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Cleveland, Ohio 44113

Court of Common Pleas

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By: MICHAEL J. STEWART 0082257

Confirmation Nbr. 1981435

CUYAHOGA COUNTY BOARD OF HEALTH

CV 20 931731

vs.

Judge: ASHLEY KILBANE

SECONDS CITY LTD DBA SECONDS CITY
CONSIGNMENT HOME

Pages Filed: 18

**IN THE COMMON PLEAS COURT
CUYAHOGA COUNTY, OHIO**

CUYAHOGA COUNTY BOARD OF HEALTH)	
)	
Plaintiff,)	CASE NO.
)	
v.)	JUDGE
)	
SECONDS CITY, LTD. d.b.a)	
Seconds City Consignment Home)	
Furnishings)	
)	
Defendant.)	

**EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

Plaintiff, the Cuyahoga County Board of Health (“CCBOH”) requests this Court issue a Temporary Restraining Order (“TRO”) pursuant to Civ.R 65(A) and Preliminary Injunction Pursuant to Civ.R. 65(B) requiring Defendant Seconds City, LTD to immediately cease operations pursuant to the state-wide “Stay at Home” directive that non-essential businesses close due to the COVID-19 outbreak. Despite repeated warnings, Defendant has refused to close voluntarily.

CCOH requests a TRO directing that Defendant immediately cease operation of its second-hand consignment furniture store. Further, CCBOH requests that the Court schedule a hearing as soon as practicable on its motion for a preliminary injunction directing Defendant to remain closed.

The basis for this motion is more fully set forth in the attached Memorandum in Support.

Respectfully submitted,

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for Cuyahoga County, Ohio

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The general circumstances surrounding the spread of COVID-19 (“coronavirus”) are well-known. The Ohio Department of Health and Governor DeWine have recently lawfully issued extraordinary orders to prevent the spread of COVID-19 and promote “social distancing.” The vast majority of Ohioans have heeded the direction of government officials and public-health experts and have remained at home except for essential business.

Defendant has not. Despite repeated warnings, Defendant has continued to operate as if nothing has changed. Unfortunately, at this stage, judicial intervention is necessary.

II. STATEMENT OF FACTS

In the face of a public-health emergency, Ohio Health Director Dr. Amy Acton is empowered to issue “Director’s Orders” pursuant to her authority under R.C. § 3701.13 (“to make special orders *** for preventing the spread of contagious or infectious diseases”). Relevant to this motion, Director Acton has issued the following orders:

- On March 12, Director Action first issued an order to “Limited and/or Prohibit Mass Gatherings of more than 100 people. (Cmplt. Ex. A). This order was amended on March 17 to prohibit mass gatherings of more than 50 people and strongly discourage private gatherings of more than 10 individuals. (Cmplt. Ex. B).
- On March 15, Ohio limited the sale of food and beverage sales throughout the state to carry out only. (Cmplt. Ex. C). Dr. Acton issued the order “to avoid an imminent threat with the high probability of widespread exposure to COVID-19 with a significant risk of substantial harm to a large number of people in the general population.”

- On March 23, 2020, Director Acton issued an order referred to as the “Stay At Home Order” which, among other statements, required all persons to stay at home unless they were employed in or operating an “essential business” as defined in the order. (Cmplt. Ex. D). While drastic, Director Acton and Governor DeWine concluded that such a broad restriction was necessary to protect public health.

In short, the Ohio Department of Health has required that most businesses close their doors to the public for the duration of the COVID-19 outbreak.

In response to the COVID-19 outbreak and the subsequent Director’s orders, CCBOH has established a call center by which members of the public can contact the Board about a range of issues concerning the virus, including businesses that remain open despite the widely-publicized orders to close. (Cmplt. at ¶ 14). In appropriate circumstances, sanitarians employed by CCBOH visit businesses to determine whether they are open and make a preliminary determination as to whether they are “essential” within the meaning of Director Acton’s “Stay at Home” order. (Lynch aff. at ¶ 3).

