FILED
Superior Court of California
County of Los Angeles
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Sherri R. Carter, Executive Officer / Clerk of Court
By: M. De Luna Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

City of Burbank, a municipal corporation, et al.

Plaintiffs,

v.

Barfly, Inc., a California corporation, et al.

Defendants.

Barfly, Inc., a California corporation, et al.

Cross-Complainants,

v.

City of Burbank, a municipal corporation, et al.

Cross-Defendants.

Case No. 21STCV07923

ORDER REGARDING CROSS-DEFENDANTS' DEMURRER

Hearing: January 11, 2022

Plaintiffs/cross-defendants City of Burbank (City) and the People of the State of California, by and through Joseph H. McDougall, City Attorney for the City of Burbank generally demur to the first amended cross-complaint filed by cross-complainants Barfly, Inc. (Barfly), Baret Lepejian, Lucas Lepejian, and Tayla Lepejian.

Barfly operates as Tin Horn Flats Saloon & Grill in Burbank. Baret, Lucas, and Tayla Lepejian are agents of Barfly. Operating the restaurant requires a conditional use permit issued by the City.

On December 12, 2020, the City suspended Barfly's conditional use permit for allowing outdoor dining despite the County of Los Angeles's order closing restaurants due to the COVID-19 pandemic. The City stated it did so because allowing outdoor dining poses a health and safety risk to the community. Barfly requested a revocation hearing. The City held the hearing and did not reinstate Barfly's conditional use permit.

On March 1, 2021, the City filed its complaint in this case alleging that defendants continued to operate the restaurant. On March 8, the court granted a temporary restraining order requiring Barfly to close the restaurant and authorizing the City to disconnect electrical service and padlock the restaurant's doors. On April 9, 2021, the court issued a preliminary injunction continuing the order to close the restaurant but declining to "authorize" additional enforcement mechanisms the City requested.

The next day, the City began to build a wall around the restaurant. The City has also arrested Lucas Lepejian three times for "violating a lawful court order."

Cross-complainants allege that the City's suspension of the Barfly's conditional use permit and related actions violated their constitutional rights. The first amended cross-complaint (FACC) alleges nine causes of action for violations of:

(1) Due Process Clauses of Fifth and Fourteenth Amendments to U.S. Constitution (42 U.S.C. § 1983);

(2) Equal Protection Clause of Fourteenth Amendment to U.S. Constitution (42 U.S.C. § 1983);

(3) Due Process Clause of Fifth and Fourteenth Amendment to U.S. Constitution (42 U.S.C. § 1983);

(4) Excessive Fines / Cruel and Unusual Punishment (42 U.S.C. § 1983);

(5) First Amendment Freedom of Assembly Clause (42 U.S.C. § 1983);

(6) Takings Clause of the Fifth Amendment;

(7) California Constitution Right to Liberty (Cal. Const. Art. 1, § 19);

(8) Contracts Clause of the United States Constitution (U.S. Const. Art. 1, § 10); and

(9) Bane Civil Rights Act (Cal. Civ. Code.§ 52.1)

REQUESTS FOR JUDICIAL NOTICE

The City requests judicial notice of 21 exhibits: various federal, State, and County of Los Angeles publications about the COVID-19 pandemic (Exs. 1-4, 9-10), executive orders regarding the pandemic by the State of California (Exs. 5, 8, 11), County of Los Angeles (Exs. 6, 12-13) and City of Burbank (Ex. 7), several records of this Superior Court (Exs. 14-18, 21), a notice of violation issued by the City of Burbank to defendant/cross-complainant Barfly, Inc. (Ex. 19), and a notice of enforcement of eviction by the Los Angeles County Sheriff's Department in Case No. 1PDUD00357 (Ex. 20).

