

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

ALL DOLLED UP BEAUTY BAR, LLC,
AMY MARINO, d/b/a STUDIO A,
BEL VISO SKIN STUDIO, INC.,
BLINK BEAUTY BAR, LLC,
BLUSH & BROW SPA AND SALON LLC,
BROOKE DONNELLY BEAUTY,
BUFFALO MASTER BARBER, LLC,
CELESTIAL BEAUTY BY CIARA,
CHRISTINA FILIPSKI d/b/a BELLUS SALON,
COLOR KARMA, LLC,
FACE FITNESS, LTD.,
FANTASTICS SAMS, LLC,
HOLISTIC SKIN CARE BY JANINE LLC,
HOLLY R. HUTCHINGS d/b/a STUDIO SKIN,
JACL, INC. d/b/a THE BELLEZZA SALON,
JAIMELYNN RICHTER d/b/a THE PINK SALON,
JEANNINE CORMIER d/b/a/ STEEL MAGNOLIA STUDIO,
KALU SALON AND DAY SPA, INC.,
KNF/TJF ENTERPRISES, LLC d/b/a RESTORATION SALON
AND SPA,
KONA OASIS, LLC,
LOX SALON, LLC,
MARCIA NORTON,
NORA BARNES d/b/a NORA,
PURE ESSENCE SALON & SPA, INC.,
SALON ELIZABETH LLC,
SALON IN THE TOWER, LLC,
SM AMHERST, LLC,
SM ORCHARD PARK, LLC,
SOUL SPACE SALON & YOGA LLC,
STUDIO C,
STUDIO 13 BEAUTY BAR,
SUSAN D. VOGLER d/b/a THE CORNER SALON,
THREE BAERS, INC. d/b/a FANTASTIC SAMS,
TRANQUIL TOUCH, LLC,
TRANSITIONS SALON, INC.,
TRAVIN OF W.N.Y., INC. d/b/a FANTASTIC SAMS,
WEST END SALON, LLC, and
4059 LOUIS ENTERPRISES, INC. d/b/a PHOENIX, A SALON,

**ATTORNEY'S
AFFIRMATION IN
SUPPORT OF
REQUEST FOR
TEMPORARY
RESTRAINING ORDER
AND PRELIMINARY
INJUNCTION**

Index No.: _____

Petitioners,

v.

{H2833884.1}

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HOGANWILLIG

Attorneys at Law

2410 NORTH FOREST ROAD | SUITE 301 | AMHERST, NEW YORK 14068

Phone: 716.636.7600 | Toll Free: 800.636.5255 | Fax: 716.636.7606 | www.hoganwillig.com

ANDREW M. CUOMO, in his official capacity as the
Governor of the State of New York,
NEW YORK STATE SENATE,
NEW YORK STATE ASSEMBLY,
NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT
d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,
NEW YORK STATE DEPARTMENT OF HEALTH,
MARK C. POLONCARZ, in his official capacity as the
County Executive for the County of Erie, and
ERIE COUNTY DEPARTMENT OF HEALTH,

Respondents.

STEVEN M. COHEN, being duly sworn, hereby affirms and says:

1. I am an attorney at law, admitted to practice before the Courts of the State of New York and am the Litigation Chair for the law firm of HoganWillig, the attorneys for the Petitioners herein. As such, I am fully familiar with the facts and circumstances stated herein.

2. This affirmation is submitted pursuant to CPLR 2106, under penalty of perjury, in support of the Petitioners' Petition and Complaint herein, and in support of the Petitioners' request for a Temporary Restraining Order and Preliminary Injunction.

A. Preliminary Statement

3. The Petitioners are owners of hair salons, barber shops, beauty salons and health spas (collectively "Personal Care Providers") in Erie County who face imminent irreparable harm due to Executive Orders issued by Governor Andrew M. Cuomo and enforced by the other Respondents allegedly in response to the COVID-19 pandemic.

