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TRANSCRIPTION OF A VIDEO RECORDED

HEARING AT THE MICHIGAN COURT OF CLAIMS

CASE NO. 19-000152MZ

MARC SLIS v STATE OF MICHIGAN

and with reference to

Case No. 19-000154MZ

HELD TUESDAY, OCTOBER 1, 2019

BEFORE HON. CYNTHIA DIANE STEPHENS

1 ATTORNEYS SPEAKING ON VIDEO:

2

3 KEVIN M. BLAIR P76927

4 DOUGLAS MAINS P75351

5 Appearing on behalf of Marc Slis

6

7

8 JOSEPH E. POTCHEN P49501

9 Appearing on behalf of Defendant

10

11 AARON L. DAVIS P77406

12 Appearing on behalf of A Clean Cigarette Corp

13

14

15

16 WITNESSES:

17 MARC SLIS

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1 Tuesday, October 1, 2019

2 About 2:59 PM.

3 THE COURT: This is Case 19-152 and I
4 look up, thought I had a case caption right in
5 front of me, but I don't, so let me -- technology
6 is wonderful except when it's not.

7 Okay, you're going to have to hand me
8 that. I've got everything else, but I can't get
9 that open. Thank you very much.

10 This is Marc Slis and 906 Vapor versus
11 State of Michigan and Department of Health and
12 Human Services. Thank you.

13 Counsel, would you state your
14 appearances for the record.

15 MR. BLAIR: Good afternoon, your Honor.
16 Kevin Blair on behalf of Plaintiffs Marc Slis and
17 906 Vapor. With me at counsel table is Mr. Doug
18 Mains and Mr. Marc Slis.

19 THE COURT: Thank you.

20 MR. POTCHEN: Good afternoon, your
21 Honor. Joseph Potchen on behalf of the State of
22 Michigan and Department of Health & Human
23 Services and with me at counsel table is
24 Dr. Joneigh Khaldun, chief medical director for
25 the State of Michigan.

1 THE COURT: Okay, this is a case in
2 which the Plaintiff has filed suit seeking to
3 enjoin the Department of Health & Human Services
4 and the State of Michigan from implementing a
5 certain emergency order regarding the sale,
6 distribution and intent to sell and distribute
7 certain kinds of vaporized e-cigarettes.

8 The case was originally filed in a
9 local Circuit Court. The motion for temporary
10 restraining order was filed. It was initially
11 denied.

12 The case was transferred to this court
13 whereon this court declined to grant temporary
14 restraining order, but scheduled a fairly
15 immediate -- I think we can say that -- fairly
16 immediate hearing on the preliminary injunction
17 request.

18 This is the date and time set for a
19 hearing on that preliminary injunction request.
20 The Court would note that in the interim a second
21 case was filed and that case has as its title A
22 Clean Cigarette Corporation versus Governor
23 Gretchen Whitmer.

24 The parties in that case were notified
25 of the hearing of this case. It was initially

1 assigned to one of my colleagues. Based upon our
2 court rules it was then assigned to me because it
3 was out of the same emergency rule and we
4 apprised them of this hearing date. They are not
5 as of this point participants, they are merely
6 aware, but I would allow counsel for A Clean
7 Cigarette Corporation to stand and identify
8 themselves.

9 MR. DAVIS: Good afternoon, your Honor,
10 Aaron Davis and Shaina Reed on behalf of A Clean
11 Cigarette Corporation.

12 THE COURT: Thank you.

13 MS. REED: Good afternoon, your Honor.

14 THE COURT: Has the State of Michigan
15 even been served with that Complaint to your
16 knowledge, sir?

17 MR. POTCHEN: This is the first time
18 hearing of it, your Honor.

19 THE COURT: I thought it might be,
20 okay. In any case, my clerk was kind enough to
21 contact counsel and ask them if there were any
22 witnesses whom they anticipated presenting at
23 this hearing, understanding that it's pretty
24 short notice, but the request for temporary
25 restraining order indicates an immediacy that

1 would tell me the parties were ready for short
2 order.

3 So we received only one name from
4 either the Plaintiff or the Defendant and that
5 would be the individual Defendant [sic] Mr. Marc
6 Slis, is that correct?

7 MR. BLAIR: Your Honor, I know that's
8 true for Plaintiffs. We have identified one
9 witness. I received at least an e-mail copy of a
10 witness list by Defendants that had two names on
11 it.

12 THE COURT: Okay, I guess I didn't get
13 --

14 MR. POTCHEN: That's correct. In
15 addition to Dr. Khaldun we may or may not call a
16 Molly Macotat (sp) who is also -- she's a public
17 health consultant as a witness depending on how
18 things are going to go.

19 THE COURT: If you were to give me an
20 offer of proof as to what subject Mr. Slis would
21 be giving testimony on, what would that be?

22 MR. BLAIR: Your Honor, primarily
23 Mr. Slis will help explain and elaborate on his
24 affidavit about the irreparable harm. That is
25 the primary scope of his testimony.

1 THE COURT: Okay. And, counsel, the
2 two persons that your client would wish to call
3 are going to testify primarily about the efficacy
4 of the order, is that correct?

5 MR. POTCHEN: The development of the --
6 the initiation of the rules, the rationale behind
7 seeking the creation of the administrative rules
8 due to the epidemic of the youth vaping and
9 that's it.

10 So why we initiated the rules and how
11 the rules relate to the epidemic.

12 THE COURT: Why but not how?

13 MR. POTCHEN: Excuse me?

14 THE COURT: Are you going to testify as
15 relates to compliance with the APA?

16 MR. POTCHEN: Yes, yeah, those are the
17 elements; I'm sorry, I was not being clear.

18 THE COURT: All right.

19 MR. BLAIR: Your Honor, if I could
20 briefly be heard on that?

21 THE COURT: On what, on what they said
22 their offer of proof was?

23 MR. BLAIR: Yes.

24 THE COURT: Sure, but I don't know
25 quite why yet.

1 MR. BLAIR: Well, I wanted to address
2 now -- and we don't need to decide it now, but we
3 will object to any testimony that goes beyond
4 what is the rule. The administrative law is
5 limited to the reasoning that is explained in the
6 rule itself and not post hoc rationalizations.

