PREPARED BY THE COURT

JUDITH PERSICHILLI, R.N., B.S.N., M.A., in her official capacity as Commissioner of the New Jersey Department of Health, Plaintiff, v. ATILIS GYM OF BELLMAWR, Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION – GENERAL EQUITY MERCER COUNTY DOCKET NO. C-48-20 CIVIL ACTION **ORDER**

THIS MATTER having come before the Court, the Hon. Robert Lougy, P.J.Ch., presiding, on the application of Plaintiff Judith Persichilli, R.N., B.S.N., M.A., in her official capacity as Commissioner of the New Jersey Department of Health, represented by Deputy Attorney General Stephen Slocum for an order entering judgment against Defendant Atilis Gym of Bellmawr; and Defendant Atilis Gym of Bellmawr, represented by John McCann, Esq., and Giancarlo Ghione, Esq.; and these applications having been fully briefed; and the Court having considered the parties' arguments and certifications; and for the reasons as stated below; and for good cause shown;

IT IS on this 11th day of May 2021 **ORDERED** that:

1. Defendant's application for an order reconsidering this Court's decision of November 18, 2020 is **DENIED**.

2. Defendant's application for an order vacating portions of its August 18, 2020 and October 8, 2020 Orders is **DENIED**.

3. Plaintiff's application for an order entering judgment is **GRANTED**.

4. Judgment is hereby entered in favor of the State of New Jersey against Defendant Atilis Gym of Bellmawr, Frank Trumbetti, and Ian Smith, jointly and severally, in the amount of $ 123,982.08, which this Court finds reasonable and calculated to compel Defendant's compliance.

5. Any violation of this Order shall subject Defendant to summary contempt-of-court proceedings under Rules 1:10-1 and -3, as applicable, and to any sanctions, penalties, attorney's fees and costs, or other appropriate relief due to Plaintiff or the Court.

6. This Order shall be deemed served upon receipt from a Judiciary email account (xxx@njcourts.gov).

/s/ Robert Lougy
ROBERT LOUGY, P.J.Ch.

X OPPOSED

UNOPPOSED

PURSUANT TO RULES 1:6-2(d) AND 1:7-4, THE COURT PROVIDES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter comes back before the Court on the parties' respective applications for relief. Plaintiff moves for an order entering judgment against Defendant for additional days allegedly in violation of health restrictions imposed by Plaintiff upon Defendant. Defendant asks the Court to reconsider one earlier order and to vacate portions of two others. The Court granted the parties' requests for oral argument. See R. 1:6-2(d) (stating that, upon request of a party in motions involving matters other than discovery or calendaring, request for oral argument "shall be granted as of right."); see also Raspantini v. Arocho, 364 N.J. Super. 528, 531 (App. Div. 2003) (discussing "clear mandate of the rule" that court grant oral argument as of right upon request).

Plaintiff is the Commissioner of the New Jersey Department of Health. Defendant is an indoor gym facility. Defendant has two owners: Trumbetti and Smith. This matter has been before the Court numerous times on Plaintiff's applications for enforcement and sanctions. On March 21, 2020, Governor Murphy issued Executive Order 107, which directed that gyms and fitness centers close to mitigate the community spread of the COVID-19 virus. On May 22, 2020, the Court granted Plaintiff's application for temporary restraints that prohibited Defendant from opening its facilities in violation of Executive Order 107 and set a return date of the order to show cause for June 8, 2020. On June 8, 2020, the Court entered an order granting Plaintiff's unopposed request for preliminary restraints. On June 15, 2020, the Court entered an amended consent order granting preliminary restraints that prohibited "any interior recreation activity of any kind to occur"

but permitted Defendant to access the premise for operating its nutrition/vitamin store and clothing/apparel store.

