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STATE OF MICHIGAN*
COURT OF APPEALS

MOUNT CLEMENS RECREATIONAL BOWL, INC., K.M.I., INC., and MIRAGE CATERING, INC., Individually and on Behalf of All Others Similarly Situated, Plaintiffs-Appellants, v DIRECTOR OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHAIRPERSON OF THE LIQUOR CONTROL COMMISSION, and GOVERNOR, Defendants-Appellees.	November 17, 2022 9:00 a.m. No. 358744 Court of Claims LC No. 21-000126-MZ

Before: Hood, P.J., and Jansen and K. F. Kelly, JJ.

Per Curiam.

Plaintiffs, Mount Clemens Recreational Bowl, Inc.; K.M.I., Inc.; and Mirage Catering, Inc.,[1] appeal as of right the Court of Claims order denying plaintiffs'

* Citation formatting throughout this appendix is inconsistent but is reproduced according to the original documents.

[1] Plaintiffs styled their lawsuit as a class action, but class certification was not granted.

motion to transfer the case to the Macomb Circuit Court and granting summary disposition under MCR 2.116(C)(8) to defendants, the Michigan Governor, the director of the Department of Health and Human Services (DHHS), and the chairperson of the Liquor Control Commission. Plaintiffs' lawsuit involved allegations of impacts to their properties and businesses from shutdown and other regulatory orders pertaining to food-service establishments and COVID-19. On appeal, plaintiffs contend (1) that a transfer to the Macomb Circuit Court was appropriate because they had a right to a jury trial in the circuit court, (2) that they pleaded an actionable takings claim under the Michigan Constitution, and (3) that they pleaded actionable tort claims. We affirm.

I. DISMISSAL OF MOTION TO TRANSFER

Plaintiffs first contend that the trial court erred by denying their motion to transfer. This issue involves interpretation of the Court of Claims Act, MCL 600.6401 *et seq*. *Doe v Dep't of Transp*, 324 Mich App 226, 231; 919 NW2d 670 (2018). Questions of statutory construction, including of the Court of Claims Act, are reviewed de novo. *Id*.; *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 767; 664 NW2d 185 (2003).

MCL 600.6419(1) states, in relevant part, that the Court of Claims "has the following power and jurisdiction":

> To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ

> against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.

MCL 600.6419(1) further provides that, with certain exceptions, the jurisdiction conferred on the Court of Claims "is exclusive." In addition, MCL 600.6419(7) states:

> As used in this section, "the state or any of its departments or officers" means this state or any state governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of the state, or an officer, employee, or volunteer of this state or any governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of this state, acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties.

Because plaintiffs sued the individual defendants in their official capacities, the lawsuit is against the state itself. *Mays v Snyder*, 323 Mich App 1, 88, 916 N.W.2d 227 (2018), aff'd 506 Mich 157 (2020). And MCL 600.6443 indicates that cases in the Court of Claims are to be heard without a jury.

Regarding a motion to transfer, in *Elia Cos, LLC v Univ of Mich Regents*, 335 Mich App 439, 457; 966 NW2d 755 (2021), oral argument ordered on the application 508 Mich 1003 (2021), the Court stated that "the bare fact that plaintiff filed its complaint in circuit court is irrelevant . . . . Rather, the dispositive

factor is whether plaintiff 's . . . claim may actually be *maintained* in circuit court." (Emphasis added.)[2]

Plaintiffs, in arguing that their takings claim may be pursued in circuit court, cite the exception to the Court of Claims' exclusive jurisdiction set forth in MCL 600.6421(1), which states:

> Nothing in this chapter eliminates or creates any right a party may have to a trial by jury, including any right that existed before November 12, 2013. *Nothing in this chapter deprives the circuit, district, or probate court of jurisdiction to hear and determine a claim for which there is a right to a trial by jury as otherwise provided by law*, including a claim against an individual employee of this state for which there is a right to a trial by jury as otherwise provided by law. Except as otherwise provided in this section, if a party has the right to a trial by jury and asserts that right as required by law, the claim may be heard and determined by a circuit, district, or probate court in the appropriate venue. [Emphasis added.]

In assessing whether this particular statutory provision applies, "the question is not whether there would ordinarily be a right to a jury trial as between private parties but whether there is a specific right to a jury trial *against the state*." *Elia Cos*, 335 Mich App at 457, 966 N.W.2d 755. In *Elia Cos*, *id*. at 458, 966 N.W.2d 755, the Court concluded that "the Court of Claims has exclusive jurisdiction over plaintiff's

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[2] Plaintiffs originally filed their complaint in circuit court, and it was transferred to the Court of Claims.

breach-of-contract claim seeking money damages" against the state.

The complaint in the present case makes clear that plaintiffs are seeking money damages under Const. 1963, art 10, § 2.[3] In *Hill v State Hwy Comm*, 382 Mich 398, 400; 170 NW2d 18 (1969), the

> plaintiffs filed a complaint with the Court of Appeals in which they sought an order to require defendant to show cause why a writ of mandamus should not issue directed to the State highway commission and commanding it to institute an action to ascertain and determine the damages to plaintiffs' property as a result of establishment of the right-of-way and construction of the I-94 Expressway.

"[T]he Court of Appeals denied the complaint without prejudice to the right of plaintiffs to file a claim with the court of claims," and the Supreme Court granted leave. *Id.* at 402, 170 N.W.2d 18. The Supreme Court said:

> If plaintiffs' claims have merit, they are of such a nature as to establish a constructive rather than an actual taking of plaintiffs' property. This is the crux of the case. Determination of that question (it being the contention of defendant that there has been no taking

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[3] Const. 1963, art. 10, § 2, states in part: "Private property shall not be taken for public use without just compensation therefore [sic] being first made or secured in a manner prescribed by law. . . . Compensation shall be determined in proceedings in a court of record." The language ratified in 1963 correctly used "therefor"; the error appears to have been introduced when § 2 was amended in 2006. See 2005 SJR E, approved November 7, 2006.

> whatsoever) can come only after a full testimonial hearing. In circumstances such as these, plaintiffs' remedy is by an action in the court of claims in order that a determination may be made as to whether a taking has occurred and, if so, plaintiffs' damage from the same. [*Id*. at 405, 170 N.W.2d 18.]

The plaintiffs conceded that they had a remedy in the Court of Claims, but they asserted that it was "not adequate because the amount of damages cannot be determined by a jury in such a proceeding." *Id*.

The Supreme Court noted that the 1908 Constitution did not mandate, and the 1963 Constitution does not mandate, a jury trial for condemnation proceedings. *Id*. at 406, 170 N.W.2d 18. It also noted that "some condemnation statutes provide for different modes of assessing damages than by a jury, such as by three commissioners." *Id*.; see also MCL 213.183. The Court concluded:

> Since neither the Constitution of 1908 nor 1963 provides a constitutional right to a jury in a condemnation hearing and since there is statutory authority for nonjury [condemnation] proceedings by the highway commission, the plaintiffs' claim of a right to a determination of damages by a jury is without merit. [*Hill*, 382 Mich at 406, 170 N.W.2d 18.]

Plaintiffs contend that the present case is not analogous to *Hill* because, in the present case, there is no "statutory authority for nonjury proceedings" as there was in that case. Plaintiffs rely heavily on certain provisions of the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*. MCL 213.51(e) states that "'[c]onstructive taking' or 'de

facto taking' means conduct, other than regularly established judicial proceedings, sufficient to constitute a taking of property within the meaning of section 2 of article X of the state constitution of 1963." MCL 213.52(2) states:

> If property is to be acquired by an agency through the exercise of its power of eminent domain, the agency shall commence a condemnnation action for that purpose. An agency shall not intentionally make it necessary for an owner of property to commence an action, including an action for constructive taking or de facto taking, to prove the fact of the taking of the property.

And MCL 213.62(1) states:

> A plaintiff or defendant may demand a trial by jury as to the issue of just compensation pursuant to applicable law and court rules. The jury shall consist of 6 qualified electors selected pursuant to chapter 13 of Act No. 236 of the Public Acts of 1961, as amended, being sections 600.1301 to 600.1376 of the Michigan Compiled Laws, and shall be governed by court rules applicable to juries in civil cases in circuit court.

Plaintiffs' attempt to rely on these provisions is unavailing because plaintiffs were not proceeding under the UCPA.[4] As stated in *Miller Bros v Dep't of Natural Resources*, 203 Mich App 674, 690; 513 N.W.2d 217 (1994):

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[4] In addition, the right to a jury trial under the UCPA extends only to the issue of just compensation, not to the issue of necessity. See *Kalamazoo v KTS Indus, Inc*, 263 Mich App 23, 33-34, 687 NW2d 319 (2004).

> [W]hen the state affects [sic] a taking merely by depriving an owner of all beneficial use of property, the state does not *acquire* the property "taken." Such a taking may violate the constitution, but it does not violate the UCPA. Consequently, the state cannot be compelled to invoke the UCPA. And if it cannot be forced to proceed under the statute, then the UCPA's provision regarding attorney fees is not applicable.

In other words, the UCPA is not applicable to plaintiffs' claims because it is not in dispute that defendants did not acquire plaintiffs' property. The other statutes relied on by plaintiffs also speak to the *acquisition* of property by the state. See MCL 213.1 and MCL 213.23.[5]

In *Lim v Dep't of Transp.*, 167 Mich App 751, 753; 423 NW2d 343 (1988), the defendant relocated the plaintiff's driveway, and the "plaintiff alleged that defendant's actions and omissions resulted in a de facto taking of his property without just compensation." This Court stated that "[t]he Court of Claims is the proper forum in which to seek redress where a

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[5] At any rate, in *Miller Bros*, 203 Mich App at 687, 513 N.W.2d 217, the Court stated that the UCPA "defines the exclusive means by which government is empowered to judicially condemn and acquire property." In *Kalamazoo*, 263 Mich App at 38, 687 N.W.2d 319, the Court stated:

> [T]he purpose of the UCPA is to set forth the procedures by which a public or private agency exercises the right of eminent domain conferred on it by another source . . . . Moreover, the UCPA . . . unambiguously states in MCL 213.75 that it sets forth the exclusive procedures to be followed by an agency seeking to condemn property under the power of eminent domain.

plaintiff alleges an already accomplished inverse condemnation by the State of Michigan." *Id.* at 754, 423 N.W.2d 343. It continued:

> Plaintiff argues that in enacting the UCPA the Legislature expressly conferred jurisdiction upon the circuit court to hear claims of inverse condemnation initiated by aggrieved property owners. Plaintiff is mistaken. The UCPA has no application to inverse condemnation actions initiated by aggrieved property owners. Instead, the UCPA only governs actions initiated *by an agency* to acquire property on the filing of a proper complaint and after the agency has made a good-faith written offer to purchase the property. The agency must be authorized by law to condemn property.
>
> Finally, plaintiff argues that the right to just compensation is constitutional and not contractual or tortious in nature and, therefore, because the claim is grounded in the constitution it should be adjudicated in a court created by the constitution and not one created by the Legislature. We find plaintiff's argument to be without merit. [*Id.* at 755, 423 N.W.2d 343 (citations omitted).]

Plaintiffs contend that this Court need not follow *Lim* because it is not strictly binding under MCR 7.215(J)(1) ("A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule."). But even though *Lim* was issued before November 1, 1990,

it still has precedential value. See *People v Bensch*, 328 Mich App 1, 7 n 6; 935 N.W.2d 382 (2019). Viewing the UCPA and the other statutes cited by plaintiff in connection with *Miller Bros*, 203 Mich App at 687, 690, 513 N.W.2d 217, *Kalamazoo v KTS Indus., Inc*, 263 Mich App 23, 38; 687 N.W.2d 319 (2004), and *Hill*, 382 Mich at 406, 170 N.W.2d 18, we conclude that there is no basis to conclude that the holding of *Lim* is no longer good law.

II. DISMISSAL OF TAKINGS CLAIM

Plaintiffs next argue that the trial court erred by granting defendants' motion for summary disposition regarding plaintiffs' regulatory-takings claim.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). As for motions brought under MCR 2.116(C)(8):

> A motion under [this subrule] tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. [*Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999) (quotation marks and citations omitted).]

Const. 1963, art 10, § 2, states:

> Private property shall not be taken for public use without just compensation therefore [sic] being first made or secured in a manner prescribed by law. . . . Compensation shall be determined in proceedings in a court of record.

