JASON P. SACCUZZO (Bar No. 221837)
jsaccuzzo@vivolilaw.com
VIVOLI SACCUZZO, LLP
3104 Fourth Avenue
San Diego, California 92103
(619) 744-9992 (Tel)
(619) 744-9994 (Fax)

Attorney for Plaintiffs,
MIDWAY VENTURE LLC *dba* PACERS SHOWGIRLS/PACERS SHOWGIRLS INTERNATIONAL and PETER BALOV

STEVE HOFFMAN (Bar No. 237466)
shoffmanlaw@gmail.com
LAW OFFICE OF STEVE HOFFMAN
180 Broadway, Suite 1810
San Diego, CA 92101
619-677-3015 (Tel)
888-320-9384 (Fax)

Attorney for Plaintiffs,
F-12 ENTERTAINMENT GROUP INC.
dba CHEETAHS and RICH BUONANTONY

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
10/30/2020 at 05:34:00 PM
Clerk of the Superior Court
By Gen Dieu,Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

MIDWAY VENTURE LLC *dba* PACERS SHOWGIRLS/PACERS SHOWGIRLS INTERNATIONAL, a California limited liability company; PETER BALOV, an individual; F-12 ENTERTAINMENT GROUP INC. *dba* CHEETAHS, a Nevada corporation, and RICH BUONANTONY, an individual.

Plaintiffs/Petitioners,

vs.

COUNTY OF SAN DIEGO, a governmental agency; WILMA J. WOOTEN, in her official capacity as Public Health Officer, County of San Diego; GOVERNOR GAVIN NEWSOM, in his official capacity as the Governor of the State of California; the CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, a department of the State of California; and DOES 1 through 100, inclusive,

Case No.: 37-2020-00038194-CU-CR-CTL
[Assigned for All Purposes to Hon. Joel R. Wohlfeil, Dept. C-73]

PLAINTIFFS' *EX PARTE* APPLICATION FOR A TRO PENDING OSC RE: ISSUANCE OF A PRELIMINARY INJUNCTION

[Filed Concurrently with Memorandum of Points & Authorities in Support Thereof; Declaration of Jason P. Saccuzzo in Support Thereof; Declaration of Trevor Shamshoian in Support Thereof; Declaration of Rich Buonantony in Support Thereof; Appendix of Exhibits in Support Thereof; and [Proposed] Order Thereon]

Date: November 3, 2020
Time: 8:30 a.m.
Complaint Filed: 10/21/2020

Defendants/Respondents.)
)
____________________________________)

EX PARTE APPLICATION

Plaintiffs Midway Venture LLC *dba* Pacers Showgirls/Pacers Showgirls International, Peter Balov, F-12 Entertainment Group Inc. *dba* Cheetahs, and Rich Buonantony (collectively, Plaintiffs") hereby respectfully apply, *ex parte*, for a temporary restraining order ("TRO") pending an order to show cause ("OSC") re the issuance of a preliminary injunction ("PI").

This application is made on the grounds that Defendants County of San Diego, Wilma J. Wooten, Governor Gavin Newsom, and California Department of Public Health (collectively "Defendants") have, together, effectuated for all practical purposes complete ban on live performances by adult entertainers in violation of Plaintiffs' constitutionally protected civil rights, including the right to freedom of speech, equal protection, and due process. To briefly summarize, Defendants issued cease and desist orders, prohibiting all live adult entertainment in Plaintiffs' facilities, while other businesses were allowed to provide entertainment and engage in activities that contradict the CDC's and Defendants' cited COVID-19 orders, rules, regulations, and/or guidelines. The prohibition on ***all*** live adult entertainment, with no exceptions whatsoever, violates Plaintiffs' rights to free speech and expression. Additionally, the selective enforcement of the orders through cease and desist orders violates Plaintiffs' rights to equal protection, as well as Plaintiffs' due process rights. As such, Plaintiffs have suffered irreparable injury, have a probability of prevailing on their claims, and Defendants will suffer little to no harm compared to Plaintiffs. In fact, should the ban on all live adult entertainment be left in place, the ban will cause significant harm to the community as adult entertainers are forced to perform in unsafe and unregulated venues.

None of the Defendants have made general appearances as of the date of this ex parte application. Counsel for Plaintiffs, however, will provide notice of this application to all Defendants on October 30, 2020, via personal service to their respective agents for service, along

with the Complaint filed in this action. All counsel is to appear via Courtcall on the date of the hearing.

This application is based upon this *ex parte* application, the accompanying memorandum of points and authorities, the Declaration of Jason P. Saccuzzo, the Declaration of Trever Shamshoian, the Declaration of Rich Buonantony, the Appendix of Exhibits and exhibits filed herewith, on the Proposed Order submitted herewith, on the Complaint on file herein, and upon any further evidence and argument the Court considers at the hearing hereon.

Dated: October 30, 2020

VIVOLI SACCUZZO, LLP

By:____________________________________

JASON P. SACCUZZO
Attorneys for Plaintiffs,
MIDWAY VENTURE LLC *dba* PACERS SHOWGIRLS/PACERS SHOWGIRLS INTERNATIONAL, and PETER BALOV

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs Midway Venture LLC *dba* Pacers Showgirls/Pacers Showgirls International ("Pacers"), Peter Balov, F-12 Entertainment Group Inc. *dba* Cheetahs ("Cheetahs"), and Rich Buonantony (collectively, Plaintiffs") respectfully submit the following memorandum of points and authorities in support of their application for a Temporary Restraining Order ("TRO") pending the hearing of an Order to Show Cause ("OSC") why Defendants County of San Diego (the "County"), Wilma J. Wooten ("Dr. Wooten"), Governor Gavin Newsom (the "Governor"), and California Department of Public Health ("CDPH") (collectively "Defendants"), and each of them, should not be subject to a preliminary injunction ("PI") pending trial:

1. INTRODUCTION

The history of civil liberties in America is one of struggle. This history and the safeguards afforded by the struggle have, as Justice Felix Frankfurter observed, been forged in controversies involving not very nice people. It is perhaps fitting that at this dark point in history that the operators of two so-called "strip clubs"[1] challenge the asserted right of Defendants to wield what they will undoubtedly suggest are virtually unbounded "emergency powers" because of the COVID-19 pandemic. But the emergency powers afforded to Defendants are not unbounded, nor can they exist indefinitely without at least a modicum of oversight by the judicial branch of government. It is time for courts to intervene decisively in this controversy.