7 So we would lodge that objection. If
8 your Honor wants to take testimony over that
9 objection, you know --

10 THE COURT: I pretty much can, yeah, I
11 know.

12 MR. BLAIR: Yes.

13 THE COURT: All right, so what I was
14 about to explain to you before you shared that is
15 that we do know that there is a second case
16 involving -- in which the allegations in a
17 generalized way are irreparable harm of course as
18 related to that client, but they also relate to
19 the compliance or lack therewith to the APA and
20 the efficacy of the emergency order.

21 I don't think we need to hear that
22 twice and I'm pretty sure that they're going to
23 have -- we're going to have consistent witnesses
24 and the parties may in fact wish to present
25 witnesses on that issue that are in addition.

1 To that end what I am going to hear
2 today is about irreparable harm. It is my intent
3 to consolidate the two cases for the purposes of
4 reviewing the -- what I refer to Factors 1, 3 and
5 4 of the requirements for injunctive relief and
6 for the people here who are not lawyers and you
7 wonder -- you don't even know, my system is 1 is
8 the likelihood that the party who seeks an
9 injunction will prevail on its merits.

10 Two is the danger that the party
11 seeking the injunction will suffer irreparable
12 harm. Three is the risk that the party seeking
13 the injunction would be harmed more by the
14 absence of an injunction than the opposing party
15 would be by granting of the relief.

16 And four is the harm to the public
17 interest if the injunction is issued.

18 The Court today is going to hear about
19 two, because the irreparable harm issue is unique
20 to every party who claims such. Because I know
21 that the State of Michigan has not been served
22 and because I believe that even the party who
23 first brought this case might have one or two
24 more paragraphs they want to share, the Court
25 would potentially set a hearing on A, the claim

1 of irreparable harm on the part of A Clean
2 Cigarette and the issues relative to the APA and
3 issuance of the emergency order as they relate to
4 Factors 1, 3 and 4 on Tuesday, October -- I think
5 -- I don't know what day that is -- what is it,
6 the 8th?

7 Okay, I'm going to go find a calendar
8 since you can't, but on Tuesday at 11 o'clock at
9 the Cadillac Center Building in Detroit. I do
10 not know which courtroom, they will let me know
11 when we get there.

12 Is there a reason why that date would
13 be particularly onerous for the Plaintiff in this
14 case?

15 MR. BLAIR: Your Honor, without any
16 opportunity to think about it, I can't think of
17 anything off the top of my head, no.

18 THE COURT: Okay, how about for the
19 State of Michigan.

20 MR. POTCHEN: We will be available
21 then, your Honor.

22 THE COURT: All right. And finally on
23 behalf of the now non-party, but soon to be
24 party?

25 MR. DAVIS: Thank you, your Honor. I

1 believe looking at my client, I believe that's
2 fine, your Honor. Thank you.

3 THE COURT: Therefore, counsel, why
4 don't you begin. You can make your arguments on
5 the other points if you want to or you can make
6 it once unlike a cow with cud and just focus
7 instead today on the irreparable harm, not
8 waiving anything else and we'll be able to move
9 forward from that.

10 MR. BLAIR: Yes, your Honor.

11 THE COURT: Thank you, sir, and after
12 you've made your argument and clearly your
13 colleague will respond, the witness may be sworn
14 and we can take testimony, unless the parties
15 otherwise agree as relates to a more detailed
16 offer of proof.

17 MR. BLAIR: Thank you, your Honor.
18 Good afternoon, your Honor, and thank you again
19 for making arrangements to hear this so quickly.

20 May I inquire, did you have an
21 opportunity to receive and review our reply brief
22 that was filed at about noon today?

23 THE COURT: Oh, no, not at noon, no.

24 MR. BLAIR: Well, I didn't want to
25 repeat myself if you had read it, but I will just

1 hit the high points then and we filed it and sent
2 a courtesy copy to your clerk as well I believe
3 in accordance with your order yesterday.

4 I have a paper copy if I can hand that
5 up.

6 THE COURT: Let's see if I can get an
7 electronic copy. Once again, it may refuse to
8 let me open it. I can in fact open it, yes, sir.
9 Do you have a copy in your hand yet, sir.

10 MR. POTCHEN: No, I do not.

11 MR. BLAIR: Let the record reflect I'm
12 going to give opposing counsel one of our two
13 copies here and we can live with this one.

14 THE COURT: Okay, as I look at it,
15 since -- one, two, three, four -- counsel, it
16 would appear that you're going to be talking
17 about those items that are addressed on Pages --
18 on Page 6 and about three lines of Page 7.

19 MR. BLAIR: Yes.

20 THE COURT: Okay. Yes, sir.

21 MR. BLAIR: Your Honor, I want to start
22 with just addressing that this case is not a
23 referendum on whether it's a good idea to ban
24 flavored nicotine vapor products. Some may think
25 that that's a good idea to ban those products.

1 Some think it's a terrible idea.

2 The Courts don't make those sort of
3 policy decisions. The real question here is
4 whether the rules are valid. Plaintiffs are
5 seeking a declaratory judgment that these rules
6 are invalid. My personal views about vaping are
7 largely irrelevant. Opposing counsel's views
8 about vaping are largely irrelevant, even the
9 witnesses' personal views about vaping are
10 largely irrelevant.

11 The real question is whether they are
12 valid. I've had several family and friends reach
13 out and ask, "Well, how could you help vaping
14 companies? What are you doing?"

15 And I tell them my personal views have
16 nothing to do with it. I have lost friends and
17 family to tobacco-related illnesses, but that's
18 beside the issue.

19 The issue in this case is that it is
20 critically important that we insist that agencies
21 follow proper procedures when they issue
22 regulations. That's regardless of the subject
23 matter, that's regardless of the underlying
24 policy objectives.

