STATE OF MICHIGAN
COURT OF CLAIMS

THE GYM 24/7 FITNESS, LLC, et al.,

Plaintiff,

v

STATE OF MICHIGAN,

Defendant.

No. 20-000132-MM

HON. MICHAEL KELLY

Philip L. Ellison (P74117)
Attorney for Plaintiffs
P.O. Box 107
Hemlock, MI 48626
(989) 642-0055

Matthew E. Gronda (P73693)
Attorney for Plaintiffs
P.O. Box 70
St. Charles, MI 48655
(989) 249-0350

William S. Selesky (P77750)
Joshua O. Booth (P53847)
Christopher Allen (P75329)
Attorney for Defendant
Michigan Department of Attorney General
Labor Division
P.O. Box 30376
Lansing, MI 48909
(517) 335-7641

/

DEFENDANT STATE OF MICHIGAN'S 08/19/2020 MOTION FOR SUMMARY DISPOSITION IN LIEU OF AN ANSWER

Defendant State of Michigan, through counsel, moves this Court to dismiss Plaintiff's complaint under MCR 2.116(C)(7), (8), and (10).

1. This case involves challenges to State action arising from executive orders. Specifically, Plaintiff The Gym 24/7 Fitness, LLC brings the following claims: (1) inverse condemnation; (2) taking under the Michigan

Constitution; and (3) taking under the U.S. Constitution. Plaintiff seeks monetary damages.

2. Plaintiff's complaint should be dismissed for several reasons.

3. First, *Jacobson* and its progeny give the State broad authority to implement emergency measures when faced with a society-threatening epidemic. The State's exercise of its police power to protect public health and safety does not implicate inverse condemnation or taking claims. The State need not pay compensation to businesses subjected to reasonable, temporary public health and safety measures imposed during a pandemic.

4. Second, Plaintiff fails to sufficiently plead that the State's actions constitute an inverse condemnation. Plaintiff does not assert the State's actions have permanently harmed its property value, it has not alleged facts suggesting the State abused its powers, and it has not alleged that it suffered a unique or special injury.

5. Third, Plaintiff's takings claims are facially meritless. Plaintiff has not alleged a taking at all because the challenged regulation is directed toward public health and safety, removing it from the ambit of relevant takings precedent. Further, Plaintiff has not properly pleaded viable takings claims.

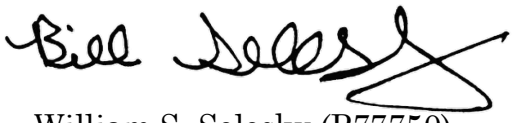
6. In further support of this motion, the State rely on the facts, law and argument more fully developed in the attached brief in support.

7. Pursuant to Local Rule 2.119(A)(2), counsel for Defendant contacted counsel for Plaintiff on August 17, 2020, and requested concurrence in the relief sought. Counsel for Plaintiffs did not concur, necessitating this motion.

For the reasons set forth in this motion and attached brief in support, Defendant State of Michigan asks this Court to dismiss Plaintiff's complaint in its entirety.

Respectfully submitted,

Dana Nessel
Attorney General



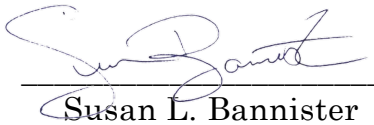
William S. Selesky (P77750)
Assistant Attorney General
Attorneys for Defendant State of Michigan
Labor Division
P.O. Box 30736
Lansing, MI 48909
(517) 335-7641
Seleskyw1@michigan.gov

Dated: August 19, 2020

PROOF OF SERVICE

Susan L. Bannister certifies that on the 19th day of August, 2020, she served a copy of the above document in this matter on all counsel of record via electronic mail:

Philip L. Ellison pellison@olcplc.com
Matthew E. Gronda matt@matthewgronda.com



Susan L. Bannister

STATE OF MICHIGAN
COURT OF CLAIMS

THE GYM 24/7 FITNESS, LLC, et al.,

Plaintiff,

v

STATE OF MICHIGAN,

Defendant.

No. 20-000132-MM

HON. MICHAEL KELLY

Philip L. Ellison (P74117)
Attorney for Plaintiff
P.O. Box 107
Hemlock, MI 48626
(989) 642-0055

Matthew E. Gronda (P73693)
Attorney for Plaintiffs
P.O. Box 70
St. Charles, MI 48655
(989) 249-0350

William S. Selesky (P77750)
Joshua O. Booth (P53847)
Christopher Allen (P75329)
Attorney for Defendant
Michigan Department of Attorney General
Labor Division
P.O. Box 30376
Lansing, MI 48909
(517) 335-7641

/

DEFENDANT STATE OF MICHIGAN'S 08/19/2020 BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION IN LIEU OF AN ANSWER

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

INTRODUCTION

For more than a century, the U.S. Supreme Court has consistently held that in times of emergency, states may exercise their police power to "protect the lives, health, morals, comfort, and general welfare of the people." *Manigault v Springs*, 199 US 473, 480 (1905). We are living through such an emergency now. The COVID-19 pandemic continues in Michigan, infecting and killing thousands of Michiganders to date. In response, Governor Whitmer has issued temporary executive orders aimed at mitigating COVID-19's spread. These orders have included reasonable and temporary restrictions on certain activities posing specific risks to the public health. Among other restrictions, the Governor has ordered the temporary closure of indoor gymnasiums and similar facilities due to their uniquely heightened risk of viral contagion. After all, COVID-19 is a highly contagious virus spread primarily through respiratory droplets[1] expelled from the body in large quantities during exercise.[2]

