

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
HEALTH,**

Petitioner :

No. _____ MD 2021

v. :

**AMERICAN LOBSTER, ANGELO'S
FAMILY RESTAURANT, BELLA
ITALIA RESTAURANT LLC, BING'S
DINER, BRICKERVILLE HOUSE,
CLOUD NINE CAFE, DAD'S GARAGE
GRILL AND BURGER, HOT SHOTS
INC. D/B/A DENNY'S LENNIES, DOB-
BROS COUNTRY KITCHEN, FUN
CENTRAL INC., HICKORY VALLEY,
HOMETOWN KITCHEN, KEYSTONE
FAMILY RESTAURANT, MAMMAS
PIZZA R&A, MANDY JO'S COUNTY
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 CAFÉ, THE BLUE COLLAR
TAVERN, TONY'S PIZZERIA &
RESTAURANT, VILLA SCHIANO, AND
YOGURT WORKS**

Respondents :

NOTICE TO PLEAD

TO: ALL RESPONDENTS

American Lobster

c/o Christopher Moon
1420 Jacobsburg Road
Wind Gap, PA 18091

Angelo's Family Restaurant

c/o Angelos Since 1939 LLC
2109 North Franklin Drive
Washington, PA 15301

Bella Italia Restaurant LLC

328 South Logan Boulevard
Altoona, PA 16602

Bing's Diner

c/o Allen Bingman
101 South Walnut Street
Burnham, PA 17009

Brickerville Family Restaurant

c/o Brickerville Family Restaurant
2 28th East Division Highway
Lititz, PA 17543

Cloud Nine Café

c/o Berks Coffee Company
84 Commerce Drive
Wyomissing, PA 19610

Dad's Garage Grill & Burger

c/o Filling Station Diner, LLC
245 East Main Street
Mechanicsburg, PA 17055

**Hot Shots, Inc. d/b/a Denny's
Lennies**

c/o Dennis C. Williams
3828 Peter's Mountain Road
Halifax, PA 17032

Dob-Bros Country Kitchen

c/o Dob-Bros County Kitchen / Ted &
Terry Dobrosky
3427 State Route 156
Spring Church, PA 15686-9743

Fun Central, Inc.

c/o Josh McCahan
14399 Clearfield-Shawville Highway
Clearfield, PA 16830

Hickory Valley Farm Restaurant

c/o Robroe JVG, Inc.
2185 Route 611
Swiftwater, PA 18370

Hometown Kitchen

c/o Hometown Kitchen, LLC
18 Furnace Road
Quarryville, PA 17566

Keystone Family Restaurant

c/o Keystone Family Restaurant
10530 Buchanan Trail East
Waynesboro, PA 17268

Mamma's Pizza R&A

c/o Ronald Rutherford
5 York Street
Wellsville, PA 17365

Mandy Jo's Country Corral

c/o Amanda J. Helsel
126 Raystown Road
Everett, PA 15537

Marteen's Family Restaurant

c/o Marteen's Family Restaurant
2 West Main Street
Everett, PA 15537

Mountain Shadows Restaurant
c/o H. Michael Pryor
14954 Buchanan Trail East
Blue Ridge Summit, PA 17214

Muller's Family Restaurant
c/o Eight Wonders of the Pocono's,
Inc.
5138 Milford Road Route 209
East Stroudsburg, PA 18302

New Holland Coffee Company 2
c/o New Holland Coffee Co. LLC
832 West Main Street
New Holland, PA 17557

Park City Diner
c/o Park City Diner, LLC
884 Plaza Parkway
Lancaster, PA 17601

Quarryville Family Restaurant
c/o Quarryville Family Restaurant,
LLC
134 East State Street
Quarryville, PA 17566

RC's Bar & Grill
c/o RC's Bar & Grill, LLC
4547 Red Rock Road
Benton, PA 17814

Riley's Restaurant & Pub
c/o Albert Charlie-Owner
4505 Main Street
Egypt-Whitehall, PA 18052

Seasons Café
c/o Joseph Church
15 Village Center Drive
Reading, PA 19607

The Blue Collar Tavern
c/o B. Lander Group, Inc.
2862 Route 38
Emlenton, PA 16373

Tony's Pizzeria & Restaurant
c/o Antonio & Krista Barone
185 South Second Street
Highspire, PA 17034

Villa Schiano
c/o Vincenzo Schiano Di Cola
4900 State Route 209
Elizabethville, PA 17023

Yogurtworks
c/o Kelly Burkholder
108-1 North Reading Road
Ephrata, PA 17522

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

Respectfully submitted,

JOSH SHAPIRO
Attorney General

By: /s/ Lindsey A. Bedell

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Deputy Attorney General
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Date: January 5, 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF	:	
PENNSYLVANIA, DEPARTMENT	:	
OF HEALTH,	:	
	:	
Petitioner	:	
	:	No. _____ MD 2021
v.	:	
	:	
	:	
AMERICAN LOBSTER, ET AL.	:	
	:	
Respondents	:	

