

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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PATRICK M. GALLIVAN, ET AL.,

Petitioners/Plaintiffs,

- against -

ANDREW M. CUOMO, ET AL.,

Respondents/Defendants.

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**ORDER TO SHOW CAUSE  
WITH TEMPORARY  
RESTRAINING ORDER  
INDEX NO. 801046/2021**

Hon. Timothy J. Walker, J.C.C., A.J.S.C.  
Presiding Justice

By way of an Order to Show Cause, Petitioners are seeking to enjoin and restrain Respondents from enforcing and/or applying Executive Order 202.74 issued on November 12, 2020 (extended by way of subsequent Executive Orders through February 26, 2021) which modified Executive Order 202.3 and Sections 105 and 106 of the Alcohol Beverage Control Law to require, among other things, that;

- a) All businesses that are licensed by the State Liquor Authority for on premises service of alcoholic beverages, shall cease all on premises service and consumption of food and beverages (including alcoholic beverages), inside or outside, at or before 10:00 p.m. and shall not reopen before the later of any stipulated opening hours or existing county opening hours permit; further, to-go and delivery service of food, and non-alcoholic beverages

only, may continue at such businesses licensed for on premises service until the earlier of any stipulated closing hours or existing county closing hours permit; and

b) All restaurants, irrespective of whether such restaurant is licensed by the State Liquor Authority, shall cease in-person dining at 10:00 p.m., but may continue curbside takeout and delivery service after 10:00 p.m. so long as otherwise permitted, and may reopen no earlier than 5:00 a.m. (NYSCEF Doc. No. 3) (the "Restaurant Curfew Directive").

New York State Executive Law Section 29-a allows the Governor of the State of New York to declare a state of emergency, and to take certain actions with respect to any emergency so declared. Prior to March 3, 2020, Section 29-a did not provide the Governor with the authority to issue directives such as the Restaurant Curfew Directive, but only suspensions of laws previously passed by the Legislature (*see* New York Laws of 2020, ch. 23, eff. March 3, 2020).

On March 3, 2020, the Legislature passed, and the Governor signed into law bill S.7919, which amended Exec. Law § 29-a to allow the Governor to issue directives (the "Amendment") (NYSCEF Doc. No. 27).

The Amendment now allows the Governor to both: (i) suspend laws/regulations (or parts thereof); and (ii) issue directives. Specifically, it provides that, during an "epidemic" or "disease outbreak":

Subject to the state constitution ... the governor may by executive order temporarily suspend any statute, local law, ordinance, or orders, rules or regulations, or parts thereof ... **The governor, by executive order, may issue any directive during a state disaster emergency declared in ... Any such directive must be necessary to cope with the disaster.** . . . (emphasis added).

Directives, as opposed to suspensions, allow the Governor certain authority to promulgate new law without first having it debated or voted upon by the Legislature. In response to the Pandemic, the Governor has issued a series of directives requiring mask wearing, social distancing, business closures, and orders directing all but essential workers to stay at home.

In enacting the Amendment, the Legislature delegated certain of its authority to deal with what was, at the time, the incipient COVID-19 crisis, when little if anything was known about the virus, its transmissibility, or effective mitigation measures. While the Amendment gives the Governor authority to issue directives in light of the unfolding COVID-19 crisis, it is not unlimited, and contains important limitations.

First, it provides that "no suspension or directive shall be made which is not in the interest of the health or welfare of the public and which is not reasonably necessary to aid the disaster effort" (Exec. Law § 29-a(2)(b)).

Second, it provides that "any such suspension order or directive shall provide for the **minimum deviation** from the requirements of the statute, local law, ordinance, order, rule or regulation suspended consistent with the goals of the disaster action deemed necessary" (*Id.* at § 29-a(2)(d)) (emphasis added).

Finally, the Amendment provides that "no suspension or directive shall be made for a period in excess of thirty days, provided, however, that upon reconsideration of all of the relevant facts and circumstances, the Governor may extend **the suspension** for additional periods not to exceed thirty days each" (*Id.* at § 29-a(2a)) (emphasis added).

Pursuant to Executive Law § 28, on March 7, 2020, the Governor issued Executive Order 202, whereby he declared a State Disaster Emergency in relation to the COVID-19 Pandemic for six months (NYSCEF Doc. No. 28).