4. Specifically, Petitioners challenge Executive Order 202.68 which was issued by the Governor on October 6, 2020. In a disturbing abuse of their power, in the name of the COVID-19 pandemic, Respondents have attempted to expand the Governor's authority in an unprecedented manner and contrary to proper constitutional, statutory and common law.

5. The Governor has been issuing what is essentially legislation from the Executive Chamber, in clear violation of the democratic imperative of separation of powers. For the past ten (10) months, some eighty (80) some odd so-called “executive orders” or “EO’s” have been flowing from the Governor’s pen, with the enforcement network and full power of the Governor’s various state divisions and agencies and Erie County agencies that are penalizing, terrorizing, punishing and adversely affecting Petitioners who are treating the EO’s as if they were statutes.

B. Background

6. Executive Order No. 202.7 was issued by the Governor on March 19, 2020 and ordered a blanket prohibition on the operation of “barber shops, hair salons, tattoo or piercing parlors and related personal care services.” Executive Order No. 202.36 was issued on June 2, 2020 and modified Executive Order 202.7 by permitting Personal Care Providers such as the Petitioners to reopen and resume business.

7. On October 6, 2020, Governor Cuomo issued Executive Order 202.68 providing for a “cluster action initiative” for purportedly controlling the spread of COVID-19. Pursuant to the referenced Executive Order, Personal Care Providers such as the Petitioners were required to reduce their workforce by 100%. Obviously, reducing the workforce of the business by 100% is tantamount to discontinuing the business without any indication when the business can resume. The Executive Order provided for a precautionary “Yellow Zone” which permitted Personal Care Providers to operate with a limit of twenty-five (25) persons.

8. On November 18, 2020, Erie County was designated as an “Orange Zone” notwithstanding the Petitioners’ careful compliance with the applicable protocol to protect public

health and safety and despite the fact that **no COVID-19 cases** have been traced to any of the Petitioners' businesses in this case.

9. Submitted herewith are Affidavits executed by each of the Petitioners herein. Each Affidavit describes the particular personal care business in which the Petitioner is engaged and states the dates the Petitioner discontinued business operations in response to Executive Order 202.7 and resumed business in response to Executive Order 202.36. The Affidavits also provide information with respect to the numbers of employees who were laid off and needed to find new employment due to the COVID-19 shutdowns and detailed information with respect of the protocol followed by each Petitioner to comply with the New York State Department of Health guidelines for COVID-19. Moreover, the Affidavits provide detailed information relative to each Petitioner with respect to the financial impact caused by the prior and current shutdowns and show that most of the Petitioners estimate it will be necessary to discontinue business permanently due to the lack of revenue caused by the current shutdown.

C. Likelihood Of Success

10. The Petitioners seek a temporary restraining order and a preliminary injunction (a) barring the Respondents from enforcing Executive Order 202.68 so as to prevent the Respondents from forcing the Petitioners to discontinue their business operations, (b) permitting the Petitioners to resume business operations without any interference from the Respondents and (c) maintaining the status quo pending the determination of the Petitioners' claims in the instant proceeding.

11. As explained in the accompanying Memorandum of Law, to establish a likelihood of success on the merits a *prima facie* showing of reasonable probability of success is adequate.

As the parties seeking a temporary stay, it is not the Petitioners' burden at this early stage to offer conclusive proof beyond any factual dispute establishing ultimate success on the merits.

12. The Petitioners' Petition and Complaint in this proceeding asserts that (a) the Respondents' actions in issuing and enforcing Executive Order No. 202.68 is arbitrary and capricious, (b) Executive Law Section 29-a is unconstitutional, (c) even if it is constitutional, the Respondents have still violated Executive Law Section 29-a, (d) the Petitioners' Fourteenth Amendment equal protection rights have been violated, (e) the Respondents have deprived Petitioners of procedural due process, and (f) the Respondents actions have violated the separation of powers. The Petitioners' Memorandum of Law provides the arguments and legal authority which demonstrate the merit of the Petitioners' claims in this proceeding.

D. Irreparable Harm

13. Where – as in this case – the movant requesting injunctive relief makes a factual showing that the opposing party is unable to refute, the likelihood of success is clear and compelling.