The executive orders, government publications, notice of violation, and notice of enforcement of eviction are subject to judicial notice as "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." (Evid. Code, § 452(c).) The court records are subject to judicial notice under Evidence Code section 452, subdivision (d)(1). The court takes judicial notice of the existence of all 21 exhibits, their contents, and their legal effects, but not the truth of the facts stated therein. (See *In re Vicks* (2013) 56 Cal.4th 274, 314.)

The requests for judicial notice are **granted**.

ANALYSIS

1. *Substantive Due Process*

The first amended cross-complaint fails to allege sufficient facts to constitute this cause of action. The threshold issue is the standard of review. *County of Los Angeles Department of Public Health v. Superior Court of Los Angeles County* (2021) 61 Cal.App.5th 478 (*LADPH*) stated there is an "extremely deferential standard of review applicable to emergency exercises of governmental authority during a public health

emergency." (*Id.* at pp. 488-489, citing *Jacobson v. Massachusetts* (1905) 197 U.S. 11, 39 (*Jacobson*).) Though "*Jacobson* predates the tiers of scrutiny used in modern constitutional law" (*LADPH,* at p. 488), *LADPH* held that restaurants' substantive due process claims about pandemic-related closures "are analyzed in essentially the same way under *Jacobson* or employing modern rational basis review." (*Id.* at p. 489.)

Under the rational basis standard, conduct is constitutional "if there is any reasonably conceivable state of facts that could provide a rational basis for" it. (*F.C.C. v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313 (*F.C.C.*)].) "A substantive due process violation requires more than 'ordinary government error,' and the 'arbitrary and capricious' standard applicable in other contexts is a lower threshold than that required to establish a substantive due process violation. [Citation.] A substantive due process violation requires some form of outrageous or egregious conduct constituting 'a true abuse of power.' " (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 855–856 (*Las Lomas*).)

LADPH applied the rational basis standard in reviewing a trial court's injunction prohibiting the County from enforcing the same restaurant closure order implemented by the City until the County conducted an additional "risk-benefit analysis." (61 Cal.App.5th at p. 493.) The court stated that "the core issue is whether the County's temporary suspension of outdoor restaurant dining is rationally related to a legitimate state interest, i.e., limiting the spread of COVID-19." (*LADPH, supra,* 61 Cal.App.5th at p. 491.) *LADPH* held that "the court's appropriate role" was solely to determine whether the agency's action was arbitrary. (*Id.* at p. 493.) The court concluded, "Because the Restaurateurs failed to satisfy their burden of demonstrating the Order is arbitrary, capricious, or without rational basis, we conclude they cannot ultimately succeed on the merits of their [substantive due process] claims." (*Id.* at p. 495.)

The first amended cross-complaint alleges:

> 48. The Regional and County shutdown orders and Cross-Defendants' enforcement thereof through their local emergency orders violate the Due

Process Clauses of the Fifth and Fourteenth Amendments, both facially and as-applied to Cross-Complainants.

[¶]

50. [The City's] implementation and enforcement of the [State and County] Orders have had a disparate impact on Cross-Complainants and have unfairly targeted Cross-Complainants' business, specifically their ability to earn a living by conducting outdoor dining, despite the total lack of scientific evidence or data to support the implementation of the Orders as applied to Cross-Complainants.

51. Cross-Defendants' basis that their emergency orders are to "protect the public health" is merely a cloak of immunity to evade judicial review. Allowing exemptions to Cross-Defendants' emergency orders, i.e., non-restaurant businesses conducting outdoor dining, while forcing specifically restaurants to shut down is arbitrary government action Cross-Complainants are protected against under the U.S. Constitution.

(FACC, ¶¶ 48, 50-51.)

