Vermont Superior Court
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Rutland Unit

VERMONT SUPERIOR COURT

RUTLAND UNIT
CIVIL DIVISION

State of Vermont, Plaintiff v. Club Fitness of Vermont, Inc. and Sean Manovill, Defendants and Counter Plaintiffs v. State of Vermont, Governor Philip B. Scott, and Attorney General Thomas J. Donovan, Jr., Counter Defendants	Docket No. 202-5-20 Rdcv

RULING ON MOTION TO DISMISS DEFENDANTS' COUNTERCLAIM
(Motion # 6)

The core issue in this case is whether certain executive orders, issued by Vermont Governor Philip B. Scott in response to the outbreak of COVID-19 in Vermont, constitute an unconstitutional governmental taking of private property. For the reasons set forth herein, this court concludes that they do not.

Plaintiff, the State of Vermont, commenced this suit on May 15, 2020, as an enforcement action against Defendant Club Fitness of Vermont, Inc. and its owner, Defendant Sean Manoville, who own and operate fitness centers in Rutland and Castleton, Vermont. The State seeks civil penalties and injunctive relief, among other things, for Defendants' alleged violation of Addenda 4 and 6 of Governor Scott's Executive Order 01-20, ordering all "gymnasiums, fitness centers and similar exercise facilities" to "cease all in-person operations" on account of Vermont's COVID-19 outbreak.

On May 27, 2020, the Defendants filed a Counterclaim alleging that the actions taken by the State, Governor and Attorney General since March 23, 2020, to promulgate and enforce the Executive Order, constitute an "unlawful taking" of Defendants' business, in violation of Chapter I, Article 2 of the Vermont Constitution and the Fifth Amendment of the United States Constitution. Defendants seek an award of damages under 20 V.S.A. § 11(5) and 42 U.S.C.A. §§ 1983 and 1985 from the State, Governor and Attorney General for the "economic and emotional distress losses suffered by [the Defendants] as a result of the ... unlawful taking without compensation" of their business.[1]

Presently before the court is a motion filed by the State, Governor and Attorney General pursuant to V.R.C.P. 12(b)(6) to dismiss Defendants' Counterclaim for failure to state a claim upon which relief may be granted. The movants contend that the Counterclaim must be dismissed because the Counterclaim fails to allege any unlawful governmental taking of the Defendants' business. Defendants oppose the motion.

A hearing on the motion was held on August 12, 2020, and the motion was taken under advisement.[2] For the reasons discussed below, the motion to dismiss is now *granted.*

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[1] On August 5, 2020, Defendants moved to amend their Counterclaim to add facts concerning events which occurred after the filing of their original Counterclaim, and to clarify their various legal and Constitutional claims against the State, Governor and Attorney General.

[2] The procedural posture of this case is somewhat complex. The State of Vermont filed a motion for a Temporary Restraining Order ("TRO") on May 15th. The State's request for a TRO was granted. In response, Defendants filed their own motion for a preliminary injunction. In light of the Governor's subsequent easing of restrictions on fitness centers, the parties withdrew their motions for preliminary injunctions and the TRO expired on its own, but the State declined to withdraw its Complaint for civil penalties and costs. The Defendants then filed their Counterclaim against the State, and they filed a motion to add Governor Scott and Attorney General Donovan individually as additional counter defendants. At the oral argument held on August 12, 2020, the court orally granted Defendants' motion to add the Governor and Attorney General as parties and also granted Defendants' motion to amend their Counterclaim.

Standard of Review

When ruling on a motion to dismiss under V.R.C.P. 12(b)(6), the court is required to take all the facts alleged in the claimant's pleading as true. The court must determine whether, assuming the facts alleged are true, the allegations are sufficient to state a legal claim upon which relief may be granted. Colby v. Umbrella, Inc., 2008 VT 20, ¶ 5 n.1, 184 Vt. 1. Also, the court must make all reasonable inferences of fact from the pleading in favor of the claimant, and the court must treat all contravening assertions in the moving party's pleadings are false. Reynolds v. Sullivan, 136 Vt. 1, 3 (1978) (citing 5 C. Wright & Miller, Federal Practice and Procedure s 2713, at 691, 693 (1969)). The court must not dismiss a claim under V.R.C.P. 12(b)(6) unless "it appears beyond doubt that there exist no facts or circumstances that would entitle the [claimant]to relief." Murray v. City of Burlington, 2012 VT 11. "The purpose of a motion to dismiss is to test the law of the claim, not the facts which support it." Powers v. Office of Child Support, 173 Vt. 390, 395 (2002) (citations omitted).

Statement of Facts

For purposes of the motion to dismiss, the court assumes the following alleged facts to be true:

Sean Manovill is the owner of Club Fitness of Vermont, Inc., which owns and operates a fitness center providing exercise facilities to clients, many of whom consider Defendants' facilities essential to their health and well-being (Amended Counterclaim ¶¶ 1-6). Club Fitness is an immaculately clean fitness center, with several stations for cleaning equipment and sanitizing hands (Id. ¶ 7). Club Fitness has been open since 2016 and had built up a client membership of approximately 500 before the Governor ordered a shutdown (Id. ¶ 8).

Manovill closed Club Fitness on March 23, 2020, when Governor Scott issued his first emergency order (Id. ¶ 10). Club Fitness remained closed until May 1, 2020 (Id.). As the only source of income for Manovill and his wife, Jeanine, the six- week closure resulted in Manovill losing all income from his business (Id. ¶¶ 11-12). During the closure, Manovill received numerous calls and messages from clients requesting the fitness center re-open, as their physical and mental wellness was declining (Id. ¶¶ 13-14). Based on these requests and the need for income to support his family, Manovill reopened Club Fitness on May 1, 2020 (Id. ¶ 14).

On May 11, 2020, Vermont Attorney General T.J. Donovan contacted Manovill and told him to close the fitness center or else a suit would be filed against him (Id. ¶ 15). After Manovill indicated that he would remain open, Donovan requested that Manovill close for a week to provide a reprieve, indicating that he thought there was a possibility that the Governor would allow fitness centers to re-open by May 15th (Id. ¶ 15). As a result of Donovan's representations, Manovill shut down Club Fitness until May 15th (Id.).

