

FILING FEE EXEMPT  
PURSUANT TO GOV. CODE § 6103

**FILED**  
Superior Court of California  
County of Los Angeles

APR 22 2021

Sherri R. Carter, Executive Officer/Clerk of Court  
By: F. Becerra, Jr., Deputy

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES – CENTRAL DISTRICT

CITY OF BURBANK, a municipal corporation; and THE PEOPLE OF THE STATE OF CALIFORNIA, by and through AMELIA ANN ALBANO, City Attorney for the City of Burbank,

Plaintiffs,

v.

BARFLY, INC., a California corporation; BARET LEPEJIAN, an individual; LUCAS LEPEJIAN, an individual; TALYA LEPEJIAN, an individual; ISABELLE LEPEJIAN, an individual; and DOES 1 through 100, inclusive,

Defendants.

Case No.: 21STCV07923

**FAXED**

**ORDER GRANTING PRELIMINARY INJUNCTION AND IMPOSING SANCTIONS PURSUANT TO CODE OF CIVIL PROCEDURE § 177.5 AGAINST DEFENDANT BARFLY, INC.**

Assigned to the Hon. Armen Tamzarian  
Stanley Mosk Courthouse, Department 52

**HEARING**

Date: April 9, 2021  
Time: 9:30 a.m.  
Dept.: 86

Complaint Filed: March 1, 2021  
Trial Date: TBD

04/23/2021

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1 **ORDER**

2 On March 26, 2021 and April 9, 2021 at 9:30 a.m., the Order to Show Cause Re  
3 Preliminary Injunction, issued on March 8, 2021, and Orders to Show Cause Re Sanctions  
4 against Defendant Barfly, Inc. ("Barfly"), issued on March 12 and 16, 2021, respectively, came  
5 on for hearing in Department 86 of the above-entitled Court, located at 111 North Hill Street,  
6 Los Angeles, California 90012, the Honorable Mitchell L. Beckloff presiding.

7 **PRELIMINARY INJUNCTION**

8 At the April 9, 2021 hearing, the Court, having considered the papers submitted by the  
9 parties, and having heard arguments of counsel, found that Plaintiffs City of Burbank and the  
10 People of the State of California, by and through Amelia Ann Albano, City Attorney for the City  
11 of Burbank (collectively, "Plaintiffs") are entitled to a preliminary injunction during the  
12 pendency of this litigation against Barfly and its agents. Accordingly, Plaintiffs' request for a  
13 preliminary injunction is **GRANTED**.

14 **IT IS HEREBY ORDERED** that Defendant Barfly and its agents, employees, and  
15 representatives, and all persons acting under, in concert or for it, are hereby enjoined and  
16 prohibited from operating, being open for business, and/or serving any customers or patrons at  
17 Tin Horn Flats Saloon/Bar & Grill, located at 2623 West Magnolia Boulevard, Burbank,  
18 California 91505, APN 2478-023-001 ("Tin Horn Flats"), until Barfly obtains all valid and  
19 legally required permits to operate Tin Horn Flats.

20 **IT IS HEREBY FURTHER ORDERED** that the City is authorized to enter onto Tin  
21 Horn Flats to post notice of this Order in a visible location, including exterior fences, gates,  
22 structures, doors, walls, or any other structure thereupon, and to distribute the Order to Barfly  
23 and its agents, employees, and representatives, and all persons acting under, in concert or for it,  
24 and/or any other persons present.

25 **IT IS HEREBY FURTHER ORDERED** that the City, through its department and  
26 utility Burbank Water and Power, is authorized to disconnect electrical service at Tin Horn Flats  
27 on no less than 24 hours' notice to counsel for Barfly (such notice having already been given).  
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1 **IT IS HEREBY FURTHER ORDERED** that the City is authorized to padlock the  
2 doors to Tin Horn Flats and/or otherwise prevent Barfly and its agents, employees,  
3 representatives, and all persons acting under, in concert with or for it, from entering or accessing  
4 Tin Horn Flats to operate a food facility or restaurant until Barfly obtains all valid and legally  
5 required permits to operate Tin Horn Flats. Should Barfly wish access to the property for some  
6 purpose other than food service, the City shall work with Barfly to provide such access. The  
7 proposed use, however, must otherwise comply with law. Access to the facility shall be  
8 facilitated by counsel. Access shall be provided as permitted herein on reasonable notice.

9  
10 **SANCTIONS**

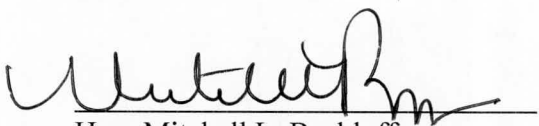
11 On April 9, 2021, the Court, having considered the papers submitted by the parties, and  
12 having heard arguments of counsel, found that Barfly violated the March 8, 2021 Temporary  
13 Restraining Order (“TRO”) without good cause or substantial justification. Accordingly, the  
14 Court imposes sanctions against Barfly pursuant to Code of Civil Procedure section 177.5 in the  
15 total amount of **\$1,150.00** for Barfly’s violations of the TRO on March 9 and 14, 2021. This  
16 amount shall be payable to the Court within 30 days of April 9, 2021.

