IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MICHELLE LUJAN GRISHAM,
Governor of New Mexico; and
KATHYLEEN KUNKEL, Secretary of the
New Mexico Department of Health,

Petitioners,

v. **S. Ct. No. S-1-SC-38396**

THE HONORABLE RAYMOND L. ROMERO,

Respondent,

and

OUTLAW MEATS, LLC,
a New Mexico Limited Liability Company,
F-2 ENTERPRISES, INC. d/b/a TEXAS CLUB
GRILL & BAR, a New Mexico Corporation,
K-BOBS OF RATON, INC., a New Mexico Corporation,
K-BOBS OF LAS VEGAS, INC., a New Mexico Corporation,
B.M.B. FINANCIAL, LLC, d/b/a TRINITY HOTEL,
a New Mexico Limited Liability Company,
RED RIVER BREWING COMPANY, LLC,
a New Mexico Limited Liability Company,
NEW MEXICO RESTAURANT ASSOCIATION,

Real Parties in Interest.

RESPONSE IN OPPOSITION TO MOTION TO LIFT STAY OF TEMPORARY RESTRAINING ORDER

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Governor of New Mexico Michelle Lujan Grisham and New Mexico Secretary of Health Kathyleen Kunkel ("Petitioners"), pursuant to Rule 12-309(E) NMRA, and respectfully submit this response in opposition to the Motion to Lift Stay of Temporary Restraining Order filed by Real Parties in Interest on July 22, 2020 ("Motion to Lift Stay"). As grounds for their response in opposition, Petitioners state as follows.

INTRODUCTION

Setting forth an incomplete procedural history of the proceedings in district court, Real Parties in Interest's Motion to Lift Stay seems to imply that Petitioners somehow encouraged or brought upon themselves the district court's issuance of a (legally deficient) temporary restraining order five days after Petitioners had notice, without first providing Petitioners with a response deadline or an opportunity to be heard. That is not accurate. Real Parties in Interest fare no better with their argument that the stay issued by this Court fails to comply with the rules of appellate procedure. That contention is also erroneous. For the reasons explained in detail below, the Court should deny the Motion to Lift Stay.

RELEVANT PROCEDURAL HISTORY

A. The request for injunctive relief filed by Real Parties in Interest in district court.

Petitioners take this opportunity to supplement the incomplete procedural history provided by the Motion to Lift Stay.

Real Parties in Interest filed their Verified Application for Temporary Restraining Order and Preliminary and Permanent Injunction ("Application") in the district court on July 14, 2020 and served it on Petitioners on July 15, 2020. As Real Parties in Interest note, Motion to Lift Stay at 3, counsel for Petitioners entered their appearance on July 17, 2020 and then filed an unopposed motion to exceed page limits under Civil Local Rule 5-207(A).

Later that afternoon, a court employee emailed the parties to state that the Judge would be granting the order for leave and that it would be filed shortly. See July 17, 2020 email, attached as Exhibit 1. The Court entered the Temporary Restraining Order ("TRO") at 11:22 a.m. on July 20, 2020. See Petitioners' Emergency Verified Petition for Superintending Control and Request for Stay of Temporary Restraining Order Against Enforcement of Directives Contained Within the Public Health Order filed on July 20, 2020 ("Petition"), Ex. 8 (providing the TRO). The district court subsequently entered an Order Granting Respondents' Unopposed Motion for Leave to Exceed Page Limits the next morning on July 21, 2020—a day after this Court issued its order to stay the underlying proceedings. Attached as Exhibit 2.

Prior to issuing the TRO, the district court never entered any order setting a deadline for responding to the Application, and it also did not enter an order setting a hearing on the Application. The district court did not informally or formally

contact Petitioners in any way to: (1) establish a deadline for responding to the Application; (2) attempt to establish an agreeable time for an expedited hearing on the Application; or (3) inquire whether or when Petitioners intended to file a responsive pleading in light of Petitioners' pending request to exceed page limits. Indeed, the district court did not even enter an order permitting Petitioners to file a response exceeding page limits until the day after it granted the TRO.