Plaintiff alleges that the Governor's orders, which have required its indoor fitness business to temporarily close, represent a "taking" requiring compensation under the Michigan and U.S. Constitutions. But Plaintiff's arguments are meritless on their face. Governor Whitmer's reasonable, temporary restrictions aimed at

---

[1] *See* World Health Organization, *Modes of transmission of virus causing COVID-19*, available at https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations.

[2] Centers for Disease Control, *Social Distancing, Quarantine, and Isolation*, available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html.

limiting COVID-19's spread do not constitute takings of private property. Rather, they are a valid, recognized exercise of the state's traditional police power. Further, even under federal and state "takings" jurisprudence, Plaintiff's allegations do not meet any of the judicially recognized takings categories that warrant compensation. Similar challenges in state and federal courts have been uniformly dismissed. Plaintiff's complaint must likewise be dismissed.

STATEMENT OF FACTS

Plaintiff's complaint offers little substantive discussion of the global health crisis affecting Michigan and the United States. To give factual context to Governor Whitmer's recent executive orders and the State's ongoing efforts to combat COVID-19, additional discussion is necessary.

COVID-19, the disease caused by the novel coronavirus SARS-CoV-2, is spread from person to person mainly through respiratory droplets produced when an infected person coughs, sneezes, talks, or breathes. The virus spreads most efficiently when infected droplets land in the mouths or noses of people who are nearby, and spread is more likely when people are in close contact. COVID-19 causes a range of symptoms, ranging from critically severe to mild. Many symptomatic people experience trouble breathing and shortness of breath, fever, cough, and loss of taste or smell. Some cases result in a severe, life-threatening pneumonia, but others produce no symptoms at all. It is widely accepted that infected individuals can spread the disease regardless of whether they are symptomatic.[3]

Because there is no effective way to immunize or treat COVID-19, the Centers for Disease Control and Prevention have indicated the best way to prevent illness is to "avoid being exposed."[4] To mitigate COVID-19's spread through

[3] U.S. Centers for Disease Control and Prevention, *COVID-19 Frequently Asked Questions* <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (accessed August 13, 2020).

[4] (*Id.*)

communities, government entities have stressed the importance of various "social distancing" measures, which involve avoiding public spaces, limiting movement, and preventing close contact with others who may be infected.

The Governor responds to the expanding epidemic

It is currently believed that COVID-19 began spreading through the United States in February 2020, and the first confirmed cases were recorded in Michigan in March 2020. As COVID-19 began to ravage Michigan that month, Governor Whitmer responded with a series of actions aimed at mitigating viral spread and protecting Michigan communities. She declared a state of emergency on March 10, 2020, invoking her emergency powers pursuant to the Emergency Powers of Governor Act (EPGA), MCL 10.31 *et seq*., and the Emergency Management Act (EMA), MCL 30.401 *et seq*. Over the following weeks and months, the Governor issued a series of executive orders in direct response to the pandemic, including her "stay home, stay safe" order.[5] This order directed all Michiganders not performing essential or critical infrastructure job functions to stay in their place of residence, subject to certain exceptions. Governor Whitmer also ordered various places of public accommodation, like restaurants, bars, and exercise facilities, to close their premises to the public.[6] The "stay home, stay safe" order and the public-

[5] Executive Order 2020-21.

[6] Executive Order 2020-9.

accommodations order were amended and reissued several times,[7] and their overall public health impact was remarkable. With these orders in place, Michigan went from a seven-day average of 1,878 new cases of COVID-19 on April 3, 2020, to 187 new cases on June 10, 2020.[8]

As Michigan's numbers improved and the Governor correspondingly planned to re-engage Michigan's economy and modify her various executive orders to that end, she announced her six-phase MI Safe Start Plan. Under this plan, the Governor divided the state into eight geographical regions, to enable the implementation of different mitigation measures based on local conditions. These phases include (1) uncontrolled growth, (2) persistent spread, (3) flattening, (4) improving, (5) containing, and (6) post-pandemic.[9]

In accordance with this plan, Governor Whitmer issued E.O. 2020-110 on June 1, 2020, which moved the State to Stage 4 of the MI Safe Start Plan, meaning Michiganders were no longer required to stay home and the State would be subject to narrower and more permissive limitations on certain gatherings, events, and businesses. This order left in place the restriction that certain places of public accommodation – including indoor gyms, fitness centers, and the like, as well as

---

[7] *See* E.O. Nos. 2020-42, 2020-59, 2020-70, 2020-77, 2020-92, and 2020-96 (stay home orders); 2020-20, 2020-43, and 2020-69 (public accommodations orders).

