

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

MOAC Mall Holdings, LLC, d/b/a
Mall of America,

Case File No. 27-CV-15-21667
Case Type: Civil Other/Misc.
Judge: Karen A. Janisch

Plaintiff,

vs.

**ORDER DENYING IN PART AND
GRANTING IN PART PLAINTIFF'S
MOTION FOR A TEMPORARY
RESTRAINING ORDER**

Black Lives Matter Minneapolis,
Miski Noor, Michael McDowell, Lena
Gardner, Kandace Montgomery, John
Doe 1, John Doe 2, John Doe 3, and
John Doe 4,

Defendants.

This matter came before Judge Karen A. Janisch on December 21, 2015 for a hearing on Plaintiff MOAC Mall Holdings, LLC's Motion for Temporary Restraining Order.

Susan Gaertner, Esq., and Joy Anderson, Esq., Gray, Plant, Mooty, Mooty & Bennett, P.A., appeared on behalf of Plaintiff MOAC Mall Holdings, LLC, d/b/a Mall of America.

Jordan Kushner, Esq., Andrea Palumbo, Esq., and Steven Appelget, Esq., appeared on behalf of Defendants Miski Noor, Michael McDowell, Lena Gardner, and Kandace Montgomery.

There were no appearances on behalf of named defendant Black Lives Matter Minneapolis or the John Doe 1-4 Defendants.

Based on the Verified Complaint, all the other files, records, and proceedings herein, and the memoranda and arguments of counsel presented to the Court, the Court makes the following:

ORDER:

1. Plaintiff MOAC Mall Holdings, LLC's Motion for a Temporary Restraining Order is GRANTED IN PART and DENIED IN PART.
2. Defendants Michael McDowell, Miski Noor, and Kandace Montgomery are enjoined from engaging in any demonstration on the MOA Premises on December 23, 2015, or thereafter, without the express, written permission from MOA Management. For

purposes of this Order, “MOA Premises” means the enclosed structure housing the commercial, retail, and entertainment complex known as the Mall of America, located at 60 East Broadway, Bloomington, Minnesota, and the attached skyways and parking facility/ramp.

3. All other requests relating to additional terms for a temporary restraining order requested by Plaintiff are DENIED, at this time.
4. This Order was issued pursuant to the motion for a temporary restraining order and the limited record and time for consideration of the motion. Nothing in this Order precludes MOA from seeking the same or similar relief in future motions if supported by the law and a more complete factual record.
5. The attached Memorandum is incorporated as part of the Court’s Order.

DATED: December 22, 2015

BY THE COURT:

Karen A. Janisch
Judge of District Court

MEMORANDUM

The MOA seeks a temporary restraining order (“TRO”) enjoining all four of the individually-named Defendants, the unincorporated association known as “Black Lives Matter Minneapolis,” all of their respective agents, and other persons acting in active concert or participation with any of the defendants, from: (1) engaging in any demonstration on MOA Premises; (2) soliciting and encouraging others to engage in any demonstration on MOA Premises; (2) ordering Defendants and their agents to delete and take down certain materials posted on Facebook, messages on Twitter, and other online messages that solicit and encourage others to demonstrate at the MOA Premises on December 23, 2015; and (4) ordering Defendants and their agents to immediately post a message on the BLM Facebook page and Twitter account

and BLM's text group informing potential demonstrators the event has been cancelled; and (5) ordering Defendants and their agents to immediately post the injunction order on BLM's Facebook page. *Plaintiff's Proposed Order*.

This case presents important issues regarding the rights of a private property owner over the possession and control of its premises and the desire of individuals to engage in protest activities in a highly visible location. However, the specific issues presented to the Court in the current motion for an emergency temporary restraining order ("TRO") are much narrower. A TRO is an extraordinary equitable remedy and a form of temporary injunction. *See* Minn. R. Civ. P. 65.01. As set forth more fully below, the burden is on the moving party. Here, the Mall of America must present to the Court clear evidentiary and legal grounds that establish a temporary restraining order against each of the defendants, and the requested terms of the order, are clearly necessary and appropriate to protect the Mall of America from imminent irreparable harm.

This case presents issues for the Court as to the nature and scope of temporary injunctive relief. The Mall of America requests that the Court order a broad temporary injunction against "defendants" which as identified in the Verified Complaint includes, Black Lives Matter, named individual defendants, and unidentified John Doe defendants 1-4. The Mall of America also requests that the Court issue broad restraints directed to "defendants," their agents, and anyone acting in active concert or participation with the defendants and to order that certain statements be posted on social media sites attributed to Black Lives Matter.

The Verified Complaint identifies Black Lives Matters as a defendant. However, Plaintiff has provided no evidence that Black Lives Matters is a legally cognizable entity capable of being sued as a party in litigation. While such evidence may exist and may eventually be

presented to the Court, without evidence establishing that a named entity is an organization that is a legal entity for purposes of suing or being sued and that service of process can be accomplished to bring the entity within the Court's jurisdiction, the Court does not have a sufficient basis to issue an injunction as to Black Lives Matters or to unidentified persons who may be acting as its agents or in active concert with the Black Lives Matters movement. Moreover, to attribute postings on social media under the moniker of Black Lives Matters to an individual defendant or other individuals similarly requires that Plaintiff produce evidence to establish a clear connection that the individual identified is responsible for the posting or specific conduct. Although these evidentiary requirements present hurdles in the electronic age, the Court can only issue temporary restraining orders if the moving party establishes, through verified pleadings and affidavits, a clear evidentiary and legal basis for the relief requested as to each defendant.

