STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

PATRICK M. GALLIVAN, ET AL.,

Petitioners/Plaintiffs,

- against -

ANDREW M. CUOMO, ET AL.,

Respondents/Defendants.

DECISION AND ORDER
Index No.: 801046/2021

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **LIPSITZ GREEN SCIME CAMBRIA LLP**
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WALKER, J.

The Petition and Complaint in this hybrid proceeding (NYSCEF Doc. No. 1) seeks a preliminary injunction and a temporary restraining order, enjoining the Respondents and those acting in concert with them, from extending, implementing, or enforcing that portion of Executive Order 202.74, issued by Respondent, Andrew M. Cuomo, Governor of New York (the

"Governor"), on November 12, 2020 ("EO 202.74"), which implemented an operational curfew on restaurants and bars (the "Curfew"):

> All businesses that are licensed by the State Liquor Authority for on premises service of alcoholic beverages, shall cease all on premises service and consumption of food and beverages (including alcoholic beverages), inside or outside, at or before 10:00PM and shall not reopen before the later of any stipulated opening hours or existing county opening hours permit . . . .
>
> All restaurants, irrespective of whether such restaurant is licensed by the State Liquor Authority, shall cease in-person dining at 10:00PM, but may continue curbside takeout and delivery service after 10:00PM so long as otherwise permitted, and may reopen no earlier than 5:00AM (Doc. No. 3)

(the "Application for a Preliminary Injunction").

Respondents have applied, pursuant to CPLR 506(b), 510, 511, and 6311(1), to change venue from Erie County to Albany County (the "Motion to Change Venue") (Doc. Nos. 45-52).

On February 5, 2021, this Court issued a Temporary Restraining Order, which ordered, in relevant part, "that Petitioners are hereby permitted to operate their businesses pursuant to the NYS Department of Health Interim Guidance for Food Services during the COVID-19 Public Health Emergency (the "Interim Guidance for food Service"), without the application of the . . . Curfew [imposed by EO 202.74]" (the "TRO") (Doc. No. 43).

Respondents sought expedited review of the TRO, pursuant to CPLR 5704(a), and on February 10, 2021, the Hon. Patrick H. NeMoyer, Associate Justice of the Appellate Division, Fourth Department (the "Fourth Department"), temporarily stayed the TRO pending determination of Respondents' motion to vacate it. Thereafter, on February 16, 2021, Justice NeMoyer issued a Decision and Order granting the motion and vacating the TRO (the "NeMoyer

Decision") (Doc. No. 59).

On February 14, 2021 (between the date of Justice NeMoyer's temporary stay of the TRO on February 10, 2021, and the issuance of the NeMoyer Decision on February 16, 2021), the Governor modified EO 202.74 by extending the Curfew from 10:00 p.m., to 11:00 p.m. Such modification is embodied in Executive Order 202.94 ("EO 202.94") (Doc. No. 112).

BACKGROUND

This matter arises out of the global pandemic associated with the spread of a novel coronavirus known as COVID-19 which, in January 2020 was linked to an outbreak of pneumonia of unknown etiology in Wuhan City, in the Hubei Province of China (the "Pandemic") (Doc. No. 60, ¶7). Since then, COVID-19 has impacted nearly every aspect of daily life.

The history of the Pandemic, its impact on the world and particularly New York State, as well as the State's response to it, are described in detail in the Affidavit of Debra S. Blog, M.D., MPH, the Director of the Division of Epidemiology, New York State Department of Health (the "Blog Affidavit"), submitted in opposition to the Petition and Complaint, and the Court refers to such portions of her affidavit without separately stating the facts and circumstances surrounding the Pandemic and COVID-19 herein (*Id*., at ¶¶7-43).