17  
18 The Court adopted its tentative ruling on the request for preliminary injunction and  
19 imposition of sanctions. Attached as **Exhibit A** is a true and correct copy of the Court’s ruling.

20  
21 **IT IS SO ORDERED.**

22 DATED: \_\_\_\_\_, 2021

23 **APR 22 2021**

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25 Hon. Mitchell L. Beckloff  
26 Judge of the Los Angeles Superior Court

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# EXHIBIT A

04/23/2021

APR 09 2021

Sherri R. Carter, Executive Officer/Clerk of Court

By: F. Becerra, Jr., Deputy

**CITY OF BURBANK v. BARFLY, INC. et al.**

Case Number: 21STCV07923

Hearing Date: March 26, 2021

*WMB* [REDACTED] **ORDER GRANTING PRELIMINARY INJUNCTION**

*WMB* [REDACTED] **ORDER IMPOSING SANCTIONS PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 177.5**

Plaintiff, the City of Burbank (City),<sup>1</sup> moves for a preliminary injunction enjoining Defendants, Barfly, Inc., Baret Lepejian, Lucas Lepejian, Talya Lepejian and Isabelle Lepejian, from serving any customers or patrons at Tin Horn Flats Saloon/Bar & Grill (Tin Horn Flats), located at 2623 West Magnolia Boulevard in the City until Defendants obtain all valid and legally required permits to operate Tin Horn Flats.<sup>2</sup>

In addition, on March 12 and then again on March 16, 2021, at *ex parte* hearings, the court ordered Barfly to show cause why it should not be sanctioned for violating the TRO pursuant to Code of Civil Procedure section 177.5. Thus, two orders to show cause re sanctions are before the court for hearing.

Barfly opposes the City's request for a preliminary injunction. Barfly also opposes any imposition of sanctions.

Barfly filed two briefs on the issues before the court. The first brief (consisting of three pages), as the court reads it, is in the nature of an objection to the proceedings in their entirety. Barfly posits the court's initial TRO "is illegal," the court's March 12 and March 16 orders were "illegal and unconstitutional," the City's actions have deprived "its citizens' procedural and substantive due process rights," and the City engaged in "gamesmanship" in which this court has participated "unwillingly" or "unknowingly." Barfly asserts the City's actions: "violate procedural due process, substantive due process, the First Amendment right to assembly and

<sup>1</sup> There are three Plaintiffs in this action—the City, the People of the State of California and the City's Attorney, Amelia Ann Albano. For ease of reference, the court refers to all Plaintiffs as the City.

<sup>2</sup> The City also requests additional relief related to enforcement. After the court issued its Order Granting Plaintiffs' *Ex Parte* Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction (TRO) on March 8, 2021 against Barfly, the City twice requested modifications of the TRO—an order authorizing the City to terminate Barfly's electrical service and an order allowing the City to padlock Barfly's doors. The court ordered the requested modifications. In reply, the City seeks additional orders from the court to assist it with enforcement of any preliminary injunction ordered.

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association, and the takings clause of the Fifth and Fourteenth Amendments to the U.S. Constitution.” (9:51 a.m. Opposition.)

Barfly’s second brief is a fulsome opposition. The City contends the court should disregard Barfly’s second brief for reasons that are not entirely clear to the court. It appears the City contends Barfly’s first brief (with no legal citations, authorities or any direct reference to the underlying facts/allegations) constitutes Barfly’s opposition. The City also may contend Barfly’s second brief was untimely as it was filed four minutes later than the court’s deadline. While Barfly’s two brief opposition is unusual, the court cannot find Barfly’s second brief should be disregarded.

The individual defendants have not filed any opposition to the City’s request.<sup>3</sup>

Importantly, Barfly has submitted no evidence in support of its opposition. It has submitted argument only.<sup>4</sup>

The City’s request for a preliminary injunction is GRANTED against Barfly only. The City’s request for court authority to employ additional enforcement mechanisms is denied.

The court imposes sanctions pursuant to Code of Civil Procedure section 177.5 upon Barfly for violations of its prior orders.

The City’s RJNs are granted.

