IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 101 CD 2021

THE CRACKED EGG, LLC

Appellant

v.

COUNTY OF ALLEGHENY

Appellee

REPLY OF APPELLEE

MOTION FOR STAY OF COURT OF COMMON PLEAS DECISION DATED FEBRUARY 3, 2021 BY THE HONORABLE JOHN T. McVAY, JR. IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA, DOCKETED AT GD-20-009809

Vijyalakshmi Patel, Esq.
PA I.D. No.: 319945

March 5, 2021

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Attorney for County of Allegheny

REPLY TO MOTION FOR STAY PENDING APPEAL PURSUANT TO PA R.A.P. 1732(b).

Appellee, County of Allegheny, through the Allegheny County Health Department (hereinafter "ACHD" or "Department"), by and through its undersigned counsel, hereby files its Reply to Motion for Stay Pending Appeal Pursuant to Pennsylvania Rules of Appellate Procedure 1732(b).

I. PROCEDURAL BACKGROUND

On September 16, 2020, Appellee, County of Allegheny, filed a Complaint in Civil Action – Equity and Emergency Motion for Preliminary Injunction against Appellant, The Cracked Egg, LLC (hereinafter "Cracked Egg") in the Court of Common Pleas of Allegheny County. The Emergency Motion requested that the court enjoin Appellant from operating in violation of the Department's August 11, 2020 Order which ordered the facility to close and cease operations. From January 27, 2021 through January 29, 2021, a hearing took place before the Court of Common Pleas on the Emergency Motion. On February 3, 2021, the court issued an order and opinion granting the Department's Emergency Motion effective immediately. A copy of the Court of Common Pleas of Allegheny County Order of Court, dated February 3, 2021 (hereinafter "Court Order") is attached hereto as Exhibit "A"; A copy of the Court of Common Pleas of Allegheny County Memorandum Opinion, dated February 3, 2021 (hereinafter "Opinion") is attached

hereto as Exhibit "B". On February 4, 2021, Cracked Egg filed a Notice of Appeal of the Court Order to the Commonwealth Court of Pennsylvania. On February 5, 2021, Cracked Egg filed a Motion for Stay Pending Appeal before the Court of Common Pleas regarding the Court Order and Opinion. On February 17, 2021, the Court of Common Pleas held oral argument and denied Cracked Egg's Motion for Stay Pending Appeal. A copy of the Court of Common Pleas of Allegheny County Order of Court, dated February 17, 2021, denying the motion for stay is attached hereto as Exhibit "C". On February 19, 2021, Cracked Egg filed a Motion for Stay Pending Appeal before this Court.

II. ARGUMENT

Cracked Egg requests a stay of the Court of Common Pleas' February 3, 2021 Court Order pending appeal pursuant to subsection (b) of the Pennsylvania Rules of Appellate Procedure § 1732. In determining whether to grant a stay pending appeal, courts consider the following four factors:

1. The petitioner makes a strong showing that he is likely to prevail on the merits.
2. The petitioner has shown that without the requested relief, he will suffer irreparable injury.
3. The issuance of a stay will not substantially harm other interested parties in the proceedings.
4. The issuance of a stay will not adversely affect the public interest.

Pennsylvania Pub. Util. Comm'n v. Process Gas Consumers Grp., 502 Pa. 545, 552–53, (1983).

The factors require "the court to balance interests of all parties, and the public where applicable." *Id.* at 553.

A. Cracked Egg has not made a strong showing of the likelihood of success on the merits.

Cracked Egg must make a strong showing of the likelihood of success on the merits that the Emergency Motion was erroneously granted.

i. County of Butler v. Wolf is not germane to the issues in the present matter.

Cracked Egg misleadingly implies that the holdings in *County of Butler v. Wolf* are relevant to this case. *See County of Butler v. Wolf*, No. 2:20-CV-677, 2020 WL 5510690 (W.D. Pa. Sept. 14, 2020). *County of Butler* found that the numeric limitations on gatherings violated the First Amendment rights to free speech and assembly, and that the stay-at-home and non-life-sustaining business closure orders violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id*. However, the present matter does not concern the constitutionality of numeric limitations on gatherings, stay-at-home order, or non-life-sustaining business closure order. Moreover, the court in *County of Butler* expressed support in *dicta* for the order reducing occupancy based on percentage of fire code maximum occupancy. The Court of Common Pleas found *County of Butler* irrelevant because

it "makes no holdings as it relates to the constitutionality of the mask and social distancing mitigation measures", and that case "has been stayed for further review by the Third Circuit." *See* Opinion at p. 7. The court concluded its assessment of *County of Butler* as "ultimately more dissuasive." *Id.* at 8. This Court should note that *County of Butler* was appealed to the Third Circuit and the Third Circuit granted Governor Wolf's motion to stay the district court's ruling, thereby leaving the Governor's emergency orders in effect until the Third Circuit issues a final ruling on the merits of the appeal.

ii. Jacobson v. Massachusetts is still controlling law in a pandemic because it has not been supplanted by another standard.

Cracked Egg lists persuasive authority[1], concurring opinion[2], and dissenting opinion from cases that supposedly find the level of review promulgated by the U.S.

[1] *Delaney v. Baker* is distinguishable from the present matter because it involves a First Amendment challenge against the Governor of Massachusetts regarding executive orders issued in a state of emergency pertaining to COVID-19 and their impact on church services. *Delaney v. Baker*, No. CV 20-11154-WGY, 2021 WL 42340 (D. Mass. Jan. 6, 2021). *Delaney* did not challenge *Jacobson*, but instead, applied it to find the Governor's orders to be constitutional. *Id.* at 13-14.

[2] The Court of Common Pleas correctly held that *Roman Catholic Diocese of Brooklyn v. Cuomo* is distinguishable to the present matter because it is a "first amendment religious liberty case where the Supreme Court considered flat numerical limitations on church capacity and attendance." *See* Opinion at p. 10; *See also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69-71 (2020). As the Court of Common Pleas noted, the concurring opinion in *Roman Catholic* did not dismiss *Jacobson*, instead it distinguished its case from *Jacobson* and found that the rational basis test applies to Fourteenth Amendment challenges, as long it does not involve a suspect classification or claim of fundamental right, neither of which are found in the present matter. *See* Opinion at p. 9-10, n. 3.

Supreme Court in *Jacobson v. Massachusetts* as invalid and improper. *See Jacobson v. Massachusetts*, 197 U.S. 11 (1905). However, even if lower courts and dissenting opinions dispute *Jacobson*, the U.S. Supreme Court has not promulgated a new standard to replace *Jacobson*. Moreover, "Jacobsen can substantially be reconciled with current constitutional law and be viewed as a forerunner of our present rational basis test." *See* Opinion at p. 10. The Court of Common Pleas found that *Jacobson* is consistent with the law because it applied the rational basis test, that this is the "traditional legal test associated with the right at issue," and that *County of Butler* erroneously concluded that *Jacobson* should not be applied. *Id.* at 9-11, n. 3.