In addressing the availability of the relief requested by the Mall of America, the Court is guided by existing jurisdictional requirements in relation to parties to a civil case, and the Rules of Civil Procedure governing the nature of temporary restraining orders. Temporary restraining orders must be specific as to the terms. The Court must identify the specific persons or legal entities subject to the injunction and the specific acts enjoined. The remedy must be narrowly tailored to the irreparable harm established by the requesting party. The availability of an injunctive remedy, temporary or permanent, must also flow as a form of relief available from the claim asserted in the Verified Complaint. Here, the Mall of America asserts a claim for civil trespass. Accordingly, in order for the Mall of America to be entitled to a temporary restraining order against a defendant, it must establish that defendant has engaged in or is imminently going to engage in actions that constitute a civil trespass, and that the requested injunctive relief is

necessary to preclude the Mall of America from suffering an irreparable harm associated with the trespass by that defendant.

In deciding this motion, the Court is compelled to follow the law as established by prior decisions of the Minnesota Supreme Court, other case law, rules and procedures governing requests for temporary restraining orders. On the record presented, the Court concludes that the Mall of America is likely to prevail under existing case law on its assertion that, as a private property owner, it can limit the conduct permitted on its premises and that persons who violate its directives as to unpermitted conduct on the property are subject to a civil trespass claim. As to three of the individually named defendants, McDowell, Noor and Montgomery, the Mall of America has presented clear evidence and legal support that these individuals intend to engage in a political demonstration at the Mall of America, that such conduct would be in violation of the Mall of America's rights to control its property and persons on its property, and that an injunction prohibiting those individuals from participating in conduct constituting a demonstration on the property of the Mall of America is necessary to prevent an irreparable harm to the Mall of America. For that reason, the Court is issuing a temporary restraining order against these three defendants enjoining them from engaging in demonstrations on the MOA Premises.

The Mall of America has also not, however, sustained its burden in establishing that it is entitled to equitable relief for its trespass claim such that the Court may issue an order compelling actions or enjoining conduct by the individual defendants that occurs away from the physical premises of the Mall of America. A claim of trespass relates to the possessory rights over real property. The Mall of America has not presented clear facts or legal support that the Court may, in relation to a civil trespass claim, enjoin actions or direct actions by parties or others that occur outside of the territorial limits of the real property.

Although the Court issues a temporary restraining order against three identified individual defendants, the Court's decision should not be interpreted as authorizing or permitting others to engage in political demonstration at the Mall of America without the express permission of the Mall of America. The Court's Order is limited to the parties before the Court and a determination of the appropriate temporary injunctive relief at this time and based on the current record before the Court.

I. FACTUAL BACKGROUND.

The facts set forth in this Order relate only to Plaintiff's motion for a temporary restraining order ("TRO") and the facts presented by Plaintiff in support of its motion. The immediate nature of Plaintiff's motion for a TRO did not allow sufficient time or opportunity for presentation of additional evidence by any of the Defendants in the form of affidavits or sworn pleadings. As such, the facts identified by the Court in relation to this Order should not be seen as an ultimate determination of any facts as to claims asserted in Plaintiff's Complaint. Final factual determination cannot be made until the underlying civil claims are fully heard on the merits.

A. The Parties.

Plaintiff MOAC Mall Holdings, LLC, a Delaware limited liability company with its principal place of business in Bloomington, Minnesota (Ver. Compl. ¶ 1). The MOA, located at 60 E. Broadway in Bloomington, is a 4.2 million square foot commercial, retail, and entertainment complex. (Ver. Compl. ¶ 9) The MOA has more than 520 stores, 50 restaurants, a seven-acre amusement park (Nickelodeon Universe, the country's largest indoor theme park), Sealife Aquarium, a House of Comedy, a movie theatre complex, and a wedding chapel. (Ver. Compl. ¶ 9 & Exh 5 at 50). The MOA now draws an estimated 42 million visitors annually.

(Ver. Compl. Exh. 5 at 50). MOA property includes the enclosed mall structure, the parking ramps surrounding the mall building, and the skyways connecting the parking ramps to the mall.

(*Id.*)

Defendant Black Lives Matter Minneapolis (“BLM”) is an unincorporated organization operating in Minneapolis, Minnesota. (Ver. Compl. ¶ 2). Plaintiff characterizes Black Lives Matter Minneapolis as the “Minneapolis-based chapter of an activist movement that campaigns against violence toward people of color, with a particular focus on violence by law enforcement officers and racial injustice in the criminal justice system.”¹ (Plaintiff’s Supporting Mem. at 3).

Plaintiff alleges that the four named individual defendants, Miski Noor (“Noor”), Michael McDowell (“McDowell”), Lena Gardner (“Gardner”), and Kandace Montgomery (“Montgomery”) reside in Minneapolis and have either identified themselves or been identified by others as “leaders” or “organizers” of BLM in various media interviews. (Ver. Compl. ¶¶ 3–6 & Exhs. 1, 3, 8). Plaintiff alleges that, in addition to Noor, McDowell, Gardner and Montgomery, there are four additional leaders of BLM, based on a KARE-11 article indicating

¹ In his November 10, 2015 Order and Memorandum Opinion arising from a BLM demonstration at the MOA on December 20, 2014 (the “2014 BLM/MOA Demonstration”), discussed in more detail below, Chief Judge Peter Cahill noted:

The BLM movement is a decentralized ideological and political movement that seeks to build leadership and power of black people and to dismantle structural racism, particularly what some in the movement perceive as a systemic pattern of anti-black law enforcement violence in the United States. <http://blacklivesmatter.com/> BLM arose in the wake of the 2013 acquittal of George Zimmerman for the fatal shooting of Trayvon Martin in Florida and gained additional national impetus after the August 9, 2014 fatal shooting of Michael Brown by police in Ferguson, Missouri. *Id.*

Order and Memorandum Opinion on Defendants’ Motions to Dismiss and Amended Scheduling Order, at 23, *State v. Kandace Montgomery, Michael McDowell, et al.*, Court File Nos. 27-CR-15-1304, 27-CR-15-1320 (Nov. 10, 2015) (the “*Montgomery/McDowell 2014 MOA/BLM Order*,” a copy of which is attached to the Verified Complaint as Exh. 5); *see also* Ver. Compl., Exh. 8 (copy of KARE-11 news report on Nov. 19, 2015).

