STATE OF ILLINOIS
IN THE FOURTH JUDICIAL CIRCUIT
CLAY COUNTY

JAMES MAINER, KALI MAINER, and HCL DELUXE TAN, LLC, an Illinois Limited liability company,	)	
Plaintiffs,	)	2020CH9
Vs.	)	~~Case No. 2020-CH-~~
ILLINOIS DEPARTMENT OF PUBLIC HEALTH and DR. NGOZI EZIKE, in her official capacity as Director of the Illinois Department of Public Health,	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF THEIR MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs JAMES MAINER, KALI MAINER and HCL DELUXE TAN, LLC., by and through their attorneys, Thomas G. DeVore, Erik D. Hyam, and DeVore Law Office, LLC., state the following as their Memorandum in Support of a Motion for a Temporary Restraining Order and Preliminary Injunction:

INTRODUCTION

1. On May 15, 2020, the Illinois Department of Public Health (the "Department") published a Notice of Emergency Amendment which went into effect on May 18, 2020 (the "Amendment").[1]

[1] While all references within the Amendment suggest the same was enacted by the Department, it is of note that essentially all public commentary upon the Amendment has been made by the Governor, the Governor's chief counsel, Ann Spillane, and the Director of Illinois State Police, Brendan Kelly. As of the time of this filing, no public

2. The Department cited the Illinois Department of Public Health Act 20 ILCS 2305 ("IDPHA") and the Communicable Disease Report Act 745 ILCS 45 as authority for its issuance of the Amendment.

3. The Amendment institutes sweeping substantive and procedural reform to the protections provided by the Illinois Legislature in the IDPHA.

4. There can be no doubt that the Department's substantive law making exceeds its authority and violates the Illinois Administrative Procedure Act ("IAPA").

5. As set forth more fully herein and in the Verified Complaint filed contemporaneously herewith, if left unchecked, the Department's unlawful usurping of power will result in immediate, irreparable harm to citizens and businesses throughout our State.

6. To be abundantly clear, this case is not about the wisdom or purpose of the substantive new law expressed by the Department.

7. This case is about the Department's far exceeding its rulemaking authority.

8. The substantive law of Illinois, and the wisdom of implementing it, is for the legislature, after proper discourse, and not the whim of the Department, its Director, or the Governor.

9. It bears noting that on the afternoon of May 15, 2020, the Governor, in the Circuit Court of Clay County (Cause No. 2020-CH-6), was denied his request to move a pending matter to Sangamon County.

10. That pending matter is a challenge to his authority to issue executive orders ordering businesses closed.

11. The businesses closed by the Amendment are some of the same businesses closed

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commentary attributable to the Department can be found in any news source.

by the Governor's executive orders.

STANDARD FOR ISSUANCE OF A TEMPORARY RESTRAINING ORDER

12. In considering whether to issue injunctive relief, the court must consider four factors: (1) whether the movant has a right or interest that needs to be protected, (2) whether the movant has an adequate remedy at law, (3) the threat of irreparable harm to the movant if the injunction is not granted, and (4) the reasonable likelihood of success on the merits. *Arcor, Inc. v. Haas*, 363 Ill. App. 3d 396, 399 (1st Dist. 2005).

13. The movant need not show an actual injury before an injunction may issue. The threat of such injury is sufficient. *Gannett Outdoor of Chicago v. Baise,* 163 Ill. App. 3d 717, 722 (1st Dist. 1987).

14. A temporary restraining order ("TRO") is an equitable remedy that is issued when necessary to preserve the status quo until the court has an opportunity to rule on a motion for preliminary injunction after an evidentiary hearing.

15. "Status quo" is defined as the last actual, peaceable, uncontested status preceding the controversy. *NW Steel & Wire Co. v. Indus. Comm'n*, 254 Ill. App. 3d 472, 476 (1st Dist. 1993).

16. Plaintiffs seek to preserve the status quo of the Illinois Department of Public Health Act and the IAPA prior to the controversy at issue here, i.e. the Department's unlawful usurped the power reserved for the legislature by exceeding its rulemaking authority under, and in violation of, the IAPA.

I. PLAINTIFFS' LIKELIHOOD OF SUCCESS ON THE MERITS

17. To show a likelihood of success on the merits, a party only needs to raise "a fair question about the existence of his right and that the court should preserve the status quo until the

case can be decided on the merits. *In re Estate of Wilson*, 373 Ill. App. 3d 1066, 1075 (1st Dist. 2007); *see also Arpac Corp. v. Murray*, 226 Ill. App. 3d 65, 72 (1st Dist. 1992).

