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8 *Attorneys for Defendant 130 Central, LLC*  
9 *d/b/a Remington Bar & Casino*

10 **MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY**

11 STATE OF MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES,

Cause No. DV-20-965D

Judge Dan Wilson

12 Plaintiff/Counter-Defendant,

13 -vs-

**DEFENDANT 130 CENTRAL, LLC  
d/b/a REMINGTON BAR &  
CASINO'S ANSWER,  
COUNTERCLAIM AND DEMAND  
FOR JURY TRIAL**

14 130 CENTRAL, LLC d/b/a REMINGTON  
15 BAR & CASINO, GRIGGS FERNDAL  
16 LLC c/b/a FERNDAL MARKET, SYKES  
17 DINER LLC d/b/a SYKES DINER AND  
18 MARKET, WHITE ENTERPRISES, INC.,  
19 d/b/a YOUR TURN MERCANTILE/YOUR  
20 LUCKY TURN CASINO, and SCOTTY'S  
21 BAR & STEAKHOUSE, LLC d/b/a  
22 SCOTTY'S BAR AND CASINO,

23 Defendants/Counterclaimants.

24 Defendant, 130 Central, LLC d/b/a Remington Bar & Casino, through counsel, answers

25 Plaintiff's Complaint as follows:

- 26 1. Defendant admits the allegations in paragraphs 7, 8, 10, 12, 13, and 16.
- 27 2. Defendant denies the allegations in paragraphs 1, 2, 3, 4, 5, 6, 21, 23, 24, 26, 29, 33, 37,  
28 38, 39, 43, 44, 46, 47, 48, 49, 54, 55, and 56.

- 1 3. Answering paragraphs 34, 40, 45, and 53: Defendant restates its responses to those  
2 restated allegations.
- 3 4. Answering paragraphs 9, 11, 28, 35, 36, 41, 42, and 50: the allegation calls for a legal  
4 conclusion and is not an allegation of fact, and therefore no response is required. To the  
5 extent an answer is required, it is denied.
- 6
- 7 5. Answering paragraphs 14, 15, 17, 18, 19, 22, 27, 30, 31, 32, 51, and 52: Defendant lacks  
8 sufficient knowledge to either admit or deny the allegations and therefore denies them.
- 9 6. Answering paragraphs 20 and 25: the documents speak for themselves. To the extent any  
10 of these paragraphs need to be answered, they are denied.
- 11

12 **AFFIRMATIVE DEFENSES**

- 13 1. The Court lacks subject matter jurisdiction.
- 14 2. Plaintiff fails to state a claim upon which relief can be granted.
- 15 3. Plaintiff's action is barred by the Separation of Powers doctrine established in Mont.  
16 Const., Art. III, Sec. 1.
- 17
- 18 4. Plaintiff's action is barred because it violates Defendant's constitutional rights under the  
19 Montana and United States Constitutions.
- 20 5. Plaintiff should be estopped from enforcing the terms of the Directive against Defendant.
- 21 6. The terms of the Directive are invalid or unenforceable.
- 22 7. Defendant has a safe harbor from enforcement pursuant to Section 5 of the Directive.
- 23 8. Plaintiff's action is barred by the equitable doctrine of unclean hands.
- 24
- 25 9. Defendant incorporates by reference any affirmative defense pleaded by any other  
26 defendant to the consolidated action that might be equally applicable to Defendant.
- 27
- 28

1 10. The affirmative defenses pleaded herein are pleaded to avoid a later claim of waiver.  
2 Any affirmative defense that is unsupported by facts discovered during the course of this  
3 action will be withdrawn at or before the final pretrial conference.

4 11. Defendant expressly reserves the right to plead any additional affirmative defense  
5 unknown to it at the time this Answer is filed but that might become known based on  
6 facts discovered throughout the course of this action.  
7

### 8 COUNTERCLAIMS

9 For its claims against Plaintiff, 130 Central, LLC d/b/a Remington Bar & Casino  
10 (“Remington”), alleges as follows:

