



CLAIM FOR DAMAGES

NOTE: A claim relating to a cause of action for death or for injury to person or to personal property or grown crops shall be presented not later than six (6) months after the accrual of the cause of action. A claim relating to any other cause of action shall be presented not later than one (1) year after the accrual of the cause of action. (Refer to California Government Code Section 911.2)

INSTRUCTIONS: Deliver or mail the completed claim form to City of Fresno, Risk Management, 2600 Fresno Street, Room 1030, Fresno, CA 93721-3612.

Sign and date all attachments to the claim form

PERSONNEL SERVICES DEPARTMENT
 CITY OF FRESNO
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Name of Claimant (Injured or Damaged Party) David Fansler		Birthdate of Claimant 12/1/1953
Home Address of Claimant 7636 N. Ingram Ave. # 109 Fresno, CA 93711		Home Telephone Number (559) 492-2451
Business Address of Claimant 7636 N. Ingram Ave. # 109 Fresno, CA 93711		Business Telephone Number (559) 492-2451
Social Security Number of Claimant **Confidential and Private Information**		CA Drivers License Number E0206746
Name of Person to whom any Notices concerning Claim should be sent (If different from above) Warren R. Paboojian, Esq., Baradat & Paboojian, Inc.		Relationship to Claimant Attorney
Address of Person to whom any Notices concerning Claim should be sent (If different from above) 720 W. Alluvial Ave., Fresno, CA 93711		Telephone Number (559) 431-5366
When did Injury, Damage or Loss occur? (Date and Time) Beginning on or about July 1, 2020, and continuing.		Police Report Number N/A
Where did Injury, Damage or Loss occur? (Location Name, Street Address, Intersecting Streets, etc.) See Attachment.		
How did Injury, Damage or Loss occur? (Provide full details - Use separate sheets, if necessary) See Attachment.		
What did City or City Employee(s) do to cause the Injury, Damage or Loss? What are the name(s) of City Employee(s) who caused the Injury, Damage or Loss (if known)? See Attachment.		
Describe the Injury, Damage or Loss claimed. (Provide full details - Attach any medical records and use separate sheets, if necessary.) See Attachment.		
What is the amount of Injury, Damage or Loss claimed, including the estimated amount of any future Injury, Damage or Loss. (Itemize and attach medical bills, property damage estimates, etc.-Use separate sheets, if necessary). If the amount claimed exceeds \$10,000.00, no dollar amount shall be included. However, you shall indicate whether the claim would be a limited civil case. (Refer to California Government Code Section 910(f)) The amount of the Claim exceeds \$10,000.00. The Claim will not be a Limited Civil Case.		
Name, Address & Telephone Number of Witness(es), Doctor(s) and/or Hospital(s). (Use separate sheets, if necessary). See Attachment.		
Signature of Claimant or Person acting on Claimant's behalf 		Date 9/21/2020

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ATTACHMENT TO CLAIM FOR DAMAGES

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Where did Injury, Damage or Loss occur? (Location Name, Street Address, Intersecting Streets, etc.)

Pismo's Coastal Grill, located at 7937 N. Blackstone Ave., Fresno, CA 93711.

Westwoods BBQ & Spice Co., located at 8042 N. Blackstone Ave., Fresno, CA 93720.

Yosemite Ranch, located at 1520 E. Champlain Dr., Fresno, CA 93720.

How did Injury, Damage or Loss occur? (Provide full details - Use separate sheets, if necessary)

As part of its response to the COVID-19 pandemic, the State Defendants (including Gavin Newsom, in his capacity as Governor of the State of California, Xavier Becerra, in his capacity as Attorney General of the State of California, Erica Pan, in her capacity as Acting Public Health Officer of the State of California, Sandra Shewry, in her capacity as Acting Director of the California Department of Public Health, and Mark Ghaly, in his capacity as Secretary of Health and Human Services for the State of California [collectively hereinafter referred to as "the State Defendants"]) have issued various emergency orders related to the use and operation of restaurants and restaurant dining rooms. Defendant Newsom stated in a televised speech in March of 2020 that these extraordinary orders were necessary because of the foundational projection of a 56 percent California COVID-19 infection rate, and a two to four percent case fatality rate, translating to between 250,000 and 500,000 deaths from the virus *in California alone*.

Fortunately, these projections have not come to pass and the predicted deaths did not occur. Nevertheless, the State Defendants' unprecedented emergency orders, which are on the verge of wiping out the California restaurant industry and which have nearly destroyed Plaintiffs' business, as well as the livelihood of Plaintiffs' 350 employees, continue to remain in effect.