At issue here is the right of Plaintiffs to allow for live adult entertainment at their venues. Such live entertainment is protected by the First Amendment as expressive conduct. Yet, without regard to the nature of the live performances and the precautions taken by Plaintiffs to prevent the transmission of COVID-19, the County, under the stated authority of the Governor and CDPH's orders, has proclaimed a ban on ***all*** live entertainment in the County of San Diego, which includes

[1] This term is not only pejorative but extremely inaccurate. The correct term is "adult entertainment establishment" as defined by San Diego Municipal Code section 33.3602. However, it is often the case that state actors, including the City and County, will use the pejorative term "strip club" as a means of diminishing the stature of plaintiff adult entertainment establishments when litigation arises.

live adult entertainment in any form. The County, in particular, has asserted there are ***no exceptions*** to its orders that would allow Plaintiffs to permit live adult entertainment, and in an act that amounts to a prior restraint, the County has issued cease and desist orders to Plaintiffs threatening criminal action if they allow for live adult entertainment at their venues.

By this *ex parte* application, Plaintiffs seek a TRO from this Court restraining and preventing Defendants from imposing a complete ban on live adult entertainment. Significantly, however, Plaintiffs have no intention of allowing live adult entertainment that involves close or personal contract. Rather, what Plaintiffs seek is to be allowed to proceed with live adult entertainment in a responsible and socially distanced manner that poses no reasonable risk of COVID-19 transmission. Indeed, Adult entertainers have long been subject to social distancing rules in San Diego and long before COVID-19 they were subject to the "six-foot" rule as it relates to performances. Plaintiffs have proposed to more than double that distance with adult performers performing on stages fifteen (15) feet from patrons, while wearing masks. Further, Plaintiffs seek no more than to allow these socially distanced adult performances in their venues that are currently only allowed to operate as restaurants at 25% capacity.

Again, however, Defendants have stated there are no exceptions that would allow Plaintiffs to permit socially distanced adult performances. Defendants have further issued cease and desist orders to Plaintiffs threatening criminal action should Plaintiffs allow adult performances at their venues. Defendants' cease and desist orders are an unconstitutional prior restraint on Plaintiffs' right to free speech and expression, and equal protection rights, because (1) Plaintiffs have a constitutional right to free expressive association and adult performances; (2) Plaintiffs have been denied equal protection of the law by Defendants' arbitrary and selective enforcement of its ban on live entertainment in restaurants; (3) Plaintiffs' rights were deprived without any due process; (4) the infringement upon free speech constitutes irreparable harm in addition to Plaintiffs' mounting financial losses; (5) the interim harm to Plaintiffs greatly outweighs any harm to Defendants; and (6) there is a strong probability that Defendants' total ban on all live adult performances will be deemed unconstitutional entitling Plaintiffs to the requested injunctive relief prohibiting Defendants from enforcing the ban.

Therefore, for the reasons stated herein, the Court should grant Plaintiffs' *ex parte* application for a TRO pending an OSC regarding the issuance of a PI.

2. FACTUAL BACKGROUND

Plaintiffs have operated within the City of San Diego, County of San Diego, as adult entertainment establishments within the meaning of San Diego Municipal Code (SDMC) section 33.3601 et seq. under the Nude Entertainment Business Permits issued by the Chief of the San Diego Police Department.

Adult entertainment establishments within the City of San Diego, such as Pacers and Cheetahs, that provide live adult entertainment are subject to a number of social distancing requirements that long pre-date the various federal, state, and local COVID-19 recommendations, restrictions and orders that have been issued during the pandemic. Among other rules and requirements, adult entertainers must stay six (6) feet or further from audience members while performing nude entertainment. (SDMC § 33.3610(a).) Adult entertainers are also prohibited from touching any member of the audience. (SDMC § 33.3610(b).) The failure of an adult entertainment establishment to enforce these restrictions can have significant and dire consequences to the operator of the adult entertainment establishment. (See *Coe v. City of San Diego* (2016) 3 Cal.App.5th 772, 784-785.) By the same token, adult entertainers must be licensed in the City and County of San Diego, and the failure of an adult entertainer to follow the requirements of the SDMC may result in the revocation of his or her license. (SDMC § 33.3604.) Accordingly, ***well before*** the Covid-19 pandemic adult entertainment establishments and the adult entertainers within the City and County of San Diego were already well accustomed to social distancing.

Consistent with the orders of the Governor, Plaintiffs dutifully complied with the "stay-at-home" orders despite the significant infringement upon their First Amendment rights and the significant economic consequences to them and their performers. (Shamshoian ¶ at 3; Buonantony ¶ 3.) During this period, Plaintiffs patiently waited for guidance from state and local officials regarding when they could reopen for live adult performances.

On or about May 7, 2020, the Governor announced that he would begin modifying the stay at home order to begin reopening California under what was described at the time as the

"Resilience Roadmap," which set forth a four tiered system for reopening California. Dr. Wooten, acting as the Health Officer for the County, would subsequently adopt and modify the State's restrictions and reopening plan through an ever changing series of health orders and regulations.(https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community_epidemiology/dc/2019-nCoV/health-order.html.) (See also **Ex. No. 1** to Appendix of Exhibits ("AOE"), Order of the Health Officer and Emergency Regulations Effective October 10, 2020.)