In *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 555 n 22; 730 NW2d 481 (2007), remanded on other grounds 480 Mich. 910, 739 N.W.2d 622 (2007), the Court stated that "[t]he Takings Clause of the Fifth Amendment is substantially similar to the Takings Clause of the Michigan Constitution, and the two provisions should generally be interpreted coextensively[.]" (Citation omitted.) However, the Michigan provision has sometimes been interpreted more broadly than the federal one. *AFT Mich. v Michigan*, 497 Mich. 197, 217-218; 866 N.W.2d 782 (2015), aff'd 497 Mich. 197 (2015); *Gym 24/7 Fitness, LLC v Michigan*, 341 Mich App 238, 258, 989 NW2d 844 (2022).

In *Cummins v Robinson Twp*, 283 Mich App 677, 707, 770 N.W.2d 421 (2009), this Court stated that there are two types of per se regulatory takings: instances wherein the government causes a permanent physical invasion onto property and instances wherein the government deprives an owner of *all* economically beneficial use of property. It stated that, apart from these two narrow categories, alleged regulatory takings are governed by a test from *Penn Central Transp Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978). *Cummins*, 283 Mich App at 707, 770 N.W.2d 421. Plaintiffs do not dispute that the two narrow categories are inapplicable here.

The parties dispute whether the *Penn Central* test need be applied. Of import is the recent case of *Gym*

24/7 Fitness. In that case, the plaintiff (the Gym) "filed suit in an individual capacity and as a representative of a putative class of plaintiffs comprised of gyms, fitness centers, recreation centers, sports facilities, exercise facilities, exercise studios, and other similarly situated businesses" in certain counties. *Gym 24/7 Fitness*, 341 Mich App at 240 n 1, 989 N.W.2d 844. The Gym alleged

> an unconstitutional taking of its business property by operation of executive orders [EOs] issued by the Governor that temporarily shuttered the business in response to the COVID-19 pandemic. The Gym demanded "just compensation" for the taking of its private property that resulted from the closure. [*Id*. at 240.]

The Court of Claims denied the defendant's motion for summary disposition, and this Court reversed. *Id*. at 241.

The Gym had conceded that the EOs had been issued for a public purpose, but it argued that constitutional principles required that fitness centers be compensated for the diminution in value of their property interests. *Id*. at 244. On appeal, the Gym argued that, "'[u]nder takings jurisprudence, whether the taking by the government was reasonable or unreasonable is legally irrelevant,'" and it asserted that "'[g]overnments can, almost always, take private property; [but] they commit an actionable wrong when they fail to pay just compensation.'" *Id*. at 250-251 (alterations in original).

This Court stated that

> the primary question presented in this appeal is whether the business owner of private property

> is entitled to just compensation under either the state or federal Takings Clause when the government properly exercises its police power to protect the health, safety, and welfare of its citizens during a pandemic by temporarily closing the owner's business operations. [*Id*. at 254.]

The Court in *Gym 24/7 Fitness* analyzed cases discussing the state's police power to react to health emergencies and whether such reactions and restrictions comported with constitutional principles of due process. *Id*. at 255-257. The Court emphasized, however, that the Gym was *not* making a due-process argument but was relying on takings principles. *Id*. at 257. The Court discussed takings in general and stated:

> To summarize, there are physical takings and regulatory takings. A physical taking of private property is a categorical taking that requires the payment of just compensation. A regulatory taking involving the deprivation of *all* economically productive or beneficial use of property is also a categorical taking, requiring the payment of just compensation. *The second type of regulatory taking—a noncategorical taking—is one that is determined upon application of the* Penn Central *balancing test*. Additionally, inverse condemnation arises when the government takes property, either by physical invasion or regulation, absent formal condemnation proceedings. Finally, a taking can be either temporary or permanent. [*Id*. at 262-263 (second emphasis added).]

In its analysis, the Court first noted "that to the best of our knowledge, every federal court and state appellate court that has addressed a takings claim stemming from the government's closure of a business as a safeguard against the spread of COVID-19 has rejected the claim." *Id*. at 263. It cited 17 cases in support, stating, "We now join those courts and reject the Gym's claim that its property was taken absent just compensation in violation of the Takings Clauses of the state and federal Constitutions." *Id*. at 264.

With regard to the *Penn Central* balancing test, the Court stated:

> *Next, we hold as a matter of law that there was no regulatory taking under* Penn Central. With respect to the *Penn Central* balancing test, the first two factors—economic impact of the EOs and their interference with reasonable investment-backed expectations—weigh in favor of the Gym because its business was in fact shuttered under the EOs, but we do not give those factors all that much weight because the economic impact and the interference with business expectations arising from the closure orders were short lived. Moreover, the third factor—the character of the government's action—was compelling in that the aim of the EOs was to stop the spread of COVID-19, which our Supreme Court described as "one of the most threatening public-health crisis of modern times," resulting in "significant numbers of persons suffering serious illness or death." *In re Certified Questions from the United States Dist Court,* [*Western Dist of Mich, Southern Div*,] 506 Mich [332, 337–338; 958 NW2d 1 (2020) (opinion by MARKMAN, J.).] And, once again, the Gym

accepted that the Governor's EOs were issued solely for a public purpose and did not contest the prudence of the Governor's actions[6] or her authority to issue the EOs. Lending further support for our stance that the character of the Governor's actions strongly favors the State, or perhaps actually demands that we find no taking, is language in precedent issued by the United States Supreme Court.

In *Lucas* [*v South Carolina Coastal Council*], 505 US [1003, 1029; 112 S Ct 2886; 120 L Ed 2d 798 (1992)], the Supreme Court indicated that just compensation is not owed to a property owner for an alleged taking that arises from a law or decree that does nothing more "than duplicate the result that could have been achieved in the courts . . . by the State under its . . . power to abate nuisances that affect the public generally, *or otherwise*." (Emphasis added.) The Supreme Court then noted, "The principal 'otherwise' that we have in mind is litigation absolving the State . . . of liability for the destruction of real and personal property, in cases of actual necessity, to prevent the spreading of a fire *or to forestall other grave threats to the lives . . . of others*." *Id*. at 1029 n 16 (quotation marks and citations omitted; emphasis added). In this case, the purpose of the EOs was to forestall the spread of COVID-19 that had hospitalized and killed thousands of

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[6] As we will discuss, caselaw has indicated that the actual, factual legitimacy of the government's actions is not a proper consideration in a takings analysis.

> Michiganders. [*Gym 24/7 Fitness*, 341 Mich App at 267-269, 989 N.W.2d 844.]

The Court in *Gym 24/7 Fitness* quoted with approval a passage from *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 U.S. 470, 491-492; 107 S Ct 1232, 94 L Ed 2d 472 (1987). *Gym 24/7 Fitness*, 341 Mich App at 269-270, 989 N.W.2d 844. The *Keystone* Court, in that passage, stated:

> The Court's hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of "reciprocity of advantage" . . . . Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. These restrictions are properly treated as part of the burden of common citizenship. Long ago it was recognized that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it. [*Keystone Bituminous Coal Ass'n*, 480 US at 491-492, 107 S.Ct. 1232 (quotation marks and citations omitted).]

The Court in *Gym 24/7 Fitness* stated, "In light of this precedent, we cannot conclude that the Gym has a viable takings case under the *Penn Central*

balancing test." *Gym 24/7 Fitness*, 341 Mich App at 270, 989 N.W.2d 844.

The only consideration that could, at least theoretically, distinguish the present case from *Gym 24/7 Fitness* is that plaintiffs in the present case did in fact argue that the regulations and EOs at issue were not actually warranted. However, this argument must be viewed in context. Plaintiffs emphatically state in their primary appellate brief that the government's purpose in making the restrictive regulations is not pertinent to a regulatory-takings analysis under *Penn Central*. They state that whether the EOs were "arbitrary, invalid exercises of the police power" "is ultimately irrelevant to the regulatory taking analysis." And caselaw supports this. See, e.g., *Lingle v Chevron USA, Inc*, 544 U.S. 528, 544; 125 S Ct 2074; 161 L Ed 2d 876 (2005) ("Rather, the gravamen of Chevron's claim is simply that Hawaii's rent cap will not actually serve the State's legitimate interest in protecting consumers against high gasoline prices. Whatever the merits of that claim, it does not sound under the Takings Clause."); see also *Dorman v Clinton Twp*, 269 Mich App 638, 646 n 23; 714 N.W.2d 350 (2006) ("[T]he determination of whether a regulation fails to 'substantially advance legitimate state interests' has no part in the takings analysis."). Plaintiffs contend that the only pertinent question regarding the government's action in the context of a *Penn Central* analysis is whether it burdens citizens equally. But plaintiffs' authority for this proposition does not adequately support their position that their takings claim should proceed. They cite *K & K Constr., Inc v Dep't of Environmental Quality*, 267 Mich App 523, 705 N.W.2d 365 (2005). In that case, the Court,

discussing *Penn Central*, indicated that "regulation in and of itself does not constitute a taking if it applies to a widespread group of landowners[.]" *Id*. at 560, 705 N.W.2d 365. The Court indicated that the wetlands regulations in that case applied to all similarly situated landowners and could not be characterized as directed at the plaintiffs. *Id*. at 562, 705 N.W.2d 365; see also *Cummins*, 283 Mich App at 720, 770 N.W.2d 421 ("Here, the township enforced the statewide building code and its provisions regarding flood-plain construction that apply equally to all landowners with property similarly situated in flood-prone areas."). Similarly, the actions challenged here applied to all similarly situated property owners.

Also, in *Gym 24/7 Fitness*, the Court stated:

> To be clear, the Gym does not believe that the closure of fitness centers was reasonable. But the Gym's theory of the case is that it is entitled to just compensation regardless of the reasonableness of the EOs. In its brief on appeal, the Gym notes that it provided documentary evidence in the form of a study that demonstrated that shuttering gyms and fitness centers was unnecessary and that the risk of transmitting COVID-19 at such facilities was no greater than at other businesses involved in indoor activities. The Gym contends that the State's argument to the contrary was not supported by any proper documentary evidence and that even if the hearsay references cobbled together by the State and obtained from the Internet can be considered, it minimally created a genuine issue of material fact on the matter. Nevertheless, the Gym indicates that this underlying factual dispute "misses the

> pertinent point" and is irrelevant. And the Gym emphasizes that "[t]his suit does not seek to contest whether Governor Whitmer's decision to issue the [EOs] . . . were [sic] prudent." [*Gym 24/7 Fitness*, 341 Mich App at 255 n 7, 989 N.W.2d 844.]

Similarly, plaintiffs in the current case, *for purposes of the regulatory-takings claim*, are not arguing on appeal that the EOs were imprudent.

The upshot is that *Gym 24/7 Fitness* is not distinguishable from the present case. Even if one could argue that the Court in *Gym 24/7 Fitness* intermingled, to some extent, concepts of taking and governmental necessity, *Gym 24/7 Fitness* is binding caselaw regarding how to view the COVID-19 regulations in Michigan. Further, even if one looks to the caselaw, such as *K & K Constr*, provided by plaintiffs, it does not provide a path to appellate relief. Plaintiffs argue that discovery is needed, but in *Redmond v Heller*, 332 Mich App 415, 448; 957 N.W.2d 357 (2020), the Court stated that "summary disposition may still be appropriate before the conclusion of discovery if there is no fair likelihood that further discovery would yield support for the nonmoving party." Such is the case here.

III. DISMISSAL OF TORT CLAIMS

Lastly, plaintiffs argue that the court erred by granting defendants' motion for summary disposition regarding plaintiffs' tort claims for alleged interference with business and contractual relationships.

MCL 691.1407(5) states, in part, that "the elective or highest appointive executive official of all levels of government [is] immune from tort liability for injuries

to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority." In *Mack v Detroit*, 467 Mich. 186, 195 n 8; 649 N.W.2d 47 (2002), the Court stated:

> The five statutory exceptions to governmental immunity are the "highway exception," MCL 691.1402, the "motor vehicle exception," MCL 691.1405, the "public building exception," MCL 691.1406, the "proprietary function exception," MCL 691.1413, and the "governmental hospital exception," MCL 691.1407(4).

A plaintiff must plead their case in avoidance of immunity. *Id*. at 198, 649 N.W.2d 47. "A plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Id*. at 204, 649 N.W.2d 47. Plaintiffs did not state a claim fitting within a statutory exception and did not plead anything occurring during a proprietary function.

Rather, plaintiffs make an argument about "ultra vires" activities. In *Coleman v Kootsillas*, 456 Mich. 615, 619; 575 N.W.2d 527 (1998), the Court stated:

> Whenever a governmental agency engages in an activity which is not expressly or impliedly mandated or authorized by constitution, statute, or other law (i.e., an *ultra vires* activity), it is not engaging in the exercise or discharge of a governmental function. The agency is therefore liable for any injuries or damages incurred as a result of its tortious conduct. [Quotation marks and citations omitted.]