14. Here, by their Affidavits the Petitioners have each shown that they have carefully followed the necessary protocol to prevent the spread of the COVID-19 virus, and that no COVID-19 cases have been traced to their businesses while operating when Erie County was designated as a “Yellow Zone”.

15. In order to refute that factual showing, it will be the Respondents' obligation to demonstrate that, despite the lack of COVID-19 cases to date, it is more likely that the COVID-19 virus would be transmitted by the business of a Personal Care Provider which has been closed under Executive Order 202.68 than a business operation which has been allowed to continue to operate, such as a convenience store, department store, grocery store, hardware store, etc.

16. As recently as December 7, 2020 the Governor stated in a press conference that “gyms and salons on the numbers, we have so many protocols on the gyms and salons, they are not major [COVID-19] spreaders on the numbers.” Accordingly, it is respectfully submitted that the Respondents will be unable to make such a showing in this proceeding.

17. Although the Respondents’ improper and unconstitutional actions will certainly result in substantial damages recoverable by each of the Petitioners in this proceeding¹, the gravamen of the instant application is the need to obtain equitable relief from the Court inasmuch as the Respondents’ enforcement of Executive Order 202.68 may ultimately result in the permanent destruction of Petitioners’ businesses.

18. It is well-settled that the loss of good will that corresponds with a viable business is not readily quantifiable and constitutes irreparable harm warranting the grant of preliminary injunctive relief. It is noteworthy that the improper directive forcing the Petitioners to close their businesses has a sweeping and exponential effect. Loss of business revenue leads not only to the potential loss of business and goodwill, but also to unemployment, potential foreclosure and hardship upon Erie County residents who are already suffering financially during the pandemic and are unable to bear such devastating financial burdens.

E. Balancing of The Equities

19. The balance of equities and hardship unquestionably tilt in the Petitioners’ favor. The temporary restraining order and preliminary injunction requested in this application are about preserving Petitioners’ businesses and livelihoods, not simply monetary damages. The granting of the requested relief will merely preserve the status quo. Traditionally, the balance of equities tilt in favor of the party seeking to preserve the status quo.

¹ The Petitioners reserve the right to recover compensatory damages against the Respondents in the New York Court of Claims.

20. The Respondents will suffer no harm if the requested injunctive relief is granted. Indeed, since the requested relief will have the positive effect of preventing some employees from losing their jobs, the requested relief is in the public interest because it will eliminate the need for terminated employees to seek public employment assistance.

21. Lastly, as the Court is aware, COVID-19 vaccines are in the process of being produced. Britain administered a COVID-19 vaccine to the first British citizen to be vaccinated on December 8, 2020 and Canada approved a COVID-19 vaccine on December 9, 2020. The United States has not yet approved a COVID vaccine, but it appears likely that will occur soon. Assuming distribution of the vaccine and the commencement of inoculation in New York will cause the Governor to withdraw Executive Order 202.68, that appears to be months away. On December 9, 2020, Lt. Governor Hochul stated that “[a]s spring comes around and certainly by summer, we expect to have mass inoculation, meaning we want to have everyone who’s eligible to be able to do this” (WGRZ online article, 12/4/2020). That will be too late for the Petitioners in this case who face the permanent closure of their businesses in the near term.

F. Conclusion

22. Accordingly, based on the foregoing, your deponent respectfully requests that the Court grant a Temporary Restraining Order and Preliminary Injunction:

23. Barring the Respondents from enforcing Executive Order No. 202.68 so as to prevent the Respondents from forcing the Petitioners to discontinue their business operations;

24. Permitting the Petitioners to resume business operations without any interference by the Respondents;

25. Maintaining the status quo pending the determination of the Petitioners’ claims in this proceeding; and

26. Granting such other and further relief to the Petitioners as the Court deems proper.



STEVEN M. COHEN
Attorney for Petitioners/Plaintiffs
HOGANWILLIG, PLLC
2410 N. Forest Rd.
Amherst, New York 14068
(716) 636-7600
scohen@hoganwillig.com