

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

BENJAMIN MADSEN, an individual,	)	Case No.: CI 20-_____
and MADSEN BOWLING AND	)	
BILLIARD CENTER CO., a	)	
Nebraska Corporation,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CLASS ACTION COMPLAINT
	)	IN LAW AND EQUITY AND
	)	DEMAND FOR JURY TRIAL
	)	
CITY OF LINCOLN,	)	
LEIRION GAYLOR BAIRD, Mayor	)	
of the City of Lincoln in her	)	
official and individual capacity,	)	
Patricia D. Lopez, acting Health	)	
Director, in her official and	)	
individual capacity, and	)	
Jeff Bliemeister, Lincoln Police Chief	)	
in his official capacity,	)	
	)	
Defendants.	)	

COME NOW the Plaintiffs, and for their cause of action against the Defendants, state and allege as follows:

1. This lawsuit brings actions at law and equity on behalf of businesses and individuals who have been damaged by the unlawful Directive Health Measures ("DHMs") promulgated and enforced by the Defendants.

**PARTIES/STANDING**

2. Madsens Bowling and Billiards Center Co., ("Madsen's") is a Nebraska S Corporation located in Lincoln, Lancaster County, Nebraska, and is similarly

situated to other business of the proposed class that have been damaged by actions of the Defendants as set forth below;

3. Benjamin Madsen (“Ben”) is a resident of Lincoln, Lancaster County, Nebraska, and is an employee and shareholder of Madsen’s and is similarly situated to all other owners and employees of the damaged businesses of the proposed class that have been individually damaged by the actions of the Defendants as set forth below;
4. When an ordinance adversely affects a personal, pecuniary, and legal interest of a person, he or she has standing to contest the validity of the ordinance. *Adam v. City of Hastings*, 267 Neb. 641, 646 (2004). The personal, pecuniary, and legal interests of Ben and all other owners and employees of the businesses in the proposed class were, and continue to be, adversely affected by the DHMs promulgated and enforced by the Defendants. Ben and all other members of the proposed class have standing to contest the validity of the DHMs;
5. The City of Lincoln is a city of the primary class located in Lancaster County, Nebraska;
6. Leirion Gaylor Baird is, and was at all relevant times, the elected Mayor of the City of Lincoln and is sued in her official and individual capacity;
7. Patricia D. Lopez is, and at all relevant times was, the acting, but not official, Director of the Lincoln-Lancaster County Health Department (“Health Department”) and is sued in her official and individual capacity; and
8. Jeff Bliemeister is, and at all relevant times was, the Police Chief for the Lincoln Police Department and is sued in his official capacity only.

### **CLASS CERTIFICATION**

9. Pursuant to Neb. Rev. Stat. § 25-319 et. seq., Plaintiffs seek to bring this suit on behalf of the following classes in the general interests of numerous persons who are similarly situated:
  - a. Similarly situated business entities and owners who have been damaged as a proximate result of the Defendants' conduct;
  - b. Similarly situated employees of business entities who have been damaged as a proximate result the Defendants' conduct;
10. That members of said classes share a common question of general interest and the Plaintiffs would be too numerous to name individually; and
11. That the relief sought in this Complaint is limited to relief that is consistent with all members of the proposed class and this Court would have the authority to award judgment to the class as a whole through the named Plaintiffs.

### **FUTILITY OF ADMINISTRATIVE REMEDIES**

12. To the extent there are administrative remedies applicable to this case that have not been exhausted, Plaintiffs allege that said remedies and processes would be futile for the following reasons:
  - a. Said remedies are likely to cause a conflict of interest in that the Defendants, who are likely the administrative decision makers, will be required witnesses in any administrative process;
  - b. Said remedies are futile because the outcome of any such process is pre-determined as the parties have already demonstrated that they will not find or rule against themselves;

- c. The exhaustion of any administrative process creates a risk of mootness given the time frame of any such administrative process relative to the action of the Defendants; and
- d. Many members of the classes may be so irreparably harmed in that they are likely to be forced out of business or into unemployment that the futility of the administrative processes in this case would act to discourage members of the proposed class from seeking redress for their issues contrary to public policy and justice.