**PETITION FOR REVIEW IN THE NATURE OF A
COMPLAINT IN EQUITY**

SARS-CoV-2, which causes the Coronavirus disease 2019 (“COVID-19”), is a highly contagious virus that is a serious threat to public health and has impacted every part of the globe. Pennsylvania has seen a similar unprecedented burden of COVID-19 and has taken equally unprecedented measures to save lives and reduce the number of deaths caused by the COVID-19 virus. This response has included Orders issued by the Secretary of the Department of Health that, *inter alia*, required masking and limited the size of public gatherings, and more recently, closed certain public establishments including the indoor, in-person dining services of restaurants (while still permitting take-out services and outdoor dining) until 8 a.m. on January 4, 2021, to reduce the spread of this virus and alleviate the stress on our healthcare system.

This decision to respond aggressively has proven to be an essential and effective measure to reduce the spread of COVID-19 and ultimately save an

unrealized number of Pennsylvanians’ lives. When individuals choose to ignore those safeguards—by conducting business contrary to those orders by having no social distancing in place, ignoring the masking mandate, and by previously holding indoor, in-person dining—they put the lives of Pennsylvanians at risk and threaten to reverse the significant progress that has been made to resolve this crisis. This dangerous conduct of violating standing orders must be stopped. As a result, the Commonwealth of Pennsylvania, Department of Health (“Department of Health” or “Department”), by and through its undersigned counsel, submits this Petition for Review in the Nature of a Complaint in Equity, and in support thereof avers as follows:

STATEMENT OF JURISDICTION

1. This Court has original jurisdiction over this action pursuant to 42 Pa. C.S. § 761(a)(2).

PARTY SEEKING RELIEF

2. The Department of Health is an executive agency of the Commonwealth that is charged by the General Assembly with the responsibility to “protect the health of the people of this Commonwealth, and to determine and employ the most efficient and practical means for the prevention and suppression of disease.” 71 P.S. § 532 (a).

3. The Department of Health has the authority to take any disease control measure appropriate to protect the public from the spread of infectious disease. *See* 35 P.S. § 521.5; 71 P.S. § 532(a); 28 Pa. Code § 27.60. The Secretary of Health, who

is the head of the Department of Health, “shall . . . exercise the powers and perform the duties by law vested in and imposed upon the department.” 71 P.S. §§ 66, 1401(b).

PARTIES WHOSE ACTION IS AT ISSUE

4. Respondent American Lobster is a restaurant located at 1420 Jacobsburg Road in Wind Gap, Pennsylvania.

5. Respondent Angelo’s Family Restaurant is a restaurant located at 2109 North Franklin Drive in Washington, PA.

6. Respondent Bella Italia Restaurant LLC is a restaurant located at 328 South Logan Boulevard in Altoona, PA 16602.

7. Respondent Bing’s Diner is a restaurant located at 101 South Walnut Street in Burnham, PA.

8. Respondent Brickerville Family Restaurant is a restaurant located at 28th East Division Highway in Lititz, PA.

9. Respondent Cloud Nine Café is a restaurant located at 84 Commerce Drive in Wyomissing, PA.

10. Respondent Dad’s Garage Grill & Burger is a restaurant located at 245 East Main Street in Mechanicsburg, PA.

11. Respondent Hot Shots, Inc. d/b/a Denny’s Lennies is a restaurant located at 3828 Peter’s Mountain Road in Halifax, PA.

12. Respondent Dob-Bros Country Kitchen is a restaurant located at 3427 State Route 156 in Spring Church, PA.
13. Respondent Fun Central, Inc. is a restaurant located at 14399 Clearfield-Shawville Highway in Clearfield, PA.
14. Respondent Hickory Valley Farm Restaurant is a restaurant located at 2185 Route 611 in Swiftwater, PA.
15. Respondent Hometown Kitchen is a restaurant located at 18 Furnace Road in Quarryville, PA.
16. Respondent Keystone Family Restaurant is a restaurant located at 10530 Buchanan Trail East in Waynesboro, PA 17268.
17. Respondent Mamma's Pizza R&A is a restaurant located at 5 York Street in Wellsville, PA.
18. Respondent Mandy Jo's Country Corral is a restaurant located at 126 Raystown Road in Everett, PA 15537.
19. Respondent Marteen's Family Restaurant is a restaurant located at 2 West Main Street in Everett, PA.
20. Respondent Mountain Shadows Restaurant is a restaurant located at 14954 Buchanan Trail East in Blue Ridge Summit, PA 17214.
21. Respondent Muller's Family Restaurant is a restaurant located at 5138 Milford Road Route 209 in East Stroudsburg, PA 18302.