BLM has eight leaders. (Ver. Comp., Exh. 8). Those individuals are pseudonymously named as Defendants John Does 1 through 4 because Plaintiff alleges their identities are currently unknown to it. (*Id.* ¶ 7).

B. The “Planned” December 23, 2015 Demonstration at the MOA.

On November 15, 2015, Jamar Clark, a 24-year old black man, was fatally shot in an incident involving two Minneapolis police officers; the circumstances are disputed and state and federal investigations are ongoing. (Ver. Compl., Exhs. 1, 3, 8 (copy of AP story on Dec. 17, 2015); *see generally* <http://www.cnn.com/2015/11/21/us/minneapolis-jamar-clark-police-shooting/index.html>). On December 17, 2015, a posting appeared on a BLM Facebook page announcing that BLM intended to hold a demonstration entitled “#BlackXmas2: #Justice4Jamar” in the east rotunda of the MOA at 1:00 p.m. on Wednesday, December 23, 2015. (Ver. Compl. ¶ 21 & Exh. 7; *see also id.*, Exh. 8 (copy of AP story on Dec. 17, 2015)). This was also announced on BLM’s Twitter account and through a group text option open to any BLM supporter requesting updates about the event. (Ver. Compl. ¶ 21). As of December 18, 2015, the BLM Facebook page indicated that about 4,200 individuals had been invited to the planned demonstration at the MOA, more than 325 had expressed plans to attend, and an additional 530 had expressed interest in attending. (*Id.*, Exh. 8). Three of the named individual defendants, Noor, McDowell, and Montgomery, have indicated, according to media interviews and through the “#BlackXmas2: #Justice4Jamar” Facebook event page, that they plan on attending the demonstration and have encouraged others to do so as well. (*Id.*) No similar information was presented as to defendant Gardner.

MOA’s counsel advised the Court, during the December 21 oral argument, that the MOA first learned of a plan to organize a demonstration at MOA on December 23, 2015 on Thursday,

December 17, 2015. The MOA has a written policy, contained in its Promotional Events Handbook, that “prohibits all forms of protest, demonstration, public debate and speech aimed at organizing political or social groups” at the MOA. (Ver. Compl. ¶ 10).²

On December 18, 2015, the MOA sent a letter to Noor, McDowell, Gardner, and Montgomery, advising them that the MOA objects to such an unauthorized demonstration at the MOA. (Ver. Compl., Exh. 8). In that letter, the MOA advised, in pertinent part, that:

Mall of America is a private commercial retail center, and we prohibit all forms of protest, demonstration, and public debate on our property, including political activity aimed at organizing political or social groups. Any attempt by BLM and its supporters to conduct this unauthorized demonstration is a violation of MOA policies and constitutes an unlawful trespass. No person is permitted to come onto MOA property to participate in a demonstration. All participants will be subject to removal from the property and potential arrest by the City of Bloomington Police Department. MOA’s authority to prohibit such a demonstration was upheld by the Minnesota Supreme Court in *State v. Wicklund, et al.* and reiterated by the Hennepin County District Court in *State of Minnesota v. Kandace Montgomery, et al.*

We request that you immediately communicate on the BLM Facebook event pages that any demonstration or protest event planned for Mall of America property is unauthorized and has been cancelled. This information should also be disseminated to all known participants, so they are aware of the consequences of any attempted unauthorized gathering on Mall of America property.

² The *Montgomery/McDowell 2014 MOA/BLM Order* noted that protests, demonstrations, picketing, handbilling, leafleting, or public speech or debate aimed at organizing political, social, or religious groups at the MOA have always been strictly prohibited at the MOA pursuant to the following provisions in the MOA Promotional Events Handbook:

Mall of America, as a private commercial retail center, prohibits all forms of protest, demonstration, public debate and speech aimed at organizing political or social groups. This includes handbills and leafleting. . . .

Mall of America prohibits political activity on its property, including . . . organizing, handbills or leafleting, debates or protests. . . .

Mall of America prohibits religious activity on its property, including . . . organizing, proselytizing, handbills, or leafleting. . . .

(Ver. Compl. Exh. 5 at 22-23.)

(Ver. Compl., Exh. 8)

A screen shot by the MOA of a BLM Facebook page acknowledged the planned demonstration is not authorized by the MOA, and that the MOA was “making threats to try to shut this event [the planned Dec. 23, 2015 demonstration] down”. (*Id.* ¶ 23 & Exh. 7).

C. Prior Demonstrations at the MOA Associated with BLM Causes.

1. The 2014 MOA Demonstration.

This demonstration planned for December 23, 2015 is not the first demonstration at the MOA associated with BLM causes. The first demonstration at the MOA occurred on December 20, 2014, the last Saturday before Christmas, and one of the MOA’s busiest shopping days of the year. (Ver. Compl. ¶¶ 11, 13). Defendants McDowell and Montgomery were present at and involved in the 2014 MOA Demonstration. *See Montgomery/McDowell 2014 MOA/BLM Order.*

About a week before the 2014 MOA Demonstration, the MOA’s management team sent a letter to McDowell, and a couple other individuals it believed were involved in planning that demonstration in relation to BLM causes, similar in content to the MOA’s December 18, 2015 letter discussed above. (*Compare* Ver. Compl., Exh. 4 (Dec. 12, 2014 letter from MOA Management) *with* Ver. Compl., Exh. 8 (Dec. 18, 2015 letter from MOA Management)). Specifically, the December 12, 2014 letter advised McDowell (and the others) that the MOA:

- (1) is a private commercial retail center;
- (2) prohibits “all forms of protest, demonstration and public debate,” “including political activity aimed at organizing political or social groups”; and
- (3) has consistently enforced that policy over the years.