### **FACTS AND ALLEGATIONS**

- 13. The Lincoln Municipal Code (“LMC”) grants certain powers to a duly appointed “Health Director,” including the ability to establish quarantine, initiate DHMs, and enforce the same under the Communicable Disease Act. LMC § 8.18 et seq. In addition to civil penalties, violations of these sections of the LMC constitute a criminal misdemeanor;
- 14. Defendant Lopez entered into a “consultant agreement” with the Mayor to serve as the “Interim” Health Director in May of 2019. The independent contract paid her at the rate of \$14,000.00 per month for “Consultant Services” with the contractual obligations to “carry out the duties as Interim Director.”;
- 15. On June 3, 2019, the Mayor ratified said consulting agreement in Executive Order 093250;
- 16. At all relevant times, Defendant Lopez and the Mayor knew this agreement did not duly appoint Defendant Lopez as the Health Director pursuant to the City Charter and the actual Health Director position remained officially vacan;

17. Plaintiffs allege the Health Director position is still officially vacant to date;
18. At all relevant times, Defendant Lopez was operating under the color of law in that the Mayor and City Council were cloaking her with the actual and apparent authority of the Health Director despite knowing she lacked such authority;
19. Upon information and belief, at all relevant times, the Mayor was using the “independent contract” for reasons of political expediency and to avoid the formal political process required to officially appoint a Health Director;
20. Other than political motivation, there was nothing that prevented the Mayor or City Council from appointing a qualified Health Director in accordance with State Law and the City Charter;
21. As early as March 2019, the Mayor was specifically advised of the fact that an Interim Director such as Defendant Lopez lacked the legal authority to exercise the powers of the Health Director;
22. Despite the fact that she was an independent contractor, the City cloaked Defendant Lopez with the color of law in that they allowed and encouraged her to act as the supervisory official and head of the Health Department;
23. On or about July 20, 2020, Defendant Lopez unlawfully exercised the power of the Health Director by issuing a DHM (07-2020) that was void ab initio;
24. That said, DHM 07-2020 as written, requires third parties, including the Plaintiffs, to enforce said mandate against individual citizens without the actual legal authority to do so;
25. While requiring businesses that lack the authority to enforce the policies, the City of Lincoln and Department of Health and Human Services have coordinated with

the Lancaster County Sheriff's Office and the Lincoln City Police Department to not enforce the mandate against individuals. The City of Lincoln has published that "LPD or LSO will not be issuing tickets to individuals for non-compliance.";

26. The DHM as written, was also adopted by the Defendants in knowing violation of Neb. Rev. Stat. § 71-1626 et. seq.;
27. That the Mayor, by authorizing, adopting, and enforcing the invalid DHM created a policy for the City of Lincoln to violate the law and impact the statutory and Constitutional rights of the Plaintiffs;
28. That the Police Chief, by following the illegal orders of the Mayor to enforce the invalid DHM created a policy for the City of Lincoln to violate the law and impact the statutory and Constitutional rights of the Plaintiffs;
29. That the Mayor, after adopting and ratifying the DHM, pleaded to the public to assist in the enforcement of the DHM that she knew, or should have known, was unlawful;
30. Thereafter, members of the public, at the behest and direction of the Mayor, but without training or understanding of the DHM, then began harassing and reporting so-called violations of the DHM;
31. That the Defendants and their employees, under the color of law, harassed or actively encouraged the harassment of the Plaintiffs. Defendants used the fruits of this harassment in their enforcement of the illegal and void DHM;
32. That the Defendants had a policy to, and did seek, criminal and civil enforcement of the unlawful DHM;

33. On August 17, 2020, in violation of the laws of Nebraska and the City Charter of Lincoln, the City Council attempted to appoint Defendant Lopez as the Director of the Lincoln-Lancaster County Health Department. Defendants allege this appointment was and remains void;
34. On August 17, 2020, the City Council, attempted to ratify the void DHM and separately approved its application and enforcement ex post facto to their attempted ratification. Despite the City Council's attempts, the DHM remained void;
35. On August 31, 2020, Defendant Lopez signed a second DHM (08-2020) that was intended to extend DHM 07-2020, which was set to expire on September 1, 2020. DHM 08-2020 is materially similar to DHM 07-2020, and the City of Lincoln considers it to remain in effect at the time of this filing;
36. Despite being unlawful, the City of Lincoln continues to threaten businesses with shutdown, civil penalty, and criminal enforcement based on DHM 08-2020;
37. The Defendants engage in an arbitrary and capricious policy of enforcement that attempts to delegate police powers to businesses and punishes businesses for failing to enforce the mandate, despite the Defendants published policy of not enforcing the mandates against individuals;
38. The Defendants engage in an arbitrary and capricious reading of the mandates in that they allege employees are not subject to the medical exemptions for mask wear;
39. At all relevant times, the Defendants and their employees engage in a policy of harassment regarding the enforcement of the void DHMs in that they arbitrarily

and capriciously targeted certain businesses for enhanced enforcement and shut down under the DHMs;