However, and as demonstrated more fully below, Dr. Blog has not fully described the extent to which the situation today is far improved since the Curfew was issued approximately three and a half months ago on November 12, 2020. Virtually all of the metrics used to measure the extent of the Pandemic and its impact on Western New York, such as, *inter alia*, percent

positivity rate and hospitalization rates, have vastly improved since that time, which is not sufficiently addressed in the Blog Affidavit, leaving the reader with a negatively skewed impression of the Pandemic's current impact on the population, the healthcare system, and society overall.

THE MOTION TO CHANGE VENUE

For the reasons which follow, the Motion to Change Venue is denied. Respondents have not satisfied their burden of demonstrating that Erie County is an improper venue for this proceeding pursuant to CPLR 506(b).

In order to prevail on their motion, Respondents must establish either, that the determinations regarding the issuance of the Curfew were made in Albany County, the material events otherwise took place in Albany County, or that the Respondents' principal offices are located in Albany County (CPLR 506[b]).

In support of their motion, Respondents submit the affidavit of Bryon Backenson, Acting Director for Disease Control of the Bureau of Communicable Disease Control in the Division of Epidemiology, New York Sate Department of Health ("NYSDOH") (Doc. No. 47). He states, relevant to this motion, that "Executive Orders 202.24 ... and 202.94 were developed in consultation with the [NYSDOH]", and that "[a]ll determinations regarding the issuance of these Executive Orders took place in Albany, New York (*Id.*, at par. 6).

Mr. Backenson avers that his affidavit is based on "personal knowledge" (although he provides no details of the basis for same), "discussions with [NYSDOH] staff " (without identifying any such persons, when and where these discussions occurred, or the substance of any

such discussions, much less the substance of any such "determinations"), and "[NYSDOH] records" (without identifying, or submitting these records to the court for review and consideration as part of the record on this motion).

The law is clear that conclusory allegations are insufficient to sustain a party's burden as a matter of law *(see, Collazo v. Netherland Prop. Assets LLC*, 35 NY3d 987 [2020]); affidavits based, in whole or in part, on hearsay lack probative value (*see, Bank of N.Y. Mellon v. Gordon*, 171 AD3d 197 [2d Dept 2019]); and an affidavit by an individual lacking personal knowledge of the facts does not establish the proponent's prima facie burden (*see, e.g., Vermette v. Kenworth Truck Co.*, 68 NY2d 714 [1986]).

Based on this record, Respondents failed to establish their burden that Erie County is an improper venue for this action, and the motion is denied.

Moreover, venue in Erie County is proper, pursuant to CPLR 6311(1), because Respondents, NYS Liquor Authority and NYS Department of Health, have regional offices located in Erie County, and the challenged Curfew and its underlying directives are being enforced in Erie County. Venue is proper in Erie County, pursuant to CPLR 510(3), because most of the material witnesses are present in Erie County (*Varone v. Memoli*, 121 AD2d 213 [1st Dept 1986]).

THE APPLICATION
FOR A PRELIMINARY INJUNCTION

Whether the Proceeding is Moot

Respondents contend that, in evaluating whether Petitioners may be entitled to a

preliminary injunction, this Court is bound by the NeMoyer Decision in accordance with the Doctrine of law of the case (the "Doctrine"). The Doctrine "is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (*Martin v. Cohoes*, 37 NY2d 162, 165 [1975]). Further, "[a]n appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on . . . Supreme Court, as well as on the appellate court"(*Micro-Link, LLC v. Town of Amherst*, 155 AD3d 1638, 1640 [4th Dept 2017]). Thus, "the law of the case Doctrine forecloses re-examination of a question previously determined by an appellate court in the same action, absent a showing of subsequent evidence or change in the law" (*Id.*).

However, the Doctrine does not apply to the procedural facts and circumstances of this matter. While the Court agrees with, and is bound by, the holdings of the decisions concerning the Doctrine upon which Respondents rely, such decisions are distinguishable from this matter, because they relate to appellate decisions made by the full appellate panel in the context of appeals following final judgments. On the contrary, the NeMoyer Decision was issued by a single Associate Justice of the Fourth Department in the narrow and limited context of reviewing the validity of a temporary restraining order.