On May 15th, Manovill re-opened the facility, despite the lack of any announcement by the Governor whether the shutdown would continue (Id. ¶ 16). At 11:00am on May 15th, Manovill learned that Governor Scott had extended the emergency order (Id. ¶ 17). Sergeant Whitehead and Corporal Plemmons of the Rutland Police Department visited Club Fitness to take notes and ask Manovill questions that day, but neither officer told Manovill to close the fitness center (Id.). Therefore, Manovill remained open until 5:00 p.m., despite the Governor's emergency order; at no point that day were there more than ten people at the fitness center at one time (Id.).

Later that day, Attorney General Donovan, on behalf of the State of Vermont, filed this suit against Manovill and Club Fitness and obtained a temporary restraining order against them

(Id. ¶ 18). On Sunday, May 17, Manovill opened Club Fitness for a few hours, with a few clients attending (Id. ¶ 19). On May 18, Manovill placed fitness equipment outside the facility, after realizing the court order did not prohibit outdoor fitness activities at his facility (Id. ¶ 20). Manovill provided customers with hand sanitizer and cleaning material to clean the equipment (Id.). On May 20, the Attorney General told Manovill to close the outdoor facility, and he threatened to ask the court to hold Manovill in contempt, which he indicated could result in jail time (Id. ¶ 21). Manovill closed Club Fitness and has remained closed ever since (Id. ¶ 22).

At no time has the government offered to compensate Manovill for his losses (Id. ¶ 23). Manovill and Club Fitness suffered a 100% loss of business between March 23, 220, and June 1, 2020, as a result of Governor Scott's emergency orders (Id. ¶ 25). Since June 1st Defendants' loss of business from the shutdown is projected to be at least 75% (Id. ¶ 26). As a result of the loss of business, Manovill is planning to close the fitness center and permanently move out of state (Id. ¶ 27).

Analysis

Defendants Manovill and Fitness Center contend that they are entitled to an award of damages for their losses pursuant to 20 V.S.A. § 11 and 42 U.S.V.A. §§ 1983 and 1985 because the Governor's emergency orders, requiring Defendants to close their business due to the COVID-19 outbreak, constitute an uncompensated governmental taking of their property in violation of Chapter 1, Article 2 of the Vermont Constitution and the Fifth Amendment of the United States Constitution. The State, Governor and Attorney General deny that contention and argue that Defendants' Counterclaim must be dismissed because it fails to allege any taking resulting from the Governor's orders. This court will address the Constitutional claims first, the statutory claims second, and the immunity claim last.

Chapter 1, Article 2 and the Fifth Amendment

Chapter 1, Article 2 of the Vermont Constitution provides:

> That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money.

The Fifth Amendment to the United States Constitution provides "nor shall private property be taken for public use, without just compensation." It is undisputed that the State has not offered to compensate Defendants for the closing of their fitness center. The question, therefore, is whether Defendants' fitness center business was "taken" for public use by the Governor's executive orders.

"'Because the federal and Vermont Constitutions use virtually the same test for takings review,' ... the analysis and result ... are the same under both...." Ondovchik Family L.P v. Agency of Transportation, 2010 VT 35, ¶ 14, 187 Vt. 556 (*quoting* Conway v. Sorrell, 894 F.Supp. 794, 801 n. 8 (D. Vt. 1995)). The purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). "The Takings Clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power" by requiring the government to compensation the property owner. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536-37 (2005). "For a property loss to be compensable as a taking, the government must 'intend[ ] to invade a protected property interest or the asserted invasion [must be] the direct, natural, or probable result of an authorized activity

and not the incidental or consequential injury inflicted by the action.'"[3] Lorman v. City of Rutland, 2018 VT 64, ¶ 35, 207 Vt. 598 (*quoting* Ondovchik, 2010 VT 35, ¶ 16).

"There are two types of cases cognizable under the Takings Clause: physical takings and regulatory takings." McCarthy v. Cuomo, 2020 WL 3286530, at *4 (E.D.N.Y. June 18, 2020) (*citing* 1256 Hertel Ave. Associates, LLC v. Calloway, 761 F.3d 252, 263 (2d Cir. 2014)). A physical taking "occur[s] when the government physically takes possession of an interest in property for some public purpose." Buffalo Teachers Fed. v. Tobe, 464 F.3d 362, 374 (2d Cir. 2006) ("The fact of a taking is fairly obvious in physical takings cases: for example, the government might occupy or take over a leasehold interest for its own purposes...or the government might take over a part of a rooftop of an apartment building so that cable access may be brought to residences within.") (internal citations omitted). A regulatory taking is an interference with property rights that "arises from a public program adjusting the benefits and burdens of economic life to promote the public good[.]" Id. (*quoting* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)). "The Supreme Court has 'generally eschewed any set

[3] This court would be remiss not to mention Jacobson v. Massachusetts, the landmark case decided more than 100 years ago during a smallpox epidemic, which developed the framework governing emergency public health and public safety measures. 197 U.S. 11 (1905). In Jacobson, the Court held that "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." Jacobson, 197 U.S. at 29. In the context of the COVID-19 pandemic, Jacobson has been called "the controlling Supreme Court precedent that squarely governs judicial review of rights-challenges to emergency public health measures." In re Abbott, 954 F.3d 772, 785 (5th Cir. 2020). "[A] community has the right to protect itself against an epidemic of disease which threatens the safety of its members,'" including by '"enact[ing] quarantine laws and health laws of every description." Jacobson, 197 U.S. at 27, 25, 25 S.Ct. 358). *See* South Bay United Pentecostal Church v. Newson, 140 S. Ct. 1613, 1614 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) ("[States] undoubtedly ha[ve] a compelling interest in combating the spread of COVID-19 and protecting the health of [their] citizens.").

formula' for identifying regulatory takings, instead 'preferring to engage in essentially ad hoc, factual inquiries' to determine in each case whether the challenged property restriction rises to the level of a taking." 1256 Hertel Ave. Assoc., LLC v. Calloway, 761 F.3d 252, 264 (2d 2014) (*quoting* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015, (1992)).