- 11 1. Remington is a Montana limited liability company in good standing with the Montana  
12 Secretary of State.
- 13 2. The Montana Department of Public Health and Human Services [“DPHHS”] is an agency  
14 of the State of Montana organized pursuant to Title 2, Section 15, Part 22, MCA.  
15
- 16 3. On March 12, 2020, the Governor declared a state of emergency due to the spread of the  
17 Covid-19 virus. (Executive Order 2-2020)  
18
- 19 4. Pursuant to his emergency powers, Governor Bullock issued a Directive on July 15<sup>th</sup>  
20 2020, entitled “Face Covering Requirement in Indoor Spaces Open to the Public” [“Mask  
21 Directive”], a copy of which is attached to DPHHS’ Complaint as Exhibit F.
- 22 5. DPHHS claims authority to enforce the terms of the Mask Directive against Montana  
23 businesses pursuant to § 50-1-103, MCA.
- 24 6. DPHHS in turn demands that Defendant and other businesses accept responsibility for  
25 enforcing the Mask Directive against patrons and employees.  
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- 1 7. The Directive does not indemnify business owners who are sued for wrongful or  
2 constructive discharge if an employee refuses an order to wear a face covering.
- 3 8. The Directive does not indemnify business owners who violate the Montana Human  
4 Rights Act in attempting to enforce its provisions.
- 5 9. The Directive does not indemnify business owners for violating the constitutional right to  
6 privacy of patrons and employees.
- 7 10. DPHHS's demands for mask compliance enforcement that goes beyond the terms of the  
8 Directive exposes Defendant to legal liability.
- 9 11. DPHHS' demands for mask compliance enforcement beyond the terms of the Directive  
10 require Defendant to violate the protected right to privacy of patrons and employees.
- 11 12. Steve Bullock, in his official capacity as Governor, held a press conference on October 7,  
12 2020 to publicly admonish the Flathead County Attorney and the Commissioners of  
13 Flathead County for leaving decisions about how to comply with the Mask Directive up  
14 to local businesses and patrons.
- 15 13. Flathead County officials have chosen to refrain from imposing penalties on businesses  
16 when enforcing the Governor's Directive.
- 17 14. After Governor Bullock's statements to the press, Plaintiff sent investigators to  
18 Defendant's place of business on October 20, 2020. The investigators determined that  
19 Defendant had placed compliant signage on the front door of the establishment. The  
20 investigators witnessed patrons and employees who were not wearing masks. The  
21 investigators also witnessed some of the tables were spaced to allow for social distancing  
22 between parties.
- 23 15. The investigators did not speak to the Defendant about the measures taken to comply  
24 with the Directive.
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- 1 16. The investigators did not ask patrons who were not wearing face coverings if they had a  
2 Section 4 exception.
- 3 17. DPHHS intentionally singled out Defendant, on the basis of two speculative accusations  
4 of noncompliance, merely because Defendant does business in Flathead County.
- 5 18. On information and belief, there have been only two complaints registered against  
6 Defendant over the last six months.
- 7 19. DPHHS made no attempt prior to filing its lawsuit to discuss any compliance issues with  
8 Defendant in any formal or informal way.
- 9 20. Before Defendant was even given notice of the lawsuit, the Governor's press secretary  
10 Erin Loranger, went to the press to garner publicity for Plaintiff's action leading into the  
11 final weekend before the election.
- 12 21. Plaintiff publicly described the Defendant as an "egregious" and "repeat" offender that  
13 was "flagrantly" violating the Mask Directive.
- 14 22. In comments to the press, and prior to any service of notice to the Defendant, Plaintiff  
15 indicated its confidence that Defendant would quickly settle the matter, giving the public  
16 the impression that Defendant was without legal grounds to defend.
- 17 23. Defendant first found out about the lawsuit and the allegations therein from the press, not  
18 from DPHHS.
- 19 24. The actions taken by DPHHS have harmed Defendant's business and resulted in  
20 emotional distress for the members of the Defendant LLC and its employees.
- 21 25. Members of the community at large, including members of the Whitefish City Council,  
22 have wrongfully tagged Defendant as a "superspreader" business even though there is no  
23 evidence of any Covid-19 spread occurring at Defendant's premises. The reputational  
24 damage to Defendant was caused by DPHHS' frivolous and politically-motivated action.  
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**COUNT I—ABUSE OF PROCESS**

Counterclaimant restates and re-alleges all paragraphs above as if set forth herein.

