

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF SCOTT

FIRST JUDICIAL DISTRICT

File No. 70-CV-08-9559

State of Minnesota, by Dr. Sanne Magnan,
Commissioner of Health, in her official
capacity,

FILED

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SCOTT COUNTY COURTS

**TEMPORARY
INJUNCTION
ORDER AND
MEMORANDUM**

Plaintiff,

vs.

Red Eye Enterprises, Inc., d/b/a Bullseye
Saloon,

Defendant.

The above-entitled matter came before the Honorable Jerome B. Abrams, Judge of District Court, on May 6, 2008, at the Scott County Courthouse, Shakopee, Minnesota. Kristen Olsen, Assistant Attorney General, appeared as counsel for and on behalf of the Plaintiff. Patrick O'Neill, Attorney at Law, appeared as counsel for and on behalf of the Defendant. Other appearances were as noted on the record.

This matter comes before the Court on Plaintiff's motion for a temporary injunction.¹ The Plaintiff seeks to enjoin the Defendant from allowing individuals to smoke in the Bullseye Saloon in violation of the Minnesota Clean Indoor Air Act (hereinafter "MCIAA"), as amended by the Freedom to Breathe Act of 2007 (hereinafter "MCIAA as amended"). The Defendant opposes Plaintiff's motion on the grounds that it is acting in compliance with the MCIAA as amended. The Defendant also opposes Plaintiff's motion on constitutional grounds. These competing arguments raise issues of

¹ The parties declined the Court's invitation to consolidate the hearing for the temporary injunction with the trial on the merits in accordance with Rule 65.02(c) of the Minnesota Rules of Civil Procedure. Consequently, the Court's decision is limited to the facts presented in the affidavits submitted by the parties and the representations made by counsel during the hearing.

first impression in the State of Minnesota.

Based upon the arguments of counsel and the limited record at this stage of these proceedings, this Court makes the following:

FINDINGS OF FACT

Statutory Background

1. The purpose of the MCIAA as amended “is to protect employees and the general public from the hazards of secondhand smoke by eliminating smoking in public places” Minn. Stat. § 144.412.
2. The Minnesota Legislature has proclaimed that “[s]moking shall not be permitted in and no person shall smoke in a public place, at a public meeting, in a place of employment, or in public transportation, except as provided in [Minn. Stat. § 144.414 or §] 144.4167.” Minn. Stat. § 144.414, subd. 1.
3. “Public place” was redefined by the Freedom to Breathe Act of 2007 to explicitly include “bars [and] any other food or liquor establishment.” Freedom to Breathe Act of 2007, ch. 82 § 5, S.F. 238, 85 Leg., Reg. Sess. (Minn. 2007) (codified at Minn. Stat. § 144.413, subd. 2).
4. The definition of a “place of employment” includes bars and theaters.² Minn. Stat. § 144.413, subd. 1b.
5. Proprietors of public places and places of employment must “make reasonable efforts to prevent smoking” in their establishments. Minn. Stat. § 144.416(a). They also “must not provide smoking equipment, including ashtrays or matches, in areas where smoking is prohibited.” Minn. Stat. § 144.416(b). Proprietors of bars and restaurants “may not serve an individual who is in violation of [Minn.

² The definition for “place of employment” was added to the MCIAA by the Freedom to Breathe Act of 2007.

Stat. §] 144.411 to 144.417.” Id.

6. There is a narrow exception to the prohibition on smoking in Minn. Stat. § 144.414 for “smoking by actors and actresses as part of a theatrical performance conducted in compliance with [Minn. Stat. §] 366.01.” Minn. Stat. § 144.4167, subd. 9. To fit within this exception, “[n]otice of smoking in a performance [must] be given to theater patrons in advance and [must] be included in performance programs.” Id.
7. A town board “may by ordinance prohibit or license and regulate . . . theatrical performances. They may fix the price and duration of the license. When in their opinion the public interest requires it, they may revoke the license.” Minn. Stat. 366.01, subd. 2.