The State Disaster Emergency has been extended by Executive Orders as follows:

Executive Order 202.60, which extended the State Disaster Emergency to October 4, 2020 (NYSCEF Doc. No. 29);

Executive Order 202.67, which extended the State Disaster Emergency to November 3, 2020 (NYSCEF Doc. No. 30);

Executive Order 202.72, which extended the State Disaster Emergency to December 3, 2020 (NYSCEF Doc. No. 31);

Executive Order 202.79, which extended the State Disaster Emergency to January 1, 2021 (NYSCEF Doc. No. 32);

Executive Order 202.87, which extended the State Emergency Declaration to January 29, 2021 (NYSCEF Doc. No. 33); and

Executive Order 202.92, which extended the State Disaster Emergency to February 26, 2021.

Upon the foregoing, and upon careful review and consideration of the Petition, dated January 27, 2021 (NYSCEF Doc. No. 1) (the "Petition"), together with the additional

submissions in support of Petitioners' application for a temporary restraining order and preliminary injunction (NYSCEF Doc. Nos. 2-35); Respondents' email, dated January 27, 2021 (NYSCEF Doc. No. 40); Petitioners' letter, dated February 4, 2021 (NYSCEF Doc. No. 41), and after conducting a conference with the parties' respective counsel on February 5, 2021; and, equally important, recognizing that the Pandemic has presented our government, and the Governor in particular, with a Hobson's Choice between exposing the public to a deadly and highly contagious disease through an open economy (here, in-person dining in restaurants and bars) on the one hand, and depriving business owners and their employees of an opportunity to maximize earning potential on the other (here, by implementing the Restaurant Curfew Directive);

**LET** Respondents show cause before this Court, by submissions filed with the NYSCEF System on or before February 19, 2021 at 5:00 p.m., why an Order should not be granted:

1. Declaring that Respondents have violated Section 29-a of the Executive Law and that said statute is unconstitutional;
2. Declaring that Respondents' actions have violated Petitioners' equal protection rights under the New York State Constitution;
3. Permanently enjoining and restraining Respondents' enforcement of the Restaurant Curfew Directive;
4. Pending a determination of the Petition, preliminarily enjoining and restraining Respondents' enforcement of the Restaurant Curfew Directive, and permitting Petitioners to operate their businesses without application of the Restaurant Curfew Directive.

Sufficient Cause having been shown, it is hereby

**ORDERED**, that service of a copy of this Order To Show Cause and the submissions upon which it is based (as set forth above), shall be made *via* email upon the office of the Attorney General ([michael.russo@ag.ny.gov](mailto:michael.russo@ag.ny.gov); [ryan.belka@ag.ny.gov](mailto:ryan.belka@ag.ny.gov); [joel.terragnoli@ag.ny.gov](mailto:joel.terragnoli@ag.ny.gov); and [george.zimmermann@ag.ny.gov](mailto:george.zimmermann@ag.ny.gov)) on or before February 5, 2021 at 5:00 p.m., and such service shall be deemed proper and sufficient service as to each Respondent; and it is further

**ORDERED**, that Respondents' submissions shall be filed with the NYSCEF System on or before February 19, 2021 at 5:00 p.m., with leave to request additional time to do so; and it is further

**ORDERED**, that Petitioners' reply submissions, if any, shall be filed with the NYSCEF System on or before February 26, 2021 at 5:00 p.m., with leave to request additional time; and it is further

**ORDERED**, that virtual oral argument on the application for a preliminary injunction shall take place on March 15, 2021 at 10:00 a.m. *via* Microsoft TEAMS (the Court shall send the invitation to the parties' counsel), at which time the Court will determine whether to schedule a hearing on the application; and it is further

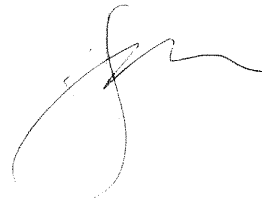
**DETERMINED**, that Petitioners have demonstrated a reasonable likelihood of success on the merits of their claims; that they will suffer irreparable harm unless Respondents are enjoined and restrained from enforcing the Restaurant Curfew Directive pending determination of Petitioners' application for a preliminary injunction; and that the equities balance in Petitioners' favor (*see, Tucker v. Toia*, 54 AD2d 322 [4<sup>th</sup> Dept. 1976]); and it is further

**ORDERED**, that Petitioners' application for a temporary restraining order is hereby granted, to the extent that Petitioners are hereby permitted to operate their businesses pursuant to

the NYS Department of Health Interim Guidance for Food Services during the COVID-19 Public Health Emergency (the “Interim COVID-19 Guidance for food Service”), without the application of the Restaurant Curfew Directive; and it further

**ORDERED**, that this Temporary Restraining Order shall be, and the same is hereby effective immediately.

Dated: Buffalo, New York  
February 5, 2021



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**HON. TIMOTHY J. WALKER, J.C.C.**  
**Acting Supreme Court Justice**