In applying the rational basis test, the Court of Common Pleas concluded that orders issued by Governor Wolf, Secretary Levine, and the Department are constitutional because "they are rationally related to the legitimate government interest of protecting the citizens of Allegheny County from the spread of COVID-19." *Id.* at 7. This holding is consistent with the U.S. District Court for the Middle District of Pennsylvania in *M. Rae, Inc. v. Wolf,* a case that also reviews social distancing, mask requirement, and other COVID-19 mitigation measures. *See M. Rae, Inc. v. Wolf,* No. 1:20-CV-2366, 2020 WL 7642596 (M.D. Pa. Dec. 23, 2020). The court in *M. Rae, Inc.* acknowledged that "[s]ince September, the nation has again experienced an alarming spike in COVID-19 cases and hospitalizations… and the Commonwealth [] saw record-breaking spikes in daily case numbers throughout the

fall." *Id*. at 6. After having reviewed judicial history, the court in *M. Rae, Inc.* determined that the analysis regarding the constitutionality of public health orders by the U.S. Supreme Court in *Jacobson v. Massachusetts* "is controlling precedent until the Supreme Court or Third Circuit Court of Appeals tell us otherwise." *Id*. at 14.

The court in *Jacobson* held that "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulation, as the safety of the general public may demand." *Jacobson*, 197 U.S. at 29. The court determined that a measure "enacted to protect the public health, the public morals, or the public safety" will be subject to judicial review only if it "has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of the rights secured by the fundamental law." *Id*. at 31. Thus, the court in *M. Rae, Inc.* concluded that the rational basis standard of review should apply. *M. Rae, Inc.*, No. 1:20-CV-2366 at 14-15, n. 25.

The rational basis test requires a showing by the movant that they have been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). This test is "very deferential" and "'is met if there is any reasonably conceivable state of facts that could provide a rational basis' for the

differing treatment." *Newark Cab Ass'n v. City of Newark*, 901 F.3d 146, 156 (3d Cir. 2018) (*quoting United States v. Walker*, 473 F.3d 71, 77 (3d Cir. 2007) (*quoting Heller v. Doe*, 509 U.S. 312, 320 (1993))). "Mathematical precision is simply not required" to prove rational basis. *M. Rae, Inc.*, No. 1:20-CV-2366 at 19. "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and end." *Heller*, 509 U.S. at 321. As the court in *M. Rae, Inc.* correctly acknowledged, "it is an unfortunate reality during this unprecedented global pandemic that there are no perfect choices; so 'imperfect,' if properly justified, must suffice." *M. Rae, Inc.*, No. 1:20-CV-2366 at 20. "It cannot genuinely be disputed that COVID-19 cases are surging and pushing the Commonwealth's healthcare system to the brink." *Id*. at 16.

COVID-19 is "transmitted predominantly by respiratory droplets generated when people cough, sneeze, sing, talk, or breathe." *See* Scientific Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2, CDC (updated Nov. 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/more/masking-science-sars-cov2.html. The scientific community has overwhelmingly acknowledged that wearing face coverings helps to reduce transmission of respiratory droplets. *Id.*; *See also* Coronavirus Disease (COVID-19): Masks, WORLD HEALTH ORG. (Dec. 1, 2020), https://www.who.int/news-room/q-a-detail/coronavirus-disease-covid-19-masks. The Centers for Disease Control and Prevention (hereinafter "CDC") warns

that "[i]ndoor venues, where distancing is not maintained and consistent use of face masks is not possible (e.g., restaurant dining), have been identified as particularly high-risk scenarios." *See* Margaret A. Honein, PhD, et al., Morbidity and Mortality Weekly Report (MMWR): Summary of Guidance for Public Health Strategies to Address High Levels of Community Transmission of SARS-CoV-2 and Related Deaths, CDC (Dec. 4, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6949e2.htm. The CDC categorizes indoor dining as high risk even with reduced capacity and tables spaced six feet apart. *See* Restaurants and Bars, CDC (updated Dec. 16, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html.

The U.S. Supreme Court stated that the "Constitution principally entrusts '[t]he health and safety of the people' to the politically accountable officials of the States 'to guard and protect'…and [w]hen those officials 'undertake[] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *S. Bay United Pentecostal Church v. Newson*, 140 S. Ct. 1613, 1613 (2020) (mem.) (Roberts, C.J., concurring) (*quoting Jacobson*, 197 U.S. at 38; *Marshall v. United States*, 414 U.S. 417, 427 (1974)). Furthermore, "[i]t is for the Commonwealth's public officials—not this or any court—to determine the most appropriate means by which to meet the current crisis." *M. Rae, Inc.*, No. 1:20-CV-

2366 at 20. After reviewing the scientific evidence, the court in *M. Rae, Inc.* held that "[it has] little difficulty concluding that defendants' decision to enact temporary mitigation measures targeted at indoor-dining establishments was eminently rational" and it was "Governor Wolf's and Secretary Levine's prerogative and duty to act." *M. Rae, Inc.*, No. 1:20-CV-2366 at 18-19. Thus, even if Cracked Egg does not think it is "right", it is rational to require face coverings and reduce occupancy in restaurants.

iii. The COVID-19 mitigation measure orders are valid, and the Department was authorized to enforce them.

Cracked Egg also makes general claims that the COVID-19 mitigation measure orders issued by the Commonwealth and Department are invalid because proper rule-making procedure was not followed. The Court of Common Pleas found *Friends of Danny DeVito v. Wolf* "precedential" in its holdings that "1) the Governor has the authority to issue his order and that the pandemic qualified as a natural disaster under Pennsylvania's Emergency Code 2) the Governor's order was a proper exercise of police power 3) the doctrine of separation of powers was not violated by his executive order and finally 4) his order did not deprive non-life sustaining business owners of procedural due process." *See* Opinion at p. 11; *See also Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020).

The Governor of Pennsylvania has the authority to "issue, amend and rescind executive orders, proclamations and regulations which shall have the force and effect of law" in disaster emergencies. *See* 35 Pa.C.S.A. § 7301(b). The authority also provides the following powers:

1. Suspend the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency.
2. Utilize all available resources of the Commonwealth Government and each political subdivision of this Commonwealth as reasonably necessary to cope with the disaster emergency.
3. Transfer the direction, personnel or functions of Commonwealth agencies or units thereof for the purpose of performing or facilitating emergency services…
7. Control ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises therein.
8. Suspend or limit the sale, dispensing or transportation of alcoholic beverages, firearms, explosives and combustibles.

See 35 Pa.C.S.A. § 7301(f)(1), (2), (3), (7), and (8); *See also DeVito*, 227 A.3d at 885-86.

The Pennsylvania statutory code defines "disaster" as "A man-made disaster, natural disaster or war-caused disaster", and defines "natural disaster" as "Any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life." *See* 35 Pa.C.S.A. § 7102. The Governor made a statewide COVID-19 disaster declaration on March 6, 2020, thereby invoking the Emergency Code. Thus, the Court of Common Pleas correctly found that this "supersed[ed] and suspend[ed] the provisions of any regulatory statute prescribing the procedures for the conduct of Commonwealth business in dealing with the emergency" and made the COVID-19 mitigation measure orders valid. *See* Opinion at p. 13-14. Moreover, "[t]o require the Commonwealth or the ACHD to follow time-consuming rule-making procedures would result in greater harm to the general public." *Id*. at p. 14.

The Pennsylvania Department of Health (hereinafter "PA DOH") and local health departments also have independent and distinct authority, separate from the Governor's emergency powers, "to issue administrative orders to abate, mitigate, and/or prevent public health hazards such as the COVID-19 pandemic." *Id*. at p. 14. For example, the Administrative Code of 1929 specifically authorizes the PADOH

and its agencies to "protect the health of the people of the Commonwealth, and to determine and employ the most efficient and practical means for the prevention and suppression of disease", and to “order nuisances, detrimental to the public health, or the causes of disease and mortality, to be abated and removed.” *See* 71 P.S. State Government § 532(a) and (c); *See also* Opinion at p. 14-15.