Bullseye Saloon

8. Robert J. Ripley (hereinafter “Ripley”) owns and operates the Bullseye Saloon, via Red Eye Enterprises, Inc. (collectively “Bullseye Saloon”), located at 9646 Main Street, Elko New Market, Minnesota.
9. The Bullseye Saloon is a bar. As such, it fits squarely within the definitions of “public place” and “place of employment” in which smoking is prohibited pursuant to Minn. Stat. § 144.414, subd. 1.
10. After smoking was prohibited in public places and places of employment, the Bullseye Saloon’s revenue decreased by 20% to 25%.
11. Ripley twice contacted the City Administrator for Elko New Market to determine if there were any ordinances prohibiting, regulating, or licensing theatrical performances. The City Administrator informed Ripley there are no ordinances

prohibiting, regulating, or licensing theatrical performances in Elko New Market.

12. Ripley was informed that the Bullseye Saloon is located in an area which is zoned to permit use as a theater.³

13. The Bullseye Saloon has a stage.

The Unconstitutional Ban

14. On March 2, 2008, the Bullseye Saloon began hosting an event called "The Unconstitutional Ban."

15. A notice was posted on the front door of the Bullseye Saloon which informed patrons that "[t]here will be some cigarette smoking and ashtray use during ['The Unconstitutional Ban']." [Affidavit of Robert J. Ripley (hereinafter "Ripley aff."), at Ex. A (emphasis in original)]

16. A notice was also posted inside the front entrance of the Bullseye Saloon which informed patrons of multiple events occurring during March. These events included "The Unconstitutional Ban," wine tasting, ladies' nights with disc jockeys and karaoke provided by "Ghostrider," "Bruce the Entertainer," and "Absolut Power Entertainment," "DJ Jesse," St. Patrick's Day, and a disc jockey and karaoke night with "Absolut Garth Entertainment." [Affidavit of John D. Olson (hereinafter "Olson aff."), at Ex. B]

17. Programs are provided to patrons of the Bullseye Saloon. These programs inform patrons that "**THERE WILL BE SOME CIGARETTE SMOKING AND ASHTRAY USE DURING THE PERFORMANCE.**" [Affidavit of Dale F. Dorschner (hereinafter "Dorschner aff."), at Ex. A; Ripley aff., at Ex. C (emphasis in originals)]

³ The Defendant does not claim that the Bullseye Saloon is a theater.

18. "The Unconstitutional Ban" has run continuously during the hours of operation of the Bullseye Saloon since March 2, 2008.
19. The Bullseye Saloon instructs each member of the Bullseye Saloon Acting Guild to improvise their character and role in "The Unconstitutional Ban." If any member believes the character or role they are improvising should smoke, then the Bullseye Saloon permits and encourages them to do so.
20. The Defendant has not provided the Court with information as to how "The Unconstitutional Ban" constitutes a theatrical performance. The Defendant also has not provided the Court with information on how any of the individual "characters" are involved in a theatrical performance, improvisational or otherwise, requiring smoking.

Bullseye Saloon Acting Guild

21. Patrons and employees of the Bullseye Saloon must pay \$2 to the Defendant to become a junior member of the Bullseye Saloon Acting Guild.
22. Members of the Bullseye Saloon Acting Guild are given a button which states "I'm an actor."
23. The Bullseye Saloon allows patrons and employees who are wearing a button identifying them as an actor to smoke.
24. The Bullseye Saloon provides ashtrays and matches to patrons and employees wearing a button identifying them as an actor.
25. The Bullseye Saloon has permitted every member of the Bullseye Saloon Acting Guild to smoke within the bar.
26. Most of the individuals who have joined the Bullseye Saloon Acting Guild have

smoked as part of improvising the character and role they have selected for “The Unconstitutional Ban.”

27. Not every patron of the Bullseye Saloon has become a member of the Bullseye Saloon Acting Guild.
28. One individual who was not a member of the Bullseye Saloon Acting Guild was asked to leave the bar and not return for one week “because he had not joined the actor’s (sic) guild[;] . . . yet insisted on smoking in the bar.” [Affidavit of Lezlie A. Claire, at ¶ 12]

Steve Hamilton

29. Steve Hamilton (hereinafter “Hamilton” or “Steve Hamilton”) is a disc jockey and karaoke leader at the Bullseye Saloon. He has created a character he calls “Garth.” The costume for this character consists of a cowboy hat, belt buckle, and boots.
30. The performance of Hamilton as “Garth” consists of singing and dancing in several choreographed numbers as a karaoke leader and some unspecified amount of unexplained improvisation.
31. The Defendant has allowed Hamilton to smoke at the Bullseye Saloon since March 2, 2008.
32. It is unclear why and what part of the theatrical performance of the character “Garth” requires smoking.
33. It is also unclear how the theatrical performance of the character “Garth” is any different from the life of the person Steve Hamilton.