There are two types of regulatory takings: categorical and non-categorical. A categorical taking occurs "where regulation denies all economically beneficial or productive use of land." Lucas, 505 U.S. at 1015. A Lucas taking is a "'relatively narrow' and relatively rare taking category[ ] confined to the 'extraordinary circumstance when *no* productive or economically beneficial use of land is permitted[.]'" Bridge Aina Le'a, LLC v. Land Use Comm'n, 950 F.3d 610, 625–26 (9th Cir. 2020) (*quoting* Lingle, 544 U.S. at 538 and Lucas, 505 U.S. at 1017). "Anything less than a 'complete elimination of value,' or a 'total loss' would require the kind of analysis applied in Penn Central" and is considered a non-categorical regulatory taking. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 330 (2002) (*quoting* Lucas, 505 U.S. at 1019-1020, n. 8). Penn Central has set forth familiar factors paramount to the taking inquiry: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." Penn Central, 438 U.S. at 124. "Also telling, is the 'character of the governmental action,' particularly 'whether it amounts to a physical invasion' or appropriation of property or instead merely affects property interests through 'some public program adjusting the benefits and

burdens of economic life to promote the common good.'"[4] 1256 Hertel Ave., 761 F.3d at 264 (*quoting* Penn Central, 438 U.S. at 124).

In McCarthy, the owner of a New York restaurant, bar and gentleman's club, claimed that the executive orders issued by Governor Cuomo which resulted in the restaurant closing was, among other things, a violation of the Fifth Amendment takings clause.[5] The court determined that because "[n]o government officials have taken physical possession of any property belonging to McCarthy or the Blush Club," there was no physical taking. Id. at *5.

Moving on to a regulatory taking analysis, the McCarthy court concluded that

> [t]he COVID-19 Executive Orders plainly do not deny McCarthy all economically beneficial use of his property. He could, for example, offer food and drinks from the Blush Club for take-out or delivery...[i]f McCarthy has lost all income from his club, that is a result of a voluntary choice not to pursue alternative business models that would allow the business to remain open while complying with the regulation. McCarthy's voluntary choice to close his business

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[4] In Buffalo Teachers Fed'n, the court considered whether a wage freeze was a taking. In so considering, the Court noted that the "wage freeze is temporary and operates only during a control period," and the "wage freeze is a negative restriction rather than an affirmative exploitation by the state. Nothing is affirmatively taken by the government...The freeze is in this respect like a temporary cap on how much plaintiffs may charge for their services," and finally, that the "temporary suspension of plaintiffs' wage increase arises from a public program that undoubtedly burdens the plaintiffs in order to promote the common good." 464 F.3d at 375. Based on these factors, the court was not persuaded that the plaintiffs had established a taking had occurred.

[5] In Defendants' Memorandum in Opposition to Motion to Dismiss, Defendants claim there are "a dearth" of court decisions on the issue as to whether temporarily shutting down legitimate, innocent businesses because of a perceived emergency threat of contagion constitutes a "taking" under the Fifth Amendment or similar state constitutions. While Defendants only cited to one case, Friends of Danny DeVito v. Wolf, 227 A.3d 872 (Pa. 2020), there have been at least five other courts that have addressed the issue and determined such shut-downs did not constitute a taking. *See* McCarthy v. Cuomo, 2020 WL 3286530 (E.D.N.Y. June 18, 2020); PCG-SP Venture I LLC v. Newsom, 2020 WL 4344631 (C.D. Cal. June 23, 2020); TJM 64, Inc. v. Harris, 2020 WL 4352756 (W.D. Tenn. July 29, 2020); Auracle Homes, LLC v. Lamont, 2020 WL 4558682 (D.Conn. Aug. 7, 2020); Lebanon Valley Auto Racing Corp. v. Cuomo, 2020 WL 4596921 (N.D.N.Y. Aug. 11, 2020). Defendants appear not to recognize the reality of COVID-19, the state of emergencies that have been announced throughout the country, and the attempts by courts at all levels to address situations similar to the present case.

> also makes him unlikely to succeed in an ad hoc factual analysis of the alleged regulatory taking. He cannot demonstrate any causal connection between the COVID-19 Executive Orders and his financial losses because his choice to close the club entirely was not mandated by the regulation. Moreover, all of his allegations of economic impact are vague and conclusory...Thus, the Fifth Amendment Takings Clause claim is unlikely to succeed on the merits.

McCarthy, at *5.

In addition to McCarthy, several courts across the country have addressed whether executive orders closing or restricting business during the COVID-19 pandemic constitute a taking. In line with McCarthy, no court has found that such closings or restrictions have resulted in a deprivation of all economically beneficial use of such property, constituting a taking under Lucas. *See* PCG-SP Venture I LLC v. Newsom, 2020 WL 4344631 (C.D. Cal. June 23, 2020); TJM 64, Inc. v. Harris, 2020 WL 4352756 (W.D. Tenn. July 29, 2020); Auracle Homes, LLC v. Lamont, 2020 WL 4558682 (D.Conn. Aug. 7, 2020). Rather, these courts focused their analysis on the Penn Central factors: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017).

In PCG-SP Venture I LLC v. Newsom, 2020 WL 4344631 (C.D. Cal. June 23, 2020), a California company that operates a hotel brought suit against the California Governor, alleging that it had "been forced to close its [h]otel, cease operations, and terminate a majority of its employees as a result of the" Governor's Orders. Id. at *3. Plaintiff argued that the Orders constituted a "complete and total regulatory and physical taking" of plaintiff's property, presumably in reference to Lucas. Id. at * 9. The court determined, however, that plaintiff retained "some productive or economically beneficial

use of its property... Plaintiff is free, for example, to sell food or beverages on the premises and engage in commercial construction or development of the Hotel." Id. at *10. The court also concluded that "[t]o the extent Plaintiff could provide evidence of lost profits or interference with investment-backed expectations, the character of the government action at issue would likely outweigh either factor." Id. "Penn Central explained that regulations, statutes, and ordinances that merely 'adjust[ ] the benefits and burdens of economic life to promote the common good' rather than enact a "physical invasion" of property rarely constitute a taking.'" Id. (*quoting* Penn Central, 438 U.S. at 124). Ultimately, the Court found that, "to the extent the Orders temporarily deprive Plaintiff of the use and benefit of its Hotel, the Takings Clause is indifferent. The State is entitled to prioritize the health of the public over the property rights of the individual." PCG-SP, 2020 WL 4344631, at *10.