### Preliminary Injunction

#### LEGAL STANDARD

The standards governing a preliminary injunction are well known. “[A] court will deny a preliminary injunction unless there is a reasonable probability that the plaintiff will be successful on the merits, but the granting of a preliminary injunction does not amount to an adjudication of the merits.” (*Beehan v. Lido Isle Community Assn.* (1977) 70 Cal.App.3d 858, 866.) “The function of a preliminary injunction is the preservation of the status quo until a final determination of the merits.” (*Ibid.*)

<sup>3</sup> Defendant Baret Lepejian is the President and Chief Executive Officer of Barfly. (3/3/21 City’s Request for Judicial Notice (RJN), Ex. 10.) Defendant Isabelle Lepejian is the record title owner of the property where Tin Horn Flats is located. (3/3/21 City’s RJN, Ex. 11.) Defendants Lucas Lepejian and Talya Lepejian are the children of Baret Lepejian and they hold themselves out to be owners, managers, employees, and/or agents for Tin Horn Flats. (3/3/21 Lee Decl., Exs. 1, 2, 8, 13, 31, 32.) These facts are undisputed.

<sup>4</sup> At 2:27 p.m., the day before the hearing in this matter, Barfly filed a declaration from one of its counsel on the status of an administrative appeal of the County’s revocation of its public health permit. The court elects to disregard the late filed evidence.

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As the parties recognize, “Trial courts traditionally consider and weigh two factors in determining whether to issue a preliminary injunction. They are (1) how likely it is that the moving party will prevail on the merits, and (2) the relative harm the parties will suffer in the interim due to the issuance or nonissuance of the injunction.” (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1420.) “[T]he greater the ... showing on one, the less must be shown on the other to support an injunction.” (*ibid.* [quoting *Butt v. State of California*, (1992) 4 Cal.4th 668, 678].) The burden of proof is on the plaintiff as the moving party “to show all elements necessary to support issuance of a preliminary injunction.” (*O’Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1481.)

Preliminary injunctive relief requires the use of competent evidence to create a sufficient factual showing on the grounds for relief. (*See e.g., Ancora-Citronelle Corp. v. Green* (1974) 41 Cal.App.3d 146, 150.) A plaintiff seeking injunctive relief must also show the absence of adequate damages remedy at law. (Code Civ. Proc. § 526, subd. (a)(4).)

A preliminary injunction ordinarily cannot take effect unless and until the plaintiff provides an undertaking for damages which the enjoined defendant may sustain by reason of the injunction if the court finally decides that the plaintiff was not entitled to the injunction. (*See* Code Civ. Proc. § 529, subd. (a); *City of South San Francisco v. Cypress Lawn Cemetery Ass’n.* (1992) 11 Cal. App. 4th 916, 920.) A municipality that obtains a preliminary injunction, however, is not required to post an undertaking.

## ANALYSIS

The City’s complaint alleges three causes of action—violation of Burbank Municipal Code (BMC) section 4-1-101-1 (8.04.932), violation of BMC section 10-1-501 and abatement of a public nuisance. The City asserts all three causes of action against all Defendants.

BMC section 4-1-101-1 (8.04.932), alleged in the complaint’s first cause of action, provides:

“No person shall engage in, conduct, manage or carry on any business or other activity for which a license or permit is required by this chapter [concerning public health licenses] . . . [i]f such license or permit has expired, been suspended, revoked, or denied.” (3/3/21 City’s RJN Ex. 1 [BMC § 4-1-101].)

BMC sections 10-1-501 and 10-1-502, alleged in the complaint’s second cause of action, provide “restaurant/drinking establishments” within the “MPC-3 Magnolia Park General Business” zone are required to hold a conditional use permit (CUP) to operate within the City. (3/3/21 Prescott Decl., ¶ 12; City RJN Ex. 1 [BMC § 10-1-501].)

The BMC also requires full restaurant service without alcohol to hold an administrative use permit (AUP). (3/3/21 Prescott Decl., ¶ 12; City RJN Ex. 4 [BMC § 10-1-502].)



BMC section 1-1-108, alleged in the complaint's third cause of action, provides "any condition caused or permitted to exist in violation of any provisions of [the BMC] shall be deemed a public nuisance and may be, by this City, summarily abated as such . . ." (3/3/21 City's RJN, Ex. 5 [BMC § 1-1-108].) Similarly, the BMC provides that "[a]ny property, building or structure used . . . in violation of the Zoning Ordinance is declared to be a public nuisance." (3/3/21 City's RJN, Ex. 5 [BMC § 10-1-409].)

***Likelihood of Success on the Merits:***

Barfly owns and operates Tin Horn Flats, a restaurant/drinking establishment located in the City within the "MPC-3 Magnolia Park General Business" zone in the City. (3/3/21 City's RJN Ex. 10; 3/3/21 Prescott Decl., ¶ 12.) The City originally approved Barfly's CUP to operate Tin Horn Flats with 35 conditions of approval in June 2011. Barfly is required to comply with all of the conditions attached to the CUP to lawfully operate Tin Horn Flats. (3/3/21 Prescott Decl., ¶ 13, Ex. 1.)