Furthermore, the Director of the Department is permitted to issue orders under the Pennsylvania Disease Prevention and Control Law of 1955 (hereinafter “DPCL”) and the Local Health Administration Law. Under the DPCL, the Department has primary responsibility for the prevention and control of communicable and non-communicable diseases in Allegheny County. *See* 35 P.S. § 521.3(a). Section 5 of the DCPCL states, “Upon the receipt by a local board or department of health or by the department, as the case may be, of a report of a disease which is subject to isolation, quarantine, or any other control measure, the local board or department of health or the department shall carry out the appropriate control measures in such a manner and in such a place as is provided by rule or regulation.” *See* 35 P.S. § 521.5.

The Court of Common Pleas also held that the Department is authorized to enforce health laws, rules, regulations, and orders of the Commonwealth pursuant to the Local Health Administration Law and that “[o]nce ACHD discovers a nuisance detrimental to the health and well-being of the public, the health director is authorized to take action to abate the nuisance”. *See* Opinion at p. 15; *See also* 16

P.S. § 12012(c) and (d). The issuance of an order does not require approval from county commissioners. *See* 16 P.S. § 12012(d).

Thus, the Court of Common Pleas properly found "the actions of the Governor and Secretary Levine to be constitutional and *a fortiori* the County and Dr. Bogen's actions in following them as they are mandated to do so by the Local Health Administration Act 16 P.S. 12001 and Disease Prevention Act 35 P.S. § 521.1 et seq." *See* Opinion at p. 11.

iv. The COVID-19 mitigation measure orders are temporary.

Cracked Egg claims that the Court of Common Pleas' reliance on *DeVito* is flawed by implying that the COVID-19 mitigation measure orders in the present matter are not temporary. This analysis was only made in a government takings claim in *DeVito* and no such similar claim has been made in the present matter. Despite this claim, "temporary" has not been defined, and instead, has been analyzed on a case-by-case basis. For example, the U.S. Supreme Court found a 32-month moratorium on real estate development to be temporary. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

In *DeVito*, the Supreme Court of Pennsylvania found the executive orders regarding COVID-19 to be temporary because "the Emergency Code temporarily limits the Executive Order to ninety days unless renewed and provides the General Assembly with the ability to terminate the order at any time." *DeVito*, 227 A.3d at

895-96; *See also* 35 Pa.C.S.A. § 7301(c). The orders were found to be a temporary loss of use of property to "protect the lives and health of millions of Pennsylvania citizens, undoubtedly constitutes a classic example of the use of the police power to 'protect the lives, health, morals, comfort, and general welfare of the people[.]'" *Id* at 865-96, citing *Manigault v. Springs*, 199 U.S. 473, 480 (1905). "[T]he public health rationale for imposing the restrictions in the Executive Order, to suppress the spread of the virus throughout the Commonwealth, is a stop-gap measure and, by definition, temporary." *DeVito,* 227 A.3d at 896.

In the present matter, the Governor invoked the Emergency Code to issue the COVID-19 mitigation measure orders. *See* Opinion at p. 13-14. The Court of Common Pleas found that the "regulatory statutes were suspended in Governor Wolf's emergency proclamation dated March 6, 2020 and amended on August 31, 2020 and November 24, 2020." *See* Court Order at p. 1; *See also* Opinion at p. 14. "The suspension of the regulatory statutes remains in effect until its expiration by operation of law on February 24, 2021." *See* Opinion at p. 14. Thus, the COVID-19 mitigation measure orders are temporary, as they were in *DeVito*.

v. Cracked Egg's procedural due process right was not violated because it had notice and opportunity for a hearing.

Cracked Egg claims that the suspension of its health permit violated its procedural due process because it was done without notice or a hearing. The

fundamental elements of procedural due process are notice and an opportunity to be heard before being deprived of any significant property interest. *Fuentes v. Shevin*, 407 U.S. 67, 80, (1972). The record before the trial court demonstrates that prior to the August 11, 2020 closure order, Cracked Egg was cited by the Department three times, on July 1, 2020, August 5, 2020, and August 7, 2020, for not complying with the COVID-19 mitigation measures, among other violations. The record also shows that each inspection notice was accompanied by a letter that was emailed to Cracked Egg that notified the facility of its right for a hearing if it felt aggrieved by the notice. Cracked Egg did not appeal the July 1, 2020, August 5, 2020, or August 7, 2020 orders. The August 11, 2020 closure order, also emailed to Cracked Egg, notified the facility of its right for a hearing if it felt aggrieved by the order. Again, Cracked Egg did not appeal this order. When questioned why the Cracked Egg did not challenge the Department's orders through the administrative appeal process, Kimberly Waigand, owner of the Cracked Egg, replied with, "I can't give you an answer." (354:17-20; 355:2-9). Thus, despite having been provided multiple opportunities to challenge the Department's orders and be heard before a tribunal, Cracked Egg chose not to exercise its rights.

vi. The Department's witness defined a COVID-19 prevention plan, and the authority to require such a plan is found in the Department's Rules and Regulations Article III, "Food Safety".

Cracked Egg contends that the Court of Common Pleas erred in requiring the facility to submit a COVID-19 mitigation plan, that this plan is not defined, and that the Department does not have the authority to require the submission of this plan. Amanda Mator, the Department's Program Operations Manager for the Food Safety program, testified that "a COVID-19 prevention plan would include all mitigation steps that the food facility would be addressing to comply to the current COVID-19 order." (146:1-2; 153:17-20). Moreover, Ms. Mator's testimony identified section 337.1 of the Department's Rules and Regulations Article III, "Food Safety" (hereinafter "Article III") as the source of authority to require the submission of a corrective action plan for the reinstatement of a permit. (185:19-25; 186:1-25). Ms. Mator explained that the corrective action required by Cracked Egg for the reinstatement of its permit is the completion of the COVID-19 prevention plan. (187:1-8).

Accordingly, Cracked Egg has not made a strong showing of likelihood of success on the merits, therefore, the motion for stay pending appeal must be denied.

B. The balance of harm weighs in favor of denying a stay.

In further support, the following analysis will show that the balance of harm weighs in favor of denying the stay pending appeal.

i. Cracked Egg will not suffer irreparable injury absent a stay.

The Court of Common Pleas found that "issuance of an injunction will not substantially harm other interested parties in the proceeding." *See* Opinion at p. 17. Cracked Egg claims that it will suffer irreparable injury[3] if the case is not stayed pending appeal because it cannot operate at 25% occupancy. However, this claim has no weight because Ms. Waigand testified that Cracked Egg currently operates at 100% capacity despite the closure order. (350:5-16). Moreover, Ms. Waigand stated that Cracked Egg has been operating without interruption since August 24, 2020. (351:4-13). Additionally, Cracked Egg has not complied with the masking order since July 4, 2020 and other COVID-19 mitigation measure orders since August 24, 2020. (352:20-25; 353:1-4).

