

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:
DEPARTMENT OF HEALTH,	:
Petitioner	:
	: No. 5 MD 2021
VS.	:
	:
American Lobster, Angelo's Family	:
Restaurant, Bella Italia Restaurant LLC,	:
Bing's Diner, Brickerville Family Restaurant.	:
Cloud Nine Cafe, Dad's Garage Grill & Burger.	:
Dob-Bros Country Kitchen, Fun Central, Inc.,	:
Hickory Valley Farm Restaurant, Hometown	:
Kitchen, Hot Shots, Inc. d/b/a Denny's Lennies,	:
Keystone Family Restaurant. Mamma's Pizza R&A,	:
Mandy Jo's Country Corral. Marteen's	:
Family Restaurant, Mountain Shadows	:
Restaurant, Muller's Family Restaurant,	:
New Holland Coffee Company 2, Park City Diner,	:
Quarryville Family Restaurant. RC's Bar & Grill,	:
Riley's Restaurant & Pub. Seasons Cafe,	:
The Blue Collar Tavern, Tony's Pizzeria &	:
Restaurant, Villa Schiano, and Yogurtworks,	:
Respondents	:

NOTICE TO PLEAD

TO: Commonwealth of Pennsylvania Department of Health

You are hereby notified to plead to the enclosed Preliminary Objections within thirty (30) days from service thereof or a default judgment may be entered against you.

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Restaurant, Villa Schiano, and Yogurtworks,	:	
Respondents	:	

**PRELIMINARY OBJECTIONS OF AMERICAN LOBSTER, ANGELO'S FAMILY
RESTAURANT, BING'S DINER, BRICKERVILLE FAMILY RESTAURANT,
CLOUD NINE CAFE, DOB-BROS COUNTRY KITCHEN, FUN CENTRAL, INC.,
HICKORY VALLEY FARM RESTAURANT, HOT SHOTS, INC. D/B/A DENNY'S LEN
NIES, MAMMA'S PIZZA R&A, MANDY JO'S COUNTRY CORRAL, MARTEEN'S
FAMILY RESTAURANT, MULLER'S FAMILY RESTAURANT,
EW HOLLAND COFFEE COMPANY 2, RC'S BAR & GRILL, SEASONS CAFE,
THE BLUE COLLAR TAVERN, TONY'S PIZZERIA &
RESTAURANT, VILLA SCHIANO, AND YOGURTWORKS**

The aforementioned Respondents, by and through their counsel respectfully raise the following preliminary objections:

1. Pursuant to Pa. R.A.P. 1516 preliminary objections are permitted in actions of this nature. Moreover, the Pennsylvania Rules of Civil Procedure do serve as the basis for Preliminary Objections in actions involving original jurisdiction in the Commonwealth Court pursuant to Pa. R.A.P. 1517. See Uniontown Newspapers, Inc. v. Roberts, 576 Pa. 231, 839 A.2d 185 (2003)
2. Respondents are a group of restaurants and bars in Pennsylvania.
3. COVID-19 is an extremely serious disease that does require public health intervention. However, the public health intervention by the government must be taken in accordance with Pennsylvania law and the underlying principles of the United States and Pennsylvania Constitutions.
4. In March 2020, the COVID-19 pandemic hit Pennsylvania. Governor Wolf and the Department of Health issued a series of virus mitigation orders throughout the ensuing months. Restaurants and bars were required to close for indoor dining and services. The Respondents did close for indoor dining for some or all of that period of time.
5. This proved to be a devastating blow as Respondents quickly found that the revenue generated by takeout was less than the revenue provided by in person dining. Respondents also found that they could not support the same numbers of staff members

as fewer staff are necessary to maintain takeout service. During this period of time there was unemployment stimulus money available, which meant that laid off staff was usually getting the same income as if they were working.

6. Respondents cut their bills where possible. They spent down their savings and borrowed against lines of credit and somehow managed to keep their businesses operating.
7. Despite all of this, business overhead did not substantially change. Mortgages, rents and property taxes all remained due in the same amount. Utilities were less, but still had to be paid.
8. By mid to late June 2020, the Governor and Department of Health began labelling counties as “green” and allowing indoor dining to resume, but with capacity limitations.
9. Many of respondents completely changed their business model in order to comply. They put up plexiglass, they removed seating, they purchased tents and fans, outdoor furniture and air cooling units. This further hurt them financially.
10. Guidance regularly changed, particularly for liquor license holders. There were ongoing questions about whether drinks could be served across a bar, whether bar seating was ever permissible and what food might or might not constitute a meal to be served along with drinks.
11. By late fall, the new business model was no longer working. It was impractical to expect people to eat in a tent in November. Some businesses did buy outdoor heaters and tried to make this work.