CUP condition 31 requires Barfly to comply with all federal, state and local laws. The condition admonishes: "Violation or conviction of any of those laws in connection with the use will be cause for revocation of the permit." (3/3/21 Prescott Decl. ¶ 14, Ex. 1.) CUP condition 32 provides the CUP "may be modified or revoked by the City should it be determined that the use or conditions under which they were permitted are detrimental to public health, welfare, or materially injurious to property or improvements in the vicinity or if the use is maintained so as to constitute a public nuisance." (3/3/21 Prescott Decl. ¶ 14, Ex. 1.)

On December 10, 2020, inspectors from the Los Angeles County Department of Public Health (DPH) inspected Tin Horn Flats and found Barfly was operating the restaurant illegally and in violation of the County Health Officer's order concerning COVID-19 (County Health Order). (3/3/21 McShane Decl., ¶¶ 3, 8-11, Exs. 1-3.) The DPH made similar inspections and repeated violation findings between December 12, 2020 and January 24, 2021. (3/3/21 McShane Decl. ¶¶ 12-39, Exs. 4-24; 3/3/21 Midtlyng Decl., ¶¶ 8-35 & Exs. 1-21; 3/3/21 Harutyunyan Decl., ¶¶ 8-20 & Exs. 1-9; Grigoryan Decl., ¶¶ 8-19, Exs. 1-9; 3/3/21 Derhartounian Decl., ¶¶ 8-19, Exs. 1-9; 3/3/21 Ter-Oganesyan Decl., ¶¶ 8-15, Exs. 1-6; 3/3/21 Lindsey Decl., ¶¶ 8-15, Exs. 1-6.)

After an administrative hearing on January 20, 2021, the DPH revoked the County's public health permit for Tin Horn Flats on January 27, 2021. (Keshishian Decl., ¶ 9, Ex. 1.) Despite Tin Horn Flat's lack of a public health permit, Barfly has continued its operation of Tin Horn Flats. (Midtlyng Decl. ¶¶ 36-39 & Exs. 22-24; Harutyunyan Decl. ¶¶ 21-28 & Exs. 10-15; 3/3/21 Grigoryan Decl. ¶¶ 20-23 & Exs. 10-12; Derhartounian Decl. ¶¶ 20-23 & Exs. 10-12; 3/3/21 Andreasyan Decl., ¶¶ 8-11, Exs. 1-3; Midtlyng Supp. Decl. ¶¶ 7-10 & Exs. 1-3; 3/3/21 Supp. Derhartounian ¶¶ 7-10, Exs. 1-2; McShane Supp. Decl. ¶¶ 7-30 & Exs. 1-18.) DPH has issued multiple citations to Barfly and fined it in excess of \$28,000; Barfly has neither paid the fines nor appealed any of the citations. (Keshishian Decl., ¶¶ 6-8.)

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On January 8, 2021, the City sent Barfly and Defendant Baret Lepejian a notice of violation. The notice advised them the City intended to hold a public hearing on February 22, 2021 to consider revocation, suspension, or modification of Barfly's CUP (No. 11-0000126). (Prescott Decl. ¶ 16 & Ex. 2.) The notice advised Barfly and Defendant Baret Lepejian of CUP conditions 31 and 32. (Prescott Decl. ¶ 16 & Ex. 2.)

On February 22, 2021, the City Council held a four-and-a-half hour public hearing to consider revocation, suspension, or modification of Barfly's CUP. (3/3/21 Prescott Decl. ¶ 19; 3/3/21 Frutos Decl. ¶ 5.) At the conclusion of the hearing, the five-member City Council unanimously voted to adopt a resolution to revoke Barfly's CUP based on its violation of CUP conditions 31 and 32. The City Council also revoked Barfly's CUP finding Barfly created a public nuisance under BMC section 10-1-1952 (3).<sup>5</sup> (3/3/21 Prescott Decl. ¶ 19; 3/3/21 Frutos Decl. ¶ 5 & Ex. 1.) The City Council's decision revoking Barfly's CUP was immediately effective. (3/3/21 Prescott Decl. ¶ 19; 3/3/21 Frutos Decl. ¶ 5, Ex. 1.)

Despite the revocation of both its County public health permit and its CUP after administrative proceedings, Defendants have continued to operate Tin Horn Flats. (McShane Supp. Decl. ¶¶ 27-30 & Exs. 16-18; 3/3/21 Ogle Decl., ¶¶ 5-8.)

Based on the foregoing facts, the City contends it is likely to prevail on the merits of this action because the evidence will show Barfly has been operating its restaurant unlawfully, without a public health permit since December 12, 2020, and without a CUP since February 23, 2021. The City argues Barfly's actions (and those of the other Defendants who actually operate Tin Horn Flats) are in violation of BMC sections 4-1-101-1 (8.04.932) (first cause of action), 10-1-501 (second cause of action), 1-1-108 and 10-1-409 (third cause of action).