Moreover, these orders, as they apply to the restaurant industry, are hopelessly vague and enforcement of them – or not – is left in the hands of local officials. Consistent with State and local Orders, Plaintiff Restaurant Pismo's opened for outdoor, open air dining only, after Governor Newsom ordered restaurants to cease indoor dining effective July 1, 2020.

Nevertheless, despite Plaintiffs' compliance with Governor Newsom's directive, City Defendants (including Lee Brand in his official capacity as Mayor for the City of Fresno, Doug

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Sloan in his official capacity as City Attorney for the City of Fresno, Esmeralda Soria in her official capacity as Council Member for the City of Fresno, Mike Karbassi in his official capacity as Council Member for the City of Fresno, Miguel Arias in his personal and official capacity as Council Member for the City of Fresno, Paul Caprioglio in his official capacity as Council Member for the City of Fresno, Luis Chaviz in his official capacity as Council Member for the City of Fresno, and Nelson Esparza in his official capacity as Council Member for the City of Fresno [collectively hereinafter referred to as “the City Defendants”]) singled out Plaintiffs for unfair and discriminatory enforcement action. Plaintiff Restaurants (including Fansler Restaurant Group, Inc., Yosemite Ranch Investors, LLC, Pismo’s of Fresno, LLC, and Westwoods BBQ Investors, LLC [collectively hereinafter referred to as “Plaintiff Restaurants”]) have been unfairly singled out and harassed by City Defendants despite operating under the same or better and same or safer conditions than numerous other restaurants within the City of Fresno, giving rise to the Claims herein asserted against the State and City Defendants as set forth herein below.

As set forth herein, City Defendants enacted “Emergency Orders” which deprived Plaintiffs of the ability to operate and selectively and discriminatorily enforced such Orders by fining and “turning in” Plaintiff Pismo’s Restaurant when it was lawfully operating outdoor dining only consistent with the Emergency Orders. Because City Defendants’ unjust and selective enforcement, Plaintiffs ceased operation of outdoor dining at Plaintiff Pismo’s Restaurant and did not open outdoor dining at its other restaurants, even though they could do so safely and in compliance with the Emergency Orders, for fear of continued harassment and unjust fines and Alcohol and Beverage Control enforcement against Plaintiffs as a result of City Defendants’ targeting of Plaintiffs.

What did City or City Employee(s) do to cause the Injury, Damage or Loss? What are the name(s) of City Employee(s) who caused the Injury, Damage or Loss (If known)?

- A. Defamation, against all City Defendants, and Miguel Arias, in both his official and personal capacities.**

Defendant Arias, in response to requests from the Fresno area restaurant industry to City Council members to help the local restaurant industry survive, has specifically and maliciously singled out Plaintiff David Fansler (hereinafter referred to as “Plaintiff Fansler”) and Plaintiff Restaurants and made defamatory statements about them. Arias has falsely claimed that Plaintiff Fansler and Plaintiff Restaurants harmed and placed their employees at increased risk of exposure to COVID, that they have harmed the public and placed the public at risk to COVID-19, and they operated with an intent to harm employees and the public. Defendant Arias has made statements that are false and which have unjustly exposed Plaintiffs to hatred, contempt and ridicule and which has injured Plaintiff Fansler in his occupation and has caused injury to reputation and financial harm to Plaintiff Restaurants.

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Upon information and belief, City Defendants committed the acts alleged herein recklessly, maliciously, fraudulently and oppressively, with the wrongful intention of injuring Plaintiffs for an improper and evil motive amounting to malice, and which abused and/or prevented the existence of any conditional privilege which, in fact, did not exist, and with a reckless and conscious disregard of Plaintiffs' rights. All actions of Defendants, their agents and employees herein alleged, were known, ratified and approved by Defendants.

B. Intentional and Negligent Interference with Prospective Business Advantage, against all City Defendants.

State and City Defendants' actions have caused numerous contractual relationships to be breached in relation to Plaintiff Restaurants. City Defendants' intentional acts of harassing and stopping the lawful operation of Plaintiff Restaurants, in compliance with the Emergency Orders for outdoor dining, were designed to shut down Plaintiffs' restaurant operations and disrupt contractual relationships with vendors. The breach of these contractual relationships has caused Plaintiffs damages as set forth herein.

C. Intentional Infliction of Emotional Distress, against all City Defendants.

City Defendants conduct was outrageous and beyond the bound of decency, where Plaintiffs were operating in compliance with State and local orders and for the purpose of maintaining income for Plaintiffs' 350 employees during a global pandemic. Plaintiff Pismo's opened for outdoor dining only when allowed to do so by State and local orders, and strictly enforced all social distancing and mask requirements of the State and local orders.