Petitioners, who intended to file a response to the claims in the Application on July 20, were able to make some quick adjustments to their brief and file the Petition and request a stay just a few hours after the TRO was issued.

B. The district court's order granting the TRO.

The TRO recited three findings: (1) that actual notice of the Application had been given to Petitioners (in this matter) on July 15, 2020; (2) that Petitioners had not filed any responsive pleading as of July 20, 2020 at 11:00 a.m.; and (3) that "[i]mmediate irreparable injury, less or damage will result to the [Real Parties in Interest] before the [Petitioners] or their attorneys can be heard in opposition to the [Application], to wit: permanent loss of revenue, permanent business closure, and/or bankruptcy." Petition, Ex. 8 at 1-2. The TRO then set a hearing date for a preliminary injunction hearing ten days later. Id. at p. 2.

The TRO did not find that any of the required elements for obtaining injunctive relief had been established, aside from irreparable harm.[1] Ordinarily, to obtain a preliminary injunction such as a temporary restraining order, the moving party must demonstrate four factors: "(1) the plaintiff will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; (3) issuance of the injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood plaintiff will prevail on the merits." Nat'l Tr. for Historic Pres. v. City of Albuquerque, 1994-NMCA-057, ¶ 21, 117 N.M. 590, 874 P.2d 798. These factors are assessed against the well-established notion that a TRO constitutes drastic relief and should issue only in "extreme cases of pressing necessity and only where there is no adequate remedy at law." Insure N.M., LLC v. McGonigle, 2000-NMCA-18, ¶ 7, 128 N.M. 611, 995 P.2d 1053 (alterations, internal quotation marks, and citation omitted). The right to relief must be clear and unequivocal. Nova Health Sys. v. Edmondson, 460 F.3d 1295, 1298 (10th Cir. 2006) (holding that because a

[1] The TRO's factual recitation regarding irreparable harm contains similar language to Rule 1-066(B)(1) NMRA, which permits a temporary restraining order to be issued without written or oral notice to an adverse party. That provision was not applicable in this case because—as the TRO acknowledges—Petitioners were given notice before the TRO was issued. Moreover, as described above, the district court never entered an order or otherwise communicated a response deadline to the parties and did not set a hearing. Instead, it issued a TRO relying solely on the irreparable harm factor five days after Petitioners had been served and with a motion to exceed page limits still technically pending.

temporary restraining order is an "extraordinary remedy, . . . the right to relief must be clear and unequivocal.").[2]

Moreover, when the relief sought is identical to that which would be obtained at trial, like the Real Parties in Interest's Application in the district court, a more exacting analysis is employed and "the movant must satisfy a heightened burden." O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft, 389 F.3d 973, 975 (10th Cir. 2004) (identifying categories of disfavored injunctions including those, like here, which seek the full measure of relief that would be obtained at trial). In all cases, the moving party bears the burden of demonstrating that an injunction should issue. Nat'l Tr. for Historic Pres., 1994-NMCA-057, ¶ 18 (observing that the party seeking injunctive relief bears the burden of "prov[ing] the facts supporting their claim for relief.").

The district court's order issuing a TRO omitted any finding that Real Parties in Interest had met their burden in demonstrating three of the four necessary factors for obtaining injunctive relief under New Mexico law. This alone would subject the TRO to a swift reversal on appeal, even absent the extraordinary

[2] Federal authorities interpreting Federal Rule of Civil Procedure 65 are persuasive guidance in construing the similar language in Rule 1-066. New Mexico Courts interpreting Rule 1-066 have previously relied on federal cases interpreting Federal Rule of Civil Procedure 65 in evaluating the necessary factors for establishing injunctive relief. Labalbo v. Hymes, 1993-NMCA-010, ¶¶ 11-12, 115 N.M. 314, 850 P.2d 1017; see also Rogers v. Bd. of Cty. Comm'rs, 2020-NMCA-002, ¶ 10, 455 P.3d 871(following persuasive federal authorities in interpreting a provision of Federal Rule of Civil Procedure 60 similar to a provision of Rule 1-060 NMRA).

posture of this matter. See Labalbo, 1993-NMCA-010, ¶ 11 ("The trial court may abuse its discretion by applying the incorrect standard for a preliminary injunction . . . .").

