



State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO Box 112
TRENTON, NJ 08625-0112

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

GURBIR S. GREWAL
Attorney General

MICHELLE L. MILLER
Director

August 17, 2020

Via Electronic Mail & JEDS System

Honorable Robert Lougy, J.S.C.
Mercer County Civil Courthouse
175 South Broad Street, 3rd Floor
Trenton, NJ 08650

Re: Persichilli v. Atilis Gym of Bellmawr
Docket No.: MER-C-48-20

Letter Brief in Opposition to Defendant's Motion
for a Stay

Dear Judge Lougy:

This office represents Plaintiff Judith M. Persichilli, R.N., B.S.N., M.A., in her official capacity as Commissioner of the New Jersey Department of Health, in this matter. Please accept this letter brief in opposition to Defendant's Motion for a Stay.



August 17, 2020
Page 2

TABLE OF CONTENTS

PROCEDURAL HISTORY.....	2
ARGUMENT	
I. DEFENDANT'S MOTION SHOULD BE DENIED AS INAPT.....	4
II. DEFENDANT CANNOT SATISFY THE CRITERIA FOR THE EXTRAORDINARY RELIEF OF A STAY.....	7
III. DEFENDANT'S ONGOING CONTEMPT ILLUSTRATES THAT A STAY IS NOT APPROPRIATE.....	10
CONCLUSION.....	11

PROCEDURAL HISTORY

On July 20, 2020, this court entered an order enforcing Plaintiff Commissioner Persichilli's July 1, 2020 Modified Order directing Defendant Atilis Gym of Bellmawr to comply with the provisions of Executive Order 157. The next day, Defendant publically declared that it would not comply with the court's order. See <https://www.youtube.com/watch?v=ibQC0WF3cG0> (last visited August 17, 2020). Following investigation by the Department of Health and surveillance by the Camden County Prosecutor's Office, on July 23, 2020, the Commissioner filed a motion to find Atilis Gym in contempt of the July 20, 2020 Order and to enforce litigant's rights. After written submissions and oral argument, on July 24, 2020, this court granted the Commissioner's motion. July 24, 2020 Order of Contempt and Enforcing Litigant's Rights as to July 20, 2020 Order.

August 17, 2020
Page 3

In finding that Atilis Gym was in contempt, the court noted that Defendant's opposition included no factual denial of the contempt. Significantly, the court did not find that Defendant's silence amounted to guilt,¹ but rather identified the careful and strategic approach of Defendant's counsel as a credit to professionalism and cautious advocacy. In response to Defendant's oral request for a stay, made while the court was issuing its decision, the court advised that Atilis Gym was free to move for a stay or other relief through formal motion. This was memorialized in the court's July 24, 2020 Order.

Defendant initially submitted a motion for a stay on July 31, 2020, which was rejected as deficient. On August 3, 2020, Defendant cured the deficiencies, but then voluntarily withdrew the application on August 6, 2020.

On August 13, 2020, Defendant re-filed a motion for a stay. Defendant's motion is premised primarily upon its assertion that co-owners Frank Trumbetti and Ian Smith are exercising their rights to avoid self-incrimination with regard to "fourteen criminal citations and/or complaints from the Bellmawr Police Department." (Defendant's Brief at 1).

¹ The Commissioner is unable to account for Defendant's assertion that the court "attributed Defendants' silence in response to the State's allegations as an *admission of guilt*." (Emphasis in original). The July 24, 2020 proceedings on the record do not support Defendant's contention.

August 17, 2020

Page 4

As set forth during oral argument on August 13, 2020, Defendant has established a bunker-style scenario at Atilis Gym. Specifically, co-owners Frank Trumbetti and Ian Smith remain in the building at all times with an entourage of supporters, and appear to have stationed at least two individuals at the front doors of the building overnight, accompanied by a dog. These facts are documented in an August 14, 2020 Supplemental Report of the Camden County Prosecutor's Office.²

Because Defendant's request for a stay is inapt, because it cannot satisfy the criteria for a stay, and because its continued defiance of the court's Order marshals against a stay, the motion should be denied.

ARGUMENT

POINT I

DEFENDANT'S MOTION SHOULD BE DENIED AS INAPT.

Atilis Gym asserts that the civil proceedings pending before this court must be stayed pending the Bellmawr Municipal Court's disposition of the criminal charges that it currently faces. It argues that N.J.R.E. 503 and the Fifth Amendment protection against self-incrimination ``not only protect[] the individual against being involuntarily called as a witness against

² A true and accurate copy of the August 14, 2020 Supplemental Report is attached hereto as Exhibit A. The undersigned hereby specifically certifies as to the authenticity of this document.