25 I explained to those friends and family

1 that it's not because I love vaping, it's
2 critically important that we make sure that
3 agencies are following the proper procedures.

4 I've always been interested in
5 administrative law, it's somewhat of a specialty
6 of mine, and that means sometimes I wind up
7 challenging regulations that may be popular or
8 may seem well intentioned, but no matter how well
9 intentioned the rule may be, agencies need to
10 follow the proper procedures to exercise that
11 power to regulate.

12 The legal analysis to determine whether
13 these emergency rules are valid is not a sliding
14 scale that allows for more margin of error
15 depending on how popular the underlying policy
16 objectives are.

17 Here I think that Defendants -- the
18 opening words of their brief cotton candy, and
19 that are pages and pages of policy arguments
20 before there are only three paragraphs addressing
21 the merits speaks volumes about how they're
22 trying to change how the Court is thinking about
23 this case.

24 Again, Plaintiffs are challenging the
25 validity of the rules and this is not a debate

1 about whether vaping is healthy of whether it's a
2 good idea to ban flavored vaps. These policy
3 arguments are largely a red herring. They are
4 relevant, if at all, as only a sub-issue within
5 the element of the public interest prong of the
6 preliminary injunction analysis.

7 THE COURT: And, indeed, that's
8 probably all very true and we're focusing our
9 inquiry today on whether or not your client can
10 demonstrate irreparable harm.

11 THE COURT: Yes, your Honor. I was
12 almost done anyway, but the only reason I gave
13 that brief intro is because you mentioned you
14 hadn't read it and that I could make arguments --

15 THE COURT: And then I focused on which
16 Page --

17 MR. BLAIR: Yep.

18 THE COURT: -- in that argument --

19 MR. BLAIR: Gotcha.

20 THE COURT: -- addressed irreparable
21 harm which was Page 6.

22 MR. BLAIR: So I think we've outlined
23 in our brief that we have a very strong
24 likelihood of success and the public policy
25 arguments are a red herring that should not

1 distract the Court from the only real issue here,
2 whether the rules are valid. Thank you.

3 THE COURT: Okay, I'm confused. You
4 don't want to make any argument regarding the
5 irreparable harm prong prior to taking testimony?

6 MR. BLAIR: Your Honor, we've addressed
7 it in the briefs and we're ready to present
8 witness testimony on the irreparable harm.

9 THE COURT: Okay, I'll consider that a
10 waiver of the opportunity for an opening.

11 Did you wish to say anything prior to
12 hearing testimony or would you like to wait until
13 afterwards, solely on the issue of irreparable
14 harm.

15 MR. POTCHEN: Yeah.

16 THE COURT: Although you too get to
17 make your for-the-good-of-the-world argument.

18 MR. POTCHEN: I'm going to focus on
19 what the Court would like us to focus on.

20 THE COURT: Thank you, sir.

21 MR. POTCHEN: The scope of the rules is
22 much narrower when we're talking about
23 irreparable harm than what Plaintiff wants you to
24 believe. First, not all vaping products are
25 prohibited from sale or distribution.

1 The Plaintiff can still sell,
2 transport, distribute flavorless and
3 tobacco-flavored nicotine products and they can
4 sell, transport and distribute flavored vaping
5 products that don't contain nicotine. So to the
6 extent that they're claiming irreparable harm
7 because they have to shut down their business,
8 that actually isn't true.

9 The scope of the rules again is much
10 narrower. It is the candy and fruit-flavored
11 vaping products with nicotine that are the health
12 concerns. It's the hook that DHHS and the health
13 officials are raising the alarm about. That is
14 the crisis we're concerned about.

15 And, again, as to irreparable harm,
16 Plaintiff is not required to destroy or get rid
17 of all these flavored nicotine products.
18 Plaintiff can store them as long as he doesn't
19 sell them. There's no limit on the amounts for
20 his personal use and there's no limits on storage
21 as long as it's not intended for sale during the
22 time the emergency rules are in place, which is
23 six months.

24 Again, to the extent somehow this court
25 found these rules to be invalid, Plaintiff can

1 seek monetary damages and virtually all the harm
2 they point to is economic. They know the amount
3 of their product. Plaintiff has been in business
4 for a number of years. He knows the sales
5 volumes before and after the ban and he can
6 fairly easily determine what the impact of the
7 ban would be.

8 As the loss of good will, they claim
9 that's irreparable harm. The rules apply to all
10 Michigan retailers and those online retailers who
11 intend to deliver flavored nicotine products to
12 in-state residents.

13 No one Michigan retailer or online
14 retailer can gain an advantage over the
15 Plaintiff, it applies with equal force and it
16 doesn't discriminate.

17 Therefore, your Honor, we believe that
18 Plaintiff cannot establish irreparable harm.

19 THE COURT: Call your first -- your
20 witness please, sir.

21 MR. MAINS: Yes, at this time, your
22 Honor, we would call Marc Slis to the stand.

23 MARC SLIS,
24 having first been duly sworn, was examined and
25 testified on his oath as follows:

1 THE COURT: I think we have the
2 spelling of your name, but let's make sure.

3 THE WITNESS: First name is Marc,
4 M-a-r-c, last name Slis, S-l-i-s.

5 THE COURT: You may proceed, sir.

6 MR. MAINS: Thank you, your Honor.

7 DIRECT EXAMINATION

8 BY MR. MAINS:

9 Q. Mr. Slis, where do you currently live?

10 A. Hancock, Michigan.

11 Q. And is that where you're originally from?

12 A. I was born in Detroit and raised in Livonia, a
13 suburb of Detroit.

14 Q. So how did you end up in the Hancock area?

15 A. I visited there in 1998 for a wedding, fell in
16 love with the place and two years later I moved
17 there with my wife and my son to attend Michigan
18 Tech University.

19 Q. And what did you study while you were at Michigan
20 Tech?

21 A. I originally enrolled in chemical engineering was
22 a precursor to genetic engineering, but I changed
23 to geological engineering and in my senior year
24 to straight geology in order to work in the oil
25 industry.