Sarah E. Braun

34. Sarah E. Braun (hereinafter "Braun" or "Sarah Braun") is a bartender at the Bullseye Saloon. She has created characters called the "Russian Lady," "Kung Fu Ninja," and "Hippy Chick." The Defendant has not informed the Court of what a theatrical performance of any one of these characters entails.
35. The Bullseye Saloon has allowed Braun to smoke at the Bullseye Saloon since March 2, 2008.
36. It is unclear why and what part of the theatrical performance of the characters "Russian Lady," "Kung Fu Ninja," or "Hippy Chick" require smoking.
37. It is also unclear how the theatrical performances of the characters "Russian Lady," "Kung Fu Ninja," or "Hippy Chick" are any different from the life of the person Sarah Braun.

Lezlie A. Claire

38. Lezlie A. Claire (hereinafter "Claire" or "Leslie Claire") is a bartender at the Bullseye Saloon. She has created characters called the "Cabana Girl" and "Happy Bartender." The Defendant has not informed the Court of what a theatrical performance of either of these characters entails.
39. The Bullseye Saloon has allowed Claire to smoke at the Bullseye Saloon since March 2, 2008.
40. It is unclear why and what part of the theatrical performance of the characters "Cabana Girl" and "Happy Bartender" require smoking.
41. It is also unclear how the theatrical performance of the characters "Cabana Girl" and "Happy Bartender" are any different from the life of the person Lezlie Claire.

Minnesota Department of Health

42. On March 7, 2008, John Linc Stine, Director of the Environmental Health Division at the Minnesota Department of Health (hereinafter "Department"), sent a letter to all licensed bars in Minnesota. This letter informed the bar owners of the Department's position that "putting on 'theater nights' in bars to allow smoking does not fall within the theatrical production" exception. [Affidavit of John Linc Stine, at ¶ 2 (quotation in original)]
43. The Department received two complaints that the Bullseye Saloon was allowing patrons and employees to smoke indoors.
44. John Olson (hereinafter "Olson") is the enforcement coordinator of the Indoor Air Program at the Department. Dale Dorschner (hereinafter "Dorschner") is an environmental health supervisor of the Indoor Air Program at the Department. Both are responsible for overseeing statewide enforcement of the MCIAA as amended.

Inspection

45. On March 27, 2008, from approximately 2:00 p.m. to 2:30 p.m., Olson and Dorschner inspected the Bullseye Saloon for violations of the MCIAA as amended. During the inspection, Olson "observed several ashtrays on the bar in front of barstools and an odor of tobacco smoke in the air." [Olson aff., at ¶ 5] He did not observe anyone smoking. He also "did not observe any actors or actresses taking part in a theatrical performance[,] any set or stage, any area for an audience to watch a play, any costumes, identifiable characters, any recited lines, any audience members, or any other indicia of a legitimate theatrical

production.” [Id. at ¶ 7]

46. The Defendant has not explained why the ashtrays and odor of tobacco smoke were present on March 27, 2008. The Defendant has not indicated that any of the “characters” it has identified, including those created by Hamilton, Braun, or Claire, were using the ashtrays or caused the odor of tobacco smoke. The Defendant has not indicated that the ashtrays were being used or the odor of tobacco smoke was generated in the course of a theatrical performance.
47. Olson and Dorschner prepared an inspection report documenting their March 27, 2008 visit to the Bullseye Saloon. As part of preparing this report, they contacted Ripley to inform him of the Department’s opinion that the Bullseye Saloon was in violation of Minn. Stat. §§ 144.414, subd. 1, and 144.416(a)(2) and (b). Ripley disagreed with the Department’s opinion and intends to continue the Bullseye Saloon’s practice of permitting smoking as part of “The Unconstitutional Ban.”