ARGUMENT

A. Petitioners' request for stay was proper under Rule 12-504(D) NMRA.

A request for stay may be granted without notice to other parties under Rule 12-504(D) NMRA if three things are established. First, it must "clearly appear[] from the verified petition or by affidavit filed with the Court that immediate and irreparable injury, loss, or damage will result to the petitioner before the respondent or real parties in interest can be heard in opposition." Rule 12-504(D)(2)(a). Second, it must "clearly appear[] from the verified petition or by affidavit filed with the Court that no loss or damage will result to the respondent or any real parties in interest, or, if loss or damage will occur, what that loss or damage will be." Rule 12-504(D)(2)(b). Third, the Petitioner must "certif[y] in writing to the Court the efforts, if any, that have been made to give notice and the reasons supporting the petitioner's claim that notice should not be required." Rule 12-504(D)(2)(c). This Court correctly concluded that Petitioners' request for stay in its Petition satisfied these three requirements.

First, this Court was right to conclude that it clearly appeared from the Petition that immediate and irreparable injury would be caused prior to receiving a

response in opposition. The Petition describes facts—of which, Petitioners have no doubt, this Court is well aware—regarding the circumstances surrounding the COVID-19 pandemic and the manner in which the virus can rapidly and exponentially spread in certain environments, along with the importance of the State's emergency public health orders in the efforts to curb that spread. Petition at 2-9. The Petition also explains the link between indoor dining and spikes in positive COVID-19 cases. Id. at 9-13. The irreparable harm that would result from allowing the TRO to stand is self-evident: a person who becomes infected with COVID-19 while dining in a restaurant cannot become un-infected; nor can any secondary contacts of that person. Because the COVID-19 virus is highly contagious and can be passed through asymptomatic and pre-symptomatic individuals, even a handful of additional infections each day can multiply into significantly more cases and deaths over time. Id. at 2-4. That is why early intervention measures can have such a significant impact on case and death rates over time.[3] This is particularly true now, as there is a significant resurgence of the virus in New Mexico and nationwide. Petition at 10-11.

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[3] See, e.g., Andrew Van Dam and Tony Romm, "As Arizona struggles, neighboring New Mexico found a more cautious path to sustained growth," Washington Post (July 21, 2020), available at https://www.washingtonpost.com/business/2020/07/21/arizona-struggles-neighboring-new-mexico-found-more-cautious-path-sustained-growth/ (describing the dramatic effects of different reopening strategies on case counts in Arizona and New Mexico).

Real Parties in Interest fail to engage at all with the operative facts and the existing health crisis. Instead, they imply that the TRO will cause no irreparable harm because they will simply follow the Public Health Order issued on June 30, 2020. Motion to Lift Stay at 10. That will not cure any of the significant—and literally life-or-death—harms described above. Further, Real Parties in Interest's promise to comply with applicable public health orders, Motion to Lift Stay at 10, with a hefty grain of salt considering that at least one of the Real Parties in Interest (Trinity Hotel) openly flouts its noncompliance with the operative public health order.[4] Indeed, it has already had its license revoked for such violations and continues to openly defy those directives.[5]

Second, this Court accurately assessed that it was informed of what the loss or damage to the Real Parties in Interest would be from a stay. The Court was

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[4] See KQRE, "Two restaurant owners plan on keeping dine-in service, defying public health order" (July 11, 2020), available at https://www.krqe.com/health/coronavirus-new-mexico/two-restaurant-owners-plan-on-keeping-dine-in-service-defying-public-health-order/ (describing Real Party in Interest Trinity Hotel's intention to defy the public health order by providing dine-in services); KOB, "4 NM restaurants have permits suspended after violating public health order" (July 14, 2020) (reporting that the Trinity Hotel had its license temporarily revoked for violating the public health order as it had earlier vowed to do).

