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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TATOMA, INC., a California Corporation, DBA Atelier Aucoin Salon, on behalf of itself and all others similarly situated,

Plaintiff,

v.

GAVIN NEWSOM, in his official capacity as the Governor of California; XAVIER BECERRA, in his official capacity as the Attorney General of California; and KRISTY UNDERWOOD, in her official capacity as Executive Officer of the State Board of Barbering and Cosmetology,

Defendants.

3:21-cv-00098-BEN-JLB

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Date: March 29, 2021
Time: 10:30 a.m.
Courtroom: 5A
Judge: Hon. Roger T. Benitez
Trial Date: Not Set
Action Filed: January 19, 2021

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INTRODUCTION

The State of California continues to grapple with the public health emergency caused by the highly contagious and fatal coronavirus disease 2019 ("COVID-19"), which was declared a worldwide pandemic almost a year ago in March 2020, and continues to have no known treatment or cure. Over the past year, state and local officials have been tasked with flattening the curve of new COVID-19 infections and keeping local communities safe, with little to no direction from the federal government. As predicted by epidemiologists and scientists, the rate of new COVID-19 infections dropped under the strictest shelter-in-place orders and raged in the winter months when the guidelines against large indoor gatherings and interstate travel were ignored by members of the public who wanted to enjoy their holiday gatherings. Recognizing the extensive and deadly risks of this novel disease – and especially its ability to overwhelm ICU capacity – California officials issued emergency public health orders including stay-at-home orders and the necessary, temporary closure of certain non-essential businesses (the "challenged orders"). Over the past year, the State has revised its orders and guidance several times to reflect the most current information regarding COVID-19's spread throughout California.

Plaintiff – a corporation doing business as a hair salon, on behalf of itself and those similarly situated – asserts a variety of claims challenging the constitutionality of the State's response to the pandemic. Like many businesses, salons were closed for several months last spring during the onset of the pandemic. Plaintiff was then authorized to reopen with modifications necessary to protect the health of its employees and the public. However, due to COVID-19 infections surging after the Thanksgiving holiday and the impact on ICU capacity, salons were again ordered to temporarily cease indoor operations. After the filing of Plaintiff's Complaint, on January 25, 2021, California lifted regional stay-at-home orders across the state in response to improving COVID-19 conditions, allowing salons to

reopen for indoor operations based upon the applicable county guidance.

Plaintiff's Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Although the conditions of the pandemic and the State's emergency public-health directives continue to evolve, the legal standard for assessing the validity of these directives remains the same. The Eleventh Amendment doctrine of sovereign immunity bars all of the Plaintiff's state-law claims against state officials, as well as its Takings Clause claim and all damages claims, which is the only relief sought by the Complaint. Moreover, Plaintiff's constitutional claims fail on the merits, especially in light of the deference that courts must accord the government's public health decisions in this extraordinary emergency in which scientific understanding of the deadly disease continues to evolve as new evidence about its spread and effectiveness of mitigation efforts emerges over time. For these reasons, Plaintiff's Complaint should be dismissed with prejudice as to Governor Gavin Newsom, Attorney General Xavier Becerra, and Executive Officer of the State Board of Barbering and Cosmetology, Kristy Underwood (collectively "Defendants" or "State Defendants").

BACKGROUND

I. THE COVID-19 PANDEMIC AND CALIFORNIA'S RESPONSE

COVID-19 is a highly contagious respiratory illness that has killed hundreds of thousands. *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring). COVID-19 has infected more than 106.5 million people and caused the deaths of more than 2.3 million people worldwide.[1] In the United States alone, COVID-19 has infected more than 26.9 million people and caused the deaths of more than 463,650 people.[2] California recognized early that

[1] See World Health Org., Coronavirus Disease (COVID-19) Pandemic, *available at*: https://www.who.int/emergencies/diseases/novel-coronavirus-2019 (last accessed February 10, 2021).

[2] *See* Cases in U.S., *available at*: https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last accessed February 10, 2021).

COVID-19 had the potential to spread rapidly throughout the state. *See* Request for Judicial Notice in Support of Defendants' Motion to Dismiss ("RJN"), Exs. 1, 2. California's decisive action initially slowed the rate of new infections, but the State now has more than 3.3 million cases and nearly 45,000 deaths.[3] The Supreme Court has acknowledged that the novel SARS-CoV2 coronavirus that causes COVID-19 is easily transmissible. *South Bay*, 140 S.Ct. at 1613. It spreads through respiratory droplets that remain in the air, and may be transmitted unwittingly by individuals who exhibit no symptoms. *Id.* There is no cure and no widely effective treatment. *Id*. Consequently, measures that limit physical contact, such as physical distancing and closure of places where people gather indoors, have been "the most effective way to stop COVID-19's spread." *Best Supplement Guide, LLC v. Newsom*, No. 2:20-cv-00965-JAM-CKD, 2020 WL 2615022, at *6 (E.D. Cal., May 22, 2020). Although vaccines are now being administered to the most vulnerable of our population, widespread distribution of the vaccine is still months away.