(Ver. Compl., Exh. 4). That letter further advised that any attempt to conduct an unauthorized protest at the MOA would subject demonstrators to removal from the MOA and potential arrest by the Bloomington Police Department. (*Id.*) The BLM organizers were offered an alternative

protest site - public property immediately adjacent to the MOA at the southeast corner of 24th Avenue and Lindau Lane, the site of the former Alpha Business Center lot. (*Id.*) Although MOA management refused to grant permission for the BLM demonstration, the letter did not inform McDowell or the other recipients that neither they nor others interested in the BLM cause were barred from coming to the MOA. (*Id.*)

Protesters involved in the December 2014 demonstration rejected the MOA's offer for the alternate protest site on public property and proceeded with an unauthorized demonstration in the MOA's east rotunda on December 20 2014, attended by a crowd of approximately 1,000 to 1,500 people. (Ver. Compl. ¶ 13). Montgomery and McDowell both attended the 2014 BLM/MOA Demonstration. (*Id.*; see also *Montgomery/McDowell 2014 MOA/BLM Order*). After thirty minutes of demonstration-related speeches, chanting, signing, sign-holding, and symbolic "die-ins," during which MOA Management had broadcast and posted three warnings to participants to disperse, MOA security guards and Bloomington Police Department officers at the scene ordered all members of the public in the MOA's east end to leave the MOA, began ushering everyone out the MOA's east side, and warned that anyone refusing to leave the MOA would be subject to arrest for trespassing. (*Montgomery/McDowell 2014 MOA/BLM Order* at 34-39, 114-15; see also Ver. Compl. ¶ 14). A total of twenty-two individuals were arrested at the MOA on December 20, 2014 and charged with trespass. (*Montgomery/McDowell 2014 MOA/BLM Order* at 115). None of the four individual defendants named in this action were among those twenty-two individuals. (*Id.*)

2. **The July 2015 MOA Demonstration Associated with BLM Causes.**

On July 25, 2015, the MOA reports that more than forty individuals conducted another unauthorized demonstration at the MOA associated with BLM causes. (Ver. Compl. ¶ 19 &

Exh. 6) Neither the allegations made by the MOA in its Verified Complaint in this action nor the posting from the BLM Facebook page included as an exhibit to the Verified Complaint indicate if Noor, McDowell, Gardner, or Montgomery were in attendance at the July 2015 demonstration or played any role in organizing or planning that demonstration.

D. Procedural Issues as to Service and the Current Motion.

At the time of the December 21 hearing, only two of the individually-named defendants, Noor and Montgomery, had been served with the Summons and Verified Complaint and Notice of Motion and Motion, Memorandum, supporting documents and Proposed Order. After the hearing, the MOA filed an affidavit of personal service of the Summons and Verified Complaint on McDowell, the third of the individually-named defendants. As of the time of filing of this Order, the Court does not have any information that personal service has been made on Gardner, the fourth of the individually-named defendants. MOA counsel Gaertner conceded during the hearing that there had been no attempted service of process on Defendant Black Lives Matters Minneapolis. Because there is no evidence presented to the Court that BLM is an organization that has legal status to sue or be sued, it is unclear to the Court from the information provided by MOA in support of its motion, how MOA would anticipate serving BLM and under which provision of Rule 4.03 of the Minnesota Rules of Civil Procedure it would be able to provide effective service of process upon BLM.

This matter was filed after close of the Court's regular business hours on Friday, December 18, 2015. It was assigned to a judicial officer on Monday morning, December 21, 2015. A hearing was scheduled as soon as practicable on the Court's calendar. Because of the timing of the motion, each of the individually-named defendants was able to appear through counsel, but there was not sufficient time for the Court to receive written memoranda from

counsel for the individual defendants or for the individual defendants to prepare and submit sworn affidavits or other evidence in relation to the motion. The individual defendants, through counsel, however, presented arguments in opposition to Plaintiff's motion, including citations to applicable case law, which the Court has reviewed in its consideration of this motion.

In the appearance on behalf of the individual defendants who had not been personally served at the time of the hearing (McDowell and Gardner), defense counsel argued the Court lacked personal jurisdiction over unserved individual defendants because Minnesota law provides the Court obtains personal jurisdiction over individual defendants only after they have been served with process in accordance with Rules 3.01 and 4.03 of the Minnesota Rules of Civil Procedure.

II. JURISDICTIONAL ISSUES AS TO BLM AND DEFENDANT GARDNER.

Injunctive relief is a form of equitable relief that is available, under appropriate circumstance, as a remedy to a civil legal claim. In this case, Mall of America in its Verified Complaint alleges a claim for civil trespass. In order to obtain any form of relief, the party seeking relief must establish that the Court has jurisdiction over each of the defendants. Under Minnesota law, a civil action is commenced against each defendant with service of the Summons and Complaint as provided by the court rules. Minn. R. Civ. P. 3.01. As to an individual, service is accomplished through personal service upon the individual pursuant to Minn. R. Civ. P. 4.03(a). Service upon a partnership or association which is subject to suit under a common name must be made by delivering a copy to a member or the managing agent of the partnership or association. Minn. R. Civ. P. 4.03(b).

At the hearing, counsel for Defendant Gardner argued that MOA's motion for a temporary restraining order cannot issue because she has not been personally served and an

action has not been commenced against her.³ The MOA argues the Court has authority to issue a TRO against unserved defendants under Minn. R. 65.01 as an ex parte TRO issued without notice, presumably subject to future commencement of the action against the defendant through personal service. Minnesota Rule of Civil Procedure 65.01 provides the Court may grant a temporary restraining order without written or oral notice to the adverse party or that party's attorney only if:

- (1) It clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party can be heard in opposition; *and*
- (2) The applicant's attorney states to the court *in writing* the efforts, if any, which have been made to give notice or the reasons supporting the claim that notice should not be required.