Plaintiffs contend that the Governor engaged in ultra vires activity because, in *In re Certified Questions*, 506 Mich at 347, 372, 958 N.W.2d 1, the Court ruled that the Governor did not have the authority to declare a state of emergency beyond April 30, 2020. But the Governor was clearly acting, at the very least, under implied authority, even if the Supreme Court later ruled against that authority. Justice MARKMAN, in fact, acknowledged that the Governor's interpretation of the Emergency Powers of the Governor Act (the EPGA), MCL 10.31 *et seq*., was correct, but then went on to conclude that the statute was unconstitutional. *Id*. at 356–357 (opinion of MARKMAN, J.). He stated that, as a consequence, "the EPGA cannot *continue* to provide a basis for the Governor to exercise emergency powers." *Id*. at 385 (emphasis added). The actions by the Governor, subject to a reasonable dispute needing to be resolved by the Michigan Supreme Court in a lengthy and divided opinion, were not ultra vires. In addition, the DHHS was authorized to issue its own regulations, and plaintiffs do not argue otherwise. No basis for reversal is apparent.[7]

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[7] Even disregarding the question of governmental immunity, plaintiffs acknowledge in their complaint that in *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002), the Court stated:

> [O]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another. [Quotation marks and citation omitted.]

Affirmed.

Hood, P.J., and Jansen and K. F. Kelly, JJ., concurred.

In this case, no malice or nefarious purpose was alleged. And the actions by the Governor, subject to a reasonable dispute needing to be resolved by the Michigan Supreme Court, were not per se wrongful. See, e.g., *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 N.W.2d 629 (1992) ("A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances."). In addition, plaintiffs' argument about the alleged unconstitutional taking providing a basis to avoid governmental immunity does not make sense because that claim pertained to a different count of the complaint.

Michigan Supreme Court
Lansing Michigan

ORDER
August 30, 2024
165169

MOUNT CLEMENS RECREATIONAL BOWL, INC., K.M.I., INC., and MIRAGE CATERING, INC., Individually and on Behalf of All Others Similarly Situated,

Plaintiffs-Appellants,

v

DIRECTOR OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHAIRPERSON OF THE LIQUOR CONTROL COMMISSION, and GOVERNOR,

Defendants-Appellees.
_____/

SC: 165169

COA: 358755

Ct of Claims: 21-000126-MZ

On January 10, 2024, the Court heard oral argument on the application for leave to appeal the November 17, 2022 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not

persuaded that the questions presented should be reviewed by this Court.

Viviano, J. (dissenting).

Plaintiffs are a group of food and beverage establishments that were forced to shut down during the COVID-19 pandemic due to Governor Gretchen Whitmer's executive orders.[1] After they were allowed to reopen, they were subject to restrictions, which they allege resulted in the loss of significant business.[2] Plaintiffs filed suit against the director of

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[1] See Executive Order No. 2020-9 (requiring "[r]estaurants, food courts, cafes, coffeehouses, and other places of public accommodation offering food or beverage for on premises consumption" and "[b]ars, taverns, brew pubs, breweries, microbreweries, distilleries, wineries, tasting rooms, special licensees, clubs, and other places of public accommodation offering alcoholic beverages for on-premises consumption" to close to the public).

[2] When food and beverage establishments were allowed to reopen in June 2020, they were subject to a number of limitations, including reduced occupancy. See Executive Order No. 2020-110. All places of public accommodation were allowed to open in September 2020, see Executive Order No. 2020-176, but restrictions on food and beverage establishments continued. This Court subsequently held that the Governor's executive orders exceeded her scope of authority under the Emergency Management Act and that the since repealed Emergency Powers of the Governor Act was unconstitutional because it violated the nondelegation doctrine. *In re Certified Questions from the US Dist. Court, Western Dis.t of Mich.*, 506 Mich. 332, 958 N.W.2d 1 (2020). During this period, the director of the Department of Health and Human Services began issuing orders under Part 22 of the Public Health Code, specifically MCL 333.2253. Among them were orders that restricted food and beverage establishments from returning to full capacity. In June 2021, the final capacity restrictions on such businesses were lifted. State of Michigan, *Rescission of Emergency Orders*

the Department of Health and Human Services, the chairperson of the Liquor Control Commission, and the Governor (hereinafter collectively "defendants"), alleging, among other things, a regulatory taking in violation of the Michigan Constitution. Relevant to this appeal, the Court of Claims granted summary disposition in favor of defendants on this claim.

The Court of Appeals affirmed in a published opinion.[3] The Court of Appeals relied heavily on the analysis of *Penn Central Transp Co v City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), in *The Gym 24/7 Fitness, LLC v Michigan*, 341 Mich App 238, 989 N.W.2d 844 (2022).[4] The Court of

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<https://www.michigan.gov/coronavirus/resources/orders-and-directives/lists/executivedirectives-content/rescission-of-emergency-orders-2> (June 17, 2021) (accessed July 30, 2024) [https://perma.cc/EP3H-22A6].

[3] *Mount Clemens Recreational Bowl, Inc v Dir. of Dep't of Health & Human Servs.*, 344 Mich App 227, 998 N.W.2d 917 (2022).

[4] *Penn Central* identified three factors that should bear "particular significance" in determining whether a regulatory taking has occurred:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. [*Penn Central*, 438 US at 124, 98 S.Ct. 2646 (citations omitted).]

Appeals found *Gym 24/7 Fitness* controlling, explaining:

> The upshot is that *Gym 24/7 Fitness* is not distinguishable from the present case. Even if one could argue that the Court in *Gym 24/7 Fitness* intermingled, to some extent, concepts of taking and governmental necessity, *Gym 24/7 Fitness* is binding caselaw regarding how to view the COVID-19 regulations in Michigan. Further, even if one looks to the caselaw, such as *K & K Constr*[, *Inc v Dep't of Environmental Quality*, 267 Mich App 523, 705 N.W.2d 365 (2005)], provided by plaintiffs, it does not provide a path to appellate relief. Plaintiffs argue that discovery is needed, but in *Redmond v Heller*, 332 Mich App 415, 448; 957 N.W.2d 357 (2020), the Court stated that "summary disposition may still be appropriate before the conclusion of discovery if there is no fair likelihood that further discovery would yield support for the nonmoving party." Such is the case here. [*Mount Clemens Recreational Bowl*, 344 Mich App at 244–245, 998 N.W.2d 917.]

Plaintiffs sought leave to appeal in this Court, and we ordered oral argument on the application, to be heard with *Gym 24/7 Fitness*.[5]

For reasons similar to those I relied on to conclude that factual development is necessary in *Gym 24/7 Fitness* to properly analyze the *Penn Central* factors,

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[5] Unlike the plaintiff in *Gym 24/7 Fitness*, plaintiffs in this case did not raise a categorical-taking claim.

further factual development is necessary here.[6] I discuss the *Penn Central* factors at length in my dissent in *Gym 24/7 Fitness* and incorporate that discussion by reference here. Plaintiffs in this case have an even stronger argument that the Court of Appeals erred in its *Penn Central* analysis. Plaintiffs' takings claim relates to the restrictions on food and beverage establishments that lasted through June 2021. While all places of public accommodation were allowed to open in September 2020, the class of businesses that continued to have capacity restrictions was smaller than before, and food and beverage establishments had unique restrictions placed on them. These differences would affect all three *Penn Central* factors. The Court of Appeals failed to understand the meaningful distinctions between the facts of this case and those in *Gym 24/7 Fitness*. Contrary to the Court of Appeals' assertion, *Gym 24/7 Fitness* is not "binding caselaw regarding how to view the COVID-19 regulations in Michigan."[7] The Governor alone issued 140 executive orders, which does not include the dozens of COVID-19-related orders issued by the DHHS. It is absurd to think that *Gym 24/7 Fitness*'s analysis of a select few orders—specifically as they affected gyms and fitness centers—could apply broadly to every COVID-19 regulation. The Court of Appeals gave short shrift to plaintiffs' claims—its reliance on a *Penn Central* application to plaintiffs in a completely different

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[6] See *The Gym 24/7 Fitness v Michigan*, ___ Mich ___, ___, 10 N.W.3d 443 (2024) (VIVIANO, J., dissenting) (Docket No. 164557).

[7] *Mount Clemens Recreational Bowl*, 344 Mich App at 244, 998 N.W.2d 917.

industry ignores that takings claims are "fact-intensive"[8] and that the *Penn Central* analysis involves "complex factual assessments of the purposes and economic effects of government actions."[9] By looking the other way on claims like these, we "damage the credibility of the judiciary to serve as a bulwark of our liberty and ensure that the government does not take private property without just compensation—even in times of crisis."[10] I would reverse the lower court judgments in this case and remand to the Court of Claims to allow discovery to continue.

For these reasons, I respectfully dissent.

Bernstein, J., joins the statement of Viviano, J.

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[8] *Resource Investments, Inc v United States*, 85 Fed Cl 447, 466 (2009).

[9] *Yee v City of Escondido*, 503 U.S. 519, 523, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). See generally *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646 ("Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely upon the particular circumstances [in that] case.") (quotation marks and citations omitted; alteration in original).

[10] *Gym 24/7 Fitness*, ___ Mich at ___, 10 N.W.3d 443 (VIVIANO, J., dissenting); slip op at 17.

Michigan Court of Claims.
Ingham County

MOUNT CLEMENS RECREATIONAL BOWL, INC., a Michigan profit corporation, K.M.I., Inc., a Michigan profit corporation, and Mirage Catering, Inc., a Michigan profit corporation, all on behalf of themselves and a class of all others similarly situated, Plaintiffs, v. Elizabeth HERTEL, in her official Capacity as Director of the Michigan Department of Health and Human Services, Patrick Gagliardi, in his official capacity as Chair of the Michigan Liquor Control Commission, and Gretchen Whitmer, in her official capacity as Governor of the State of Michigan, Defendant.	No. 21-000126-MZ. September 14, 2021.

OPINION AND ORDER

Hon. Elizabeth L. Gleicher.

Plaintiffs represent a putative class of restaurants, bars and banquet halls seeking "just compensation" under Const 1963, art 10, § 2, for a "regulatory taking" occasioned by executive orders promulgated in response to the COVID-19 pandemic. Plaintiffs' complaint also raises claims for "tortious interference with a contract" and tortious interference with a business relationship. Defendants have moved for summary disposition under MCR 2.116(C)(8). Defendants' motion is GRANTED. Additionally, plaintiffs' motion to transfer the case back to the Macomb Circuit Court is DENIED.

I. FACTUAL BACKGROUND

On March 10, 2020, Governor Gretchen Whitmer declared a state of emergency due to the detection of the COVID-19 virus in our state. Despite that Michigan had only two proven cases of COVID-19 on that date, the virus had demonstrated its virulence and lethality elsewhere in the country and the world. Seven weeks before Governor Whitmer declared a COVID-19 emergency, the United States Secretary of Health and Human Services determined "that a health emergency exists and has existed since January 27, 2000, nationwide." U.S. Department of Health & Human Services, *Determination that a Public Health Emergency Exists*, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> (accessed September 14, 2021). Governor Whitmer's order of March 16, 2020, temporarily closed restaurants as well as "other places of public accommodation offering food or beverage for on-premises consumption." Executive Order No. 2020-09. During the next six months Governor Whitmer issued additional executive orders

restricting public gatherings and public access to food service establishments such as the businesses represented by the plaintiffs.

On March 23, 2020, Robert Gordon, the Director of the Michigan Department of Health and Human Services at the time, issued his first order related to the pandemic. On or about April 2, 2020, Director Gordon adopted some of the measures outlined by the Governor in various orders. Director Gordon continued to issue orders related to the COVID-19 pandemic, including temporary restrictions on indoor dining and gatherings. In an order issued on April 2, 2020, Director Gordon explained that pursuant to his powers under MCL 333.2253, he had determined that "COVID-19 has reached epidemic status in Michigan" and that "control of the epidemic is necessary to protect the public health and it is necessary to establish procedures to be followed during the epidemic to ensure the continuation of essential public health services and enforcement of health laws." See Michigan Department of Health and Human Services, *Director's Order*, <https://www.michigan.gov/documents/coronavirus/DHHS_0iderIncorporating_EOs_into_epidemic_finding_final_4-2-20_002_685693_7.pdf> (accessed September 14, 2021).