CONCLUSIONS OF LAW

1. The MCIAA as amended, which bans smoking indoors in bars and restaurants, is valid and unambiguous.
2. Despite the efforts of Defendant, there are no bases upon the present record to find any constitutional infirmity in the MCIAA as amended, either as enacted or applied.
3. The Minnesota Department of Health, through the Minnesota Attorney General, is authorized to secure an injunction, inter alia to enforce the MCIAA as amended.
4. The term “theatrical performance” is not specifically defined in Minn. Stat. §§

144.411 to 144.417.⁴

5. Based upon the existing record, the conduct of individual members of the Bullseye Saloon Acting Guild does not appear to be within the exception to the MCIAA as amended which permits smoking indoors “as part of a theatrical performance.”
6. “The Unconstitutional Ban” does not appear to be a theatrical performance. The single recurring message or content related aspect of the production is that it is permissible to smoke in Defendant’s bar in protest of the law.
7. Defendant has a burden to demonstrate the conduct it is permitting and encouraging fits within the theatrical production exception.
8. The intent underlying “The Unconstitutional Ban” and the Bullseye Saloon Acting Guild is to provide patrons and employees a means to smoke; not a means to conduct theatrical performances.
9. Conduct as presented in the current record, which is primarily asserted as smoking, does not rise to the level of speech protected by the State or Federal constitutions.
10. The statute as written does not require further construction or interpretation by the Court.

ORDER

1. The defendant, Red Eye Enterprises, Inc., d/b/a Bullseye Saloon, its agents, patrons, employees, attorneys and all persons in active concert or participation

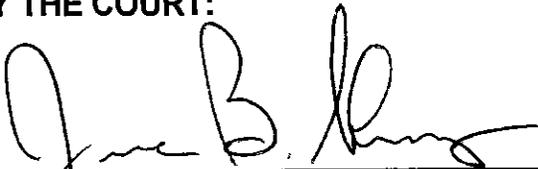
⁴ The Defendant urges the Court to construe this lack of a specific definition as indicative of the Legislature’s intent to make the theatrical production exception as broad as possible. However, the Court recognizes there may have been many reasons underlying the Legislature’s decision to not include a specific definition; one of which may have been a desire to allow the courts develop the definition on a case by case basis.

with them be and hereby are restrained from violation of the MCIAA as amended, Minn. Stat. §§ 144.411 to 144.417, and are thereby prohibited from smoking indoors in violation of the law.

2. Defendant is enjoined from providing smoking equipment, including but not limited to matches, lighters, and ashtrays, in an area where smoking is prohibited under the MCIAA as amended.
3. Defendant is also enjoined from serving any individual in violation of the MCIAA as amended.
4. This Order shall remain in effect until further order of the Court.
5. The attached memorandum is incorporated herein.

Dated: May 14, 2008

BY THE COURT:



Jerome B. Abrams
Judge of District Court

MEMORANDUM

The Bullseye Saloon has invited the close scrutiny of its “acting guild” by staging “performances.” There is no doubt that the MCIAA as amended, which prohibits smoking in bars, applies in this situation. Equally, unless the conduct present in the Bullseye Saloon fits within the exception providing for “smoking by actors and actresses as part of a theatrical performance . . . ,” Minn. Stat. § 144.4167, subd. 9, it is in violation of the smoking ban.

Constitutional Challenges

Freedom of expression is deeply embedded in our democracy. It is woven into the fabric of our lives and has a prominent place in both the First Amendment of the United States Constitution as well as article I, section 3 of the Minnesota Constitution. Yet what constitutes expression protected by our laws is not without limits. As noted by the United States Supreme Court:

Although it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive.

Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 n.5 (1984).

Governmental bans on smoking have repeatedly survived challenges on constitutional grounds. For example, a ban adopted by the City of New York which prohibits smoking in bars, restaurants, and theaters was tested on multiple constitutional bases in C.L.A.S.H. v. City of New York, 315 F. Supp. 2d 461, 467-468 (S.D.N.Y. 2004) (discussing N.Y.C. Admin. Code § 17-503). In the C.L.A.S.H. case, the plaintiff sought a declaratory judgment that the New York City Smoke Free Air Act

(codified at N.Y.C. Admin. Code §§ 17-501 et seq.) and the New York State Clean Indoor Air Act (codified at N.Y. Pub. Health Law §§ 1399-n et seq.) were unconstitutional and invalid due to violation of individual constitutional rights including: the freedoms of speech, association and assembly; the right to travel; equal protection; and the right to enter into contracts. *Id.* at 466-68.

While the present case does not involve, on its face, a broad based attack on the validity of the MCIAA as amended, both filings and arguments made by the Defendant appear to invite a challenge to the law. The Court declines to accept an invitation to broadly review Minn. Stat. §§ 144.411 to 144.417 on constitutional grounds. The sole issue in the present case is whether the activity encouraged by the Bullseye Saloon as part of “The Unconstitutional Ban” fits within the exception allowing smoking as a part of a theatrical performance.