August 17, 2020
Page 5

himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" (Defendant's Brief at 3 (quoting Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)) (emphasis added). This contention is wholly inapt.

Plaintiff has not propounded any discovery upon Defendant Atilis Gym. Nor has Plaintiff or the court requested testimony from any member of the Gym.³ The record that has been established here, which is comprised of documented circumstances of non-compliance, amply supports the court's finding of contempt. (See Certifications of Stephen Slocum dated July 17 and 23, 2020). Indeed, in making its decision on July 24, 2020, the court noted that the supporting investigation report of the Department of Health and surveillance reports of the Camden County Prosecutor's Office satisfied Plaintiff's burden to prove Defendant's contempt. The court noted that this burden was satisfied even without considering the public statements of co-owners Frank Trumbetti and Ian Smith -- that is, even if Defendant's argument were accepted and Mr. Trumbetti's and Mr. Smith's public declarations excluded, the record still establishes contempt.

³ During the July 24, 2020 proceedings, Defendant's counsel sought leave to allow Atilis Gym co-owner Frank Trumbetti to offer testimony midway through the court's decision, which was denied.

August 17, 2020
Page 6

There is also a logical disconnect in Defendant's assertion that supporting affidavits or certifications in this matter would be self-incriminating. (Defendant's Brief at 5). It is unclear how, for example, a certification averring that Defendant is not in contempt of the July 24, 2020 Order would incriminate Defendant or offer evidence to support the pending municipal criminal matter. If anything, such a denial would support Defendant's criminal defense.

Defendant's attempt to compare this proceeding to the action it filed in the United States District Court for the District of New Jersey⁴ is similarly inapt. Atilis Gym's assertion that "[t]he attorney general's office of New Jersey argued that the federal court matter should be stayed until the criminal proceedings were resolved" is patently untrue. (Defendant's Brief at 2). Rather, in opposing Atilis Gym's motion for a temporary restraining order in the District Court, the defendants in that matter -- Governor Murphy, Attorney General Grewal, Superintendent Callahan, and Commissioner Persichilli -- argued that the District Court should abstain from hearing the matter pursuant to Younger v. Harris, 401 U.S. 37 (1971), in the interest of comity. (Docket

⁴ That matter proceeded under Docket No. 1:20-cv-06347-RBK-KMW and is publically available and viewable through the District Court's electronic case filing system. On June 23, 2020, Atilis Gym voluntarily withdrew its complaint without prejudice. (Docket No. 1:20-cv-06347, Docket Entry No. 29, PageID 473).

August 17, 2020
Page 7

No. 1:20-cv-06347, Docket Entry No. 20, PageID 228-34). At no time did the Attorney General's Office request a stay of the federal proceedings as Atilis Gym claims before this court. Furthermore, this matter and Defendant's affirmative litigation in the District Court are inapposite in their very natures.

Atilis Gym's position that the matter should be stayed because the issues raised in the criminal proceedings and this civil action overlap is similarly flawed. (Defendant's Brief at 2). Aside from the jurisdictional distinctions, the matters are brought by entirely different parties and raise distinct legal claims. Indeed, this court could no more enter judgment on the municipal criminal matter than the municipal court could enter judgment enforcing the Department of Health's July 1, 2020 Order. Atilis Gym's attempt to conflate "the State" is baseless.

Defendant's suggestion that it should be permitted to remain in contempt of a duly entered order of this court merely because its noncompliance has also resulted in criminal penalties by a separate governmental entity is absurd and should be patently rejected by the court.

POINT II

DEFENDANT CANNOT SATISFY THE CRITERIA FOR THE EXTRAORDINARY RELIEF OF A STAY.

Defendant's request for a stay should be denied because it fails to satisfy, or even address, the well-settled standard

August 17, 2020

Page 8

for injunctive relief set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). In requesting a stay, the moving party bears the burden to show that (1) it has a reasonable probability of success on the merits; (2) the threatened harm is irreparable if the relief is not granted; and (3) the public interest and the relative hardship to the parties favor a stay. Crowe, 90 N.J. at 132-34; Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013). Furthermore, "[w]hen a case presents an issue of 'significant public importance,' a court must consider the public interest in addition to the traditional Crowe factors." Garden State, 216 N.J. at 321 (quoting McNeil v. Leg. Apportionment Comm'n of N.J., 176 N.J. 484, 484 (2003)). Each of these factors and the public interest marshal against a stay here.