On June 26, 2020, Governor Murphy issued Executive Order 157, which stated "gyms, sports facilities, and fitness centers present particularly high risks of COVID-19 transmission" and "it will not be administrable, enforceable, and/or otherwise sufficiently protective of public safety to simply allow business owners to set their own divergent health measures, done without approval of the State and its health officials." The Order allowed allow gyms and fitness centers "to offer individualized indoor instruction by appointment only where an instructor is offering training to an individual." Ibid.

On July 1, 2020, Plaintiff issued an order specific to Defendant consistent with the provisions of Executive Order 157. It permitted Defendant to "open its indoor premises to the public to offer individualized indoor instruction by appointment only where an instructor is offering training to an individual, and the individual's immediate family members, household members, caretakers, or romantic partners." Ibid. It provided that "[i]f Atilis Gym is offering multiple simultaneous instructions at its facility pursuant to [the preceding paragraph], these instructions must take place in separate rooms or, if they take place in the same room, must be separated by a floor-to-ceiling barrier that complies with all fire code requirements." Ibid. It specified that "Atilis Gym shall remain closed to the public, including members of the gym, for all gym-related purposes and activities, excluding those activities" specifically allowed under the order.

On July 20, 2020, the Court denied Plaintiff's application to hold Defendant in contempt of this Court's June 15, 2020 order, concluding that Executive Order 157 and Plaintiff's July 1, 2020 order permitted, in fact, a range of indoor recreation activity as specified in the July 1, 2020 order. At the same time, the Order enforced the Commissioner's Order of July 1, 2020, and cautioned Defendant that:

> [a]ny violation of this Order of the Court shall subject Defendant to summary contempt-of-court proceedings per N.J. Court Rule 1:10-1, -3, and any sanctions, penalties, attorneys fees and costs, or other appropriate reliefs available to Plaintiff or the Court. Nothing in this Order constrains Plaintiff's rights or authorities to enforce her July 1, 2020 Order per R. 4:67-6 or the authorities enumerated in Paragraph 5 of the 7.1.20 Order. If Plaintiff returns to court to enforce this Order, counsel shall include a certification of attorney services and fees. See R. 1:10-3.

Four days later, Plaintiff returned to court, seeking to enforce this Court's July 20, 2020 order. On July 24, 2020, the Court entered an order finding Defendant in contempt of this Court's July 20, 2020 order. At the request of Defendant's counsel, who indicated that Defendant was going to seek to stay the proceedings, the Court's order did not specify the penalties associated with Defendant's ongoing violations. The Order authorized Plaintiff to lock the doors or "otherwise construct or place barriers on or around the premises to ensure compliance with the court's July 20, 2020 order and the Department's July 1, 2020 Modified Order." Additionally, it directed that "Defendant shall not obstruct Plaintiff in any way from carrying out the terms of this order or otherwise monitoring to ensure compliance with the court's July 20, 2020 order and the Department's July 1, 2020 Modified Order."

On August 3, 2020, Plaintiff advised the Court, by way of correspondence, that Defendant continued to violate this Court's order July 20 and July 24, 2020 orders. On that date, Defendant's counsel withdrew without prejudice a submitted, but not filed, motion seeking to stay these proceedings.

On August 18, 2020, the Court granted Plaintiff's application for an order imposing sanctions for Defendant's contemptuous non-compliance with this Court's Order of July 24, 2020. The Order specified that "[f]or each day Defendant remains in violation of Plaintiff's litigant's this Court's order of July 24, 2020 Defendant Atilis Gym and co-owners Frank Trumbetti and Ian Smith, jointly and severally, shall pay to the State of New Jersey the additional sum of $ 15,497.76."

On October 8, 2020, the Court entered an order enforcing Plaintiff's August 28, 2020 Modified Closure Order for Defendant. The Court continued the sanction, as applied to the August 28, 2020 order.

On December 8, 2020, Defendant filed the instant motion. On December 10, 2020, Plaintiff filed her respective motion. Due to health issues beyond the control of the parties or of counsel, the Court granted a lengthy adjournment to Defendant. The Court heard oral argument in this matter on May 3, 2021.

