summer tourist season to make up the bulk of their revenue. See Cleveland.com, at <https://www.cleveland.com/business/2020/06/gov-mike-dewine-says-hell-reveal-thursday-when-zoos-museums-and-amusement-parks-can-reopen.html>.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants, and that this Court:

- (1) Declare that R.C. 3701.352 and R.C. 3701.99, when enforcing R.C. 3701.13 and 3701.56, and the closure and criminalization of operations within the *Director's Order* pursuant thereto are unconstitutional on their faces and as applied to Plaintiffs due to the statutes and the *Director's Order*: (i) failing to provide meaningful procedural due process (ii) failing to afford equal

protection of the law; (iii) violating the doctrine of separation of powers; and (iv) delegated unfettered and unbridled vague power to unelected officials.

- (2) Declare that the closure and criminalization of “amusement parks’ and “water parks,” within the *Director’s Order*, is unconstitutional as applied to Plaintiffs’ businesses, so long as those businesses operate safely.
- (3) Declare that the Director of the Ohio Department of Health has exceeded the statutory limits of her authority in closing water parks and amusement parks.
- (4) Declare that Defendants’ fines, threatened fines, and equitable action such as physical closure taken against Plaintiffs effectuates impermissible takings.
- (5) Issue a temporary restraining order, and a preliminary and permanent injunction, prohibiting Defendants and Defendants’ agents from enforcing the mandate within the *Director’s Order* that safe amusement parks and water parks remain closed.
- (6) Issue a preliminary and permanent injunction prohibiting Defendants from enforcing or relying on the mandate closing amusement parks and water parks so as to prosecute, fine, imprison, or otherwise punish or sanction Plaintiffs or others who operate safely.
- (7) Enjoin Defendants from enforcing penalties for non-compliance with the Order closing the following businesses listed in Paragraph 9(d) of the *Director’s Order*: “amusement parks,” and “water parks,” so long as they operate in compliance with all applicable safety regulations, whether those in the *Director’s Order* or the state’s supplemental guidelines governing businesses like those of the Plaintiffs in this case (because disparate treatment of these operations is arbitrary, so long as those operations are safely conducted).
- (8) Enjoin Defendants from imposing penalties predicated solely on non-compliance with the Order (because R.C. 3701.352 is impermissibly vague and violates separation of powers, insofar as it authorized criminal penalties and the other severe sanctions articulated in R.C. 3701.99 for disobedience of “any order” of the Ohio Department of Health with the sole unconfined limit that the order be one “to prevent a threat to the public caused by a pandemic”).
- (9) Pursuant to Ohio Rev. Code § 2335.39 (“the Equal Access to Justice Act”), and other applicable law, award Plaintiff its costs, actual damages, nominal damages and expenses incurred in bringing this action, including reasonable attorneys’ fees;

and

- (10) Grant such other and further relief as the Court deems equitable, just, and proper.

Respectfully submitted,

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DIRECTOR'S ORDER**Re: Director's Order that Reopens Facilities Providing Child Care Services, with Exceptions**

I, Amy Acton, MD, MPH, Director of the Ohio Department of Health (ODH), pursuant to the authority granted to me in R.C. 3701.13 to "make special orders...for preventing the spread of contagious or infectious diseases" **Order** the following to prevent the spread of COVID-19 into the State of Ohio:

- 1. Preamble:** The sacrifices and incredible efforts that Ohioans have undertaken, make it possible to begin to lift the mandatory requirements and restrictions that were needed during the initial phase of the COVID-19 Pandemic. The adjustment of these orders is able to proceed based upon the facts and the science existing at this time in Ohio, however if the situation continues to improve, then more restrictions will be lifted, and if the situation deteriorates additional targeted restrictions will need to be made. While government can set the baseline, it should be understood that these orders set forth the minimum acts that must be taken and if people do more than the minimum to act safely, it will benefit everyone.
- 2. Facilities providing child care services to reopen.** All facilities providing child care services licensed by the Ohio Department of Job and Family Services (ODJFS) are permitted to reopen within the State so long as all safety standards are met. In addition, any child care provider that is not required by law to be licensed by ODJFS or the Ohio Department of Education (ODE) is permitted to reopen. All facilities providing ODE licensed preschool and school age child care programs are permitted to reopen within the State once ODE has in effect rules that meet or exceed the newly adopted ODJFS rules governing child care facilities and so long as all safety standards are met. Any comprehensive child development program that receives funds distributed under the "Head Start Act," 95 Stat. 499 (1981), 42 U.S.C. 9831, as amended, is also permitted to reopen within the State so long as all safety standards are met. Any facility that stayed open for the purpose of operating a United States Department of Agriculture food service program is permitted to continue the program so long as all safety standards are met. All other facilities providing child care services in the State are to remain closed, unless specifically permitted to be open in a separate Director of Health order. Businesses and operations shall continue to comply with Social Distancing Requirements as defined in this Order, including by maintaining six-foot social distancing for both employees and members of the public when possible, including, but not limited to, when any customers are standing in line.
- 3. Elderly people and those who are vulnerable as a result of illness should take additional precautions.** People at high risk of severe illness from COVID-19, including elderly people and those who are sick, are urged to stay in their residence to the extent possible except as necessary to seek medical care. According to CDC, those at high-risk for severe illness from COVID-19 include people who are sixty-five years or older and people of all ages with underlying medical conditions, particularly if not well controlled, including:

- a. People with chronic lung disease or moderate to severe asthma;
 - b. People who have serious heart conditions;
 - c. People who are immune compromised;
 - d. People with severe obesity (body mass index [BMI] of 40 or higher);
 - e. People with diabetes;
 - f. People with chronic kidney disease undergoing dialysis; and
 - g. People with liver disease.
4. **Facial Coverings (Masks).** Businesses must allow all customers, patrons, visitors, contractors, vendors and similar individuals to use facial coverings, except for specifically documented legal, life, health or safety considerations and limited documented security considerations. Businesses must require all employees to wear facial coverings, except for one of the following reasons:
- a. Facial coverings in the work setting are prohibited by law or regulation;
 - b. Facial coverings are in violation of documented industry standards;
 - c. Facial coverings are not advisable for health reasons;
 - d. Facial coverings are in violation of the business's documented safety policies;
 - e. Facial coverings are not required when the employee works alone in an assigned work area;
or
 - f. There is a functional (practical) reason for an employee not to wear a facial covering in the workplace.

Businesses must provide written justification, upon request, explaining why an employee is not required to wear a facial covering in the workplace. At a minimum, facial coverings (masks) should be cloth/fabric and cover an individual's nose, mouth, and chin.

5. **Prior Director of Health Order.** The Director of Health Order signed March 24, 2020 that closed facilities providing child care services is rescinded.
6. **Social Distancing Requirements.** For purposes of this Order, Social Distancing Requirements includes maintaining at least six-foot social distancing from other individuals, washing hands with soap and water for at least twenty seconds as frequently as possible or using hand sanitizer, covering coughs or sneezes (into the sleeve or elbow, not hands), regularly cleaning high-touch surfaces, and not shaking hands.
- a. **Required measures.** Businesses and Operations and businesses must take proactive measures to ensure compliance with Social Distancing Requirements, including where possible:
 - i. **Designate six-foot distances.** Designating with signage, tape, or by other means six-foot spacing for employees and customers in line to maintain appropriate distance;
 - ii. **Hand sanitizer and sanitizing products.** Having hand sanitizer and sanitizing products readily available for employees and customers; and
 - iii. **Online and remote access.** Posting online whether a facility is open and how best to reach the facility and continue services by phone or remotely.
7. **Enforcement.** This Order may be enforced by State and local law enforcement to the extent set forth in Ohio law. Specifically, pursuant to R.C 3701.352 “[n]o person shall violate any rule the director of health or department of health adopts or any order the director or department of health issues under this chapter to prevent a threat to the public caused by a pandemic, epidemic, or

bioterrorism event.” R.C. 3701.56 provides that “[b]oards of health of a general or city health district, health authorities and officials, officers of state institutions, police officers, sheriffs, constables, and other officers and employees of the state or any county, city, or township, shall enforce quarantine and isolation orders, and the rules the department of health adopts.” To the extent any public official enforcing this Order has questions regarding what services are prohibited under this Order, the Director of Health hereby delegates to local health departments the authority to answer questions in writing and consistent with this Order, but does not require local health departments to provide advisory opinions to nongovernmental entities.

8. **Penalty.** A violation of R.C. 3701.352 is guilty of a misdemeanor of the second degree, which can include a fine of not more than \$750 or not more than 90 days in jail, or both.
9. **General COVID-19 Information and Checklist for Businesses/Employers.** Business and employers are to take the following actions:
 - i. Strongly encourage as many employees as possible to work from home by implementing policies in areas such as teleworking and video conferencing, subject to the discretion of the employer;
 - ii. Actively encourage sick employees to stay home until they are free of fever (without the use of medication) for at least 72 hours (three full days) AND symptoms have improved for at least 72 hours AND at least seven days have passed since symptoms first began. Do not require a healthcare provider’s note to validate the illness or return to work of employees sick with acute respiratory illness; healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way;
 - iii. Ensure that your sick leave policies are up to date, flexible, and non-punitive to allow sick employees to stay home to care for themselves, children, or other family members. Consider encouraging employees to do a self-assessment each day to check if they have any COVID-19 symptoms (fever, cough, or shortness of breath);
 - iv. Separate employees who appear to have acute respiratory illness symptoms from other employees and send them home immediately. Restrict their access to the business until they have recovered;
 - v. Reinforce key messages — stay home when sick, use cough and sneeze etiquette, and practice hand hygiene — to all employees, and place posters in areas where they are most likely to be seen. Provide protection supplies such as soap and water, hand sanitizer, tissues, and no-touch disposal receptacles for use by employees;
 - vi. Frequently perform enhanced environmental cleaning of commonly touched surfaces, such as workstations, countertops, railings, door handles, and doorknobs. Use the cleaning agents that are usually used in these areas and follow the directions on the label. Provide disposable wipes so that commonly used surfaces can be wiped down by employees before each use;
 - vii. Be prepared to change business practices if needed to maintain critical operations (e.g., identify alternative suppliers, prioritize customers, or temporarily suspend some of your operations); and
 - viii. Comply with all applicable guidance from the U.S. Centers for Disease Control and Prevention and the Ohio Department of Health regarding social distancing.

10. Sector Specific COVID-19 Information and Checklist for Businesses/Employers Covered by this Order. Businesses and employers, whether currently open or reopening, are to take the following actions:

a. Employees

- i. Child care providers must operate under reduced staff to child ratios and maximum group size limitations at all times.
 1. One child care staff member per four infants with no more than six children in the room.
 2. One child care staff member per six toddlers with no more than six children in the room.
 3. One child care staff member per nine preschool children with no more than nine children in the room.
 4. One child care staff member per nine school-age children with no more than nine children in the room.
- ii. Employees must perform a daily symptom assessment that should include taking temperature with a thermometer, monitoring for fever and watching for coughing or trouble breathing.
- iii. Require employees to stay home if symptomatic.
- iv. It is recommended that, if possible, child care workers should wear a cloth face covering, unless it is unsafe for them to do so.
 1. Cloth face coverings should not be worn if the person has trouble breathing is unconscious, is incapacitated, or they are unable to remove the mask without assistance.

b. At Drop-Off

- i. Child care providers must ensure that children wash their hands upon entering their classroom. This may require providers to assist children with handwashing.
- ii. Child care providers must check the temperatures of all staff, children, and adults upon arrival. If any individual has a fever of 100 degrees or higher, they may not enter the facility.
- iii. It is recommended that, if possible, providers should modify pick-up and drop-off to ensure social distancing.
 1. Providers may stagger drop-off and pick-up times to reduce contact between families.
 2. Parent or caretaker should, when safe to do so, wear a mask for pick-up and drop-off.
 3. The same parent or caretaker should conduct pick-up and drop-off each day.
 4. Providers should conduct “curbside” pick up and drop-off where possible.
 - a. A single employee should operate child pick-up and drop-off, escorting all children to and from their classroom.
- iv. It is recommended that, if possible, child care providers should limit parent and visitor entry into the facility.

c. During the Day

- i. Child care workers must follow rigorous handwashing procedures as detailed in Appendix B to Ohio Administrative Code 5101:2-12-13.
 1. Upon arrival for the day, after breaks and upon returning from outside.
 2. After toileting or assisting a child with toileting.
 3. After each diaper change or pull-up change.
 4. After contact with bodily fluids or cleaning up spills or objects contaminated with bodily fluids.
 5. After cleaning or sanitizing or using any chemical products.
 6. After handling pets, pet cages or other pet objects that have come in contact with the pet.
 7. Before eating, serving or preparing food or bottles or feeding a child.
 8. Before and after completing a medical procedure or administering medication.
 9. When visibly soiled (must use soap and water).
 10. Prior to departure.
- ii. Child care attendees must follow rigorous handwashing procedures as detailed in Appendix B to Ohio Administrative Code 5101:2-12-13.
 1. Upon arrival for the day.
 2. After toileting/diaper change.
 3. After contact with bodily fluids.
 4. After returning inside after outdoor play.
 5. After handling pets, pet cages or other pet objects that have come in contact with the pet before moving on to another activity.
 6. Before eating or assisting with food preparation.
 7. After water activities.
 8. When visibly soiled (must use soap and water).
 9. Prior to departure.
- iii. Child care providers may use non-permanent sinks to meet handwashing requirements.
- iv. Child care providers must immediately send home any child or employee who has a temperature of 100 degrees or higher. This individual may not return until they are fever free for 24 hours, without the use of fever-reducing medication. If the individual has had contact with someone confirmed or probable to have COVID-19, he or she must complete isolation or quarantine procedures in coordination with the local health department prior to returning to the program.
- v. It is recommended that, where possible, child care providers should cancel all field trips, excursions, and large-group events such as parties.
- vi. It is recommended that, if possible, child care providers should, to the extent possible, prevent groups from mixing.
 1. Children of the same employer, to the extent possible, should be in the same group.
 2. Teachers should remain with their group throughout the day.
 3. Support staff should only serve one group of children and should not “float” from room to room.

- vii. It is recommended that, if possible, child care providers should stagger the use of any communal space, such as playgrounds, lunchrooms, and bathrooms. Providers should sanitize communal spaces between each group of children.
- viii. It is recommended that, if possible, when temporary dividers are used, child care providers should ensure that groups do not mix.
 - 1. Providers should use different entrance/exits for each group of students.
 - 2. Providers should use separate sinks for each group of kids.
 - 3. To the extent possible, providers should use different bathrooms for each group.
- ix. It is recommended that, if possible, child care providers should sanitize toys after each use and remove toys that cannot be sanitized.
- x. It is recommended that, if possible, child care providers should wear gloves while serving food and preparing bottles.
 - 1. Gloves should be changed between bottle feedings.

d. At Pick-Up

- i. Child care providers must ensure that children wash their hands prior to departure. This may require providers to assist children with handwashing.
- ii. It is recommended that, if possible, providers should modify pick-up and drop-off to ensure social distancing.
 - 1. Providers may stagger drop-off and pick-up times to reduce contact between families.
 - 2. Caregiver should, when safe to do so, should wear a mask for pick-up and drop-off.
 - 3. Providers should conduct “curbside” pick up and drop-off.
 - a. A single employee should operate child pick-up and drop-off, escorting all children to and from their classroom.

e. Physical Environment

- i. Child care providers may use temporary walls to divide a room into smaller spaces to serve multiple groups, under limited circumstances.
 - 1. The smaller space must contain at least 35 square feet of space per child.
 - 2. The divider must be at least six feet in height.
 - 3. The divider must be made from nonporous material or other material that can be sanitized.
 - 4. The divider must meet any requirements set by the Department of Commerce, local building department, state fire marshal, or local fire safety inspector.

f. Confirmed Cases

- i. Child care providers may use temporary walls to divide a room into smaller spaces to serve multiple groups, under limited circumstances.

- ii. Immediately isolate and seek medical care for any individual who develops symptoms while at the day care facility.
- iii. Shutdown rooms for deep sanitation, if possible.
- iv. Child care providers should immediately notify the Department of Job and Family Services in writing of any confirmed cases of COVID-19 among children or staff.
- v. It is recommended that, if possible, businesses work with local health department to identify potentially infected or exposed individuals to help facilitate effective contact tracing/notifications.
- vi. It is recommended that, if possible, once testing is readily available, test all suspected infections or exposures.
- vii. It is recommended that, if possible, following testing, contact local health department to initiate appropriate care and tracing.

11. Duration. This remainder of this Order shall be effective at 12:01 a.m. on May 31, 2020 and remains in full force and effect until 11:59 p.m. on July 1, 2020, unless the Director of the Ohio Department of Health rescinds or modifies this Order at a sooner time and date.

COVID-19 is a respiratory disease that can result in serious illness or death, is caused by the SARS-CoV-2 virus, which is a new strain of coronavirus that had not been previously identified in humans and can easily spread from person to person. The virus is spread between individuals who are in close contact with each other (within about six feet) through respiratory droplets produced when an infected person coughs or sneezes. It may be possible that individuals can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose or eyes.

On January 23, 2020, the Ohio Department of Health issued a Director's Journal Entry making COVID-19 a Class A reportable disease in Ohio.

On January 28, 2020, the Ohio Department of Health hosted the first statewide call with local health departments and healthcare providers regarding COVID-19.

On January 30, 2020, the International Health Regulations Emergency Committee of the World Health Organization declared the outbreak of COVID-19 a public health emergency of international concern.

On January 31, 2020, Health and Human Services Secretary, Alex M. Azar II, declared a public health emergency for the United States to aid the nation's healthcare community in responding to COVID-19.

On February 1, 2020, the Ohio Department of Health issued a statewide Health Alert Network to provide local health departments and healthcare providers with updated guidance for COVID-19 and revised Person Under Investigation (PUI) criteria.

On February 3, 2020, the Ohio Department of Health trained over 140 personnel to staff a call center for COVID-19, in the event it was needed.

On February 5, 2020, the Ohio Department of Health began updating and notifying the media of the number of PUIs in Ohio every Tuesday and Thursday.

On February 6, 2020, the Ohio Department of Health updated all agency assistant directors and chiefs of staff on COVID-19 preparedness and status during the Governor's cabinet meeting.

On February 7, 2020, the Ohio Department of Health and the Ohio Emergency Management Agency met to conduct advance planning for COVID-19.

On February 13, 2020, the Ohio Department of Health conducted a Pandemic Tabletop Exercise with State agencies to review responsive actions should there be a pandemic in Ohio.

On February 14, 2020, the Ohio Department of Health held a conference call with health professionals across the state. The purpose of the call was to inform and engage the healthcare community in Ohio. Presentations were provided by the Department of Health, Hamilton County Public Health, and the Ohio State University.

On February 27, 2020, the Ohio Department of Health and the Ohio Emergency Management Agency briefed the directors of State agencies during the Governor's cabinet meeting regarding preparedness and the potential activation of the Emergency Operations Center.

On February 28, 2020, the "Governor DeWine, Health Director Update COVID-19 Prevention and Preparedness Plan" was sent to a broad range of associations representing healthcare, dental, long-term care, K-12 schools, colleges and universities, business, public transit, faith-based organizations, non-profit organizations, and local governments.

On March 2, 2020, the Ohio Department of Health activated a Joint Information Center to coordinate COVID-19 communications.

On March 5, 2020, the Ohio Department of Health hosted the Governor's Summit on COVID-19 Preparedness, a meeting with the Governor, cabinet agency directors, local health department commissioners, and their staff.

On March 6, 2020, the Ohio Department of Health opened a call center to answer questions from the public regarding COVID-19.

On March 9, 2020, testing by the Department of Health confirmed that three (3) patients were positive for COVID-19 in the State of Ohio. This confirms the presence of a potentially dangerous condition which may affect the health, safety and welfare of citizens of Ohio.