1 Q. After graduation did you work in the oil
2 industry?

3 A. I did, I worked as a marine seismic data process
4 and geophysicist.

5 Q. And in layman's terms what exactly does that
6 mean?

7 A. I would say geophysicist is concerned with taking
8 the navigation of the fishing data and seismic
9 data and processing it into a three-dimensional
10 cube for the oil industry or oil companies to
11 utilize to find oil.

12 Q. And about how long did you do that for?

13 A. I think it was about 20 years.

14 Q. And what did you do after that?

15 A. I opened a -- started a geophysical consulting
16 firm.

17 Q. So your background is in geology, but you're
18 involved in the vapor industry now. How did that
19 come to be?

20 A. I was walking downtown Houghton, noticed there
21 was a new business and just opened the door and
22 poked my head in and asked what they were
23 selling.

24 Q. And what was the response?

25 A. The kid behind the counter said they were selling

1 **electronic cigarettes and I asked what that was.**

2 Q. And you went in and what did they tell you?

3 A. **And he explained electronic cigarettes, that they**
4 **were a smoking cessation device, gave me a**
5 **demonstration, took about 20 minutes.**

6 Q. So did you purchase anything that day?

7 A. **Yes, I purchased some electronic cigarettes.**

8 Q. And why did you do that?

9 A. **It was just another attempt at quitting after 30**
10 **years of trying to quit.**

11 Q. So you had been trying to quit smoking for 30
12 years?

13 A. **Thirty years.**

14 Q. Had you tried other methods to stop before
15 vaping?

16 A. **Everything I could find in this country and**
17 **abroad. Like I said, I spent a lot of time**
18 **working abroad.**

19 Q. Can you give us a couple of examples of what
20 other methods you tried?

21 A. **Hypnosis a few times, Chantix, the patches, I**
22 **think there were two different brands of patches.**
23 **I tried cold turkey, cutting down, chewing gum,**
24 **carrot sticks.**

25 MR. POTCHEN: Your Honor, to the extent

1 we're going beyond the scope of this hearing and
2 efforts Plaintiff may have made to stop --
3 quitting smoking I think is irrelevant and I
4 object to further questioning down this line. I
5 think we can get directly to the issue of
6 irreparable harm, but I'll let --

7 MR. BLAIR: Your Honor, may I respond?

8 THE COURT: Yes.

9 MR. BLAIR: One aspect of the
10 irreparable harm is that there are individuals
11 including Mr. Slis who would be irreparably
12 harmed if they do not have access to the flavored
13 nicotine vapor products.

14 It's all relevant and we're not going
15 to spend too much time on it, but I think it's
16 relevant in the context.

17 THE COURT: He can testify as to his
18 irreparable harm.

19 MR. BLAIR: Yes.

20 THE COURT: Not other people's.

21 MR. BLAIR: Yeah, I was imprecise with
22 my language, excuse me.

23 MR. POTCHEN: And, again, to the extent
24 that he's claiming that these products helped
25 him, the emergency rules don't bar him from

1 personal use of these products.

2 THE COURT: Again, I said he could
3 testify as to his irreparable harm.

4 MR. POTCHEN: Thank you.

5 MR. MAINS: Thank you, your Honor.
6 I'll try to expedite this.

7 BY MR. MAINS:

8 Q. So were any of those methods that you tried
9 successful?

10 **A. No, none of them were.**

11 Q. But when you tried vaping was that successful for
12 you?

13 **A. Yes, it was.**

14 Q. And when you initially went into this store to
15 see what was seeing on, what was the first flavor
16 you tried?

17 **A. Tobacco.**

18 Q. And how did that work for you?

19 **A. It really didn't. I tried, but it didn't even
20 taste like a cigarette and it didn't taste good.**

21 Q. So did you go back to the store after that?

22 **A. I went back as soon as I could and tried some
23 flavors.**

24 Q. And just, if you can recall, do you remember what
25 flavors you tried specifically?

- 1 **A. I think one was yogurt, one was a drink flavor**
2 **like a cherry cola, one is a cereal I think**
3 **Fruity Pebbles and one was a mixture of fruits.**
- 4 Q. And did you find those to be more palatable than
5 the tobacco-flavored?
- 6 **A. Yeah, I took all flavors with me that day.**
- 7 Q. Now, if tobacco had been your only choice of
8 vapor product do you believe that you would be
9 tobacco free still?
- 10 **A. No, I wouldn't be.**
- 11 Q. And with flavored products, how long has it been
12 since you've had a combustible cigarette?
- 13 **A. Five and a half years.**
- 14 Q. Now, the shop you mentioned that you went into,
15 that was 906 Vapor, correct?
- 16 **A. Correct.**
- 17 Q. And you eventually purchased that store, correct?
- 18 **A. I did after about a year and a half of being a**
19 **customer.**
- 20 Q. So, again, your background is in geology. Why
21 would you purchase a vaping store?
- 22 **A. The opportunity arose both for myself and the**
23 **previous owner, but after a year and a half of**
24 **being a customer I wanted to give something back**
25 **to the industry as well that helped me save my**

1 **life.**

2 Q. So at this point how many customers does the
3 store have at any given time?

4 A. **It fluctuates, but probably somewhere between 200
5 and just under 500.**

6 Q. And when you say it fluctuates, what causes that
7 fluctuation?

8 A. **Well, our customers transition in and transition
9 out. I don't think I have any of my original
10 customers -- maybe a couple, but they tend to use
11 it to quit smoking and then they quit vaping.**

12 And at some point they come in and give
13 back all the things they bought to give away to
14 other people and go on their way. That's the
15 second best day with my customers.

