IN THE COURT OF CLAIMS OF THE STATE OF NEW YORK

NORMAN TURKOWITZ, both for himself
and for all other persons similarly situated,

Claimant

v.

THE STATE OF NEW YORK,

Respondent.

Claim No. E20-1426

AFFIRMATION IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS CLAIM AND NOTICE OF CROSS-MOTION

Harry D. Lewis, an attorney duly licensed to practice law in the State of New York, under penalty of perjury affirms as follows:

1. I am the attorney for Claimant Norman Turkowitz ("claimant" or "Turkowitz"), and am fully familiar with the facts and circumstances set forth herein and set out in the verified claim, and the exhibits thereto. This affirmation is submitted in opposition to the State of New York's motion to dismiss the claim on the grounds that the claim fails to state a cause of action against the State for lack of subject matter jurisdiction.

I. THE SUBJECT MATTER JURISDICTION OF THE COURT

2. This claim arises under N.Y. Court of Claims Act §§9(2), (4) and 10(3) and (3-b) in that the actions of New York Governor Andrew Cuomo (hereinafter "Governor Cuomo"), acting solely and exclusively in his capacity as governor of the State of New York, were intentional, as described in the claim and its exhibits, the contents of which are incorporated herein by reference.

3. With respect to this Court's subject matter jurisdiction, D.D. Siegel, New York Practice §17 at 20-21 (2011), entitled "Court of Claims," states in pertinent part:

> The court of claims has jurisdiction "to hear and determine claims against the state or by the state against the claimant". [N.Y.] Const. Art VI, §9. Its jurisdiction is set forth in detail in the Court of Claims Act. Ct. Cl. Act §9. In a landmark decision in 1996, *Brown v. State of New York*, 89 N.Y.2d 172, 652 N.Y.S.2d 223 (1996)[hereinafter "*Brown*"], the Court of Appeals expanded its jurisdiction by adopting what is described as the "constitutional tort". It held that the state of New York is liable in damages for violations of the equal protection and search and seizure clauses of the state constitution, and that the court of claims has jurisdiction to hear those claims.

4. Although not directly on point because it dealt with the equal protection and search and seizure clauses of the state constitution, which implicate the liberty interests of a citizen rather than property interests as in this case, *Brown* nonetheless lays out important policies and principles of subject matter jurisdiction with respect to this Court and claimant's claim, which is of constitutional dimension both under the U.S. Const. amend. V and XIV and N.Y. Const. art. I, §7 cl. a.

5. As the Court of Appeals stated in Brown at 179-80:

> Under the common law, a State is immune from suit unless it waives its sovereign immunity. . . The present Court of Claims Act was adopted in 1939. One commentator observed, it confers jurisdiction on the court to "hear and determine "almost every conceivable kind of action against the State" [citation omitted]. Subdivision (2) of section 9 of the present Act confers jurisdiction on the court "[t]o hear and determine a claim of any person, corporation or municipality against the state *for the appropriation of any real or personal property or any interest therein* for the breach of contract, express or implied, or for the torts of its officers or employees while acting as such officers or employees". (emphasis added). *Brown, supra*, at 179-180.

6. The *Brown* court rejected its earlier holding in *Smith v. State of New York*, [citation omitted], noting that "the [N.Y.] Legislature subsequently enacted a new statute to overcome the ruling in *Smith*. That revision, the substance of which was incorporated into the statute now before us, "extend, supplemented and enlarged" the waiver to remove the defense of sovereign immunity for tort actions [citation omitted]". *Brown* at 180; N.Y. Ct. Cl. Act §8.

7. N.Y. Ct. Cl. Act §8 provides in pertinent part: "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article."

8. "The waiver includes all claims over which the Court of Claims has appropriate jurisdiction, breach of contract and torts and applies the rule of *respondeat superior* to the State [citations omitted]." *Brown* at 180.

9. "Accordingly, we conclude that the Court's jurisdiction is not limited to common law tort causes of action and that *damage claims against the state based upon violations of the State Constitution come within the jurisdiction of the Court of Claims.*" (emphasis added). *Brown* at 180.

II. THE CLAIM FOR EMERGENCY TAKING

10. U.S. Const. amend. V provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

11. U.S. Const. amend. XIV, §1 provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

12. N.Y. Const. art. I, §7, cl. a provides: "Private property shall not be taken for public use without just compensation."

13. In this affirmation, claimant has relied in part upon the research done by Professor B.A. Lee, Brooklyn Law School, in his article published at B.A. Lee, "Emergency Takings", 114 Mich. L. Rev. 391 (2015)(hereinafter "Lee"). A true and exact copy of that article is annexed hereto as Exhibit 1.

