

DEPARTMENT 85 LAW AND MOTION RULINGS

Case Number: 20STCP03881 **Hearing Date:** December 08, 2020 **Dept:** 85

California Restaurant Association, Inc. v. County of Los Angeles Department of Public Health, et al.,
20STCP03881

Mark's Engine Company No. 28 Restaurant LLC, vs County of Los Angeles-Department of Public Health, et al., 20STCV45134

Tentative decision on application for preliminary injunction: granted in part

Petitioners California Restaurant Association, Inc. ("CRA") and Mark's Engine Company No. 28 Restaurant, LLC ("MEC"), each apply in a consolidated hearing (with Case No. 20STCP03881 as the lead case) for a preliminary injunction enjoining Respondents/Defendants County of Los Angeles Department of Public Health and Dr. Barbara Ferrer ("Ferrer"), in her official capacity as Director of Public Health, and Muntu Davis, M.D., M.P.H. ("Davis") in his official capacity as Health Officer for County (collectively, "Department"), from enforcing the November 25, 2020 Order of the Health Officer entitled "Reopening Safer at Work and in the Community for Control of COVID 19, Blueprint for a Safer Economy–Tier 1 Surge Response" ("Restaurant Closure Order").

The court has read and considered the moving papers, the County's oppositions to the *ex parte* applications and consolidated opposition to the order to show cause ("OSC"), and the replies, and renders the following tentative decision.

A. Statement of the Case

1. 20STCP03881

Petitioner CRA commenced this action on November 24, 2020, alleging causes of action for administrative and traditional mandamus and declaratory relief. The Petition alleges in pertinent part as follows.

The Department has issued a series of health orders in an effort to halt the spread of COVID.[1] The Department's Health Order dated November 19, 2020 ("November 19 Order") issued restrictions that outdoor

dining and wine service seating must be reduced by 50%, or tables must be repositioned so that they are at least eight feet apart.

On November 22, 2020, the Department announced that it was modifying the November 19 Order to eliminate outdoor dining and drinking entirely at restaurants, bars, breweries, and wineries by issuing the Restaurant Closure Order. The Restaurant Closure Order took effect on November 25, 2020.

The Department's own data provide no support for the planned shutdown of outdoor restaurant operations. The data tracks all non-residential settings at which three or more laboratory confirmed COVID cases have been identified. Of the 204 locations on the list, fewer than 10% are restaurants. Of the 2,257 cases identified on the list, fewer than 5% originate from restaurants.

On November 17, 2020, the Department held a hearing at which COVID and restaurant closures were discussed. The Department scheduled another hearing for November 24, 2020. On November 23, 2020, CRA sent a notice and objection letter to the Department asking it to cancel the proposed modification to the November 19 Order on the grounds that the spread of COVID is due primarily to people in close proximity at private gatherings and other sources, not from restaurants.

CRA contends that the Department prejudicially abused its discretion by having hearings at which it failed to take and consider relevant advice. The Department made a decision to close restaurant dining that is not realistically designed to halt the spread of COVID. The Department proceeded without, and in excess of, its discretion, failed to give CRA a fair hearing, and prejudicially abused its discretion. The Restaurant Closure Order is not supported by any findings or the evidence.

2. 20STCV45134

Plaintiff MEC commenced this action on November 24, 2020 against the Department and Davis, in his official capacity as Health Officer for County, alleging causes of action for declaratory relief and violations of the California Constitution and seeking the remedy of injunctive relief. The Complaint alleges in pertinent part as follows.

The Department's initial June 2020 Health Order ("June Order") allowed many businesses, including MEC, to operate so long as they followed guidelines established by the state and County to help curb the spread of COVID. As of June 1, 2020, restaurants in the County such as MEC were not permitted to provide dine-in service indoors. They were able to provide outdoor dining and take-out dining upon implementing County safety protocols as set forth in the June 2020 Order.

Since the promulgation of the June Order, MEC has complied with all local and statewide protocols relating to the safe operation of its restaurant, including a large investment of time and resources, to pivot from its previous indoor-dining concept to a takeout and outdoor-dining model.

On November 20, 2020, the Department announced that its June Order, as it relates to the operation of restaurants across the County, was being revised by the November 19 Order to limit the number of customers at outdoor restaurants to 50% of the outdoor establishment's outdoor capacity (which is already limited by virtue of compliance with the June 2020 Order, which requires physically distanced tables). In addition, the November 19 Order curtailed the hours of operation for restaurants by banning operations between 10:00 p.m. and 6:00 a.m.

On November 22, 2020, without any evidence to support it, the Department further modified the November 19 Order by issuing the Restaurant Closure Order, which prohibits any outdoor dining irrespective of capacity or curfew. The Restaurant Closure Order took effect on November 25, 2020 at 10 p.m. and will last for a minimum of three weeks. Take-out, delivery, and drive-thru services remain unaffected.

In attempting to justify the Restaurant Closure Order, Respondent Ferrer said at a November 22, 2020 press conference that there had been a 61% increase in hospitalization cases involving COVID in the County between November 7 and 20, 2020, which could potentially lead to overwhelming the healthcare system. Further, Ferrer pointed out that while most restaurants have complied with safety mandates, almost 20% of restaurants have had issues, mainly regarding social distancing.

Ferrer conceded that she did not have concrete data on how many people had been infected by outside dining at a restaurant. In actuality, the Department's data indicates that COVID cases traced back to the County's restaurants and bars accounted for a mere 3.1 % (70 of the total 2,257) confirmed cases countywide from over 204 outbreak locations -- the vast majority of which were chain/fast-food type restaurants and not MEC's model. Of those 2,257 confirmed cases, 2,249 of were traced to staff members at workplaces and just eight cases came from non-staff members.

The Restaurant Closure Order is an abuse of the Department's emergency powers, is not grounded in science, evidence, or logic, and should be adjudicated to be unenforceable as a matter of law.

3. Course of Proceedings

On November 24, 2020, the court denied CRA's *ex parte* application to stay the Restaurant Closure Order for failure to present sufficient evidence to make a *prima facie* case. The court permitted CRA to renew its application as one for a temporary restraining order ("TRO") and OSC re: preliminary injunction ("OSC") if it presented evidence that the restrictions are unsupported and of irreparable harm.

On December 1, 2020, the court denied MEC's *ex parte* application for declaratory and injunctive relief and informed the parties that declaratory relief cannot be granted on an *ex parte* basis. The court permitted MEC to file and serve new *ex parte* application for a TRO and OSC.

On December 2, 2020, the court denied CRA's and MEC's *ex parte* applications for a TRO, but it set an OSC for the instant date.

The independent calendar court assigned to Case No. 20STCV45134 found that it and Case No. 20STCP03881 are not related under CRC 3.300(a) and declined to relate them. This court consolidated both cases only for hearing on the OSCs and designated 20STCP03881 as the lead case for the hearing.

B. Governing Law

1. Emergency Services Act

The Emergency Services Act ("ESA") empowers state and local governments to declare emergencies and coordinate efforts to provide services. Govt. Code §§ 8550-668. The purpose of the ESA and the policy of the state is that all emergency services functions shall be coordinated as far as possible with the comparable functions of its political subdivisions, the federal government, and private agencies, to the end that the most effective use may be made of all resources for dealing with an emergency. Govt. Code §8550.

A "state of emergency" means the existence of conditions of disaster or of extreme peril to the safety of persons and property within the state caused by conditions including an epidemic and which by reason of their magnitude, are or likely to be beyond the control of any single county or city and require the combined forces of a mutual aid region or regions. Govt. Code §8558.

During a state of emergency, the Governor shall, to the extent he deems necessary, have complete authority over all agencies of the state government and the right to exercise within the area designated all police power

vested in the state by the California Constitution and laws of the State of California in order to effectuate the purposes of this chapter. Govt. Code §8627.

The Governor may make, amend, and rescind orders and regulations necessary to carry out the provisions of this chapter. The orders and regulations shall have the force and effect of law. Due consideration shall be given to the plans of the federal government in preparing the orders and regulations. The Governor shall cause widespread publicity and notice to be given to all such orders and regulations, or amendments or rescissions thereof. Govt. Code §8567(a).

“State Emergency Plan” means the State of California Emergency Plan approved by the Governor. Govt. Code §8560. The Office of Emergency Services shall update the State Emergency Plan on or before January 1, 2019 and every five years thereafter. Govt. Code §8570.4.

“The Governor may, in accordance with the State Emergency Plan and programs for the mitigation of the effects of an emergency in this state: ... (c) Use and employ any of the property, services, and resources of the state as necessary to carry out the purposes of this chapter;... (i) Plan for the use of any private facilities, services, and property and, when necessary, and when in fact used, provide for payment for that use under the terms and conditions as may be agreed upon. Govt. Code §8570.

In the exercise of the emergency powers vested in him during a state of emergency, the Governor is authorized to commandeer or utilize any private property or personnel deemed by him necessary in carrying out the responsibilities hereby vested in him as Chief Executive of the state and the state shall pay the reasonable value thereof. Govt. Code §8572.

A political subdivision of the state is obligated to take all actions necessary to carry out a State Emergency Plan once the Governor has declared an emergency. Govt. Code §8568. A political subdivision includes any city, city and county, county, district, or other local governmental agency or public agency authorized by law. Govt. Code §8557(b).

The governing body of a county or city may proclaim a local emergency. Govt. Code §8630. A local emergency must be reviewed by the governing body every 30 days and it shall be terminated at the earliest possible date that conditions warrant. Govt. Code §8630(c), (d). During a local emergency, the governing body of a county or city may promulgate orders and regulations necessary to protect life and property. Govt. Code §8634.

2. Health and Safety Code

The Restaurant Closure Order specifies the authority upon which it is based—Health and Safety Code (“H&S Code”) sections 101040, 101085 and 120175. H&S Code section 101040 permits a local health officer to take preventative measures that may be necessary to protect and preserve the public health during an “state of emergency” or “local emergency” under the ESA. [2]

H&S Code section 120175 provides:

“Each health officer knowing or having reason to believe that any case of the diseases made reportable by regulation of the department, or any other contagious, infectious or communicable disease exists, or has recently existed, within the territory under his or her jurisdiction, shall take measures as may be necessary to prevent the spread of the disease or occurrence of additional cases.” H&S Code §120175 (emphasis added).

While H&S Code section 101040 is dependent on the ESA, H&S Code section 120175 is not. The statute imposes a mandatory duty on a health officer to take measures to prevent the spread of contagious and communicable diseases. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693, 701. The health officer must take “measures as may be necessary,” or “reasonably necessary,” to achieve the Department’s goals and policies, leaving the course of action to the health officer’s discretion. Ibid. The health officer is vested with discretion to act in a particular manner depending upon the circumstances. Ibid.

The notion that a municipality’s health officer has broad authority is well-established and long-standing. Jacobson v. Commonwealth of Massachusetts, (“Jacobson”) (1905) 197 U.S. 11, 25. “[A] community has a right to protect itself against an epidemic of disease which threatens the safety of its members.” Id. at 27. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and public safety. Ibid.

The health officer’s authority is not unbridled. Courts have the duty to evaluate an exercise of that authority to ensure actions taken have a “real and substantial relationship” to public health and safety. Id. at 31. The health officer cannot act arbitrarily or oppress. Id. at 38. In addition, the health officer cannot engage in a “plain, palpable invasion of rights” secured by the Constitution. Id. at 31. *See also* Jew Ho v. Williamson, (C.D. Cal. 1900) 103 F. 10. (Whether the regulation in question is a reasonable one, directed to accomplish the purpose that appears to have been in view, is a question for the court to determine).

3. Injunctive Relief

An injunction is a writ or order requiring a person to refrain from a particular act; it may be granted by the court in which the action is brought, or by a judge thereof; and when granted by a judge, it may be enforced as an order of the court. CCP §525. An injunction may be more completely defined as a writ or order commanding a person either to perform or to refrain from performing a particular act. *See* Comfort v. Comfort, (1941) 17 Cal.2d 736, 741. McDowell v. Watson, (1997) 59 Cal.App.4th 1155, 1160.[3] It is an equitable remedy available generally in the protection or to prevent the invasion of a legal right. Meridian, Ltd. v. City and County of San Francisco, et al., (1939) 13 Cal.2d 424.

The purpose of a preliminary injunction is to preserve the *status quo* pending final resolution upon a trial. *See* Scaringe v. J.C.C. Enterprises, Inc., (1988) 205 Cal.App.3d 1536. Grothe v. Cortlandt Corp., (1992) 11 Cal.App.4th 1313, 1316; Major v. Miraverde Homeowners Assn., (1992) 7 Cal.App.4th 618, 623. The *status quo* has been defined to mean the last actual peaceable, uncontested status which preceded the pending controversy. Voorhies v. Greene (1983) 139 Cal.App.3d 989, 995, quoting United Railroads v. Superior Court, (1916) 172 Cal. 80, 87. 14859 Moorpark Homeowner’s Assn. v. VRT Corp., (1998) 63 Cal.App.4th 1396. 1402.

A preliminary injunction is issued after hearing on a noticed motion. The complaint normally must plead injunctive relief. CCP §526(a)(1)-(2).[4] Preliminary injunctive relief requires the use of competent evidence to create a sufficient factual showing on the grounds for relief. *See e.g.* Ancora-Citronelle Corp. v. Green, (1974) 41 Cal.App.3d 146, 150. Injunctive relief may be granted based on a verified complaint only if it contains sufficient evidentiary, not ultimate, facts. *See* CCP §527(a). For this reason, a pleading alone rarely suffices. Weil & Brown, California Procedure Before Trial, 9:579, 9(II)-21 (The Rutter Group 2007). The burden of proof is on the plaintiff as moving party. O’Connell v. Superior Court, (2006) 141 Cal.App.4th 1452, 1481.

A plaintiff seeking injunctive relief must show the absence of an adequate damages remedy at law. CCP §526(4); Thayer Plymouth Center, Inc. v. Chrysler Motors, (1967) 255 Cal.App.2d 300, 307; Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist., (1992) 8 Cal.App.4th 1554, 1565. The concept of “inadequacy of the legal remedy” or “inadequacy of damages” dates from the time of the early courts of

chancery, the idea being that an injunction is an unusual or extraordinary equitable remedy which will not be granted if the remedy at law (usually damages) will adequately compensate the injured plaintiff. Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist., (1992) 8 Cal.App.4th 1554, 1565.

In determining whether to issue a preliminary injunction, the trial court considers two factors: (1) the reasonable probability that the plaintiff will prevail on the merits at trial (CCP §526(a)(1)), and (2) a balancing of the “irreparable harm” that the plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction. CCP §526(a)(2); 14859 Moorpark Homeowner’s Assn. v. VRT Corp., (1998) 63 Cal.App.4th 1396, 1402; Pillsbury, Madison & Sutro v. Schectman, (1997) 55 Cal.App.4th 1279, 1283; Davenport v. Blue Cross of California, (1997) 52 Cal.App.4th 435, 446; Abrams v. St. Johns Hospital, (1994) 25 Cal.App.4th 628, 636. Thus, a preliminary injunction may not issue without some showing of potential entitlement to such relief. Doe v. Wilson, (1997) 57 Cal.App.4th 296, 304. The decision to grant a preliminary injunction generally lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Thornton v. Carlson, (1992) 4 Cal.App.4th 1249, 1255.

A preliminary injunction ordinarily cannot take effect unless and until the plaintiff provides an undertaking for damages which the enjoined defendant may sustain by reason of the injunction if the court finally decides that the plaintiff was not entitled to the injunction. See CCP §529(a); City of South San Francisco v. Cypress Lawn Cemetery Assn., (1992) 11 Cal.App.4th 916, 920.

D. Statement of Facts

1. CRA and MEC’s Evidence[5]

a. Background

On March 4, 2020, Governor Newsom declared a “State of Emergency” followed by a March 19, 2020 Stay-at-Home Order which included an indefinite prohibition on operating “non-essential businesses,” including restaurants. Ellis Decl., Ex. 18. Governor Newsom specified that California’s response to the coronavirus pandemic “must be done using a gradual, science-based and data-driven framework.” Id. (emphasis added). He also stated that the state’s actions should be aligned to achieve the objectives of (1) ensuring the ability to care for the sick within the state’s hospitals, (2) preventing infection in people who are at high risk for severe disease, (3) building the capacity to protect the health and well-being of the public, and (4) reducing social, emotional, and economic disruptions. Id.

On August 28, 2020, Governor Newsom and the California Department of Public Health announced a revised regulatory regime entitled the “Blueprint for a Safer Economy” (the Blueprint), outlining a four-tiered system of community disease transmission risk with activity and business tiers for each risk level. Ellis Decl. Ex. 7. Restaurants are listed as a separate sector in the Blueprint. Id. A county in Tier 2 may allow indoor dining at a maximum capacity of 25% or 100 people, whichever is less, while a county in Tier 1 may permit only outdoor dining. Id. Even in the most restrictive tier, outdoor dining is expressly permitted. Id.

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b. The Restaurant Closure Order

On November 22, 2020, the Department issued a press release announcing the issuance of the Restaurant Closure Order, effective November 25, 2020, which would ban outdoor dining for at least three weeks. Ellis Decl., Ex. 1.

On November 23, 2020, CRA sent an objection letter to the Department, asking it to cancel the proposed Restaurant Closure Order on grounds that the spread of COVID is due primarily to persons in close proximity

at private gatherings and other sources, and not from restaurants. Ellis Decl. ¶9, Ex. 8. The letter contended that the County had no study that would support the Restaurant Closure Order, it was not supported by the existing scientific evidence, and it would cause significant harm to restaurants, their employees, and customers. Ex. 8, p. 1-2.

On November 24, 2020, the Board of Supervisors held a public meeting at which the potential Restaurant Closure Order was discussed, and the Department was questioned about the basis for its contemplated action. Ellis Decl., ¶13, Ex. 11. At this meeting, the Department admitted that it has not been tracking COVID transmission at County restaurants and did not have state or County data to support the Restaurant Closure Order. Id. Instead, County Health Officer Davis referred to a study by the Centers for Disease Control (“CDC”), calling it “the best information that we have” to support the Restaurant Closure Order. Id.

Department public health officials Davis, Health Officer, Ferrer, Director of the Department of Public Health, and Dr. Christina Ghaly (“Ghaly”), Director of the Department of Health Services, explained the reasons for the Restaurant Closure Order during the November 24 Board meeting:

Ghaly: “[H]ospital capacity is available right now, but we do risk using it up if the case counts continue to rise at the level they have to date.” Siegel Decl. Ex. B, p. 131 (emphasis added).

Davis: “We are solving the problem of people mixing together, often times from different households, being in close contact with a face covering while they are eating and drinking.” Id., p. 136.

Ferrer: “[B]ecause all of the people and customers are not wearing their face coverings while eating drinking, there’s lot of increased risk in those settings. As you know, we have seen picture after picture of activity at restaurants, people close together and intermingling and many people going to . . . restaurants are not with members . . . of their household, when we proposed in the beginning of reopening restaurants, we said perhaps it makes sense to limit people coming into restaurants and sitting together in households, and the restaurants notified us that would be impossible to enforce. They have no way of knowing whether people are from one household. We are looking at increased risk, and a significant increase in increased risk because people are not wearing their face covering.” Id., pp. 137-38 (emphasis added).

Ferrer: “[I] agree that it seems a little bit counterintuitive to talk about cases when really all we are worried about is overwhelming the healthcare system. The issue is that cases are the earlier predictor of what is going to happen in our hospital care system. And I think Dr. Ghaly spoke to this as well, you don’t want to wait until the case numbers in the hospitals are really high, because those numbers that you are seeing in the hospital reflect people who are infected a couple of weeks earlier. As I said, we have seen this rapid acceleration this past week and a half with hospitals and the number of patients that are there with COVID-19 and it is not attributed to the 4,500 cases we are seeking today, it is attributed to the 2,300 cases we saw two weeks ago.” Id., pp. 139-40 (emphasis added).

Ferrer: “We are, in fact, trying to make sure that whenever you’re out and you’re not with people in your household, you’re always at an activity where you can wear your face covering and keep it on the entire time. And then we’re also trying to reduce crowded situations and having people not—and having people stay with just people from their household.” Id., p. 149.

Ghaly: “And now about this most recent surge, we’ve seen that test positivity rate creep up again at 6, 7 percent. And that’s what’s concerning. And that’s one of the things that may lead in the future to more hospitalization over the next week or two.” Id., pp. 161-62. Opp. to CRA Ex Parte at 14-15.

Two Board supervisors expressed their opinion at the November 24 meeting that scientific evidence was lacking to support the Restaurant Closure Order. Supervisor Barger stated: “There is no data to support closing restaurants. This action was arbitrary and only further encourages private gatherings, which is where the virus is actually spreading.” Ellis Decl. Ex. 14. Supervisor Janice Hahn stated: “I don't think we have the data to prove that outdoor dining is driving the recent surge in cases, nor do we have the data to assure us that this action will turn our case numbers around. I am also very worried that it will drive more people to indoor gathering.” Ellis Decl. Ex. 13.

On November 25, 2020, the Department issued the Restaurant Closure Order, shutting down all outdoor dining by 10:00 p.m. that night. Ellis Decl., Ex. 17. The Restaurant Closure Order states that restaurants, breweries, and wineries can only offer food and beverage via take-out, drive-thru, or delivery -- *i.e.*, no indoor or outdoor dining at restaurants. *Id.* Pursuant to the Restaurant Closure Order, County restaurants are prohibited from offering outdoor dining of any kind, regardless of the safety protocols in place. *Id.* The Department ordered the closure of all restaurants for in-person onsite dining for an indefinite period. *Id.*

CRA presents evidence that the Restaurant Closure Order imposes great financial hardship on the restaurant industry. Many restaurants previously had implemented safety measures to comply with the previous Health Order at significant financial cost. *See* Leon, Rosenthal, Terzian, Shams, Gay, and Thornberg declarations. CRA's declarations refer to the abrupt nature of the County's Restaurant Closure Order, the harm that restaurant outdoor dining closure will cause, and the risk of layoffs and permanent restaurant closure from an outdoor dining ban. *See* Shams Decl., ¶¶ 9, 11. Many restaurant owners feel the Restaurant Closure Order is unreasonable because the risk of COVID transmission from outdoor dining is greatly outweighed by the devastating economic consequences. *Id.*

c. Expert Declarations[6]

(i) Barke

Jeff Barke, M.D. (“Barke”), is a primary care physician based in Orange County, California who has treated numerous COVID patients on a near-daily basis since the start of the outbreak. Barke Decl., ¶4.

Barke opines that there is no rational and legitimate basis to support the breadth and scope of the Department's shutdown of outdoor dining. Barke Decl., ¶7. Since the beginning of the pandemic, one of the consistent findings of studies of COVID transmission has been that the risk of transmission in outdoor settings is low, and the risk becomes negligible when combined with the use of commonly-accepted COVID precautionary measures such as symptom checks, spacing, and the appropriate use of personal protective equipment by servers according to CDC guidelines. Barke Decl., ¶7.

An academic study published on April 7, 2020 by professors and scientists from Southeast University, the University of Hong Kong, and Tsinghua University (“China Study”) extracted case reports from the local municipal health commissions of 320 prefectural (a district governed by a prefect) cities in China, identified all outbreaks of COVID (defined as three or more individual cases), reviewed the major characteristics of the enclosed spaces in which the outbreaks were reported and their associated indoor environmental issues, and found that only one of the 318 identified outbreaks – amounting to only two infected persons – implicated an outdoor environment. Barke Decl., ¶8, Ex. A.

Another academic study published on April 16, 2020 by professors and scientists from the Japanese Ministry of Health, Labour and Welfare, Hokkaido University, the Tohoku University Graduate School of Medicine, and the Japanese National Institute of Public Health and National Institute of Infectious Diseases (“Japan Study”), examined clusters of COVID in Tokyo, Aichi, Fukuoka, Hokkaido, Shikawa, Kanagawa and Wakayama prefectures in Japan, finding that closed – not open – environments contribute to the secondary

transmission of COVID. Barke Decl., ¶9, Ex. B. The Japan Study also found that an infected person transmitted COVID in a closed environment at a rate 18.7 times greater than an open-air environment. Id. On the basis of these findings, the Japan Study concluded that a reduction of unnecessary close contact in closed environments may help prevent large case clusters and so-called “superspreading” events relating to COVID. Barke Decl., ¶9, Ex. B.

An article from the Mayo Clinic describes a general medical consensus regarding safe outdoor activities during the COVID pandemic. Barke Decl., ¶10, Ex. C. According to the Mayo Clinic article, COVID is primarily spread from person-to-person by those within six feet of each other. Ex. C. In some situations, especially in enclosed spaces with poor ventilation, COVID can spread when a person is exposed to small droplets or aerosols that stay in the air for minutes to hours. Id. When the weather is appropriate, outside patio dining can be a good outdoor option. Id. Outdoor patio dining at uncrowded restaurants where patio tables are spaced appropriately is safer than indoor dining. Id. The article advises persons to wear a mask when not eating or drinking, in other areas of the restaurant, keep a distance of at least six feet (two meters), avoid self-service food and drink options, and remember to wash their hands when they enter and leave. Id.

These studies comport with Barke’s observations in practice. Barke has not treated a single COVID who contracted it in an outdoor dining setting. Barke Decl., ¶11. The risk of COVID infection and transmission is much lower when eating in an outdoor setting, just as it is safe and permitted to travel for hours across the country in a crowded and enclosed aircraft. Id.

(ii) Bhattacharya

Jayanta Bhattacharya, M.D. (“Bhattacharya”) is a Professor of Medicine and infectious disease specialist at Stanford University with a primary research area in health economics, including a focus on epidemiology and infectious disease epidemiology. Bhattacharya Decl., ¶¶ 2, 4. Bhattacharya opines that the blanket countywide prohibition on outdoor dining in the County does not comport with, and is inconsistent with, good public health practice applicable to COVID. Bhattacharya Decl., ¶2.

Bhattacharya conducted a study that found that 4.3% of County adults showed specific antibody evidence of prior or current COVID infection by April 10-11, 2020. Bhattacharya Decl., ¶6. This prevalence rate represents a multiple 43.5 times the number of cases confirmed by the County’s public health authority by that same date. Bhattacharya Decl., ¶6. One important implication of this paper is that, on the date of the survey, the COVID infection fatality rate (the probability of dying from a COVID infection) in the County was at least an order of magnitude lower than the “case fatality rate”, which consists only of patients who have been infected with COVID and identified as a “case”. Id. A case most typically is a patient with severe symptoms who has come to the attention of medical authorities. Id.

In May 2020, Bhattacharya testified at a virtual roundtable organized by United States Senator Pat Toomey on the subject of the potential reopening of youth baseball leagues while protecting the safety of participants. Bhattacharya Decl., ¶12. At this roundtable, he reviewed the evidence regarding the relatively low mortality and morbidity risk that COVID infection poses to children and adolescents and discussed social distancing and other protocols to make youth baseball safer for coaches, umpires, and other adult participants. Id.

In October 2020, Bhattacharya, Harvard Professor Dr. Martin Kulldorff, and Oxford Professor Dr. Sunetra Gupta, wrote a declaration (the “Great Barrington Declaration”) which discussed an alternative to the current COVID strategies in jurisdictions across the United States. Bhattacharya Decl., ¶15. The Great Barrington Declaration offers an alternative approach called focused protection. Bhattacharya Decl., ¶16. According to focused protection, the most compassionate approach to the COVID pandemic balances the risks and benefits of reaching herd immunity by allowing those who are at minimal risk of death to live their lives normally to build up immunity to the virus through natural infection, while better protecting those who are at highest risk. Id. The Great Barrington Declaration was published with approximately 30 co-signers in early October 2020.

Bhattacharya Decl., ¶17. Since then, it has been co-signed by more than 10,000 medical and public health scientists and 30,000 medical practitioners. Id.

Pursuant to the CDC’s “Considerations for Restaurant and Bar Operators,” updated November 18th, 2020, outdoor dining may occur with relative safety at restaurants if precautionary measures are observed, including but not limited to, social distancing and mask wearing by servers and by patrons (when not eating).

Bhattacharya Decl., ¶20. The CDC includes outdoor dining in the second lowest tier of risk, and notes that even this risk can be mitigated by reasonable accommodations such as spacing tables appropriately, encouraging mask wearing by servers, frequent sanitizing of surfaces, and other actions that are well within the capability of County restaurants. Id. The Restaurant Closure Order is inconsistent with this guidance. Id.

Bhattacharya’s medical opinion is that restaurants in the County can safely permit outdoor dining by following the CDC guidelines. Bhattacharya Decl., ¶20. Bhattacharya has read many of the contact tracing studies in the scientific literature that document the most common sources of spread of COVID infection and he is aware of no evidence suggesting that outdoor dining is more likely to spread the COVID virus than the activities – including private gatherings – that remain permissible. In fact, spread through permitted activities will be more likely if the Restaurant Closure Order remains in effect. Bhattacharya Decl., ¶22.

The County guidelines prohibiting outdoor dining are substantively stricter than is required by the state. Bhattacharya Decl., ¶23. The state’s Blueprint builds considerable lags into the measurement of the epidemiological metrics (a seven-day lag and a seven-day smoothing requirement) and requires that a county must stay in the same tier for at least 21 days before it is permitted to move to a less restrictive tier even if it meets the criteria of the less restrictive tier. Bhattacharya Decl., ¶26. By prohibiting outdoor on-premises dining and doing so throughout the county, the Department is imposing stricter requirements than those required by the state. Bhattacharya Decl., ¶28.

The County has done so without a scientific justification for imposing such stricter requirements on these activities. Id. The Department’s available data does not contain any epidemiological or other model that shows prohibiting outdoor dining on a countywide basis in a county the size of the County has any relationship to avoiding circumstances that challenge the healthcare delivery system’s ability to deal with a surge with space, supplies, and staff as required by the Blueprint, does not compare hospitalization forecasts against hospital capacity in light of prohibitions on outdoor dining, does not account for the possibility of transfers of patients across counties, and does not account for the possibility of building and staffing field hospitals in overstretched areas. Bhattacharya Decl., ¶28.

The Department also has provided no indication that it has estimated or otherwise taken into account any of the economic, social, and public health costs of restricting outdoor dining. Bhattacharya Decl., ¶29. Basic standards of public health policy design require a comparison of both costs and benefits of a policy to justify it from a scientific and ethical point of view. Id. A scientifically justified policy must explicitly account for these costs – including an explicitly articulated economic analysis – in setting, imposing, and removing criteria for business restrictions such as the blanket prohibition on outdoor dining. Id.

The County’s positivity rate data is scientifically unjustified. Bhattacharya Decl., ¶30. Both the number of new daily cases and the percent positivity criteria require analysis of results from the reverse transcriptase - polymerase chain reaction (“RT-PCR”) test for the COVID virus utilized by the County. Id. The available scientific information regarding the accuracy of COVID PCR tests, as conducted by clinical laboratories in California, suggests that they are not sufficiently accurate regarding infectivity risk to warrant the central role they play in the criteria the County has adopted for restricting activity. Id.

There are two major problems that render these criteria scientifically unjustified. Id. Both criteria used by the County -- the new daily cases number and the positivity number -- are premised on a measurement that includes many people who are identified as COVID positive but who pose little or no community transmission risk. Bhattacharya Decl., ¶35.

First, neither new daily cases number nor the positivity number represent random samples of the California population, but rather results from selected populations who have chosen to obtain testing. Bhattacharya Decl., ¶31. Without population representative sampling for testing, the number does not reflect the risk of transmission and thus is scientifically unjustified as a criterion for imposing restrictions on normal activities. Id.

Second, the criteria do not account for the fact that the RT-PCR tests, as used in most laboratories around the U.S., likely register positive test results even for non-infectious viral fragments. Bhattacharya Decl., ¶32. Although a positive test result indicates that a person has come into contact with the COVID genomic sequence or some other viral antigen at some point, the mere presence of the viral genome is not sufficient by itself to indicate infectivity. Id. A binary “yes or no” approach to the RT-PCR test will result in false positives, segregating large numbers of people who are no longer infectious and not a threat. Bhattacharya Decl., ¶35.

The mortality rates used by the County as a justification for the ban on outdoor dining similarly lack a rational medical and scientific basis. The best evidence on the COVID infection fatality rate (the fraction of infected people who die from the infection) comes from seroprevalence studies. Bhattacharya Decl., ¶36. Seroprevalence studies provide better evidence of the total number of people who have been infected than do case reports or a positive RT-PCR test, which both miss infected people who either are not identified by the public health authorities or do not volunteer for RT-PCR testing. Id. Because the County’s mortality rates ignore unreported cases in the denominator, its fatality rate estimates based on case reports and positive test counts are substantially biased upwards. Id.

According to a meta-analysis by Dr. John Ioannidis of every seroprevalence study conducted with a supporting scientific paper (74 estimates from 61 studies and 51 different localities around the world), the median infection survival rate from a COVID infection is 99.77%. Bhattacharya Decl., ¶37. For COVID patients under 70, the meta-analysis finds an infection survival rate of 99.95%. Id. A newly released meta-analysis by analysts independent of Dr. Ioannidis’ group, reaches qualitatively similar conclusions. Id.

In September 2020, the CDC updated its current best estimate of the infection fatality ratio—the ratio of deaths to the total number of people infected—for various age groups. Bhattacharya Decl., ¶39. The CDC estimates that the infection fatality rate for people ages 0-19 years is .00003, meaning infected children have a 99.997% infection survivability rate. Id. The CDC’s best estimate of the infection fatality rate for people ages 20-49 years is .0002, meaning that young adults have a 99.98% survivability rate. Id. The CDC’s best estimate of the infection fatality rate for people age 50-69 years is .005, meaning middle-aged persons have a 99.5% survivability rate. Id. The CDC’s best estimate of the infection fatality rate for elderly people aged 70+ years is .054, meaning seniors have a 94.6% survivability rate. Id.

The CDC’s current best fatality rate estimates for COVID patients who are symptomatic among patients less than 50 years old is 0.05% (5 in 10,000), 0.2% for patients between ages 50 and 64, and 1.3% for patients 65 and above. Bhattacharya Decl., ¶40. The infection fatality rates are lower than these numbers since only a fraction of patients is symptomatic. Id.

A study of the seroprevalence of COVID in Geneva, Switzerland provides a detailed age break down of the infection survival rate in a preprint companion paper: 99.9984% for patients 5 to 9 years old; 99.99968% for patients 10 to 19 years old; 99.991% for patients 20 to 49 years old; 99.86% for patients 50 to 64 years old; and 94.6% for patients above 65. Bhattacharya Decl., ¶41.

In all of California through August 2020, there have been only two deaths among COVID patients below age 18. Id. 74.2% of all COVID-related deaths occurred in patients 65 and older. Id.

The scientific evidence shows that, for non-elderly outdoor diners, the mortality risk from contracting the disease is very low. Bhattacharya Decl., ¶43. The infection survival rate is more than 99.8% for this population. Id. Even this number overestimates the risk of outdoor dining, since the probability of contracting the disease during an outdoor meal is much less than one, though difficult to estimate with

available public health information. Id. For elderly congregants (age 70+), the mortality risk conditional on contracting the disease is higher, but still small, with 98.7% of infected elderly people surviving the infection, according to the infection fatality rate from the Santa Clara study. Id. These risks are commensurate with other risks that many people are prepared to take in their lives. Id. The risks are lower, in fact negligible, if precautions of wearing masks, social distancing, spacing and hand washing are followed. Bhattacharya Decl., ¶44.

The risks of COVID transmission should be considered against the substantial evidence that social eating provides significant and tangible psychological and physiological benefits for diners that are lost through the imposition of such scientifically and epidemiologically unjustified blanket and untargeted bans. Bhattacharya Decl., ¶45. A comprehensive survey of 17,612 men and 19,581 women over the age of 65 found that eating alone has been linked to a higher incidence of depression among adults, particularly those who live alone. Id. Eliminating the possibility of all outdoor dining, no matter the precautions taken, reduces or eliminates these important benefits. Id.

Public health recommendations regarding behavior by private actors (such as the decision to protest) should weigh the benefits of that behavior against the public health costs. Bhattacharya Decl., ¶50. If the benefits of the undertaking are important enough relative to the public health risks and care is taken to minimize those risks by adhering to the extent possible to safe practice guidelines promulgated by public health authorities, then the activity should receive approval by public health experts. Id.

(iii) Lyons-Weiler

Dr. James Lyons-Weiler (“Lyons-Weiler”) is a scientific researcher with a background in public health policy and statistical research. Weiler Decl., ¶1. He opines that the risk of COVID transmission in outdoor dining is minimal because of the outdoor setting, with breeze, humidity, and sunlight. Weiler Decl., ¶2.

As of November 27, 2020, 364,261 cases, including presumed cases as well as laboratory-confirmed cases, have been detected in the County, with 7,174 deaths attributed to COVID infection. Weiler Decl., ¶8. Transmission is understood to occur in enclosed spaces with poor ventilation. Id.

In the County, the overall infection case fatality rate is 0.0196 (7,174/364,261). Weiler Decl., ¶9. In the week of November 29, 2020, 37 new deaths and 5087 new cases have been reported, implying a much lower current infection case fatality rate (0.007). Id.

A person who tests positive for the presence of the virus may not be contagious. Weiler Decl., ¶18. That depends on viremia (viral load), which is supposed to be reflected in the PCR curve. Id. All of the available empirical estimates support a minimum false positive rate of 0.48, meaning that 45-48% of cases of COVID have nearly a zero risk of transmission. Weiler Decl., ¶19. Concern over person-to-person transmission from people who test positive (and are thus given a presumptive diagnosis of COVID) must be adjusted downward by at least 50%. Id. It is possible that most of the asymptomatic cases being reported are false positives. Id.

Dr. Bonnie Henry, B.C. Provincial Health Officer, reported to CBC Vancouver that the risk of becoming infected by walking through a cloud of droplets from someone who has sneezed outside while walking by is “negligible.” Weiler Decl., ¶20. These principles have been applied to the study of the outdoor transmission as of COVID. Id.

The China Study found for 318 outbreaks that only 1 of 7,324 cases was assumed to be due to outdoor transmission. Id. The Japan Study tested 110 COVID individuals and used contact-tracing to follow-up on secondary cases. Weiler Decl., ¶23. The data indicated that people are much more likely to catch COVID indoors; the authors estimated that a primary case was 18.7 times more likely to transmit the disease in a closed environment than in the open air. Id. The environments considered included exercise gyms, a restaurant boat, and eating spaces in tents with minimum ventilation. Id.

The CDC reports that there are 24,292 restaurants in the County. Weiler Decl., ¶24. When the seating capacity is limited to 60 patrons for all 24,000 County restaurants, about two to 450 new COVID cases every 30 days would be expected. Weiler Decl., ¶30. COVID has a >99.9% survival rate, and it would be reasonable to conclude that about 4.5 deaths might occur (worst case scenario). Id.

Scientists recognize that all forms of human death should be avoided if possible. Weiler Decl., ¶31. Nevertheless, all forms of human activity, including eating at restaurants, carry some risk. Weiler Decl., ¶33. The risks associated with COVID from outdoor dining are far smaller than the risks of choking or food poisoning. Id. While on average, there is about one death from COVID for every 124 days of outdoor restaurant operation -- assuming that every restaurant in the County is operating at full capacity with 40 outdoor seats -- about 250 people die each year in the County from either choking or food poisoning. Id. Given the information available on outdoor transmission, the risk is “lower than a convenience store”. Weiler Decl., ¶33.

(iv) Allen

Hubert A. Allen, Jr. (“Allen”) has a Masters of Science Degree in Biostatistics from Johns Hopkins University, Bloomberg School of Public Health and 35 years as a statistician and in public health. Allen Decl., ¶2. He acknowledges that COVID rages in November 2020 with daily records of cases, hospitalizations, and deaths. Allen Decl., ¶3. The question is what are the effective methods of controlling community spread of COVID? Id.

Allen opines that the County has no basis to close outdoor dining because the Department has provided no supporting evidence and/or scientific studies, data, or evidence that the operating of outdoor dining establishments poses an unreasonable risk to public health. Allen Decl., ¶5. The Department’s own data provide no support for the planned shutdown of outdoor restaurant operations. Allen Decl., ¶6. The data tracks all non-residential settings at which three or more laboratory-confirmed COVID cases have been identified. Id. Of the 204 locations identified on this list, fewer than 7% are restaurants. Id. Based on the case data for October-November, it is clear that the County’s increased cases are not due to the restaurant sector as restaurants only making up 3.10% of new infections during that period. Allen Decl., ¶7. Allen’s independent analyses show little risk of COVID spread in restaurants, and no evidence that outdoor dining is the problem. Allen Decl., ¶8.

Allen opines that the state’s California Risk Tier System and trigger definitions are too simple and too blunt as deliberating instruments. Allen Decl., ¶11. There was no effort to conduct a comprehensive risk-benefit analysis, which means looking not only at two metrics but also the economic consequences of a move to greater constriction of the economy and whether the constricting actions are targeting the greatest risk businesses and activities based on business sector data and statistics in the specific country. Id.

(v) Kaufman

Sean G. Kaufman (“Kaufman”) is a certified public health professional, behaviorist, health education and infectious disease specialist with over 25 years of expertise in both behavioral-based training and infectious disease risk mitigation in clinical, laboratory and other public health settings. Kaufman Decl., ¶1. He worked for the CDC from 1999 through 2006. Kaufman Decl., ¶5. He opines that the risk of COVID transmission in an outside environment is extremely low due to the wind, dryness, sunlight, and the mere dilution of quantities needed for an exposure to cause illness and no scientific evidence exists which would warrant wide-spread closures of outside dining. Kaufman Decl., ¶2.

Contrary to Davis’s statement that a CDC study is the “best data” in support of the Restaurant Closure Order, the CDC study is not specific to restaurants and does not support the conclusion that outdoor dining should be

banned. Kaufman Decl., ¶¶ 16-17. The study showed that a subset of COVID patients reported that they had recently dined at restaurants more than the general population. Id. The CDC study does not make any distinction between indoor and outdoor dining, even though all available evidence on the transmission of any airborne illness suggests that this is a key factor. Kaufman Decl., ¶17.

There is no scientific evidence that County public officials have cited that demonstrates that there is a measurable risk of transmission of COVID in an outdoor dining situation when the appropriate safety measures are implemented. Kaufman Decl., ¶19. With the precautions already implemented by most restaurants in the County prior to the Restaurant Closure Order -- socially distanced outdoor dining, masks, and temperature checks -- the transmission of the virus from one person to another is highly unlikely. Id. The Department's data only attributed 3.1% of County COVID cases to restaurants. Id.

The CDC has determined that masks can help prevent people infected with COVID from spreading the virus. Kaufman Decl., ¶25. Restaurants that subscribe to adequate precautions, such as outdoor air ventilation, temperature checks, requiring restaurant employees to wear masks and gloves, and social distancing, can safely and effectively prevent the spread of the virus. Id. A restaurant that offers outdoor dining is reducing disease transmission drastically. Id.

There is no rational and legitimate scientific or public health basis supporting the ban on outdoor dining in restaurants. Kaufman Decl., ¶21. In making public health decisions, it is important for health officials to weigh the overall risk of the given disease to the overall benefits of the imposed public health policy. Kaufman Decl., ¶22. The likelihood of symptomatic and pre-symptomatic transmission, reproduction rates, signs, symptoms, mortality, risks and other infectious disease characteristics of COVID in both child and adult populations both domestically and internationally does not rationally support the County's order. Id.

There is now a widespread scientific consensus that COVID does not affect all people equally. Kaufman Decl., ¶26. Over 41% of the COVID deaths in the United States have occurred in nursing homes. Id. And 94% of all deaths associated with the COVID condition involved victims with pre-existing underlying medical conditions—such as diabetes or heart disease. Id. It is now understood that most of the severe cases of the disease occur in individuals over the age of 65. Id.

The recent countywide ban on all indoor and outdoor dining in restaurants is counter to the purpose and mission of public health. Kaufman Decl., ¶27. Realistically, asymptomatic transmission of COVID is fairly low. Id. Logically, it is unlikely that a symptomatic person would choose to dine out at a restaurant, just as someone with flu symptoms is unlikely to opt for a restaurant dining experience versus staying home. Id.

The sweeping nature of the Department's order shows that it is not rationally targeted as an infectious disease control mechanism. Kaufman Decl., ¶29. There is no public health reason that a restaurant in an unaffected portion of a California county must be prohibited from operating outdoor dining because of an outbreak in an affected portion of a California county. Id.

2. The Department's *Ex Parte* Evidence[7].

a. Jeffrey D. Gunzenhauser

Jeffrey D. Gunzenhauser, M.D. ("Gunzenhauser") is the County's Chief Medical Officer/Medical Director. Gunzenhauser Decl., ¶1. While older adults and those with underlying medical conditions are at higher risk of severe illness and death from COVID, the virus can cause severe illness and death in individuals of any age. Gunzenhauser Decl., ¶9. Unusual blood clotting has also been observed in COVID patients, which can lead to pulmonary embolism, deep vein thrombosis, or stroke. COVID-related clotting often does not respond to standard treatment, such as blood-thinners. Id.

Emerging evidence suggests that some who recover from COVID experience serious effects that linger long after clearing the viral infection. Gunzenhauser Decl., ¶10. Some of these long-term effects may be attributable to organ damage caused by the COVID infection. Id. Scans and tests of some patients who recovered from COVID have shown damage to heart muscle and scarring in the lungs. Id. Some of this damage is believed to be the result of COVID-related blood clotting, including clots that weaken blood vessels and very small clots that block capillaries. Id.

The effectiveness of treatment remains limited, and a widely available vaccine is still months away. Gunzenhauser Decl., ¶11. Additionally, despite improved treatment, the proportion of COVID patients requiring hospitalization has remained elevated above 10% throughout the pandemic and averaging about 10% in the most recent four months, with approximately one quarter to one third of hospitalized patients in the ICU, and approximately one half of those ICU patients requiring ventilators. Id.

There is consensus among epidemiologists that the most common mode of transmission of COVID is from person-to-person through respiratory droplets that are expelled when a person coughs, sneezes, or projects their voice. Gunzenhauser Decl., ¶13. There is no scientifically agreed-upon safe distance, but it is widely accepted that standing or sitting near an infectious person is riskier than being farther away. Id.