16 Q. So of the customers that you have about how many
17 of them use flavored vaping products on a regular
18 basis?

19 A. **95 percent.**

20 Q. So there's a small percentage that use
21 tobacco-flavored or non-flavored nicotine vaping
22 products?

23 A. **Correct.**

24 Q. So if you had to estimate, about what percentage
25 of your sales are vapor liquid?

1 **A. About 90 percent, a little bit more.**

2 Q. And of that liquid that you sell, about what
3 percentage is flavored versus unflavored or
4 tobacco-flavored?

5 **A. About 95 percent are flavored.**

6 Q. So when did you first learn of Governor Whitmer's
7 emergency rules?

8 **A. It was about 1 o'clock in the morning I read a
9 Washington Post article.**

10 Q. And since that time what has the attitude been
11 like around your store?

12 THE COURT: Pardon me?

13 MR. MAINS: Sorry, your Honor?

14 THE COURT: I don't know what that
15 means, an attitude around the store?

16 BY MR. MAINS:

17 Q. What has been the mood around the store?

18 MR. MAINS: I'm sorry, your Honor.

19 MR. POTCHEN: I was going to object to
20 that to the extent does not get to any
21 irreparable harm.

22 THE COURT: I'm going to have to
23 sustain that.

24 MR. MAINS: Fair enough, your Honor.

25 BY MR. MAINS:

1 Q. Mr. Slis, we'll get right to the point. What
2 happens at midnight tonight if the rules go into
3 effect?

4 **A. I close my business and probably have to file for
5 bankruptcy.**

6 Q. Can your business survive just selling
7 non-flavored or tobacco-flavored vapor products?

8 **A. No, it definitely can't.**

9 Q. Do you work full time at the store?

10 **A. Yes, more than full time.**

11 Q. Is it the full source of your livelihood?

12 **A. It is.**

13 Q. Do you have any employees at the store?

14 **A. I have one employee, the 19-year-old kid that
15 helps me to save my life that first day I poked
16 my head in and he's my employee now.**

17 Q. And what happens to that employee at midnight
18 tonight?

19 **A. I'd have to let him go tonight.**

20 Q. Mr. Slis, since the announcement of the rules
21 have customers been stocking up?

22 **A. Those that can afford it. A lot of my customers
23 can't afford it, but those that can have tried to
24 stock up with what they can afford.**

25 MR. MAINS: That's all the questions I

1 have at this point, your Honor.

2 THE COURT: Your witness, sir.

3 CROSS-EXAMINATION

4 BY MR. POTCHEN:

5 Q. Good afternoon, Mr. Slis.

6 A. **Good afternoon.**

7 Q. My name is Joe Potchen, I'm assistant attorney
8 general with the State of Michigan if you've
9 haven't heard, but I'm going to be asking you a
10 number of questions about your business and how
11 it's run, okay?

12 A. **Sure.**

13 Q. And if you don't understand any of my questions,
14 please ask me to rephrase it or if it's somehow
15 unclear, okay?

16 A. **Okay.**

17 Q. Now, you've owned and operated 906 Vapor since
18 2015, is that correct?

19 A. **Yes.**

20 Q. And before that time have you run any other
21 businesses?

22 A. **Yes.**

23 Q. What have you run?

24 A. **Superior (INDECIPHERABLE)QC.**

25 Q. And what is that business?

- 1 **A. That's the geophysical consulting firm.**
- 2 Q. How many years did you do that?
- 3 **A. I believe I started in 2009.**
- 4 Q. And before that business did you run another
5 business?
- 6 **A. No, sir.**
- 7 Q. In your store, 906 Vapor, do you buy vaping
8 products from manufacturers to sell to customers?
- 9 **A. Yes, sir.**
- 10 Q. You don't make your own vaping products, is that
11 correct?
- 12 **A. (INAUDIBLE).**
- 13 Q. So it's all bought from another manufacturer,
14 brought to your store and then you sell those
15 products, is that correct?
- 16 **A. Yes.**
- 17 Q. During your operation of 906 Vapor you maintain a
18 number of business records, correct?
- 19 **A. Yes.**
- 20 Q. You maintain sales records, correct?
- 21 **A. Yes.**
- 22 Q. You maintain inventory records, correct?
- 23 **A. Yes.**
- 24 Q. And you maintain tax records, correct?
- 25 **A. Yes, sir.**

- 1 Q. You maintain sales receipts at your business,
2 correct?
- 3 **A. Yes, they're electronic, but yes.**
- 4 Q. They're electronic, you have them on a database?
- 5 **A. (INAUDIBLE).**
- 6 Q. You have invoices, correct?
- 7 **A. Yes.**
- 8 Q. Any other types of business records that you
9 maintain in running your business at 906 Vapor?
- 10 **A. The records for my employee.**
- 11 Q. The employee records, okay. Any other records I
12 might be missing here?
- 13 **A. Not that I can think of off the top of my head.**
- 14 Q. How far do those records go back?
- 15 **A. I guess on the day I started the business.**
- 16 Q. So you kept records and maintained business
17 records from 2015 to the present, correct?
- 18 **A. I believe so, yes.**
- 19 Q. Do you have sort of a record retention policy
20 that you get rid of records after a certain time?
- 21 **A. No, no policy.**
- 22 Q. Where do you keep these records?
- 23 **A. It's, I believe, somewhere at the store and some
24 would be at my home.**
- 25 Q. And then you also maintain some of them

1 electronically as well, correct?

2 **A. My accountant I believe would hold some of those**
3 **I suppose.**

4 Q. So some are at the store, some are at home and
5 some are with your accountant, correct?

6 **A. I believe so.**

7 Q. Anywhere else that those records might be?

8 **A. Not that I can think of off the top of my head.**

9 Q. So I could request those records from you and you
10 would know where to access them to get them from,
11 correct?

12 **A. I believe so eventually.**

13 Q. And a person could review your sales records and
14 see what products have sold well and not sold
15 well over the years, correct?