Respondents contend further that Petitioners' claims are moot, because Petitioners have achieved all the relief they sought to obtain by having filed this action. They rely on the decision in *Pleasant View Baptist Church v. Beshear* (No. 20-cv-6399, 2020 WL 7658397, at *1 [6th Cir, Dec. 21, 2020]) (and similar decisions), which determined, in relevant part, that "[o]nce the law is off the books and replaced with a 'new rule' that does not injure the plaintiff, a case becomes

moot, leaving us with an absence of jurisdiction to adjudicate the case." However, the Governor's modification of EO 202.74 (namely, to extend the Curfew from 10:00 p.m. to 11:00 p.m.) did not provide the Restaurant/Bar Petitioners[1] with a "new rule that does not injure [them]." Rather, the Restaurant/Bar Petitioners continue to claim significant injury by being forced to close for business earlier than prior to the time for same under the law that existed prior to the issuance of EO 202.74, free from **any** Curfew.

Standard of Review

It is well settled that injunctive relief is a "drastic remedy" that "should be awarded sparingly, and only where the party seeking it has met its burden of proving both the clear right to the ultimate relief sought, and the urgent necessity of preventing irreparable harm" (*Buffalo v. Mangan*, 49 AD2d 697 [4th Dept 1975]). However, where "violation of important principles contained in the New York Constitution" is alleged, "[t]his is precisely the situation in which a preliminary injunction should be granted" (*Tucker v. Toia*, 54 AD2d 322, 326 [4th Dep't 1976]).

Whether the Curfew Expired or was Unlawfully Extended

The Fourth Cause of Action contends that EO 202.74 expired and that EO 202.94 constitutes an unlawful modification of it (Doc. No. 1, ¶¶138-149).

Executive Law §29-a provides, in relevant part, as follows:

> 2. Suspensions pursuant to subdivision one of this section shall be subject to the following standards and limits, **which shall apply to any directive where specifically indicated**:
>
> a. **no suspension or directive** shall be made for a period in excess of thirty days, provided, however, that upon reconsideration of all of the relevant facts and circumstances, the governor may

[1]All Petitioners other than New York State Senator Patrick M. Gallivan, are collectively referred to as the "Restaurant/Bar Petitioners."

> extend the **suspension** for additional periods not to exceed thirty days each;
>
> b. no **suspension or directive** shall be made which is not in the interest of the health or welfare of the public and which is not reasonably necessary to aid the disaster effort (emphasis added).

The express, clear, and unambiguous terms of the statute authorize the Governor to extend a "suspension" for additional periods of up to thirty (30) days each, but no similar provision exists authorizing the Governor to extend "directives" for any period of time. Accordingly, EO 202.74, which was issued on November 12, 2020, expired on December12, 2020, and should no longer serve as a bar to the Restaurant/Bar Petitioners in connection with the operation of their respective businesses.

According to the maxim *expressio unius est exclusio alterius* (the "Maxim"), this Court is bound to draw an "irrefutable inference" that the absence of the term "directive" from that portion of the statute addressing extensions means that the Legislature "intended" to "exclude" directives from being extended by Executive Order (*see Colon v. Martin*, 35 NY3d 75, 78 [2020] ["The maxim *expressio unius est exclusio alterius* applies in the construction of the statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded"]).

Moreover, the Court of Appeals has "long held that the statutory text is the clearest indicator of legislative intent" and that "a court need not resort to legislative history" where, as here, "the statutory language is unambiguous" (*Walsh v. New York State Comptroller*, 34 NY3d 520, 524 [2019]).

Notwithstanding the Maxim and its explanation in *Colon, supra*, the Court need not rely on it or *Colon* (although it does), because Executive Law §29-a(2)(a) is patently clear; it does not provide that extensions apply to directives. Contrary to Respondents' contention, neither Petitioners, nor the Court, are reading the statute narrowly. The statute's language is not complex, nor does it require parsing out.

