IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

MUNICIPALITY OF ANCHORAGE,
Plaintiff,

v.

DEWEY C. WELLS, and SAMANTHA WELLS,
Defendants.

FILED in the Trial Courts
State of Alaska Third District

AUG 17 2020

Clerk of the Trial Courts
By _____ Deputy

Case No. 3AN-20-07424 CI

MOTION & MEMORANDUM FOR RECONSIDERATION OF THE COURT'S AUGUST 11, 2020 ORDER

DEWEY C. WELLS, and SAMANTHA WELLS, by and through the Law Offices of Blake Fulton Quackenbush, moves for the court to reconsider its August 10, 2020 order granting *Plaintiff's Motion for Temporary Injunction*.

I. Alaska R. Civ. Proc. 77(k)(1)(i): it was error to deny counsel's oral motion for a continuance.

Refusal to grant a continuance is an abuse of discretion "when a party has been deprived of a substantial right or seriously prejudiced."[1] The reasonableness of the denial and any prejudice arising from the denial are evaluated on a case-by-case basis.[2] "[B]ecause of the necessity for orderly, prompt and effective disposition of litigation and the loss and hardship to the parties [and] witnesses," trial courts should deny motions for continuances unless there is "some weighty reason to the contrary." [3] One

[1] *Shooshanian v. Dire*, 237 P.3d 618, 623 (Alaska 2010) (citation omitted).

[2] *Id.* at 987 (citing among others *Wright v. State,* 501 P.2d 1360, 1366 (Alaska 1972)).

[3] *Id.* (citations omi).

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such weighty reason is "prejudice [to] the substantial rights of parties by forcing them to go to trial without being able to fairly present their case."[4]

Undersigned counsel requested a continuance for several reasons, but chief among them was because Defendants had not been given any notice of any witnesses to be called at trial on the issue of the Plaintiff's request for a temporary injunction. Defendants were caught by surprise when the court denied the request for a continuance and allowed Plaintiffs to call a previously undisclosed witness. Counsel for defendants pointed out the Plaintiff's last-minute disclosure of a witness to this Court and counsel for Defendants specifically argued that he did not have time to depose the witness or even speak to the witness prior to the hearing. Plaintiffs had not provided any notice of any witnesses prior to the hearing, and there was no opportunity afforded to Defendants to depose the witness. Defendants did not even have a chance prior to trial to investigate the witness or contact the witness to inquire about the scope of the witnesses' testimony.

Based on the foregoing, Defendants could not therefore prepare their own witnesses to testify at trial and were accordingly prejudiced. Defendants were prejudiced because their right to due process under the law was violated when the court permitted Plaintiff's to present a witness to testify at court without prior notice and without affording

[4] *Id.* (citing *Yates v. Superior Court,* 120 Ariz. 436, 586 P.2d 997, 998 (Ariz.App.1978) and *Gonzales v. Harris,* 189 Colo. 518, 542 P.2d 842, 844 (1975)).

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additional time for Defendants to prepare and be hard through presentation of their own witnesses.

II. Alaska R. Civ. Proc. 77(k)(1)(ii): the Court's August 11, 2020 order has no factual basis.

Plaintiff bears the burden of proof and the burden of going forward on a motion for a temporary injunction.[5] The court has overlooked or misconceived all the material facts it expressly or implicitly found in issuing its August 11, 2020 oral decision on the record.

The temporary injunction was granted without Plaintiff satisfying its legal burden of proof and burden of going forward. Defendants stipulated to no facts at or prior to the August 11, 2020 hearing. The Municipality of Anchorage submitted absolutely no evidence whatsoever at the August 11, 2020 hearing that satisfied its burden of irreparable harm or adequate protection. The Municipality called only one witness, and no exhibits were identified by Plaintiff. No exhibits were offered for admission by Plaintiff. No exhibits were admitted into evidence by the court. The Plaintiffs failed to present any evidence whatsoever at the hearing that would satisfy the Plaintiff's burden of proof on its motion for a temporary injunction.

Among the facts the Municipality failed to prove are the following:

1. Whether Defendants operate a business within the Municipality of Anchorage;

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[5] *State v. Kluti Kaah Native Vill. of Copper Ctr.*, 831 P.2d 1270, 1273-74 (Alaska 1992).