16 **A. Not everything is itemized.**

17 Q. You -- when a product is selling well you buy
18 more of that product to sell to customers,
19 correct?

20 **A. Yes.**

21 Q. And when a product doesn't sell well, you don't
22 buy that product any more, right?

23 **A. Yes, in general, yes.**

24 Q. And you also would -- if a product isn't selling
25 well you would take it off the shelf, correct?

- 1 **A. Yes, eventually.**
- 2 Q. So to your memory what have been some of the
3 vaping flavors that haven't sold well?
- 4 **A. Specific favor that hasn't -- I suppose things**
5 **perhaps go in a bit of cycles. Like currently I**
6 **don't believe I have any yogurt flavors.**
- 7 Q. So does that mean it's selling well if you have
8 any or it's not selling well?
- 9 **A. That would mean it's not selling well, but they**
10 **go in cycles. It could.**
- 11 Q. And I apologize for not knowing much of the
12 flavors. There's a lot of flavors, for lack of a
13 better term, correct?
- 14 **A. Yes.**
- 15 Q. And what type of flavors sell well?
- 16 **A. Fruits, drinks -- well, these are the general**
17 **categories.**
- 18 Q. Yes.
- 19 **A. Fruits, drinks, desserts.**
- 20 Q. And what type of flavors don't sell well?
- 21 **A. Tobacco.**
- 22 Q. Now, all those flavors that we've been talking
23 about, do all of them contain nicotine or are
24 some of them non-nicotine containing?
- 25 **A. For all the flavors I carry there are varying**

1 **nicotine levels from zero to the maximum.**

2 Q. So you can still sell products that contain zero
3 nicotine yet are flavored after this ban goes
4 into effect, correct?

5 **A. Yes, I could.**

6 Q. Is there any sort of shelf life for vaping
7 liquids?

8 **A. It's generally considered to be 12 months.**

9 Q. So if you took off the certain type of vaping
10 liquid for, say, six months, that wouldn't affect
11 the quality of the liquid, is that fair to say?

12 **A. It would if it's already six months old and the**
13 **nicotine does tend to oxidize slightly changing**
14 **the color.**

15 Q. So -- but how long from ordering a product to
16 placing it on the shelf to sale, how long does
17 that usually take? I don't know?

18 **A. I don't know.**

19 Q. So do you sell little packets of nicotine in your
20 store?

21 **A. Just nicotine?**

22 Q. Yes.

23 **A. No.**

24 Q. Do you sell nicotine products that don't contain
25 flavors?

- 1 **A. Sir, I had to think -- no.**
- 2 Q. So is there like a liquid -- a nicotine liquid
- 3 that doesn't have flavor?
- 4 **A. I've never seen one. I suppose there is.**
- 5 Q. But you don't sell that in your shop? You could
- 6 sell it if there was one out there, is that fair
- 7 to say?
- 8 **A. That would just be the liquid, the PG, VG and**
- 9 **nicotine?**
- 10 Q. Okay.
- 11 **A. I don't think so.**
- 12 Q. Why couldn't you sell that product?
- 13 **A. I can only assume that would taste horrible.**
- 14 Q. Okay.
- 15 **A. I believe nicotine, the taste by itself, is**
- 16 **similar to pepper.**
- 17 Q. The powder you said?
- 18 **A. No, the nicotine itself, the flavor I believe it**
- 19 **tastes like pepper.**
- 20 Q. Pepper, okay. So after the ban goes in effect
- 21 you can still sell, transport and distribute
- 22 flavorless and tobacco nicotine products,
- 23 correct?
- 24 **A. Can you repeat that?**
- 25 Q. Yes. After this ban goes in effect, you can

1 still sell, transport or distribute flavorless
2 and tobacco-flavored nicotine products, is that
3 correct?

4 **A. I believe that's correct, yes.**

5 Q. And you can still sell, transport and distribute
6 flavored vaping products that don't contain
7 nicotine, correct?

8 **A. Correct (INDECIPHERABLE).**

9 Q. And you sell flavored vaping products that don't
10 contain nicotine, correct?

11 **A. Yes, every one of my flavors comes in zero
12 nicotine.**

13 Q. Okay.

14 MR. POTCHEN: I don't have any further
15 questions, your Honor.

16 THE COURT: Do you have anything
17 further?

18 MR. MAINS: Just a few questions, your
19 Honor.

20 REDIRECT EXAMINATION

21 BY MR. MAINS:

22 Q. Let me just clarify, opposing counsel pointed out
23 you can still sell once the ban goes into effect
24 non-flavored nicotine products, so your store
25 sells those or not?

1 A. Non-flavored nicotine products, no, we don't have
2 any non-flavored -- it tastes horrible, I don't
3 --

4 Q. Now, you said that you do sell flavored
5 non-nicotine products, correct?

6 A. For every flavor we have graduated levels of
7 nicotine so people can work their way down to
8 zero in phases.

9 Q. And if you had to estimate, what percent of your
10 sales are people buying non-nicotine flavored
11 products?

12 A. I don't know if I could give an accurate
13 estimate, but it's pretty small.

14 Q. So assuming that the rules go into effect if you
15 can still sell those products do you think you
16 would stay in business?

17 A. No, that would only be the people who were
18 already doing that or just about ready to do that
19 if they're cutting down. It would be a very tiny
20 percentage.

21 Q. And as someone who uses these products themselves
22 as a smoking cessation device, do you use
23 non-nicotine flavored products?

24 A. No. I use one of the lowest levels, but I do use
25 nicotine.

1 Q. So if you had to switch to a non-nicotine
2 flavored product, what impact do you think that
3 would have on your potential tobacco usage?

4 **A. I don't know if it would send me back to smoking.**
5 **I've been vaping for five and a half years, but I**
6 **don't know what that would do.**

7 **To be honest, I've been more concerned**
8 **with everything else.**

9 Q. Understood.

10 MR. MAINS: That's all, your Honor.

11 THE COURT: You can step down, sir.

12 **THE WITNESS: Thank you.**

13 **My understanding is you have no other**
14 **testimony?**

15 MR. BLAIR: That's correct, your Honor.

16 THE COURT: And you have no testimony
17 on this issue?

18 MR. POTCHEN: That is correct, your
19 Honor.

20 THE COURT: The Court will hear your
21 argument, sir.

22 MR. BLAIR: Thank you, your Honor.

23 As outlined in Mr. Slis' affidavit and
24 as elaborated upon today here in court we believe
25 we've more than shown the requisite showing of

1 irreparable harm, not only to Mr. Slis personally
2 as an individual, a former smoker who smoked for
3 approximately 40 years and tried to quit for 30
4 of those years.