As of May 22, 2020, Dr. Wooten, acting as the Public Health Officer for the County had issued a revised order concerning the reopening of "restaurants and bars," among the other businesses, venues, and facilities that were allowed to reopen under modified conditions. Because Plaintiffs had onsite restaurants connected to their adult entertainment venues, Plaintiffs reached out to Dr. Wooten to obtain clarification as to how the County's orders would apply to adult entertainment within the guidelines for reopening restaurants and bars. The "four-tier system" for reopening California launched by the Governor did not address adult entertainment, nor did any of Dr. Wooten's published orders. In circular fashion, however, Dr. Wooten responded to Plaintiffs' inquiry by instructing Plaintiffs to follow "the guidance from the Governor's Office and the California Department of Public Health," which as noted above provided no such guidance to adult entertainment establishments. This placed Plaintiffs in the difficult position of having to devise their own reopening plans, which ultimately were based upon the reopening plans applicable to restaurants and churches, with the added requirements of SDMC as it relates to adult entertainment. (Saccuzzo Decl., ¶ 4.)

On June 12, 2020, Dr. Wooten was specifically asked during a press conference if live music would be allowed in restaurants and bars under the County's orders. Dr. Wooten explained that it was not because it "encourages people to get up and start dancing," and Dr. Wooten did not want people to engage in such activity.[2] Shortly after the press-conference, Dr. Wooten issued a revised order specifying that "[d]ance floors shall be closed and performances such as musical or dance acts that encourage large gatherings shall be discontinued." (See **Ex. No. 2** to AOE, Order

[2] https://www.facebook.com/watch/?v=1108203749556777

of Health Officer and Emergency Regulation Effective June 16, 2020, at ¶ 13(g).) The generalized prohibition on dancing and music at restaurants, however, did not address adult entertainment as contemplated by the SDMC.

Like many businesses and other venues, Plaintiffs sought to make sense of the restrictions and closure orders, and to this end Pacers initially proposed a plan to reopen with only outside adult performances. Consistent with the "Safe Reopening Plan" being enforced at the time, Pacers applied for permission to operate outdoors, and to that end it submitted a detailed plan to the County and the San Diego Police Department ("SDPD"), Permits & Licensing Unit seeking permission to operate outside. (See **Ex. No. 3** to AOE, Pacers' Proposal for Outside Operation.) Pacers, however, was told by the SDPD that it could ***not operate outside***, and fearing administrative or criminal action Pacers decided not to reopen outside, despite having already rented tables and equipment for outside operations. (Shamshoian ¶ at 4.) Other adult entertainment establishments, including Cheetahs, learned of the restriction on outdoor performances, and decided not to submit their own plans for reopening outside for fearing similar rejection. (Buonantony ¶ 4.) At the time of the rejection of Pacers' plan for outdoor adult performances, the County was allowing other businesses and venues to operate outside, including but not limited to churches and other venues that draw large groups of people. (Shamshoian ¶ at 4.)

On or about August 28, 2020, the Governor announced California's new reopening plan called the "The Blueprint for a Safer Economy" (hereinafter the "Blueprint").[3] The Blueprint, which became effective August 31, 2020, set forth four color coded tiers: yellow, orange, red and purple. Yellow indicates minimal Covid-19 spread and allows for nearly all businesses to reopen indoor operations. Orange means that some in-door business operations can open with modifications. Red means that some non-essential indoor business operations are closed. Purple means there is widespread Covid-19 transmission in the county and nearly all businesses have to keep indoor operations closed or severely limited. The Blueprint also provides a list of covered activities and businesses. Again, however, adult entertainment and adult entertainment

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[3] https://covid19.ca.gov/safer-economy

establishments are not listed on the Blueprint and to date no specific guidance has been given to adult entertainers or to adult entertainment establishments regarding reopening. (See **Ex. No. 4** to AOE, Blueprint for a Safer Economy Activity and Business Tiers.)

The express restrictions on open dance floors and musical or dance acts remained in Dr. Wooten's order until August 22, 2020. (See **Ex. 5** to AOE, Order of Health Officer and Emergency Regulation Effective August 22, 2020, at ¶ 14(k).) Notably, however, these express restrictions were removed shortly after the Blueprint was published and after the County was designated as falling into "Tier 2," *i.e.*, the "Red Category." Upon entering "Tier 2," many businesses were expressly allowed to reopen with restrictions for inside operations. (See **Ex. 6** to AOE, Order of Health Officer and Emergency Regulation Effective September 1, 2020.) Again, however, no guidance was provided for adult entertainment establishments.

Dr. Wooten, in her official capacity, has been interpreting the orders of the Governor and CDPH, which gives her substantial power and nearly unchecked discretion given the vagueness of the various orders of the Governor and CDPH. Exercising this authority, Dr. Wooten's orders have undergone endless and bewildering changes, yet none of them even attempt to address adult entertainment. With no guidance as to how adult entertainment establishments fit into the "Tier System" or Dr. Wooten's various orders, Plaintiffs were left guessing on how to comply with the various orders in reopening. However, rather than simply reopen and potentially violate one or more of the vague orders, Pacers attempted to work with the officials in charge of the COVID-19 response team by submitting a proposed plan for reopening. This plan was submitted to Dr. Joel Day, who is leading the City of San Diego Covid-19 response and recovery. Under Pacers' plan, as it pertained specifically to adult entertainment, Pacers proposed the following additional restrictions above and beyond those already in place under the SDMC:

- Stages to be located on two (2) foot platforms, fifteen (15) feet from any tables.
- Stages to be roped off with signs strictly advising patrons not to pass within the fifteen foot buffer.
- Adult entertainers to perform one artist at a time per stage.
- All stage equipment to be sanitized after a performance.

- All performers to wear mask coverings while performing.
- The announcer and disc jockey ("DJ") to be located fifteen (15) feet from any tables, roped off and designated for one person at a time.
- Audio stage to be sanitized and cleaned after every daily use.
- The announcer and DJ to wear a mask covering.
- The announcer and DJ to issue regular reminders to patrons that they are not to approach performers and they are to remain seated at their tables.