The does not agree with Plaintiff's contention that Minn. R. Civ. P. 65.01 provides grounds for the Court to exercise jurisdiction over a party against whom the action has not been commenced by service of the Summons and Complaint. MOA has not identified any case law that provides the Court has jurisdiction to issue a temporary restraining order against a defendant who has not been served with the underlying lawsuit. The language in Minn. R. Civ. P. 65.01 permits the party, under limited circumstances, to request a TRO issue on an ex parte and without notice. The Rule does not state that it is an exception to this Court's jurisdiction over parties only in relation to actions that have been commenced pursuant to Minn. R. Civ. P. 3.01, and the Court declines to interpret Rule 65.01 as creating a new rule for commencement of an action and the jurisdiction of the court in cases where a temporary restraining order is sought.

As to the individual defendants who have been served, Defendants Noor, Montgomery and McDowell, this action has been commenced against them, the Court has thus obtained

³ This argument was also asserted as to Defendant McDowell, who has subsequently been personally served by Plaintiff.

personal jurisdiction over them, and notice to counsel prior to the hearing was provided. As to these defendants, the Court will address the merits of the requested temporary restraining order under the *Dahlberg* factors, below.

As to Gardner, the unserved individual defendant, the Court concludes Plaintiff has not commenced an action Gardner and the Court's does not have personal jurisdiction over her to issue a temporary restraining order against her. *See Nagle v. Lee*, 807 F.2d 435, 437-38 (5th Cir. 1987) (defendant that was never served and which made no general appearance never became party to action); *see generally* Restatement (Second) of Judgments, § 34(1) (1982) ("A person who is named as a party to an action and subjected to the jurisdiction of the court is a party to the action").⁴

As to BLM, MOA has not met its burden of establishing that the Court has jurisdiction over BLM as a legal entity subject to suit and as a defendant in this case. As Plaintiff bears the burden of proof for temporary injunctive relief, part of that burden necessarily includes establishing a record that would support the viability of directing the requested relief to the identified party as an individual or legal entity subject to being sued and, thereby, subject to the

⁴ Even assuming the Court could address relief against Defendant Gardner without initiation of an action against her pursuant to the provisions of Minn. R. Civ. P. 65.01, MOA has not met its evidentiary burden of establishing specific facts that it will suffer irreparable injury from Defendant Gardner and MOA has not produced in writing to the Court the efforts to give notice to Defendant Gardner or the reason why no notice should be required. The sole evidence in the record is an allegation in the Verified Complaint that Gardner resides in Minneapolis and was identified in a KARE 11 article as being a "leader" in BLM. (*Ver. Compl. ¶ 5 and Exh. 8*). The factual basis for this assertion by a KARE 11 reporter is not identified. Even if the Court overlooks to hearsay issues as to the admissibility of this evidence, the factual record does not "clearly" support that Defendant Gardner has participated in any prior demonstrations, that she intends to participate in an upcoming demonstration or that she is actively involved in any specific actions related to the anticipated demonstration. The evidence in the record is insufficient to establish that Defendant Gardner is intending to commit a civil trespass at MOA by engaging in a demonstration against the request by MOA that she refrain from engaging in demonstrations at the MOA.

Court's jurisdiction. The Verified Complaint asserts that BLM is an “unincorporated organization.” (Ver. Compl. ¶ 2). MOA has not established by clear evidence that BLM as so named is an entity that is capable of suing or being sued as a party in litigation. Moreover, there is no evidence that MOA has commenced this lawsuit against BLM as a party through service of the summons and complaint or that it will be able to do so on or before December 23, 2015.

Based on the record before the Court, the Court cannot conclude that BLM is an entity subject to suit. Without evidence establishing the basis for the underlying claim of trespass against BLM, temporary injunctive relief through a TRO is not appropriate.

MOA request that the Court issue a temporary restraining order directed to “Defendants, their agents and *all persons in active concert or participation with them[.]*” (Plaintiff’s Proposed Order ¶¶ a and b). MOA argues the enjoining of conduct by unnamed persons acting in concert with defendants is permitted by the language of Minn. R. Civ. P. 65.04 which provides:

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not in reference to the complaint or other documents, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Defendants argue the Court lacks jurisdiction to issue a general injunction directed at unidentified persons who are not parties to this case. None of the parties cited any applicable case law in support of their opposing positions on this issue.

Given the limited time the Court had to consider the multitude of issues presented in the current motion and the record before the Court, the Court concludes that Minn. R. Civ. P. 65.04 does not act to extend the power of the Court to direct a temporary restraining order generally to

unidentified individuals. Although protests and actions within shopping malls or other spaces have been an issue of legal disputes and requests for injunctions for decades, the MOA has not provided the Court with any legal authority or specific prior court decision in which a court has entered a broad temporary restraining order enjoining the future acts of unidentified individuals or the public at large. The MOA has also not identified any specific individuals who they claim are acting in active concert or participation with the named individual defendants. While the language of Minn. R. Civ. P. 65.04 may allow MOA (under the appropriate specific facts and circumstances) to move to enforce the temporary restraining order issued as to McDowell, Montgomery and Noor against another person in “active concert,” this issue is not currently before the Court and would be highly dependent upon the facts supporting such claim for enforcement. By this Order, the Court concludes that it is not appropriate at this time to issue a temporary restraining order that expressly references unidentified persons, as the Court does not currently have personal jurisdiction over unidentified and unserved individuals and there is no pending action to enforce the injunction against any unidentified individuals.

III. STANDARD OF REVIEW FOR TRO.

A Temporary Restraining Order (“TRO”) is a form of a temporary injunction. Minn. R. Civ. P. 65.01. A TRO is an extraordinary equitable remedy, *Miller v. Foley*, 317 N.W.2d 710, 712 (Minn. 1982), whose “purpose is to preserve the status quo until adjudication of the case on its merits” and thus “should be granted only when it is clear that the rights of a party will be irreparably injured before a trial on the merits is held.” *Id.*; *see also Prolife Minnesota v. Minnesota Pro-Life Committee*, 632 N.W.2d 748, 753 (Minn. App. 2001). The party asking for injunctive relief carries the burden of proving that the irreparable harm alleged warrants a TRO. *Id.* at 712-13.

