

STATE OF MICHIGAN
46TH CIRCUIT TRIAL COURT
OTSEGO COUNTY

IN THE MATTER OF:

MOORE MURPHY HOSPITALITY, LLC
D/B/A IRON PIG SMOKEHOUSE,

Petitioner-Plaintiff,

v

MICHIGAN DEPARTMENT OF HEALTH
AND HUMAN SERVICES; GRETCHEN
WHITMER, in her official capacity as Governor of
the State of Michigan

Respondent-Defendant,

Circuit Court Case No: 21-18522-AE/CZ
MOAHR Docket No.: 20-007763

Colin G. Hunter
P-71821



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APPEAL OF ADMINISTRATIVE ORDER
AND
COMPLAINT

There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.

NOW COMES Petitioner-Plaintiff Moore-Murphy Hospitality d/b/a Iron Pig Smokehouse, by and through its attorney David M. Delaney and in support of its appeal and complaint states:

JURISDICTION AND VENUE

1. THAT Petitioner-Appellant Iron Pig Smokehouse claims an appeal from the March 11, 2021 Amended Decision and Order Granting the Michigan Department of Health and Human Service's motion for summary disposition.
2. THAT substantial rights of the Petitioner-Appellant have been prejudiced because the decision or order is:
 - (a) In violation of the Constitution or statute.
 - (b) In excess of the statutory authority or jurisdiction of the agency.
 - (c) Made upon unlawful procedure resulting in material prejudice to a party.
 - (e) Not supported by competent, material and substantial evidence on the whole record.
 - (f) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
 - (g) Affected by other substantial and material error of law.
3. THAT Petitioner-Appellant requests the court reverse or remand the case for further proceedings as provided in MCL 24.306.

4. Jurisdiction is proper in this Court pursuant to Section 1, Article VI of the Michigan Constitution, which vests the circuit court with general jurisdiction. Nothing in this complaint should be read to waive Plaintiff's right to bring this suit in circuit court. Plaintiff alleges regulatory takings; therefore, circuit court jurisdiction is proper.
5. The amount in controversy exceeds the sum of twenty-five thousand dollars (\$25,000.00).
6. Venue is proper in this Court pursuant to MCL 600.1615, which provides that "[a]ny county in which any governmental unit...exercises or may exercise its governmental authority is the proper county in which to commence and try actions against such governmental units..." Under MCR 2.201(C)(5), actions against an officer of a governmental unit in that officer's official capacity are deemed to be actions against the governmental unit itself. Therefore, because the governmental units being sued in this actions exercise—and have, in fact, exercised—their governmental authority in Otsego County, said county is the proper venue for this action. Further, all economic injuries complained of in this suit occurred in Otsego County. Venue is also proper in Otsego County pursuant to MCL 600.1629(1)(a)(i) by way of MCL 600.1641(2).

RESPONDENT AND DEFENDANT

7. Respondent Michigan Department of Health and Human Services is a Michigan State Administrative Agency.
8. Defendant Gretchen Whitmer is the Governor of Michigan, controls the agency involved in this matter pursuant to Article V, Section 8, of the Michigan Constitution, and directed the Respondent to issue and enforce the emergency orders at issue in this case. She also

was responsible for issuing the executive Orders in this litigation. She is being sued in her official capacity.

COVID-19-ORDERS

9. The following information regarding the orders issued by Defendant shall collectively be referred to as the “COVID-19 Orders”.
10. Defendant Gretchen Whitmer issued an Executive Order (EO) on March 16, 2020, and it required that restaurants and bars be closed and those businesses be shut down to the public.
11. Defendant Gretchen Whitmer continued to issue numerous Executive Orders (EO), which mandated the closure of restaurants and bars.
12. Defendant Gretchen Whitmer’s Executive Orders (EO) were determined to be unconstitutional by the Michigan Supreme Court on October 2, 2020. *In re Certified Questions* (No. 161492, October 2, 2020).
13. As a result of Defendant Gretchen Whitmer’s unconstitutional conduct and EOs, Plaintiff’s business and property were forcibly closed and taken by Defendant with no just compensation paid.
14. Defendant Robert Gordon, through MDHHS, issued an Emergency Order pursuant to MCL 333.2253 on November 15, 2020 which closed in-door dining at all restaurants and bars, including Plaintiff’s business.
15. Defendant Gretchen Whitmer, through the Liquor Control Commission and the Department of Agriculture and Rural Development, respectively suspended Plaintiff’s liquor license and food service license and issued fines.