22. Respondent New Holland Coffee Company 2 is a restaurant located at 832 West Main Street in New Holland, PA.

23. Respondent Park City Diner is a restaurant located at 884 Plaza Parkway in Lancaster, PA.

24. Respondent Quarryville Family Restaurant is a restaurant located at 134 East State Street in Quarryville, PA.

25. Respondent RC's Bar & Grill is a restaurant located at 4547 Red Rock Road in Benton, PA.

26. Respondent Riley's Restaurant & Pub is a restaurant located at 4505 Main Street in Egypt-Whitehall, PA.

27. Respondent Seasons Café is a restaurant located at 15 Village Center Drive in Reading, PA.

28. Respondent The Blue Collar Tavern is a restaurant located at 2862 Route 38 in Emlenton, PA.

29. Respondent Tony's Pizzeria & Restaurant is a restaurant located at 185 South Second Street in Highspire, PA.

30. Respondent Villa Schiano is a restaurant located at 4900 State Route 209 in Elizabethville, PA 17023.

31. Respondent Yogurtworks is a restaurant located at 108-1 North Reading Road in Ephrata, PA.

STATEMENT OF MATERIAL FACTS

COVID-19 TRANSMISSION

32. SARS-CoV-2 is a highly contagious virus that is a serious threat to public health. (See <https://www.governor.pa.gov/wp-content/uploads/2020/12/20201210-SOH-Limited-Time-Mitigation-Order.pdf> (last accessed Jan. 5, 2021).)¹

33. SARS-CoV-2 is spread mainly from person to person from respiratory droplets produced by an infected person, and is spread from both symptomatic and asymptomatic persons. (*See id.*)

34. Due to the manner of transmission, spread of SARS-CoV-2 is more likely to occur when people are in close contact with one another, such as within about six (6) feet, especially when people are not wearing masks. (See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last accessed Jan. 5, 2021).)

35. An individual who is in close contact, meaning within six feet of another person for fifteen or more minutes, with another person is at an increased risk of transmitting and/or obtaining the virus. *See* Transcript of Hearing, *Parker v. Wolf*, Pa. M.D. No. 1:20-CV-1601, at 7:24-25, 8:2-4 (Nov. 24, 2020).

¹ The Court may take judicial notice of this information as well as the information in subsequent links and through other public court dockets pursuant to Rule of Civil Procedure 201. *See* 225 Pa. Code § 201.

36. On-site dining has been associated with an increased risk for acquiring COVID-19. (See <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html> (last accessed Jan. 5, 2021).)

37. Current CDC guidelines state that the risk of COVID-19 spread increases in a restaurant or bar setting as interactions within six (6) feet of others increase:

- **Lowest Risk:** Food service limited to drive-through, delivery, take-out, and curbside pick-up.
- **More Risk:** Drive-through, delivery, take-out, and curbside pick-up emphasized. On-site dining limited to outdoor seating. Seating capacity reduced to allow tables to be spaced at least 6 feet apart.
- **Higher Risk:** On-site dining with indoor seating capacity reduced to allow tables to be spaced at least 6 feet apart. And/or on-site dining with outdoor seating, but tables not spaced at least 6 feet apart.
- **Highest Risk:** On-site dining with indoor seating. Seating capacity not reduced and tables not spaced at least 6 feet apart.

Id. Individuals who participate in in-person, indoor dining are at a higher risk for transmission of COVID-19 because they are sedentary in a compact location for an extended period of time while eating—an activity that requires individuals to remove

their masks and repeatedly touch the areas around their mouths and noses, activities that are known to increase the risk of spreading the virus. (*See id.*)

38. Current CDC guidelines further state that “[i]n general, being outdoors and in spaces with good ventilation reduces the risk of exposure to the virus that causes COVID-19.” *Id.*

ORDERS FOR MITIGATION OF THE SPREAD OF COVID-19

39. Paragraphs 1-38 are incorporated as if set out herein.

40. As a result of COVID-19, the Governor and Secretary of Health issued a series of orders to protect the public health.

41. The Governor’s March 2020 Order implemented prohibitions on the operation of non-life sustaining businesses and the operation of dine-in facilities. (*See* <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200319-TWW-COVID-19-business-closure-order.pdf> (last accessed Jan 5, 2021).)

42. The Secretary of Health’s March 2020 Order required the closure of all non-life sustaining businesses. (*See* <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200319-Order-of-Secretary-of-PA-DOH-Closure-of-All-Businesses-That-Are-Not-Life-Sustaining.pdf> (last accessed Jan. 5, 2021).)