The plaintiff owners of several limited service restaurants in TJM 64, Inc. v. Harris, 2020 WL 4352756 (W.D. Tenn. July 29, 2020) asserted that the applicable executive order qualified as "as a categorical taking under Lucas...and, alternatively, qualifies as a regulatory taking under the framework established by Penn Central." Id. at *2. The court first rejected the Lucas taking, stating that "[w[hile it may not accord with Plaintiffs' pre-pandemic financial plans to operate their businesses in ways the Order allows, it does not follow that the Closure Order has necessarily stripped Plaintiffs' businesses of *all* their value." Id. at *6. Looking to the Penn Central factors, the court found that although the "first and second Penn Central factors support Plaintiffs, the third factor does not and outweighs the other two factors." Id. "On balance, the Court [found] that Defendants' need to effectively and quickly respond to the COVID-19 pandemic by

promulgating the July 8, 2020 Closure Order outweighs any other considerations warranting a finding that the Order amounts to a taking." Id. at *7. *See also* Friends of Danny DeVito v. Wolf, 227 A.3d 872, 895-96 (Pa. 2020) (concluding that petitioners, a Pennsylvania candidate committee, did not establish a regulatory taking as the executive order resulted "in only a temporary loss of the use of the Petitioners' business premises, and the Governor's reason for imposing said restrictions on the use of their property, namely to protect the lives and health of millions of Pennsylvania citizens, undoubtedly constitutes a classic example of the use of the police power to protect the lives, health, morals, comfort, and general welfare of the people") (internal quotations omitted).

A Connecticut district court also recently addressed the takings issue under the Penn Central factors, as related to the state's Executive Orders which sought to "temporarily limit the ability of residential landlords to initiate eviction proceedings against tenants and allow tenants to apply security deposit funds to past due rents, provided the security deposit amount exceeds the value of one month's rent." Auracle Homes, LLC v. Lamont, 2020 WL 4558682, at *13 (D.Conn. Aug. 7, 2020). As to the first factor of economic impact, the court stated that the "Executive Orders constitute a regulatory taking only if they 'effectively prevented [Plaintiffs] from making any economic use of [their] property.'" Id. at *14 (*quoting* Sherman v. Town of Chester, 752 F.3d 554, 565 (2d Cir. 2014)). Ultimately, the court decided that the plaintiffs had not "quantified the precise economic impact" that the executive orders had on their property. Auracle, 2020 WL 4558682, at *15. As to the second factor, investment-backed expectations, "the purpose [of this Penn Central factor] is to limit recovery to owners who could demonstrate that they bought their property in reliance on a state of affairs that

did not include the challenged regulatory regime." Allen v. Cuomo, 100 F.3d 253, 262 (2d Cir. 1996). In Auracle, "the Executive Orders merely 'regulate[ ] the terms under which the [Plaintiffs] may use the property as previously planned,' during a global pandemic." 2020 WL 4558682, at *15 (*quoting* Fed. Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal, 83 F.3d 45, 48 (2d Cir. 1996)). Finally, the court determined that the final factor, the character of the governmental action, also weighed "against a finding that Plaintiffs have suffered a regulatory taking, because the Executive Orders are 'part of a public program adjusting the benefits and burdens of economic life to promote the common good.'" Auracle, 2020 WL 4558682, at *16 (*quoting* Sherman, 752 F.3d at 565). *See* Connolly, 475 U.S. at 223 ("Given the propriety of the governmental power to regulate, it cannot be said that the Takings Clause is violated whenever the legislation requires one person to use his or her assets for the benefit of another.").

Even more recently, two New York courts have addressed this taking issue as it pertains to emergency orders related to COVID-19. In Lebanon Valley Auto Racing Corp. v. Cuomo, 2020 WL 4596921 (N.D.N.Y. Aug. 11, 2020), plaintiffs, a New York race track, asserted that defendants violated the Fifth Amendment, among other things, by enacting an executive order which restricted how Plaintiffs' businesses operate during COVID-19. While the race track was allowed to host competitors, spectators were restricted. The court first concluded that the alleged taking was non-categorical, stating that "[i]t defies common sense to conclude 'no productive or economically beneficial use of [Plaintiffs'] land is permitted' simply because that land cannot currently be used as a racetrack with spectators." Lebanon Valley, 2020 WL 4596921, at *7, n.5. See

Kabrovski v. City of Rochester, 149 F. Supp. 3d 413, 425 (W.D.N.Y. 2015) (A taking "does not occur merely because a property owner is prevented from making the most financially beneficial use of a property"). After concluding that the alleged taking was non-categorical, the court looked to the Penn Central factors. Ultimately, the court determined that Plaintiffs failed to "adequately plead interference with investment-backed expectations, and the character of the governmental action heavily favor[ed] dismissal." Lebanon Valley, 2020 WL 4596921, at *9.

In Luke's Catering Service, LLC v. Cuomo, 2020 WL 5425008, at *2 (W.D.N.Y. Sept. 10, 2020), the plaintiffs consisted of event, banquet, and catering facilities which serve as private venues for various events and large gatherings and are considered "non-essential" businesses and subject to a 50-person limitation under an Executive Order. The court concluded first that a "categorical claim would [] fail, since Plaintiffs admit that they are not precluded from all economically beneficial uses of their property."[6] Id. at *12. In determining that a non-categorial regulatory takings claim was also likely to fail, the court stated that, "[f]irst, the Executive Orders are temporary and do not preclude all economic use of Plaintiffs' property," "[s]econd, although Plaintiffs' investment-backed expectations are surely disrupted by the 50-person limitation, the Executive Orders are 'a negative restriction rather than an affirmative exploitation by the state,'" and third, "the State 'does not physically invade or permanently appropriate any of [Plaintiffs'] assets for its own use." Id. "Rather, the character of the government action

[6] "Plaintiffs elsewhere concede that the Executive Orders do not preclude them from hosting events of 50 or fewer people, and in fact, several Plaintiffs admit that they are scheduled to host such events." Luke's Catering, 2020 WL 5425008, at *12.

here is a temporary and proper exercise of the police power to protect the health and safety of the community, which weighs against a taking." Id.