On March 9, 2020, the Ohio Emergency Management Agency activated the Emergency Operations Center.

On March 9, 2020, the Governor Declared a State of Emergency in Executive Order 2020-01D.

On March 11, 2020, the head of the World Health Organization declared COVID-19 a pandemic.

On March 11, 2020, testing by the Ohio Department of Health confirmed that one (1) more patient was positive for COVID-19 in the State of Ohio.

On March 11, 2020, the Ohio Departments of Health and Veterans Services issued a Joint Directors' Order to limit access to Ohio nursing homes and similar facilities.

On March 15, 2020, the Ohio Department of Health issued a Director's Order to limit access to Ohio's jails and detention facilities.

On March 15, 2020, the Ohio Department of Health issued a Director's Order to limit the sale of food and beverages, liquor, beer and wine to carry-out and delivery only.

On March 15, 2020, the CDC issued Interim Guidance for mass gatherings or large community events, stating that such events that consist of 50 or more people should be cancelled or postponed.

On March 16, 2020 the Ohio Department of Health issued a Director's Order closing polling locations for the March 17, 2020 primary election.

On March 17, 2020 the Ohio Department of Health issued a Director's Order for the management of non-essential surgeries and procedures throughout Ohio.

On March 17, 2020 the Ohio Department of Health issued an Amended Director's Order to limit and/or prohibit mass gatherings and the closure of venues in the State of Ohio.

On March 19, 2020, the Ohio Department of Health issued a Director's Order closing hair salons, nail salons, barber shops, tattoo parlors, body piercing locations, and massage therapy locations.

On March 21, 2020, the Ohio Department of Health issued a Director's Order closing older adult day care services and senior centers.

On March 21, 2020, the Ohio Department of Health issued a Director's Order closing family entertainment centers and internet cafes.

On March 22, 2020, the Ohio Department of Health issued a Director's Order that all persons are to stay at home unless engaged in essential work or activity.

On March 24, 2020, the Ohio Department of Health issued a Director's Order that closed facilities providing child care services.

On March 30, 2020, the Ohio Department of Health issued an Amended Director's Order that closed all K-12 schools in the State of Ohio.

On April 2, 2020, the Ohio Department of Health issued an Amended Director's Order that all persons are to stay at home unless engaged in essential work or activity.

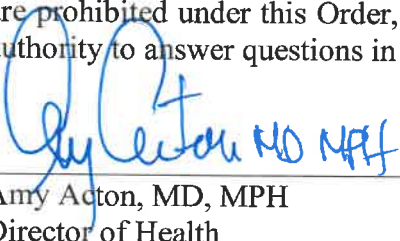
On April 30, 2020, the Ohio Department of Health issued the Stay Safe Ohio Order that reopened businesses, with exceptions, and continued a stay healthy and safe at home order.

Multiple areas of the United States are experiencing “community spread” of the virus that causes COVID-19. Community spread, defined as the transmission of an illness for which the source is unknown, means that isolation of known areas of infection is no longer enough to control spread.

The CDC reports that people are most contagious when they are most symptomatic (the sickest) however some spread might be possible before people show symptoms although that is not the main way the virus spreads.

Mass gatherings (10 or more persons) increase the risk of community transmission of the virus COVID-19.

Accordingly, I hereby **ORDER** that facilities providing child care services may reopen or continue to operate as set forth in this Order. This Order shall remain in full force and effect until 11:59 p.m. on July 1, 2020, unless the Director of the Ohio Department of Health rescinds or modifies this Order at a sooner time and date. To the extent any public official enforcing this Order has questions regarding what services are prohibited under this Order, the Director of Health hereby delegates to local health departments the authority to answer questions in writing and consistent with this Order.



A handwritten signature in blue ink, appearing to read 'Amy Acton MD MPH', is written over a horizontal line. The signature is stylized and includes the letters 'MD MPH' at the end.

Amy Acton, MD, MPH
Director of Health

May 29, 2020

FILED IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

2020 MAY 20 AM 9:23
ROCK HOUSE FITNESS, INC.,
et al. MAUREEN G. KELLY
LAKE CO. CLERK OF COURT

Plaintiffs

vs.

AMY ACTON, DIRECTOR OF
THE OHIO DEPARTMENT OF
HEALTH, *et al.*

Defendants

CASE NO. 20CV000631

JUDGE EUGENE A. LUCCI

ORDER GRANTING
PRELIMINARY INJUNCTION

{¶1} The court has considered: (1) the plaintiffs' motion for preliminary injunction, filed May 14, 2020; (2) Defendant Lake County General Health District's (Lake County) motion to exceed page limitation, filed May 17, 2020; (3) Defendant Amy Action, Director of the Ohio Department of Health's (Acton) motion to exceed page limitation, filed May 17, 2020; (4) Defendant Lake County's brief in opposition to the motion for preliminary injunction, filed May 17, 2020; (5) Defendant Acton's brief in opposition to the motion for preliminary injunction, filed May 17, 2020; (6) the affidavit of Mary Kathleen Francis, M.D., filed May 17, 2020; (7) the affidavit of Brian Fowler, filed May 17, 2020; (8) the affidavit of Corey Hamilton, filed May 17, 2020; (9) the affidavit of Terry Allan, filed May 17, 2020; (10) the affidavit of Edward Johnson, filed May 17, 2020; (10) the plaintiffs' reply brief, filed May 18, 2020; (11) the affidavit of Timothy Cassell, filed May 18, 2020; and (11) the affidavit of Michael S. Wilson, filed May 18, 2020.

{¶2} The motions for leave to exceed the page limit are well-taken and are hereby granted.

{¶3} The plaintiffs' amended complaint seeks a declaratory judgment finding that Defendant Acton's *Stay at Home*, *Amended Stay at Home*, and *Stay Safe Ohio* orders, on their face and as applied, violate Article I, sections 1, 2, 16, 19, and 20, and Article II, Section 1, of the Ohio Constitution and constitute a taking. The plaintiffs also seek costs, actual damages, nominal damages, and expenses.

{¶4} The plaintiffs' allege that "[o]ne of two conclusions is necessarily true: either (i) the General Assembly's delegation of authority to the Ohio Department of Health in Ohio Rev. Code § 3701.13 is too broad or vague; or (ii) the Ohio Department of Health's exercise of the delegated authority is too broad. Under either conclusion, the *Director's Stay at Home Order*, the *Amended Director's Stay at Home Order*, and/or the *Director's Stay Safe Ohio Order*, in criminalizing the operation of gyms, violates the separation of powers guarantees to which Plaintiffs are entitled." Plaintiff's Amended Complaint, ¶98.

{¶5} The plaintiffs seek a preliminary injunction enjoining the defendants from:

- (1) relying solely on the authority in R.C. 3701.13 and R.C. 3701.352 to impose criminal, civil, or equitable penalties on Plaintiffs *so long as they adhere to the safety regulations expressly articulated in Paragraphs 8, 16, 21(a), 21(b), and 21(c) of the Director's Stay Safe Ohio Order*;
- (2) imposing criminal, civil, or equitable penalties that arise from orders that exceed the limits of the authority granted by R.C.3701.13 on Plaintiffs *so long as they adhere to the safety regulations expressly articulated in Paragraphs 8, 16, 21(a), 21(b), and 21(c) of the Director's Stay Safe Ohio Order*;
- (3) imposing criminal, civil, or equitable penalties on Plaintiffs *so long as they adhere to the safety regulations expressly articulated in Paragraphs 8, 16, 21(a), 21(b), and 21(c) of the Director's Stay Safe Ohio Order*;
- and/or (4) enjoin the enforcement of Paragraph 13(g) of the *Director's Stay Safe Ohio Order*.

{¶6} An injunction is an extraordinary remedy, equitable in nature, that should only be granted where no adequate remedy is available at law and where it is necessary to prevent a future wrong that the law cannot. *Arndt v. P & M Ltd.*, 11th Dist. Portage No. 2007-P-0038, 2008-Ohio-2316, ¶63. The primary goal of a preliminary injunction is to maintain the status quo pending final determination of the matter. *Id.* at ¶64.

{¶7} In ruling on a motion for a preliminary injunction, the court must consider whether the movants can establish by clear and convincing evidence that a balancing of the following factors favors granting the relief requested:

- (1) whether the movants have shown a strong or substantial likelihood or probability of success on the merits;

(2) whether the movants have shown irreparable injury, including whether the movant has an adequate remedy at law, and whether the injunction would prevent the claimed irreparable harm;

(3) whether the preliminary injunction could harm the defendants, third parties, and the general public, along with a balancing of the potential injuries;

(4) whether the public interest would be served by issuing the preliminary injunction.

(5) whether the preliminary injunctive relief sought is for the purpose of maintaining the status quo pending a trial on the merits.

Arndt v. P & M Ltd., 11th Dist. Portage No. 2007-P-0038, 2008-Ohio-2316, ¶64.

LIKELIHOOD OF SUCCESS ON THE MERITS

{¶8} At issue in this matter are orders issued by Defendant Amy Acton, MD, MPH, Director of Health of the state department of health responding to the COVID-19 pandemic.

{¶9} On March 22, 2020, Defendant Amy Acton issued her Director's Stay at Home Order, ordering that "non-essential businesses and operations must cease" and "effective at 11:59 pm on March 23, 2020, all persons are to stay at home or their place of residence unless they are engaged in Essential Activities, Essential Governmental Functions, or to operate Essential Businesses and Operations as set forth in this Order." Gyms were determined to be non-essential by the defendant.

{¶10} On April 2, 2020, Defendant Acton issued an Amended Director's Stay at Home Order, without enabling legislation or administrative rulemaking. (Amended Complaint Par 59 and 60.) This order clarified that a violation will be punished as a misdemeanor of the second degree, which can carry imprisonment of up to 90 days or a fine of up to \$750, or both.

{¶11} On April 30, 2020, Defendant Acton issued her Director's Stay Safe Ohio Order, pursuant to the authority she claimed or assumed was granted to her in R.C. 3701.13, again, without enabling legislation or administrative rulemaking. In that order, Defendant Acton continued the closure of the plaintiffs' gymnasium businesses until May 29, 2020, unless the order is rescinded or modified.

{¶12} The plaintiffs argue that that these statutes are impermissibly vague. The plaintiffs also argue that the director's order exceeds her authority by legislating and directing

public policy, rather than administering public policy established by the General Assembly. Although the plaintiffs' motion does not state so explicitly, the plaintiffs' vagueness and delegation of authority arguments appear to involve, or at least rely on, case law involving: (1) allegations of improper delegation of legislative authority in violation of the separation of powers; (1) allegations of improper delegation of legislative authority in violation of due process considerations; (3) allegations that the statutes and Defendant Acton's orders are void for vagueness; and (4) allegations that Defendant Acton's orders exceed the authority granted to her by R.C. 3701.13.

{¶13} The orders at issue in this case were issued pursuant to Defendant Acton's authority under R.C. 3701.13.

{¶14} R.C. 3701.13 provides that:

The department of health shall have supervision of all matters relating to the preservation of the life and health of the people and have ultimate authority in matters of *quarantine and isolation*, which it may declare and enforce, when neither exists, and modify, relax, or abolish, when either has been established. (Emphasis added.)

{¶15} "Isolation' means the separation of an infected individual from others during the period of disease communicability in such a way that prevents, as far as possible, the direct or indirect conveyance of an infectious agent to those who are susceptible to infection or who may spread the agent to others." Ohio Adm.Code 3701-3-01(R).

{¶16} "Quarantine' means the restriction of the movements or activities of a well individual or animal who has been exposed to a communicable disease during the period of communicability of that disease and in such a manner that transmission of the disease may have occurred. The duration of the quarantine ordered shall be equivalent to the usual incubation period of the disease to which the susceptible person or animal was exposed." Ohio Adm.Code 3701-3-01(W).

{¶17} "Period of communicability" means the interval during which an infected individual or animal is shedding the specific microorganism of a communicable disease in such a manner that those who are susceptible could acquire the infection. Ohio Adm.Code 3701-3-01(U).

{¶18} R.C. 3701.13 further permits the department of health to make special or standing orders or rules for preventing the spread of contagious or infectious disease.

{¶19} R.C. 3701.352 prohibits the violation of any rule or order issued by the director or department of health that is issued pursuant to Chapter 3701 to prevent a threat to the public caused by a pandemic, epidemic, or bioterrorism event.

{¶20} “Pandemic’ means an epidemic disease that is occurring throughout a very wide area, usually several countries or continents, and usually affecting a large proportion of the population.” Ohio Adm.Code 3701-3-01(S).

{¶21} Criminal penalties attend a violation of the director’s orders:

... (C) Whoever violates section 3701.352 ... of the Revised Code is guilty of a misdemeanor of the second degree. R.C. 3701.99.

{¶22} The department of health informed the public and stated on its official website the incubation period for the virus:

The incubation period (of the coronavirus that causes COVID-19) can be up to 14 days so people who are incubating the illness also aren’t showing symptoms. See, <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/families-and-individuals/how-can-you-respond/COVID-19-and-Community-Spread> (last accessed 5/19/2020).

{¶23} The director was granted ultimate authority in matters of quarantine and isolation. The department of health defined those terms. “Isolation” is the separation of an **infected individual** from others **during the period of disease communicability** in such a way that prevents, as far as possible, the direct or indirect conveyance of an infectious agent to those who are susceptible to infection or who may spread the agent to others.

{¶24} “Quarantine” is the restriction of the movements or activities of a **well individual who has been exposed** to a communicable disease **during the period of communicability** of that disease and in such a manner that transmission of the disease may have occurred.

{¶25} The **duration of the quarantine ordered shall be equivalent to the usual incubation period** of the disease to which the susceptible person was exposed. Ohio Adm.Code 3701-3-01(W). The incubation period can be up to 14 days, according to the department of health.

{¶26} The director has quarantined the entire people of the state of Ohio, for much more than 14 days. The director has no statutory authority to close all businesses, including the plaintiffs' gyms, which she deems non-essential for a period of two months. She has acted in an impermissibly arbitrary, unreasonable, and oppressive manner and without any procedural safeguards.

{¶27} The movants have shown a strong or substantial likelihood or probability of success on the merits.

IRREPARABLE HARM

{¶28} "An irreparable injury is an injury that cannot be redressed via monetary damages or an adequate remedy at law." *LCD Videography, L.L.C. v. Finomore*, 11th Dist. Lake No. 2009-L-147, 2010-Ohio-6571, ¶ 55. The party alleging irreparable injury must do more than make conclusory allegations of irreparable harm, and must offer independent evidence. *Id.* at ¶59.

{¶29} The plaintiffs will suffer imminent prosecution, sanctions, equitable, and economic harm by the continued closure of their businesses or any attempt to open the businesses in the absence of an injunction.

{¶30} The rights of the plaintiffs are fundamental. "The right of private property is an *original* and *fundamental* right, existing anterior to the formation of the government itself..." *Bank of Toledo v. City of Toledo*, 1 Ohio St. 622, 632 (1853), emphasis sic. "Ohio has always considered the right of property to be a fundamental right. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces." *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 36-38.

{¶31} Fundamental liberties to own and use property and earn a living are at stake and are violated by the defendants' actions.

{¶32} The defendant has criminalized lawful businesses, imposing strict liability for violations, including severe criminal, civil, and equitable penalties. Some of the plaintiffs' businesses will not survive the lockdown of two or more months.

{¶33} For these reasons, the court finds that the plaintiffs have established that they will suffer irreparable harm if an injunction is not granted.

OTHER REMEDIES AND BALANCING OF HARMS

{¶34} The plaintiffs have no adequate remedy at law, as there is no means to obtain compensation, no monetary damages that can make them whole, and there is no administrative appeal process within the department of health regulation for this taking. An injunction is reasonably calculated to prevent the claimed irreparable harm.

{¶35} An injunction cannot harm the defendants, for the defendants should not have the ability to enact and enforce the director's sweeping *ultra vires* orders.

{¶36} Third parties are affected by a grant or refusal to grant an injunction. Customers of the plaintiffs would be harmed by not being able to utilize facilities for which they paid initiation fees and dues, and to which they have a property interest. And, if the customers paid no membership dues during the time of the lockdown, then the plaintiffs suffered the loss of income. These facilities are members-only institutions; the general public cannot simply walk into a gym and start using the equipment and facilities. Of course, customers who are concerned about this coronavirus have the option to stay away from the gym facilities if they so choose. The property owners/landlords of the gyms also suffer from a lack of payment of rent by the gyms; if the gym owns the property, then the gym owner suffers economic detriment by his property laying fallow.

{¶37} The general public would be harmed if an injunction was not granted. There would be a diminishment of public morale, and a feeling that one unelected individual could exercise such unfettered power to force everyone to obey impermissibly oppressive, vague, arbitrary, and unreasonable rules that the director devised and revised, and modified and reversed, whenever and as she pleases, without any legislative guidance. The public would be left with feelings that their government is not accountable to them. Prolonged lockdowns have deleterious effects upon the public psyche. Humans are naturally social beings; socialization strengthens immunities against disease and benefits psychological health.

{¶38} There are many benefits of belonging to a gym, of which the court can take judicial notice: people join gyms to acquire, improve and maintain health, including their immune systems; gyms provide social infrastructure and support; and safety in handling weights and equipment. The top killers of Americans are heart disease, obesity, and depression. Opening up gyms, with precautions and protections in place that are generally

recognized, benefits the public greatly. The primary benefits of physical activity are weight management, bone and muscle health, relief from physical pains, protection against unhealthy conditions, triggering production of anti-oxidants for younger and healthier skin (a natural barrier to infection), a boost in mental health, a boost in energy levels, improvements in mood, and more quality sleep. Physical activity is indispensable when a person is striving for optimal physical and mental health. Gyms permit people to reap these benefits by regimenting them in a safe environment with proper equipment and properly trained peers, instructors, and mentors. There are safety and equipment issues in trying to duplicate a gym in one's home, assuming the person has the space, wherewithal, and ability to do so.

{¶39} The court has balanced the potential injuries, and finds that the harm to the defendants, third parties, and the public is greatly outweighed by the harm to the plaintiffs, their customers, third parties, and the public if a preliminary injunction was not granted.

{¶40} The preliminary injunctive relief sought is for the purpose of maintaining the status quo pending a trial on the merits, and should be granted.

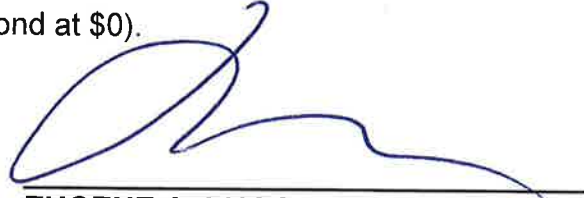
ORDER

{¶41} Accordingly, Defendant Amy Acton, in her official capacity as the Director of the Ohio Department of Health, and the Lake County General Health District, together with their officers, agents, servants, employees, attorneys, and those persons or entities acting at their direction or behest, or in active concert or participation with them, and who receive actual notice of this order, whether by personal service or otherwise, including, without limitation, law enforcement officers, prosecuting attorneys, and the attorney general, are hereby ENJOINED from imposing or enforcing penalties solely for non-compliance with the director's order against the following businesses listed in Paragraph 13(g) of the order: "gymnasiums," "health clubs," "fitness centers," "gyms," and "workout facilities," so long as they operate in compliance with all applicable safety regulations, whether those in the state's order, the state's supplemental guidelines governing businesses like those of the plaintiffs in this case, or the Lake County General Health District.

{¶42} In light of the fundamental constitutional rights involved, the statutory violations, and the continual infringement of such rights, the court exercises its discretion to require no bond be posted or, alternatively, the bond is set at zero dollars (\$0.00) pursuant to

Ohio R.Civ.P. 65(C). See *Lamar Advantage GP Co., LLC v. City of Cincinnati*, 114 N.E.3d 805, 831 (Ham. Cty. C.P. 2018) (“[i]n light of the analysis and assessment on the issuance or non-issuance of a preliminary injunction, together with the overall equities of the case, including the fact that the injunction seeks to protect fundamental constitutional rights,” court expressly waived posting of bond or set the bond at \$0).