43. The Governor issued a May 2020 Order implementing the phased reopening structure for businesses across the Commonwealth. (*See*

<https://www.governor.pa.gov/wp-content/uploads/2020/05/20200527-TWW-green-phase-order.pdf> (last accessed Jan. 5, 2021).)

44. On November 17, 2020, the Secretary issued an Order requiring the universal use of face coverings (masks) in the Commonwealth thereby requiring:

a. Every individual, age two and older and who does not meet an exception, must wear a face covering when they are:

- 1) indoors near others not a part of their household;
- 2) outdoors with non-household members and are not able to practice social distancing;
- 3) participating in indoor physical activity in a gym or fitness center where other non-household members are present, regardless of physical distance;
- 4) waiting for, riding on, driving or operating public transportation regardless of physical distance;
- 5) obtaining services in settings including but not limited to a hospital, pharmacy, medical clinic, physician or dental office; and
- 6) “working in any space where food is prepared, packaged for sale, or prepared for distribution to others.”

(See

<https://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/Updat>

[ed%20Order%20of%20the%20Secretary%20Requiring%20Universal%20Face%20Coverings.pdf](#), at Section 2 (last accessed Jan. 5, 2021).)

45. Under this Order of the Secretary, businesses are required to:
 - a. ensure all employees, patrons, or other visitors wear a face covering;
 - b. take reasonable steps to enforce the face covering mandate,
 - c. mitigate individuals' exposure to those who cannot or refuse to wear a face covering;
 - d. "post prominent signs that are visible to all people . . . stating that face coverings are required by the Order of the Secretary of Health[;]" and
 - e. "provide reasonable accommodation to people . . . who state they have a medical[, mental health, or disability] condition . . . that makes it unreasonable for the person to maintain a face covering."

(*Id.* at Section 4.)

46. The Secretary issued an Order on November 23, 2020, providing for the reduction of elective procedures in the medical industry. (*See* <https://www.governor.pa.gov/wp-content/uploads/2020/11/20201123-Order-of-the-Secretary-Regional-Reduction-of-Elective-Procedures-Signed.pdf> (last accessed Jan. 5, 2021).)

47. The Secretary issued an Order on November 23, 2020, requiring public schools, through their Chief School Administrator and Chair/President of their Governing Board, to attest that they have read and complied with the Secretary’s November 17, 2020 Order mandating universal use of face coverings and have read and complied with the “Recommendations for Pre-K to 12 Schools Following Identification of a Case(s) of COVID-19” and will comply with the “Recommendations for Pre-K to 12 Schools Following Identification of a Case(s) of COVID-19” upon COVID-19 cases occurring within the school. (*See <https://www.governor.pa.gov/wp-content/uploads/2020/11/20201123-TWW-stay-at-home-advisory.pdf>* (last accessed Jan. 5, 2021).)

48. The Secretary issued a stay at home advisory on November 23, 2020, that urges Pennsylvanians to:

a. “Only leave [their] home[s for] work, [] school, or for essential needs of themselves or persons they are caring for When not at home, individuals must wear a face covering . . . and practice physical distancing by staying at least six feet away from others and frequent hand hygiene[;]”

b. Not have non-household members in their homes unless they are essential for health, education, or other essential home needs and wear a face covering;

- c. Limit holiday parties to either only household members or in accordance with CDC guidelines; and
- d. Avoid traveling outside of the Commonwealth.

(See <https://www.governor.pa.gov/wp-content/uploads/2020/11/20201123-TWW-stay-at-home-advisory.pdf> (last accessed Jan. 5, 2021).)

49. On November 23, 2020, the Secretary issued an Order prohibiting the sale and consumption of alcohol on-site. (See <https://www.governor.pa.gov/wp-content/uploads/2020/11/20201123-Order-of-the-Secretary-On-Site-Alcohol-Consumption-signed.pdf> (last accessed Jan. 5, 2021).)

50. The Secretary Amended this Order with the December 3, 2020 Order allowing for alcohol to be served and consumed on-site when purchased within the same transaction as a meal but also prohibiting any patron from possessing alcoholic beverages within the facility after midnight. (See <https://www.governor.pa.gov/wp-content/uploads/2020/12/2020.12.3-TWW-amendment-to-mitigation-enforcement-immunity-order.pdf> (last accessed Jan. 5, 2021).)

51. On November 27, 2020, the Secretary issued an Order setting forth these new requirements on the following industries, including those requirements that are relevant to this current action:

- a. Unless impossible, all businesses must operate through remote teleworking procedures.

