

JOHN MCCANN, ESQ bar number:

024081998

THE LAW OFFICE OF JOHN  
MCCANN

13 Ponds Way

Oakland, New Jersey 07436

Attorneys for Defendant

ATILIS GYM OF BELLMAWR

By: John McCann (201) 803-0530

mccannlaw@comcast.net

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JUDITH M. PERSICHILLI, :

R.N., B.S.N., M.A., in :

Her official capacity :

As Commissioner of the :

New Jersey Department :

Of Health, :

Plaintiff, :

V. :

ATILIS GYM BELLMAWR. :

Defendant. :

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SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION - MERCER COUNTY  
GENERAL EQUITY PART

DOCKET NO. MER-C-48-20

CIVIL ACTION

NOTICE OF MOTION FOR STAY  
OF JULY 24, 2020, AUGUST 10,  
2020 ORDERS

TO: Gurbir S. Grewal  
Attorney General of New Jersey Richard J.  
Hughes Justice Complex P.O. Box 112  
25 Market Street  
Trenton, New Jersey 08625  
Att: Stephen Slocum  
Deputy Attorney General




**PLEASE TAKE NOTICE** that on a date and time to be set by the Court, Defendant Atilis Gym Bellmawr, through the The Law Office of John McCann., shall move before the Honorable Robert Lougy, P.J.Ch., in the Superior Court of New Jersey, Chancery Division, General Equity Part, Mercer County, for an Order staying the July 24, 2020 and August 10, 2020 Orders as it violates Defendants' Constitutional Fifth Amendment rights to self-incrimination.

**PLEASE TAKE FURTHER NOTICE** that Defendant shall rely upon the Certification of Counsel, and Letter Brief filed herewith in support of its motion. A proposed form of order is also filed herewith.

Defendant requests oral argument.

**John McCann**  
**THE Law Office of John McCann**

  
\_\_\_\_\_  
BY: John McCann, Esq.

Dated: August 13, 2020



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SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION - MERCER COUNTY  
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DOCKET NO. MER-C-48-20

CIVIL ACTION

CERTIFICATION OF JOHN  
MCCANN, ESQ

I, John McCann of the Law office of John McCann  
hereby certifies as follows:

1. I am counsel for Defendant Atilis Gym Bellmawr in this matter, and am personally familiar with the subject of this motion.



2. On July 24, 2020, Defendant's prior counsel raised a Fifth Amendment self-incrimination argument during oral arguments and the Honorable Judge Lougy asked them to brief the arguments.
3. Defendants asserted their constitutionally protected fifth amendment rights and did not submit certifications in defense of this civil action in order to protect themselves from the fourteen criminal complaints in Bellmawr Municipal Court.
4. Defendants, Ian Smith and Frank Trumbetti, have been charged with criminal conduct by the State of New Jersey. Any statements that they would make including providing a certification in defense to the contempt of court motion could be and most likely be used against them in Bellmawr Municipal Court.
5. The potential for self-incrimination is great, which is why defendants refused to respond to Plaintiff's contempt motion and this "silence" was used against defendants by this Honorable Court by finding them in contempt of court.
6. It is unconstitutional to force defendants into the choice of waiving or asserting their Fifth Amendment rights, therefore a stay is required in the interests of justice.
7. Plaintiff's motions impinge on defendants' right of self-incrimination and information and evidence obtained from

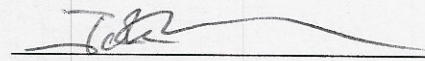


defendants' waiving their rights in response, would be critical to Plaintiff's case.

8. It is in the interest of justice to avoid placing the defendants in this position and your Honor should grant this stay.

9. Defendants respectfully request that this Honorable Court stay Your Honor's July 24, 2020 and August 10, 2020 Orders and all future proceedings in this matter pending the criminal matter as these proceedings violate their Fifth Amendment right to self-incrimination. Our clients could not properly defend this action due to self- incrimination concerns.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made buy me are willfully arise, I am subject to punishment.