[8] The New York Times, *Michigan Coronavirus Map and Case Count* <https://www.nytimes.com/interactive/2020/us/michigan-coronavirus-cases.html> (accessed August 13, 2020).

[9] MI Safe Start, available at <https://www.michigan.gov/documents/whitmer/MI_SAFE_START_PLAN_689875_7.pdf> (accessed August 13, 2020).

indoor entertainment and recreational facilities such as trampoline parks, climbing facilities, dance halls, and the like – remain "closed to ingress, egress, use, and occupancy by members of the public," given the heightened risks of infection and spread that attends use of those facilities.

On June 5, 2020, the Governor issued E.O. 2020-115, which lifted many restrictions in Regions 6 (northern Lower Peninsula) and 8 (Upper Peninsula) due to the significantly and steadily lower case numbers in those regions. This included lifting the restrictions on indoor fitness activity in those regions and permitting gyms and similar businesses to fully resume in-person operations subject to certain safety measures. On July 31, 2020, E.O.s 2020-110 and 2020-115 were superseded by E.O. 2020-160. Among other requirements, E.O. 2020-160 requires Michiganders to wear face coverings in enclosed public spaces and follow social distancing protocols, and leaves in place the prior orders' restrictions on indoor gyms and similar facilities in all regions of the State but 6 and 8.[10]

Gyms and fitness centers have remained temporarily closed in these regions of the State because they pose a uniquely heightened hazard of COVID-19 infection and spread. This is due primarily to the respiratory nature of the virus and its symptoms. Exercise is a sustained vigorous physical activity, which means heavy breathing and therefore, acute, propulsive bursts of virus shed by anyone in the confined space. Apart from individual exercisers in proximity, there is the added risk of individuals working out together or organized groups working out for

[10] E.O. 2020-160(4)(b).

extended trainer-led sessions.[11] The risk of viral spread is only heightened further by the sharing of exercise equipment among many different people over the course of the day, even when good-faith efforts are made to clean that equipment after each use. These factors merge to make gyms and fitness centers a source of particular concern to the State in its efforts to mitigate COVID-19's spread.

And while Michigan fared better than many states in combatting the spread of COVID-19, the virus has inflicted a devastating toll, and it remains a constant threat. As the Governor has gradually lifted restrictions over the course of the summer, Michigan has seen an uptick in new COVID-19 cases. As of August 13, there have been at least 98,825 cases and 6,541 deaths in Michigan since the beginning of the pandemic.[12] This, coupled with the experiences of other states that have reopened more quickly and have faced alarmingly steep surges in viral spread as a result, counsels continued patience and caution in lifting social distancing measures such as the current restrictions on indoor gymnasiums and fitness centers.

---

[11] *See, e.g.*, CDC Research Paper, *Cluster of Coronavirus Disease Associated with Fitness Dance Classes, South Korea*, available at https://wwwnc.cdc.gov/eid/article/26/8/20-0633_article; *see also USA Today, Is group exercise safe? Study raises questions about coronavirus risk in gyms* (June 5, 2020), available at https://www.today.com/health/coronavirus-group-exercise-are-classes-safe-coronavirus-risk-gyms-t183428 (summarizing South Korea study of 112 infections linked to fitness dance classes at twelve gyms); *New York Times*, *Is It Safe to Go Back to the Gym?* (May 13, 2020), available at https://www.nytimes.com/2020/05/13/well/move/coronavirus-gym-safety.html.

[12] (*Id.*)

Although these facilities, among other places of public accommodation, must remain temporarily closed to the public, those restrictions are subject to loosening as conditions improve. Indeed, in recognition of the temporary nature of the current restrictions on gyms and fitness centers, E.O. 2020-161 contains specific workplace safety rules for those businesses to follow once conditions allow for them to safely re-open for indoor use, as their counterparts have in Regions 6 and 8.[13]

Furthermore, while these restrictions do not permit the provision of indoor gym services, employees of these businesses continue to be permitted on site, and outdoor fitness classes and other outdoor recreational activities are permitted.[14] The order also does not prevent gyms and similar businesses from offering online and certain in-home services to clients, or from selling products via delivery, curbside pickup, or at outdoor classes and the like.

Under the Governor's incremental, data-driven approach to imposing and lifting restrictions to mitigate COVID-19's spread, gyms and fitness centers in parts of the State must remain closed to public, indoor use, but those restrictions are limited, temporary, and subject to loosening as soon as is safely possible.

[13] E.O. 2020-161(13).

[14] E.O. 2020-160(9)(a).

ARGUMENT

I. Governor Whitmer's temporary orders are reasonable, temporary exercises of the State's police power. Under United States Supreme Court precedent, the Governor has wide latitude in dealing with great dangers to public health.

Plaintiff challenges the executive orders' limited and temporary restriction on the business operations of gyms and fitness centers under theories of inverse condemnation and taking. These claims, however, all plainly fail under the highly deferential review to which the Governor's orders are entitled.