Barfly does not dispute it is operating Tin Horn Flats in violation of the BMC. Barfly also concedes it continues to operate the restaurant to this day without a County-issued public health permit and City-issued CUP. Thus, Barfly acknowledges it is not lawfully operating.

Barfly contends, however, it continues to operate the restaurant "in exercise of its fundamental liberties protected by the United States Constitution." That is, without regard to state law,<sup>6</sup> the Los Angeles County Code or the BMC, Barfly asserts its operation of Tin Horn Flats is a constitutionally protected fundamental liberty interest. Barfly asserts the administrative actions—the revocation proceedings conducted by the County (as to the public health permit) and the City (as to the CUP)—denied Barfly due process; the permits "were . . .

<sup>5</sup> The City Council's resolution found Tin Horn Flat's ongoing operation without a public health permit was "detrimental to the public health and welfare, [was] materially injurious to the property and to the adjacent neighborhood, and thus constitutes a public nuisance and justification for the revocation of Tin Horn Flats [CUP] under" the BMC. (3/3/21 Frutos Decl. ¶ 5, Ex. 1.)

<sup>6</sup> Health and Safety Code section 114381, subdivision (a) provides: "A food facility shall not be open for business without a valid permit."

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unconstitutionally taken” from Barfly. Therefore, Barfly reasons, “invalidating the alleged ‘per se’ violation” means the City cannot prevail on the merits of its claims. (Opposition 13:10-13.)

As a preliminary matter, assuming Barfly’s collateral attack on the administrative proceedings could properly be considered by the court as a defense to this action, Barfly has submitted no evidence upon which the court could find the County and/or the City denied Barfly due process. Without evidence, Barfly’s constitutional challenge has no traction. It is nothing more than unsupported argument.

Barfly recognizes the County suspended its health permit because Tin Horn Flats provided outdoor dining for customers during a time when such outdoor dining was forbidden by the County Health Order. Barfly acknowledges the City found the violation of the County’s Health Order placed the health and safety of the public at risk. (Opposition 8:5-7.)

Barfly provides its justification for servicing its customers outdoors in violation of the County Health Order—Judge James Chalfant’s December 8, 2021 decision “enjoining the County from enforcing or enacting any County ban on outdoor dining after December 16, 2020, unless and until its public health officers ‘conduct[] an appropriate risk-benefit analysis and articulate it for the public to see.’ ” (*County of Los Angeles Department of Public Health v. Superior Court of Los Angeles County [LADPH]* (Cal. Ct. App., Mar. 1, 2021, No. B309416) 2021 WL 777699, at \*9.) Judge Chalfant issued the order, according to Barfly, because the County’s Health Order “lack[ed] any scientific, rational or logical foundation . . . .” (Opposition 8:8.) Barfly reasons Judge Chalfant’s finding demonstrates Tin Horn Flats did not put the public health and safety at risk, and therefore, the County had insufficient grounds to revoke Barfly’s health permit. (Opposition 8:5-9.)

After DPH suspended Barfly’s health permit on December 12, 2020, Barfly requested an administrative hearing. Barfly contended it had a valid defense to the County’s suspension of its health permit “on the basis that the Health Order imposing the restaurant shutdowns was unconstitutional or at the very least, its legality was in dispute following Judge Chalfant’s December” 8, 2021 ruling. (Opposition 8:12-14.) The County revoked Barfly’s health permit after a hearing on January 20, 2021.<sup>7</sup>

Barfly’s justification is unpersuasive. First, Judge Chalfant made no ruling on December 8, 2020. Judge Chalfant did not sign an order in the *LADPH* matter until December 15, 2020. While Judge Chalfant issued a tentative decision and heard argument in *LACPH* on December 8, at the

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<sup>7</sup> Barfly concedes it has not administratively challenged the City’s decision to revoke its CUP. The City “claims that Barfly did not appeal or provide a response before the City of Burbank held a public permit revocation hearing in regard to Tin Horn’s CUP and as such, was provided an adequate opportunity to be heard. However, it was made abundantly clear that any efforts by Barfly to receive a fair, neutral hearing would be futile, and thus, was denied due process whether they appealed or sent a response pre-hearing.” (Opposition 13:14-18.) The court has no evidence upon which to judge Barfly’s claims of an unfair administrative proceeding.

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conclusion of the hearing on December 8, he took the matter under submission. Judge Chalfant did not decide the matter and did not issue his order until December 15, 2020. Thus, the DPH citations issued to Barfly on December 10, December 12 and December 13, 2020 all occurred before Judge Chalfant issued any order. Moreover, on December 18, 2020, the Court of Appeal stayed Judge Chalfant's order. Thus, as Judge Chalfant did not issue his order until December 15, 2020, Barfly could not have been operating under any confusion on December 10, 12 or 13, 2020. Accordingly, when the County suspended Barfly's health permit, Barfly had no justification based on Judge Chalfant's order—the order did not yet exist.