On March 27, 2020, CCBOH Sanitarian Joe Lynch visited Defendant’s store located at 6530 Pearl Road in Parma Heights, Cuyahoga County, Ohio. (Lynch aff. at ¶ 4). The store, Seconds City Consignment Home Furnishings (“Seconds City”), was flagrantly open to the public and conducting business as usual. (*Id.*, at ¶ 4). Seconds City primarily sells second-hand furniture and other items for the home on consignment. (*Id.*, at ¶ 4). According to Seconds City’s Facebook page, the store “has a little bit of everything for your home, from furniture of every type and style to knick-knacks, collectibles and antiques. The price of everything in the store drops by 1% every day and if there [sic] 100 days, its 100% off and totally free.¹” Consistent with this description,

¹ <https://www.facebook.com/pg/SecondsCityConsignment/about/> (last visited April 5, 2020).

Lynch observed Seconds City offering various used couches, chairs and other furniture for sale. (Lynch aff. at ¶ 4). At that time, Lynch advised Seconds City employees that the store may remain open briefly while CCBOH considered the matter. (Lynch aff. at ¶ 4). On March 31, 2020, after further considering the matter, Lynch advised Defendants employees and owner (Mr. Guinness) that Seconds City must close pursuant to Director Acton's "Stay at Home Order." (Lynch aff. at ¶ 5). Seconds City remained open anyway.

During the week of March 30, 2020, officers from the City of Parma Heights Police Department observed Defendant's business open to the public and issued a misdemeanor citation for violating R.C. 3701.352 (Violating Orders of the Department of Health). Upon information and belief, officers also advised Defendant's employees and managers that they must close to the public in compliance with the Director's orders as set forth above.

Despite all of this, Lynch observed that Seconds City remained open for business. (Lynch aff. at ¶ 6).

III. LAW AND ARGUMENT

Plaintiff, the Cuyahoga County Board of Health ("CCBOH") requests this Court issue a Temporary Restraining Order ("TRO") pursuant to Civ.R 65(A) and Preliminary Injunction Pursuant to Civ.R. 65(B) requiring Defendant Seconds City, LTD to immediately cease operations pursuant to the state-wide "Stay at Home" directive that non-essential businesses close due to the COVID-19 outbreak. Despite repeated warnings, Defendant has refused to close voluntarily. Defendant's continued operation manifestly threatens the health and safety of the public.

The TRO is necessary to protect the public until a court can hold a hearing on CCBOH's request for injunctive relief, which Plaintiff requests remain in place until Director Acton's orders concerning the COVID crisis are modified to permit retail establishments to open as usual.

A. The statutory prerequisites for injunctive relief have been met.

Plaintiff Cuyahoga County Board of Health (“CCBOH”) is a “general health district” CCBOH is among multiple state officials directed by statute to “enforce quarantine and isolation orders, and rules that [the Ohio Department of Health] adopts.” R.C. § 3701.56. Moreover, “the board of health of a general health district *** may petition the court of common pleas for injunctive or other appropriate relief requiring any person violating a[n] *** order issued by the director of health under this chapter to comply with such rule or order. The court of common pleas of the county in which the offense is alleged to be occurring may grant such injunctive or other appropriate relief as the equities of the case require.” R.C. § 3701.57.

Where a statute grants a specific injunctive remedy to the State, the State may obtain an injunction from the court merely by showing that the defendant has violated the statute. *Ackerman v. Tri-City Geriatric & Health Care, Inc.*, 55 Ohio St.2d 51, 56-57, 378 N.E.2d 145, 149 (1978). “It is established law in Ohio that, when a statute grants a specific injunctive remedy * * * to the state, the [state] need not aver and show, as under ordinary rules in equity, that great or irreparable injury is about to be done for which he has no adequate remedy at law.” *Mid-America Tire, Inc. v. PTZ Trading Ltd.*, 95 Ohio St.3d 367, 768 N.E.2d 619, 2002-Ohio-2427, ¶175, citing *Ackerman*, 55 Ohio St.2d at 56 (other quotations and citations omitted).