A. California's Initial Response

On March 4, 2020, Governor Gavin Newsom proclaimed a State of Emergency as to the spread of COVID-19. RJN, Ex. 1. The Governor subsequently issued Executive Order N-25-20 directing California residents to heed any orders or guidance issued by state and local public health officials. RJN, Ex. 2. On March 16, 2020, the Public Health Officer issued a directive restricting activities throughout the State. RJN, Ex. 3. The directive defined "gatherings" to include "any event or convening that brings together people in a single room or single space at the same time, such as an auditorium, stadium, … or any other indoor or outdoor space." *Id.* The directive prohibited gatherings, ordered the closure of gyms, health clubs, salons, and theaters, and required the postponement or cancellation of all concerts, conferences, and sporting events. *Id.* The Public Health Officer explained that the

[3] *See* California COVID-19 by the Numbers, *available at*: https://www.cdph.ca.gov/Programs/CID/DCDC/PublishingImages/COVID-19/12-17_daily_numbers.png (last accessed February 10, 2021).

directive was intended to "[r]educe the number of Californians who contract COVID-19 before an effective treatment or vaccine is available," "[p]rotect those most likely to experience severe symptoms," "[p]reserve and protect our health care delivery system," and "[m]inimize the social and economic impacts of COVID-19 over the long run." *Id.* This was followed by the issuance of Executive Order N-33-20 on March 19, 2020, which directed California residents to heed the State Public Health Official's Stay-at-Home orders and directives and incorporated the Public Health Officer's order requiring Californians to stay home except as necessary to maintain certain critical infrastructure. RJN, Ex. 4.

B. The Re-Opening of California, COVID's Resurgence, and Retightened Restrictions

On April 28, 2020, the Governor announced a "Resilience Roadmap" to provide for the safe, gradual reopening of the State. The Roadmap had four stages: (1) safety and preparation; (2) reopening of lower-risk workplaces and other spaces; (3) reopening of higher-risk workplaces and other spaces; and (4) an end to the Stay-at-Home Order. RJN, Ex. 5. Following the creation of the Roadmap, the Public Health Officer issued an order on May 7, 2020, acknowledging that statewide data showed stabilization of infection rates within the State. RJN, Ex. 6. She determined that the data supported moving the State from Stage 1 to Stage 2 of the Roadmap and reopening activities and business sectors in a phased manner with modifications as needed to curb the spread of COVID-19. *Id.* Pursuant to the Roadmap, San Diego County permitted hair salons and other business to reopen for indoor service on May 26, 2020.[4]

But as business activities and sectors began reopening, the State saw a resurgence of COVID-19. By July 13, 2020, statewide data demonstrated a

[4] *See* Teri Figueroa, *Barber shops, hair salons get OK to reopen; theme parks target July 1*, San Diego Union-Tribune (May 26, 2020) https://www.sandiegouniontribune.com/news/story/2020-05-26/coronavirus-summary-may-26-barber-shops-hair-salons-get-ok-to-reopen-theme-parks-targeted-july-1 (last visited February 16, 2021).

significant increase in the disease's spread, as well as increases in COVID-19 hospitalizations and deaths. RJN, Ex. 7. In response, the Public Health Officer issued a new order requiring the temporary statewide closure of indoor operations of restaurants, tasting rooms, family entertainment centers, movie theaters, zoos, museums, and cardrooms and closure of all operations, indoor or outdoor, of bars, pubs, brewpubs, and breweries. *Id.* The order imposed further restrictions on counties with heightened transmission of COVID-19, requiring the closure of indoor operations of places of worship, personal care services, hair salons, barbershops, gyms, fitness centers, and malls. *Id.*

C. The Blueprint for a Safer Economy

On August 28, 2020, the State revised its framework for reopening, replacing the prior monitoring list system with the Blueprint for a Safer Economy. RJN, Exs. 8-9. The Blueprint places every county in the State in one of four tiers based on the COVID-19 transmission rates within the county. RJN, Ex. 10. The four tiers are the "minimal" or "yellow" tier, the "moderate" or "orange" tier, the "substantial" or "red" tier, and the "widespread" or "purple" tier. *Id.* A county's tier is currently determined by two statistics: (1) the "adjusted case rate," the 7-day average of daily COVID-19 cases per 100,000 residents as adjusted for number of tests performed, and (2) the "positivity rate," the 7-day average rate of positive tests in the county. *Id.*

The Blueprint permits a broader range of reopening guided by risk-based criteria pertinent to each sector. *See* RJN, Exs. 9 and 10. Restrictions on businesses and activities vary by tier level, with greater restrictions in tiers with greater transmission and lower restrictions in tiers with lower transmission. *Id.* In the minimal/yellow tier – which reflects the lowest levels of transmission – most indoor business operations are open with modifications. *Id.* In contrast, in the widespread/purple tier – which reflects the greatest level of transmission – most non-essential indoor business operations are closed, due to the heightened risk of

transmission indoors. *Id.* However, even under the widespread/purple tier, personal care services, such as hair and nail salons, can open indoors with modifications. *Id.* Thus, hair salons were permitted to reopen for indoor services upon adoption of the Blueprint in late August 2020.[5]

Which activities or business are permitted to open in each tier, and what restrictions are required, is determined based on criteria that reflect the risk of transmission the business or activity poses. RJN, Ex. 9. These include: the "[a]bility to accommodate face covering wearing at all times (e.g., eating and drinking would require removal of face coverings);" the "[a]bility to physically distance between individuals from different households" [e.g., hairstylists cannot limit physical distance between themselves and their clients while performing the hair service]; the "[a]bility to limit duration of exposure" [e.g., some salon services, such as coloring, can take hours]; the "[a]bility to limit amount of mixing of people from differing households and communities;" and the "[a]bility to limit the amount of physical interactions of visitors/patrons." *Id.*

D. The December 3, 2020 Regional Stay-at-Home Order

Around the Thanksgiving holiday, likely due to more people traveling, and spending time indoors with members from different households, California, along with the rest of the country, experienced an alarming surge in new COVID-19 cases. The State responded to this unprecedented rise in cases, hospitalizations, and test positivity rates, by issuing a Regional Stay-at-Home Order on December 3, 2020, and a supplemental Order on December 6, 2020. *See* RJN, Exs. 11-12.