Assuming the City can be liable under 42 U.S.C. section 1983 for enforcing the County's or State's orders,[1] these allegations fail to state a cause of action for violation of substantive due process against the City. Just as in *LADPH*, there is a rational basis for the City to enforce State and County orders prohibiting outdoor dining: to protect the public from contagious disease by minimizing close contact between people. Eating at a restaurant results in close contact between people, including unrelated people who

[1] There is persuasive authority to the contrary. (See *Surplus Store and Exchange, Inc. v. City of Delphi* (7th Cir. 1991) 928 F.2d 788, 791, fn. 4 ["This argument would render meaningless the entire body of precedent… that requires culpability on the part of a municipality and/or its policymakers before the municipality can be held liable under § 1983, and would allow municipalities to be nothing more than convenient receptacles of liability for violations caused entirely by state actors"].)

1 otherwise would not encounter one another. It is rational that doing so increases
2 transmission of the virus, while prohibiting that reduces transmission.

3 Unlike other businesses that incidentally "conduct[] outdoor dining," restaurants
4 exist to serve food to diners. That means different groups of people coming and going
5 with a substantial rate of turnover, which widens the circles of contact between people
6 and therefore likely contributes to transmitting a contagious airborne virus. Furthermore,
7 there is a preexisting system of monitoring and enforcing rules and regulations regarding
8 health and safety at restaurants.

9 Though the first amended cross-complaint alleges the City violated the due
10 process clause "both facially and as-applied" (FACC, ¶ 48), it does not allege the City
11 arbitrarily enforced the rules specifically against Barfly, but not other restaurants. The
12 only factual allegation of a violation as applied is "disparate impact" or being "unfairly
13 targeted" (FACC, ¶ 50) because the City allowed exemptions to "non-restaurant
14 businesses conducting outdoor dining, while forcing specifically restaurants to shut
15 down." (FACC, ¶ 51.) That is a facial challenge to the County's orders, not an applied
16 challenge to the City's conduct. The Revised Temporary Targeted Safer at Home Health
17 Officer Order for control of COVID-19, issued by the County of Los Angeles
18 Department of Public Health on December 9, 2020, requires all restaurants to close for
19 indoor or outdoor dining. (RJN, Ex. 12, ¶¶ 5.e., 8.n.) The revised order issued on
20 December 30, 2020 does the same. (RJN, Ex. 13, ¶¶ 5.e., 8.n.) Any distinction between
21 restaurants and other businesses with outdoor dining comes from those County orders.

22 Cross-complainants argue that this cause of action cannot be resolved on the
23 pleadings and can only be done based on the evidence. The court disagrees. "[R]ational
24 basis review allows for decisions 'based on rational speculation unsupported by evidence
25 or empirical data.' " (*U.S. v. Navarro* (9th Cir. 2015) 800 F.3d 1104, 1114, citing *F.C.C.,*
26 *supra,* 508 U.S. at p. 315; see also *Las Lomas, supra,* 177 Cal.App.4th at p. 857.)
27 Although *LADPH* reviewed an order issuing a preliminary injunction and considered the
28 evidence, the same conclusion is appropriate on demurrer. It makes no difference

whether outdoor dining truly poses a danger to public health and that revoking Tin Horn Flats' conditional use permit truly protects the public. Even if the government is wrong on the science and empirical evidence on how outdoor dining affects the spread of COVID-19, prohibiting outdoor dining is not an abuse of power. The only question is if there is a rational basis for the government to believe so—and there is.

2. *Equal Protection*

The first amended cross-complaint fails to allege sufficient facts to state this cause of action against the City for the same reason as the substantive due process claim. "'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' [Citation.]" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.)

The second question is "whether disparate treatment of the groups is justified." (*Landau v. Superior Court* (2019) 32 Cal.App.5th 1072, 1085.) A "classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose." (*Central State Univ. v. Am. Assn. of Univ. Professors* (1999) 526 U.S. 124, 127-128.) The rational basis standard applies to "economic and social welfare legislation in which there is a 'discrimination' or differentiation of treatment between classes or individuals." (*Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 298, quoting *Warden v. State Bar* (1999) 21 Cal.4th 628, 640-641 [zoning ordinance prohibited selling furniture except by stores with 50,000 square feet of floor space].)