It is well-settled, and in the present crisis highly relevant, that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson v Massachusetts*, 197 US 11, 27 (1905). Specifically, "the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." *Id.* at 25; see also *S Bay United Pentecostal Church*, *South Bay United Pentecostal Church, et al v Gavin Newsom, Governor of California,* 509 US ___, ___ (2020) slip op, p. 3 (summary order released May 29, 2020) (Roberts, CJ, concurring). (providing state officials "broad" latitude in dealing with COVID-19 restrictions). Recognizing the separation of powers, and the limits on the judiciary to invade the authority of a co-equal branch, the Supreme Court in both *Jacobson* and *South Bay* refused to "usurp the functions of another branch of government" by second-guessing the executive's exercise of police power in such circumstances. *Jacobson*, 197 US at 28. Review of the exercise of such power is "only" available if the challenged action "has no real or substantial relation to those

objects [of securing public health and safety], or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 31 (emphasis added).

That broad principle has recently been applied to a similar challenge in federal court to the constitutionality of temporarily closing indoor fitness facilities. In *League of Independent Fitness Facilities and Trainers v Whitmer*, the Sixth Circuit stayed an injunction pending appeal in a case challenging the closure of indoor fitness facilities. Sixth Cir No 20-1581 (June 24, 2020). (Exhibit A.) In that opinion, the Sixth Circuit concluded that deference to Governor Whitmer was appropriate under *Jacobson* and *South Bay*. Specifically, "all agree that the police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts." (*Id.*) "Crises like COVID-19 can call for quick, decisive measures to save lives. Yet those measures can have extreme costs—costs that often are not borne evenly. The decision to impose those costs rests with the political branches of government, in this case, Governor Whitmer." (*Id.*)

Michigan law has established a similar principle of deference in these circumstances. See e.g., *People ex rel Hill v Lansing Bd of Ed*, 224 Mich 388, 390–392 (1923) (citing *Jacobson*). In fact, this Court, citing both *Jacobson* and *Lansing Bd of Ed*, recently recognized that its role is not to second-guess the Governor's judgment on matters of such significance to the public health, but only to "determine whether the Governor's orders are consistent with the law." *Martinko,*

et al v Whitmer, et al, Court of Claims No 20-00062-MM, Opinion and Order Regarding Preliminary Injunction (4/29/20), pp 11, 14. (Exhibit B.)

Jacobson and its progeny outline the State's police power to protect public health in the COVID-19 context, and there is no viable path for Plaintiff around its well-settled rule of law. Plaintiff cannot dispute the gravity of the pandemic in Michigan. It is a once-in-a-century kind of epidemiological public health crisis caused by a potentially fatal virus that remains easily transmittable and still lacks adequate treatment, let alone a vaccine. In such times, the State has wide plenary authority to temporarily restrict activity that presents a diffuse but real threat to the public health.

Under *Jacobson* and applicable principles of separation of powers, judicial deference to the Governor's authority responding to the crisis is paramount. Indeed, this Court has recognized as much in denying a motion for a preliminary injunction:

> The role courts play under *Jacobson* and *Lansing Bd of Ed* is not to "second-guess the state's policy choices in crafting emergency public health measures," *In re Abbott*, 954 F3d at 784, but is instead to determine whether the state regulation has a "real or substantial relation to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" *Id*., quoting in part *Jacobson,* 197 US at 31. Part of this review includes looking to whether any exceptions apply for emergent situations, the duration of any rule, and whether the measures are pretextual. *Id.* at 785.

(Exhibit B, p. 11.)

As will be discussed in more detail, Plaintiff's claims cannot survive this settled standard, and should be dismissed. The executive orders' restriction on

indoor gym services plainly bears a "real or substantial relation" to suppressing the spread of COVID-19 and does not constitute, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 US at 31.[15]

To wit, a simple trip to an indoor fitness business for a workout might appear both innocuous and inoculated for purposes of the virus.

But appearances are deceiving. Customers and employees all share space, breathe the same air, and touch common surfaces. For these factors, the context of an indoor fitness facility is critical. Why? Because even the most ventilated indoor facility is susceptible to respiratory spread of the virus. The danger is only amplified when people congregate (even with social distancing) in a confined space and work out. By its nature, working out is sustained, vigorous physical activity, which induces heavy breathing and, from that heavy breathing, acute, propulsive bursts of virus shedding by anyone in that confined space who might be infected—including those who display no signs of infection.[16] And the risk of viral spread is

---

[15] Indeed, when courts have evaluated constitutional challenges to COVID-19 mitigation measures of the general sort at issue here – i.e., that restrict business activities – they have consistently rejected those challenges. *See, e.g.*, *LIFFT*, *supra*; *CH Royal Oak, LLC v Whitmer*, No. 1:20-CV-570, 2020 WL 4033315 (W.D. Mich. July 16, 2020); *Talleywhacker, Inc. v. Cooper*, No. 5:20-CV-218-FL, 2020 WL 3051207 (E.D.N.C. June 8, 2020); *Best Supplement Guide, LLC v. Newsom*, No. 220-CV-00965-JAMCKD, 2020 WL 2615022 (E.D. Cal. May 22, 2020); *Open Our Oregon v. Brown*, No. 6:20-CV-773-MC, 2020 WL 2542861 (D. Or. May 19, 2020); *Amato v. Elicker*, No. 3:20-CV-464 (MPS), 2020 WL 2542788 (D. Conn. May 19, 2020); *SH3 Health Consulting, LLC v. St. Louis County Exec.*, 2020 WL 2308444 (E.D. Mo., May 8, 2020); *Hartman v. Acton*, No. 2:20-CV-1952, 2020 WL 1932896 (S.D. Ohio Apr. 21, 2020).