Not every exposure to the COVID virus will lead to infection. Gunzenhauser Decl., ¶15. Infection occurs when a person receives a dose of the virus large enough to overcome the body's defenses, which may vary from person to person. Id. Measures to control the spread of COVID should therefore include efforts to limit interactions in conditions that support exposure to higher viral doses. Id. Conditions that pose a particularly high risk are present in gatherings. Id. It is widely accepted that a gathering of any size increases the risk of community transmission. Id. Risk increases with the size of the gathering because the more people who gather, the likelier it is that one or more infected persons will be present. Id. In turn, the number of people who are potentially exposed to the virus increases with the size of the gathering. Id.

The risk of transmission further increases when individuals are in close proximity for an extended period of time. Gunzenhauser Decl., ¶16. Risk is also increased when individuals are not wearing face coverings. Id. Close proximity to an unmasked infected person for a prolonged period of time presents an especially high risk of receiving a viral dose sufficient to cause COVID infection. Id.

Many cases of COVID are the result of secondary spread wherein an individual who did not attend a particular event contracts the virus as a result of an outbreak triggered by that event. Gunzenhauser Decl., ¶27.

Evidence indicates that gatherings of individuals from different households facilitate the spread of COVID. Gunzenhauser Decl., ¶26. While large gatherings present the greatest risk, any gathering of individuals poses a risk of transmission. Id. There is widespread consensus among public health experts that restrictions on gatherings are a necessary and effective tool for preventing the spread of COVID. Id. Principles of infection control have shown that systematic administrative control measures such as the prohibition of gatherings are more effective than measures dependent on widespread individual compliance as the latter are difficult to enforce and sustain and will fail in protecting the public's health even if a small proportion is non-compliant. Id. Excluding symptomatic individuals from gatherings is an inadequate strategy because a substantial proportion of transmission, and perhaps even the majority, involves spread of the virus from persons who are pre-symptomatic or asymptomatic carriers of the virus. Id.

The County's experience bears out the effectiveness of systematic responses such as prohibitions on gatherings. Gunzenhauser Decl., ¶29. While the initial March 2020 state and County stay-at-home orders were in effect, the rate of COVID transmission dropped significantly. Id. When COVID spreads, it is believed that the average infected person goes on to infect two to four other people. Id. This is sometimes referred to as the "R number." When the stay-at-home orders were in effect, the County's R number dropped to less than one, indicating that on average each infected person would infect less than one other individual, leading to a reduction in the number of new daily cases. Id. Once the orders were lifted, the R number began

increasing again. Id. As of November 23, 2020, the R number for the County was 1.27, meaning the daily number of new COVID cases is expected to increase over time. Id.

The County's experience demonstrates the risk in relying on widespread individualized compliance alone to control the spread of COVID. Gunzenhauser Decl., ¶30. During one weekend in June, Department inspectors found that 49% of bars and 33% of restaurants were not adhering to physical distancing protocols and that 54% of bars and 44% of restaurants were not enforcing mask requirements. Id. In September, the County reported that 20% of restaurants inspected were violating COVID protocols. Id.

A key part of any public health department's response to outbreaks involves field investigations. The level of evidence required in a field investigation is not the same as that required in a clinical trial. Gunzenhauser Decl., ¶32. In a field investigation, the purpose is to determine what steps can be taken to stop or slow the spread of an infectious disease. Id. The purpose of public health decisions based on field investigations is to take actions in a timely manner that will prevent or curtail the spread of the virus or other disease-causing agent. Id. Often, officials will have to make decisions quickly and when information is limited, especially in comparison to other medical studies such as full-blown, clinical trials when the urgency of the situation is not so severe. Id.

The accepted approach to outbreak response is systemic and multi-pronged. The purpose of "reopening" sectors is to create spaces where people can resume normal activities without triggering uncontrolled spread of the virus. Gunzenhauser Decl., ¶34.

From November 1, 2020 to November 22, 2020, the County's seven-day average of new daily cases more than doubled from 1,216 per day to 3,099 per day. Gunzenhauser Decl., ¶36. On November 23, 2020, the County reported 6,124 new cases for that day alone, which is the most since the onset of the pandemic. Id. Between November 13 and November 27, hospitalizations of confirmed COVID patients increased by 101%. Id. This indicates widespread and uncontrolled community transmission of the virus. Id. Currently, approximately one in 145 County residents is infectious to others. During the week of November 16, that number was one in 250. Id.

The number of new cases and hospitalizations is expected to rapidly increase over the next 21 days which, without rapid public health interventions, will lead to a major increase in the number of persons with severe illness and the number of deaths and will stress the healthcare system and healthcare workers. Gunzenhauser Decl., ¶37. This stress will limit the availability of ICU beds for patients who may need them, including patients hospitalized for conditions other than COVID. Gunzenhauser Decl., ¶37.

On November 21, 2020, the County reported 4,522 new confirmed cases and 1,391 people hospitalized, 26% of whom were in the ICU. On November 22, 2020, the County reported that the five-day average of new cases surpassed 4,000 daily cases—the threshold for suspending in-person dining. Gunzenhauser Decl., ¶40.

On November 23, the County reported the highest number of COVID cases in a single day, at 6,124. Gunzenhauser Decl., ¶41. This brought the total number of known COVID cases in the County to 370,636, with 7,446 deaths. Id. As of November 29, 2,049 COVID patients were hospitalized in the County, with 24% in the ICU. Id. The day before, 1,951 patients were hospitalized, with 25% in the ICU. Id.

When community spread of the virus increases, the number of known and suspected COVID patients occupying both ICU and non-ICU beds increases as well. Gunzenhauser Decl., ¶43. On most days in June, there were fewer than 1,500 confirmed COVID cases in the County's hospital beds. Id. For ICU beds, that number rarely exceeded 500. Id. Because hospitalizations tend to lag behind by two to three weeks, those numbers did not yet fully reflect the increase in community spread that followed the County's reopening measures that began in May. Id. During the July surge, the number of confirmed COVID patients exceeded 1,500 every day, and often approached 2,000. Id. For the ICU, those numbers never dropped below 500 and at times approached 700. Id. On November 1, 2020, known and suspected COVID cases accounted for 721 non-ICU beds and 239 ICU beds. Id. By the day before Thanksgiving, those numbers had risen to 1,431 and 475, respectively. Id. From October 27 to November 27, 2020, COVID hospitalizations jumped from 747 to

1,893. Id. The current surge is accelerating much more rapidly than the July surge. New cases and hospitalizations in the current surge are increasing at double the rate seen in July. Id.

Data shows that infections among younger people are a significant contributing factor to the surge. The CDC found that the median age of confirmed COVID cases decreased from 46 years in May to 38 years in August. Gunzenhauser Decl., ¶44. That same study found that people in their twenties accounted for the largest proportion of cases (more than 20%) out of any age group. Id. Younger adults make up a significant proportion of workers in front-line occupations such as retail stores and highly exposed industries such as restaurants and bars, where they have more contact with members of the public. Id.

Increased hospitalizations due to COVID, including ICU admissions, risk overwhelming the County's hospital capacity. Gunzenhauser Decl., ¶45. A secondary effect of the COVID pandemic is that some individuals delay seeking treatment for other conditions for fear of being exposed to COVID at healthcare facilities. Gunzenhauser Decl., ¶46. More people in the United States have died in 2020 than in an ordinary year, but not all of these excess deaths are attributable to COVID. Id.

Based on public health observations of the effects of the virus during this pandemic, hospitalizations typically increase two to three weeks after a spike in cases, and deaths increase thereafter. Gunzenhauser Decl., ¶49. Therefore, while the County is currently experiencing a surge in hospitalizations, it expects the current high case counts to lead to an even higher hospitalization rate in the coming weeks, which is why the Department took proactive steps to combat the virus: ordering the temporary closure of in-person dining and issuing a new Safer-at-Home Order. Id.

There is general consensus that in-person eating and drinking at restaurants, breweries, and wineries are among the riskiest activities in terms of COVID transmission. Gunzenhauser Decl., ¶48. Studies have demonstrated that COVID is less likely to be transmitted in outdoor spaces than in indoor spaces, where respiratory droplets and aerosols can accumulate. Id. The risk of transmission is further reduced when outdoor diners are spaced away from each other, when restaurant staff wear face coverings and face shields, and when patrons only remove their face coverings to eat and drink. Id.

Studies show the role of masks in limiting the spread of COVID, and that situations where unmasked individuals from different households spend prolonged periods of time in proximity to one another present a higher risk of transmission than settings where one or more of these factors is absent. Gunzenhauser Decl., ¶51.

In-person dining and drinking are particularly high risk, and an effective response to the COVID pandemic must account for these risks. Gunzenhauser Decl., ¶52. By contrast, activities such as shopping in stores and working in offices present lower risk because they lack one or more of the risk factors associated with restaurant dining. Id. The County has identified 90 restaurant outbreaks, including 20 in the last four weeks. Id.

CRA cites figures from the Department's COVID webpage in claiming that the Department's data does not support the Restaurant Closure Order. Gunzenhauser Decl., ¶54. This data is dynamic, changes daily, and may not reflect real-time investigation counts for the settings listed. Gunzenhauser Decl., ¶55. Restaurants and other employers are required to notify the Department if three or more employees test positive for COVID in a 14-day period. Id. It can be difficult or impossible for these businesses to know if they have been visited by customers who tested positive in that same time span. Id.

While every business on the list identified three or more confirmed staff cases, the "Total Confirmed Non-Staff" column for the vast majority of businesses lists zero. This does not mean that there were no cases of COVID among non-staff (such as customers). Id. It simply means that the Department has not identified any laboratory-confirmed cases that can be linked to the outbreak. Id. Non-restaurant businesses will necessarily be over-represented in the data set on which CRA relies because other sectors have been reopened for longer, and some were never closed for in-person operations to begin with. Gunzenhauser Decl., ¶56. These

businesses, such as grocery stores and other essential businesses, will necessarily be over-represented in any location-based listing of outbreaks. Id.

There is wide consensus that risk reduction in a pandemic does not require definitive proof that a particular sector or activity is the cause of an increase in cases. Gunzenhauser Decl., ¶58. Best practices dictate that public health departments identify those sectors and activities that present a higher risk of transmission and take steps to mitigate those risks, especially during a surge in cases and hospitalizations. Id.

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b. Peter B. Imrey[8]

Peter B. Imrey (“Imrey”) is a biostatistician-epidemiologist. Imrey Decl., ¶1. The disciplines most central to understanding and combatting infectious diseases in populations outside a clinic or hospital are infectious disease epidemiology and public health disciplines such as health education and biostatistics. Imrey Decl., ¶13. Medical students and residents typically receive only a rudimentary orientation to epidemiology, biostatistics, and other public health disciplines. Imrey Decl., ¶13. Relatively long-term projections from infectious disease outbreak models are highly fallible. Imrey Decl., ¶21.

Bhattacharya’s studies seroprevalence survey-based claims of very low overall and age-specific COVID infection fatality rates, generally and specifically in California, remain matters on which there is no scientific consensus. Imrey Decl., ¶¶ 42, 43, 49, 50.

3. The Department’s OSC Evidence[9]

a. Davis

Respondent Davis is the County Health Officer and serves as the County’s medical expert regarding public health matters. He provides guidance and direction across the Department. Davis Decl., ¶¶ 2-3.

From November 1 to November 22, 2020, the County’s seven-day average of new daily cases more than doubled from 1,216 per day to 3,099 per day. Davis Decl., ¶7. Between November 13 and November 27, 2020, the number of hospitalized COVID patients increased by 101%. Id. As of December 3, 2020, there are 2,572 COVID patients hospitalized, 23% of whom are in the ICU. Id.

On November 23, 2020, the County reported its then-highest number of cases for a single day at 6,124. Davis Decl., ¶8. That record was broken on December 1, 2020 and again on December 3, 2020, when the County reported 7,854 new cases. Id. The average daily cases have increased by 225% since early November. Id. The County has also seen a jump in the daily death rate, which has increased by 92% since November 9, 2020. Id.

The majority of COVID hospitalized patients have been adults between the ages of 18 and 64. Davis Decl., ¶9. This is consistent with the high numbers of infections the County has seen in younger and middle-aged adults. Id. These numbers are consistent with the theory advanced by many experts that increased infections among young adults are driving the ongoing surge. Davis Decl., ¶10. This is believed to be due to young adults engaging in risky behaviors, including socializing with people outside of their household. Id. Although members of this younger and healthier cohort are less likely to die, they may still transmit and have transmitted the virus to older or other individuals at high risk for severe COVID illness. Davis Decl., ¶12.

The Department regrets that the preventative measures required to slow the spread of the ongoing pandemic have had an emotional and economic impact on businesses, families, and individuals and, at the same time, must implement measures to fulfill its day-to-day statutory responsibility for communicable

disease control, based on appropriate preventive measures for the communicable disease hazards in the community. Davis Decl., ¶14.

Because COVID spreads between persons in close contact via droplets and, under special circumstances, via airborne transmission produced through speaking, shouting/singing, breathing, coughing or sneezing, Davis issues orders that require persons and businesses to modify their behaviors so that human interactions can occur with less risk of transmission. Davis Decl., ¶15.

The County's restriction on outdoor dining is necessary because dining with others creates a circumstance where non-household members are gathering in close proximity without COVID infection control protections and typically for more than 15 minutes. Davis Decl., ¶18. Close proximity for more than 15 minutes are two of the three criteria for the definition of a close contact; the third is this occurring with a person who is knowingly or unknowingly infected with the COVID virus. Id.

The County recognizes that it has asked its businesses and more than ten million residents to make significant adjustments to fight this pandemic. Davis Decl., ¶19. Yet, in the considered opinions of the Department and its top communicable disease experts, these temporary adjustments and modifications are necessary to combat the ongoing surge in COVID cases and hospitalizations, and the resulting strain on the County's healthcare system. Id.

The rate at which a pathogen spreads in a community is determined by its reproductive number, sometimes referred to as the "R number" or simply "R." Davis Decl., ¶20. R describes the number of new cases directly generated by one case in a population—the number of other people a single infected person is expected to infect. Id. When R is below 1.0, the number of cases diminishes over time, and community spread eventually ends. Id. When R is greater than 1.0, community spread increases over time. Id. That increase is exponential, not linear. Id.

Most public health experts believe that employing health measures such as distancing, gathering restrictions, and masking is scientifically, morally, and ethically justified and necessary. Davis Decl., ¶25. A minority of the scientific community has advocated for a more hands-off approach to the pandemic, in which the government does not employ measures such as physical distancing or limits on gatherings, and instead would let the virus spread unimpeded among the general population while (purportedly) protecting the most vulnerable. Id. This approach—allowing the virus to proliferate among healthy individuals so that herd immunity is achieved through "natural infection"—has been advanced by Plaintiffs' expert Bhattacharya. Id. Bhattacharya's opinion is a minority opinion in the scientific community. The Department strongly disagrees with the hands-off approach advocated by Bhattacharya in the Great Barrington Declaration and believes it to be contrary to accepted public health practice, public health ethical standards, and the public interest. Id.

A herd immunity approach similar to the one Bhattacharya advances was initially employed in Sweden with disastrous results. Sweden experienced a much higher rate of severe illness and death than neighboring countries, as well as a worse economic downturn and higher level of unemployment. Davis Decl., ¶27.

Most public health experts believe the hands-off approach would result in many more deaths and much more severe illness than would the approach followed by the County, the state, and most other jurisdictions. Davis Decl., ¶29. Most public health professionals would view any approach that would result in many preventable deaths to be unethical and would conclude that the overall societal costs of such an approach far outweigh any economic or other benefits. Id. The County's orders reflect these principles and are consistent with public health best practices. They provide for various sectors to reopen based upon their risk factors, while other sectors and activities are required to stay closed or reopen at reduced capacities. Davis Decl., ¶30.

Increased community spread leads to increasing numbers of infections, hospitalizations, and deaths. Davis Decl., ¶35. Community spread can be reduced by limiting activities that present a higher risk of exposure. Id. It is now well-established that gatherings of individuals from different households of any size presents a greater risk of COVID transmission, which increases with the size of the gathering. Id.

The purpose of the suspension of restaurant dining is to address the County's current emergency. Davis Decl., ¶31. Based on the data, the Department determined that the risks and harms of uncontrolled community spread, strain on the health care system, and excess preventable deaths outweighed the social and economic harm of a temporary suspension on in-person restaurant dining. Id.

Gunzenhauser, the Department's Communicable Disease Bureau director, identified a number of studies showing the role of masks in limiting the spread of COVID, and that situations where unmasked individuals from different households spend extended periods in close proximity to one another present a higher risk of transmission than settings where one or more of these factors is absent. Davis Decl., ¶33. *See* Gunzenhauser Decl. ¶¶ 51-52. Residents are instructed to wear masks even when outdoors because it is undisputed that COVID transmission can occur and has occurred in outdoor settings. Davis Decl., ¶34. While the risk of transmission is lower outdoors, it is still present. Id. This is why face coverings are recommended whenever individuals from different households are in proximity to one another, regardless of whether it is indoors or outdoors. Id.

A study on the effectiveness of physical distancing in controlling the spread of COVID shows that, in outdoor, well-ventilated spaces, such as an open patio at a restaurant, where unmasked persons have prolonged contact, present a moderate risk of transmission. Davis Decl., ¶37. Being outdoors reduces risk but does not eliminate it. Id. The risk of transmission outdoors is even more elevated at a restaurant where people are sitting close to each other for a prolonged period, not wearing, not distancing, eating and drinking and projecting their voices (and respiratory and aerosol droplets) toward each other. Id.

The benefits of being outdoors are reduced when a space is partially enclosed, such as is often the case on a restaurant patio. Davis Decl., ¶38. Even partial enclosures affect airflow and the extent to which virus-containing respiratory droplets and aerosols can accumulate. Id. The benefits of being outdoors are further diminished when people from different households gather for prolonged periods without wearing masks. Davis Decl., ¶39. The Department consulted with members of the County's restaurant industry in an attempt to avoid an outdoor dining closure. Id. The Department proposed that restaurants take steps to ensure that all persons seated at a table were from the same household. Id. The Department was informed that restaurants had no way of verifying that information for their diners. Id.

A September 2020 CDC report found that adults testing positive for COVID were twice as likely to have reported dining at a restaurant within the past two weeks than those who tested negative. Davis Decl., ¶42. *See* Gunzenhauser Decl., ¶50. The fact that the study did not distinguish between indoor and outdoor dining does not undermine its usefulness and validity in determining the County's responses to the recent surge in COVID cases. Davis Decl., ¶42. The study looked at dining in any area designated by the restaurant, including indoor, patio, and outdoor seating. Id.

Studies show that asymptomatic cases can have higher viral loads and be more infectious than symptomatic cases. Davis Decl., ¶43. Asymptomatic and pre-symptomatic spread of COVID are believed to be significant drivers of community spread, which was not understood earlier in the pandemic. Davis Decl., ¶44. "Viral load" refers to the quantity of virus in a given volume of fluid, such as saliva. A person with a high viral load expels more virus, exposing others to a higher dose of virus. Id. While intuitively one would expect an asymptomatic person to carry a lower viral load, and thus be less infectious, there is data suggesting that is not the case with COVID. Id. A study published on November 24, 2020 found that asymptomatic patients had a higher viral load than symptomatic ones, and that those who were severely ill had lower viral loads. Davis Decl., ¶45. Other studies have found little to no difference in the viral loads of asymptomatic and symptomatic patients. Id. This suggests that asymptomatic individuals as a category are at least as infectious as those with symptoms. Id.

The County has not conducted a clinical study on how outdoor dining affects the transmission rates of COVID. Davis Decl., ¶48. The County has limited time and resources to conduct clinical studies during a pandemic when it must act swiftly and proactively to halt the spread of the disease. Id. Clinical studies provide minimal value in deciding how to respond to an emergency like the COVID pandemic. Davis Decl., ¶49. Clinical studies have a higher evidentiary standard and take longer to complete whereas field

investigations are intended to identify those factors and behaviors that impose a higher risk of transmission, so that those factors can be quickly addressed. Id.

Davis made the decision to issue the Restaurant Closure Order based on the evidence that COVID spreads most easily when individuals from different households are in close proximity to one another for prolonged periods of time, without wearing masks. Davis Decl., ¶51. Restaurant dining was the only remaining setting where this was largely still permitted, and while dining outdoors is less risky than dining indoors, the nature of dining together at a restaurant still presents a substantial risk of viral transmission. Id.

Based on the current projections and reported data, COVID is projected to be one of the leading causes of death in the County in 2020. Davis Decl., ¶53. For the period between March 15 and November 14, 2020, there were 339,000 excess COVID deaths in the United States—18% above normal. Davis Decl., ¶54. COVID is currently the third leading cause of death in the United States, behind heart disease and cancer. Davis Decl., ¶55. As of December 3, 2020, the County had recorded 7,782 COVID deaths. Davis Decl., ¶56.

Beyond hospitalizations and mortality rates, emerging evidence suggests that some number of patients who recover from active COVID infection experience long-term effects. Davis Decl., ¶57. The full extent of the long-term health consequences after recovering from COVID is not yet known, but the evidence available is concerning. Id. Scans and tests of some people who recovered from COVID have shown damage to heart muscle and scarring in the lungs, which is believed to be the result of COVID-related blood clotting. Davis Decl., ¶58.

The Department hoped the County would not reach a 4,000 case per day average after the initial outbreak of the pandemic in March 2020. Davis Decl., ¶64. Hospitalizations trail new cases by two to three weeks, meaning that when cases go up, hospitalizations will increase a few weeks after that. Davis Decl., ¶65. While most people who contract the virus will not need to be hospitalized, the larger the number of infected people, the larger the number of people who will need hospital treatment. Id.

If the state's Regional Stay Home Order takes effect in the Southern California Region, this would mean that all restaurants in the County must be closed for in-person dining pursuant to state law, but could continue to service their customers through take-out, pick-up, or delivery. Davis Decl., ¶71. Based upon the current data being reported by the hospitals, counties, and California Department of Public Health, it is projected that the Southern California Region, of which the County is part, will cross this threshold within the next few days because ICU availability in the Southern California Region will be less than 15%. Davis Decl., ¶69.

b. Gausche-Hill

Marianne Gausche-Hill ("Hill") is the Medical Director for the County Department of Emergency Medical Services ("EMS") Agency and has served in that capacity since July 1, 2015. Hill Decl., ¶¶ 1, 5. The EMS Agency serves as the lead agency for emergency medical services system in the County and is responsible for coordinating all hospitals with emergency rooms in the County, both public and private. Hill Decl., ¶6.

There has been a recent surge in COVID cases and hospitalizations in the County. Hill Decl., ¶9. From November 1 to November 22, 2020, the County's seven-day average of new daily cases more than doubled from 1,216 per day to 3,099 per day. Hill Decl., ¶10. On November 23, 2020, the County reported 6,124 new cases for that day alone, which was the most since the onset of the pandemic at that time. Hill Decl., ¶11. About a week later, on December 1, 2020, the County reported a record-breaking 7,593 new cases. Id. That same day, 46 deaths were reported, up from the average of 30 deaths per day the prior week. Id. Hospitalizations have also seen a marked increase in the last month. Hill Decl., ¶12. Between November 13 and November 27, 2020, hospitalizations of confirmed COVID patients increased by 101%. Id.

On average, there are approximately 14,000 licensed non-intensive care unit ("non-ICU") beds and 2,500 licensed intensive care unit ("ICU") beds available in the County at 70 designated 911-receiving hospitals.

Hill Decl., ¶13. The number of beds can fluctuate from day-to-day depending on staff availability and other factors, including a mix of COVID and non-COVID patients and the need for cohorting (collecting in one place) COVID patients. Id.

Non-COVID patients occupy between 9,500 and 11,000 non-ICU beds on average, and between 1,000 and 1,500 ICU beds on average. Hill Decl., ¶14. The County tracks daily the number of COVID patients who are hospitalized. Hill Decl., ¶15. When the County started to reopen in the summer, there was a surge of COVID cases and hospitalizations. Hill Decl., ¶16. During the months of June and July, COVID positive patients and patients under investigation (“PUIs”) occupied as much as 15% of the County’s non-ICU capacity and as much as 30% of the County’s ICU capacity. Id.

The hospitalization rate began to decrease in August 2020 after the County re-implemented certain public health restrictions and the number of COVID hospitalizations decreased significantly. Hill Decl., ¶17.

Between August and October 2020, COVID patients and PUIs occupied as low as 6% of the County’s non-ICU capacity and as low as 14% of the County’s ICU capacity. Id.

Beginning in November 2020, the number of COVID cases and hospitalizations began to surge again. Hill Decl., ¶18. The percentage of non-ICU and ICU beds occupied by COVID patients has increased every week:

Percentage of Non-ICU Beds Occupied by COVID Patients

November 1-7: 6%

November 8-14: 7%

November 15-21: 9%

November 22-28: 12%

Percentage of ICU Beds Occupied by COVID Patients

November 1-7: 15%

November 8-14: 16%

November 15-21: 19%

November 22-28: 24%

(Hill Decl., ¶18).

On November 1, 2020, approximately 960 COVID patients were hospitalized in ICU and non-ICU beds. Hill Decl., ¶19. On November 28, 2020, approximately 2,000 COVID patients were hospitalized in ICU and non-ICU beds. Hill Decl., ¶20.

These numbers have continued to rise in the beginning of December. Hill Decl., ¶21. On December 1, 2020, 2,690 COVID patients were hospitalized as follows: 573 COVID positive patients and 42 PUIs occupied ICU beds, a total of 615. Id. That means approximately 25% of the County’s ICU beds were occupied by COVID patients. Id. Additionally, 1,858 COVID positive patients and 217 PUIs occupied non-ICU beds, a total of

2,075. Id. That means approximately 15% of the County's non-ICU beds were occupied by COVID patients. Id.

The number of COVID patients hospitalized in the County has nearly tripled. Hill Decl., ¶22. The strain on the healthcare system caused by COVID hospitalization is particularly concerning for ICU beds. ICU beds are generally reserved for the sickest of patients (acutely ill patients) and are staffed by specially trained medical professionals. Hill Decl., ¶23. As a result of the recent surge, the number of available ICU beds in the County has significantly decreased. In mid-October, there were 149 available ICU beds. Hill Decl., ¶24. The County's ICU bed availability in the month of November has decreased to less than 5% of total capacity, with 4.44% available from November 22-28. Hill Decl., ¶25.

The numbers and the trajectory show a fast-moving and substantial upward trend of COVID hospitalizations. Hill Decl., ¶26. In one week, the number of COVID hospitalizations has increased by greater than 40%. Id. The surge in hospitalizations will further stress the County's healthcare system, which can manifest itself in many ways. Hill Decl., ¶28. Hospitals will have to change what they do day-to-day to meet the needs of their patients. Id. For example, an emergency room may have to be re-purposed to treat ICU patients, which will impact the number of day-to-day medical emergencies that can be treated. Id. The healthcare workforce will also be taxed heavily because staffing and related costs will significantly increase. Id. Medical workers also have to comply with very restrictive precautions, such as the use of personal protective equipment, to treat COVID patients. Id.

The County's projections concerning the demand for non-ICU hospital beds shows that demand could exceed the County's available beds before the end of the year and within a couple of weeks. Hill Decl., ¶¶ 31-32. Typically, when a shortage occurs, the availability of ICU beds diminishes first because there are fewer alternatives where ICU-patients can be treated effectively. Hill Decl., ¶33.

On December 3, 2020, the state announced its Regional Stay at Home Order ("Regional Order"). Hill Decl., ¶34. For the purposes of the Regional Order, the Southern California Region includes Imperial, Inyo, Los Angeles, Mono, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura counties. Hill Decl., ¶35. The Southern California Region was at 82% ICU capacity as of December 3, 2020, meaning 18% ICU availability. Hill Decl., ¶36. If the surge continues unchanged, it is projected that the Southern California Region, of which the County is a part, will cross this threshold and have less than 15% ICU availability by the end of this week. Id.

c. Reingold[10]

Arthur I. Reingold ("Reingold") is the Division Head of Epidemiology and Biostatistics at the University of California, Berkeley, School of Public Health and has previously worked at the CDC on the prevention and control of infectious diseases. Reingold Decl., ¶1.

The rise in cases nationwide is not just a reflection of increased testing. Reingold Decl., ¶9. If the rate of COVID were stable or decreasing, increased testing would produce a lower proportion of tests being positive, as presumably a larger and more representative selection of the population (not only those with symptoms or known exposure) would be included. Id. Since the case rate and the proportion of tests positive rate have increased simultaneously, data suggest that the increase in confirmed cases indicates a true rise in cases. Id.

COVID can be spread when an infected person talks, breaths, coughs, sneezes, and the like, expelling droplets that can transmit the virus to others in their proximity. Reingold Decl., ¶18. Because of this, COVID can spread rapidly in crowded conditions, particularly indoors. Id. It is generally believed that such droplets can infect people who are within six feet of an infected person, and on this basis, it is recommended that people maintain at least six feet of distance from each other. Id.

There is now very strong evidence that the virus can also be aerosolized, such that microscopic droplets containing the virus are expelled into the air by breathing, talking, singing, sneezing, and coughing; they remain in the air; and they can be inhaled by others who subsequently come into contact with the air. Reingold Decl., ¶19. Multiple studies have shown that COVID may remain airborne for extended periods. Id. One study found that COVID remained viable in aerosols for the entire three-hour experiment. Id. Another analysis led by researchers at Tulane University concluded that “preliminary data suggest that COVID is resilient in aerosol form,” and that respirable-sized aerosols could retain infectivity for up to 16 hours. Id.

This research is consistent with studies showing that sharing indoor space increases the risk of infection. Reingold Decl., ¶20. When indoors, it is more likely that one will inhale respiratory droplets and aerosols from an infected person. Id. When outdoors, more frequent air movement disperses and dilutes respiratory droplets and aerosols making transmission less likely. Id. The CDC currently advises that activities are safer when held in outdoor spaces. Id.

Some individuals who are infected with COVID but do not develop symptoms are nonetheless infectious and can transmit the virus to others. Reingold Decl., ¶23. Those who do develop symptoms may be infectious up to 48 hours before the onset of symptoms. Id. This means that isolating only persons known to be ill with COVID or with symptoms of COVID will not stop the spread of COVID infection. Id.

It is currently unknown if those who have had COVID develop protective immunity from reinfection. Reingold Decl., ¶24. Only those who have been infected and recovered are possibly immune; there is no known population with pre-existing immunity to the virus. Id. Anyone who has not yet been infected with COVID is likely susceptible to infection. Id. For those who have been infected, it is unknown if any protective immunity is permanent, will exist for only a limited time, and whether reinfection is possible. Id. Research has found that the level of antibodies in those recovering from the virus appears to decline within a few months of infection, which may indicate a limited period of protective immunity. Id.

Epidemics and pandemics occur when the number of infections grows exponentially. Reingold Decl., ¶33. When describing exponential growth rates, epidemiologists often refer to the doubling period of a disease, which is the amount of time required for the number of infections to double. Id. The shorter the doubling time, the greater the growth rate of the epidemic/pandemic. If exponential growth rates are not moderated, the number of infections and resultant illnesses can quickly overwhelm a given health system. Id. For this reason, public health officials often prioritize efforts to reduce the growth rate of infections, including lengthening the doubling time. Id. Reducing the growth rate of infections and resultant disease is achieved through both official policies and changes to individual social behavior. Id.

Easing or ending restrictions on the community spread of the COVID virus would lead to an increase in cases and risk exponential growth in the spread of the virus. Reingold Decl., ¶34. This would increase serious and potentially long-term illness and death caused by the disease. Id. It would also risk overburdening the healthcare system, particularly in areas where critical care facilities and beds are limited. Id.

It is true that development of herd immunity is another means through which dissemination of certain viruses in a population can cease. Reingold Decl., ¶35. Herd immunity occurs when a high percentage of the population becomes immune to an infectious agent such that the spread is dramatically slowed as infected persons become deadends for the infectious agent. Id. Approximately 40-95% of a population must be immune in order to achieve herd immunity, depending on the infectiousness of the agent. Id.

There are significant risks to pursuing a herd immunity approach without a vaccine, which is why the vast majority of epidemiologists and infectious disease experts reject the approach for COVID. Reingold Decl., ¶36. There is the risk that it would not work, as it has not been confirmed that those who have had the virus develop protective immunity. Id. Even if it does work, because herd immunity may take a year or more to develop in the population, it is unlikely to prevent the spread of the virus in the near future. Id. The approach would result in very significant increases in illnesses, hospitalizations, and deaths for a disease that has

already killed almost 250,000 over ten months—despite a concerted public health response to minimize those deaths. Id.

4. Reply Evidence

Davis misinterprets the CDC study in claiming that it has relevance to outdoor dining. Weiler Reply Decl., ¶6. The CDC study did not ask what risks come with outdoor dining compared to indoor dining. Id. Nor did it parse out the relative contribution of outdoor and indoor dining to the overall risk of transmission. Weiler Reply Decl., ¶¶ 7-8. Contrary to Davis’ statement, it cannot possibly be used to support a finding that outdoor dining is less or more risky than indoor dining, or whether outdoor dining poses a risk at all. Id.

Davis’s use of data related to the “number of cases” and the “number of deaths” is insufficient to show that outdoor dining presents any significant risk for increased COVID transmission. Weiler Reply Decl., ¶9. Population sizes change over time and increased testing or changes in testing protocols could lead to an artificially higher absolute number of positive tests. Id. In addition, the numbers reported in Davis’s declaration do not address the demonstrable false positive rate in the test results. Weiler Reply Decl., ¶10. Unless we know the false positive rate of RT-PCR testing in the County, we cannot know what percentage of “laboratory confirmed” and “asymptomatic” cases are actually false positives. Id. Because Davis’ data does not account for false positives and because the CDC shifted in April to count all positive test results showing the presence of virus as COVID, some of the counted cases will be other infections with similar symptoms, including viral pneumonia, bacterial pneumonia, or pneumonia from other coronaviruses. Weiler Reply Decl., ¶11.

Crucially, Davis provides no estimates for expected new cases from outdoor dining. In other words, his data does not answer the single most important question whether any future spread may be attributed to outdoor dining rather than other activities. Weiler Reply Decl., ¶13.

Hill’s presentation of statistics as to the amount of beds occupied by COVID patients in both ICU and non-ICU settings does not provide relevant statistical context. Weiler Reply Decl., ¶14. There is seasonal variation in hospitalizations, and other diseases have similar symptom profiles to COVID, these figures are not meaningful without a comparison to hospitalizations in prior years, expressed per capita and per available bed. Id.

Hill does not provide any data on the key factor relevant to percentages and numbers of ICU beds being utilized. Weiler Reply Decl., ¶15. As both the total population size and the number of hospital beds both change over time, the relevant data set needs to address the number of hospital beds per capita. Id.

Hill’s projection model fails to consider several key parameters, including changes in population size, the impact of changes in the number of tests applied and changes in testing protocols on the number of cases, increased immunity due to past exposure within the relevant population, and improvements over time in the medical care and treatment of COVID. Weiler Reply Decl., ¶17.

5. The Governor’s December 3, 2020 Regional Order

The Governor issued the Regional Order on December 3, 2020. County Opp. to OSC, RJN Ex. 9. The Governor’s Regional Order takes effect on December 5, 2020 and is triggered for the Southern California Region if its ICU capacity falls below 15%. The Governor’s reasoning is that “we are at a tipping point” and “we need to take decisive action now to prevent California’s hospital system from being overwhelmed in the coming weeks.” The Governor acknowledged the burden the Regional Order will place on small businesses that are struggling and is helping those businesses with grants and tax relief to get through the month.

The Regional Order is effective for three weeks after the trigger and affects numerous activities and businesses. In pertinent part, the Regional Order prohibits restaurant dining, indoor or outdoor, permitting only take-out or pick-up. The Regional Order ends if a region's ICU capacity projection for four weeks (three weeks after the order) is above or equal to 15%. Conversely, the Regional Order continues if the ICU projection for that period is less than 15%. The assessment will occur on a weekly basis.

D. Analysis

Petitioners CRA and MEC seek a preliminary injunction enjoining the County and the Department from enforcing the Restaurant Closure Order on the ground that it is an improper use of emergency powers. The County and Department oppose.

1. Standard of Review

The notion that a municipality's health officer has broad authority is well-established and long-standing. Jacobson v. Commonwealth of Massachusetts, ("Jacobson") (1905) 197 U.S. 11, 25. "[A] community has a right to protect itself against an epidemic of disease which threatens the safety of its members." Id. at 27. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and public safety. Ibid.

The health officer's authority is not unbridled. Courts have the duty to evaluate an exercise of that authority to ensure actions taken have a "real and substantial relationship" to public health and safety:

"[I]f a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." Id. at 31 (emphasis added).

In addition, the health officer cannot engage in a "plain, palpable invasion of rights" secured by the Constitution or act arbitrarily or oppress. Id. at 31, 38. *See also* Jew Ho v. Williamson, (C.D. Cal. 1900) 103 F. 10 (whether the regulation in question is a reasonable one and directed to accomplish the apparent purpose is a question for the court to determine); Cross Culture Christian Ctr. v. Newsom, (E.D. Cal. 2020) 445 F. Supp. 3d 758, 766; Six v. Newsom, (C.D. Cal. 2020) 462 F. Supp. 3d 1060, 1068 (upholding physical distancing measures to slow down spreading of the virus).

As Justice Gorsuch recently explained, the Jacobson test is equivalent to rational basis review. *See* Roman Catholic Diocese, supra, 2020 WL 6948354 at *4 (Gorsuch, J. concurring). In the same case, the high court reaffirmed that because the "Constitution 'principally entrusts the safety and the health of the people to the politically accountable officials of the States'[,...] courts therefore must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic. Id. at *8 (Kavanaugh, J. concurring).

Petitioners CRA and MEC both initially agree that their challenge to the Restaurant Closure Order, which is the exercise of the Department's authority in a legislative capacity, is a substantive due process claim subject to a rational basis standard of review.^[11] CRA App. at 14; MEC App. at 13-14. In reply, MEC relies on County of Butler v. Wolf, (W.D. Pa. Sept. 14, 2020) 2020 WL 5510690 at *9, to argue that the deferential Jacobson standard no longer applies nine months into the pandemic. MEC Reply at 7.

For purposes of equal protection claims, the rational basis test does not allow a party to probe the decision-making processes of the government because the Constitution “does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification.” Nordlinger v. Hahn, (1992) 505 U.S. 1, 15; FCC v. Beach Communications, Inc., (1993) 508 U.S. 307, 315. When a court applies rational basis review, “a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” Warden v. State Bar, (1999) 21 Cal.4th 628, 650. While the rational basis test is forgiving, the government action must still bear at least a rational relationship to some legitimate end. Romer v. Evans, 517 U.S. 620, 631(1996). Rational basis review is a forgiving standard for government acts, but it “is not a toothless one” Mathews v. Lucas, (1976) 427 U.S. 495, 510.

The Due Process Clause of the Fourteenth Amendment includes a substantive component that bars arbitrary, wrongful, government action “regardless of the fairness of the procedures used to implement them.” Zinermon v. Burch, (1990) 494 U.S. 113, 125. The “core of the concept” of substantive due process is the protection against arbitrary government action. Hurtado v. California, (1884) 110 U.S. 516, 527 (1884).

Indeed, “the touchstone of due process is protection of the individual against arbitrary actions of government” Id. When executive branch agencies act in a legislative capacity, courts evaluate whether the challenged agency action has been “arbitrary, capricious, or entirely lacking in evidentiary support.” Davies v. Contractors’ State License Bd., (1978) 79 Cal. App. 3d 940, 946. While courts do not weigh evidence when applying this test, they must ensure that the agency has adequately considered all relevant factors and has demonstrated a rational connection between those factors and the choice made. Carrancho v. California Air Resources Board, (“Carrancho”) (2003) 111 Cal. App. 4th 1255, 1265.

“[A]ctions which are irrational, arbitrary or capricious do not bear a rational relationship to any end.” Wolf, *supra*, 2020 WL 5510690 at *26. In Wolf, a federal district court found constitutional violations in a governor’s COVID emergency restrictions limiting the number of people permitted to attend gatherings and determining which businesses could remain open based on whether they are “life-sustaining” in nature. Plaintiff’s challenge was rooted in claims of equal protection, due process, and First Amendment rights. The closures were temporary but had no certain end date. With respect to the open ended uncertainty, the district court recognized the harm to the that would result to businesses: “A total shutdown of a business with no end-date and with the specter of additional, future shutdowns can cause critical damage to a business's ability to survive, to an employee's ability to support him/herself, and adds a government-induced cloud of uncertainty to the usual unpredictability of nature and life.” Id. at *26.[12]

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2. Probability of Success

a. Petitioners’ Position

(i). Petitioners’ Evidence

Petitioners’ evidence may be summarized as follows. The CDC’s “Considerations for Restaurant and Bar Operators,” updated November 18th, 2020, states that outdoor dining may occur with relative safety at restaurants if precautionary measures are observed, including but not limited to, social distancing and mask wearing by servers and by patrons (when not eating). Bhattacharya Decl., ¶20. The CDC includes outdoor dining in the second lowest tier of risk, and notes that even this risk can be mitigated by reasonable accommodations such as spacing tables appropriately, encouraging mask wearing by servers, frequent sanitizing of surfaces, and other actions that are well within the capability of LA County restaurants. Id.

The County’s Restaurant Closure Order has no scientific justification for imposing stricter requirements on these activities. The Department’s available data does not contain any epidemiological or other model that shows prohibiting outdoor dining on a countywide basis has any relationship to avoiding circumstances that challenge the healthcare delivery system’s ability to deal with a surge with space, supplies, and staff. Bhattacharya Decl., ¶28. The County has no basis to close outdoor dining because the Department has

provided no supporting evidence and/or scientific studies, data, or evidence that the operating of outdoor dining establishments poses an unreasonable risk to public health. Allen Decl., ¶5.

The safety of outdoor dining has been well-established by numerous studies, including the China Study and the Japan Study. *See* Barke Decl. ¶¶ 7-10. The China Study found that only one of the 318 identified outbreaks – two infected persons – implicated an outdoor environment. *See id.* ¶ 8. The Japan Study found that closed, not open, environments contribute to the secondary transmission of COVID and that the odds of transmission of COVID in a closed environment was 18.7 times greater than an open-air environment. *See id.*, ¶ 9. An article from the Mayo Clinic described a general medical consensus regarding “safe outdoor activities during the COVID-19 pandemic.” *See id.* ¶10. According to this article, “when the weather is appropriate to be outside, patio dining can be a good outdoor option. Outdoor patio dining at uncrowded restaurants where patio tables are spaced appropriately is safer than indoor dining.” *Id.* CRA Op. Br. at 18.

The Department’s own data provides no support for a shutdown of outdoor restaurant operations. Allen Decl., ¶6. The data tracks all non-residential settings at which three or more laboratory-confirmed COVID cases have been identified. *Id.* Of the 204 locations identified on this list, fewer than 7% are restaurants. *Id.* Based on the case data for October-November 2020, it is clear that the County’s increased cases are not due to restaurants, which only make up 3.10% of new infections during that period. Allen Decl., ¶7.

Contrary to Davis’s statement that the CDC study is the “best data” in support of the Restaurant Closure Order, the CDC study is not specific to restaurants and does not support a conclusion that outdoor dining should be banned. Kaufman Decl., ¶¶ 16-17. The study showed that a subset of COVID patients reported that they had recently dined at restaurants more than the general population. *Id.* The CDC study made no distinction between indoor and outdoor dining, even though all available evidence on the transmission of any airborne illness suggests that this is a key factor. Kaufman Decl., ¶17.[13]

As a result, County public officials have cited no evidence that demonstrates that there is a measurable risk of transmission of COVID in an outdoor dining situation when the appropriate safety measures are implemented. Kaufman Decl., ¶19. With the precautions already implemented by most restaurants in the County prior to the Restaurant Closure Order -- socially distanced outdoor dining, masks, and temperature checks -- the transmission of the virus from one person to another is highly unlikely. *Id.*

The Department has provided no indication that it has taken into account any of the economic, social, and public health costs of restricting outdoor dining. Bhattacharya Decl., ¶29. Basic standards of public health policy design require a comparison of both costs and benefits of a policy to justify it from a scientific and ethical point of view. *Id.* A scientifically justified policy must explicitly account for these costs – including an explicitly articulated economic analysis – in setting, imposing and removing criteria for business restrictions such as the blanket prohibition on outdoor dining. *Id.*

The risks of COVID transmission should be considered against the substantial evidence that social eating provides significant and tangible psychological and physiological benefits for diners that are lost through the imposition of such scientifically and epidemiologically unjustified blanket and untargeted bans. Bhattacharya Decl., ¶45. A comprehensive survey of 17,612 men and 19,581 women over age 65 found that eating alone has been linked to a higher incidence of depression among adults, particularly those who live alone. *Id.* Eliminating the possibility of all outdoor dining reduces or eliminates these important benefits. *Id.*

There is no rational and legitimate scientific or public health basis supporting the ban on outdoor dining in restaurants (Kaufman Decl., ¶21) and the Restaurant Closure Order is inconsistent with the CDC’s guidance. Bhattacharya Decl., ¶20. Restaurants in the County can safely permit outdoor dining by following the CDC guidelines. Bhattacharya Decl., ¶20. The likelihood of symptomatic and pre-symptomatic transmission, reproduction rates, signs, symptoms, mortality, risks and other infectious disease characteristics of COVID in both child and adult populations do not rationally support the Restaurant Closure Order. Kaufman Decl., ¶22.

(ii). Petitioners' Argument

From this evidence, Petitioner CRA argues that restaurants across the County are on the verge of total economic collapse, with 89.6% of surveyed restauranteurs are at risk of closure. The outdoor dining ban is not the result of any rational thought process about how to mitigate the spread of COVID, but rather is a politically-motivated decision to create merely the appearance of action. CRA Op. Br. at 8. The County has no data showing that outdoor dining is a significant risk for spreading COVID. CRA Op. Br. at 9.

The Restaurant Closure Order irrationally singles out the restaurant industry and its hundreds of thousands of workers. The County's explanation for the decision is the rise in positive COVID test results, even though a positive test does not show that the person actually is ill; a positive test includes persons who are asymptomatic as well as false positives. Nor does the order consider the number of deaths in the County. The County did not bother to assess evidence particular to outdoor dining or even consider the relative risks and benefits of such a sweeping order. Kaufman Decl. ¶¶ 15-19. CRA Op. Br. at 14-15.