In addressing a motion for temporary injunctive relief, the Court must apply the five-factor test of *Dahlberg Bros., Inc. v. Ford Motor Co.*, 272 Minn. 264, 137 N.W.2d 314, 321-22 (Minn. 1965) which include:

- (1) The nature and background of the relationship between the parties before the dispute;
- (2) The harm to be suffered by the moving party if the TRO is denied compared to that inflicted on the non-moving party if the TRO is granted;
- (3) The moving party's likelihood of success on the merits;
- (4) The public policy interests involved; and
- (5) The administrative burdens imposed on the court in supervising and enforcing the order.

The Court is not required to address all five factors in reaching its decision, but the likelihood of success on the merits is primary. *See Minneapolis Federation of Teachers, AFL-CIO, Local 59 v. Minneapolis Public Schools, Special School District. No. 1*, 512 N.W.2d 107, 110 (Minn. Ct. App. 1994).

A. The relationship of the parties before the dispute

Plaintiff MOA is the owner of private property used as a shopping mall and entertainment venue. MOA has voiced its desire that its property not be used for political organization and demonstration. This has been communicated publically through its policies and communicated in writing to McDowell, Montgomery and Noor. The three individually named defendants have voiced intent to engage in political demonstration on Wednesday, December 23, 2015.

Defendants McDowell and Montgomery participated in a prior demonstration at MOA in December 2014.

B. Plaintiff's Likelihood of Success on the Merits

As the party seeking the TRO, Plaintiff bears the burden of establishing the likelihood of success on the merits. *See Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 165 (Minn. Ct. App. 1993). Of the *Dahlberg* factors, the Court believes this factor is of the greatest weight and importance in the Court's decision.

In the Verified Complaint, Plaintiff pleaded a single cause of action for civil trespass. To prevail on that claim, Plaintiff must establish that it has the "right to possession" of the property at issue – the enclosed mall and attached skyways and parking structure – and that there has been a "wrongful and unlawful entry upon such possession by the defendant." *Johnson v. Paynesville Farmers Union Co-op Oil Co.*, 817 N.W.2d 693, 701 (Minn. 2012). The gist of the tort of trespass is the intentional interference with another's right of exclusive possession. *Id.* at 701, 705. So, when a defendant enters upon a plaintiff's land without permission, or remains on a plaintiff's land after permission has been revoked, the defendant, by disturbing the plaintiff's right to exclusively possess its land, commits the tort of trespass. *Id.* at 702, 704.

The MOA is open to the public, extending generally to all what is referred to as a "limited license" as public invitees to enter the mall for a wide variety of purposes, including shopping, window shopping, dining at the mall's numerous restaurants, and partaking of entertainment at many of the mall's attractions, like the cinema, Nickelodeon Universe, or the Sea Life Aquarium. However, the Minnesota Supreme Court has held that the implied license a business owner provides to the public to enter the owner's private property for "ordinary business intercourse" with the owner does not afford members of the public, as invitees, a license to "engage in extraordinary activity hostile to the business of the owner." *State v. Quinnell*, 277 Minn. 63, 151 N.W.2d 598, 602 (1967) (affirming trespass conviction for participating in

demonstration at privately-owned stockyard protesting stockyard's marketing methods that had completely shut down stockyard operations). That principle was expressly recognized to apply to the MOA in *State v. Wicklund*, 589 N.W.2d 793, 802 (Minn. 1999), in which the Court concluded that the license the MOA extends to the public is a limited license only to come to the mall to spend money while shopping, dining, or otherwise being entertained and is revocable at the will of MOA's management. *Accord Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972).

1. Likelihood of Success on Merits of Trespass Intended by McDowell, Montgomery, and Noor.

Here, it is clear in the record before the Court that the Plaintiff owns the MOA and, together with the retail, commercial and other entertainment tenants to which it has leased space, has the right to possession of the MOA. Although Plaintiff does not seek to bar the individual defendants or any other person from generally entering or being present at the MOA it contends it has the right to revoke their implied license to be on MOA property if they seek to engage in political demonstrations while at the MOA prohibited by its written policy and to have them arrested for trespass if they refuse to leave when ordered to do so. In opposition, Defendants' counsel urges the Court to hold that the constitutional rights to free expression guaranteed to the individual defendants by the United States and Minnesota Constitutions expressly affords them the right to engage in expressive conduct at the MOA, even if the MOA's owners are desirous of banning all such expressive conduct, regardless of the specific content or message, because they view such conduct as disruptive to the experience they wish their guests to enjoy while at the mall and thus as interfering with their right to decide how their property will be used.

Binding precedents of the United States Supreme Court and the Minnesota Supreme Court hold that owners and management of privately-owned shopping malls, like the MOA, are not obligated to make their malls available to political demonstrators as venues on which to

engage in expressive speech and conduct but are instead free to prohibit political or social group protesters from engaging in free speech, other expressive conduct, assembly, and petitioning the government on the premises of privately-owned shopping malls, even those as large, complex, and as heavily-trafficked and visited as the MOA. This Court is bound by existing precedent established by the Minnesota Supreme Court and United States Supreme Court on this issue.

For example, in *Lloyd Corp. v. Tanner*, the U.S. Supreme Court was confronted with anti-draft and anti-Vietnam War protestors engaged in distributing handbills within a privately-owned, enclosed retail mall. The mall had a policy prohibiting handbilling for any purpose and denied permission to all groups seeking to use the mall for political purposes. The Court rejected the argument that a private shopping mall was the equivalent of a company-owned town and declined to extend the rationale of *Logan Valley Plaza*⁵ to encompass a right by members of the public to engage in political protesting unrelated to any purpose for which a shopping mall was built and being used. The Court expressly rejected the protesters' argument that because the mall was open to the public, the First Amendment prohibited the mall's private owners from enforcing their policy against handbilling at the mall for any purpose or cause, 407 U.S. at 564, observing that property does not lose "its private character merely because the public is generally invited to shop there." *Id.* at 569. The Court emphasized that the invitation to the public to come onto the mall was an invitation to do business with the mall's tenants, not an "open-ended