In October 2020, the Michigan Supreme Court held that Governor Whitmer's constitutional authority to issue executive orders expired on April 30, 2020. *In re Certified Questions from United States District Court, Western District of Michigan, Southern Division*, 506 Mich 332; 958 NW2d 1 (2020). However, the orders involved in this case were issued before that date or were re-issued after it by Director Gordon or his successor, defendant Elizabeth Hertel. Plaintiffs have

not challenged the general authority of the Directors to issue public health orders.[1]

Plaintiffs' complaint[2] asserts that the executive and MDHHS orders restricting indoor dining have resulted in a "taking" of their property without just compensation in violation of Michigan's Constitution, and that the orders tortiously interfered with protected property interests. Count I avers that defendants have seized or otherwise taken without just compensation plaintiffs' real property, and have "substantially and materially jeopardized Plaintiffs' businesses." According to plaintiffs, "[e]ither no compensation has been paid for these regulatory takings or the compensation that has been paid is woefully insufficient."

Counts II and III of the complaint raise tort claims. Count II alleges tortious interference with contract. According to plaintiffs, defendants tortiously interfered "with contractual relationships between

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[1] Plaintiffs' brief is replete with scornful criticisms of the scientific bases for the orders, such as: "It is arbitrary and capricious to issue orders restricting Plaintiffs' business so egregiously when the science underlying those regulations changes as often as the flavor-of-the-month ice cream," and "there is absolutely no reason to believe that Defendants' regulations are based in sound science, or that there was even a rational basis to believe that such food-establishment regulations would produce favorable results in the fight against the Covid-19 pandemic." But in crafting their legal arguments in support of their regulatory compensation claim, plaintiffs have apparently assumed that the relevant orders were legally issued. And plaintiffs have not argued that the statute underlying the authority of the Directors to issue public health orders, MCL 333.2253, is unconstitutional.

[2] The complaint was originally filed in Macomb Circuit Court, and it was transferred to this Court by defendants.

the Plaintiffs and their vendors, contractors and suppliers." Because defendants "were not acting within the scope of their authority due to the illegal nature of the acts and regulations complained of," plaintiffs contend, the Michigan Governmental Tort Liability Act does not afford them immunity. Count III re-alleges much of Count II, averring that the defendants "induced breaches and terminations of relationships and business expectancies between Plaintiffs and their vendors."

Defendants have moved for summary disposition under MCR 2.116(C)(8), arguing that plaintiffs' complaint does not state an actionable claim for compensation of any kind because the orders issued by Governor Whitmer and Directors Gordon and Hertel do not implicate the Takings Clause, and that the defendants are immune from liability in tort.

II. ANALYSIS

A. PLAINTIFFS' MOTION TO TRANSFER

Because it implicates this Court's jurisdiction, the Court will first address plaintiffs' pending motion to transfer this matter back to Macomb Circuit Court, where it was originally filed. While they do not raise any statutory takings claims, plaintiffs argue that there is a statutory jury-trial right in takings cases against the state. They also argue that this Court should recognize a constitutional jury-trial right against the state as a check against the state's use of the police power. They do not address their tort claims, however.

MCL 600.6419(1)(a) gives this Court exclusive jurisdiction—subject to certain exceptions—for "any claim or demand, statutory or constitutional . . .

against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court." An exception exists to the Court's exclusive jurisdiction over claims against the state if the plaintiff has the right to a jury trial. MCL 600.6419(1); MCL 600.6421(1). See also *Doe v Dep't of Transp*, 324 Mich App 226, 229-230; 919 NW2d 670 (2018). The key inquiry "is not whether there would ordinarily be a right to a jury trial as between private parties, but whether there is a specific right to a jury trial against the state." *Elia Cos v. Univ of Mich Regents*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 351064), slip op at 8. In this case, plaintiffs do not generally dispute that their claims fall within this Court's jurisdiction; instead, they cite MCL 600.6421 and argue that, because they have the right to a jury trial, this matter must be heard in circuit court.

The Court agrees with defendants that no right to a jury trial exists on the claims pled by plaintiffs.[3] In general, the right to a jury trial must arise by constitution or statute. *New Prods Corp v Harbor Shores BHBT Land Dev, LLC*, 308 Mich App 638, 644–646; 866 NW2d 850 (2014). As an initial matter, there is no right to a jury trial under this state's Constitution for the types of claims asserted here. See *Hill v. State*, 382 Mich 398, 405; 170 NW2d 18 (1969); *Kalamazoo v KTS Indus, Inc*, 263 Mich App 23, 29-30;

[3] Plaintiffs have not presented an argument as to why they have a jury-trial right on the tort claims that were alleged in Counts II-III of the complaint. As a result, the Court will consider plaintiffs to have abandoned any contention that they possess a jury-trial right on their tort claims, and will focus primarily on the issue of whether a jury-trial right exists on the regulatory takings claims.

687 NW2d 319 (2004). Nor can plaintiffs rely on the Uniform Condemnation Procedures Act as the basis of their purported jury-trial right. See *Lim v Dep't of Transp*, 167 Mich App 751, 754-755; 423 NW2d 343 (1988). Indeed, plaintiffs' attempts to rely on condemnation statutes for the basis of their jury-trial right are particularly unconvincing because the type of taking alleged here—a regulatory taking—does not violate or invoke such statutes. See *Miller Bros v. Dep't of Natural Resources*, 203 Mich App 674, 690; 513 NW2d 217 (1994). See also *Merkur Steel Supply, Inc v. Detroit*, 261 Mich App 116, 130; 680 NW2d 485 (2004) (explaining the difference between inverse condemnation claims and regulatory taking claims). As a result, plaintiffs' attempts to rely on these statutes, and any jury-trial rights contained therein, are meritless.

In sum, because plaintiffs failed to establish their right to a jury trial on any of the claims pled in the complaint, this Court has exclusive jurisdiction over their claims pursuant to MCL 600.6419(1)(a), and the motion to transfer will be denied.

B. "TAKING" CLAIM

Article 10, §2 of the Michigan Constitution prohibits the taking of private property for public use without just compensation. "The Taking Clause of the state constitution is substantially similar to that of the federal constitution." *Tolksdorf v Griffith*, 464 Mich 1, 2; 626 NW2d 163 (2001). For the most part, Michigan's Takings Clause is interpreted coextensively with the federal Takings Clause. *AFT*

Michigan v. State of Michigan, 497 Mich 197, 217-218; 866 NW2d 782 (2015).[4]

The United States Supreme Court has identified "two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas v S C Coastal Council*, 505 US 1003, 1015; 112 S Ct 2886; 120 L Ed 2d 798 (1992). The first of these "categorical takings" covers "regulations that compel the property owner to suffer a physical 'invasion' of his property," and the second addresses situations "where regulation denies all economically beneficial or productive use of land." *Id*. The parties agree that no "permanent physical invasion" of any of the plaintiffs' property occurred, negating the first form of a "categorical taking." Plaintiffs concede that they have not lost all economically beneficial use of their property, eliminating the second.

The analysis of other regulatory takings is generally guided by the factors set forth in *Penn Central Transp Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978). Penn Central established a balancing test requiring a court to examine three factors: "(1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations." *Merkur Steel Supply*, 261 Mich App at 131, citing *Penn Central*, 438 US at 124. Plaintiffs urge that the *Penn Central* factors control the

[4] The clauses are applied differently when there has been a "forced transfer of private property to a private entity for a private use," which is not the situation here. See *AFT Mich*, 497 Mich at 217 n 9.

ultimate outcome of their takings claim and argue that application of those standards demonstrates the existence of questions of fact precluding summary disposition.

Defendants respond that *Penn Central* is inapplicable because the "challenged action comprises an exercise of police power directed to protect the community's health and safety by limiting the use of that property where its use may pose a danger to the community more generally." As an alternative to the *Penn Central* approach, defendants rely on opinions of the United States Supreme Court supporting that, in defendants' words, "there is no taking when the government is combatting a public nuisance to protect the community's health and safety."

The Court finds defendants' argument persuasive and legally well-supported. A long line of United States Supreme Court cases hold that regulations such as those under consideration here do not effect "takings" under the federal Constitution and, by analogy, under Article 10, §2 of the Michigan Constitution. "Takings" jurisprudence instructs that valid regulations promoting public health, safety and welfare are not compensable.

More than a century ago, our Supreme Court described the power of the state to protect public health, pointing out that "property rights" are subject to this power:

> There inhere in the state, however, certain sovereign powers, among which powers is that characterized as the police power, which, when broadly stated, is that power of the state which relates to the conservation of the health, morals, and general welfare of the public, and the

> property rights of the citizen are always held and enjoyed subject to reasonable exercise of the police power by the state. [*Withey v Bloem*, 163 Mich 419, 426-427; 128 NW 913 (1910)].

The exercise of a state's traditional and fundamental police power permits the promulgation of regulations and rules intended to protect the public health. Any concomitant loss of use of private property is simply not a "taking" in the constitutional sense.

In *Lucas*, 505 US at 1022, the United States Supreme Court pointed to several cases illuminating the proposition that the state's police powers enable legislatures and authorities to protect public health by enjoining the use of private property "without the requirement of compensation," including *Mugler v Kansas*, 123 US 623, 668-669; 8 S Ct 273; 31 L Ed 205 (1887). Justice Harlan explained in *Mugler* the rationale for insulating public health orders such as those at issue from "takings" challenges:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. . . . The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the

> morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. [*Id.* at 668–669.]

See also *Goldblatt v. Town of Hempstead*, NY, 369 US 590, 592; 82 S Ct 987; 8 L Ed 2d 130 (1962) ("If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional."). And in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 US 470, 488-490; 107 S Ct 1232; 94 L Ed 2d 472 (1987), the Supreme Court firmly rejected the argument that "takings" cases decided after *Mugler* had implicitly overruled *Mugler*'s central holding.

The restrictions put in place by the Governor's and Directors' orders were designed to stop the spread of COVID-19. The orders advanced legitimate state interests flowing from traditional police powers and did not result in a taking under the Michigan Constitution. As Justice Oliver Wendell Holmes, Jr., observed in *Pennsylvania Coal Co v Mahon*, 260 US 393, 413; 43 S Ct 158; 67 L Ed 322 (1922), "some values [incident to property] are enjoyed under an implied limitation and must yield to the police power." Plaintiffs have simply not established that the orders resulted in a regulatory taking. Accordingly, Count I of their complaint fails to state a claim upon which relief may be granted.

C. TORT CLAIMS

Plaintiffs do not challenge the proposition that defendants are state officials who are absolutely immune from tort claims. MCL 691.1407(5). Primarily relying on our Supreme Court's opinion in *Certified Questions*, 506 Mich 332, plaintiffs claim that defendants were without legal authority to issue orders that tortiously interfered with contractual rights and business relationships. Because defendants' actions were ultra vires, plaintiffs posit, defendants are not entitled to immunity.

Plaintiffs' argument is without merit. In *Certified Questions*, the Supreme Court explained that Governor Whitmer acted under the authority granted in the Emergency Powers of the Governor Act of 1945 (EPGA), MCL 30.401 *et seq*., but that the EPGA was "an unlawful delegation of legislative power to the executive branch in violation of the Michigan Constitution." *Id*. at 338. The Court's holding emerged only after the Governor had issued the orders about which plaintiffs complain and lends no support to plaintiffs' argument that the Governor's actions were in violation of the law as it existed at the time the orders were promulgated. Furthermore, the Directors of the Department of Health and Human Services contemporaneously issued or later reissued the challenged orders, and plaintiffs cite no caselaw undercutting the Directors' authority to do so. Accordingly, summary disposition of Counts II and III is warranted on immunity grounds.

III. CONCLUSION

IT IS HEREBY ORDERED that defendants' motion for summary disposition is GRANTED pursuant to MCR 2.116(C)(8).

IT IS HEREBY FURTHER ORDERED that plaintiffs' motion to transfer is DENIED.

This order resolves the last pending claim and closes the case.

