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October 13, 2020

VIA E-FILE

Hon. John M. Yackel
Sawyer County Courthouse
10610 Main Street, Suite 74
Hayward, WI 54843

RE: *Tavern League of Wisconsin, et al. v. Andrea Palm, et al.*
Sawyer County Circuit Court

Dear Judge Yackel:

Today, Plaintiffs filed the Complaint in the above-captioned case. Plaintiffs also filed a Motion for an Ex Parte Temporary Restraining Order and Temporary Injunction. The grounds for this motion are fully explained in the pleadings, but because time is of the essence and our motion seeks an ex parte TRO, we are providing this cover letter with a short summary.

This case is a challenge to Emergency Order #3, issued by Department of Health Services Secretary-Designee Andrea Palm on October 6, 2020. In *Wisconsin Legislature v. Palm*, 2020 WI 42, the Wisconsin Supreme Court ruled that a prior order issued by Secretary-Designee Palm was “unlawful, invalid, and unenforceable” because Palm did not follow “the rulemaking procedures of Wis. Stat. § 227.24 [that] were required to be followed during the promulgation of Order 28.” *Id.* ¶¶ 3, 52.

Last week, however, Palm flatly ignored the Supreme Court’s ruling: on October 6, Palm issued Emergency Order #3 *without following* the rulemaking procedures of Wis. Stat. § 227.24. This is exactly the sort of unfounded “assertion of power by one unelected official” that the Court struck down in *Palm*. *Palm*, 2020 WI 42, ¶ 1.

Yesterday, pursuant to Wis. Stat. § 227.26(2)(b), the legislature’s Joint Committee for the Review of Administrative Rules (“JCRAR”) determined that Emergency Order #3 is a statement of policy or interpretation of a statute that meets the definition of a rule under Wis. Stat. § 227.01(13) and directed the DHS to promulgate the policy statements and interpretations of Wis. Stat. § 252.02(3) as an emergency rule. Notwithstanding JCRAR’s directive, DHS has not withdrawn Emergency Order #3. Indeed, on the contrary, this afternoon Governor Evers doubled-down on Emergency Order #3, stating in a press conference: “There is no reason to

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have . . . a rule. We don't have a rule prepared. There is no reason to have a rule prepared because we have an emergency order that is in place in the State of Wisconsin."

Thus, because Plaintiffs are highly likely to succeed on their claim (given the Supreme Court's decision in *Palm*), and because Plaintiffs will suffer irreparable harm if Defendants attempt to enforce Emergency Order #3 (which is invalid), Plaintiffs contend that the Court should enter a temporary injunction barring enforcement of Emergency Order #3.

In addition, because of the devastating impact enforcement of the order would have on our clients, we are asking the Court to issue an immediate, ex parte temporary restraining order, before the close of business today, to prevent Defendants from enforcing Emergency Order #3.

If the Defendants wish to contest the TRO and Plaintiffs' claims, a temporary injunction hearing must be held within five days, and we stand prepared to participate in person, telephonically, or via videoconference. We contacted DHS Chief Legal Counsel Sandra Rowe (608-266-0355) this morning to inquire about the department's position on Emergency Order #3 in light of yesterday's action by the JCRAR and to inform her that our clients were preparing to take legal action. As of this filing, we have not received a response to our detailed voice message.

Thank you for your consideration of this matter.

Sincerely,

GODFREY & KAHN, S.C.

Electronically signed by Josh Johanningmeier
Josh Johanningmeier

JLJ:ap

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STATE OF WISCONSIN : CIRCUIT COURT : SAWYER COUNTY

TAVERN LEAGUE OF WISCONSIN,
INC., SAWYER COUNTY TAVERN
LEAGUE, INC., FLAMBEAU FOREST
INN LLC,

Plaintiffs,

v.

ANDREA PALM, in her official capacity
as Secretary-Designee of the Wisconsin
Department of Health Services,
1 West Wilson Street,
Madison, Wisconsin 53703, and

WISCONSIN DEPARTMENT OF
HEALTH SERVICES,
1 West Wilson Street,
Madison, Wisconsin 53703,

JULIA LYONS, in her official capacity
as Health Officer of Sawyer County
Sawyer County Health & Human Services
10610 Main Street, Suite 224
Hayward, WI 54834,

Defendants.

Case No.

Code No(s). 30701, 30607 (Declaratory
Judgment; Administrative
Agency Review)

**NOTICE OF MOTION AND MOTION FOR AN EX PARTE
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

TO:

Andrea Palm
Secretary-Designee of the Wisconsin
Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

Wisconsin Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

Julia Lyons,
Health Officer of Sawyer County
Sawyer County Health & Human Services
10610 Main Street, Suite 224
Hayward, WI 54834

NOTICE OF MOTION

PLEASE TAKE NOTICE that Plaintiffs Tavern League of Wisconsin, Inc., Sawyer County Tavern League, Inc., and Flambeau Forest Inn LLC (collectively, “Plaintiffs”), by counsel, hereby moves the Court for an Ex Parte Temporary Restraining Order and Preliminary Injunction to enjoin Defendants from enforcing Emergency Order #3, issued by Department of Health Services Secretary-Designee Andrea Palm on October 6, 2020, as set forth in the simultaneously-filed proposed Temporary Restraining Order. Plaintiffs request that this motion be heard by the Honorable John M. Yackel at the Sawyer County Courthouse, 10610 Main St, Hayward, Wisconsin 54843 at the first available date and time.