12. However the overhead did not change. Most of Respondents need to be functioning at 80-85% of capacity to make any profit. The Governor and Department of Health were only permitting operation at 25 or 50%.
13. For most restaurants and bars, the holiday season is the most profitable. After sustaining heavy financial losses in 2020, Respondents prayed for a good holiday season to temper their losses.
14. By early December 2020, Respondents began advertising their Christmas and New Year's specials. Some arranged for small holiday gatherings. Food and beverages were ordered, staff schedules were coordinated and reservations and deposits were taken.
15. On December 10, 2020, the Governor and Department of Health issued orders requiring that all restaurants and bars close for indoor dining between December 12, 2020 and January 4, 2021. Respondents do not concede that either of these orders were legally valid.
16. For this shutdown, there was no unemployment aid for staff. A large number of servers, hostesses, bartenders and cooks live paycheck to paycheck. With the substantial delays in the unemployment system, most people would not receive unemployment benefits until January 2021. Moreover, as unemployment only pays out about 60% of a regular wage, staff would be getting substantially less than they had anticipated over the holiday season in a particularly devastating year.

17. Neither the Governor nor Department of Health offered any aid for the thousands of affected individuals.
18. When restricting a Constitutional right, the government is required to take the least restrictive approach in terms of restrictions. There were multiple other options that the Governor or Department of Health could have taken instead of a complete shutdown, these include:
- a. Allowing indoor dining, but limiting the number of hours per day a business could be open.
 - b. Pennsylvania is able to track COVID spread by ZIP Code or municipality. The orders could have been targeted to allow areas with less COVID spread to remain open for indoor dining.
 - c. The Governor and/or Department of Health could have asked for the cooperation of local police in strict enforcement of capacity limits. Local police likely would have agreed for a period of weeks.
 - d. The COVID surge began in late October 2020. Had the governor imposed restrictions starting in late November/early December, the 3 week holiday shutdown would likely not have been necessary.
19. Hundreds, if not thousands of Pennsylvania bars and restaurants chose to stay open for indoor dining.
20. Respondents made that decision for their own financial survival as well as the well being of their staff and vendors.
21. To the knowledge of Respondents, no one contracted COVID due to their decision to remain open.

22. Shortly before Christmas 2020, the Department of Agriculture began issuing warnings to bars and restaurants directing them to close. There were hundreds of warnings issued throughout Pennsylvania.
23. Shortly thereafter, the Department of Agriculture began issuing placards directing restaurants and bars to close. There were reportedly just over 100 placards issued between December 12, 2020 and January 4, 2021. Some restaurants and bars did close, others continued to stay open. Respondents do not concede that the placards were valid orders.
24. On December 23, 2020 and January 5, 2021, the Department of Health in conjunction with the Attorney General's office brought two similar petitions for review before this court, including the instant petition.
25. Between the two Petitions for review, 50 out of the 100 restaurants and bars that were placarded were named as respondents. 4 have since been dismissed as Respondents.
26. Even though the December 10, 2020 order also included gym shutdowns and crowd limitations on grocery and department stores, no gyms or other stores were named in the suits.
27. There are 61 counties in Pennsylvania that are overseen by the Pennsylvania Department of Health. The 50 businesses named in the two lawsuits only represent 24 counties out of that 61. Moreover, at least three counties appear to have disparate actions taken against them. 10 out of the 50 businesses that were named in the lawsuit are from Berks County.

7 of the 50 businesses are from Lancaster County, 4 from Dauphin and 4 from Bedford County. It would be expected that the number of businesses named in the lawsuit would be proportional to a county's population. This is not the case. This selection of businesses to be named in the lawsuits suggests disparate enforcement.