Allowing restaurants to operate with outdoor dining has not produced significant coronavirus cases to date. The County's own data shows that restaurants are responsible for only 3.10% of new coronavirus infections, paling in comparison to sectors which have not been shut down like groceries, manufacturing, automotive, construction, aviation, and more. *See* Kaufman Decl. ¶ 19; Allen Decl., ¶¶ 6-9. Simply put, there is no scientific evidence that there is a significant risk of transmission of COVID in an outdoor dining situation when the appropriate safety measures are implemented. *See* Kaufman Decl. ¶¶ 21-31; Barke Decl. ¶ 7; Bhattacharya Decl. ¶¶ 18-29. In a recent interview, Health Director Ferrer, who is not a medical doctor, presented the County's rationale for the Restaurant Closure Order: "I think one of the sad realities is that we've never seen a rate of increase as high as we've just seen. We know places where people are eating are places where transmission is easiest, and most likely." *See* Ellis Decl. Ex. 14. These assertions are not based on science or data showing restaurants as the cause of the problem. CRA Op. Br. at 15.

The Restaurant Closure Order actually is likely to exacerbate the spread of COVID. The Restaurant Closure Order will drive residents indoors, to gather with friends and family in their homes. *See* Bhattacharya Decl. ¶¶ 22, 45-46; Kaufman Decl. ¶ 28; Allen Decl. ¶ 10. Those indoor gatherings easily become super-spreader events; the scientific and medical data clearly show the danger of indoor gatherings. *See, e.g.,* Barke Decl. ¶¶ 7-11; Kaufman Decl. ¶ 28. These are the exact kind of unintended consequences that would have been avoided had the County considered actual evidence prior to the Restaurant Closure Order. CRA Op. Br. at 18-19.

In addition to the lack of scientific evidence, the Department has provided no indication that it has estimated or otherwise considered any of the economic, social and public health costs of restricting outdoor dining. Basic standards of public health policy require a comparison of both costs and benefits of a policy to justify it from a scientific and ethical point of view. *See* Kaufman Decl. ¶¶ 21-22, 29-31; Bhattacharya Decl. ¶ 29. A scientifically justified policy must explicitly account for these costs – including an explicitly articulated economic analysis – in setting, imposing, and removing criteria for business restrictions such as the blanket prohibition on outdoor dining. *Id.* CRA Op. Br. at 16.

CRA argues that the Restaurant Closure Order is an unmistakable example of the Politician's Fallacy: "1. We must do something. 2. This is something. 3. Therefore, we must do this." The actual scientific evidence—available to Respondents but ignored by them—shows that transmission of COVID in an outdoor dining scenario is negligible. *See* Lyons-Weiler Decl. ¶¶ 20-34; Barke Decl. ¶¶ 7-11; Bhattacharya Decl. ¶¶ 36-44; Kaufman Decl. ¶¶ 19-31. If closing an entire industry without evidence of any significant quantum of disease spread is not arbitrary, what is? CRA Op. Br. at 16-17.

CRA concludes that the Restaurant Closure Order infringes CRA's fundamental rights under the Fifth and Fourteenth Amendments to pursue common professions. *See Truax v. Raich*, 239 U.S. 33, 41 (1915) (the Fourteenth Amendment secures "[t]he right to work for a living in the common occupations of the community"). "The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within both the 'liberty' and the 'property' concepts of the

Fifth and Fourteenth Amendments.” Greene v. McElroy, (1959) 360 U.S. 474, 492 (citing cases). CRA Op. Br. at 19.[14]

MEC makes similar arguments concerning the measurable scientific and statistical data showing that outdoor dining with the correct precautionary measures is safe and has no correlation with the spread of COVID. Even under the most lenient standard of constitutional review, no rational reason exists for singling out Plaintiff’s business activities. There is no rational reason to continue to ban MEC and the restaurant industry from providing outdoor dining as they continue to follow the County’s recommended precautionary measures while doing so. MEC Op. Br. at 15-16. Not only will the ban not avert the crisis, but it has already contributed to the crisis of unemployment and severe economic damages and harm. MEC Op. Br. at 16.

MEC cites Jew Ho v. Williamson, (“Jew Ho”) (C.C. Cal. 1900) 103 F. 10 and Wong Wai v. Williamson, (“Wong Wai”) (C.C. Cal. 1900) 103 F. 1, where the courts found that public health officials could not quarantine 12 blocks of San Francisco Chinatown because of nine deaths due to bubonic plague. The courts found that there were more than 15,000 people lived in the twelve blocks to be quarantined. The courts found it arbitrary and unreasonable to shut down the ability of over 15,000 people to make a living because of nine deaths where the complainant had never contracted the bubonic plague, had never been exposed to the danger of contracting it, and had never been in any locality where the bubonic plague existed. Id.[15]

MEC notes that California has a population of almost 40 million. As of November 29, 2020, California has sustained a total of 19,121 COVID deaths. This means one death for every 2,066 inhabitants. MEC concludes that, if public health officers were denied the ability to stop the people of Chinatown from operating their businesses for one death for every 1,666 inhabitants, then the County should not be allowed to deny restaurants the ability to make a living when the death rate is even lower than it was in Jew Ho and there is zero evidence that outdoor dining has contributed to the spread of the virus. MEC Op. Br. at 16.

According to the CDC, in the last seven days, California is ranked 44th in the nation for per capita COVID deaths. There are 43 other states with a higher COVID death rate than California. This data undercuts the need for the Department’s draconian measures targeting the restaurant industry. See Ex Parte Jentzsch, (1896) 112 Cal. 468, 474-75 (there must be a substantial reason why [a law] is made to operate only upon a class, and not generally upon all). MEC Op. Br. at 17.

b. The County’s Position

(i). The County’s Evidence

The County’s evidence opposing the *ex parte* applications may be summarized as follows. While older adults and those with underlying medical conditions are at higher risk of severe illness and death from COVID, the virus can cause severe illness and death in individuals of any age. Gunzenhauser Decl., ¶9. The effectiveness of treatment remains limited, and a widely available vaccine is still months away. Gunzenhauser Decl., ¶11.

Emerging evidence also suggests that some persons who recover from COVID experience serious effects that linger long after clearing the viral infection. Gunzenhauser Decl., ¶10. Some of these long-term effects may be attributable to organ damage caused by the COVID infection. Id. Scans and tests of some patients who recovered from COVID have shown damage to heart muscle and scarring in the lungs. Id. Some of this damage is believed to be the result of COVID-related blood clotting, including clots that weaken blood vessels and very small clots that block capillaries. Id.

There is consensus among epidemiologists that the most common mode of transmission for COVID is from person-to-person through respiratory droplets expelled when a person coughs, sneezes, or projects their voice. Gunzenhauser Decl., ¶13. There is no scientifically agreed-upon safe distance, but it is widely accepted that standing or sitting near an infectious person is riskier than being farther away. Id.

There is a consensus that in-person eating and drinking at restaurants, breweries, and wineries are among the riskiest activities in terms of COVID transmission. Gunzenhauser Decl., ¶48. Studies have demonstrated that COVID is less likely to be transmitted in outdoor spaces than in indoor spaces, where respiratory droplets and aerosols can accumulate. Id. The risk of transmission is further reduced when outdoor diners are spaced from each other, when restaurant staff wear face coverings and face shields, and when patrons only remove their face coverings to eat and drink. Id.

Studies show the role of masks in limiting the spread of COVID, and that situations where unmasked individuals from different households spend prolonged periods of time in proximity to one another present a higher risk of transmission than settings where one or more of these factors is absent. Gunzenhauser Decl., ¶51.

Not every exposure to the COVID virus will lead to infection. Gunzenhauser Decl., ¶15. Infection occurs when a person receives a dose of the virus large enough to overcome the body's defenses, which may vary from person to person. Id. Measures to control the spread of COVID should therefore include efforts to limit interactions in conditions that support exposure to higher viral doses. Id. Conditions that pose a particularly high risk are present in gatherings. Id. It is widely accepted that a gathering of any size increases the risk of community transmission. Risk increases with the size of the gathering because the more people who gather, the likelier it is that one or more infected persons will be present. Id.

The risk of transmission increases when individuals are in close proximity for an extended period. Gunzenhauser Decl., ¶16. Risk is also increased when individuals are not wearing face coverings. Id. Close proximity to an unmasked infected person for a prolonged period presents an especially high risk of receiving a viral dose sufficient to cause COVID infection. Id. Evidence indicates that gatherings of non-family members facilitates the spread of COVID. Gunzenhauser Decl., ¶26.

There is wide consensus that risk reduction in a pandemic does not require definitive proof that a particular sector or activity is the cause of an increase in cases. Gunzenhauser Decl., ¶58. Best practices dictate that public health departments identify those sectors and activities that present a higher risk of transmission and take steps to mitigate those risks, especially during a surge in cases and hospitalizations like we are now experiencing. Id.

The County's experience bears out the effectiveness of systematic responses such as prohibitions on gatherings. Gunzenhauser Decl., ¶29. The County's experience also demonstrates the risk inherent in relying on widespread individualized compliance alone to control the spread of COVID. Gunzenhauser Decl., ¶30. In September, the County reported that 20% of restaurants inspected were violating COVID protocols. Id.

A key part of any public health department's response to outbreaks involves conducting field investigations. The level of evidence required in a field investigation is not the same as that required in a clinical trial. Gunzenhauser Decl., ¶32. The purpose of a field investigation is to determine what steps can be taken to stop or slow the spread of an infectious disease. Id. The purpose of public health decisions based on field investigations is to take actions in a timely manner that will prevent or curtail the spread of the virus or other disease-causing agent. Id. Often, officials will have to make decisions in a brief period and when information is limited, especially in comparison to other medical studies such as full-blown, clinical trials when the urgency of the situation is not so severe. Id.

Despite improved treatment, the proportion of COVID patients requiring hospitalization has remained elevated above 10% throughout the pandemic. It has averaged about 10% in the most recent four months, with approximately 25-33% of hospitalized patients in the ICU and approximately one half of those ICU patients requiring ventilators. Id.

When community spread of the virus increases, the number of known and suspected COVID patients in both ICU and non-ICU beds increases as well. Gunzenhauser Decl., ¶43. On most days in June, there were fewer than 1,500 confirmed COVID cases in the County's hospital beds. Id. For ICU beds, that number rarely exceeded 500. Id. During the July surge, the number of confirmed COVID patients exceeded 1,500 every day

and often approached 2,000. Id. For the ICU, those numbers never dropped below 500 and at times approached 700. Id.

On November 1, 2020, known and suspected COVID cases accounted for 721 non-ICU beds and 239 ICU beds. Id. By the day before Thanksgiving, those numbers had risen to 1,431 and 475, respectively. Id.

On November 21, 2020, the County reported 4,522 new confirmed cases and 1,391 people hospitalized, 26% of whom were in the ICU. On November 22, 2020, the County reported that the five-day average surpassed 4,000 new daily cases, the Department's threshold for suspending in-person dining. Gunzenhauser Decl., ¶40.

On November 23, 2020, the County reported its highest number of COVID cases in a single day at 6,124. Gunzenhauser Decl., ¶41. This brought the total number of COVID cases to 370,636, with 7,446 deaths. Id. As of November 23, 2020, the R number for the County was 1.27, meaning the daily number of new cases of COVID is expected to increase over time. Gunzenhauser Decl., ¶29.

As of November 29, 2020, 2,049 COVID patients were hospitalized in the County, with 24% of those patients in the ICU. Gunzenhauser Decl., ¶41. From October 27 to November 27, 2020, COVID hospitalizations jumped from 747 to 1,893. Gunzenhauser Decl., ¶43. The current surge is accelerating much more rapidly than the prior surge in July. Between November 13 and November 27, 2020, hospitalizations of confirmed COVID patients increased by 101%. Gunzenhauser Decl., ¶41.

This indicates widespread and uncontrolled community transmission of the virus. Id. Currently, approximately one in 145 County residents is infectious to others. During the week of November 16, 2020, that number was 1 in 250. Id. The number of new cases and hospitalizations is expected to rapidly increase over the next 21 days without rapid public health interventions, which will lead to a major increase in the number of persons with severe illness and the number of deaths and will stress the healthcare system and healthcare workers. Gunzenhauser Decl., ¶37. This stress will limit the availability of ICU beds for patients who may need them, including patients hospitalized for conditions other than COVID. Gunzenhauser Decl., ¶37.

Increased hospitalizations due to COVID, including ICU admissions, risk overwhelming the County's hospital capacity. Gunzenhauser Decl., ¶45. A secondary effect of the COVID pandemic is that some individuals delay seeking treatment for other conditions for fear of being exposed to COVID at healthcare facilities. Gunzenhauser Decl., ¶46. Based on public health observations of the effects of the virus during this pandemic, hospitalizations typically increase two to three weeks after a spike in cases, and deaths increase thereafter. Gunzenhauser Decl., ¶49. Therefore, while the County is currently experiencing a surge in hospitalizations, it expects the current high case counts to lead to an even higher hospitalization rate in the coming weeks. Id.

(ii). The County's Argument

The County argued that the Restaurant Closure Order easily meets the highly deferential standard of a rational basis because of the recent surge in COVID cases and hospitalizations. Petitioners cannot refute the fact that the risk of spreading COVID becomes heightened when people are sitting in close proximity without face coverings, eating and drinking, and projecting their voices toward each other. Gunzenhauser Decl., ¶52. All of these things occur when diners are eating and drinking at restaurants. Id. Opp. to CRA Ex Parte at 11.

Courts have repeatedly held that orders limiting gatherings and requiring businesses to close in response to the pandemic bear a real and substantial relation to public health. *See, e.g., Six v. Newsom, supra*, 462 F. Supp. 3d at 1068 (“[P]hysical distancing measures like California’s Stay-at-Home Order are critical to slowing down the spread of the virus”); *Givens v. Newsom*, (E.D. Cal. 2020) 459 F. Supp. 3d 1302, 1311 (“[I]t is uncontroverted that the State’s stay at home order bears a real and substantial relation to public

health.”). While striking down restrictions on religious worship based on New York Governor Cuomo’s order, the U.S. Supreme Court reiterated that government has “authority to impose tailored restrictions—even very strict restrictions—on attendance at religious services and secular gatherings.” Roman Catholic Diocese, *supra*, 2020 WL 6948354, at *8 (Kavanaugh, J., concurring). If the Supreme Court permits restrictions on enumerated, long-standing First Amendment rights like religious worship, then it would clearly uphold the County’s ability to temporarily prohibit outdoor dining at restaurants. Opp. to CRA Ex Parte at 12.

Petitioners’ experts argue that the Department failed to consider relevant evidence and assess other evidence. But Petitioners’ experts cannot rebut the enhanced risk in eating and drinking at close proximity without face coverings, which is inherent in dining at restaurants, breweries, wineries, and bars. Moreover, Petitioners are asking the court to weigh the evidence by making this argument. Courts do not weigh evidence under the arbitrary and capricious standard. Therefore, the fact that Petitioners’ experts may have differing views about how to address the pandemic is irrelevant; rational basis review is not a “battle of the experts.” Opp. to CRA Ex Parte at 12-13.

Additionally, Petitioners do not establish why their experts’ opinions should be given more weight than the County Health Officer’s opinion when none has any advanced training or specialization in the study of epidemiology—the branch of medicine which studies the spread and control of infectious diseases. Barke is a primary care physician (Barke Decl., ¶1), Bhattacharya, the closest to an epidemiologist, is a researcher in the area of health economics (Bhattacharya Decl., ¶3-4), Lyans-Weiler is a biomedical researcher (Lyons-Weiler Decl., ¶3), Allen is a biostatistician (Allen Decl., ¶2), and Kaufman is trained as a public health behaviorist and biosafety expert (Kaufman Decl., ¶1, 3-4). The court should reject Petitioners’ attempts to replace the considered judgment of the County’s public health officials with the opinions of persons who do not have expertise in the relevant field. Opp. to CRA Ex Parte at 13.

Petitioners’ argument that the County’s Restaurant Closure Order lacks a rational basis is false. [16] The law does not require the County to act with exacting scientific evidence when responding to a novel, evolving public health emergency. A key part of any public health department’s response to a new virus involves conducting field investigations. Gunzenhauser Decl., ¶32. The purpose of public health decisions based on field investigations is to combat the spread of the virus when officials do not have sufficient time or information to conduct full-blown, peer-reviewed clinical trials. *Id.* This aids the public health experts’ understanding of COVID continues to evolve and swift and aggressive actions must be taken to combat community transmission. *Id.* Opp. to CRA Ex Parte at 13-14.[17]

For these reasons, Petitioners cannot establish a likelihood of success on the merits of their claims. Opp. to CRA Ex Parte at 15; Opp. to MEC Ex Parte at 19.

c. The Court’s TRO/OSC Decision

Plainly, the County established that the surge is legitimately concerning, particularly hospitalizations, ICU load, and deaths. Increased hospitalizations due to COVID, including ICU admissions, risk overwhelming the County’s hospital capacity. Gunzenhauser Decl., ¶45. As a result, the County is entitled to act. The principal question is: Does the action of closing outdoor restaurants have rational support in furthering the reduction of this risk?

Assuming that Jacobson test applies to a pandemic nine months old, the County is correct that it is highly deferential to an agency’s public health action. Even if Jacobson no longer applies, the Department still has great discretion. The court may not weigh the evidence or substitute its judgment for that of the Department. For this reason, the fact that Petitioners’ experts have differing views than the County’s experts about how to address the pandemic is not significant; the court’s rational basis review is not a battle of the experts.

The County further is correct that the law does not require the Department to act with exacting scientific evidence when responding to a novel, evolving public health emergency. The Department relies on field

investigations, the purpose of which is to combat the spread of the virus when officials do not have sufficient time or information to conduct full-blown, peer-reviewed clinical trials. Gunzenhauser Decl., ¶32.

At the December 3, 2020 TRO/OSC hearing, the court acknowledged that the Department has the right to take prophylactic measures that require swift action to address public health during the COVID pandemic. Suppl. Siegel Decl., Ex. C, p. 14. In so doing, the court stated that the Department's public health job is "to ensure that the [healthcare] system does not get overwhelmed." Ex. C, p. 8.

The court further stated that the County has evidence to support the Restaurant Closure Order:

"The County's evidence is general in nature, but it's real evidence. The evidence is that when you don't wear a mask and you're sitting around, it's a greater risk when you're in a group. And we're trying to reduce the risk, and we have this huge problem of a surge. They have evidence. It's not specific to the risk of outdoor dining, but they do have evidence." Ex. C, p. 19. *See also id.*, p. 33 ("[The County does] have a medical basis. . . . [T]hey have a generalized basis of the risk of taking your mask off with others around the table. They do have that.").

The court further acknowledged that the County has evidence that "restaurants are not following the restrictions." *Id.*, p. 15. The court concluded:

"We have a County that is taking actions in good faith based on a surge in cases, surge in hospitalizations. And it has a duty to prophylactically try to address that to avoid overwhelming the health care system. It has chosen to do that by a three-week limited restaurant closure, except for take-out. No outdoor dining in, other words. And, you know, it sounds like it's rational." *Id.*, p. 14 (emphasis added).

Because the County had a duty to act and had generalized evidence about dining at a restaurant without a mask, the court denied a TRO. *Id.*, pp. 32-33. According to the County, that should have been the end of the inquiry and the court also should have denied the request for an OSC. OSC Opp. at 6.

Not so. While the County had generalized evidence that outdoor dining necessarily means that diners will not wear masks while eating, and that not wearing masks in proximity to another increases the risk of COVID transmission, Petitioners had specific evidence that outdoor dining does not involve any significant COVID risk.

Petitioners' evidence consisted of the following: (a) the opinion of experts that there is no rational and legitimate scientific or public health basis supporting the ban on outdoor dining in restaurants (Kaufman Decl., ¶21; Bhattacharya Decl., ¶20); (b) the fact that the safety of outdoor dining has been well-established by the China Study, the Japan Study, and a Mayo Clinic article (Barke Decl. ¶¶ 7-10); (c) the fact that the Department's data provide no support for a shutdown of outdoor restaurant operations (Allen Decl., ¶7); (d) the fact that 3.10% of new infections have occurred at restaurants; (e) expert conclusion that the CDC study relied upon by Davis as the Department's "best data" does not support the Restaurant Closure Order (Kaufman Decl., ¶¶ 16-17); (f) the CDC's updated November 18th, 2020 recommendation that outdoor dining may occur with relative safety at restaurants if precautionary measures are observed and that outdoor dining is in the second lowest tier of risk and can be mitigated further by reasonable accommodations (Bhattacharya Decl., ¶20), and (g) the fact that precautions already are in place for outdoor dining -- socially distanced outdoor dining, masks, and temperature checks. All of these opinions and facts supported the conclusion that the transmission of the virus from one person to another in an outdoor restaurant dining setting is highly unlikely. *See Kaufman Decl.*, ¶19.

If the court were permitted to weigh evidence, it would have issued the TRO. Because it may not do so, the court concluded that the County's evidence may be sufficient if it provided certain additional information: (1) the actual numbers for hospital and ICU capacity (the County's evidence of the surge's impact on hospitalizations and ICU load lacked capacity numbers); (2) the articulated risk-benefit analysis for restaurant closure which Plaintiffs' evidence showed is required; (3) why the only available study evidence suggests that outdoor dining is not a risk?; (4) the statistics on mortality from COVID; and (5) why the County is acting inconsistently with the Governor's order and his direction that restrictions would be based on science and data.

The County's OSC opposition addresses these issues.

(i). Actual Numbers for the Hospital and ICU Capacity.

The court has consistently viewed the County's daily statistics of the daily number of positive tests and positivity (the rate at which persons who are tested test positive) as not particularly significant to the need for the Restaurant Closure Order. What is important is the burden on the health care system -- which means usage of hospital beds and ICU beds -- and the death rate.

Petitioners' evidence shows why. A person who tests positive for the presence of the virus may not be contagious. Weiler Decl., ¶18. The person's contagious nature depends on viral load, which is the amount of virus in his or her body. *Id.* All of the available empirical estimates support a minimum false positive rate of 0.48, meaning that 45-48% of persons who test positive for COVID have a nearly zero risk as a source of transmission. Weiler Decl., ¶19. As a result, concern over person-to-person transmission from people who test positive (and are thus given a presumptive diagnosis of COVID) must be adjusted downward by at least 50%. *Id.*

The County's evidence shows that positive tests and positivity are relevant to community spread. The rise in cases nationwide is not just a reflection of increased testing. Reingold Decl., ¶9. If the rate of COVID were stable or decreasing, increased testing would produce a lower proportion of tests being positive, as presumably a larger and more representative selection of the population (not only those with symptoms or known exposure) would be included. *Id.* Since the case rate and the proportion of tests positive rate have increased simultaneously, data suggest that the increase in confirmed cases indicates a true rise in cases. *Id.* This evidence indicates that positive tests, which must be taken with a grain of salt because of false positives, and positivity are relevant to COVID spread, but do not directly bear on the burden to the healthcare system.

Ferrer's comments to the Board show that she agrees: "[I] agree that it seems a little bit counterintuitive to talk about cases when really all we are worried about is overwhelming the healthcare system. And I think Dr. Ghaly spoke to this as well, you don't want to wait until the case numbers in the hospitals are really high. Siegel Decl., Ex B (emphasis added).

Finally, in issuing his March 4, 2020 State of Emergency and March 19, 2020 Stay-at-Home Order, Governor Newsom stated that the state's actions should be aligned to achieve the objectives of: (1) ensuring the ability to care for the sick within the state's hospitals.

Thus, the key information for COVID restrictions are hospitalizations and ICU bed utilizations.

The County now has provided this information. On average, there are approximately 14,000 licensed non-ICU beds and 2,500 licensed ICU beds available in the County. Hill Decl., ¶13. The actual number of beds can fluctuate from day-to-day. *Id.*

Beginning in November 2020, the number of COVID cases and hospitalizations began to surge. Hill Decl., ¶18. On November 1, 2020, there were approximately 960 COVID patients hospitalized in both ICU and

regular hospital beds. Hill Decl., ¶19. On November 28, 2020, there were approximately 2,000 total COVID patients hospitalized in both ICU and regular hospital beds. Hill Decl., ¶20.

That number has continued to rise in the beginning of December. Hill Decl., ¶21. On December 1, 2020, 2,690 COVID patients were hospitalized. *Id.* Approximately 25% of the ICU beds were occupied by COVID patients: 573 COVID positive patients and 42 PUIs (persons under investigation), a total of 615. *Id.* Approximately 15% of the regular hospital beds were occupied by COVID patients: 1,858 COVID positive patients and 217 PUIs, a total of 2,075. *Id.* The number of COVID patients hospitalized in the County has nearly tripled. Hill Decl., ¶22.

As a result of the recent surge, the number of available ICU beds in the County has significantly decreased. In mid-October, there were 149 available ICU beds. Hill Decl., ¶24. The County's ICU bed availability in November decreased to less than 5% of total capacity, with 4.44% available from November 22-28. Hill Decl., ¶25.

Projections for ICU beds show that demand could exceed the County's available beds within a couple of weeks. Hill Decl., ¶32. Typically, when a shortage occurs, the availability of ICU beds diminishes first because there are fewer alternatives where ICU-patients can be treated effectively. Hill Decl., ¶33. The surge in hospitalizations will further stress the County's healthcare system, which can manifest itself in many ways. Hill Decl., ¶28. Hospitals will have to change what they do day-to-day to meet the needs of their patients. *Id.* For example, an emergency room may have to be repurposed to treat ICU patients, which will thus impact the number of day-to-day medical emergencies that can be treated, such as heart attacks. *Id.*

The Governor's Regional Order includes the County in the Southern California Region, which was at 82% ICU capacity (18% ICU availability) as of December 3, 2020. Hill Decl., ¶36. If the surge continues unchanged, it is projected that the Southern California Region will cross this threshold and have less than 15% ICU availability by the end of this week. *Id.* As of December 6, 2020, the threshold has been reached and the Regional Order is in effect.

The County has sufficiently shown the actual numbers for hospital and ICU capacity.

(ii). Risk-Benefit Analysis for the Restaurant Industry.

In issuing his March 4, 2020 State of Emergency and March 19, 2020 Stay-at-Home Order Governor Newsom stated that the state's actions should be aligned to achieve the objectives of: (4) reducing social, emotional, and economic disruptions. Ellis Decl., Ex. 18.

The un rebutted evidence is that public health decisions require a risk/benefit analysis of health restrictions. In making public health decisions, it is important for health officials to weigh the overall risk of the given disease to the overall benefits of the imposed public health policy. Kaufman Decl., ¶22. Public health recommendations regarding behavior by private actors (such as the decision to protest) should weigh the benefits of that behavior against the public health costs. Bhattacharya Decl., ¶50. If the benefits of the undertaking are important enough relative to the public health risks, and care is taken to minimize those risks by adhering to the extent possible to safe practice guidelines, then the activity should receive approval by public health experts. *Id.* Basic standards of public health policy design require a comparison of both costs and benefits of a policy to justify it from a scientific and ethical point of view. Bhattacharya Decl., ¶29. A scientifically justified policy must explicitly account for these costs – including an explicitly articulated economic analysis – in setting, imposing, and removing criteria for business restrictions such as the blanket prohibition on outdoor dining. *Id.*

With respect to economic cost, Allen opines that the state's California Risk Tier System and trigger definitions are too simple and too blunt. Allen Decl., ¶11. There is no effort to conduct a comprehensive risk-benefit analysis by looking at the economic consequences of the move and whether the constricting actions are

targeting the greatest risk businesses and activities based on business sector data and statistics in the specific country. Id.

Petitioners also present evidence concerning the social and psychological costs of restaurant closure. One of the risks of restaurant closure is increased feelings of isolation and depression among some members of the public. A comprehensive survey of 17,612 men and 19,581 women over the age of 65 found that eating alone has been linked to a higher incidence of depression among adults, particularly those who live alone. Id.

Finally, Petitioners note the comparative health risk of outdoor restaurant dining. Scientists recognize that all forms of human death should be avoided if possible. Weiler Decl., ¶31. Nevertheless, all forms of human activity, including eating at restaurants, carry some risk. Weiler Decl., ¶33. The risks associated with COVID from outdoor dining are far smaller than the risks of choking or food poisoning. Id. While on average, there is about one death due to COVID for every 124 days of outdoor restaurant operation -- assuming that every restaurant in the County is operating at full capacity with 40 outdoor seats -- about 250 people die each year in the County from either choking or food poisoning. Id. Given the information available on outdoor transmission, the risk is “lower than a convenience store”. Weiler Decl., ¶33.

The County presents no evidence that it conducted a risk-benefit analysis. The Department merely “regrets” that the preventative measures have an emotional and economic impact on businesses, families, and individuals and states that it must implement measures to fulfill its day-to-day statutory responsibility for communicable disease control. Davis Decl., ¶14. The Department recognizes that it has asked businesses and its more than ten million residents to make significant adjustments to fight this pandemic. Davis Decl., ¶19. Yet, it is the considered opinions of the Department’s communicable disease experts that these temporary adjustments and modifications are necessary to combat the ongoing surge in COVID cases and hospitalizations, and the resulting strain on the County’s healthcare system. Id.

Davis purports to conclude that, based on the data, the Department determined that the risks and harms of uncontrolled community spread, strain on the health care system, and excess preventable deaths outweighed the social and economic harm of a temporary suspension on in-person restaurant dining. Davis Decl., ¶31. This conclusion is unsupported by any evidence or analysis. The required risk-benefit analysis must be explicitly articulated in setting, imposing, and removing criteria for business restrictions. Bhattacharya Decl., ¶29. An expert’s opinion is no better than the facts upon which it is based (Turner v. Workmen’s Comp. Appeals Board, (1974) 42 Cal.App.3d 1036, 1044) and an expert opinion is not substantial evidence when it is based upon conclusions or assumptions not supported by evidence. Hongsathavij v. Queen of Angels/Hollywood Presbyterian Med. Center, (1998) 62 Cal.App.4th 1123, 1137; Rorges v. Department of Motor Vehicles, (2011) 192 Cal.App.4th 1118, 1122. Davis’ conclusion carries no weight.

The County argues that it is not required to show that it conducted a cost-benefit analysis of the Restaurant Closure Order to meet the arbitrary and capricious standard of review. The Restaurant Closure Order is valid unless Petitioners disprove “every conceivable basis which might support it.” FCC v. Beach Communications, Inc., *supra*, 508 U.S. at 314-15. This analysis does not allow a party to probe the decision-making processes of the government because the Constitution “does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification.” Nordlinger v. Hahn, *supra*, 505 U.S. at 15. Opp. to OSC at 10.

The County wrongly relies on equal protection cases. In FCC v. Beach Communications, Inc., the United States Supreme Court reviewed the federal Cable Communications Policy Act of 1984, which requires that cable television systems be franchised by local governmental authorities. One provision exempted facilities serving subscribers in one or more multiple unit dwellings under common ownership, control, or management. After petitioner FCC ruled that a satellite master antenna television system -- which typically receives a satellite signal through a rooftop dish and then retransmits the signal by wire to units within a building -- is subject to the franchise requirement, satellite operators petitioned for review. The high court reversed the court of appeals and held that the common ownership classification does not violate equal protection. 508 U.S. at 307.

In Nordlinger v. Hahn, the petitioner recently had purchased a house and filed suit against the County and its tax assessor, claiming that Prop. 13 violates the Equal Protection Clause of the Fourteenth Amendment because of dramatic disparities in the taxes paid by long-term owners and newer owners. 505 U.S. at 1. The high court disagreed, finding that the classifications had a rational basis. Id.[18]

These equal protection cases have no bearing on the risk-benefit analysis requirement because Petitioners make no equal protection claim other than a cursory disparate treatment argument. This is a substantive due process case under the Due Process Clause of the Fourteenth Amendment, which includes a substantive component that bars arbitrary, wrongful, government action "regardless of the fairness of the procedures used to implement them." Zinermon v. Burch, (1990) 494 U.S. 113, 125. The "core of the concept" of substantive due process is the protection against arbitrary government action. Hurtado v. California, (1884) 110 U.S. 516, 527 (1884). When executive branch agencies act in a legislative capacity, courts evaluate whether the challenged agency action has been "arbitrary, capricious, or entirely lacking in evidentiary support." Davies v. Contractors' State License Bd., (1978) 79 Cal. App. 3d 940, 946. While courts do not weigh evidence when applying this test, they must ensure that the agency has adequately considered all relevant factors and has demonstrated a rational connection between those factors and the choice made. Carrancho, *supra*, 111 Cal. App. 4th at 1265.[19] This is true even under the highly deferential review set forth in Jacobson.

The undisputed evidence required the County to perform and articulate a risk-benefit analysis in imposing the Restaurant Closure Order and it clearly did not do so.

(iii). Why the Only Available Evidence is that Outdoor Dining Is Not a Significant Risk?

In issuing his March 4, 2020 State of Emergency and March 19, 2020 Stay-at-Home Order Governor Newsom specified that California's response to the coronavirus pandemic "must be done using a gradual, science-based and data-driven framework." Ellis Decl., Ex. 18.

The federal, state, and local governments have done a poor job of supporting COVID restrictions with science. In March 2020, it was acceptable not to have studies at the outset of the pandemic. This is less true nine months into it. The County relies on field investigations instead of studies. Should not the relevant federal, state, and county government agencies be committing all their resources to this problem? Why isn't it an all hands-on-deck situation when the public and small and large businesses are being asked to sacrifice so much? What have these agencies been doing besides keeping track of statistics and making public pronouncements? Should they not be obtaining the best information about who is at risk, what spreads the disease, and what tasks and activities are safe?

The Department admits that the CDC recommendation on the effectiveness of physical distancing in controlling the spread of COVID shows that outdoor well-ventilated spaces, such as an open patio at a restaurant, where unmasked persons have prolonged contact, present a moderate risk of transmission. Davis Decl., ¶37. The Department argues that sitting outdoors reduces risk but does not eliminate it. Id. This risk of transmission outdoors is more elevated at a restaurant where people are sitting close to each other for a prolonged period of time, not wearing masks, not socially distancing, eating and drinking, and projecting their voices (and respiratory and aerosol droplets) toward each other. Id.

The Department adds that the benefits of being outdoors are reduced when a space is partially enclosed, such as is often the case on a restaurant patio. Davis Decl., ¶38. Even partial enclosures affect airflow and the extent to which virus-containing respiratory droplets and aerosols can accumulate. Id. The benefits of being outdoors are further diminished when people from different households gather for prolonged periods without wearing masks. Davis Decl., ¶39. The Department consulted with members of the restaurant industry in an attempt to avoid an outdoor dining restriction through other measures. Id. The Department proposed that restaurants take steps to ensure that all persons seated at a table were from the same household but was informed that restaurants had no way of verifying that information for their diners. Id.

The Department defends the fact that it has not conducted a clinical study on how outdoor dining in specific affects the transmission rates of COVID because it has limited time and resources to conduct clinical studies during a pandemic when it must act swiftly and proactively to halt the spread of the disease. Davis Decl., ¶48. Clinical studies provide minimal value in deciding how to respond to an emergency like the COVID pandemic because they have a higher evidentiary standard and take longer to complete. Davis Decl., ¶49. Field investigations, on the other hand, are intended to identify those factors and behaviors that impose a higher risk of transmission so that these factors can be quickly addressed. Id.

The Department disputes that the September 2020 CDC report has little bearing on outdoor dining. Davis Decl., ¶42. The fact that the study did not distinguish between indoor and outdoor dining does not undermine its usefulness and validity in determining the Department's responses to the recent surge in COVID cases. Davis Decl., ¶42. The study looked at dining in any area designated by the restaurant, including indoor, patio, and outdoor seating. Id.

Davis made the decision to issue the Restaurant Closure Order based on the evidence that COVID spreads most easily when individuals from different households are in close proximity to one another, for prolonged periods of time, without wearing masks. Davis Decl., ¶51. Restaurant dining was the only remaining setting where this was largely still permitted. While dining outdoors is less risky than dining indoors, the nature of dining together at a restaurant still presents a substantial risk of viral transmission. Id.

Based on this evidence, the County argues that its time is better spent in directly responding to the virus than focused on a study effort that would yield macro results to better inform its decision-making. Opp. to OSC at 13.

This argument – that clinical studies have little value -- is spurious. Clinical studies plainly have more scientific and medical value than anecdotal field investigations. The County does not have any evidence of the risks of outdoor dining beyond the generalized evidence of its syllogism: (a) COVID is spread by expelled droplets that transmit the virus to others in proximity, (b) people eating in outdoor restaurants are in proximity to others and are not wearing masks, (c) therefore outdoor restaurant eating creates a risk of spreading COVID. Yet, outdoor dining is considered by the CDC to be only a moderate risk, one that can be mitigated further by proper controls.

The County's argument that it does not have time in the pandemic to conduct clinical studies does not explain why the state, federal, and local governments cannot perform a study (or some other reliable evaluation) of the COVID risk for outdoor restaurants nine months into a pandemic. To say the least, it is disappointing that governmental agencies have yet to conduct a study on the risks of outdoor dining, particularly in California where outdoor dining is a viable concept even in winter (with heaters).

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(iv). The Statistics on Mortality.

Although not widely publicized, the evidence shows that the pandemic is not so overwhelming that the public should live in fear. It is sadly true that large numbers of people have died from COVID: 282,000 in the United States, 19,876 in California, and 7,886 in the County. But the mortality rates have gone down as healthcare professionals have learned to treat the disease and the vulnerable groups are known. There is now a widespread scientific consensus that COVID does not affect all people equally. Kaufman Decl., ¶26. Over 41% of the COVID deaths in the United States have occurred in nursing homes. Id. 94% of all deaths associated with the COVID involve victims with pre-existing underlying medical conditions such as diabetes and heart disease. Id. It is now understood that most of the severe cases of the disease occur in individuals over the age of 65. Id. In California through August 2020, 74.2% of all COVID-related deaths occurred in patients 65 and older. There have been only two deaths among COVID patients below age 18.

Of those who are infected, the median survival rate is 99.77%. Bhattacharya Decl., ¶37. In September 2020, the CDC updated its current best estimate of the ratio of deaths to the number of people infected for various

age groups. Bhattacharya Decl., ¶39. Infected children ages 0-19 years have a 99.997% survival rate. *Id.* Persons ages 20-49 years have a 99.98% survivability rate. *Id.* Persons ages 50-69 years have a 99.5% survivability rate. *Id.* Persons age 70+ years have a 94.6% survival rate. *Id.* A focus on symptomatic COVID patients also shows very high survival rates. Bhattacharya Decl., ¶40. These statistics provide the American public with a very high probability that healthy people will not die from COVID and that we should be protecting the most vulnerable – aged persons and/or those with other risk factors.

The County argues that “a large portion” of the County’s population consists of people of all ages with underlying medical conditions -- medical conditions include cancer, heart conditions, obesity, diabetes, smoking, and even pregnancy -- that pose an increased risk of severe illness and death as a result of contracting COVID. *See* RJN Ex. 10. People with pre-existing conditions should not be left to die prematurely when the County can proactively try to stop the spread of the virus. This is even more true when a vaccine will soon be available, and those deaths can be prevented. OSC Opp. at 16-17.

The County notes that COVID is currently the third leading cause of death in the United States, behind heart disease and cancer. Davis Decl., ¶55. In 2017, the most recent year for which a published mortality report is available, heart disease was the leading cause of death in the County at 11,211. *Id.* As of December 3, 2020, the County had recorded 7,782 COVID deaths. *Id.* Opp. to OSC at 17. Emerging evidence also suggests that some number of patients who recover from active COVID infection experience long-term effects. The full extent of the health consequences of COVID is not yet known, but the evidence available is concerning. Davis Decl. ¶62; Gunzenhauser Decl., ¶10. Opp. to OSC at 17.

The County does not explain what it means by “a large portion” of the population, but nothing in Petitioners’ argument suggests that those persons at serious risk of contracting COVID and death should not be protected. Nothing in Petitioners’ papers undermines the County’s conclusion that the mortality from COVID is serious and that the Department must take action to protect those vulnerable and to avoid long-term effects for those who recover. Petitioner CRA simply points out that the County has not shown any link between outdoor dining and COVID transmissions, hospitalizations, or mortality. CRA Reply at 11.

(v). Why the County Acted Inconsistently with the Governor’s Order

When issued, the County’s Restaurant Closure Order was inconsistent with the Governor’s Blueprint outlining a four-tiered system of community disease transmission risk with activity and business tiers for each risk level. Ellis Decl. Ex. 7. Restaurants were listed as a separate sector in the Blueprint. *Id.* A county in Tier 2 may allow indoor dining at a maximum capacity of 25% or 100 people, whichever is fewer, while a county in Tier 1 may permit only outdoor dining. *Id.* Even in the most restrictive tier, outdoor dining was expressly permitted. *Id.*

The County notes that it is expressly empowered to adopt measures more restrictive than the Blueprint: “This framework lays out the measures that each county must meet, based on indicators that capture disease burden, testing, and health equity,” but that “[a] county may be more restrictive than this framework.” Opp. to OSC, RJN Ex. 5. The Blueprint also provides that local health jurisdictions “may continue to implement or maintain more restrictive public health measures if the local health officer determines that health conditions in that jurisdiction warrant such measures.” *Id.* The Legislature’s statutory instruction to Davis provides that he “shall take measures as may be necessary to prevent the spread of the disease or occurrence of additional cases.” H&S Code §120175. OSC Opp. at 17-18.

The County notes that it has suffered disproportionately from COVID compared to the rest of the state. With a population of 10 million, the County accounts for 25% of California’s population. Over the past week, the County has accounted for 32.6% of new cases. Opp. to OSC, RJN Ex. 6. Because of the recent surge, Davis imposed restrictions that are more stringent than the state’s in several sectors—not just limited to outdoor dining at restaurants, breweries, bars, and wineries. The County has taken a more aggressive approach than the state framework because the pandemic has been felt more severely in the County than the state overall.

The County thus implemented its own plan to close outdoor dining once the County reached a five-day average of 4,000 cases/day, which it has. Because hospitalizations trail new cases by about two weeks, this 4,000 cases/day threshold indicates that the surge has become so widespread that it risks overwhelming County hospitals and resulting in a shortage of critical ICU staffed beds. Davis Decl. ¶¶ 64-66.[20]

In any event, on December 3, 2020 the State announced its Regional Order. Hill Decl., ¶34. Under the Regional Order, the Southern California Region includes Imperial, Inyo, Los Angeles, Mono, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura counties. Hill Decl., ¶35. The Regional Order will prohibit on-site dining at restaurants for three weeks, while restaurants can still provide drive-thru, take-out and delivery services.

The Regional Order takes effect on December 5, 2020 and, pertinent to the Southern California Region, is triggered if the Southern California Region's ICU capacity falls below 15%. The Regional Order is effective for three weeks after the trigger. It affects numerous activities and businesses. In pertinent part, the order prohibits restaurant dining, indoor or outdoor, permitting only take-out or pick-up. The Regional Order will end if the region's ICU capacity projection for four weeks (three weeks after the order) is above or equal to 15%. Conversely, the order continues if the ICU projection for that period is less than 15%. The assessment will occur on a weekly basis.

The County argues the identical restrictions are at issue in the County's Restaurant Closure Order. The County argues that the Regional Order proves that (1) the health emergency is ongoing, and courts must give deference to the public health officials responsible for protecting the public; and (2) the County's Restaurant Closure Order, is not arbitrary and capricious. If the Regional Order takes effect, the OSC and Petitioners' request for relief will be moot. Opp. to OSC at 6-7.

As of December 6, 2020, the Regional Order has been triggered by the fact that the Southern California Region has less than 15% ICU capacity. Sur-Reply RJN Exs. 20, 21. However, the County has drawn overbroad conclusions from the Regional Order. The Regional Order does not moot this case. Petitioners are entitled to attack the County's Restaurant Closure Order without regard to the viability of the Governor's Regional Order, which they may separately attack if they wish. It is true that the Regional Order takes some of the urgency out of Petitioners' application. It is also true that it serves some evidentiary value, including that the issue why the County acted inconsistently with the Governor's Blueprint is no longer significant.

3. Balance of Hardships

In determining whether to issue a preliminary injunction, the second factor which a trial court examines is the interim harm that plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction. Donahue Schriber Realty Group, Inc. v. Nu Creation Outreach, (2014) 232 Cal.App.4th 1171, 1177. This factor involves consideration of the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo. Id.

Petitioners argue that the supposed benefit, if any, of the Restaurant Closure Order is unclear, while its negative impact is apparent and imminent. The Restaurant Closure Order has put at least tens of thousands of economically fragile Los Angelenos out of work since before Thanksgiving and will cause businesses to permanently close. See Gay Decl., ¶24 ("The loss of revenue associated with an outright ban on outdoor dining, especially in conjunction with the amounts already spent on making outdoor dining possible, would likely drive many restaurants out of business entirely."), ¶26 ("Outdoor dining also maintains jobs for a large number of servers who would otherwise not be able to work at all during the Pandemic."); Leon Decl., ¶¶ 7-8 (144 jobs would be eliminated due to outdoor dining ban); Declaration of John Terzian of h.wood Group ¶¶ 7-8 (350 jobs would be eliminated); Rosenthal Decl., ¶4 (potential closure of restaurant and hotel due to outdoor dining ban), ¶6 (describing potential permanent loss of jobs); Thornberg Decl. ¶¶ 6-15. CRA Op. Br. at 20-21.

A significant number of restaurants will shutter their doors completely as they will be uncertain as to the future, unable to retrain employees and reopen due to lack of capital, which has already been severely

depleted by the pandemic. *See* Gay Decl., ¶2; Thornberg Decl., ¶¶ 6-15. Expert analysis and statistical evidence confirm that outdoor dining was, for many restaurants, the difference between staying in business and closing permanently, allowing thousands of restaurant workers to avoid permanent unemployment until the Restaurant Closure Order took effect. Gay Decl., ¶¶ 24-26; Thornberg Decl., ¶14 (outdoor dining is a “critical revenue lifeline” for restaurants until vaccines become available). Out of nearly 1,000 surveyed restauranteurs, 96.7% responded that the outdoor dining ban will require them to fire staff and 89.6% responded that they are at risk of closing their restaurants. Shams Decl., ¶¶ 8-9, Ex. B (29 restauranteur declarations detailing irreparable harm due to the Restaurant Closure Order). Depriving restaurants of significant holiday income will further the devastation. *See* Gay Decl., ¶¶ 20-28. Restaurants would be forced to close, even those that invested heavily in the equipment and procedures that Respondents had previously advised would be sufficient to allow them to operate safely. *See id.* CRA Op. Br. at 21.[21]

The County argues that the Restaurant Closure Order is a critical part of efforts by public health officials to prevent the further spread of a highly contagious disease, protect the health and safety of residents from exposure, illness and possibly death, and avoid overwhelming the healthcare system at a time of increasing rates of infection. Opp. to CRA Ex Parte at 18; Opp. to MEC Ex Parte at 19. Petitioners are temporarily prevented from being allowed to conduct outdoor dining. They are not precluded, however, from continuing to provide take-out, drive-thru and delivery services for customers. Comparing this harm to the harm an injunction would do to the County’s efforts to protect its more than ten million residents, the balance of equities tips sharply in the County’s favor. The potential consequences of community spread of COVID and concomitant risk of death to members of the community outweigh the harm from temporary restrictions on businesses. Opp. to CRA Ex Parte at 18-19; Opp. to MEC Ex Parte at 19-20.