It is worth noting for purposes of the issue before this Court that the court in the C.L.A.S.H. case was confronted with the issue of “whether, and to what extent, smoking in a public indoor establishment, such as a bar or restaurant, constitutes expressive speech that can be protected under the First Amendment.” C.L.A.S.H., 315 F. Supp. 2d at 476. Relevant to the inquiry that must be made in this case, as in all First Amendment cases, is “whether ‘[a]n intent to convey a particularized message⁵ was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.’” Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting Spence v. Washington, 418 U.S. 405, 411 (1974)).

As so far established in the record, the Bullseye Saloon hosts a continuous

⁵ There is some relaxation of the ‘particularized message’ requirement in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 568-570 (1995), but there must still be some message present.

“theatrical performance” which allegedly protests the Minnesota ban on smoking by people who pay \$2 to become actors. After purchasing the opportunity to perform, the actors can embellish their role or otherwise achieve dramatic effect by smoking whatever tobacco product suits their need to be in character. Except for employees, whose characters and connections to “The Unconstitutional Ban” are ill defined, the actors perform in a perpetual run of improvisational performance. There is obviously no script or even an articulated story line. As far as the Court can presently discern, the single common thread in the performance is the desire of the actors to defy the ban by smoking in Defendant’s establishment.

When examples were given in the written materials and argument, little could be found to distinguish the message sought to be conveyed by the actors, and the regular habits or conduct of the actors before the smoking ban. In other words, there is very little, if anything, in the current record to identify as protected speech, and much to observe as unprotected conduct. United States v. O’Brien, 391 U.S. 367, 376 (1968) (stating “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea” cannot be accepted).

Unlike the argument, as made by Defendant, that the State becomes the arbiter of taste or the gatekeeper⁶ of what is a theatrical performance, there remains the need to identify what is being expressed, and thereby protected by the First Amendment. The Defendant’s diffuse production has some trappings of a theatrical performance, yet

⁶ The official title in ancient Rome of the person who held this post, as noted by Defendant, was ‘Arbiter Elegantie’ (the Supreme Judge of Taste). This position last appeared in the reign of Nero (54-68 A.D.). In modern constitutional democracies, such as ours, there is protection for speech under the First Amendment. The Court does not consider the law in question an effort to revive the post of Arbiter Elegante.

it presents on the current record a singular message; that Defendant doesn't like the law that bans indoor smoking. The improvisational performance is limited to a protest of the law. The protest is largely based on the act of smoking in the bar in defiance of the ban.

Smoking is not protected speech. C.L.A.S.H., 315 F. Supp. 2d at 480, cited in Player's, Inc. v. City of New York; 371 F. Supp. 2d 522, 547 (S.D.N.Y 2005); Taverns for Tots, Inc. v. City of Toledo, 341 F. Supp. 2d 844, 854 (N.D. Ohio 2004); Curious Theater Co. v. Colo. Dept. of Public Health and Env't., _____ P.3d _____, _____, File No. 06CA2260, 2008 WL732113, *7 (Colo. App. March 20, 2008). The current position of Defendant as thus far expressed, falls short of the expressive conduct in theatrical performances which are provided constitutional and Minnesota statutory protection. It appears that the principle object of Defendant's "theater nights" is to be smoking for its own sake in violation of the law.

The Court recognizes and embraces the concept that expression in theatrical performances, including smoking, can be found in places other than mainstream theaters. The First Amendment operates equally well in Elko New Market as it does on the stages of the Guthrie Theater in Minneapolis or the Ordway in St. Paul. The misapprehension of the law by Defendant is in the reliance placed upon the appearance of a theatrical performance, not its content. The narrow exception to allow indoor smoking in Minnesota does not inhibit expression of protected speech, nor does the statute grant authority to bar staff and customers an excuse for smoking in the bar.