28. Respondents are unaware of any Petition similar to the instant Petition ever having been filed previously.

II. Preliminary Objections Pursuant to Pa. R.C.P. 1028(a)(2)- failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter

A. Improper Verification

29. All of the foregoing paragraphs are incorporated herein by reference.

30. Pa. Rule of Civil Procedure 1024 states in relevant part as follows:

(c) The verification shall be made by one or more of the parties filing the pleading unless all the parties (1) lack sufficient knowledge or information, or (2) are outside the jurisdiction of the court and the verification of none of them can be obtained within the time allowed for filing the pleading. In such cases, the verification may be made by any person having sufficient knowledge or information and belief and shall set forth the source of the person's information as to matters not stated upon his or her own knowledge and the reason why the verification is not made by a party.

Pa.R.C.P. No. 1024.

31. The Petition for Review in this case is verified by a "Jeffrey Warner." Jeffrey Warner is not mentioned in the Petition for review, nor is there a job title or other evidence of authority stated in the verification.

32. Based on a Google search it appears that Jeffrey Warner is the Food Safety Director for the Pennsylvania Department of Agriculture.
33. Respondents do not believe that an employee of the Department of Agriculture can verify a complaint for the Department of Health and are aware of not authority that would allow this to occur.
34. It is believed that a civil complaint on behalf of a Pennsylvania administrative agency can only be authorized by the head of that Department, a deputy, head or an employee who has been specifically delegated that duty. See 71 Pa. Stat. Ann. § 73 (West)
35. There is no evidence that a non-employee has the authority to sign a complaint on behalf of the Department of Health, or that such authority was or could be specifically delegated to Jeffrey Warner. Accordingly the verification is invalid.

WHEREFORE, this Preliminary Objection should be sustained as it has not been verified by Petitioner or anyone who has authority so verify such a pleading.

B. Improper Contents of Pleading

36. All of the foregoing paragraphs are incorporated herein by reference.
37. Pa. Rule of Civil Procedure 1022 states as follows:

Every pleading shall be divided into paragraphs numbered consecutively. Each paragraph shall contain as far as practicable only one material allegation.

Pa.R.C.P. No. 1022

38. On pages 5-6 of the Petition for Review, Petitioner has provided a two paragraph introductory statement. There are at least a dozen averments of fact contained within those two paragraphs.

39. As the Petitioner has not complied with Pa. Rule of Civil Procedure 1022, it is unclear as to whether Respondents have to respond to those paragraphs and averments of fact.

40. Those paragraphs should either be properly incorporated into the Petition,,or struck from the pleading.

WHEREFORE, this Preliminary Objection should be sustained and the introductory statement should be stricken from the Petition.

C. Incomplete Pleadings

41. All of the foregoing paragraphs are incorporated herein by reference.

42. Paragraph 76 of the Petition for Review makes reference to an Exhibit A- attachment 1.

No exhibits or attachments were served on Respondents.

43. Accordingly, the Petition is defective as it is attempting to refer to an Exhibit or Exhibits that are not of record.

WHEREFORE, this Preliminary Objection should be sustained and references to the Exhibit should be stricken from the Petition.

D. Failure to Attach Orders

44. All of the foregoing paragraphs are incorporated herein by reference.

45. Throughout the Petition the Department of Health has referenced numerous orders but has not attached any copy of the orders.

46. Pursuant to Pa. R.C.P. 1019:

(d) In pleading an official document or official act, it is sufficient to identify it by reference and aver that the document was issued or the act done in compliance with law.

...

(i) When any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing.

Pa.R.C.P. No. 1019

47. Official documents shall be published in the Pennsylvania bulletin per 45 Pa. C.S.A. 725, which states in relevant part:

(a) General rule.--Except as otherwise provided by regulations promulgated by the joint committee the following documents, if not otherwise required to be published by this part, shall be published in the bulletin:

(1) All proclamations and executive orders of the Governor, except such as have no general applicability and legal effect or are effective only against Commonwealth agencies or persons in their capacity as officers, agents or employees thereof.

(2) All agency notices directed to the public with respect to proceedings conducted under any statute the expense of the administration of which is by law assessed directly against the class of persons regulated or supervised thereunder.

45 Pa. Stat. and Cons. Stat. Ann. § 725 (West).

48. Respondents believe that the publishing of orders in the Pennsylvania Bulletin would serve to make them Official Documents and that said publication would provide legal notice to Pennsylvanians of said documents.

49. To the knowledge of Respondents, not one of the orders has been published. If they have been, Petitioner has not provided citations for same.