Date: September 14, 2021

s/ Elizabeth L. Gleicher
Judge, Court of Claims

State of Michigan

Gretchen Witmer Governor	Office of the Governor Lansing	Garlin Gilchrist II LT. Governor

EXECUTIVE ORDER

2020-09

TEMPORARY RESTRICTIONS ON THE USE OF PLACES OF PUBLIC ACCOMMODATION

March 16, 2020

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the

governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945, provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To mitigate the spread of COVID-19, protect the public health, and provide essential protections to vulnerable Michiganders, it is reasonable and necessary to impose limited and temporary restrictions on the use of places of public accommodation.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. Beginning as soon as possible but no later than March 16, 2020 at 3:00 pm, and continuing until March 30, 2020 at 11:59 pm, the following places of public accommodation are closed to ingress, egress, use, and occupancy by members of the public:

(a) Restaurants, food courts, cafes, coffeehouses, and other places of public accommodation offering food or beverage for on-premises consumption;

(b) Bars, taverns, brew pubs, breweries, microbreweries, distilleries, wineries, tasting rooms, special licensees, clubs, and other places of public accommodation offering alcoholic beverages for on-premises consumption;

(c) Hookah bars, cigar bars, and vaping lounges offering their products for on-premises consumption;

(d) Theaters, cinemas, and indoor and outdoor performance venues;

(e) Libraries and museums;

(f) Gymnasiums, fitness centers, recreation centers, indoor sports facilities, indoor exercise facilities, exercise studios, and spas;

(g) Casinos licensed by the Michigan Gaming Control Board, racetracks licensed by the Michigan Gaming Control Board, and Millionaire Parties licensed by the Michigan Gaming Control Board; and

(h) Places of public amusement not otherwise listed above.

Places of public accommodation subject to this section are encouraged to offer food and beverage using delivery service, window service, walk-up service, drive-through service, or drive-up service, and to use precautions in doing so to mitigate the potential transmission of COVID-19, including social distancing. In offering food or beverage, a place of public accommodation subject to this section may permit up to five members of the public at one time in the place of public accommodation for the purpose of picking up their food or beverage orders, so long as those individuals are at least six feet apart from one another while on premises.

This section does not prohibit an employee, contractor, vendor, or supplier of a place of public accommodation from entering, exiting, using, or occupying that place of public accommodation in their professional capacity.

2. The restrictions imposed by this order do not apply to any of the following:

(a) Places of public accommodation that offer food and beverage not for on-premises consumption, including grocery stores, markets, convenience stores, pharmacies, drug stores, and food pantries, other than those portions of the place of public accommodation subject to the requirements of section 1;

(b) Health care facilities, residential care facilities, congregate care facilities, and juvenile justice facilities;

(c) Crisis shelters or similar institutions; and

(d) Food courts inside the secured zones of airports.

3. For purposes of this order:

(a) "Place of public accommodation" means a business, or an educational, refreshment, entertainment, or recreation facility, or an institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public. Place of public accommodation also includes the facilities of private clubs, including country clubs, golf clubs, boating or yachting clubs, sports or athletic clubs, and dining clubs.

(b) "Place of public amusement" means a place of public accommodation that offers indoor services or facilities, or outdoor services or facilities involving close contact of persons, for amusement or other recreational or entertainment purposes. A place of public amusement includes an amusement park, arcade, bingo hall, bowling alley, indoor climbing facility, skating rink, trampoline park, and other similar recreational or entertainment facilities.

4. The director of the Department of Health and Human Services, the Michigan Liquor Control Commission, and the executive director of the Michigan Gaming Control Board must issue orders and directives and take other actions pursuant to law as necessary to implement this order.

5. This order does not alter any of the obligations under law of an employer affected by this order to its employees or to the employees of another employer.

6. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

Date: March 16, 2020

s/ Gretchen Whitmer
GRETCHEN WHITMER
GOVERNOR
By the Governor

s/ Jocelyn Benson
SECRETARY OF STATE

State of Michigan

Gretchen Witmer	Department of Health and Human Services	Robert Gordon
Governor	Lansing	Director

OCTOBER 9, 2020

EMERGENCY ORDER UNDER MCL 333.2253 – GATHERING PROHIBITION AND FACE COVERING ORDER

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine for this disease. COVID-19 spreads through close human contact, even from individuals who may be asymptomatic. On March 10, 2020, the Michigan Department of Health and Human Services ("MDHHS") identified the first two presumptive-positive cases of COVID-19 in Michigan. Throughout the pandemic, Michigan has used a range of public health tools and guidance to contain the spread of COVID-19 and protect the public health, including via the Governor's authority under the Emergency Management Act and the Emergency Powers of Governor Act. On Friday, October 2, 2020, the Michigan Supreme Court concluded that the Governor was not authorized to issue executive orders addressing COVID-19 after April 30, 2020.

Michigan was one of the states most heavily impacted by COVID-19 early in the pandemic, with

new cases peaking at nearly 2,000 per day in late March. Strict preventative measures and the cooperation of Michiganders drove those numbers down dramatically, greatly reducing the loss of life. Although fewer than 100 new cases per day were reported in mid-June, cases have increased since that time, and recently nearly 1,000 new cases have been reported per day. To protect vulnerable individuals, ensure the health care system can provide care for all health issues, and prevent spread in schools as we head into the influenza season, we must not permit the spread of COVID-19 to increase. This necessitates continued use of mitigation techniques to restrict gatherings and require procedures in order to reduce the spread of the virus. In the absence of the Governor's executive orders, it is necessary to issue orders under the Public Health Code addressing these topics.

Michigan law imposes on MDHHS a duty to continually and diligently endeavor to "prevent disease, prolong life, and promote public health," and gives the Department "general supervision of the interests of health and life of people of this state." MCL 333.2221. MDHHS may "[e]xercise authority and promulgate rules to safeguard properly the public health; to prevent the spread of diseases and the existence of sources of contamination; and to implement and carry out the powers and duties vested by law in the department." MCL 333.2226(d).

In recognition of the severe, widespread harm caused by epidemics, the Legislature has granted MDHHS specific authority, dating back a century, to address threats to the public health like that posed by COVID-19. MCL 333.2253(1) provides that "[i]f the director determines that control of an epidemic is

necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code." See also *In re Certified Questions,* Docket No. 161492 (Viviano, J., concurring in part and dissenting in part, at 20) ("[T]he 1919 law passed in the wake of the influenza epidemic and Governor Sleeper's actions is still the law, albeit in slightly modified form."); see also *id*. (McCormack, C.J., dissenting, at 12). Enforcing Michigan's health laws, including preventing disease, prolonging life, and promoting public health, requires limitations on gatherings and the establishment of procedures to control the spread of COVID-19. This includes limiting the number, location, size, and type of gatherings, and instituting mitigating measures like face coverings, to prevent ill or infected persons from infecting others.

Considering the above, and upon the advice of scientific and medical experts employed by MDHHS, I have concluded pursuant to MCL 333.2253 that the COVID-19 pandemic continues to constitute an epidemic in Michigan. I further conclude that control of the epidemic is necessary to protect the public health and that it is necessary to establish procedures to be followed during the epidemic to ensure the continuation of essential public health services and enforcement of health laws. As provided in MCL 333.2253, these emergency procedures are not limited to the Public Health Code.

I therefore order that:

1. **Definitions.**

(a) "Child care organizations" means that term as defined by section 1(b) of the Child Care Organizations Act, 1973 PA 116, as amended, MCL 722.111(b)) and day, residential, travel, and troop camps for children (as defined by Rule 400.11101 of the Michigan Administrative Code).

(b) "Close contact" means being within six feet of an individual for fifteen minutes or longer.

(c) "Face covering" means a covering that covers at least the nose and mouth.

(d) "Food service establishment" means that term as defined in section 1107(t) of the Food Law, 2000 PA 92, as amended, MCL 289.1107(t).

(e) "Employee" means that term as defined in section 2 of the Improved Workforce Opportunity Wage Act, 2018 PA 337, as amended, MCL 408.932, and also includes independent contractors.

(f) "Gathering" means any occurrence where two or more persons from more than one household are present in a shared space.

(g) "Organized sports" means competitive athletic activity requiring skill or physical prowess and organized by an institution or by an association that sets and enforces rules to ensure the physical health and safety of all participants ("sports organizer" or "sports organizers").

(h) "Region 6" means that region as defined in Attachment A to this order.

(i) "Symptoms of COVID-19" means fever, an uncontrolled cough, new onset of shortness of breath, or at least two of the following not explained by a known medical or physical condition: loss of taste or smell, muscle aches, sore throat, severe headache, diarrhea, vomiting, or abdominal pain.

2. **Attendance limitations at gatherings.**

(a) The restrictions imposed by this section do not apply to the incidental gathering of persons in a shared space, including an airport, bus station, factory floor, food service establishment, shopping mall, public pool, or workplace.

(b) Gatherings are permitted only as follows:

(1) Indoor gatherings of up to 10 persons occurring at a residence are permitted (face coverings are strongly recommended for such gatherings);

(2) Indoor gatherings of up to 10 persons occurring at a non-residential venue are permitted provided each person at the gathering wears a face covering except as provided in section 6 of this order;

(3) Indoor gatherings of more than 10 and up to 500 persons occurring at a non-residential venue are permitted only to the extent that the organizers and venue:

(A) In venues with fixed seating, limit attendance to 20% of seating capacity of the venue, provided however that gatherings at up to 25% of seating capacity are permitted in Region 6;

(B) In venues without fixed seating, limit attendance to 20 persons per 1,000 square feet in each occupied room, provided however that gatherings of up to 25 persons per 1,000 square feet in each occupied room are permitted in Region 6;

(C) Require that each person at the gathering wears a face covering except as provided in section 6 of this order.

(4) Outdoor gatherings of up to 100 persons occurring at a residence are permitted (face coverings are strongly recommended for such gatherings);

(5) Outdoor gatherings of up to 100 persons occurring at a non-residential venue are permitted provided that each person at the gathering wears a face covering except as provided in section 6 of this order;

(6) Outdoor gatherings of more than 100 and up to 1,000 persons occurring at a non-residential venue with fixed

seating are permitted only to the extent that the organizers and venue:

(A) In venues with fixed seating, limit attendance to 30% of seating capacity;

(B) In venues without fixed seating, limit attendance to 30 persons per 1,000 square feet, including within any distinct area within the event space;

(C) Require that each person at the gathering wear a face covering except as provided in section 6 of this order.

(c) Gatherings are permitted for the following purposes notwithstanding the requirements of subsection (b) of this section:

(1) Voting or election-related activities at polling places;

(2) Training of law enforcement, correctional, medical, or first responder personnel, insofar as those activities cannot be conducted remotely;

(3) Gatherings for the purpose of engaging in organized sports held in accordance with section 8 of this order;

(4) Students in a classroom setting or children in a daycare setting.

(d) Organizers and venues hosting gatherings permitted under subsection (b) of this

section must ensure that persons not part of the same household maintain six feet of distance from one another, including by designing the gathering to encourage and maintain distancing.

3. **Capacity restrictions.** In addition to the attendance limitations imposed by section 2 of this order, the following gathering restrictions apply:

   (a) Except in Region 6, a gathering at a retail store, library, or museum may not exceed 50% of total occupancy limit established by the State Fire Marshal or a local fire marshal.

   (b) Gatherings at recreational sports and exercise facilities, such as gymnasiums, fitness centers, recreation centers, exercise studios, bowling centers, roller rinks, ice rinks, and trampoline parks are prohibited under any of the following circumstances:

      (1) If they exceed 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal;

      (2) If there is less than six feet of distance between each workout station.

   (c) Gatherings in waiting rooms at out-patient health-care facilities, veterinary clinics, personal care services, and other businesses are prohibited unless the facility implements a system to ensure that persons not of the same household

maintain six feet of distance (this system should include a policy that patients wait in their cars for their appointment to be called, if possible).

(d) Gatherings at professional sports and entertainment facilities, including arenas, cinemas, concert halls, performance venues, sporting venues, and stadiums and theaters, are prohibited unless the venue is designed to ensure that patrons not of the same household maintain six feet of distance (e.g. stagger group seating upon reservation, close off every other row, etc.).

(e) Gatherings at outdoor pools may not exceed 50% of bather capacity limits described in Rule 325.2193 of the Michigan Administrative Code.

(f) Gatherings at indoor pools may not exceed 25% of bather capacity limits described in Rule 325.2193 of the Michigan Administrative Code.

(g) Gatherings at non-tribal casinos may not exceed 15% of total occupancy limits established by the State Fire Marshal or a local fire marshal.

4. **Protection of workers.**

(a) Gatherings of employees in the workplace are prohibited under any of the following circumstances:

(1) Except in Region 6, if not strictly necessary to perform job duties, provided however

that, where gatherings are necessary, employees must still maintain six feet of distance from one another where practicable;

(2) If employees not otherwise required to wear face coverings cannot maintain six feet of distance from others;

(3) If employees not otherwise required to wear face coverings occupy the same indoor shared space, such as conference rooms, restrooms, and hallways;

(b) Employees who are subject to a recommendation to isolate or quarantine consistent with CDC guidance; have been instructed to remain home by a health or public health professional; or who are awaiting a COVID-19 test or the results of a COVID-19 test after having symptoms of COVID-19, must not be present in a gathering at work until the employee is advised by a health or public health professional that they may return to work, or the following conditions are met:

(1) 24 hours have passed since the resolution of fever without the use of fever-reducing medications; and

(2) 10 days have passed since their symptoms first appeared

or since they were administered a COVID-19 test that yielded the positive result, if applicable; and

(3) Other symptoms have improved.