[3] Cracked Egg cites to three cases in support of its irreparable harm analysis. *See Greenmoor, Inc. v. Burchick Const.Co., Inc.*, 908 A.2d 310, (Pa. Super. 2006),; *Three County Services, Inc. v. Philadelphia Inquirer*, 486 A.2d 997 (Pa. Super. 1985),; *Mozenter v. Trigiani*, No. 0595 MAY TERM 2002, 2003 WL 1861578 (Pa. Com. Pl. Apr. 2, 2003). However, these cases analyze irreparable harm in the context of preliminary injunction and not stay pending appeal. Therefore, these cases are irrelevant to the analysis of whether a stay pending appeal should be granted or denied.

Cracked Egg must "'demonstrate that irreparable injury is likely [not merely possible] in the absence of [a] [stay].'" *In re Revel AC, Inc.*, 802 F.3d at 569 *quoting Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008). "Likely" means "more apt to occur than not." *In re Revel AC, Inc.*, 802 F.3d at 569. Moreover, "'purely economic injury, compensable in money, cannot satisfy the irreparable injury requirement.'" *In re Revel AC, Inc.*, 802 F.3d at 572 *quoting Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 255 (3d Cir.2011).

As the Court of Common Pleas acknowledged, the Department is not attempting to "shut down" Cracked Egg but attempting to require that it operate within the parameters of current COVID-19 control measure orders in order to protect the public health.[4] Cracked Egg has only claimed that it will suffer economic harm. As the court in *M. Rae, Inc.*, acknowledged, these may not be Cracked Egg's "preferred or most profitable means of doing business, but they can still do business." *M. Rae, Inc.*, No. 1:20-CV-2366 at 23-24. Cracked Egg's fear of potential economic harm is the *only* basis of its irreparable injury claim. Thus, Cracked Egg has not shown that it is more likely than not to suffer irreparable injury in the absence of stay.

[4] Currently, Cracked Egg can operate at 25% occupancy, or 50% occupancy if it self-certifies for free with the Commonwealth. *See* Certify My Restaurant, https://www.pa.gov/covid/business-unites/certify-my-restaurant.

ii. A stay will substantially harm the Department.

The Court of Common Pleas found that "greater injury would result from refusing an injunction than from granting it." *See* Opinion at p. 17. One of the purposes of the Department is to regulate food operations in restaurants and eating establishments in order to "promote the underlying purpose of protecting the public health." *See* Article III § 300. The Department, as a public health agency, is tasked to enforce orders, laws, and regulations for the promotion of public health. Granting a stay would substantially harm the Department because it would prevent the Department from performing its duties, to the detriment of public health, and it would permit the continued operation of Cracked Egg without a valid health permit and in violation of COVID-19 mitigation measure orders. The Court of Common Pleas found the Department's interest in protecting the public from the spread of COVID-19 to be a "legitimate government interest." *See* Opinion at p. 17. Therefore, the balance of harm weighs in favor of denying the stay.

C. **A stay is not in the public interest because it will harm public health.**

A stay is not in the public interest because, as the Court of Common Pleas determined, preliminary injunction was necessary to prevent immediate and irreparable harm to the public health of Allegheny County. *See* Opinion at p. 17. The Court of Common Pleas found Dr. Brink's testimony persuasive that not wearing a mask increases the probability of the COVID-19 virus spreading and that

"COVID-19 can spread exponentially." *Id*. at 17-18. This is especially a concern in indoor dining establishments where face masks, reduced occupancy, and social distancing is not enforced. It is also in the public interest to prevent community spread, including to "other businesses who are following masking, capacity limits and social distancing" and their employees and customers. *Id.* at 18. Moreover, a stay would cause "restaurants that are following the rules [to] become less likely to do so and this further increasing public health risks to everyone involved and possibly increasing overall community spread." *Id*. Thus, granting Cracked Egg's stay, thereby allowing it to continue to operate without COVID-19 mitigation measures in place and without a valid health permit, is not in the public interest to promote and protect public health.

III. CONCLUSION

WHEREFORE, Appellee, County of Allegheny, through the Allegheny County Health Department, herein moves this Honorable Court to issue an order denying Cracked Egg's Motion for Stay Pending Appeal.

Dated: March 5, 2021

Respectfully submitted,

_/s/ Vijyalakshmi Patel___

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **Reply of Appellee** was served upon the persons below by electronic service through PACFile on March 5, 2021, which service satisfies the requirements of Pa.R.A.P. 121:

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Dated: March 5, 2021

By: _/s/ Vijyalakshmi Patel___
Vijyalakshmi Patel, Esq.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania,	)	CIVIL DIVISION – EQUITY
Plaintiff,	)	No.: GD–20–9809
vs.	)	
THE CRACKED EGG, LLC,	)	
Defendant.	)	

ORDER OF COURT

AND NOW, this 3rd day of February 2021, after a full and complete evidentiary hearing held remotely on January 27-29 2021, pursuant to PA. R.C.P 1531, it is ORDERED, ADJUDGED, AND DECREED as follows:

1. The Court finds that the orders of Governor Wolf, Secretary Levine and the ACHD are constitutional as rationally related to the legitimate government interest of protecting the citizens of Allegheny County from the spread of COVID-19.
2. The order of Governor Wolf, Secretary Levine, and the ACHD are not null *ab initio* as the regulatory statutes were suspended in Governor Wolf's emergency proclamation dated March 6, 2020 and amended on August 31, 2020 and November 24, 2020.
3. The Court finds that the burden of proof has been met by the County of Allegheny and thus, makes the following findings:
   a. An injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages.
   b. Greater harm would result from refusing the injunction than from granting it, and the issuance of an injunction will not substantially harm other interested parties.
   c. The activity the County of Allegheny seeks to restrain is actionable, its right to relief is clear, and that the wrong is manifest, or, in other words, that the County of Allegheny is likely to prevail on the merits.
   d. A Preliminary injunction will properly restore the parties to their status quo as it existed immediately prior to the Crack'd Egg's wrongful conduct.
   e. The requested injunction is reasonably suited to abate the Crack'd Egg's offending conduct.
   f. The injunction will not adversely affect the public interest.
4. A Memorandum Opinion shall be separately filed in support of this Order of Court.

EXHIBIT A

5. Plaintiffs Emergency Motion for Preliminary Injunction is GRANTED and a Preliminry Injunction is entered, as follows;

The above-captioned Defendant, as further identified in the Complaint, is ORDERED to:

1. Submit to the ACHD a COVID-19 compliance plan for the operation of The Crack'd Egg at 4131 Brownsville Road, Pittsburgh, PA, 15227 (lot and block number 0188-N-00133).
2. Cease and desist from violating the August 11, 2020 enforcement order by willfully opening and operating The Crack'd Egg at 4131 Brownsville Road, Pittsburgh, PA, 15227 (lot and block number 0188-N-00133).
3. Cease and desist from ignoring its obligations under the August 11, 2020 enforcement order,
4. This ORDER shall become effective IMMEDIATELY.

BY THE COURT

Judge John T. McVay Jr.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania,

Plaintiff,

Vs.

THE CRACKED EGG, LLC,

Defendant

CIVIL DIVISION – EQUITY

No.: GD-20-9809

MEMORANDUM OPINION

DATE- February 3, 2021

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EXHIBIT B

MEMORANDUM OPINION

The Plaintiff is the County of Allegheny, a home rule county and political subdivision of the Commonwealth of Pennsylvania, acting by and through the Allegheny County Health Department ("ACHD"), a local health department organized under the Local Health Administrative Law 16 P.S. ss 12001-12029 , whose powers and duties include the enforcement of laws relating to public health and food and environmental safety within Allegheny County.

