SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

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

Plaintiffs,

v.

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

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

ORDER ON APPLICATION FOR TEMPORARY RESTRAINING ORDER

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

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

Defendant(s).

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

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

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

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

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

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

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

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

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

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

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

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

Factual Allegations in Complaint and First Amended Complaint

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiffs allege that the Governor's Blueprint lacks a path to a "green" tier; in other words, identification of criteria that would allow a return to pre-pandemic conditions. They allege that neither the Governor nor the CDPH has articulated a plan to rescind the state of emergency. Thus, Plaintiffs allege, the Plan could not lead to terminating the state of emergency at the earliest possible date, which according to the First Amended Complaint, is in violation of GC 8629. Plaintiffs allege that the Emergency Powers granted to the Governor by the legislature are not limitless. During a State of Emergency, the Governor may direct state personnel and resources to respond to the emergency (GC 8628 and 8628.5); exercise complete authority over state agencies and use police power to effectuate purposes (GC 8627); promulgate, issue, and enforce orders and regulations necessary with the force of law (violation of which is a misdemeanor) (GC 8567). The provisions give authority to direct state resources to respond to the emergency, including police powers properly vested in Executive Branch.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Temporary Restraining Order

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

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

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

Plaintiffs make the following arguments in their Ex Parte Application:

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

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

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

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

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

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

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

Opposition From the State

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

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

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

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

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

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

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

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

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

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

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

Standard for Temporary Restraining Orders

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

Balance of Harm

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

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

Americans and over a quarter of a million have lost their lives. As the Governor has moved San Diego County into the Purple Tier, the United States has seen the worst daily infection rates over the course of the pandemic, with the number of positive infections topping 100,000 per day in all but one day from November 4 through November 16. The rate of increase in cases presently is greater than at any other time in the course of the pandemic. Hospitalizations continue to climb. The Court takes judicial notice of and accepts these statistics from the Opposition brief.

The design of the Blueprint at issue in this litigation is the reduction of community spread. As stated by Dr. Soto, "The basic idea behind the California Blueprint is set forth in a declaration by Dr. James Watt, Chief of the Division of Communicable Disease Control of the Center for Infectious Diseases at the California Department of Public Health, which I have reviewed follows: `By reducing community spread, we can decrease death and disability in our community….'" (Soto Declaration, page 5).

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

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

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Probability of Success

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

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

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

Whether the Emergency Services Act Violates the California Constitution

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

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

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

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

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

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

Whether the Governor's Actions re the Blueprint for Safer Economy are Outside Authority Granted in the Emergency Services Act

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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(4) Criticisms of the Methodology for Including Restaurants and Gyms in the move from "Red" to "Purple"

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

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

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

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

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

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

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

[Epidemiological Article, p. 2]

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

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Conclusion

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

Dated: December 23, 2020

KENNETH J. MEDEL
Judge of the Superior Court