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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PATRICK M. GALLIVAN, NEW YORK STATE SENATOR,  
A.C. + J RESTAURANT, INC. d/b/a THE PEPPERMILL RESTAURANT,  
ALFIERI DUQUIN, INC.,  
AMHERST PIZZA & ALE HOUSE, INC.,  
BANCHETTI BY RIZZOS, INC., d/b/a BANCHETTI BY RIZZO'S,  
BILL SHAFIUCAS, LLC, d/b/a BREW BUS BUFFALO and  
DJ TRIVIA OF WNY,  
BOTTOMS UP V, LLC d/b/a BOTTOMS UP,  
BUFFALO'S BEST CATERING, LLC,  
BUFFALO GRILL N ALE HOUSE, LLC d/b/a, BUFFALO  
GRILL N ALE HOUSE,  
BVPK, INC.,  
CAMPFIRE GRILL II, INC,  
CARJONS RESTAURANT GROUP, INC. d/b/a SHARE  
KITCHEN + BAR ROOM,  
CHICK'S RESTAURANT AND LANES, INC.,  
COWBOY OF CHIPPEWA, INC., d/b/a THE COWBOY  
COLONIE LOUNGE, INC. d/b/a COLONIE LOUNGE,  
CRITCHEN, LLC, d/b/a THE CRITCHEN,  
DA BADA, INC. d/b/a BADABING BAR AND GRILL,  
DADDY GOO GOO, LLC, d/b/a CASA DI FRANCESCA'S,  
DDF RESTAURANTS, INC. d/b/a DUFF'S FAMOUS WINGS,  
DON BENOIT d/b/a PRESCOTT'S PROVISIONS,  
DVS PROPERTIES, LLC,  
D&R KAZ, INC. d/b/a KAZ'S BAR,  
EXPO MARKET, INC.,  
GALLERY EVENTS, LLC d/b/a VENU,  
GABRIEL'S GATE, INC.,  
GERTIES, INC. d/b/a GERTIE'S RESTAURANT,  
GREEK TO ME RESTAURANT, LLC, d/b/a GREEK TO ME  
RESTAURANT,  
GYPSY BOHEMIAN GROVE BAR, INC.,  
HUTCH & ASSOCIATES, INC., d/b/a HUTCH'S RESTAURANT  
ICE HOUSE PUB, LLC, d/b/a ICE HOUSE PUB,  
JMB ENTERPRISES OF ERIE, INC. d/b/a MURPH'S WARSAW GRILL,  
JOHN DOE CORP.,  
KFEATHER5, LLC d/b/a DUFF'S FAMOUS WINGS,  
KMT MANAGEMENT, INC. d/b/a BUFFALO BREW PUB,  
KELLY'S KORNER, INC.,  
KOOKOOVAYIA, LLC, d/b/a DUFFS OF ORCHARD PARK,  
LADY BIRDS RESTAURANTS, LLC d/b/a THE BAYOU,  
LOCAL BUFFALO, LLC,