Pursuant to the December 3 Order, the State established five geographic regions to be evaluated based on hospital capacity – specifically, adult Intensive Care Unit ("ICU") bed capacity. *See* RJN, Ex. 13. The Regional Stay-at-Home

[5] *See* City News Service, *S.D. County To Allow Some Indoor Businesses To Open Monday*, www.kpbs.org (August 28, 2020), https://www.kpbs.org/news/2020/aug/28/sd-county-allow-some-indoor-businesses-open-monday/ (last visited February 16, 2021).

Order would be triggered for a region if an adjusted ICU capacity measure that factors in the specific impact of COVID-19 on ICUs dropped below 15% in that region. *See* RJN, Exs. 11-13. Once triggered, the Stay-at-Home Order would apply to the region for at least three weeks. *Id.* The Southern California Region, which included San Diego County, became subject to the Regional Stay at Home Order on December 6, 2020 based on its ICU capacity.[6]

On January 25, 2021, the Regional Stay-at-Home Order ended statewide. *See* RJN, Ex. 14. The counties returned to the rules and framework of the Blueprint for a Safer Economy and color-coded tiers that indicate which activities and businesses are open based on local case rates and test positivity. As the acting director and state public health officer of the California Department of Public Health pointed out, "Californians heard the urgent message to stay home as much as possible and accepted that challenge to slow the surge and save lives." *Id.* Consequently, Plaintiff reopened its two salons in La Jolla and Del Mar in San Diego County, offering both indoor and outdoor services.[7] Plaintiff's website exclaims that it is reopen "AGAIN," indicating it has been operating in some capacity since the initial March 2020 Stay-at-Home Order. *Id*.

II. PLAINTIFF'S LAWSUIT

Plaintiff filed this purported class action on January 19, 2021, although the Complaint does not seek class certification. Complaint (Dkt. #1). Plaintiff is a California corporation doing business as Atelier Aucoin Salon in San Diego. Complaint, ¶ 8. Plaintiff holds License No. 313411 issued by the California Board of Barbering and Cosmetology. *Id*. Plaintiff has brought this suit against Governor Newsom, Attorney General Becerra, and Executive Officer of the State Board of

[6] *See* KPBS Staff, *San Diego Stay-At-Home Order To Be Imposed Sunday With SoCal ICU Capacity Below 15%*, www.kpbs.org (December 5, 2020), https://www.kpbs.org/news/2020/dec/05/new-restrictions-sunday-covid-19-hospitalizations/ (last visited February 16, 2021)

[7] *See* Atelier Aucoin Salons - Hair Salon, Hair Stylist, Hair Color (last visited February 10, 2021.)

Barbering and Cosmetology, Kristy Underwood, in their official capacities.

Generally, Plaintiff alleges that since March 2020, the State of California has issued multiple closure orders prohibiting barbering and cosmetology professionals *from operating their businesses, "with no opportunities to conduct any operations whatsoever or earn a livelihood*." Complaint, page 1 (emphasis added). As such, Plaintiff argues that it, and the purported class of barbers and cosmetologists, have been subject to a complete taking of their property and business in violation of the Fifth Amendment to the U.S. Constitution and Article I, § 19 of the California Constitution. Plaintiff further contends that the challenged orders issued by state and local officials violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution and Article I, Sections 1 and 7 of the California Constitution. *Id.*, ¶¶ 12-15. Plaintiff seeks compensation for the alleged taking, attorneys' fees and costs. *Id.*, Prayer for Relief. Plaintiff does not seek injunctive relief. *Id.*

LEGAL STANDARD

Under Rule of Civil Procedure 12(b)(1), a party may move to dismiss a complaint on the basis that there is no subject matter jurisdiction. In such situations, the party asserting jurisdiction has the burden of proving it exists. *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015). In analyzing a motion under Rule 12(b)(1), a court does not presume the truthfulness of a plaintiff's allegations and may hear evidence not presented in the complaint. *Id.* A motion under Rule 12(b)(1) is the proper vehicle to raise the argument that a plaintiff's claims are barred by sovereign immunity. *Id.*

Under Federal Rule of Civil Procedure 12(b)(6), a complaint should be dismissed if it fails to state a claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). A "threadbare recital[] of the elements of a

cause of action, supported by mere conclusory statements, do[es] not suffice." *Id.* In ruling on a motion to dismiss under Rule 12(b)(6), the court may consider documents referenced in a complaint as well as matters subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. *Mollett v. Netflix, Inc.*, 795 F.3d 1062, 1065 (9th Cir. 2015).

ARGUMENT

As an initial matter, sovereign immunity bars all of Plaintiff's claims – its state-law claims, its Takings Clause claims, and its claims for damages against the Defendants, which is the only relief sought. Even setting aside sovereign immunity, all of Plaintiff's claims fail as a matter of law. The challenged public health orders pass constitutional muster as a permissible exercise of the State's emergency authority in a pandemic, and Plaintiff has failed to allege any cognizable infringements on its rights. Because these defects cannot be cured by amendment, the Complaint should be dismissed without leave to amend and with prejudice.

I. ALL OF PLAINTIFF'S CLAIMS ARE BARRED BY SOVEREIGN IMMUNITY

Through the Eleventh Amendment, a state is immune from suit brought in federal court by its own citizens or citizens of other states. *See Papasan v. Allain*, 478 U.S. 265, 275 (1986). Specifically, the Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const., amend. XI.