The first amended cross-complaint alleges the government "discriminatorily label[ed] restaurants as 'non-essential'." (FACC, ¶ 62.) Again, it does not allege the City itself did that. Assuming the City is liable for the classification, cross-complainants fail to state sufficient facts to constitute a violation of equal protection.

First, the City does not argue that restaurants are not similarly situated as other businesses. The court therefore does not address the question.

Second, assuming the groups are similarly situated, there is a rational basis for different treatment as discussed above. "The rational basis test is used for both equal protection analysis involving economic legislation [citations] and substantive due process analysis [citations]." (*Morning Star Co. v. Board of Equalization* (2011) 201 Cal.App.4th 737, 756.) Again, there is no need for evidence showing that the rational basis is empirically correct. "A court must reject an equal protection challenge to government action 'if there is any reasonably conceivable state of facts that could provide a rational basis for the' " classification. (*Las Lomas, supra,* 177 Cal.App.4th at p. 858, quoting *F.C.C., supra,* 508 U.S. at p. 313; see also *Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 896 ["appellants have failed to state a claim under the federal equal protection clause"].)

3. *Procedural Due Process*

The first amended cross-complaint fails to allege sufficient facts to state this cause of action against the City. The first issue is determining which allegations can support this cause of action against the City itself. Cross-complainants allege various things violated their right to procedural due process, only one of which is an action by the City. The City did not make "[t]he Regional and County orders." (FACC, ¶ 68.) The City had no part in the Los Angeles County of Department of Public Health revoking the restaurant's public health permit. (FACC, ¶¶ 26-29.) Cross-complainants also allege the City violated procedural due process by violating the Administrative Procedures Act (FACC, ¶ 73), but the Act only applies to state agencies, not municipalities. (*Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 91.)

There is only one action by the City that could ostensibly deprive cross-complainants of protected liberty or property interests without due process of law: revoking the restaurant's conditional use permit. (FACC, ¶¶ 21, 25, 30-31.) Under the due process clause, one who has acquired a permit generally has a protectible property

interest in it. (*Trans-Oceanic Oil Corp. v. City of Santa Barbara* (1948) 85 Cal.App.2d 776, 783-784.) "In revoking a permit lawfully granted, due process requires that [the municipality] act only upon notice to the permittee, upon a hearing, and upon evidence substantially supporting a finding of revocation." (*Id.* at p. 795.) "A compelling public necessity warranting the revocation of a use permit for a lawful business may exist if the conduct of a business as a matter of fact constitutes a nuisance and the permittee refuses to comply with reasonable conditions to abate the nuisance. In these circumstances a municipality has the authority to remove such a business under its police power to prohibit and enjoin nuisances." (*Korean American Legal Advocacy Foundation v. City of Los Angeles* (1994) 23 Cal.App.4th 376, 393, fn. 5.)

The first amended cross-complaint does not allege lack of notice, hearing, or substantial evidence supporting the revocation. Instead, it alleges that at the revocation hearing, the restaurant asserted "there was a valid dispute as to whether the Health Order both Burbank and LACPDH base Tin Horn's violations off of was in fact 'lawful'." (FACC, ¶ 30.) The City "concluded the hearing with the ruling revoking Tin Horn's CUP with no consideration of the perfunctory question as to whether their decision was based on a valid law, in clear violation yet again of Tin Horn's procedural due process rights." (FACC, ¶ 31.)

In other words, the purported violation of procedural due process is that the hearing failed to determine whether the restaurant closure orders by the State and County were lawful. That is beyond the scope of the revocation hearing. The hearing's scope is limited to determining if the permit: (1) "was obtained by fraud or misrepresentation," (2) "has been exercised contrary to the terms or conditions of approval, or in violation of any statute, ordinance, law or regulation not excused by the Conditional Use Permit," or (3) "the conditional use is being or has been so exercised as to be detrimental to the public health or safety or so as to constitute a nuisance." (Burbank Mun. Code, § 10-1-1952.) The right to procedural due process does not require the City Council to independently evaluate the lawfulness of orders by the State and County.