The Defendant is the Cracked Egg, LLC, which operates a restaurant food facility, The Crack'd Egg at 4131 Brownsville Road , Pittsburgh, PA 15227. The Cracked Egg is provided a permit by the ACHD to operate its business as a food facility in Allegheny County and is subject to its rules and regulations in order to provide food services to the general public.

PROCEDURAL HISTORY

On September 16, 2020, the County of Allegheny, through the ACHD, filed a Civil Complaint in Equity and an Emergency Motion for Preliminary Injunction alleging the following: 1.) The Cracked Egg operates a restaurant located in Allegheny County. 2.) The Cracked Egg was on numerous occasions in violation of the Commonwealth's COVID-19 control measures and willfully failed to comply with the ACHD orders of compliance. 3.) As a result of its noncompliance, the ACHD suspended the Cracked Egg's permit to operate a restaurant and ordered the immediate closure of its operation. 4.) The Cracked Egg has continued to operate its restaurant business in clear violation of the ACHD's suspension order. 5.) The Cracked Egg's deliberate noncompliance with the COVID-19 control measures poses an immediate health risk by exposing and contributing to the spread of the highly infectious and contagious COVID-19 virus to the public at large.

The Cracked Egg filed a Notice of Removal to the U.S. District Court Western District of Pennsylvania on September 18, 2020. I held a brief status conference on September 21, 2020 and issued an order the following day confirming that this matter had been transferred to federal court pursuant to 28 U.S.C. 1446(d).

On October 7, 2020, the U.S. District Court remanded this matter back to the Court of Common Pleas of Allegheny County. The Cracked Egg immediately filed a Suggestion of Bankruptcy with this Court indicating that it had filed a Chapter 11 Bankruptcy Petition on October 7, 2020 at case No. 20-22889. On October 15, 2020, the Defendant filed a Notice of Removal with this Court, removing this matter to the bankruptcy court. After argument before the Bankruptcy Court, an order and opinion were issued on January 7, 2021, granting the ACHD's Motion for Relief from Automatic Stay and remanding this matter back to the Allegheny County Court of Common Pleas. I promptly held a status conference on January 11, 2021 to discuss with the parties and reach an agreement for scheduling of argument on the Plaintiff's Motion. It was raised at that time by the Cracked Egg that nothing could occur until the expiration of fourteen (14) days due to Rule 4001(a)(1) of the Bankruptcy Code.[1]

At the status conference on January 11, 2021, the parties agreed to proceed with oral argument on the ACHD's Emergency Motion for a Preliminary Injunction on January 22, 2021, the earliest date after which the stay under Rule 4001(a)(1) would permit. I offered at that time to proceed with argument earlier if the Bankruptcy Court granted relief from the stay. No relief from the stay under Rule 4001(a)(1) was sought and argument proceeded on January 22, 2021.

[1] Rule 4001(a)(1) states "An order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 14 days after the entry of the order, unless the court orders."

After argument on January 22, 2021, I determined that a full evidentiary hearing was required immediately to rule on the Emergency Motion and ordered a full evidentiary hearing that the parties agreed was to begin on January 27, 2021, and also requiring the parties to exchange briefs, exhibits and witness lists by January 26, 2021, and asking the parties to reach any factual or evidentiary stipulations. After a three-day remote hearing conducted through advanced communication technology ending on January 29, 2021, I finds as discussed below.[2]

STANDARD OF REVIEW

Before the injunctive relief requested can be granted, as the party seeking relief, the ACHD must first satisfy a six-part test. Specifically, a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. Singzon v. Dep't of Pub. Welfare, 496 Pa. 8, 436 A.2d 125, 127-28 (1981); John G. Bryant Co. v. Sling Testing & Repair, Inc., 471 Pa. 1, 369 A.2d 1164, 1167-68 (1977); Ala. Binder & Chem. Corp. v. Pa. Indus. Chem. Corp., 410 Pa. 214, 189 A.2d 180, 184 (1963). Second, the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. Maritrans GP, 602 A.2d at 1283; Valley Forge Historical Soc'y v. Washington Mem'l Chapel, 493 Pa. 491, 426 A.2d 1123, 1128-29 (1981); Ala. Binder & Chem. Corp., 189 A.2d at 184. Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. Valley Forge Historical Soc'y, 426 A.2d at 1128-29; Herman, 141 A.2d at 577-78. Fourth, the party seeking an injunction must show that the activity

[2] The Court notes that as of the time of the writing of this memorandum, a transcript of the hearing is unavailable. Thus, the Court reserves the right to amend this memorandum to properly reflect the record.

it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits. Anglo-Am. Ins. Co. v. Molin, 547 Pa. 504, 691 A.2d 929, 933-34 (1997); Maritrans GP, 602 A.2d at 1283-84; Shenango Valley Osteopathic Hosp. v. Dep't of Health, 499 Pa. 39, 451 A.2d 434, 440 (1982); Singzon, 436 A.2d at 127-28. Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. John G. Bryant Co., 369 A.2d at 1167-71; Albee Homes, Inc. v. Caddie Homes, Inc., 417 Pa. 177, 207 A.2d 768, 771-73 (1965). Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest. Maritrans GP, 602 A.2d at 1283; Philadelphia v. District Council 33, AFSCME, 528 Pa. 355, 598 A.2d 256, 260-61 (1991).

FACTUAL HISTORY

The COVID-19 virus has caused a global pandemic, creating a national public health hazard to the United States and the Commonwealth of Pennsylvania which has not been experienced in over 100 years. The COVID-19 pandemic threatens the health and safety of every citizen and person in the Commonwealth while overburdening our healthcare systems and destroying the businesses and livelihoods of many Americans. Particularly hard hit are restaurants, bars and other entertainment and leisure industries requiring the congregation of large numbers of people in confined indoor spaces.

The CDC reported the first COVID-19 case in the U.S. in January 2020. As of March 6, 2020, there were 233 confirmed COVID-19 cases in the U.S. and only two presumed cases in Pennsylvania. On March 6, 2020 Governor Wolf issued his Proclamation of Disaster Emergency formally declaring a state of emergency in the Commonwealth Pennsylvania. During the early stages of the pandemic Governor Wolf implemented numerous mitigation measures that closed

all businesses designated as non-life sustaining. In particular, restaurants and bars were closed for all in person dining and were limited to carry out, delivery and drive through food and beverage services.

Pursuant to Governor Wolf's May 1, 2020 reopening plan, the Commonwealth's 67 counties would be categorized into three phases, Red the most restrictive, Yellow less restrictive and Green the least restrictive. As the Covid-19 cases stabilized in June 2020 most counties were moved into the Green phase. By the end of June and early July 2020 the Commonwealth started to experience an uptick in the number of daily COVID-19 cases. As a direct result of the increase in COVID-19 cases, the Pennsylvania Secretary of Health Dr. Rachel Levine issued the universal face covering order on July 1, 2020 and Governor Wolf issued the "targeted mitigation" order on July 15, 2020, which incorporated Dr. Levine's face covering order. In addition, Dr. Bogen issued her own order on July 2, 2020 pursuant to the Local Health Administration Law, 16 P.S. 12001, which called for a one-week closure of bars, restaurants and casinos and the cancellation of all activities or events over 25 people for that same one-week time period. Included in Dr. Bogen's order was a voluntary stay-at-home recommendation for residents.