18. As set forth below, Plaintiffs' Verified Complaint raises more than fair questions about the existence of the rights of Plaintiffs, the limitations on the Department's authority, the substantive nature of the Amendment, the Department's violations of the IAPA, and the resulting nullity of the Amendment where the Department has exceeded its authority.

19. "The power to make the laws is a sovereign power vested in the legislature," and this power cannot be delegated to an administrative body. *People v. Tibbitts*, 56 Ill.2d 56, 58 (1973).

20. The Department is an administrative body created by legislative enactment for the purposes of supervising the interests of the health and lives of the people of this State as outlined in the Illinois Department of Public Health Act.

21. The Department is granted the authority to "adopt, promulgate, repeal and amend rules and regulations…" (See *20 ILCS 2305/2(a)*.)

22. Nothing within the IAPA or the IDPHA provides the Department authority to adopt, promulgate, repeal and amend statutes enacted by the Legislature.

23. Every state agency, unless otherwise provided by statute, must adhere to the confines of the IAPA in adopting, promulgating, repealing and amending its rules and regulations. (See *5 ILCS 100/1-5*.)

24. Therefore, an agency's rulemaking authority must be found in the statute authorizing it or in the IAPA.

25. An administrative agency cannot, by its rules or regulations, extend the substantive provisions of a legislative enactment, nor can it create substantive rights thereby. *People v. Kueper*,

111 Ill. App. 2d 42, 47 (5th Dist. 1969).

26. Although the Department has not cited the IAPA in connection with its authority to enact the Amendment, to be clear, the IAPA does not confer any such authority.

27. Section 5-10 of the IAPA allows for the making of rules of procedure for hearings; Section 5-15 allows for the making of rules regarding organization, information requests and rulemaking; and Section 10-5 allows for the making of rules for the handling of contested cases.

28. None of these provisions, nor any other provision in the IAPA, expressly authorizes any agency to promulgate substantive rules relating to the implementation or enforcement of particular statutes within their jurisdiction nor altering existing statutes.

29. Rather, the IAPA merely provides the procedure for making rules which are otherwise authorized by law.

30. The Amendment at issue is clearly substantive in that it seeks to deny substantive and procedural protections specifically provided in statute.

31. In 2004, former President Barack Obama, then Illinois State Senator, sponsored certain changes to the IDPHA, including the right to notice and counsel for a person or business that is sought to be closed, and the imposition of a strict scrutiny standard of review by the Courts.

32. The then Senator and his colleagues in the 93rd General Assembly clearly intended to provide our citizens with significant protections from overreach by a Chief Executive, and his administrative minions, acting in times of a public health emergency, similar to where the State finds itself today.

33. With the then Senator's requested changes, the Department could seek closure of a business in three ways: (1) obtain the consent of the owner; (2) obtain a Court order prior to closure; or (3) if immediate action is required, issue an immediate closure and obtain the consent

of the owner or petition for a court order within 48 hours. *20 ILCS 2305/2(c)*.

34. Prior to the emergency Amendment at issue here, any citizen or business whose premises the Department sought to close was guaranteed procedural due process by the express intention of the legislature. (See 20 ILCS 2305/2(c).)

35. Under the Illinois Department of Public Health Act, a business or citizen was entitled to a hearing before a Court, not just an administrative hearing, where the Department is required to provide facts, specific to that location, in order to obtain a closure of the premises.

36. The Department, under Section 2(c) of the IDPHA is required to prove, by clear and convincing evidence, that:

> "…the public's health and welfare are significantly endangered…by a place where there is a significant amount of activity likely to spread a dangerously contagious or infectious disease." *20 ILCS 2305/2(c)*

37. Further, the Department must prove, again by clear and convincing evidence, that:

> "…**all** other reasonable means of correcting the problem have been exhausted and **no less restrictive alternative exists**." *20 ILCS 2305/2(c)* (**Emphasis added.**)

38. For almost a century, the same check of authority, on rules and regulations of the Department of Public Health, has existed by Illinois Supreme Court precedent. See *People ex. rel. Barmore v. Robertson*, 302 Ill. 422 (1922).