Statutory violations “proscrib[e] behavior which the General Assembly has determined not to be in public interest.” *Ackerman*, 55 Ohio St.2d at 57. Therefore, to obtain injunctive relief, the State only has to establish that “the statutory conditions exist.” *Id.*

The Court reasoned that it would be “redundant” to require a governmental agent to establish the elements of a private action for injunctive relief, such as irreparable damage or lack

of an adequate legal remedy, because “activities deemed harmful by the General Assembly are not designed primarily to do justice to the parties but to prevent harm to the general public.” *Id.*

Plaintiff, Cuyahoga County Board of Health in its capacity as a statutory agency is a the equivalent of a state agency that should be treated in the same manner as the State when it comes to its duty to abate nuisances and to enforce environmental crimes such as failing to comply with lead hazard control orders. The Board has authority to abate nuisances pursuant to R.C. § 3707.01. It also has delegated authority to Director’s Orders from the Ohio Department of Health concerning closures and quarantine. R. C. §§ 3701.56; 3701.57.

B. Defendant is in violation of Director Acton’s “Stay at Home” order.

Director Acton’s order is clear: “Non-essential business and operations must cease. All businesses and operations in the State, except Essential Business and Operations as defined below, are required to cease all activities within the State...” Cmplt. Ex. D at p. 1. In turn, the “Stay at Home Order” contains a list of “Essential Businesses and Operations,” including, for example, stores that sell groceries and medicine, organizations that provide charitable and social services, religious entities, gas stations, hardware and supply stores, critical trades, educational institutions (for distance learning purposes), businesses that sell supplies to work at home, etc. Cmplt. Ex. D at pp. 5-7.

As set forth above, Seconds City sells second-hand furniture on consignment as well as to “knick-knacks, collectibles and antiques.” Defendant’s business does not qualify under any of the categories of “Essential” under Director Acton’s order. Yet Seconds City remains open for business. As set forth above, CCBOH is entitled to injunction directing that Defendant close, just like thousands of other Ohio businesses.

C. All equitable requirements for a preliminary injunction have also been met to abate the public nuisance.

Even without explicit statutory authority to enforce the director's orders, this Court should nonetheless grant a preliminary injunction to enjoin the public nuisance alleged in the Complaint because Defendants' operation of non-essential business continues to and will threaten public health, welfare, and safety.

Ohio courts have generally considered whether four factors are shown by clear and convincing evidence in order to issue a preliminary injunction: (1) that the plaintiff is likely to prevail on the merits; (2) that there is likely to be irreparable injury unless relief is granted; (3) that third-parties will not suffer unjustifiable harm if such relief is granted; and (4) that an injunction will be in the public interest. *Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267, 747 N.E.2d 268 (1st Dist. 2000). Because the State establishes all four of these factors, this Court should award the Preliminary Injunction in equity as the State requests.

1. There is substantial likelihood that CCBOH will prevail on the merits.

The Complaint, Statement of Facts and affidavit of Joe Lynch summarize the overwhelming evidence against Defendant. Defendant continues to operate a non-essential business without regard for an explicit order by the Director of Health to close.

The whole point to the extraordinary orders by Director Acton and Governor DeWine over the past motion is to protect the public from a dangerous virus that public health experts around the world have adjudged to be a serious threat to human life. Although these measures are painful to millions of Ohioans, they are both necessary and lawful. Simply put, there is nothing so special about Defendant's second-hand furniture store that justifies flouting a widely-publicized order to close.