MOTION

1. Relief Requested. Pursuant to Wis. Stat. §§ 813.02 and 813.025, Plaintiffs hereby move the Court for an Ex Parte Temporary Restraining Order and Preliminary Injunction to enjoin Defendants from enforcing Emergency Order #3, issued by Department of Health Services Secretary-Designee Andrea Palm on October 6, 2020, as set forth in the simultaneously-filed proposed Temporary Restraining Order.

2. Grounds. The grounds for this motion are set out in the Complaint and accompanying Memorandum in Support of Motion for an Ex Parte Temporary Restraining Order

and Preliminary Injunction, as well as the simultaneously filed supporting affidavits, which are incorporated herein by reference.

Dated: October 13, 2020

Respectfully submitted,

GODFREY & KAHN, S.C.

Electronically signed by Josh Johanningmeier

Josh Johanningmeier (#1041135)

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STATE OF WISCONSIN : CIRCUIT COURT : SAWYER COUNTY

TAVERN LEAGUE OF WISCONSIN,
INC., SAWYER COUNTY TAVERN
LEAGUE, INC., FLAMBEAU FOREST
INN LLC,

Plaintiffs,

v.

ANDREA PALM, in her official capacity
as Secretary-Designee of the Wisconsin
Department of Health Services,
1 West Wilson Street,
Madison, Wisconsin 53703,

WISCONSIN DEPARTMENT OF
HEALTH SERVICES,
1 West Wilson Street,
Madison, Wisconsin 53703, and

JULIA LYONS, in her official capacity
as Health Officer of Sawyer County
Sawyer County Health & Human Services
10610 Main Street, Suite 224
Hayward, WI 54834,

Defendants.

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR AN EX PARTE
TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION**

Case No.

Code No(s). 30701, 30607 (Declaratory
Judgment; Administrative
Agency Review)

Plaintiffs Tavern League of Wisconsin, Inc. (“TLW”), Sawyer County Tavern League, Inc. (“SCTL”), and Flambeau Forest Inn LLC (“Flambeau”) (collectively, “Plaintiffs”), by counsel and pursuant to Wis. Stat. §§ 813.02 and 813.025, state as follows for their Memorandum in Support of Motion for an Ex Parte Temporary Restraining Order and Temporary Injunction:

INTRODUCTION

On April 16, 2020, in response to the COVID-19 pandemic, Defendant Andrea Palm, the Secretary-Designee of the Department of Health Services, issued Emergency Order #28, pursuant (purportedly) to “the authority vested” in her by Wis. Stat. §§ 252.02(3), (4), and (6).¹ Just 27 days later, the Wisconsin Supreme Court declared the order “unlawful, invalid, and unenforceable” because Palm did not follow “the rulemaking procedures of Wis. Stat. § 227.24 [that] were required to be followed during the promulgation of Order 28.” *Wis. Legislature v. Palm*, 2020 WI 42, ¶¶ 3, 59, 391 Wis. 2d 497, 942 N.W.2d 900. The Court also concluded that “Palm’s order confining all people to their homes, forbidding travel and closing businesses exceeded the statutory authority of Wis. Stat. § 252.02, upon which Palm claims to rely.” *Id.* ¶ 59.

The Supreme Court could hardly have been clearer: Palm is not “without any power to act in the face of this pandemic,” but to exercise those powers she “must follow the law that is applicable to state-wide emergencies.” *Id.* ¶ 4. Last week, however, Palm blatantly disregarded the Supreme Court’s ruling: on October 6, 2020, Palm issued Emergency Order #3 again pursuant (purportedly) to authority under Wis. Stat. § 252.02(3) and again *without following* the

¹ See Gov. Tony Evers & Andrea Palm, Sec’y Wis. Dep’t of Health Servs., Emergency Order #28: Safer at Home Order (Apr. 16, 2020), <https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf>. Under Wis. Stat. § 902.01, the Court can take judicial notice of Emergency Order #28, along with other orders, notices, and statements made by elected officials.

rulemaking procedures of Wis. Stat. § 227.24. This is exactly the sort of unfounded “assertion of power by one unelected official” that the Court struck down in *Palm*. *Palm*, 2020 WI 42, ¶ 1. Indeed, Wisconsin’s statutory rulemaking procedure “exists precisely to ensure that . . . controlling, subjective judgment asserted by one unelected official, *Palm*, is not imposed in Wisconsin.” *Id.* ¶ 28. And *Palm*’s unlawful usurpation of power threatens irreparable harm to Plaintiffs: if Emergency Order #3 is enforced, it will result in a devastating loss of customers, sales, and revenue that will put Plaintiff Flambeau (and similarly situated members of the other Plaintiffs) substantially or entirely out of business.

Thus, because Plaintiffs are highly likely to succeed on their claim (given the Supreme Court’s decision in *Palm*), and because Plaintiffs will suffer irreparable harm if Defendants attempt to enforce Emergency Order #3 (which is invalid), the Court should enter a temporary injunction barring enforcement of Emergency Order #3. Indeed, Plaintiffs respectfully urge the Court to issue an immediate, ex parte temporary restraining order and/or preliminary injunction today, before the close of business, to prevent Defendants from enforcing Emergency Order #3.

FACTS

Facts Related to Emergency Order #3

On October 6, 2020, Defendant Palm issued Emergency Order #3, which took effect October 8, 2020 at 8:00 a.m. and is currently scheduled to end on November 6, 2020. *See* Compl., Ex. 1.