⁵ In *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 316-19 (1968), the Supreme Court held that a privately-owned shopping mall which served as the "community business block" and which was freely accessible to and open to the public was functionally equivalent to the business block in the privately-owned town in *Marsh* such that peaceful picketing by union members targeting a non-union store in the mall was protected by the First Amendment. In *Marsh v. Alabama*, 326 U.S. 501 (1946), the Supreme Court had extended constitutional free speech rights to the distribution of religious literature, over the objection of the town's management, in the business block of a company-owned town in which the company had taken over all municipal functions.

invitation to the public to use the [mall] for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve.” *Id.*

Four years later, in *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976), the Supreme Court noted that the rationale of *Logan Valley Plaza* did not survive *Lloyd Corp. v. Tanner*, observing that “the ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley*.” In *Hudgens*, the Court rejected a union’s claim of unfair labor practice when the owner of a privately-owned enclosed shopping mall threatened to arrest and charge demonstrating employees with criminal trespass for peaceful picketing in front of their employer’s store in the mall to advertise a strike.

State v. Wicklund, 589 N.W.2d 793 (Minn. 1999), is the definitive statement of the law in Minnesota regarding the interplay, under the Minnesota Constitution, between claims of right to engage in constitutionally-protected free speech and expressive activities on privately-owned property and the rights of private property owners to control activities on their property. *Wicklund* arose from an “anti-fur” protest in a courtyard area in front of Macy’s inside the MOA. The *Wicklund* protesters carried placards illustrating cruel treatment of animals in the fur trade, distributed leaflets urging a boycott of Macy’s based on its selling of fur products, and also sought to engage passing shoppers in conversation over the ethics of producing and selling fur products. Although the protest was peaceful and non-confrontational, MOA security guards warned the protesters several times that they were on private property and would be arrested if they continued to protest. Four protesters who refused to leave the mall were arrested and charged with misdemeanor criminal trespass.

The *Wicklund* defendants sought dismissal of the trespass charges, contending the free speech provisions of the United States and Minnesota Constitutions afforded them a claim of

right to conduct their protest at the MOA. The trial court concluded the MOA was public property. It based that conclusion on two lines of reasoning: (i) the general invitation the MOA extends to the public to come to the MOA for shopping and entertainment; and (ii) the nature and extent of the public financing involved in the MOA's development. Consequently, the trial court ruled that the protesters' expressive conduct was protected by Minnesota's constitutional free speech guarantees.

The Minnesota Court of Appeals reversed and, on further appeal, the Supreme Court affirmed the Court of Appeals. Adopting the U.S. Supreme Court's First Amendment analysis in *Lloyd Corp. v. Tanner* and *Hudgens* and applying that analysis to the Minnesota Constitution's free speech guarantees, the Minnesota Supreme Court declined to construe free speech rights more broadly under the Minnesota Constitution than the U.S. Supreme Court has done under the First Amendment. 589 N.W.2d at 798-801, 803.

The *Wicklund* Court held that the MOA was private property, not a public forum, on which there is no constitutionally-protected right under either the federal or Minnesota state constitutions to engage in peaceful, non-confrontational, speech-related protests over the objections of the MOA's owners or managers. 589 N.W.2d 797. The Court reasoned that private property is not converted to public property simply because it is openly accessible to the public. *Id.* at 798. The Court also concluded that the license extended by the MOA to members of the public to come onto mall property is a limited license only to come to the mall to spend money while shopping, dining, or otherwise being entertained and is revocable at will by the MOA's management. *Id.* at 802. *See also State v. Scholberg*, 412 N.W.2d 339, 340, 344 (Minn. Ct. App. 1987) (reversing trial court dismissal of trespass charges against anti-abortion activists attempting to distribute anti-abortion literature at Meadowbrook Women's Clinic who had

refused demand to leave pursuant to clinic's policy prohibiting all protest activity and distribution of unauthorized literature, holding defendants had no right to demonstrate on clinic's private property over clinic's objections).

In the wake of *Lloyd Corp. v. Tanner, Hudgens, Wicklund, Scholberg, and Quinnell*, the established precedent is that owners of privately-held shopping malls, such as the MOA, may exercise their rights of possession and control over their private property to exclude from their private property political demonstrators, like the individual defendants here, who wish to engage in speech and expressive conduct on private property. Plaintiff has thus met its burden of showing it is likely to succeed on the merits of its trespass claim against McDowell, Noor and Montgomery if they engage in conduct that constitutes unauthorized political demonstration at the Mall. MOA has further established that these three individuals have manifested an intention to engage in this conduct on December 23, 2105 at the MOA despite being informed by MOA that such conduct is prohibited in its space.

2. Likelihood of Success on Merits of Trespass against McDowell, Montgomery and Noor based on Organizing and/or Conduct Encouraging Others to Protest.

MOA also seeks injunctive relief in relation to conduct by McDowell, Montgomery, Noor and possibly other persons associated with BLM for organizing, planning and communicating to others about coming to the MOA to engage in a political demonstration on December 23, 2015. The only claim pleaded in the Verified Complaint from which temporary or permanent injunctive relief could flow is a claim for civil trespass. By its nature this claim is tied to the real property interests of the MOA as owner of the property. The conduct complained of in relation to McDowell, Montgomery and Noor as "organizing" or "planning" or "encouraging" the December 23, 2015 demonstration necessarily occurs *off* MOA property.

MOA has not provided the Court with any legal support that conduct occurring off its property regarding communications or planning by individuals to potentially engage in conduct that, if disallowed by the property owner, would be a trespass, supports a claim for civil trespass or is subject in a civil trespass claim or an injunction enjoining such off-premise planning or communication. Indeed, some of the communication or “encouragement” may be in statements to the media or in other forums where the individual defendant has a constitutionally protected right to free speech. The Courts review of applicable case law in the limited time available to the Court also did not uncover any legal authority that would allow a claim of civil trespass, or injunctive relief for a civil trespass to include conduct and speech occurring off of the real property. As a result, MOA has not established a likelihood of success on the merits of a civil trespass claim against the individual defendants based on their conduct off of MOA grounds and has not established a clear basis for a temporary restraining order prohibiting such off premises conduct.