The Governor's targeted mitigation order specifically reduced capacity for all indoor dining to 25%, restricted alcohol sales, and mandated the wearing of masks and physically distancing. On July 14, 2020, the day before the issuing of the new targeting mitigation order, Pennsylvania reported 1,064 new COVID-19 cases, 96,671 total cases, and 6,931 total deaths. I also note that Allegheny County recorded 331 new cases of COVID-19 on July 14, 2020 which was a new daily record for the county.

The case begins when the ACHD received complaints that the Cracked Egg was not complying with the current COVID-19 Control Measure orders in effect at the time. In response

to those complaints, the ACHD employees did an onsite visit on July 1, 2020 and observed public facing employees not wearing masks along with customers not wearing masks upon their entrance to the restaurant. After observing the alleged violations, the ACHD employees met with Cracked Egg staff and provided guidance on compliance measures that needed to be followed.

After the July 1, 2020 onsite visit, the ACHD continued to receive complaints that the Cracked Egg was not complying with the Commonwealth's and County's COVID-19 control measures. During additional onsite inspections on July28, 2020, August 5, 2020, and August 7, 2020, the ACHD employees confirmed that the Cracked Egg's employees and customers were still not following the mask requirements along with other violations. The ACHD employees again reviewed the violations and provided guidance on compliance with the COVID-19 control measures.

During the August 11, 2020 onsite inspection, the ACHD again revealed that the Cracked Egg was still not complying with the applicable COVID-19 control measures. After the inspection, the ACHD determined that the Cracked Egg's continued noncompliance with the COVID-19 control measures constituted an imminent danger to the public health and issued an immediate suspension order pursuant to its authority granted under Article III "Food Safety" of the Allegheny County Health Departments Rules and Regulations.

The ACHD became aware through online social media postings that the Cracked Egg planned on opening its restaurant in the near future. As a result, the ACHD issued a warning letter that opening the restaurant would be a violation of the ACHD Article III.

Employees of the ACHD performed compliance inspections to check whether the Cracked Egg was complying with the suspension and closure order on August 24, 2020 through

August 28, 2020, and August 31, 2020 through September 4, 2020 and September 10, 2020. The result of these inspections confirmed that the Cracked Egg continued to operate the restaurant with a suspended permit and in violation of the August 11, 2020 ACHD closure order.

The record reflects that the Cracked Egg never appealed the suspension order or provided a COVID-19 compliance plan or requested a reinstatement of their permit. The ACHD then proceeded to file the Complaint in Equity and Enforcement action.

I take judicial notice as of February 1, 2020, the W.H.O. reports 102,584,351 Covid-19 cases and 2,222,647 deaths worldwide. The CDC reports 26,034,475 Covid-19 cases and 439,955 deaths in the U.S. The Pennsylvania Department of Health reports 736,236 confirmed Covid-19 cases and 21,687 deaths in Pennsylvania. The Allegheny County Department of Health reports 69,537 confirmed case of Covid-19 and 1,454 deaths in Allegheny County.

DISCUSSION

Constitutionality

The orders of Governor Wolf, Secretary Levine and the ACHD are constitutional as they are rationally related to the legitimate government interest of protecting the citizens of Allegheny County from the spread of COVID-19. While the Cracked Egg relies upon the distinguishable opinion in County of Butler v. Wolf, No. 2:20-CV-677, 2020 WL 5510690 (W.D. Pa. Sept. 14, 2020)), it cannot be overstated that the opinion focuses upon the provisions of the Governor's order regarding stay at home and business closure or restriction. In fact, the court makes no holdings as it relates to the constitutionality of the mask and social distancing mitigation measures. Further, and to the extent that I agree or respectfully disagree with its merits, the opinion has been stayed for further review by the Third Circuit and thus warrants my

consideration only for possible persuasive, and ultimately more dissuasive, constitutional jurisprudence.

Respectfully, I would synthesize the constitutional conclusions in County of Butler for consideration *sub judice* as follows;

1. The holding in Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 12, 25 S. Ct. 358, 359, 49 L. Ed. 643 (1905), provides that greater deference be given to the States exercise of the police power during a pandemic, should no longer apply because it was decided before the strict scrutiny, intermediate scrutiny and rational basis test line of cases had developed and that are indeed foundational to any current constitutional analysis;
2. Intermediate scrutiny should apply to the First Amendment claims of freedom of assembly, which the court found to exist; and
3. Business restrictions trigger the Equal Protection and Substantive Due Process clauses of the 14th Amendment and require a rational basis analysis.

While I might agree with the part of the holding of the County of Butler that constitutional analysis involving a fundamental right during a pandemic may require a stricter level of review due to the recent United States Supreme Court's opinion in Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68 (2020), which directly involved the fundamental right of religious liberty, I nonetheless strongly disagree with the County of Butler's apparent conclusion that Jacobson is no longer good law.

Jacobson , a 1905 United States Supreme Court case, was decided before modern constitutional analysis was developed and held that states, through their police power, could mandate smallpox vaccinations during a pandemic despite the obvious compromise of individual physical liberty. Jacobson is often cited for the holding that deference must be given to governmental action during a pandemic and has been utilized in subsequent cases regarding public health decisions and the police power. What seems to get glossed over by Jacobson critics is that " The Great Dissenter "Justice John Marshall Harlan's majority opinion specifically

recognizes that the deference given to the states police power is not limitless. Justice Harlan stated:

> Before closing this opinion, we deem it appropriate, in order to prevent misapprehension as to our views, to observe-perhaps to repeat a thought already sufficiently expressed, namely-that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression.

Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 38, 25 S. Ct. 358, 366, 49 L. Ed. 643 (1905)

While the court's opinion in County of Butler recognizes that this express limitation on the police power is found in Jacobson, the court appears to view it as quasi-dicta and thus believes "deference' to the police power during a pandemic is with little, if any, constitutional limitation. Primarily, the court relies upon a Harvard Law Review article that argues that to apply Jacobson today after the development of the modern three test constitutional analyses, would require a "suspension" of the three tests i.e. conceptually changing how we would constitutionally analyze the police power and creating a different constitutional analysis for government action during pandemics. While I find erroneous the Harvard Law review argument that persuaded the federal court in County of Butler, in fairness to all jurists, trying to determine Jacobson's holding in light of modern constitutional analysis, our United States Supreme Court can be found contentiously debating the same consideration in the cases of Roman Catholic Diocese of Brooklyn v. Cuomo,[3] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613,

[3] Justice Gorsuch's Concurrence stated, "Start with the mode of analysis. Although Jacobson pre-dated the modern tiers of scrutiny, this Court essentially applied rational basis review to Henning Jacobson's challenge to a state law that, in light of an ongoing smallpox pandemic, required individuals to take a vaccine, pay a $5 fine, or establish that they qualified for an exemption. Id., at 25, 25 S.Ct. 358 (asking whether the State's scheme was "reasonable"); id., at 27, 25 S.Ct. 358 (same); id., at 28, 25 S.Ct. 358 (same). Rational basis review is the test this Court normally applies to Fourteenth Amendment challenges, so long as they do not involve suspect classifications based on race or some other ground, or a claim of fundamental right. Put differently, Jacobson didn't seek to depart from normal

(Mem)-1614, 207 L. Ed. 2d 154 (2020)[4], and Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2607, 207 L. Ed. 2d 1129 (2020)[5]