The court cannot adequately balance the harms without the County’s performance of a risk-benefit analysis. While the County clearly may take action to reduce COVID’s impact on hospital bed space and ICUs, it is not clear that the closure of restaurants may aid in reducing that stress to the system or that the benefits of doing so outweigh the costs.

E. Conclusion

As the County argues, the alarming surge in COVID cases, hospitalizations, and deaths entitle the Department to act. OSC Opp. at 6. The County has shown that the greatly decreased capacity of hospitals and ICUs are burdening the healthcare system and action is necessary. However, the County’s syllogism – (a) COVID is spread by expelled droplets that transmit the virus to others in proximity, (b) people eating outdoors in restaurant are in proximity to others and they are not wearing masks, (c) therefore outdoor restaurant dining has a risk of spreading COVID – only weakly supports closure of outdoor restaurant dining because it ignores the outdoor nature of the activity, which the CDC says carries only a moderate risk (and less with mitigations). Nonetheless, the County is correct that the court cannot weigh evidence in deciding whether the restriction has a rational basis, and the Department does have generalized evidence of a COVID risk in outdoor dining.

However, the County clearly has failed to perform the required risk-benefit analysis. By failing to weigh the benefits of an outdoor dining restriction against its costs, the County acted arbitrarily and its decision lacks a rational relationship to a legitimate end. The balance of harms works in Petitioners’ favor until such time as the County concludes after proper risk-benefit analysis that restaurants must be closed to protect the healthcare system.

The applications for an OSC are granted in part. The proper remedy is not to enjoin the County’s Restaurant Closure Order. The Governor’s Regional Order is in effect and outdoor restaurant dining in the County cannot open at this time. Instead, the County should be prevented from continuing the Restaurant Closure Order indefinitely. As proposed on November 22, 2020, the Department planned to ban outdoor dining for at least three weeks. Ellis Decl., Ex. 1. Three days later the County’s Restaurant Closure Order made the ban indefinite. Ellis Decl., Ex. 17. The County will be limited to the initially proposed three-week period which

ends on December 16, 2020, and it is enjoined from extending the Restaurant Closure Order only after conducting an appropriate risk-benefit analysis.

This means that the outdoor restaurant dining portion of the County's revised Restaurant Closure Order (Sur-Reply RJN Ex. 21) must be enjoined. The revised Restaurant Closure Order was revised to "align and comply" with the Governor's Regional Order because it may not be less restrictive than that order. Ex. 21. Fair enough, but the County has no basis for the outdoor dining portion of the order and it must be enjoined until the risk-benefit analysis is performed for outdoor dining.

The court cannot dictate what the Department must do as part of the risk-benefit analysis. A reasonable person would expect the County to consider all pertinent evidence on the benefits of closure, including its own expert evidence, the opinions of other experts such as Kaufman and Bhattacharya (and criticisms of their opinions), the China Study, the Japan Study, and the Mayo Clinic article (and criticisms of their significance), the CDC study, the CDC recommendation concerning outdoor dining, the precautions already in place for outdoor dining -- socially distanced outdoor dining, masks, and temperature checks, and whether its trigger of 4000 new cases has any bearing on hospital burden. As part of the risks of closure, the County could be expected to consider the economic cost of closing 30,000 restaurants, the impact to restaurant owners and their employees, and the psychological and emotional cost to a public tired of the pandemic and seeking some form of enjoyment in their lives. This analysis must be articulated for Petitioners and the public to see. *See* Bhattacharya Decl., ¶29.

[1] For convenience, the court will refer to COVID-19 and SARS-CoV-2 as "COVID".

[2] H&S Code section 101085 confers powers on a local health officer to take action after a declaration of a health emergency or local health emergency under H&S Code section 101080. In turn, H&S Code section 101080 concerns hazardous waste spills and releases. As such, H&S Code section 101085 has no application in this case.

[3] The courts look to the substance of an injunction to determine whether it is prohibitory or mandatory. Agricultural Labor Relations Bd. v. Superior Court, (1983) 149 Cal.App.3d 709, 713. A mandatory injunction — one that mandates a party to affirmatively act, carries a heavy burden: "[t]he granting of a mandatory injunction pending trial is not permitted except in extreme cases where the right thereto is clearly established." Teachers Ins. & Annuity Assoc. v. Furlotti, (1999) 70 Cal.App.4th 187, 1493.

[4] However, a court may issue an injunction to maintain the *status quo* without a cause of action in the complaint. CCP §526(a)(3).

[5] CRA requests judicial notice of the following exhibits attached to the Ellis declaration: (1) a November 22, 2020 Department press release entitled "Public Health to Modify Health Officer Order to Restrict Dining at Restaurants, Breweries, Wineries and Bars Amid Surge in Cases - 5-Day Average of New Cases is 4,097" (Ex. 1); (2) a transcript of a November 24, 2020 County Board of Supervisors (sometimes "Board") meeting (Ex. 11); (3) the Restaurant Closure Order, a November 25, 2020 Order of the Health Officer for Los Angeles County entitled "Reopening Safer at Work and in the Community for Control of COVID-19, Blueprint for a Safer Economy – Tier 1 Surge Response" (Ex. 17); (4) a September 2020 California Department of Public Health chart entitled "Blueprint for a Safer Economy" ("Blueprint") (Ex. 7); (5) a press release issued by the Governor entitled "Governor Newsom Outlines Six Critical Indicators the State will Consider Before Modifying the Stay-at-Home Order and Other COVID-19 Interventions" (Ex. 18); (6) the United States Supreme Court's opinion in Roman Catholic Diocese of Brooklyn, New York v. Cuomo, ("Roman Catholic Diocese") (Nov. 25, 2020) 2020 WL 6948354, 592 U.S. ____ (Ex. 21); and (7) the TRO/OSC and accompanying minute order dated November 6, 2020 in Midway Ventures, LLC v. County of San Diego, et al., Case No. 37-2020-00038194-CU-CR-CTL (San Diego County Superior Court) (Ex. 22).

The existence of the Exhibits 21 and 22, but not the truth of their contents, is judicially noticed. Evid. Code §452(d); Sosinsky v. Grant, (1992) 6 Cal.App.4th 1548, 1551 (judicial notice of findings in court documents may not be judicially noticed). The existence of the press release (Ex. 1), the Restaurant Closure Order (Ex. 17), the Blueprint (Ex. 7), and the Governor's press release (Ex. 18) are judicially noticed. Evid. Code §452(c). The court cannot judicially notice a reporter's transcript (Ex. 11), and the request is denied.

[6] CRA and MEC filed similar declarations from two experts, Jayanta Bhattachara and Sean Kaufman. The court's citations are to CRA's declarations.

[7] CRA has filed written objections to the County's evidence supporting its *ex parte* opposition and its OSC opposition. Most of these objections are made on relevance grounds. The court has considered only relevant evidence and need not rule on those objections. The court has ruled on the other objections, the vast majority of which were overruled. The clerk is ordered to scan and file the rulings.

[8] The Imrey declaration is attached to the Siegel declaration as Exhibit A.

[9] In support of its OSC opposition, the County requests judicial notice of: (1) a May 1, 2020 Department of Finance public release of a "California Tops 39.8 Million Residents at New Year per New State Demographic Report" (Ex. 1); (2) the Blueprint (Ex. 2); (3) a County press release titled "Public Health to Modify Health Officer Order to Restrict Dining at Restaurants, Breweries, Wineries and Bars Amid Surge in Cases – 5-Day Average of New Cases is 4,097" dated November 22, 2020 (Ex. 3); (4) the County's Public Health Temporary Targeted Safer at Home Health Officer Order to Control of COVID-19 (Ex. 4); (5) a Blueprint update on December 1, 2020 (Ex. 5); (6) a California State Workbook: COVID-19 Cases report, updated on December 2, 2020 (Ex. 6); (7) "About COVID_19 restrictions", an update accessed on December 3, 2020 (Ex. 7); (8) a County press release titled "COVID-19 New Cases and Hospitalizations Continue to Break Records – L.A. County Public Health advises everyone to stay home as much as possible" dated December 3, 2020 (Ex. 8); (9) a December 3, 2020 California Department of Public Health Regional Stay At Home Order (Ex. 9); (10) a December 1, 2020 CDC article titled "People with Certain Medical Conditions" (Ex. 10); (11) a Declaration of Peter B. Imrey dated August 31, 2020 and filed in the matter titled South Bay United, et al. v. Newsom, et al., United States District Court case No. 3:20-cv-00865 BAS-AHG (Ex. 11); (12) a Declaration of Michael A. Stoto dated December 2, 2020 and filed in the matter titled Burfitt v. Newsom, et al., Kern County case No. BCV-20-102267 (Ex. 12); (13) a Declaration of Dr. George Rutherford dated December 2, 2020 and filed in the matter titled Burfitt v. Newsom, et al., Kern County case No. BCV-20-102267 (Ex. 13); (14) a Declaration of Marc Lipsitch dated on November 17, 2020 and filed in the matter titled Tandon, et al. v. Newsom, et al., United States District Court (San Jose Division) case No. 20CV07108LHK (Ex. 14); (15) a Declaration of Yvonne Maldonado dated November 18, 2020 and filed in the matter titled Tandon, et al. v. Newsom, et al., United States District Court (San Jose Division) case No. 20CV07108LHK (Ex. 15); (16) a Declaration of Arthur R. Reingold dated November 17, 2020 and filed in the matter titled Tandon, et al. v. Newsom, et al., United States District Court (San Jose Division) case No. 20CV07108LHK (Ex. 16); (17) a September 11, 2020 CDC article titled "Morbidity and Mortality Weekly Report" (Ex. 17); and (18) a December 3, 2020 press release "California Health Officials Announce a Regional Stay at Home Order Triggered by ICU Capacity" (Ex. 18).

The requests are granted as to Exhibits 1-5, 8-10, and 16-18. Evid. Code §452(c). The requests are denied as to Exhibits 6-7, which are not official acts. With the exception of the Reingold declaration (Exhibit 16), none of the other declarations (Exhibits 11-15) were made under penalty of perjury of the laws of California. While otherwise subject to judicial notice under Evid. Code section 452(d), they are inadmissible and therefore not relevant. The requests for Exhibits 11-15 are denied.

In an unauthorized sur-reply, the County asks the court to judicially notice a California Department of Public Health press release dated December 5, 2020 announcing the latest ICU capacity by region (Ex. 19), a Department press release dated December 5, 2020 stating that Southern California Region ICU capacity has fallen below 15% (Ex. 20), the Department's revised Restaurant Closure Order intended to conform with the

Governor's Regional Order, effective December 6, 2020 and continuing for at least 21 days (Ex. 21), and a Department press release dated December 6, 2020 and stating that the County has surpassed 10,000 new cases for the first time (Ex. 22). Although unauthorized, the exhibits present the latest information available and are judicially noticed. Evid. Code §452(c).

[10] The Reingold declaration is Exhibit 16 to the County's request for judicial notice in support of its opposition to the OSC.

[11] MEC also argues that the Restaurant Closure Order violates the California Constitution by interfering with its constitutional right to operate its business and is subject to strict scrutiny review. MEC Op. Br. at 6. As the County correctly notes (MEC Opp. at 12), neither the state nor the federal Constitution guarantees the unrestricted privilege of conducting business as one pleases. Ex parte Maki, (1943) 56 Cal.App.2d 635, 641.

[12] Both CRA and MEC cite the recent United States Supreme Court case of Roman Catholic Diocese, *supra*, 2020 WL at 6948354 (CRA Op. Br. at 9; MEC Op. Br. at 13), but that case concerned the First Amendment rights of churches, synagogues, and their members with respect to COVID restrictions for which the high court applied a strict scrutiny standard of review. As such, it has little bearing on this case except to highlight that the government does not have unfettered discretion to restrict activities during a pandemic.

[13] The CDC report also is not specific to restaurants, let alone outdoor dining. *See* Kaufman Decl. ¶ 17; Ellis Decl., Ex. 20. At a general level, that study showed that a subset of COVID patients reported they had recently dined at restaurants more than the general population. Kaufman Decl. ¶ 17. The CDC report also was limited to adults in eleven participating healthcare facilities and did not take into specific factors about the County, such as its climate, that might make it safer than other places for outdoor dining. For example, outdoor areas in Los Angeles may not need to be enclosed in the same way as a restaurant patio in Boston. *Id.* CRA Op. Br. at 15-16.

[14] CRA also makes a disparate treatment argument that the County did not close (a) parks or picnic tables for private gatherings and outdoor dining, (b) indoor nail and hair salons, tattoo parlors, and barbershops, (c) indoor day camps—where attendees undoubtedly eat meals, (d) indoor music, film, and television production, and (e) outdoor fitness centers, even though patrons are undoubtedly encouraged to drink beverages while exercising. *See* Restaurant Closure Order, §§ 3(a)(ii), 9.5(a), (b), (c), (f), (h). CRA argues that these activities and locations are much more likely to spread COVID than restaurants. *See* Kaufman Decl. ¶¶ 16-18, 30; Allen Decl. ¶¶ 6-9. CRA contends that, by singling out restaurants for disparate treatment without a rational basis, the Restaurant Closure Order violates CRA's members' equal protection rights under the Fourteenth Amendment. CRA Op. Br. at 16-17.

[15] The County properly distinguishes Jew Ho as a case which dealt with a discriminatory, arbitrary, and counterproductive quarantine enacted in response to a seemingly illusory public health threat. The quarantine's failure to limit travel within the quarantined district counterproductively increased the risk of bubonic plague transmission and the quarantine also impermissibly "discriminate[d] against the Chinese population of this city, . . . in favor of the people of other races." *Id.* at 21-23. The County points out that the companion case, Wong Wai, *supra*, 103 F. at 1, is similar. Opp. to MEC Ex Parte at 18.

[16] The County argues that CRA's assertion that the County's data shows "restaurants are responsible for only 3.10% of new coronavirus infections" is premised on an incorrect use of the statistics on workplace outbreaks. The list of workplace outbreaks on the County's COVID webpage is not an indication of the role

played by the specific sector in community spread. Gunzenhauser Decl., ¶¶ 54-56. Further, essential sectors that were never required to cease indoor operations will necessarily be overrepresented on this list. Id., ¶56. Opp. to CRA Ex Parte at 13, n.12.

[17] The County argues that Petitioner MEC's reliance on County of Butler v. Wolf, ("Wolf") (W.D. Pa. Sept. 14, 2020) 2020 WL 5510690 is misplaced. In Wolf, a COVID "policy team" tasked with deciding what business were "life-sustaining" and allowed to reopen and which were not, was comprised "solely of employees from the Governor's policy and planning office, none of whom possess a medical background or [were] experts in infection control." Id. at *2. In contrast, the County's Restaurant Closure Order was formulated by County public health officials tasked with responding to the pandemic and with backgrounds in epidemiology. Opp. to MEC Ex Parte at 18-19.

[18] Additionally, in Warden v. State Bar, the plaintiff attorney made an equal protection challenge to the constitutional validity of the State Bar's mandatory continuing legal education (MCLE) program because categories of attorney-retired judges, elected officials of the state, and full-time law professors were exempt from the MCLE requirements. 21 Cal.4th at 633.

[19] In Carrancho, the court addressed an amended statutory scheme to phase down the practice of burning rice straw left over after harvest. 111 Cal. App. 4th at 1255. As part of the amendment, state agencies responsible for managing the phasedown were required to develop a plan to divert at least 50% of the straw to off-field uses by 2000 and to make a progress report to the Legislature on progress in achieving that goal. Id. The rice grower plaintiffs filed a petition for traditional mandate, alleging that the diversion plan and progress report failed to comply with the statute. Id. The court noted that the plan and report performed the quasi-legislative function of gathering information and making recommendations in aid of prospective legislation, acts that are reviewed under a deferential standard. Id. at 1266-67.

While the plaintiffs could compel the agencies to issue the statutorily required documents, review of their discretionary manner of preparation and the contents was limited to whether the actions were arbitrary, capricious, or unsupported by substantial evidence. Id. at 1269. The judicial review must "ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." Id. at 1273-74 (citation omitted). This required deferential, but not perfunctory, review. Ibid.

[20] As CRA argues (CRA Reply at 12), the County's argument does not demonstrate any rationale for the 4000 cases/day trigger, even though the court asked for it. A trigger of 4000 new cases per day is not directly related to the burden on hospitalizations and ICU beds.

[21] Petitioners also argue that enjoining the Restaurant Closure Order will save lives because a closure of all dining options at restaurants will cause individuals to move into homes and encourage indoor gatherings, one of the highest-risk areas for the spread of COVID. See Bhattacharya Decl., ¶¶ 22, 45-46; Kaufman Decl., ¶28; Allen Decl., ¶10. CRA Op. Br. at 21. The court views this evidence and argument as speculative.

Tentative decision on application for right to attach order: denied

Plaintiff Tuscany Cheese, LLC. (“Tuscany”) applies for a right to attach order against Defendant Whittier Enterprise, LLC, dba Popkoff’s Frozen Food Manufacturing (“Whittier”) in the amount of \$761,862.41.

The court has read and considered the moving papers and opposition^[1] (no reply was filed), and renders the following tentative decision.

A. Statement of the Case

1. Complaint

Plaintiff Tuscany commenced this action on August 10, 2020 against Defendants Whittier, Mike Lev (“Lev”), Alex Meseonznik (“Meseonznik”), and Derek W. Zirkle (“Zirkle”), alleging causes of action for (1) breach of oral contract; (2) open book account; (3) account stated; (4) fraud-negligent misrepresentation; (5) intentional misrepresentation; (6) breach of covenant of good faith and fair dealing; and (7) negligence. The alleges in pertinent part as follows.

In December 2018, Tuscany entered into an oral agreement with Whittier for the distribution and supply of bulk cheese at the determined rate under the Chicago Mercantile Exchange.

From approximately October 2019 through February 2020, Whittier failed to pay invoices totaling \$761,862.41 for products delivered by Tuscany to Whittier. Whittier remitted payment in November and December 2019 but never remitted any payments thereafter. These remitted payments were to satisfy open invoices predating October 2019. In January 2020, in response to Tuscany’s refusal to ship additional product, Whittier remitted a check payable to Tuscany in the amount of \$310,908.63. In reliance on the January 2020 payment, Tuscany shipped additional product to Whittier. Within two days after the shipment, Whittier informed Tuscany it could not deposit said check and have never remitted any payments thereafter.

On February 5, 2020, Tuscany met with Defendant Lev to discuss the overdue payment. Lev represented that Whittier was in the process of securing additional financing and the parties reached a repayment plan (“Repayment Plan”) wherein Whittier would remit \$10,000 to resume shipment of all orders and thereafter payments would be made on Friday of every week until the past-due balance was satisfied in full.

Tuscany resumed its distribution of bulk cheese to Whittier in reliance on the Repayment Plan, but Whittier never issued any payments it was responsible to pay. In March 2020, Tuscany ceased delivery of bulk cheese to Whittier and issued a formal request for payment. To date, no payment has been made by Whittier towards the balance owed.

2. Course of Proceedings

According to an acknowledgement of receipt on file, Whittier was served with the Summons and Complaint on August 14, 2020. According to a proof of service on file, Whittier's counsel was served with the moving papers via U.S. mail on September 24, 2020.

B. Applicable Law

Attachment is a prejudgment remedy providing for the seizure of one or more of the defendant's assets to aid in the collection of a money demand pending the outcome of the trial of the action. See Whitehouse v. Six Corporation, (1995) 40 Cal.App.4th 527, 533. In 1972, and in a 1977 comprehensive revision, the Legislature enacted attachment legislation (CCP §481.010 *et seq.*) that meets the due process requirements set forth in Randone v. Appellate Department, (1971) 5 Cal.3d 536. See Western Steel & Ship Repair v. RMI, (12986) 176 Cal.App.3d 1108, 1115. As the attachment statutes are purely the creation of the Legislature, they are strictly construed. Vershow v. Reiner, (1991) 231 Cal.App.3d 879, 882.

A writ of attachment may be issued only in an action on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars (\$500). CCP §483.010(a). A claim is "readily ascertainable" where the amount due may be clearly ascertained from the contract and calculated by evidence; the fact that damages are unliquidated is not determinative. CIT Group/Equipment Financing, Inc. v. Super DVD, Inc., (2004) 115 Cal.App.4th 537, 540-41 (attachment appropriate for claim based on rent calculation for lease of commercial equipment).

All property within California of a corporation, association, or partnership is subject to attachment if there is a method of levy for the property. CCP §487.010(a), (b). While a trustee is a natural person, a trust is not. Therefore, a trust's property is subject to attachment on the same basis as a corporation or partnership. Kadison, Pfaelzer, Woodard, Quinn & Rossi v. Wilson, *supra*, 197 Cal.App.3d at 4.

The plaintiff may apply for a right to attach order by noticing a hearing for the order and serving the defendant with summons and complaint, notice of the application, and supporting papers any time after filing the complaint. CCP §484.010. Notice of the application must be given pursuant to CCP section 1005, sixteen court days before the hearing. See ibid.

The notice of the application and the application may be made on Judicial Council forms (Optional Forms AT-105, 115). The application must be supported by an affidavit showing that the plaintiff on the facts presented would be entitled to a judgment on the claim upon which the attachment is based. CCP §484.030.

Where the defendant is a corporation, a general reference to "all corporate property which is subject to attachment pursuant to subdivision (a) of Code of Civil Procedure Section 487.010" is sufficient. CCP §484.020(e). Where the defendant is a partnership or other unincorporated association, a reference to "all property of the partnership or other unincorporated association which is subject to attachment pursuant to subdivision (b) of Code of Civil Procedure Section 487.010" is sufficient. CCP §484.020(e). A specific description of property is not required for corporations and partnerships as they generally have no exempt property. Bank of America v. Salinas Nissan, Inc., ("Bank of America") (1989) 207 Cal.App.3d 260, 268.

A defendant who opposes issuance of the order must file and serve a notice of opposition and supporting affidavit as required by CCP section 484.060 not later than five court days prior to the date set for hearing. CCP §484.050(e). The notice of opposition may be made on a Judicial Council form (Optional Form AT-155).

The plaintiff may file and serve a reply two court days prior to the date set for the hearing. CCP §484.060(c).

At the hearing, the court determines whether the plaintiff should receive a right to attach order and whether any property which the plaintiff seeks to attach is exempt from attachment. The defendant may appear the hearing. CCP §484.050(h). The court generally will evaluate the attachment application based solely on the pleadings and supporting affidavits without taking additional evidence. Bank of America, supra, 207 Cal.App.3d at 273. A verified complaint may be used in lieu of or in addition to an affidavit if it states evidentiary facts. CCP §482.040. The plaintiff has the burden of proof, and the court is not required to accept as true any affidavit even if it is undisputed. See Bank of America, supra, at 271, 273.

The court may issue a right to attach order (Optional Form AT-120) if the plaintiff shows all of the following: (1) the claim on which the attachment is based is one on which an attachment may be issued (CCP §484.090(a)(1)); (2) the plaintiff has established the probable validity of the claim (CCP §484.090(a)(2)); (3) attachment is sought for no purpose other than the recovery on the subject claim (CCP §484.090(a)(3); and (4) the amount to be secured by the attachment is greater than zero (CCP §484.090(a)(4)).

A claim has “probable validity” where it is more likely than not that the plaintiff will recover on that claim. CCP §481.190. In determining this issue, the court must consider the relative merits of the positions of the respective parties. Kemp Bros. Construction, Inc. v. Titan Electric Corp., (2007) 146 Cal.App.4th 1474, 1484. The court does not determine whether the claim is actually valid; that determination will be made at trial and is not affected by the decision on the application for the order. CCP §484.050(b).

Except in unlawful detainer actions, the amount to be secured by the attachment is the sum of (1) the amount of the defendant’s indebtedness claimed by the plaintiff, and (2) any additional amount included by the court for estimate of costs and any allowable attorneys’ fees under CCP section 482.110. CCP §483.015(a); Goldstein v. Barak Construction, (2008) 164 Cal.App.4th 845, 852. This amount must be reduced by the sum of (1) the amount of indebtedness that the defendant has in a money judgment against plaintiff, (2) the amount claimed in a cross-complaint or affirmative defense and shown would be subject to attachment against the plaintiff, and (3) the value of any security interest held by the plaintiff in the defendant’s property, together with the amount by which the acts of the plaintiff (or a prior holder of the security interest) have decreased that security interest’s value. CCP §483.015(b). A defendant claiming that the amount to be secured should be reduced because of a cross-claim or affirmative defense must make a *prima facie* showing that the claim would result in an attachment against the plaintiff.

Before the issuance of a writ of attachment, the plaintiff is required to file an undertaking to pay the defendant any amount the defendant may recover for any wrongful attachment by the plaintiff in the action. CCP §489.210. The undertaking ordinarily is \$10,000. CCP §489.220. If the defendant objects, the court may increase the amount of undertaking to the amount determined as the probable recovery for wrongful attachment. CCP §489.220. The court also has inherent authority to increase the amount of the undertaking *sua sponte*. North Hollywood Marble Co. v. Superior Court, (1984) 157 Cal.App.3d 683, 691.

C. Analysis

Plaintiff Tuscany applies for a right to attach order against Defendant Whittier in the amount of \$761,862.41. Tuscany’s application must be denied for procedural failures.

An application for a writ of attachment is a law and motion matter. CRC 3.1103(a). All law and motion matters, with inapplicable exceptions, must be accompanied by a memorandum of points and authorities. CRC 3.1113(a). Tuscany fails to comply with this requirement, and thereby fails to set forth the law of attachment and any analysis in support of its application.

Moreover, as Whittier correctly notes, Tuscany fails to comply with the evidentiary requirements for an application for writ of attachment. Opp. at 2-3. An application for a right to attach order must be supported by an affidavit or declaration showing that the applicant, on the facts presented, would be entitled to a judgment on the claim upon which the attachment is based. CCP §484.030. Tuscany fails to provide an

affidavit or declaration, instead relying solely on its verified Complaint and unauthenticated exhibits. This is insufficient under CCP section 484.030.

There are some circumstances in which a verified complaint is admissible as evidence in lieu of a declaration or affidavit. However, the affidavit or declaration must state the facts "with particularity." CCP §482.040. Except where matters are specifically permitted to be shown upon information and belief, each affidavit or declaration must show that the affiant or declarant, if sworn as a witness, can testify competently to the facts stated therein. Id. This means that the affiant or declarant must show actual personal knowledge of the relevant facts, rather than the ultimate facts commonly found in pleadings, and such evidence must be admissible and not objectionable. Id. As Whittier notes, the Complaint's verification is insufficient to satisfy the requirements of CCP section 482.040 as it does not state explain how the verifying person, Joseph Gaglio, who is Tuscany's manager, has personal knowledge of the facts alleged. The requirements for attachment are subject to strict construction. Vershbow v. Reiner, (1991) 231 Cal.App.3d 879, 882.

More important, Tuscany cannot rely on its manager's verification at all. CCP section 446 permits a corporate officer to verify a complaint, but in that circumstance the complaint cannot be considered as a declaration or affidavit to support the facts alleged. Presumably, this law exists because a corporate officer will not have firsthand knowledge of everything alleged on the corporation's behalf. Tuscany's failure to provide a satisfactory declaration supported by source documents of outstanding invoices is fatal to its application, as it has no admissible evidence.

E. Conclusion

The application for a right to attach order is denied.

[1] Whittier failed to lodge a courtesy copy of its opposition brief in violation of the Presiding Judge's General Order Re: Mandatory Electronic Filing. Its counsel is admonished to provide courtesy copies in all future filings.

Case Number: 20STCV36124 **Hearing Date:** December 08, 2020 **Dept:** 85

MUFG Union Bank, N.A. v. Tolliver Ranch Brands, LLC, et al., 20STCV36124

Tentative decision on: (1) application for appointment of receiver: denied; (2) motion for preliminary injunction: denied

Plaintiff MUFG Union Bank (“Bank”) moves for the appointment of a receiver to maximize the value of Defendant Tolliver Ranch Brands, LLC (“TRB”) by either conducting a sale of the company as a going concern or liquidating assets in an orderly manner for the payment of Bank and other creditors. Bank also moves for a preliminary injunction restraining and enjoining TRB from interfering with the duties of the receiver.

The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.

A. Statement of the Case

1. Complaint

Plaintiff Bank commenced this proceeding on September 22, 2020, against Defendants TRB, Jon Robert Murray (“Murray”), and Jon Robert Murray and Nancy Murray as Trustees of the Jon and Nancy Murray Trust (“Trustees”),^[1] alleging causes of action for: (1) breach of contract; (2) account stated; (3) open book account; (4) recovery of possession of personal property (claim and delivery); (5) breach of guaranties; and (6) appointment of receiver and seeking the remedy of injunctive relief. The Complaint alleges in pertinent part as follows.

Pursuant to a Business Loan Agreement (“Loan Agreement”) and Commercial Promissory Note (“Note”) dated as of February 1, 2018, Bank made a loan to TRB in the amount of \$4,500,000 (“Loan”). To secure the payment of the Loan, TRB granted to Bank a security interest in essentially all of its personal property (“Collateral”) described in a Security Agreement dated as of February 1, 2018 (“Security Agreement”). Bank filed a UCC-1 Financing Statement with the California Secretary of State on February 15, 2018, as Filing Number 18-7633717639 (“Financing Statement”).

On February 1, 2018, TRB signed an Alternative Dispute Resolution Agreement/Judicial Reference and Waiver of Jury Trial (“ADR Agreement”). Also on February 1, 2018, Murray, as an individual, and Trustees (collectively, the “Guarantors”) each signed a Continuing Guaranty of performance and payment on the obligations represented by the Loan Agreement and Note.

TRB, the Guarantors and Bank subsequently entered into amendments and forbearance agreements, including an Amendment Letter dated December 5, 2018, an Amendment Letter dated December 20, 2018, an Extension and Modification Agreement dated July 15, 2019, a Forbearance Agreement dated November 14, 2019, a Second Forbearance Agreement dated January 20, 2020, and a Third Forbearance dated March 25, 2020 (collectively, “Forbearance Agreements”).

Pursuant to the Amendment Letter dated December 5, 2018, the amount of the Loan was increased to \$5,500,000. In conjunction with that amendment, TRB signed a Commercial Promissory Note dated December 5, 2018, in the amount of \$5,500,000. The Loan Agreement, Note, Second Note, Security Agreement, Guaranties, ADR Agreements and Forbearance Agreements are collectively referred to herein as the “Loan Documents.”

TRB defaulted under the Loan Documents by failing to pay the Loan on the maturity date of the Second Note, which was June 30, 2019 and extended by written agreement to September 30, 2019. All Forbearance Agreements have expired. A demand letter was sent to TRB and Guarantors on August 7, 2020.

The Loan remains unpaid. As of September 17, 2020, the balance on the Loan, including accrued interest, is \$5,531,547.83, consisting of principal of \$5,183,684.07, accrued interest of \$330,863.76 and \$17,000 of expenses, plus legal fees and costs as described below. Interest and expenses continue to accrue.

2. Course of Proceedings

According to an acknowledgment of receipt on file, TRB was served with the Summons and Complaint on September 30, 2020. According to a proof of service on file, Defendants' counsel was served with the moving papers on October 27, 2020.

TRB filed an Answer to the Complaint on November 13, 2020.

B. Statement of Facts

1. Bank's Evidence

TRB manufactures and sells wine and operates its business in leased property that includes a 7,900 square foot building, a 20,000 square foot production facility, and 9.6 acres of vineyards. Klinge Decl., ¶3. TRB represented that it produced about 75,000 cases of wine in 2019. *Id.*

Pursuant to the Loan Agreement and the Note, dated as of February 1, 2018, Bank agreed to make, and did make, the Loan to TRB in the original amount of \$4,500,000. Klinge Decl., ¶5, Exs. A, B. To secure the payment and performance of all obligations owed to Bank, TRB granted to Bank a security interest in the Collateral, consisting of essentially all of its assets, described in the Security Agreement dated as of February 1, 2018. Klinge Decl., ¶6, Ex. C. The Collateral consists primarily of equipment, inventory, and accounts receivable. *Id.* Bank filed the Financing Statement with the California Secretary of State on February 15, 2018. Klinge Decl., ¶6, Ex. D.

Pursuant to the Amendment Letter dated December 5, 2018, the amount of the Loan was increased to \$5,500,000. Klinge Decl., ¶7, Ex. H. In conjunction with that amendment, TRB signed a Commercial Promissory Note ("Second Note") dated December 5, 2018, in the amount of \$5,500,000. *Id.*, Ex. E.

TRB and Bank entered into multiple amendments and forbearance agreements, including an Amendment Letter dated December 5, 2018, an Amendment Letter dated December 20, 2018, an Extension and Modification Agreement dated July 15, 2019, a Forbearance Agreement dated November 14, 2019, a Second Forbearance Agreement dated January 20, 2020, and a Third Forbearance dated March 25, 2020. Klinge Decl., ¶8, Exs. F-K.

TRB defaulted under the Loan Documents by, among other things, failing to pay the Loan on the original maturity date of the Second Note, which was June 30, 2019 and had been extended by the Extension and Modification Agreement dated July 15, 2019 to September 30, 2019. Klinge Decl., ¶10. Multiple forbearances were given at TRB's request to allow it to complete a merger with Winc, Inc. ("Winc"), which purportedly would include full payment of the Bank's Loan by December 31, 2019. Klinge Decl., ¶11.

In addition to the payment defaults, TRB's business shortcomings include an unusually high turnover in its accounting staff, resulting in late and inconsistent financial reporting. Klinge Decl., ¶12. Bank's concern about accounting and management turnover was compounded in October 2020 when it learned that TRB's president, Caine Thompson ("Thompson"), had left TRB to take a job at another local winery. Thompson's position has not been filled with another person.

After the Winc merger collapsed, TRB retained Business Capital in early summer 2020 to locate other sources of money to pay the matured Bank debt. Klinge Decl., ¶13. Business Capital has been unable to locate a source of money that would pay Bank's loan. *Id.*

Bank sent a demand letter to TRB on August 7, 2020. Klinge Decl., ¶14, Ex. L. TRB continues to report that it is attempting to raise money through various means, but continues to fail to do so, despite the passage of 13

months since the maturity date. Id.

As of October 23, 2020, the Loan balance, including accrued interest, is \$5,545,777.40 consisting of principal of \$5,183,684.07, and accrued interest of \$362,093.33. Klinge Decl., ¶15. There are also unreimbursed expenses of \$37,300. Interest, expenses, and legal fees continue to accrue. Id.

The Loan Documents provide that in the event of default, Bank has the right to the immediate and exclusive possession of the Collateral. Klinge Decl., ¶16. Upon information and belief, essentially all of the Collateral, which consists primarily of accounts receivable and bulk wine and bottled wine, is located at 3090 Anderson Road, Paso Robles, California. Id.

Pursuant to the Security Agreement, whenever a default exists, Bank may file an action to protect and preserve its right, title and interest in the Collateral. Klinge Decl., ¶17, Ex. C, ¶5. TRB expressly waived any right to oppose the appointment of a receiver or similar official to operate its business. Ex. C, ¶6. The agreement also requires TRB to assemble and deliver any Collateral to Bank at a reasonably convenient place designated by Bank. Ex. C, ¶5.

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2. Defendant's Evidence[2]

In February 2018, Bank loaned TRB \$4.5 million, which was increased in December 2018 to \$5.5 million. Murray Decl., ¶4. The Loan matured on September 2019. Murray Decl., ¶5. Since February 2018, TRB has paid Bank interest at the non-default rate (approximately \$20,000 per month) on a regular and timely basis. Id.

From September 2019 through the end of March 2020, Bank agreed to forbear from exercising its rights under the loan documents to allow TRB to pursue a transaction with Winc, Inc., a publicly-traded online wine club, which TRB expected to generate sufficient proceeds to pay the Bank in full. Murray Decl., ¶6. In October 2019, TRB entered into a Letter of Intent with Winc pursuant to which Winc agreed to purchase all of the assets of TRB. Id. Had the transaction closed, TRB would have had sufficient funds to satisfy its obligations to the Bank. Id. On April 23, 2020, one day before Winc was set to begin an audit of TRB's inventory in connection with the transaction, Winc advised TRB that it was pulling out of the deal in light of the economic uncertainty caused by the Covid-19 pandemic, which at that point was in its early stages. Id.

Beginning in May 2020, TRB actively pursued a number of financing and other alternatives with the goal of generating sufficient funds to satisfy its obligations to Bank. Murray Decl., ¶7. TRB: (a) retained Business Capital, a commercial finance company with experience in assisting distressed small and middle market companies, to help locate alternative sources of asset-based financing; (b) retained Aspect Consumer Partners, a strategic advisory firm with substantial experience in wine industry mergers and acquisitions, to help locate potential buyers and investors; (c) reached out directly to a number of winery companies that had expressed interest in investing in or purchasing TRB at the time of the Winc transaction; and (d) contacted a number of potential "friends and family" investors with the financial wherewithal to make substantial investments in TRB. Id.

Although a handful of wineries expressed interest in purchasing all or part of TRB's assets, until recently none provided TRB with any definitive proposals. Although Business Capital located several lenders interested in providing TRB with new financing, none of the lenders offered to provide financing sufficient to satisfy TRB's obligation to the Bank. Id.

At no time has Bank alleged that Murray has mismanaged TRB's business, is guilty of any malfeasance, or misappropriated or wasted any of TRB's funds or assets. Murray Decl., ¶9. Since TRB's loan matured in September 2019, Murray has continued to operate the company without objection from the Bank. Id. Although the Bank has expressed concern in its moving papers over the recent resignation of TRB's President, Caine Thompson ("Thompson"), he left TRB for personal and health reasons, not because he lacked

confidence in the company. Id. Murray actively managed TRB on a day-to-day basis for years before Thompson joined the company, continued managing it during Mr. Thompson's two-plus year tenure as President, and has devoted all of his time and attention to operating and managing TRB's business since Thompson's departure. Id.

Since the Winc deal fell through, TRB has increased its collateral borrowing base from roughly \$2.7 million to nearly \$5.4 million, and currently is on track to meet or exceed its budget for 2020. Murray Decl., ¶10.

Bank expressed concern in its moving papers over some recent turnover in TRB's accounting staff. Murray Decl., ¶11. TRB provides Bank with monthly financial statements (both Profit & Loss Statements, as well as Balance Sheets), as well as detailed breakdowns of any changes in the collateral borrowing base. Id. The materials provided to Bank are initially prepared by TRB's Controller, reviewed by Murray, and then reviewed and approved by an outside accounting firm with experience in the wine industry. Id. Like its concerns regarding Thompson, Bank's concerns regarding the turnover in TRB's internal accounting staff and its financial reporting are unfounded. Id. In June 2020, Bank's auditors took no material exception to TRB's reporting procedures or financial statements. Id.

Although it is true, as Bank alleges, that TRB has incurred expenses in the ordinary course of business and will continue to do so going forward, the only new secured obligations incurred in 2020 which takes priority over the debt it owes to the Bank were to growers for the purchase of grapes for its 2020 vintage wines — a total of roughly \$500,000. Murray Decl., ¶12. Pursuant to an agreement with the growers, if TRB decides not to bottle the bulk wine, the growers, not TRB, are responsible for the processing costs. Id. Absent a liquidation of the company, the same business expenses and grape purchase obligations TRB has been incurring will necessarily continue, whether the company is managed by Murray or a receiver. Id. No further grape purchases, however, will need to be made until the Fall of 2021. Id.

Other than paying expenses in the ordinary course of business, the only secured or unsecured creditor with overdue balance in excess of \$100,000 who TRB paid in 2020 is Brown Pelican Farms, LLC ("Brown Pelican"). Murray Decl., ¶13. TRB purchased roughly \$1 million in grapes from Brown Pelican in 2018 and 2019 but was unable to pay Brown Pelican in full for the grapes. Id. As a result, Brown Pelican lodged a complaint against TRB with the California Department of Food & Agriculture ("CDFA"). Id. In order to avoid having its license suspended (or not renewed) by the CDFA, TRB agreed to pay Brown Pelican \$120,000 per month until its debt is paid. The Bank's counsel was advised of this agreement in July 2020. Id.

Because TRB's debt to Brown Pelican is secured by a statutory producer's lien that is entitled to priority over TRB's obligation to the Bank, by paying Brown Pelican rather than the Bank, Murray did not believe he prejudiced Bank's rights or impaired its Collateral in any way. Murray Decl., ¶14. By entering into the agreement with Brown Pelican, TRB not only avoided losing its license, it protected Bank's Collateral by preserving the bulk wine and case goods made from the grapes it purchased from Brown Pelican in 2018 and 2019, which otherwise would have been subject to foreclosure. Id.

On November 17, 2020, TRB entered into a non-binding Confidential Letter of Intent ("LOI") pursuant to which agreed to sell its Rabble brand and inventory. Murray Decl., ¶15. TRB provided Bank with a copy of the LOI on November 17, 2020. Id.

In the event that the deal summarized in the LOI does not go forward, Murray believes that it would be disruptive and prejudicial to TRB's creditors to remove him from management of the company and replace him with a receiver. Murray Decl., ¶16. Murray believes his extensive experience and knowledge in the industry makes him best suited to manage TRB. Id. Murray also believes many employees will seek employment elsewhere if he is replaced and many retailers will not continue to work with TRB if a receiver is appointed. Id.

3. Reply Evidence

TRB had no Profits whatsoever in 2017, 2018 and 2019, long before the 2020 pandemic became an issue. Klinge Reply Decl., ¶3. TRB's current financial reporting, as provided to Bank, shows that, year-to-date through August 31, 2020, TRB has incurred a Net Operating Loss of \$779,049, so its inability since 2017 to generate a dollar in profit will continue in 2020. Id.

Murray's declaration alludes to additional grower debt being incurred, and expresses his opinion that the grower debt is secured by California Producer Liens that are senior in priority to the Bank's security interest. Klinge Reply Decl., ¶4. Mr. Murray therefore admits that Bank is suffering material and irreparable harm by way of additional debt owed to growers. Id.

TRB faced the suspension of its Producer's License in mid-2020 for failing to pay for grapes purchased from Brown Pelican Farms in 2018 and 2019. Klinge Reply Decl., ¶4. Murray then purchased 2020 grapes during the past few months and has not paid for those, creating additional grower liens and payables that he believes will have lien priority over Bank's liens. Id. TRB's financial records through August 31, 2020 reflect that, due to its ongoing operating losses and over-levered balance sheet, TRB has burned an additional \$912,000 of cash financed with additional debt of \$727,000 and a reduction in cash balances of ~\$185,000. Id. TRB senior management's failure to operate a profitable business that generates positive free cash flow necessary to satisfy its repayment obligations to creditors is among the reasons why a receiver is necessary. Id.

At no point in his declaration does Murray allege that there is sufficient Collateral to pay Bank in full. Klinge Reply Decl., ¶5. Thus, incurring any senior debt or paying junior debt causes irreparable harm to Bank. Id. At no point does Murray even allege that TRB is solvent. Id. Despite Bank's forbearance, Murray has been unable to find a solution to the fact that TRB cannot pay a long-matured, senior secured loan of over \$5.5 million, while other creditors are paid and additional debt is incurred. Id.

C. Applicable Law

CCP section 564(b) provides that the court has authority to appoint a receiver in any of the following pertinent circumstances: (1) in an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to the creditor's claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured; and (9) in all other cases where necessary to preserve the property or rights of any party.

The appointment of a receiver is a drastic remedy to be utilized only in "exceptional cases." As such, a receiver should not be appointed unless absolutely essential and because no other remedy will serve its purpose. City & County of San Francisco v. Daley, (1993) 16 Cal.App.4th 734, 744. A plaintiff who seeks appointment of a receiver of certain property, under CCP section 564(b)(1), has the burden to establish by a preponderance of the evidence that plaintiff has a joint interest with defendant in the property, that the property is in danger of being lost, removed or materially injured and that plaintiff's right to possession is probable. Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp., (1953) 116 Cal.App.2d 869, 873.

D. Analysis

Plaintiff Bank moves for the appointment of David P. Stapleton ("Stapleton") as receiver to conduct a sale of TRB as a going concern or liquidate assets in an orderly manner for the payment of Bank and other creditors pursuant to CCP sections 564(b)(1) and (b)(9). Defendant TRB opposes.

1. Mootness

As a preliminary matter, TRB asserts that Bank's application should be denied as moot or, alternatively continued until after December 14, 2020, because the parties have reached a settlement in principle of Bank's claims under the Loan Documents. Opp. at 4. This settlement is conditioned on, among other things, the timely consummation of TRB's non-binding LOI pursuant to which it agreed to sell its Rabble brand and inventory. Murray Decl., ¶15.

The court declines to deny or continue the matter on this ground. As Bank notes (Reply at 4) and TRB concedes, its agreement to sell its Rabble brand and inventory is non-binding and Bank has not agreed to a dismissal or continuance. The matter is not moot.

2. CCP Section 564(b)(1)

Bank asserts that it is entitled to appointment of a receiver pursuant to CCP section 564(b)(1) because its evidence shows that TRB is insolvent and unable to timely pay its creditors. Mot. at 4-5; Reply at 3-4.

The court has authority to appoint a receiver in an action by a creditor to subject any property or fund to the creditor's claim, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured. CCP §564(b)(1).

Bank has fulfilled the first prong for CCP section 564(b)(1) and shown its probable right to the Collateral. Bank provides the Security Agreement, pursuant to which TRB granted to Bank a security interest in the Collateral. Klinge Decl., ¶6, Ex. C.