14. U.S. Const. amend. V requires that the government pay "just compensation" to people whose property the government "takes" for "public use". U.S. Const. amend. V. In 1897, the U.S. Supreme Court held that the Fifth Amendment's "just compensation" requirement was incorporated into the Fourteenth Amendment, and that state governments also were bound by the "just compensation" requirement. See Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 241 (1897). N.Y. Const. art. 1, §7, cl.a. contains a similar requirement.

15. The just compensation requirement applies whether the government uses eminent domain to take the property, or destroys the property outright to further a government purpose. *Armstrong v. United States*, 364 U.S. 40, 48 (1960); *see also United States v. Causby*, 328 U.S. 256, 261-62 (1946).

16. The Constitution requires that the government pay just compensation whether it is taking the property for its own use, or destroying the property to further some other government objective, since the owner's loss is the same in either event. *Cf. Causby*, 328 U.S. at 261 (citing *United States v. Miller*, 317 U.S. 369 (1943))("It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken.").

17. Even in an emergency arising out of circumstances beyond the government's control, the government must pay just compensation to owners of private property that the government confiscated and used to address the emergency. *See, e.g., Standard-Vacuum Oil Co. v. United States*, 127 F. Supp. 195, 196-97 (Ct. Cl. 1955); *Chicago League Ball Club v. City of Chicago*, 77 Ill. App. 124, 138-9 (1898); cf. *United States v. Caltex, Inc.*, 344 U.S. 149, 153-53 (1952). "The U.S. Supreme Court has repeatedly emphasized the fairness aspect of takings compensation, routinely invoking Justice Hugo Black's famous words in *Armstrong v. United States*, [364 U.S. 40, 49 (1960)]: "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing

some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Lee at 437 (2015).

18. Although there is a line of cases denying just compensation to property owners who lose their property due to government actions in an emergency as an exercise of the state's police power, the authors of the Second Restatement of Torts note that "the moral obligation to compensate the person whose property has been damaged or destroyed for the public good is obviously very great, and is of the kind which should be recognized by the law." RESTATEMENT (SECOND) OF TORTS §196 cmt. h. *E.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982), *reversing Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 440 N.Y.S.2d 843, 423 N.E.2d 320 (1981): "[T]he government does not have unlimited power to redefine property rights. See Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) ("a State, by ipse dixit, may not transform private property into public property without compensation"). And *Loretto* also notes that *even if the state's taking of property is a legitimate exercise of its police power (as in this case), "It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid. See Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 -128 (1978); *Delaware, L. & W. R. Co. v. Morristown*, 276 U.S. 182, 193 (1928). 458 U.S. 419, 426-7 (1982)." (emphasis added). The ruling rejected New York's former distinction between the police power and the

power of eminent domain which held that, "The police power is usually exercised by the state to regulate, or even destroy, an owner's use and enjoyment of his property in order to promote or conserve the public safety, health, and morality. The state exercises the police power by such means as zoning and subdivision controls, and does so without compensation to the owner for the damages sustained." 3 Warren's Weed New York Real Property §28.05[1] at 28-14 (5th ed. 2004)(discussing N.Y. principles of eminent domain as applicable to real property. Prior to *Loretto*, some N.Y. courts also applied the rule that government destruction of personal property in the legitimate exercise of its police power was not compensable.)

19. With respect to personal property, it is well-settled that "Generally, all private property, both real and personal, is subject to the sovereign's power of eminent domain." 3 Warren's Weed New York Real Property §28.18 at 28-41 (5th ed. 2004). And this Court held in *Brewer v. State (In re Added-Value Communications, Inc.)*, 176 Misc. 2d 337, 672 N.Y.S.2d 650 (1998) that New York State's taking of personal property was compensable, and that this Court had jurisdiction over such claims. *See also Parsa v. State*, 64 N.Y.2d 143, 485 N.Y.S.2d 27, 474 N.E.2d 235 (1984). *But see Williamsburg Candy and Tobacco v. State*, 106 Misc. 2d 728, 435 N.Y.S.2d 252 (N.Y. Ct. Cl. 1981), which held, in part, that "proper exercise of the police power" to destroy property does not give rise to a cause of action for appropriation (government taking) of personal property under N.Y. Const. art. I, §7, cl. a, New York's

constitutional takings provision, because the government's rightful destruction of property using its police power is not a "public use". At the conclusion of the destruction, the court argued, there is no property for the government to "use". As noted *supra*, the U.S. Supreme Court in *Loretto* rejected the New York Court of Appeals's holding that a rightful government exercise of its police power alone was sufficient to deny just compensation to the claimant in that case, calling the conclusion denying claimant just compensation in *Williamsburg Candy and Tobacco* into serious question.