16. Defendant Robert Gordon and his successor continue to issue Emergency Orders pursuant to MCL 333.2253 limiting capacity and hours of operation.

GENERAL ALLEGATIONS

17. Because Defendant Gretchen Whitmer's EOs that closed Plaintiff's business were declared to be unconstitutional by the Michigan Supreme Court, the EOs were not a valid exercise of the State's Police Power.
18. Defendant unlawfully closed Plaintiff's business and property for a public use, specifically, in the name of preventing the spread of COVID-19.
19. Plaintiff's business was shut down to the extent that it was unable to operate, unable to earn an income, and unable to function in any way.
20. Plaintiff have received no just compensation from Defendant for the taking of its business and property.
21. Director Gordon's and his successor's orders are being enforced by MDHHS in violation of Plaintiff's rights as set forth herein.
22. Plaintiff is being materially affected by these orders in that they are being forced to close operations in violation of its constitutional rights and under threat of civil and criminal sanctions.

COUNT I
VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT
MCL 24.201 et seq

31. Plaintiff incorporates herein by reference the allegations in all preceding paragraphs of this Complaint.
32. MDHHS is an “agency” within the meaning of the Michigan Administrative Procedures Act of 1969 (“MAPA”). MCL 24.203(2).
33. MDHHS is subject to and not exempt from compliance with the MAPA.
34. Under the MAPA, a “rule” is “an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency.” MCL 24.207.
35. The MAPA contains requirements for processing and publishing rules, which include obtaining approval from the Office of Regulatory Reinvention, MCL 24.239, and giving notice of a public hearing offering persons an opportunity to present data, views, questions, and arguments, MCL 24.241.
36. The MDHHS orders are subject to MAPA’s administrative rulemaking requirements.
37. The MAPA provides, in part, that a court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because that decision or order is arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion. MCL 24.306.
38. MDHHS’s issuance of the Orders failed to comply with the MAPA’s statutory

requirements and is thus subject to reversal under MCL 24.306.

39. The Orders are substantively invalid as arbitrary and capricious because it permits, with no reasonable explanation, businesses to operate that create greater public-health risks than the prohibited restaurants and bars. The Orders also fail to consider the harm inflicted upon restaurants and bars, who have suffered injury.

COUNT II
NONDELEGATION DOCTRINE
UNCONSTITUTIONAL STATUTE

40. Plaintiff incorporates herein by reference the allegations of all preceding paragraphs of this complaint.
41. MCL 333.2253 provides in pertinent that “If the director determines that control of an epidemic is necessary to protect the public health, **the director may prohibit the gathering of people for any purpose...**” (emphasis supplied)
42. The 1963 Michigan Constitution Article 3 Section 2 mandates the separation-of-powers of the three branches: legislative, executive and judicial.
43. “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny” *46th Circuit Court Trial Court v Crawford County*, 476 Mich 131 (2006); *The Federalist No. 47 Madison*
44. There is no acceptable delegation of legislative power.
45. Challenges of unconstitutional delegation of legislative power is to determine whether the statute contains sufficient limits or standards. When broad power is delegated with few or no constraints, the risk of an unconstitutional delegation is at its peak.

46. The conferral of indefinite authority accords a greater accumulation of power than does the grant of temporary authority.
47. Under MCL 333.2253 the director's powers are indefinite.
48. There are no limits on the director's discretion.
49. The director possesses free rein to exercise a substantial part of the state and local legislature authority-including police powers-for an indefinite period of time.
50. The delegation of power to the director to *prohibit the gathering of people for any purpose* constitutes an unlawful delegation of legislative power to the executive and is an unconstitutional under Const 1963, Art 3, Sec. 2, which prohibits exercise of the legislative power by the executive branch.
51. If invalid or unconstitutional language can be deleted from an ordinance and still leave it complete and operative then such remainder of the ordinance can be permitted to stand MCL 8.5.