[5] Other restaurants have openly ignored directions incorporated into the public health order. As one example, local news outlets have reported that local restaurants have been providing dine-in service to Lea County Sheriffs. See KQRE, "Lea County deputies dining in at restaurants despite public health order" (July 21, 2020) https://www.krqe.com/news/new-mexico/lea-county-deputies-dining-in-at-restaurants-despite-public-health-order/

informed of the harms claimed by Real Parties in Interest when it granted the stay. That is because the Petition described their Application and provided the Application in full (with all exhibits) for this Court's review. Petition at 12-13; Id., Ex. 7. Real Parties in Interest also describe these harms again in their Motion to Lift Stay at 10-11. Petitioners do not seek to downplay the very real challenges that COVID-related public health restrictions have posed for Real Parties in Interest and thousands of other businesses and groups across the State. Petitioners have not imposed those restrictions lightly, but with a recognition of the urgent public health interests implicated by a pandemic that is unprecedented in modern times.

Third, Petitioners' request for stay complied with Rule 12-504(D)(3) because Petitioners certified to the Court that notice of the stay request would be given to Real Parties in Interest. And it was. The Petitioners filed their request with the Court at 1:52 p.m. on July 20 and it was emailed to counsel for Real Parties in Interest, Respondent, and the Office of the Attorney General at 2:05 p.m. See July 20 email attached as Exhibit 3. Petitioners provided notice promptly after filing, but not before, owing to the emergency nature of the Petition (and the significant consequences of the TRO remaining in effect overnight if the Court did not have an opportunity to review the Petition at the soonest possible moment). Real Parties in Interest have now had an opportunity to challenge the basis for

issuing a stay and do not articulate any significant harm that befell them from learning about the Petition and its request for stay at 2 p.m. on July 20, rather than around 11:30 a.m. when the TRO was issued.

CONCLUSION

For the foregoing reasons, Petitioners respectfully ask the Court to deny Real Parties in Interest's Motion to Lift Stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2020, I filed the foregoing through the New Mexico Electronic Filing system, which caused all counsel of record to be served by electronic means.

Respectfully submitted,

Matthew L. Garcia

From:	Dannielle Marrs
To:	Kennedy, Vanessa, GOV
Cc:	carddiv1proposedtxt@nmcourts.gov; Garcia, Matt, GOV; Guss, Jonathan, GOV; DARREN@ROYBALMACKLAW.COM; ANTONIO@ROYBALMACKLAW.COM
Subject:	[EXT] Re: [carddiv1proposedtxt] D-503-CV-2020-00506, Outlaw Meats, LLC, et. al., v. Michelle Lujan Grisham, et. al.: Order on Unopposed Motion for Leave to File
Date:	Friday, July 17, 2020 3:02:29 PM

The Judge is granting the Motion for Leave, I will file the signed order shortly.

Thank you!

Dannielle Marrs
TCAA for Judge Romero, Div. I

On Fri, Jul 17, 2020 at 1:56 PM Kennedy, Vanessa, GOV <Vanessa.Kennedy@state.nm.us> wrote:

> Dear Judge Romero:
>
> Attached please find an endorsed copy of Respondents' Unopposed Motion for Leave to Exceed Page Limits together with a proposed Order for your consideration.
>
> Respectfully,
>
> **Vanessa S. Kennedy** (she/her)
>
> Paralegal | Publication & Record Liaison Officer
>
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> 490 Old Santa Fe Trail, Suite 400 |Santa Fe, New Mexico 87501
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>
> --

Exhibit 1

You received this message because you are subscribed to the Google Groups "carddiv1proposedtxt-grp@nmcourts.gov" group.
To unsubscribe from this group and stop receiving emails from it, send an email to carddiv1proposedtxt-grp+unsubscribe@nmcourts.gov.
To view this discussion on the web visit https://groups.google.com/a/nmcourts.gov/d/msgid/carddiv1proposedtxt-grp/e8a4318102de4b76a0fe64344816e80e%40MBXCAS003.nmes.lcl.