A. Plaintiff's State-Law Claims Are Barred

Sovereign immunity bars Plaintiff's state-law claims (Counts 4-6, Complaint, ¶¶ 101-118) in federal court. Sovereign immunity generally bars official-capacity suits against state officials, including suits under state law. *See Pennhurst State*

School & Hosp. v. Halderman, 465 U.S. 89, 98-102 (1984); *Shaw v. State of Cal. Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 603 (9th Cir. 1986) ["Furthermore, a suit against a state agency is considered to be a suit against the state, and thus is barred by the Eleventh Amendment."]. And although there is a limited exception to state sovereign immunity under *Ex Parte Young*, 209 U.S. 123 (1908), such that state officials may be enjoined from violating federal law, this exception does not apply to claims brought under state law. *Pennhurst*, 465 U.S. at 102-06; *see also Doe v. Regents of the Univ. of Cal.*, 891 F.3d 1147 (9th Cir. 2018); *Best Supplement Guide*, 2020 WL 2615022, at *7 ("Plaintiffs can neither succeed nor proceed on [their state law claim] against the State."). Accordingly, Plaintiff's state-law causes of action four through six (Complaint, ¶¶ 101-118) should be dismissed without leave to amend.

B. Plaintiff's State and Federal Takings Clause Claims Are Barred

Plaintiff seeks just compensation for alleged takings pursuant to Article 1 § 19 of the California Constitution and the Fifth Amendment to the U.S. Constitution. Complaint, ¶¶ 94-100; ¶¶ 113-118. Suits seeking monetary compensation for Takings Clause claims against States, state agencies, and state officials are barred by sovereign immunity. *Jachetta v. United States*, 653 F.3d 898, 909 (9th Cir. 2011); *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 956 (9th Cir. 2008) ("[w]e therefore conclude that the Eleventh Amendment bars reverse condemnation actions [actions seeking compensation under the Takings Clause] brought in federal court against state officials in their official capacities"); *see also, e.g., Ladd v. Marchbanks*, 971 F.3d 574, 580 (6th Cir. 2020). Congress did not abrogate the states' Eleventh Amendment immunity from suit through enactment of 42 US.C. § 1983. *See Quern v. Jordan*, 440 U.S. 332, 344-345 (1979). Section 1983 solely allows suits against individual state officials seeking prospective injunctive relief, and does not permit suits for monetary relief against state officials. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). The *Ex Parte Young* exception does not

apply when a state official in his or her official capacity is sued for money damages. *Wolfe v. Strankman*, 392 F.3d 358, 365 (9th Cir. 2004).

Moreover, to the extent Plaintiff might seek declaratory relief, such relief is barred for essentially the same reason: "the issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution," which is prohibited by the Eleventh Amendment. *Green v. Mansour*, 474 U.S. 64, 73 (1985). "[D]eclaratory judgment is not available when the result would be a partial 'end run' around [the Supreme Court's] decision in *Edelman v. Jordan* [415 U.S. 651 (1974)]," which bars such monetary relief here. *Green*, 474 U.S. at 73.

Consequently, Plaintiff's claims against the State Defendants seeking compensation under the state and federal Takings Clause (causes of action three and six, Complaint, ¶¶ 94-100, 113-118) are barred by sovereign immunity.

C. Plaintiff's Other Federal Law Claims Are Barred

Plaintiff's first and second causes of action for alleged violations of the Fourteenth Amendment are also barred by sovereign immunity because Plaintiff seeks only monetary damages in connection with such claims. (Complaint, p. 39, Prayer for Relief.) Sovereign immunity bars any damages action against the Defendants in their official capacities, for such an action is "no different than a suit against the state itself." *Will*, 491 U.S. at 71. As stated above, the *Ex parte Young* doctrine, which allows federal courts to hear claims for prospective injunctive relief against state officials to remedy ongoing or future violations of federal law, does not apply to suits seeking monetary damages. *Wolfe*, 392 F.3d at 364; *Pennhurst*, 465 U.S. at 106; *Shaw*, 788 F.2d at 603.

Here, Plaintiff seeks only monetary damages in connection with each of its claims. *See* Complaint [seeking "monetary damages"], ¶¶ 86, 93, 100, 107, 112, 118, Prayer for Relief, A-C. Accordingly, sovereign immunity bars Plaintiff's remaining federal law claims, and the first and second causes of action should be

dismissed without leave to amend.

II. PLAINTIFF FAILS TO STATE A CLAIM FOR RELIEF

Regardless of the applicability of sovereign immunity, Plaintiff's claims against the Defendants should be dismissed because they fail to state a viable claim for relief. The challenged orders are a permissible exercise of the State's emergency powers to protect the public's welfare during a pandemic under *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Multiple courts have already found challenges to the orders at issue here unavailing or unlikely to succeed. *See, e.g.*, *Culinary Studios, Inc. v. Newsom*, No. 1:20-cv-01340, 2021 WL 427115, at *22 (E.D. Cal. Feb. 5, 2021)(granting Defendants' Motions to Dismiss); *Whitsitt v. Newsom*, No. 2:20-cv-00691-JAM-CKD, 2020 WL 4818780, at *4 (E.D. Cal. Aug. 19, 2020), *report & recommendation adopted granting motion to dismiss*, 2020 WL 3944195 (Oct. 7, 2020); *PCG-SP Venture I LLC v. Newsom*, No. 5:20-cv-01138, 2020 WL 4344631, at *4-*6 (C.D. Cal. June 23, 2020) (denying preliminary injunction, but applying traditional constitutional scrutiny); *Six v. Newsom*, 462 F. Supp. 3d 1060, 1068-1073 (C.D. Cal. 2020) (denying temporary restraining order and injunctive relief); *Best Supplement Guide, LLC v. Newsom*, No. 2:20-cv-00965-JAM-CKD, 2020 WL 2615022, at *3 (E.D. Cal. May 22, 2020) (denying temporary restraining order and injunctive relief); *but see Bols v. Newsom*, No. 20-cv-873-BEN BLM, 2021 WL 268609, at *10 (S.D. Cal. Jan. 26, 2021) (denying motions to dismiss). Even if ordinary constitutional standards applied, Plaintiff's claims fail as a matter of law.