40. At all relevant times, the Defendants and their employees engage in a policy of harassment that was designed to stifle and discourage legitimate public debate;
41. The Health Department and City of Lincoln, including Law Enforcement, failed to properly train and supervise its inspectors and employees regarding the DHMs, their enforcement, and created a policy to allow inconsistent and harassing enforcement of the unlawful DHM; and
42. A Copy of the DHM 07-2020 and 08-2020 are attached and incorporated herein.

### **CAUSES OF ACTION**

#### **I. Nebraska Constitution**

43. Paragraphs 1-42 are incorporated by this reference as if fully set forth;
44. Under Nebraska law, “the right to acquire and sell property in a lawful manner, and the right to conduct lawful business are constitutionally protected rights.” *Malone v. City of Omaha*, 294 Neb. 516, 533 (2016) (citing *State v. Copple*, 224 Neb. 672 (1987), *abrogated on other grounds*, *State v. Reynolds*, 235 Neb. 662 (1990)). The power to regulate and restrict the exercise of these rights is limited by the Constitution of this State and of the United States. *U.S. Brewers’ Ass’n, Inc. v. State*, 192 Neb. 328, 333 (1974);
45. The issuance and enforcement of the void DHMs by the Defendants violates Plaintiffs’ constitutionally protected rights to conduct lawful business and to acquire and sell property under Article 1, § 3;



46. The Defendants' issuance and enforcement of the void DHMs violates Plaintiffs' fundamental right to the pursuit of happiness under Article 1, § 1;
47. The Defendants' issuance and enforcement of the void DHMs constitutes a taking without just compensation in violation of Article 1 § 21;
48. The Defendants' authorization of the continued enforcement of void DHM 08-2020 violates the prohibition against ex post facto laws under Article 1, § 16;
49. The Defendants' conduct violates Plaintiffs' procedural and substantive due process rights under Article 1 § 3;
50. The Defendants' conduct violates the equal protection rights of the Plaintiffs under Article 1 § 3;
51. The relevant portions of the City's Communicable Disease Act enforced by the City of Lincoln violate Nebraska's Constitution as they are unreasonably vague and overbroad;
52. The relevant portions of the City's Communicable Disease Act violate Art. Xi, § 2 of Nebraska's Constitution both on their face and as applied to Plaintiffs; and
53. The Defendants' conduct proximately caused damages to the Plaintiffs as fully set forth below;

## **II. Nebraska Open Meetings Act**

54. Pursuant to Neb. Rev. Stat. § 84-1407 et. seq., Plaintiffs bring a citizen suit against the City of Lincoln for violation of the Open Meetings Act;
55. Under the Open Meetings Act, specifically Neb. Rev. Stat. § 84-1411(1), public bodies must provide an agenda of subjects to be considered at each meeting. This agenda shall be available for public inspection at the principal office of the

public body during normal business hours, and it is not to be altered later than 24 hours before the scheduled commencement of the meeting; and

56. That the actions of the City of Lincoln relative to Defendant Lopez and the DHMs on August 17, 2020, including Defendants' failure to give proper notice of the August 17, 2020 City Council meeting agenda, violated the State Open Meeting Act, the LMC and the Lincoln City Charter;

### **III. Abuse of Power**

57. Paragraphs 1-42 are incorporated by this reference as if fully set forth;
58. Nebraska Law recognizes the ability of citizens to seek redress through the Courts for official abuses of power. State ex. Rel. Steinke v. Lautenbaugh, 263 Neb. 652 (2002);
59. Defendant Lopez abused her legal authority in promulgating and enforcing the void DHMs;
60. The Mayor abused her legal authority and oath of office in authorizing Defendant Lopez to promulgate and enforce the void DHMs;
61. The City Council abused their legal authority in passing, ratifying or appointing matters related to the void DHMs on August 17, 2020; and
62. That these actions of the Defendants proximately caused damages as fully set forth below;