(Shamshoian ¶ at 5.)

After submitting its plan to Dr. Day on or about August 20, 2020, and being advised by Dr. Day that Pacers plan was also provided to County, Pacers received no input or objection from the City or County, and based upon subsequent oral discussions with County representatives, Pacers believed it had the City and County's express, if not tacit approval, of its plan to allow adult entertainment. (Shamshoian ¶ at 6; see also **Ex. 7** to AOE, Pacers' Reopening Plan as Outlined to Dr. Day on August 20, 2020.) As it is noteworthy, Pacers' plan for reopening was subsequently adopted by many other adult entertainment establishments in the city and county of San Diego. (Shamshoian ¶ at 6.)

After San Diego County officially moved into "Tier 2" and following the removal of the express restriction on dancing from Dr. Wooten's orders, Pacers reopened for business inside on or about September 3, 2020, under the plan it previously outlined to the City and County. After reopening Pacers received no complaints from the City or County, and more importantly no Covid-19 cases can be tracked to Pacers' reopening. As Pacers has done throughout its long tenure, it served as a model for other adult entertainment establishments and provided many adult performers – who had been unable to perform for nearly six months – a venue to perform. (Shamshoian ¶ at 7.)

On or about September 18, 2020, Cheetahs reopened, complying with all of the requirements of Dr. Wooten's September 1, 2020 Health Order, and, like Pacers, no Covid-19 cases can be tracked to Cheetahs' reopening. (Buonantony ¶ 6.)

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On October 11, 2020, at approximately 10:00 p.m., as Pacers began to close as required by the restrictions applicable to restaurants, a group of young men demanded to enter Pacers. They were told, however, that Pacers was closing as required by the COVID-19 orders and no one was being admitted. These men were unhappy with being told that they could not enter Pacers and they took it upon themselves to attempt to bypass security in order to enter Pacers. After being thwarted in their efforts to enter Pacers, the men began to congregate outside of the parking lot of Pacers and nearby a vehicle owned by a member of the Padres professional baseball team. While the events of what transpired next remain unclear, words appear to have been exchanged between the group of men and the Padres ballplayer, which escalated to a violent encounter where the Padres ballplayer suffered a stab wound to his back. Pacers, as it has always done when contacted by the authorities, subsequently fully cooperated with the investigation of the San Diego Police Department. Nonetheless, this incident resulted in much negative media attention toward Pacers, which included false stories on social media regarding the operation of Pacers. Among other false stories on social media, it was reported that Pacers was allowing adult entertainers to perform so-called "lap dances." This was simply not true. Ironically, this incident was caused in no little part by the COVID-19 curfew restrictions as imposed by Dr. Wooten, which have resulted in much frustration by members of the public concerning their loss of liberty and freedom, and in this instance the ability to view live adult entertainment. (Shamshoian ¶ at 8.)

Apparently relying upon the false reports referenced above, on October 14, 2020, Dr. Wooten, acting in her official capacity, issued a cease and desist order to Pacers prohibiting Pacers from having ***any*** form of live entertainment. Dr. Wooten expressly threatened that any violation of the cease and desist order could result in criminal prosecution and monetary fines for each violation. And, while Dr. Wooten acknowledged Pacers' right to remain open solely as a restaurant, Dr. Wooten warned that if there were any violations of her order prohibiting live adult entertainment, she would issue an order closing Pacers entirely. (See **Ex. 8** to AOE, October 14, 2020, Cease and Desist Order to Pacers.) Significantly, however, Dr. Wooten performed no investigation into the truth of the reports nor did Dr. Wooten ever contact Pacers to discuss its operations before issuing the cease and desist order. (Shamshoian ¶ at 9.)

On October 15, 2020, Pacers wrote to Dr. Wooten seeking clarification of the basis of her order prohibiting Pacers from continuing with live adult entertainment under the guidelines outlined above. Pacers further pointed out that her cease and desist order was based upon false reports regarding the activities of Pacers, and that Pacers had apparently been singled out because of the unfortunate event that occurred on October 11th. Pacers made clear its desire to work with Dr. Wooten and the County to arrive at clear guidance from the County that would allow for the continuation of live adult performances as protected by the First Amendment. Pacers further reiterated its desire to provide a safe environment for live adult entertainment. (See **Ex. 9** to AOE, Jason P. Saccuzzo's October 15, 2020, Letter to Dr. Wooten.) Dr. Wooten, however, provided no clarification of her cease and desist order, nor have any exceptions been provided that would allow adult performances to occur a Pacers' venue. (Saccuzzo Decl., at ¶ 11.)

On October 16, 2020, Pacers received an unannounced visit from Brandon Posada of the County of San Diego to verify that Pacers was in compliance with Dr. Wooten's cease and desist order. Consistent with Dr. Wooten's order Pacers had ceased all adult entertainment at its venue, which was verified by Mr. Posada during his inspection on October 16, 2020. Mr. Posada, nonetheless, advised that the County intended to closely monitor Pacers' compliance with Dr. Wooten's cease and desist order, and it was made impliedly clear that any violation would result in swift punishment. (Saccuzzo Decl., at ¶ 12.)

Mr. Posada would subsequently conduct another unannounced visit to Pacers on October 27, 2020. Again, Mr. Posada confirmed that Pacers had stopped all live entertainment. Nonetheless, Pacers was instructed that even paying a game of "trivia" at Pacers would be in violation of the County's orders. (See Saccuzzo Decl., at ¶ 12; see also **Ex. No. 10** to AOE, Brandon Posada's October 27, 2020, Email.)

Again, Pacers halted all adult performances at its venue out of fear of criminal prosecution. (Shamshoian ¶ at 10.)

On October 20, 2020, Rich Buonantony was served with a cease and desist order signed by Dr. Wooten, threatening criminal charges and closure of the business for having live entertainment. (See **Ex. No. 11** to AOE, October 20, 2020, Cease and Desist Order to Cheetahs.)