  
John McCann

Dated: August 13, 2020



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MCCANN

13 Ponds Way

Oakland, New Jersey 07436

Attorneys for Defendant

ATILIS GYM OF BELLMAWR

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SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION - MERCER COUNTY  
GENERAL EQUITY PART

DOCKET NO. MER-C-48-20

CIVIL ACTION

ORDER TO STAY  
JULY 24, 2020 AND AUGUST 10 2020  
ORDER

This matter having been brought to the Court by the The Law Office of John McCann, by John McCann, attorneys for Defendant Atilis Gym of Bellmawr, on a motion for a Stay of the July 24, 2020 and August 10, 2020 Orders, on notice to the Attorney General of New Jersey, counsel for Plaintiff, and the Court having considered the papers submitted and the arguments of counsel, if any, for good cause shown:



It is on this \_\_\_\_\_ day of August, 2020 **ORDERED** that:

1. This Court's July 24, 2020 and August 10, 2020 Order of Contempt is hereby stayed until the criminal matters are resolved in Bellmawr Municipal Court.
2. Defendant's Counsel shall serve a copy of this Order upon all interested parties and attorneys of record within\_\_ Days from the receipt thereof.
3. The Order shall be deemed served upon the receipt from a Judiciary email account ([xxx@njcourts.gov](mailto:xxx@njcourts.gov).)

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Hon. Robert Lougy, P.J.Ch.

\_\_\_\_\_ Opposed

\_\_\_\_\_ Unopposed



The  
Law Office of John McCann, L.L.C.  
13 Ponds Way  
Oakland, New Jersey 07436

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John McCann

Member NJ, NY, MA, DC Bar

August 13, 2020

**Via Electronic Mail-JEDS**

The Honorable Robert Lougy, J.S.C.  
Mercer County Civil Courthouse  
175 South Broad Street, 3rd Floor  
Trenton, N.J. 08650

RE: Judith M. Persichilli v. Atilis Gym Bellmawr  
Docket No.: MER-C-48-20

Dear Judge Lougy:

This office represents Atilis Gym Bellmawr. Please find enclosed a Notice of Motion to Stay your honor's Orders of July 24, 2020 and August 10, 2020, Certification of Counsel, and proposed form of Order. In lieu of a more formal brief please accept this letter brief in support of this motion. I am asking your Honor to stay Plaintiff's motion for contempt and further proceedings in New Jersey Superior Court due to criminal charges that have been filed against my clients, Ian Smith and Frank Trumbetti, owners of Atilis Gym Bellmawr.

**Material Facts**

On May 18, 2020, Atilis Gym re-opened to the public after being shuttered for two months. Between May 18, 2020 and May 22, 2020, our clients received fourteen criminal citations and/or complaints from the Bellmawr Police Department. All criminal complaints



and/or citations are to be answered in Bellmawr Municipal Court and all are still pending in said Bellmawr Municipal Court.

On May 26, 2020, Atilis Gym filed a Civil Action Complaint seeking Declaratory Relief, Injunctive Relief and Damages for a Fifth Amendment Taking in United States District Court in Camden, New Jersey. On June 5, 2020, we filed a motion for a TRO and Preliminary Injunction. On June 19, 2020, after oral arguments, Senior District Court Judge Robert Kugler refused to decide our motion for preliminary injunction because of the pending fourteen criminal citations against our clients and stayed the case until the criminal citations were resolved. The attorney general's office of New Jersey argued that the federal court matter should be stayed until the criminal proceedings were resolved.

On June 24, 2020, your Honor in making your decision to hold my clients in contempt attributed Defendants' silence in response to the State's allegations as an *admission of guilt*. The "silence" was the result of the pending criminal charges against both Defendants in Bellmawr Municipal Court.

On July \_\_\_ this identical motion was submitted and after conference the motion was withdrawn by previous counsel on August \_\_\_ And on Thursday August 6, your Honor filed a scheduling Order for on contempt matter to be heard on Monday August 10, 2020. On Friday August 7, 2020 previous filed a motion to withdraw from this matter. A Substitution of Attorney was sent to the Court on the same day but filed on Monday August 10, 2020. I conferenced as per the scheduling Order on Monday August 10, 2020. During the conference your Honor kindly bifurcated his Order and allowed me until Friday August 14, to respond on the issue of fines. Your Honor, however did order that the State could barricade Atilis gym as soon as possible.



As of the filing of this motion, there has yet to be any court appearance or conference in any of these criminal proceedings. In light of these facts as they are constituted, defendants by way of this motion are advising all parties to the case at bar that they are and will assert their Fifth Amendment rights not to make any statements or provide any information that is protected under their constitutional right not to incriminate themselves.