However, in arguing that it has fulfilled the second prong, Bank only makes the conclusory statement that there is a danger that the value of Bank's Collateral will be lost, removed or materially injured, based on TRB's inability to pay creditors.[3] Mot. at 5. While TRB concedes that it has not paid all its creditors, it persuasively argues that Bank has not sufficiently demonstrated that there is any danger that the Collateral will be lost, removed, or materially injured during the pendency of this case. Opp. at 6-7.

TRB asserts that it is well-managed by Murray and Bank's Collateral is better preserved now than it was in April 2020 when the Winc deal fell through. Opp. at 6. TRB shows that it increased its collateral borrowing base from approximately \$2.7 million to \$5.4 million and currently is on track to meet or exceed its budget for 2020, and that Bank is aware of TRB's financial performance.[4] Murray Decl., ¶¶ 10-11. TRB notes that, while it did incur expenses totaling roughly \$500,000, these expenses would have been incurred regardless of who was managing TRB, as the expenses were necessary for the purchase of grapes from which to produce TRB's 2020 vintage wines.[5] Murray Decl., ¶12. TRB states that no further grape purchases will need to be made until the Fall of 2021 and there is no risk of TRB incurring any additional secured debt superior to the Bank's until then. Murray Decl., ¶12.

TRB also notes that Brown Pelican is its only secured or unsecured creditor with an overdue balance in excess of \$100,000 paid in in 2020. Opp. at 7; Murray Decl., ¶13. TRB agreed to pay Brown Pelican \$120,000 per month until its debt is paid in full. *Id.* TRB argues that its agreement with Brown Pelican does not prejudice the Bank's rights in any way because its debt to Brown Pelican was secured by a statutory producer's lien and is entitled to priority over TRB's obligations to Bank. Opp. at 8. TRB also argues that this agreement protected Bank's interests by avoiding the loss of its license and preserving the bulk wine and case goods made from the grapes it purchased from Brown Pelican in 2018 and 2019, which otherwise would have been subject to foreclosure. Opp. at 8; Murray Decl., ¶14.

The issue in appointing a receiver to operate a business is always whether a receiver would do a better job than existing management. TRB provides un rebutted evidence that appointment of a receiver would be

disastrous for the business. Murray believes his extensive experience and knowledge in the industry makes him best suited to manage TRB. Murray Decl., ¶16. There is no evidence that Murray is guilty of misconduct in operating the business. If a receiver is appointed, he believes that TRB's creditors may demand payment, employees will seek employment elsewhere, and many retailers will not continue to work with TRB. Id. Thus, a receiver cannot be appointed to operate the business.

Bank does not seek a receiver to operate TRB; it wants a receiver to sell the business as a going concern. Clearly, this is a remedy to which Bank would be entitled upon obtaining a judgment in this case. The question is whether a receiver should be appointed to sell TRB as a provisional remedy.

Bank argues that TRB is insolvent and seizes on the payments to Brown Pelican as an admission that the Collateral is jeopardized and faces an undeniable danger of being lost, removed, or materially injured. Reply at 3-4. Not so. Bank has not shown that a receiver would not have had to make the same payments to Brown Pelican if appointed to continue operating the business. Bank does not show that TRB is likely to make additional payments that would impair its Collateral. In fact, TRB states that it will not incur new secured obligations in 2020, only unsecured expenses in the ordinary course of business. Murray Decl., ¶12. Additionally, no further grape purchases, TRB's main expense, will need to be made until the Fall of 2021. Id.

Bank has not shown that a sale of the business is necessary at this time. Apart from the fact that TRB has an LOI which may solve its problems and that a forced sale during the pandemic would not maximize the return, Bank does not show that TRB is taking or will take any action during the lawsuit of incurring unnecessary debts that would "undermine Bank's collateral." Reply at 3. TRB did not show a profit in 2017-19 (Klinge Reply Decl., ¶3), but it is on track to meet or exceed its budget in 2020. Murray Decl., ¶10. Bank's contention that TRB actually is on track in 2020 for a net operating loss of \$779,049 (id.) is unsupported by documentary evidence. This evidence is insufficient to require a sale before Bank prevails on its lawsuit. Bank has not shown that the mere continued operation of TRB during the lawsuit will undermine its Collateral.

Bank relies heavily on TRB's agreement in the Security Agreement that a receiver may be appointed in the event of default. Klinge Decl., ¶18, Ex. C, §6. Mot. at 4; Reply at 2. Such an agreement is entitled to "some weight" and presents a *prima facie*, but rebuttable, evidentiary showing of the beneficiary's entitlement to a receiver. Barclays Bank of California v. Superior Court, (1977) 69 Cal.App.3d 593, 602. The presumption has been rebutted.

Based on the evidence presented, there is no danger of the Collateral being lost, removed, or materially injured. Bank has not demonstrated that appointment of a receiver is necessary pursuant to CCP section 564(b)(1).

3. CCP Section 564(b)(9)

Bank argues that a receiver should be appointed pursuant to CCP section 564(b)(9) because the Loan Documents specifically provide for the appointment of a receiver upon default. App. at 4; Reply at 2-3.

The court has authority to appoint a receiver in all other cases where necessary to preserve the property rights of any party. CCP §564(b)(9). As discussed *ante*, TRB has rebutted Bank's conclusory assertions that the appointment of a receiver is necessary.

E. Conclusion

The motion for appointment of a receiver is denied.[6]

[1] On October 26, 2020, Bank requested dismissal of its claims against Murray and Trustees, which the clerk entered on October 27, 2020.

[2] The court has ruled on Bank's evidentiary objections, some of which were overruled under Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, Seelworkers of America, AFL-CIO, (1964) 227 Cal.App.2d 675, 712 (court may overrule objection if any portion of objected to material is admissible). The clerk is ordered to scan and file the court's rulings.

[3] To the extent that Bank is relying on its evidence of high accounting staff turnover at TRB to show a risk of loss of the Collateral (Klinge Decl., ¶12), this alone is insufficient to demonstrate any risk. TRB notes that Thompson left TRB for personal reasons and the accountancy turnover has not affected the accuracy of TRB's financial reports to Bank. Murray Decl., ¶¶ 9, 11.

[4] TRB also asserts that Bank's failure to seek a receivership until October 27, 2020 constitutes strong evidence that a receivership is not necessary, but there are numerous reasons for Bank to have waited to request a receivership. Opp. at 6. Bank states that it only granted a forbearance to allow TRB to pursue a deal with Winc, which ultimately fell through. Reply at 4.

[5] TRB makes a conclusory claim that the expenses would have been much higher if not for Murray's management. Opp. at 7.

[6] Bank also seeks a preliminary injunction in aid of the receiver. This issue is moot as the motion to appoint a receiver is denied.

Case Number: 20STCV36853 **Hearing Date:** December 08, 2020 **Dept:** 85

Nicholas Crawley v. The H Collective, Inc., et al., 20STCV36853

Tentative decision on: (1) application to file under seal: denied; (2) application for right to attach order: granted

Plaintiff Nicholas Crawley (“Crawley”) applies for a right to attach order against Defendant the H Collective, Inc. (“H Collective”) in the amount of \$325,000. Crawley also applies to file under seal the contract in question between the parties pursuant to CRC 2.550 and 2.551.

The court has read and considered the moving papers (no opposition was filed), and renders the following tentative decision.

A. Statement of the Case

1. Complaint

Plaintiff Crawley commenced this action on September 28, 2020, alleging a cause of action for breach of contract. The Complaint alleges in pertinent part as follows.

Pursuant to a written employment contract dated September 29, 2017 (“Exclusive Employment Agreement”), H Collective engaged Crawley to work for it in a business or commercial setting. On July 1, 2020, H Collective and Crawley negotiated and entered into a written contract entitled Separation Agreement (“Separation Agreement”) to terminate H Collective’s obligations to Crawley under the earlier Engagement Agreement.

H Collective agreed to pay Crawley \$300,000.00 in three monthly installments of \$100,000.00 on July 1, 2020, August 1, 2020 and September 1, 2020. H Collective agreed to continue Crawley’s Group Health Insurance coverage until December 1, 2020.

H Collective breached the terms of the Separation agreement by failing to pay any of the three installments it contracted to pay Crawley.

2. Course of Proceedings

On November 2, 2020, the court denied Crawley’s *ex parte* application for writ of attachment and issued a temporary protective order (“TPO”). The court directed Crawley to file the contract conditionally under seal concurrent with an application to seal. The court deemed the *ex parte* documents to be the moving papers for the instant application. All documents were to be personally served unless counsel stipulated to an alternate form of same-day service.

On December 1, 2020, the court denied Crawley’s *ex parte* application to shorten time for a hearing on pending motion to seal, noting that the application was defective for failing to include a memorandum of points and authorities. The court also noted that Crawley failed to comply with the November 2, 2020 order to file the contract conditionally under seal and stated Crawley may file a separate application to be heard on December 8, 2020, concurrent with the application for writ of attachment. The court ordered Crawley to comply with CRC 2.551’s requirements for filing documents conditionally under seal.

According to proofs of service on file, H Collective was served with the Summons, Complaint, and *ex parte* moving papers via substituted service on October 28, 2020. There is no proof of service on file for the TPO or Crawley’s supplemental declaration.

B. Statement of Facts^[1]

Crawley was engaged by H Collective as its CEO until July 1, 2020, and he is still currently a director of the corporation. Crawley Decl., ¶3. Pursuant to the Exclusive Employment Agreement dated September 29,

2017, he worked as H Collective's CEO in the entertainment industry, producing entertainment products, including two feature films each year, and planning television products. Id.

On July 1, 2020, H Collective and Crawley negotiated and entered into the Separation Agreement to terminate H Collective's obligations to Crawley. Based on the Separation Agreement, Crawley resigned his employment. He has not resigned as a director. Crawley Decl., ¶5.

The Separation Agreement contained a confidentiality provision, allowing Crawley to present any breach of the Separation Agreement to a court but requiring that the actual written agreement to be submitted to the court under seal. Crawley Decl., ¶6. The Separation Agreement contains an arbitration clause, but it does not preclude Crawley from seeking a provisional remedy, and the same may be waived. Id.

Pursuant to the Separation Agreement, H Collective agreed to pay Crawley \$300,000 in three monthly installments of \$100,000 on July 1, 2020, August 1, 2020 and September 1, 2020, to continue Crawley's Group Health Insurance coverage until December 1, 2020, and to return his retirement benefit contributions and to give him production credit on the next film in production. Crawley Decl., ¶9.

H Collective breached the Separation Agreement by failing to pay any of the three installments. Crawley Decl., ¶10. Kent Huang ("Huang"), current CEO and President of H Collective, has asked Crawley several times to be patient and wait for payment, which H Collective planned to pay using \$900,000 in funds expected from its joint venture partner, Rakuten H Collective Inc ("Rakuten H"). Crawley Decl., ¶11. Rakuten H is one of two joint ventures H Collective has with Rakuten Inc. ("Rakuten"), a Japanese corporation. Crawley Decl., ¶12.

Based on Crawley's emails and texts messages with the officers and directors of H Collective and his work as a director of Rakuten H, he has determined that H Collective has not received funds from Rakuten or any other source since July 2020. The company is currently insolvent, having liabilities which exceed its assets. Crawley Decl., ¶14; Crawley Supp. Decl., ¶6.

Based on allegations of fraud, H Collective's joint venture partners have postponed any further cash investments in H Collective, including the \$900,000 that was intended to be sent earlier in the summer. Crawley Supp. Decl., ¶4. H Collective does not have sufficient cash to operate and cannot pay its current liabilities. Crawley Supp. Decl., ¶7. H Collective has less than \$50,000 in liquid assets, consisting of monies that were on deposit at Bank of America, and other assets that could be liquidated, such as furniture, office supplies, and equipment. Crawley Supp. Decl., ¶8. H Collective has current and future contingent liabilities that Crawley estimates exceeds \$3,000,000. Crawley Supp. Decl., ¶9. H Collective has ongoing monthly expenses of approximately \$30,000 to cover salaries, office space rent, insurance premiums, the mortgages and upkeep of the Roscomare and Stone Canyon Properties, supplies, accounting fees, and other overhead. Crawley Supp. Decl., ¶11.

H Collective owes Crawley \$300,000 under the Separation Agreement, plus interest at the legal rate of 10% per annum or \$82.35 per day from July 1, 2020 until judgment is entered, and an award of attorney's fees per Civil Code section 1717. Crawley Decl., ¶16.

Crawley anticipates incurring a minimum of \$9,270 in attorney's fee per the court's attorney fees schedule in its Local Rules, and a minimum of \$5,730 in costs, including attachment costs, bond premiums, filing fees, and service of process. Crawley Decl., ¶17.

H Collective holds assets in its own name and also has other assets which H Collective holds 100% of the ownership interest in, despite the fact that the assets are titled in the names of two related entities H Holdings LLC and H Collective LLC. Crawley Decl., ¶18. H Holdings LLC and H Collective LLC are both inactive LLC's owned by H Collective. Crawley Decl., ¶¶ 19, 23-24, Exs. 3, 4.

Two substantial corporate assets of H Collective are being held in the names of these two inactive LLC's: the Roscomare Property, held by H Collective LLC, and the Stone Canyon Property, held by H Holdings LLC.

Crawley Decl., ¶¶ 20, 22, Exs. 1, 2; Crawley Supp. Decl., ¶12. Both are assets of H Collective. Id.

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C. Motion to Seal

1. Applicable Law

CRC Rules 2.550 and 2.551 set forth the standards and procedures for sealing court records.

The rules are derived from the holding in NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, (1999) 20 Cal.4th 1178. Unless confidentiality is required by law, court records are presumed to be open. CRC 2.550(c).

A court may order records sealed only if it expressly finds all of the following: (1) there exists an overriding interest that overcomes the right of public access to the record; (2) the overriding interest supports sealing the record; (3) a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) the proposed sealing is narrowly tailored; and (5) no less restrictive means exist to achieve the overriding interest. CRC 2.550(d).

As to procedures, CRC 2.551(b) provides: (1) a party requesting that a record be filed under seal must file a noticed motion for an order sealing the record. The motion must be accompanied by a memorandum of points and authorities and a declaration containing facts sufficient to justify the sealing; (2) the party requesting that a record be filed under seal must lodge it with the court under (d) when the motion is made, unless good cause exists for not lodging it. Pending the determination of the motion, the lodged record will be conditionally under seal; (3) if necessary to prevent disclosure, the motion, any opposition, and any supporting documents must be filed in a public redacted version and lodged in a complete version conditionally under seal; (4) if the court denies the motion to seal, the clerk must return the lodged record to the submitting party and must not place it in the case file.

A record filed publicly in the court must not disclose material contained in a record that is sealed, conditionally under seal, or subject to a pending motion to seal. CRC 2.551(c).

The party requesting that a record be filed under seal must put it in a manila envelope or other appropriate container, seal the envelope or container, and lodge it with the court. CRC 2.551(d)(1). The envelope or container lodged with the court must be labeled “CONDITIONALLY UNDER SEAL.” CRC 2.551(d)(2). The party submitting the lodged record must affix to the envelope or container a cover sheet that: (i) contains all the information required on a caption page under rule 201; and (ii) states that the enclosed record is subject to a motion to file the record under seal. CRC 2.551(d)(3).

Upon receipt of a record lodged under this rule, the clerk must endorse the affixed cover sheet with the date of its receipt and must retain but not file the record unless the court orders it filed. CRC 2.551(d)(4).

The Advisory Committee Comment to Rule 2.550 provides that the rules recognize the First Amendment Right of Access to documents used at trial or as a basis of adjudication, but do not apply to records that courts must keep confidential by law.

Before sealing a record, a court must find an “overriding interest” that support the sealing. KNBC-TV, supra, 20 Cal.4th at 1217-218.

Under appropriate circumstances, such interests may include protection of minor victims of sex crimes from further trauma and embarrassment; privacy interests of a prospective juror during individual voir dire; protection of witnesses from embarrassment or intimidation so extreme that it would traumatize them or render them unable to testify; of trade secrets, protection of information within the attorney-client privilege, and enforcement of binding contractual obligations not to disclose; safeguarding national security, ensuring

the anonymity of juvenile offenders in juvenile court; and ensuring the fair administration of justice, and preservation of confidential investigative information. Id. at 1222, fn. 46.

The leading case with respect to sealing orders under CRC 243.1 et seq. is Universal City Studios, Inc. v. Superior Court, (2003) 110 Cal.App.4th 1273.

To determine whether records should be sealed, the court must hold a hearing and expressly find that (i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest. Universal City Studios, *supra*, 110 Cal.App.4th at 1279.

2. Analysis

Crawley moves to file under seal the unredacted version of the Separation Agreement. H Collective does not oppose.

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a. Procedural Issue

Although directed to do so by two different judges, Crawley failed to comply with the requirements of CRC 2.551 for an application to file under seal. The party requesting that a record be filed under seal must put it in a manila envelope or other appropriate container, seal the envelope or container, and lodge it with the court. CRC 2.551(d)(1). The envelope or container lodged with the court must be labeled “CONDITIONALLY UNDER SEAL.” CRC 2.551(d)(2).

Crawley failed to file the unredacted version of the Separation Agreement in a sealed manila envelope, instead attaching it to his application as an unsealed exhibit. This procedure is fatal to the application.

b. Merits

Even if Crawley’s procedural failure is not fatal to his application, he fails to meet the requirements of CRC 2.551 set forth an overriding interest that supports sealing. *See Universal City Studios*, *supra*, 110 Cal.App.4th at 1279. Crawley relies solely on the fact that the Separation Agreement includes a provision requiring the parties to attempt to maintain its terms as confidential.[2] App. at 4.

Contrary to Crawley’s assertions (App. at 4-5), the Separation Agreement does not contain any private financial information or any other sensitive information that would necessitate sealing. The proposed redactions concern an unpaid furlough (§1), group health insurance (§2(b)), disclaimer of benefit plan (§3), a release (§5(a)), resignation (§6), film credits (§7), and return of property (§10(b)). Nothing about these provisions is so sensitive or confidential that it would impair either party’s competitive advantage in the industry.

3. Conclusion

Crawley’s application to seal the unredacted Separation Agreement is denied. Crawley may either withdraw the unredacted version or allow it to be filed unsealed. Crawley’s application states that he intends to use the unsealed document if H Collective does not oppose. Therefore, the clerk is directed to file the Separation Agreement in unsealed fashion.

D. Application for Writ of Attachment

1. Applicable Law

Attachment is a prejudgment remedy providing for the seizure of one or more of the defendant's assets to aid in the collection of a money demand pending the outcome of the trial of the action. *See Whitehouse v. Six Corporation*, (1995) 40 Cal.App.4th 527, 533. In 1972, and in a 1977 comprehensive revision, the Legislature enacted attachment legislation (CCP §481.010 *et seq.*) that meets the due process requirements set forth in *Randone v. Appellate Department*, (1971) 5 Cal.3d 536. *See Western Steel & Ship Repair v. RMI*, (12986) 176 Cal.App.3d 1108, 1115. As the attachment statutes are purely the creation of the Legislature, they are strictly construed. *Vershow v. Reiner*, (1991) 231 Cal.App.3d 879, 882.

A writ of attachment may be issued only in an action on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars (\$500). CCP §483.010(a). A claim is "readily ascertainable" where the amount due may be clearly ascertained from the contract and calculated by evidence; the fact that damages are unliquidated is not determinative. *CIT Group/Equipment Financing, Inc. v. Super DVD, Inc.*, (2004) 115 Cal.App.4th 537, 540-41 (attachment appropriate for claim based on rent calculation for lease of commercial equipment).

All property within California of a corporation, association, or partnership is subject to attachment if there is a method of levy for the property. CCP §487.010(a), (b). While a trustee is a natural person, a trust is not. Therefore, a trust's property is subject to attachment on the same basis as a corporation or partnership. *Kadison, Pfaelzer, Woodard, Quinn & Rossi v. Wilson*, *supra*, 197 Cal.App.3d at 4.

The plaintiff may apply for a right to attach order by noticing a hearing for the order and serving the defendant with summons and complaint, notice of the application, and supporting papers any time after filing the complaint. CCP §484.010. Notice of the application must be given pursuant to CCP section 1005, sixteen court days before the hearing. *See ibid.*

The notice of the application and the application may be made on Judicial Council forms (Optional Forms AT-105, 115). The application must be supported by an affidavit showing that the plaintiff on the facts presented would be entitled to a judgment on the claim upon which the attachment is based. CCP §484.030.

Where the defendant is a corporation, a general reference to "all corporate property which is subject to attachment pursuant to subdivision (a) of Code of Civil Procedure Section 487.010" is sufficient. CCP §484.020(e). Where the defendant is a partnership or other unincorporated association, a reference to "all property of the partnership or other unincorporated association which is subject to attachment pursuant to subdivision (b) of Code of Civil Procedure Section 487.010" is sufficient. CCP §484.020(e). A specific description of property is not required for corporations and partnerships as they generally have no exempt property. *Bank of America v. Salinas Nissan, Inc.*, ("*Bank of America*") (1989) 207 Cal.App.3d 260, 268.

A defendant who opposes issuance of the order must file and serve a notice of opposition and supporting affidavit as required by CCP section 484.060 not later than five court days prior to the date set for hearing. CCP §484.050(e). The notice of opposition may be made on a Judicial Council form (Optional Form AT-155).

The plaintiff may file and serve a reply two court days prior to the date set for the hearing. CCP §484.060(c).

At the hearing, the court determines whether the plaintiff should receive a right to attach order and whether any property which the plaintiff seeks to attach is exempt from attachment. The defendant may appear the

hearing. CCP §484.050(h). The court generally will evaluate the attachment application based solely on the pleadings and supporting affidavits without taking additional evidence. Bank of America, supra, 207 Cal.App.3d at 273. A verified complaint may be used in lieu of or in addition to an affidavit if it states evidentiary facts. CCP §482.040. The plaintiff has the burden of proof, and the court is not required to accept as true any affidavit even if it is undisputed. See Bank of America, supra, at 271, 273.

The court may issue a right to attach order (Optional Form AT-120) if the plaintiff shows all of the following: (1) the claim on which the attachment is based is one on which an attachment may be issued (CCP §484.090(a)(1)); (2) the plaintiff has established the probable validity of the claim (CCP §484.090(a)(2)); (3) attachment is sought for no purpose other than the recovery on the subject claim (CCP §484.090(a)(3); and (4) the amount to be secured by the attachment is greater than zero (CCP §484.090(a)(4)).

A claim has “probable validity” where it is more likely than not that the plaintiff will recover on that claim. CCP §481.190. In determining this issue, the court must consider the relative merits of the positions of the respective parties. Kemp Bros. Construction, Inc. v. Titan Electric Corp., (2007) 146 Cal.App.4th 1474, 1484. The court does not determine whether the claim is actually valid; that determination will be made at trial and is not affected by the decision on the application for the order. CCP §484.050(b).

Except in unlawful detainer actions, the amount to be secured by the attachment is the sum of (1) the amount of the defendant’s indebtedness claimed by the plaintiff, and (2) any additional amount included by the court for estimate of costs and any allowable attorneys’ fees under CCP section 482.110. CCP §483.015(a); Goldstein v. Barak Construction, (2008) 164 Cal.App.4th 845, 852. This amount must be reduced by the sum of (1) the amount of indebtedness that the defendant has in a money judgment against plaintiff, (2) the amount claimed in a cross-complaint or affirmative defense and shown would be subject to attachment against the plaintiff, and (3) the value of any security interest held by the plaintiff in the defendant’s property, together with the amount by which the acts of the plaintiff (or a prior holder of the security interest) have decreased that security interest’s value. CCP §483.015(b). A defendant claiming that the amount to be secured should be reduced because of a cross-claim or affirmative defense must make a *prima facie* showing that the claim would result in an attachment against the plaintiff.

Before the issuance of a writ of attachment, the plaintiff is required to file an undertaking to pay the defendant any amount the defendant may recover for any wrongful attachment by the plaintiff in the action. CCP §489.210. The undertaking ordinarily is \$10,000. CCP §489.220. If the defendant objects, the court may increase the amount of undertaking to the amount determined as the probable recovery for wrongful attachment. CCP §489.220. The court also has inherent authority to increase the amount of the undertaking *sua sponte*. North Hollywood Marble Co. v. Superior Court, (1984) 157 Cal.App.3d 683, 691.

2. Analysis

Crawley seeks a right to attach orders against H Collective in the amount of \$325,000,[3] which includes estimated attorneys’ fees of \$9,270 and costs of \$5,730. H Collective does not oppose.

a. Procedural Issue

As a preliminary matter, Crawley has not filed a proof of service establishing that the TPO and his supplemental declaration were served upon H Collective. Personal jurisdiction requires proper service of process upon that party. Ziller Elecs. Lab GmbH v. Superior Court, (1988) 206 Cal.App.3d 1222, 1228. Crawley’s failure to serve the TPO on H Collective means that the TPO was ineffectual and the company is not subject to it. His failure to serve the supplemental declaration mean that the court cannot consider it.

3. Merits

The court will consider Crawley's showing without the supplemental declaration.

a. A Claim Based on a Contract

Crawley's claim is based on the Separation Agreement, which is a written contract between Crawley and H Collective. Pursuant to the Separation Agreement, Crawley agreed to release H Collective from its obligations under the Exclusive Employment Agreement in exchange for (a) three monthly installment payments of \$100,000, (b) continuation of Crawley's Group Health Insurance coverage until December 1, 2020, (c) a return of Crawley's retirement benefit contributions, and (d) production credit on the next film H Collective has in production. Separation Agreement §§ 2(a), 3, 7.

This is a claim on which attachment can be based.

b. An Amount Due That is Fixed and Readily Ascertainable

A claim is "readily ascertainable" where the damages may be readily ascertained by reference to the contract and the basis of the calculation appears to be reasonable and definite. CIT Group/Equipment Financing, Inc. v. Super DVD, Inc., (2004) 115 Cal.App.4th 537, 540-41. The fact that the damages are unliquidated is not determinative. Id. But the contract must furnish a standard by which the amount may be ascertained and there must be a basis by which the damages can be determined by proof. Id. (citations omitted).

Crawley provides the Separation Agreement, which contains the terms demonstrating Crawley's entitlement to payment of the \$300,000. Separation Agreement §2(a). This is fixed and readily ascertainable.

The Separation Agreement does not contain a provision for contractual interest. Nor does Crawley provide a basis for his claim that he is owed interest at a rate of 10% per annum or \$82.35 per day. His reference to paragraph 8 of the Separation Agreement is incorrect. Crawley Decl., ¶16.

Potentially, Crawley is seeking pre-judgment interest. Pre-judgment interest is available on attachment and is owed from the time that the obligation to pay money begins. See Santa Clara Waste Water Company v. Allied World National Assurance Company, (2017) 18 Cal.App.5th 881, 890. The rate for pre-judgment interest is 10%. Civil Code §3289(b). However, Crawley fails to provide a proper calculation of the amount of prejudgment interest due. The Separation Agreement requires three monthly installments of \$100,000 on July 1, 2020, August 1, 2020 and September 1, 2020. Crawley Decl., ¶9. Yet, Crawley claims that interest is owed on the entire amount beginning July 1, 2020. Interest cannot accumulate on a payment until it is due. The request is denied.

Crawley claims estimated attorneys' fees of \$9,270 and estimated costs of \$5,730. The attorney's fees are supported by Local Rule 3.214[4] for an uncontested case. Crawley fails to support the costs with an attorney declaration and they are denied.

The amount due is only fixed and readily ascertainable as to the \$300,000 payment due and the estimated attorneys' fees of \$9,270, for a total of \$309,270.

c. Probability of Success

Crawley has demonstrated a probability of success on its claims for breach of written contract because he has shown that H Collective failed to fulfill its obligations under the Separation Agreement by failing to make the

required payment installment payments of \$100,000 on July 1, 2020, August 1, 2020 and September 1, 2020. Crawley Decl., ¶10.

E. Conclusion

Crawley's application for a right to attach order is granted in the amount of \$309,270. Crawley has not filed a right to attach order on the proper Judicial Council form (he only filed an ex parte right to attach order), and he is ordered to do so in the next two court days or it will be waived. No writ shall issue unless a \$10,000 bond is posted.

[1] Crawley requests judicial notice of the following documents attached to his declaration: (1) the grant deed and legal description for the real property at 2385 Roscomare Road Unit B4 Los Angeles CA 90077 APN 4378-018-053 ("Roscomare Property"), filed with the Office of the County Recorder on July 6, 2018 (Ex. 1); (2) the grant deed and legal description for the real property at 1749 Stone Canyon Road Los Angeles CA 90077 APN 4370-010-012 ("Stone Canyon Property"), filed with the Office of the County Recorder on June 24, 2019 (Ex. 2); (3) the entity status printout from the Delaware Division of Corporations for H Collective LLC (Ex. 3); and (4) the entity status printout from the California Secretary of State for H Holdings LLC (Ex. 4). The requests are granted. Evid. Code §452(c).

[2] Crawley incorrectly states that the Separation Agreement is a negotiated settlement agreement within the meaning of Evid. Code §1152. App. at 4. Evid. Code section 1152 only states that evidence of settlement negotiations is inadmissible to prove liability.

[3] Crawley's memorandum incorrectly states the amount due is \$375,000.

[4] Crawley only cites generally to the Local Rules (Crawley Decl., ¶17) but presumably he refers to Local Rule 3.214.

Case Number: 20STCV45134 **Hearing Date:** December 08, 2020 **Dept:** 85

California Restaurant Association, Inc. v. County of Los Angeles Department of Public Health, et al.,
20STCP03881

Mark's Engine Company No. 28 Restaurant LLC, vs County of Los Angeles-Department of Public Health, et al., 20STCV45134

Tentative decision on application for preliminary injunction: granted in part

Petitioners California Restaurant Association, Inc. (“CRA”) and Mark’s Engine Company No. 28 Restaurant, LLC (“MEC”), each apply in a consolidated hearing (with Case No. 20STCP03881 as the lead case) for a preliminary injunction enjoining Respondents/Defendants County of Los Angeles Department of Public Health and Dr. Barbara Ferrer (“Ferrer”), in her official capacity as Director of Public Health, and Muntu Davis, M.D., M.P.H, (“Davis”) in his official capacity as Health Officer for County (collectively, “Department”), from enforcing the November 25, 2020 Order of the Health Officer entitled “Reopening Safer at Work and in the Community for Control of COVID 19, Blueprint for a Safer Economy–Tier 1 Surge Response” (“Restaurant Closure Order”).

The court has read and considered the moving papers, the County’s oppositions to the *ex parte* applications and consolidated opposition to the order to show cause (“OSC”), and the replies, and renders the following tentative decision.

A. Statement of the Case

1. 20STCP03881

Petitioner CRA commenced this action on November 24, 2020, alleging causes of action for administrative and traditional mandamus and declaratory relief. The Petition alleges in pertinent part as follows.

The Department has issued a series of health orders in an effort to halt the spread of COVID.[1] The Department’s Health Order dated November 19, 2020 (“November 19 Order”) issued restrictions that outdoor dining and wine service seating must be reduced by 50%, or tables must be repositioned so that they are at least eight feet apart.

On November 22, 2020, the Department announced that it was modifying the November 19 Order to eliminate outdoor dining and drinking entirely at restaurants, bars, breweries, and wineries by issuing the Restaurant Closure Order. The Restaurant Closure Order took effect on November 25, 2020.

The Department’s own data provide no support for the planned shutdown of outdoor restaurant operations. The data tracks all non-residential settings at which three or more laboratory confirmed COVID cases have been identified. Of the 204 locations on the list, fewer than 10% are restaurants. Of the 2,257 cases identified on the list, fewer than 5% originate from restaurants.

On November 17, 2020, the Department held a hearing at which COVID and restaurant closures were discussed. The Department scheduled another hearing for November 24, 2020. On November 23, 2020, CRA sent a notice and objection letter to the Department asking it to cancel the proposed modification to the November 19 Order on the grounds that the spread of COVID is due primarily to people in close proximity at private gatherings and other sources, not from restaurants.

CRA contends that the Department prejudicially abused its discretion by having hearings at which it failed to take and consider relevant advice. The Department made a decision to close restaurant dining that is not realistically designed to halt the spread of COVID. The Department proceeded without, and in excess of, its discretion, failed to give CRA a fair hearing, and prejudicially abused its discretion. The Restaurant Closure Order is not supported by any findings or the evidence.

2. 20STCV45134

Plaintiff MEC commenced this action on November 24, 2020 against the Department and Davis, in his official capacity as Health Officer for County, alleging causes of action for declaratory relief and violations of the California Constitution and seeking the remedy of injunctive relief. The Complaint alleges in pertinent part as follows.

The Department's initial June 2020 Health Order ("June Order") allowed many businesses, including MEC, to operate so long as they followed guidelines established by the state and County to help curb the spread of COVID. As of June 1, 2020, restaurants in the County such as MEC were not permitted to provide dine-in service indoors. They were able to provide outdoor dining and take-out dining upon implementing County safety protocols as set forth in the June 2020 Order.

Since the promulgation of the June Order, MEC has complied with all local and statewide protocols relating to the safe operation of its restaurant, including a large investment of time and resources, to pivot from its previous indoor-dining concept to a takeout and outdoor-dining model.

On November 20, 2020, the Department announced that its June Order, as it relates to the operation of restaurants across the County, was being revised by the November 19 Order to limit the number of customers at outdoor restaurants to 50% of the outdoor establishment's outdoor capacity (which is already limited by virtue of compliance with the June 2020 Order, which requires physically distanced tables). In addition, the November 19 Order curtailed the hours of operation for restaurants by banning operations between 10:00 p.m. and 6:00 a.m.

On November 22, 2020, without any evidence to support it, the Department further modified the November 19 Order by issuing the Restaurant Closure Order, which prohibits any outdoor dining irrespective of capacity or curfew. The Restaurant Closure Order took effect on November 25, 2020 at 10 p.m. and will last for a minimum of three weeks. Take-out, delivery, and drive-thru services remain unaffected.

In attempting to justify the Restaurant Closure Order, Respondent Ferrer said at a November 22, 2020 press conference that there had been a 61% increase in hospitalization cases involving COVID in the County between November 7 and 20, 2020, which could potentially lead to overwhelming the healthcare system. Further, Ferrer pointed out that while most restaurants have complied with safety mandates, almost 20% of restaurants have had issues, mainly regarding social distancing.

Ferrer conceded that she did not have concrete data on how many people had been infected by outside dining at a restaurant. In actuality, the Department's data indicates that COVID cases traced back to the County's restaurants and bars accounted for a mere 3.1 % (70 of the total 2,257) confirmed cases countywide from over 204 outbreak locations -- the vast majority of which were chain/fast-food type restaurants and not MEC's model. Of those 2,257 confirmed cases, 2,249 of were traced to staff members at workplaces and just eight cases came from non-staff members.

The Restaurant Closure Order is an abuse of the Department's emergency powers, is not grounded in science, evidence, or logic, and should be adjudicated to be unenforceable as a matter of law.

3. Course of Proceedings

On November 24, 2020, the court denied CRA's *ex parte* application to stay the Restaurant Closure Order for failure to present sufficient evidence to make a *prima facie* case. The court permitted CRA to renew its application as one for a temporary restraining order ("TRO") and OSC re: preliminary injunction ("OSC") if it presented evidence that the restrictions are unsupported and of irreparable harm.

On December 1, 2020, the court denied MEC's *ex parte* application for declaratory and injunctive relief and informed the parties that declaratory relief cannot be granted on an *ex parte* basis. The court permitted MEC to file and serve new *ex parte* application for a TRO and OSC.

On December 2, 2020, the court denied CRA's and MEC's *ex parte* applications for a TRO, but it set an OSC for the instant date.

The independent calendar court assigned to Case No. 20STCV45134 found that it and Case No. 20STCP03881 are not related under CRC 3.300(a) and declined to relate them. This court consolidated both cases only for hearing on the OSCs and designated 20STCP03881 as the lead case for the hearing.

B. Governing Law

1. Emergency Services Act

The Emergency Services Act ("ESA") empowers state and local governments to declare emergencies and coordinate efforts to provide services. Govt. Code §§ 8550-668. The purpose of the ESA and the policy of the state is that all emergency services functions shall be coordinated as far as possible with the comparable functions of its political subdivisions, the federal government, and private agencies, to the end that the most effective use may be made of all resources for dealing with an emergency. Govt. Code §8550.

A "state of emergency" means the existence of conditions of disaster or of extreme peril to the safety of persons and property within the state caused by conditions including an epidemic and which by reason of their magnitude, are or likely to be beyond the control of any single county or city and require the combined forces of a mutual aid region or regions. Govt. Code §8558.

During a state of emergency, the Governor shall, to the extent he deems necessary, have complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the California Constitution and laws of the State of California in order to effectuate the purposes of this chapter. Govt. Code §8627.

The Governor may make, amend, and rescind orders and regulations necessary to carry out the provisions of this chapter. The orders and regulations shall have the force and effect of law. Due consideration shall be given to the plans of the federal government in preparing the orders and regulations. The Governor shall cause widespread publicity and notice to be given to all such orders and regulations, or amendments or rescissions thereof. Govt. Code §8567(a).

"State Emergency Plan" means the State of California Emergency Plan approved by the Governor. Govt. Code §8560. The Office of Emergency Services shall update the State Emergency Plan on or before January 1, 2019 and every five years thereafter. Govt. Code §8570.4.

"The Governor may, in accordance with the State Emergency Plan and programs for the mitigation of the effects of an emergency in this state: ... (c) Use and employ any of the property, services, and resources of the state as necessary to carry out the purposes of this chapter; ... (i) Plan for the use of any private facilities, services, and property and, when necessary, and when in fact used, provide for payment for that use under the terms and conditions as may be agreed upon. Govt. Code §8570.

In the exercise of the emergency powers vested in him during a state of emergency, the Governor is authorized to commandeer or utilize any private property or personnel deemed by him necessary in carrying out the responsibilities hereby vested in him as Chief Executive of the state and the state shall pay the reasonable value thereof. Govt. Code §8572.

A political subdivision of the state is obligated to take all actions necessary to carry out a State Emergency Plan once the Governor has declared an emergency. Govt. Code §8568. A political subdivision includes any city, city and county, county, district, or other local governmental agency or public agency authorized by law. Govt. Code §8557(b).

The governing body of a county or city may proclaim a local emergency. Govt. Code §8630. A local emergency must be reviewed by the governing body every 30 days and it shall be terminated at the earliest possible date that conditions warrant. Govt. Code §8630(c), (d). During a local emergency, the governing body of a county or city may promulgate orders and regulations necessary to protect life and property. Govt. Code §8634.

2. Health and Safety Code

The Restaurant Closure Order specifies the authority upon which it is based—Health and Safety Code (“H&S Code”) sections 101040, 101085 and 120175. H&S Code section 101040 permits a local health officer to take preventative measures that may be necessary to protect and preserve the public health during an “state of emergency” or “local emergency” under the ESA. [2]

H&S Code section 120175 provides:

“Each health officer knowing or having reason to believe that any case of the diseases made reportable by regulation of the department, or any other contagious, infectious or communicable disease exists, or has recently existed, within the territory under his or her jurisdiction, shall take measures as may be necessary to prevent the spread of the disease or occurrence of additional cases.” H&S Code §120175 (emphasis added).

While H&S Code section 101040 is dependent on the ESA, H&S Code section 120175 is not. The statute imposes a mandatory duty on a health officer to take measures to prevent the spread of contagious and communicable diseases. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693, 701. The health officer must take “measures as may be necessary,” or “reasonably necessary,” to achieve the Department’s goals and policies, leaving the course of action to the health officer’s discretion. Ibid. The health officer is vested with discretion to act in a particular manner depending upon the circumstances. Ibid.

The notion that a municipality’s health officer has broad authority is well-established and long-standing. Jacobson v. Commonwealth of Massachusetts, (“Jacobson”) (1905) 197 U.S. 11, 25. “[A] community has a right to protect itself against an epidemic of disease which threatens the safety of its members.” Id. at 27. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and public safety. Ibid.

The health officer’s authority is not unbridled. Courts have the duty to evaluate an exercise of that authority to ensure actions taken have a “real and substantial relationship” to public health and safety. Id. at 31. The health officer cannot act arbitrarily or oppress. Id. at 38. In addition, the health officer cannot engage in a “plain, palpable invasion of rights” secured by the Constitution. Id. at 31. *See also Jew Ho v. Williamson*, (C.D. Cal. 1900) 103 F. 10. (Whether the regulation in question is a reasonable one, directed to accomplish the purpose that appears to have been in view, is a question for the court to determine).

3. Injunctive Relief

An injunction is a writ or order requiring a person to refrain from a particular act; it may be granted by the court in which the action is brought, or by a judge thereof; and when granted by a judge, it may be enforced as an order of the court. CCP §525. An injunction may be more completely defined as a writ or order commanding a person either to perform or to refrain from performing a particular act. See Comfort v. Comfort, (1941) 17 Cal.2d 736, 741. McDowell v. Watson, (1997) 59 Cal.App.4th 1155, 1160.[3] It is an equitable remedy available generally in the protection or to prevent the invasion of a legal right. Meridian, Ltd. v. City and County of San Francisco, et al., (1939) 13 Cal.2d 424.

The purpose of a preliminary injunction is to preserve the *status quo* pending final resolution upon a trial. See Scaringe v. J.C.C. Enterprises, Inc., (1988) 205 Cal.App.3d 1536. Grothe v. Cortlandt Corp., (1992) 11 Cal.App.4th 1313, 1316; Major v. Miraverde Homeowners Assn., (1992) 7 Cal.App.4th 618, 623. The *status quo* has been defined to mean the last actual peaceable, uncontested status which preceded the pending controversy. Voorhies v. Greene (1983) 139 Cal.App.3d 989, 995, quoting United Railroads v. Superior Court, (1916) 172 Cal. 80, 87. 14859 Moorpark Homeowner's Assn. v. VRT Corp., (1998) 63 Cal.App.4th 1396. 1402.

A preliminary injunction is issued after hearing on a noticed motion. The complaint normally must plead injunctive relief. CCP §526(a)(1)-(2).[4] Preliminary injunctive relief requires the use of competent evidence to create a sufficient factual showing on the grounds for relief. See e.g. Ancora-Citronelle Corp. v. Green, (1974) 41 Cal.App.3d 146, 150. Injunctive relief may be granted based on a verified complaint only if it contains sufficient evidentiary, not ultimate, facts. See CCP §527(a). For this reason, a pleading alone rarely suffices. Weil & Brown, California Procedure Before Trial, 9:579, 9(11)-21 (The Rutter Group 2007). The burden of proof is on the plaintiff as moving party. O'Connell v. Superior Court, (2006) 141 Cal.App.4th 1452, 1481.

A plaintiff seeking injunctive relief must show the absence of an adequate damages remedy at law. CCP §526(4); Thayer Plymouth Center, Inc. v. Chrysler Motors, (1967) 255 Cal.App.2d 300, 307; Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist., (1992) 8 Cal.App.4th 1554, 1565. The concept of "inadequacy of the legal remedy" or "inadequacy of damages" dates from the time of the early courts of chancery, the idea being that an injunction is an unusual or extraordinary equitable remedy which will not be granted if the remedy at law (usually damages) will adequately compensate the injured plaintiff. Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist., (1992) 8 Cal.App.4th 1554, 1565.

In determining whether to issue a preliminary injunction, the trial court considers two factors: (1) the reasonable probability that the plaintiff will prevail on the merits at trial (CCP §526(a)(1)), and (2) a balancing of the "irreparable harm" that the plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction. CCP §526(a)(2); 14859 Moorpark Homeowner's Assn. v. VRT Corp., (1998) 63 Cal.App.4th 1396. 1402; Pillsbury, Madison & Sutro v. Schectman, (1997) 55 Cal.App.4th 1279, 1283; Davenport v. Blue Cross of California, (1997) 52 Cal.App.4th 435, 446; Abrams v. St. Johns Hospital, (1994) 25 Cal.App.4th 628, 636. Thus, a preliminary injunction may not issue without some showing of potential entitlement to such relief. Doe v. Wilson, (1997) 57 Cal.App.4th 296, 304. The decision to grant a preliminary injunction generally lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Thornton v. Carlson, (1992) 4 Cal.App.4th 1249, 1255.

A preliminary injunction ordinarily cannot take effect unless and until the plaintiff provides an undertaking for damages which the enjoined defendant may sustain by reason of the injunction if the court finally decides that the plaintiff was not entitled to the injunction. See CCP §529(a); City of South San Francisco v. Cypress Lawn Cemetery Assn., (1992) 11 Cal.App.4th 916, 920.

D. Statement of Facts

1. CRA and MEC's Evidence[5]

a. Background

On March 4, 2020, Governor Newsom declared a "State of Emergency" followed by a March 19, 2020 Stay-at-Home Order which included an indefinite prohibition on operating "non-essential businesses," including restaurants. Ellis Decl., Ex. 18. Governor Newsom specified that California's response to the coronavirus pandemic "must be done using a gradual, science-based and data-driven framework." Id. (emphasis added). He also stated that the state's actions should be aligned to achieve the objectives of (1) ensuring the ability to care for the sick within the state's hospitals, (2) preventing infection in people who are at high risk for severe disease, (3) building the capacity to protect the health and well-being of the public, and (4) reducing social, emotional, and economic disruptions. Id.

On August 28, 2020, Governor Newsom and the California Department of Public Health announced a revised regulatory regime entitled the "Blueprint for a Safer Economy" (the Blueprint), outlining a four-tiered system of community disease transmission risk with activity and business tiers for each risk level. Ellis Decl. Ex. 7. Restaurants are listed as a separate sector in the Blueprint. Id. A county in Tier 2 may allow indoor dining at a maximum capacity of 25% or 100 people, whichever is less, while a county in Tier 1 may permit only outdoor dining. Id. Even in the most restrictive tier, outdoor dining is expressly permitted. Id.

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b. The Restaurant Closure Order

On November 22, 2020, the Department issued a press release announcing the issuance of the Restaurant Closure Order, effective November 25, 2020, which would ban outdoor dining for at least three weeks. Ellis Decl., Ex. 1.

On November 23, 2020, CRA sent an objection letter to the Department, asking it to cancel the proposed Restaurant Closure Order on grounds that the spread of COVID is due primarily to persons in close proximity at private gatherings and other sources, and not from restaurants. Ellis Decl. ¶9, Ex. 8. The letter contended that the County had no study that would support the Restaurant Closure Order, it was not supported by the existing scientific evidence, and it would cause significant harm to restaurants, their employees, and customers. Ex. 8, p. 1-2.