1 Despite prohibiting Pacers and Cheetahs from allowing live adult oriented performances
2 under the restrictions outlined above, the County of San Diego has allowed, implicitly or tacitly,
3 restaurants and other venues to have live music at locations such as the Inn at Rancho Bernardo,
4 McP's Irish Pub in Coronado, the Del Mar Highlands Town Center, and Fluxx Nightclub to name
5 just a few. (Shamshoian ¶ at 11.) There is also evidence that the County has also allowed stand-
6 up comedy at venues such as the Comedy Palace and other comedy venues, as apparently these
7 venues have the ear of council member Chris Cate. (*Ibid*.) By the same token, under the County's
8 reopening plan concerning "Tier 2," the following are allowed to remain open despite the
9 possibility of far more contact among members of the public than what is even conceivably
10 possible under Plaintiffs' reopening plan for adult entertainment:

11 • Places of worship. 25% capacity or 100 people, whichever is lower.
12 • Movie theaters. 25% capacity or 100 people, whichever is lower.
13 • Museums. 25% capacity.
14 • Gyms and fitness centers. 10% capacity.
15 • Dance studios. 10% capacity.
16 • Yoga studios. 10% capacity.
17 • Zoos and aquariums. 25% capacity.
18 • Hair salons and barbershops
19 • Nail salons
20 • Body waxing
21 • Tattoo parlors
22 • Piercing
23 • Skin care and cosmetology

24 In short, Plaintiffs have been prohibited from providing any live adult entertainment, and
25 have suffered and continue to suffer substantial financial and non-financial losses as set forth more
26 fully below.
27 / / / /
28 / / / /

3. AUTHORITY FOR APPLICATION

Plaintiffs are entitled to a TRO on an *ex parte* basis and even without notice to the defendants, pursuant to Code of Civil Procedure section 527, subdivision (c), so long as the following requirements are satisfied:

> (1) It appears from facts shown by affidavit or by the verified complaint that great or irreparable injury will result to the applicant before the matter can be heard on notice.
>
> (2) The applicant or the applicant's attorney certifies one of the following to the court under oath:
>
> > (A) That within a reasonable time prior to the application the applicant informed the opposing party or the opposing party's attorney at what time and where the application would be made.
> > (B) That the applicant in good faith attempted but was unable to inform the opposing party and the opposing party's attorney, specifying the efforts made to contact them.
> > (C) That for reasons specified the applicant should not be required to so inform the opposing party or the opposing party's attorney. (Code Civ. Proc., § 527, subd. (c)(1)-(2).)

Here, the evidence submitted in support of this application meets all of the foregoing requirements. Absent immediate injunctive relief, Plaintiffs stand to suffer severe and irreparable harm due to Defendants' infringement of their constitutional rights to free speech, equal protection, and due process in addition to substantial financial losses. As explained below, the "balancing of equities" required of this Court in evaluating this request for injunctive relief weighs overwhelmingly in Plaintiffs' favor.

The TRO should issue without notice to the Defendants subject to a hearing, within 15 days, of an OSC why a PI should not be issued against the Defendants, and each of them. (See Code of Civ. Proc. § 572(d).) Defendants will have ample time to explain their arbitrary standards for selectively enforcing COVID-19 restrictions that infringe upon Plaintiffs' constitutional rights while minimizing additional harm to Plaintiffs.

4. LEGAL ARGUMENT

While the court has broad discretion in ruling on an application for a TRO or PI, such discretion must be exercised in light of two related factors: (1) "the interim harm that the plaintiff

would be likely to sustain if the injunction were denied as compared to the harm the defendant would be likely to suffer if the preliminary injunction were issued," (*Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 749), and (2) whether there is "some possibility" that plaintiff will ultimately prevail on the merits of the claim. (*Jamison v. Department of Transportation* (2016) 4 Cal.App.5th 356, 362 ("[a] trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim.") (internal quotations omitted).) The two factors are interrelated, and the Court must balance them in deciding whether to issue injunctive relief. (*Shoemaker v. County of Los Angeles* (1995) 37 Cal. App. 4th 618, 633.) The greater plaintiff's showing on one, the less must be shown on the other to support an injunction. (*Butt v. State of Calif.* (1992) 4 Cal.4th 668, 678; *Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc.* (2001) 91 Cal.App.4th 678, 696.)

"The ultimate goal of any test to be used in deciding whether [injunctive relief] should issue is to minimize the harm which an erroneous interim decision may cause." (*American Credit*, *supra*, 213 Cal.Ap.3d at 637.)

Here, both factors weigh heavily in favor of granting Plaintiffs' request for a TRO to maintain the status quo pending an OSC regarding the issuance of a PI.

4.1 A TRO Pending an OSC re Issuance of a PI is Eminently Appropriate Here, as Plaintiffs Have and Will Continue to be Irreparably Injured.

Injunctions may be issued to prevent enforcement of *unconstitutional* statutes, or valid statutes sought to be enforced *illegally* (*i.e.*, to regulate conduct beyond the reach of the statute), where their enforcement would cause irreparable injury. (*Novar Corp. v. Bureau of Collection & Investigative Services* (1984) 160 Cal.App.3d 1). Irreparable injury is presumed where plaintiff's First Amendment rights are threatened: "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns* (1976) 427 US 347, 373.

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4.1.1. Adult Entertainment is an Expressive Activity Protected by the First Amendment.

It is well settled that nude or semi-nude adult oriented nude entertainment is recognized by both state and federal courts as being protected by the First Amendment of the United States Constitution and the California Constitution. The First Amendment protects the right of adult entertainment establishments, adult entertainers and audience members to free expressive association and performances, subject only to reasonable and clear regulations for the preservation of public health, safety, welfare and morals. (*City of Erie v. Pap's A.M.* (2000) 529 U.S. 277, 289; *Tily B., Inc. v. City of Newport Beach* (1998) 69 Cal.App.4th 1, 10; *Krontz v. City of San Diego* (2006) 136 Cal. App. 4th 1126, 1135.)

