STATE OF MICHIGAN

COURT OF CLAIMS

MARC SLIS, and 906 VAPOR,

Plaintiffs,

v

STATE OF MICHIGAN, and DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.
_____/

OPINION AND ORDER

Case No. 19-000152-MZ

Hon. Cynthia Diane Stephens

Pending before the Court is plaintiffs' motion for preliminary injunction. On the record and briefing before this Court, the motion is DENIED without prejudice at this time. However, all parties will have the opportunity for additional briefing, testimony, and argument at a hearing to be held on Tuesday, October 8, 2019 at 2:00 p.m.

I. BACKGROUND

Plaintiff seeks to enjoin enforcement of emergency rules promulgated by the Department of Health and Human Services (DHHS). The rules followed a declaration of emergency by DHHS in August 2019 in which DHHS declared that this state was facing "a vaping crisis among youth" that necessitated the promulgation of emergency rules. The declaration cited a 900% increase in "e-cigarette"[1] use among middle school and high school students from 2011-2015. In

[1] The parties' briefing uses the terms "e-cigarette" and "vaping" interchangeably.

addition, DHHS cited increases in e-cigarette usage in students from 2017-2018, including a recent uptick in this state's counties—ranging from 30% to 118% increases—in students who used e-cigarettes in the last month alone.

After documenting the increase in usage of vaping products by youth, the declaration noted various health problems associated with e-cigarette or vaping usage, including that:

> The nicotine in e-cigarettes can rewire the brain to crave more of the substance and create a nicotine addiction. Resulting brain changes may have long-lasting effects on attention, learning, and memory. Research has also shown that youth who use e- cigarettes are significantly more likely to start smoking combustible cigarettes despite the well-known, documented, and often deadly health consequences such as lung cancer and heart disease.
>
> In December of 2018, the United States Surgeon General Jerome Adams officially declared e-cigarette use among youth in the United States an epidemic. Dr. Adams issued an advisory on e-cigarette use among youth, noting that action must be promptly taken to protect the health of young people. Dr. Adams was joined by the Secretary of the U.S. Department of Health & Human Services, Alex Azar, who called the historic increase in e-cigarette use by youth, which has outpaced any other substance, an "unprecedented challenge." [Footnotes omitted.]

One of the primary catalysts of the crisis, noted the declaration, was the role of flavored e-cigarettes or vaping products. The declaration noted that youth e-cigarette use was overwhelmingly linked to flavored e-cigarettes, with 81% of youth reporting that the first e-cigarette they used had some sort of flavor. In addition, the reported cited a study noting that nearly two thirds (2/3) of middle school and high school students reported using a flavored tobacco product in the past month.

On or about September 19, 2019, DHHS filed emergency rules entitled "Protection of Youth from Nicotine Product Addiction Emergency Rules" with the Secretary of State. The emergency rules ban the sale of flavored vapor products and restrict advertising of the same. In particular, Rule 2(1)(a) declares, within 14 days after the rules are filed, that a retailer or reseller

shall not "Sell, offer for sale, give, transport, or otherwise distribute, nor possess with intent to sell, give, or otherwise distribute a flavored nicotine vapor product." The types of flavors subject to the ban are described as those possessing a "characterizing flavor," such as:

> a taste or aroma, *other than the taste or aroma of tobacco*, imparted either prior to or during consumption of a tobacco product, vapor product, or alternative nicotine product, or any byproduct produced thereof. This includes, but is not limited to, tastes or aromas relating to food or drink of any sort; menthol; mint; wintergreen; fruit; chocolate; vanilla; honey; candy; cocoa; dessert; alcoholic beverages; herbs; or spices. [Emphasis added.]

The rules gave retailers 14 days to comply with the new mandates, and that 14-day deadline has now expired.

II. PROCEDURAL MATTERS

This case was initially filed in Houghton Circuit Court. The Circuit Court judge denied the prayer for a Temporary Restraining Order, noting a lack of service on defendants. The case was transferred to the Court of Claims on September 27, 2019. A renewed prayer for a Temporary Restraining Order was denied by this court on September 30, 2019. A hearing was set for October 1, 2019 on the request for a Preliminary Injunction. In the interim, a new case, *A Clean Cigarette Corporation v Governor Gretchen Whitmer*, Docket No. 19-000154-MZ, was filed on October 1 and also seeks to enjoin enforcement of the rules at issue in this case. The plaintiff in Docket No. 19-154 seeks a temporary restraining order and injunctive relief. The complaint alleges that the emergency rules were issued in violation of the Administrative Proceeding Act and that no emergency justifying the rules exists. Similar arguments have been presented in the briefs in this case. In order to allow full briefing and argument on the common issues regarding the issuance of the emergency rules, the court orders the two cases consolidated for the purposes of a full hearing on the respective motions for preliminary injunction. In

addition, on October 1, 2019, the Court proceeded to take proofs on the issue of irreparable harm in Docket No. 19-152. Having taken proofs in this matter, the Court finds that the plaintiff in Docket No. 19-152 has not met the burden of demonstrating an irreparable harm for which there is no adequate remedy at law, and the Court denies relief at this time. However, all parties will have the opportunity for additional briefing, testimony, and argument beginning Tuesday October 8, 2019, at 2:00 p.m.

III. ANALYSIS

"The grant or denial of a preliminary injunction is within the sound discretion of the trial court . . . ." *Davis v Detroit Fin Review Team*, 296 Mich App 568, 612; 821 NW2d 896 (2012). Injunctive relief is an extraordinary remedy that should only issue when justice requires. *Id*. at 613-614. In determining whether to grant this extraordinary remedy, the Court should consider four factors:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Id*. at 613 (citation and quotation marks omitted).]