2. The public is likely to suffer irreparable injury unless a preliminary injunction is issued.

Irreparable injury refers to the “degree of wrongs of a repeated and continuing kind which produce hurt, inconvenience or damage” and “can be estimated only by conjecture.” *Waste Technologies Industries v. Tri-State Environmental Council*, 7th Dist. Columbiana No. No. 91-C-69, 1992 WL 380296, *2 (quotations omitted); *see also Mangano v. 1033 Water St., L.L.C.*, 8th Dist. Cuyahoga No. 106861, 2018-Ohio-5349, ¶ 13 (“no plain, adequate, and complete remedy at law”). This means that courts do not need “an accurate standard of measurement” for “the nature of damages” to still impose an injunction. *Waste Technologies Industries*, at *2; *see also Mangano*, ¶ 13 (“money damages would be impossible, difficult, or incomplete”).

Every day that Seconds City remains open, it creates an unnecessary risk of spreading the COVID virus. Moreover, Defendant’s recalcitrance undermines the badly needed social distancing required at a moment of serious crisis. If other retailers see that Defendant is able to operate its non-essential business with impunity, they may well follow suit. No amount of future money damages can undo the public-health harm that is occurring today.

3. Third parties will not suffer unjustifiable harm if the Court issues the Preliminary Injunction.

The Preliminary Injunction will not harm any third parties. Rather, the Plaintiff’s request will remedy a harm imposed upon *third parties*—the risk of spreading COVID is reduced. Thus, the Plaintiff satisfies this factor.

4. The Preliminary Injunction will be in the public interest, as it will protect public health.

The Preliminary Injunction is designed for the public. It will prevent Defendants from perpetuating the public nuisance by a risk of the spread of a deadly virus. The provisions of the Preliminary Injunction will ensure that Defendants will not cause harm to the community.

Therefore, because all four factors under common law weigh strongly in favor of a preliminary injunction to prevent Defendants' ongoing public nuisance, this Court should grant the CCBOH's Motion for TRO and Preliminary Injunction.

IV. RELIEF REQUESTED

Plaintiffs filed a Complaint against Defendants and ultimately seeks permanent injunctive relief, as well as civil penalties.

Until the Court renders final judgment in this case, the Plaintiffs seek to prevent any further immediate harm to human health from environmental hazards due to Defendants' continued operations. Based on the foregoing, the Plaintiffs' respectfully requests that this Court issue an order, pursuant to Civ.R. 65 and R. C. §§ 3701.56; 3701.57, for a TRO and preliminary injunction enjoining Defendant as follows:

1. 1. Issue a TRO² ordering Defendant to:
 - a. Immediately cease all business operations at the locations identified;
 - b. Comply with the Director's Stay At Home Order; and
2. Schedule a telephonic hearing CCBOH's motion for a preliminary injunction as soon as practicable.
3. Preliminarily and permanently enjoin Defendant from violating R. C. 3701.13;
4. Declare that the businesses engaged in by Defendants are not an essential business as defined in the Director's Orders
5. Alternatively, declare that the actions of Defendants, individually and/or collectively constitute a general nuisance and/or public nuisance;
6. Retain jurisdiction of this case until all Orders issued by this Court are complied with in all respects;
7. Order that Defendant pay any and all fines and costs incurred in bringing this action; and

² A proposed TRO order is attached hereto.

Grant such other relief as may be necessary and appropriate in law and equity

V. CONCLUSION

For the above-stated reasons, Plaintiffs respectfully request that this Court grant this Motion and issue the Temporary Restraining Order and Preliminary Injunction against Defendants