Barfly argues the City's revocation of its CUP, which prevents it from conducting lawful business in the state—despite other compliance measures Barfly has elected to take to satisfy public health and safety interests—violates its liberty under the California Constitution and constitutes a "taking." Barfly asserts its fundamental and substantial rights—the right to freely operate a lawful business to earn a living—was stripped away by an unelected bureaucrat, the Acting State Health Officer, without any opportunity for a hearing.

The revocation actions by the County and City are not directly before the court. That is, this action cannot reverse those administrative decisions; this action will not result in an order reinstating Barfly's County health permit or CUP. To the extent the administrative proceedings of the County or City may have infected this matter or undermine the City's position on the substance of its claims, Barfly has submitted no evidence upon which this court could evaluate Barfly's constitutional claims. Thus, Barfly has given the court no evidentiary basis to find either the County or the City violated its due process.

Moreover, based on *LADPH, supra*, 2021 WL 777699, Barfly's arguments are not persuasive. Curiously, Barfly has elected not to address *LADPH*. *LADPH* rejected similar (if not identical) arguments made by the California Restaurant Association, Inc. and a restaurant, Mark's Engine Company No. 28 (collectively, the Restaurants), concerning the County's Health Order's prohibition on outdoor dining. In *LADPH*, the plaintiffs/petitioners argued the prohibition on outdoor dining violated substantive due process and equal protection, was an abuse of government emergency powers and violated first amendment rights of assembly. (*Id.* at \*2.)

The Court of Appeal rejected the Restaurants' challenge. The Court found the Restaurants could not succeed on the merits of their claims because they had not demonstrated the County Health Order was "arbitrary, capricious, or without rational basis." (*Id.* at \*9.) The Court also specifically rejected the Restaurants' First Amendment rights of assembly violation claim. (*Id.* at \*10.) The Court noted it was not "unsympathetic to the plight of restaurant owners and their employees, or to those in so many other sectors who have had their livelihoods taken away and personal finances decimated by the pandemic. Far from it." (*Id.* at \*2.) Nonetheless, the Court recognized the County's Health Order in the context of the Restaurants' claims were subject to "modern rational basis review." (*Id.* at \*5.)

Barfly's undeveloped "takings" claim fares no better. The "doctrine of necessity" applies where there is an imminent danger and an actual emergency. A taking in the face of actual necessity in

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an emergency obviates the need for compensation under the takings clause. (*United States v. Caltex (Philippines), Inc.* (1952) 344 U.S. 149, 154;<sup>8</sup> *Bowditch v. City of Boston* (1880) 101 U.S. 16, 16-19; see also *Patrick v. Riley* (1930) 209 Cal. 350, 354.) The City sufficiently argues—given Barfly’s generalized argument—the COVID-19 global pandemic satisfies the “necessity” doctrine.

Barfly also suggests the County’s Health Order limiting restaurant services was made “at the whim of an unelected bureaucrat” which constitutes government overreach by arbitrarily banning Barfly’s right to operate a lawful business. Further, Barfly argues its right to operate its business was “stripped away before any opportunity to a hearing by the unelected bureaucrat, the Acting State Health Officer.”

However, as stated by the United States Supreme Court more than 100 years ago in *Jacobson v. Massachusetts* (1905) 197 U.S. 11 (relied upon by the Court of Appeal in *LADPH*), government action that “purport[s] to . . . protect the public health” in an emergency will be upheld, unless it “has no real or substantial relation” to the object of public health or is “beyond all question, a plain, palpable invasion of rights secured by the fundamental law[.]” (*Id.* at 31; *LADPH, supra*, 2021 WL 777699, at \*4.) Here, like the Restaurants in *LADPH*, Barfly had the burden of demonstrating that, under the circumstances, the County’s health order was arbitrary, capricious, or without rational basis in order show a probability of prevailing on its due process defenses. With absolutely no evidence submitted to the court and only generalized constitutional legal argument, Barfly has failed to carry its burden on any defense against the City’s claims.

Moreover, even if the court were to credit Barfly’s arguments as having some merit, Barfly’s arguments and showing are insufficient to demonstrate the City has no probability of prevailing on the merits of its claims. As noted earlier, the court today does not make a final determination of the merits of the City’s claims. Instead, the court weighs the relative merits of the parties’ positions (argument and evidence) to consider whether to issue a preliminary injunction—an injunction that will be in effect until trial unless otherwise modified or terminated.

Based on the foregoing on this record, the court finds the City has a strong probability of prevailing on the merits of its claims against Barfly.