On November 24, 2020, the Board of Supervisors held a public meeting at which the potential Restaurant Closure Order was discussed, and the Department was questioned about the basis for its contemplated action. Ellis Decl., ¶13, Ex. 11. At this meeting, the Department admitted that it has not been tracking COVID transmission at County restaurants and did not have state or County data to support the Restaurant Closure Order. Id. Instead, County Health Officer Davis referred to a study by the Centers for Disease Control ("CDC"), calling it "the best information that we have" to support the Restaurant Closure Order. Id.

Department public health officials Davis, Health Officer, Ferrer, Director of the Department of Public Health, and Dr. Christina Ghaly ("Ghaly"), Director of the Department of Health Services, explained the reasons for the Restaurant Closure Order during the November 24 Board meeting:

Ghaly: "[H]ospital capacity is available right now, but we do risk using it up if the case counts continue to rise at the level they have to date." Siegel Decl. Ex. B, p. 131 (emphasis added).

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Davis: "We are solving the problem of people mixing together, often times from different households, being in close contact with a face covering while they are eating and drinking."
Id., p. 136.

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Ferrer: “[B]ecause all of the people and customers are not wearing their face coverings while eating drinking, there’s lot of increased risk in those settings. As you know, we have seen picture after picture of activity at restaurants, people close together and intermingling and many people going to . . . restaurants are not with members . . . of their household, when we proposed in the beginning of reopening restaurants, we said perhaps it makes sense to limit people coming into restaurants and sitting together in households, and the restaurants notified us that would be impossible to enforce. They have no way of knowing whether people are from one household. We are looking at increased risk, and a significant increase in increased risk because people are not wearing their face covering.” Id., pp. 137-38 (emphasis added).

- Ferrer: “[I] agree that it seems a little bit counterintuitive to talk about cases when really all we are worried about is overwhelming the healthcare system. The issue is that cases are the earlier predictor of what is going to happen in our hospital care system. And I think Dr. Ghaly spoke to this as well, you don’t want to wait until the case numbers in the hospitals are really high, because those numbers that you are seeing in the hospital reflect people who are infected a couple of weeks earlier. As I said, we have seen this rapid acceleration this past week and a half with hospitals and the number of patients that are there with COVID-19 and it is not attributed to the 4,500 cases we are seeking today, it is attributed to the 2,300 cases we saw two weeks ago.” Id., pp. 139-40 (emphasis added).

- Ferrer: “We are, in fact, trying to make sure that whenever you’re out and you’re not with people in your household, you’re always at an activity where you can wear your face covering and keep it on the entire time. And then we’re also trying to reduce crowded situations and having people not—and having people stay with just people from their household.” Id., p. 149.

- Ghaly: “And now about this most recent surge, we’ve seen that test positivity rate creep up again at 6, 7 percent. And that’s what’s concerning. And that’s one of the things that may lead in the future to more hospitalization over the next week or two.” Id., pp. 161-62. Opp. to CRA Ex Parte at 14-15.

Two Board supervisors expressed their opinion at the November 24 meeting that scientific evidence was lacking to support the Restaurant Closure Order. Supervisor Barger stated: “There is no data to support closing restaurants. This action was arbitrary and only further encourages private gatherings, which is where the virus is actually spreading.” Ellis Decl. Ex. 14. Supervisor Janice Hahn stated: “I don’t think we have the data to prove that outdoor dining is driving the recent surge in cases, nor do we have the data to assure us that this action will turn our case numbers around. I am also very worried that it will drive more people to indoor gathering.” Ellis Decl. Ex. 13.

On November 25, 2020, the Department issued the Restaurant Closure Order, shutting down all outdoor dining by 10:00 p.m. that night. Ellis Decl., Ex. 17. The Restaurant Closure Order states that restaurants, breweries, and wineries can only offer food and beverage via take-out, drive-thru, or delivery -- *i.e.*, no indoor or outdoor dining at restaurants. Id. Pursuant to the Restaurant Closure Order, County restaurants are prohibited from offering outdoor dining of any kind, regardless of the safety protocols in place. Id. The Department ordered the closure of all restaurants for in-person onsite dining for an indefinite period. Id.

CRA presents evidence that the Restaurant Closure Order imposes great financial hardship on the restaurant industry. Many restaurants previously had implemented safety measures to comply with the previous Health Order at significant financial cost. *See* Leon, Rosenthal, Terzian, Shams, Gay, and Thornberg declarations. CRA’s declarations refer to the abrupt nature of the County’s Restaurant Closure Order, the harm that restaurant outdoor dining closure will cause, and the risk of layoffs and permanent restaurant closure from an outdoor dining ban. *See* Shams Decl., ¶¶ 9, 11. Many restaurant owners feel the Restaurant Closure Order is

unreasonable because the risk of COVID transmission from outdoor dining is greatly outweighed by the devastating economic consequences. Id.

c. Expert Declarations^[6]

(i) Barke

Jeff Barke, M.D. (“Barke”), is a primary care physician based in Orange County, California who has treated numerous COVID patients on a near-daily basis since the start of the outbreak. Barke Decl., ¶4.

Barke opines that there is no rational and legitimate basis to support the breadth and scope of the Department’s shutdown of outdoor dining. Barke Decl., ¶7. Since the beginning of the pandemic, one of the consistent findings of studies of COVID transmission has been that the risk of transmission in outdoor settings is low, and the risk becomes negligible when combined with the use of commonly-accepted COVID precautionary measures such as symptom checks, spacing, and the appropriate use of personal protective equipment by servers according to CDC guidelines. Barke Decl., ¶7.

An academic study published on April 7, 2020 by professors and scientists from Southeast University, the University of Hong Kong, and Tsinghua University (“China Study”) extracted case reports from the local municipal health commissions of 320 prefectural (a district governed by a prefect) cities in China, identified all outbreaks of COVID (defined as three or more individual cases), reviewed the major characteristics of the enclosed spaces in which the outbreaks were reported and their associated indoor environmental issues, and found that only one of the 318 identified outbreaks – amounting to only two infected persons – implicated an outdoor environment. Barke Decl., ¶8, Ex. A.

Another academic study published on April 16, 2020 by professors and scientists from the Japanese Ministry of Health, Labour and Welfare, Hokkaido University, the Tohoku University Graduate School of Medicine, and the Japanese National Institute of Public Health and National Institute of Infectious Diseases (“Japan Study”), examined clusters of COVID in Tokyo, Aichi, Fukuoka, Hokkaido, Shikawa, Kanagawa and Wakayama prefectures in Japan, finding that closed – not open – environments contribute to the secondary transmission of COVID. Barke Decl., ¶9, Ex. B. The Japan Study also found that an infected person transmitted COVID in a closed environment at a rate 18.7 times greater than an open-air environment. Id. On the basis of these findings, the Japan Study concluded that a reduction of unnecessary close contact in closed environments may help prevent large case clusters and so-called “superspreading” events relating to COVID. Barke Decl., ¶9, Ex. B.

An article from the Mayo Clinic describes a general medical consensus regarding safe outdoor activities during the COVID pandemic. Barke Decl., ¶10, Ex. C. According to the Mayo Clinic article, COVID is primarily spread from person-to-person by those within six feet of each other. Ex. C. In some situations, especially in enclosed spaces with poor ventilation, COVID can spread when a person is exposed to small droplets or aerosols that stay in the air for minutes to hours. Id. When the weather is appropriate, outside patio dining can be a good outdoor option. Id. Outdoor patio dining at uncrowded restaurants where patio tables are spaced appropriately is safer than indoor dining. Id. The article advises persons to wear a mask when not eating or drinking, in other areas of the restaurant, keep a distance of at least six feet (two meters), avoid self-service food and drink options, and remember to wash their hands when they enter and leave. Id.

These studies comport with Barke’s observations in practice. Barke has not treated a single COVID who contracted it in an outdoor dining setting. Barke Decl., ¶11. The risk of COVID infection and transmission is much lower when eating in an outdoor setting, just as it is safe and permitted to travel for hours across the country in a crowded and enclosed aircraft. Id.

(ii) Bhattacharya

Jayanta Bhattacharya, M.D. (“Bhattacharya”) is a Professor of Medicine and infectious disease specialist at Stanford University with a primary research area in health economics, including a focus on epidemiology and infectious disease epidemiology. Bhattacharya Decl., ¶¶ 2, 4. Bhattacharya opines that the blanket countywide prohibition on outdoor dining in the County does not comport with, and is inconsistent with, good public health practice applicable to COVID. Bhattacharya Decl., ¶2.

Bhattacharya conducted a study that found that 4.3% of County adults showed specific antibody evidence of prior or current COVID infection by April 10-11, 2020. Bhattacharya Decl., ¶6. This prevalence rate represents a multiple 43.5 times the number of cases confirmed by the County’s public health authority by that same date. Bhattacharya Decl., ¶6. One important implication of this paper is that, on the date of the survey, the COVID infection fatality rate (the probability of dying from a COVID infection) in the County was at least an order of magnitude lower than the “case fatality rate”, which consists only of patients who have been infected with COVID and identified as a “case”. Id. A case most typically is a patient with severe symptoms who has come to the attention of medical authorities. Id.

In May 2020, Bhattacharya testified at a virtual roundtable organized by United States Senator Pat Toomey on the subject of the potential reopening of youth baseball leagues while protecting the safety of participants. Bhattacharya Decl., ¶12. At this roundtable, he reviewed the evidence regarding the relatively low mortality and morbidity risk that COVID infection poses to children and adolescents and discussed social distancing and other protocols to make youth baseball safer for coaches, umpires, and other adult participants. Id.

In October 2020, Bhattacharya, Harvard Professor Dr. Martin Kulldorff, and Oxford Professor Dr. Sunetra Gupta, wrote a declaration (the “Great Barrington Declaration”) which discussed an alternative to the current COVID strategies in jurisdictions across the United States. Bhattacharya Decl., ¶15. The Great Barrington Declaration offers an alternative approach called focused protection. Bhattacharya Decl., ¶16. According to focused protection, the most compassionate approach to the COVID pandemic balances the risks and benefits of reaching herd immunity by allowing those who are at minimal risk of death to live their lives normally to build up immunity to the virus through natural infection, while better protecting those who are at highest risk. Id. The Great Barrington Declaration was published with approximately 30 co-signers in early October 2020. Bhattacharya Decl., ¶17. Since then, it has been co-signed by more than 10,000 medical and public health scientists and 30,000 medical practitioners. Id.

Pursuant to the CDC’s “Considerations for Restaurant and Bar Operators,” updated November 18th, 2020, outdoor dining may occur with relative safety at restaurants if precautionary measures are observed, including but not limited to, social distancing and mask wearing by servers and by patrons (when not eating). Bhattacharya Decl., ¶20. The CDC includes outdoor dining in the second lowest tier of risk, and notes that even this risk can be mitigated by reasonable accommodations such as spacing tables appropriately, encouraging mask wearing by servers, frequent sanitizing of surfaces, and other actions that are well within the capability of County restaurants. Id. The Restaurant Closure Order is inconsistent with this guidance. Id.

Bhattacharya’s medical opinion is that restaurants in the County can safely permit outdoor dining by following the CDC guidelines. Bhattacharya Decl., ¶20. Bhattacharya has read many of the contact tracing studies in the scientific literature that document the most common sources of spread of COVID infection and he is aware of no evidence suggesting that outdoor dining is more likely to spread the COVID virus than the activities – including private gatherings – that remain permissible. In fact, spread through permitted activities will be more likely if the Restaurant Closure Order remains in effect. Bhattacharya Decl., ¶22.

The County guidelines prohibiting outdoor dining are substantively stricter than is required by the state. Bhattacharya Decl., ¶23. The state’s Blueprint builds considerable lags into the measurement of the epidemiological metrics (a seven-day lag and a seven-day smoothing requirement) and requires that a county must stay in the same tier for at least 21 days before it is permitted to move to a less restrictive tier even if it meets the criteria of the less restrictive tier. Bhattacharya Decl., ¶26. By prohibiting outdoor on-premises

dining and doing so throughout the county, the Department is imposing stricter requirements than those required by the state. Bhattacharya Decl., ¶28.

The County has done so without a scientific justification for imposing such stricter requirements on these activities. Id. The Department's available data does not contain any epidemiological or other model that shows prohibiting outdoor dining on a countywide basis in a county the size of the County has any relationship to avoiding circumstances that challenge the healthcare delivery system's ability to deal with a surge with space, supplies, and staff as required by the Blueprint, does not compare hospitalization forecasts against hospital capacity in light of prohibitions on outdoor dining, does not account for the possibility of transfers of patients across counties, and does not account for the possibility of building and staffing field hospitals in overstretched areas. Bhattacharya Decl., ¶28.

The Department also has provided no indication that it has estimated or otherwise taken into account any of the economic, social, and public health costs of restricting outdoor dining. Bhattacharya Decl., ¶29. Basic standards of public health policy design require a comparison of both costs and benefits of a policy to justify it from a scientific and ethical point of view. Id. A scientifically justified policy must explicitly account for these costs – including an explicitly articulated economic analysis – in setting, imposing, and removing criteria for business restrictions such as the blanket prohibition on outdoor dining. Id.

The County's positivity rate data is scientifically unjustified. Bhattacharya Decl., ¶30. Both the number of new daily cases and the percent positivity criteria require analysis of results from the reverse transcriptase - polymerase chain reaction ("RT-PCR") test for the COVID virus utilized by the County. Id. The available scientific information regarding the accuracy of COVID PCR tests, as conducted by clinical laboratories in California, suggests that they are not sufficiently accurate regarding infectivity risk to warrant the central role they play in the criteria the County has adopted for restricting activity. Id.

There are two major problems that render these criteria scientifically unjustified. Id. Both criteria used by the County -- the new daily cases number and the positivity number -- are premised on a measurement that includes many people who are identified as COVID positive but who pose little or no community transmission risk. Bhattacharya Decl., ¶35.

First, neither new daily cases number nor the positivity number represent random samples of the California population, but rather results from selected populations who have chosen to obtain testing. Bhattacharya Decl., ¶31. Without population representative sampling for testing, the number does not reflect the risk of transmission and thus is scientifically unjustified as a criterion for imposing restrictions on normal activities. Id.

Second, the criteria do not account for the fact that the RT-PCR tests, as used in most laboratories around the U.S., likely register positive test results even for non-infectious viral fragments. Bhattacharya Decl., ¶32. Although a positive test result indicates that a person has come into contact with the COVID genomic sequence or some other viral antigen at some point, the mere presence of the viral genome is not sufficient by itself to indicate infectivity. Id. A binary "yes or no" approach to the RT-PCR test will result in false positives, segregating large numbers of people who are no longer infectious and not a threat. Bhattacharya Decl., ¶35.

The mortality rates used by the County as a justification for the ban on outdoor dining similarly lack a rational medical and scientific basis. The best evidence on the COVID infection fatality rate (the fraction of infected people who die from the infection) comes from seroprevalence studies. Bhattacharya Decl., ¶36. Seroprevalence studies provide better evidence of the total number of people who have been infected than do case reports or a positive RT-PCR test, which both miss infected people who either are not identified by the public health authorities or do not volunteer for RT-PCR testing. Id. Because the County's mortality rates ignore unreported cases in the denominator, its fatality rate estimates based on case reports and positive test counts are substantially biased upwards. Id.

According to a meta-analysis by Dr. John Ioannidis of every seroprevalence study conducted with a supporting scientific paper (74 estimates from 61 studies and 51 different localities around the world), the median infection survival rate from a COVID infection is 99.77%. Bhattacharya Decl., ¶37. For COVID patients under 70, the meta-analysis finds an infection survival rate of 99.95%. Id. A newly released meta-analysis by analysts independent of Dr. Ioannidis' group, reaches qualitatively similar conclusions. Id.

In September 2020, the CDC updated its current best estimate of the infection fatality ratio—the ratio of deaths to the total number of people infected—for various age groups. Bhattacharya Decl., ¶39. The CDC estimates that the infection fatality rate for people ages 0-19 years is .00003, meaning infected children have a 99.997% infection survivability rate. Id. The CDC's best estimate of the infection fatality rate for people ages 20-49 years is .0002, meaning that young adults have a 99.98% survivability rate. Id. The CDC's best estimate of the infection fatality rate for people age 50-69 years is .005, meaning middle-aged persons have a 99.5% survivability rate. Id. The CDC's best estimate of the infection fatality rate for elderly people aged 70+ years is .054, meaning seniors have a 94.6% survivability rate. Id.

The CDC's current best fatality rate estimates for COVID patients who are symptomatic among patients less than 50 years old is 0.05% (5 in 10,000), 0.2% for patients between ages 50 and 64, and 1.3% for patients 65 and above. Bhattacharya Decl., ¶40. The infection fatality rates are lower than these numbers since only a fraction of patients is symptomatic. Id.

A study of the seroprevalence of COVID in Geneva, Switzerland provides a detailed age break down of the infection survival rate in a preprint companion paper: 99.9984% for patients 5 to 9 years old; 99.99968% for patients 10 to 19 years old; 99.991% for patients 20 to 49 years old; 99.86% for patients 50 to 64 years old; and 94.6% for patients above 65. Bhattacharya Decl., ¶41.

In all of California through August 2020, there have been only two deaths among COVID patients below age 18. Id. 74.2% of all COVID-related deaths occurred in patients 65 and older. Id.

The scientific evidence shows that, for non-elderly outdoor diners, the mortality risk from contracting the disease is very low. Bhattacharya Decl., ¶43. The infection survival rate is more than 99.8% for this population. Id. Even this number overestimates the risk of outdoor dining, since the probability of contracting the disease during an outdoor meal is much less than one, though difficult to estimate with available public health information. Id. For elderly congregants (age 70+), the mortality risk conditional on contracting the disease is higher, but still small, with 98.7% of infected elderly people surviving the infection, according to the infection fatality rate from the Santa Clara study. Id. These risks are commensurate with other risks that many people are prepared to take in their lives. Id. The risks are lower, in fact negligible, if precautions of wearing masks, social distancing, spacing and hand washing are followed. Bhattacharya Decl., ¶44.

The risks of COVID transmission should be considered against the substantial evidence that social eating provides significant and tangible psychological and physiological benefits for diners that are lost through the imposition of such scientifically and epidemiologically unjustified blanket and untargeted bans. Bhattacharya Decl., ¶45. A comprehensive survey of 17,612 men and 19,581 women over the age of 65 found that eating alone has been linked to a higher incidence of depression among adults, particularly those who live alone. Id. Eliminating the possibility of all outdoor dining, no matter the precautions taken, reduces or eliminates these important benefits. Id.

Public health recommendations regarding behavior by private actors (such as the decision to protest) should weigh the benefits of that behavior against the public health costs. Bhattacharya Decl., ¶50. If the benefits of the undertaking are important enough relative to the public health risks and care is taken to minimize those risks by adhering to the extent possible to safe practice guidelines promulgated by public health authorities, then the activity should receive approval by public health experts. Id.

(iii) Lyons-Weiler

Dr. James Lyons-Weiler (“Lyons-Weiler”) is a scientific researcher with a background in public health policy and statistical research. Weiler Decl., ¶1. He opines that the risk of COVID transmission in outdoor dining is minimal because of the outdoor setting, with breeze, humidity, and sunlight. Weiler Decl., ¶2.

As of November 27, 2020, 364,261 cases, including presumed cases as well as laboratory-confirmed cases, have been detected in the County, with 7,174 deaths attributed to COVID infection. Weiler Decl., ¶8. Transmission is understood to occur in enclosed spaces with poor ventilation. Id.

In the County, the overall infection case fatality rate is 0.0196 (7,174/364,261). Weiler Decl., ¶9. In the week of November 29, 2020, 37 new deaths and 5087 new cases have been reported, implying a much lower current infection case fatality rate (0.007). Id.

A person who tests positive for the presence of the virus may not be contagious. Weiler Decl., ¶18. That depends on viremia (viral load), which is supposed to be reflected in the PCR curve. Id. All of the available empirical estimates support a minimum false positive rate of 0.48, meaning that 45-48% of cases of COVID have nearly a zero risk of transmission. Weiler Decl., ¶19. Concern over person-to-person transmission from people who test positive (and are thus given a presumptive diagnosis of COVID) must be adjusted downward by at least 50%. Id. It is possible that most of the asymptomatic cases being reported are false positives. Id.

Dr. Bonnie Henry, B.C. Provincial Health Officer, reported to CBC Vancouver that the risk of becoming infected by walking through a cloud of droplets from someone who has sneezed outside while walking by is “negligible.” Weiler Decl., ¶20. These principles have been applied to the study of the outdoor transmission as of COVID. Id.

The China Study found for 318 outbreaks that only 1 of 7,324 cases was assumed to be due to outdoor transmission. Id. The Japan Study tested 110 COVID individuals and used contact-tracing to follow-up on secondary cases. Weiler Decl., ¶23. The data indicated that people are much more likely to catch COVID indoors; the authors estimated that a primary case was 18.7 times more likely to transmit the disease in a closed environment than in the open air. Id. The environments considered included exercise gyms, a restaurant boat, and eating spaces in tents with minimum ventilation. Id.

The CDC reports that there are 24,292 restaurants in the County. Weiler Decl., ¶24. When the seating capacity is limited to 60 patrons for all 24,000 County restaurants, about two to 450 new COVID cases every 30 days would be expected. Weiler Decl., ¶30. COVID has a >99.9% survival rate, and it would be reasonable to conclude that about 4.5 deaths might occur (worst case scenario). Id.

Scientists recognize that all forms of human death should be avoided if possible. Weiler Decl., ¶31. Nevertheless, all forms of human activity, including eating at restaurants, carry some risk. Weiler Decl., ¶33. The risks associated with COVID from outdoor dining are far smaller than the risks of choking or food poisoning. Id. While on average, there is about one death from COVID for every 124 days of outdoor restaurant operation -- assuming that every restaurant in the County is operating at full capacity with 40 outdoor seats -- about 250 people die each year in the County from either choking or food poisoning. Id. Given the information available on outdoor transmission, the risk is “lower than a convenience store”. Weiler Decl., ¶33.

(iv) Allen

Hubert A. Allen, Jr. (“Allen”) has a Masters of Science Degree in Biostatistics from Johns Hopkins University, Bloomberg School of Public Health and 35 years as a statistician and in public health. Allen Decl., ¶2. He acknowledges that COVID rages in November 2020 with daily records of cases,

hospitalizations, and deaths. Allen Decl., ¶3. The question is what are the effective methods of controlling community spread of COVID? Id.

Allen opines that the County has no basis to close outdoor dining because the Department has provided no supporting evidence and/or scientific studies, data, or evidence that the operating of outdoor dining establishments poses an unreasonable risk to public health. Allen Decl., ¶5. The Department's own data provide no support for the planned shutdown of outdoor restaurant operations. Allen Decl., ¶6. The data tracks all non-residential settings at which three or more laboratory-confirmed COVID cases have been identified. Id. Of the 204 locations identified on this list, fewer than 7% are restaurants. Id. Based on the case data for October-November, it is clear that the County's increased cases are not due to the restaurant sector as restaurants only making up 3.10% of new infections during that period. Allen Decl., ¶7. Allen's independent analyses show little risk of COVID spread in restaurants, and no evidence that outdoor dining is the problem. Allen Decl., ¶8.

Allen opines that the state's California Risk Tier System and trigger definitions are too simple and too blunt as deliberating instruments. Allen Decl., ¶11. There was no effort to conduct a comprehensive risk-benefit analysis, which means looking not only at two metrics but also the economic consequences of a move to greater constriction of the economy and whether the constricting actions are targeting the greatest risk businesses and activities based on business sector data and statistics in the specific country. Id.

(v) Kaufman

Sean G. Kaufman ("Kaufman") is a certified public health professional, behaviorist, health education and infectious disease specialist with over 25 years of expertise in both behavioral-based training and infectious disease risk mitigation in clinical, laboratory and other public health settings. Kaufman Decl., ¶1. He worked for the CDC from 1999 through 2006. Kaufman Decl., ¶5. He opines that the risk of COVID transmission in an outside environment is extremely low due to the wind, dryness, sunlight, and the mere dilution of quantities needed for an exposure to cause illness and no scientific evidence exists which would warrant wide-spread closures of outside dining. Kaufman Decl., ¶2.

Contrary to Davis's statement that a CDC study is the "best data" in support of the Restaurant Closure Order, the CDC study is not specific to restaurants and does not support the conclusion that outdoor dining should be banned. Kaufman Decl., ¶¶ 16-17. The study showed that a subset of COVID patients reported that they had recently dined at restaurants more than the general population. Id. The CDC study does not make any distinction between indoor and outdoor dining, even though all available evidence on the transmission of any airborne illness suggests that this is a key factor. Kaufman Decl., ¶17.

There is no scientific evidence that County public officials have cited that demonstrates that there is a measurable risk of transmission of COVID in an outdoor dining situation when the appropriate safety measures are implemented. Kaufman Decl., ¶19. With the precautions already implemented by most restaurants in the County prior to the Restaurant Closure Order -- socially distanced outdoor dining, masks, and temperature checks -- the transmission of the virus from one person to another is highly unlikely. Id. The Department's data only attributed 3.1% of County COVID cases to restaurants. Id.

The CDC has determined that masks can help prevent people infected with COVID from spreading the virus. Kaufman Decl., ¶25. Restaurants that subscribe to adequate precautions, such as outdoor air ventilation, temperature checks, requiring restaurant employees to wear masks and gloves, and social distancing, can safely and effectively prevent the spread of the virus. Id. A restaurant that offers outdoor dining is reducing disease transmission drastically. Id.

There is no rational and legitimate scientific or public health basis supporting the ban on outdoor dining in restaurants. Kaufman Decl., ¶21. In making public health decisions, it is important for health officials to weigh the overall risk of the given disease to the overall benefits of the imposed public health policy.

Kaufman Decl., ¶22. The likelihood of symptomatic and pre-symptomatic transmission, reproduction rates, signs, symptoms, mortality, risks and other infectious disease characteristics of COVID in both child and adult populations both domestically and internationally does not rationally support the County's order. Id.

There is now a widespread scientific consensus that COVID does not affect all people equally. Kaufman Decl., ¶26. Over 41% of the COVID deaths in the United States have occurred in nursing homes. Id. And 94% of all deaths associated with the COVID condition involved victims with pre-existing underlying medical conditions—such as diabetes or heart disease. Id. It is now understood that most of the severe cases of the disease occur in individuals over the age of 65. Id.

The recent countywide ban on all indoor and outdoor dining in restaurants is counter to the purpose and mission of public health. Kaufman Decl., ¶27. Realistically, asymptomatic transmission of COVID is fairly low. Id. Logically, it is unlikely that a symptomatic person would choose to dine out at a restaurant, just as someone with flu symptoms is unlikely to opt for a restaurant dining experience versus staying home. Id.

The sweeping nature of the Department's order shows that it is not rationally targeted as an infectious disease control mechanism. Kaufman Decl., ¶29. There is no public health reason that a restaurant in an unaffected portion of a California county must be prohibited from operating outdoor dining because of an outbreak in an affected portion of a California county. Id.

2. The Department's *Ex Parte* Evidence[7]

a. Jeffrey D. Gunzenhauser

Jeffrey D. Gunzenhauser, M.D. ("Gunzenhauser") is the County's Chief Medical Officer/Medical Director. Gunzenhauser Decl., ¶1. While older adults and those with underlying medical conditions are at higher risk of severe illness and death from COVID, the virus can cause severe illness and death in individuals of any age. Gunzenhauser Decl., ¶9. Unusual blood clotting has also been observed in COVID patients, which can lead to pulmonary embolism, deep vein thrombosis, or stroke. COVID-related clotting often does not respond to standard treatment, such as blood-thinners. Id.

Emerging evidence suggests that some who recover from COVID experience serious effects that linger long after clearing the viral infection. Gunzenhauser Decl., ¶10. Some of these long-term effects may be attributable to organ damage caused by the COVID infection. Id. Scans and tests of some patients who recovered from COVID have shown damage to heart muscle and scarring in the lungs. Id. Some of this damage is believed to be the result of COVID-related blood clotting, including clots that weaken blood vessels and very small clots that block capillaries. Id.

The effectiveness of treatment remains limited, and a widely available vaccine is still months away. Gunzenhauser Decl., ¶11. Additionally, despite improved treatment, the proportion of COVID patients requiring hospitalization has remained elevated above 10% throughout the pandemic and averaging about 10% in the most recent four months, with approximately one quarter to one third of hospitalized patients in the ICU, and approximately one half of those ICU patients requiring ventilators. Id.

There is consensus among epidemiologists that the most common mode of transmission of COVID is from person-to-person through respiratory droplets that are expelled when a person coughs, sneezes, or projects their voice. Gunzenhauser Decl., ¶13. There is no scientifically agreed-upon safe distance, but it is widely accepted that standing or sitting near an infectious person is riskier than being farther away. Id.

Not every exposure to the COVID virus will lead to infection. Gunzenhauser Decl., ¶15. Infection occurs when a person receives a dose of the virus large enough to overcome the body's defenses, which may vary from person to person. Id. Measures to control the spread of COVID should therefore include efforts to limit interactions in conditions that support exposure to higher viral doses. Id. Conditions that pose a particularly

high risk are present in gatherings. Id. It is widely accepted that a gathering of any size increases the risk of community transmission. Id. Risk increases with the size of the gathering because the more people who gather, the likelier it is that one or more infected persons will be present. Id. In turn, the number of people who are potentially exposed to the virus increases with the size of the gathering. Id.

The risk of transmission further increases when individuals are in close proximity for an extended period of time. Gunzenhauser Decl., ¶16. Risk is also increased when individuals are not wearing face coverings. Id. Close proximity to an unmasked infected person for a prolonged period of time presents an especially high risk of receiving a viral dose sufficient to cause COVID infection. Id.

Many cases of COVID are the result of secondary spread wherein an individual who did not attend a particular event contracts the virus as a result of an outbreak triggered by that event. Gunzenhauser Decl., ¶27.

Evidence indicates that gatherings of individuals from different households facilitate the spread of COVID. Gunzenhauser Decl., ¶26. While large gatherings present the greatest risk, any gathering of individuals poses a risk of transmission. Id. There is widespread consensus among public health experts that restrictions on gatherings are a necessary and effective tool for preventing the spread of COVID. Id. Principles of infection control have shown that systematic administrative control measures such as the prohibition of gatherings are more effective than measures dependent on widespread individual compliance as the latter are difficult to enforce and sustain and will fail in protecting the public's health even if a small proportion is non-compliant. Id. Excluding symptomatic individuals from gatherings is an inadequate strategy because a substantial proportion of transmission, and perhaps even the majority, involves spread of the virus from persons who are pre-symptomatic or asymptomatic carriers of the virus. Id.

The County's experience bears out the effectiveness of systematic responses such as prohibitions on gatherings. Gunzenhauser Decl., ¶29. While the initial March 2020 state and County stay-at-home orders were in effect, the rate of COVID transmission dropped significantly. Id. When COVID spreads, it is believed that the average infected person goes on to infect two to four other people. Id. This is sometimes referred to as the "R number." When the stay-at-home orders were in effect, the County's R number dropped to less than one, indicating that on average each infected person would infect less than one other individual, leading to a reduction in the number of new daily cases. Id. Once the orders were lifted, the R number began increasing again. Id. As of November 23, 2020, the R number for the County was 1.27, meaning the daily number of new COVID cases is expected to increase over time. Id.

The County's experience demonstrates the risk in relying on widespread individualized compliance alone to control the spread of COVID. Gunzenhauser Decl., ¶30. During one weekend in June, Department inspectors found that 49% of bars and 33% of restaurants were not adhering to physical distancing protocols and that 54% of bars and 44% of restaurants were not enforcing mask requirements. Id. In September, the County reported that 20% of restaurants inspected were violating COVID protocols. Id.

A key part of any public health department's response to outbreaks involves field investigations. The level of evidence required in a field investigation is not the same as that required in a clinical trial. Gunzenhauser Decl., ¶32. In a field investigation, the purpose is to determine what steps can be taken to stop or slow the spread of an infectious disease. Id. The purpose of public health decisions based on field investigations is to take actions in a timely manner that will prevent or curtail the spread of the virus or other disease-causing agent. Id. Often, officials will have to make decisions quickly and when information is limited, especially in comparison to other medical studies such as full-blown, clinical trials when the urgency of the situation is not so severe. Id.

The accepted approach to outbreak response is systemic and multi-pronged. The purpose of "reopening" sectors is to create spaces where people can resume normal activities without triggering uncontrolled spread of the virus. Gunzenhauser Decl., ¶34.

From November 1, 2020 to November 22, 2020, the County's seven-day average of new daily cases more than doubled from 1,216 per day to 3,099 per day. Gunzenhauser Decl., ¶36. On November 23, 2020, the County reported 6,124 new cases for that day alone, which is the most since the onset of the pandemic. Id. Between November 13 and November 27, hospitalizations of confirmed COVID patients increased by 101%. Id. This indicates widespread and uncontrolled community transmission of the virus. Id. Currently, approximately one in 145 County residents is infectious to others. During the week of November 16, that number was one in 250. Id.

The number of new cases and hospitalizations is expected to rapidly increase over the next 21 days which, without rapid public health interventions, will lead to a major increase in the number of persons with severe illness and the number of deaths and will stress the healthcare system and healthcare workers. Gunzenhauser Decl., ¶37. This stress will limit the availability of ICU beds for patients who may need them, including patients hospitalized for conditions other than COVID. Gunzenhauser Decl., ¶37.

On November 21, 2020, the County reported 4,522 new confirmed cases and 1,391 people hospitalized, 26% of whom were in the ICU. On November 22, 2020, the County reported that the five-day average of new cases surpassed 4,000 daily cases—the threshold for suspending in-person dining. Gunzenhauser Decl., ¶40.

On November 23, the County reported the highest number of COVID cases in a single day, at 6,124. Gunzenhauser Decl., ¶41. This brought the total number of known COVID cases in the County to 370,636, with 7,446 deaths. Id. As of November 29, 2,049 COVID patients were hospitalized in the County, with 24% in the ICU. Id. The day before, 1,951 patients were hospitalized, with 25% in the ICU. Id.

When community spread of the virus increases, the number of known and suspected COVID patients occupying both ICU and non-ICU beds increases as well. Gunzenhauser Decl., ¶43. On most days in June, there were fewer than 1,500 confirmed COVID cases in the County's hospital beds. Id. For ICU beds, that number rarely exceeded 500. Id. Because hospitalizations tend to lag behind by two to three weeks, those numbers did not yet fully reflect the increase in community spread that followed the County's reopening measures that began in May. Id. During the July surge, the number of confirmed COVID patients exceeded 1,500 every day, and often approached 2,000. Id. For the ICU, those numbers never dropped below 500 and at times approached 700. Id. On November 1, 2020, known and suspected COVID cases accounted for 721 non-ICU beds and 239 ICU beds. Id. By the day before Thanksgiving, those numbers had risen to 1,431 and 475, respectively. Id. From October 27 to November 27, 2020, COVID hospitalizations jumped from 747 to 1,893. Id. The current surge is accelerating much more rapidly than the July surge. New cases and hospitalizations in the current surge are increasing at double the rate seen in July. Id.

Data shows that infections among younger people are a significant contributing factor to the surge. The CDC found that the median age of confirmed COVID cases decreased from 46 years in May to 38 years in August. Gunzenhauser Decl., ¶44. That same study found that people in their twenties accounted for the largest proportion of cases (more than 20%) out of any age group. Id. Younger adults make up a significant proportion of workers in front-line occupations such as retail stores and highly exposed industries such as restaurants and bars, where they have more contact with members of the public. Id.

Increased hospitalizations due to COVID, including ICU admissions, risk overwhelming the County's hospital capacity. Gunzenhauser Decl., ¶45. A secondary effect of the COVID pandemic is that some individuals delay seeking treatment for other conditions for fear of being exposed to COVID at healthcare facilities. Gunzenhauser Decl., ¶46. More people in the United States have died in 2020 than in an ordinary year, but not all of these excess deaths are attributable to COVID. Id.

Based on public health observations of the effects of the virus during this pandemic, hospitalizations typically increase two to three weeks after a spike in cases, and deaths increase thereafter. Gunzenhauser Decl., ¶49. Therefore, while the County is currently experiencing a surge in hospitalizations, it expects the current high case counts to lead to an even higher hospitalization rate in the coming weeks, which is why the Department took proactive steps to combat the virus: ordering the temporary closure of in-person dining and issuing a new Safer-at-Home Order. Id.

There is general consensus that in-person eating and drinking at restaurants, breweries, and wineries are among the riskiest activities in terms of COVID transmission. Gunzenhauser Decl., ¶48. Studies have demonstrated that COVID is less likely to be transmitted in outdoor spaces than in indoor spaces, where respiratory droplets and aerosols can accumulate. *Id.* The risk of transmission is further reduced when outdoor diners are spaced away from each other, when restaurant staff wear face coverings and face shields, and when patrons only remove their face coverings to eat and drink. *Id.*

Studies show the role of masks in limiting the spread of COVID, and that situations where unmasked individuals from different households spend prolonged periods of time in proximity to one another present a higher risk of transmission than settings where one or more of these factors is absent. Gunzenhauser Decl., ¶51.

In-person dining and drinking are particularly high risk, and an effective response to the COVID pandemic must account for these risks. Gunzenhauser Decl., ¶52. By contrast, activities such as shopping in stores and working in offices present lower risk because they lack one or more of the risk factors associated with restaurant dining. *Id.* The County has identified 90 restaurant outbreaks, including 20 in the last four weeks. *Id.*

CRA cites figures from the Department's COVID webpage in claiming that the Department's data does not support the Restaurant Closure Order. Gunzenhauser Decl., ¶54. This data is dynamic, changes daily, and may not reflect real-time investigation counts for the settings listed. Gunzenhauser Decl., ¶55. Restaurants and other employers are required to notify the Department if three or more employees test positive for COVID in a 14-day period. *Id.* It can be difficult or impossible for these businesses to know if they have been visited by customers who tested positive in that same time span. *Id.*

While every business on the list identified three or more confirmed staff cases, the "Total Confirmed Non-Staff" column for the vast majority of businesses lists zero. This does not mean that there were no cases of COVID among non-staff (such as customers). *Id.* It simply means that the Department has not identified any laboratory-confirmed cases that can be linked to the outbreak. *Id.* Non-restaurant businesses will necessarily be over-represented in the data set on which CRA relies because other sectors have been reopened for longer, and some were never closed for in-person operations to begin with. Gunzenhauser Decl., ¶56. These businesses, such as grocery stores and other essential businesses, will necessarily be over-represented in any location-based listing of outbreaks. *Id.*

There is wide consensus that risk reduction in a pandemic does not require definitive proof that a particular sector or activity is the cause of an increase in cases. Gunzenhauser Decl., ¶58. Best practices dictate that public health departments identify those sectors and activities that present a higher risk of transmission and take steps to mitigate those risks, especially during a surge in cases and hospitalizations. *Id.*

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b. Peter B. Imrey[8]

Peter B. Imrey ("Imrey") is a biostatistician-epidemiologist. Imrey Decl., ¶1. The disciplines most central to understanding and combatting infectious diseases in populations outside a clinic or hospital are infectious disease epidemiology and public health disciplines such as health education and biostatistics. Imrey Decl., ¶13. Medical students and residents typically receive only a rudimentary orientation to epidemiology, biostatistics, and other public health disciplines. Imrey Decl., ¶13. Relatively long-term projections from infectious disease outbreak models are highly fallible. Imrey Decl., ¶21.

Bhattacharya's studies seroprevalence survey-based claims of very low overall and age-specific COVID infection fatality rates, generally and specifically in California, remain matters on which there is no scientific consensus. Imrey Decl., ¶¶ 42, 43, 49, 50.

3. The Department's OSC Evidence[9]

a. Davis

Respondent Davis is the County Health Officer and serves as the County's medical expert regarding public health matters. He provides guidance and direction across the Department. Davis Decl., ¶¶ 2-3.

From November 1 to November 22, 2020, the County's seven-day average of new daily cases more than doubled from 1,216 per day to 3,099 per day. Davis Decl., ¶7. Between November 13 and November 27, 2020, the number of hospitalized COVID patients increased by 101%. Id. As of December 3, 2020, there are 2,572 COVID patients hospitalized, 23% of whom are in the ICU. Id.

On November 23, 2020, the County reported its then-highest number of cases for a single day at 6,124. Davis Decl., ¶8. That record was broken on December 1, 2020 and again on December 3, 2020, when the County reported 7,854 new cases. Id. The average daily cases have increased by 225% since early November. Id. The County has also seen a jump in the daily death rate, which has increased by 92% since November 9, 2020. Id.

The majority of COVID hospitalized patients have been adults between the ages of 18 and 64. Davis Decl., ¶9. This is consistent with the high numbers of infections the County has seen in younger and middle-aged adults. Id. These numbers are consistent with the theory advanced by many experts that increased infections among young adults are driving the ongoing surge. Davis Decl., ¶10. This is believed to be due to young adults engaging in risky behaviors, including socializing with people outside of their household. Id. Although members of this younger and healthier cohort are less likely to die, they may still transmit and have transmitted the virus to older or other individuals at high risk for severe COVID illness. Davis Decl., ¶12.

The Department regrets that the preventative measures required to slow the spread of the ongoing pandemic have had an emotional and economic impact on businesses, families, and individuals and, at the same time, must implement measures to fulfill its day-to-day statutory responsibility for communicable disease control, based on appropriate preventive measures for the communicable disease hazards in the community. Davis Decl., ¶14.

Because COVID spreads between persons in close contact via droplets and, under special circumstances, via airborne transmission produced through speaking, shouting/singing, breathing, coughing or sneezing, Davis issues orders that require persons and businesses to modify their behaviors so that human interactions can occur with less risk of transmission. Davis Decl., ¶15.

The County's restriction on outdoor dining is necessary because dining with others creates a circumstance where non-household members are gathering in close proximity without COVID infection control protections and typically for more than 15 minutes. Davis Decl., ¶18. Close proximity for more than 15 minutes are two of the three criteria for the definition of a close contact; the third is this occurring with a person who is knowingly or unknowingly infected with the COVID virus. Id.

The County recognizes that it has asked its businesses and more than ten million residents to make significant adjustments to fight this pandemic. Davis Decl., ¶19. Yet, in the considered opinions of the Department and its top communicable disease experts, these temporary adjustments and modifications are necessary to combat the ongoing surge in COVID cases and hospitalizations, and the resulting strain on the County's healthcare system. Id.

The rate at which a pathogen spreads in a community is determined by its reproductive number, sometimes referred to as the "R number" or simply "R." Davis Decl., ¶20. R describes the number of new cases directly generated by one case in a population—the number of other people a single infected person is expected to infect. Id. When R is below 1.0, the number of cases diminishes over time, and community spread eventually ends. Id. When R is greater than 1.0, community spread increases over time. Id. That increase is exponential, not linear. Id.

Most public health experts believe that employing health measures such as distancing, gathering restrictions, and masking is scientifically, morally, and ethically justified and necessary. Davis Decl., ¶25. A minority of the scientific community has advocated for a more hands-off approach to the pandemic, in which the government does not employ measures such as physical distancing or limits on gatherings, and instead would let the virus spread unimpeded among the general population while (purportedly) protecting the most vulnerable. Id. This approach—allowing the virus to proliferate among healthy individuals so that herd immunity is achieved through “natural infection”—has been advanced by Plaintiffs’ expert Bhattacharya. Id. Bhattacharya’s opinion is a minority opinion in the scientific community. The Department strongly disagrees with the hands-off approach advocated by Bhattacharya in the Great Barrington Declaration and believes it to be contrary to accepted public health practice, public health ethical standards, and the public interest. Id.

A herd immunity approach similar to the one Bhattacharya advances was initially employed in Sweden with disastrous results. Sweden experienced a much higher rate of severe illness and death than neighboring countries, as well as a worse economic downturn and higher level of unemployment. Davis Decl., ¶27.

Most public health experts believe the hands-off approach would result in many more deaths and much more severe illness than would the approach followed by the County, the state, and most other jurisdictions. Davis Decl., ¶29. Most public health professionals would view any approach that would result in many preventable deaths to be unethical and would conclude that the overall societal costs of such an approach far outweigh any economic or other benefits. Id. The County’s orders reflect these principles and are consistent with public health best practices. They provide for various sectors to reopen based upon their risk factors, while other sectors and activities are required to stay closed or reopen at reduced capacities. Davis Decl., ¶30.

Increased community spread leads to increasing numbers of infections, hospitalizations, and deaths. Davis Decl., ¶35. Community spread can be reduced by limiting activities that present a higher risk of exposure. Id. It is now well-established that gatherings of individuals from different households of any size presents a greater risk of COVID transmission, which increases with the size of the gathering. Id.

The purpose of the suspension of restaurant dining is to address the County’s current emergency. Davis Decl., ¶31. Based on the data, the Department determined that the risks and harms of uncontrolled community spread, strain on the health care system, and excess preventable deaths outweighed the social and economic harm of a temporary suspension on in-person restaurant dining. Id.

Gunzenhauser, the Department’s Communicable Disease Bureau director, identified a number of studies showing the role of masks in limiting the spread of COVID, and that situations where unmasked individuals from different households spend extended periods in close proximity to one another present a higher risk of transmission than settings where one or more of these factors is absent. Davis Decl., ¶33. *See* Gunzenhauser Decl. ¶¶ 51-52. Residents are instructed to wear masks even when outdoors because it is undisputed that COVID transmission can occur and has occurred in outdoor settings. Davis Decl., ¶34. While the risk of transmission is lower outdoors, it is still present. Id. This is why face coverings are recommended whenever individuals from different households are in proximity to one another, regardless of whether it is indoors or outdoors. Id.

A study on the effectiveness of physical distancing in controlling the spread of COVID shows that, in outdoor, well-ventilated spaces, such as an open patio at a restaurant, where unmasked persons have prolonged contact, present a moderate risk of transmission. Davis Decl., ¶37. Being outdoors reduces risk but does not eliminate it. Id. The risk of transmission outdoors is even more elevated at a restaurant where people are sitting close to each other for a prolonged period, not wearing, not distancing, eating and drinking and projecting their voices (and respiratory and aerosol droplets) toward each other. Id.

The benefits of being outdoors are reduced when a space is partially enclosed, such as is often the case on a restaurant patio. Davis Decl., ¶38. Even partial enclosures affect airflow and the extent to which virus-containing respiratory droplets and aerosols can accumulate. Id. The benefits of being outdoors are further diminished when people from different households gather for prolonged periods without wearing masks.