Respondents rely on the principle that courts must "interpret statutes so as to avoid an unreasonable or absurd application of the law" (*People ex rel. McCurdy v. Warden, Westchester Cnty. Corr. Facility*, 2020 N.Y. LEXIS 2597, at 14-15 [NY Nov. 23, 2020]). However, there is nothing unreasonable or absurd about concluding - from the clear language of the statute - that the Legislature intended to provide the Governor with the power to extend suspensions but not directives.

Respondents' contrary arguments seek to inject ambiguity into a statute where none exists.

With respect to EO 202.94 (Doc. No. 112), which the Governor issued on February 14, 2021, provides, in relevant part, as follows:

> The directive contained in Executive Order 202.74 that required all businesses that are licensed by the State Liquor Authority under sections 63 and 79 of the Alcoholic Beverage Control Law ("liquor stores" and "wine stores") to cease all off premises sales and close at or before 10:00PM, is **modified** only to the extent that all such businesses shall cease off premises sales and close at or before at 11:00PM;
>
> The directive contained in Executive Order 202.74 that required all restaurants, irrespective of whether such restaurant is licensed by the State Liquor Authority, to cease in-person dining at 10:00PM, is hereby **modified** only to the extent that all such restaurants shall cease in-person dining at or before 11:00PM;

> The directive contained in Executive Order 202.74 that required all businesses that are licensed by the State Liquor Authority for on premises service of alcoholic beverages, to cease all on premises service and consumption of food and beverages (including alcoholic beverages), inside or outside, at or before 10:00PM is hereby **modified** only to the extent that all such businesses shall cease all on premises service and consumption of food and beverages (including alcoholic beverages), inside or outside, at or before 11:00PM; and provided further licensees operating bowling alleys or casinos shall cease all operations at or before 11:00PM.

The explicit references to EO 202.74 contained throughout EO 202.94 clearly show that it is not a new directive, but a modified extension of an existing directive. Accordingly, EO 202.94 is a nullity, because it sought to modify an Executive Order which had expired on December 12, 2020.

Whether the Curfew is Arbitrary and Capricious

The First Cause of Action contends that the Curfew is arbitrary and capricious, pursuant to CPLR Article 78 (Doc. No. 1, ¶¶100-117).

Executive Orders 202. 74 and 202.94 are subject to review in a CPLR Article 78 proceeding in terms of whether they were issued without a rational basis and were arbitrary and capricious (*see, e.g., Era Steel Const. Corp. v. Egan*, 145 AD2d 795, 798 [3d Dept. 1988] [finding an executive order "lacked a rational basis and was arbitrary and capricious"]). Executive Orders shall be deemed arbitrary and capricious in the event they were issued "without sound basis in reason or regard to the facts;" that is, when not "supported by a rational basis" (*Peckham v. Calogero*, 12 NY3d 424, 431 [2009]).

Moreover, Executive Law §29-a includes additional requirements beyond the necessity for a rational basis. Subsection 2(b) provides that "no . . . directive shall be made which is not . .

. reasonably necessary to aid the disaster effort," and subsection 2(d) provides that "any such . . . directive shall provide for the minimum deviation from the requirements of the statute, local law, ordinance, order, rule or regulation suspended consistent with the goals of the disaster action deemed necessary."

Respondents contend that the Blog Affidavit provides significant scientific support for the Governor's issuance of EO 202.74 and EO 202.94. While the Court recognizes Dr. Blog as an expert in her field of epidemiology and affords her opinions a commensurate level of deference, she has not stated why it was rational to impose the Curfew, nor do any of the numerous attachments to the Blog Affidavit (numbering forty-four [44]) justify the issuance of a Curfew (Doc. No. 60 is the Blog Aff.; Doc. Nos. 66 -109 consist of exhibits thereto).