5. **Face covering requirement at gatherings.**

(a) A person responsible for a business, government office, school, or other operation, or an agent of such person, must not allow indoor gatherings of any kind unless they require individuals in such gatherings (including employees) to wear a face covering, subject to the exceptions in section 6 of this order. For schools in Region 6, the wearing of face coverings is strongly recommended, but not required.

(b) A person responsible for a business, government office, school, or other operation, or an agent of such person, may not assume that someone who enters the operation without a face covering falls in one of the exceptions specified in section 6 of this order, including the exception for individuals who cannot medically tolerate a face covering. An individual's verbal representation that they are not wearing a face covering because they fall within a specified exception, however, may be accepted.

(c) All child-care organizations must not permit gatherings unless face coverings

are worn by:

(1) All staff and all children 2 years and older when on a school bus or other transporttation provided by the childcare organization or camp;

(2) All staff and all children 4 years and older when in indoor hallways and common areas. Face coverings should be encouraged for children 2 years and older when in indoor hallways; and

(3) All staff and all children 5 years and older when in classrooms, homes, cabins, or similar indoor settings. Face coverings should be encouraged for children 2 years and older when in these settings.

(d) A person responsible for establishments open to the public, or an agent of such person must:

(1) Post signs at entrances instructing customers of their legal obligation to wear a face covering when inside the store; and

(2) Post signs at entrances informing customers not to enter if they are or have recently been sick.

6. **Exceptions to face covering requirements.** Although a face covering is strongly encouraged even for individuals not required to wear one (except for children under the age of 2), the requirement to wear a face covering in sections 2, 5 and 6 of this order do not apply to individuals who:
   (a) Except as otherwise provided in section 5 of this order, are younger than 5 years old (and, per guidance from the CDC, children under the age of 2 should not wear a face covering);
   (b) Cannot medically tolerate a face covering;
   (c) Are eating or drinking while seated at a food service establishment;
   (d) Are exercising outdoors and able to consistently maintain six feet of distance from others;
   (e) Are swimming;
   (f) Are receiving a service for which temporary removal of the face covering is necessary;
   (g) Are entering a business or are receiving a service and are asked to temporarily remove a face covering for identification purposes;
   (h) Are communicating with someone who is deaf, deafblind, or hard of hearing and whose ability to see the mouth is essential to communication;
   (i) Are actively engaged in a public safety role, including but not limited to law

enforcement, firefighters, or emergency medical personnel, and where wearing a face covering would seriously interfere in the performance of their public safety responsibilities;

(j) Are at a polling place for purposes of voting in an election;

(k) Are engaging in a religious service;

(l) Are giving a speech for broadcast or to an audience, provided that the audience is at least six feet away from the speaker;

7. **Food service establishments.** Food service establishments must prohibit gatherings in all the following circumstances:

(a) In indoor common areas in which people can congregate, dance, or otherwise mingle;

(b) If there is less than six feet of distance between each party;

(c) If they exceed 50% of normal seating capacity;

(d) Anywhere alcoholic beverages are sold for consumption onsite, unless parties are seated and separated from one another by at least six feet, and do not intermingle.

(e) If they involve any persons not seated at a table or at the bar top (customers must wait outside the food service establishment if table or bar top seating is unavailable);

(f) Until the food service establishment has

been deep cleaned consistent with Food and Drug Administration and CDC guidance, in the event that an employee of the food service establishment is confirmed positive for COVID-19 or shows symptoms of COVID-19 while at work.

8. **Organized sports.** Gatherings for the purpose of organized sports are permitted in accordance with this section. Organizers and venues of organized sports must ensure that:
   (a) Athletes wear a face covering (except when swimming) or consistently maintain six feet of social distance (except for occasional and fleeting moments) when training for, practicing for, or competing in an organized sport. For example, an athlete participating in a football, soccer, or volleyball game would not be able to consistently maintain six feet of distance, and therefore would need to wear a face covering. Sports organizers must ensure that athletes comply with this section for each organized sporting event.
   (b) They consider the guidance issued by this Department regarding how a sport can be played safely.
   (c) For organized sports competitions, sports organizers must ensure either that the live audience is limited to the guests of the athletes (requiring face coverings for non-athletes consistent with section 6), with each athlete

designating up to two guests, or that the event complies with gathering requirements of section 2(b) in this order.

(d) For indoor organized sports, sports organizers must ensure that no concessions are sold at the venue.

(e) Notwithstanding any other provision of this order, professional sports leagues and teams, including professional athletes engaged in individual sports, may engage in professional sports operations, provided that:

(1) The activities are conducted under a COVID-19 safety plan that is consistent with any guidance from the CDC and this Department; and

(2) Participants maintain six feet of distance from one another to the extent compatible with the sporting activity.

9. **Contact Tracing.**

(a) Gatherings are prohibited at the following facilities unless the facility maintains accurate records, including date and time of entry, names of patrons, and contact information, to aid with contact tracing, and denies entry for a gathering to any visitor who does not provide, at a minimum, their name and phone number:

(1) All businesses or operations that provide barbering, cos-

metology services, body art services (including tattooing and body piercing), tanning services, massage services, or similar personal care services;

(2) Sports and entertainment facilities (except outdoor, unticketed sporting events), including arenas, cinemas, concert halls, performance venues, sporting venues, stadiums and theaters, as well as places of public amusement, such as amusement parks, arcades, bingo halls, bowling centers, skating rinks, and trampoline parks;

(3) Gymnasiums, fitness centers, recreation centers, exercise facilities, exercise studios, bowling centers, roller rinks, ice rinks, and like facilities.

(b) All businesses or operations that provide in-home services, including cleaners, repair persons, painters, and the like must not permit their employees to gather with clients unless the business maintains accurate appointment records, including date and time of service, name of client, and contact information, to aid with contact tracing.

10. **Implementation.**

(a) Nothing in this order should be taken to

modify, limit, or abridge protections provided by state or federal law for a person with a disability.

(b) Under MCL 333.2235(1), local health departments are authorized to carry out and enforce the terms of this order.

(c) Law enforcement officers, as defined in the Michigan Commission on Law Enforcement Standards Act, 1965 Public Act 203, MCL 28.602(f), are deemed to be "department representatives" for purposes of enforcing this order, and are specifically authorized to investigate potential violations of this order. They may coordinate as necessary with the appropriate regulatory entity and enforce this order within their jurisdiction.

(d) Neither a place of religious worship nor its owner is subject to penalty under this order for allowing religious worship at such place. No individual is subject to penalty under this order for engaging in religious worship at a place of religious worship.

(e) Consistent with MCL 333.2261, violation of this order is a misdemeanor punishable by imprisonment for not more than 6 months, or a fine of not more than $200.00, or both.

(f) The October 5, 2020 order entitled Gathering Prohibition and Mask Order is rescinded. Nothing in this order shall be construed to affect any prosecution

based on conduct that occurred before the effective date of this order.

(g) Consistent with any rule or emergency rule promulgated and adopted in a schedule of monetary civil penalties under MCL 333.2262(1) and applicable to this order, violations of this order are punishable by a civil fine of up to $1,000 for each violation or day that a violation continues.

(h) If any provision of this order is found invalid by a court of competent jurisdiction, whether in whole or in part, such decision will not affect the validity of the remaining part of this order.

This order is effective immediately, and remains in effect through October 30, 2020. Persons with suggestions and concerns are invited to submit their comments via email to COVID19@michigan.gov.

Date: October 9, 2020
s/ Robert Gordon
Robert Gordon, Director
Michigan Department of Health
and Human Services

Michigan Court of Claims
Ingham County

MOUNT CLEMENS RECREATION BOWL, INC., a Michigan profit corporation, K.M.I, Inc., a Michigan profit corporation, and Mirage Catering, Inc., a Michigan profit corporation, all on behalf of themselves and a class of all others similarly situated, Plaintiffs,

v.

Elizabeth HERTEL, in her official capacity as Director of the Michigan Department of Health and Human Services, Patrick Gagliardi, in his official capacity as Chair of the Michigan Liquor Control Commission, and Gretchen Whitmer, in her official capacity as Governor of the State of Michigan, Defendants.

No. 21-000126.

May 25, 2021.

Class Action Complaint for Money Damages and Demand for Jury Trial

* * * * *

INTRODUCTION

1. This class action complaint for money damages and demand for jury trial is brought pursuant to the Takings Clause of Article X, Section 2 of the Michigan Constitution of 1963, and for tortious interferences with contracts[1] and business relationships[2] pursuant to the common law of the State of Michigan against Elizabeth Hertel, acting in her official capacity as Director of the Michigan Department of Health and Human Services ("MDHHS"), Patrick Gagliardi, acting in his official capacity as Chairperson of the Michigan Liquor Control Commission ("LCC"), and Governor Gretchen Whitmer, acting in her official capacity as Governor of the State of Michigan, based on the following allegations:

PARTIES

2. Plaintiffs, Mount Clemens Recreation Bowl, Inc., K.M.I. Inc., and Mirage Catering, Inc. ("Plaintiffs") bring this civil action individually and as representatives of a class of similarly situated persons and entities across and within the State of Michigan.

3. Defendant Elizabeth Hertel ("Defendant Hertel") is the Director of MDHHS.

4. Defendant Patrick Gagliardi ("Defendant Gagliardi") is the Chair of the LCC.

5. Defendant Gretchen Whitmer ("Governor Whitmer") is the Governor of the State of Michigan.

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[1] *Badiee v Brighton Area Schools*, 265 Mich App 343, 366-367; 695 NW2d 521 (2005).

[2] *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-699; (1996).

JURISDICTION AND VENUE

6. Jurisdiction is proper in this Court pursuant to Section 1, Article VI of the Michigan Constitution, which vests the circuit court with general jurisdiction. Nothing in this complaint should be read to waive Plaintiffs' rights to bring this suit in circuit court. Additionally, MCL 600.6421(1) of the Michigan Court of Claims Act recognizes the circuit court's "jurisdiction to hear and determine a claim for which there is a right to a trial by jury as otherwise provided by law, including a claim against an individual employee of this state for which there is a right to a trial by jury as otherwise provided by law." Further, "if a party has the right to a trial by jury and asserts that right as required by law, the claim may be heard and determined by a circuit . . . court in the appropriate venue." *Id.* *See also* Doe v Department of Transportation, 324 Mich App 226 (2018) (holding that jurisdiction in the circuit court was proper in an action demanding a jury trial against the Michigan Department of Transportation). Plaintiffs allege regulatory takings, tortious interference with a contract, and tortious interference with a business relationship. Plaintiffs have a right to a jury trial on all of these claims and have so demanded a jury trial contemporaneous with this Complaint; therefore, circuit court jurisdiction is proper and jurisdiction in the Court of Claims would be improper pursuant to MCL 600.6421(1) and *Doe*, *supra*.

7. The amount in controversy exceeds the sum of twenty-five thousand dollars ($25,000.00), exclusive of costs and interest.

8. Venue is proper in this Court pursuant to MCL 600.1615, which provides that "[a]ny county in which

any governmental unit . . . exercises or may exercise its governmental authority is the proper county in which to commence and try actions against such governmental units . . .” Under MCR 2.201(C)(5), actions against an officer of a governmental unit in that officer’s official capacity are deemed to be actions against the governmental unit itself. Therefore, because the governmental units being sued in this action exercise—and have, in fact, exercised—their governmental authority in Macomb County, said county is the proper venue for this action. Further, the economic injuries and tortious actions complained of in this suit impacted the representative plaintiffs in Macomb County. Venue is also proper in Macomb County pursuant to MCL 600.1629(1)(a)(i) by way of MCL 600.1641(2).

9. All named-representative plaintiffs are entities headquartered in Macomb County; their registered agents are in Macomb County; their food-service businesses operate in Macomb County; they have all had their property taken via State-government regulation; and they seek to act as class representatives for all similarly situated persons.

GENERAL ALLEGATIONS

10. On March 10, 2020, Michigan confirmed its first two cases of COVID-19, the disease caused by an infection of the SARS-CoV-2 virus. [Executive Order No. 2020-4].