There is no question that Atilis Gym does not have a reasonable likelihood of success on the merits. The court has already considered the merits of this matter in full and found that the Commissioner's proofs in support of the contempt motion overwhelmingly established Atilis Gym's contemptuous actions. To avoid unnecessary repetition, the Commissioner adopts the factual and legal arguments set forth in Plaintiff's Letter Briefs of July 17, July 23, August 3, and August 6, 2020.

Atilis Gym has also failed to show that it will suffer any irreparable harm in the absence of a stay. The only alleged

August 17, 2020

Page 9

harm is the loss of business hours and corresponding sales, which can ultimately be redressed monetarily. As a matter of law, monetary damages do not constitute irreparable harm. See Crowe, 90 N.J. at 133; Subcarrier Comms., Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997) (citing Green v. Piper, 80 N.J. Eq. 288, 293 (Ch. 1912)). Furthermore, a stay at this time upsets the status quo rather than restoring it -- that is, gyms have been ordered closed since March 16, 2020, pursuant to Executive Order 104, subject to gradual reopening only.

Finally, the public interest and relative hardships to the parties both weigh against a stay. The Commissioner's interest in ensuring that Atilis Gym complies with her closure order is protecting the health and wellbeing of the State of New Jersey. The public health emergency occasioned by the COVID-19 pandemic has had a devastating impact upon New Jersians and the State's healthcare system. This compelling health and safety interest heavily outweighs Atilis Gym's potential economic loss. Placing the public at risk of further spread of COVID-19 cannot be justified by the Defendant's interest in maintaining its business. The public interest overwhelmingly disfavors Defendant's request.

Because Atilis Gym is unable to meet any of the requisite criteria for the extraordinary remedy of a stay, its motion should be denied.

August 17, 2020
Page 10

POINT III

**DEFENDANT'S ONGOING CONTEMPT ILLUSTRATES
THAT A STAY IS NOT APPROPRIATE.**

Atilis Gym's wanton and continued contempt, even while its motion for a stay is pending, further demonstrates that no stay should be granted. The record is replete with police reports, investigation reports from the local department of health, and Atilis Gym's own social media posts demonstrating open non-compliance with this court's orders.

New Jersey courts have long recognized the doctrine of unclean hands and held that "[t]hose who ask for relief in a court of equity must come into court with clean hands." Loomis v. Pub. Serv. Transp. Co., 102 N.J. Eq. 259, 263 (1928) (citing Prindiville v. Johnson & Higgins, 93 N.J. Eq. 425 (1922)); Journal Plaza Holding Co. v. J. H. L. Co., 107 N.J. Eq. 14, 18 (1930) (the doctrine "is based upon conscience and good faith"); Pollino v. Pollino, 39 N.J. Super. 294, 299 (App. Div. 1956) ("He that hath committed iniquity shall not have equity."). The equitable doctrine has been a part of New Jersey jurisprudence for generations and is still applied today. See Capparelli v. Lopatin, 459 N.J. Super. 584, 611 (App. Div. 2019). "The equitable doctrine of unclean hands grants discretion to a trial court to refuse relief to one who is a wrongdoer with respect to the subject matter of the suit and requires that '[a] suitor in equity must come into

August 17, 2020
Page 11

court with clean hands and . . . keep them clean after his entry and throughout the proceedings.'" Id. at 611-12 (quoting Borough of Princeton v. Bd. of Chosen Freeholders, 169 N.J. 135, 158 (2001)) (internal citation omitted).

The doctrine should be applied here, and Atilis Gym should be denied the equitable relief of a stay given its unconscionable conduct. It is nothing short of galling that Defendant simultaneously rallies against this court's authority, physically removes barriers placed by State officials, and obstructs further State efforts to barricade entryways -- all while asking this court to stay its decision. Defendant's conduct must not be countenanced, and its motion should be denied.

CONCLUSION

For the reasons set forth above, the Commissioner respectfully requests that this court deny Defendant Atilis Gym's motion for a stay.

Respectfully submitted,

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: s/ Stephen Slocum
Stephen Slocum (907802012)
Deputy Attorney General
Stephen.slocum@law.njoag.gov

c. John McCann, Esq.