***Balancing the Harms:***

The second part of the preliminary injunction analysis requires the court to evaluate the harm the plaintiff is likely to sustain if the preliminary injunction is denied compared to the harm the

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<sup>8</sup> In *United States v. Caltex* (1952) 344 U.S. 149, compensation under the Takings Clause was denied for an oil terminal facility in Manila that the United States Army destroyed immediately prior to the Japanese invasion of the Philippine Islands to deprive the enemy “of a valuable logistic weapon.” (*Id.* at p. 151.)

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defendant is likely to suffer if the injunction is issued. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70.) “However, ‘[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.’ ” (*Law School Admission Council, Inc. v. State of California* (2014) 222 Cal.App.4th 1265, 1280 [quoting *Butt v. State of California* (1992) 4 Cal.4th at 678].)

The City argues a preliminary injunction is necessary to protect the health and safety of its residents and to restore public trust in the local government.

The City submits evidence that a restaurant, such as Tin Horn Flats, operating without a public health permit or CUP has the potential to lead to increased public health hazards and the failure to abide by proper hygienic and sanitary practices and potentially fatal food-borne illnesses. (See Keshishian Decl. ¶¶ 11- 15; see also Prescott Decl., ¶ 9.) With respect to public trust, the City submits evidence Barfly’s actions of publicly ignoring public health orders and permit requirements could erode the public trust in the City’s ability to enforce its laws and have a “detrimental domino effect” encouraging others to similarly disobey established rules and regulations meant to promote public health and safety; enforcement of these rules are necessary to ensure trust in the government’s ability to protect the public and enforce its laws. (Keshishian Decl. ¶¶ 14-15; Frutos Decl. ¶¶ 7-13.)

The City also relies on legal authority establishing “[w]here a public entity seeks an injunction, the trial court presumes the harm to the public outweighs the harm to the defendant if the public entity shows a likelihood of success.” (*People ex rel. Brown v. Black Hawk Tobacco, Inc.* (2011) 197 Cal.App.4th 1561, 1571.)

In opposition, Barfly suggests it will suffer grave or irreparable harm from the issuance of a preliminary injunction. Barfly fails to offer any specific facts or evidence to substantiate its argument. In reality, any harm Barfly has suffered is related to the loss of its health permit and CUP after administrative hearings. A preliminary injunction in this action merely seeks to ensure Barfly complies with the law. (Of course, the City has submitted evidence suggesting Barfly has no intentions of complying with the law.) A preliminary injunction imposes no new obligations on Barfly.

After considering the arguments and evidence, the court finds the balance of harms clearly weighs in favor of the City.

## **CONCLUSION**

Based on the court’s balance of the City’s likelihood of success on the merits and the parties’ competing harms, the court finds the City is entitled to a preliminary injunction during the pendency of the litigation. Therefore, the request for a preliminary injunction is granted.

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The court is inclined, however, to issue the preliminary injunction against Barfly and its agents only. Preliminary injunctive relief as to the individual Defendants appears duplicative and unnecessary given the scope of the preliminary injunction.

Under the circumstances here, the court is also not inclined to “authorize” the City to use additional enforcement mechanisms to preclude Barfly from doing business such as termination of water and natural gas service. Undoubtedly, based on the evidence presented—as with the electrical power—Barfly will merely obtain alternative sources. The premises already operates combustion generators because electrical service has been terminated. (See Tachco Decl., ¶ 2.) The court questions the wisdom of creating a situation where Barfly’s agents add water and propane tanks to the mix. Moreover, the City’s request to barricade the premises, in the court’s view, leads to concerns about emergency responder access and the potential for entrapment. At some point, the City’s suggested enforcement mechanisms present their own public health and safety risk—not only to Barfly and its patrons but to the surrounding neighborhood, as well.

The City has plenty of other non-physical enforcement mechanisms available to it—the court has no evidence of what other enforcement efforts, if any, the City has made since the court issued the TRO. The City does not need another court order providing for more authority.

No bond is required. (Code Civ. Proc. § 529, subd. (b).)

#### **Code of Civil Procedure section 177.5 Sanctions**

On March 8, 2021 the court issued its TRO. The TRO enjoined and prohibited:

“Barfly, Inc., and its agents, employees, representatives, and all persons acting under, in concert with or for it, from operating, being open for business, and/or serving any customers or patrons at Tin Horn Flats . . . until Defendant obtains all valid and legally required permits to operate Tin Horn Flats.” (TRO 3:22-28.)

The City thereafter caused the TRO to be served upon Barfly’s agent for service of process, Defendant Baret Lepejian and Barfly’s counsel the following day.