4.1.2. Defendants' Orders Prohibit All Live Adult Entertainment.

There is no question that Defendants have construed their various orders to prohibit all forms of live adult entertainment. In other words, the orders do not merely place limitations on this form of expressive conduct for the preservation of public health, safety, welfare and morals like the regulations at issue in *City of Erie*, *supra*, 529 U.S. at p. 283-284, which required adult performers to wear "pasties" and "g-strings" while performing. The orders at issue are also not mere limitations on how close an adult performer may come to a patron, such as those that can be found in the SDMC. (See *Krontz, supra*, at 136 Cal.App. 4th at p. 1130-1131.) Instead the cease and desist orders at issue constitute a ***complete ban*** of ***all*** live adult entertainment with no exceptions whatsoever. What's more, the cease and desist orders at issue constitute a prior restraint on the expressive speech of live adult entertainment because they expressly forbid this speech prior to it occurring. (*Krontz,* at p. 1133, citing *Alexander v. U.S.* (1993) 509 U.S. 544, 550.)

4.2. Defendants' Total Ban on Plaintiffs' Protected Speech Does Not Pass Constitutional Muster.

It is worth reiterating that the cease and desist orders preemptively ban ***all*** live adult entertainment no matter the circumstances. This is a critical point to be observed when evaluating whether the orders pass constitutional muster.

/ / / /

It is also important to recognize that the County and State orders single-out adult entertainment establishments for this draconian prior restraint on speech. As stated by the State in its publication "Stay home Q&A":

> On May 25, 2020, in an effort to balance First Amendment interests with public health, the State Public Health Officer created an exception to the prohibition against mass gatherings for faith-based services, cultural ceremonies, and protests. Those types of gatherings are now permitted indoors in counties in Substantial (red).

(See **Ex. No. 12** to AOE, Stay home Q&A.)[4]

As it pertains to places of worship, religious services, and cultural ceremonies, the State has published specific guidance for reopening. (See **Ex. No. 13** to AOE, COVID-19 Industry Guidance: Places of Worship and Providers of Religious Services and Cultural Ceremonies, published July 29, 2020.) Similarly, the County's October 10, 2020, Order expressly exempts from the definition of "gathering" many activities that require far more social interaction and risk of COVID-19 transmission that the viewing of a live adult performance at a distance, such as wedding ceremonies and protests to name a few. (See **Ex. No. 1** to Appendix of Exhibits ("AOE"), Order of the Health Officer and Emergency Regulations Effective October 10, 2020, ¶ 15.)

4.2.1. The Ban Fails the Strict Scrutiny Test.

Because of the apparent singling-out of adult entertainment establishments for a total ban on their speech, the restriction is a content-based restriction, which subjects the restriction to the "strict scrutiny" test. (See *Reed v. Town of Gilbert, Ariz*. (2015) 576 U.S. 155, 163.) Under this test, the restriction must "promote a compelling interest" and use "the least restrictive means to further the articulated interest." (*Id*. at 171.) While Defendants may have a compelling governmental interest in stopping the spread of COVID-19, a total ban on live adult entertainment is clearly not the least restrictive means to further that interest.

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[4] https://covid19.ca.gov/stay-home-except-for-essential-needs

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4.2.2. The Ban Fails the Intermediate Scrutiny Test.

It is anticipated that Defendants will argue that the ban on live entertainment is a ban on all live entertainment, not just live adult entertainment. The ban, presumably, would have to apply to a concert by The Rolling Stones, as well as the lowly street performer. Clearly, however, the County is not construing its orders in this manner.

Nonetheless, assuming for argument sake that the ban is content neutral and is being equally applied across the board, the ban still fails to satisfy the four part intermediate scrutiny test articulated in *United States v. O'Brien* (1968) 391 U.S. 367, 377 to address a content neutral restriction on expressive activity. Under the *O'Brien* test, a restriction on expressive activity will be found to be valid only if: "(1) the regulation is within the power of the government to enact; (2) it furthers an important or substantial governmental interest; (3) the government interest is unrelated to the suppression of free speech; and (4) the restriction is no greater than is essential to the furtherance of the governmental interest." (*Krontz v. City of San Diego*, *supra*, 136 Cal.App. at p. 1137, citing *O'Brien*.)

It may be conceded that Defendants have generalized "police powers" to enact emergency orders[5] to prevent the spread of COVID-19 and to protect the health and safety of the public, and that there is a substantial government interest in these ends. It remains, however, debatable that government interest is unrelated to the suppression of free speech given other forms of speech have been allowed, but not live adult entertainment. But again, construing the ban as a ban on ***all live entertainment***, the ban is far greater than reasonably necessary to further the governmental interest at issue. That is because the live adult entertainment Plaintiffs seek to allow at their venues more than exceeds the requirements for social distancing by Defendants' own guidelines.

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[5] See *Jacobson v. Commonwealth* (1904) 197 U.S. 11. Notably, however, Defendants would be remiss to put too much faith in the *Jacobson* case for the "emergency" powers they seek to freely wield. Among other things, *Jacobson* involved a legislatively enacted statute requiring members of the public to be vaccinated against smallpox. The penalty for refusing to do so was a minimal $5, not a ruinous and draconian closure. *Jacobson* also did not involve extensive stay-at-home orders and other significant restrictions on liberty as are at issue. Moreover, *Jacobson* did not involve a prior restraint on free speech as at issue here.