Exhibit A



CAMDEN COUNTY PROSECUTOR'S OFFICE

SUPPLEMENTAL REPORT

Page
1 of 2

1. Unit MAJOR CRIMES		2. Unit File # MC-0160-20-07		3. Promis Gavel # 20004211	
4. Case Agency(s) CAMDEN COUNTY PROSECUTOR'S OFFICE/NEW JERSEY DEPARTMENT OF HEALTH					
5. Crime OGO-OBSTRUCT GOV OPER		6. N.J.S.		7. Date 08/13/2020	8. Time 09:45 PM
9. Location of Crime 1). Incident date & Time: (07/22/2020 12:00 AM -); Address: 363 W BROWNING RD BELLMAWR, NJ 08031;					
10. Person Reporting Incident / Crime:					
11. Suspect(s) 1). SMITH, IAN A 2). TRUMBETTI, FRANK W		12. Person Info(s): [REDACTED] [REDACTED]		13. Address(s): [REDACTED] [REDACTED]	
14. Victim(s):		15. Person Info(s):		16. Address(s):	
17. Stolen / Missing Property:			18. Weapon Used:		

NARRATIVE

Thursday, August 13, 2020

On the above date, at approximately 9:00 pm, I arrived at the:

**Camden County Prosecutor's Office
200 Federal Street
Camden, New Jersey**

at which time I made contact with:

**Detective Briana Hagan
Camden County Prosecutor's Office
Major Crimes Unit**

to further investigate executive order violations by:

**Atilis Gym
363 W. Browning Road,
Bellmawr, New Jersey.**

At approximately 9:40 pm, the above-mentioned law enforcement personnel arrived in the area within close proximity of Atilis Gym. Detective Hagan and I observed the front double doors to the gym to be in the closed position, with what appeared to be tan construction paper covering the windows of the gym thus obstructing any view of the interior of the gym.

As the above-mentioned law enforcement personnel remained in the direct vicinity of Atilis Gym, our views of the front doors of the gym were never blocked, hindered or obstructed in anyway thus granting me a continuous view of the gym's front entrance in its entirety. Surveillance of the above location was then initiated, to which the following is a brief synopsis:



CAMDEN COUNTY PROSECUTOR'S OFFICE

SUPPLEMENTAL REPORT

Page
2 of 2

	Case#	MC-0160-20-07	Promis Gavel#	20004211
--	-------	---------------	---------------	----------

- 9:45 pm through 11:00 pm. – Approximately seventeen (17) individuals were observed to exit the gym. Approximately nineteen (19) individuals entered the gym. All of the individuals appeared to not be wearing any masks. Approximately twenty-three (23) vehicles were observed in the parking lot.

- 11:00 pm through 12:00 am – Approximately thirteen (13) individuals exited the gym. Approximately two (2) individuals entered the gym. The said individuals appeared to not be wearing masks.

-12:00 am through 1:00 am- Approximately three (3) individuals were observed to exit the gym. Approximately one (1) individual entered the gym. It should be noted that an individual, who appeared to be the owner, was observed carrying what appeared to be blanket(s) from the parking lot into the gym. The said individuals appeared to not be wearing a mask. Two (2) individuals were observed standing out front of the gym. Approximately thirteen (13) vehicles were observed in the parking lot.

-1:00 am through 2:00 am- No individuals were observed to exit the gym. No individuals entered the gym. Approximately four (4) to five (5) individuals were observed standing and/or sitting out front of the gym.

-2:00 am through 3:00 am- No individuals were observed to exit the gym. No individuals were observed to enter the gym. Approximately ten (10) vehicles were observed in the parking lot.

-3:00 am through 3:30 am- No individuals were observed to exit the gym. No individuals were observed to enter the gym. Approximately ten (10) vehicles were observed in the parking lot.

At approximately 3:30 am, Detective Hagan terminated surveillance, however, I continued to maintain surveillance. At which time, I was joined by:

Detective Tanner Ogilvie
Camden County Prosecutor's Office
Major Crimes Unit

and we continued our surveillance of Atilis Gym.

-3:30 am through 5:00 am- Approximately one (1) individual and one (1) K-9 were observed walking around in the parking lot and Atilis Gym. Two (2) individuals were observed standing/sitting in the parking lot, near a utility van, that was parked in the parking lot. The utility van was observed in the parking lot at the time of the start of the surveillance and remained there until surveillance was terminated. These actions were consistent with counter-surveillance being conducted during the morning hours. Approximately one (1) individual was observed to enter the gym. It should be noted that the said individual knocked on the front door of the gym and waited out front for several seconds. Shortly thereafter, an individual opened the front door to the gym, from the inside, at which time the said individual entered the gym. Approximately eleven (11) vehicles were observed in the parking lot. The said individual was observed not wearing a mask.

At approximately 5:00 am, Detective Ogilvie and I terminated surveillance on the individuals entering and/or exiting Atilis Gym.

Reporting Detective No further information to report at this time.	Reporting Detective Signature  BRINING, JAMES	Date of Report 8/14/2020	Supervisor Signature  CONVERY, DENNIS
<div style="display: flex; justify-content: space-between;"> JAMES M BRINING JR. 8/14/2020 CONVERY, DENNIS </div>			