**PETITION AND  
COMPLAINT**

Index No. \_\_\_\_\_



LOCAL GRILLE & CATERING, LLC,  
LYONS, BIGGANE, INC. d/b/a THE BYRD HOUSE RESTAURANT,  
MALBEAT INC., d/b/a MALLWITZ'S ISLAND LANE,  
MAMBRINO KING WINE-COFFEE BAR, LLC,  
MANFURT & TORALTI RESTAURANTS, INC.,  
MARY SANTARINI d/b/a LONDA'S DINER,  
MATILDA BIRD, LLC d/b/a THE GLOBE,  
MCCANS, INC. d/b/a MOONEY'S SPORTS BAR & GRILL,  
MGPUBLIC, LLC,  
MIKEYCATIE, INC. d/b/a ROOKIES SPORTS BAR  
MKC RESTAURANTS, LLC d/b/s NEAT,  
MPR RESTAURANTS WNY, Inc. d/b/a SCHNITZEL & CO.,  
MUSTANG SALLYS SPIRITS AND GRILL, INC. d/b/a NY SHOWGIRLS,  
MY TOMATO PIE, INC.,  
OVERPASS PUB, LLC d/b/a OVERPASS PUB,  
PHARAOHS GC, INC.,  
RADCOL, INC. d/b/a RADIGAN'S,  
RAPHAEL'S CORP. d/b/a RAPHAEL'S,  
RIZOTTO, INC., d/b/a RIZOTTO ITALIAN EATERY,  
RIZZO'S CASA DI ITALIA, INC., d/b/a RIZZO'S CASA DI ITALIA,  
RUSSELL M. BRAUN, INC. d/b/a SMOKIN LITTLE DINER  
SANTORA'S PHASE II, LLC,  
SANTORA'S PIZZA PUB AND GRILL, INC.,  
SCOTT A. JARGIELLO d/b/a CAMPFIRE GRILL,  
SCHWEIS SPRINGER, LLC, d/b/a EBENEZER ALE HOUSE  
SHOWNY, LLC d/b/a SCULPTURE HOSPITALITY OF WNY,  
SMITH BUDUSON, INC. d/b/a ROBBIE'S BAR AND GRILL,  
SPORTS CITY PIZZA PUB, INC. d/b/a SPORTS CITY PIZZA PUB,  
STEEL CITY PUB, INC. d/b/a STEEL CITY PUB,  
SUNNY'S DRIVE IN, INC., d/b/a NINA'S CUSTARD,  
SUNNY'S DRIVE IN TRANSIT, INC.,  
TACO COCINE ELLICOTT, LLC d/b/a DEEP SOUTH TACO,  
TACO COCINE HERTEL, LLC d/b/a DEEP SOUTH TACO,  
TANTALUS, LLC, d/b/a THE YELLING GOAT RESTAURANT,  
TBF ENTERPRISES, INC.,  
TETON SKY CORP. d/b/a TETON KITCHEN and  
TETON KITCHEN ELMWOOD,  
THE DEFIELDS CORP. d/b/a  
THE FIRE HOUSE SPORTS BAR & GRILL,  
THE HOWLING ROOSTER, LLC,  
THE ORIGINAL PANCAKE HOUSE OF ORCHARD PARK, INC.,  
THE ORIGINAL PANCAKE HOUSE OF WILLIAMSVILLE, INC.,  
TRACY STREET PRODUCTIONS, INC.,  
WILLIAM JAMES DEVELOPMENT CORP. d/b/a RODNEY'S RESTAURAN  
WNY BEER CLUB, LLC d/b/a RUSTY NICKEL BREWING CO.,  
WNY RESTAURANT SYSTEM d/b/a DUFF'S FAMOUS WINGS,

3G ENTERTAINMENT, INC., d/b/a MANOR LANES,  
23 S. BUFFALO ST., INC. d/b/a THE POUR HOUSE BAR AND GRILL  
99 BRICK OVEN BAR AND GRILLE, LLC,  
3989 MAIN STREET, INC. d/b/a, BRUNNER'S TAVERN,  
5111 GENESEE ST., INC. d/b/a SCORES,  
5786 TRANSIT RD., INC. d/b/a FIELDSTONE COUNTRY INN, and  
8444 TRANSIT RD., LLC d/b/a TAVERN AT WINDSOR PARK,

*Petitioners/Plaintiffs,*

For Judgment Pursuant to  
Article 78 of the CPLR

v.

ANDREW M. CUOMO, GOVERNOR OF NEW YORK,  
NEW YORK STATE DEPARTMENT OF HEALTH, and  
NEW YORK STATE LIQUOR AUTHORITY

*Respondents/Defendants.*

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Petitioners/Plaintiffs, PATRICK M. GALLIVAN, in his official capacity as a New York State Senator ("Senator Gallivan"), HUTCH & ASSOCIATES d/b/a HUTCH'S RESTAURANT, by and through their undersigned counsel, LIPSITZ GREEN SCIME CAMBRIA LLP, and Petitioners/Plaintiffs A.C. + J RESTAURANT, INC. d/b/a THE PEPPERMILL RESTAURANT, ALFIERI DUQUIN, INC., AMHERST PIZZA & ALE HOUSE, INC., BANCHETTI BY RIZZOS, INC., d/b/a BANCHETTI BY RIZZO'S, BILL SHAFLOCAS, LLC, d/b/a BREW BUS BUFFALO and DJ TRIVIA OF WNY, BOTTOMS UP V, LLC d/b/a BOTTOMS UP, BUFFALO'S BEST CATERING, LLC, BUFFALO GRILL N ALE HOUSE, LLC d/b/a, BUFFALO GRILL N ALE HOUSE, BVPK, INC., CAMPFIRE GRILL II, INC., CARJONS RESTAURANT GROUP, INC. d/b/a SHARE KITCHEN + BAR ROOM, CHICK'S RESTAURANT AND LANES, INC., COLONIE LOUNGE, INC. d/b/a COLONIE LOUNGE, CRITCHEN, LLC, d/b/a THE CRITCHEN, DA BADA INC d/b/a BADA