## **LEGAL ARGUMENT**

### **Point I**

#### **Defendants Assert Their New Jersey Common Law Rights, Statutory Rights and their Fifth Amendment Rights Pursuant to the Constitution of the United States Not to Answer any Questions and Provide any Information in the Instant Matter.**

The Supreme Court reaffirmed in *Lefkowitz v. Turley*, supra, 414 U.S. at 77, 94 S.Ct. at 322, the Fifth Amendment “not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.” In addition although New Jersey does not have a provision in the state Constitution similar to the Fifth Amendment, the privilege against self-incrimination is deeply rooted in the State’s common law and codified in both a statute and an evidence rule. [State v. Brown, 190 N.J. 144, 919 A.2d 107 \(2007\)](#). Criminal Law §393(1) New Jersey embraces its common law tradition through its statutes and Rules of Evidence. Rule of Evidence 503 encompasses [N.J.S.A. 2A:84A-19](#), which provides:

Subject to Rule 37 [Rule 530], every natural person  
has a right to refuse to disclose in an action or to a police



officer or other official any matter that will incriminate him or expose him to a penalty or forfeiture of his estate, except that under this rule:

(a) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics or his physical and mental condition;

(b) no person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control if some other person or a corporation or other association has a superior right to the possession of the thing ordered to be produced;

(c) no person has a privilege to refuse to disclose any matter which the statutes or regulations governing his office, activity, occupation, profession or calling, or governing the corporation or association of which he is an officer, agent or employee, require him to record or report or disclose except to the extent that such statutes or regulations provide that the matter to be recorded, reported or disclosed shall be privileged or confidential;

(d) subject to the same limitations on evidence affecting



credibility as apply to any other witness, the accused in a criminal action or a party in a civil action who voluntarily testifies in the action upon the merits does not have the privilege to refuse to disclose in that action, any matter to any issue therein.

In the present mater, it is clear that defendants, Ian Smith and Frank Trumbetti, have been charged with criminal conduct. Any statements that they would make including providing a certification in defense to the contempt of court motion could be and most likely be used against them in Bellmawr Municipal Court. As such, this Honorable Court should respect Defendants' constitutional protections and not issue any orders to the contrary.

## **Point II**

### **The Court Should Grant A Stay In the Interest of Justice**

The factors to be considered in deciding whether to grant a stay include:

- 1) the extent to which the issues in the criminal and civil cases overlap; and
- 2) the status of the case, including whether the defendants have been indicted; and
- 3) the plaintiff's interest in proceeding expeditiously weighed against the prejudice to plaintiff caused by the delay; and
- 4) the private interests of and burden on defendants;
- 5) the interests of the court; and
- 6) the public interest.

a. The "similarity of issues has been termed "the most important issue at the threshold" in determining whether or not to grant a stay. Milton Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 203 (1989). There is no dispute that the civil and



criminal cases here involve the exact issues arising out of alleged violations of the executive orders, specifically the alleged operation of Atilis Gym in violation of executive orders and health department orders. The civil action is seeking hold the defendants in contempt for the same allegations as alleged in the fourteen criminal complaints. Therefore, this factor weighs in favor of the stay.

b. The defendants have been charged with fourteen criminal complaints. The potential for self-incrimination is great, which is why defendants refused to respond to Plaintiff's contempt motion and this "silence" was used against defendants by this Honorable Court by finding them in contempt of court.

The defendants are also concerned that they may be revealing defense strategy in the civil action, which may be prejudicial to their criminal defense. For the above reasons, a stay is warranted.

c. There is absolutely no prejudice to Plaintiff because the prosecutor at Bellmawr Municipal Court is prosecuting the defendants and defendants will have to answer for the same exact charges. As a result, a stay is warranted.

d. The Defendants must choose between waiving their Fifth Amendment rights and defending themselves in the civil contempt action or asserting the privilege and losing the civil case, as was the case on July 24, 2020. The defendants asserted their constitutionally protected privilege and were found in contempt of court. In this matter, it is in the interest of justice to avoid placing the defendants in this position and your Honor should grant this stay.

It is unconstitutional to force defendants into the choice of waiving or asserting their Fifth Amendment rights, therefore a stay is required in the interests of justice. Plaintiff's motion



impinges on defendants' right of self-incrimination and information and evidence obtained from defendants' waiving their rights in response, would be critical to Plaintiff's case.

Defendants respectfully request that this Honorable Court stay Your Honor's July 24, 2020 Order and August 10, 2020 Order and all future proceedings in this matter pending the criminal matter as these proceedings violate their Fifth Amendment right to self-incrimination. Our clients could not properly defend this action due to self-incrimination concerns.

Respectfully yours,

A handwritten signature in black ink, appearing to read 'JM', with a long horizontal flourish extending to the right.

John McCann, Esq.