### **IV. 42 U.S.C. § 1983**

63. Paragraphs 1-42 are incorporated by this reference as if fully set forth;

64. The Due Process Clauses of the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution (1) guarantee fair process when the government deprives a person of liberty or property and (2) bar government administrators from abusing or arbitrarily exercising their power in violation of a person's constitutionally protected rights, regardless of the fairness of the procedures used. *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998);
65. That the enforced sections of the City's Communicable Disease Act, on their face and as applied, are unconstitutionally vague, overbroad and violate substantive and procedural due process under the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution by depriving Plaintiffs of liberty or property without fair process in an abusive and arbitrary exercise of Defendants' power;
66. That the enforcement of the City's Communicable Disease Act LMC in this case violated the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 14<sup>th</sup> Amendments to the United States Constitution;
67. That Defendants and their employees abused their power by encouraging and engaging in retaliation against Plaintiffs for their political speech and conduct in violation of Plaintiffs' constitutionally protected rights under the 1<sup>st</sup> Amendment to the United States Constitution;
68. That Defendants, by and through both the vote of the City Council and the enforcement policies of the Mayor and Chief of Police, violated the Ex Post Facto clause of § 10, Article 1 of the United States Constitution;
69. That the actions of the City of Lincoln relative to Defendant Lopez and the DHM on August 17, 2020, including, but not limited to, Defendants' failure to give proper notice and opportunity for Plaintiffs to be heard, violated the substantive

and procedural Due Process Clauses of the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution;

70. That the DHMs and the enforcement thereof violate the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et. seq.) in that the activities of the City of Lincoln unlawfully discriminate or cause discrimination against individuals on the basis of a disability; and

71. That Defendants' actions proximately caused damages as fully set forth below;

### **RELIEF SOUGHT**

72. Plaintiffs seek both temporary and permanent injunctive relief suspending all enforcement of the unlawful DHMs, either civilly or criminally;

73. A declaratory order holding the DHMs unlawful;

74. Equitable and declaratory relief finding the applicable sections of the City's Communicable Disease Act unconstitutional either as applied or on their face;

75. An order, pursuant to Neb. Rev. Stat. § 84-1414, declaring the attempted appointment of Defendant Lopez as the Health Director void;

76. An order, pursuant to Neb. Rev. Stat. § 84-1414, declaring the ex post facto resolution of the City Council void;

77. An order, pursuant to Neb. Rev. Stat. § 84-1414, declaring the ratification of DHM 07-2020 void;

78. Judgment against the Defendants in favor of the Plaintiff business class for damages, including lost and diminished profits, in an amount to be proven at trial, caused by the unlawful conduct of the Plaintiffs;

79. Judgment against the Defendants in favor of the Plaintiff individual employee class for damages, including lost and diminished wages, in an amount to be proven at trial, caused by the unlawful conduct of the Defendants;
80. Punitive damages against Defendants named in their individual capacities;
81. An award of attorney's fees under law and as this Court deems just and equitable;
82. That Plaintiffs be awarded pre and post-judgment interest; and
83. All other damages available at law and equity as this Court deems just and equitable;

#### **DEMAND FOR JURY TRIAL**

84. Plaintiffs hereby demand a jury trial on all eligible claims, including, but not limited to, claims arising out of 42 U.S.C § 1983.

WHEREFORE the Plaintiffs seek equitable and legal judgments against the Defendants consistent with this Complaint.

Dated this 10<sup>th</sup> day of September 2020.

Respectfully submitted,  
Benjamin Madsen and Madsen  
Bowling and Billiard Center Co., Plaintiffs

/s/ Christopher M. Ferdico  
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## **PRAECIPE**

To the Clerk of the Court:

Please issue summons, and deliver the same to the undersigned via email, for service via certified mail upon the Defendants, who may be served via certified mail at:

Yohance L. Christie  
City Attorney  
555 S. 10th Street, Suite 300  
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Mayor Leirion Gaylor Baird  
City of Lincoln  
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/s/ Christopher M. Ferdico

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