In support of its application, Defendant argues the following. Defendant argues that this Court's rejection of Defendant's application for a stay based on purported Fifth Amendment rights of Trumbetti and Smith is inconsistent with the order holding Defendant, Trumbetti, and Smith jointly and severally liable. It argues that the Court should

reconsider its order denying a stay of the proceeding. It additionally argues that the Court should grant it relief under Rule 4:50-1(f) to relieve Defendant's owners from personal liability.

In opposition to Defendant's application, Plaintiff argues the following. She notes that it is undisputed that Trumbetti and Smith are the exclusive owners and operators of Defendant. She points out that they, individually, have indisputably violated her orders and the orders of this Court by kicking down a barrier erected over the door to the gym, announcing their non-compliance, and memorializing and celebrating their contempt through social media postings. She argues that Defendant gives no explanation why it waited for months to file this application and fails to reckon its present argument with its prior assertions that Trumbetti and Smith are the sole owners, employees, and representatives of Defendant. She argues that the application fails procedurally because it is untimely and substantively because it is without merit. She argues that the court has the authority to pierce the corporate veil and that the sanctions being levied against Smith and Trumbetti are entirely appropriate since they personally participated in and engaged in the contemptuous actions that continue to this day. Defendant's application must fail, she argues, because "Defendant Atilis Gym of Bellmawr is Smith and Trumbetti." Finally, she argues that Defendant fails to identify any basis to bring this Court's prior orders within the gambit of Rule 4:50-1(f).

In support of her application, Plaintiff argues the following. She argues that overwhelming evidence posted on various social medial platforms demonstrates that the

gym routinely fails to comply with the closure order. She argues that the postings – which Plaintiff provided as part of the filings – demonstrate non-compliance on November 17, 20, 21, 22, 23, 24, 29, and 30. She asks the Court to enforce its October 8, 2020 order and sanction Defendant, Smith, and Trumbetti.

In an opposition brief filed on the return date of the motion, Defendant launches a broad-scale attack on the Governor's constitutional and statutory authority to maintain a state of emergency under the Disaster Control Act and to direct the exercise of powers under the Emergency Health Powers Act. It argues that Plaintiff has failed to provide any evidence to support the Governor's executive orders. It argues that the orders are arbitrary and capricious because they lack scientific support. It further argues that the Disaster Control Act is an unconstitutional delegation of legislative power to the Governor. It argues that the "current orders are not rationally related to his goal of preventing the spread of COVID-19 based upon the scientific evidence demonstrated herein." Def.'s Opp. Br., at 16. It argues that the orders violate its due process rights. Finally, it argues that the sanction imposed by this Court are punitive and, further, that it should not be sanctioned for disregarding unconstitutional orders.

In a pithy reply, Plaintiff argues that Defendant's opposition is "both grossly untimely and wholly without merit." She argues that Rule 4:67-6(c)(3) precludes this Court's consideration of the validity of her order. She also points to Rule 2:2-3(a)(2), which vests exclusive jurisdiction over challenges to agency action to the Appellate Division.

The Court turns first to Defendant's request for reconsideration. Such an application is governed by Rule 4:49-2, which provides:

> a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.
>
> [Ibid.]

On reconsideration of a court order, the objective is to correct a court's error or oversight, "not to re-argue [a] motion that has already been heard for the purpose of taking the proverbial second bite of the apple." State v. Fitzsimmons, 286 N.J. Super. 141, 147 (App. Div. 1995). "Reconsideration . . . is 'a matter within the sound discretion of the Court, to be exercised in the interest of justice[.]'" Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). "It is not appropriate merely because a litigant is dissatisfied with a decision of the court or wishes to reargue a motion." Ibid. Rather, "the magnitude of the error cited must be a game-changer for reconsideration to be appropriate." Id. at 289. "[D]isappoint[ment] with a judicial determination" is not a basis for reconsideration; it is instead grounds for appeal. D'Atria, 242 N.J. Super. at 401.