20. The mistake *Williamsburg Candy and Tobacco* and similar cases, make in denying just compensation in an emergency is in confusing just compensation (whether in an eminent domain case or in an emergency) with restitution, which requires that the property owner, to obtain an equitable remedy, demonstrate a wrongful act by the person against whom he seeks restitution. In short, property owners need not demonstrate that the government is doing anything wrong in taking their property (whether via eminent domain or to address an emergency) to obtain just compensation.

21. For example, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), cited by the *Williamsburg Candy and Tobacco* court, was a forfeiture case in which the majority of the Court held that in the context of a Puerto Rican statute requiring forfeiture of property for criminal acts, no just compensation was due to the innocent owners of the forfeited yacht which had been used to transport a single marijuana cigarette, contraband under

the Puerto Rican statute. The opinion of Justice Douglas, dissenting, noted: "If the yacht had been notoriously used in smuggling drugs, those who claim forfeiture might have equity on their side. But no such showing was made, and, so far as we know, only one marihuana cigarette was found on the yacht. We deal here with trivia where harsh judge-made law should be tempered with justice. I realize that the ancient law is founded on the fiction that the inanimate object itself is guilty of wrongdoing. *United States v. United States Coin & Currency*, 401 U. S. 715, 401 U. S. 719-720. But that traditional forfeiture doctrine cannot at times be reconciled with the requirements of the Fifth Amendment. *Id.* at 401 U. S. 721. Such a case is the present one, [416 U.S. at 693]. . . But, in my view, there was a taking of private property "for public use" under the Fifth Amendment, applied to the States by the Fourteenth, and compensation must be paid an innocent owner. Where the owner is in no way implicated in the illegal project, I see no way to avoid paying just compensation for property taken. I, therefore, would remand the case to the three-judge court for findings as to the innocence of the lessor of the yacht -- whether the illegal use was of such magnitude or notoriety that the owner cannot be found faultless in remaining ignorant of its occurrence." 416 U.S. at 694.

22. Although not a direct response to *Calero-Toledo*, the more recent unanimous opinion of the Court in *Timbs v. Indiana*, 586 U.S. ____ (2019), written by Justice Ginsberg, addressed a case analogous on its facts, except that Timbs

was admittedly guilty of dealing a small quantity of heroin for which he paid a criminal fine of $1,203.00. Indiana then sought civil forfeiture of Timbs's $42,000 automobile, which was purchased with the proceeds of a policy on Timbs's father's life, for transporting heroin. The U.S. Supreme Court unanimously reversed and remanded to the Indiana Supreme Court for application of the "Excessive Fines" clause of U.S. Const. amend. VIII to the Indiana statute. Although the Court's use of the Eighth Amendment in this context was novel, the factual analogy with the situation in *Calero-Toledo,* in which the property owner, unlike Timbs, was innocent of any crime, is obvious, and the outcome, opposite.

23. With respect to *Mugler v. Kansas*, 123 U.S. 623 (1887), also cited by the *Williamsburg Candy and Tobacco* court, Lee at 420-7 quotes *Mugler's* reasoning that the government's destruction of property in and of itself somehow proves that the property is a "nuisance" that justifies such destruction, but then rejects it as follows: "Moreover, there is a deep general difficult with adopting a conception of nuisance that is so broad as to encompass property destroyed to address emergencies. If such a conception of nuisance is applied in the takings context, then even ordinary exercises of eminent domain would be immune from demands for compensation. . . This incompatibility with a basic constitutional principle of eminent domain law renders this version of the nuisance analogy implausible." Lee at 396-397 describes the Great New York Fire of 1835, which led to multiple lawsuits for

just compensation by the owners of goods destroyed by government action to create a firebreak in combatting the fire. Lee at 397; *See, e.g., Am. Print Works v. Lawrence*, 23 N.J.L. 590 (N.J. 1851); *Mayor of New York v. Lord*, 17 Wend. 285 (N.Y. Sup. Ct.), aff'd, 18 Wend. 126 (N.Y. 1837).