COUNT III
FEDERAL TAKINGS CLAUSE

52. Plaintiff incorporates by reference the allegations in all preceding paragraphs of this complaint.
53. Defendant's actions are a seizure of Plaintiff's property without just compensation, all in violation of the Fifth Amendment of the United States Constitution.
54. This claim is being made against Defendant pursuant to 42 U.S.C. § 1983 and § 1988.
55. The Fifth Amendment of the United States Constitution, made applicable via the Fourteenth Amendment, is a constitutional provision and right requiring the payment of

just compensation upon a taking of private property by Defendant.

56. Defendant's COVID-19 policies have required the complete closure of Plaintiff's businesses, thereby effectively taking its business through governmental policy and regulation without offering any compensation for these takings.
57. Defendant's COVID-19 orders to close Plaintiff's business did not substantially advance a legitimate state interest.
58. Defendant's COVID-19 orders to close Plaintiff's business denied it any economically viable use of its property.
59. Defendant's COVID-19 orders to close Plaintiff's business required it to sacrifice all economically beneficial uses of its property in the name of the common good.
60. Defendant's COVID-19 orders that required Plaintiff to close its business for months had a severe and destructive impact on Plaintiff's business and property.
61. Defendant's COVID-19 orders interfered with Plaintiff's distinct, investment-backed expectations as to its business and property.
62. As outlined above, Defendant has taken Plaintiff's property for public use without providing just compensation.
63. Defendant has provided no compensation to Plaintiff for the closure and taking of its business, thereby depriving Plaintiff of its constitutional rights in violation of the Fifth Amendment of the United States Constitution.
64. As a result of Defendant's actions and failure to pay just compensations, Plaintiff has been injured and suffered damages in an amount to be determined at trial.

COUNT IV
MICHIGAN TAKINGS CLAUSE

65. Plaintiff hereby incorporates by reference all preceding paragraphs of this complaint.
66. Defendant has seized or otherwise taken without just compensation Plaintiff's real and personal property by way of regulations imposed upon it. The operation of bars and restaurants in Otsego County necessarily requires an interest in real property in order to function, either through ownership or leasehold interests, and Defendant has interfered with and regulated that property and the use of that property substantially to the point that these properties have become valueless or largely valueless. Defendant's regulatory actions constitute a taking of real property as the limitations on in-door dining have devalued the buildings that house these businesses. Therefore, such regulation constitutes a taking.
67. An uncompensated regulatory taking violates the Article X, Section 2 of Michigan's 1963 Constitution.
68. The above-cited and referenced regulatory orders issued by Governor Whitmer and the MDHHS, as well as the LCC's and MDARD's regulatory actions predicated on those orders, have substantially and materially jeopardized Plaintiff's business. Either no compensation has been paid for these regulatory takings or the compensation that has been paid is woefully insufficient.
69. The Takings Clause applies whether the governmental regulations/interference with private business is temporary or permanent and partial or total.
70. The Defendant's actions constitute a regulatory taking without just compensation.

COUNT V
VIOLATION OF PROCEDURAL DUE PROCESS

71. Plaintiff incorporates herein by reference the allegations in all preceding paragraphs of this complaint.
72. The Michigan Constitution of 1963, Article 1 Sec. 17 provides that no person shall be deprived of life, liberty or property without due process of law. The Constitution's due process clause protects the rights of persons to both procedural and substantive due process.
73. A procedural due process analysis requires a dual inquiry: (1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient.
74. The Plaintiff has an undisputed property interest in its restaurant and bar. Absolutely no procedures of any kind occurred before the Defendant unilaterally decided to deprive Plaintiff of its rights in its property. Plaintiff's property right is a fundamental right. Due process demands that minimal procedural protections be afforded before the state can burden a fundamental right. If a regulation impinges upon the exercise of a fundamental right a higher standard of review, strict scrutiny, is applied.
75. Defendant's actions were devoid of any procedure. No constitutionally sufficient procedure could have existed. Therefore, Defendant has deprived Plaintiff of a fundamental property interest without procedural due process as required by the Michigan Constitution. Defendant's regulations are subject to strict scrutiny.
76. Defendant exceeded its authority under MCL 333.2253 and acted outside the scope of its authority and therefore governmental immunity under MCL 691.1407(5) of the

Governmental Liability for Negligence Act, 1964 PA 170; MCL 690.1401-MCL 691.1419 and the Government Tort Liability Act does not apply. A due process violation is not subject to immunity.