4. *Excessive Fines*

The first amended cross-complaint fails to allege sufficient facts for this cause of action. A "civil penalty" with a "partially punitive purpose, is a *fine* for purposes of the constitutional protection." (*City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1321.) "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." (*U.S. v. Bajakajian* (1998) 524 U.S. 321, 334.) "[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." (*Ibid.*) The key considerations in this analysis are: "(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728.)

The first amended cross-complaint does not clearly state whether the City has, in fact, imposed excessive fines on cross-complainants and, if so, facts supporting such an allegation. The Eighth Amendment does not apply "until after [the government] has secured a formal adjudication of guilt." (*Ingraham v. Wright* (1977) 430 U.S. 651, 671, fn. 40.) Cross-complainants allege, "It is unconscionable that Cross-Complainants and their employees and independent contractors could, in perpetuity, (as the Regional, County, and Local Orders have no sunset), face ruinous fines and months of incarceration." (FACC, ¶ 99.) Potential fines or incarceration in the future, however, cannot state a present cause of action for violating the Eighth Amendment.

The first amended cross-complaint also alleges, "Cross-Defendants have used arbitrary and capricious outdoor dining shutdown orders, that have no relation to limiting the spread of Covid-19, to impose excessive civil penalties such as the underlying lawsuit Cross-Complainants are Defendants in, and to criminally fine, and even illegally arrest one of Cross-Complainants." (FACC, ¶ 102.) This lawsuit cannot constitute a "fine" at this stage. Not only is it still pending, meaning no fine has been imposed yet, but also the

City does not seek a civil penalty or even damages. (Comp., Prayer, p. 17:1-7.) Similarly, arresting someone is not a formal adjudication of guilt.

The only potential violation of the Eighth Amendment is that the City "used … outdoor dining shutdown orders … to criminally fine" cross-complainants. (FACC, ¶ 102.) But the first amended cross-complaint does not allege the amount of the fines, who was fined, or for what crime. These conclusory allegations fail to state a cause of action for imposing grossly disproportional fines.

5. *Freedom of Assembly*

The first amended cross-complaint fails to allege sufficient facts for this cause of action. *LADPH* addressed the same issue:

> The First Amendment guarantees that "Congress shall make no law ... abridging ... the right of the people to peaceably assemble.'" (U.S. Const. 1st Amend.) Constitutional rights, however, "may at times, under the pressure of great dangers" be restricted "as the safety of the general public may demand." [Citation.] Specifically, states may impose reasonable restrictions on the time, place, and manner of protected speech and assembly provided the restrictions " 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' [Citations.]" … The Order meets this standard.
>
> First, the Order does not regulate assembly based on the expressive content of the assembly. Instead, it prohibits all outdoor dining at restaurants, breweries, wineries, and bars irrespective of the purpose of the gathering or type of speech the patrons may wish to express.
>
> Second, as stated above, it is undisputed limiting the spread of COVID-19 is a legitimate and substantial government interest. Banning outdoor dining, where people from different households gather in close proximity for

> extended periods without masks, is narrowly tailored to limiting the spread of COVID-19. [Citation.]
>
> Third, the Order leaves open alternative channels for assembling, i.e., videoconference or in-person socially distant gatherings with face coverings. [Citation.] We therefore conclude the Order does not violate [the restaurant's] purported First Amendment right to freedom of assembly or that of its patrons.

(*LADPH, supra,* 61 Cal.App.5th 478, 496.)

The situation in this case is identical. The same reasoning applies.

6. *Federal Takings Clause*; 7. *California Takings Clause*

The sixth and seventh causes of action require the same analysis. The first amended cross-complaint labels the seventh cause of action violation of the "right to liberty" under article 1, section 19 of the California Constitution. That section is the California takings clause. "California courts generally construe the federal and California takings clauses congruently." (*Small Property Owners of San Francisco v. City and County of San Francisco* (2006) 141 Cal.App.4th 1388, 1395–1396.)