Reconsideration should be used only for those cases where "1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious

that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." J.P. v. Smith, 444 N.J. Super. 507, 520 (App. Div. 2016) (quoting State v. Puryear, 441 N.J. Super. 280, 294 (App. Div. 2015)). "[A] litigant must initially demonstrate that the [c]ourt acted in an arbitrary, capricious, or unreasonable manner, before the [c]ourt should engage in the actual reconsideration process." Palombi, 414 N.J. Super. at 289 (quoting D'Atria, 242 N.J. Super. at 401).

Reconsideration is not an appropriate vehicle to bring to the court's attention evidence that was available but not presented in connection with the initial argument. Fusco v. Bd. of Educ. of City of Newark, 349 N.J. Super. 455, 463 (App. Div. 2002). Rather, a motion for reconsideration is designed to seek review of an order based on the evidence before the court during the trial, not to serve as a vehicle to introduce new evidence in order to cure an inadequacy in the motion record. Cummings, 295 N.J. Super. at 384. Similarly, reconsideration cannot be used to merely relitigate the case, Capital Fin. Co. of Del. Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008), but rather to point out "the matters or controlling decisions which [the litigant] believes the court has overlooked or as to which it has erred[.]" R. 4:49-2. "In short, a motion for reconsideration provides the court, and not the litigant, with an opportunity to take a second bite at the apple to correct errors inherent in a prior ruling." Medina v. Pitta, 442 N.J. Super. 1, 18 (App. Div. 2015). It "does not provide the litigant with an opportunity to raise new legal issues that were not presented to the court in the underlying motion." Ibid.

The Court denies Defendant's application for reconsideration.[1] Defendant's request for a stay was and remains unwarranted – Defendant would still be bound by the Commissioner's Order and Defendant has no entitlement to flout the Commissioner's directives – and Defendant raises no material fact or controlling law that the Court overlooked. Regarding the provision of the judgment holding Defendant and its owners jointly and severally liable, the Court notes that Defendant failed to raise that argument at the time of Plaintiff's original application, even though it was plainly stated in Plaintiff's proposed form of order. Additionally, the culpability and responsibility of Trumbetti and Smith for Defendant's ongoing and willful non-compliance is indisputable and uncontroverted. Going behind the corporate shield is appropriate where an entity "has abused the privilege of incorporation by using the [entity] to perpetrate a fraud or injustice, or otherwise to circumvent the law." DEP v. Ventron Corp., 94 N.J. 473, 501 (1983). A plainer description of the collective contempt of Defendant, by and through Trumbetti and Smith, would be difficult to find. Finally, as discussed in this Court's earlier order, Trumbetti and Smith have raised nearly half a million dollars through social media fundraising to support their continued non-compliance. The Court considered those funds

[1] The Court rejects Plaintiff's argument regarding timeliness. As Pressler and Verniero explain, the "time prescription of this rule applies only to final judgments and orders." Current N.J. Court Rules, cmt. on R. 4:49-2 (2021); see also Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 263 (App. Div. 1987) (explaining that "we hold that the principle of finality of judgments does not prevent a trial court from granting relief from its interlocutory orders upon a change in the governing law before litigation ends. During this time, the trial court has complete power over its interlocutory orders and may revise them when it would be consonant with the interests of justice to do so.") (quoting Ford v. Weisman, 188 N.J. Super. 614, 619 (App. Div. 1983)).

in assessing the sanction. Accordingly, the Court denies Defendant's request for reconsideration.