{¶43} IT IS SO ORDERED.



EUGENE A. LUCCI, JUDGE

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**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

TANYA RUTNER HARTMAN, <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Case No. 2:20-cv-1952
	:	
AMY ACTON, <i>in her official capacity as</i>	:	Chief Judge Algenon L. Marbley
DIRECTOR of the OHIO DEPARTMENT	:	
OF HEALTH,	:	
	:	
Defendant.	:	

**DEFENDANT’S MEMORANDUM IN OPPOSITION TO
PLAINTIFFS’ MOTION FOR TEMPORARY RESTRAINING ORDER**

Respectfully submitted,

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Table of Contents

I. INTRODUCTION1

II. BACKGROUND6

 A. The COVID-19 pandemic.....6

 B. Tanya Rutner Hartman and Gilded Social, LLC10

III. STANDARD OF REVIEW13

IV. SUMMARY OF ARGUMENT14

V. LAW AND ARGUMENT18

 A, Plaintiffs lack standing to bring claims on behalf of third parties.....18

 B. The Court lacks jurisdiction of Plaintiffs’ state law claims.....19

 C. Plaintiffs have no substantial likelihood of success on the merits.....19

 1. Neither the statute delegating authority to the Ohio Department of Health or Dr. Actons’ amended order is unconstitutionally vague.19

 2. Dr. Action’s amended order does not violate due process.....22

 3. Plaintiffs have not demonstrated that they will suffer irreparable injury absent the temporary restraining order.....32

 4. Granting the injunction would harm third parties and the public interest.....34

VI. CONCLUSION.....36

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Abbott</i> , No. 20-50264, 2020 U.S. App. LEXIS 10893 (5th Cir. Apr. 7, 2020).....	29
<i>Alessandro v. Beshear</i> , E. D. Ky. No. 3:20-cv-00023 (issued April 3, 2020).....	29
<i>Basicomputer Corp. v. Scott</i> , 973 F.2d 507 (6th Cir. 1992)	33
<i>Bell v. Ohio State Univ.</i> , 351 F.3d 240 (6th Cir. 2003)	26
<i>Binford v. Sununu</i> , New Hamp. Sup. Ct. No 217-2020-cv-00152 (issued March 25, 2020)	29
<i>Brautigam v. Pastoor</i> , No. 1:16-cv-1141, 2018 U.S. Dist. LEXIS 139774 (S.D. Ohio Aug. 17, 2018)	32
<i>Brown v. Norwalk City Sch. Dist. Bd. of Educ.</i> , No. 3:10 cv 687, 2011 U.S. LEXIS 135926 (N.D. Ohio Nov. 28, 2011).....	24
<i>Cleveland Bd. of Educ. v. Loudermill</i> , 470 U.S. 532 (1985).....	24
<i>Craigmiles v. Giles</i> , 312 F.3d 220 (6th Cir. 2002)	31
<i>Damon’s Rests., Inc. v. Eileen K Inc.</i> , 461 F. Supp.2d 607 (S.D. Ohio Nov. 13, 2006)	14
<i>Déjà vu of Cincinnati, LLC v. Union Twp. Bd. Of Trustees</i> , 411 F.3d 777 (6th Cir. 2005) (en banc)	20
<i>Experimental Holdings, Inc. v. Farris</i> , 503 F.3d 514 (6th Cir. 2007)	15, 19
<i>FDIC v. Mallen</i> , 486 U.S. 230 (1988).....	24
<i>Hickox v. Christie</i> , 205 F. Supp. 3d 579 (D.N.J. 2016).....	28

Honeywell, Inc. v. Brewer-Garrett Co.,
145 F.3d 1331 (6th Cir. 1998)14

Ind. Land Co., LLC v. City of Greenwood,
378 F.3d 705 (7th Cir. 2004)25

J. W. Hampton, Jr., & Co. v. United States,
276 U.S. 394 (1928).....21

Jacobson v. Commonwealth of Massachusetts,
197 U.S. 11, 25 S.Ct. 358 (1905)..... *passim*

Kentucky v Graham,
473 U.S. 159 (1985).....15

Krimstock v. Kelly,
464 F.3d 246 (2d Cir. 2006).....24

Leary v. Daeschner,
228 F.3d 729 (6th Cir. 2000)13, 15

Lifter v. Cleveland State Univ.,
707 Fed. Appx 355 (6th Cir. 2017).....18

Lochner v. New York,
198 U.S. 45 (1905).....31

Marshall v. Ohio University,
No. 2:15-cv-775, 2015 U.S. Dist. LEXIS 31272, 2015 WL 1179955 (S.D.
Ohio Mar. 13, 2015).....13

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. E.F. Hutton & Co.,
403 F. Supp. 336 (E.D. Mich. 1975).....32

Michael v. Ghee,
498 F.3d 372 (6th Cir. 2007)21

Minaf v. Geren,
553 U.S. 674 (2008).....13, 15

Ogden v. Gibbons,
22 U.S. 1, 6 L.Ed. 23 (1824).....6

Overstreet v. Lexington-Fayette Urban County Gov’t,
305 F.3d 566 (6th Cir. 2002)13

Pennhurst State Sch. & Hosp. v. Halderman,
465 U.S. 89 (1984).....19

<i>Performance Unlimited v. Questar Publishers</i> , 52 F.3d 1373 (6th Cir. 1995)	33
<i>Plain Dealer Publ. Co. v. Cleveland Typographical Union</i> , 520 F.2d 1220 (6th Cir. 1975)	14
<i>Platt v. Bd. Of Comm'rs on Grievs. & Discipline of the Ohio Supreme Court</i> , 894 F.3d 235 (6th Cir. 2018)	20
<i>Puckett v. Lexington-Fayette Urban Cnty. Govt.</i> , 833 F.3d 590 (6th Cir. 2016)	26, 27
<i>Simon v. Cook</i> , 261 F. App'x 873 (6th Cir. 2008)	16, 20
<i>Smith v. Jefferson County Bd. of School Comm'rs</i> , 641 F.3d 197 (6th Cir. 2011)	16, 24, 25, 26
<i>Touby v. United States</i> , 500 U.S. 160, 111 S. Ct. 1752 (1991).....	21
<i>Tucker Anthony Realty Corp. v. Schlesinger</i> , 888 F.2d 969 (2nd Cir. 1989).....	32
<i>United States v. James Daniel Good Real Prop.</i> , 510 U.S. 43 (1993).....	24
<i>United States v. Lantaz</i> , No. CR-2-08-015, 2009 U.S. Dist. LEXIS 39653 (S.D. Ohio Apr. 22, 2009)	20
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975).....	15, 18
<i>Williamson v. Lee</i> , 348 U.S. 483 (1955).....	28
<i>Winder v. NRDC, Inc.</i> , 555 U.S. 7 (2008).....	13
<i>Zinerman v. Burch</i> , 494 U.S. 113 (1990).....	24
Statutes	
Ohio Rev. Code 3701.352.....	8, 9, 28
Ohio Revised Code 3701.13	<i>passim</i>
Ohio Revised Code 3701.13 and 3701.352	28

Ohio Revised Code Section 119.03	19
Ohio Revised Code Section 3701.13	20, 34
Other Authorities	
Fourteenth Amendment	31
Due Process Clause.....	20, 31
Proc. No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).....	8
U.S. Constitution Eleventh Amendment.....	15, 19, 21

I. INTRODUCTION

The United States Supreme Court held almost 200 years ago that, “[T]he power of States to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants . . . is beyond question.” *Ogden v. Gibbons*, 22 U.S. 1, 6 L.Ed. 23 (1824). States may “enact quarantine laws and health laws **of every description.**” *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25, 25 S.Ct. 358 (1905) (emphasis added).

Plaintiffs now challenge this nearly 200 year-old history of federal endorsement of state emergency action and seek to enjoin a lawfully-issued order of the Ohio Department of Health, which expires on May 1, 2020, so that their bridal shop can immediately supplement its online business with in-person dress fittings, sales, and social activities. The Court should deny Plaintiffs’ request. Plaintiffs lack standing to raise several of their claims and the Court lacks jurisdiction over Plaintiffs’ state-law claims. Plaintiffs’ remaining claims fail to pass the four-part test applicable to requests for injunctive relief. They have no likelihood success on the merits, Plaintiffs have failed to present more than the most conclusory evidence of an irreparable injury, let alone clear and convincing evidence. Finally, the risk of harm to third parties and the public is so great that Plaintiffs have not even attempted to argue that those factors support the issuance of an injunction.

For these reasons, the Court should deny Plaintiffs’ request for a temporary restraining order.

II. BACKGROUND

A. The COVID-19 pandemic

The novel coronavirus named COVID-19, which is caused by a new strain of coronavirus that had not been previously identified in humans, is a respiratory disease that can result in serious

illness or death.¹ First identified in Wuhan, China in late 2019, COVID-19 has since spread across the globe with rapid speed, reaching almost every nation and all 50 of the United States.² The rapid spread is due to the virus being easily transmissible and transmissible by asymptomatic carriers, which means that infected people can spread the virus without knowing it.³ The virus has an incubation period of up to 14 days, during which “[i]nfected individuals produce a large quantity of virus . . . , are mobile, and carry on usual activities, contributing to the spread of infection.”⁴ The virus can remain on surfaces for many days, and patients may remain infectious for weeks after their symptoms subside.⁵

On March 11, 2020, the World Health Organization (WHO) officially declared COVID-19 to be a pandemic.⁶ “A pandemic is a global outbreak of disease.”⁷ Pandemics result from the emergence of new viruses, as the lack of “pre-existing immunity” facilitates worldwide spread. *Id.* Over the past century, four pandemics have occurred as a result of influenza viruses, but this is the first known pandemic to be caused by a coronavirus. *Id.*

¹ Centers for Disease Control and Prevention, What You Need to Know About Coronavirus Disease 2019 (COVID-19), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>.

² WORLD HEALTH ORGANIZATION, ROLLING UPDATES ON CORONAVIRUS DISEASE (COVID-19), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen> (last updated April 3, 2020).

³ WORLD HEALTH ORGANIZATION, CORONAVIRUS DISEASE 2019 (COVID-19) SITUATION REPORT – 73, (April 2, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_2.

⁴ David L. Heymann, *COVID-19: What is Next for Public Health?*, 395 THE LANCET 542, 543 (2020).

⁵ WORLD HEALTH ORGANIZATION, Q&A ON CORONAVIRUSES (*COVID-19*), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>.

⁶ WORLD HEALTH ORGANIZATION, CORONAVIRUS DISEASE 2019 (COVID-19) SITUATION REPORT – 51, (March 11, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200311-sitrep-51-covid-19.pdf?sfvrsn=1ba62e57_10.

⁷ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Situation Summary, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html>

On March 13, 2020, U.S. President Donald Trump declared a national emergency due to the outbreak of COVID-19 in the United States, citing the WHO's pandemic designation and 1,645 cases in the United States.⁸ As of March 31, 2020, less than three weeks after the declaration of national emergency, the Center for Disease Control ("CDC") reported COVID-19 exists in every state in the U.S. with 186,101 cases and 2,860 deaths.⁹ As of April 14, 2020, the CDC reported in the U.S. 632,548 cases and 31,071 deaths.¹⁰ The World Health Organization reports that as of April 16, 2020 worldwide there are 2,034,802 confirmed cases, 135,163 confirmed deaths.¹¹

An Ohio statute, Ohio Revised Code 3701.13, gives the Director of the Ohio Department of Health very broad authority during health crises like the COVID-19 one:

The department of health shall have supervision of all matters relating to the preservation of the life and health of the people and have ultimate authority in matters of quarantine and isolation, which it may declare and enforce, when neither exists, and modify, relax, or abolish, when either has been established.

* * *

The department may make special or standing orders or rules...for preventing the spread of contagious or infectious diseases[.]

Ohio Rev. Code 3701.13. And violations of such orders are prohibited:

No person shall violate any rule the director of health or department of health adopts or any order the director or department of health issues under this chapter to prevent a threat to the public caused by a pandemic, epidemic, or bioterrorism event.

Ohio Rev. Code 3701.352.

⁸ Proc. No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

⁹ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Cases in U.S., <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

¹⁰ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Cases in U.S., <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>

¹¹ <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

As provided in these statutes, Ohio Department of Health Director Dr. Amy Acton has issued multiple orders to mitigate the spread of COVID-19.¹² The relevant order here is the Amended Stay at Home Order issued on April 2, 2020 (“Amended Order”). Ex. 1 to Compl. These mitigation efforts decreased the spread of the COVID-19 in Ohio. Without mitigation, it was projected that Ohio would have had 62,000 cases per day by March 23, 2020.¹³ However, due to these orders, as of April 16, 2020, Ohio has 8,239 total confirmed cases, 2,331 hospitalizations, and 389 confirmed deaths.¹⁴ Approximately 29% of confirmed cases result in hospitalizations and approximately 4% of confirmed cases result in death. *Id.* Due to Ohio’s early and extensive mitigation efforts, has fewer confirmed COVID-19 cases and fewer confirmed COVID-19 deaths than neighboring states.¹⁵ The Amended Order will expire on May 1, 2020, and the Governor has announced plans to lift restrictions on non-essential businesses beginning on that date. *See* archives, April 16, 2020 press conference <https://ohiochannel.org/collections/governor-mike-dewine>.

¹² Declaration of Brian Fowler at ¶ 4.

¹³ Declaration of Brian Fowler at ¶ 3.

¹⁴ Declaration of Brian Fowler at ¶ 2.

¹⁵ Washington Post, Did Ohio get it right, early intervention, Preparation for pandemic may pay off, https://www.washingtonpost.com/national/health-science/did-ohio-get-it-right-early-intervention-preparation-for-pandemic-may-pay-off/2020/04/09/7570bfea-7a4f-11ea-9bee-c5bf9d2e3288_story.html

There are a total of 46 states have also ordered non-essential businesses to close.¹⁶ In addition to Ohio, this includes South Carolina,¹⁷ New York,¹⁸ Connecticut,¹⁹ Pennsylvania,²⁰ Kentucky,²¹ and Michigan.²²

B. Tanya Rutner Hartman and Gilded Social, LLC

Tanya Rutner Hartman owns and operates Gilded Social, L.L.C. (“Gilded Social”), which is a dress shop located in Columbus, Ohio. (Compl. ¶¶9-10.) Gilded Social was incorporated with the Ohio Secretary of State on November 28, 2017. (*Id.* at ¶10; Ex. A, <https://bizimage.ohiosos.gov/api/image/pdf/201733201788> (Ohio Secretary of State, Gilded Social’s Articles of Incorporation)). It is a for-profit limited liability company. (Ex. A.) Gilded Social opened for business on March 1, 2018. (Ex. B, <https://www.facebook.com/events/1482349955220998/> (Facebook Grand Opening Celebration).) Gilded Social has three employees: Mrs. Hartman, a director of sales, and a director of operations. (Ex. C, <https://www.shopgildedsocial.com/about.>)

¹⁶ ABC News, Here are the states that have shutdown nonessential businesses, <https://abcnews.go.com/Health/states-shut-essential-businesses-map/story?id=69770806>

¹⁷ South Carolina Office of the Governor Henry McMaster, Gov. Henry McMasters Orders Non-Essential Businesses Closed Throughout S.C.,

¹⁸ Governor Andrew M. Cuomo press release, Gov. Cuomo Issues Guidance on Essential Services Under The “New York State on Pause” Executive Order, <https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order>

¹⁹ Ct.gov Connecticut’s Official State Website, Suspension of non-essential in-person business operations, <https://portal.ct.gov/Coronavirus/Pages/Suspension-of-Non-Essential-In-Person-Business-Operations>

²⁰ Fox 29 News Philadelphia, Wolf Orders Shutdown of all Non-Essential Businesses in Pennsylvania, <https://www.fox29.com/news/wolf-orders-shutdown-of-all-non-essential-businesses-in-pennsylvania>

²¹ Louisville Courier Journal, Gov. Beshear orders “nonessential retail businesses to close. What that includes, <https://www.courier-journal.com/story/news/local/2020/03/22/kentucky-coronavirus-beshear-orders-nonessential-businesses-close/2895931001/>

²² Michigan.gov The Office of Gretchen Whitmer, Executive Order 2020-21 (COVID-19), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html

Gilded Social is located on the second floor of 65 East Gay Street, Columbus, Ohio. (Ex. D, <https://www.shopgildedsocial.com/>.) Its space includes a small waiting room, several dressing rooms, a common lounge space, storage space for its more than 1,200 samples. (Ex. E, <https://www.shopgildedsocial.com/space-rental-inquiry-form?rq=rental.>; Ex. I, <https://www.shopgildedsocial.com/blog/so-youve-scheduled-your-initial-dress-shopping-appointment>; Ex. J, <https://www.shopgildedsocial.com/the-top-ten-reasons-why-you-should-buy-with-us>.)

Gilded Social sells special order dresses that can be ordered in-store or online. Gilded Social's designers' collection can be viewed on its website, Instagram page, and its designers' websites. Ex. I; Ex. M, <https://www.shopgildedsocial.com/blog/what-to-know-before-you-come-in-to-purchase-your-bridesmaid-dress>. Gilded Social's website provides the following advice to its customers regarding the deadline for ordering:

- Brides with September, October, and November 2020 weddings cannot and should not wait until the end of this restricted period to order their bridesmaids' dresses! As such, we are committed to continuing our order process in the most flexible way possible.
 - Please Note: If the deadline for ordering your dress for an upcoming Fall wedding is between now and the end of April, don't miss it!. The deadlines are calculated to ensure that the dress arrives in plenty of time for the wedding and delaying ordering during this restricted period may jeopardize that.

(Ex. L.) Despite this April deadline, Gilded Social acknowledges that designers' estimated ship dates are typically 12-14 weeks out. (Ex. L.)

Gilded Social also has hundreds of sample size and consignment dresses available for purchase in its store. (Ex. H, <https://www.shopgildedsocial.com/sample-sale-dress-index>; Ex. J, <https://www.shopgildedsocial.com/the-top-ten-reasons-why-you-should-buy-with-us>.) Dresses can be marked for pick up and held until Gilded Social reopens, or it will ship the items to its

customers. (Ex. H.) Special order dresses can be purchased in store or online. (Ex. J.) Additionally, for its sample size and consignment dresses, Gilded Social offers a Home Try On service. (Ex. H, <https://www.shopgildedsocial.com/sample-sale-dress-index>.) Gilded Social will deliver three customer-chosen dresses to its customer and wait while the customer tries them on. (*Id.*) The customer can purchase any of the three dresses and the delivery is free. (*Id.*) If the customer doesn't want any of the dresses, they are charged a \$25 delivery fee that can be used toward a future purchase. (*Id.*)

Appointments can be made for a bride and members of her bridal party. (Ex. G, <https://www.shopgildedsocial.com/praise>). Customers are encouraged to “bring a little bubbly to celebrate.” (Ex. I.) Appointments are 90 minutes and are “often ... scheduled back-to-back.” (*Id.*) Since it does not “have a large waiting area,” Gilded Social recommends that if customers arrive early they “have a quick beverage or snack” at a neighboring restaurant. (Ex. I, <https://www.shopgildedsocial.com/blog/so-youve-scheduled-your-initial-dress-shopping-appointment>.)

In addition to selling dresses, Gilded Social has an online shop where its customers can purchase gift cards and accessories such as emergency kit, lint removing sheets, oil blotting tissues, jewelry (such as earrings, bracelets, and necklaces), cocktail mixers, cocktail kits, bottle openers, candlesticks and confetti poppers. (Ex. P; Ex. K, <https://www.shopgildedsocial.com/gift-card-order-form>.)