The first amended cross-complaint does not allege that cross-defendants have taken any tangible property from cross-complainants. "[T]akings cases almost universally involve governmental action that affects ownership rights in *real property*." (*Broad v. Sealaska Corp.* (9th Cir. 1996) 85 F.3d 422, 430 [holding corporate equity is not property subject to the takings clause].) Tangible personal property can also be subject to the takings clause. (See, e.g., *Andrus v. Allard* (1979) 444 U.S. 51, 64 (*Andrus*) [bald eagle feathers].) But the Court of Appeal has held there is no property interest in a permit when the "permit was not only revocable, but also conditional." (*Belmont County Water Dist. v. State of California* (1976) 65 Cal.App.3d 13, 20.) Instead of taking tangible property, the first amended cross-complaint alleges the "Regional and County shutdown orders . . . completely and unconstitutionally deprived Cross-Complainants of all economically beneficial use of its *businesses* without just

compensation." (FACC, ¶ 119, italics added.) If the first amended cross-complaint attempts to allege taking of real property at the restaurant's location, the court notes that cross-complainant Baret Lepejian was evicted from the property on June 3, 2021. (RJN, Ex. 20.)

Assuming a "business" can be subject to a taking claim, the first amended cross-complaint fails to allege sufficient facts to constitute a taking. "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." (*Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528, 537 (*Lingle*).) But "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and ... such 'regulatory takings' may be compensable." (*Ibid.*) There are two types of *per se* takings: "First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation." (*Id.* at p. 538.) "A second categorical rule applies to regulations that completely deprive an owner of '*all* economically beneficial us[e]' of her property." (*Ibid.*)

Cross-complainants fail to allege sufficient facts for these three types of taking. They do not allege the City has directly appropriated or physically invaded their property. They allege the government has prevented them from serving diners at the restaurant and that the City revoked the restaurant's conditional use permit. That did not deprive the owners of all economically beneficial uses of the property. The government merely limited one specific type of economically beneficial use. And until the City revoked the restaurant's conditional use permit, it could have continued to operate as a restaurant for takeout and delivery.

The only potential claim is for a non-categorical regulatory taking under *Penn Central Transportation Company. v. New York City* (1978) 438 U.S. 104 (*Penn Central*). Rather than a "set formula," courts generally conduct "ad hoc, factual inquiries into the circumstances of each particular case." (*Connolly v. Pension Ben. Guar. Corp.* (1986) 475 U.S. 211, 224–225 (*Connolly*).) *Penn Central* "identified three factors which have

'particular significance': (1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.' " (*Connolly,* at pp. 224–225, citing *Penn Central,* at p. 124.)

This analysis does not, however, always require factual inquiries—particularly when the character of the governmental action is an exercise of its police power. In *Farmers Ins. Exchange v. State of California* (1985) 175 Cal.App.3d 494 (*Farmers*), the court addressed this question. In 1980, the Governor declared a state of emergency due to a medfly infestation. (*Id.* at p. 499.) The State then conducted "wide-scale aerial spraying with the insecticide malathion," which resulted in damage to automobile paint. (*Id.* at pp. 500-501.) Plaintiff insurance companies "were obliged to pay numerous claims of their policy holders for costs of new paint jobs." (*Id.* at p. 498.) The Court of Appeal held:

> The point is made that it is a question of fact whether the exercise of the police power is reasonable or proper under the circumstances, a matter which therefore cannot be resolved at the pleading stage. This may be so in those cases where it is unclear whether the public agency is exercising a regulatory police power or an eminent domain power constituting a taking. [Citations.] Where there exists an obvious emergent public interest, however, such analysis is unnecessary. "In such cases calling for immediate action the emergency constitutes full justification for the measures taken to control the menacing condition, and private interests must be held wholly subservient to the right of the state to proceed in such manner as it deems appropriate for the protection of the public health or safety." [Citation.] Among the types of emergencies which justify police action without calling for compensation are "the demolition of all or parts of buildings to prevent the spread of conflagration, or the destruction of diseased animals, of rotten fruit, or infected trees where life or health is jeopardized." [Citation.]