Exhibit 1

STATE OF NEW MEXICO
COUNTY OF EDDY
FIFTH JUDICIAL DISTRICT COURT

OUTLAW MEATS, LLC,
a New Mexico Limited Liability Company,
F-2 ENTERPRISES, INC. d/b/a TEXAS CLUB GRILL & BAR, a New Mexico Corporation,
K-BOBS OF RATON, INC., a New Mexico Corporation,
K-BOBS OF LAS VEGAS, INC., a New Mexico Corporation,
B.M.B. FINANCIAL, LLC, d/b/a TRINITY HOTEL,
a New Mexico Limited Liability Company,
RED RIVER BREWING COMPANY, LLC,
a New Mexico Limited Liability Company,
NEW MEXICO RESTAURANT ASSOCIAION,

Applicants,

v. **No. D-503-CV-2020-506**

MICHELLE LUJAN GRISHAM,
in her official capacity as the Governor of the State of New Mexico,
KATHYLEEN KUNKEL,
in her official capacity as the Secretary of the New Mexico Department of Health,

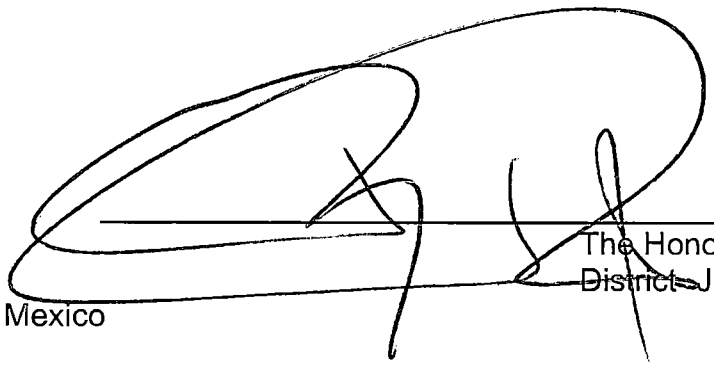
Respondents.

ORDER GRANTING RESPONDENTS' UNOPPOSED MOTION FOR LEAVE TO EXCEED PAGE LIMITS

The Court, having reviewed Respondents' Unopposed Motion for Leave to Exceed Page Limits, filed on July 17, 2020, finds the motion to be well taken and hereby **GRANTS** the motion. It is hereby **ORDERED**, pursuant to Local Rule 5-207(A), that Respondents may file a response brief to Applicants' Verified Application for Temporary Restraining Order and Preliminary and Permanent Injunction that does not exceed twenty-five (25) pages in length.

IT IS SO ORDERED.

Exhibit 2



The Honorable Raymond L. Romero
District Judge, Fifth Judicial District of New Mexico

Exhibit 2

Submitted by:

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Cc:	Garcia, Matt, GOV; Guss, Jonathan, GOV
Subject:	Governor Michelle Lujan Grisham, et al. v Honorable Raymond Romero, et al.,
Date:	Monday, July 20, 2020 2:05:33 PM
Attachments:	Petition.pdf

Good afternoon,

Attached please find a copy of the Emergency Verified Petition for Superintending Control and Request for Stay of Temporary Restraining Order Against Enforcement of Directives Contained Within the Public Health Order which was electronically submitted with the Supreme Court for filing this afternoon.

Thank you.

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