24. The case law holding that the emergency taking was "necessary", and hence non-compensable, omits an important distinction between the need to destroy property to address an emergency (the "emergency taking"), and the need to deny compensation because the government cannot afford it (the "affordability factor"). Adjudication of the government's need to destroy property in an emergency taking is necessary only if the property owner contends that his property was wrongfully destroyed for no good reason, say, by a malicious or negligent government official or employee. If the property owner (as in this case) contends no such thing, then the separate issue of whether compensation is owed for the destruction, and if so, how much (the "affordability factor"), is the only one for adjudication by the court. *Loretto, supra.* In short, the emergency taking obligates the government to pay just compensation.

25. How much that compensation should be could vary, with partial compensation a possibility. The common law composition provides an analogy for partial compensation, BLACK'S LAW DICTIONARY at 262 (2010): "an agreement between a debtor and two or more creditors for the adjustment or discharge of an obligation for some lesser amount; an agreement among the

debtor and two or more creditors that the debtor will pay the creditors less than their full claims in full satisfaction of their claims." *See also* N.Y. Debtor and Creditor Act Article 3, §§50-88.

26. In short, just compensation may be less than full compensation if the fiscal exigencies of the emergency taking demand it. The burden of proof of such exigencies must be upon the State, however, which controls access to the fiscal information necessary to make such a determination. *See, e.g.,* N.Y. Ct. Cl. Act §§12, 20, and 20-a; Press Release from Office of the New York State Comptroller dated September 16, 2020 entitled "DiNapoli: State's Financial Hole Deepens, Tax Revenues Trail $3.2 Billion in 2020", a copy of which is annexed hereto as Exhibit 2.

27. E.J. McMahon, "State Has Dug Itself Into Its Deep Hole", Empire Center for Public Policy, https://www.empirecenter.org/, Sept. 18, 2020" describes the current fiscal situation of the State of New York due to the pandemic as follows:

> Another noteworthy aspect of the current financial hole: the state Legislature and the Governor stepped right into it, eyes wide open (https://www.empirecenter.org/publications/amid-covid-a-shaky-state-budget/) . . . In walking into a $10 billion hole, Cuomo assumed he'd actually land on something of a trampoline, in the form of additional unrestricted federal aid to states and local governments under a fifth stimulus bill. At the time, it appeared such a bill would emerge from Congress before congressional recess in early August. And after all, under the last stimulus bill (the CARES Act)(http://home.treasury.gov/policy-issues/cares) enacted in March, New York State already had collected $1 billion in special aid to title 1 schools serving the disadvantaged and $5.1 billion from a Coronavirus Relief Fund, whose parameters have since been broadened beyond expenditures strictly related to COVID-19 expenses. But as summer

> wore on, House Democrats, Senate Republicans, and the Trump administration seemed to move further and further apart" . . . with the result that no follow-up federal appropriation has yet been enacted to date. What will Cuomo do if he gets no federal aid before the end of 2020? If Democrats have swept federal elections and Cuomo thinks such aid is almost guaranteed to be forthcoming from a Biden Administration, his response is likely to include a one-year extension of the $4.5 billion in short-term borrowing he's already done (https://www.empirecenter.org/publications/new-york-post-pandemic-state-budget-picture-is-looking-worse/)".), a copy of which is annexed hereto as Exhibit 3.

28. In short, it is not a foregone conclusion that New York State will be unable to pay the just compensation that is due the claimant here at the time this claim is adjudicated by this Court.

29. It is well-settled that outbreaks of contagious diseases are a type of emergency necessitating the government destruction of private property. For example, demolishing buildings to prevent the spread of disease has been a government strategy for protecting public health and safety for many years. *See, e.g., Juragua Iron Co. v. United States, 212 U.S. 297 (1909)*(discussing claims arising out of the U.S. military's demolition of several buildings to prevent the spread of yellow fever during the Spanish-American War). Contagious plant diseases may pose a threat to crops, requiring the destruction of other crops or orchards that could serve as a vector for the contagion. See, e.g., Terence J. Centner, Legitimate Exercises of the Police Power or Compensable Takings: Courts May Recognize Private Property Rights, 7 J. Food L. & Policy 191 (2011)(discussing efforts to stop the spread of citrus canker by destroying citrus trees); cf. Miller v. Schoene, 276 U.S. 272