Looking to this persuasive case law, there was no physical taking in the present case.[7] Therefore, the court must determine whether a regulatory taking occurred under Lucas or Penn Central. The court first looks to Lucas. The rule articulated in Lucas applies only "to regulations that completely deprive an owner of all economically beneficial us[e] of [their] property." Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005). Defendants assert that there is a "total regulatory taking" under the criteria outlined in Lucas. In so stating, Defendants point to Alger v. Department of Labor and Industry, 2006 VT 115, 181 Vt. 309 (2006). In Alger, residents of an apartment building which the Vermont Department of Labor and Industry attempted to close for longstanding housing code violations argued that such closure was "an unconstitutional taking of property without due process or just compensation". Id. ¶ 1. Like the present case, state actions closed or attempted to close a building. However, that appears to be where the similarities end. In Alger, the Court acknowledged that while "Vermont law allows a tenant to remain in a dwelling after a landlord's violation of the warranty of habitability...[t]his does not mean [] that tenants are entitled to remain in a building when doing so threatens the surrounding community, as in cases where occupancy of the building poses a fire hazard." Id. ¶ 32. Accordingly, the Court determined that, "to the extent plaintiffs' claims challenge the Department's ultimate decision to order that their

[7] Defendants confirm in their memo in opposition that they are not alleging a physical taking. Rather, they are asserting a "total regulatory taking" as outlined in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992), or, in the alternative, a Fifth Amendment taking under the factors outlined in Penn Central.

homes be vacated or their utility service be terminated, their allegations do not state valid takings claims."[8] Id. Rather, the Court looked to the Department's knowledge of the code violations and their continued failure to act until the removal of tenants was required, stating that if plaintiffs could prove that "[b]ut for the Department's failure to act, there would have been no nuisance to abate, and plaintiffs' property would not have been taken," plaintiffs would be entitled to just compensation.[9] Id. ¶ 35. This is drastically different from the present case, where the state took swift action to contain the spread of COVID-19, by temporarily closing businesses and providing restrictions throughout the State of Vermont.

Defendants appear to rely on Alger for the argument that a temporary total loss of an economically beneficial use of their property is compensable. In holding that the lower court's dismissal of plaintiffs' taking claims was inappropriate, the Alger Court looked to both Lucas and First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, noting that "the loss need not be permanent; a temporary taking of property can be compensable." Alger, 2006 VT 115, ¶ 30 (citing First English, 482

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[8] Ultimately, the Court "agree[d] with the Department that the isolated act of ordering a building vacated cannot be characterized as an unconstitutional taking without just compensation, or as a taking without due process, when the order to vacate is necessary to eliminate an imminent threat of harm." Nevertheless, the Court held that the lower court's dismissal "on these grounds was premature" because although "plaintiffs' complaint does not state a due process claim, the facts alleged were sufficient to raise the question of whether the Department's alleged failures to act led to the destruction of plaintiffs' leaseholds without compensation." Alger, 2006 VT 115, ¶ 27.

[9] The issue of whether a nuisance is a compensable taking was discussed heavily in Alger. "[A]n exercise of the police power to abate a public nuisance, and specifically, to abate a fire hazard, is not a compensable taking." Alger, ¶ 31 (*citing* Eno v. City of Burlington, 125 Vt. 8, 13 (1965) ("A fire hazard is a nuisance and the abatement of such a nuisance is not the taking of property without due process or a taking for which compensation must be made."). While Plaintiff did state in its Reply Memorandum that the temporary closing of "businesses to abate the nuisance of a deadly disease spreading at an exponential rate is not a taking," no other court has concluded that COVID-19 is a nuisance. As such, this court will not hold so.

U.S. 304 (1987)). However, Alger does not address the difference between a temporary and permanent loss, and whether the analysis would change anything. Moreover, Lucas did not deal with a temporary taking.[10] Rather, the Court specifically stated that "Lucas had no reason to proceed on a 'temporary taking' theory at trial, or even to seek remand for that purpose prior to submission of the case to the South Carolina Supreme Court, since as the Act then read, the taking was unconditional and permanent." 505 U.S. at 1012. Additionally, First English did not determine whether a temporary taking had occurred. 482 U.S. at 1033 (concurrence, J. Kennedy) ("Although we establish a framework for remand, moreover, we do not decide the ultimate question whether a temporary taking has occurred in this case.").[11] While the Vermont Supreme Court has

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[10] In Lucas, the petitioner had purchased two residential lots with the intent of building single-family homes. 505 U.S. at 1003. At the time of the purchase, the lots were not subject to any building permit requirements. Id. However, two years later, the state enacted statutes which barred petitioner from "erecting any permanent habitable structures on his parcels. Id. Petitioner filed suit alleging that "the ban on construction deprived him of all 'economically viable use' of his property and therefore effected a 'taking.'" Id. The Court then dove into the lengthy background and analysis of takings, resulting in the creation of a new scheme for categorical regulations" a categorical taking occurs "where [a] regulation denies all economically beneficial or productive use of land." Id. at 1015. If a regulation denies all economically beneficial use, the state "may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." Id. at 1027.

[11] "In fact, *First English* expressly disavowed any ruling on the merits of the takings issue because the California courts had decided the remedial question on the assumption that a taking had been alleged." Tahoe-Sierra, 535 U.S. at 328-39. See First English, 482 U.S. at 312–313 ("We reject appellee's suggestion that ... we must independently evaluate the adequacy of the complaint and resolve the takings claim on the merits before we can reach the remedial question"). The Court merely held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." First English, 482 U.S. at 321. The Tahoe-Sierra Court went on to clarify the taking issue in First English:

> In *First English*, 482 U.S. at 315, 318, 321, 107 S.Ct. 2378, the Court addressed the separate remedial question of how compensation is measured once a regulatory taking is established, but not the different and prior question whether the temporary regulation was in fact a taking. To the extent that the Court referenced the antecedent takings question, it recognized that a regulation temporarily denying an owner all use of her property might not constitute a taking if the denial was part of the State's authority to enact safety

not made it clear that all alleged takings resulting from temporary regulations should be analyzed under the Penn Central framework, rather than Lucas, it is clear that a temporary taking is compensable.

