

STATE OF NORTH CAROLINA
NEW HANOVER COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

CASE NO. _____

Michael Jason Morgan,
Plaintiff,
Muscleworx Fitness Systems, L.L.C.,
Plaintiff,

**COMPLAINT, APPLICATION FOR
DECLARATORY JUDGEMENT
AND INJUNCTIVE RELIEF**

v.

Governor Roy Cooper,
Defendant.

NOW COMES Plaintiff, Michael Jason Morgan and Muscleworx Fitness Systems, L.L.C., pursuant to Rule 65 of the North Carolina Rules of Civil Procedure, N.C. Gen. Stat. §1-485, and N.C. Gen. Stat. § 7A-245, and files this *COMPLAINT, APPLICATION FOR DECLARATORY AND INJUNCTIVE RELIEF*.

PARTIES

1. Plaintiff Michael Jason Morgan is a citizen and resident of New Hanover County, North Carolina.
2. Plaintiff Muscleworx Fitness Systems L.L.C., (hereinafter Muscleworx) is a Limited Liability Company registered with the North Carolina Secretary of State. Its principal place of business is located at 6331 Carolina Beach Rd. Ste. 5 Wilmington, NC 28412. Plaintiff Morgan is the owner and registered agent for Muscleworx.
3. Defendant Roy Cooper, (hereinafter Gov. Cooper) upon information and belief is a resident of Wake County, N.C., has acted in his official capacity as the Governor of North Carolina, and is responsible for enacting and requiring enforcement of the Executive Orders in question, related to the COVID-19 pandemic, which has forced the closure of certain businesses in North Carolina.

JURISDICTION

4. N.C. Gen. Stat. § 7A-245 gives this Honorable Court subject matter jurisdiction over this matter. “Injunctive and declaratory relief to enforce or invalidate statutes; constitutional rights. (a) The superior court division is the proper division without regard to the amount in controversy, for the trial of civil actions where the principal relief prayed is (1) Injunctive relief against the enforcement of any statute, ordinance, or regulation; (2) Injunctive relief to compel enforcement of any statute, ordinance, or regulation; (3) Declaratory relief to establish or disestablish the validity of any statute, ordinance, or regulation; or (4) The enforcement or declaration of any claim of constitutional right.”
5. N.C. Gen. Stat. § 1-75.4(1) gives this Court personal jurisdiction over all of the parties.

VENUE

6. Venue is proper in that Plaintiff is a citizen resides in New Hanover County, North Carolina.

FACTS

7. On March 10, 2020, Gov. Cooper issued Executive Order 116 (**See Exhibit 1**) and declared a State of Emergency for the State of North Carolina, effective immediately.
8. Later, Gov. Cooper issued Executive Order 120 (**See Exhibit 2**) and ordered the closure of certain businesses, and specifically indoor exercise facilities (gyms), scheduled to be effective March 25, 2020 at 5:00 p.m.
9. Plaintiff complied with Gov. Cooper’s Executive Order and suspended the operation of his business.
10. Gov. Cooper issued Executive Order 121 (**See Exhibit 3**), to become effective on March 30, 2020 at 5:00 p.m., issuing further directives closing businesses.
11. Executive Order 121, in Section 2 (c) contained the following language: “*For purposes of this Executive Order, a COVID-19 Essential Business and*

Operation includes the following businesses, not-for-profit organizations and educational institutions.

*1. **Businesses that meet Social Distancing Requirements.** Businesses, not-for-profit organizations and educational institutions that conduct operations while maintaining Social Distancing Requirements:*

a. Between and among its employees, and

b. Between and among employees and customers except at the point of sale or purchase.”

12. Plaintiff's business remained closed until April 30, 2020, when Plaintiff re-opened his business to avoid the loss of his property, i.e., the property interest in his business.

13. This is commonly known and referred to as “*the fruits of his labor*” and is protected as a fundamental right in the North Carolina State Constitution.

14. Plaintiff followed and exceeded the Center for Disease Control Guidelines required for essential businesses in Executive Order 121.

15. Plaintiff was charged by citation by a Deputy with the New Hanover County Sheriff's Department with violating N.C. Gen. Stat. § 14-228A.20A. (See **Exhibit 4** – address and date of birth redacted)

16. Plaintiff was threatened by the New Hanover County Sheriff's Department with forced closure of his business, by padlocking the doors, if he did not comply and remain closed.

17. As provided in Section F of Executive Order 121, Plaintiff applied for and received a letter from the North Carolina Department of Revenue, (hereinafter NCDOR) which was allowed by the wording of Executive Order 121.