COUNT VI
VIOLATION OF SUBSTANTIVE DUE PROCESS

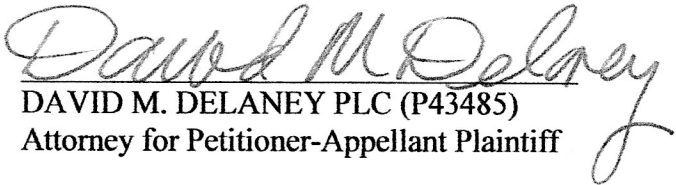
77. Plaintiff incorporates herein by reference the allegations in all preceding paragraphs of this complaint.
78. Where the right asserted is not fundamental, the government's interference with that right need only be reasonably related to a legitimate government interest. Property rights are fundamental rights. Substantive due process prevents the government from engaging in conduct that interferes with rights implicit in the concept of ordered liberty. Michigan courts have acknowledged that the essence of a substantive due process claim is the arbitrary deprivation of liberty or property interests. If a regulation impinges on the exercise of a fundamental right a higher standard of review, strict scrutiny, is applied.
79. Defendants have indisputably deprived Plaintiff of property, use of the property and rights to the property by severely restricting and banning Plaintiff's ability to open and serve patrons through the Order. Defendant applied a unilateral, erroneous legal interpretation of MCL 333.2253. Defendant's actions are arbitrary, capricious and an overreach. Defendants' regulations are subject to strict scrutiny.
80. Defendant exceeded its authority under MCL 333.2253, acted outside the scope of its authority and therefore governmental immunity under MCL 691.1407 (5) of the Governmental Liability for Negligence Act, 1964 PA 170; MCL 690.1401-MCL 691.1419 and the Governmental Tort Liability Act does not apply. A due process

violation is not subject to immunity.

WHEREFORE Plaintiff respectfully requests that this Honorable Court:

- a. Reverse the decision and order of the Administrative Law Judge; and
- b. Declare a violation of the Administrative Procedures Act; and
- c. Declare MCL 333.2253 unconstitutional, in part; and
- d. Award Just Compensation in the form of monetary damages to Plaintiff for the regulatory takings, including business expenses and lost profits; and
- e. Enter an award of reasonable attorney fees and costs in favor of Plaintiff; and
- f. Grant such other and further relief as the Court deems just and proper.

Dated: May 5, 2021


DAVID M. DELANEY PLC (P43485)
Attorney for Petitioner-Appellant Plaintiff



STATE OF MICHIGAN

GRETCHEN WHITMER
GOVERNOR

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ORLENE HAWKS
DIRECTOR

IN THE MATTER OF:

MOAHR Docket No.: 20-007763

**Moore Murphy Hospitality LLC,
Petitioner**

Agency Case No.:

v

Case Type: DSR-E

**Michigan Department of Health and
Human Services,
Respondent**

**Issued and entered
this 11th day of March 2021
by: Steven Kibit
Administrative Law Judge**

**AMENDED DECISION AND ORDER GRANTING
RESPONDENT'S MOTION FOR SUMMARY DISPOSITION¹**

This matter is before the undersigned Administrative Law Judge pursuant to Section 2253 of Public Act 368 of 1978 (Public Health Code), MCL 333.2253, and Chapter 4 of the Administrative Procedures Act of 1969, as amended, MCL 24.271 *et seq.*, and upon a request for a hearing filed by Petitioner Moore Murphy Hospitality LLC (Petitioner).

With due notice, a telephone prehearing conference was scheduled for 10:00 a.m. on January 14, 2021.

On January 11, 2021, the Michigan Office of Administrative Hearings and Rules (MOAHR) received a Motion for Summary Disposition filed by the Respondent Michigan Department of Health and Human Services (Respondent or Department). As part of that motion, the Department included eight exhibits:

- A. MDHHS Emergency Order dated November 15, 2020
- B. Gaylord Police Department Report dated November 25, 2020
- C. Cease and Desist Order – Health Department of Northwest Michigan
- D. MDHHS Citation dated December 1, 2020
- E. Iron Pig Smokehouse Facebook posts
- F. 9&10 News Article dated December 15, 2020
- G. Michigan Liquor Control Commission Summary Suspension Order

¹ The Decision and Order is being amended to correct an error in the Notice of Appeal language at the end of the decision.