> In our view there is no question but that the case at bar falls squarely within the police power exception to the just compensation rule stated in California Constitution Article I, section 19. Thus the State and its agents are afforded complete immunity from liability on this theory.

(*Id.* at pp. 501-502.)

In *Farmers*, there was no need to consider evidence on the extent of the threat caused by medflies or whether the spraying of insecticide was justified. The Court of Appeal found an infestation of medflies—an agricultural pest—was an obvious emergent public interest. Likewise, in the present case, the coronavirus pandemic is an obvious a public interest emergency justifying the use of the exercise of police power in prohibiting dining at restaurants and shuttering those that refuse to comply.

As the United States Supreme Court stated, "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." (*Andrus v. Allard* (1979) 444 U.S. 51, 65–66.) For whatever property cross-complainants allege was taken, the government has not even destroyed one complete strand in the bundle of property rights. The only limit was that cross-complainants could not have indoor or outdoor dining at the restaurant. Cross-complainants can use their property for any other purpose. There is no factual scenario in which such a minor limit on cross-complainants' rights for the purpose of protecting public health during a pandemic can constitute a taking requiring compensation.

8. *Contract Clause*

Cross-complainants fail to allege sufficient facts to constitute a violation of either the federal or California Contract Clause. "The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' [Citation.]" (*Energy Reserves Group, Inc. v. Kansas Power and Light Co.* (1983) 459 U.S. 400, 411.) "If the state regulation constitutes a substantial impairment, the State, in

justification, must have a significant and legitimate public purpose behind the regulation, [citation] such as the remedying of a broad and general social or economic problem." (*Id.* at pp. 411-412.) Finally, the court determines "whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying' " the impairment of the contract. (*Id.* at p. 412.) For contracts between private parties, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." (*U.S. Trust Co. of New York v. New Jersey* (1977) 431 U.S. 1, 23.)

The first amended cross-complaint alleges, "The Shutdown Orders and Cross-Defendants' arbitrary and capricious enforcement of them through Cross-Defendants' local orders fundamentally upend the contractual bargains struck between Cross-Complainant employers and their employees by effectively terminating contracted-for employment without any recourse for a period of time." (FACC, ¶ 139.)

Assuming the City's conduct substantially impaired these contractual relationships, the legitimate public purpose is to protect the public from the spread of a deadly virus. The final question, whether that purpose justifies the impairment, is parallel to the rational basis test used for substantive due process and equal protection. Prohibiting in-person dining at restaurants and revoking the restaurant's conditional use permit for not complying are reasonable means to further that legitimate public purpose.

9. *Bane Civil Rights Act*

The first amended cross-complaint fails to allege sufficient facts for this cause of action. A violation requires: "(1) intentional interference or attempted interference with a state or federal constitutional or legal right, and (2) the interference or attempted interference was by threats, intimidation or coercion." (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 67.) "The word 'interferes' as used in the Bane Act means 'violates.' [Citations.] The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., 'threats, intimidation or coercion'), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or

to force the plaintiff to do something that he or she was not required to do under the law." (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 883.)

This cause of action fails because cross-complainants do not allege any attempted or completed interference to prevent them from something they had the right to do. The only rights they allege interference with are those in the first eight causes of action—all of which fail on the pleadings. Nothing the City allegedly did prevented cross-complainants from doing anything they had the right to do or required them to do something they were not required to do under the law.

DISPOSITION

Cross-defendants' demurrer is **SUSTAINED** with 20 days' leave to amend.

IT IS SO ORDERED

Date: January 12, 2022

Armen Tamzarian / Judge
JUDGE OF THE SUPERIOR COURT