[16] *See* CDC Research Paper, *Cluster of Coronavirus Disease Associated with Fitness Dance Classes, South Korea*, available at https://wwwnc.cdc.gov/eid/article/26/8/20-0633_article; *see also USA Today, Is group exercise safe? Study raises questions*

only heightened further by the sharing of exercise equipment among many different people over the course of the day, even when good-faith efforts are made to clean that equipment after each use.

At a fitness center, these factors merge to significantly increase the incidence of this highly contagious and asymptomatically transmittable virus spreading. Use of personal protective equipment (PPE), sanitizers, and the like will only do so much to avoid these harms. And the reality of working out makes things like face coverings all the more likely to be discarded or worn improperly given the heavy breathing associated with fitness activities, heavy breathing that is a key spreader of the virus.

Accordingly, there is ample good reason to temporarily regulate fitness centers, as the executive orders challenged here do. And there is ample good reason for those regulations to remain in place longer than those that restrict activity that does not pose the same level of risk of infection and spread—such as activity that is outdoors or more sedentary or isolated. The restrictions at issue serve to protect the public health of the State and its residents from a highly contagious, potentially fatal or disabling, and still untreatable virus. They—like the broader set of measures regarding travel and in-person work and activities that were put in place

---

about coronavirus risk in gyms (June 5, 2020), available at https://www.today.com/health/coronavirus-group-exercise-are-classes-safe-coronavirus-risk-gyms-t183428 (summarizing South Korea study of 112 infections linked to fitness dance classes at twelve gyms); *New York Times, Is It Safe to Go Back to the Gym?* (May 13, 2020), available at https://www.ytimes.com/2020/05/13/well/move/coronavirus-gym-safety.html

by the Governor's emergency orders—are temporary, tailored, and aimed at guiding the state as swiftly and safely as possible through the severe dangers posed by this pandemic.

Adequate time must be given for the restrictions' public health goals to be served and for the State to transition safely toward economic normalcy—and due deference must be given under *Jacobson* to the Governor's assessment and actions in that regard.[17] *See, e.g., South Bay United Pentecostal Church*, 509 U.S. ___ (Roberts, C.J., concurring in summary denial order) (explaining that "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement," and the judgment of "the politically accountable officials" to whom those decisions are entrusted "should not be subject to second-guessing" by the courts). And indeed, this careful and gradual transition is exactly what has been happening, with the Governor constantly and carefully calibrating the restrictions in place based on the best available data and the advice of public-health experts. This is the very essence of the emergency management authority afforded the Governor under the principles announced in *Jacobson*.

In sum, the limited and temporary restrictions in the Governor's orders have been necessary and appropriate, with a "real [and] substantial relation" to stopping

[17] The incubation period of the virus and its duration of contagion are other important variables not yet fully understood. Accordingly, a variable dial approach to reopening should be preferred over the flipping of a switch that Plaintiff's legal position might suggest.

the spread of the virus, and they most certainly do not constitute, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 US at 31. As stated by this Court:

> What the Court must do—and can only do—is determine whether the Governor's orders are consistent with the law. Under the applicable standards, they are.

(*Martinko* Opinion, Ex B, p. 14, citation omitted). Accordingly, Plaintiffs cannot overcome *Jacobson*, even in the context of an after-the-fact inverse-condemnation or takings theory, and their claims fail as a matter of law.

II. Plaintiff's inverse condemnation claim fails because Plaintiff has not alleged facts establishing that the government abused its powers.

Even absent *Jacobson*'s highly deferential review, and under a more standard analysis, Plaintiff's claims warrant dismissal. In Count I, Plaintiff alleges an inverse condemnation claim against the State arising from the Governor's orders affecting its operations. This claim must be dismissed because Plaintiff has not sufficiently pleaded that the State's actions constitute an inverse condemnation.

Inverse condemnation, also known as de facto taking, is a distinct legal doctrine from the "regulatory taking" claim implicated in Plaintiff's Counts II and III. *Id.* An inverse condemnation claim is not implicated where a plaintiff alleges simply that the government effectively takes its property by overburdening it with regulations; rather, inverse condemnation arises where the government seeks to take the property "in fact." *In re Acquisition of Land Virginia Park*, 121 Mich App 153, 158–159 (1982).

Generally, inverse condemnation "is a cause of action against a government defendant to recover the value of property which has been taken in fact by the government defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Id.* A plaintiff alleging a de facto taking or inverse condemnation must establish (1) that the government's actions were a substantial cause of decline in private property's value, and (2) that the government abused its powers in affirmative actions directly aimed at the property. *Blue Harvest, Inc v Dep't of Transp*, 288 Mich 267, 277 (2010).