Emergency Order #3 enacts capacity restrictions that apply broadly to all “Public Gatherings” in the state of Wisconsin, unless a specific exemption applies. *Id.* at 3. The Order defines “public gathering” to mean “an indoor event, convening, or collection of individuals, whether planned or spontaneous, that is open to the public and brings together people who are

not part of the same household in a single room.” *Id.* The Order further defines places “open to the public” to include “[r]ooms within a business location, store, or facility that allow members of the public to enter” and “[t]icketed events where tickets are available for free or for purchase by any individual or by any individual within a specific class of people.” *Id.*

Under the Order, “[p]ublic gatherings are limited to no more than 25% of the total occupancy limits for the room or building, as established by the local municipality” or “[f]or indoor spaces without an occupancy limit for the room or building that is established by the local municipality, such as a private residence, public gatherings are limited to no more than 10 people.” *Id.* at 3-4

Emergency Order #3 purports to be issued pursuant to authority under Wis. Stat. § 252.02(3). *Id.* at 3. Violations of Emergency Order #3 are punishable by a civil forfeiture of not more than \$500 per violation. *Id.* at 6 (citing Wis. Stat. § 252.25). Defendants issued Emergency Order #3 without following the rulemaking procedures of Wis. Stat. § 227.24.

On October 7, 2020, a senior coordinating attorney at the Wisconsin Legislative Reference Bureau provided to Assembly Speaker Robin Vos a memorandum concluding that a “court following the reasoning of *Wisconsin Legislature v. Palm* would likely require Emergency Order #3, which limits public gatherings, to be promulgated as a rule.” *See* Memorandum from Tamara Dodge, Wis. Legis. Reference Bureau, to Robin Vos, Assemb. Speaker, Analysis of Emergency Order #3 and *Wisconsin Legislature v. Palm* (Oct. 7, 2020), http://www.thewheelerreport.com/wheeler_docs/files/100720voslr_b_01.pdf.

The next day, the same senior attorney provided to State Senate Minority Leader Janet Bewley a memorandum noting that “even if enforceability of Emergency Order #3 is questioned, the order remains in effect until one of the following occur: 1) a court issues an order enjoining

DHS from enforcing Emergency Order #3 or an order ruling the Emergency Order #3 unenforceable, 2) Secretary-designee Palm voluntarily terminates the order for any reason, or 3) the expiration date specified in the order, November 6, 2020, is reached.” *See* Memorandum from Tamara Dodge, Wis. Legis. Reference Bureau, to Janet Bewley, S. Minority Leader, Status of Emergency Order #3 (Oct. 8, 2020),

http://www.thewheelerreport.com/wheeler_docs/files/100820LRBmemo.pdf.

On October 9, 2020, in response to the issuance of Emergency Order #3, the Joint Committee for Review of Administrative Rules (“JCRAR”) noticed an Executive Session pursuant to Wis. Stat. § 227.26(2)(b) to review Emergency Order #3. *See* Joint Comm. for Rev. of Admin. Rules, Executive Session Notice for October 12, 2020,

<https://docs.legis.wisconsin.gov/raw/cid/1573309>).

On October 12, 2020, pursuant to Wis. Stat. § 227.26(2)(b) the JCRAR determined that Emergency Order #3 is a statement of policy or interpretation of a statute that meets the definition of a rule under Wis. Stat. § 227.01(13) and directed the DHS to promulgate the policy statements and interpretations of Wis. Stat. § 252.02(3) as an emergency rule. Wis. Legis., *J. Comm. for Rev. of Admin. Rules Exec. Sess.*, Wis. Eye (Oct. 12, 2020),

<https://wiseye.org/2020/10/12/joint-committee-for-review-of-administrative-rules-55/>.

Following the JCRAR’s action on October 12, the Department has 30 days to promulgate Emergency Order #3 as an emergency rule—but the action by the JCRAR does not suspend the enforcement of Emergency Order #3. The Defendants have not withdrawn Emergency Order #3 as of the filing of this action. Indeed, on the contrary, Governor Evers doubled-down on Emergency Order #3, stating in a press conference the next day: “There is no reason to have . . . a rule. We don’t have a rule prepared. There is no reason to have a rule prepared because we

have an emergency order that is in place in the State of Wisconsin.” See Wis. Eye (Oct. 13, 2020), <https://wiseye.org/2020/10/13/wisconsin-dhs-media-briefing-on-covid-19-for-october-13/>.

Nevertheless, some local government entities in Wisconsin are openly ignoring the capacity restrictions of the order. See, e.g., Press Release, City of Milwaukee Health Dep’t, The City of Milwaukee Health Department will continue to enforce the Moving Milwaukee Forward Safely Order as written (Oct. 7, 2020), https://city.milwaukee.gov/ImageLibrary/Groups/healthAuthors/ADMIN/PDFs/PressReleases/2020/MMFSUpdate_10.7.20.pdf (“As a result, even though the Moving Milwaukee Forward Safely Order permits a larger threshold of individuals in certain places than Emergency Order #3 allows, the additional restrictions listed under the local order do more to prevent COVID-19 transmission than Governor Evers’ Emergency Order #3.”).