Gilded Social also rents out its space for wedding day preparations. (Ex. E, <https://www.shopgildedsocial.com/space-rental-inquiry-form>.) Space rentals include a make-your-own-mimosa bar, and Gilded Social's staff helps with set up, hosting, and clean up. (*Id.*) Brides can bring their own wedding professionals to the space, such as wedding planners, hair and

makeup artists, photographers, and videographers. (Ex. E, <https://www.shopgildedsocial.com/space-rental-inquiry-form>.) The pre-wedding party can bring food and beverages or Gilded Social will arrange for a neighboring business to cater the event. (*Id.*)

Gilded Social holds events throughout the year. It has a sample sale scheduled for May 6, 2020 through May 17, 2020. Ex. O, <https://www.shopgildedsocial.com/events>. Plaintiffs' Verified Complaint states that it is an appointment-only business, but its website states that no appointments are needed during the sample sale. *Id.*

III. STANDARD OF REVIEW

The issuance of a temporary restraining order is an extraordinary and drastic remedy, which may only be awarded upon a clear showing that the movant is entitled to such relief. *Winder v. NRDC, Inc.*, 555 U.S. 7, 22 (2008), *citing Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). As such, the party seeking such a remedy must clearly establish that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the issuance of a temporary restraining order would not cause substantial harm to others; and (4) the injunction is in the public interest. *See Minaf v. Geren*, 553 U.S. 674, 689-90 (2008). *See also Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000).

The movant also bears the burden of establishing the entitlement to a temporary restraining order “an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it.” *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002) (emphasis in original). The party seeking a preliminary injunction must establish its entitlement by clear and convincing evidence. *Marshall v. Ohio University*, No. 2:15-cv-775, 2015 U.S. Dist. LEXIS 31272, at *10 2015 WL 1179955

(S.D. Ohio Mar. 13, 2015), *citing Overstreet; Honeywell, Inc. v. Brewer-Garrett Co.*, 145 F.3d 1331 (6th Cir. 1998). To meet its burden, the movant’s evidence “must more than outweigh the [opposing] evidence,” but must also “persuade the court that [the] claims are highly probable.” *Damon’s Rests., Inc. v. Eileen K Inc.*, 461 F. Supp.2d 607, 621 (S.D. Ohio Nov. 13, 2006).

In this case, Plaintiffs have failed to establish a clear showing that these four factors are met. In particular, Plaintiffs have failed to establish it has any significant likelihood of succeeding on the merits of their case against Health Director Dr. Amy Acton, much less demonstrate the “strong showing of probable success at trial” that is required. *Plain Dealer Publ. Co. v. Cleveland Typographical Union*, 520 F.2d 1220, 1223 (6th Cir. 1975). They also cannot satisfy the remaining three factors. For these reasons, Plaintiffs’ Motion for Temporary Restraining Order must be denied.

IV. SUMMARY OF ARGUMENT

Given the clear and officially declared public health emergency presented by the COVID-19 virus, Defendant, Dr. Amy Acton, Director of the Ohio Department of Health, exercising her broad public-health-related statutory powers, issued orders aimed at slowing the spread of this pernicious disease to protect the public health by saving lives, most directly by preventing our healthcare system from being overwhelmed by the spike in cases that experts predicted would occur absent aggressive, widespread mitigation efforts. Ohio’s mitigation efforts have been deemed very successful thus far.

Plaintiffs, a Columbus-based dress shop (with an established online presence) and its owner, have sued Dr. Acton, seeking, among other things, to enjoin the continued enforcement of those orders. Plaintiffs, arguing that now is a critical season in the wedding industry, wrongly arguing that they have been deprived of their right to due process—namely, a hearing to challenge

the claimed deprivation of the right to operate their business in the usual manner during this public health crisis. They claim that they would be able to open their storefront safely and in compliance with certain protective measures, even though their advertised methods of doing business would seem to make that questionable. Plaintiffs also incorrectly claim that Dr. Acton's orders are void for vagueness, even though Plaintiffs concede that they understand how the orders apply to them. Further, Plaintiffs improperly seek money damages against the state of Ohio, despite the fact that such damages are barred by the Eleventh Amendment to the U.S. Constitution. See *Kentucky v. Graham*, 473 U.S. 159, 169 (1985).

Of immediate concern is Plaintiffs' motion for a temporary restraining order. The Court should deny the motion, as Plaintiffs fail to meet the test for a temporary restraining order by any standard, much less by the required clear and convincing evidence. Plaintiffs try to vindicate claimed rights of *other* people and businesses, but they lack standing to succeed in that attempt, and therefore the Court could not grant relief to Plaintiffs on that basis. See *Warth v. Seldin*, 422 U.S. 490, 449 (1975). Nor does the Court have jurisdiction over Plaintiffs' state-law claims or—as noted above—over their claims for money damages. See *Experimental Holdings, Inc. v. Farris*, 503 F.3d 514, 520-21 (6th Cir. 2007); *Kentucky v. Graham, supra*. Finally, Plaintiffs fail the four-part test for a temporary restraining order on any of their other claims. They cannot establish a likelihood of success on the merits, irreparable harm caused by the orders, or a public benefit or lack of harm to third parties if their motion were granted. See *Minaf v. Geren*, 553 U.S. 674, 689-90 (2008); *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000) (discussing the elements for a temporary restraining order).

Plaintiffs cannot successfully show that Dr. Acton's statutory authority or orders are void for vagueness. They admit that they understand their position with respect to the orders, which means they know how to conform their conduct to the law. *Simon v. Cook*, 261 F. App'x 873, 882 (6th Cir. 2008).

Plaintiffs also cannot successfully demonstrate that they are entitled to a hearing based on a deprivation of a property interest, as they claim. Dr. Acton's generally-applicable orders are legislative acts, and as such they do not even arguably trigger due-process hearing rights. See *Smith v. Jefferson County Bd. of School Comm'rs*, 641 F.3d 197, 216 (6th Cir. 2011). Regardless, there is no right to operate a business in Ohio free of any inconvenient constraints. Whatever right Plaintiffs enjoy under Ohio law (the source of any claimed property interests relevant here) necessarily comes with the limitations that are embedded (and apparent) in Ohio law itself. Given the public health emergency and the authority vested in Dr. Acton by the General Assembly, the effects of Dr. Acton's orders on Plaintiffs' business do not infringe on any constitutionally-protected property interest enjoyed by Plaintiffs.

The upshot of Plaintiffs' theory is that Ohio can *never* take aggressive, disease-mitigation actions that will have a temporary negative effect on Ohioans' normal ways of living and doing business, regardless of how necessary those actions might be to preserve lives and protect public safety in general. Obviously, there would be no way Ohio could offer a hearing to every non-essential business in Ohio (or even to a modest percentage of Ohio's considerable population of business owners).

Nor have Plaintiffs supported their bare assertions of likely irreparable harm from Dr. Acton's orders. They offer no evidence that allowing the orders to remain in effect for another two weeks will cause their business to suffer in light of the general changes made by Ohio's population

in postponing weddings. Plaintiffs have not provided any evidence about their economic situation, much less tied that evidence to their status as a non-essential business. Nor have they shown why they could not be sufficiently sustained by their considerable online services, which include available video contact with customers. Plaintiffs have thus failed to carry their burden on the irreparable-injury prong of the test for a temporary restraining order.

Finally, it is clear that granting the requested injunction would harm third parties and the public interest, and that it would do so in ways that unquestionably outweigh any temporary drop in business experienced by Plaintiffs. Plaintiffs do not even address these prongs of the test for a temporary restraining order, and it is easy to see why. It hardly needs to be said that a fast-spreading, severe, and often fatal illness that not only directly threatens many lives but also indirectly threatens others by having the potential to overwhelm the healthcare system makes it imperative that Ohio be able to slow down the spread of COVID-19. Indeed, regarding Plaintiffs' understandable economic worries, it would be awfully difficult for Ohio's businesses to survive if large numbers of Ohioans became sick over a short period.

For these reasons, as further explained below, the Court should deny Plaintiffs' motion for a temporary restraining order.

V. LAW AND ARGUMENT

A. Plaintiffs lack standing to bring claims on behalf of third parties.

Plaintiffs seek: 1) a declaration that the order is unconstitutional “as applied to a class of Ohio businesses not previously subject” to regulation by the Ohio Department of Health; 2) an injunction prohibiting actions against “a class of similarly situated business owners[;]” and 3) an injunction prohibiting action against unspecified “others.” *See* Complaint, pp. 13-14. These claims fail because Plaintiffs lack standing to seek relief on behalf of unrelated third parties. A “plaintiff generally must assert his own rights and legal interests, and cannot sue to protect the rights of third parties. *Warth v. Seldin*, 422 U.S. 490, 449 (1975); *Lifter v. Cleveland State Univ.*, 707 Fed. Appx 355, 365 (6th Cir. 2017).

Although there are exceptions to this general prohibition about asserting the rights of third parties, those exceptions are not met here. In order for an individual²³ to sue on behalf of another, she must prove a close relationship between herself and the third party whose rights she is asserting, and a hinderance preventing the third party from raising her own claim. *Lifter*, 707 Fed. Appx. at 365. Plaintiffs have not even alleged these elements and the allegations indicate they could never be met. Plaintiffs could never credibly allege a “close relationship” between themselves and every other business in Ohio not previously subject to regulation by the Ohio Department of Health, “similarly situated” businesses, or “others.” The first two relationships are necessarily arm’s-length business relationships and the third is so nebulous as to be meaningless in this context.

For these reasons, the Court should not award relief to any third party not before the Court.

²³ Because Plaintiffs are not, and could not credibly, assert organization standing, we have not addressed that issue. Obviously, organizational standing presents separate issues, with a separate body of case law that is inapplicable here.

B. The Court lacks jurisdiction of Plaintiffs' state law claims.

This Court lacks jurisdiction over Plaintiffs' state law claims and claims for damages due to sovereign immunity. The Eleventh Amendment precludes a federal court from ruling against a State or its officials on the basis of state law. *Experimental Holdings, Inc. v. Farris*, 503 F.3d 514, 520-21 (6th Cir. 2007). “[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

Plaintiffs' Complaint includes allegations that are violations of state, rather than federal law. Plaintiffs assert a claim of a violation of due process under both the United States and Ohio Constitution. Compl. at 7. Plaintiffs also allege that Dr. Acton failed to comply with the procedure for emergency rules under Ohio Revised Code Section 119.03. Compl. ¶ 30. Much of Plaintiffs' motion discusses assertions that Dr. Acton improperly infringed on the Ohio General Assembly's legislative authority. Pls.' Mot. at 12-13. To the extent that Plaintiff alleges that Dr. Acton lacks statutory authority to implement the Amended Order or failed to comply with Ohio law, Plaintiffs have alleged a state law claim over which this Court has no jurisdiction.

C. Plaintiffs have no substantial likelihood of success on the merits

Plaintiffs claim that the Dr. Acton's order is unconstitutional because it is vague and violates procedural due process, and impermissibly delegates authority to the Ohio Department of Health. All of these claims fail on their merits.

1. Neither the statute delegating authority to the Ohio Department of Health or Dr. Acton's Amended Order is unconstitutionally vague.

The Department of Health's determination of a business' "essentiality" is not vague merely because Plaintiffs disagree with the decision. Complaint, ¶42 (ECF 1). “ [A] law fails to meet

the requirements of the Due Process Clause if it so vague and standardless that it leaves the public uncertain as to the conduct it prohibits....’ ” *Simon v. Cook*, 261 F. App’x 873, 882 (6th Cir. 2008) (quoting *Giacco v. Pennsylvania*, 382 U.S. 399, 402-403 (1966)). “A statute is void for vagueness if it does not give adequate notice to people of ordinary intelligence concerning the conduct it proscribes, or if it invites arbitrary and discriminatory enforcement.” *United States v. Lantaz*, No. CR-2-08-015, 2009 U.S. Dist. LEXIS 39653 (S.D. Ohio Apr. 22, 2009) (citing *United States v. Halter*, 259 F. App’x 738 (6th Cir. 2008)). Here, Plaintiffs allege that both the underlying statute, Ohio Revised Code Section 3701.13, and the Director’s Amended Order are vague. Complaint, ¶¶42-46 (Amended Order) (ECF 1); Complaint, ¶¶47-49 (statute) (ECF 1).

In assessing vagueness, a court must look to the words of the statute itself. *Platt v. Bd. Of Comm’rs on Grievs. & Discipline of the Ohio Supreme Court*, 894 F.3d 235, 247 (6th Cir. 2018). If a word’s common meaning “ ‘provides adequate notice of the prohibited conduct, the statute’s failure to define the term will not render the statute void for vagueness.’ ” *Id.* (quoting *United States v. Hollern*, 366 F. App’x 609, 612 (6th Cir. 2010)). And, “where the challenged language ‘is commonly used in both legal and common parlance,’ it will often be ‘sufficiently clear so that a reasonable person can understand its meaning.’ ” *Id.* (citing *Déjà vu of Cincinnati, LLC v. Union Twp. Bd. Of Trustees*, 411 F.3d 777, 798 (6th Cir. 2005) (en banc)).

The language of the Ohio Revised Code 3701.13 sufficiently clear. It states that the “department of health shall have supervision of all matters relating to the preservation of the life and health of the people and have ultimate authority in matters of quarantine and isolation, which it may declare and enforce, when neither exists, and modify, relax, or abolish, when either has been established.” Ohio Rev. Code 3701.13. The department of health “may make special or standing Amended Orders * * * for preventing the spread of contagious or infectious diseases.”

Id. Plaintiffs point to nothing in the statute that is vague, such that a person of ordinary intelligence cannot determine the authority of the Director regarding quarantines.

Instead, Plaintiffs contend that the broad authority granted to the Department of Health in Ohio Revised Code 3701.13 as the “ultimate authority” over quarantine Amended Orders is an improper delegation of legislative authority to another branch of government, the Executive Branch. Plaintiffs asserts federal and state claims here, but the General Assembly’s authority to delegate is governed by the Ohio Constitution, not the United States Constitution. *Michael v. Ghee*, 498 F.3d 372, 375 (6th Cir. 2007). To the extent Plaintiffs are asserting a violation of the Ohio Constitution, her claim is barred by the Eleventh Amendment, as discussed above. Even if the claim were not barred, the nondelegation doctrine does not prevent legislatures from seeking assistance, within proper limits, from other branches of government. *Touby v. United States*, 500 U.S. 160, 164, 111 S. Ct. 1752, 1755 (1991). Nor does a legislature violate the nondelegation doctrine “merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors.” *Id.* Instead, the legislature must simply provide an “intelligible principle to which the person or body authorized to [act] is directed to conform.” *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

Here, Plaintiffs claim that the delegation of “ultimate authority in matters of quarantine and isolation” to the Director of Health renders Ohio Revised Code 3701.13 unconstitutional. Complaint, ¶ 47 (ECF 1). The General Assembly granted such authority so that the Director could act quickly to preserve the life and health of people and to prevent the spread of contagious disease. Ohio Rev. Code 3701.13. There can be no real contention that the standards in Ohio Rev. Code 3701.13 don’t include an “intelligible principle” that limits the Director’s authority in an emergency situation.

Plaintiffs also allege that the Amended Order is vague. This argument fails because Plaintiffs are not arguing that they cannot determine whether the order applies to them. Plaintiffs simply disagree with the conclusion that their business is non-essential. The Amended Order does not provide a “definition” of essential businesses (e.g., “a business that is necessary for people to survive”) that Plaintiffs must interpret; rather it provides a detailed list of the businesses that are considered Essential Business Operations (grocery stores, hardware stores, gas stations, etc.). Ex. 2 to Comp., Amended Order at 5-8. Clothing stores are not listed.

It seems apparent that Plaintiffs have determined they are not an Essential Business Operation under the Amended Order. When their attorney contacted the local health department, his email stated that his client, who owns a bridal shop, “is not classified as ‘essential’ by the Health Department’s Order, but would like to operate, or present evidence that it could safely operate.” See Ex. 3 to Comp. In other words, Plaintiffs simply think it’s unfair that bridal stores were not listed in the Amended Order. Plaintiffs have determined which side of the line they are on--they just do not agree with where it was drawn. The problem is not an issue of vagueness. For these reasons, Plaintiffs’ void for vagueness argument is not likely to succeed.

2. Dr. Action’s amended order does not violate due process.

Plaintiffs’ due process claim is also unlikely to succeed. When faced with a public health crisis—such as the deadly COVID-19 pandemic currently expanding not just across the U.S. but across the whole world—States have broad powers to issue orders aimed at mitigating the spread of the disease. See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 (1905). Because such orders will often need to be issued both quickly and in an abundance of caution, of necessity they need not be perfect or perfectly precise in their impacts. These types of orders will be struck down only if they have “no real or substantial relation” to protecting public health. *Id.* at 31.

There were multiple reports of devastation wrought by the COVID-19 disease on individuals afflicted with it. Ohio officials also saw the projected high rate of community transmission in Ohio in the absence of government-ordered mitigation efforts. See footnote 13, above. Ohio officials saw modeling showing that, unmitigated, the fast spread of COVID-19 was capable of completely overwhelming available healthcare facilities, making it impossible to provide adequate care to those who contract it—and Ohio officials learned that many healthcare workers in hard-hit locations had become ill themselves while trying to care for their highly-contagious patients. See Fowler declaration at ¶¶ 2, 3. Ohio’s modeling predicted that the same would happen in Ohio if steps were not taken to mitigate the spread and “flatten the curve” (i.e., prevent an overwhelming spike in cases). See Fowler declaration ¶¶ 2,3,4. The federal government itself declared a national public health emergency on January 31, 2020. (Amended Order at 11, Ex. 2 to Compl.) The World Health Organization declared COVID-19 a pandemic on March 11, 2020. (Amended Order at 12, Ex. 2 to Compl.)

In response to this dire situation, Dr. Acton issued orders under the authority of Ohio Revised Code 3701.13. The orders were issued to in an attempt to slow the spread of COVID-19 so that fewer people in Ohio would get sick and so that the healthcare facilities would not be so overwhelmed that even *more* people would die simply due to inadequate or unavailable medical attention. See Fowler declaration at ¶¶ 3. Among other things, the Director’s orders prohibited large gatherings; required schools to close temporarily; required businesses deemed nonessential to close temporarily; and required essential business that remained open to operate with certain safety precautions to protect the health of the employees and customers and, ultimately, the public (by reducing the spread of the virus). See Amended Order at 1, 9, 13. Many Ohioans began working from home. Various courts issued orders to address the situation. Hearings and oral arguments

were postponed or even canceled, and *even speedy-trial rights* were temporarily suspended by this Court, and other courts, in light of the health crisis. See S. D. Ohio Gen. Order No. 20-05 (issued March 20, 2020); *see also* <https://www.paulhastings.com/about-us/advice-for-businesses-in-dealing-with-the-expanding-coronavirus-events/u.s.-court-closings-cancellations-and-restrictions-due-to-covid-19>.

Plaintiffs were not entitled to a due process hearing. The cases that Plaintiffs cite requiring a hearing involve individual deprivations of liberty or property interests, such as termination of employment or seizure of property. (Pls. Mot. at 9-10.) *See Krimstock v. Kelly*, 464 F.3d 246, 255 (2d Cir. 2006) (seized vehicle); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 (1993) (criminal forfeiture of real estate); *FDIC v. Mallen*, 486 U.S. 230, 242 (1988) (suspending director of bank); *Zinerman v. Burch*, 494 U.S. 113, 125-26 (1990) (admission to mental hospital); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985) (termination of employment). No individual action has been taken against Plaintiffs, however. Rather, a statewide order was issued of general application to all Ohioans. No property was seized from Plaintiffs and no individual determination was made about their rights. No due process hearing right arises from this type of general action.