Even accepting Plaintiff's assertions as true, it has not stated a claim for inverse condemnation. First, Plaintiff does not assert that Governor Whitmer's actions substantially caused a permanent decline in its property value. The Governor's orders affecting Plaintiff's property are temporary, and Plaintiff has not asserted that the State has physically taken or destroyed its property. Simply put, once conditions allow for gyms and fitness centers to reopen for public, indoor use, Plaintiff will be able to reopen without any damage to or loss of its property.

Second, Plaintiff has not alleged any facts whatsoever even suggesting that the State "abused its powers" in affirmative actions directly aimed at the property. Plaintiff specifically states that it does not seek to challenge the Governor's executive orders, either the authority for the orders or their application to Plaintiff's business. (Complaint, p 3.) Without any allegation that Governor Whitmer abused her powers in ordering Plaintiff and other fitness centers to temporarily close for

indoor public use during the pandemic, Plaintiff's inverse condemnation claim is fatally deficient.

Additionally, Plaintiff fails to allege—as is also necessary to their claim—that it suffered a "unique or special injury, that is an injury that is different in kind, not simply in degree, from the harm suffered by all persons similarly situated." *Mays v Governor of Michigan*, ___ Mich ___, ___ (July 29, 2020) (Docket No. 157335), 2020 WL 4360845, at *7, quoting *Spiek v Mich Dep't of Transp*, 456 Mich 331, 348 (1998). The Governor's orders aimed at limiting COVID-19's spread are generally applicable and, whether the proper scope of "similarly situated" entities is broad (places of public accommodation like movie theaters, bowling alleys, performances venues, and skating rinks, see E.O. 2020-160, ¶ 4) or narrow (indoor fitness centers), Plaintiffs have not alleged a "unique or special injury." *Mays*, slip op at *7. Many of these businesses may have suffered losses during the ongoing pandemic due to the heightened risks that currently attend use of their facilities, but the Governor's orders are temporary, limited, and designed to protect the public health while the pandemic is ongoing. Plaintiff fails to allege why its fitness center business has suffered an injury different in kind from the harm suffered by all entities similarly situated to it.

III. Plaintiff's takings claims are meritless because the Governor's orders constitute reasonable, temporary public health regulations.

Plaintiff's takings claims fare no better, and fail on multiple grounds. First, Plaintiff has not alleged a taking at all because the challenged regulation is directed

toward public health and safety, removing it from the ambit of relevant takings precedent. Second, even assuming this was not a health-and-safety regulation, Plaintiff has not properly pleaded viable takings claims, and this Court should dismiss them.

A. Plaintiffs have not alleged a taking at all, because the challenged regulation is a health-and-safety regulation.

Plaintiff frames the State's exercise of its police power as a "taking" of its property under the Michigan and U.S. Constitutions. (Counts II and III.) But this argument misses a critical distinction. Where the State regulates the use of property to promote the health, safety, morals, or general welfare, the U.S. Supreme Court routinely upholds regulations that adversely affected *or even destroyed* recognized property interests. *Penn Central Transp Co v New York City*, 438 US 104, 125 (1978). These public-health-and-safety regulations are not "takings" in the first place. Instead, the general rule is that a person may not claim compensation or damages that result from state regulations reasonably aimed at securing or protecting public health and public safety. *Mugler v Kansas*, 123 US 623, 668–669 (1887); *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 489–490 (1987). Such regulations simply do not amount to exercise of the state's eminent domain power requiring compensation.

Where the State seeks to condemn or appropriate property for a public purpose, a compensable taking may exist. But where, as here, the regulation of property to protect public health and safety by preventing that property's use for

harmful purposes does not constitute a "taking." *Id.*; see also *Miller v Schoene,* 276 US 272 (1928) (holding that state action to destroy infected cedar trees to protect nearby apple orchards does not constitute a compensable taking). The circumstances presented by this case do not give rise to a cognizable taking case, such as where government action seeks to protect the public against threats external to the subject property. Instead, the Governor's executive orders are regulations on businesses that, by continuing to operate, would themselves pose a public health threat through the continued spread of a deadly disease. These regulations simply do not constitute takings.

Accordingly, when a government regulation arises directly from an emergency threatening public health and safety, courts are highly reluctant to find a taking. For example, the U.S. Court of Appeals for the Third Circuit fairly recently considered government regulation ordering an open-air flea market to close for five months in response to unexploded munitions discovered on the property. *Nat'l Amusements Inc v Borough of Palmyra*, 716 F3d 57 (CA 3, 2013). The Court categorically denied that a regulatory taking had occurred, holding that "it is difficult to imagine an act closer to the heartland of a state's traditional police power than abating the danger posed by unexploded artillery shells." *Id.* at 63. The government's "emergency action to temporarily close the market therefore constituted an exercise of its police power that did not require just compensation." *Id.* Notably, the Third Circuit did not even apply the "regulatory takings" tests adopted by the courts. Instead, the Court simply determined that the government

regulation was at the heart of the state's traditional police power, and so there was no taking requiring compensation. Further analysis was not required.