Defendant also seeks relief under Rule 4:50-1(f). Rule 4:50 provides relief from judgment may be obtained

> [o]n motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

Generally, with the exception of default judgments, motions for relief from judgment under Rule 4:50 should be granted sparingly. Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 4:50-1 (2021). To establish a right to relief under Rule 4:50-1, the moving party must show "that enforcement of the order would be unjust, oppressive or inequitable." Harrington v. Harrington, 281 N.J. Super. 39, 48 (App. Div.). The court must then balance "'the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case.'" Baumann v. Marinaro, 95 N.J. 380, 392 (1984) (quoting Manning Eng'g, Inc. v. Hudson Cty. Park Comm'n, 74 N.J. 113, 120 (1977)). The rule, however, may not be used to circumvent the

time limitations for appeals and other post-judgment motions in order to challenge erroneous factual findings and trial errors. Id. at 392; Hodgson v. Applegate, 31 N.J. 29, 36-37 (1959); Wausau Ins. Co. v. Prudential Prop. & Cas. Ins. Co., 312 N.J. Super. 516, 519 (App. Div. 1998); Di Pietro v. Di Pietro, 193 N.J. Super. 533, 539 (App. Div. 1984). The denial of a motion for relief from judgment will not be disturbed absent a clear abuse of discretion. In re Guardianship of J.N.H., 172 N.J. 440, 473 (2002).

Subsection (f) of Rule 4:50-1 is the "catchall" category. "No categorization can be made of the situations which warrant redress under subsection (f) . . . [T]he very essence of (f) is its capacity for relief in exceptional situations. And in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice." Court Inv. Co. v. Perillo, 48 N.J. 334, 341 (1966); see also DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 269-71 (2009). "Designed to balance the interests of finality of judgments and judiciary efficiency against the interest of equity and fairness, relief from judgments pursuant to R. 4:50-1(f) requires proof of exceptional and compelling circumstances." Harrington, 281 N.J. Super. at 48.

A movant's right to relief depends on the totality of the circumstances, and the correctness or error of the original judgment is ordinarily an irrelevant consideration. See Pressler & Verniero, cmt. 5.6.1 on R. 4:50-1; In re Guardianship of J.N.H., 172 N.J. 440, 476 (2002). In order to obtain relief under subsection (f), the movant must demonstrate that the circumstances are an exception and that enforcement of the order or judgment would be unjust, oppressive, or inequitable. Lawson Mardon Wheaton, Inc. v. Smith, 160 N.J. 383,

404-07 (1999); Nowosleska v. Steele, 400 N.J. Super. 297, 304-05 (App. Div. 2008); City of East Orange v. Kynor, 383 N.J. Super. 639, 646, (App. Div.), certif. denied, 188 N.J. 352(2006).

The Court denies Defendant's application to vacate the portions of the order holding Trumbetti and Smith jointly and severally liable. The inclusion of these two most culpable individuals within the scope of sanctions imposed upon the entity that they solely own and control was not accidental or in error and was, to the contrary, compelled by their instrumental control over and involvement with the contemptuous conduct. The only exceptional circumstance is the length and durability of Defendant's non-compliance and Defendant fails to demonstrate that the liability is unjust, oppressive, or inequitable.

The Court turns to Plaintiff's request for entry of judgment. Rule 1:10-3 provides that "[n]otwithstanding that an act or omission may also constitute a contempt of court, a litigant in any action may seek relief by application in the action." "The scope of relief in a motion in aid of litigants' rights is limited to remediation of the violation of a court order." Abbott ex rel. Abbott v. Burke, 206 N.J. 332, 371 (2011). As Justice LaVecchia explained:

> Although Rule 1:10-3 encompasses the notion of civil contempt, we have expressly stated that "we view the process [under Rule 1:10-3] as one of relief to litigants." In re Daniels, 118 N.J. 51, 60 (*per curiam*) (emphasis added) (citing R. 1:10-5, now R. 1:10-3), cert. denied, 498 U.S. 951 (1990). The focus being on the vindication of litigants' rights, relief sought pursuant to Rule 1:10-3 does not necessarily require establishing that the violator of an order acted with intention to disobey. Indeed, courts have recognized that "demonstration of a *mens rea*, wilful disobedience and lack of concern for the order of the court, is necessary for a finding of contempt, *but irrelevant in a proceeding designed simply to enforce a judgment on a litigant's behalf*." Lusardi v. Curtis Point Prop.