The Sixth Circuit has held that “[n]o notice or hearing is required before legislative action.” *Smith v. Jefferson County Bd. of School Comm’rs*, 641 F.3d 197, 216 (6th Cir. 2011); *see also Brown v. Norwalk City Sch. Dist. Bd. of Educ.*, No. 3:10 cv 687, 2011 U.S. LEXIS 135926, at *8 (N.D. Ohio Nov. 28, 2011) (statute and rules prohibiting employment of a felon did not give rise to hearing rights). In *Brown*, the district court held that an employee was not entitled to a hearing when he lost his job because of newly enacted statutes and rules that prohibited employment of a felon. *See* 2011 U.S. LEXIS 135926, at *8. The court found that the law was one of general

application, and that no hearing rights arise from a legislative action. The Amended Order is similarly of general application. Although the Amended Order is not a statute, in this context, the Sixth Circuit has made clear that a “legislative action” need not be a statute, or an action of a state legislature.

The Sixth Circuit in *Smith* rejected “formalistic distinctions” between legislative, adjudicatory, or administrative actions. *See* 641 F.3d at 216. Rather, the court held that the determination of whether an act is legislative depends on the nature of the act. *Id.* (citing *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998)). The determination turns on the type of decision and whether it is of general application. “[L]egislation normally is general in its scope rather than targeted on a specific individual.” *Id.* at 216 (citing *Ind. Land Co., LLC v. City of Greenwood*, 378 F.3d 705, 710 (7th Cir. 2004)).

In *Smith*, the action at issue was a decision by a school board to eliminate an alternative school. *Id.* The court found this decision to be legislative in nature. *Id.* The court noted that the school board made a generally applicable budgetary decision after weighing its priorities. *Id.* at 217. Similarly, Dr. Acton weighed the danger from the spread of COVID-19 with the need of Ohioans to obtain necessary goods and services, and issued an order designating essential and non-essential businesses. The Amended Order is an action of general application, not an action targeted to a specific individual.

When a governmental action is of general application, “its generality provides a safeguard that is a substitute for procedural protections. The greater the number of people burdened by a proposed law, the easier it is to mobilize political resistance,” and the more likely it is that the government will react to opposition to the action. *Ind. Land Co.*, 378 F.3d at 710. Accordingly, no notice and hearing are necessary.

Although the Amended Order is not a statute or rule, Ohioans still have the opportunity to influence the State's response to the COVID-19 pandemic. The General Assembly created the statute giving the Director of ODH the authority to enact laws in response to a public health emergency. Ohio's General Assembly also passed comprehensive legislation, H. B. 197, in response to the COVID-19 pandemic and the economic consequences of the Amended Order. Ohioans can influence the legislature's decisions about its response to the pandemic. Dr. Acton is appointed by the Governor, and he could take appropriate action if he did not agree with her decisions. Ohioans can put political pressure on the Governor to direct or encourage Dr. Acton to rescind or modify her orders. Indeed, some Ohioans have loudly protested the State's pandemic restrictions. The Governor has made clear in daily press conferences, however, that he supported the Amended Order. *See* archives, <https://ohiochannel.org/collections/governor-mike-dewine>.

The Amended Order is a legislative act of general application. Most property interests entitled to procedural due process may be restricted or even abolished by the legislature. *Bell v. Ohio State Univ.*, 351 F.3d 240, 250 (6th Cir. 2003). A State can make general policy decisions to restrict certain categories of businesses without affording a right to due process to every business affected. *Smith*, 641 F.3d at 216. The Amended Order is an order of general application and does not give rise to any due process right to a hearing. This Court should therefore reject Plaintiffs' due process claim.

Even if the Amended Order were not a legislative act, Plaintiffs still would not be entitled to a due-process hearing. Procedural due process is the right to notice and a meaningful opportunity to be heard. *See, e.g., Puckett v. Lexington-Fayette Urban Cnty. Govt.*, 833 F.3d 590, 606 (6th Cir. 2016). A person claiming a property interest is, constitutionally speaking, entitled to notice and a hearing regarding any deprivation only if she has a *constitutionally-protected* property interest.

See *id.* at 604-605. Such property interests are derived, not from the Constitution, but from independent sources of law, such as state law. See *id.* at 605. Therefore, whatever property interest Plaintiffs claim to have that might entitle them to a hearing would—in this case—have to be a property interest derived from Ohio law.

The property interest Plaintiffs appear to assert here is the right to conduct their business as usual even during a public health emergency like the COVID-19 pandemic, free from any temporary restrictions issued by the Director of the Ohio Department of Health. See, *e.g.*, Complaint at ¶ 63. It is this claimed right that Plaintiffs must believe they have been deprived of, because no one permanently shut their business down, and the Director's orders were issued only because it was an effective way to slow down this deadly pandemic and prevent our healthcare system from being overwhelmed (and thus unable to respond effectively to the needs of very sick Ohioans).

Plaintiffs do not have a constitutionally-protected right to operate free of orders like the ones referenced in the Complaint. In Ohio, businesses necessarily operate within the regulatory framework put in place by the General Assembly. They are subject to many limitations found in Ohio statutes. They must adhere to any applicable sanitation laws, licensing laws, tax laws, zoning laws, and health laws, just to name a few.

As noted above, Ohio Revised Code 3701.13, gives the Director of the Ohio Department of Health very broad authority:

The department of health shall have supervision of all matters relating to the preservation of the life and health of the people and have ultimate authority in matters of quarantine and isolation, which it may declare and enforce, when neither exists, and modify, relax, or abolish, when either has been established.

* * *

The department may make special or standing orders or rules...for preventing the spread of contagious or infectious diseases[.]

Ohio Rev. Code 3701.13. And violations of such orders are prohibited pursuant to Ohio Revised Code 3701.352.

Because any right Plaintiffs have to run their business is based on Ohio law, that right is subject to any accompanying limitations placed on that right by Ohio law. As discussed above, the Health Department statutes, Ohio Revised Code 3701.13 and 3701.352, are such limitations, and Plaintiffs take their business-operation rights subject to those restrictions. The Supreme Court has recognized that states have broad authority to regulate professions even in the absence of a public health emergency. *See Williamson v. Lee*, 348 U.S. 483, 487 (1955). Plaintiffs do not possess an absolute right to operate their business however they normally do regardless of orders issued by the Director under Ohio Revised Code 3701.13.

“The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law.”

Jacobson, 197 U.S. at 26-27, quoting *Crowley v. Christensen*, 137 U.S. 86, 89 (1890).

Even where there is an arguable due-process right, the right is not absolute. “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Hickox v. Christie*, 205 F. Supp. 3d 579, 601 (D.N.J. 2016) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 334-345 (1976). “[U]nder the pressure of great dangers,” liberty may be reasonably restricted “as the safety of the general public may demand.” *Jacobson*, 197 U.S. at 29.

In *Jacobson*, the Supreme Court upheld a mandatory vaccination law. *Id.* The Court explained that the “liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. . . . Rather, a

community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Id.* at 27 (internal quotations omitted).

In the midst of this pandemic, courts have recognized the broad authority and need for states to issue public health orders in response to the threat of COVID-19. In *In re Abbott*, No. 20-50264, 2020 U.S. App. LEXIS 10893, *4 (5th Cir. Apr. 7, 2020), the Fifth Circuit upheld the State of Texas’s public health order issued in response to the COVID-19 pandemic. The *Abbott* court held, “That settled rule allows the state to restrict, for example, one’s right to peaceably assemble, to publicly worship, to travel, and even to leave one’s home.” *Id.* The court held that the district court erred in granting a TRO against the State and substituting the district court’s judgment regarding the efficacy of the State’s order. *Id.* *Abbott* held that, “[i]t is no part of the function of a court’ to decide which measures are ‘likely to be the most effective for the protection of the public against disease.’” *Id.* (quoting *Jacobson*, 197 U.S. at 30). Other courts have also declined to enjoin state’s responses to the COVID-19 epidemic. *See, e.g., Alessandro v. Beshear*, E. D. Ky. No. 3:20-cv-00023 (issued April 3, 2020); *Binford v. Sununu*, New Hamp. Sup. Ct. No 217-2020-cv-00152 (issued March 25, 2020).

Plaintiffs allege that the Director’s orders violate their procedural due process rights because they are given no right to a hearing to challenge the order to temporarily restrict their business. (Compl. ¶ 64.) According to Plaintiffs, they are entitled to a post-deprivation hearing.²⁴ (Compl. ¶ 63.) Plaintiffs need a hearing, they claim, in order to have the opportunity to prove that Gilded Social is “essential” after all and/or can operate safely by implementing crowd control,

²⁴ Plaintiffs also complain that it is not fair that, if a hearing were provided, they would bear the burden of showing that they are essential business. (Pls. Mot. at 10-12.) As discussed above, Ohio law provides no hearing here, so it is odd to debate the merits of a proceeding that does not exist. However, if the State brought a civil or criminal action against Plaintiffs, the State would have the burden of proof.

social distancing, and cleaning regimens. (Compl. ¶ 63.) Plaintiffs assert that they have the means to implement these methods, and they also claim that they are actually “essential” after all because, at this time of year, many people planning weddings must order their wedding dresses in order to have them by September and October, which are—according to Plaintiffs—popular months for weddings.²⁵ (Compl. ¶ 70.) Plaintiffs also claim to be essential because they, their employees, and their landlord derive significant financial benefit from the business generated by Gilded Social. (Comp. ¶ 77.)

Plaintiffs’ theory is simply unworkable, not to mention incorrect. Their claims about Gilded Social’s value are undoubtedly true of thousands, if not tens of thousands, of Ohio businesses and business owners. Nearly any given business exists to serve customers and provide a living for its owner(s), and many businesses and industries are seasonal. Plaintiffs assert that they and every other nonessential business is entitled to a post-deprivation hearing to challenge the temporary closure of its operations. But obviously that would be physically impossible. Plaintiffs’ theory, then, is really a theory that a State is simply not permitted to issue blanket orders temporarily closing businesses (or taking other action that negatively impacts business), because Ohio does not have the resources to provide a hearing to every non-essential business in Ohio.

Plaintiffs say that they are seeking to vindicate merely their right to “operat[e] a business” or “[earn] a living.” (Compl. ¶ 53.) They go on to compare the Director’s orders to an order revoking an entity’s permit to do business or permanently shutting down a particular business. See *id.* at ¶ 54-57. But the Director has not revoked any permits or ordered businesses to be closed permanently, nor has she prohibited Plaintiffs from operating online or generally earning a living.

²⁵ Plaintiffs invoke the constitutional right to marriage and seem to imply that it applies here. Compl. ¶ 72. Plaintiffs have no standing to raise other individuals’ right to marry. Moreover, people can get married without purchasing a dress from Plaintiffs or visiting their storefront.

The orders are a *temporary* measure to save lives. They are not singling out Plaintiffs in order to punish them.

The orders have general application, and *they will work only if they are applied as widely as possible*. If businesses and owners across the State could potentially carve thousands of Swiss-cheese holes in the Director's reasonable attempts to "flatten the curve," the likely result would be a spike in cases, an overwhelmed healthcare system, and many Ohio deaths that could have been avoided. This is exactly why the Director has the authority to issue the orders that she did. Her authority is necessary in times like this, when there is a great and serious danger to the public that, in the opinions of medical and other scientific experts, only well-enforced, widely-applicable physical-distancing orders will mitigate.

It is hard to avoid hearing in Plaintiffs' argument faint echoes of a now-discredited case decided 105 years ago today: *Lochner v. New York*, 198 U.S. 45 (1905). Without saying so expressly, the plaintiffs are claiming a *substantive* right to operate their business without being burdened by state laws *they judge* too extreme—a right found nowhere in the Constitution. But the "Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Id.* at 75 (Holmes, J., dissenting). Nor does it entitle every business to emergency orders perfectly tailored to their liking. To rule for the plaintiffs would mark "a return to *Lochner*," and an approach to constitutional adjudication in which courts "elevate [their] economic theory" and public-health policy "over of that of legislative bodies." *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002).

One final point. *Even if* the State violated the Due Process Clause by failing to provide a hearing on the essential nature of businesses, the remedy for that would be a narrow injunction creating a right to a hearing. So even if the plaintiffs were correct on their due-process claim, they

would not be entitled to the relief they seek: an order invalidating the Amended Order in its entirety.

For these reasons, Plaintiffs are unlikely to succeed on their due process claims.

3. Plaintiffs have not demonstrated that they will suffer irreparable injury absent the temporary restraining order.

To demonstrate show an irreparable injury Plaintiffs must “exhibit a non-compensable injury for which there is no legal measure of damages.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. E.F. Hutton & Co.*, 403 F. Supp. 336, 343 (E.D. Mich. 1975) (citations omitted). And the harm must be “‘actual and imminent,’ and not merely remote or speculative.” *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2nd Cir. 1989); *see also Brautigam v. Pastoor*, No. 1:16-cv-1141, 2018 U.S. Dist. LEXIS 139774, *20-21 (S.D. Ohio Aug. 17, 2018) *citing Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006).

Plaintiffs allege two forms of irreparable injury: 1) the deprivation of Plaintiffs’ constitutional rights; and 2) the “virtual certainty” of the closure or bankruptcy of Gilded Social. *See Plaintiff’s Memo (Doc. 2)*, p. 16. Both of these claims fail.

Plaintiffs’ claims regarding the deprivation of its constitutional rights fail for the reasons discussed above. Their claims regarding the closure or bankruptcy of Gilded Social fail because Plaintiff has produced no evidence other than bare assertions that allowing Dr. Acton’s orders to remain in effect for an additional 14 days will result in the harm claimed or that any drop-off in its business is due to Dr. Acton’s orders and not other factors, such as society’s willingness to postpone or downsize weddings due to the pandemic. Further, Gilded Social has already been subject to Dr. Acton’s orders declaring it non-essential for 25 days and the harm Plaintiffs allege has not yet come to pass. Plaintiffs have produced no evidence explaining why that harm will occur within the next 14 days. They have not provided any evidence of the expenses that the

business has incurred, the effect that Dr. Acton's orders have had on its revenues, the business' cash reserves or credit, or the terms of the credit line that allegedly underwrite the Gilded Social. Plaintiffs' website indicates that they are able to provide considerable services online, and that they are actively engaged in providing virtual appointments, video chats, and shipping products, (which they are permitted to do under the Amended Order) yet Plaintiff has provided no evidence about the economics of those activities.

This lack of evidence distinguishes this case from the authorities cited by Plaintiffs. In *Performance Unlimited v. Questar Publishers*, 52 F.3d 1373 (6th Cir. 1995) the court granted a preliminary injunction based on un rebutted evidence about the dollar-value of the plaintiff's lost revenue, the percentage of that loss as a share of the plaintiff's biennial revenues, and the dollar-value of withheld royalties. *See Performance Unlimited*, 52 F.3d at 1381. The case did not state that the "inability to operate a business for an unknown period of time constitutes irreparable harm," as Plaintiffs claim. *See Plaintiffs' Memo* (Doc. 2), p. 16. The second case Plaintiffs cite, *Basicomputer Corp. v. Scott*, 973 F.2d 507 (6th Cir. 1992) was another preliminary injunction case, decided after development of an evidentiary record at a hearing. *Id.* at 512. It granted an injunction because the plaintiff was able to show that the breaching of non-competition and confidentiality covenants caused damages that were difficult to compute. In this case, there is virtually no evidentiary record and no evidence to review. Plaintiffs could have introduced evidence to support their claims, but have chosen not to do so.

A plaintiff's failure to carry its evidentiary burden at this stage of the proceedings should always result in the denial of the requested relief, but particularly when, as here, Plaintiffs have had nearly a month to draft their pleadings, and Defendants have had only 24 hours to respond.

4. Granting the injunction would harm third parties and the public interest.

If there were ever a case where the harm to third parties and the public interest required denial of an injunction, this is it. On the one hand, Plaintiffs assert a need to have employees, customers, and (presumably) suppliers physically present in their store so that people can “shop for their wedding attire immediately” to get their dresses in time for fall weddings. *See* Complaint, ¶70. On the other hand, Dr. Acton has exercised her authority under Ohio Revised Code Section 3701.13 to temporarily restrict certain activities to help stop the spread of a deadly disease and save the lives of citizens of the state. There should be no question as to which interest is more important.

The COVID-19 virus is a deadly infectious disease. At the time this was written, the virus had infected at least 8,239 people in Ohio and killed 373.²⁶ Nationally, the toll is much higher. There were 632,220 confirmed cases and 26,930 deaths at the time this was written.²⁷ If current trends continue, 20 more Ohioans will die by the time the Court reads this memorandum and more than 60 will die by the time the Court hears argument in this case on Monday.²⁸ Nationally, over 30,000 more people will be infected by Monday and there will be a correspondingly tragic number of deaths. The virus has an incubation period of up to 14 days, during which “[i]nfected individuals produce a large quantity of virus . . . , are mobile, and carry on usual activities, contributing to the spread of infection.”²⁹ The virus can remain on surfaces for many days, and patients may remain

²⁶ *See* <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home> (last visited April 16, 2020).

²⁷ *See* <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited April 16, 2020)

²⁸ *See* <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home> (last visited April 16, 2020).

²⁹ David L. Heymann, *COVID-19: What is Next for Public Health?*, 395 *THE LANCET* 542, 543 (2020).

infectious for weeks after their symptoms subside.³⁰ Because no one who has not contracted the virus is immune and there is no vaccine, literally every single person in the state could be infected. Dr. Acton's orders are necessary to prevent an explosion of disease that could overwhelm the state's health care system and greatly increase the death toll. The Ohio Department of Health estimates that Ohio would have seen a peak of 62,000 new COVID-19 cases per day³¹ without the Director's orders. One need only look at reports from other states and other countries to see what even a smaller outbreak would look like. This is why Dr. Acton and Governor DeWine have repeatedly emphasized the need for temporary business closures and social distancing. *See* Archived Covid-19 Updates, available at <https://www.ohiochannel.org/collections/governor-mike-dewine> (last visited April 17, 2020).

Plaintiffs have presented no evidence or made any allegation challenging any of the harms discussed above. Their memo in support of their Motion makes no attempt to balance the harms to the public and third parties against the harm to Plaintiffs. And although Plaintiffs' pleadings do not discuss it, their website provides extensive details on how their business can operate while complying with the Director's orders. Plaintiffs currently operates an on-line store selling jewelry, accessories, and dresses.³² Plaintiffs also sell gift cards, offer virtual appointments, video chats with customers, and shipment of sample to customers' homes.³³ Plaintiffs deliver gowns to customers' houses to try them on and schedule video chats to help customers "properly try

³⁰ WORLD HEALTH ORGANIZATION, Q&A ON CORONAVIRUSES (*COVID-19*), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>.

³¹ *See* <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards/forecast-model> (last visited April 17, 2020).

³² *See* Ex. P, Gilded Social website, at <https://www.shopgildedsocial.com/online-shop> (last visited April 17, 2020); Ex. H, <https://www.shopgildedsocial.com/sample-sale-dress-index> (last visited April 17, 2020).

³³ *See* Ex. N, Gilded Social website, at <https://www.shopgildedsocial.com/schedule-a-virtual-appointment> (last visited April 17, 2020).

[clothes] on and answer any questions.”³⁴ Plaintiffs’ website states that these and other measures “will help us stay afloat during this critical time in our history.”³⁵

Plaintiffs have attempted to minimize the impact of enjoining Dr. Acton’s order by stating their business is by appointment only, so they can minimize the number of people in their store. *See* Complaint, ¶78. But it is clear that Plaintiffs do not intend to do this. Their website advertises that from May 6, 2020, to May 17, 2020, they are holding a Sample Sale, with “no appointment necessary.”³⁶ Plaintiffs’ website also invites not only customers, but wedding planners/coordinators, hair artists, makeup artists, photographers, and “others.”³⁷ Customers and others are encouraged to bring their “Gilded Tribe,” as well as food and beverages.³⁸ This conduct poses a significant risk to the public of illness, death, and collapse of the healthcare system. The risk far outweighs the burden on Plaintiffs to be subject to the Amended Order until May 1, 2020.