A. The State's Public Health Determinations Are Entitled to Deference

As the Supreme Court recognized over a century ago, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson*, 197 U.S. at 27. In response to a public health threat, a State may enact "quarantine laws and health laws of every description." *Id.* at 25

(internal quotation marks omitted); *see also Compagnie Francaise de Navigation a Vapeur v. Bd. of Health of State of La.*, 186 U.S. 380, 387-393 (1902); *Benson v. Walker*, 274 F. 622, 623-625 (4th Cir. 1921). While the Constitution is of course not suspended during a state of emergency, the Supreme Court has recognized that "under the pressure of great dangers" constitutional rights may be reasonably restricted "as the safety of the general public may demand." *Jacobson*, 197 U.S. at 29. The obligation to protect public health and safety is "principally entrust[ed] … to the politically accountable officials of the States" under the Constitution. *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring). And where those officials act "'in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad'" and "should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *Id.* at 1613-1614 (citations omitted).

Under the *Jacobson* framework, an emergency measure must be upheld unless (1) the measure "has no real or substantial relation to public health," or (2) the measure is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 U.S. at 31; *see, e.g., Whitsitt*, 2020 WL 481878, at *1 (applying *Jacobson*); *PCG-SP Venture*, 2020 WL 4344631, at *4 (same); *Six*, 462 F. Supp. 3d at 1068 (same).

As to the first prong, Plaintiff cannot reasonably dispute that the challenged orders, which were specifically enacted to limit the spread of a novel, deadly, and highly contagious virus, have a "real or substantial relation" to a legitimate public health end. Indeed, every federal court to consider a challenge to these orders, either on a motion to dismiss or on a motion for a preliminary injunction, has recognized they do. *See, e.g., Brach v. Newsom*, No. 2:20-cv-06472-SVW-AFM, 2020 WL 6036764, at *3 (C.D. Cal. Aug. 21, 2020); *PCG-SP Venture*, 2020 WL 4344631, at *4-*5; *Professional Beauty Federation of Cal. v. Newsom*, No.2:20-cv-

04275-RGK-AS, 2020 WL 3056126, at *5-*6 (C.D. Cal. June 8, 2020); *Best Supplement Guide*, 2020 WL 2615022, at *3; *Six*, 462 F. Supp. 3d at 1068-1069; *Cross Cultural Christian Ctr. v. Newsom*, 445 F. Supp. 3d 758, 767 (E.D. Cal. 2020); *Gish v. Newsom*, EDCV 20-755-JGB-KKX, 2020 WL 1979970, at *4-*5 (C.D. Cal. April 23, 2020), *appeal docketed*, No. 20-55445 (9th Cir. April 28, 2020).

Nor can Plaintiff establish that the challenged orders are a "plain and palpable invasion" of constitutional rights "beyond all question." Plaintiff contends that the challenged orders violate four constitutional provisions: procedural due process, substantive due process, equal protection, and the prohibition on takings without just compensation. As detailed below, plaintiffs do not plausibly allege facts rising to a violation of their constitutional rights under ordinary constitutional analysis. But even if Plaintiff did state a plausible claim, under *Jacobson*, the temporary restrictions on its activities in light of the pandemic do not rise to a "plain and palpable" invasion of its constitutional rights. Contrary to Plaintiff's arguments, the challenged orders never "completely shut down" Plaintiff's business, but rather limited certain indoor activities to take place based on related rates of infections/ICU capacity in the county where the business is located. In fact, several times since the onset of this global health pandemic, Plaintiff was able to continue to provide the indoor services once temporarily restricted, as demonstrated on Plaintiff's website, which currently advertises that its salons are "once again" re-opened.[8] Temporarily restricting businesses from providing certain services that require close contact between members of different households in counties facing heightened spread of COVID-19, limiting capacity in businesses, and requiring the wearing of face masks when in public, are not plain and palpable constitutional violations of Plaintiff's due process or equal protection rights or their rights under

[8] *See* Atelier Aucoin Salons - Hair Salon, Hair Stylist, Hair Color (last visited February 10, 2020.)

the Takings Clause.

Under the *Jacobson* framework, the Complaint cannot state a claim and should be dismissed without leave to amend.

B. Under Traditional Constitutional Standards, Plaintiff's Claims Fail as a Matter of Law

Even under ordinary constitutional standards, Plaintiff has failed to allege a cognizable violation of its constitutional rights.

1. Plaintiff's Procedural Due Process Claim Fails

Plaintiff alleges that the challenged orders violate the Procedural Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. (Complaint, ¶¶ 80-86.) Plaintiff contends it has a "fundamental property interest in conducting lawful business activities" that is infringed by the challenged orders without adequate procedural process, specifically a meaningful opportunity to challenge the orders. (*Id.*) Assuming *arguendo* that plaintiffs have identified a protected liberty or property interest, their claims still fail because "governmental decisions which affect large areas and are not directed at one or a few individuals do not give rise to the constitutional procedural due process requirements of individual notice and hearing." *Halverson v. Skagit County*, 42 F.3d 1257, 1261 (9th Cir. 1994), *as amended on denial of reh'g* (Feb. 9, 1995). Rather, for actions that are "legislative in nature," due process is satisfied when the officials "perform[] [their] responsibilities in the normal manner prescribed by law." *Id.* at 1260 (citation omitted).