While the facts of Roman Catholic Diocese are clearly distinguishable as a first amendment religious liberty case where the Supreme Court considered flat numerical limitations on church capacity and attendance, Justice Gorsuch's concurrence is important when assessing Jacobson's future applicability. Justice Gorsuch sarcastically suggests in his concurrence that the Jacobson court's analysis is nothing more than a rational basis analysis, implying that it can be reconciled with current constitutional analysis. Conceptually it follows that by adopting the Gorsuch approach, the perceived conundrum is substantially solved with perhaps a future narrowing of Jacobson's application by the Supreme Court required when the government action involves a fundamental right or a suspect class. Regardless and independent of any Jacobson conundrum real or perceived, I would submit that when read in context and its entirety, Jacobson can substantially be reconciled with current constitutional law and be viewed as a forerunner of our present rational basis test . Thus, the deference to be afforded the government's exercise of the police power during a pandemic in Jacobson means that the existence of a pandemic should be considered as a factor when applying the rational basis test and does not in any way mean that our current constitutional analysis needs to be suspended or lowered. Consequently, while I would agree with portions of the opinion in County of Butler v. Wolf, I find the reliance upon the mistaken Harvard law review article to have led to the erroneous conclusion that Jacobson

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legal rules during a pandemic, and it supplies no precedent for doing so. Instead, Jacobson applied what would become the traditional legal test associated with the right at issue—exactly what the Court does today. Here, that means strict scrutiny:

[4] Justice Roberts stated, "Where those broad limits are not exceeded, they 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."

[5] Justice Alito Stated, "[w]e have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility."

should not be applied. While the applicability of Jacobson in light of our modern constitutional analyses has not yet been fully decided by our Supreme Court and is probably in need of further tailoring and clarification, I find its holding to be nothing more than a rational basis test. Accordingly, I find that Jacobson's sound analysis should apply to my assessment whether the actions of Allegheny County through Dr Bogen, and the emergency declarations and subsequent COVID-19 mitigation orders of Governor Wolf and Dr Levine were all taken with the undoubted intent to protect public health during a pandemic, and thus were rationally related to a legitimate government interest.

Furthermore, the Pennsylvania Supreme Court in the case of Friends of Danny DeVito v. Wolf, 227 A.3d 872, 876 (Pa.) made numerous holdings that I find binding and precedential to my decision. Specifically, and upon review of the same police power and executive orders of state government that are being constitutionally challenged *sub judice*, our Supreme Court held in DeVito *inter alia*, and germane to our case, that 1) the Governor had the authority to issue his order and that the pandemic qualified as a natural disaster under Pennsylvania s Emergency Code 2) the Governor's order was a proper exercise of the police power 3) the doctrine of separation of powers was not violated by his executive order and finally 4) his order did not deprive non-life sustaining business owners of procedural due process. While I recognize distinctions of facts in DeVito upon comparison with our case, none are of significance to require my failure to follow it as precedential. Accordingly, I am bound to find the actions of the Governor and Secretary Levine to be constitutional and *a fortiori* the County and Dr. Bogen's actions in following them as they are mandated to do by the Local Health Administration Act 16 P.S. 12001 and Disease Prevention Act 35 P.S. § 521.1 *et seq.*

The Cracked Egg also challenges all governmental action by both the state and county as being violative of its Fourteenth Amendment rights of Substantive Due Process and Equal Protection and I agree that there is a recognized constitutional right to earn a living i.e. the entrepreneurship that the Cracked Egg has undertaken and that the government with closures and limitations on indoor dining, has adversely impacted that right. The constitutional test to be applied under the Fourteenth Amendment to the Cracked Egg's claim however remains the same, the rational basis test. Thus, I reach the same conclusion as under my Jacobson analysis that the government action is constitutional in that its orders and mitigation measures are rationally related to a legitimate government interest.

Nullity

The orders of Governor Wolf, Secretary Levine, and the ACHD are not null *ab initio* as the regulatory statutes were suspended in Governor Wolf emergency proclamation dated March 6, 2020 and amended on August 31, 2020 and November 24, 2020. My findings and conclusions of law with respect to Cracked Egg's argument regarding the nullity of the government actions *ab intio* are based upon again the precedential holding in DeVito, upholding the emergency declaration by Governor Wolf, where he proclaimed:

> I hereby suspend the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency. I find this would include normal procedures to implement regulations and orders

The Cracked Egg argues that the ACHD's enforcement, suspension and closure order were invalid and unenforceable due to the Commonwealth and ACHD's failure to promulgate the order and regulations in accordance with the requirements of the law. Specifically the Cracked

Egg contends that Secretary Levine's July 1, 2020 Universal Mask order and Governor Wolf's July 15, 2020 Targeted Mitigation Order failed to follow the requirements of the Commonwealth Documents Law 45 PS s 1201 et. sec., the Regulatory Review Act 71 P.S. s 745.1 et sec. and the Commonwealth Attorneys Act 71 P.S. 732-101 et sec. making the order/regulation or law relied upon for enforcement by ACHD void from their inception.

Respectfully, I find this argument flawed, first and foremost based on the premise that the Governor lacks the authority to issue specific mitigation measures, namely the wearing of masks in public spaces as part of his emergency management powers granted under his proclamation of a disaster emergency. Our Supreme Court's ruling in DeVito clearly held that, "the Governor is vested with broad emergency management powers under the Emergency Code 35 Pa C.S.A. s 7101 et. sec. that in times of actual or imminent disaster where public safety and welfare are threatened ". The Court went on to state that the Governor's powers under the Emergency Code included, *inter alia*, to "[s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency;" to "[u]tilize all available resources of the Commonwealth Government and each political subdivision of this Commonwealth as reasonably necessary to cope with the disaster emergency;" to "[t]ransfer the direction, personnel or functions of Commonwealth agencies or units thereof for the purpose of performing or facilitating emergency services;". DeVito 227 A.3d at 886.

The issuing of the proclamation of disaster emergency by the Governor invoking the Emergency Code supersedes and suspends the provisions of any regulatory statute prescribing

the procedures for the conduct of Commonwealth business in dealing with the emergency. Governor Wolf's suspension of the provisions of the regulatory statutes were further extended by amendments to the Emergency Declaration on August 31, 2020 and November 24, 2020. The suspension of the regulatory statutes remains in effect until its expiration by operation of law on February 24, 2021. I find the suspension of these regulatory statutes was done due to the emergent nature of this pandemic as well as the ever-changing guidance from the CDC. To require the Commonwealth or the ACHD to follow time-consuming rule-making procedures would result in greater harm to the general public. Therefore, Secretary Levine's July 1, 2020 Universal Masking Order, that was incorporated into Governor Wolf's July 15, 2020 Targeted Mitigation Order were not required to follow the Commonwealth Documents Law, the Regulatory Review Act and the Commonwealths Attorneys Act, since they were issued in conjunction with a state of emergency to prevent the spread of the COVID-19 virus.

Notwithstanding the Governor's broad emergency powers as outlined in DeVito, the ACHD and the Pennsylvania Department of Public Health ("PADOH") have independent authority under the existing Commonwealth public health statutes and regulations that affords them the power to issue administrative orders to abate , mitigate and/or prevent public health hazards such as the COVID-19 pandemic. In addition, the Commonwealth and County have the authority to issue specific orders to deal with the control and spread of all communicable diseases including COVID-19.