As such, this court will look to the Lucas framework, and, if necessary, to Penn Central in determining whether a taking occurred. Defendants argue that the Executive Orders denied all economically beneficial or productive use of their property. However, Defendants could have pursued alternative business practices in order to financially compensate for the decrease in income, such as online fitness classes or instructional videos.[12] While Defendants would have likely been unable to avoid a decrease in income through online fitness classes or instructional videos, EO 01-20 did not completely deprive Defendants of all economic benefits of the fitness center business.

> regulations, or if it were one of the normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like. Thus, First English did not approve, and implicitly rejected, petitioners' categorical approach.

Tahoe-Sierra, 535 U.S. at 303. The Court went on to state that Lucas is also not

> dispositive of the question presented. Its categorical rule—requiring compensation when a regulation permanently deprives an owner of "*all* economically beneficial uses" of his land, 505 U.S., at 1019, 112 S.Ct. 2886—does not answer the question whether a regulation prohibiting any economic use of land for 32 months must be compensated.

Tahoe, Sierra, 535 U.S. at 303. Tahoe-Sierra went on to hold that "the interest in 'fairness and justice' will be best served by relying on the familiar Penn Central approach when deciding cases [of temporary regulations], rather than by attempting to craft a new categorical rule." Id. at 342.

[12] In response to Plaintiff's claim that Defendants could have instituted a video exercise program, Defendants argue that such a suggestion is nonsensical, as they only had a 72-hour notice before the business had to close in March. Additionally, Defendants claim that not only did the State forbade his employees from entering the premises, but Defendants lacked necessary video equipment to accommodate such video exercise programs. Such arguments are unpersuasive. Businesses across the country have had to adjust their business practices to accommodate closures and restrictions. Schools with limited funding had to provide on-line learning to students with short notice. Court systems, including the Vermont Judiciary, adjusted to accommodate tele-hearings. It does not follow that Defendants' only possible avenue to earn income was to allow in-person work outs.

This is in line with the aforementioned recent COVID-19 related cases, in which the courts determined the businesses did not lose all economically beneficial uses of their property.[13] *See* PCG-SP Venture I LLC, 2020 WL 4344631, at *10 ("Plaintiff is free, for example, to sell food or beverages on the premises and engage in commercial construction or development of the Hotel."). Accordingly, this court does not find that Defendants lost all beneficial use of their property, and thus a Lucas taking does not apply to the present case.

Looking to the Penn Central factors, Defendants' assertion that EO 01-20 amounts to a taking requiring just compensation also fails. In TJM 64, Inc., 2020 WL 4352756, the court found that although the "first and second Penn Central factors support Plaintiffs, the third factor does not and outweighs the other two factors." The plaintiffs' ability to generate profits through on-site alcohol and food sales was completely suspended by the closure. "Such disastrous economic consequences favor a finding that the Closure Order constitutes a regulatory taking." TJM 64, Inc., at *6. Similarly here, Defendants have lost the ability for in-person patronage at their gym. There is little question that this has had an economic impact on Defendants. In TJM 64, Inc., the court pointed to plaintiffs investments "in their businesses and properties for the purpose of owning and operating clubs, restaurants and bars and restaurants that derive their profits from in-person patronage" in determining that the COVID-19 related closures have interfered "in a significant way with Plaintiffs' investment-backed expectations in their

[13] Defendants point to Lucas, where the statutes prohibiting residential construction in Lucas did allow for some construction, including -small wooden decks, walkways, and fishing piers. Lucas, 505 U.S. at 1007. *See* S.C. Code Ann. § 48-39-250 et seq. Despite this "use" available, Defendants argue that the court rendered Lucas's parcels "valueless." However, as addressed above, the Supreme Court's decision in Lucas did not render anything "valueless." Rather, the Court referenced the state trial court's finding that the ban rendered Lucas's parcels "valueless." Lucas, 505 U.S. at 1001. Accordingly, this argument is irrelevant.

properties." Id. The same is true in the present case. There is no doubt that Defendants invested significantly into a gym that derived its profits from in-person patronage, and such investment expectations have been significantly interred with by the regulations.

While the first and second Penn Central factors support a finding that EO 01-20 constitutes a regulatory taking, the third factor does not. COVID-19 swept the country in a short period of time, forcing Governors and health officials to act quickly and diligently to protect the population. In TJM 64, Inc., the court determined that the COVID-19 closure order "was not for a 'public use' but was instead a valid exercise of the broad police powers bestowed upon state and local officials to prevent detrimental public harms by restricting Plaintiffs' use of their property. It is unlikely that such action would require compensation under the Takings Clause." 2020 WL 4352756, at *7. *See also* Auracle, 2020 WL 4558682, at *16 (concluding that the final factor also weighed "against a finding that Plaintiffs have suffered a regulatory taking because the Executive Orders are 'part of a public program adjusting the benefits and burdens of economic lift to promote the common good'") (*quoting* Sherman, 752 F.3d at 565). Defendants have provided no reason for this court to deviate from these cases and their rationale.

Additionally, holding that EO 01-20 resulted in a taking to businesses like Defendants could itself go against public policy. As addressed in TJM 64, Inc., labeling the executive order a taking

> would require the state to compensate every individual or property owner whose property use was restricted for the purpose of protecting public health. This would severely limit the state's especially broad police power in responding to a health emergency. Constraining such government actions would exceed the scope of the Takings Clause by "transform[ing] [the] principle [that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community'] to one that requires compensation whenever the state asserts its power to enforce it." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (quoting Mugler v. Kansas, 123 U.S. 623, 665, 8 S.Ct. 273, 31 L.Ed. 205 (1887)).

TJM 64, Inc., 2020 WL 4352756, at *7. Accordingly, EO 01-20 does not constitute a regulatory taking requiring just compensation under the Penn Central factors. Defendants' claims that the State, Governor and Attorney General violated Chapter 1, Article 2 of the Vermont Constitution and the Fifth Amendment of the United States Constitution thus fails.[14]

Finally, the State, Governor and Attorney General assert that the State is immune from claims for damages for loss of property under 20 V.S.A. § 20(a):

> Except in the case of willful misconduct or gross negligence, the state, any of its agencies, [or] state employees as defined in 3 V.S.A. § 1101, . . . involved in emergency management activities shall not be liable for the death of or any injury to persons or loss or damage to property resulting from an emergency management service or response activity, including the development of local emergency plans and the response to those plans. Nothing in this section shall exclude the state, its agencies, political subdivisions, or employees from the protections and rights provided in chapter 189 of Title 12.