H. ALJ St. John Order dated December 14, 2020

On January 14, 2021, the day of the scheduled prehearing conference, MOAHR received both an appearance filed by an attorney for Petitioner and a request via email or telephone that the prehearing conference be adjourned because the attorney was already in a hearing in another matter. The Department's representative subsequently indicated that she was fine with an adjournment and the undersigned Administrative Law Judge then found good cause to adjourn and reschedule the prehearing conference. With due notice, the telephone prehearing conference was rescheduled for February 2, 2021.

On February 2, 2021, the telephone prehearing conference was held as scheduled. Attorney David Delaney appeared on behalf of Petitioner. Andrea Moua, Assistant Attorney General, appeared on behalf of the Respondent Department.

During the conference, Petitioner expressly waived the requirement set forth in MCL 333.2263 that a hearing be held within 60 days after receipt of Petitioner's petition by the Department. The parties and undersigned Administrative Law Judge also discussed the Department's pending Motion for Summary Disposition, and the Administrative Law Judge set a deadline for any response and reply with respect to that motion. Petitioner's representative further requested oral argument on the motion, which the Department's representative did not object to. The undersigned Administrative Law Judge then granted the request and he and the parties agreed on a time and date for the motion hearing: 9:00 a.m. on March 3, 2021.

On February 18, 2021, MOAHR received Petitioner's Response to the Department's Motion for Summary Disposition. As part of that response, Petitioner included three exhibits²:

1. January 22, 2021 Executive Order
2. Iron Pig Suspension Order – Dissolution – February 12, 2021
3. Dissolution of Cease-and-Desist Order Iron Pig

On February 23, 2021, MOAHR received the Department's Reply to Petitioner's Response to the Department's Motion for Summary Disposition.

On March 3, 2021, the motion hearing was held by telephone as scheduled. The same representatives as before appeared on behalf of the parties.

ISSUE

Did the Department properly cite Petitioner under Sections 2253 and 2262 of the Public Health Code, MCL 333.2253 and MCL 333.2262, for violations of the November 15, 2020 Emergency Order that occurred on November 25, 2020, November 27, 2020,

² Petitioner did not number its exhibits, so the undersigned Administrative Law Judge has assigned numbers to them.

November 28, 2020, November 29, 2020 and November 30, 2020, and fine Petitioner \$5,000.00 for those violations?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

1. On November 15, 2020, the Department issued an order entitled Emergency Order under MCL 333.2253 – Gatherings and Face Mask Order (“Emergency Order”).
2. As part of that Emergency Order, indoor gatherings were generally prohibited at non-residential venues and only specifically permitted at food service establishments for custodial settings, medical facilities, school and university cafeterias, shelters, and soup kitchens.
3. The Emergency Order took effect on November 18, 2020 at 12:01 a.m.
4. Petitioner operates The Iron Pig Smokehouse, a food service establishment.
5. Petitioner allowed patrons to dine inside of The Iron Pig Smokehouse on November 25, 2020, November 27, 2020, November 28, 2020, November 29, 2020, and November 30, 2020.
6. On December 1, 2020, the Department issued Petitioner a Notice of Administrative Citation for Violation of November 15 Emergency Order under MCL 333.2253 and Order to Comply.
7. In that notice of citation, the Department stated that Petitioner had violated the Emergency Order on November 25, 2020, November 27, 2020, November 28, 2020, November 29, 2020 and November 30, 2020, by allowing indoor dining by patrons.
8. The notice of citation also included Petitioner’s appeal rights and ordered Petitioner to (1) immediately cease and desist the unlawful activity and to comply with the Emergency Order, and (2) pay a civil fine of \$5,000 within 30 days of receipt of this citation.
9. On December 21, 2020, MOAHR received the request for hearing filed by Petitioner in this matter.

CONCLUSIONS OF LAW

Section 2253 of the Public Health Code provides, in pertinent part:

- (1) If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code.