VI. CONCLUSION

Balancing the temporary restraining order factors results in a determination that Plaintiffs have failed to meet their burden and establish that they are entitled to a temporary restraining order. For all of the foregoing reasons, Plaintiffs’ motion should be denied and their claims should be dismissed accordingly.

³⁴ *Id.*

³⁵ *See* Gilded Social Website, at <https://www.shopgildedsocial.com/schedule-a-virtual-appointment> (last visited April 17, 2020).

³⁶ *See* Gilded Social website <https://www.shopgildedsocial.com/events> (last visited April 17, 2020).

³⁷ *See* Gilded Social website, at <https://www.shopgildedsocial.com/space-rental-inquiry-form> (last visited April 17, 2020).

³⁸ *See* Gilded Social website, at <https://www.shopgildedsocial.com/pre-wedding-space-rentals> (last visited April 17, 2020).

Respectfully submitted,

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Counsel for Defendant Director Amy Acton

CERTIFICATE OF SERVICE

This certifies that the foregoing Defendant's Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order was filed electronically on April 17, 2020. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Katherine Bockbrader
Assistant Attorney General

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

TANYA RUTNER HARTMAN, et al.,	:	Case No. 2:20-cv-1952
Plaintiffs,	:	
	:	Judge Marbley
-vs-	:	
	:	
AMY ACTON	:	DEFENDANT’S RESPONSES TO
<i>In her official capacity as Director of the Ohio</i>	:	PLAINTIFFS’ FIRST SET OF
<i>Department of Health</i>	:	INTERROGATORIES
	:	
Defendant.	:	

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Defendant Amy Acton, in her official capacity as Director of the Ohio Department of Health, provides the following responses to Plaintiffs’ Interrogatories.

INTERROGATORIES OF PLAINTIFF HARTMAN

INTERROGATORY NO. 1:

Identify the person or persons with the greatest knowledge, as known to you, related to how the Order is enforced.

ANSWER:

Objection. This interrogatory vague, ambiguous, and does not state with reasonable particularity the information sought. The Defendant does not know what it means to have “the greatest knowledge . . . related to how the Order is enforced.” Without waiving the foregoing objection, Paragraph 17 of the Order describes enforcement of the Order.



As to objections,

/s/ William C. Greene

WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 2:

Identify all standards, criteria, and other considerations used to determine which businesses and/or industries to are “essential” and which are “non-essential,” as articulated in Defendant’s Amended Stay at Home Order.

ANSWER:

Objection. This interrogatory overbroad, vague, ambiguous, and does not state with reasonable particularity the information sought. In addition, this interrogatory seeks information that is subject to the deliberative process privilege. Without waiving the foregoing objection, see the Cybersecurity & Infrastructure Security Agency of the Federal Department of Homeland Security Advisory Memorandum referenced in paragraph 12a. of the Order.

As to objections,

/s/ William C. Greene

WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 3:

Identify whether the Dispute Resolution panel created by Paragraph 23 of the Amended Stay at Home Order has correctly applied the foregoing standards at all times and in all case adjudicated up until the time you respond to this Interrogatory.

ANSWER:

Objection. The interrogatory is vague, ambiguous, and does not state with reasonable particularity the information sought. Without waiving the foregoing objection, the Dispute Resolution panel was to resolve a conflict of local health departments interpretations of the Order.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 4:

Identify the person or persons that reviewed 110 pages of Plaintiffs' website and submitted those pages as an exhibit to the Court in this case.

ANSWER:

Objection. This interrogatory is not relevant and not proportionate to the needs of the case as required by Federal Rule of Civil Procedure 26(b). Without waiving the objection, an employee of the Ohio Attorney General's Office reviewed the Plaintiffs' website.

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 5:

Identify all compensation, including salary, hourly pay, and/or fringe benefits if applicable, on an annualized basis, earned by those identified in the foregoing interrogatory.

ANSWER:

Objection. This interrogatory is not relevant and not proportionate to the needs of the case as required by Federal Rule of Civil Procedure 26(b) .

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 6:

Identify all evidence in support of the proposition that the Director’s ban on “non-essential business” reduced serious harm that would have otherwise arisen from Covid-19.

ANSWER:

Objection. The interrogatory is overbroad, requires speculation, and seeks information that is not relevant and not proportionate to the needs of the case as required by Federal Rule of Civil Procedure 26(b). Without waiving the objection, COVID-19 is an infectious respiratory disease. The intent of the Order is to ensure that the maximum number of people self-isolate in their places of residence to the maximum extent possible to slow the spread of COVID-19. Social distancing is a known method of reducing the spread of an infectious respiratory virus.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 7:

Identify each and every way, and all evidence in support of those ways identified, that banning Plaintiffs’ business reduced serious harm that would have otherwise arisen from Covid-19.

ANSWER:

Objection. The interrogatory is overbroad, requires speculation, and seeks information that is is not relevant and not proportionate to the needs of the case as required by Federal Rule of Civil Procedure 26(b). Without waiving the foregoing objection, the intent of the Order is to ensure that the Maximum number of people self-isolate in their places of residence to the maximum extent possible to slow the spread of COVID-19. Social distancing is a known method of reducing the spread of an infectious respiratory virus.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 8:

Identify each and every way, and all evidence in support of those ways identified, that denying “non-essential businesses” the opportunity for a post-derpivation hearing reduced serious harm that would have otherwise arisen from Covid-19.

ANSWER:

Objection. The interrogatory is overbroad, requires speculation, and seeks information that is is not relevant and not proportionate to the needs of the case as required by Federal Rule of Civil Procedure 26(b). Without waiving the foregoing objections, the intent of the Order is to ensure that the maximum

number of people self-isolate in their places of residence to the maximum extent possible to slow the spread of COVID-19. Social distancing is a known method of reducing the spread of an infectious respiratory disease.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 9:

Identify each and every way, and all evidence in support of those ways identified, that denying Plaintiffs the opportunity for a post-deprivation hearing reduced serious harm that would have otherwise arisen from Covid-19.

ANSWER:

See answer to interrogatory number 8.

INTERROGATORY NO. 10:

Identify any and all evidence for your assertion at Doc. 4, PageID 64 that “approximately 29 percent of confirmed cases result in hospitalizations and approximately 4 percent of confirmed cases result in death.”

ANSWER:

Objection. The interrogatory is overbroad, requires speculation, and seeks information that is not relevant and not proportionate to the needs of the case as required by Federal Rule of Civil Procedure 26(b). Without waiving the foregoing objection, the information comes from the Ohio disease reporting system that is updated daily and posted on the coronavirus.ohio.gov website.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 11:

Identify all evidence supporting the veracity of the suggestion at Doc. 4, PageID 64 that the Governor would “lift restrictions on non-essential businesses beginning on” May 1, 2020.

ANSWER:

Objection. The statement is not accurately quoted and the information sought is not relevant to the Plaintiffs’ claims. Without waiving the foregoing objections, the document referenced states that the Governor “has announced plans to lift restrictions on non-essential businesses beginning on” May 1, 2020, and contained a citation to the Governor’s press conference. A new order was issued on April 30, 2020, that lifts restrictions on non-essential businesses.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 12:

Identify all evidence in existence at that time, supporting the Governor’s decision to “announce plans to lift restrictions on non-essential businesses beginning on” May 1, 2020.

ANSWER:

Objection. See response to interrogatory number 11. Without waiving the objection, the Defendant cannot respond regarding the Governor’s decisions or what the Governor relied upon.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 13:

Identify all evidence that has arisen since April 16, 2020 that supports the Governor's decision to "announce plans to lift restrictions on non-essential businesses beginning on" May 1, 2020.

ANSWER:

Objection. See response to interrogatory number 12.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 14:

Identify each and every way basis for your indication at Doc. 4, PageID 69 that Dr. Amy Acton maintains maintains "statutory powers."

ANSWER:

Objection. Defendant objects to this interrogatory to the extent that it assumes legal conclusions. Without waiving their foregoing objection, see Ohio Revised Code Chapter 3701, which includes section 3701.13.

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 15: Identify each and every legal limit on the “statutory powers” referenced in the foregoing interrogatory.

ANSWER:

Objection. This interrogatory is overbroad and calls for a legal conclusion.

As to objections,.

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 16:

Identify each and every means by which denying post-deprivation hearings to “non-essential businesses” has furthered the governmental interest in “preventing our healthcare system from being overwhelmed by the spike in cases that experts predicted would occur,” as indicated at Doc. 4, PageId 69.

ANSWER:

See response to interrogatory number 8.

INTERROGATORY NO. 17:

Identify each and every reason why “the spike in cases” that Defendant predicted would occur, even with mitigation efforts, never took place.

ANSWER:

Objection. The interrogatory is overbroad, requires speculation, and seeks information that is not relevant and not proportionate to the needs of the case as required by Federal Rule of Civil Procedure 26(b).

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 18:

Identify each and every means by which denying post-deprivation hearings to “non-essential businesses” has furthered the governmental interest in “preventing our healthcare system from being overwhelmed by the spike in cases that experts predicted would occur,” as indicated at Doc. 4, PageId 69.

ANSWER:

See response to interrogatory number 8.

INTERROGATORY NO. 19:

Identify each and every reason why Defendant indicated at Doc. 4, PageId 71 that the “orders” would only “remain in effect for another two weeks.”

ANSWER:

The Amended Order stated that it was in effect until 11:59 PM on May 1, 2020.

INTERROGATORY NO. 20:

Identify all evidence in support of your indication at Doc. 4, PageId 71 that “obviously, there would be no way Ohio could offer a hearing to every non-essential business in Ohio (or even a modest percentage of Ohio’s considerable population of business owners)”

ANSWER:

Objection. The interrogatory is overbroad and protected by the work product privilege. Without waiving objection, the Amended Order stated that it was to expire on May 1, 2020.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 21:

Identify any and all data and other evidence you used to estimate the number of Ohio business owners what may seek hearings, would post-deprivation hearings have been, or were they to be, provided.

ANSWER:

Objection. The interrogatory is overbroad, implies the existence of facts or circumstances that do not or did not exist, and is protected by the work product privilege.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 22: Identify any and all evidence in support of your characterization, at Doc. 4, PageID 72, of Plaintiffs' "online services" as "considerable."

ANSWER:

Exhibits B through P attached to the Defendant's Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order.

INTERROGATORY NO. 23: Identify each and every board, commission, or other state agency within the State of Ohio that provides pre-deprivation or post-deprivation administrative hearings.

ANSWER:

Objection: This interrogatory is overbroad and the interrogatory seeks information that is outside the scope of the Ohio Department of Health. The number of other administrative hearings that are provided in Ohio is not relevant to the Plaintiffs claims.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 24:

Identify any and all evidence in support of your indication at Doc. 4, PageID 72 that in (1) the absence of the “non-essential business” ban; or (2) with the provision of post-deprivation hearings, a “large number of Ohioans” would have “become sick over a short period.”

ANSWER:

Objection. Doc.4 does not contain this statement. Without waiving the foregoing objections, see response to interrogatory number 8.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 25:

Identify any and all evidence in support of your indication at Doc. 4, PageID 72 that the illness you referenced is “often fatal.”

ANSWER:

Objection. The interrogatory is overbroad, requires speculation, and seeks information that is not relevant and not proportionate to the needs of the case as required by Federal Rule of Civil Procedure 26(b). Without waiving the foregoing objections, with respect to Ohio, the information comes from the Ohio disease reporting system that is updated daily. With respect to the Global pandemic, there are multiple sources of information that are too numerous to list. Some of the sources of evidence are the Centers for Disease Control and the World Health Organization.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 26:

Identify each and every reason why Defendant has regulated businesses on the basis of their identity, i.e. essentiality predicated on identify, rather than on the basis of safety alone.

ANSWER:

Objections. This interrogatory seeks information, “every reason why”, which is protected by the deliberative process privilege and also implies the existence of facts or circumstances that do not or did not exist. Without waiving the foregoing objections, see the Cybersecurity & Infrastructure Security Agency of the Federal Department of Homeland Security Advisory Memorandum referenced in paragraph 12a. of the Order.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORIES OF PLAINTIFF GILDED SOCIAL, LLC

INTERROGATORY NO. 27:

Identify any and all evidence demonstrating how many additional deaths and/or serious illnesses would have occurred were “non-essential businesses” permitted to operate while adhering to all otherwise applicable social distancing and safety regulations articulated in the Director’s Amended Stay at Home Order.

ANSWER:

Objection. The interrogatory is overbroad and implies the existence of facts or circumstances that do not or did not exist.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 28:

Identify each and every reason why Governor DeWine and/or Director Acton on April 28, 2020 retracted the mandatory face-mask policy that Governor DeWine and/or Director Acton announced on April 27, 2020.

ANSWER:

Objection. This interrogatory seeks information about comments made by the Governor.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 29:

Identify each and every reason why it is safe for Plaintiffs' business to open on May 12, 2020.

ANSWER:

Objection, this interrogatory seeks information, "every reason why", which is protected by the deliberative process privilege. Without waiving the forgoing objection, see the preamble to the Director's Stay Safe Ohio Order.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 30:

Identify each and every reason why it is not safe for Plaintiffs' business to open on May 4, 2020.

ANSWER:

Objection. This interrogatory seeks information, "every reason why", which is protected by the deliberative process privilege. Without waiving the foregoing objection, pursuant to paragraph 12 of the Director's Stay Safe Ohio Order, retail businesses that restrict operations to appointment only with less than 10 people may reopen on May 1, 2020 at 11:59 PM.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 31:

Identify the specific health data benchmarks that the Director is relying upon to determine whether and which businesses should be open or closed and when.

ANSWER:

Objection, this interrogatory seeks information, “every reason why”, which is protected by the deliberative process privilege.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 32:

Identify each and every reason you indicated that you would refuse to offer post-deprivation hearings to cure an injunction against the non-essential business ban, even though you have indicated that an injunction against the ban would be dangerous.

ANSWER:

Objection. The interrogatory calls for speculation, as no injunction was issued. The interrogatory is overbroad and also seeks information, “every reason why”, which is protected by the deliberative process privilege. Without waiving the forgoing objections, the intent of the Order is to ensure that the maximum number of people self-isolate in their places of residence to the maximum extent possible to slow the spread of COVID-19. Social distancing is a known method of reducing the spread of an infectious respiratory disease.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 33:

Identify specific metrics and results that Defendant will use to determine when Ohio is no long in a state of “emergency.”

ANSWER:

Objection. A state of emergency was issued by Governor DeWine. The Defendant cannot answer this interrogatory.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 34:

Identify the number of layoffs attributable to the Director’s “non-essential business” ban, including how you arrived at this number.

ANSWER:

Objection. The interrogatory is overbroad, calls for speculation, and implies the existence of facts or circumstances that do not or did not exist. Without waiving the foregoing objection, the Ohio Department of Health does not have this information and does not know if it exists.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 35:

Identify any and all adverse public and private health consequences arising from the Director’s mitigation efforts including the “non-essential business” ban, such as increased pain, depression, anxiety, suicide, drug abuse, etc.

ANSWER:

Objection. The interrogatory is overbroad, calls for speculation, and implies the existence of facts or circumstances that do not or did not exist. Without waiving the foregoing objection, the Defendant is not aware of a specific study on the effect of the Director’s mitigation efforts.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 36:

Identify each and every circumstance, including any applicable metrics or benchmarks, under which the Defendant will again impose the “non-essential business” ban (subsequent to its presumptive eventual expiration) in the future.

ANSWER:

Objection. This interrogatory seeks information that is protected by the deliberative process privilege. Without waiving the foregoing objection, see the preamble to the Director’s Stay Safe Ohio Order.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 37:

If Defendant would not again impose the “non-essential business” ban in the future, identify each and every reason why Defendant would not do so.

ANSWER:

Objection, this interrogatory seeks information, “every reason why”, which is protected by the deliberative process privilege and is overbroad. Without waiving the foregoing objection, see the preamble to the Director’s Stay Safe Ohio Order.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 38:

Identify each and every “safeguard that is a substitute for procedural protections,” as you use that phrase at Doc. 4, PageID 80, afforded to Plaintiffs by the Defendant’s implementation of the Amended Stay at Home Order in general, and the “non-essential business” ban in particular.

ANSWER:

Objection, this calls for a legal conclusion. Without waiving the foregoing objection, the statement is from a court decision, *Ind. Land Co . LLC v. City of Greenwood*, 78 F.3d 705 (7th Cir. 2004) .

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 39:

Identify each and every reason why you believe that Defendant maintains both “legislative” and “administrative” powers.

ANSWER:

Objection, this calls for a legal conclusion.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 40:

Identify each and every reason why the “modeling” that “Ohio officials saw” and “Ohio’s modeling,” as identified at Doc. 4 ,PageID 78, was ultimately incorrect.

ANSWER:

Objection. The interrogatory is overbroad, vague and calls for speculation. Without waiving the foregoing objection, Models are predictions.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 41:

Identify each and every reason why the determinations of the Dispute Resolution Panel created by the Director's Amended Stay at Home Order are "legislative" rather than "administrative" in nature.

ANSWER:

Objection. The interrogatory is overbroad and calls for a legal conclusion. Without waiving the foregoing objections, the dispute resolution commission made determinations so that the Order would be consistently applied statewide by local health departments.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 42:

Identify whether each business or industry either deemed "essential," or at least not explicitly deemed "non-essential," was or is provides "necessary goods and services," as you used that phrase at Doc. 4, PageID 80.

ANSWER:

Yes.

INTERROGATORY NO. 43:

Identify all criteria Defendant has utilized to determine which goods and services are "necessary," as well as where such criteria are located in writing.

ANSWER:

Objection. This interrogatory is overbroad and seeks information that is protected by the deliberative process privilege. Without waiving the foregoing objection, See the Order and the Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response from the US Department of Homeland Security, Cybersecurity and Infrastructure Security Agency (CISA) which is referenced in the March 22, 2020 Stay at Home Order.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 44:

Identify all State of Ohio “sanitations laws, licensing laws, tax laws, zonings laws, and health laws,” as you use that list at Doc. 4, PageID 84, that may be used to close an Ohio business without either a pre-deprivation or post-deprivation hearing.

ANSWER:

Objection, the interrogatory is overbroad and calls for a legal conclusion. These laws can be found in the Ohio Revised Code and local ordinances.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 45:

Identify each and every reason why denial of a pre or post-deprivation hearing to closed businesses has been “necessary to prevent an explosion of disease that could overhelme the state’s health care system and greatly increase the death toll,” as you use that phrase at Doc. 4, PageID 90.

ANSWER:

Objection. The interrogatory is overbroad and also seeks information, “every reason why”, which is protected by the deliberative process privilege. Without waiving objection, See response to interrogatory number 8.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 46:

Identify each and every reason and all evidence in support of your indications at Doc. 4, PageID 85 that affording post-deprivation hearings “would be physically impossible” and that “Ohio does not have the resources to provide a hearing to every non-essential business in Ohio.”

ANSWER:

Objection. The interrogatory is overbroad and also seeks information, “every reason why”, which is protected by the deliberative process privilege. Without waiving the objection, this was argument of counsel. See the number of businesses registered at the Ohio Secretary of State <https://businesssearch.ohiosos.gov/>. The Amended Order was set to expire on May 1, 2020.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 47:

Identify each and every reason, if any, why Plaintiffs should believe that Defendant will *not* again close their business due to a pandemic in the future, whether later this year in response to Covid-19, or further into the future in response to another pandemic.

ANSWER:

Objection. The interrogatory is overbroad, vague and calls for speculation. Defendant cannot speak to what Plaintiffs “should believe.”

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

INTERROGATORY NO. 48:

Identify whether the death tolls you predict in Doc. 4 refer to deaths proximately caused by Covid-19 or instead refer to deaths of those who exhibited symptoms or tested positive for Covid-19.

ANSWER:

Objection. The interrogatory is vague, ambiguous, and does not state with reasonable particularity the information sought. Without waiving the foregoing objection, the cumulative number of COVID-19 deaths is posted on coronavirus.ohio.gov.