Facts Related to Plaintiffs

Plaintiff Flambeau has been operating as bar, restaurant, and hotel at its present location in the Town of Winter since 1958 and under its present owners since 2013. Aff. of Antoinette Slack, ¶¶ 2-4. Since the emergence of COVID-19, Flambeau has suffered a substantial decrease in business, even though it has shifted to providing take-out. *Id.* ¶ 7. Flambeau has also voluntarily decreased its capacity from 60 dining seats to 48 to allow more socially distanced dining, including for their popular Friday fish fry and Saturday prime rib specials. *Id.* ¶¶ 5, 8. Flambeau’s bar area includes 25 stools. *Id.* ¶ 5. Flambeau is operated by its two owners and three additional regular employees. *Id.* ¶ 4. Flambeau does not have an established capacity restriction (and thus would be subject to the 10-person capacity under Emergency Order #3). *Id.* ¶ 6. If Flambeau were forced to operate at a 10-person capacity, it could only include five customers onsite with the five staff normally present. This would be approximately 5% of

Flambeau's normal seating capacity. Flambeau could not operate profitably under these conditions and would be forced to discontinue its business operations. *Id.* ¶ 9.

Plaintiff Tavern League of Wisconsin is the largest hospitality industry trade association in the State of Wisconsin, representing more than 5,000 bars, taverns, and restaurants. Aff. of Pete Madland, ¶ 5. Plaintiff Tavern League of Wisconsin represents its members in the State Capitol and before state administrative agencies, including through testimony before legislative hearings and comments on permanent and emergency administrative rules. *Id.* ¶ 3. The Tavern League of Wisconsin's members operate on thin margins and rely on a high volume of customers to stay in business and are directly impacted by capacity restrictions created by Emergency Order #3. *Id.* ¶ 8.

Plaintiff Sawyer County Tavern League, is a local chapter of the TLW, whose membership includes 41 bars, taverns, and restaurants in Sawyer County, Wisconsin, including Plaintiff Flambeau. SCTL's members range in size from large banquet halls to small taverns. Many of SCTL members operate without occupancy limits established by the local municipality and are therefore limited by Emergency Order #3 to no more than 10 people on site.

LEGAL STANDARD

A party is entitled to temporary injunctive relief under Wis. Stat. § 813.02 if it establishes four elements: (1) the movant has a reasonable probability of success on the merits, (2) a temporary injunction is necessary to preserve the status quo, (3) the movant has no other adequate remedy at law, and (4) the movant is likely to suffer irreparable harm if a temporary injunction is not issued. *Serv. Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35. Plaintiffs readily satisfy each of these requirements.

Ex parte restraining orders are governed by Wis. Stat. § 813.025. The court may grant an ex parte restraining order “if the court is of the opinion that irreparable loss or damage will result to the applicant unless a temporary restraining order is granted. . . .” Wis. Stat. § 813.025(2). Such an order “shall be effective only for 5 days unless extended after notice and hearing thereon, or upon written consent of the parties or their attorneys. . . .” *Id.* An ex parte order is necessary under the circumstances of this case given Defendants’ failure to withdraw Emergency Order #3 and Plaintiffs’ need for certainty and the ability to continue to safely operate their businesses during the pendency of this case and any forthcoming emergency rulemaking.

ARGUMENT

I. Plaintiffs Have a Reasonable Probability of Success on the Merits Because Defendants Failed to Follow the Rulemaking Procedures of Chapter 227 in Promulgating Emergency Order #3

To obtain temporary injunctive relief, a movant need only show that it has a “reasonable probability” of success on the merits. Here, the Wisconsin Supreme Court’s *Palm* decision—issued just five months ago—demonstrates that Plaintiffs have much more than a reasonable probability of success.

Following *Palm*, there is no doubt that Emergency Order #3 constitutes a “rule” under Wis. Stat. § 227.01(13): it is a general order of general application in that it applies to all “places that are open to the public” including “rooms within a business location, store, or facility that allow members of the public to enter.” *See Palm*, 2020 WI 42, ¶ 42; Compl., Ex. 1 at 3. Just as with Emergency Order #28 in *Palm*, the class of people, places, and businesses regulated by Emergency Order #3 “is described in general terms and new members can be added to the class.” *See Palm*, 2020 WI 42, ¶ 22 (quoting *Citizens for Sensible Zoning, Inc. v. Wis. Dep’t of Nat. Res.*, 90 Wis. 2d 804, 816, 280 N.W.2d 702 (1979)). Just like Emergency Order #28,

Emergency Order #3 is also a “rule” because it was issued by the department to “implement, interpret, or make specific” provisions of Section 252.02. *See* Wis. Stat. § 227.01(13). *See Palm*, 2020 WI 42, ¶ 22; Wis. Stat. § 227.10(1) (“Each agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute.”). It also proposes a regulatory scheme that mimics the approach rejected by the Court in *Palm*. Therefore, Emergency Order #3 raises no unique or novel substantive requirements that would distinguish it from Emergency Order #28.

Emergency Order #3 purports to resurrect one of the main substantive components of Emergency Order #28 to implement and administer Chapter 252: capacity restrictions. Emergency Order #28 subjected bars and restaurants to dine-in capacity limits of zero people, while churches and funeral homes were allowed to hold gatherings of fewer than 10 people in a room or confined space at a time.

Moreover, Emergency Order #3 exempts vast categories of businesses from its restrictions, which is the equivalent of distinguishing between “essential” and “non-essential” businesses. Paired with the practical reality that many non-exempt—that is, “non-essential”—businesses will have to close as a result of Emergency Order #3, this is exactly that the sort of “vast seizure of power” that *Palm* made clear exceeded the Secretary-Designee’s authority. *Palm*, 2020 WI 42, ¶ 50 (“[N]othing in § 252.02(4) permits Palm to close ‘All for-profit and non-profit businesses with a facility in Wisconsin, except [those Palm defines as essential businesses and operations].’ She cites no authority for this vast seizure of power.”).