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2. The existence, legality, and terms of the legal document purporting to be the Anchorage Mayor's EO-15 which they seek to enforce;
3. That the Anchorage public will suffer irreparable harm by allowing businesses such as Defendants to continue to operate under EO-15;
4. That indoor dining exacerbates facilitates the risk of the spread of COVID-19;
5. That if infected with COVID-19, individuals face significant risk of serious harm to their health to include death;
6. That if EO-15 is not followed, people may become sick from COVID-19 and may pass away because of the violation of EO-15;
7. Whether Defendants are adequately protected;
8. Whether the duration of EO-15 is less than or equal to one month;
9. Whether the Defendants are capable of operating at all through curbside or outdoor dining in a parking lot;
10. Whether individuals financially support Defendants despite EO-15;
11. Whether the Plaintiff raised serious and substantial questions going to the merits of the case; and
12. Whether there the Plaintiff has probable success on the merits.

Absent evidentiary proof of any the foregoing facts, the Plaintiff failed to meet both its legal burden of proof and burden of going forward on its motion for a temporary injunction. Therefore, the motion for a temporary injunction should have been denied, and the Court must reconsider and reverse its August 11, 2020 order granting a temporary injunction.

III. Alaska R. Civ. Proc. 77(k)(1)(i): the court improperly took judicial notice of facts not presented by Plaintiffs at the August 11, 2020 hearing.

Article II of the Alaska Rules of Evidence governs taking judicial notice. A court may take judicial notice "at any stage of the proceeding,"[6] and may do so "whether

[6] Alaska R. Evid. 203(b).

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requested or not."[7] In addition, the Rules leave considerable discretion to the court to take judicial notice of judicially noticeable facts. However, the Rules leave no discretion to the court about which kinds of fact may be judicially noticed.[8] The question of whether or not to take judicial notice of fact that satisfies the conditions of subdivision [201](b) is thus left primarily to the court's discretion."

The question is therefore whether the facts underlying the Court's decision on August 11, 2020 were judicially noticeable facts. The rules set out the applicable standard: "A judicially noticed fact must be *one not subject to reasonable dispute.*"[9] The Commentary to the Alaska Evidence Rules fleshes out this standard as follows:

> The court taking judicial notice of a fact as that term is used in Rule 201 is held to a [...] demanding standard—the same standard required for it to direct a verdict; it must be right, meaning that rational minds would not dispute the fact that the court notices.[10]

Judicial notice of fact "is restricted to discrete facts which are so well known or authoritatively established as to be essentially indisputable."[11] Applying that standard, as

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[7] Alaska R.Evid. 201(c).

[8] Alaska R.Evid. 201(b). *See* Alaska Evidence Rules Commentary, Rule 201(c) and (d): "Under subdivision [201](c) the judge has a discretionary authority to take judicial notice, as long as subdivision [201](b), supra, is satisfied...

[9] Alaska R. Evid. 201(b) (emphasis added).

[10] Evidence Rules Commentary, Rule 201(a).

[11] 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence,* ¶ 200[01], at 200–2 (1990)

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laid out in *Barber v. National Bank of Alaska,* 815 P.2d 857 (Alaska 1991), yields the following: "This court will affirm taking judicial notice only if, viewing the evidence in the light most favorable to the party against whom judicial notice is to be taken, fair-minded jurors could not disagree about the truth of the proposition to be noticed."[12]

Here, this court, did not view the evidence in the light most favorable to the Defendants when rendering its decision. Additionally, the court, during its oral decision, recognized that the science behind transmission of COVID-19 is not absolutely clear. The court also recognized that it had not heard the testimony of any doctors or any one in that regard, but the court relied instead on what it had read in the morning paper. Fair minded jurors could easily disagree about the facts relied upon by the court related to Plainiff's burden of proof. The court's decision was not impartial, was based on findings of facts and conclusions of law, and was not viewed in the light most favorable to Defendants. The Court must reconsider the August 11, 2020 order and reverse its decision.