Preliminarily, Dr. Blog paints a dire picture relative to COVID-19 and its current impact on New York State that does not accurately reflect the current state of affairs. For instance, Dr. Blog states that "New York hospitals have been operating in crisis management mode since December 16, 2020 . . . " (Doc. No. 60, ¶45). This statement is not accurate.

Official statistics provided at foward.ny.gov in connection with statewide hospitalization rates related to COVID-19 reflect the following: hospitalization rates peaked on April 12, 2020, with 18,825 persons hospitalized; hospitalization rates dropped below 1,000 for the first time on June 24, 2020 but then exceeded 1,000 for the first time since June 2020, on October 22, 2020. The hospitalization rate continued to climb and reached a high of 9,273 on January 19, 2021, but the rate has dropped steadily since then. The statewide hospitalization rate was 8,771 on January 26, 2021; 8,082 on February 2, 2021; 7,593 on February 9, 2021, and 6,574 on February 16,

2021, marking a reduction of approximately 29% since October 22, 2020[2]. The Court has discretion to "take judicial notice of material derived from official government websites" (*In re LaSonde v. Seabrook*, 89 AD3d 132, n.8 [1st Dept 2011]).

The same website provides hospitalization rates for the Western New York Region, reflecting that COVID-19 related hospitalizations in Erie County peaked on December 10, 2020 at 548 persons hospitalized, but dropped to 396 persons hospitalized by February 1, 2021, and further dropped to 201 persons hospitalized as of February 25, 2021, which marks an approximate 63% reduction in COVID-19 related hospitalizations in Erie County since December 10, 2020 (*Id*). Similarly, as of February 19, 2021, thirty-eight percent (38%) of Erie County's hospital beds were unused and available for patients infected with COVID-19[3].

In addition, the Governor's Office provides a daily update, by electronic mail, on COVID-19 related statistics to persons interested in receiving such an update (the "Email Update"). The Email Update, dated February 25, 2021 states, in relevant part, that 5,073 people were hospitalized throughout the State due to COVID-19 (a reduction of approximately 45% since 9,273 persons were hospitalized on January 19, 2021)[4].

The February 25, 2021 Email also reflects that, as of such date, in excess of 2.5 million New York residents had received at least the first of two (2) vaccinations, which amounts to approximately 12.8% of the State's population. Certainly, no vaccine was available on November 12, 2020, when the Governor issued EO 202.74.

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[2]*See* "Daily Hospitalization Summary by Region - All Regions" at https://forward.ny.gov/daily-hospitalization-summary-region

[3]*See* https://forward.ny.gov/covid-19-regional-metrics-dashboard

[4]*See* Email@exec.ny.gov, dated February 25, 2021.

These trends are real and positive, but are not reflected in the Blog Affidavit. While the Court recognizes that COVID-19 continues to pose a serious health threat to the community at large, the positive and encouraging trends ignored in the Blog Affidavit do not support a Curfew. Rather, they demonstrate that, since the Petitioner Restaurants/Bars (and other non-party restaurants and bars) re-opened on or about January 13, 2021, hospitalization rates have **improved**.

Similarly, the percent positive infection rate has also continued to improve, as reflected by the Erie County Department of Epidemiology. The percent positivity rate was 6.9% as of the week ending November 14, 2020 (two days after EO 202.74 was issued) and was 7.0% as of the week ending January 2, 2021. However, the percent positivity rate in Erie County then began to steadily drop, as follows: 5.9% the week ending January 16, 2021; 5.1% or 5.2% the weeks ending January 23 and 30, 2021 and February 6, 2021; 4.9% the week ending February 13, 2021; and 4.3% the week ending February 20, 2021[5].

The Blog Affidavit does not contain any of this critical information regarding positive trending in Erie County. Instead, Dr. Blog focuses on outdated information. She states that the "highest seven-day moving average of new COVID-19 cases with the highest number of new cases reported in a single day [occurred] on January 8, 2021: 314,093" (Doc.. No. 60, ¶48). The Court acknowledges the statistic, but as shown above, rates of infection and hospitalization rates have decreased dramatically since then (and prior to the levels that existed at the time EO 202.74 was issued in November 2020).