Public statements from Governor Evers' Chief Legal Counsel Ryan Nilsestuen asserting that Emergency Order #3 was issued under authority that was not impacted by *Palm*² are entirely baseless and unsupported by even cursory review of Emergency Order #3, Emergency Order #28, and Wis. Stat. § 252.02(3). Both orders issued by Secretary-Designee Palm invoke Wis. Stat. § 252.02(3) for authority. Both orders also purported to enact substantial capacity limitations on certain classes of businesses. While it is true that *Palm* did not apply to the provision of Emergency Order #28 closing schools, the authority for that section of the Order is found in the specific direction of the **first clause** of Wis. Stat. §252.02(3) that “[t]he department may close schools.” The Supreme Court did, in fact, find invalid and unenforceable the closure and capacity restrictions in Emergency Order #28 limiting public gatherings at bars, restaurants, churches and other locations. These provisions of Emergency Order #28 relied upon the **second clause** of § 252.02(3), granting authority to “forbid public gatherings in schools, churches, and other places. . . .” The only power not impacted by *Palm* was the specific authority to close schools. Because Emergency Order #3 relies upon the second clause of § 252.02(3), the Governor’s attorney’s assertions that this power was not impacted by *Palm* are incorrect.

Nor can Emergency Order #3 be distinguished from Emergency Order #28 by its limited duration. Emergency Order #3 is (currently) set to expire on November 8, 2020. The fact that the order responds to a specific, limited-in-time scenario is “not relevant” to whether Emergency Order #3 is a rule. *See Palm*, 2020 WI 42, ¶ 27. Just as with Emergency Order #28, Defendant Palm’s “subjective judgment” is the only limitation on the duration of Emergency Order #3. *Id.* Finally, Emergency Order #3 suffers from the same fatal flaw as Emergency Order #28: it was

²See *Evers Administration Places New Restrictions on Indoor Public Gatherings to Fight COVID-19*, Wispolitics.com (Oct. 12, 2020), <https://www.wispolitics.com/2020/evers-administration-places-new-restrictions-on-indoor-public-gatherings-to-fight-covid-19/> (“Evers’ Chief Legal Counsel Ryan Nilsestuen said today’s order was issued under authority provided to Palm that wasn’t impacted by the May Supreme Court decision.”).

issued without compliance with statutory rule-making procedures of Wis. Stat. § 227.24. *Id.* ¶ 58. The Court in *Palm* was unequivocal: “Rulemaking exists precisely to ensure that kind of controlling, subjective judgment asserted by one unelected official, Palm, is not imposed in Wisconsin.” *Id.* ¶ 28.

Consequently, just as *Palm* held that Emergency Order #28 was “unlawful, invalid, and unenforceable,” *id.* ¶ 59, so too is Emergency Order #3. Thus, given the directly on-point and controlling authority from the Wisconsin Supreme Court and the nearly identical substance of Emergency Order #3 and major portions of Emergency Order #28, Plaintiffs have more than a reasonable probability of success in this case. Indeed, where (as here) the likelihood of success so overwhelmingly favors the movant, courts have found that the other elements required for an injunction are less important. *See, e.g., Mays v. Dart*, No. 20-1792, 2020 WL 5361651, at *5 (7th Cir. Sept. 8, 2020) (“[T]he more likely the plaintiff is to win on the merits, the less the balance of harms needs to weigh in his favor, and vice versa.”). *Cf. State v. Gudenschwager*, 191 Wis. 2d 431, 441, 529 N.W.2d 225, 229 (1995) (“It has been said that the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the plaintiff will suffer absent the stay. In other words, more of one factor excuses less of the other.”). Thus, by itself this factor counsels in favor of immediately enjoining the Defendants.

II. An Injunction is Necessary to Preserve the Status Quo

A court faced with a request for a preliminary injunction must ask whether the status quo will be adversely affected without an injunction. As the court held in *Shearer v. Congdon*, 25 Wis. 2d 663, 131 N.W.2d 377 (1964), “it is well-nigh an imperative duty of the court to preserve the *status quo* by temporary injunction, if its disturbance *pendente lite* will render futile in considerable degree the judgment sought, or cause serious and irreparable injury. . . .” *Id.* at 668. An injunction would preserve the status quo in this case because it would result in preservation

of the regulatory scheme already in place and because it would allow Flambeau (and similarly situated members of the other Plaintiffs) to continue to safely operate pending resolution of this case. By contrast, enforcement of Emergency Order #3 would impose arbitrary capacity restrictions on Flambeau (and similarly situated members of the other Plaintiffs) that are the functional equivalent of a closure order. The 25% (or 10-person) capacity limits of Emergency Order #3 will make it impossible for small restaurants, taverns, bars and supper clubs (and those without established capacity restrictions, like Flambeau) to continue operating as going concerns because they cannot sustain operations where the order cuts their customer base by 90% or more, without regard to safety protocols or the prevalence of COVID-19 in their local communities.

A preliminary injunction barring enforcement of Emergency Order #3 would preserve the status quo and allow Plaintiffs to continue safely running their businesses pending a decision on the merits, or until the emergency rulemaking procedure required by state law and compelled by the JCRAR is complete (30 days or less). On the other hand, if Defendants are allowed to enforce Emergency Order #3 in defiance of the Wisconsin Supreme Court because an injunction is not issued, Plaintiffs face catastrophic business losses. *See Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977) (“[A]t the temporary injunction stage the requirement of irreparable injury is met by a showing that, without it to preserve the status quo pendente lite, the permanent injunction sought would be rendered futile.”).