18. The NCDOR letter stated in part “... *you are allowed to continue operating with the submission of this request until the NCDOR responds.*”

19. To date, the NCDOR has never responded to Plaintiff's request.

20. However, Gov. Cooper issued Executive Order 138 (See **Exhibit 5**), to be effective May 8, 2020 at 5:00 p.m. This Executive Order removed the Essential

and Non-Essential classifications and reiterated that certain entities, and specifically gyms, and ordered these businesses to remain closed.

21. Lastly Gov. Cooper issued Executive Order 141 (**See Exhibit 6**) to allow the re-opening of certain Non-Essential businesses, to be effective May 22, 2020 at 5:00 p.m.
22. Executive Order 141, in Section 8, further orders the closure of Plaintiff's business.
23. To date Plaintiff's business remains closed.

STATE CONSTITUTIONAL CLAIM

24. Plaintiff hereby incorporates by reference the allegations contained in Paragraphs 1-23 as set forth herein.
25. The North Carolina State Constitution states "We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." N.C. Const. art. 1 §1.
26. Gov. Cooper's Executive Orders 120, 121, 138, and 141 have forced the closure of Plaintiff's business and forced him to suffer the loss of "the fruits of his labor."
27. Plaintiff had enjoyed the fruits of his own labor until Gov. Cooper's Executive Orders violated these rights, presumably in the interest of the public's health and welfare.
28. Gov. Cooper's Executive Orders 120, 121, 138, and 141 violate Plaintiff's Constitutional rights by denying him the "enjoyment of the fruits" of his own labor without any rational basis to protect the public from harm.

STATE CONSTITUTIONAL ARGUMENT FOR INJUNCTIVE RELIEF

29. Plaintiff hereby incorporates by reference the allegations contained in Paragraphs 1-28 as set forth herein.

30. “The basic constitutional principle of personal liberty and freedom embraces the right of the individual to be free to enjoy the faculties with which he has been endowed by his Creator, to live and work where he will, to earn his livelihood by any lawful calling, and to pursue any legitimate business, trade or vocation.” *Roller v. Allen*, 245 N.C. 516, 96 S.E.2d 851 (1957)
31. Plaintiff’s business is a legal calling, and Plaintiff has taken the efforts to register his business with the Secretary of State as a limited liability company.
32. “While many of the rights of man, as declared in the Constitution, contemplate adjustment to social necessities, some of them are not so yielding. Among them the right to earn a living must be regarded as inalienable.” *King v. Town of Chapel Hill*, 758 S.E.2d 364 (2014)
33. The right to work and earn a livelihood is a property right that may not be denied except under the police power of the State in the public interest for reasons of health, safety, morals or public welfare.
34. Plaintiff asserts the property interest in his business and the “fruits of his labor” are fundamental rights that are inalienable rights.
35. The Supreme Court in *King* held “This Court’s duty to protect fundamental rights includes preventing arbitrary government actions that interfere with the right to the fruits of one’s own labor.” *King* at 371 citing N.C. Const. art. I, § 1; *Roller*, 245 N.C. at 525, 96 S.E.2d at 859.
36. “A state cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.” *Roller*, at 859, citing *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 49 S.Ct. 57, 59, 73 L.Ed. 204.
37. Plaintiff asserts that Defendant Gov. Cooper’s Executive Orders 120, 121, 138, and 141 are arbitrary, capricious, and violate Plaintiff’s fundamental rights to the fruits of his own labor without any compelling state interest that is narrowly tailored to achieve its results
38. Plaintiff shows this Court that:

- a. Gov. Cooper's Executive Order 120 §1(b) prohibits the operation of Plaintiff's business and deprives of him of the "fruits of his labor" without any further explanation or justification as to why Plaintiff's business imposes any threat to public health and/or safety.
 - b. Gov. Cooper's Executive Order 121 fails to distinguish businesses in any form other than Essential/Non-Essential and contradicts Executive Order 120 by allowing Plaintiff to request his business to be declared essential. Executive Order 120 and 121 fail to specify any conditions imposed by Plaintiff's operation of his business that impose any threat to public health and/or safety.
 - c. Gov. Cooper's Executive Order 138 §5 (b)(2) reiterated the Governor's desire for Plaintiff and other's businesses to remain closed, further depriving him of the "fruits of his labor." Executive Order 138 fails to specifically provide any reasons for why Plaintiff is denied this fundamental right.
 - d. Gov. Cooper's Executive Order 141 §8 (A)(2) requires the closure of Plaintiff's business for a minimum of an additional five (5) weeks ending no earlier than June 26, 2020 at 5:00 p.m. There is no indication within Executive Order 141 that specifically provides any reasons for why Plaintiff is denied this fundamental right. In fact, in §8 (C) the order allows professional athletes and athletes performing on an agreement with an educational institution to receive a scholarship or other benefit to be exempted from this section of Executive Order 141.
39. The only explanation provided to date has been through the media from Dr. Mandy Cohen, the Secretary of the North Carolina Health and Human Services. Dr. Cohen, in response to media questions about why gyms were prohibited had stated *"You know as you work out you obviously breath more heavily and more intensely," "This a viral respiratory pathogen. It is something that is expelled through your droplets of your mouth and your nose, which obviously come out with more force and can be at more distance when you are*

working out.” “Some had said is it because of the sweat. It is not an issue related to sweat. It really is more about the heavier breathing that you do naturally when you are doing any of the athletics in a gym setting. But it is also knowing that when you are working out, folks are not going to be wearing a mask covering in order to get good ability to breath in deeply.”
<https://www.wect.com/2020/05/21/live-state-health-officials-give-an-update-covid-pandemic/>