MCL 333.2253

Section 2262 of the Public Health Code provides:

- (1) The department may promulgate rules to adopt a schedule of monetary civil penalties, not to exceed \$1,000.00 for each violation or day that a violation continues, which may be assessed for a specified violation of this code or a rule promulgated or an order issued under this code and which the department has the authority and duty to enforce.
- (2) If a department representative believes that a person has violated this code or a rule promulgated or an order issued under this code which the department has the authority and duty to enforce, the representative may issue a citation at that time or not later than 90 days after discovery of the alleged violation. The citation shall be written and shall state with particularity the nature of the violation, including reference to the section, rule, or order alleged to have been violated, the civil penalty established for the violation, if any, and the right to appeal the citation pursuant to section 2263. The citation shall be delivered or sent by registered mail to the alleged violator.

MCL 333.2262

On November 15, 2020, MDHHS issued an order entitled Emergency Order under MCL 333.2253 – Gatherings and Face Mask Order (“Emergency Order”). This order was issued to control the spread of COVID-19 and protect public health by establishing restrictions on gatherings, including by prohibiting gatherings of patrons in food service

establishments. The Emergency Order concluded that the COVID-19 pandemic continues to constitute an epidemic in Michigan.

Section 2(a)(2) of the Emergency Order prohibits indoor gatherings at all non-residential venues not specifically excepted under Section 2(c). Food service establishments are not specifically excepted from the ban on indoor gatherings in Section 2(c).

Section 3(b)(1) of the Emergency Order specifically prohibits indoor gatherings at food service establishments.

Here, as discussed above, Petitioner was issued a notice of citation for violations of the Emergency Order on November 25, 2020, November 27, 2020, November 28, 2020, November 29, 2020, and November 30, 2020. The notice of citation also ordered Petitioner to immediately cease and desist the unlawful activity and imposed a civil fine of \$5,000.

Petitioner then requested an administrative hearing with respect to that citation and the matter is currently before the undersigned Administrative Law Judge on the Department's Motion for Summary Disposition.

The Administrative Procedures Act (APA) allows parties "an opportunity to present oral and written arguments on issues of law and policy". MCL 24.272(3). Pursuant to MCL 24.272(3), a party may pursue a motion for summary disposition to address questions of law that do not involve factual disputes. See *Smith v Lansing Sch Dist*, 428 Mich 248, 256-257; 406 NW2d 825 (1987).

MCR 2.116(3) serves as a guide for summary disposition motions under MCL 24.272(3). See, e.g., *American Community Mutual Ins Co v Commr of Ins*, 195 Mich App 351, 361-363; 491 NW2d 597 (1992). Pursuant to MCR 2.116(c)(10), summary disposition is appropriate when there is no genuine dispute of material fact among parties to an action.

Furthermore, the Michigan Administrative Code allows for summary disposition under Rule 792.10129, which provides, in pertinent part:

- (1) A party may make a motion for summary disposition of all or part of a proceeding. When an administrative law judge does not have final decision authority, he or she may issue a proposal for decision granting summary disposition on all or part of a proceeding if he or she determines that any of the following exists:
 - (a) There is no genuine issue of material fact.
 - (b) There is a failure to state a claim for which relief may be granted.

- (c) There is a lack of jurisdiction or standing.
- (2) If the administrative law judge has final decision authority, he or she may determine the motion for summary decision without first issuing a proposal for decision.
- (3) If the motion for summary disposition is denied, or if the decision on the motion does not dispose of the entire action, then the action shall proceed to hearing.

As such, this Administrative Law Judge has the authority to hear and decide preliminary dispositive motions and the authority to issue a decision for summary disposition.

In its Motion for Summary Disposition, the Department requests that the undersigned Administrative Law Judge issue a decision granting the Department summary disposition and affirming the Department's fine on the basis that there are no genuine issues of material fact in dispute and the Department has met its burden of showing that Petitioner acted in violation of the Emergency Order on the dates of November 25, 2020; November 27, 2020; November 28, 2020; November 29, 2020; and November 30, 2020. Specifically, the Department argued that the evidence presented in another administrative matter involving Petitioner, which the undersigned Administrative Law Judge should take judicial notice of, demonstrates that The Iron Pig Steakhouse was open for in-person dining on the identified dates and in violation of the Emergency Order.

In its response to the Department's motion, Petitioner argues that the dispute in this case is now moot as the Department subsequently opened indoor dining with restrictions, effective February 1, 2021; the food establishment license issued to The Iron Pig Smokehouse as been reinstated; and a cease-and-desist order issued against The Iron Pig Smokehouse by the Health Department of Northwest Michigan has been dissolved. Petitioner also argues that indoor dining is not an imminent threat to the public.