11. *Less than six days later*, on Monday, March 16, 2020, Governor Whitmer issued Executive Order 2020-9. [Executive Order No. 2020-9]. That Executive Order immediately shuttered every restaurant, bar, and banquet hall throughout the entire

state. The order provided, in pertinent part, as follows:

> Beginning as soon as possible but no later than March 16, 2020 at 3:00 pm, and continuing until March 30, 2020 at 11:59 pm, the following places of public accommodation are closed to ingress, egress, use, and occupancy by members of the public:
>
> (a) Restaurants, food courts, cafes, coffeehouses, and other places of public accommodation offering food or beverage for on-premises consumption;
>
> (b) Bars, taverns, brew pubs, breweries, microbreweries, distilleries, wineries, tasting rooms, special licensees, clubs, and other places of public accommodation offering alcoholic beverages for on-premises consumption. [EO 2020-9].

12. At the time Executive Order 2020-9 was issued—and despite the fact that all restaurants, bars, and banquet halls throughout Michigan were immediately closed under the order—there were a scant 54 confirmed cases of COVID-19 in all of Michigan,[3] and no deaths from the virus had yet been reported.[4]

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[3] MLive, *Michigan announces one more case of coronavirus - bringing total to 54*, https://www.mlive.com/public-interest/2020/03/michigan-announces-one-more-case-of-coronavirus-bringing-total-to-54.html (accessed January 23, 2021).

[4] Click On Detroit, *Michigan coronavirus timeline: Key dates, COVID-19 case tracking, state orders*,

13. Following Executive Order 2020-9, on March 23, 2020, Governor Whitmer issued Executive Order 2020-21, which prohibited all purportedly "nonessential" operations and businesses from requiring their employees to report to work in person. [Executive Order No. 2020-21]. This order further affected the restaurant, bar, and banquet-hall industry in Michigan, as such establishments were deemed "nonessential" by Governor Whitmer. [*Id.*]. The decree also served as a blanket stay-at-home order for the overwhelming majority of Michigan residents. [*Id.*].

14. On April 9, 2020—less than a month after her first executive order—Governor Whitmer issued her 42nd executive order, extending the stay-at-home lockdown issued under Executive Order 2020-21 through April 30, 2020. [Executive Order No. 2020-42]. All restaurants, bars, and banquet halls throughout Michigan remained closed. All "nonessential" work, travel, and commerce remained prohibited by fiat. Approximately 0.3% of the Michigan populace had contracted COVID-19 at this time.[5]

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https://www.clickondetroit.com/health/2020/03/24/michigan-coronavirus-timeline-key-dates-covid-19-case-tracking-state-orders/ (accessed January 23, 2021).

[5] 30,023 cases were reported in Michigan on April 17, 2020: Click On Detroit, *Michigan coronavirus (COVID-19) cases up to 30,023; Death toll now at 2,227* https://www.clickondetroit.com/health/2020/04/17/michigan-coronavirus-covid-19-cases-up-to-30023-death-toll-now-at-2227/ (accessed on January 23, 2021). Michigan's population is approximately 9.98 million people. United States Census Bureau, QuickFacts Michigan https://www.census.gov/

15. Though it appeared largely unnecessary given the successive lockdown orders, on April 13, 2020, Governor Whitmer issued Executive Order 2020-43 specifically covering restaurants, bars, and banquet halls, and which, in pertinent part, provides as follows:

> I order the following: Effective immediately and continuing until April 30, 2020 at 11:59 pm, the following places of public accommodation are closed to ingress, egress, use, and occupancy by members of the public:
>
> (a) Restaurants, food courts, cafes, coffeehouses, and other places of public accommodation offering food or beverage for on-premises consumption;
>
> (b) Bars, taverns, brew pubs, breweries, microbreweries, distilleries, wineries, tasting rooms, special licensees, clubs, and other places of public accommodation offering alcoholic beverages for on-premises consumption. [Executive Order No. 2020-43].

16. On April 24, 2020, Governor Whitmer again extended the general statewide lockdown order—this time until May 15, 2020. [Executive Order No. 2020-59].

17. On April 30, 2020, Governor Whitmer also extended Executive Order 2020-43's forced closure which specifically covered all bars, restaurants, and banquet halls throughout Michigan until May 29, 2020. [Executive Order No. 2020-69].

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quickfacts/MI (accessed January 23, 2021). 30,000 divided by 9.98 million = 0.3%.

18. On May 7, 2020, Governor Whitmer extended the general statewide lockdown order *even further still* (but with some new caveats) until May 28, 2020. [Executive Order No. 2020-77]. Executive Order 2020-77 is 17 pages long.

19. Bars, restaurants, and banquet halls throughout Michigan remained either fully or partially closed until June 8, 2020, when—mercifully—they were allowed to reopen for indoor dining pursuant to Executive Order 2020-110. [Executive Order No. 2020-110]. Even then, these food-service establishments were subject to extremely strict coronavirus operating regulations issued by the State.

20. Governor Whitmer's orders continued *ad nauseum* until the vast majority of the nearly *200* executive orders related to COVID-19 issued by her in just seven months were ruled unconstitutional by the Michigan Supreme Court on October 2, 2020. *In re Certified Questions*, No. 161492, 2020 WL 5877599, (Mich. Oct. 2, 2020). The orders invalidated included those that regulated bars, restaurants, and banquet halls.

21. In the wake of the Michigan Supreme Court's October 2, 2020 Order, Governor Whitmer motioned the Supreme Court to delay its ruling. The Court denied her motion.

22. Governor Whitmer also declared contemporaneous with the Supreme Court's October 2, 2020 Order that her decrees would stay in effect via "alternative sources of authority"—meaning, she would effectively circumvent the Michigan Supreme

Court's October 2, 2020 Order through other methods.[6] And that is exactly what she did.[7]

23. On October 5, 2020—just three days after the Supreme Court's Order—Governor Whitmer, upon information and belief, conspired with now-resigned Director Robert Gordon of MDHHS to issue an emergency order purportedly pursuant to MCL 333.2253 restricting gatherings and requiring that face masks be worn in public; said order was quickly replaced with an October 9, 2020 Order. [MDHHS Gathering Prohibition and Face Covering Order, October 9, 2020.]. This order provided the following restrictions with respect to restaurants, bars, and banquet halls:

> Food service establishments must prohibit gatherings in all the following circumstances:
>
> (a) In indoor common areas in which people can congregate, dance, or otherwise mingle;
>
> (b) If there is less than **six feet of distance between each party**;
>
> (c) If they exceed **50% of normal seating capacity**;
>
> (d) Anywhere alcoholic beverages are sold for consumption onsite, unless parties are seated

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[6] The Detroit News, *High court strikes down Whitmer's emergency powers; gov vows to use other means* https://www.detroitnews.com/story/news/local/michigan/2020/10/02/michigan-supreme-court-strikes-downgretchen-whitmers-emergency-powers/5863340002/ (accessed January 23, 2021).

[7] Common sense dictates that Governor Whitmer would not have spoken so boldly, had she not already secured the agreement or acquiescence **of** the other Defendants in achieving her goal.

> and **separated from one another by at least six feet, and do not intermingle**.
>
> (e) If they involve any persons not seated at a table or at the bar top (customers must wait outside the food service establishment if table or bar top seating is unavailable). [*Id*.].

24. Shortly thereafter, on November 15, 2020, MDHHS issued an order titled "Emergency Order under MCL 333.2253 - Gatherings and Face Mask Order." This "Emergency Order" initiated a "three-week pause," which completely prohibited indoor dining at bars, restaurants, and banquet halls throughout Michigan as follows:

> b. Gatherings are permitted at food service establishments under the following conditions:
>
> 1. **Persons are not gathered indoors** except in custodial settings, medical facilities, school and university cafeterias, shelters, and soup kitchens. If attendees are seated at tables, persons must be 6 feet apart, or members of a household may share a table and tables must be spaced a minimum of 6 feet apart;
>
> 2. Persons participating in outdoor dining are seated no more than 6 to a table and tables are spaced a minimum of 6 feet apart. [*Id*.].

25. The November 15, 2020 MDHHS emergency order did not provide any well-reasoned rationale explaining why restaurants, bars, and banquet halls were and are regulated differently than other businesses, and Defendants have yet to provide any science supporting their actions that would meet the minimal evidentiary threshold required in a court of

law. Yet, Defendants' regulations have cost the Plaintiffs millions and millions of dollars.

26. Then, on December 9, 2020, a new "Gatherings and Face Mask Order" went into effect, extending until December 20, 2020 the same indoor-dining prohibitions already crippling restaurants, bars, and banquet halls throughout Michigan. [MDHHS "Gatherings and Face Mask Order" December 7, 2020]. With the weather turning cold in December, outdoor dining was no longer an option for many patrons, and sales plummeted for these food-service establishments.

27. On December 18, 2020, yet another MDHHS order was issued by Director Gordon. [MDHHS "Gatherings and Face Mask Order" December 18, 2020]. This order extended the indoor dining ban until January 15, 2021.

28. And yet another order was issued by Director Gordon on January 13, 2021, further regulating and prohibiting indoor dining until January 31, 2021. [MDHHS "Gatherings and Face Mask Order" January 13, 2021].

29. On January 22, 2021, MDHHS Director Gordon issued an order titled "January 22, 2021 Gatherings and Face Mask Order." He then abruptly announced his resignation on Twitter[8] and was replaced by Defendant Director Elizabeth Hertel. The January

[8] Click On Detroit, *Michigan health director Robert Gordon announces resignation* https://www.clickondetroit.com/news/local/2021/01/22/michigan-health-director-robert-gordon-announces-resignation-from-whitmer-administration/ (accessed January 23, 2021)

22, 2021 Order provides as follows with respect to restaurants, bars, and banquet halls:

a. Gatherings are prohibited at food service establishments unless:

1. Consumption of food or beverages is permitted only in a designated dining area where patrons are seated, groups of patrons are separated by at least six feet, no more than 6 patrons are seated together (at a table, booth, or group of fixed seats), and groups of patrons do not intermingle;

2. Patrons are not permitted to gather in common areas in which people can congregate, dance, or otherwise mingle;

3. In the event that an employee of a food service establishment is confirmed positive for COVID-19 or shows symptoms of COVID-19 while at work, a gathering at that food service establishment is prohibited until the food service establishment has been deep cleaned consistent with Food and Drug Administration and CDC guidance;

4. At establishments offering indoor dining:

A. The number of patrons indoors (or a designated dining area of a multi-purpose venue) **does not exceed 25% of normal seating capacity, or 100 persons, whichever is less;**

B. Food service establishments, or the food service establishment portion of a multi-purpose venue, must close indoor dining between the hours of 10:00 PM and 4:00 AM;

C. The venue displays, in a prominent location, the MDHHS "Dining During COVID-19" brochure. [*Id*.].

30. Defendant Hertel issued a February 4, 2021 Order that—for all intents and purposes—continued identically the chocking restrictions of Director Gordon's January 22, 2021 Order with respect to restaurants, bars, and banquet halls. [MDHHS "Gatherings and Face Mask Order" February 4, 2021]. The February 4, 2021 Order kept in place the 25% indoor dining capacity regulations for food-service establishments set forth in the January 22, 2021 Order. Defendant Hertel's February 4, 2021 Order became effective of [sic] February 8, 2021, and was originally slated to remain in effect through March 29, 2021, but was superseded by a March 2, 2021 Order that became effective on March 5, 2021. [MDHHS "Gatherings and Face Mask Order" March 2, 2021]

31. Defendant Hertel's March 2, 2021 Order continued much of the same restrictions relative to indoor dining at food-service establishments, except that indoor dining capacity was increased to "50% of normal seating capacity, or 100 persons, whichever is less" and the 10:00 p.m. curfew was pushed back to 11:00 p.m. [*Id*].

32. Defendant Hertel's March 2, 2021 was set to expire on April 19, 2021. [*Id*.]. However, not less than 14 days after her March 2 Order became effective on March 5, Defendant Hertel issued yet another order on March 19, 2021. [MDHHS "Gatherings and Face Mask Order" March 19, 2021].

33. Defendant Hertel's March 19, 2021 Order became effective on March 22, 2021, and it continued

the exact same indoor-dining capacity restrictions as her March 2, 2021 Order. [*Id.*].

34. On April 16, 2021, Defendant Hertel issued yet *another* order, which became effective on April 19, 2021, and which further continued the same 50% indoor-dining seating capacities and the arbitrary 11:00 p.m. curfew. [MDHHS "Gatherings and Face Mask Order" April 16, 2021].

35. On May 4, 2021, Defendant Hertel issued her current order, which became effective on May 6, 2021. [MDHHS "Gatherings and Face Mask Order" May 4, 2021]. Predictably, this order—like her preceding three orders—forces restaurants and bars to turn away customers and maintain no more than 50% normal seating capacity or 100 patrons, whichever is less. [*Id.*].