At the hearing held on October 1, 2019, plaintiffs offered the testimony of plaintiff Marc Slis on factor (2), irreparable harm. Argument and limited briefing were presented on the other factors. For reasons stated below, the Court is denying a preliminary injunction in this case based upon plaintiffs' failure to persuade the Court that they will sufferer an immediate threat of irreparable harm for which no adequate remedy at law exists.

To that end, regardless of proofs on the other three factors plaintiffs must establish the "indispensable requirement" of showing irreparable harm. *Michigan AFSCME Council 25 v*

Woodhaven-Brownstown Sch Dist, 293 Mich App 143, 149; 809 NW2d 444 (2011). This factor is satisfied by "a particularized showing of irreparable harm," not by the "mere apprehension of future injury[.]" *Id*. (citation and quotation marks omitted). If the party seeking injunctive relief has available to it another legal remedy, the assertion of irreparable harm is not compelling. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008). A litigant's speculative assertions cannot demonstrate the type of harm necessary for the issuance of injunctive relief. *Id*.

Plaintiffs first claim irreparable harm in the alleged loss of goodwill to their business ventures. In *GC Timmis & Co. v. Guardian Alarm Co*, 468 Mich 416, 438; 662 NW2d 710, 722 (2003) the Supreme Court cited Black's Law Dictionary (5th ed), and accepted the definition of goodwill as "an intangible asset defined as '[t]he favor which the management of a business wins from the public' and '[t]he fixed and favorable consideration of customers arising from established and well-conducted business.' " Loss of goodwill can support a finding of irreparable harm. Indeed, courts have recognized that "[t]he loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute." *Basicomputer Corp v Scott*, 973 F2d 507, 512 (1992). Whether "the loss of customer goodwill amounts to irreparable harm often depends on the significance of the loss to the plaintiff's overall economic well-being." *Apex Tool Group, LLC v Wessels*, 119 F Supp 3d 599 (2015) (citation and quotation marks omitted). Here, Slis testified that he had extensive books and records detailing his sales and the products sold. He testified that the overwhelming majority of his sales were for the now-banned products. He averred without challenge that his customers would not purchase the tobacco-flavored vaping products or the flavored non-tobacco infused products. Thus, he asserted he would have to shutter his business as of midnight October 1.

This stark economic reality, however, is not a result of loss of goodwill. Goodwill is a comparable advantage over others in a same or similar business or market. No one in Michigan can sell the banned products, and there was no proof that others outside of Michigan would be comparably advantaged to Slis. As a result, plaintiffs' claim of irreparable harm from a loss of goodwill is not supported by the proofs at this time.

Plaintiffs' testimony on economic injury, though un-rebutted, also fails to establish irreparable harm for which there is no adequate remedy at law. Defendants assert that the testimony of Slis regarding potential sales drops is speculative. This Court disagrees. A seasoned businessman, Slis testified about the trends in sales, the products sold and those languishing in his inventory without contradiction or inconsistency. While it is true that that testimony was based upon a forecast of future events, that forecast was based upon a lengthy history. However, it is because Slis has a long history and multiple historical economic records that his claim for economic injury fails to meet the injunctive standard. To that end, he can calculate his damages with adequate certainty, and no argument was made that he had no legal remedies to recoup non-speculative losses.

At the hearing, counsel argued that Slis' own health, and inferentially the health of others, would be compromised irreparably if the flavored tobacco products are banned for sale in Michigan. Significant diminution in health status has been recognized as an irreparable harm. *Int'l Union, United Auto, Aerospace and Agr Implement Workers of America, UAW, and Local 6000 v State*, 194 Mich App 489, 509; 491 NW2d 855 (1992). However, Slis, a continuous user of tobacco-flavored vaping products admitted, when directly asked if the ban would send him back to combustible cigarette usage, "I do not know." Thus, in addition to the absence of proofs

on the extent and nature of any health detriment occasioned by the ban, the proofs as to the substantial likelihood of the harm are lacking.

As a final note on this point, plaintiffs argue that the ban effectuated by the emergency rules will require them to destroy approximately 80% of their inventory or suffer criminal prosecution. This court's review of the ban does not support this assertion. The products cannot be maintained for sale. Thus, retailers who store the banned products during the pendency of this litigation are not substantially likely to be subject to criminal prosecution. Transportation of these items out of state to other retailers for sale in those states is also not criminal conduct under the emergency rules. Thus, as written, the order does not subject Slis to criminal prosecution for either storing his inventory or transporting it to such places where it can be legally sold.

IV. ORDER

IT IS HEREBY ORDERED that the motion for preliminary injunction is DENIED without prejudice at this time, as specified herein.

IT IS HEREBY FURTHER ORDERED that this matter is consolidated with the matter pending in Docket No. 19-000154-MZ, and that the consolidated cases are scheduled for a full hearing on the respective motions for preliminary injunction. A hearing on the motions shall commence on **Tuesday, October 8, 2019, at 2:00 p.m., in Courtroom B of the Michigan Court of Appeals, 3020 West Grand Boulevard, 14th Floor, Detroit, MI 48202.**

IT IS HEREBY FURTHER ORDERED that briefing in advance of the hearing is due by October 5, 2019, at 5:00 p.m. Witness lists shall be filed with the Court by 12:00 noon on October 7, 2019.

This is not a final order that resolves the last pending claim or closes the case.

October 2, 2019

Cynthia Diane Stephens
Judge, Court of Claims