Although the challenged orders were issued by the Governor and state public health department, rather than passed by the state legislature, the public health orders are precisely the sort of action that is legislative in nature in that they "affect[] a large number of people, as opposed to targeting a small number of individuals based on individual factual determinations." *Gallo v. U.S. Dist. Court for Dist. of Ariz.*, 349 F.3d 1169, 1182 (9th Cir. 2003). As the *Halverson* court

explained:

> "In seeking to define when a particular governmental action is 'legislative in nature' we have eschewed the 'formalistic distinctions between "legislative" and "adjudicatory" or "administrative" government actions' and instead focused on the 'character of the action, rather than its label…' In doing so, our cases have determined also that governmental decisions which affect large areas and are not directed at one or a few individuals do not give rise to the constitutional procedural due process requirements of individual notice and hearing; general notice as provided by law is sufficient."

Halverson, 42 F.3d at 1260-61. Thus, procedural due process requirements are not determined by which official or body took the challenged action, but by the nature of the action and how many individuals it affects.

Indeed, in other suits challenging California's COVID-19 restrictions, courts have found that the State's actions are legislative in nature because they "affect all citizens of California and at their most particular direct restrictions towards nationwide groups and classes of individuals and businesses." *PCG-SP Venture*, 2020 WL 4344631, at *8 (plaintiff hotel challenging business restrictions); *Culinary Studios*, 2021 WL 427115 at *22 (restaurants and fitness centers challenging restrictions); *Six v. Newsom*, 462 F. Supp. 3d 1060, 1073 (C.D. Cal. 2020) (natural persons challenging the restrictions that apply to individuals). Accordingly, Plaintiff was not entitled to individualized notice and a right to be heard and therefore has not stated a valid procedural due process claim.

2. Plaintiff's Substantive Due Process Claim Fails

Plaintiff further contends that the challenged orders violate the substantive due process clause of the Fourteenth Amendment of the U.S. Constitution. (Complaint, ¶¶ 80-86.) Plaintiff alleges it has a fundamental property interest in conducting lawful business activities, including the right to pursue one's vocation under a state-granted license. (*Id.* ¶ 82.) Plaintiff alleges that Defendants lack any legitimate or compelling interest for depriving it of its right to lawfully pursue its vocation. (*Id.*) Plaintiff's claim fails because, although it may have a liberty interest in operating a hair salon, that right is not a fundamental right subject to strict scrutiny, the

infringement on the liberty interest was not sufficiently severe, and the State had legitimate reasons for the public health orders that have temporarily affected Plaintiff's operations.

a. Plaintiff has a generalized due process right subject to reasonable government regulation, not a fundamental property right subject to strict scrutiny

While Plaintiff alleges that it has a fundamental property right to operate as a hair salon, its right to such employment is a generalized due process right, rather than a fundamental right.

The range of liberty interests protected by the substantive due process clause is "narrow" and "largely confined to fundamental liberty interests such as marriage, procreation, family relationships, child rearing, education, and a person's bodily integrity." *Franceschi v. Yee*, 887 F.3d 927, 937 (9th Cir. 2018). Plaintiff does not allege that any such rights are violated by the challenged orders. The Supreme Court has recognized, however:

> that the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment, but a right which is nevertheless subject to reasonable government regulation.

Conn v. Gabbert, 526 U.S. 286, 291-292 (1999). As the Ninth Circuit has explained, the Supreme Court "has never held that the 'right' to pursue a profession is a *fundamental* right, such that any state-sponsored barriers to entry would be subject to strict scrutiny." *Dittman v. California*, 191 F.3d 1020, 1031 n.5 (9th Cir. 1999) (emphasis in original).

Moreover, to give rise to a protectable liberty interest, a charge must constitute more than a brief interruption of a plaintiff's ability to pursue an occupation or profession. *Guzman v. Shewry*, 552 F.3d 941, 954 (9th Cir. 2009). The Ninth Circuit has recognized that although there is a potential liberty interest in pursuing one's calling, "all cases recognizing such a right have 'dealt with a *complete prohibition on the right to engage in a calling*, and not [a] sort of brief

interruption.'" *Guzman v. Shewry*, 552 F.3d 941, 954 (9th Cir. 2009) (citation omitted) (emphasis added). In *Guzman*, the Ninth Circuit found no substantive due process violation when a doctor was temporarily suspended from participation in California's Medi-Cal program pending the completion of a billing fraud investigation, reasoning that the doctor could still practice his profession as there was no "revo[cation] or suspen[sion of] his license to practice medicine." *Id.* "Accordingly, Guzman has not been deprived of a protected liberty interest in pursuing the occupation of his choice." *Id.* at 955.

Similarly, in *Llamas v. Butte Community College District*, the Ninth Circuit found no substantive due process violation where a janitor was terminated and barred from future employment by a community college district because the janitor was not prohibited from pursuing a janitorial position elsewhere. *Llamas v. Butte Comm'y Coll. Dist.*, 238 F.3d 1123, 1128 (9th Cir. 2001). In *Lowry v. Barnhart*, the Ninth Circuit held that an administrative law judge's interference with an attorney's practice was not severe enough to constitute a complete prohibition implicating the attorney's liberty interest in practicing law. *Lowry v. Barnhart*, 329 F.3d 1019, 1023 (9th Cir. 2003) ("This indirect and incidental burden on professional practice is far too removed from a complete prohibition to support a due process claim."). *See also Wedges/Ledges of Calif., Inc. v. City of Phoenix*, 24 F.3d 56, 65 (9th Cir. 1994) (fact that city temporarily banned one type of amusement game did not establish that city unduly interfered with plaintiffs' ability to pursue their livelihoods in amusement game industry).