50. The Petitioner has cited Pa. R.C.P. 201 as the authority for the Court taking judicial notice of the information that can be obtained from following the listed hyperlinks. (See Petition at Paragraph 32, fn 1).

51. Pa. R.C.P. 201 does not discuss Judicial Notice and states as follows:

Agreements of attorneys relating to the business of the court shall be in writing, except such agreements at bar as are noted by the prothonotary upon the minutes or by the stenographer on the stenographer's notes.

Pa.R.C.P. No. 201

52. 225 Pa. Code is also cited by Petitioner and states as follows:

(a) *Scope*. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) *Kinds of Facts That May Be Judicially Noticed*. The court may judicially notice a fact that is not subject to reasonable dispute because it:

- (1) is generally known within the trial court's territorial jurisdiction; or
- (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

225 Pa. Code Rule 201.

53. 225 Pa. Code 201 is also known as Pennsylvania Rule of Evidence 201. As far as

Respondents are aware, the Pennsylvania Rules of Evidence apply to hearings, trials and other Court proceedings, but do not apply to pleadings. Additionally, the orders of the Governor or Department of Health are not adjudicative facts and would not be among the types of facts that could be judicially noticed under Pa. R.E. 201.

54. Petitioner also states that notice can be taken through Public Court Dockets. There are no public court dockets listed in the Petition.

55. Accordingly, Petitioner has not properly offered the orders of the Department of Health.

This renders the Petition Defective.

WHEREFORE, this Preliminary Objection should be sustained and the Petition should be dismissed.

E. Failure to Attach Transcript

56. All of the foregoing paragraphs are incorporated herein by reference.

57. Pennsylvania Rule of Civil Procedure 1019 states in relevant part:

- (i) When any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing.

Pa. R.C.P. 1019.

58. In Paragraph 35 of the Petition, Petitioner refers to a transcript from a Federal Court proceeding- Parker v. Wolf, Pa. M.D. No. 1:20-CV-1601, at 7:24-25, 8:2-4 (Nov. 24, 2020).

59. This Counsel has checked the cited docket through the Federal PACER system. This transcript is not available in the PACER system.

60. Accordingly, Petitioner is attempting to cite a transcript that is not publicly available. If Petitioner wishes to rely on a transcript, the transcript should either be readily publicly available through standard legal sources, or attached to the pleading.

WHEREFORE, this Preliminary Objection should be sustained and references to the transcript should be stricken from the Petition.

F. Lack of Specificity/Defective Ad Damnum Clauses

61. All of the foregoing responses are incorporated herein by reference.

62. Pennsylvania Rule of Civil Procedure 1021 states in relevant part:

(a) Any pleading demanding relief shall specify the relief sought. Relief in the alternative or of several different types, including an accounting may be demanded.

Pa.R.C.P. No. 1021

63. The Petition states in relevant part at paragraph 87:

b. All damages permitted by law.

...

e. All such other damages as this Court deems fit and applicable given the Respondents' acts against the Commonwealth.

64. Vague claims of the possibility of other damages are not permissible in a pleading. See

Martindale Lumber Co. v. Trusch, 452 Pa. Super. 250, 681 A.2d 803 (1996) and Baird v.

First Pennsylvania Bank, N. A., 1 Pa. D. & C.3d 665 (Pa. Com. Pl. 1976).

65. Accordingly, these claims for damages cannot survive.

WHEREFORE, this Preliminary Objection should be sustained and these claims for damages should be stricken from the Petition.

III. Preliminary Objections Pursuant to Pa. R.C.P. 1028(a) (3) insufficient specificity in a pleading and (4) legal insufficiency of a pleading (demurrer);

A. Count I- Declaratory Relief

66. All of the foregoing paragraphs are incorporated herein by reference.

67. The pleading in this case is completely silent as to the basis in law for seeking declaratory relief.

68. The Department of Health is presumably attempting to obtain declaratory judgment under the Declaratory Judgment Act. See PA ST 42 Pa.C.S.A. § 7531 et seq. See also Pa. R.C.P. 1601 et seq. (Rules of Civil Procedure for Declaratory Judgments).

69. In their *ad damnum* clause The Department of Health has requested the following relief:

WHEREFORE, the Department of Health respectfully requests that the Court declare and decree that the Orders of the Secretary were necessary to protect the public health, are authorized by law, and continue to be necessary due to the ongoing pandemic.