Notably, in the 312 pages of exhibits attached to the Blog Affidavit, there is not one (1)

[5]*See* PDFs at https://www2.erie.gov/health/index.php?q=covid-19-media-data

reference to, or recommendation that, restaurants and bars should close early. Rather, on December 16, 2020 (well into the Pandemic), the CDC issued a publication entitled, "Considerations for Restaurant and Bar Owners," consisting of a comprehensive, seventeen (17) page primer on how restaurant and bar owners should operate in order to best reduce the spread of COVID-19 (Doc. No. 93) (the "Considerations Document"). The Considerations Document identifies on-site dining with indoor seating as a "Higher Risk" activity, and identifies numerous behaviors designed to reduce the spread of COVID-19, such as, *inter alia*, wearing masks when not eating or drinking; hand hygiene; signs and messaging; cleaning and disinfecting; discouraging the use of shared objects (such as serving spoons and condiments); modifying layouts; creating physical barriers; etc. However, nowhere does the CDC recommend that restaurants and bars close altogether **or that they close early**, and it is undisputed on this record that Petitioners-Restaurants/Bars have otherwise been following the CDC's recommendations.

The most relevant science included in the Blog Affidavit consists of the slide that was shown during one of the Governor's press conferences in December 2020, entitled "By the Facts: 46,000 Data Points" (the "Slide") (Doc. No. 106). It shows that contact tracing revealed that of the approximate 46,000 infected people studied, only 1.43% of them traced the infection to a restaurant or bar, as compared to a vastly higher percentage of people (73.84%) having traced their infection to home gatherings. This information consists of the precise type of science the Court seeks in evaluating whether the imposition of the Curfew is rational, but Dr. Blog dismisses it as being "misleading," because the pool of persons tested consisted of approximately twenty percent (20%) of the known positive cases between September and November 2020, which Dr. Blog describes as a "discreet" sample (Doc. No. 60, ¶¶91-92). In so

doing, Dr. Blog ignores the Slide's use of the phrase "by the facts" in the Slide's title, and her characterization of the Slide is self-serving, because a sample size consisting off 46,000 cases is significant and reliable - not "discreet."

It is telling that Respondents have not performed a similar analysis with a new sample, since then. For this reason, the news article, entitled "Deadly Mix: How Bars Are Fueling COVID-19 Outbreaks," dated August 21, 2020, published by Kaiser Health News (Doc. No. 109) is belied by the Slide.

The irrationality of the Curfew is further demonstrated by the Governor having permitted as many as 6,772 people to attend the Buffalo Bills playoff game at Bills Stadium in the Town of Orchard Park, on January 3, 2021 (the "Playoff Game"). At that time, Erie County restaurants and bars were shuttered, having not reopened until after January 13, 2020, when the court (Nowak, J.), in *Amherst Pizza & Ale House, Inc., v. Cuomo* (Sup Ct, Erie Cnty, Index No. 816373/2020), granted the application of the petitioners therein, pursuant to CPLR Article 78, "to operate under the prior Yellow Zone restrictions and pursuant to the DOH's Interim COVID-19 Guidance . . ." (*Id*., at Doc. No. 148).

Moreover, the day before the Playoff Game, the Erie County Department of Health reported the highest COVID-19 percent positivity rate - 7.0%, since the week ending November 28, 2020, following the Thanksgiving Holiday[6]. The percent positivity rate had steadily climbed from 5.8% the week ending December 19, 2020, to 6.2% the week ending December 26, 2020, to 7.0%, the week ending January 2, 2021 (*Id.*). This is also the period of time during which Dr. Blog claims that hospitals throughout the State were operating in crisis mode.