(See <https://www.governor.pa.gov/wp-content/uploads/2020/11/20201123-Order-of-the-Secretary-for-Mitigation-and-Enforcement-SIGNED.pdf> (last accessed Jan. 5, 2021).)

b. Any business that maintains in-person operations must do the following:

1) Implement new and additional cleaning and disinfecting protocols for high-touch areas and areas contaminated by a positive COVID-19 individual while also maintaining the traditional cleaning procedures;

2) Implement mitigation measures such as screening employees' temperatures prior to shift start time, stagger work start and stop times to avoid large groups of people gathering, limit individuals in common areas, conduct meetings or trainings virtually, provide employees with access to hand washing and sanitizing tools, provide and require the use of face coverings, provide personnel to clean areas, enforce mask mandate and social distancing, prohibit non-essential visitors from entering the business, and make all patrons aware of these safety procedures.

3) Implement and comply with a contact tracing program that identifies individuals who were in close contact with a COVID-19

positive individual and promptly notifies employees who were exposed to that individual.

4) Require employees who become sick during the work day to go home, those who are sick with COVID-19 symptoms prior to the work day should stay home, and where one tests positive for COVID-19, that employee may no longer work at the in-person business and must self-isolate.

(Id.)

c. Businesses that are serving the public, either inside or outside of a building, must do the following:

1) “Require employees and customers to maintain a physical distance of 6 feet at check-out and counter lines.”

2) “Place signage at the entrance to and throughout the business mandating universal face coverings and physical distancing for all individuals, including employees, entering the business.”

3) “Provide markings or other signage showing where 6-foot distances are, to help all individuals entering the business, including employees, maintain physical distancing.”

- 4) “Post, at every entrance, a maximum capacity limit to ensure that a minimum of 6-feet physical distance can be maintained throughout the location. This maximum capacity limit shall be clearly identified and displayed.”
- 5) “Arrange store aisles to be directionally one-way, if required to achieve appropriate physical distancing.”
- 6) “Place hand sanitizer stations at high-contact locations.”
- 7) “Designate a COVID-19 compliance officer who is responsible for ensuring compliance with this Order and all other mitigation orders incorporated therein.”
- 8) “Install plexiglass shields at registers and check out areas to shield employees and customers or take other measures to ensure physical distancing of customers from check-out personnel, or close lines and counters to maintain a physical distance of 6 feet between customers.”
- 9) “Provide for outside curbside pick-up or delivery options, when feasible, by instituting online ordering or other such means.”
- 10) “Designate a specific time for high-risk and elderly persons to use the business at least once every week if there is a continuing in-person customer-facing component.”

11) “Require individuals entering the business to wear face coverings . . . unless the individual qualifies for an exception . . . and deny entry to individuals not wearing face coverings or alternatives to face coverings, unless the business is providing medication, medical supplies, or food, in which case the business must provide alternative methods of pick-up or delivery of such goods.”

(Id. at Section 2.)

d. Capacity Limitations for Businesses

1) “All in-person businesses serving the public within a building or defined area may operate up to 75% of the maximum capacity stated on the applicable certificate of occupancy at any given time unless specifically subject to other requirements” outlined in the Order.

(Id. at Section 3.)

e. Retail Food Services Industry, Including Bars, Restaurants, and Private Catered Events

1) Bars

(A) “All bars are prohibited from conducting operations unless they offer sit-down, dine-in meals or take-out sales

of alcoholic beverages. Alcohol only can be served for on-premises consumption when in the same transaction as a meal. All service must be at a table or booth; bar service is prohibited. All sale or dispensing of alcoholic beverages for on-site consumption must cease at 11:00 p.m. and no patron may possess alcoholic beverages within the establishment after midnight.”

(B) “Take-out sales of alcohol for the purposes of off-site consumption are permitted subject to any limitations or restrictions imposed by Pennsylvania law.”

(C) “Occupancy requirements shall be the following:”

(D) “Limited to 25% of stated fire code maximum occupancy for indoor dining.”

(E) “A discrete indoor event or gathering within a bar must comply with the limits in Section 9 (Specific Requirements For Events And Gatherings Other Than In-Person Retail Businesses or Businesses In The Retail Food Services Industry).”

(Id. at Section 7.)

2) Restaurants and Private Catered Events

(A) “The Guidance for Businesses in the Restaurant Industry Permitted to Operate During the COVID-19 Disaster Emergency to Ensure the Safety and Health of Employees and the Public, dated May 27, 2020, as updated October 9, 2020, along with any future updates (the “Guidance”), is incorporated herein by reference, with the exception of occupancy requirements. For purposes of this Order, occupancy requirements shall be the following:”

1) “Limited to 25% of stated fire code maximum occupancy for indoor dining.”

2) “Discrete indoor event or gathering must comply with the limits outlined in Section 9 (Specific Requirements For Events And Gatherings Other Than In-Person Retail Businesses or Businesses In The Retail Food Services Industry).”