Curious Theater Co. appears to be close legal authority in its discussion of the constitutional issues raised herein. _____ P.3d _____, 2008 WL732113. Colorado, unlike Minnesota, has no exception for theatrical productions that permit characters to

smoke while performing. Cf. Colo. Rev. Stat. Ann. §§ 25-14-201 et seq. (2006), with Minn. Stat. §§ 144.411 et seq. The court in Curious Theater Co. did conclude that **“smoking by an actor as part of a theatrical production is expressive conduct for purposes of the First Amendment.”**⁷ _____ P.3d _____, _____, 2008 WL732113, *9 (emphasis added). In reaching this result, the court also observed that the theaters challenging the ban listed a number of plays that:

require smoking as critical elements of their performance, including such classics as Edward Albee's Who's Afraid of Virginia Woolf?, Jez Butterworth's Mojo, John Osborne's Look Back in Anger, Julianne Shepherd's Buicks, John Patrick Shanley's Sailor Song, Tennessee Williams's Vieux Carre, Eugene O'Neill's A Moon for the Misbegotten, Harold Pinter's The Caretaker, John Pielmeier's Agnes of God, Nilo Cruz's Anna in the Tropics, and Calder Willingham's The Graduate.

Id. at _____, 2008 WL732113, *11. In each play listed, smoking is an essential element of the character or of the plot. Rare would it be to find any of these performances on stage without faithful adherence to the author's original dramatic work. Precisely what is protected by Colorado courts in theatrical performances, and the requirements of the MCIAA as amended to engage in permitted smoking, is lacking in what is described as the conduct of theater nights at the Bullseye Saloon.

Nothing has been offered to suggest there is a storyline, or even a story, being portrayed on an improvisational basis or otherwise. There is no script, choreography, staging, etc., which resembles anything. The criterion for selection of the cast appears to be people with \$2 and a desire to smoke in the bar. There is not the slightest suggestion that talent or an interest in conveying a message, other than smoking, is sought from any actor.

⁷ Despite this determination, the Curious Theater Co. court did uphold the complete ban on smoking during theatrical performances, finding the law content neutral because it focuses on the adverse health effects of tobacco, not on expression. _____ P.3d _____, _____, 2008 WL732113, *9-*10, *13.

The Court recognizes that at the current stage of this case, what ultimately may be proven by Defendant is unknown. What is known is that irreparable harm does exist from exposure to smoke; and the stated performance by each actor involves smoking. As a consequence, it appears that an exposure to the “acting” involves conduct prohibited by Minn. Stat. § 144.414, subd. 1. Further, the conduct does not lie within the statutory exception present in Minn. Stat. § 144.4167, subd. 9. The Court has closely examined the submissions and the claims being made to constitutional protection for the performances, but finds the claims fail on the record before the Court.

Injunctive Relief

The Defendant admits, and all agree, that the Bullseye Saloon is subject to the MCIAA as amended. See Minn. Stat. § 144.411, et seq. The express terms of the law apply and Defendant has sought recognition of its ‘theater nights’ under an exception.

Case law provides guidance to trial courts under circumstances such as these as to how the relief, in the form of a temporary injunction, should be evaluated. Given the express authority granted to the Minnesota Commissioner of Health to seek an injunction, Minn. Stat. § 144.417, subd. 3, the Court need not address the factors set forth in Dahlberg Bros. v. Ford Motor Co., 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965).

If the injunctive relief being sought “is explicitly authorized by statute, ‘proper exercise of discretion requires the issuance of an injunction if the prerequisites for the remedy have been demonstrated and the injunction would fulfill the legislative purposes behind the statute’s enactment.’” State v. Cross Country Bank, Inc., 703 N.W.2d 562, 572 (Minn. Ct. App. 2005) (quoting Wadena Implement Co. v. Deere & Co., 480 N.W.2d

383, 388-89 (Minn. Ct. App. 1992)).

The facts derived from the supporting affidavits amply demonstrate that Defendant appears likely to violate the MCIAA as amended by its hosting theater nights and presenting “The Unconstitutional Ban.” The circumstances surrounding this performance based upon the available record demonstrate that the law is being violated by smoking indoors, by bar patrons and staff, whether “actors” or not. Further, injunctive relief does fulfill the legislative purpose behind enactment of the statute.

To be clear, the temporary injunction is granted solely as to Count II of the Complaint. Defendant is enjoined from conduct which is in violation of the MCIAA as amended.

Statutory Construction

Much of the argument and briefing urges this Court to make a ruling construing what is meant by the term “theatrical performance” found in subdivision 9 of Minn. Stat. § 144.4167. It is a difficult task since the words themselves have an obvious meaning, which should be given effect. Minn. Stat. § 645.08(1); Amaral v. St. Cloud Hosp., 598 N.W.2d 379, 384 (Minn. 1999). In addition, a standard of construction universally applied is that an absurd or unreasonable result should not be reached in interpreting laws. Am. Family Ins. Group v. Schroedl, 616 N.W.2d 273, 277 (Minn. 2000); Smith v. Barry, 219 Minn. 182, 187, 17 N.W.2d 324, 327 (1944).