The Court reaches a similar result in relation to MOA’s request for a temporary restraining order compelling the individual defendants to delete or take down posts on BLM’s Facebook page and Twitter account. Not only is there insufficient evidence presented on the record that any of the individual defendants have control over these social media sites, these sites operate outside of the physical premises of MOA. Plaintiff has not established a clear factual or legal basis that it will prevail in establishing these actions on social media constitute a civil trespass.

C. The relative harm to the parties if an injunction is granted or denied.

For temporary injunctive relief, Plaintiff is required to show that she faces “irreparable harm and has no adequate remedy at law.” *See Metropolitan Sports Facilities Com’n v. Minn.*

Twins Partnership, 638 N.W.2d 214, 221-22 (Minn. Ct. App. 2002). Temporary injunctions should only be granted “in the exceptional circumstance where a party will be irreparably injured before a trial on the merits can be held.” *Webb Publ’g Co. v. Fosshage*, 426 N.W.2d 445, 448 (Minn. Ct. App. 1988).

MOA, through its Verified Complaint, contends the December 2014 Demonstration at MOA caused irreparable harm in several ways to the MOA, its tenants, and their employees. First, MOA provided the December 2014 demonstration interfered with its right to control activities on its property and with its right and ability to conduct business on that property. (Ver. Compl. ¶ 15). Second, the MOA contends its retailers and other tenants experienced decreased sales and foot traffic (Ver. Compl. ¶ 16), based on statistics showing the parking garage entry rate for visiting vehicles was down approximately fifteen percent (15%) from the average of the previous five years for the last Saturday before Christmas, which it asserts translating to a decrease of approximately 24,000 guests. (*Id.*) Retailers at the MOA reported double-digit decreases in sales on the date of the December 2014 demonstration and one of the family attractions reported its attendance had decreased by fifty percent. (*Id.*) Third, the MOA contends the partial shutdown also resulted in lost goodwill with its patrons. (*Id.* ¶¶ 16-17). Finally, the MOA contends that many of the 15,000 people employed by the MOA and its tenants were adversely affected by their inability to earn commissions, tips, or bonuses due to the reduced number of guests and the two and one-half hours during which many of the stores in the MOA’s east end were shut down during the December 2014 demonstration. (*Id.* ¶ 18; *see also Montgomery/McDowell 2014 MOA/BLM Order*, at 35, 39).

For purposes of issuance of a temporary restraining order directed to McDowell, Noor and Montgomery, the evidence in the record is sufficient to establish that MOA faces imminent

irreparable harm from conduct by these defendants to engage in political demonstration despite the notice from MOA that this conduct is prohibited on its property. Although the issuance of the limited temporary restraining order directed to those three individual defendants may not result in a complete abatement of the irreparable harm, the fact that the remedy may not be complete, does not preclude the Court from granting the partial relief requested by MOA as to these three named defendants.

As to the three individual defendants the relative harm from issuing the temporary restraining order prohibiting them from demonstrating at MOA Premises is minimal. As set forth above, the individual defendants do not have a constitutional or other protected right to demonstrate at MOA against the express request by MOA that they not do so.

D. The Public Policy Interests Involved.

MOA and the defendants can each articulate public policy reasons for or against issuance of the TRO. As the application of existing case law and rules direct the Court's analysis in this case, public policy considerations are not determinative.

E. The Administrative Burden, if any, to the court in Supervising and Enforcing the Order.

The temporary injunctive relief granted by the Court as to Defendants Montgomery, McDowell and Noor identifies the individuals to whom it applies and describes in reasonable detail the acts prohibited by the Court's Order. As to this narrow relief, the administrative burden in supervising and enforcing the order is minimal and does not weigh against issuance of the temporary restraining order.

As to MOA's request for additional temporary injunctive relief including prohibition on conduct occurring outside of MOA's premises, and requesting that the Court order these individuals to make certain statements in postings on social media associated with BLM's, the

limited factual record before the Court suggests that supervision and enforcement of the order would likely create a significant administrative burden. For example, the record is devoid of any facts establishing that the three named defendants are responsible for directing postings on social media associated with BLM or have access or a capability to carry out any such order if given by the Court.

Similarly, issuance of a broad injunction generally prohibiting unidentified persons from demonstrating at the MOA would present significant administrative burdens to the Court in relation to supervising and enforcing such a broad temporary restraining order. For example, because Rule 65.01 provides that a temporary restraining order issued without prior notice may be challenged by motion by the “adverse party.” Given the timing of the need to schedule and hold hearing for any “adverse party” seeking dissolution of the temporary restraining order, the administrative burden on the Court could be significant. The enforcement of such a broad order through contempt or other procedures as to non-parties and would also potentially involve hundreds of unidentified persons and be a significant administrative burden. The amount of time and effort to enforce such a broad injunction against unnamed parties would likely be more administratively burdensome than hearing specific claims for civil trespass brought against specific individuals based upon specific acts. This factor weighs against issuance of a broad temporary restraining order encompassing actions by unidentified individuals.

CONCLUSION

Temporary injunctive relief is an exceptional remedy and Plaintiff bears the significant burden in establishing the immediate necessity for the temporary injunctive relief it seeks. Plaintiff has established that the five *Dahlberg* factors favor issuance of a TRO as to three of the named individual defendants, Miski Noor, Michael McDowell, and Kandace Montgomery to

enjoin them engaging in a demonstration at the Mall of America on December 23, 2015 or thereafter. For all the reasons discussed above, Plaintiff has failed to carry its burden of proof to obtain a temporary restraining order against the unincorporated entity known as Black Lives Matter Minneapolis which has not, in any event, been served with process, with respect to defendants Lena Gardner of any of the John Doe individual defendants, or other unnamed persons.

K.A.J.