The following day, March 9, 2021, Juan Carlos Murillo called Tin Horn Flats and “place[d] an order for take out.” (Murillo Decl., ¶ 4.) Murillo then went to the restaurant and “paid the cashier \$13.23 in cash.” (Murillo Decl., ¶ 4.) While Murillo waited for his order he “observed over ten customers sitting in the rear patio, all of whom were eating, drinking, and/or ordering food.” (Murillo Decl., ¶ 4.) Murillo observed “two servers and two cooks working behind the bar . . .” (Murillo Decl., ¶ 4.) Murillo’s receipt corroborates his purchase of food at Tin Horn Flats on March 9. (Murillo Decl., ¶ 4, Ex. 1.)

On March 12, 2021, based on the evidence Barfly had violated the court’s TRO, at the City’s request, the court set a hearing and ordered Barfly to show cause why it should not be

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sanctioned pursuant to Code of Civil Procedure section 177.5 for violating the court's TRO. At the hearing, the court provided Barfly's counsel with the date to file any opposition to the order to show cause.

Two days later, on March 14, 2021, Michael Tachco went to the restaurant and placed a takeout order. (Tachco Decl., ¶ 2.) A food server took Tachco's order. (Tachco Decl., ¶ 2.) While Tachco waited for his food, he saw "customers who were in various stages of eating, drinking, and/or ordering." (Tachco Decl., ¶ 3.) Eventually, "a server brought [his] takeout order to [him], along with a receipt for [his] order." (Tachco Decl., ¶ 4.) Tachco paid for the food and left Tin Horn Flats. (Tachco Decl., ¶ 4.) Like Murillo, Tachco obtained a receipt showing his purchase. (Tachco Decl., ¶ 4, Ex. 1.)

On March 16, 2021, based on the evidence Barfly had again violated the court's TRO, at the City's request, the court set a hearing and ordered Barfly to show cause why it should not be sanctioned pursuant to Code of Civil Procedure section 177.5 for violating the court's TRO. At the hearing, the court provided Barfly's counsel with the date to file any opposition to the order to show cause.

Based on the evidence, it is clear Barfly violated the court's TRO by "serving . . . customers or patrons at Tin Horn Flats" without "all valid and legally required permits to operate Tin Horn Flats." (TRO 3:25-28.)

Code of Civil Procedure section 177.5 authorizes the imposition of reasonable monetary sanctions up to \$1,500, payable to the court, "for any violation of a lawful court order by a person, done without good cause or substantial justification." Code of Civil Procedure section 177.5 is intended to "punish and deter violations of lawful court orders [citation], and to compensate the judicial system for the cost of unnecessary hearings." (*People v. Landers* (2019) 31 Cal.App.5th, 288, 303.) The statute "does not require that the offending act be 'willful,' but only that it be committed without good cause or substantial justification" that is, "without a valid excuse." (*People v. Muhammad* (2003) 108 Cal.App.4th 313, 324; *People v. Kareem A.* (2020) 46 Cal.App.5th 58, 78.)

"The 'imposition of sanctions, monetary or otherwise, is within the discretion of the trial court. That discretion must be exercised in a reasonable manner with one of the statutorily authorized purposes in mind and must be guided by existing legal standards as adapted to current circumstances.'" (*In re Woodham* (2001) 95 Cal.App.4th 438, 443; *In re Marriage of Eustice* (2015) 242 Cal.App.4th 1291, 1309. ["The trial court has broad discretion to impose sanctions for violations of court orders . . . subject to reversal only for arbitrary or capricious action."].)

Barfly admits "it continued its business operations in light of the Court's orders" but argues it was justified in doing so. (Opposition 17:5-7.) Barfly contends the County's Health Order is "an illegal health order" and it was deprived "of procedural due process in challenging its permit revocations." (Opposition 17:9-10.)

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Given the Court of Appeal's decision in *LADPH, supra*, 2021 WL 777699, filed March 3, 2021—five days before this court issued its TRO—the court rejects Barfly's claim it was substantially justified based on an "illegal health order." The court also cannot find on this record the administrative proceedings before the County or City violated its procedural due process.

The court finds when Barfly violated the TRO, it did so without good cause or substantial justification.

Based on Barfly's violation of the TRO on March 9, 2021, the court imposes a sanction of \$500 on Barfly payable to the court within 30 days.

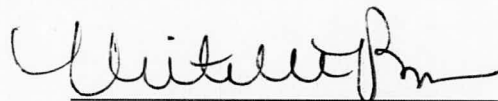
Based on Barfly's violation of the TRO on March 14, 2021, the court imposes a sanction of \$650 on Barfly payable to the court within 30 days.

**CONCLUSION**

Based on the foregoing, Barfly shall pay to the court as and for sanctions pursuant to Code of Civil Procedure section 177.5 a total of \$1,150 within 30 days.

**IT IS SO ORDERED.**

~~March 26, 2021~~ MBS  
4-9-21

  
\_\_\_\_\_  
Hon. Mitchell Beckloff  
Judge of the Superior Court

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