Here, as in *Guzman*, Plaintiff was *not* denied its license to practice cosmetology or operate a salon. Indeed, Plaintiff admits that licensees could pursue their vocation in certain sectors of the beauty industry during the pandemic. Complaint, ¶ 31(a) (licensees "supporting the entertainment industries as beauticians, hair stylists, and manicurists at a film studio are 'essential'" and therefore not prevented from lawfully pursuing their vocation). Further, Plaintiff

admits that, even during the periods when indoor salon services were prohibited, it and other similarly situated licensees were able to open their businesses up to retail sales of shampoo and other personal hygiene products, contradicting its allegations that Plaintiff's business has been left with "no opportunity to conduct any operations whatsoever or earn a livelihood." (*Id*. at p. 1 and ¶ 31(b).) Rather than being completely prohibited from pursuing its vocation, Plaintiff, like all other hair salons in COVID-affected areas of California, was required to temporarily cease indoor salon services at various times over the course of the last year.

In fact, Plaintiff is currently open and not prohibited from pursuing its chosen vocation. Accordingly, since Plaintiff was never completely prohibited from engaging in its calling, Plaintiff has "not been deprived of a protected liberty interest in pursuing the occupation of [its] choice." *Guzman*, 552 F.3d at 955.

b. The public health orders are rationally related to a legitimate government interest in stopping or slowing the COVID-19 pandemic

Even assuming that Plaintiff's liberty interest in operating a salon was infringed, the restriction on operations was rationally related to a legitimate government interest, and Plaintiff's due process claim fails.

Where, as here, a plaintiff relies on substantive due process to challenge an action that does not infringe on a fundamental right, the plaintiff bears a heavy burden. *Dittman*, 191 F.3d at 1031. The government action is upheld so long as the government could have had a legitimate reason for the action; that is, that there is a conceivable basis on which the action might survive constitutional scrutiny. *Id*. (quoting *Halverson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir. 1995) and *Lupert v. California State Bar*, 761 F.2d 1325, 1328 (9th Cir. 1985).) Rational-basis review "allows for decisions 'based on rational speculation unsupported by evidence or empirical data.'" *United States v. Navarro*, 800 F.3d 1104, 1114 (9th Cir. 2015) (citation omitted). Courts will "accept 'generalization even when there is an imperfect fit'" or where the line-drawing "'is not made with mathematical nicety

or ... results in some inequality'" in practice. *Id.* (citation omitted).

In *Dittman*, the Ninth Circuit held that a requirement that an acupuncturist provide his social security number to renew his license did not violate his liberty interest in practicing his profession even though it operated as a complete prohibition on his entry into the profession. *Dittman*, 191 F.3d 1020. The Court found that the legislature could have had in mind at least two rational bases for requiring acupuncturists to provide their social security numbers – to ensure that acupuncturists have the financial means to answer liability claims asserted by patients, and to ensure that acupuncturists were current in any child support and tax obligations as an element of their moral character. *Id.* at 1031-1032. The Ninth Circuit noted that the "fit" between the state's interest in ensuring the financial accountability of acupuncturists and the restriction at issue was imperfect:

> [W]hen a fundamental right is not at stake, "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

Id. at 1032 (quoting *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955)). *See also Wedges/Ledges*, 24 F.3d at 65 (plaintiffs must show that inability to pursue their occupation "is due to actions that substantively were 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare'").

Here, the challenged public health orders are rationally related to a legitimate – and indeed compelling – government interest in protecting the public from COVID-19, a highly infectious, highly serious, and even fatal, airborne illness. The tier framework provides restrictions on activities and businesses that are not able to accommodate certain safety standards and/or limit certain risks, such as: the "[a]bility to accommodate face covering wearing at all times;" the "[a]bility to physically distance between individuals from different households;" the "[a]bility to limit duration of exposure;" the "[a]bility to limit amount of mixing of people from

differing households and communities;" and the "[a]bility to limit the amount of physical interactions of visitors/patrons." (RJN, Ex. 9.) The public health orders that require protective measures for indoor salon services and temporarily prohibited indoor services when COVID-19 cases were surging clearly are rationally related to the goal of preventing the spread of the deadly disease.

3. Plaintiff's Equal Protection Claims Fail

Plaintiff alleges that the challenged public health orders violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and similarly violate equal protection under Article I, Sections 1 and 7 of the California Constitution. (Complaint, ¶¶ 87-93,101-112.) Plaintiff alleges that Defendants have intentionally and arbitrarily categorized California businesses and conduct as either "essential" or "nonessential" in violation of the Equal Protection Clause. (*Id*. at ¶ 91.) Plaintiff's equal protection claim fails as a matter of law.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." C*ity of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Differential treatment may violate the Equal Protection Clause only if (1) two similarly situated groups are treated differently, and (2) the differential treatment fails the applicable standard of constitutional scrutiny. *See Gallinger v. Becerra*, 898 F.3d 1012, 1016 (9th Cir. 2018). Equal protection claims only garner strict scrutiny when a law disadvantages a suspect class or impinges upon a fundamental right. *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997).

The public health orders at issue here are subject to rational basis review because they do not involve a suspect class and, as discussed above, they implicate a liberty interest, but not a fundamental right. *Dittman v. California*, 191 F.3d at 1031-1032 & n.5; *Wedges/Ledges*, 24 F.3d at 65; *see also Best Supplement Guide, LLC v. Newsom*, 2020 WL 2615022, at *6 (finding that State's COVID-19 public

health orders are subject to rational basis review because they do not impinge on gym owners' fundamental rights or discriminate on basis of any suspect classification); *Culinary Studios*, 2021 WL 427115 at *20 (finding that State's COVID-19 public health orders are subject to rational basis review because they do not impinge on restaurants' fundamental rights or discriminate on basis of any suspect classification; finding that businesses termed non-essential are not a suspect class).