IV. Alaska R. Civ. Proc. 77(k)(1)(i): the court violated Defendants' right to due process of law

Due process of law requires that before valuable property rights can be taken directly or infringed upon by governmental action, there must be notice and an opportunity to be heard.[13] It has long been recognized that an interest in

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[12] *F.T. v. State*, 862 P.2d 857, 864 (Alaska 1993).

[13] *Frontier Saloon, Inc. v. Alcoholic Beverage Control Bd.*, 524 P.2d 657, 659 (Alaska 1974).

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a lawful business is a species of property entitled to the protection of due process.[14] This interest may not be viewed as merely a privilege subject to withdrawal or denial at the whim of the mayor of the Municipality of Anchorage.[15] Neither may this interest be dismissed as *de minimis*.[16] A license to engage in a business enterprise is of considerable value to one who holds it.[17] There can be no question in this case that a suspension of appellant's liquor license would represent a potential economic loss to its business.[18]

Here, the Court's August 11, 2020 decision to not grant the Defendants a continuance violated the Defendants right to procedural due process under Alaska law. Defendants were allegedly served on August 5, 2020, but they were not represented by counsel until approximately two hours before the hearing of the Plaintiff's motion for a temporary injunction. The Plaintiff's provided no notice of the witnesses it intended to call prior to the hearing. The Defendants, as *unrepresented* litigants, were given no notice

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[14] *Id.*(citing *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 123 (1926); *Greene v. McElroy*, 360 U.S. 474, 492, (1959); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957); *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102, (1963); *Slochower v. Board of Higher Education*, 350 U.S. 551, 555 (1956)).

[15] *Id.* 524 P.2d at 660 (citing *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964),

[16] *Id.*

[17] *Id.*

[18] *Frontier Saloon, Inc.*, 524 P.2d at 660 (citing *Misurelli v. City of Racine*, 346 F.Supp. 43, 48 (E.D.Wis.1972)).

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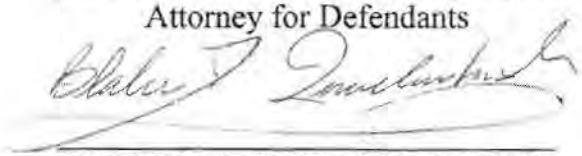
of the witness the Plaintiff intended to call at the hearing on the Plaintiff's request for a temporary injunction. Counsel for the Defendants was not given notice by the Plaintiff of any witnesses the Plaintiff intended to call prior to the hearing. Given the lack of notice, the Defendants were not given the opportunity and time to prepare their own witnesses.

The court's August 11, 2020 decision denied Defendants of their constitutional right to be heard. The Defendants were not given an opportunity by the court prior to the hearing on the Plaintiff's request for a temporary restraining order to prepare witnesses for the court to hear in opposition to the witness the Plaintiff called to testify. The court appeared to have already made a decision before considering the facts and information presented at the hearing. This became apparent when undersigned counsel asked the court to clarify the facts and information it relied on when it made its decision. The court made clear that it was relying in facts not presented or admitted into evidence.

For these reasons, the Defendants request that the court reconsider its decision and reverse its August 11, 2020 decision.

DATED this 17th day of August 2020 at Anchorage, Alaska.

LAW OFFICES OF
BLAKE FULTON QUACKENBUSH
Attorney for Defendants



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CERTIFICATE OF SERVICE

Undersigned hereby certifies that on Aug. 17, 2020 a true and correct copy of this document was served by: ☒USPS 1st Class Mail; ☐E-Mail; ☐Fax; ☐Messenger; and/or ☐Hand Delivery to the following recipient(s):

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ORDER ON MOTION FOR RECONSIDERATION

THE COURT, having reviewed the motion for reconsideration, hereby orders that the motion is GRANTED. It is further ordered that the preliminary injunction ordered by this court on the record August 11, 2020 is hereby VACATED.

IT IS SO ORDERED this _____ day of _____ 2020 at Anchorage, Alaska.

ERIN B. MARSTON
SUPERIOR COURT JUDGE

CERTIFICATE OF SERVICE

Undersigned hereby certifies that on Aug 17, 2020 a true and correct copy of this document was served by: ☒USPS 1st Class Mail; ☐E-Mail; ☐Fax; ☐Messenger; and/or ☐Hand Delivery to the following recipient(s):

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