26. The elements of abuse of process are: “(1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding.” *Brault v. Smith*, 209 Mont. 21, 28, 679 P.2d 236 (1984). “For a defendant to claim abuse of process, there must be an attempt by the plaintiff to use process to coerce the defendant to do some collateral thing which he could not be legally and regularly compelled to do.” *Brault*, 209 Mont at 29.
27. DPHHS filed the Complaint against Defendant because the Defendant does business and is located in Flathead County.
28. DPHHS filed the Complaint with the purpose of frightening other businesses in Flathead County into tightening enforcement of the Mask Directive.
29. DPHHS filed the Complaint with the purpose of applying political pressure to the Flathead County Commissioners, the county attorney, and other local public officials.
30. DPHHS filed this suit, and the four others related to it, in retaliation against the Flathead County Attorney and the County Commissioners because they would not impose further restrictions on largely compliant local businesses already suffering a historic economic depression.
31. DPHHS filed this lawsuit with the intention of garnering headlines for Governor Bullock and his administration in the days before the election.
32. DPHHS intended to use the legal process to force Defendant into settlement, garnering further headlines and publicity for Governor Bullock and his administration.

1 33. DPHHS did not file the lawsuit with the intent of reaching a final adjudication on the  
2 merits, but to use the pressure of the legal process to force Defendant to agree to new and  
3 additional conditions above and beyond those contained in the Mask Directive.  
4

5 **COUNT II—CONSTITUTIONAL VIOLATIONS**

- 6 Counterclaimant restates and re-alleges all paragraphs above as if set forth herein.
- 7 34. The right to equal protection, guaranteed by Art. II, Sec. 4 of the Montana Constitution, is  
8 a self-executing right.
- 9 35. The right to freely assemble, guaranteed by Art. II, Sec. 6 of the Montana Constitution, is  
10 a self-executing right.
- 11 36. The right to freely speak and express one’s opinions, guaranteed by Art. II, Sec. 7 of the  
12 Montana Constitution, is a self-executing right.
- 13 37. The right of privacy, guaranteed by Art. II, Sec. 10 of the Montana Constitution, is a self-  
14 executing right.
- 15 38. The Montana Legislature has not granted immunity to the State or its Agencies, including  
16 DPHHS, for redress for violations of Montana’s self-executing constitutional protections.  
17 Mont. Const., Art. II, Sec. 18.
- 18 39. Remington is a “person” as that word is used in the Montana State Constitution.
- 19 40. Remington, like all other persons afforded protections guaranteed by the Montana  
20 Constitution, is entitled to full legal redress for the actions that DPHHS takes in violation  
21 of the self-executing rights guaranteed to all persons by the Montana Constitution.  
22
- 23 41. The actions DPHHS has taken against Remington to enforce the July 15, 2020  
24 Gubernatorial Directive were actions taken in violation of Mont. Const., Art. II, Sec. 4  
25 (Individual Dignity – Equal Protection), Sec. 6 (Freedom of Assembly), Sec. 7 (Freedom  
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1 of Speech), Sec. 10 (Right to Privacy), Sec. 17 (Due Process), and U.S. Const., Amend. 9  
2 (All Rights Protected) & Amend. 14 (Due Process and Equal Protection). Those actions  
3 intended to compel violations of constitutionally-protected rights, and were actions taken  
4 to selectively prosecute Remington in violation of equal protection.  
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6 42. The Governor’s July 15, 2020 Directive is, on its face, or as applied to Remington,  
7 unconstitutional pursuant to Mont. Const., Art. II, Sec. 4 (Individual Dignity – Equal  
8 Protection), Sec. 6 (Freedom of Assembly), Sec. 7 (Freedom of Speech), Sec. 10 (Right  
9 to Privacy), Sec. 17 (Due Process), and U.S. Const., Amend. 9 (All Rights Protected) &  
10 Amend. 14 (Due Process and Equal Protection).

11 43. DPHHS’s actions in attempting unconstitutional enforcement of the Governor’s July 15,  
12 2020 Directive has resulted in damage to Remington’s business reputation, and have  
13 caused economic damage to Remington in an amount to be proven at trial.  
14

15 **COUNT III—DECLARATORY JUDGMENT**

16 Counterclaimant restates and re-alleges all paragraphs above as if set forth herein.  
17

18 44. DPHHS claims the basis for its authority to enforce the Mask Directive is found in § 50-  
19 1-103 and § 50-2-102, MCA.