Respectfully submitted,

MICHAEL C. O'MALLEY

Respectfully submitted,

s// Michael J. Stewart

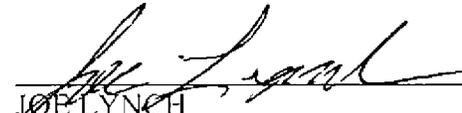
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2. I am a registered and licensed Sanitarian in the State of Ohio. A licensed sanitarian must have at least a baccalaureate (bachelors) degree from an accredited college including 45 quarter hours or 30 semester hours of science courses. Science courses must be in the subject areas of biology, chemistry, physics, geology, mathematics, or statistics and be applicable to the practice of environmental health science. One must also have completed at least two years of experience in the practice of environmental health; however, if the candidate has a degree higher than a baccalaureate, or completed a major in environmental health which included a Board approved internship, one year of experience as a sanitarian is required. Registered sanitarians are required to complete 18 hours of Board approved continuing education on an annual basis. I have worked in this capacity for the last 28 years for the Cuyahoga County Board of Health (CCBH).
3. In my capacity as a Registered Sanitarian, I was assigned to work in the city of Parma Heights and to check on local businesses to determine their compliance with the Director of Health's Stay at Home Order issued on or about March 23, 2020.
4. On or about March 27, 2020, I stopped at the Defendant Second's City Consignment Home Furnishings business. I found the doors open to the public, shoppers inside shopping and the manager and other employees working. The store sells mostly used furniture and other home furnishings. I spoke with the manager, Ms. Bobby and agreed that the store could remain open at that time.
5. Between then and March 31, 2020, upon further review of the Director's Order and after consultation with counsel, our office came to a different conclusion on whether or not the Defendant's furniture store was an essential business. On that day, I called and spoke with the owner, Mr. Giness. I told them that the store was not an "essential" business as that is defined in the Director's Order and that the store had to close to the public.

6. Defendant's owner advised that they were staying open.
7. Despite my order to close, Defendant continued to be open to the public on that date and every day since that date.
8. When Defendant refused to close the store, the Parma Hts. Police Officer issued a criminal citation for violation of ORC 3701.352 for violating the Director's Orders.
9. I completed a COVID-19 Business Investigation and Inspection Report and served that on the Defendant. See, Exhibit ___ attached hereto.
10. According to the Director's Order, Defendant's business is not an essential business and must close to the public.

FURTHER AFFIANT SAYETH NAUGHT.



JOE LYNCH
Cuyahoga County Board of Health

Sworn to and subscribed in my presence by Joe Lynch this 7 day of April, 2020.



Notary Public
THOMAS P. O'DONNELL, Attorney
NOTARY PUBLIC - STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.

My commission expires

SEAL



CUYAHOGA COUNTY BOARD OF HEALTH

YOUR TRUSTED SOURCE FOR PUBLIC HEALTH INFORMATION

COVID-19 BUSINESS INVESTIGATION INSPECTION REPORT

Name of Establishment <i>Second's City</i>		Address <i>6530 Pearl Rd.</i>	
City <i>Parma Hts.</i>	Zip <i>44130</i>	Phone <i>4-845-3000</i>	Owner/Operator Email
Name of Owner/Operator <i>Brian Mc Ginnis</i>		Address of Owner/Operator	
Owner/Operator City	Owner/Operator Zip	Owner/Operator Phone	
Inspected by <i>Del Lytle</i>	Inspection Date <i>4/6/2020</i>		

NOTICE

A state of emergency has been declared in the State of Ohio due to the prevalence of COVID-19. Pursuant to Ohio Revised Code 3701.13, the Ohio Director of Health has issued numerous public health orders. Failure to comply with any order listed below is a misdemeanor criminal offense subject to prosecution pursuant to Ohio Revised Code 3701.352. Businesses that do not comply are found to be in violation and are ordered immediately closed until the applicable public health order is lifted. These inspection reports are public documents and may be posted. As a result of our inspection today, your establishment is either in compliance or in violation as noted below.