5 And as he shared on the witness stand
6 today he tried many different ways to stop and
7 the way that he stopped successfully eventually
8 was when he poked his head into the store that he
9 now owns and he's been using flavored nicotine
10 vapor products since.

11 I think it's worth noting that the
12 draft rules included a presumptive -- a
13 rebuttable presumption about how much quantity
14 can be possessed without --

15 MR. POTCHEN: Your Honor, I'm going to
16 object to any sort of reference to any sort of
17 draft rules that may have been out there.

18 THE COURT: And we're going to let him
19 argue.

20 MR. POTCHEN: Sorry.

21 MR. BLAIR: Thank you, your Honor.

22 What I was going to say is that the
23 original draft rules included a rebuttable
24 presumption that anything four packages or more,
25 there was a rebuttable presumption that that was

1 possession with intent to distribute or intent to
2 sell.

3 THE COURT: And you would agree that
4 those are not in -- that is not in the current
5 rule, is that correct?

6 MR. BLAIR: Correct and that is exactly
7 my point, that there is no so-called safe harbor
8 in these rules. So especially for a gentleman
9 like Mr. Slis who owns a store and also uses it
10 for personal use, it is not accurate to say that
11 he can just lock his doors and sit on this
12 product.

13 We noted in our reply brief that the
14 rules prohibit transporting this product, so if
15 his material -- if his inventory of flavored
16 nicotine vapor products is not outside of
17 Michigan by midnight tonight or destroyed, he may
18 never have an opportunity to move it, transport
19 it away from where it is right now without facing
20 serious fines and prison time. That goes to the
21 irreparable harm as well.

22 So as an individual, he faces
23 irreparable harm that he may be forced back into
24 using combustible tobacco products and as a
25 business he testified that he would have to close

1 up shop and likely declare bankruptcy.

2 He sells less than 5-10 percent of his
3 sales are the products that are not covered by
4 the emergency rules and he simply cannot keep the
5 doors open and the electricity on selling those
6 products.

7 I understand that the focus of today
8 has been irreparable harm. I think we've more
9 than shown that. I also think that the
10 likelihood of success is a legal issue that we've
11 briefed and we've shown that we have a very
12 strong likelihood of success.

13 At this time we would respectfully
14 renew our motion orally under 2.119, renew our
15 motion for a TRO to preserve the status quo until
16 further hearings. We believe we've made a very
17 strong showing of likelihood of success and if
18 these rules are invalid they should not go into
19 effect for a single minute.

20 We've shown irreparable harm and the
21 irreparable harm that will come if these rules go
22 into effect at midnight and we think we've shown
23 way more than required to show that we are very
24 likely to succeed on the merits and if we find
25 out a week or two weeks from now that these rules

1 are invalid, we will have inconvenienced Mr. Slis
2 and his business and caused irreparable harm to
3 Mr. Slis and his business based on rules that I
4 believe, as of now, appear to be likely invalid.

5 If the Court has any questions, I'd be
6 happy to address those. Otherwise, that's all I
7 have.

8 THE COURT: Okay.

9 MR. POTCHEN: Your Honor, as you're
10 well aware, a critical element prior to the
11 issuance of a preliminary injunction is the
12 showing of irreparable injury and the fact that
13 Plaintiff may be inconvenienced, to use his
14 counsel's own word, is not sufficient to
15 establish irreparable jury.

16 As the case law holds, irreparable harm
17 requires a showing of imminent concrete actual
18 injury before the issuance of a preliminary
19 injunction, the irreparable injury must be both
20 certain and great and must be actual and not
21 merely theoretical. The mere apprehension of
22 further injury and damage cannot be the basis for
23 injunctive relief.

24 And, again, a preliminary injunction
25 shouldn't issue where there's an adequate legal

1 remedy available. All those --

2 THE COURT: That leads me to a few
3 questions.

4 MR. POTCHEN: Sure.

5 THE COURT: As of midnight today what
6 is your department's position regarding the
7 storage of the precluded products?

8 MR. POTCHEN: There is no limit on
9 storage, your Honor.

10 THE COURT: What do you consider
11 storage as opposed to possessing with intent to
12 sell?

13 MR. POTCHEN: To the extent that they
14 keep them in the back and, again, I --

15 THE COURT: I lived with years of the
16 marijuana law where is it dry, is it drying.

17 We need something a little clearer. Is
18 it the department's position that if the flavored
19 vaping products which contain nicotine are stored
20 separately and securely, they are not subject to
21 penalty? That's kind of a yes or no.

22 Would you like to consult with your
23 client on that?

24 MR. POTCHEN: Yeah, that would help.

25 THE COURT: Let me finish the rest of

1 this.

2 MR. POTCHEN: Okay, yeah.

3 THE COURT: And is it the department's
4 position that if we encounter -- somebody
5 somewhere around here is a wholesaler because
6 we're hearing from retailers, so that means there
7 are wholesalers.

8 I'm willing to be there's a wholesaler
9 somewhere in Michigan. It may be A Clean
10 Cigarette, I have no idea, I don't know who they
11 are at this time. Which means they have a bunch
12 of them, right.

13 I want you to consider what the
14 department's position would be about a period of
15 time within which if there is a wholesaler the
16 wholesaler can put their product on a truck and
17 take their product which has an economic value to
18 Illinois or Indiana or Canada or wherever else
19 they can so that their product which suffers --
20 if you run a business, you know the longer you
21 hold inventory the more it costs you.

22 So if you want to have that kind of
23 conversation with your client.

24 MR. POTCHEN: Actually I can answer
25 that one.

1 THE COURT: Okay.

2 MR. POTCHEN: The rules do not prohibit
3 the transport of the material out of state for
4 sale out of state.

5 THE COURT: By when? It says you can't
6 transport it at all right now.

7 MR. POTCHEN: Within the state for sale
8 within the state.

9 THE COURT: So it's in my truck, I'm
10 driving.

11 MR. POTCHEN: Yes.

12 THE COURT: I get stopped. How do I
13 prove I'm taking it somewhere else? I'm thinking
14 of is there a rational period that you consider
15 to say look, if you don't get injunctive relief
16 we know this rule was to take effect at midnight.