40. Executive Order 120 fails to require and even recommend persons to wear masks. Executive Order 120 fails to mention prohibitions on any activities that would increase or effect persons heart rate and/or increase the rate at which the inhale and exhale their own breath.
41. Executive Order 121 is the government’s first mention of forcing non-essential persons to remain at home. Section 3 (iii) of Executive Order 121 authorizes citizens to exercise if the form of running and biking, which are commonly known to increase the persons heath rate and increase their rate of breath. However, Executive Order 121 does not require these individuals to wear masks or to avoid entering confined spaces while their rate of breath remains at an increased level. These persons could legally ride a bicycle to the liquor store and engage in the same conduct Defendant proposes to prohibit for the sake of preventing the spread of Covid-19 but cannot, under the threat of criminal prosecution, ride a stationary bike inside of a gym.
42. Executive Order 121 fails to require or recommend the usage of masks.
43. Executive Order 138 is the first Executive Order, effecting Plaintiff’s business, that mentions the wearing of facial coverings. Gov. Cooper declared a state of emergency on March 10, 2020 (see Executive Order 116), prohibits the operation of Plaintiff’s business effective March 25, 2020 (see Executive Order 120), only recommends the wearing of facial coverings effective May 8, 2020 (see Executive Order 138), but would propose that gyms cannot meet the social distancing requirements because users will not wear masks and will breathe heavier than normal.

44. The protections provided to the citizens of North Carolina through the State's Constitution is greater than what is provided in the United States' Constitution. "Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983)
45. Our Courts have taken a liberal interpretation of the safeguards our State Constitution provides to the protection of its citizens lives and property against government intrusion. *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940).
46. Our State Supreme Court, in *Sale*, held "This Court has recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights." *Sale v. State Highway and Public Works Comm.*, 242 N.C. 612, 89 S.E.2d 290.
47. Section 1, Article I, of the State Constitution of North Carolina guarantees to the citizens of the State 'the enjoyment of the fruits of their own labor' and declares this an inalienable right. *State v. Warren*, 114 s.e.2d 660, 252 N.C. 690 (1960)
48. "While it may adopt such regulations relating thereto as are reasonably necessary to promote the accomplishment of a public good or to prevent the infliction of a public harm, the legislature can neither deny nor unreasonably curtail the common right secured to all men by Sections 1 and 17 of the State Constitution to maintain themselves and their families by the pursuit of the usual legitimate and harmless occupations of life." *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949) citing *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854.
49. "In consequence, a statute which prevents any person from engaging in any legitimate business, occupation, or trade cannot be sustained as a valid exercise of the police power unless the promotion or protection of the public health, morals, order, or safety, or the general welfare makes it reasonably necessary." *Id* at 735.

FEDERAL CONSTITUTIONAL CLAIM AND ARGUMENT

50. Plaintiff hereby incorporates by reference the allegations contained in Paragraphs 1-49 as set forth herein.
51. Furthermore, the Executive Orders aforementioned violate Plaintiff's liberty interest as applied to the States through the Fourteenth Amendment to the United States Constitution.
52. "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 US 390 (1923)
53. "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." *Id* at 400.

LEGISLATIVE INTENT

54. Plaintiff hereby incorporates by reference the allegations contained in Paragraphs 1-53 as set forth herein.
55. The North Carolina Legislature has expressed its intent to provide the North Carolina Governor with certain powers during natural disasters and other man-made calamities.
56. N.C. Gen. Stat. 166A demonstrates the authority the Legislature has granted to the Governor of North Carolina during gubernatorially declared states of emergency.