70. Pursuant to 42 Pa. C.S.A. 7532, the scope of declaratory review is as follows:

Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

42 Pa. Stat. and Cons. Stat. Ann. § 7532 (West)

71. It must be noted that there appears to be no precedent for a state administrative agency asking for declaratory relief that its own orders are enforceable.

72. Nothing in statute indicates that a Court has the authority to determine whether an order is “necessary” to protect the public health. Such a conclusion is beyond the scope of this Court’s review. This Court can, in appropriate circumstances, determine the applicability of a presently effective order.

73. Nothing in statute authorizes the Court to predict what will continue to be necessary in the future. The conditions of the present pandemic are changing on a daily basis. There is no way that a Court could predict what will be necessary in the future.

74. The ripeness doctrine prohibits a court from addressing issues until they are “ripe” to be heard. That doctrine has been explained in part as follows:

The doctrine of ripeness arises out of a judicial concern not to become involved in abstract disagreements of administrative policies. *Texas Keystone, Inc. v. Pa. Dep’t of Conservation & Natural Res.*, 851 A.2d 228 (Pa.Cmwlth.2004). The doctrine insists on a concrete contest, where there is a final agency action so that the courts can properly exercise their function. *Id.* Court rulings applying the ripeness doctrine are premised on policies of sound jurisprudence; courts should not give answers to academic questions, render advisory opinions, or make decisions based on assertions of hypothetical events that might occur in the future. *Phila. Entm’t & Dev. Partners, L.P. v. City of Phila.*, 594 Pa. 468, 937 A.2d 385 (2007).

Philips Bros. Elec. Contractors v. Pennsylvania Tpk. Comm’n, 960 A.2d 941, 945 (Pa. Commw. Ct. 2008)

75. Respondents do not believe it possible for the Court to predict or rule on the necessity of Department of Health orders indefinitely into the future.

76. Moreover, the Department of Health has listed at least 8 Department of Health orders in their pleading. See Petition for Review Paragraphs 39-59. These orders have multiple

parts and subparts. They have been modified multiple times and some have expired. The Department of Health is apparently seeking review of orders or portions of orders that are no longer in effect.

77. There has also not been any specificity as to exactly which of the orders or subsections thereof that the Department of Health is saying should be applied to respondents.

78. The Mootness Doctrine States as follows:

Under the mootness doctrine, “an actual case or controversy must be extant at all stages of review, not merely at the time the complaint is filed.” *Pub. Defender's Office of Venango County v. Venango County Court of Common Pleas*, 586 Pa. 317, 325, 893 A.2d 1275, 1279 (2006) [quoting *Pap's A.M. v. City of Erie*, 571 Pa. 375, 389, 812 A.2d 591, 599–600 (2002)]. The existence of a case or controversy requires “a real and not a hypothetical legal controversy and one that affects another in a concrete manner so as to provide a factual predicate for reasoned adjudication....” *City of Philadelphia v. SEPTA*, 937 A.2d 1176, 1179 (Pa.Cmwlt.2007).

Harris v. Rendell, 982 A.2d 1030, 1035 (Pa. Commw. Ct. 2009), aff'd, 605 Pa. 562, 992 A.2d 121 (2010)

79. As there is no “case or controversy” established by the Department of Health, the

Department of Health should be required to establish a clear case or controversy and identify with specificity the orders or subsections thereof for which it seeks determination.

80. Respondents do agree that the Department of Health can certainly issue orders pursuant to 35 P.S. 521.5 (addressing control measures). However those orders must be predicated on other portions of Pennsylvania Statutes, Pennsylvania Caselaw, Pennsylvania Rules

and Regulations and United States and Pennsylvania Constitutional principles. Were this case to reach consideration on its merits, Respondents do plan to argue that most or all of the orders issued by the Department of Health do not meet the requisite legal standards for issuance or enforcement.

81. As further addressed herein, Respondents are also concerned that the Department of Health is seeking declaratory relief which will impact thousands of Pennsylvanians, but have only named fewer than 30 restaurants and bars to the instant action.

WHEREFORE, this Preliminary Objection should be sustained and the cause of action for declaratory judgement should be dismissed.

B. Count II- Injunctive Relief

82. All of the foregoing paragraphs are incorporated here in by reference.

83. Petitioner has again failed to cite clear legal authority for this count. It is unclear as to whether Petitioner is seeking a preliminary injunction, final injunction, or both.