Your establishment is deemed to be: IN COMPLIANCE X IN VIOLATION

YOU ARE IN VIOLATION OF THE PUBLIC HEALTH ORDER(S) SPECIFIED BELOW:

- | | |
|---|---|
| <ul style="list-style-type: none"> <input type="checkbox"/> 3/15/20 Order Limiting the Sale of Food and Beverages, Liquor, Beer and Wine to Carry-Out and Delivery Only. (No onsite consumption is permitted.) <input type="checkbox"/> 3/17/20 Amended Order to Limit and/or Prohibit Mass Gatherings in the State of Ohio. (Closure of bowling alleys, health clubs, gyms, yoga studios, indoor trampoline parks, indoor water parks, movie theaters and performance theaters, public recreation centers, indoor sports facilities, etc.) <input type="checkbox"/> 3/19/20 Order to Cease Business Operation at Hair Salons, Day Spas, Nail Salons, Barber Shops, Tattoo Parlors, Body Piercing Locations, Tanning Facilities and Massage Therapy Locations. <input type="checkbox"/> 3/21/20 Order to Prohibit Adult Day Support or Vocational Habilitation Services in a Congregate | <ul style="list-style-type: none"> <input type="checkbox"/> 3/21/20 Order to Cease Business Operations and Close Venues. (Closure of indoor family entertainment businesses and venues, including but not limited to laser tag, roller skating and ice skating rinks, arcades and indoor miniature golf, etc. and dance studios) <input checked="" type="checkbox"/> 3/22/20 Order that All Persons Stay at Home Unless Engaged in Essential Work or Activity. <input type="checkbox"/> 3/24/20 Amended Order to Close Facilities Providing Older Adult Day Care Services and Senior Centers. <input type="checkbox"/> 3/25/20 Order to Close Facilities Providing Child Care Services. <input type="checkbox"/> 3/30/20 Amended Order Requiring the Closure of All K-12 Schools in the State of Ohio. (until May 2, 2020) |
|---|---|

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Terrence M. Allan, R.S., M.P.H. Health Commissioner

**IN THE COMMON PLEAS COURT
CUYAHOGA COUNTY, OHIO**

CUYAHOGA COUNTY BOARD OF HEALTH)	
)	
Plaintiff,)	CASE NO.
)	
v.)	JUDGE
)	
SECONDS CITY, LTD. d.b.a)	
Seconds City Consignment Home)	<u>[Proposed] TEMPORARY RESTRAINING</u>
Furnishings)	<u>ORDER</u>
)	
Defendant.)	
)	
)	
)	
)	

Upon consideration, for good cause shown and pursuant to Ohio Civ.R. 65(A), Plaintiff Cuyahoga County Board of Health’s (“CCBOH’s”) Motion for Temporary Restraining Order is hereby **GRANTED**. Upon review of the Affidavit of Joe Lynch, Defendant Seconds City, LTD is operating a non-essential business in violation of Director’s Orders issues by Ohio Health Director Amy Acton to control the spread of COVID-19 and encourage “social distancing.” Continued operation of Defendant’s business may cause irreparable harm to the public health. The Court further finds that CCBOH has previously attempted to communicate with Defendant concerning its continued operation, but Defendant’s business remains open. **THEREFORE:**

- 1) Defendant is ordered to cease operations immediately upon receipt of this order. Failure to do so may be punishable by contempt sanctions, including fines and jail time.
- 2) A telephonic hearing on CCBOH’s Motion for Preliminary Injunction is set for ____ AM/PM on April ____, 2020. The Court will then determine whether Defendant must stay closed pursuant to the Director’s Orders or may remain open. Failure to appear by

telephone may be punishable by contempt sanctions, including fines and jail time. In addition, a default judgment may be entered.

- 3) Plaintiff is directed to use reasonable efforts to inform Defendant of this Order and the date and time of the hearing on preliminary injunction.
- 4) The Clerk is directed to serve a copy of this order via certified mail pursuant to Civ.R. 4.1(A)(1)(a) and via Sheriff service pursuant to Civ.R. 4.1(B).
- 5) This order may be enforced by all persons authorized by R.C. 3701.56.

JUDGE, CUYAHOGA COUNTY
COURT OF COMMON PLEAS