57. On May 5, 2020, Senators Daniel, Sawyer, and Ford filed Senate Bill 712. (**See Exhibit 7**)
58. The bill is entitled “AN ACT GUARANTEEING THE CONSTITUTIONAL RIGHT OF NORTH CAROLINIANS TO ENJOYMENT OF THE FRUITS OF THEIR OWN LABOR AND THE PURSUIT OF HAPPINESS BY LIMITING CERTAIN PENALTIES FOR VIOLATIONS OF EXECUTIVE ORDERS AND LOCAL PROHIBITIONS AND ACTIONS BY OCCUPATIONAL LICENSING BOARDS.” (See <https://ncleg.gov/BillLookUp/2019/S712>)
59. The bill, as proposed, seeks to eliminate criminal penalties for anyone found in violation of Gov. Cooper’s Executive Orders 118, 120, 121, 131, 135, and all other Executive Orders subsequently issued that authorize criminal enforcement of Gov. Cooper’s Executive Orders.
60. This bill, while only filed as of this time, has been referred to the Committee on Rules and Operations of the Senate, but expresses serious concern amongst members of the General Assembly that Governor Cooper has and continues to over-step the authority granted to him by the General Assembly.

CLAIM FOR INJUNCTIVE RELIEF

61. Plaintiff hereby incorporates by reference the allegations contained in Paragraphs 1-60 as set forth herein.
62. Rule 65 of the North Carolina Rules of Civil Procedure provide for a temporary restraining order if “it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (ii) the applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required.”
63. Plaintiff shows this honorable Court that he has been forced to close the doors of his business from March 25, 2020 to April 30, 2020.

64. That during the interim, Plaintiff applied for any and all forms of government assistance offered to business owners, but was denied or was informed there were insufficient funds to provide Plaintiff with financial relief.
65. That Plaintiff opened his business on April 30, 2020 due to the “*necessity*” he had incurred to protect the property interest on his business.
66. Subsequently, that Plaintiff was criminally charged with a violation of N.C. Gen. Stat. § 14-228A.20A for operating his business by members of the New Hanover County Sheriff’s Department and was verbally warned that if he continued to operate his business that his business would be padlocked by Court order.
67. Plaintiff was forced to physically move his business from its previous location to a new location within the city limits of Carolina Beach, N.C., in part, due to financial burden placed on Plaintiff’s business by the forced closure.
68. Plaintiff cannot remain closed for an additional five (5) weeks, minimum, as required by Executive Order 141 and remain financially viable.
69. Plaintiff will potentially be forced into bankruptcy and/or suffer irreparable harm to his business and credit by the forced closure of his business.
70. Plaintiff seeks the following:
 - e. A Declaration that Plaintiff is entitled to the enjoyment of the “fruits of his labor, free from the intrusion of the government, and that the government intrusion is not narrowly tailored to avoid denying Plaintiff’s State and/or Federal Constitutional rights,
 - f. An injunction and/or order prohibiting the enforcement of any and all Executive Orders of Gov. Cooper that prohibit the operation of his business, Musclexorx Fitness Systems, L.L.C., and,
 - g. An injunction and/or order prohibiting the enforcement of any and all Executive Orders prohibiting members and guests of Musclexorx Fitness Systems, L.L.C. from engaging in otherwise lawful conduct by engaging in the use of Plaintiff’s business and equipment, and,
 - h. Any other just and equitable relief the Court deems proper.

**ATTORNEY'S CERTIFICATION OF EFFORTS TO CONTACT OPPOSING
PARTY**

I, Barry K. Henline, do certify to the Court, that I contacted the Office of Governor Roy Cooper at 4:30 p.m. on Tuesday May 26, 2020. I spoke with the receptionist and was directed to the voice mail box of Scarlett Hargress (sp.?) and thereby left a voice mail message indicating my intention to file this Complaint and Application for Declaratory and Injunctive Relief. I left my name and cell phone number, requested to be contacted about the hearing, and indicated the county in which said filing would take place.

Respectfully Submitted, this the 27th day of May, 2020.

By: _____

Barry K. Henline
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STATE OF NORTH CAROLINA
NEW HANOVER COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

CASE NO. _____

Michael Jason Morgan,
Plaintiff,
Muscleworx Fitness Systems, L.L.C.,
Plaintiff,

VERIFICATION

v.

Governor Roy Cooper,
Defendant.

I, Michael Jason Morgan, do hereby verify that I have read the Complaint, Application for Declaratory Judgment and Injunctive Relief, and hereby swear under penalty of perjury that to the best of my knowledge all of the facts and allegations contained within are true.

Michael Jason Morgan

I, _____, Notary Public, do hereby certify that Michael Jason Morgan personally appeared before me this day and acknowledged the due execution of the foregoing Verification for the purposes set forth therein.

Witness my hand and notarial seal, this the ____ day of May, 2020.

_____(SEAL) Notary Public

CERTIFICATE OF SERVICE

I do hereby certify that I have served the foregoing ***Complaint, Application for Declaratory and Injunctive Relief*** upon the Attorney/Party below by delivering a copy of the summons and of the complaint to the natural person or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute, by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee, by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt, or by mailing a copy of the summons and of the complaint by signature confirmation as provided by the United States Postal Service, addressed to the party to be served, and delivering to the addressee.

Governor Roy Cooper
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By: _____

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