36. Importantly, while restaurants and bars are currently restricted to these 50% indoor capacity regulations, banquet halls have been obligated to comply with the standard prohibition governing nonresidential indoor gatherings in the orders. This means that banquet halls are permitted to host no more than 25 persons at one time. This has obviously had a devastating effect on Michigan banquet halls.

37. So, as of now, food service establishments throughout Michigan continue to be relegated to 50% indoor seating capacity—which equates to a 50% partial taking—as Plaintiffs' food-service establishments enter their 14th month of suffocating regulations. And banquet halls are stuck with far worse capacity restrictions, such that they cannot realistically operate their business at any discernable profit.

38. With the advent of spring, food service establishments have been able to serve more patrons outdoors. But in the recently passed colder months when restaurants, bars, and banquet halls tried to install and operate open-air tents, heaters, and other apparatus to facilitate safe, outdoor dining during wintertime, the Defendants unleashed agents of the LCC to fine, threaten, and summarily shut down food-service businesses. Now, if food-service establishments do not follow the opaque, enigmatic, and amorphous rules concerning dining, they risk losing their liquor licenses through LCC enforcement, among other disciplinary actions. It is unclear when, how, and why Defendant LCC Chair Pat Gagliardi and the LCC became the deputized law-enforcement wing of MDHHS. However, Plaintiffs note that the MDHHS orders referenced above provide that "[l]aw enforcement officers, as defined [by] MCL 28.602(f), are deemed to be 'department representatives' for purposes of enforcing th[ese] order[s], and are specifically authorized to investigate potential violations of th[ese] order[s]." Yet, under MCL 28.602(f), liquor control inspectors are specifically *excluded from the definition* of "law enforcement officer." MCL 28.206(f)(ii)(U).

39. Through all of these draconian regulations (whether issued by (1) Governor Whitmer, (2) the MDHHS through then-Director Gordon or acting Director Elizabeth Hertel, or (3) the LCC through Chair Pat Gagliardi) new, different, and unforeseen business expenses attributable to the COVID-19 orders are extreme, and severely affect restaurants, bars, and banquet halls. Furthermore, lost profits suffered by these businesses are astronomical.

40. Importantly, restaurants, bars, and banquet halls are specific-use properties, and their value is appraised most accurately on an income-based approach to business valuation. More plainly, these businesses are appraised based on their ability to pay rent, which, in turn, is based on their ability to generate income, which, as a corollary, is directly connected to sales. Sales are tied to the number of patrons a restaurant can serve. And it is a fact that the Defendants' regulations and corresponding enforcement actions have drastically reduced the number of patrons that Plaintiffs' food-service establishments can and do serve.

41. Regardless of the legality of these regulations, (the legality of which no court has yet determined) the orders shut down Michigan's economy, devastating food-service businesses and severely disrupting people's lives. Businesses that were operated by families for generations were and are disappearing. Favorite neighborhood restaurants that have served as landmarks and social hotspots for decades sit dark and empty. These facts are indisputable.

42. Yet not a single dime has been paid in the form of just compensation[9] by or on behalf of the Defendants for the unwarranted regulations which decimated restaurants, bars, and banquet halls across Michigan. "Just compensation" is required per Article X, Section 2 of the Michigan Constitution whenever

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[9] It remains to be seen what, if any, effect the PPP loan program had, and whether such a scheme could be deemed "just compensation." Regardless, the pittance of distributed PPP money is completely insufficient to cover the massive losses that bars, restaurants, and banquet halls have incurred because of the above-mentioned regulations.

government regulation substantially interferes with an owner's use and enjoyment of their property. Const 1963, art X, § 2.

43. It is *indisputable* that the regulations imposed by Governor Whitmer, the MDHHS, and the LCC constitute a taking for which just compensation must be remitted to business owners in Michigan.

44. Sadly, the stark reality is that while the above-cited orders were and are being fashioned to appear detailed and precise, there is no science and no hard data attendant to these orders at all that properly correlates with the regulations imposed. Governor Whitmer, MDHHS, and the LCC have worked hard to create bases to regulate the restaurant, bar, and banquet hall industry—but the science is woefully lacking to sufficiently justify such an enormous taking and the subsequent economic fallout to one industry. And Defendants have often made much ado about COVID-19 infection numbers declining following their orders which shut down food-service establishments, but these averments are examples of the *post hoc ergo propter hoc* logical fallacy; what follows is not necessarily caused by what precedes it. That is, to say, that the connective scientific studies employed by Defendants are erroneous, the correlative effect between restaurant closures and declining infection numbers is tenuous, and yet the oppressive regulations against restaurants, bars, and banquet halls continues unabated and without even a scintilla of just compensation being rendered.

45. Indeed, the recent "third wave" of Covid-19 infections, which began on or about February 24, 2021 and peaked on April 12, 2021, continue to fall sharply despite the fact that restaurants were not shut down

nor were any capacity restrictions tightened. This reality makes it obvious that Defendants' rhetoric claiming that dining capacity restrictions and other regulations kept infections low and helped save lives is false.

46. Yet every time the science and the correlators between COVID-19 infection numbers and food-service-establishment closures is challenged, the Defendants' collective position is simply that there is no need to debate the issue because the science is well-settled. Recent events surrounding the third wave prove otherwise.

47. MDHHS itself has reported that, on the basis of actual contact tracing, only *4.4% of COVID-19 infections statewide are attributable to restaurants.*[10] Other studies show that *less than 2% of COVID-19 cases originate from bars and restaurants.*[11]

48. The Defendants' actions undoubtedly constitute regulatory takings against Michigan restaurants, bars, and banquet halls.

49. Therefore, it is indisputable per the Michigan Constitution that just compensation must be rendered to compensate Plaintiffs for business expenses and

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[10] Detroit Free Press, Michigan restaurant group sues to stop 3-week shutdown of indoor dining https://www.freep.com/story/news/local/michigan/2020/11/17/michigan-restaurant-group-sues-state-new-covid-restrictions/6326821002/ (accessed January 25, 2021).

[11] Newsweek, *Restaurants and Bars Account for Less Than 2 Percent of New COVID-19 Cases in New York*, https://www.newsweek.com/restaurants-bars-account-less-2-percent-new-covid-19-cases-new-york-1554206 (accessed January 25, 2021).

lost profits, among other damages, and Plaintiffs hereby demand same.

50. And, to the extent this Honorable Court finds the Defendants' actions illegal, those actions therefore constitute illegal tortious interference outside the scope of their governmental authority. As such, Plaintiffs hereby seek monetary damages for same.

CLASS ALLEGATIONS

51. This class action is brought pursuant to MCR 3.501 by the named Plaintiffs on behalf of all similarly situated food-service establishment businesses throughout Michigan negatively affected by Defendants' regulations and enforcement actions. The number of food-service and liquor licensees in Michigan number around 17,000. Therefore, the class members are so numerous that joinder of all members is impractical and class action status is the most practical method available for Plaintiffs to seek recompense.

52. The named-Plaintiffs' claims are typical of the claims of class members. The named Plaintiffs, as food service establishments, are members of the Class they are seeking to represent, and Plaintiffs were injured by the same wrongful and illegal regulations by the Defendants.

53. There are questions of law and fact raised by the named-Plaintiffs' claims common to, and typical of, those raised by the Class they seek to represent because all Michigan food-service establishments have been subjected to harsh Covid-19 regulations involving shutdowns and restricted dining capacities. As such, Defendants' violations of law and resulting harms alleged by the named Plaintiffs are typical of

the violations and harms suffered by all Class members.

54. Plaintiffs Class representatives will fairly and adequately protect the interest of the Plaintiff class members. Counsel is unaware of any conflicts of interest between the class representatives.

55. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder is impracticable. Separate actions would create a risk of inconsistent or varying results, and separate actions would impair and impede individual members from adequate protection of their interests. Plaintiffs anticipate no difficulty in managing this action as a class action.

COUNT I VIOLATION OF THE MICHIGAN CONSITUTION TAKINGS CLAUSE

56. Plaintiffs hereby incorporate by reference all preceding paragraphs herein.

57. Defendants have seized or otherwise taken without just compensation Plaintiffs real and personal property by way of regulations imposed upon them. The operation of bars, restaurants, and banquet halls in Michigan necessarily requires an interest in real property in order to function, either through ownership or leasehold interests, and Defendants have interfered with and regulated that property and the use of that property substantially to the point that these properties have become valueless or largely valueless. In truth, Defendants' regulatory actions constitute a taking of real property as the limitations on indoor dining have devalued the buildings that house these businesses. Therefore, such regulation constitutes a taking.

58. An uncompensated regulatory taking violates the Article X, Section 2 of Michigan's 1963 Constitution.

59. The above-cited and referenced regulatory orders issued by Governor Whitmer and the MDHHS, as well as the LCC's regulatory actions predicated on those orders, have substantially and materially jeopardized Plaintiffs' businesses. Either no compensation has been paid for these regulatory takings or the compensation that has been paid is woefully insufficient.

60. The Takings Clause applies whether the governmental regulations/interference with private businesses is temporary or permanent and partial or total.

61. The Defendants' actions constitute a regulatory taking without just compensation.

COUNT II TORTIOUS INTERFERENCE WITH A CONTRACT

62. Plaintiffs hereby incorporate by reference all preceding paragraphs herein.

63. Under *Badiee v Brighton Area Schools*, 265 Mich App 343, 366–367; 695 NW2d 521 (2005), "the elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant." *See also Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996); *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 95–96; 443 NW2d 451 (1989).

64. "[O]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing

of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *CMI Int'l., Inc. v Intermet Int'l. Corp.*, 251 Mich App 125, 131, 649 NW2d 808 (2002), quoting *Feldman v Green*, 138 Mich App 360, 378, 360 NW2d 881 (1984). "A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances." *Prysak v R L Polk Co.*, 193 Mich App 1, 12–13, 483 NW2d 629 (1992). "If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference." *CMI Int'l.*, 251 Mich App at 131.

65. Defendants were not acting within the scope of their authority due to the illegal nature of the acts and regulations complained of; therefore, MCL 691.1407(5) of the Michigan Governmental Tort Liability Act would not apply to shield Defendants from tort liability, and accordingly Defendants would not enjoy immunity for tortiously interfering with contractual relationships between the Plaintiffs and their vendors, contractors, and suppliers.

66. Defendants are aware that the correlative infection-rate science is lacking with respect to their food-service establishment moratorium orders. Restaurants, bars, and banquet halls were and are still specifically persecuted under the Defendants' orders and actions. These aforementioned interferences constitute affirmative acts perpetrated by Defendants which have unjustifiably instigated breaches of contracts held between the Plaintiffs and third parties.

COUNT III TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP

67. Plaintiffs hereby incorporate by reference all preceding paragraphs herein.

68. Under *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698–699; (1996) the elements of tortious interference with a business relationship are "the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff . . ."

69. Defendants were not acting within the scope of their authority due to the illegal nature of the acts and regulations complained of; therefore, MCL 691.1407(5) of the Michigan Governmental Tort Liability Act would not apply to shield Defendants from tort liability, and accordingly Defendants would not enjoy immunity for tortiously interfering with business relationships and expectancies between the Plaintiffs and their vendors.

70. Plaintiffs enjoy valid business relationships and expectancies with a multitude of third-party vendors. All restaurants, bars, and banquet halls require outside suppliers, and this reality is common sense and common knowledge; therefore, Defendants were aware of such relationships. Through their intentional actions, Defendants induced breaches and terminations of relationships and business expectancies between Plaintiffs and their vendors.

WHEREFORE, the Plaintiffs request that this Honorable Court enter judgement against Defendants providing:

a. Just compensation in the form of monetary damages to Plaintiffs' businesses for the regulatory takings perpetrated by Defendants, including business expenses and lost profits;

b. Any and all damages of whatever kind attributable to the Defendants' tortious interference with Plaintiffs businesses' contracts, relationships, and expectancies;

c. Attorneys' fees and costs.

Respectfully submitted,

MICHIGAN JUSTICE, PLLC

/s/ Albert B. Addis

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Attorneys for Plaintiffs

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Dated: May 25, 2021

DEMAND FOR JURY TRIAL

The Plaintiffs, Mount Clemens Recreation Bowl, Inc., K.M.I. Inc., and Mirage Catering, Inc. by and through their attorneys, Michigan Justice, PLLC, hereby demand a trial by jury in this matter.

Respectfully submitted,

MICHIGAN JUSTICE, PLLC

/s/ Albert B. Addis

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