As to objections,

/s/ William C. Greene
WILLIAM C. GREENE (0059230)

Respectfully submitted,

DAVE YOST (0056290)
Ohio Attorney General

/s/ William C. Greene

KATHERINE J. BOCKBRADER (0066472)

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Counsel for Defendant Director Amy Acton

CERTIFICATE OF SERVICE

This certifies that the foregoing Responses to Plaintiffs' First Set of Interrogatories to Defendant was served via email on May 20, 2020 upon the following counsel of record.

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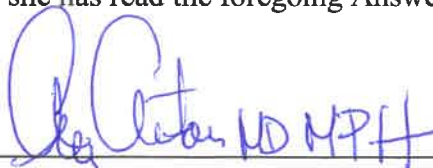
/s/ Katherine Bockbrader

Assistant Attorney General

VERIFICATION

STATE OF OHIO)
COUNTY OF FRANKLIN),SS:

AMY ACTON, being first duly sworn, say that she has read the foregoing Answers to Plaintiffs' Interrogatories and they are true as she believes.



Amy Acton, MD MPH
Director of Health

Sworn to and subscribed in my presence this 20th day of May, 2020.



LANCE DAVID HIMES
Attorney at Law
Notary Public, State of Ohio
My Commission Has No Expiration
Section 147.03 R.C.



Notary Public

Responsible RestartOhio

Local and Public Pools and Aquatic Centers



Aquatic Facilities Operators

Mandatory

General Operations

- Review and consult the [CDC guidance](#) for aquatic venues

Communicate clearly:

- Post information throughout the pool and surrounding areas to frequently remind swimmers and visitors to take steps to prevent the spread of COVID-19. These messages should include information about:
 - Staying home if you are sick or do not feel well.
 - Using social distancing and maintaining at least six feet or more between individuals in all areas of the pool and deck whenever possible.
 - No gathering in groups of different households
 - Swimmers should not stand, sit, or otherwise block walkways or any identified narrow passage area.
 - Encourage face covering when entering buildings or interacting in close proximity to other swimmers, practice good personal hygiene including washing hands often with soap and water for at least 20 seconds, using hand sanitizer, refraining from touching eyes, nose, and mouth with unwashed hands, coughing and sneezing into an elbow, etc.

Maintain public restrooms and shower facilities to lower risk of spread of virus.

- Disable, or mark every other or every third locker for non-use to enforce six-foot social distancing requirement. Facilities where lockers are assigned to members are not required to disable lockers but must enforce social distancing requirement.
- Remove any casual seating other than benches by lockers as necessary.
- Ensure there are functional toilets and restroom facilities.
- Clean and disinfect public areas and restrooms every two hours using EPA-registered disinfectants, particularly on high-touch surfaces such as faucets, toilets, doorknobs and light switches.
- Make sure supplies for handwashing, including soap and materials for drying hands are fully stocked every time the bathroom is cleaned.
- If towels are provided, they are to be stored in covered, sanitized containers that are clearly delineated clean versus soiled. Appropriate temperatures are to be used when washing and drying towels to ensure sanitation (hot water for washing, ensure they are completely dried). Employees handling towels must wear gloves and face covering.
- Restroom and shower facilities should limit the number of users at any one time based on the facility size current social distancing guidelines. These facilities should be cleaned/sanitized per CDC recommended protocol along with established restroom cleaning schedules.

Recommended Best Practices

General Operations

- Consult with the company or engineer that designed your pool or aquatic venue to decide which [disinfectants, approved, by the U.S. Environmental Protection Agency are best for your site.](#)
- Increase the frequency of air filter replacement and HVAC cleaning for indoor pools and aquatic centers.

Communicate clearly:

- Develop regular communication with customers through a variety of channels (text, emails, social posts, flyers, etc.) to clearly communicate the steps your beach, pool and aquatic center is taking to protect users and stop the spread of COVID-19.
- Develop and update website, send emails to users with additional preventative steps the facility is taking, as well as communicate any changes users should expect to experience.

Maintain public restrooms and shower facilities to lower risk of spread of virus.

- Post a cleaning schedule at each location
- Install touch-free entry points at restrooms and other facilities.
- Install touchless sensors on faucets, paper towel, and soap dispensers wherever possible.
- Install and stock toilet seat cover dispensers.

Aquatic Facilities Operators *cont.*

Mandatory

Closures, modifications and limitations:

- Install physical barriers (for example, lane lines in the water or chairs and tables on the deck) and visual cues (for example, tape on the decks, floors, or sidewalks) and signs to ensure that staff, patrons, and swimmers stay at least six feet apart from those they don't live with, both in and out of the water.
- Discourage or prohibit shared objects including goggles, nose clips, and snorkels.
- In accordance with current orders, close any non-essential areas where people could potentially congregate.
- Any food service must be run in accordance with current orders and guidelines for such establishments, found in Responsible Restart Ohio for Restaurants and Bars.
- Develop and implement a reduced maximum capacity to allow 6-feet of distance between users. The formula for capacity should consider the available deck area as well as the pool surface area, as often one is greater than the other. If water surface area is smaller than deck area, an additional limit of swimmers/pool occupants should be implemented to ensure proper social distancing.
- Develop revised deck layouts in the standing and seating areas so individuals can remain at least 6 feet apart from others.

Follow all appropriate guidance for customer interaction, retail sales, and equipment rentals.

- Install barriers and protective shields where needed to safely distance staff and customers.
- Post a revised occupancy number in retail or rental areas in accordance with any current order to minimize crowding where necessary.
- Mark floors inside buildings for six feet standing areas or one-way traffic.
- Clean and disinfect high-use areas like door handles, keypads, counter tops, etc. after each use or at a minimum of every two hours.
- Disinfect all rental equipment after each use, using EPA-registered disinfectants.
- Arrange any seating areas, tables, chairs, etc. (indoors and out) at safe distances from each other. If safe distances are not achievable, or regular sanitizing of these areas is not possible, barricade or remove seating areas.
- Review and follow all guidance for retail operations as provided in Responsible Restart Ohio for Retail Services.

Maintaining Distance in outdoor spaces

- In areas of concern, mark six-foot spaces on pool deck to help users visualize safe distancing.
- In areas with a lot of cross traffic, direct pedestrian traffic to enter/exit these locations in specific ways or indicate one-way traffic wherever possible.

Employees and contractors:

- Maintain at least six feet physical distance from other employees.
- Businesses must require all employees to wear facial coverings, except for one of the following reasons:
 - Facial coverings in the work setting are prohibited by law or regulation.
 - Facial coverings are in violation of documented industry standards.
 - Facial coverings are not advisable for health reasons.
 - Facial coverings are in violation of the business' documented safety policies.
 - Facial coverings are not required when the employee volunteer works alone in an assigned work area.
 - There is a functional (practical) reason for an employee/volunteer not to wear a facial covering in the workplace.

Recommended Best Practices

Closures, modifications and limitations:

- Facilities may determine if masks are required to enter common spaces.
- Implement a reservation system or a time limit for visitors and swimmers to accommodate the reduction in pool capacity.
- Ensure adequate equipment for patrons and swimmers, such as kick boards and pool noodles, to minimize sharing to the extent possible, or limiting use of equipment by one group of users at a time and cleaning and disinfecting between use.

Follow all appropriate guidance for customer interaction, retail sales, and equipment rentals.

- Regularly provide customers with up-to-date information about COVID-19 and related business procedures and policies. Communicate the importance of practicing preventive actions.
- Where available, use online solutions for reservations, waivers, or payment.
- Install touch-free entry points to buildings where possible.
- Create self-sanitizing stations by making hand sanitizer, soap, and water, or effective disinfectant available to the public at or near the entrance of facilities and at any locations where people have direct interactions and near high-touch surfaces.

Employees and contractors:

- Encourage 3rd-party delivery staff to wait outside or in non-congested areas practicing social distancing guidelines. Encourage 3rd-party delivery staff to wear face coverings.
- Educate on proper use, disposal, and maintenance of face coverings. Enhance education on proper use of gloves, per code.
- Health checks may include temperature assessments, questionnaires, employee self-checks, screening apps or other tools. Update files with log of "health checks".
- Conduct telephone symptom assessment for employees who were ill and planning to return to work.
- As employee rehiring begins, consider virtual interviewing and on-boarding when possible.

Mandatory

Aquatic Facilities Operators cont.

(Businesses must provide written justification to local health officials, upon request, explaining why an employee is not required to wear a facial covering in the workplace. At minimum, facial coverings (masks) should be cloth/fabric and cover an individual's nose, mouth, and chin.)

- Be as flexible as possible with staff attendance and sick-leave policies. Remind staff to stay at home if they are sick. Isolate and send home anyone who exhibits fever, cough, or shortness of breath.
- Employees must perform daily symptom assessment, including assessing for symptoms,* taking their temperatures, and monitoring for fevers.
- Require employees to stay at home if symptomatic and perform daily symptom assessment requirements before returning to work.
- Company vehicles, equipment, break rooms, bathrooms, and other common areas must be cleaned and disinfected after every use.
- Implement staggered employee entry, working in assigned teams, varied arrival and departure, and staggered breaks to avoid interaction or grouping among staff.
- Require regular handwashing.
- Businesses that offer sports activities and sports leagues must follow General Non-Contact Sports Guidance.

Recommended Best Practices

- Reinforce education per current food safety code about when to wash hands. Post health department handwashing posters at sinks and stations. Set times for periodic handwashing.
- Avoid switching tasks when possible to reduce cross contamination concerns. Increase handwashing if changing tasks is necessary.
- Appoint an employee safety team or point of contact to identify safety concerns; suggest additional safety or sanitizing measures; and make ongoing improvements to your safety plan. Make sure all employees know who is on this team and how to contact them. This team can be responsible for training, developing, and distributing information regarding updated protocols, answering questions, and displaying information.
- Regularly provide staff with up-to-date information about COVID-19 and related business procedures and policies. Communicate the importance of practicing preventive actions.

Pool Users

- Stay home if you are sick or do not feel well.
- Use social distancing and maintain at least six feet between individuals in all areas of the pool or aquatic center.
- Do not swim or gather in groups of more than 10.

- Wear a mask or face covering when on the pool deck, entering buildings, or interacting near other pool guests. Masks should be removed prior to swimming as wet masks can cause difficulty breathing.
- Practice good personal hygiene including washing hands often with soap and water for at least 20 seconds, using hand sanitizer, refraining from touching eyes, nose, and mouth with unwashed hands, coughing and sneezing into an elbow, etc.
- Bring trash bags, food, and supplies. Plan to carry in and carry out trash and other items.

Confirmed Cases

- Immediately isolate and seek medical care for any individual who develops symptoms while at work.
- Contact the local health district about suspected cases or exposures.
- Shutdown area for deep sanitation if possible.

- Work with local health department to identify potentially infected or exposed individuals to help facilitate effective contact tracing/ notifications.
- Once testing is readily available, test all suspected infections or exposures.
- Following testing, contact local health department to initiate appropriate care and tracing.

*Per the CDC, symptoms include cough, shortness of breath or difficulty breathing, fever, chills, muscle pain, sore throat, and new loss of taste or smell.

Responsible RestartOhio

Canoe Liveries and Recreational Paddling



Livery Operators

Mandatory

Post information in areas around the livery reminding paddlers to take steps to prevent the spread of COVID-19. These messages should include information about:

- Staying home if you are sick or do not feel well.
- Using social distancing and maintaining at least six feet between those who are not part of their household.
- Not gathering in groups of more than 10.
- Wearing a mask or face covering when entering buildings or interacting in close proximity to other paddlers, practicing good personal hygiene including washing hands often with soap and water for at least 20 seconds, using hand sanitizer, refraining from touching eyes, nose, and mouth with unwashed hands, coughing and sneezing into an elbow, etc.

Maintain public restrooms to lower risk of spread of virus.

- Ensure there are functional toilets.
- Clean and disinfect public areas and restrooms at least three times a day using EPA-registered disinfectants, particularly on high-touch surfaces such as faucets, toilets, doorknobs, and light switches.
- Make sure supplies for handwashing, including soap and materials for drying hands, are fully stocked every time the bathroom is cleaned.
- Provide hand sanitizer where water is not available.

Closures, modifications and limitations:

- In accordance with current orders, close any non-essential buildings, amenities, and areas where people could potentially congregate, such as pavilions.

Follow all appropriate guidance for customer interaction, retail sales, and equipment rentals.

- Install barriers and protective shields where needed to safely distance staff and customers.
- Post a revised occupancy number in retail or rental areas in accordance with any current order to minimize crowding where necessary.
- Mark six feet spacers at registration areas and on docks and ramps to help customers practice safe distancing.
- In areas with a lot of cross traffic, direct pedestrian traffic to enter/exit these locations in specific ways or indicate one-way traffic wherever possible.
- Launching and landing of vessels should occur one at a time with adequate social distancing maintained between individuals.
- Clean and disinfect high-use areas like door handles, keypads, counter tops, etc. multiple times a day, as often as possible.

Recommended Best Practices

Maintain public restrooms to lower risk of spread of virus.

- Post a cleaning schedule at each location.
- Install touch-free entry points at restrooms and other facilities.

Closures, modifications and limitations:

- Facilities may determine if masks are required to enter common spaces or may be made available to guests entering common spaces based on the facility.

Follow all appropriate guidance for customer interaction, retail sales, and equipment rentals.

- Regularly provide customers with up-to-date information about COVID-19 and related business procedures and policies. Communicate the importance of practicing preventive actions.
- Where available, use online solutions for reservations, waivers, or payment.
- Paddler registration/check in should be completed outside where feasible.
- Install touch-free entry points to stores, check-ins, or buildings where possible.
- Create self-sanitizing stations by making hand sanitizer, soap and water, or effective disinfectant available to the public at or near the entrance of facilities, at any locations where people have direct interactions, and near high-touch surfaces.

Livery Operators cont.

Mandatory

- Disinfect all rental equipment after each use using EPA-registered disinfectants.
- Arrange any seating areas, tables, chairs, etc. (indoors and out) at safe distances from each other. If safe distances are not achievable, or regular sanitizing of these areas is not possible, barricade or remove seating areas.
- Require staff working at registration to wear gloves.
- Businesses must require all employees to wear facial coverings, except for one of the following reasons:
 - Facial coverings in the work setting are prohibited by law or regulation
 - Facial coverings are in violation of documented industry standards
 - Facial coverings are not advisable for health reasons
 - Facial coverings are in violation of the business' documented safety policies
 - Facial coverings are not required when the employee volunteer works alone in an assigned work area
 - There is a functional (practical) reason for an employee/volunteer not to wear a facial covering in the workplace.

(Businesses must provide written justification to local health officials, upon request, explaining why an employee is not required to wear a facial covering in the workplace. At minimum, facial coverings (masks) should be cloth/fabric and cover an individual's nose, mouth, and chin.)

Be as flexible as possible with staff attendance and sick-leave policies. Remind staff to stay at home if they are sick. Isolate and send home anyone who exhibits fever, cough, or shortness of breath.

- Employees must perform a daily symptom assessment, including assessing for symptoms*, taking their temperatures with a thermometer, and monitoring for a fever.
- Require employees to stay at home if symptomatic and to perform daily symptom assessments before returning to work.
- Employers should provide proper PPE including masks to staff and define proper use when interacting with customers, as well as the expectation to keep these items clean. Allow ample opportunities for employees to wash and sanitize their hands.
- Company vehicles, golf carts, keys, tools, break rooms, bathrooms, and other common areas must be cleaned and disinfected after every use.
- Implement staggered employee entry, working in assigned teams, varied arrival and departure, and staggered breaks to avoid interaction or grouping among staff.

Livery buses and vans should be operated at partial capacity with passengers as follows:

- Buses should operate at approximately 50% capacity with an empty row of seats between passengers.
- Buses should be loaded row-by-row, back to front when embarking and front to back when disembarking. This will eliminate the need for individuals to walk past other seated individuals when going up and down the aisle.
- Bus drivers should wear masks when transporting passengers.
- Bus seats should be wiped down with an appropriate disinfecting agent between trips.
- Vans should also operate at 50% capacity (4-5 persons maximum) and the guidelines for buses should be applied to the greatest extent possible.

Recommended Best Practices

- Promote kayak rentals. Kayaks foster better social distancing simply because only one person can be in the boat at a time. Kayak paddles are a minimum of six feet in length so they can be used to gauge distance between individuals.

Be as flexible as possible with staff attendance and sick-leave policies. Remind staff to stay at home if they are sick. Isolate and send home anyone who exhibits fever, cough, or shortness of breath.

- Encourage third-party delivery staff to wait outside or in non-congested areas practicing social distancing guidelines. Encourage third-party delivery staff to wear face coverings.
- Educate on proper use, disposal, and maintenance of face coverings.
- Health checks may include temperature assessments, questionnaires, employee self-checks, screening apps, or other tools.
- As employee rehiring begins, consider virtual interviewing and on-boarding when possible.
- Reinforce education per current food safety code about when to wash hands. Post health department handwashing posters at sinks and stations. Set times for periodic handwashing.
- Avoid switching tasks when possible to reduce cross contamination concerns. Increase handwashing if changing tasks is necessary.
- Regularly provide staff with up-to-date information about COVID-19 and related business procedures and policies. Communicate the importance of practicing preventive actions.

Livery buses and vans should be operated at partial capacity with passengers as follows:

- Only family members or individuals who reside in the same household should share seats or be seated next to one another.
- Passengers should wear masks when being transported on buses.
- Hand sanitizer or disinfecting wipes should be available to passengers when disembarking. Bus windows should be left open during operation.

*Per the CDC, symptoms include cough, shortness of breath or difficulty breathing, fever, chills, muscle pain, sore throat, and new loss of taste or smell.

Livery Operators *cont.*

Mandatory

Paddling equipment should be disinfected between trips.

- Paddles should be submersed in disinfecting solution for approximately 20 minutes then allowed to dry on a rack in the sun.
- Personal flotation devices should be treated with disinfecting agent or submersed in a disinfecting solution and hung to dry in the sun.
- Watercraft should be sprayed with disinfectant and wiped down between trips.
- Special attention should be given to the combing or lip around the seat area and other high contact areas on the vessel that people typically grasp while entering and exiting the boat.
- Boats should be placed in direct sunlight after disinfecting.
- Livery operators should not transport private boats as they may not be properly disinfected and thus should not be mixed with treated livery boats.

Pets

- Pets should be prohibited because they tend to increase socialization between people and make social distancing difficult.

Paddlers

- Limit groups to 10 individuals or less.

Confirmed Cases

- Immediately isolate and seek medical care for any individual who develops symptoms.
- Contact the local health district about suspected cases or exposure.
- Shut down affected areas for deep sanitation, if possible.

Recommended Best Practices

Paddling equipment should be disinfected between trips.

- Large containers with water and disinfecting agents can be placed at launch and take out points to speed the process.

Pets

- Launch and land kayaks and canoes one at a time, maintaining good social distancing with those outside of your household at all times.
- Share canoes only with members of your household, otherwise use a kayak. Maintain appropriate social distancing between other boats while on the water.
- Paddlers should wear a face covering while waiting in line and hand sanitizer should be available at the check-in point.
- Travel to and from paddling destinations and shuttle from put-in to take-out points should be done in separate vehicles or limited to only household members.
- Do not share equipment, personal flotation devices, paddles, food, or drinks with others outside of your household. Disinfect equipment at the end of each trip.
- Maintain six feet social distance from those outside of your household at all times. Most kayak paddles are 6 feet or more in length and can be used as a good gauge of distance.
- Maintain good hygiene at all times by washing hands with soap and water frequently. Use hand sanitizer when soap and water are not available.

- Work with local health department to identify potentially infected or exposed individuals to help facilitate effective contact tracing/notifications.
- Once testing is readily available, test all suspected infections or exposures.
- Following testing, contact local health department to initiate appropriate care and tracing.
- Collect guest contact information as appropriate that can be shared with the health department for contact tracing purposes.