(B) “All businesses in the retail food services industry, including restaurants, wineries, breweries, private clubs and bars, are permitted to provide take-out and delivery sales of food, as well as dine-in service in both indoor and outdoor seating areas so long as they strictly adhere to the

requirements of the Guidance, as required by this Order, including the following:”

1) “Non-bar seating in outdoor areas (i.e., tables or counter seats that do not line up to a bar or food service area) may be used for customer seating.”

2) “Customers must be seated at a table.”

3) “The maximum occupancy limit includes staff.”

(C) “Physical distancing, face covering[s], and other mitigation measures must be employed to protect workers and patrons.”

(D) “Alcohol only can be served for on-premises consumption when in the same transaction as a meal. All sale or dispensing of alcoholic beverages for on-site consumption must cease no later than 10:00 p.m., and no patron may possess alcoholic beverages within the establishment after midnight.”

(E) “Take-out sales of alcohol for the purposes of off-site consumption are permitted subject to any limitations or restrictions imposed by Pennsylvania law.”

3) Self-Certification

(A) “Notwithstanding the maximum occupancy requirements specified . . . , an eligible establishment may increase non-event capacity limitations to 50% of stated fire code maximum occupancy for indoor dining if the establishment enrolls in and complies with the Open & Certified Pennsylvania program administered by the Department of Community and Economic Development. Discrete events within Open & Certified establishments remain subject to Section 8 (Specific Requirements For Events And Gatherings Other Than In-Person Retail Businesses or Businesses In The Retail Food Services Industry).”

(Id.)

52. By fall and early winter 2020, COVID-19 made a drastic resurgence in a second wave, as evidenced by a great increase in the number of infected individuals.

(See <https://www.governor.pa.gov/wp-content/uploads/2020/12/20201210-TWW-Limited-Time-Mitigation-Order.pdf> (last accessed Jan. 5, 2021).)

53. The Commonwealth recently has been recording daily COVID-19 cases and hospitalizations in greater numbers than at any other time during the pandemic

including record high counts since the end of November. (See <https://www.governor.pa.gov/wp-content/uploads/2020/12/20201210-TWW-Limited-Time-Mitigation-Order.pdf> (last accessed Jan. 5, 2021).)

54. As of December 10, 2020, the number of positive or probable cases of COVID-19 was 457,289 and the number of deaths from COVID-19 was 12,010. (See <https://www.governor.pa.gov/wp-content/uploads/2020/12/20201210-TWW-Limited-Time-Mitigation-Order.pdf> (last accessed Jan. 5, 2021).)

55. Across the Commonwealth, hospitals are nearing maximum capacity due to the recent surge of COVID-19, and the increase in hospitalizations is making it difficult for hospitals to provide care to persons who need it. (See <https://www.governor.pa.gov/wp-content/uploads/2020/11/20201123-Order-of-the-Secretary-Regional-Reduction-of-Elective-Procedures-Signed.pdf> (last accessed Jan. 5, 2021).)

56. On December 10, 2020, the Secretary issued a Limited-Time Targeted Mitigation Order prohibiting in-person, indoor dining services.² (See <https://www.governor.pa.gov/wp-content/uploads/2020/12/20201210-SOH-Limited-Time-Mitigation-Order.pdf> (last accessed Jan. 5, 2021).)

57. On December 10, 2020, the Governor of Pennsylvania signed into law Executive Order 20201210 (Executive Order), thereby mandating these same

² The Order also prohibited indoor gatherings of more than ten persons.

restrictions in response to the COVID-19 pandemic in an effort to provide protective mitigation measures throughout the Commonwealth. (See <https://www.governor.pa.gov/wp-content/uploads/2020/12/20201210-TWW-Limited-Time-Mitigation-Order.pdf> (last accessed Jan. 5, 2021).)

58. The Executive Order, which took effect at 12:01 a.m. on December 12, 2020, and remained in effect until 8:00 a.m. on January 4, 2021, required the following, as is relevant to this Petition:

- a. “All in-person indoor dining at businesses in the retail food services industry, including, but not limited to, bars, restaurants, breweries, wineries, distilleries, social clubs, and private catered events is prohibited.” *Id.* at Section 2(A).
- b. “Outdoor dining, take-out food service and take-out alcohol sales are permitted and may continue, subject to any limitations or restrictions imposed by Pennsylvania law, or this or any other Order issued by me or by the Secretary of Health.” *Id.* at Section 2(B).
- c. “Indoor gatherings and events of more than 10 persons are prohibited.” *Id.* at Section 3(A).
- d. “Outdoor gatherings and events of more than 50 persons are prohibited.” *Id.* at Section 4.

e. “All in-person businesses serving the public within a building or defined area may only operate at up to 50% of the maximum capacity stated on the applicable certificate of occupancy, except as limited by existing orders to a smaller capacity limit.” *Id.* at Section 5.