[6]*See* PDF for Week Ending 1/2/2021, at https://www2.erie.gov/health/index.php?q=covid-19-media-data

Persons attending the Playoff Game were required to undergo a COVID-19 test two (2) to three (3) days prior thereto. The tests were administered in a stadium parking lot, and the persons tested were charged $63 to cover expenses associated with the testing[7]. However, such testing could not, and did not, guarantee that a person tested would not contract COVID-19 in the few days between the test and Playoff Game. If a person tested contracted the virus, he or she would likely have been asymptomatic, because the incubation period is fourteen (14) days (Doc. No. 60, ¶62), but the infected person would have been capable of transmitting the virus to others (*Id*.).

Under the circumstances - notably the extent of COVID-19 at that time and the negative trending, as compared to today, it is difficult to reconcile that determination with the current imposition of the Curfew.

Notably, persons were not permitted to attend the Buffalo Bills home game on December 13, 2020, despite that the percent positivity rate was lower for the week ending December 12, 2020, than the week ending January 2, 2021 (*Id.*).

Moreover, there is nothing in the record before the Court that definitively (or even generally) shows that a closure at 10:00 p.m., or 11:00 p.m. (or some other time), would be rational. Respondents rely on studies which conclude that alcohol reduces a person's inhibitions in a bar context, over time (Doc. Nos. 99-102). However, these studies fail to address that people enter bars and restaurants serving alcoholic beverages at all times of the day and night. For instance, a midnight curfew would have no impact on a person who arrives at a bar at noon to watch an afternoon hockey game and remains at the bar for nine (9) hours until 9:00 p.m., which

[7]See https://www.buffalobills.com/tickets/playoff-tickets-faq

is prior to the Curfew. Respondents have failed to demonstrate a nexus between the requirement for the Curfew and a particular time, be it 10:00 p.m., 11:00 p.m., or some other time.

Finally, Respondents ignore the fact that other directives require that food be ordered by anyone who purchases an alcoholic beverage in a restaurant.

In light of the foregoing, the Restaurant/Bar Petitioners have demonstrated a reasonable likelihood of success on the merits on their claim that EO 202.74 and EO 202.94 are arbitrary and capricious.

Whether the Curfew Violates Executive Law §29-a(2)(d)

The Third Cause of Action contends that the Curfew violates limitations imposed on directives by Executive Law §29-a(2)(d) (Doc.. No. 1, ¶¶127-137), which requires that directives be "reasonably necessary" and "the minimum deviation, consistent with the goals of the disaster action deemed necessary".

In light of the Court's findings that EO 202.74 has expired and that, had it not expired, the Restaurant/Bar Petitioners would likely prevail on the merits of demonstrating that it and the Curfew are arbitrary and capricious, the Restaurant/Bar Petitioners have demonstrated a likelihood of success on the merits in connection with the Third Cause of Action.

Equal Protection Under The State Constitution

The Second Cause of Action asserts that the Curfew violates the Restaurant/Bar Petitioners' right to equal protection under article I, §11 of the New York State Constitution (Doc. No. 1, ¶¶118-126). Article I, section 11, provides, as follows:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or

> her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

However, "as commercial business owners, [the Restaurant/Bar Petitioners] do not belong to a suspect or quasi-suspect class. Moreover, the regulation of business operations does not 'impinge on fundamental rights'" (*Talleywhacker, Inc. v. Cooper*, 465 FSupp3d 523, 537 [EDNC 2020], quoting *Levin v. Commerce Energy, Inc.*, 560 US 413, 426 & n.5 [2010])[1].