> Owners Ass'n, 138 N.J. Super. 44, 49 (App.Div.1975) (emphasis added); see also N.J. Dep't of Health v. Roselle, 34 N.J. 331, 347 (1961) ("The Appellate Division correctly held that upon a litigant's application for enforcement of an injunctive order, relief should not be refused merely because the violation was not willful.").
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> [In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 17 (2015).]

"Rule 1:10-3 allows a court to enter an order to enforce litigant's rights commanding a disobedient party to comply with a prior order" or face sanctions. Milne v. Goldenberg, 428 N.J. Super. 184, 198 (App. Div. 2012).

"Sanctions under the Rule are intended to coerce a party's compliance." Ibid.; see also Ridley v. Dennison, 298 N.J. Super. 373, 381 (App. Div. 1997) ("Relief under R. 1:10-3, whether it be the imposition of incarceration or a sanction, is not for the purpose of punishment, but as a coercive measure to facilitate the enforcement of the court order."). "[A] proceeding to enforce litigants' rights under Rule 1:10-3 'is essentially a civil proceeding to coerce the defendant into compliance with the court's order for the benefit of the private litigant.'" Pasqua v. Council, 186 N.J. 127, 140 (2006) (citation omitted). "[P]unishment [under Rule 1:10-3] is not the objective, though a sanction imposed by the court to compel compliance may inflict punishment's sting." Franklin Twp. Bd. of Educ. v. Quakertown Educ. Ass'n, 274 N.J. Super. 47, 54 (App. Div. 1994) (quoting East Brunswick Bd. of Educ. v. East Brunswick Educ. Ass'n, 235 N.J. Super. 417, 420-21 (App. Div. 1989)).

The sanctions available to the Court are as broad as may be reasonably appropriate and necessary, including monetary sanctions. Ibid. The availability of monetary sanctions is appropriate and authorized, id. at 55 – indeed, Defendant's brief in opposition quotes

authority endorsing its availability, see Def.'s Br., at 3 (quoting Ridley, 298 N.J. Super. at 381 (noting that court did "not dispute the view that a monetary sanction imposed pursuant to R. 1:10-3 is a proper tool to compel compliance with a court order.")) – and provides the Court an option other than the "frequently undesirable alternative of incarceration as 'the only available compliance sanction,'" id. at 56 (quoting East Brunswick Bd. of Educ., 235 N.J. Super. at 422).

The Court quickly addresses Defendant's opposition. Since this Court's initial May 2020 hearing on temporary restraints, and on numerous other occasions, the Court has advised Defendant that Rule 4:67-6(c)(3) establishes that "the validity of an agency order shall not be justiciable in an enforcement proceeding." Additionally, the Court has reminded Defendant's counsel that Rule 2:2-3(a)(2) assigns to the Appellate Division the exclusive responsibility for "review[ing] final decisions or actions of any state administrative agency or officer." Whatever arguments Defendant wanted to make regarding the constitutionality or legitimacy of the Governor's or the Commissioner's order belonged in the Appellate Division. See Bullet Hole, Inc. v. Dunbar, 335 N.J. Super. 562, 571-72 (App. Div. 2000) (observing that respondent State agencies did not dispute that Governor's actions appealable under R. 2:2-3(a)(2)); N.J. Builders Ass'n v. Byrne, 80 N.J. 469, 471 (1979) (noting that Supreme Court directly certified appeal from Governor's Executive Order on Court's own motion). That they failed to pursue such relief in a timely manner was their choice, see R. 2:4-1(b) (stating the appeals from final decisions of state agencies and officers "shall be filed within 45 days from the date of service of the decision or notice of the action taken."), but it