1 To put matters in perspective, the live adult entertainment proposed by Plaintiffs consists
2 of an adult performer, performing alone on a stage well beyond the six foot social distancing
3 recommendations and requirements that have been the continued montra of the claimed "health
4 experts" and governmental officials for the last eight months. Indeed, Pacers' proposed floor plan
5 provided for a fifteen (15) foot buffer between performers and patrons, rendering the possibility
6 of COVID-19 transmission remote at best. (Shamshoian ¶ at 12.)
7 Moreover, the unwillingness of County health officials to conduct any investigation into
8 the manner in which Plaintiffs were allowing performances to proceed prior to the cease and desist
9 orders, and their unbudging unwillingness to even discuss with Plaintiffs a means by which live
10 adult performances could be allowed to proceed, demonstrates that the restriction is far more
11 heavy-handed than necessary to address the governmental interest of preventing the spread of
12 COVID-19 and protecting the health and safety of the public. Again, Plaintiffs have been slapped
13 with a total ban on live adult performances – no exceptions.
14 In short, there is no question that the County's cease and desist orders have denied Plaintiffs
15 their constitutional rights to freedom of speech and expression. The County, in turn, as looked to
16 the State for authority for these orders, and therefore the State must be equally enjoined against
17 preventing all live adult entertainment. Moreover, in these circumstances, the court must exercise
18 its discretion "in favor of the party most likely to be injured … If denial of an injunction would
19 result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted,
20 then it is an *abuse of discretion* to *fail to grant* the preliminary injunction." (*Robbins v. Superior*
21 *Court* (1985) 38 Cal.3d 199, 204, italics added.)
22 Here, as a consequence of Defendants' orders to cease and desist from engaging in activity
23 protected by the First Amendment, Plaintiffs are and will continue to be threatened with criminal
24 and civil penalties, as well as suffer a denial of due process and their civil rights on the basis of
25 the enforcement of the challenged cease and desist orders if they exercise their protected liberties
26 similar to other venues in San Diego County that are being permitted, implicitly or tacitly by the
27 County, to allow live performances or gatherings that involve much more contact than what
28 Plaintiffs propose. Further, as a result of Defendants' infringement of Plaintiffs' constitutional

rights, Plaintiff have suffered and continue to suffer substantial financial losses.[6] Plaintiffs and all those similarly situated are not viable entities without adult entertainment, and unless the cease and desist orders are immediately lifted, Plaintiffs may be required to close permanently. (Shamshoian ¶ at 13; Buonantony ¶ 8.) This will not only result in significant losses to Plaintiffs, but also to the adult performers who rely on their ability to perform at Plaintiffs' venues and members of the public that seek out adult themed entertainment in a safe and regulated environment.

It also bears noting to the Court the direct consequence of Defendants' orders is that many adult entertainers will continue performing, albeit outside of the safety of regulated venues such as Pacers and Cheetahs. They will also undoubtedly engage in performances that do not follow the restrictions of the SDMC, let alone COVID-19 social distancing requirements. The danger to these adult performers is substantial. Many adult performers are young and ill equipped to deal with a testosterone-filled room of a private residence. Be as it may that good members of the community may object to adult entertainment at places like Pacers and Cheetahs, adult entertainment will continue either in safe and regulated venues such as those provided by Pacers and Cheetahs, or in the shadows where the risks are great to the performers and public. It is no understatement to say that Plaintiffs care for the performers like members of their own family and the tragedy of forcing performers into the shadows is a true injustice. (Shamshoian ¶ at 14.) No amount of money damages could adequately compensate for the irreparable harm described herein, specifically the deprivation of constitutionally protected fundamental rights.

Defendants, on the hand, will suffer no harm if Plaintiffs resume providing live adult entertainment in strict compliance with and in excess of CDC guidelines, *e.g.*, limited capacity, masks required, fifteen (15) feet or more between performers and patrons, and no contact allowed. Indeed, only by allowing live adult entertainment in a safe and regulated environment as proposed by Plaintiffs can Defendants achieve the goals they purport to attain.

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[6] Defendants' financial losses are mirrored by those of the adult entertainers who have been unable to perform for the better part of eight months.

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4.3. There is a Reasonable Possibility that Plaintiffs Will Prevail at Trial

A number of Plaintiffs' claims provide for injunctive relief, including their 42 U.S.C. Section 1983 claims for violations of their fundamental rights to free speech, equal protection, and due process under the United States Constitution and California Constitution. Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

As explained below, due to the lopsided harm to Plaintiffs, the bar has been lowered and Plaintiffs have demonstrated "some possibility" of prevailing at trial on their section 1983 claims for violation of their rights to free speech, equal protection, and due process.

4.3.1. Freedom of Speech and Expression

The First Amendment provides "Congress shall make no law . . . abridging the freedom of speech . . . or the right . . . to petition the Government for a redress of grievances." (U.S. Const. amend. I.) Article 1, Section 2 of the California Constitution also provides "Every person may freely speak, write and publish his or her sentiments on all subjects . . . A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. I, § 2.)

Both state and federal courts have held that "erotic dancing" is "free expression entitled to protection under the First Amendment." *Krontz v. City of San Diego*, *supra*, 136 Cal. App. 4th at p. 1135; *Morris v. Mun. Court* (1982) 32 Cal. 3d 553, 563, *quoting Chase v. Davelaar* (9th Cir. 1981) 645 F.2d 735, 737 ["the [ordinance] would prevent the affected establishments from offering entertainment that is *not* obscene under current law, since nudity alone is not sufficient to make material legally obscene. [Citation omitted.] Such non-obscene entertainment is protected by the First Amendment."].)

Here, there is no question that Dr. Wooten's cease and desist orders violate Plaintiffs' and their performers' First Amendment rights. In addition, according to the cease and desist orders,

there is a ban on live entertainment in restaurants regardless of whether alcohol is served. The California Supreme Court has held that "an enactment prohibiting nonobscene nude dancing which extends beyond establishments serving alcohol is presumptively overbroad." (See *Morris v. Municipal Court* (1982) 32 Cal.3d 553.) As such, there is a presumption that Defendants' cease and desist orders are overbroad and therefore unconstitutional.