Plaintiff has alleged that Governor Whitmer's orders temporarily decreased the value of its property, but it has failed to adequately allege other facts that might trigger this Court to consider this a true "takings" case at all. At its core, Plaintiff asserts that the State has "taken" its property by requiring it close to the public for indoor operations, resulting in some diminution of value. But this is insufficient to establish a takings claim. "[A] reduction in the value of the regulated property is insufficient, standing alone, to establish a compensable regulatory taking." *K & K Construction, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 553 (2005). In fact, in takings challenges brought in the zoning regulation context, the Michigan Court of Appeals has determined that even a 75% or 87.5% diminution in property value was insufficient on its own to establish a government taking. *Id.*, citing *Euclid v Ambler Realty Co*, 272 US 365 (1926) and *Hadacheck v Sebastian*, 239 US 394 (1915). The State's temporary restriction on Plaintiff's business activity constitutes a reasonable exercise of its police power to protect the public health during a pandemic. Plaintiff's conclusory allegations that the Governor's temporary restrictions on its property "inflicted very nearly the same effect for constitutional purposes as appropriating or destroying the property as a whole" are insufficient to establish a takings claim as a matter of law.

Already, virtually identical "takings" claims have been rejected by other state courts in the COVID-19 context. This year, the Pennsylvania Supreme Court

rejected takings claims brought by businesses ordered closed by Pennsylvania's governor to mitigate COVID-19's spread. *Friends of Danny DeVito v Wolf*, 227 A3d 872 (2020). The Court observed that Pennsylvania's regulations posed a temporary loss of the plaintiff's business premises, and the Governor's reason for imposing the restrictions was to protect the lives and health of millions of Pennsylvanians. *Id.* at 895–896. The Court held that the temporary regulation was a classic example of the use of the police power to protect public health and safety, and accordingly, concluded there was no compensable taking. *Id.*, citing *Manigault*, 199 US at 480. As the preceding cases demonstrate, the State's police power incorporates the authority to impose reasonable regulations to promote the public health and the public safety during emergencies, including epidemics. *Jacobson*, 197 US at 25. That Plaintiff has found itself subject to such a regulation in the midst of this deadly pandemic does not give rise to a legally viable takings claim.

B. Plaintiffs have not adequately alleged a regulatory taking.

In certain circumstances not present here, government action affecting private property may require the government to compensate the property owner under the Takings Clause of the U.S. and Michigan Constitutions.[18] For example, when the government physically takes possession of an interest in property for some

[18] Michigan courts have held that Michigan's Constitution provides no greater protection for property owners than that provided by the Fifth Amendment. *K & K*, 267 Mich App at 385 n 40. Accordingly, the Takings Clause provisions in the Michigan and U.S. Constitutions are coextensive. *AFT Michigan v State of Michigan*, 497 Mich 197, 217 (2015).

public purpose, it has a categorical duty to compensate the former owner. *United States v Pewee Coal Co*, 341 US 114, 115 (1951). But Plaintiff alleges no such physical taking in its complaint.

1. An actionable "*Penn Central*" regulatory taking requires more than a decidedly proper use of the State's police power.

In contrast to physical takings, which require compensation, private property owners may also allege a "regulatory taking" in two circumstances. First, if governmental action leaves a property owner with "no productive or economically beneficial use" of his property, the action constitutes a "categorical taking." See *Lucas v S Ca Coastal Council*, 505 US 1003, 1017 (1992). Categorical takings occur only when the government action completely deprives a landowner of *all* economically beneficial or productive use of land. *K & K Const, Inc v Dep't of Natural Resources*, 456 Mich 570, 586 (1998). If government action diminishes the value of land, but does not completely deprive it of all value, the landowner cannot establish a categorical taking. *Id.* at 587 n 13. Further, temporary government actions do not give rise to categorical takings claims. See *Tahoe-Sierra Preservation Council, Inc v Tahoe Reg'l Planning Agency*, 535 US 302, 341-342 (2002).

Plaintiff has not alleged a categorical taking. First, Governor Whitmer's orders impose temporary regulations aimed at mitigating COVID-19 until the virus's spread is sufficiently contained to permit the regulations' removal. The State has not moved to permanently close Plaintiff's business, or imposed permanent regulations of any kind. Further, Plaintiff has not alleged that the

Governor's orders have completely diminished the value of its land. For example, E.O. 2020-160 temporarily prohibits the public from entering Plaintiff's indoor gym facility, but it does not otherwise burden Plaintiff's land, prevent Plaintiff from selling products or operating outside, or make use of its land in other economically beneficial ways. Simply put, there can be no serious assertion that the Governor's order has permanently deprived Plaintiff's land of all productive use. Accordingly, Plaintiff has not alleged a categorical taking claim.

The second variety of regulatory taking claim available to a private property owner is the so-called "*Penn Central*" taking doctrine. This doctrine is implicated when government regulation is temporary or results in less than a complete elimination of value of private property. *Tahoe-Sierra*, 535 US at 330. When the government takes actions that diminish an owner's ability to freely use his or her land, courts employ the *Penn Central* balancing test, considering (1) the character of the government action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations." *Dorman v Township of Clinton*, 269 Mich App 638, 646 (2006), citing *Penn Central Transp Co v New York City*, 438 US 104 (1978) .