59. These Mitigation Orders were issued with three goals in mind: (1) stopping the spread of COVID-19 in the Commonwealth, (2) keeping our health care systems from becoming overwhelmed, and (3) helping Pennsylvanians get through the holiday season, and closer to a vaccine, as safely as possible. (*Id.*)

**CONTINUED ACTS IN DEFIANCE
OF THE MITIGATION ORDERS**

60. Paragraphs 1-59 are incorporated as if set out herein.

61. Respondents violated Orders of the Secretary by doing some or all of the following: operating restaurants with in-person, indoor dining including offering food and beverages for consumption on-site; failing to enforce mask guidelines for employees and patrons; failing to observe and require physical distancing; failing to post COVID-19 safety signage, and failing to install physical barriers between employees and patrons.

62. The Department of Agriculture, through its Bureau of Food Safety and Laboratory Services (“Bureau”), and in coordination with the Department of Health,³

³ The Bureau is authorized to enforce these Orders pursuant to Section 501 of the Pennsylvania Administrative Code. *See* 71 P.S. § 181 (The head of a

conducted in-person inspections of Respondents' establishments on December 18 and 21, 2020 to determine whether the facilities were compliant with current requirements.

63. During the inspections, Respondents' establishments were determined to be out of compliance as follows:

- a. All Respondents refused to comply with the December 10 Order by continuing to host in-person, indoor dining at their facilities.
- b. Respondents had additional violations that may have included some or all of the following:
 - 1) failing to post signage relating to COVID-19 safety measures for customers and employees;
 - 2) failing to follow CDC guidelines to enforce masks to be worn by employees while on the premise of the facility;
 - 3) not maintaining a social distance of six (6) feet between customers at check-out and counter lines;
 - 4) not separating employees from customers using physical barriers;

Pennsylvania administrative department may empower an employee of another administrative department, subject to the consent of its department head, to perform any duty in which it requires of the employees of its own department.)

- 5) failing to have barriers between tables or markings indicating that certain tables are not to be used; and
- 6) hosting in-person, indoor dining within their facilities in violation of the Secretary's December 10 Order.

64. After completing the onsite inspection, the Bureau representatives provided a copy of the Inspection Report to Respondents and directed that they close their in-person indoor dining services.

65. When the Respondents refused to close their in-person indoor dining services, the Bureau representatives provided the Respondents with a "Closed by Order Notice," which directed that the establishments shall not reopen until approved to do so by the Bureau.

66. A copy of the Inspection Report was provided to Respondents with a "Closed by Order Notice."

67. The Closure Order was to be posted at the establishments and not removed, altered, or concealed, under penalty of law.

68. Despite receiving the "Closed by Order Notice" from the Bureau, Respondents refused to stop the in-person, indoor dining services at their facilities.

69. Respondents held indoor dining services despite:

- a. Widely publicized information and knowledge that close or direct contact makes transmission of COVID-19 extremely likely;
- b. People who are contagious for COVID-19 may present with few symptoms, resembling a minor cold, or may be entirely asymptomatic; and
- c. The prospect of spreading a highly infectious disease to its staff, customers, and the general public.

70. Based on the Orders noted above, if Respondents continue to serve customers in violation of the Secretary's Orders, they create a high risk of spreading COVID-19 and constitute a public health threat.

COUNT I – DECLARATORY RELIEF

71. Paragraphs 1-70 are incorporated as if set out herein.

72. The Department of Health has the duty to administer the health laws of the Commonwealth. 71 P.S. § 532(a).

73. The Orders of the Secretary were necessary to protect the public health, continue to be necessary due to the ongoing pandemic, and are authorized by law including 35 P.S. § 521.5; 71 P.S. § 66, 532(a), 1401(b); and 28 Pa. Code § 27.60.

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.

COUNT II – INJUNCTIVE RELIEF

74. Paragraphs 1-73 are incorporated as if set out herein.

75. Respondents acted and are acting in violation of the Secretary's Orders signed into law by allowing in-person, indoor dining, failing to enforce masking requirements, failing to observe social distancing, or failing to install COVID-19 safety signage or protective barriers between their employees and patrons.

76. Respondents' refusal to abide by the Secretary's Orders is an irreparable harm *per se*, as a violation of law. *See Philips Bros. Elec. Contractors, Inc. v. Valley Forge Sewer Auth.*, 999 A.2d at 657-58 (Pa. Cmwlth. 2010); *see also* Exhibit A, Attach. 1.

77. If such ongoing violations by Respondents are permitted to continue, Respondents will continue to intentionally and purposefully violate the current and future Orders of the Secretary.

78. The Department of Health has no other adequate remedy at law to redress this harm and the anticipated continued violations of the Orders issued by the Secretary.