III. Plaintiffs Lack an Adequate Remedy at Law

“In seeking an injunction it is not necessary to prove that the plaintiff has suffered irreparable damage, but only that he is likely to suffer such damage. The remedy at law may be inadequate because of the difficulty or impossibility of measuring the damages.” *Simenstad v. Hagen*, 22 Wis. 2d 653, 664, 126 N.W.2d 529 (1964) (citing *Butterick Publ’g Co. v. Rose*, 141

Wis. 533, 124 N.W. 647 (1910); *Lakeside Oil Co. v. Slutsky*, 8 Wis. 2d 157, 168, 98 N.W.2d 415 (1959)). As explained above, if Emergency Order #3 is enforced, it will result in lost customers and sales, which will put Flambeau (and similarly situated members of the other Plaintiffs) substantially or entirely out of business. This is precisely the sort of harm that is remediable by an injunction. *See, e.g., Lakeside Oil*, 8 Wis. 2d at 168 (injunction appropriate to enforce non-compete agreement where damage would consist of lost customers and damage to customer relationships for which there was no adequate remedy at law).³ Indeed, as noted above, the practical reality of Emergency Order #3 is that it distinguishes between “essential” and “non-essential” business, and the “non-essential” businesses will suffer significant, and in some cases severe, financial hardship if the order is enforced. *See Palm*, 2020 WI 42, ¶ 50.

Further underscoring the need for injunctive relief, on Monday October 12, 2020 the Joint Committee for Review of Administrative Rules (“JCRAR”) determined that Executive Order #3 meets the definition of a rule and directed the agency to promulgate the order as an emergency rule within 30 days.⁴ Wis. Legis., *J. Comm. for Rev. of Admin. Rules Exec. Sess.*, Wis. Eye (Oct. 12, 2020), <https://wiseye.org/2020/10/12/joint-committee-for-review-of-administrative-rules-55/>. The JCRAR has the authority to direct DHS to promulgate Emergency Order #3 as an emergency rule, subject to JCRAR’s continued review, oversight, and potential suspension. However, the JCRAR cannot itself prevent DHS from enforcing Emergency Order #3, even if it suffers the same exact flaws as the “invalid, and unenforceable” order at issue in *Palm*. That power rests exclusively with the Court.

³ Money damages also are unlikely to be available to compensate Plaintiffs because Defendants are protected from suit by the doctrine of sovereign immunity. *See generally Grall v. Bugher*, 181 Wis. 2d 163, 511 N.W.2d 336 (Ct. App. 1993), *rev’d on other grounds*, 193 Wis. 2d 65, 532 N.W.2d 122 (1995).

⁴ Wis. Stat. § 227.24 establishes the process for promulgating emergency rules and this process may be completed in less than the 30 days required by JCRAR. Secretary-Designee Palm is also familiar with the emergency rule process as the department currently has three active emergency rules that became effective within the last two months: Emergency Rule EmR 2029; Emergency Rule EmR 2031; and Emergency Rule EmR 2033.

IV. Plaintiffs are Likely to Suffer Irreparable Harm if a Temporary Injunction Is Not Issued

As explained above, issuance of an injunction in this case is necessary to preserve the status quo. This fact alone is sufficient to satisfy the requirement of irreparable harm. *See Werner*, 80 Wis. 2d at 520. Identifying the status quo in the midst of a pandemic is no easy task, but here, it means a hospitality industry operating as safely as possible based on specific, local circumstances.

Even if an injunction would not preserve the status quo, however, Flambeau (and similarly situated members of the other Plaintiffs) still can show irreparable harm because they are likely to be driven out of business if Emergency Order #3 is enforced. It is well-settled that if a party is likely to be driven out of business, this constitutes irreparable harm. For example, in *Northern Wisconsin Co-operative Tobacco Pool v. Bekkedal*, 182 Wis. 571, 197 N.W. 936 (1923), a tobacco reseller sued a cooperative association that bought and sold tobacco, alleging that the cooperative had induced the farmers from whom the reseller purchased tobacco to breach their contracts with the reseller. This threatened to drive the reseller out of business. The court held that this was sufficient to show irreparable harm. *Id.* at 580.

Allowing DHS to continue to enforce the Emergency Order #3 when the JCRAR has already directed DHS to promulgate the order as an emergency rule would further cause irreparable harm to the Plaintiffs. “The requirement of formal rulemaking requires administrative agencies to follow a rational, public process. This requirement ensures that administrative agencies will not issue public policy of general application in an arbitrary, capricious, or oppressive manner. Many public policy concerns could be illuminated through the rulemaking process.” *Mack v. Wis. Dep’t of Health & Family Servs.*, 231 Wis. 2d 644, 649, 605 N.W.2d 651 (Ct. App. 1999).

These principles are perfectly illustrated here. Palm's noncompliance with the rulemaking process has resulted in a flawed order that is arbitrary and capricious and imposes irreparable harm on Plaintiff Flambeau and Plaintiffs' members operating in municipalities without established capacity restrictions by limiting their capacity to 25% or the miniscule amount of 10 people, regardless of the actual size of the business. It is unclear (but unlikely) whether Secretary-Designee Palm considered the egregious effect these arbitrary capacity limits would have for some of Plaintiffs' members. Had the defendants complied with Chapter 227 in developing Emergency Order #3, the irreparable harm from this arbitrary and capricious behavior could have been avoided.

Defendants will likely argue that the short timeframe of the order—24 days until its current expiration—minimizes Plaintiffs' harm and counsels in favor of leaving the order in place. But that argument misses the point: during those 24 days, Flambeau (and other Plaintiffs' members) will suffer significant business losses, which cannot be recovered from Defendants. That is irreparable harm, and it has been caused by Defendants blatant disregard of the Wisconsin Statutes and the Wisconsin Supreme Court. In other words, promulgating an invalid order that creates irreparable harm cannot be justified simply by saying, "it won't last very long."