The State's public health orders clearly pass muster under a rational basis review. As explained above, the restrictions on certain activities and businesses is not dependent on arbitrary classifications of "essential" vs. "non-essential," but rather are based on a determination of which activities/businesses are able to accommodate certain safety standards and/or limit certain risks, such as the ability to accommodate face coverings; limit physical distance and interactions between members of different households; and limit duration of exposure. Clearly, such restrictions are rationally related to the goal of stopping the spread of a deadly respiratory illness. *See Professional Beauty Federation*, 2020 WL 3056126, at *7 (applying rational basis review and finding that plaintiffs did not show that designation between essential and non-essential businesses was a plain violation of equal protection); *PCG-SP Venture*, 2020 WL 4344631, at *6-*8 (applying rational basis review to equal protection claim and finding that plaintiffs did not show that designation between essential and non-essential businesses lacked rational basis); *see also, e.g., Cross Culture Christian Ctr. v. Newsom*, 445 F.Supp.3d 758, 770-71 (2020) (determining that, in context of a Free Exercise claim, the state and local stay at home orders were "neutral laws of general applicability" that were only subject to rational basis review).

Accordingly, Plaintiff's equal protection claims pursuant to the U.S. and California Constitution should be dismissed.

4. Plaintiff's Takings Clause Claims Fail

Plaintiff alleges that the challenged public health orders violate the Takings Clause of the Fifth Amendment to the U.S. Constitution and Article 1, § 19 of the California Constitution. Complaint, ¶¶ 94-100; 113-118. Even if the takings claims were not barred by sovereign immunity, as discussed above, they would fail on the merits.

Plaintiff alleges that the regulatory actions by Defendants have resulted in Plaintiff being deprived of "all economically beneficial or productive use of its property including, without limitation, its licenses, its leased property, and its business property." *Id*. ¶ 97. However, Plaintiff's own allegations negate its Takings Clause claim. Indeed, Plaintiff admits that it could use its license to conduct personal care services for the entertainment industry and could use its leased property to continue retail sales of personal hygiene products. *Id*. ¶ 31. Further, Plaintiff has, in fact, been open for business on and off throughout the pandemic and is currently open for business.[9] Because the Regional Stay at Home Order has been lifted, RJN, Ex. 14, and hair salons are permitted to operate even in counties subject to the most restrictive purple tier, RJN, Exs. 9-10, Plaintiff clearly cannot be found to be deprived of *all* economically beneficial use of its property. *See PCG-SP Venture*, 2020 WL 4344631, at *10 (hotel owners retained some productive use of property and, even if plaintiffs could establish that public health orders prohibited all economically beneficial use for a certain time, "a temporary moratorium on all beneficial use of one's property is not a taking so long as it is reasonable"); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 334-35 (2002) (holding that 32-month moratorium on property development did not constitute a compensable taking; rejecting "extreme categorical rule that any deprivation of all economic use, no matter how brief,

[9] *See* Atelier Aucoin Salons - Hair Salon, Hair Stylist, Hair Color (last visited February 10, 2021.)

constitutes a compensable taking").

Because the challenged orders do not deprive Plaintiff of all beneficial use of its property or establish a permanent physical invasion, this case is not governed by either *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), or *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Instead, Plaintiff argues, alternatively, that this case involves a regulatory taking. Complaint, ¶ 98. Such regulatory takings are analyzed under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). *See Hotop v. City of San Jose*, 982 F.3d 710, 714 (9th Cir. 2020). The Supreme Court in *Penn Central* stated that any takings inquiry should include consideration of three factors: (1) economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with distinct investment-backed expectations; and (3) the character of the government action. *Penn Central*, 438 U.S. 104, 124 (1978); *Hotop*, 982 F.3d at 714; *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 625 (9th Cir. 2020).

In this case, to the extent that Plaintiff could provide evidence of significant lost profits or interference with investment-backed expectations, the character of the government action at issue here outweighs either of the first two factors. Actions that merely "adjust[] the benefits and burdens of economic life to promote the common good," rather than enact a "physical invasion" of property, rarely constitute a taking. *Penn Central*, 438 U.S. at 124. Moreover, the Takings Clause permits the outright destruction of property so long as the government is acting to abate an imminent threat to the public welfare. *See United States v. Caltex*, 344 U.S. 149, 154 (1952). The COVID-19 public health orders in this case are "quintessential examples of regulations that 'adjust[] the benefits and burdens of economic life to promote the common good.'" *PCG-SP Venture*, 2020 WL 4344631, at *10. To the extent that the public health orders temporarily deprive Plaintiff of the use and benefit of its hair salon, "the Takings Clause is indifferent.

The State is entitled to prioritize the health of the public over the property rights of the individual." *Id.* (citation omitted); *see also Tahoe-Sierra Pres. Council*, 535 U.S. at 334-35.

Accordingly, Plaintiff cannot state a regulatory takings claim.

CONCLUSION

Plaintiff's Complaint should be dismissed. Plaintiff's Complaint seeks only monetary damages and is therefore barred by sovereign immunity. Moreover, the challenged public health orders are constitutional under either *Jacobson* or under traditional constitutional standards, and Plaintiff cannot maintain a valid claim for a violation of its rights under the Due Process, Equal Protection, or Takings Clauses. Numerous courts have upheld the State's public health orders against these same types of constitutional attacks brought by various types of affected businesses. Defendants respectfully ask this Court to do the same and to dismiss Plaintiff's Complaint in its entirety, without leave to amend.

Dated: February 17, 2021

Respectfully Submitted,

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