The U.S. Supreme Court has rejected the view that "any deprivation of all economic use, no matter how brief, constitutes a compensable taking." *Tahoe-Sierra*, 535 US at 334. As the Court observed, the government is not required to compensate private property owners for "normal delays in obtaining permits, changes in zoning ordinances, . . . orders temporarily prohibiting access to crime

scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee." *Id.* at 335 (internal quotation marks omitted). Such a result is untenable because these practices "have long been considered permissible exercises of the police power, which do not entitle the individuals affected to compensation." *Id.* Indeed, government "hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co v Mahon*, 260 US 393, 413 (1922).

Although the *Penn Central* balancing test provides property owners with an avenue to show that government regulations constitute a taking of property, the Court has consistently held that regulation preventing the most profitable use of property is not enough to establish a claim. *Andrus v Allard*, 444 US 51, 66 (1979). Where an owner possesses a full "bundle" of property rights, the destruction of one "strand" via government regulation is not a taking." *Tahoe-Sierra*, 535 US at 327; see also *D.A.B.E., Inc v City of Toledo*, 393 F3d 692, 696 n 1 (CA 6, 2005).

2. The *Penn Central* test requires dismissal of Plaintiff's takings claims.

Applying the *Penn Central* balancing test to Plaintiff's claim leads to an inevitable conclusion: Governor Whitmer's action does not constitute a regulatory taking. As noted, this test requires a Court to consider (1) the economic impact of the regulation, (2) the extent to which the regulation has interfered with distinct

investment-backed expectations, and (3) the character of the government action. *Penn Central*, 438 US at 124-125. The third factor, involving the nature of the State's action, is especially critical. *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 488 (1987).

Taking each factor in turn, the Governor's order—put in place as the State came together in shared sacrifice to "flatten the curve" and prevent COVID-19 from exponentially spreading through the state population—may have had a negative economic impact on Plaintiff's business. But the economic impact is blunted by the temporary nature of the ordered restrictions. And the Governor's data-driven, tailored approach to the restrictions allowed for some continued use of the Plaintiff's business by the public. These same facts are relevant in analyzing investment-backed expectations; nobody could have predicted the arrival and impact of COVID-19 on Michigan and the United States, but gyms and fitness centers present uniquely heightened risks of spreading respiratory disease as patrons breathe heavily in close quarters and use shared equipment. These first two factors favor the State.

More importantly, the character of the government action clearly favors the State. Governor Whitmer's orders have arisen from a genuine emergency that has inflicted untold human and economic suffering on Michigan. These measures are specifically designed to protect Michiganders from a highly infectious and dangerous disease, and they lie at the heart of the state's traditional police power. After all, "because a property owner does not have a right to use his property in a

manner harmful to public health or safety, the government's exercise of its powers to protect public health or safety does not constitute a compensable taking of any of the owner's property rights." *Hendler v United States*, 38 Fed Cl 611, 615 (1997).

It bears mentioning that this case presents a novel legal theory: Plaintiff essentially argues that the State cannot exercise its police power to protect the public health and safety without paying each and every property and business owner negatively affected by those regulations. This theory is unfounded. See *Mahon*, 260 US at 413 (government "hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law").

None of this is to suggest that Plaintiff's suffering during this present pandemic is unworthy of recognition or sympathy. Indeed, Plaintiff, like countless individuals and businesses negatively affected by COVID-19, may well be deserving of aid, and it is incumbent on legislative and executive leaders in state and federal government to determine whether such aid is appropriate through the lawmaking process. But relief cannot be secured through this lawsuit; the State's measures in this case do not present a constitutional taking, and Plaintiffs' claims to that effect should be dismissed as a matter of law.

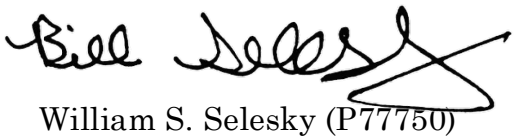
CONCLUSION AND RELIEF REQUESTED

Governor Whitmer's reasonable, temporary measures to mitigate COVID-19's spread constitute a classic exercise of the State's police powers during an emergency, and Plaintiff's claims of inverse condemnation and taking fail as a matter of law.

The State of Michigan respectfully requests this Court dismiss Plaintiff's complaint with prejudice.

Respectfully submitted,

Dana Nessel
Attorney General



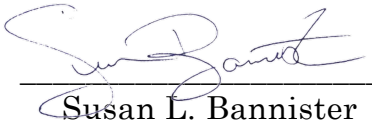
William S. Selesky (P77750)
Joshua O. Booth (P53847)
Christopher Allen (P75329)
Assistant Attorney General
Attorneys for State of Michigan
Defendant
Labor Division
P.O. Box 30736
Lansing, MI 48909
(517) 335-7641

Dated: August 19, 2020

PROOF OF SERVICE

Susan L. Bannister certifies that on the 19th day of August, 2020, she served a copy of the above document in this matter on all counsel of record via electronic mail:

Philip L. Ellison pellison@olcplc.com
Matthew E. Gronda matt@matthewgronda.com



Susan L. Bannister