Indeed, along these lines, the Wisconsin Supreme Court has indicated that unlawful activity by a governmental entity may be enjoined even in the absence of an express showing of irreparable harm. *Joint Sch. Dist. No. 1, City of Wisconsin Rapids v. Wisconsin Rapids Educ. Ass'n*, 70 Wis. 2d 292, 309-310, 234 N.W. 2d 289 (1975). "The express basis for such holdings is that the fact that the activity has been declared unlawful reflects a legislative or judicial determination that it would result in harm which cannot be countenanced by the public." *Id.* at 310.

CONCLUSION

Plaintiffs have established that: (1) they are likely to succeed on the merits; (2) the injunction is necessary to preserve the status quo; (3) they have no adequate remedy at law; and (4) they are likely to suffer irreparable harm in the absence of temporary relief. Plaintiffs respectfully urge this Court to immediately prohibit enforcement of Emergency Order #3 by entering an ex parte temporary restraining order and, following a hearing, a temporary injunction.

Dated: October 13, 2020

Respectfully submitted,

GODFREY & KAHN, S.C.

Electronically signed by Josh Johanningmeier

Josh Johanningmeier (#1041135)

Zachary P. Bemis (#1094291)

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Attorneys for Plaintiffs

FILED
10-13-2020
Clerk of Circuit Court
Sawyer County, WI
2020CV000128

**Affidavit of Peter Madland in Support of
Petition for Temporary Restraining Order and Injunction**

STATE OF WISCONSIN)
) ss
COUNTY OF DANE)

I, Kenneth Peter Madland, being duly sworn on oath, state that:

1. I am an adult resident of Barron County in the State of Wisconsin. I make this Affidavit upon personal knowledge in support of the Petition for Temporary Restraining Order and Injunction against the continued enforcement of Emergency Order #3.

2. I am the Executive Director of the Tavern League of Wisconsin. The Tavern League of Wisconsin is a non-profit trade association dedicated to serving the needs of the hospitality industry in Wisconsin. The League provides its members with services such as legislative and governmental relations, legal information, educational services, and promotes the industry on behalf of its membership.

3. The Tavern League of Wisconsin includes represents taverns, bars and restaurants throughout all 72 counties of Wisconsin. TLW includes approximately 5,000 members, all of which are small businesses, and many of which are family enterprises. In addition to serving alcohol beverages, many taverns operate as restaurants and serve as both formal and informal meeting and event spaces for Wisconsinites. TLW represents its members before state government, but has been effectively deprived of its ability to do so because of the manner in which DHS has issued Emergency Order #3.

4. In Wisconsin alcohol beverage retail licensees have a \$6.43 billion impact on the economy and employ approximately 144,400 individuals with approximately \$2.72 billion in

wages. Am. Beverage Licensees, *Economic Impact of Direct Retail Alcohol Beverage Sales in Wisconsin* (citing John Dunham & Associates. 2018 Economic Impact Study of America's Beer, Wine and Spirits Retailers (August 2018)).

5. The Tavern League of Wisconsin regularly advocates for the hospitality industry before the State Legislature, Governor's Office, and executive agencies on proposed legislation and regulations affecting its members. The Tavern League of Wisconsin wishes to participate in the development of administrative rules pertaining to limiting the spread of communicable diseases like COVID-19 through the opportunities for public comment provided in Chapter 227 and the ability to lobby and petition state public officials.

6. The TLW has encouraged its members to follow social distancing and hygiene and sanitation practices and guidelines recommended by the Wisconsin Economic Development Corporation, Department of Health Services, and other government agencies.

7. I have over 30 years of experience working in and representing the hospitality industry. I was President of the Tavern League for 6 years and have served as Executive Director for the past 16 years.

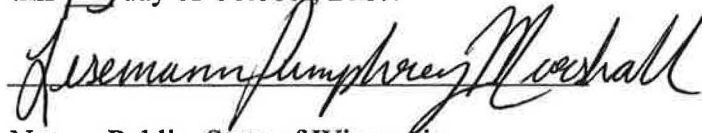
8. The hospitality industry operates on thin margins and requires a high volume of transactions to operate profitably. Occupancy restrictions such as those in Emergency Order #3 greatly reduce the ability of TLW members to operate a profitable and sustainable business.

9. Many of TLW's members operate in municipalities that do not have established occupancy limits.

Dated: October 12, 2020


Peter Madland

Subscribed and sworn to before me
this 13 day of October, 2020.



Notary Public, State of Wisconsin

My commission expires:

3/3/2024

22998842.1

LESEMAN PUMPHREY MARSHALL
NOTARY PUBLIC
STATE OF WISCONSIN

**Affidavit of Antoinette Slack in Support of
Motion for Temporary Restraining Order and Temporary Injunction**

STATE OF WISCONSIN)
) ss
COUNTY OF PRICE)

I, Antoinette Slack, being duly sworn on oath, state that:

1. I am an adult resident of Sawyer County in the State of Wisconsin. I make this Affidavit upon personal knowledge in support of the Petition for Temporary Restraining Order and Injunction against the continued enforcement of Emergency Order #3.

2. I am the owner of the Flambeau Forest Inn, located at W980 County Road W in the Town of Winter, Sawyer County.

3. The Flambeau Forest Inn has been in operation since 1959. On April 1, 2013, I purchased the Flambeau Forest Inn and my husband Perry and I have been operating it ever since.