Davis Decl., ¶39. The Department consulted with members of the County's restaurant industry in an attempt to avoid an outdoor dining closure. Id. The Department proposed that restaurants take steps to ensure that all persons seated at a table were from the same household. Id. The Department was informed that restaurants had no way of verifying that information for their diners. Id.

A September 2020 CDC report found that adults testing positive for COVID were twice as likely to have reported dining at a restaurant within the past two weeks than those who tested negative. Davis Decl., ¶42. *See* Gunzenhauser Decl., ¶50. The fact that the study did not distinguish between indoor and outdoor dining does not undermine its usefulness and validity in determining the County's responses to the recent surge in COVID cases. Davis Decl., ¶42. The study looked at dining in any area designated by the restaurant, including indoor, patio, and outdoor seating. Id.

Studies show that asymptomatic cases can have higher viral loads and be more infectious than symptomatic cases. Davis Decl., ¶43. Asymptomatic and pre-symptomatic spread of COVID are believed to be significant drivers of community spread, which was not understood earlier in the pandemic. Davis Decl., ¶44. "Viral load" refers to the quantity of virus in a given volume of fluid, such as saliva. A person with a high viral load expels more virus, exposing others to a higher dose of virus. Id. While intuitively one would expect an asymptomatic person to carry a lower viral load, and thus be less infectious, there is data suggesting that is not the case with COVID. Id. A study published on November 24, 2020 found that asymptomatic patients had a higher viral load than symptomatic ones, and that those who were severely ill had lower viral loads. Davis Decl., ¶45. Other studies have found little to no difference in the viral loads of asymptomatic and symptomatic patients. Id. This suggests that asymptomatic individuals as a category are at least as infectious as those with symptoms. Id.

The County has not conducted a clinical study on how outdoor dining affects the transmission rates of COVID. Davis Decl., ¶48. The County has limited time and resources to conduct clinical studies during a pandemic when it must act swiftly and proactively to halt the spread of the disease. Id. Clinical studies provide minimal value in deciding how to respond to an emergency like the COVID pandemic. Davis Decl., ¶49. Clinical studies have a higher evidentiary standard and take longer to complete whereas field investigations are intended to identify those factors and behaviors that impose a higher risk of transmission, so that those factors can be quickly addressed. Id.

Davis made the decision to issue the Restaurant Closure Order based on the evidence that COVID spreads most easily when individuals from different households are in close proximity to one another for prolonged periods of time, without wearing masks. Davis Decl., ¶51. Restaurant dining was the only remaining setting where this was largely still permitted, and while dining outdoors is less risky than dining indoors, the nature of dining together at a restaurant still presents a substantial risk of viral transmission. Id.

Based on the current projections and reported data, COVID is projected to be one of the leading causes of death in the County in 2020. Davis Decl., ¶53. For the period between March 15 and November 14, 2020, there were 339,000 excess COVID deaths in the United States—18% above normal. Davis Decl., ¶54. COVID is currently the third leading cause of death in the United States, behind heart disease and cancer. Davis Decl., ¶55. As of December 3, 2020, the County had recorded 7,782 COVID deaths. Davis Decl., ¶56.

Beyond hospitalizations and mortality rates, emerging evidence suggests that some number of patients who recover from active COVID infection experience long-term effects. Davis Decl., ¶57. The full extent of the long-term health consequences after recovering from COVID is not yet known, but the evidence available is concerning. Id. Scans and tests of some people who recovered from COVID have shown damage to heart muscle and scarring in the lungs, which is believed to be the result of COVID-related blood clotting. Davis Decl., ¶58.

The Department hoped the County would not reach a 4,000 case per day average after the initial outbreak of the pandemic in March 2020. Davis Decl., ¶64. Hospitalizations trail new cases by two to three weeks, meaning that when cases go up, hospitalizations will increase a few weeks after that. Davis Decl., ¶65. While

most people who contract the virus will not need to be hospitalized, the larger the number of infected people, the larger the number of people who will need hospital treatment. Id.

If the state's Regional Stay Home Order takes effect in the Southern California Region, this would mean that all restaurants in the County must be closed for in-person dining pursuant to state law, but could continue to service their customers through take-out, pick-up, or delivery. Davis Decl., ¶71. Based upon the current data being reported by the hospitals, counties, and California Department of Public Health, it is projected that the Southern California Region, of which the County is part, will cross this threshold within the next few days because ICU availability in the Southern California Region will be less than 15%. Davis Decl., ¶69.

b. Gausche-Hill

Marianne Gausche-Hill ("Hill") is the Medical Director for the County Department of Emergency Medical Services ("EMS") Agency and has served in that capacity since July 1, 2015. Hill Decl., ¶¶ 1, 5. The EMS Agency serves as the lead agency for emergency medical services system in the County and is responsible for coordinating all hospitals with emergency rooms in the County, both public and private. Hill Decl., ¶6.

There has been a recent surge in COVID cases and hospitalizations in the County. Hill Decl., ¶9. From November 1 to November 22, 2020, the County's seven-day average of new daily cases more than doubled from 1,216 per day to 3,099 per day. Hill Decl., ¶10. On November 23, 2020, the County reported 6,124 new cases for that day alone, which was the most since the onset of the pandemic at that time. Hill Decl., ¶11. About a week later, on December 1, 2020, the County reported a record-breaking 7,593 new cases. Id. That same day, 46 deaths were reported, up from the average of 30 deaths per day the prior week. Id. Hospitalizations have also seen a marked increase in the last month. Hill Decl., ¶12. Between November 13 and November 27, 2020, hospitalizations of confirmed COVID patients increased by 101%. Id.

On average, there are approximately 14,000 licensed non-intensive care unit ("non-ICU") beds and 2,500 licensed intensive care unit ("ICU") beds available in the County at 70 designated 911-receiving hospitals. Hill Decl., ¶13. The number of beds can fluctuate from day-to-day depending on staff availability and other factors, including a mix of COVID and non-COVID patients and the need for cohorting (collecting in one place) COVID patients. Id.

Non-COVID patients occupy between 9,500 and 11,000 non-ICU beds on average, and between 1,000 and 1,500 ICU beds on average. Hill Decl., ¶14. The County tracks daily the number of COVID patients who are hospitalized. Hill Decl., ¶15. When the County started to reopen in the summer, there was a surge of COVID cases and hospitalizations. Hill Decl., ¶16. During the months of June and July, COVID positive patients and patients under investigation ("PUIs") occupied as much as 15% of the County's non-ICU capacity and as much as 30% of the County's ICU capacity. Id.

The hospitalization rate began to decrease in August 2020 after the County re-implemented certain public health restrictions and the number of COVID hospitalizations decreased significantly. Hill Decl., ¶17.

Between August and October 2020, COVID patients and PUIs occupied as low as 6% of the County's non-ICU capacity and as low as 14% of the County's ICU capacity. Id.

Beginning in November 2020, the number of COVID cases and hospitalizations began to surge again. Hill Decl., ¶18. The percentage of non-ICU and ICU beds occupied by COVID patients has increased every week:

Percentage of Non-ICU Beds Occupied by COVID Patients

November 1-7: 6%

November 8-14: 7%

November 15-21: 9%

November 22-28: 12%

Percentage of ICU Beds Occupied by COVID Patients

November 1-7: 15%

November 8-14: 16%

November 15-21: 19%

November 22-28: 24%

(Hill Decl., ¶18).

On November 1, 2020, approximately 960 COVID patients were hospitalized in ICU and non-ICU beds. Hill Decl., ¶19. On November 28, 2020, approximately 2,000 COVID patients were hospitalized in ICU and non-ICU beds. Hill Decl., ¶20.

These numbers have continued to rise in the beginning of December. Hill Decl., ¶21. On December 1, 2020, 2,690 COVID patients were hospitalized as follows: 573 COVID positive patients and 42 PUIs occupied ICU beds, a total of 615. Id. That means approximately 25% of the County's ICU beds were occupied by COVID patients. Id. Additionally, 1,858 COVID positive patients and 217 PUIs occupied non-ICU beds, a total of 2,075. Id. That means approximately 15% of the County's non-ICU beds were occupied by COVID patients. Id.

The number of COVID patients hospitalized in the County has nearly tripled. Hill Decl., ¶22. The strain on the healthcare system caused by COVID hospitalization is particularly concerning for ICU beds. ICU beds are generally reserved for the sickest of patients (acutely ill patients) and are staffed by specially trained medical professionals. Hill Decl., ¶23. As a result of the recent surge, the number of available ICU beds in the County has significantly decreased. In mid-October, there were 149 available ICU beds. Hill Decl., ¶24. The County's ICU bed availability in the month of November has decreased to less than 5% of total capacity, with 4.44% available from November 22-28. Hill Decl., ¶25.

The numbers and the trajectory show a fast-moving and substantial upward trend of COVID hospitalizations. Hill Decl., ¶26. In one week, the number of COVID hospitalizations has increased by greater than 40%. Id. The surge in hospitalizations will further stress the County's healthcare system, which can manifest itself in many ways. Hill Decl., ¶28. Hospitals will have to change what they do day-to-day to meet the needs of their patients. Id. For example, an emergency room may have to be re-purposed to treat ICU patients, which will impact the number of day-to-day medical emergencies that can be treated. Id. The healthcare workforce will also be taxed heavily because staffing and related costs will significantly increase. Id. Medical workers also have to comply with very restrictive precautions, such as the use of personal protective equipment, to treat COVID patients. Id.

The County's projections concerning the demand for non-ICU hospital beds shows that demand could exceed the County's available beds before the end of the year and within a couple of weeks. Hill Decl., ¶¶ 31-32. Typically, when a shortage occurs, the availability of ICU beds diminishes first because there are fewer alternatives where ICU-patients can be treated effectively. Hill Decl., ¶33.

On December 3, 2020, the state announced its Regional Stay at Home Order (“Regional Order”). Hill Decl., ¶34. For the purposes of the Regional Order, the Southern California Region includes Imperial, Inyo, Los Angeles, Mono, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura counties. Hill Decl., ¶35. The Southern California Region was at 82% ICU capacity as of December 3, 2020, meaning 18% ICU availability. Hill Decl., ¶36. If the surge continues unchanged, it is projected that the Southern California Region, of which the County is a part, will cross this threshold and have less than 15% ICU availability by the end of this week. Id.

c. Reingold[10]

Arthur I. Reingold (“Reingold”) is the Division Head of Epidemiology and Biostatistics at the University of California, Berkeley, School of Public Health and has previously worked at the CDC on the prevention and control of infectious diseases. Reingold Decl., ¶1.

The rise in cases nationwide is not just a reflection of increased testing. Reingold Decl., ¶9. If the rate of COVID were stable or decreasing, increased testing would produce a lower proportion of tests being positive, as presumably a larger and more representative selection of the population (not only those with symptoms or known exposure) would be included. Id. Since the case rate and the proportion of tests positive rate have increased simultaneously, data suggest that the increase in confirmed cases indicates a true rise in cases. Id.

COVID can be spread when an infected person talks, breaths, coughs, sneezes, and the like, expelling droplets that can transmit the virus to others in their proximity. Reingold Decl., ¶18. Because of this, COVID can spread rapidly in crowded conditions, particularly indoors. Id. It is generally believed that such droplets can infect people who are within six feet of an infected person, and on this basis, it is recommended that people maintain at least six feet of distance from each other. Id.

There is now very strong evidence that the virus can also be aerosolized, such that microscopic droplets containing the virus are expelled into the air by breathing, talking, singing, sneezing, and coughing; they remain in the air; and they can be inhaled by others who subsequently come into contact with the air. Reingold Decl., ¶19. Multiple studies have shown that COVID may remain airborne for extended periods. Id. One study found that COVID remained viable in aerosols for the entire three-hour experiment. Id. Another analysis led by researchers at Tulane University concluded that “preliminary data suggest that COVID is resilient in aerosol form,” and that respirable-sized aerosols could retain infectivity for up to 16 hours. Id.

This research is consistent with studies showing that sharing indoor space increases the risk of infection. Reingold Decl., ¶20. When indoors, it is more likely that one will inhale respiratory droplets and aerosols from an infected person. Id. When outdoors, more frequent air movement disperses and dilutes respiratory droplets and aerosols making transmission less likely. Id. The CDC currently advises that activities are safer when held in outdoor spaces. Id.

Some individuals who are infected with COVID but do not develop symptoms are nonetheless infectious and can transmit the virus to others. Reingold Decl., ¶23. Those who do develop symptoms may be infectious up to 48 hours before the onset of symptoms. Id. This means that isolating only persons known to be ill with COVID or with symptoms of COVID will not stop the spread of COVID infection. Id.

It is currently unknown if those who have had COVID develop protective immunity from reinfection. Reingold Decl., ¶24. Only those who have been infected and recovered are possibly immune; there is no known population with pre-existing immunity to the virus. Id. Anyone who has not yet been infected with COVID is likely susceptible to infection. Id. For those who have been infected, it is unknown if any protective immunity is permanent, will exist for only a limited time, and whether reinfection is possible. Id. Research has found that the level of antibodies in those recovering from the virus appears to decline within a few months of infection, which may indicate a limited period of protective immunity. Id.

Epidemics and pandemics occur when the number of infections grows exponentially. Reingold Decl., ¶33. When describing exponential growth rates, epidemiologists often refer to the doubling period of a disease, which is the amount of time required for the number of infections to double. Id. The shorter the doubling time, the greater the growth rate of the epidemic/pandemic. If exponential growth rates are not moderated, the number of infections and resultant illnesses can quickly overwhelm a given health system. Id. For this reason, public health officials often prioritize efforts to reduce the growth rate of infections, including lengthening the doubling time. Id. Reducing the growth rate of infections and resultant disease is achieved through both official policies and changes to individual social behavior. Id.

Easing or ending restrictions on the community spread of the COVID virus would lead to an increase in cases and risk exponential growth in the spread of the virus. Reingold Decl., ¶34. This would increase serious and potentially long-term illness and death caused by the disease. Id. It would also risk overburdening the healthcare system, particularly in areas where critical care facilities and beds are limited. Id.

It is true that development of herd immunity is another means through which dissemination of certain viruses in a population can cease. Reingold Decl., ¶35. Herd immunity occurs when a high percentage of the population becomes immune to an infectious agent such that the spread is dramatically slowed as infected persons become deadends for the infectious agent. Id. Approximately 40-95% of a population must be immune in order to achieve herd immunity, depending on the infectiousness of the agent. Id.

There are significant risks to pursuing a herd immunity approach without a vaccine, which is why the vast majority of epidemiologists and infectious disease experts reject the approach for COVID. Reingold Decl., ¶36. There is the risk that it would not work, as it has not been confirmed that those who have had the virus develop protective immunity. Id. Even if it does work, because herd immunity may take a year or more to develop in the population, it is unlikely to prevent the spread of the virus in the near future. Id. The approach would result in very significant increases in illnesses, hospitalizations, and deaths for a disease that has already killed almost 250,000 over ten months—despite a concerted public health response to minimize those deaths. Id.

4. Reply Evidence

Davis misinterprets the CDC study in claiming that it has relevance to outdoor dining. Weiler Reply Decl., ¶6. The CDC study did not ask what risks come with outdoor dining compared to indoor dining. Id. Nor did it parse out the relative contribution of outdoor and indoor dining to the overall risk of transmission. Weiler Reply Decl., ¶¶ 7-8. Contrary to Davis' statement, it cannot possibly be used to support a finding that outdoor dining is less or more risky than indoor dining, or whether outdoor dining poses a risk at all. Id.

Davis's use of data related to the "number of cases" and the "number of deaths" is insufficient to show that outdoor dining presents any significant risk for increased COVID transmission. Weiler Reply Decl., ¶9. Population sizes change over time and increased testing or changes in testing protocols could lead to an artificially higher absolute number of positive tests. Id. In addition, the numbers reported in Davis's declaration do not address the demonstrable false positive rate in the test results. Weiler Reply Decl., ¶10. Unless we know the false positive rate of RT-PCR testing in the County, we cannot know what percentage of "laboratory confirmed" and "asymptomatic" cases are actually false positives. Id. Because Davis' data does not account for false positives and because the CDC shifted in April to count all positive test results showing the presence of virus as COVID, some of the counted cases will be other infections with similar symptoms, including viral pneumonia, bacterial pneumonia, or pneumonia from other coronaviruses. Weiler Reply Decl., ¶11.

Crucially, Davis provides no estimates for expected new cases from outdoor dining. In other words, his data does not answer the single most important question whether any future spread may be attributed to outdoor dining rather than other activities. Weiler Reply Decl., ¶13.

Hill's presentation of statistics as to the amount of beds occupied by COVID patients in both ICU and non-ICU settings does not provide relevant statistical context. Weiler Reply Decl., ¶14. There is seasonal variation in hospitalizations, and other diseases have similar symptom profiles to COVID, these figures are not meaningful without a comparison to hospitalizations in prior years, expressed per capita and per available bed. Id.

Hill does not provide any data on the key factor relevant to percentages and numbers of ICU beds being utilized. Weiler Reply Decl., ¶15. As both the total population size and the number of hospital beds both change over time, the relevant data set needs to address the number of hospital beds per capita. Id.

Hill's projection model fails to consider several key parameters, including changes in population size, the impact of changes in the number of tests applied and changes in testing protocols on the number of cases, increased immunity due to past exposure within the relevant population, and improvements over time in the medical care and treatment of COVID. Weiler Reply Decl., ¶17.

5. The Governor's December 3, 2020 Regional Order

The Governor issued the Regional Order on December 3, 2020. County Opp. to OSC, RJN Ex. 9. The Governor's Regional Order takes effect on December 5, 2020 and is triggered for the Southern California Region if its ICU capacity falls below 15%. The Governor's reasoning is that "we are at a tipping point" and "we need to take decisive action now to prevent California's hospital system from being overwhelmed in the coming weeks." The Governor acknowledged the burden the Regional Order will place on small businesses that are struggling and is helping those businesses with grants and tax relief to get through the month.

The Regional Order is effective for three weeks after the trigger and affects numerous activities and businesses. In pertinent part, the Regional Order prohibits restaurant dining, indoor or outdoor, permitting only take-out or pick-up. The Regional Order ends if a region's ICU capacity projection for four weeks (three weeks after the order) is above or equal to 15%. Conversely, the Regional Order continues if the ICU projection for that period is less than 15%. The assessment will occur on a weekly basis.

D. Analysis

Petitioners CRA and MEC seek a preliminary injunction enjoining the County and the Department from enforcing the Restaurant Closure Order on the ground that it is an improper use of emergency powers. The County and Department oppose.

1. Standard of Review

The notion that a municipality's health officer has broad authority is well-established and long-standing. Jacobson v. Commonwealth of Massachusetts, ("Jacobson") (1905) 197 U.S. 11, 25. "[A] community has a right to protect itself against an epidemic of disease which threatens the safety of its members." Id. at 27. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and public safety. Ibid.

The health officer's authority is not unbridled. Courts have the duty to evaluate an exercise of that authority to ensure actions taken have a "real and substantial relationship" to public health and safety:

“[I]f a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.” Id. at 31 (emphasis added).

In addition, the health officer cannot engage in a “plain, palpable invasion of rights” secured by the Constitution or act arbitrarily or oppress. Id. at 31, 38. *See also Jew Ho v. Williamson*, (C.D. Cal. 1900) 103 F. 10 (whether the regulation in question is a reasonable one and directed to accomplish the apparent purpose is a question for the court to determine); Cross Culture Christian Ctr. v. Newsom, (E.D. Cal. 2020) 445 F. Supp. 3d 758, 766; Six v. Newsom, (C.D. Cal. 2020) 462 F. Supp. 3d 1060, 1068 (upholding physical distancing measures to slow down spreading of the virus).

As Justice Gorsuch recently explained, the Jacobson test is equivalent to rational basis review. *See Roman Catholic Diocese, supra*, 2020 WL 6948354 at *4 (Gorsuch, J. concurring). In the same case, the high court reaffirmed that because the “Constitution ‘principally entrusts the safety and the health of the people to the politically accountable officials of the States’[...], courts therefore must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic. Id. at *8 (Kavanaugh, J. concurring).

Petitioners CRA and MEC both initially agree that their challenge to the Restaurant Closure Order, which is the exercise of the Department’s authority in a legislative capacity, is a substantive due process claim subject to a rational basis standard of review.[11] CRA App. at 14; MEC App. at 13-14. In reply, MEC relies on County of Butler v. Wolf, (W.D. Pa. Sept. 14, 2020) 2020 WL 5510690 at *9, to argue that the deferential Jacobson standard no longer applies nine months into the pandemic. MEC Reply at 7.

For purposes of equal protection claims, the rational basis test does not allow a party to probe the decision-making processes of the government because the Constitution “does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification.” Nordlinger v. Hahn, (1992) 505 U.S. 1, 15; FCC v. Beach Communications, Inc., (1993) 508 U.S. 307, 315. When a court applies rational basis review, “a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” Warden v. State Bar, (1999) 21 Cal.4th 628, 650. While the rational basis test is forgiving, the government action must still bear at least a rational relationship to some legitimate end. Romer v. Evans, 517 U.S. 620, 631(1996). Rational basis review is a forgiving standard for government acts, but it “is not a toothless one” Mathews v. Lucas, (1976) 427 U.S. 495, 510.

The Due Process Clause of the Fourteenth Amendment includes a substantive component that bars arbitrary, wrongful, government action “regardless of the fairness of the procedures used to implement them.”

Zinermon v. Burch, (1990) 494 U.S. 113, 125. The “core of the concept” of substantive due process is the protection against arbitrary government action. Hurtado v. California, (1884) 110 U.S. 516, 527 (1884).

Indeed, “the touchstone of due process is protection of the individual against arbitrary actions of government” Id. When executive branch agencies act in a legislative capacity, courts evaluate whether the challenged agency action has been “arbitrary, capricious, or entirely lacking in evidentiary support.” Davies v. Contractors’ State License Bd., (1978) 79 Cal. App. 3d 940, 946. While courts do not weigh evidence when applying this test, they must ensure that the agency has adequately considered all relevant factors and has demonstrated a rational connection between those factors and the choice made. Carrancho v. California Air Resources Board, (“Carrancho”) (2003) 111 Cal. App. 4th 1255, 1265.

“[A]ctions which are irrational, arbitrary or capricious do not bear a rational relationship to any end.” Wolf, supra, 2020 WL 5510690 at *26. In Wolf, a federal district court found constitutional violations in a governor’s COVID emergency restrictions limiting the number of people permitted to attend gatherings and determining which businesses could remain open based on whether they are “life-sustaining” in nature. Plaintiff’s challenge was rooted in claims of equal protection, due process, and First Amendment rights. The closures were temporary but had no certain end date. With respect to the open ended uncertainty, the district court recognized the harm to the that would result to businesses: “A total shutdown of a business

with no end-date and with the specter of additional, future shutdowns can cause critical damage to a business's ability to survive, to an employee's ability to support him/herself, and adds a government-induced cloud of uncertainty to the usual unpredictability of nature and life.” Id. at *26.[12]

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2. Probability of Success

a. Petitioners’ Position

(i). Petitioners’ Evidence

Petitioners’ evidence may be summarized as follows. The CDC’s “Considerations for Restaurant and Bar Operators,” updated November 18th, 2020, states that outdoor dining may occur with relative safety at restaurants if precautionary measures are observed, including but not limited to, social distancing and mask wearing by servers and by patrons (when not eating). Bhattacharya Decl., ¶20. The CDC includes outdoor dining in the second lowest tier of risk, and notes that even this risk can be mitigated by reasonable accommodations such as spacing tables appropriately, encouraging mask wearing by servers, frequent sanitizing of surfaces, and other actions that are well within the capability of LA County restaurants. Id.

The County’s Restaurant Closure Order has no scientific justification for imposing stricter requirements on these activities. The Department’s available data does not contain any epidemiological or other model that shows prohibiting outdoor dining on a countywide basis has any relationship to avoiding circumstances that challenge the healthcare delivery system’s ability to deal with a surge with space, supplies, and staff. Bhattacharya Decl., ¶28. The County has no basis to close outdoor dining because the Department has provided no supporting evidence and/or scientific studies, data, or evidence that the operating of outdoor dining establishments poses an unreasonable risk to public health. Allen Decl., ¶5.

The safety of outdoor dining has been well-established by numerous studies, including the China Study and the Japan Study. See Barke Decl. ¶¶ 7-10. The China Study found that only one of the 318 identified outbreaks – two infected persons – implicated an outdoor environment. See id. ¶ 8. The Japan Study found that closed, not open, environments contribute to the secondary transmission of COVID and that the odds of transmission of COVID in a closed environment was 18.7 times greater than an open-air environment. See id., ¶ 9. An article from the Mayo Clinic described a general medical consensus regarding “safe outdoor activities during the COVID-19 pandemic.” See id. ¶10. According to this article, “when the weather is appropriate to be outside, patio dining can be a good outdoor option. Outdoor patio dining at uncrowded restaurants where patio tables are spaced appropriately is safer than indoor dining.” Id. CRA Op. Br. at 18.

The Department’s own data provides no support for a shutdown of outdoor restaurant operations. Allen Decl., ¶6. The data tracks all non-residential settings at which three or more laboratory-confirmed COVID cases have been identified. Id. Of the 204 locations identified on this list, fewer than 7% are restaurants. Id. Based on the case data for October-November 2020, it is clear that the County’s increased cases are not due to restaurants, which only make up 3.10% of new infections during that period. Allen Decl., ¶7.

Contrary to Davis’s statement that the CDC study is the “best data” in support of the Restaurant Closure Order, the CDC study is not specific to restaurants and does not support a conclusion that outdoor dining should be banned. Kaufman Decl., ¶¶ 16-17. The study showed that a subset of COVID patients reported that they had recently dined at restaurants more than the general population. Id. The CDC study made no distinction between indoor and outdoor dining, even though all available evidence on the transmission of any airborne illness suggests that this is a key factor. Kaufman Decl., ¶17.[13]

As a result, County public officials have cited no evidence that demonstrates that there is a measurable risk of transmission of COVID in an outdoor dining situation when the appropriate safety measures are implemented. Kaufman Decl., ¶19. With the precautions already implemented by most restaurants in the

County prior to the Restaurant Closure Order -- socially distanced outdoor dining, masks, and temperature checks -- the transmission of the virus from one person to another is highly unlikely. Id.

The Department has provided no indication that it has taken into account any of the economic, social, and public health costs of restricting outdoor dining. Bhattacharya Decl., ¶29. Basic standards of public health policy design require a comparison of both costs and benefits of a policy to justify it from a scientific and ethical point of view. Id. A scientifically justified policy must explicitly account for these costs – including an explicitly articulated economic analysis – in setting, imposing and removing criteria for business restrictions such as the blanket prohibition on outdoor dining. Id.

The risks of COVID transmission should be considered against the substantial evidence that social eating provides significant and tangible psychological and physiological benefits for diners that are lost through the imposition of such scientifically and epidemiologically unjustified blanket and untargeted bans. Bhattacharya Decl., ¶45. A comprehensive survey of 17,612 men and 19,581 women over age 65 found that eating alone has been linked to a higher incidence of depression among adults, particularly those who live alone. Id. Eliminating the possibility of all outdoor dining reduces or eliminates these important benefits. Id.

There is no rational and legitimate scientific or public health basis supporting the ban on outdoor dining in restaurants (Kaufman Decl., ¶21) and the Restaurant Closure Order is inconsistent with the CDC's guidance. Bhattacharya Decl., ¶20. Restaurants in the County can safely permit outdoor dining by following the CDC guidelines. Bhattacharya Decl., ¶20. The likelihood of symptomatic and pre-symptomatic transmission, reproduction rates, signs, symptoms, mortality, risks and other infectious disease characteristics of COVID in both child and adult populations do not rationally support the Restaurant Closure Order. Kaufman Decl., ¶22.

(ii). Petitioners' Argument

From this evidence, Petitioner CRA argues that restaurants across the County are on the verge of total economic collapse, with 89.6% of surveyed restaurateurs are at risk of closure. The outdoor dining ban is not the result of any rational thought process about how to mitigate the spread of COVID, but rather is a politically-motivated decision to create merely the appearance of action. CRA Op. Br. at 8. The County has no data showing that outdoor dining is a significant risk for spreading COVID. CRA Op. Br. at 9.

The Restaurant Closure Order irrationally singles out the restaurant industry and its hundreds of thousands of workers. The County's explanation for the decision is the rise in positive COVID test results, even though a positive test does not show that the person actually is ill; a positive test includes persons who are asymptomatic as well as false positives. Nor does the order consider the number of deaths in the County. The County did not bother to assess evidence particular to outdoor dining or even consider the relative risks and benefits of such a sweeping order. Kaufman Decl. ¶¶ 15-19. CRA Op. Br. at 14-15.

Allowing restaurants to operate with outdoor dining has not produced significant coronavirus cases to date. The County's own data shows that restaurants are responsible for only 3.10% of new coronavirus infections, piling in comparison to sectors which have not been shut down like groceries, manufacturing, automotive, construction, aviation, and more. *See* Kaufman Decl. ¶ 19; Allen Decl., ¶¶ 6-9. Simply put, there is no scientific evidence that there is a significant risk of transmission of COVID in an outdoor dining situation when the appropriate safety measures are implemented. *See* Kaufman Decl. ¶¶ 21-31; Barke Decl. ¶ 7; Bhattacharya Decl. ¶¶ 18-29. In a recent interview, Health Director Ferrer, who is not a medical doctor, presented the County's rationale for the Restaurant Closure Order: "I think one of the sad realities is that we've never seen a rate of increase as high as we've just seen. We know places where people are eating are places where transmission is easiest, and most likely." *See* Ellis Decl. Ex. 14. These assertions are not based on science or data showing restaurants as the cause of the problem. CRA Op. Br. at 15.

The Restaurant Closure Order actually is likely to exacerbate the spread of COVID. The Restaurant Closure Order will drive residents indoors, to gather with friends and family in their homes. *See* Bhattacharya Decl. ¶¶

22, 45-46; Kaufman Decl. ¶ 28; Allen Decl. ¶ 10. Those indoor gatherings easily become super-spreader events; the scientific and medical data clearly show the danger of indoor gatherings. *See, e.g.,* Barke Decl. ¶¶ 7-11; Kaufman Decl. ¶ 28. These are the exact kind of unintended consequences that would have been avoided had the County considered actual evidence prior to the Restaurant Closure Order. CRA Op. Br. at 18-19.

In addition to the lack of scientific evidence, the Department has provided no indication that it has estimated or otherwise considered any of the economic, social and public health costs of restricting outdoor dining. Basic standards of public health policy require a comparison of both costs and benefits of a policy to justify it from a scientific and ethical point of view. *See* Kaufman Decl. ¶¶ 21-22, 29-31; Bhattacharya Decl. ¶ 29. A scientifically justified policy must explicitly account for these costs – including an explicitly articulated economic analysis – in setting, imposing, and removing criteria for business restrictions such as the blanket prohibition on outdoor dining. *Id.* CRA Op. Br. at 16.

CRA argues that the Restaurant Closure Order is an unmistakable example of the Politician’s Fallacy: “1. We must do something. 2. This is something. 3. Therefore, we must do this.” The actual scientific evidence—available to Respondents but ignored by them—shows that transmission of COVID in an outdoor dining scenario is negligible. *See* Lyons-Weiler Decl. ¶¶ 20-34; Barke Decl. ¶¶ 7-11; Bhattacharya Decl. ¶¶ 36-44; Kaufman Decl. ¶¶ 19-31. If closing an entire industry without evidence of any significant quantum of disease spread is not arbitrary, what is? CRA Op. Br. at 16-17.

CRA concludes that the Restaurant Closure Order infringes CRA’s fundamental rights under the Fifth and Fourteenth Amendments to pursue common professions. *See Truax v. Raich*, 239 U.S. 33, 41 (1915) (the Fourteenth Amendment secures “[t]he right to work for a living in the common occupations of the community”). “The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within both the ‘liberty’ and the ‘property’ concepts of the Fifth and Fourteenth Amendments.” *Greene v. McElroy*, (1959) 360 U.S. 474, 492 (citing cases). CRA Op. Br. at 19.[14]

MEC makes similar arguments concerning the measurable scientific and statistical data showing that outdoor dining with the correct precautionary measures is safe and has no correlation with the spread of COVID. Even under the most lenient standard of constitutional review, no rational reason exists for singling out Plaintiff’s business activities. There is no rational reason to continue to ban MEC and the restaurant industry from providing outdoor dining as they continue to follow the County’s recommended precautionary measures while doing so. MEC Op. Br. at 15-16. Not only will the ban not avert the crisis, but it has already contributed to the crisis of unemployment and severe economic damages and harm. MEC Op. Br. at 16.

MEC cites *Jew Ho v. Williamson*, (“*Jew Ho*”) (C.C. Cal. 1900) 103 F. 10 and *Wong Wai v. Williamson*, (“*Wong Wai*”) (C.C. Cal. 1900) 103 F. 1, where the courts found that public health officials could not quarantine 12 blocks of San Francisco Chinatown because of nine deaths due to bubonic plague. The courts found that there were more than 15,000 people lived in the twelve blocks to be quarantined. The courts found it arbitrary and unreasonable to shut down the ability of over 15,000 people to make a living because of nine deaths where the complainant had never contracted the bubonic plague, had never been exposed to the danger of contracting it, and had never been in any locality where the bubonic plague existed. *Id.*[15]

MEC notes that California has a population of almost 40 million. As of November 29, 2020, California has sustained a total of 19,121 COVID deaths. This means one death for every 2,066 inhabitants. MEC concludes that, if public health officers were denied the ability to stop the people of Chinatown from operating their businesses for one death for every 1,666 inhabitants, then the County should not be allowed to deny restaurants the ability to make a living when the death rate is even lower than it was in *Jew Ho* and there is zero evidence that outdoor dining has contributed to the spread of the virus. MEC Op. Br. at 16.

According to the CDC, in the last seven days, California is ranked 44th in the nation for per capita COVID deaths. There are 43 other states with a higher COVID death rate than California. This data undercuts the need for the Department’s draconian measures targeting the restaurant industry. *See Ex Parte*

Jentzsch, (1896) 112 Cal. 468, 474-75 (there must be a substantial reason why [a law] is made to operate only upon a class, and not generally upon all). MEC Op. Br. at 17.

b. The County's Position

(i). The County's Evidence

The County's evidence opposing the *ex parte* applications may be summarized as follows. While older adults and those with underlying medical conditions are at higher risk of severe illness and death from COVID, the virus can cause severe illness and death in individuals of any age. Gunzenhauser Decl., ¶9. The effectiveness of treatment remains limited, and a widely available vaccine is still months away. Gunzenhauser Decl., ¶11.

Emerging evidence also suggests that some persons who recover from COVID experience serious effects that linger long after clearing the viral infection. Gunzenhauser Decl., ¶10. Some of these long-term effects may be attributable to organ damage caused by the COVID infection. *Id.* Scans and tests of some patients who recovered from COVID have shown damage to heart muscle and scarring in the lungs. *Id.* Some of this damage is believed to be the result of COVID-related blood clotting, including clots that weaken blood vessels and very small clots that block capillaries. *Id.*

There is consensus among epidemiologists that the most common mode of transmission for COVID is from person-to-person through respiratory droplets expelled when a person coughs, sneezes, or projects their voice. Gunzenhauser Decl., ¶13. There is no scientifically agreed-upon safe distance, but it is widely accepted that standing or sitting near an infectious person is riskier than being farther away. *Id.*

There is a consensus that in-person eating and drinking at restaurants, breweries, and wineries are among the riskiest activities in terms of COVID transmission. Gunzenhauser Decl., ¶48. Studies have demonstrated that COVID is less likely to be transmitted in outdoor spaces than in indoor spaces, where respiratory droplets and aerosols can accumulate. *Id.* The risk of transmission is further reduced when outdoor diners are spaced from each other, when restaurant staff wear face coverings and face shields, and when patrons only remove their face coverings to eat and drink. *Id.*

Studies show the role of masks in limiting the spread of COVID, and that situations where unmasked individuals from different households spend prolonged periods of time in proximity to one another present a higher risk of transmission than settings where one or more of these factors is absent. Gunzenhauser Decl., ¶51.

Not every exposure to the COVID virus will lead to infection. Gunzenhauser Decl., ¶15. Infection occurs when a person receives a dose of the virus large enough to overcome the body's defenses, which may vary from person to person. *Id.* Measures to control the spread of COVID should therefore include efforts to limit interactions in conditions that support exposure to higher viral doses. *Id.* Conditions that pose a particularly high risk are present in gatherings. *Id.* It is widely accepted that a gathering of any size increases the risk of community transmission. Risk increases with the size of the gathering because the more people who gather, the likelier it is that one or more infected persons will be present. *Id.*

The risk of transmission increases when individuals are in close proximity for an extended period. Gunzenhauser Decl., ¶16. Risk is also increased when individuals are not wearing face coverings. *Id.* Close proximity to an unmasked infected person for a prolonged period presents an especially high risk of receiving a viral dose sufficient to cause COVID infection. *Id.* Evidence indicates that gatherings of non-family members facilitates the spread of COVID. Gunzenhauser Decl., ¶26.

There is wide consensus that risk reduction in a pandemic does not require definitive proof that a particular sector or activity is the cause of an increase in cases. Gunzenhauser Decl., ¶58. Best practices dictate that

public health departments identify those sectors and activities that present a higher risk of transmission and take steps to mitigate those risks, especially during a surge in cases and hospitalizations like we are now experiencing. Id.

The County's experience bears out the effectiveness of systematic responses such as prohibitions on gatherings. Gunzenhauser Decl., ¶29. The County's experience also demonstrates the risk inherent in relying on widespread individualized compliance alone to control the spread of COVID. Gunzenhauser Decl., ¶30. In September, the County reported that 20% of restaurants inspected were violating COVID protocols. Id.

A key part of any public health department's response to outbreaks involves conducting field investigations. The level of evidence required in a field investigation is not the same as that required in a clinical trial. Gunzenhauser Decl., ¶32. The purpose of a field investigation is to determine what steps can be taken to stop or slow the spread of an infectious disease. Id. The purpose of public health decisions based on field investigations is to take actions in a timely manner that will prevent or curtail the spread of the virus or other disease-causing agent. Id. Often, officials will have to make decisions in a brief period and when information is limited, especially in comparison to other medical studies such as full-blown, clinical trials when the urgency of the situation is not so severe. Id.

Despite improved treatment, the proportion of COVID patients requiring hospitalization has remained elevated above 10% throughout the pandemic. It has averaged about 10% in the most recent four months, with approximately 25-33% of hospitalized patients in the ICU and approximately one half of those ICU patients requiring ventilators. Id.

When community spread of the virus increases, the number of known and suspected COVID patients in both ICU and non-ICU beds increases as well. Gunzenhauser Decl., ¶43. On most days in June, there were fewer than 1,500 confirmed COVID cases in the County's hospital beds. Id. For ICU beds, that number rarely exceeded 500. Id. During the July surge, the number of confirmed COVID patients exceeded 1,500 every day and often approached 2,000. Id. For the ICU, those numbers never dropped below 500 and at times approached 700. Id.

On November 1, 2020, known and suspected COVID cases accounted for 721 non-ICU beds and 239 ICU beds. Id. By the day before Thanksgiving, those numbers had risen to 1,431 and 475, respectively. Id.

On November 21, 2020, the County reported 4,522 new confirmed cases and 1,391 people hospitalized, 26% of whom were in the ICU. On November 22, 2020, the County reported that the five-day average surpassed 4,000 new daily cases, the Department's threshold for suspending in-person dining. Gunzenhauser Decl., ¶40.

On November 23, 2020, the County reported its highest number of COVID cases in a single day at 6,124. Gunzenhauser Decl., ¶41. This brought the total number of COVID cases to 370,636, with 7,446 deaths. Id. As of November 23, 2020, the R number for the County was 1.27, meaning the daily number of new cases of COVID is expected to increase over time. Gunzenhauser Decl., ¶29.

As of November 29, 2020, 2,049 COVID patients were hospitalized in the County, with 24% of those patients in the ICU. Gunzenhauser Decl., ¶41. From October 27 to November 27, 2020, COVID hospitalizations jumped from 747 to 1,893. Gunzenhauser Decl., ¶43. The current surge is accelerating much more rapidly than the prior surge in July. Between November 13 and November 27, 2020, hospitalizations of confirmed COVID patients increased by 101%. Gunzenhauser Decl., ¶41.

This indicates widespread and uncontrolled community transmission of the virus. Id. Currently, approximately one in 145 County residents is infectious to others. During the week of November 16, 2020, that number was 1 in 250. Id. The number of new cases and hospitalizations is expected to rapidly increase over the next 21 days without rapid public health interventions, which will lead to a major increase in the number of persons with severe illness and the number of deaths and will stress the healthcare system and healthcare workers. Gunzenhauser Decl., ¶37. This stress will limit the availability of ICU beds for patients

who may need them, including patients hospitalized for conditions other than COVID. Gunzenhauser Decl., ¶37.

Increased hospitalizations due to COVID, including ICU admissions, risk overwhelming the County's hospital capacity. Gunzenhauser Decl., ¶45. A secondary effect of the COVID pandemic is that some individuals delay seeking treatment for other conditions for fear of being exposed to COVID at healthcare facilities. Gunzenhauser Decl., ¶46. Based on public health observations of the effects of the virus during this pandemic, hospitalizations typically increase two to three weeks after a spike in cases, and deaths increase thereafter. Gunzenhauser Decl., ¶49. Therefore, while the County is currently experiencing a surge in hospitalizations, it expects the current high case counts to lead to an even higher hospitalization rate in the coming weeks. Id.

(ii). The County's Argument

The County argued that the Restaurant Closure Order easily meets the highly deferential standard of a rational basis because of the recent surge in COVID cases and hospitalizations. Petitioners cannot refute the fact that the risk of spreading COVID becomes heightened when people are sitting in close proximity without face coverings, eating and drinking, and projecting their voices toward each other. Gunzenhauser Decl., ¶52. All of these things occur when diners are eating and drinking at restaurants. Id. Opp. to CRA Ex Parte at 11.

Courts have repeatedly held that orders limiting gatherings and requiring businesses to close in response to the pandemic bear a real and substantial relation to public health. *See, e.g., Six v. Newsom, supra*, 462 F. Supp. 3d at 1068 (“[P]hysical distancing measures like California’s Stay-at-Home Order are critical to slowing down the spread of the virus”); *Givens v. Newsom*, (E.D. Cal. 2020) 459 F. Supp. 3d 1302, 1311 (“[I]t is uncontroverted that the State’s stay at home order bears a real and substantial relation to public health.”). While striking down restrictions on religious worship based on New York Governor Cuomo’s order, the U.S. Supreme Court reiterated that government has “authority to impose tailored restrictions—even very strict restrictions—on attendance at religious services and secular gatherings.” *Roman Catholic Diocese, supra*, 2020 WL 6948354, at *8 (Kavanaugh, J., concurring). If the Supreme Court permits restrictions on enumerated, long-standing First Amendment rights like religious worship, then it would clearly uphold the County’s ability to temporarily prohibit outdoor dining at restaurants. Opp. to CRA Ex Parte at 12.

Petitioners’ experts argue that the Department failed to consider relevant evidence and assess other evidence. But Petitioners’ experts cannot rebut the enhanced risk in eating and drinking at close proximity without face coverings, which is inherent in dining at restaurants, breweries, wineries, and bars. Moreover, Petitioners are asking the court to weigh the evidence by making this argument. Courts do not weigh evidence under the arbitrary and capricious standard. Therefore, the fact that Petitioners’ experts may have differing views about how to address the pandemic is irrelevant; rational basis review is not a “battle of the experts.” Opp. to CRA Ex Parte at 12-13.

Additionally, Petitioners do not establish why their experts’ opinions should be given more weight than the County Health Officer’s opinion when none has any advanced training or specialization in the study of epidemiology—the branch of medicine which studies the spread and control of infectious diseases. Barke is a primary care physician (Barke Decl., ¶1), Bhattacharya, the closest to an epidemiologist, is a researcher in the area of health economics (Bhattacharya Decl., ¶3-4), Lyons-Weiler is a biomedical researcher (Lyons-Weiler Decl., ¶3), Allen is a biostatistician (Allen Decl., ¶2), and Kaufman is trained as a public health behaviorist and biosafety expert (Kaufman Decl., ¶1, 3-4). The court should reject Petitioners’ attempts to replace the considered judgment of the County’s public health officials with the opinions of persons who do not have expertise in the relevant field. Opp. to CRA Ex Parte at 13.

Petitioners’ argument that the County’s Restaurant Closure Order lacks a rational basis is false. [16] The law does not require the County to act with exacting scientific evidence when responding to a novel, evolving public health emergency. A key part of any public health department’s response to a new virus

involves conducting field investigations. Gunzenhauser Decl., ¶32. The purpose of public health decisions based on field investigations is to combat the spread of the virus when officials do not have sufficient time or information to conduct full-blown, peer-reviewed clinical trials. Id. This aids the public health experts' understanding of COVID continues to evolve and swift and aggressive actions must be taken to combat community transmission. Id. Opp. to CRA Ex Parte at 13-14.[17]

For these reasons, Petitioners cannot establish a likelihood of success on the merits of their claims. Opp. to CRA Ex Parte at 15; Opp. to MEC Ex Parte at 19.

c. The Court's TRO/OSC Decision

Plainly, the County established that the surge is legitimately concerning, particularly hospitalizations, ICU load, and deaths. Increased hospitalizations due to COVID, including ICU admissions, risk overwhelming the County's hospital capacity. Gunzenhauser Decl., ¶45. As a result, the County is entitled to act. The principal question is: Does the action of closing outdoor restaurants have rational support in furthering the reduction of this risk?

Assuming that Jacobson test applies to a pandemic nine months old, the County is correct that it is highly deferential to an agency's public health action. Even if Jacobson no longer applies, the Department still has great discretion. The court may not weigh the evidence or substitute its judgment for that of the Department. For this reason, the fact that Petitioners' experts have differing views than the County's experts about how to address the pandemic is not significant; the court's rational basis review is not a battle of the experts.

The County further is correct that the law does not require the Department to act with exacting scientific evidence when responding to a novel, evolving public health emergency. The Department relies on field investigations, the purpose of which is to combat the spread of the virus when officials do not have sufficient time or information to conduct full-blown, peer-reviewed clinical trials. Gunzenhauser Decl., ¶32.