Moreover, to succeed on an equal protection challenge to an economic directive, the Restaurant/Bar Petitioners are required to demonstrate an "extremely high degree of similarity" between themselves and a purportedly similarly situated business (*Progressive Credit Union v. City of New York*, 889 F3d 40, 49 [2d Cir 2018]). While the Restaurant/Bar Petitioners assert that "all other businesses" are "similarly situated in posing some risk of COVID-19 transmission" (Doc. No. 36, p. 11), critical distinctions exist between bars and restaurants on the one hand and grocery stores and big box stores, for example, on the other, which, *inter alia*, do not facilitate social gatherings, portions of which are mask-less. Accordingly, such businesses do not present the same risks as do bars and restaurants, rendering the Petitioner Restaurants unlikely to succeed on the merits of their equal protection claims.

Whether Executive Law §29-a is Unconstitutional under the State Constitution, as Applied, and Facially

The Fifth Cause of Action contends that the Executive Branch's continued implementation and enforcement of directives affecting the Restaurant/Bar Petitioners'

[1] Federal law is applicable to the analysis of the Equal Protection Clause of the State Constitution (*Anonymous v. City of Rochester*, 56 AD3d 139, 145 [4th Dept 2008], *aff'd,* 13 NY3d 35 [2009]).

businesses violates the separation of power set forth in Article III, Section 1 of the State Constitution (Doc. No. 1, ¶¶150-159).

The Sixth Cause of Action contends that all directives issued pursuant to Executive Law §29-a violate the principle of bicameralism set forth in Article III, Section 13 of the State Constitution (*Id*., at ¶¶160-175), which prohibits the enactment of a law in any manner other than through the adoption of a bill by both the Senate and the Assembly. Petitioners contend that directives issued pursuant to Executive Law §29-a violate bicameralism, because they were purportedly issued with the force of law.

The Court disagrees with these contentions because, on March 3, 2020, the State Legislature amended Executive Law §29-a to provide the Governor the broad and flexible powers required to issue "any directives" reasonably necessary to cope with the Pandemic, which then constituted a disaster emergency.

Irreparable Harm and Balancing of the Equities

The court finds both that the Restaurant/Bar Petitioners have sufficiently demonstrated irreparable harm in the absence of the granting of a preliminary injunction, and that the equities tip in their favor. While economic loss that is compensable by money damages does not, generally, constitute irreparable harm (*Dana Distr., Inc. v. Crown Imports, LLC*, 48 AD3d 613 [2d Dept 2008]), loss of business relationships, goodwill, and market share does (*Waldbaum, Inc. v. Fifth Ave. of Long Is. Realty Assoc*., 85 NY2d 600 [1995]; *Second on Second Café, Inc. v. Hing Sing Trading, Inc*., 66 AD3d 255 [1st Dept. 2009]).

Further, the Restaurant/Bar Petitioners have sufficiently demonstrated the imminent nature of the harm alleged.

Respondents contend that, in the event the Curfew is lifted, public safety will be negatively impacted. However, this contention is belied by a lack of scientific evidence in the record showing that restaurant and bar patrons are at an elevated risk of contracting (or spreading) COVID-19 at any time, let alone after 10:00 p.m. or 11:00 p.m. On the contrary, the Slide (Doc. No. 106) reflects that restaurants and bars are not meaningfully contributing to the Pandemic. Accordingly, the balance of the equities tips in Petitioners' favor.

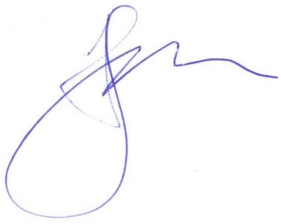
In light of the foregoing, it is hereby

ORDERED, that the Motion to Change Venue is denied in all respects; and it is further

ORDERED, that the Application for a Preliminary Injunction is granted to the extent that the Restaurant/Bar Petitioners are hereby permitted to operate their businesses pursuant to the NYS Department of Health Interim Guidance for Food Services during the COVID-19 Public Health Emergency, without the application of any curfew, whether it be imposed by EO 202.74 in its original form, or as purportedly modified by EO 202.94.

This constitutes the Decision and Order of this Court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: February 27, 2021
Buffalo, New York



HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice
Presiding Justice, Commercial Division
8th Judicial District

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