84. The Petition for Review does mention a preliminary injunction in paragraph 81, but fails to address the requisite legal standard. The Superior Court has noted in the past that preliminary injunctions and final injunctions are two separate things and different legal standards apply. Soja v. Factoryville Sportsmen's Club, 361 Pa. Super. 473, 481, 522 A.2d 1129, 1132 (1987)

85. As the case cited by Petitioner, Greater Nanticoke Area Educ. Ass'n v. Greater Nanticoke Area Sch. Dist., 938 A.2d 1177, 1186 (Pa. Commw. Ct. 2007) discusses only preliminary injunctions, Respondents will address preliminary injunctions.

86. The Supreme Court of Pennsylvania has described the standard for a preliminary injunction as follows:

First, 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. 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. 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. Fourth, the party seeking an injunction must show 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. Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.

Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc., 573 Pa. 637, 646–47, 828 A.2d 995, 1001 (2003) (Internal Citations omitted).

87. Petitioners have failed to address any of these required elements in their Petition for Review. As Petitioners have failed to plead or address these elements, Respondents find it very difficult to address them.

88. Respondents do submit however that:

- a. The Department of Health has not sustained any damages.
- b. It is unclear as to what the scope of the injunction would even be at this point as Petitioner has failed to specify what relief it actually wants.

- c. The state of the parties prior to the actions was that restaurants and bars were operating under PA law in accordance with the terms of the Food and Liquor Codes.
- d. Respondents dispute that Petitioner has a clear right to relief as Petitioner's orders have not been issued in accordance with Pennsylvania law or in accordance with the Constitutional Principles that underlie said law.
- e. It is unclear as to what the scope of the injunction would even be at this point as Petitioner has failed to show what relief it actually wants.
- f. Respondents believe that the public interest would be adversely affected as an injunction would serve to restrict the rights of not only the Respondents, but millions of Pennsylvanians.

89. Finally it must be noted that a claim for preliminary injunction, by its own name and essence must be "preliminary" to some other cause of action. Often a preliminary injunction is requested in anticipation of a final injunction or breach of contract claim. In this case, it is not clear to what the preliminary injunction is preliminary.

WHEREFORE, this Preliminary Objection should be sustained and the cause of action for injunctive relief should be dismissed.

C. The Final Ad Damnum Clause

90. All of the foregoing paragraphs are incorporated herein by reference.

91. The final ad damnum clause in the Petition actually appears to add new elements and suggest a new cause of action which has not been pleaded. That clause states as follows:

87. Based on Respondents' continued violations of the Secretary's Orders, Petitioner requests the Court to award damages in favor of Petitioner and against Respondents, including, but not limited to:

a. Compensatory damages and all costs relative to enforcing the provisions of the Orders;

b. All damages permitted by law;

c. Equitable damages and restitution for the unjust enrichment of Respondents including any wrongful gains and disgorgement of profits realized through their violations of the Orders of the Secretary;

d. Punitive damages for the willful and wanton violation of the Orders in which Respondents have engaged despite knowledge that their actions are in violation of the Orders;

e. All such other damages as this Court deems fit and applicable given the Respondents' acts against the Commonwealth.

92. The Declaratory Judgments Act does not permit compensatory or punitive damages.

Mueller v. Com., Pennsylvania State Police Headquarters, 110 Pa. Cmwlth. 265, 274, 532

A.2d 900, 905 (1987). Therefore, if the claim for damages is based on anticipated declaratory judgment, it cannot stand.

93. Additionally, Respondents have been unable to find any authority for awarding damages on a preliminary injunction. See Three Cty. Servs., Inc. v. Philadelphia Inquirer, 337 Pa. Super. 241, 486 A.2d 997 (1985) (Damages are a separate, later action from a preliminary injunction).

94. Petitioner also appears to advance an “unjust enrichment” cause of action in the ad damnum clause rather than as an independent cause of action.

95. Even if Petitioner had properly raised “unjust enrichment” as a cause of action, it would fail.

96. The Superior Court of Pennsylvania has stated as follows:

The elements of unjust enrichment are “benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.”

Ne. Fence & Iron Works, Inc. v. Murphy Quigley Co., 2007 PA Super 287, ¶ 12, 933

A.2d 664, 669 (2007).

97. In this instance, Petitioner has conveyed no benefit on Respondents. Therefore any unjust enrichment claim must fail.