At the December 3, 2020 TRO/OSC hearing, the court acknowledged that the Department has the right to take prophylactic measures that require swift action to address public health during the COVID pandemic. Suppl. Siegel Decl., Ex. C, p. 14. In so doing, the court stated that the Department's public health job is "to ensure that the [healthcare] system does not get overwhelmed." Ex. C, p. 8.

The court further stated that the County has evidence to support the Restaurant Closure Order:

"The County's evidence is general in nature, but it's real evidence. The evidence is that when you don't wear a mask and you're sitting around, it's a greater risk when you're in a group. And we're trying to reduce the risk, and we have this huge problem of a surge. They have evidence. It's not specific to the risk of outdoor dining, but they do have evidence." Ex. C, p. 19. See also id., p. 33 ("[The County does] have a medical basis. . . . [T]hey have a generalized basis of the risk of taking your mask off with others around the table. They do have that.").

The court further acknowledged that the County has evidence that "restaurants are not following the restrictions." Id., p. 15. The court concluded:

"We have a County that is taking actions in good faith based on a surge in cases, surge in hospitalizations. And it has a duty to prophylactically try to address that to avoid overwhelming the health care system. It has chosen to do that by a three-week limited

restaurant closure, except for take-out. No outdoor dining in, other words. And, you know, it sounds like it's rational." *Id.*, p. 14 (emphasis added).

Because the County had a duty to act and had generalized evidence about dining at a restaurant without a mask, the court denied a TRO. *Id.*, pp. 32-33. According to the County, that should have been the end of the inquiry and the court also should have denied the request for an OSC. OSC Opp. at 6.

Not so. While the County had generalized evidence that outdoor dining necessarily means that diners will not wear masks while eating, and that not wearing masks in proximity to another increases the risk of COVID transmission, Petitioners had specific evidence that outdoor dining does not involve any significant COVID risk.

Petitioners' evidence consisted of the following: (a) the opinion of experts that there is no rational and legitimate scientific or public health basis supporting the ban on outdoor dining in restaurants (Kaufman Decl., ¶21; Bhattacharya Decl., ¶20); (b) the fact that the safety of outdoor dining has been well-established by the China Study, the Japan Study, and a Mayo Clinic article (Barke Decl. ¶¶ 7-10); (c) the fact that the Department's data provide no support for a shutdown of outdoor restaurant operations (Allen Decl., ¶7); (d) the fact that 3.10% of new infections have occurred at restaurants; (e) expert conclusion that the CDC study relied upon by Davis as the Department's "best data" does not support the Restaurant Closure Order (Kaufman Decl., ¶¶ 16-17); (f) the CDC's updated November 18th, 2020 recommendation that outdoor dining may occur with relative safety at restaurants if precautionary measures are observed and that outdoor dining is in the second lowest tier of risk and can be mitigated further by reasonable accommodations (Bhattacharya Decl., ¶20), and (g) the fact that precautions already are in place for outdoor dining -- socially distanced outdoor dining, masks, and temperature checks. All of these opinions and facts supported the conclusion that the transmission of the virus from one person to another in an outdoor restaurant dining setting is highly unlikely. *See* Kaufman Decl., ¶19.

If the court were permitted to weigh evidence, it would have issued the TRO. Because it may not do so, the court concluded that the County's evidence may be sufficient if it provided certain additional information: (1) the actual numbers for hospital and ICU capacity (the County's evidence of the surge's impact on hospitalizations and ICU load lacked capacity numbers); (2) the articulated risk-benefit analysis for restaurant closure which Plaintiffs' evidence showed is required; (3) why the only available study evidence suggests that outdoor dining is not a risk?; (4) the statistics on mortality from COVID; and (5) why the County is acting inconsistently with the Governor's order and his direction that restrictions would be based on science and data.

The County's OSC opposition addresses these issues.

(i). Actual Numbers for the Hospital and ICU Capacity.

The court has consistently viewed the County's daily statistics of the daily number of positive tests and positivity (the rate at which persons who are tested test positive) as not particularly significant to the need for the Restaurant Closure Order. What is important is the burden on the health care system -- which means usage of hospital beds and ICU beds -- and the death rate.

Petitioners' evidence shows why. A person who tests positive for the presence of the virus may not be contagious. Weiler Decl., ¶18. The person's contagious nature depends on viral load, which is the amount of virus in his or her body. *Id.* All of the available empirical estimates support a minimum false positive rate of 0.48, meaning that 45-48% of persons who test positive for COVID have a nearly zero risk as a source of transmission. Weiler Decl., ¶19. As a result, concern over person-to-person transmission from people who test positive (and are thus given a presumptive diagnosis of COVID) must be adjusted downward by at least 50%. *Id.*

The County's evidence shows that positive tests and positivity are relevant to community spread. The rise in cases nationwide is not just a reflection of increased testing. Reingold Decl., ¶9. If the rate of COVID were stable or decreasing, increased testing would produce a lower proportion of tests being positive, as presumably a larger and more representative selection of the population (not only those with symptoms or known exposure) would be included. *Id.* Since the case rate and the proportion of tests positive rate have increased simultaneously, data suggest that the increase in confirmed cases indicates a true rise in cases. *Id.* This evidence indicates that positive tests, which must be taken with a grain of salt because of false positives, and positivity are relevant to COVID spread, but do not directly bear on the burden to the healthcare system.

Ferrer's comments to the Board show that she agrees: "[I] agree that it seems a little bit counterintuitive to talk about cases when really all we are worried about is overwhelming the healthcare system. And I think Dr. Ghaly spoke to this as well, you don't want to wait until the case numbers in the hospitals are really high. Siegel Decl., Ex B (emphasis added).

Finally, in issuing his March 4, 2020 State of Emergency and March 19, 2020 Stay-at-Home Order, Governor Newsom stated that the state's actions should be aligned to achieve the objectives of: (1) ensuring the ability to care for the sick within the state's hospitals.

Thus, the key information for COVID restrictions are hospitalizations and ICU bed utilizations.

The County now has provided this information. On average, there are approximately 14,000 licensed non-ICU beds and 2,500 licensed ICU beds available in the County. Hill Decl., ¶13. The actual number of beds can fluctuate from day-to-day. *Id.*

Beginning in November 2020, the number of COVID cases and hospitalizations began to surge. Hill Decl., ¶18. On November 1, 2020, there were approximately 960 COVID patients hospitalized in both ICU and regular hospital beds. Hill Decl., ¶19. On November 28, 2020, there were approximately 2,000 total COVID patients hospitalized in both ICU and regular hospital beds. Hill Decl., ¶20.

That number has continued to rise in the beginning of December. Hill Decl., ¶21. On December 1, 2020, 2,690 COVID patients were hospitalized. *Id.* Approximately 25% of the ICU beds were occupied by COVID patients: 573 COVID positive patients and 42 PUIs (persons under investigation), a total of 615. *Id.* Approximately 15% of the regular hospital beds were occupied by COVID patients: 1,858 COVID positive patients and 217 PUIs, a total of 2,075. *Id.* The number of COVID patients hospitalized in the County has nearly tripled. Hill Decl., ¶22.

As a result of the recent surge, the number of available ICU beds in the County has significantly decreased. In mid-October, there were 149 available ICU beds. Hill Decl., ¶24. The County's ICU bed availability in November decreased to less than 5% of total capacity, with 4.44% available from November 22-28. Hill Decl., ¶25.

Projections for ICU beds show that demand could exceed the County's available beds within a couple of weeks. Hill Decl., ¶32. Typically, when a shortage occurs, the availability of ICU beds diminishes first because there are fewer alternatives where ICU-patients can be treated effectively. Hill Decl., ¶33. The surge in hospitalizations will further stress the County's healthcare system, which can manifest itself in many ways. Hill Decl., ¶28. Hospitals will have to change what they do day-to-day to meet the needs of their patients. *Id.* For example, an emergency room may have to be repurposed to treat ICU patients, which will thus impact the number of day-to-day medical emergencies that can be treated, such as heart attacks. *Id.*

The Governor's Regional Order includes the County in the Southern California Region, which was at 82% ICU capacity (18% ICU availability) as of December 3, 2020. Hill Decl., ¶36. If the surge continues unchanged, it is projected that the Southern California Region will cross this threshold and have less than 15% ICU availability by the end of this week. *Id.* As of December 6, 2020, the threshold has been reached and the Regional Order is in effect.

The County has sufficiently shown the actual numbers for hospital and ICU capacity.

(ii). Risk-Benefit Analysis for the Restaurant Industry.

In issuing his March 4, 2020 State of Emergency and March 19, 2020 Stay-at-Home Order Governor Newsom stated that the state's actions should be aligned to achieve the objectives of: (4) reducing social, emotional, and economic disruptions. Ellis Decl., Ex. 18.

The un rebutted evidence is that public health decisions require a risk/benefit analysis of health restrictions. In making public health decisions, it is important for health officials to weigh the overall risk of the given disease to the overall benefits of the imposed public health policy. Kaufman Decl., ¶22. Public health recommendations regarding behavior by private actors (such as the decision to protest) should weigh the benefits of that behavior against the public health costs. Bhattacharya Decl., ¶50. If the benefits of the undertaking are important enough relative to the public health risks, and care is taken to minimize those risks by adhering to the extent possible to safe practice guidelines, then the activity should receive approval by public health experts. *Id.* Basic standards of public health policy design require a comparison of both costs and benefits of a policy to justify it from a scientific and ethical point of view. Bhattacharya Decl., ¶29. A scientifically justified policy must explicitly account for these costs – including an explicitly articulated economic analysis – in setting, imposing, and removing criteria for business restrictions such as the blanket prohibition on outdoor dining. *Id.*

With respect to economic cost, Allen opines that the state's California Risk Tier System and trigger definitions are too simple and too blunt. Allen Decl., ¶11. There is no effort to conduct a comprehensive risk-benefit analysis by looking at the economic consequences of the move and whether the constricting actions are targeting the greatest risk businesses and activities based on business sector data and statistics in the specific country. *Id.*

Petitioners also present evidence concerning the social and psychological costs of restaurant closure. One of the risks of restaurant closure is increased feelings of isolation and depression among some members of the public. A comprehensive survey of 17,612 men and 19,581 women over the age of 65 found that eating alone has been linked to a higher incidence of depression among adults, particularly those who live alone. *Id.*

Finally, Petitioners note the comparative health risk of outdoor restaurant dining. Scientists recognize that all forms of human death should be avoided if possible. Weiler Decl., ¶31. Nevertheless, all forms of human activity, including eating at restaurants, carry some risk. Weiler Decl., ¶33. The risks associated with COVID from outdoor dining are far smaller than the risks of choking or food poisoning. *Id.* While on average, there is about one death due to COVID for every 124 days of outdoor restaurant operation -- assuming that every restaurant in the County is operating at full capacity with 40 outdoor seats -- about 250 people die each year in the County from either choking or food poisoning. *Id.* Given the information available on outdoor transmission, the risk is "lower than a convenience store". Weiler Decl., ¶33.

The County presents no evidence that it conducted a risk-benefit analysis. The Department merely "regrets" that the preventative measures have an emotional and economic impact on businesses, families, and individuals and states that it must implement measures to fulfill its day-to-day statutory responsibility for communicable disease control. Davis Decl., ¶14. The Department recognizes that it has asked businesses and its more than ten million residents to make significant adjustments to fight this pandemic. Davis Decl., ¶19. Yet, it is the considered opinions of the Department's communicable disease experts that these temporary adjustments and modifications are necessary to combat the ongoing surge in COVID cases and hospitalizations, and the resulting strain on the County's healthcare system. *Id.*

Davis purports to conclude that, based on the data, the Department determined that the risks and harms of uncontrolled community spread, strain on the health care system, and excess preventable deaths outweighed the social and economic harm of a temporary suspension on in-person restaurant dining. Davis Decl., ¶31.

This conclusion is unsupported by any evidence or analysis. The required risk-benefit analysis must be explicitly articulated in setting, imposing, and removing criteria for business restrictions. *Bhattacharya Decl.*, ¶29. An expert's opinion is no better than the facts upon which it is based (*Turner v. Workmen's Comp. Appeals Board*, (1974) 42 Cal.App.3d 1036, 1044) and an expert opinion is not substantial evidence when it is based upon conclusions or assumptions not supported by evidence. *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Med. Center*, (1998) 62 Cal.App.4th 1123, 1137; *Rorges v. Department of Motor Vehicles*, (2011)192 Cal.App.4th 1118, 1122. Davis' conclusion carries no weight.

The County argues that it is not required to show that it conducted a cost-benefit analysis of the Restaurant Closure Order to meet the arbitrary and capricious standard of review. The Restaurant Closure Order is valid unless Petitioners disprove "every conceivable basis which might support it." *FCC v. Beach Communications, Inc.*, *supra*, 508 U.S. at 314-15. This analysis does not allow a party to probe the decision-making processes of the government because the Constitution "does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, *supra*, 505 U.S. at 15. Opp. to OSC at 10.

The County wrongly relies on equal protection cases. In *FCC v. Beach Communications, Inc.*, the United States Supreme Court reviewed the federal Cable Communications Policy Act of 1984, which requires that cable television systems be franchised by local governmental authorities. One provision exempted facilities serving subscribers in one or more multiple unit dwellings under common ownership, control, or management. After petitioner FCC ruled that a satellite master antenna television system -- which typically receives a satellite signal through a rooftop dish and then retransmits the signal by wire to units within a building -- is subject to the franchise requirement, satellite operators petitioned for review. The high court reversed the court of appeals and held that the common ownership classification does not violate equal protection. 508 U.S. at 307.

In *Nordlinger v. Hahn*, the petitioner recently had purchased a house and filed suit against the County and its tax assessor, claiming that Prop. 13 violates the Equal Protection Clause of the Fourteenth Amendment because of dramatic disparities in the taxes paid by long-term owners and newer owners. 505 U.S. at 1. The high court disagreed, finding that the classifications had a rational basis. *Id.*[18]

These equal protection cases have no bearing on the risk-benefit analysis requirement because Petitioners make no equal protection claim other than a cursory disparate treatment argument. This is a substantive due process case under the Due Process Clause of the Fourteenth Amendment, which includes a substantive component that bars arbitrary, wrongful, government action "regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, (1990) 494 U.S. 113, 125. The "core of the concept" of substantive due process is the protection against arbitrary government action. *Hurtado v. California*, (1884) 110 U.S. 516, 527 (1884). When executive branch agencies act in a legislative capacity, courts evaluate whether the challenged agency action has been "arbitrary, capricious, or entirely lacking in evidentiary support." *Davies v. Contractors' State License Bd.*, (1978) 79 Cal. App. 3d 940, 946. While courts do not weigh evidence when applying this test, they must ensure that the agency has adequately considered all relevant factors and has demonstrated a rational connection between those factors and the choice made. *Carrancho*, *supra*, 111 Cal. App. 4th at 1265.[19] This is true even under the highly deferential review set forth in *Jacobson*.

The undisputed evidence required the County to perform and articulate a risk-benefit analysis in imposing the Restaurant Closure Order and it clearly did not do so.

(iii). Why the Only Available Evidence is that Outdoor Dining Is Not a Significant Risk?

In issuing his March 4, 2020 State of Emergency and March 19, 2020 Stay-at-Home Order Governor Newsom specified that California's response to the coronavirus pandemic "must be done using a gradual, science-based and data-driven framework." Ellis Decl., Ex. 18.

The federal, state, and local governments have done a poor job of supporting COVID restrictions with science. In March 2020, it was acceptable not to have studies at the outset of the pandemic. This is less true nine months into it. The County relies on field investigations instead of studies. Should not the relevant federal, state, and county government agencies be committing all their resources to this problem? Why isn't it an all hands-on-deck situation when the public and small and large businesses are being asked to sacrifice so much? What have these agencies been doing besides keeping track of statistics and making public pronouncements? Should they not be obtaining the best information about who is at risk, what spreads the disease, and what tasks and activities are safe?

The Department admits that the CDC recommendation on the effectiveness of physical distancing in controlling the spread of COVID shows that outdoor well-ventilated spaces, such as an open patio at a restaurant, where unmasked persons have prolonged contact, present a moderate risk of transmission. Davis Decl., ¶37. The Department argues that sitting outdoors reduces risk but does not eliminate it. Id. This risk of transmission outdoors is more elevated at a restaurant where people are sitting close to each other for a prolonged period of time, not wearing masks, not socially distancing, eating and drinking, and projecting their voices (and respiratory and aerosol droplets) toward each other. Id.

The Department adds that the benefits of being outdoors are reduced when a space is partially enclosed, such as is often the case on a restaurant patio. Davis Decl., ¶38. Even partial enclosures affect airflow and the extent to which virus-containing respiratory droplets and aerosols can accumulate. Id. The benefits of being outdoors are further diminished when people from different households gather for prolonged periods without wearing masks. Davis Decl., ¶39. The Department consulted with members of the restaurant industry in an attempt to avoid an outdoor dining restriction through other measures. Id. The Department proposed that restaurants take steps to ensure that all persons seated at a table were from the same household but was informed that restaurants had no way of verifying that information for their diners. Id.

The Department defends the fact that it has not conducted a clinical study on how outdoor dining in specific affects the transmission rates of COVID because it has limited time and resources to conduct clinical studies during a pandemic when it must act swiftly and proactively to halt the spread of the disease. Davis Decl., ¶48. Clinical studies provide minimal value in deciding how to respond to an emergency like the COVID pandemic because they have a higher evidentiary standard and take longer to complete. Davis Decl., ¶49. Field investigations, on the other hand, are intended to identify those factors and behaviors that impose a higher risk of transmission so that these factors can be quickly addressed. Id.

The Department disputes that the September 2020 CDC report has little bearing on outdoor dining. Davis Decl., ¶42. The fact that the study did not distinguish between indoor and outdoor dining does not undermine its usefulness and validity in determining the Department's responses to the recent surge in COVID cases. Davis Decl., ¶42. The study looked at dining in any area designated by the restaurant, including indoor, patio, and outdoor seating. Id.

Davis made the decision to issue the Restaurant Closure Order based on the evidence that COVID spreads most easily when individuals from different households are in close proximity to one another, for prolonged periods of time, without wearing masks. Davis Decl., ¶51. Restaurant dining was the only remaining setting where this was largely still permitted. While dining outdoors is less risky than dining indoors, the nature of dining together at a restaurant still presents a substantial risk of viral transmission. Id.

Based on this evidence, the County argues that its time is better spent in directly responding to the virus than focused on a study effort that would yield macro results to better inform its decision-making. Opp. to OSC at 13.

This argument – that clinical studies have little value -- is spurious. Clinical studies plainly have more scientific and medical value than anecdotal field investigations. The County does not have any evidence of the risks of outdoor dining beyond the generalized evidence of its syllogism: (a) COVID is spread by expelled droplets that transmit the virus to others in proximity, (b) people eating in outdoor restaurants are in proximity to others and are not wearing masks, (c) therefore outdoor restaurant eating creates a risk of spreading

COVID. Yet, outdoor dining is considered by the CDC to be only a moderate risk, one that can be mitigated further by proper controls.

The County's argument that it does not have time in the pandemic to conduct clinical studies does not explain why the state, federal, and local governments cannot perform a study (or some other reliable evaluation) of the COVID risk for outdoor restaurants nine months into a pandemic. To say the least, it is disappointing that governmental agencies have yet to conduct a study on the risks of outdoor dining, particularly in California where outdoor dining is a viable concept even in winter (with heaters).

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(iv). The Statistics on Mortality

Although not widely publicized, the evidence shows that the pandemic is not so overwhelming that the public should live in fear. It is sadly true that large numbers of people have died from COVID: 282,000 in the United States, 19,876 in California, and 7,886 in the County. But the mortality rates have gone down as healthcare professionals have learned to treat the disease and the vulnerable groups are known. There is now a widespread scientific consensus that COVID does not affect all people equally. Kaufman Decl., ¶26. Over 41% of the COVID deaths in the United States have occurred in nursing homes. *Id.* 94% of all deaths associated with the COVID involve victims with pre-existing underlying medical conditions such as diabetes and heart disease. *Id.* It is now understood that most of the severe cases of the disease occur in individuals over the age of 65. *Id.* In California through August 2020, 74.2% of all COVID-related deaths occurred in patients 65 and older. There have been only two deaths among COVID patients below age 18.

Of those who are infected, the median survival rate is 99.77%. Bhattacharya Decl., ¶37. In September 2020, the CDC updated its current best estimate of the ratio of deaths to the number of people infected for various age groups. Bhattacharya Decl., ¶39. Infected children ages 0-19 years have a 99.997% survival rate. *Id.* Persons ages 20-49 years have a 99.98% survivability rate. *Id.* Persons ages 50-69 years have a 99.5% survivability rate. *Id.* Persons age 70+ years have a 94.6% survival rate. *Id.* A focus on symptomatic COVID patients also shows very high survival rates. Bhattacharya Decl., ¶40. These statistics provide the American public with a very high probability that healthy people will not die from COVID and that we should be protecting the most vulnerable – aged persons and/or those with other risk factors.

The County argues that “a large portion” of the County’s population consists of people of all ages with underlying medical conditions -- medical conditions include cancer, heart conditions, obesity, diabetes, smoking, and even pregnancy -- that pose an increased risk of severe illness and death as a result of contracting COVID. *See* RJN Ex. 10. People with pre-existing conditions should not be left to die prematurely when the County can proactively try to stop the spread of the virus. This is even more true when a vaccine will soon be available, and those deaths can be prevented. OSC Opp. at 16-17.

The County notes that COVID is currently the third leading cause of death in the United States, behind heart disease and cancer. Davis Decl., ¶55. In 2017, the most recent year for which a published mortality report is available, heart disease was the leading cause of death in the County at 11,211. *Id.* As of December 3, 2020, the County had recorded 7,782 COVID deaths. *Id.* Opp. to OSC at 17. Emerging evidence also suggests that some number of patients who recover from active COVID infection experience long-term effects. The full extent of the health consequences of COVID is not yet known, but the evidence available is concerning. Davis Decl. ¶62; Gunzenhauser Decl., ¶10. Opp. to OSC at 17.

The County does not explain what it means by “a large portion” of the population, but nothing in Petitioners’ argument suggests that those persons at serious risk of contracting COVID and death should not be protected. Nothing in Petitioners’ papers undermines the County’s conclusion that the mortality from COVID is serious and that the Department must take action to protect those vulnerable and to avoid long-term effects for those who recover. Petitioner CRA simply points out that the County has not shown any link between outdoor dining and COVID transmissions, hospitalizations, or mortality. CRA Reply at 11.

(v). Why the County Acted Inconsistently with the Governor's Order

When issued, the County's Restaurant Closure Order was inconsistent with the Governor's Blueprint outlining a four-tiered system of community disease transmission risk with activity and business tiers for each risk level. Ellis Decl. Ex. 7. Restaurants were listed as a separate sector in the Blueprint. *Id.* A county in Tier 2 may allow indoor dining at a maximum capacity of 25% or 100 people, whichever is fewer, while a county in Tier 1 may permit only outdoor dining. *Id.* Even in the most restrictive tier, outdoor dining was expressly permitted. *Id.*

The County notes that it is expressly empowered to adopt measures more restrictive than the Blueprint: "This framework lays out the measures that each county must meet, based on indicators that capture disease burden, testing, and health equity," but that "[a] county may be more restrictive than this framework." Opp. to OSC, RJN Ex. 5. The Blueprint also provides that local health jurisdictions "may continue to implement or maintain more restrictive public health measures if the local health officer determines that health conditions in that jurisdiction warrant such measures." *Id.* The Legislature's statutory instruction to Davis provides that he "shall take measures as may be necessary to prevent the spread of the disease or occurrence of additional cases." H&S Code §120175. OSC Opp. at 17-18.

The County notes that it has suffered disproportionately from COVID compared to the rest of the state. With a population of 10 million, the County accounts for 25% of California's population. Over the past week, the County has accounted for 32.6% of new cases. Opp. to OSC, RJN Ex. 6. Because of the recent surge, Davis imposed restrictions that are more stringent than the state's in several sectors—not just limited to outdoor dining at restaurants, breweries, bars, and wineries. The County has taken a more aggressive approach than the state framework because the pandemic has been felt more severely in the County than the state overall. The County thus implemented its own plan to close outdoor dining once the County reached a five-day average of 4,000 cases/day, which it has. Because hospitalizations trail new cases by about two weeks, this 4,000 cases/day threshold indicates that the surge has become so widespread that it risks overwhelming County hospitals and resulting in a shortage of critical ICU staffed beds. Davis Decl. ¶¶ 64-66.[20]

In any event, on December 3, 2020 the State announced its Regional Order. Hill Decl., ¶34. Under the Regional Order, the Southern California Region includes Imperial, Inyo, Los Angeles, Mono, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura counties. Hill Decl., ¶35. The Regional Order will prohibit on-site dining at restaurants for three weeks, while restaurants can still provide drive-thru, take-out and delivery services.

The Regional Order takes effect on December 5, 2020 and, pertinent to the Southern California Region, is triggered if the Southern California Region's ICU capacity falls below 15%. The Regional Order is effective for three weeks after the trigger. It affects numerous activities and businesses. In pertinent part, the order prohibits restaurant dining, indoor or outdoor, permitting only take-out or pick-up. The Regional Order will end if the region's ICU capacity projection for four weeks (three weeks after the order) is above or equal to 15%. Conversely, the order continues if the ICU projection for that period is less than 15%. The assessment will occur on a weekly basis.

The County argues the identical restrictions are at issue in the County's Restaurant Closure Order. The County argues that the Regional Order proves that (1) the health emergency is ongoing, and courts must give deference to the public health officials responsible for protecting the public; and (2) the County's Restaurant Closure Order, is not arbitrary and capricious. If the Regional Order takes effect, the OSC and Petitioners' request for relief will be moot. Opp. to OSC at 6-7.

As of December 6, 2020, the Regional Order has been triggered by the fact that the Southern California Region has less than 15% ICU capacity. Sur-Reply RJN Exs. 20, 21. However, the County has drawn overbroad conclusions from the Regional Order. The Regional Order does not moot this case. Petitioners are entitled to attack the County's Restaurant Closure Order without regard to the viability of the Governor's

Regional Order, which they may separately attack if they wish. It is true that the Regional Order takes some of the urgency out of Petitioners' application. It is also true that it serves some evidentiary value, including that the issue why the County acted inconsistently with the Governor's Blueprint is no longer significant.

3. Balance of Hardships

In determining whether to issue a preliminary injunction, the second factor which a trial court examines is the interim harm that plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction. Donahue Schriber Realty Group, Inc. v. Nu Creation Outreach, (2014) 232 Cal.App.4th 1171, 1177. This factor involves consideration of the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo. Id.

Petitioners argue that the supposed benefit, if any, of the Restaurant Closure Order is unclear, while its negative impact is apparent and imminent. The Restaurant Closure Order has put at least tens of thousands of economically fragile Los Angelenos out of work since before Thanksgiving and will cause businesses to permanently close. *See* Gay Decl., ¶24 ("The loss of revenue associated with an outright ban on outdoor dining, especially in conjunction with the amounts already spent on making outdoor dining possible, would likely drive many restaurants out of business entirely."), ¶26 ("Outdoor dining also maintains jobs for a large number of servers who would otherwise not be able to work at all during the Pandemic."); Leon Decl., ¶¶ 7-8 (144 jobs would be eliminated due to outdoor dining ban); Declaration of John Terzian of h.wood Group ¶¶ 7-8 (350 jobs would be eliminated); Rosenthal Decl., ¶4 (potential closure of restaurant and hotel due to outdoor dining ban), ¶6 (describing potential permanent loss of jobs); Thornberg Decl. ¶¶ 6-15. CRA Op. Br. at 20-21.

A significant number of restaurants will shutter their doors completely as they will be uncertain as to the future, unable to retrain employees and reopen due to lack of capital, which has already been severely depleted by the pandemic. *See* Gay Decl., ¶2; Thornberg Decl., ¶¶ 6-15. Expert analysis and statistical evidence confirm that outdoor dining was, for many restaurants, the difference between staying in business and closing permanently, allowing thousands of restaurant workers to avoid permanent unemployment until the Restaurant Closure Order took effect. Gay Decl., ¶¶ 24-26; Thornberg Decl., ¶14 (outdoor dining is a "critical revenue lifeline" for restaurants until vaccines become available). Out of nearly 1,000 surveyed restauranteurs, 96.7% responded that the outdoor dining ban will require them to fire staff and 89.6% responded that they are at risk of closing their restaurants. Shams Decl., ¶¶ 8-9, Ex. B (29 restaurant declarations detailing irreparable harm due to the Restaurant Closure Order). Depriving restaurants of significant holiday income will further the devastation. *See* Gay Decl., ¶¶ 20-28. Restaurants would be forced to close, even those that invested heavily in the equipment and procedures that Respondents had previously advised would be sufficient to allow them to operate safely. *See id.* CRA Op. Br. at 21.[21]

The County argues that the Restaurant Closure Order is a critical part of efforts by public health officials to prevent the further spread of a highly contagious disease, protect the health and safety of residents from exposure, illness and possibly death, and avoid overwhelming the healthcare system at a time of increasing rates of infection. Opp. to CRA Ex Parte at 18; Opp. to MEC Ex Parte at 19. Petitioners are temporarily prevented from being allowed to conduct outdoor dining. They are not precluded, however, from continuing to provide take-out, drive-thru and delivery services for customers. Comparing this harm to the harm an injunction would do to the County's efforts to protect its more than ten million residents, the balance of equities tips sharply in the County's favor. The potential consequences of community spread of COVID and concomitant risk of death to members of the community outweigh the harm from temporary restrictions on businesses. Opp. to CRA Ex Parte at 18-19; Opp. to MEC Ex Parte at 19-20.

The court cannot adequately balance the harms without the County's performance of a risk-benefit analysis. While the County clearly may take action to reduce COVID's impact on hospital bed space and ICUs, it is not clear that the closure of restaurants may aid in reducing that stress to the system or that the benefits of doing so outweigh the costs.

E. Conclusion

As the County argues, the alarming surge in COVID cases, hospitalizations, and deaths entitle the Department to act. OSC Opp. at 6. The County has shown that the greatly decreased capacity of hospitals and ICUs are burdening the healthcare system and action is necessary. However, the County's syllogism – (a) COVID is spread by expelled droplets that transmit the virus to others in proximity, (b) people eating outdoors in restaurant are in proximity to others and they are not wearing masks, (c) therefore outdoor restaurant dining has a risk of spreading COVID – only weakly supports closure of outdoor restaurant dining because it ignores the outdoor nature of the activity, which the CDC says carries only a moderate risk (and less with mitigations). Nonetheless, the County is correct that the court cannot weigh evidence in deciding whether the restriction has a rational basis, and the Department does have generalized evidence of a COVID risk in outdoor dining.

However, the County clearly has failed to perform the required risk-benefit analysis. By failing to weigh the benefits of an outdoor dining restriction against its costs, the County acted arbitrarily and its decision lacks a rational relationship to a legitimate end. The balance of harms works in Petitioners' favor until such time as the County concludes after proper risk-benefit analysis that restaurants must be closed to protect the healthcare system.

The applications for an OSC are granted in part. The proper remedy is not to enjoin the County's Restaurant Closure Order. The Governor's Regional Order is in effect and outdoor restaurant dining in the County cannot open at this time. Instead, the County should be prevented from continuing the Restaurant Closure Order indefinitely. As proposed on November 22, 2020, the Department planned to ban outdoor dining for at least three weeks. Ellis Decl., Ex. 1. Three days later the County's Restaurant Closure Order made the ban indefinite. Ellis Decl., Ex. 17. The County will be limited to the initially proposed three-week period which ends on December 16, 2020, and it is enjoined from extending the Restaurant Closure Order only after conducting an appropriate risk-benefit analysis.

This means that the outdoor restaurant dining portion of the County's revised Restaurant Closure Order (Sur-Reply RJN Ex. 21) must be enjoined. The revised Restaurant Closure Order was revised to "align and comply" with the Governor's Regional Order because it may not be less restrictive than that order. Ex. 21. Fair enough, but the County has no basis for the outdoor dining portion of the order and it must be enjoined until the risk-benefit analysis is performed for outdoor dining.

The court cannot dictate what the Department must do as part of the risk-benefit analysis. A reasonable person would expect the County to consider all pertinent evidence on the benefits of closure, including its own expert evidence, the opinions of other experts such as Kaufman and Bhattacharya (and criticisms of their opinions), the China Study, the Japan Study, and the Mayo Clinic article (and criticisms of their significance), the CDC study, the CDC recommendation concerning outdoor dining, the precautions already in place for outdoor dining -- socially distanced outdoor dining, masks, and temperature checks, and whether its trigger of 4000 new cases has any bearing on hospital burden. As part of the risks of closure, the County could be expected to consider the economic cost of closing 30,000 restaurants, the impact to restaurant owners and their employees, and the psychological and emotional cost to a public tired of the pandemic and seeking some form of enjoyment in their lives. This analysis must be articulated for Petitioners and the public to see. *See* Bhattacharya Decl., ¶29.

[1] For convenience, the court will refer to COVID-19 and SARS-CoV-2 as "COVID".

[2] H&S Code section 101085 confers powers on a local health officer to take action after a declaration of a health emergency or local health emergency under H&S Code section 101080. In turn, H&S Code section 101080 concerns hazardous waste spills and releases. As such, H&S Code section 101085 has no application in this case.

[3] The courts look to the substance of an injunction to determine whether it is prohibitory or mandatory. Agricultural Labor Relations Bd. v. Superior Court, (1983) 149 Cal.App.3d 709, 713. A mandatory injunction — one that mandates a party to affirmatively act, carries a heavy burden: “[t]he granting of a mandatory injunction pending trial is not permitted except in extreme cases where the right thereto is clearly established.” Teachers Ins. & Annuity Assoc. v. Furlotti, (1999) 70 Cal.App.4th 187, 1493.

[4] However, a court may issue an injunction to maintain the *status quo* without a cause of action in the complaint. CCP §526(a)(3).

[5] CRA requests judicial notice of the following exhibits attached to the Ellis declaration: (1) a November 22, 2020 Department press release entitled “Public Health to Modify Health Officer Order to Restrict Dining at Restaurants, Breweries, Wineries and Bars Amid Surge in Cases - 5-Day Average of New Cases is 4,097” (Ex. 1); (2) a transcript of a November 24, 2020 County Board of Supervisors (sometimes “Board”) meeting (Ex. 11); (3) the Restaurant Closure Order, a November 25, 2020 Order of the Health Officer for Los Angeles County entitled “Reopening Safer at Work and in the Community for Control of COVID-19, Blueprint for a Safer Economy – Tier 1 Surge Response” (Ex. 17); (4) a September 2020 California Department of Public Health chart entitled “Blueprint for a Safer Economy” (“Blueprint”) (Ex. 7); (5) a press release issued by the Governor entitled “Governor Newsom Outlines Six Critical Indicators the State will Consider Before Modifying the Stay-at-Home Order and Other COVID-19 Interventions” (Ex. 18); (6) the United States Supreme Court’s opinion in Roman Catholic Diocese of Brooklyn, New York v. Cuomo, (“Roman Catholic Diocese”) (Nov. 25, 2020) 2020 WL 6948354, 592 U.S. ____ (Ex. 21); and (7) the TRO/OSC and accompanying minute order dated November 6, 2020 in Midway Ventures, LLC v. County of San Diego, et al., Case No. 37-2020-00038194-CU-CR-CTL (San Diego County Superior Court) (Ex. 22).

The existence of the Exhibits 21 and 22, but not the truth of their contents, is judicially noticed. Evid. Code §452(d); Sosinsky v. Grant, (1992) 6 Cal.App.4th 1548, 1551 (judicial notice of findings in court documents may not be judicially noticed). The existence of the press release (Ex. 1), the Restaurant Closure Order (Ex. 17), the Blueprint (Ex. 7), and the Governor’s press release (Ex. 18) are judicially noticed. Evid. Code §452(c). The court cannot judicially notice a reporter’s transcript (Ex. 11), and the request is denied.

[6] CRA and MEC filed similar declarations from two experts, Jayanta Bhattachara and Sean Kaufman. The court’s citations are to CRA’s declarations.

[7] CRA has filed written objections to the County’s evidence supporting its *ex parte* opposition and its OSC opposition. Most of these objections are made on relevance grounds. The court has considered only relevant evidence and need not rule on those objections. The court has ruled on the other objections, the vast majority of which were overruled. The clerk is ordered to scan and file the rulings.

[8] The Imrey declaration is attached to the Siegel declaration as Exhibit A.

[9] In support of its OSC opposition, the County requests judicial notice of: (1) a May 1, 2020 Department of Finance public release of a “California Tops 39.8 Million Residents at New Year per New State Demographic Report” (Ex. 1); (2) the Blueprint (Ex. 2); (3) a County press release titled “Public Health to Modify Health Officer Order to Restrict Dining at Restaurants, Breweries, Wineries and Bars Amid Surge in Cases – 5-Day Average of New Cases is 4,097” dated November 22, 2020 (Ex. 3); (4) the County’s Public Health Temporary Targeted Safer at Home Health Officer Order to Control of COVID-19 (Ex. 4); (5) a Blueprint update on December 1, 2020 (Ex. 5); (6) a California State Workbook: COVID-19 Cases report, updated on December 2, 2020 (Ex. 6); (7) “About COVID_19 restrictions”, an update accessed on December 3, 2020 (Ex. 7); (8) a County press release titled “COVID-19 New Cases and Hospitalizations Continue to Break Records – L.A. County Public Health advises everyone to stay home as much as possible” dated December 3, 2020 (Ex. 8); (9) a December 3, 2020 California Department of Public Health Regional Stay At Home Order (Ex. 9); (10) a December 1, 2020 CDC article title “People with Certain Medial Conditions” (Ex. 10); (11) a Declaration of Peter B. Imrey dated August 31, 2020 and filed in the matter titled South Bay United, et al. v. Newsom, et al.,

United States District Court case No. 3:20-cv-00865 BAS-AHG (Ex. 11); (12) a Declaration of Michael A. Stoto dated December 2, 2020 and filed in the matter titled Burfitt v. Newsom, et al., Kern County case No. BCV-20-102267 (Ex. 12); (13) a Declaration of Dr. George Rutherford dated December 2, 2020 and filed in the matter titled Burfitt v. Newsom, et al., Kern County case No. BCV-20-102267 (Ex. 13); (14) a Declaration of Marc Lipsitch dated on November 17, 2020 and filed in the matter titled Tandon, et al. v. Newsom, et al., United States District Court (San Jose Division) case No. 20CV07108LHK (Ex. 14); (15) a Declaration of Yvonne Maldonado dated November 18, 2020 and filed in the matter titled Tandon, et al. v. Newsom, et al., United States District Court (San Jose Division) case No. 20CV07108LHK (Ex. 15); (16) a Declaration of Arthur R. Reingold dated November 17, 2020 and filed in the matter titled Tandon, et al. v. Newsom, et al., United States District Court (San Jose Division) case No. 20CV07108LHK (Ex. 16); (17) a September 11, 2020 CDC article titled “Morbidity and Mortality Weekly Report” (Ex. 17); and (18) a December 3, 2020 press release “California Health Officials Announce a Regional Stay at Home Order Triggered by ICU Capacity” (Ex. 18).

The requests are granted as to Exhibits 1-5, 8-10, and 16-18. Evid. Code §452(c). The requests are denied as to Exhibits 6-7, which are not official acts. With the exception of the Reingold declaration (Exhibit 16), none of the other declarations (Exhibits 11-15) were made under penalty of perjury of the laws of California. While otherwise subject to judicial notice under Evid. Code section 452(d), they are inadmissible and therefore not relevant. The requests for Exhibits 11-15 are denied.

In an unauthorized sur-reply, the County asks the court to judicially notice a California Department of Public Health press release dated December 5, 2020 announcing the latest ICU capacity by region (Ex. 19), a Department press release dated December 5, 2020 stating that Southern California Region ICU capacity has fallen below 15% (Ex. 20), the Department’s revised Restaurant Closure Order intended to conform with the Governor’s Regional Order, effective December 6, 2020 and continuing for at least 21 days (Ex. 21), and a Department press release dated December 6, 2020 and stating that the County has surpassed 10,000 new cases for the first time (Ex. 22). Although unauthorized, the exhibits present the latest information available and are judicially noticed. Evid. Code §452(c).

[10] The Reingold declaration is Exhibit 16 to the County’s request for judicial notice in support of its opposition to the OSC.

[11] MEC also argues that the Restaurant Closure Order violates the California Constitution by interfering with its constitutional right to operate its business and is subject to strict scrutiny review. MEC Op. Br. at 6. As the County correctly notes (MEC Opp. at 12), neither the state nor the federal Constitution guarantees the unrestricted privilege of conducting business as one pleases. Ex parte Maki, (1943) 56 Cal.App.2d 635, 641.

[12] Both CRA and MEC cite the recent United States Supreme Court case of Roman Catholic Diocese, *supra*, 2020 WL at 6948354 (CRA Op. Br. at 9; MEC Op. Br. at 13), but that case concerned the First Amendment rights of churches, synagogues, and their members with respect to COVID restrictions for which the high court applied a strict scrutiny standard of review. As such, it has little bearing on this case except to highlight that the government does not have unfettered discretion to restrict activities during a pandemic.

[13] The CDC report also is not specific to restaurants, let alone outdoor dining. *See* Kaufman Decl. ¶ 17; Ellis Decl., Ex. 20. At a general level, that study showed that a subset of COVID patients reported they had recently dined at restaurants more than the general population. Kaufman Decl. ¶ 17. The CDC report also was limited to adults in eleven participating healthcare facilities and did not take into specific factors about the County, such as its climate, that might make it safer than other places for outdoor dining. For example, outdoor areas in Los Angeles may not need to be enclosed in the same way as a restaurant patio in Boston. *Id.* CRA Op. Br. at 15-16.

[14] CRA also makes a disparate treatment argument that the County did not close (a) parks or picnic tables for private gatherings and outdoor dining, (b) indoor nail and hair salons, tattoo parlors, and barbershops, (c)

indoor day camps—where attendees undoubtedly eat meals, (d) indoor music, film, and television production, and (e) outdoor fitness centers, even though patrons are undoubtedly encouraged to drink beverages while exercising. *See* Restaurant Closure Order, §§ 3(a)(ii), 9.5(a), (b), (c), (f), (h). CRA argues that these activities and locations are much more likely to spread COVID than restaurants. *See* Kaufman Decl. ¶¶ 16-18, 30; Allen Decl. ¶¶ 6-9. CRA contends that, by singling out restaurants for disparate treatment without a rational basis, the Restaurant Closure Order violates CRA’s members’ equal protection rights under the Fourteenth Amendment. CRA Op. Br. at 16-17.

[15] The County properly distinguishes Jew Ho as a case which dealt with a discriminatory, arbitrary, and counterproductive quarantine enacted in response to a seemingly illusory public health threat. The quarantine’s failure to limit travel within the quarantined district counterproductively increased the risk of bubonic plague transmission and the quarantine also impermissibly “discriminate[d] against the Chinese population of this city, . . . in favor of the people of other races.” *Id.* at 21-23. The County points out that the companion case, Wong Wai, *supra*, 103 F. at 1, is similar. Opp. to MEC Ex Parte at 18.

[16] The County argues that CRA’s assertion that the County’s data shows “restaurants are responsible for only 3.10% of new coronavirus infections” is premised on an incorrect use of the statistics on workplace outbreaks. The list of workplace outbreaks on the County’s COVID webpage is not an indication of the role played by the specific sector in community spread. Gunzenhauser Decl., ¶¶ 54-56. Further, essential sectors that were never required to cease indoor operations will necessarily be overrepresented on this list. *Id.*, ¶56. Opp. to CRA Ex Parte at 13, n.12.

[17] The County argues that Petitioner MEC’s reliance on County of Butler v. Wolf, (“Wolf”) (W.D. Pa. Sept. 14, 2020) 2020 WL 5510690 is misplaced. In Wolf, a COVID “policy team” tasked with deciding what business were “life-sustaining” and allowed to reopen and which were not, was comprised “solely of employees from the Governor’s policy and planning office, none of whom possess a medical background or [were] experts in infection control.” *Id.* at *2. In contrast, the County’s Restaurant Closure Order was formulated by County public health officials tasked with responding to the pandemic and with backgrounds in epidemiology. Opp. to MEC Ex Parte at 18-19.

[18] Additionally, in Warden v. State Bar, the plaintiff attorney made an equal protection challenge to the constitutional validity of the State Bar’s mandatory continuing legal education (MCLE) program because categories of attorney-retired judges, elected officials of the state, and full-time law professors were exempt from the MCLE requirements. 21 Cal.4th at 633.

[19] In Carrancho, the court addressed an amended statutory scheme to phase down the practice of burning rice straw left over after harvest. 111 Cal. App. 4th at 1255. As part of the amendment, state agencies responsible for managing the phasedown were required to develop a plan to divert at least 50% of the straw to off-field uses by 2000 and to make a progress report to the Legislature on progress in achieving that goal. *Id.* The rice grower plaintiffs filed a petition for traditional mandate, alleging that the diversion plan and progress report failed to comply with the statute. *Id.* The court noted that the plan and report performed the quasi-legislative function of gathering information and making recommendations in aid of prospective legislation, acts that are reviewed under a deferential standard. *Id.* at 1266-67.

While the plaintiffs could compel the agencies to issue the statutorily required documents, review of their discretionary manner of preparation and the contents was limited to whether the actions were arbitrary, capricious, or unsupported by substantial evidence. *Id.* at 1269. The judicial review must "ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between

those factors, the choice made, and the purposes of the enabling statute." Id. at 1273-74 (citation omitted). This required deferential, but not perfunctory, review. Ibid.

[20] As CRA argues (CRA Reply at 12), the County's argument does not demonstrate any rationale for the 4000 cases/day trigger, even though the court asked for it. A trigger of 4000 new cases per day is not directly related to the burden on hospitalizations and ICU beds.

[21] Petitioners also argue that enjoining the Restaurant Closure Order will save lives because a closure of all dining options at restaurants will cause individuals to move into homes and encourage indoor gatherings, one of the highest-risk areas for the spread of COVID. *See* Bhattacharya Decl., ¶¶ 22, 45-46; Kaufman Decl., ¶28; Allen Decl., ¶10. CRA Op. Br. at 21. The court views this evidence and argument as speculative.