79. Injunctive relief is necessary to prevent the harm that the Department of Health would suffer if Respondents are permitted to continue to violate the current Orders.

80. A greater injury would occur in refusing the injunction than in granting it because Respondents may help facilitate the spread of COVID-19.

81. The Court shall issue a preliminary or special injunction only after written notice and hearing unless it appears to the satisfaction of the Court that immediate and irreparable injury will be sustained before notice can be given or a hearing held, in which case the Court may issue a preliminary special injunction without a hearing or without notice. *See Greater Nanticoke Area Educ. Ass'n v. Greater Nanticoke Area Sch. Dist.*, 938 A2d 1177, 1182 (Pa. Cmwlth. Ct. 2007).

82. The injunction that is requested is limited to compliance with the current Orders of the Secretary and is necessary to protect the health and safety of the citizens of the Commonwealth.

83. Given Respondents' repeated violations of the Orders, the Court is justified in entering an injunction enjoining Respondents from committing further such violations.

84. By entering an injunction against Respondents in this matter, the persistent and continuing illegal conduct will finally be abated and stopped.

85. If a preliminary injunction is issued, Respondents will not suffer any cognizable harm.

WHEREFORE, the Department of Health respectfully requests entry of an order in its favor and against Respondents: (1) requiring that Respondents comply with the Secretary's Order, including closing its establishment to in-person dining and (2) awarding costs, and such other relief as this Court deems appropriate.

REQUEST FOR DAMAGES

86. Paragraphs 1-85 are incorporated as if set out herein.

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.

Respectfully submitted,

JOSH SHAPIRO
Attorney General

By: /s/ Lindsey A. Bedell

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Date: January 5, 2021

*Counsel for Plaintiff Commonwealth of
Pennsylvania, Department of Health*

VERIFICATION

I, Jeffrey Warner, verify that the statements set forth in the attached document are true and correct to the best of my knowledge, information, and belief. I understand that false statements made herein are made subject to the penalties of 18 Pa. C.S. § 3904 relating to unsworn falsification to authorities.



12/31/2020
Date

Jeffrey Warner

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.

/s/ Lindsey A. Bedell

LINDSEY A. BEDELL

Deputy Attorney General

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF	:	
PENNSYLVANIA, DEPARTMENT	:	
OF HEALTH,	:	
	:	
Petitioner	:	
	:	No. _____ MD 2021
v.	:	
	:	
	:	
AMERICAN LOBSTER, ET AL.	:	
Respondents	:	

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2021, I will have the foregoing document directed upon the Respondents by email as indicated below with a request to waive the requirement for mailed service. If they do not waive service by January 8, 2021, hard copies will be sent via overnight mail to the addresses indicated. One Respondent, as indicated, will be served by hand delivery. This service will satisfy the requirement of Pa. R.A.P. 121 and 1514(c).

American Lobster
c/o Christopher Moon
1420 Jacobsburg Road
Wind Gap, PA 18091
americanlobstergrill@gmail.com

Angelo's Family Restaurant
c/o Angelos Since 1939 LLC
2109 North Franklin Drive
Washington, PA 15301
rhonda@ANGELOSRESTAURANT.COM

Bella Italia Restaurant LLC

328 South Logan Boulevard
Altoona, PA 16602
HAND DELIVERY

Bing's Diner

c/o Allen Bingman
101 South Walnut Street
Burnham, PA 17009
nlr5595@gmail.com

Brickerville Family Restaurant

c/o Brickerville Family Restaurant
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Lititz, PA 17543
brickerville@outlook.com

Cloud Nine Café

c/o Berks Coffee Company
84 Commerce Drive
Wyomissing, PA 19610
cloud9berks@gmail.com

Dad's Garage Grill & Burger

c/o Filling Station Diner, LLC
245 East Main Street
Mechanicsburg, PA 17055
LEDO449@icloud.COM

Hot Shots, Inc. d/b/a Denny's Lennies

c/o Dennis C. Williams
3828 Peter's Mountain Road
Halifax, PA 17032
DENNY@WILLIAMSCATERING.COM

Dob-Bros Country Kitchen

c/o Dob-Bros County Kitchen / Ted & Terry Dobrosky
3427 State Route 156
Spring Church, PA 15686-9743
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Fun Central, Inc.

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funcentralofclearfield@hotmail.com

Hickory Valley Farm Restaurant

c/o Robroe JVG, Inc.
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RGRIMALDI2003@YAHOO.COM

Hometown Kitchen

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Keystone Family Restaurant

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Mamma's Pizza R&A

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Mandy Jo's Country Corral

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Marteen's Family Restaurant

c/o Marteen's Family Restaurant

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Mountain Shadows Restaurant
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/s/ Lindsey A. Bedell

LINDSEY A. BEDELL
Deputy Attorney General