In its reply to Petitioner's response, the Department argues that Petitioner provides no argument or evidence that any factual issues remain in this case and, instead, only makes an incorrect argument that the matter is moot. The Department also argues that the Administrative Citation is not moot because any subsequent modifications of the Department's orders do not affect whether Petitioner violated the order that was in effect at the time or whether Petitioner could be cited for such violations. It further argued that Petitioner's food license status is not determinative in this case.

Having considered the parties arguments in full, it is determined that the Department's Motion for Summary Disposition must be granted.

In presenting its motion for summary disposition, the Department met its initial burden of factually supporting the motion, through both the evidence attached as exhibits alone and evidence from another judicial proceeding³, and demonstrating that Petitioner violated on five separate dates an Emergency Order issued by the Department. Moreover, while the burden then shifted to Petitioner to establish that a genuine issue of fact did exist⁴, Petitioner failed to respond to the factual arguments made in the Department's motion or even suggest that a genuine issue of material fact exists in this case. At best, Petitioner's attorney raised such arguments for the first time during the motion hearing, including a challenge to the factual allegations laid out in the Emergency Order as they apply to Petitioner. However, while Petitioner was free to argue that a genuine issue of material fact exists or that the Emergency Order was invalid as applied in this case, it failed to properly do so in its response to the Motion for Summary Disposition and, instead, Petitioner's attorney only offered unpersuasive allusions to uncited Michigan case law and unidentified factual issues on the record.

Rather than disputing anything in the Department's motion, Petitioner argues that the Department's motion should be denied because the dispute in this matter is now moot. However, that argument must be rejected. "Mootness" precludes the adjudication of a claim where the actual controversy no longer exists, such as where the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. See *Michigan Chiropractic Council v. Commissioner of Office of Financial and Ins. Services*, 475 Mich 363, 716 NW2d 561 (2006). Here, both parties have a legally cognizable interest in the outcome of this matter given that the result of the violations is the imposition of a \$5,000 fine, with Petitioner failing to even suggest how that fine could be moot. Accordingly, even if the part of the citation ordering Petitioner to cease-and-desist indoor dining is now moot as indoor dining has been reopened in Michigan, the fine of \$5,000 for past violations of the Emergency Order is not moot and must be enforced.

As such, based on the evidence and arguments presented, there is no genuine issue of material fact and the Department is entitled to judgment as a matter of law. The Emergency Order was issued and in effect at all relevant times, with nothing to suggest that it was invalid in general or as applied to Petitioner; Petitioner violated the Emergency Order on five separate dates; and the portion of the citation finding that Petitioner violated the Emergency Order and imposing a \$5,000 fine is not moot. Therefore, the Department's Motion for Summary Disposition must be granted.

³ A trial court may take judicial notice of another court's authenticated opinion or judgment because it constitutes "prima facie evidence of all facts recited therein in any other court of this state" pursuant to MCL 600.2106. *In re Sumpter Estate*, 166 Mich App 48, 57 (1988).

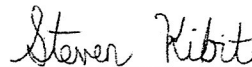
⁴ See *Neubacher v. Globe Furniture Rentals*, 205 Mich App 418, 420 (1994).

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department properly cited Petitioner under Sections 2253 and 2262 of the Public Health Code, MCL 333.2253 and MCL 333.2262, for violations of the November 15, 2020 Emergency Order that occurred on November 25, 2020, November 27, 2020, November 28, 2020, November 29, 2020 and November 30, 2020, and fined Petitioner \$5,000.00 for those violations.

IT IS THEREFORE ORDERED that:

- The Department's Motion for Summary Disposition is **GRANTED**.
- The Department's decision is **AFFIRMED**.



Steven Kibit
Administrative Law Judge

NOTICE OF APPEAL: A party may appeal this Order in circuit court within 60 days of the date of the Order. A copy of the circuit court appeal must be filed with the Michigan Office of Administrative Hearings and Rules (MOAHR).

PROOF OF SERVICE

I certify that I served a copy of the foregoing document upon all parties, to their last-known addresses in the manner specified below,
This 11th day of March 2021.

Shona Bowie

**Michigan Office of Administrative
Hearings and Rules**

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