The Commonwealth has a long history of enacting public health laws that provides for the PADOH, its agencies and local health departments to combat the spread of disease and other health related nuisances throughout the Commonwealth. The Administrative Code of 1929 specifically authorizes the PADOH to "protect the health of the people of the Commonwealth

and to employ the most efficient and practical means for the prevention and suppression of disease " see PA ST 71 PS s 532(a). It also empowers PADOH to "enter , examine,..all buildings and places within the Commonwealth". *See* PA ST PS s 532 (b). Last but not least it authorizes and empowers the PADOH to order nuisances, detrimental to the public health , or the case of disease and mortality to be abated and removed and to enforce quarantine regulations see PA ST PS 532(c). A clear reading of the Administrative Code of 1929 reveals that the PADOH and its agencies are empowered and authorized to combat and abate the spread of COVID-19 through the establishment of specific orders, rules and procedures through the most efficient and practical means.

The ACHD and its health director is authorized to enforce the health laws, rules regulations and orders of the Commonwealth authorized by the Local Health Administration Law see 16 P.S. s 12001 et. sec. as follows:

> (c) The health director and his authorized subordinates may enter and inspect at reasonable times and in a reasonable manner any places or conditions whatsoever within the jurisdiction of the county department of health for the purpose of enforcing the health laws, rules and regulations of the Commonwealth the county department of health, and for the purpose of examining for, and abating nuisances detrimental to the public health.

16 Pa. Stat. Ann. §12012

Once the ACHD discovers a nuisance detrimental to the health and well-being of the public, the health director is authorized to take action to abate the nuisance. *See* 16 P.S. 12012(d). Therefore, Dr. Bogen and the ACHD's actions were fully authorized to take the necessary steps to abate the threat of COVID-19 spread by enforcing Governor Wolf's and Dr. Levine's COVID-19 mitigation/ abatement orders in effect in July and August 2020. Dr. Bogen had the full support of the County Executive Rich Fitzgerald and had any County authorization

necessary as evidenced by her always appearing publicly with the County Executive and despite her admission that formal approval had not been obtained. *See* Defense Exhibit's 66 and 77.

In conclusion, I find that the ACHD was not only authorized but mandated to implement and enforce the Governor's July 15, 2020 Targeted Mitigation order incorporating the Secretary of Health's July 1, 2020 Universal Mask order when it suspended the Cracked Egg's permit and ordered it closed until it complied the Commonwealth's COVID-19 mitigation measures in effect at that time.

PRELIMINARY INJUNCTION ANALYSIS

The County of Allegheny has shown that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. The first prong is easily proven through the testimony of Dr. Bogen and Dr. Brink and further supported by the pandemic orders enacted by the Governor, Secretary Levine, and Dr. Bogen admitted into evidence and enacted in order protect the public health of all citizens of Allegheny County. As noted above, I find that those orders are constitutional as they are rationally related to the legitimate government interest in protecting the public from the spread of COVID-19. The Cracked Egg counters that no immediate or irreparable harm can be found because of the lack of proof of any outbreaks or clustering at their restaurant. The Cracked Egg further challenged the efficacy of masks primarily through the cross examination of Dr. Bogen and Dr. Brink, and to a limited degree with their own OSHA expert Kelly Miller, to which little weight was given in my overall analysis in that the sum and substance of her testimony was her opinion that for an employer to require employees to wear cloth masks would be a violation of OSHA.

Significantly, analyzing the evidence in the context of the rational basis test does not require proof beyond a reasonable doubt. Further, I do not find that evidence of 100% mask efficacy or that outbreaks have occurred at the Cracked Egg are requisites to prove immediate or irreparable harm to preventative public health. Clearly, I recognized throughout the case that we are dealing with COVID-19, a disease unknown to the world a little over a year ago and we are studying it and learning about it as we go and as reflected in changing recommendations by the WHO and CDC. While not all studies are the same and multiple counter studies exist regarding masking efficacy, and while mis-categorization and some faulty testing may be occurring as testified to by the Cracked Eggs expert Dr. James Lyons-Weiler, I find the County has proven that this preliminary injunction is necessary to prevent immediate and irreparable harm to the public health of Allegheny County and which of course cannot be adequately compensated by damages. Dr. Brink's testimony regarding masks is especially important as she testified that not wearing a mask increases the chances of the spread of the COVID-19 virus. Ultimately, the County of Allegheny's legitimate government interest in protecting the public from the spread of COVID-19 is necessary to prevent immediate and irreparable harm

The County of Allegheny has shown that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. At the outset, I find both the testimony of Ms. Waigand and Mr. McGill regarding the impact on their business throughout the COVID-19 pandemic as credible. Ms. Waigand specifically testified that due to government shutdowns instituted in March 2020, her monthly gross went from approximately $50,000 to $12,000 and I believe her. Mr. McGill also provided credible testimony regarding the impact he is seeing on his restaurant and from other restaurant owners and I believe him and can only say

that hopefully our legislative leaders will do more to help small businesses that clearly are suffering. That being said however, I nonetheless find that greater injury would result from my refusing an injunction than from granting it. As Dr. Brink testified too, COVID-19 can spread exponentially. Early numbers during the pandemic were in the lower teens and exploded through the summer months to over 1,000 infections a day. Other interested parties to this litigation include other restaurants and their employees and when I consider their health safety and the other businesses who are following masking, capacity limits and social distancing like Mr. McGill, I am compelled to conclude that greater harm will indeed occur by not granting it and the public health of others by not preventing possible community spread will be harmed including the public health of all business owners , employees and customers. If I did not grant the injunction, restaurants that are following the rules will become less likely to do so and thus further increasing public health risks to everyone involved and possibly increasing overall community spread.

The County of Allegheny has shown a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. As I have found Ms. Waigand to be credible, I likewise believed her when she said that she would never require masks and therefore to return to the closure order in light of her subsequent reopening at full capacity with masking will properly restore the status quo. I ask her to reconsider and work with the health department to come up with a COVID-19 mitigation plan.

I would find that The County of Allegheny has shown that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits as discussed previously.

I find that that prayer for relief the County of Allegheny provided in its Emergency Motion for Preliminary Injunction is reasonably suited to abate the offending activity. Specifically, the County of Allegheny is not asking that the Cracked Egg be shut down indefinitely. They simply are asking that the Cracked Egg submit a proposed mitigation plan on how the Cracked Egg will become compliant with the ACHD's Enforcement Order and the COVID-19 mitigation measures in addition to ceasing any violation of the Enforcement Orders. Lastly, The County of Allegheny has met the sixth prong in that the preliminary injunction will not adversely affect the public interest and to the contrary, the public interest requires it!

BY THE COURT

DATE-February 3, 2021

Judge John T. McVay Jr.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania,	)	CIVIL DIVISION – EQUITY
Plaintiff	)	No.: GD–20–9809
vs.	)	
THE CRACKED EGG, LLC,	)	
Defendant,	)	

ORDER OF COURT

AND NOW, this 17th day of February 2021, rgument on the Defendant's Motion for Stay Pending Appeal, it is ORDERED, ADJUDGED, and DECREED that the motion is DENIED for the reasons stated in my Memorandum Opinion filed February 3, 2021, the County of Allegheny's Brief in Opposition, and as I stated on the record at the argument held February 17, 2021.

BY THE COURT;

Judge John T. McVay Jr. ,J.

EXHIBIT C