WHEREFORE, this Preliminary Objection should be sustained and any reference to compensatory or punitive damages or unjust enrichment should be stricken from the Petition.

IV. Preliminary Objections Pursuant to Pa. R.C.P. 1028(a)(5) lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action;

98. All of the foregoing paragraphs are incorporated herein by reference.

99. Petitioner has brought an action for declaratory judgment that impacts thousands of Pennsylvanians. Were this Court to find that any of the orders issued by the Department

of Health were valid and binding, this would affect the interests of every restaurant and bar in Pennsylvania as well as their staff, patrons, vendors and multiple related businesses.

100. Pennsylvania Statute states as follows:

(a) General rule.--When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party and shall be entitled to be heard.

42 Pa. Stat. and Cons. Stat. Ann. § 7540 (West)

101. In other words, the thousands of Pennsylvanians who would be affected by this action should be represented in some way.

102. In normal cases, the Pennsylvania Attorney General represents the interests of large groups of Pennsylvanians in lawsuits. See e.g. Stilp v. Com., 910 A.2d 775, 786 (Pa. Commw. Ct. 2006), aff'd sub nom. Stilp v. Com., Gen. Assembly, 601 Pa. 429, 974 A.2d 491 (2009) and Commonwealth, Office of Atty. Gen. ex rel. Corbett v. Richmond Twp., 917 A.2d 397, 403 (Pa. Commw. Ct. 2007).

103. As noted, this current situation appears to be completely unprecedented. While it sounds absurd, the Department of Health working in coordination with the Office of Attorney General should have joined the Attorney General's office in this lawsuit.

104. The Attorney General's Office has broad statutory authority to represent Pennsylvanians. See 71 Pa. Stat. Ann. § 732-204 (West).

105. Obviously, the Attorney General's Office is already representing the Department of Health and cannot represent the thousands of impacted Pennsylvanians. However Pennsylvania already has two advocates that might be appropriate in this instance.

106. The Pennsylvania Small Business Advocate is empowered by statute to:

...represent the interest of small business consumers as a party, or otherwise participate for the purpose of representing an interest of small business consumers before the commission in any matter properly before the commission, and before any court, or agency, initiating proceedings if in his judgment such may be necessary, in connection with any matter involving regulation by the commission or the corresponding regulatory agency of the United States, whether on appeal or otherwise initiated.

73 Pa. Stat. Ann. § 399.45 (West)

107. Additionally Pennsylvania has an Office of Consumer Advocate which is empowered by statute to:

... represent the interest of consumers as a party, or otherwise participate for the purpose of representing an interest of consumers, before the commission in any matter properly before the commission, and before any court or agency, initiating proceedings if in his judgment such may be necessary, in connection with any matter involving regulation by the commission or the corresponding regulatory agency of the United States whether on appeal or otherwise initiated.

71 Pa. Stat. Ann. § 309-4 (West)

108. Both of the aforementioned advocates regularly advocate for the interests of millions of Pennsylvanians before the Public Utility Commission and would be well suited to make sure that those interests are heard in this case.

109. Respondents respectfully suggest that this case cannot proceed without providing some form of representation for all the other Pennsylvanians who would be impacted by determination of the claim for declaratory judgment.

WHEREFORE, this preliminary objection should be sustained for the failure to join an indispensable party.

V. Preliminary Objections Pursuant to Pa. R.C.P. 1028(a) (7) failure to exercise or exhaust a statutory remedy.

110. All of the foregoing paragraphs are incorporated herein by reference.

111. The Petition of the Department of Health is interesting as it in two instances references the statutory remedies which it could use (Petition at paragraphs 3 and 73), but then goes on to baldly state that it does not have an adequate remedy at law (Petition at paragraph 78). No explanation is given as to why the Petitioner believes that they do not have an adequate statutory remedy.

112. Respondents, believe that if used in accordance with Pennsylvania law and the principles of the U.S. and Pa. Constitutions, the Department of Health actually has three direct statutory remedies available to it.