There is only a need to interpret a statute which is ambiguous. Am. Family Ins. Group, 616 N.W.2d at 277 (citing Amaral, 598 N.W.2d at 384). If a statute is unambiguous, statutory construction is neither necessary nor permitted. Weston v. McWilliams Ass'n., Inc., 716 N.W.2d 634, 639 (Minn. 2006). The ambiguity, if any, is

caused by an interpretation given to the law by Defendant.

The playbill for “The Unconstitutional Ban,” as placed on the entry door to the Bullseye Saloon, announces “[a] theatrical performance and satire regarding the Minnesota Legislature and the Freedom to Breathe Act.” [Ripley aff., at Ex. A] The run of the performance started Sunday, March 2, 2008, at 11:00 a.m. and is “running daily thereafter from 8:00 a.m. to 2:30 a.m.” [Id.] Patrons are advised to “[n]ote: there will be some cigarette smoking and ashtray use during the performances.” [Id. (emphasis in original)]

The playbill advises that the law “prohibits cigarette smoking in bars” [Id.] It further proclaims:

[h]owever, our legislators made an exception for actors and actresses – allowing them to smoke during theatrical productions. So tonight Bullseye Saloon is putting on just such a theatrical production – and we need actors and actresses.

Come join us, our loyal patrons, in celebrating artistic freedom conferred upon us by our legislature. Join us in our raucous festivity of liberty. There will be dance. There will be drink. And best of all, there will be smoke – indoors!

[Id.]

The Defendant misconstrues, in part, the law as written. They have it correct concerning the prohibition of smoking in bars; however, they advise their patrons that smoking is allowed during “theatrical productions,” which is not correct. The law is specific, clear, and unambiguous: it permits smoking “as part of a theatrical performance” as an exception to the overall ban on smoking. This is not a general invitation for all smokers to become actors. It is a special exception for a part of “theatrical performances.”

The playbill announces that smoking is permitted during theatrical productions. It

is not. The audience cannot smoke. The employees cannot smoke. Those who are involved as 'actors' may not smoke except "as a part of a theatrical performance." Minn. Stat. § 144.4167, subd. 9 (emphasis added). The plain meaning is obvious.

The Bullseye Saloon has gone to elaborate measures to establish a 'theatrical production'⁸ when in fact there is no cognizable 'theatrical performance' taking place. As much as the phrase 'aris gratis artis' (art for art's sake) has meant, it has never given license for purported artistic expression to have as its sole goal an opportunity to be in violation of a health or safety law.⁹

Smoking for the sake of smoking indoors, in violation of the law, does not constitute a theatrical performance based upon the record submitted to the Court. Whether labeled as 'Improvisational,' 'Avant Garde,' or even 'Existentialism,' there is no thread to what has been presented that can be concluded as "part of a theatrical performance" without doing violence to the ordinary meaning of the phrase.

Conclusion

Perhaps it was most succinctly stated by Ralph Waldo Emerson when he wrote in Journals, 1859:

The believing we do something when we do nothing is the first illusion of tobacco.

The act of smoking in bars is against the law as enacted by the Minnesota Legislature.

The act of smoking as a part of a theatrical performance is a narrow exception to that

⁸ Despite subdivision 9 being labeled "Theatrical productions," the bold face headnote preceding the language of subdivision 9 is inserted by the Revisor of Statutes and has no value as an aid to determine legislative intent. In re Dissolution of School Dist. No. 33, 239 Minn. 439, 443-44, 60 N.W.2d 60, 63 (1953). See Minn. Stat. § 3C.08, subd. 3.

⁹ In a case involving a different aspect of the First Amendment, expression of religion, the United States Supreme Court stated: "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." Employment Div. Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 878-879 (1990).

law. The elaborate efforts to ordain actors, create characters, etc., is not what matters. The narrow exception only allows for smoking: 1.) as “a part” of a 2.) “theatrical performance.” What has been submitted to the Court thus far, satisfies neither of the two elements of the exception. Consequently, the conduct is enjoined as provided by Minn. Stat. § 144.417, subd. 3 and the temporary injunction is issued herewith.

JBA