4. The Flambeau Forest Inn operates a bar, restaurant, and six-room motel. The bar and restaurant cater to locals, tourists, and sportsmen. We operate a full-service restaurant that includes Friday night fish fry and Saturday night steak and prime rib specials. We operate the Flambeau Forest Inn with the assistance of three employees.

5. The restaurant space normally includes seating for 60 people. The bar space includes 25 stools.

6. The Flambeau Forest Inn does not have a capacity limit established by the Town of Winter.

7. Since the onset of COVID-19 we have seen a major shift in our business. We have seen a sharp decrease in-person dining, but increase in carry-out business.

8. We have taken numerous steps to provide a safe dining experience for our guests in light of COVID-19. We have adopted a hygiene policy to ensure appropriate cleaning of counters, tables, and other surfaces with which customers are likely to come into contact. As a licensed restaurant, we follow sanitary and food safety practices. We have rearranged our seating plan to increase social distancing and have decreased our seating capacity to 48 by marking tables reserved and placing mounts, taxidermy, or antlers on the tables to prevent customer seating. We have also eliminated our popular self-service salad bar.

9. Complying with Emergency Order #3 would require us to have not more than 10 people present in our bar and restaurant at a time, including staff and employees. Even assuming we could operate with only two workers on site, this would still limit us to only 8 paying customers at a time. Operating with such limited capacity would not be feasible or profitable and we would have no choice but to close the Flambeau Forest Inn bar and restaurant for as long as the occupancy restriction remains in place.

10. We are members of the Tavern League of Wisconsin and the Tavern League of Sawyer County. We belong to the TLW because they represent bars, taverns, restaurants and supper clubs before state government, including participating in legislative hearings on proposed legislation and administrative rules.

Dated: October 12, 2020

Antoinette Slack

Subscribed and sworn to before me
this ____ day of October, 2020.

Notary Public, State of Wisconsin
My commission expires:
22998841.1

8 We have taken numerous steps to provide a safe dining experience for our guests in light of COVID-19. We have adopted a hygiene policy to ensure appropriate cleaning of counters, tables, and other surfaces with which customers are likely to come into contact. As a licensed restaurant, we follow sanitary and food safety practices. We have rearranged our seating plan to increase social distancing and have decreased our seating capacity to 48 by marking tables reserved and placing murals, tiniermyn, or others on the tables to prevent customer seating. We have also eliminated our popular self-service salad bar.

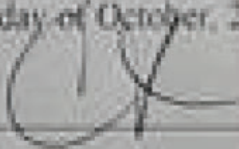
9 Complying with Emergency Order #3 would require us to have not more than 30 people present in our bar and restaurant at a time, including staff and employees. Even assuming we could operate with only two workers on site, this would still limit us to only 8 paying customers at a time. Operating with such limited capacity would not be feasible or profitable and we would have no choice but to close the Flambeau Forest Inn bar and restaurant for as long as the occupancy restriction remains in place.

10 We are members of the Tavern League of Wisconsin and the Tavern League of Sawyer County. We belong to the TLW because they represent bars, taverns, restaurants and supper clubs before state government, including participating in legislative hearings on proposed legislation and administrative rules.

Dated: October 12, 2020


Antoinette Slack

Subscribed and sworn to before me
this 12 day of October, 2020.



Notary Public, State of Wisconsin
My commission expires: 09-14-2021
22700041



FILED
10-13-2020
Clerk of Circuit Court
Sawyer County, WI
2020CV000128

STATE OF WISCONSIN : CIRCUIT COURT : SAWYER COUNTY

TAVERN LEAGUE OF WISCONSIN,
INC., SAWYER COUNTY TAVERN
LEAGUE, INC., FLAMBEAU FOREST
INN LLC,

Plaintiffs,

v.

ANDREA PALM, in her official capacity
as Secretary-Designee of the Wisconsin
Department of Health Services,
1 West Wilson Street,
Madison, Wisconsin 53703, and

WISCONSIN DEPARTMENT OF
HEALTH SERVICES,
1 West Wilson Street,
Madison, Wisconsin 53703,

JULIA LYONS, in her official capacity
as Health Officer of Sawyer County
Sawyer County Health & Human Services
10610 Main Street, Suite 224
Hayward, WI 54834,

Defendants.

Case No.

Code No(s). 30701, 30607 (Declaratory
Judgment; Administrative
Agency Review)

TEMPORARY RESTRAINING ORDER

Based on the materials submitted by Plaintiffs Tavern League of Wisconsin, Inc., Sawyer County Tavern League, and Flambeau Forest Inn LLC, including the Complaint, Motion for an Ex Parte Temporary Restraining Order and Preliminary Injunction, Memorandum in Support, and Supporting Affidavits, and based on the Court's inherent power,

IT IS ORDERED that Plaintiffs' Motion for an Ex Parte Temporary Restraining Order and Preliminary Injunction is **GRANTED**;

IT IS FURTHER ORDERED that the Defendants and their agents, servants, employees, successors, representatives and assigns, and all other persons in active concert and privity with Defendants, are immediately restrained, until further order from the Court, from enforcing Emergency Order #3.

IT IS FURTHER ORDERED that Defendants shall appear before this Court on _____, 2020, at _____, to show cause why a temporary injunction should not be entered according to the conditions set forth above and which shall remain in place during the pendency of this action.

The Temporary Restraining Order shall remain in effect unless and until terminated by subsequent Order of this Court.

SO ORDERED.

23006911.1