39. The Illinois Supreme Court made it abundantly clear when it ruled "[h]ealth authorities cannot promulgate and enforce rules which merely have a tendency to prevent the spread of contagious and infection diseases…" *Id.* at 431. (Emphasis Added.)

40. The Court went on "authorities cannot interfere with the liberties of a citizen until the emergency actually exists." *Id.*

41. This precedent is squarely in line with the safeguards for liberties enshrined in the

IDPHA by the Legislature.

42. Under the executive fiat of the Governor, thinly veiled as an administrative rule:

a. The Department has arbitrarily determined that the premises of certain business types, not specific business locations, shall be closed for an unknown period.

b. The Department is required to make no findings nor provide even a scintilla of evidence that the business or location constitutes a significant health risk.

c. Citizens are stripped of their right to have a Court of this State review the facts and evidence put forth by the Department.

43. Generally, the emergency rulemaking provision of the IAPA provides that an emergency rule must expire no more than 150 days after it takes effect and no emergency rule may be issued more than one time within any 24-month period. (*5 ILCS 100/5-45(c)*)

44. That said, however, any emergency rule of the Department issued pursuant to authority under subsections (a) through (k) of the IDPHA, like that at issue here, are exempt from such limitations. (*5 ILCS 100/5-45(c)(iii).*)

45. Effectively, if the Department's authority to promulgate the Amendment is held valid, the Department may, reissue the emergency Amendment over and over and over, without limitation or check.

46. Allowing such an unchecked authority to divest citizens of protections specifically delineated in the IDPHA cannot be an authority conferred upon the Department.

47. Not only has the Department stripped the citizens of the protections guaranteed them by the Legislature, the Department has barred the Court from exercising any check upon executive authority wielded by the Department, its Director, agents and employees.

48. Citizens and businesses have a protectable interest in being free from invalid

lawmaking generally, and certainly from that which blatantly denies them of procedural and substantive protections.

49. The Department has rewritten the law to affirmatively state that a mere possibility of contamination by COVID-19 is sufficient for closure.

50. This pronouncement of new law is not only inconsistent with black letter law in Illinois but presumes, on nothing more than a hunch, that certain types of businesses constitute a public health risk.

II. PROTECTABLE RIGHTS AND INTERESTS ARE AT STAKE

51. It should go without saying that Plaintiffs have protectable rights and interests at stake.

52. As set forth more fully above, Plaintiffs have a protectable right and interest in being free from invalid lawmaking that blatantly overreaches the authority of the Department.

53. The Department has unilaterally determined that certain businesses, like that of Plaintiffs, automatically, without any oversight, constitute a threat to public health.

III. IRREPARABLE HARM EXISTS FOR WHICH THERE IS NO ADEQUATE REMEDY AT LAW

54. Once a protectable interest has been established, **"irreparable injury [or harm] is presumed** if that interest is not protected." *Guns Save Life, Inc. v. Raoul*, 2019 IL App (4th) 190334, ¶ 51 (*quoting Cameron v. Bartels*, 214 Ill. App. 3d 69, 73 (4th Dist. 1991)) (emphasis added).

55. Moreover, for harm that is of a continuous nature, and involves a right for which monetary compensation would be inadequate, like a deprivation of liberty, courts have considered it to be *per se* irreparable harm. *C.J. v. Dept. of Human Services*, 331 Ill. App. 3d 871, 891-92 (1st Dist. 2002).

56. Here, the harm is of a continuing nature so long as the Amendment is left unchecked and capable of being enforced by the Department or any other law enforcement agency which may desire.

57. Moreover, Plaintiffs face an unnecessary Sophie's Choice: acquiesce to the closure of their business or face criminal penalties for non-compliance.

WHEREFORE, Plaintiffs respectfully request that this Court enjoin the Commission from invoking the Amendments in favor of or against any person or entity until this Court has the opportunity to fully and finally declare the Amendment a nullity.

Respectfully submitted,

JAMES MAINER, KALIE MAINER and
HCL DELUXE TAN, LLC., Plaintiffs.

By: /s/ Thomas G. DeVore
One of Their Attorneys

Thomas G. DeVore
IL Reg. No. 6305737
Erik D. Hyam
IL Reg. No. 6311090
DeVore Law Office, LLC.
118 North Second Street
Greenville, Illinois 62246
Tel. (618) 664-9439
Fax (618) 664-9486
tom@silverlakelaw.com
erik@silverlakelaw.com