(1928). The threat of Mad Cow Disease has required government destruction of livestock, see, e.g., Judge Upholds Killing of Vermont Sheep in Mad Cow Case, N.Y. Times (Aug. 2, 2000), and disease outbreaks ("avian influenza" or "bird flu") on poultry farms have necessitated government destruction of economically valuable chickens. http://www.nytimes.com/2000/08/02/us/judge-upholds-killing-of-vermont-sheep-in-mad-cow-case.html. For a general discussion of this issue in the United States, see Stephen Ott, Issues Associated With US Livestock Disease Compensation in the 21st Century, in THE ECONOMICS OF LIVESTOCK DISEASE INSURANCE 68 (S.R. Koontz et al. eds., 2006), http://www.telegraph.co.uk/news/1316726/Two-months-that-changed-the-face-of-rural-Britain.html (offering a timeline of the start of the 2001 "foot and mouth" disease crisis that required livestock destruction in Britain). See, e.g., Mike Hughlett, Bird Flu Outbreak Could Last for Years, STAR TRIB. (Minneapolis), Apr. 17, 2015, at A1 (describing millions of dollars in costs from destroying poultry as a result of bird flu outbreak in midwestern United States.; 112,000 Chickens Destroyed After Bird Flu Outbreak, S. CHINA MORNING POST (April 14, 2014), 5:14 AM), http://www.scmp.comnews/asia/article/1481263/112000-chickens-destroyed-after-bird-flu-outbreak (describing destruction in Japan)." Lee at 399-400.

30. Just compensation is not restitution for a wrongful act by the government, but rather, a payment by government to compensate the property owner for loss or destruction of his property. In short, if payment occurs, no wrong has

been committed. See also Lee Anne Fennell, Picturing Takings, 88 NOTRE DAME L. REV. 57, 80 (2012)("Paying just compensation transforms what otherwise would have been an impermissible governmental act into a permissible one under the Takings Clause . . ."); *cf. Mayor of New York v. Lord, 17 Wend 285, 303 (N.Y. Sup. Ct. 1837)*(Bronson, J., dissenting)("The destruction of individual property, for the public safety, bears a strong analogy to the case of taking private property for the public use. In both cases the act is legal; it only amounts to a forced sale; and damages mean nothing more than compensation or value."). Because just compensation is not paid to compensate the property owner for a tort, proof of a tort is not a necessary element in the vast majority of emergency takings cases.

31. The two questions this court must resolve in this case are:

(1) was there a government taking (emergency or otherwise) of claimant's property?; and

(2), if so, what is the appropriate amount, if any, of compensation for that taking?

32. Governor Cuomo's actions, as recited in paragraph 5 of the Claim, in entering Executive Orders 202 and 202.6, classifying New York businesses, including claimant's dental practice, and not-for-profit entities into general "essential business" and "non-essential business" categories, delegating gubernatorial authority for such classification to the Empire State Development Corporation ("ESDC"), and prohibiting "non-essential"

businesses from operating, amounted to an emergency taking that was necessary and not wrongful except to the extent that Respondent has failed to pay just compensation for the damage those orders inflicted on claimant's dental practice under the well-settled principle of respondeat superior of the State for the actions of its employees.

33. ESDC's actions, as recited in paragraph 7 of the Claim, acting under authority of Governor Cuomo's Order No. 202.6, in issuing guidance on essential services under the executive order relevant to claimant's dental practice as follows: "For purposes of Executive Order 202.6, "Essential Business" means: . . . "doctor [services] and emergency dental [services]. (emphasis added), effectively limiting claimant's dental practice to dental emergencies, a tiny fraction of his regular dental practice", amounted to an emergency taking that was necessary and not wrongful except to the extent that Respondent has failed to pay just compensation for the damage those orders and classifications inflicted.

34. Even though the governor's and ESDC's actions in destroying part of claimant's property interest in his dental practice for a limited duration of time were not wrongful, they nonetheless amounted to an emergency taking of claimant's property interest in his dental practice for which claimant is entitled to just compensation under U.S. Const. amend. V and XIV. (Given the contrary case law interpreting N.Y. Const. art I, sec. 7, cl.a, it may be that the takings clause of the N.Y. Constitution does not permit such

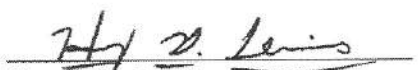
compensation as a matter of state law.) It is just compensation that makes such emergency government takings of private property permissible, and not wrongful.

35. It is well-settled that professional licenses, including dental licenses, are a property interest with a constitutional dimension. C.R. Cody, Professional Licenses and Substantive Due Process: Can States Compel Physicians to Provide Their Services?, 22 William & Mary Bill of Rights J. 941, 942 (March 2014)("Because [professional] licenses are property rights, the U.S. Supreme Court has thus recognized that due process protection applies to license revocation actions by the state.", citing Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970)).

36. Accordingly, Respondent's motion to dismiss for lack of subject matter jurisdiction must be denied.

DATED: September 23, 2020
New York, N.Y.

Respectfully submitted,



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