Nevertheless, City Defendants falsely targeted Pismo's as operating in violation of the orders, wrongly reported Pismo's to the Department of Alcohol and Beverage Control, purposefully causing licensing issues for Plaintiffs which could destroy their ability to operate at all, and issued improper and unjust fines against Pismo's. These acts have caused severe emotional distress including but not limited to shock, embarrassment, anger and worry for Plaintiff Fansler. Plaintiff Fansler has also been unduly caused to worry incessantly about his employees and his employees' ability to pay their bills, keep their homes and be able to provide for their families during a global pandemic. All of the unnecessary and unjust harm has been caused by City Defendants' intentional and reckless disregard for its own orders and guidelines and their purposeful targeting of Plaintiffs alone, despite similar outdoor dining as well as indoor dining occurring throughout the City of Fresno in other restaurants.

D. Violation of Fifth Amendment (Takings), against all City Defendants.

The actions taken by City Defendants have resulted in Plaintiffs being deprived of the economically beneficial and productive use of their property including, without limitation, their use licenses, business property and opportunity to operate as restaurants, resulting in the involuntary closure of Plaintiff Restaurants and the loss of income for employees.

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City Defendants' Orders and enforcement thereof has caused a regulatory taking of Plaintiffs' property without just compensation in violation of the Takings Clause of the Fifth Amendment of the United States constitution and the corollary California Constitutional provisions (Article 19). At a minimum, City Defendants' actions and the effect of their Orders constitute a partial taking. Accordingly, Plaintiffs are entitled to compensation for the economic loss as a result of the taking.

E. Violation of Fourteenth Amendment (Due Process), against all City Defendants.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides that "[n]o State shall ... deprive any person of life, liberty or property, without due process of law." A State violates this guarantee by depriving one of property under a law "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2552, 2556 (2015), Ca. Const., Article 1.

Defendants' Orders regarding restaurants and outdoor dining are so standardless they invite arbitrary enforcement, and have been arbitrarily enforced by City Defendants. There is no sound basis on which to discriminate against restaurants with roll-up doors or fully open-sided "windows," especially where air circulation in such establishments is superior to "outdoor" dining under a tent in a parking lot without any forced air circulation whatsoever. Any enforcement of the Orders which prohibit such open-air restaurants from operating, but permit others to allow indoor dining or alleged "patio" dining, is arbitrary, and constitutes a violation of Plaintiffs' right to due process. Moreover, Plaintiffs have experts who agree that Plaintiff Restaurants can safely operate and are in fact safer in terms of COVID-19 risk than other restaurants currently not being targeted by City Defendants.

In addition, City Defendants have violated the due process clause inasmuch as the Orders fail to provide any procedure whatsoever for challenging the determination that a business is not operating with "outdoor" dining.

F. Violation of the Fourteenth Amendment (Equal Protection), against all City Defendants.

Defendants have violated the Equal Protection clauses of the United States and California Constitutions because, "[w]hen those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to ensure that all persons subject to legislation or regulation are indeed being 'treated alike, under like circumstances and conditions.'" *Engquist v. Ore Dep't of Agric.*, 128 S. Ct. 2146, 2153 (2008), Ca. Const., Article 7.

Defendants' Orders, which have been enforced by City Defendants to distinguish between "outdoor" dining in a parking lot, for example, and outdoor dining in an open-air restaurant, are unsupported by any rational reason. Indeed, refusing Plaintiff Restaurants to open with their superior air circulation and open-air dining rooms while permitting other "tented" and similar

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patio style restaurants to operate likely increases the risk of transmission of COVID-19, by limiting dining options within the City of Fresno and forcing the public to dine in fewer establishments with inferior air circulation and open-air capabilities as Plaintiff Restaurants.

In addition, Defendants' Orders cannot satisfy strict scrutiny because the classifications and term "outdoor" dining are arbitrary and not narrowly tailored to further compelling government interests.

G. Violation of Cal. Government Code Section 8572, against all City Defendants.

California's Government Code section 8572 provides, in pertinent part, that the Governor, in exercising his emergency powers, is authorized to commandeer or utilize any private property deemed by him to be necessary in carrying out the responsibilities hereby vested in him as Chief Executive of the State and the state shall pay the reasonable value thereof. However, the Orders enforced against Plaintiffs by City Defendants have effectively shut down and caused the cessation of lawful daily business activities of Plaintiff Restaurants. By virtue of the Governor's Executive Order and the City Defendants' enforcement thereof, Defendants have commandeered and utilized Plaintiff Restaurants for the purported purposes of slowing the spread of COVID-19, but has not paid Plaintiffs for the "reasonable value thereof." Plaintiffs seek such reasonable compensation.