does not give them license to raise the arguments here. Additionally, since Plaintiff seeks to enforce her own orders – not those of the Governor – much of Defendant's arguments is misplaced and misdirected. Finally, Defendant's argument regarding the duration that the Governor has exercised emergency powers is without merit, even were the Court to consider it. Governor Christie's executive orders issued before, during, and in the aftermath of Hurricane Sandy remained operative for years after the storm. The State's response to the prison overcrowding crisis that precipitated the Supreme Court's decision in Worthington v. Fauver, 88 N.J. 183 (1982), was maintained for twelve years, through the administrations of three Governors, until the Court finally determined that "[t]he long-term problem of prison overcrowding calls for an executive and legislative solution rather than an executive order under the Disaster Control Act," County of Gloucester v. State, 132 N.J. 141 (1993).

The Court turns to the proofs offered by Plaintiff of Defendant's alleged violations.[2] Plaintiff submitted video clips that, she argues, supports the conclusion that Defendant operated in violation of this Court's order. The proofs illustrate the following:

[2] Defendant argues that Plaintiff cannot establish social distancing violations without an expert. That is plainly wrong. A lay witness may testify "in the form of opinions or inferences … if [the testimony] (a) is rationally based on the witness' perception and (b) will assist in understanding the witness' testimony or determining a fact in issue." N.J.R.E. 701. Our highest court has repeatedly observed that opinions about "distance" is one of the "[t]raditional examples of permissible lay opinions." State v. McLean, 205 N.J. 438, 457 (2011) (citing State v. Haskins, 131 N.J. 643, 649 (1993)); State v. Laster, 71 N.J.L. 586, 588-89 (E. & A. 1905). Opinions concerning "distance" have long been a "prototypical example[s]" of proper lay opinion. Fed. R. Evid. 701, Advisory Committee Note on the 2000 Amendments (quoting Asplundh Mfg. Div. v. Bent on Harbor Eng'g, 57 F.3d 1190, 1196 (3d Cir. 1995)).

- November 17: The 40-second video clip inside the gym, filmed by Smith as he walked through a portion of the gym, shows no social distancing, no barriers, no demarcation and signage concerning social distancing, and no barriers. One person was wearing a mask.
- November 20: The 25-second video clip inside the gym, filmed by Smith as he walked through a portion of the gym, shows no social distancing, no barriers, no demarcation and signage concerning social distancing, and no barriers. Smith is not wearing a mask. No other person shown on the video is wearing a mask. Another video shows Smith and another individual, neither of whom are wearing a mask, spotting for a third person who is not wearing a mask. A third clip shows someone entering the facility without a mask. It is also apparent that there are no barriers. Smith is visible not wearing a mask. A fourth clip shows someone working out at the gym without a mask.
- November 21: Several clips show patrons and Smith at the gym with no masks, no social distancing, and barriers or demarcations.
- November 22: The video clip shows the retail section of the gym with no barrier between customers and employees and no six-foot separation. Additionally, it shows Smith, other patrons, and other employees not wearing masks. It shows no demarcation or signage. No one appears to be social distancing.

- November 23: Smith posted a video clip showing no social distancing, no barriers, a no signage. Of the numerous persons in the facility, no one visible on the video was wearing a mask.
- November 24: Numerous clips show persons in the gym not wearing masks and not socially distancing.[3]
- November 29: A clip shows four individuals. Violations shown include no social distancing, no masks, no barriers, and no demarcations.
- November 30: A video clip shows what appears to be a boxing class. Violations shown include no social distancing, no masks, no barriers, and no demarcations. It additionally violated the provision of the order regarding individual, as opposed to group, lessons.

Accordingly, the Court finds that the video recordings establish, by a preponderance of the evidence, that Defendant was operating in violation of the Commissioner's Order and the Orders of this Court on each of the above dates. The Court enters judgment against Defendant, Trumbetti, and Smith in the amount of $ 123,982.08.

[3] For clarity and precision, the Court notes that the video was posted on November 25, 2020. The timestamps for the individual social media postings, however, establish that the videos document violations as of the preceding day.