Again, Plaintiffs anticipate that Defendants will attempt to rebut this presumption under the guise of COVID-19 safety concerns. However, a review of the timeline of events and selective application of the County's ban on live entertainment prove otherwise. For example, the County did not object to Pacers' reopening plans after the plans submission and subsequent reopening under stringent COVID-19 restrictions that prohibited contact with live performers, required masks to be worn at all times, fifteen (15) feet or more distance between performers and patrons, and limited capacity in compliance with Defendants' orders, rules, and regulations concerning restaurants. Indeed, there were no issues with Pacers reopening until the infamous stabbing incident which was subsequently followed by unsubstantiated social media reports regarding Pacers' alleged Covid-19 violations. Thereafter, the County issued its cease and desist order to Pacers, and then hit Cheetahs.

The timeline of events, indicates at best an arbitrary and knee jerk reaction to the media by Dr. Wooten, which, despite Plaintiffs' compliance with Covid-19 restrictions, has led to the prohibition of live entertainment in Plaintiffs' facilities. Justice O'Scannlain's dissenting opinion in *Harvest Rock Church, Inc. v. Newsom* (9th Cir. 2020) --- F.3d ----2020 WL 5835219 encapsulates this sentiment in his observation that the Covid-19 restrictions are a "complex morass," which are not content neutral in their application. The abuse of power must be checked and the Orwellian rules that have been imposed with seemingly no push back from the courts can no longer be allowed.

In any event, based on Dr. Wooten's every changing orders and selective application of the ban on live entertainment in restaurants, there is at least "some possibility" that Defendants will not be able to rebut the presumption that its orders are unjustifiably overbroad, and therefore, unconstitutional.

4.3.2. Equal Protection

Under the Fourteenth Amendment, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const. amend. XIV.) Article 1, Section 7 of the California Constitution also provides "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws." (Cal. Const., art. I, § 7.)

Here, the limitation on allowing adult entertainment is arbitrary and capricious, and is discriminatory toward adult entertainment establishments and adult performers. From the perspective of imposing restrictions to prevent the spread of Covid-19, Defendants have allowed restaurants, churches, dance studios, yoga studios, and various personal service industries to operate, while prohibiting Plaintiffs and adult performers from operating under much more stringent safety protocols, and threatening Plaintiffs with "criminal" liability for attempting to do so. The orders smack of unfairness.

Moreover, the financial and non-financial losses the Plaintiffs have suffered during the period of time since issuance of the cease and desist orders have been substantial, and are the direct result of the discriminatory, irrational, and unequal restrictions flowing from Dr. Wooten's overreaching construction of the orders of Governor Newsom and CDPH. Simply, Dr. Wooten's disparate treatment of Plaintiffs' fundamental rights compared to other non-adult entertainment related businesses and venues is a violation of the equal protection clause, and her abuse of power must be checked. Accordingly, there is "some possibility" that Plaintiffs will prevail on their equal protection claim.

4.3.3. Due Process.

Under the Fifth Amendment's Due Process Clause, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (U.S. Const. amend. V.) The Fourteenth Amendment also provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const. amend. XIV; see also Cal. Const., art. I, § 7.)

With no due process whatsoever, Defendants have denied Plaintiffs the right to allow adult oriented performances at their venues and have taken away their property rights and civil liberties without due process of law. Indeed, Defendants failed to conduct a hearing, consider any evidence regarding alleged violations, and, to date, refuse to even answer Plaintiffs' inquiries regarding the basis of the cease and desist orders and have instead acted as one might expect a monarch might act in simply issuing an order with no justification, clarification, or exceptions. Plaintiffs have a fundamental and protected interest in the use and enjoyment of their venue as well as their constitutional rights to free speech and equal protection. Plaintiffs have no adequate remedy at law and Plaintiffs, as well as members of the public, will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from the continuous implementation and enforcement of the cease and desist order, or any other similar orders.

Clearly, Defendants infringed upon Plaintiffs' constitutional rights without due process, and thus, there is "some possibility," and in fact a probability that Plaintiffs will prevail on their due process claim.

4.3.4. Defendants' Orders are Vague and Arbitrary.

As evidenced above, Plaintiffs have sought to comply with the orders issued by Defendants. These orders, which are not legislatively enacted, seemingly change day by day, and the enforcement of these orders is delegated to bureaucratic offices most members of the public never heard of before the COVID-19 pandemic. Take for example the ban on live adult entertainment at issue in this action, there is not one word addressing live entertainment in Dr. Wooten's October 10, 2020, order (Ex. No. 1 to AOE), and live adult entertainment has never been mentioned in any of the Dr. Wooten's prior orders, or in any of the various orders of the State. There has been no guidance published for adult entertainment establishments, and even the officials in charge of enforcing the orders at issue have not yet articulated the basis upon which they believe all adult entertainment must be banned. At the same time, Plaintiffs are being threatened for failing to comply with these vague and arbitrary non-legislatively enacted rules and

regulations. This is an intolerable situation, and one that is precisely why the void-for-vagueness doctrine exists. Under this doctrine, ordinary people must be able to understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.) It is high time that courts step in and bring some semblance of clarity to what is permitted and what is not. Courts no longer have the luxury of sitting on the sidelines in what is turning out to be an indefinite abridgment of the Constitutional rights of Plaintiffs and those similarly situated.

5. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request this Court issue the requested TRO pending the hearing of an Order to Show Cause why the Defendants, and each of them, should not be preliminarily enjoined pending trial as provided for in the proposed PI Order submitted herewith. Absent such relief, Plaintiffs are threatened with irreparable injury as Defendants violations of the United States and California Constitutions goes unchecked.

Dated: October 30, 2020 VIVOLI SACCUZZO, LLP

By: /s/ *Jason P. Saccuzzo*
JASON P. SACCUZZO
Attorneys for Plaintiffs,
MIDWAY VENTURE LLC *dba* PACERS SHOWGIRLS/PACERS SHOWGIRLS INTERNATIONAL, and PETER BALOV

Dated: October 30, 2020 LAW OFFICE OF STEVE HOFFMAN

By: /s/ *Steve Hoffman*
STEVE HOFFMAN
Attorneys for Plaintiffs,
F-12 ENTERTAINMENT GROUP INC.
dba CHEETAHS and RICH BUONANTONY