20 45. DPHHS admits that it did not implement a public health rule separately from the Mask  
21 Directive, whether by the regular administrative procedure or by emergency health rule  
22 procedure.

23 46. No ordinary public health rule has been implemented by DPHHS, following the  
24 procedures described in § 2-4-302, MCA, to enforce the Mask Directive.

25 47. DPHHS admits that it did not follow the statutory requirements for implementing an  
26 emergency health rule, as described in § 2-4-303(1)(a), MCA:  
27  
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1 If an agency finds that an imminent peril to the public health, safety, or  
2 welfare requires adoption of a rule upon fewer than 30 days' notice and  
3 states in writing its reasons for that finding, it may proceed upon special  
4 notice filed with the committee, without prior notice or hearing or upon  
5 any abbreviated notice and hearing that it finds practicable, to adopt an  
6 emergency rule. The rule may be effective for a period not longer than 120  
7 days, after which a new emergency rule with the same or substantially the  
8 same text may not be adopted, but the adoption of an identical rule under  
9 2-4-302 is not precluded...

7 48. No written finding was issued by DPHHS that an imminent peril existed.

8 49. No notice was given to the public nor to the administrative review committee that a  
9 public health rule was being issued.

10 50. DPHHS did not state in writing its reasons for finding that an emergency health rule was  
11 required.

12 51. The Mask Directive was issued on July 15, 2020. 120 Days from issuance of the Mask  
13 Directive is November 12, 2020.

14 52. Governor Bullock issued an additional directive on November 17, 2020 that relates back  
15 to the July 15, 2020 Mask Directive.

16 53. The Mask Directive was issued by the Governor more than 120 days ago. Even if the  
17 Mask Directive were a public health rule properly issued by DPHHS, it has expired.

18 54. The Montana legislature requires that DPHHS show respect for the people's right to  
19 notice and participation in the rule making process. § 2-4-303(1)(a), MCA, goes on to  
20 state:  
21

22 ...Because the exercise of emergency rulemaking power precludes the  
23 people's constitutional right to prior notice and participation in the  
24 operations of their government, **it constitutes the exercise of**  
25 **extraordinary power requiring extraordinary safeguards against**  
26 **abuse**. [emphasis added].

27 55. DPHHS has not respected the people of Montana's constitutional right to notice and  
28 participation in the rulemaking process.

1 56. DPHHS has no lawful authority to enforce the Governor's Mask Directive.

2  
3 **PRAYER FOR RELIEF**

4 WHEREFORE, Defendant/Counterclaimant prays for judgment as follows:

- 5 1. That Plaintiff's claims be dismissed or that Plaintiff is awarded nothing;
- 6 2. Judgment in favor of Remington, and against the STATE OF MONTANA,
- 7 DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES for all damages
- 8 pursuant to Montana law;
- 9
- 10 3. Declaratory judgment that the Montana Department of Public Health and Human
- 11 Services has no authority to enforce the Mask Directive;
- 12 4. For all fees and costs allowed by law; and
- 13 5. For any further relief the Court deems just.

14  
15 DATED this 18<sup>th</sup> day of November, 2020.

16 FRAMPTON PURDY LAW FIRM  
17 *Attorneys for Plaintiff*

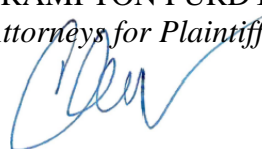
18 By:   
19 \_\_\_\_\_  
Connor C. Walker

20  
21 **DEMAND FOR JURY TRIAL**

22 Defendant/Counterclaimant demands a jury trial on all applicable issues.

23 DATED this 18<sup>th</sup> day of November, 2020.

24 FRAMPTON PURDY LAW FIRM  
25 *Attorneys for Plaintiff*

26 By:   
27 \_\_\_\_\_  
Connor C. Walker

## CERTIFICATE OF SERVICE

I, Connor C. Walker, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Answer and Counterclaim to the following on 11-18-2020:

Bruce Allen Fredrickson (Attorney)

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Service Method: eService

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Representing: Department of Public Health and Human Services

Service Method: eService

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Representing: Department of Public Health and Human Services

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Electronically signed by Kelly Kracker-Sletten on behalf of Connor C. Walker

Dated: 11-18-2020