20 V.S.A. § 20(a). However, the Vermont Supreme Court has previously held that the doctrine of immunity from liability for governmental activities "does not apply where the injury complained of is the taking of private property for public use without compensation." Griswold v. Weathersfield Town School Dist., 117 Vt. 224 226 (1952) (citing cases and other authority). Accordingly, the State, Governor and Attorney General are not immune from the state law taking claims.

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[14] Plaintiff and Counter-Defendants also asserts that this claim should be dismissed as the Governor was not acting pursuant to the emergency takings statute. Rather, 20 V.S.A. § 8(b)(1), § 9, and § 11(6) provided the necessary powers for the Governor to declare a state of emergency. Closing in-person businesses to slow the undetectable spread of a deadly disease falls squarely within the power to "order the evacuation of persons . . . working within . . . an area for which a state of emergency has been proclaimed," as authorized by § 9(9). However, EO 01-20 specifically refers to § 11 in its list of authorizing statutes.

20 V.S.A. § 11

On March 13, 2020, Governor Phil Scott issued Executive Order 01-20, declaring a state of emergency in response to COVID-19, as authorized by the Constitution of the State of Vermont, Chapter II, Section 20 and under 20 V.S.A. §§ 8, 9 and 11 and Chapter 29.[15] While Executive Order 01-20 was originally set to expire by April 15, the Governor has extended the state of emergency approximately every thirty days since it was first issued. In addition, the Governor has issued a series of addenda and directives related to EO 01-20. On March 21, 2020, Addendum 4 was issued, directing all "close-contact businesses," including "gymnasiums, fitness centers and similar exercise

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[15] https://governor.vermont.gov/sites/scott/files/documents/EO%2001-20%20Declaration%20of%20State%20of%20Emergency%20in%20Response%20to%20COVID-19%20and%20National%20Guard%20Call-Out.pdf.

See 20 V.S.A. § 20(a),(b):

> (a) The governor shall have general direction and control of the emergency management agency and shall be responsible for the carrying out of the provisions of this chapter.
> (b) In performing the duties under this chapter, the governor is further authorized and empowered:
>
> (1) Orders, rules and regulations. To make, amend and rescind the necessary orders, rules and regulations to carry out the provisions of this chapter with due consideration of the plans of the federal government.

See also 20 V.S.A. § 9(9):

> Subject to the provisions of this chapter, in the event of an all-hazards event in or directed upon the United States or Canada that causes or may cause substantial damage or injury to persons or property within the bounds of the State in any manner, the Governor may proclaim a state of emergency within the entire State or any portion or portions of the State. Thereafter, the Governor shall have and may exercise for as long as the Governor determines the emergency to exist the following additional powers within such area or areas:
>
> (9) To order the evacuation of persons living or working within all or a portion of an area for which a state of emergency has been proclaimed.

facilities, hair salons and barbers, nail salons, spas and tattoo parlors" to "cease all in-person operations."[16]

Defendants argue that they are entitled to compensation under 20 V.S.A. § 11 as a result of Plaintiff and Counter-Defendants' alleged taking of its lawful business. In pertinent part, 20 V.S.A. § 11 provides the following:

> In the event of an all-hazards event, the governor may exercise any or all of the following additional powers:
>
> (3) To seize, take, or condemn property for the protection of the public or at the request of the president, or his or her authorized representatives including:
>
> (A) All means of transportation;
> (B) All stocks of fuel of whatever nature;
> (C) Food, clothing, equipment, materials, medicines, and all supplies;
> (D) Facilities, including buildings and plants; provided that neither this nor any other authority in this chapter shall be deemed to authorize the eviction of a householder and his or her family from their own home.
>
> (5) To make compensation for the property so seized, taken, or condemned on the following basis:
>
> Any owner of property of which possession has been taken under the provisions of this chapter to whom no award has been made or who is dissatisfied with the amount awarded him or her by the governor, may file a petition in the superior court within the county wherein the property was situated at the time of taking to have the amount to which he or she is entitled by way of damages or compensation determined, and thereafter either the petitioner or the state shall have the right to have the amount of such damages or compensation fixed after hearing by three disinterested appraisers appointed by said court, and who shall operate under substantive and administrative procedure to be established by the superior judges. If the petitioner is dissatisfied with the award of the appraisers, he or she may file an appeal therefrom in said court and thereafter have a trial by jury to determine the amount of such damages or compensation in such manner as the court shall provide. The court costs of a proceeding brought under this section by the owner of the property shall be paid by the state; and the fees and expenses of any attorney for such owner shall also be paid by the state after allowances by the court wherein the petition is brought in such amount as the court in its discretion shall fix. The statute of limitations shall not apply to proceedings brought by such owners of property as above provided for and during the time

[16]https://governor.vermont.gov/sites/scott/files/documents/ADDENDUM%204%20TO%20EXECUTIVE%20ORDER%2001-20.pdf.

> that any court having jurisdiction of such proceedings shall be prevented from holding its usual and stated sessions due to conditions resulting from emergencies as herein referred to.

20 V.S.A. § 11(3),(5).

The State, Governor and Attorney General argue that the Governor's order is a generally applicable law aimed at protecting the public health and welfare, is a proper exercise of the State's police power, and does not result in a governmental taking. As this statute does not state any distinctions between a taking under 20 V.S.A. § 11(3),(5) and a taking under the Vermont and United States Constitution, this court must look to the plethora of case law previously mentioned, which, for reasons already explained, compel the conclusion that the actions of the State, Governor and Attorney General do not amount to a governmental taking that requires the payment of compensation. Therefore, the Defendants have no actionable claim for compensation for their alleged losses under 20 V.S.A. § 11.[17]

42 U.S.C. § 1983 and § 1985

Having concluded that the State, Governor and Attorney General did not violate Defendants' constitutional or statutory rights, the court will only briefly address Defendants' § 1983 claim and the immunity claims asserted by the Governor and Attorney General.