Responsible RestartOhio

Restaurants, Bars, and Banquet & Catering Facilities/Services



Mandatory

Employees

- **Ensure minimum of six feet between employees, if not possible, utilize barriers if applicable and increase the frequency of surface cleaning, handwashing, sanitizing and monitor compliance.**
- Businesses must allow all customers, patrons, visitors, contractors, vendors and similar individuals to use facial coverings, except for specifically documented legal, life, health or safety considerations and limited documented security considerations
- Businesses must require all employees to wear facial coverings, except for one of the following reasons:
 - Facial coverings in the work setting are prohibited by law or regulation
 - Facial coverings are in violation of documented industry standards
 - Facial coverings are not advisable for health reasons
 - Facial coverings are in violation of the business's documented safety policies
 - Facial coverings are not required when the employee works alone in an assigned work area
 - There is a functional (practical) reason for an employee not to wear a facial covering in the workplace

(Businesses must provide written justification to local health officials, upon request, explaining why an employee is not required to wear a facial covering in the workplace. At minimum, facial coverings (masks) should be cloth/fabric and cover an individual's nose, mouth, and chin.)

- Employees must perform daily symptom assessment*
- Require employees to stay at home if symptomatic and perform daily symptom assessment requirements before returning to work
- Provide ServSafe, or other approved COVID-19 education, as soon as possible. Add COVID-19 symptoms to the current standard Health Agreement required by the food safety code
- Require regular handwashing by employees
- Comply with person in charge certification requirements and manager certification requirements as set forth in OAC 3701-21-25 and OAC 3717-1-02.4 as applicable
- Maintain compliance with ODH sanitation and food safety regulations
- Limit number of employees allowed in break rooms at the same time and practice social distancing. Maximum to be current group size per state guidelines (currently 10)
- Banquet and catering facilities/services must not serve more than 300 guests at one time

Recommended Best Practices

- Encourage 3rd-party delivery staff to wait outside or in non-congested areas practicing social distancing guidelines. Encourage 3rd-party delivery staff to wear face coverings
- Educate on proper use, disposal, and maintenance of face coverings. Enhance education on proper use of gloves, per code
- Health checks may include temperature assessments, questionnaires, employee self-checks, screening apps or other tools. Update files with log of "health checks"
- Conduct telephone symptom assessment* for employees who were ill and planning to return to work
- As employee rehiring begins, consider virtual interviewing and on-boarding when possible
- Reinforce education per current food safety code about when to wash hands. Post health department handwashing posters at sinks and stations. Set times for periodic handwashing
- Avoid switching tasks when possible to reduce cross contamination concerns. Increase handwashing if changing tasks is necessary

*Per the CDC, symptoms include cough, shortness of breath or difficulty breathing, fever, chills, muscle pain, sore throat, and new loss of taste or smell.

Mandatory

Customers & Guests

- **Ensure a minimum of six feet between parties waiting and when dining - if not possible, utilize barriers or other protective devices**
- Post a list of COVID-19 symptoms in a conspicuous place
- Ask customers and guests not to enter if symptomatic
- Provide access to hand washing methods while in the food service establishment, and if possible, place approved hand washing/sanitizing products in high-contact areas
- Food service establishments offering dine-in service must take affirmative steps with customers to achieve safe social distancing guidelines

Physical Spaces

- Establish and post maximum dining area capacity using updated COVID-19 compliant floor plans. With maximum party size per state guidelines (currently 10)
- Post a kitchen floor plan, establishing safe social distancing guidelines and following established state health dept guidance for masks and gloves
- Daily cleaning for the entire establishment. Clean and sanitize tabletops, chairs, and menus between seatings. Clean all high touch areas every two hours, and more frequently as needed (e.g. door handles; light switches; phones, pens, touch screens)
- Provide approved hand washing/sanitizing products in common areas
- When appropriate, establish ordering areas and waiting areas with clearly marked safe distancing and separations per individual/social group for both restaurant and bar service
- Remove self-service, table, and common area items (e.g. table tents, vases, lemons, straws, stir sticks, condiments)
- Salad bars and buffets are permitted if served by staff with safe six feet social distancing between parties
- Self-service buffets and product samples are prohibited, but self-service beverage is permitted.
- Private dining and bar seating areas within a foodservice establishment must follow all approved safe social distancing guidelines
- The open congregate areas in restaurants, bars, and banquet and catering facilities that are not necessary for the preparation and service of food or beverages (billiards, card playing, pinball games, video games, arcade games, dancing, entertainment) shall remain closed

Confirmed Cases

- Immediately isolate and seek medical care for any individual who develops symptoms while at work
- Contact the local health district about suspected cases or exposures
- Shutdown area for deep sanitation if possible

Recommended Best Practices

- Face coverings are recommended at all times, except when eating
- Health questions for symptoms** posted at the entrance
- If possible, identify a dedicated entrance door and exit door. When possible, enable dining room ventilation (e.g. open doors and windows)
- When possible, encourage customers to make dine-in reservations or use drive through, pick-up, call-in, curbside or delivery options
- Encourage at-risk population to utilize alternative options such as using the drive through, pick-up, call-in, curbside, or delivery options

- Utilize barriers in high volume areas
- If possible, stagger workstations so employees avoid standing directly opposite or next to each other. If not possible, increase the frequency of surface cleaning, handwashing, sanitizing, and monitor compliance
- Limit entrance and exit options when possible while still maintaining code regulations
- Enhance weekly deep cleaning checklists. Consider posting communication to indicate table has been cleaned. Utilize disposable menus when possible
- Post health department "best practices" highlighting continuous cleaning and sanitizing of all food equipment and common surfaces
- Continue to emphasize employee education and compliance with hand washing, glove use, employee health, and food handler training
- Consider air filtration improvements within HVAC system
- Encourage and continue to use designated curbside pickup zones for customers

- Work with local health department to identify potentially infected or exposed individuals to help facilitate effective contact tracing/ notifications
- Once testing is readily available, test all suspected infections or exposures
- Following testing, contact local health department to initiate appropriate care and tracing

**Per the CDC, symptoms include cough, shortness of breath or difficulty breathing, fever, chills, muscle pain, sore throat, and new loss of taste or smell.

Responsible RestartOhio

**Hair Salons, Day Spas, Nail Salons, Barbershops
 Tanning Facilities, Tattoo Services and
 Body Piercings**



Mandatory

Employees

- **Ensure minimum of 6 feet between employees, if not possible, install barriers**
 - Social distancing will apply with exception that the distance between the client and employee may be less than six feet
- Businesses must allow all customers, patrons, visitors, contractors, vendors and similar individuals to use facial coverings, except for specifically documented legal, life, health or safety considerations and limited documented security considerations.
- Businesses must require all employees to wear facial coverings, except for one of the following reasons:
 - Facial coverings in the work setting are prohibited by law or regulation
 - Facial coverings are in violation of documented industry standards
 - Facial coverings are not advisable for health reasons
 - Facial coverings are in violation of the business' documented safety policies
 - Facial coverings are not required when the employee works alone in an assigned work area
 - There is a functional (practical) reason for an employee not to wear a facial covering in the workplace.

(Businesses must provide written justification to local health officials, upon request, explaining why an employee is not required to wear a facial covering in the workplace. At minimum, facial coverings (masks) should be cloth/fabric and cover an individual's nose, mouth, and chin.)
- Employees must perform daily symptom assessment*
- Require employees to stay home if symptomatic
- Require regular handwashing by employees
- Place hand sanitizers in high-contact locations
- Clean high-touch items after each use (e.g. carts, baskets)
- Wear gloves and dispose of gloves in between tasks in accordance with Centers for Disease Control and Prevention (CDC) glove removal guidance; if gloves cannot be worn, wash hands in between tasks in accordance with CDC handwashing guidance
- Dispose of single-use materials between clients
- Maintain accurate appointment and walk-in records including date and time of service, name of client, and contact information to assist in contact tracing
- Both oral and nose piercings are prohibited at this juncture given the risk of respiratory droplet transmission
- Continue to follow all guidelines in existing ORC and OAC for individual profession
 - OAC 4713
 - Please re-review OAC 4713-15-01, 02, 03, 13, & 15
 - These sections provide pointed rules on cleaning, disinfecting, and sanitation
 - RC 4709 and RC 4713
 - These Ohio Revised Code sections are the governing laws for Cosmetologists and Barbers, and set the overarching standards for requirements of sanitation and cleanliness in a licensee's business
 - RC 3730
 - OAC 3701-9
 - These laws and rules govern tattoo and body piercings and include sterilization and disinfection procedures.
 - Additionally, the "Laws & Rules" tab on the Cosmetology and Barber Board's website provides links and information pertaining to the rules and regulations of the industry
 - www.cos.ohio.gov

Recommended Best Practices

- Group employees by shift to reduce exposure
- Wear eye protection when providing services in close proximity to client, when possible
- Launder work clothing daily and shower immediately upon returning home from the establishment

*Per the CDC, symptoms include cough, shortness of breath or difficulty breathing, fever, chills, muscle pain, sore throat, and new loss of taste or smell.

Mandatory

Customers & Guests

- **Ensure minimum 6 feet between customers**
 - Social distancing will apply with exception that the distance between the client and employee may be less than six feet
- Specify hours for at-risk populations (e.g. elderly)
- Place hand sanitizers in high-contact locations
- Ask customers and guests not to enter if symptomatic
- Stagger entry of customers and guests
- Only clients will be allowed in the establishment for their service; unless client must be accompanied by a caregiver

Physical Spaces

- **Ensure minimum of 6 feet between people, if not possible, install barriers**
 - Social distancing will apply with exception that the distance between the client and employee may be less than six feet
- Post social distancing signage and disinfect high-contact surfaces hourly
- Clean merchandise before stocking if possible
- Establish maximum capacity
- Discontinue all self-service refreshments
- Discontinue client use of product testers; switch to employee-only product handling
- Clean chairs and equipment before and after each use
- Discard magazines and other non-essential items in the waiting area that cannot be disinfected
- Self-service buffets and product samples are prohibited, but self-service beverage is permitted.

Confirmed Cases

- Immediately isolate and seek medical care for any individual who develops symptoms while at work
- Contact the local health department about suspected cases or exposures
- Shutdown area for deep sanitation if possible

Recommended Best Practices

- Consider having customers wear face coverings at all times.
- Health questionnaire for symptoms at entry point
- Provide face coverings upon entry
- Where possible, accept customers by appointment only
- Increase availability for curbside pickup
- Consider suspending return policies
- Schedule appointments with adequate time in between appointments to reduce the number of clients in the establishment
- Ask clients to wait outside in their vehicle or, if not possible, at the entrance of the business with at least six feet between clients until their scheduled appointment

- Close once a week for deep cleaning
- Maximize available checkout space to promote social distancing (e.g., space customer lines with floor markers, use alternate registers)
- Use contact-less payments where possible
- Increase capacity for delivery and curbside pickup
- Post visible and appropriate signage to communicate to the client that thorough sanitation procedures are in place, and that service will not be provided to clients exhibiting symptoms of COVID-19. Signage to be created, in consultation with the Ohio Department of Health, and distributed to licensees by the Cosmetology and Barber Board

- Work with local health department to identify potentially infected or exposed individuals to help facilitate effective contact tracing/ notifications
- Once testing is readily available, test all suspected infections or exposures
- Following testing, contact local health department to initiate appropriate care and tracing

AFFIDAVIT OF GENERAL MANAGER BRIAN SHANLE

STATE OF OHIO:

COUNTY OF ERIE:

I, Brian Shanle, declare the following:

1. I have personal knowledge of the factual matters alleged in Plaintiffs' Complaint in this case and the matters below because I am the general manager of the Sandusky, Ohio Kalahari Resorts & Conventions (the "Resort").
2. I have reviewed Plaintiffs' Complaint in this case, and all factual allegations contained in the Complaint regarding the capacity of the Resort to operate safely are true and accurate.
3. The Resort has, among other amenities, 890 hotel rooms, approximately 250,000 square feet of indoor and outdoor water parks, a 215,000 square foot convention center, a "family entertainment center" featuring arcade, redemption and other games and numerous restaurants, bars and retail stores.
4. Kalahari's hotel business can, generally, be broken down into types of guests – leisure and group.
5. Leisure guests consist mainly of families on vacation and group business consists mainly of people attending conventions.
6. In general, Kalahari's leisure business pays higher rates than its group business.
7. The COVID pandemic has hit our group business particularly hard, with cancelations and delays.
8. This increases the importance of Kalahari's leisure business.
9. Kalahari's leisure business is seasonal, with the busiest times being when children are out of school. In particular, the months of June, July and August are very good months for Kalahari.
10. These months are even more important because Kalahari is not sure how its group business will be in the fall.
11. Every time the shutdown is extended, Kalahari is forced to refund deposits to people who have made reservations to stay at the Resort.
12. As a result, every day that passes causes harm to Kalahari.
13. At its busiest, our Resort holds in excess of 5,000 guests onsite. As a result, when it is busy (particularly in the summer), Kalahari's guests have an impact beyond that to Kalahari's owners.

EXHIBIT

6

tabbles

14. Others significantly damages by Kalahari's closing include the following:
 - a. Kalahari's employees. When closed, Kalahari employed over 1,100 local residents. The vast majority of those have been furloughed and are not being paid at this time.
 - b. Surrounding businesses, such as restaurants and retail stores. Many of these businesses benefit from the tourists that come to the Kalahari but spend money in the community.
 - c. Kalahari's vendors / suppliers (and their employees), which have been impacted by Kalahari being closed.
 - d. Erie County, which collects certain "bed" taxes from Kalahari. As the largest hotel in Erie County, Kalahari believes that it is a substantial portion of these taxes collected by Erie County.
 - e. Huron Township, which collects taxes from Kalahari and certain of its employees.
 - f. Surrounding cities and townships, which similarly collect taxes from Kalahari's employees.
 - g. The citizens of these cities and townships, whose budgets depend on this revenue to fund basic services provided to these citizens.
15. Although hotels are allowed to be open, the Resort cannot reopen and be profitable if it cannot operate its waterparks, convention center and other amenities.
16. The Ohio Department of Health has issued safety regulations governing "local and public pools and aquatic centers," which has allowed these facilities to reopen. Kalahari's pools are materially identical to those permitted to open, and Kalahari is ready, willing and able to operate its waterparks under these regulations.
17. Similarly, even though gatherings of up to 300 people are allowed to occur in the state for weddings and funerals and for banquets and catering facilities/services, our convention center cannot host meetings of this size without food being served.
18. Kalahari has worked with the Erie County Health Department with respect to its reopening plan (the "Reopening Plan"), including making requested changes to earlier drafts of the Reopening Plan. The current draft of the Reopening Plan, which is over 180 pages, was submitted to the Erie County Health Department on June 1, 2020. I have attached a short summary of that plan to this affidavit.
19. In response, Craig Ward, RS, the Director of Environmental Health at the Erie County Health Department stated the following in a June 3 email: "I think your plan looks good." However, while the Erie County Health Department is required to enforce the Director's Order, it is not allowed to relax it so as to permit Kalahari to open.
20. Kalahari is ready, able and willing to operate the Resort in compliance with its own Reopening Plan and all generally applicable safety regulations in the May 29, 2020 Director's Order.

21. Unlike many retail establishments and other workplaces permitted to open, Plaintiff carefully controls access to their waterparks, as paid admissions (which are included with a hotel stay) are required.
22. Unlike many retail establishments and other workplaces permitted to open, the Resort maintains exceptionally large spaces capable of effectuating social distancing.
23. Based on my experience and expertise, there is no factor inherent in the operation of the Resort that provides a unique threat of spreading any particular pandemic above and beyond factors inherent in the operation of any other permitted business.
24. To the contrary, I believe that the waterparks in the Resort are safer than many businesses already operating in the State of Ohio because the CDC has stated that:

“There is no evidence that COVID-19 can spread to people through the water used in pools, hot tubs, or water playgrounds. Proper operation and disinfection of pools, hot tubs, and water playgrounds should kill the virus that causes COVID-19.”

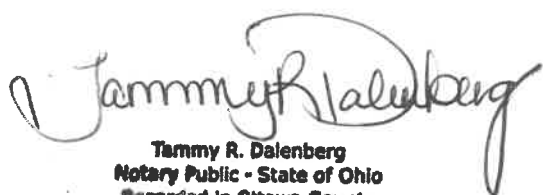
25. Finally, all three Kalahari Resorts & Conventions are owned by a single family. As a result, I am in frequent contact with the General Manager of the Kalahari Resorts & Conventions located in Wisconsin. As a result, I have personal knowledge that the Kalahari Resorts & Conventions located in Wisconsin was reopened safely on May 27, 2020 and has operated safely since then.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12 day of June, 2020.

/s/ 
Mr. Brian Shanle

Notary:



Tammy R. Dalenberg
Notary Public - State of Ohio
Recorded in Ottawa County
My Commission Expires May 29th, 2024

6-4-20

Key Components of Kalahari Sandusky's Reopening Plans

1.) Employees

- a. All employees must stay home if they are feeling ill
- b. Mandatory temperature checks and frequent hand washing
- c. Shared equipment will be sanitized frequently
- d. With limited exceptions consistent with all legal and CDC guidance, mandatory face coverings
- e. Mandatory social distancing
- f. Mandatory health and safety training

2.) General

- a. Floor stickers placed six-foot intervals in key areas
- b. Reduced use of check in stations to provide for distancing
- c. Enhanced cleaning, including logs to ensure compliance
- d. Signage with hygiene reminders throughout the resort
- e. Use of plexiglass shields where appropriate
- f. High touch-point areas such as credit card machines will be sanitized after each use
- g. Increased hand sanitizer stations and sanitation wipes
- h. To lessen direct contact, increased messaging through texts
- i. If we are alerted of a COVID-19 positive case, we will work closely with the Department of Health. Any affected guest room and all adjoining guest rooms will be placed out of service and we will follow all CDC guidelines for disinfecting and reopening.
- j. Isolation rooms, with PPE, will be available
- k. Increased air filter replacement and increased fresh air exchange
- l. Suspension of certain services such as valet service
- m. An in room TV station will highlight new sanitation procedures

3.) Guest Rooms/Housekeeping

- a. Increased cleaning protocols
- b. Laundry and linens will be washed in high temperature in accordance with the CDC guidelines. All soiled laundry will be bagged in guest rooms.
- c. No stay over service will be provided unless requested and the room is unoccupied.
- d. Removal of certain items from guest rooms

4.) Waterpark

- a. Continue to follow state guidelines for sanitation of pools and chlorine levels.
- b. Reduction of chairs and increased chair sanitation.
- c. Pressure wash floors throughout the waterpark each night.
- d. Increased sanitation of high touch areas

5.) The Big Game Room

- a. Increased sanitization of high touch areas, including all arcade games, rides and entertainment, including daily after closure

- b. Social distancing monitors will observe to ensure guest compliance

6.) Convention Center

- a. Reduced use of linens. Soiled linens will be transported in plastic bags
- b. Social distancing seating arrangements and floor plans
- c. Discontinue the offerings of pens, paper and mints
- d. Removal of business center computers
- e. A “Wellness Concierge” will be employed to answer any questions and ensure safe and healthy meetings

7.) Food and Beverage

- a. Room service attendant to notify guest of room service outside of their room to lessen direct contact
- b. All to go food must be delivered in closed to go containers
- c. Hostess to aid in complying all guests to be within a six-foot distance
- d. Tables and bar stools to be moved to allow increased distance

8.) Retail and Adventures Club

- a. Cash wraps, credit card readers, phones, handles and high touch point areas will be sanitized after each use
- b. Adventures Club will be closed and we will offer complimentary craft kits daily
- c. Cookie time will be suspended until further notice

9.) Spa Kalahari

- a. Increased sanitation and use of gloves and masks. Increased use of newly laundered smocks
- b. Chocolates will be suspended until further notice