- a. Pursuant to 35 P.S. § 521.20, the Department of Health has the authority to issue summary criminal citations for up to \$300 for violating control measures (orders) issued under the Disease prevention and Control Law of 1955. Respondents are aware that the Department of Health and Department of Agriculture have previously issued such citations during the COVID-19 pandemic. It is unclear as to why this statutory remedy would be inadequate.
- b. 71 P.S. § 1409 also allows for enforcement of Department of Health Orders through a summary criminal citation and allows for a fine of \$50. Respondents are not aware of this provision of law having been used by the Department of Health, but suggests that it could be.
- c. Every Respondent holds some type of food license from the PA Department of Agriculture. The Department of Agriculture and Department of Health are cooperating on this Petition (See Petition at 62). Pursuant to 3 Pa.C.S.A. § 5714(a), the Department of Agriculture does have the ability to issue violation notices and seek fines from licensees that are not in compliance with rules, regulations, standards or orders made under that subchapter.

113. All three of these statutory remedies provide for prompt individual hearings. The summary citations can be issued on a standard citation form and would be heard before local Magisterial District Judges within weeks of issuance. A full slate of criminal procedure rights and due process rights do apply to those citations. For individuals that were found guilty, there is a payment enforcement system in place that includes incarceration for individuals who have refused to pay.

114. Pennsylvania statute also provides two less direct civil remedies to the

Department of Health:

Whenever the secretary or a local qualified medical health officer has reasonable grounds to suspect any person of being infected with a venereal disease, tuberculosis or any other communicable disease, or of being a carrier, he shall require the person to undergo a medical examination and any other approved diagnostic procedure, to determine whether or not he is infected with a venereal disease, tuberculosis or any other communicable disease, or is a carrier. In the event that the person refuses to submit to the examination, the secretary or the local qualified medical health officer may (1) cause the person to be quarantined until it is determined that he is not infected with a venereal disease, tuberculosis or any other communicable disease, or of being a carrier, or (2) file a petition in the court of common pleas of the county in which the person is present, which petition shall have appended thereto a statement, under oath, by a physician duly licensed to practice in the Commonwealth, that such person is suspected of being infected with venereal disease, tuberculosis or any other communicable disease, or that such person is suspected of being a carrier. Upon filing of such petition, the court shall, within twenty-four hours after service of a copy thereof upon the respondent, hold a hearing, without a jury, to ascertain whether the person named in the petition has refused to submit to an examination to determine whether he or she is infected with venereal disease, tuberculosis or any other communicable disease, or that such person is a carrier. Upon a finding that the person has refused to submit to such examination and that there was no valid reason for such person so to do, the court shall forthwith order such person to submit to the examination.

35 Pa. Stat. Ann. § 521.7 (West)

115. Pennsylvania law goes on to state:

(a.1) If the secretary or any local health officer finds that any person who is infected with venereal disease, tuberculosis or any other communicable disease in a communicable stage refuses to submit to treatment approved by the department or by a local board or department of health, the secretary or his representative or the local medical health officer may cause the person to be isolated in an appropriate institution designated by the department or by the local board or department of health for safekeeping and treatment until the disease has been rendered non-communicable.

(a.2) The secretary or the local health officer may file a petition in the court of common pleas of the county in which the person is present to commit such person to an appropriate institution designated by the department or by the local board or department of health for safekeeping and treatment until such time as the disease has been rendered non-communicable. Upon filing of such petition, the court shall, within twenty-four hours after service of a copy thereof upon the respondent, hold a hearing, without a jury, to ascertain whether the person named in the petition has refused to submit to treatment.

Upon a finding that the person has refused to submit to such treatment, the court shall forthwith order such person to be committed to an appropriate institution or hospital designated by the department or by the local board or department of health.

35 Pa. Stat. Ann. § 521.11 (West)

116. To the knowledge of Respondents, the procedures authorized by 35 P.S. 521.7 or 35 P.S. 521.11 have not even been attempted by Petitioner. There has not been any statement as to why the Department of Health is not attempting to utilize these remedies.

117. The Petitioner has not averred any reason why the existing statutes are inadequate to provide remedies.

WHEREFORE, the Petition should be dismissed as the Department of Health has failed to utilize the statutory remedies available to it.

VI. CONCLUSION

WHEREFORE for all the foregoing reasons, the Preliminary Objections in this matter should be SUSTAINED. This Petition should be dismissed with prejudice.

Respectfully submitted,



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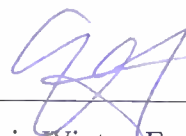
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CONFIDENTIAL INFORMATION CERTIFICATION

I certify that this filing complies with applicable state and local rules and the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts*, which require filing confidential information and documents differently than non-confidential information and documents.

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