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[17] Defendants points to the use of the term "condemn" in support of the assertion that 20 V.S.A 11(3) applies to the circumstances of the present case. According to Defendants, the Vermont Supreme Court has "repeatedly used the term 'inverse condemnation' to mean a taking other than a physical invasion of private property by the government," citing to Ondovchik, 2010 VT 35, and Ridge Line, Inc. v. United States, 346 F.3d 1346 (Fed. Cir. 2003). However, Defendants fail to provide any case law or rationale for why EO 01-20 would be considered an inverse condemnation when it is not considered a taking. Accordingly, this argument also fails.

Defendants assert a civil rights claim under 42 U.S.C. § 1983 and 42 U.S.C § 1985[18], seeking damages against Governor Scott and Attorney General Donovan in their personal capacities, for allegedly depriving Defendants of their property without due process of law, in violation of the Fifth Amendment, by closing down the fitness center and refusing to compensate Defendants for the taking or condemnation, as required by 20 V.S.A. § 11 and the Vermont and United States Constitutions. 42 U.S.C. § 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the

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[18] Defendants also assert a civil action under § 1985(3).

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3). Defendants, however, do not allege a conspiracy or an act in furtherance of the conspiracy. In fact, other than listing § 1985 on the counter-claim, Defendants fail to address the claim at all. Thus, this claim is dismissed.

> District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983. *See* Williams v. State, 156 Vt. 42, 47, 589 A.2d 840, 844 (1990) ("[The statute, 42 U.S.C. § 1983,] provides a private remedy for those alleging abridgment of federal rights by 'persons' acting 'under color of' state law ... [and was] intended to provide a federal forum for those seeking vindication of federal rights ...."). "Claims under 42 U.S.C. § 1983 may be brought in either federal or state court; however, § 1983 may not be used to support claims for deprivation of state constitutional rights." Brown v. State, 2018 VT 1, ¶ 13, 206 Vt. 394 (*citing* Bock v. Gold, 2008 VT 81, ¶ 10, 184 Vt. 575, 959 A.2d 990 (mem.)). Accordingly, Defendants' § 1983 claim would only apply to the alleged violation of the Fifth Amendment of the United States Constitution. Because the court has determined that the Defendants' Counterclaim fails to state a viable claim that the Fifth Amendment was violated by the EO 01-20, Defendants' § 1983 claim must fail for this reason alone. Moreover, for the reasons set forth below, the Governor and Attorney General would be immune from such a claim, even if it were viable.

Attorney General Donovan asserts that as a prosecutor he has absolute immunity against the Defendants' § 1983 action for quasi-judicial acts. "Immunity is a defense to § 1983 actions for damages against certain officials sued in their individual capacity for damages. Those acting in a legislative, judicial or prosecutorial capacity are absolutely immune, irrespective of whether they act in good faith." Billado v. Appel, 165 Vt. 482, 486 (1996). "[P]rosecutors are protected by absolute immunity for quasi-judicial acts, which the Supreme Court has defined as those 'intimately associated with the judicial phase of the criminal process,'" O'Connor v. Donovan, 2012 VT 27, ¶ 11, 191 Vt. 412 (*quoting* Imbler v. Pachtman, 424 U.S. 409, 430 (19760). Applying this standard, the

Vermont Supreme Court concluded in Levinsky v. Diamond, 151 Vt. 178 (1989) "that the prosecutor defendants were all protected by absolute immunity for their actions 'in filing the ... charges' as well as for the allegedly unlawful subpoenaing of records, which 'involved an activity legally sanctioned as part of the investigative process, a process necessary to the effective operation of the prosecutors' office.'" O'Connor, 2012 VT 27, ¶ 12 (*quoting* Levinsky, 151 Vt. at 193–94) (partially overruled on other grounds by Muzzy v. State, 155 Vt. 279 (1990)).[19] Although this is not a criminal prosecution, Donovan is nevertheless entitled to absolute immunity because his alleged actions, in pursuing this enforcement action, are "functionally comparable" to that of a prosecutor. *See* Li v. Lorenzo, 712 Fed.Appx. 21, 23 (2d Cir. 2017 (holding that two attorneys who served as counsel to a state disciplinary committee were entitled to absolute immunity because their actions on behalf of the committee were "functionally equivalent" to that of a prosecutor). Accordingly, Attorney General Donovan does have absolute immunity against Defendants' § 1983 action. Moreover, for the reasons set forth below, he would be entitled to qualified immunity, even if he did not enjoy absolute immunity from Defendants' counterclaim.

Governor Scott argues that Defendants' claims against him for damages in his personal capacity are barred by qualified immunity because Defendants cannot show that he violated a clearly established right. "Other public officials and employees have qualified immunity that protects them if they act in good faith. Under the objective test of

[19] "It is unlikely . . . that Muzzy's intent was to overrule—in a brief footnote— Levinsky's specific and carefully constructed holding as to the Attorney General. It is more likely that, in purporting to overrule Levinsky 'to the extent that [it] . . . considers prosecutors acting in their quasi-judicial role as executive rather than judicial officers, . . . Muzzy was referring only to states' attorneys." O'Connor v. Donovan, 2012 VT 27, ¶ 18.

good faith adopted by the Supreme Court, government officials performing discretionary functions are immune "'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Billado, 165 Vt. at 487 (*quoting* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). The Supreme Court has held that qualified immunity can be defeated if an official "'"*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury...." Wood v. Strickland, 420 U.S. 308, 322 (1975) (emphasis added). Here, Defendants have alleged no facts which would support the conclusion that Governor Scott or Attorney General Donovan either violated a clearly established right or knew or should have known he was violating such a right. *See* Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 27 (1905) ("[A] community has the right to protect itself against an epidemic of disease which threatens the safety of its members."); McCarthy, 2020 WL 3286530, at *3 (noting that "courts across the country...have overwhelmingly upheld COVID-related state and local restrictions on gatherings over the last few month, citing *Jacobson*"). Therefore, Governor Scott and Attorney General Donovan are immune from Defendants' suit.

Order

For these reasons, the V.R.C.P. 12(b)(6) motion to dismiss Defendants' Counterclaim for failure to state a claim is *granted.*

SO ORDERED this 24th day of September, 2020.

Robert A. Mello, Superior Judge