Describe the Injury, Damage or Loss claimed. (Provide full details - Attach any medical records and use separate sheets, if necessary.)

The actions taken by Defendants have resulted in Plaintiffs being deprived of the economically beneficial and productive use of its property including, without limitation, its use licenses, business property and opportunity to sell their food and beverages in their retail restaurants, resulting in the involuntary closing of their businesses and the involuntary limited opening of their businesses.

Defendants' Orders and the enforcement thereof has caused a regulatory taking of Plaintiffs' property without just compensation in violation of the Takings Clause of the Fifth Amendment to the United States Constitution and the California Constitution. At a minimum, the effect of Defendants' Orders and the enforcement thereof constitutes a partial taking. This has caused has caused proximate and legal harm to Plaintiffs since while some restaurants were permitted to reopen, Plaintiffs continue to suffer the loss of revenue from their restaurants.

By their forced closures and limited operations, Defendants are causing considerable damage to Plaintiffs, as well as other similarly situated restaurants, including injuries to their businesses, reputations and relationships with their customers, vendors and employees. If not for Defendants' wrongful interference, Plaintiffs would have been reasonably certain of obtaining

an economic advantage for these long-standing relationships, entitling Plaintiffs to compensation for their economic losses, including but not limited to lost profits according to proof.

Plaintiffs have suffered significant economic losses related to the ordered closures and limited operations of their restaurants. Those losses increase each day and continue to rise. Plaintiffs have incurred non-pecuniary damages as other restaurants are permitted to reopen allowing in-door dining in what Defendants have arbitrarily and unreasonably classified as “patio” dining while uncertainty and confusion impact Plaintiffs’ operations and industry and consumer reputation. Prohibiting Plaintiffs from reopening while allowing similarly-situated businesses to do so, and without recourse or protection from arbitrary enforcement of Defendants’ Orders, constitutes a taking of Plaintiffs’ property, and Plaintiffs are entitled to compensation for their economic losses as a result of the taking or partial taking according to proof.

As a legal cause of the above-described conduct of Defendants, Plaintiffs have suffered and will continue to suffer injury to their personal, business and professional reputations, including suffering embarrassment, shame, mortification, humiliation, hurt feelings, severe emotional distress, shunning, anguish and fear, and significant economic loss in the form of loss of employment, loss of wages, loss of earnings, loss of earning capacity, loss of future earnings and loss of profits, all to their economic, emotional and general damage in an amount according to proof.

The conduct of Defendants, as alleged herein, represents extreme and outrageous conduct and conduct which went beyond all bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized society. This conduct would cause an average member of the community to react with outrage. By engaging in this conduct, Defendants either intended to cause Plaintiff Fansler emotional distress, or acted with reckless disregard of the probability of causing emotional distress to Plaintiff Fansler.

As a further legal cause of Defendants’ actions as alleged above, Plaintiff Fansler has suffered and will continue to suffer pain and suffering, extreme mental anguish and severe emotional distress of substantial quantity and enduring quality that no reasonable person in a civilized society should be expected to endure in an amount according to proof.

Therefore, as a result of Defendants’ conduct alleged herein, Plaintiffs are entitled to just compensation for the economic losses they have incurred, Plaintiff Fansler is entitled to just compensation for the pain and suffering and severe emotional distress he has suffered, and Plaintiffs are entitled to reasonable attorneys’ fees and costs in the prosecution of this action.

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Name, Address & Telephone Number of Witness(es), Doctor(s) and/or Hospital(s).
(Use separate sheets, if necessary).

1. David Fansler (7636 N. Ingram Ave. # 109 Fresno, CA 93711)

2. State of California (1315 10th St., Sacramento, CA 95814):
 - Gavin Newsom, Governor of the State of California
 - Xavier Becerra, Attorney General of the State of California
 - Erica Pan, Acting Public Health Officer of the State of California
 - Sandra Shewry, Acting Director of the California Department of Public Health
 - Mark Ghaly, Secretary of Health and Human Services for the State of California

3. City of Fresno (2600 Fresno St., Fresno, CA 93721):
 - Lee Brand, Mayor, City of Fresno
 - Doug Sloan, City Attorney, City of Fresno
 - Esmeralda Soria, Council Member, City of Fresno
 - Mike Karbassi, Council Member, City of Fresno
 - Miguel Arias, Council Member, City of Fresno
 - Paul Caprioglio, Council Member, City of Fresno
 - Luis Chaviz, Council Member, City of Fresno
 - Garry Bredefeld, Council Member, City of Fresno
 - Nelson Esparza, Council Member, City of Fresno

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