17 We will give you until Sunday or
18 Tuesday if you wish to transport significant
19 amounts out of state where there will be no
20 presumption -- where you have a safe harbor to
21 get rid of your product that you're holding.
22 Just think about it.

23 MR. POTCHEN: Okay, the rules -- first
24 question I need to consult with the client. As
25 to the second question, the transport, again the

1 rules do no prohibit the transport out of state
2 for sale out of state. If the transport was for
3 sale in state, that's what the rules prohibit, so
4 --

5 THE COURT: Who, according to you, would
6 have a burden of proving where they're being
7 transported to?

8 MR. POTCHEN: I would imagine the
9 person transporting it. Let me check on the
10 first question.

11 THE COURT: I would have a conversation
12 with my client on the second one and a time
13 period too.

14 MR. POTCHEN: Yes.

15 MR. BLAIR: We're going to take a
16 10-minute recess to allow you to do that. They
17 tell me -- okay, this is the neatest thing.

18 This is apparently a client
19 consultation room, but I guess it's for people
20 who are normally in custody. I just thought it
21 was the most amazing thing. It's the cone of
22 silence right there.

23 But we'll let you go out of the hall,
24 wherever you think you can find a time to talk
25 with your client and you may actually want to

1 engage in a conversation with your colleague
2 although he's not dealing with a wholesaler, but
3 in terms of being able to transport things and
4 store them in ways that would at least allow, if
5 we do not grant a preliminary injunction, but do
6 grant an expedited briefing and decisional
7 schedule give people within 30 to 45 days an
8 opportunity to move this stuff.

9 MR. POTCHEN: Yes, your Honor.

10 THE COURT: Okay, thank you. We're in
11 recess.

12 (A recess was taken).

13 THE COURT: Please be seated.

14 MR. POTCHEN: Your Honor, we greatly
15 appreciate the opportunity to consult with the
16 client. I now have become more educated.

17 So one of the -- the first question
18 can you store it in a locked and secure place,
19 can owners of vap shops do that with the product.

20 While DHHS cannot tell law enforcement
21 what to do, we find it hard to fathom how any law
22 enforcement would pursue an action or prosecute
23 it if it was stored in back in a locked and
24 secured area of the building.

25 That would seem to the department as

1 there's clearly no intent to sell in that type of
2 situation. The department wouldn't recommend
3 action in such a situation and that's what I can
4 speak on behalf of.

5 As to the transporting out of state, I
6 have learned that to prosecute a case in such a
7 situation there must be possession with intent to
8 sell. The burden is on the State to prove that.
9 Merely having the product would not be
10 sufficient, is our understanding, to prosecute a
11 case in such a situation.

12 We also understand that if you're
13 transporting you are given a receipt or some sort
14 of bill of lading where the product is actually
15 going. That would be able to show that it's
16 being brought out of state, but again, it's with
17 intent to sell and merely having the product is
18 insufficient.

19 To the extent that this court is at all
20 concerned with the transport of it, Rule 8 allows
21 for severability. We would ask the Court if they
22 were going to issue some sort of injunctive
23 relief today that only to those aspects where the
24 Court has questions and allow the rest of the
25 rules to go into effect.

1 THE COURT: Anything final, sir?

2 MR. BLAIR: Yes, your Honor, thank you.
3 Your Honor, I want to just briefly address I
4 think the Court had some very good questions, but
5 I would point out that this invitation to allow
6 the Defendants to red line the rules or explain
7 what they mean is exactly the sort of post hoc
8 rationalization that is prohibited in
9 administrative law cases.

10 The rules cannot be modified, they
11 can't be changed, they can't be explained any
12 further than they exist when they were issued.

13 They cannot change and the agency is
14 bound by the rules themselves. Rule 2(1)(a)
15 specifically prohibits transporting any flavored
16 nicotine vapor product.

17 There is no safe harbor for
18 transporting it in state. There are many
19 situations where these products may be
20 transported without a bill of lading and if that
21 is what the department meant when it issued these
22 rules, it could have said that in the rules.

23 We cannot change those rules now and
24 red line them so that they address the Court's
25 concerns or my client's --

1 THE COURT: Actually I can.

2 MR. BLAIR: Your Honor, you're correct.
3 You can red line them, that's true. That goes to
4 the irreparable harm that Mr. Slis, his business
5 face six months in prison for transporting or
6 possession with intent to sell.

7 So my first point is that legally they
8 cannot be red lined unless your Honor does it.
9 My second point, your Honor, is that it doesn't
10 matter what DHHS says today about how the rules
11 should be interpreted.

12 As brother counsel indicated, the law
13 enforcement on the ground around the state will
14 be enforcing this as of midnight tonight and,
15 your Honor, I have from DHHS' website, they have
16 their frequently asked questions and the last
17 question is, "Who has the authority to enforce
18 the rules?"

19 "Answer: The rules will be enforceable
20 by both state and local enforcement with
21 assistance by the Michigan Department of Health &
22 Human Services Tobacco Section", which again we
23 have many law enforcement personnel all
24 throughout the state.

25 If you ask them what possession with

1 intent to sell means, in the cannabis context for
2 example, they will tell you if you have a bunch
3 of it and they're in individual packets that's
4 possession with intent to sell or possession with
5 intent to distribute.

6 Even if it's the State's burden to
7 prove that it's intent to sell or distribute,
8 you're causing irreparable harm to Mr. Slis and
9 others having to come to court to defend
10 themselves and potentially be held pending trial
11 to defend themselves against an accusation that
12 they intended to sell even if they truly did not
13 have an intent to sell.

14 Again, I think I would underscore yet
15 again that we think we've shown a very strong
16 likelihood that these rules are invalid and they
17 should not go into effect for even a minute.

18 There's irreparable harm if they go
19 into effect for one minute and I appreciate that
20 counsel has offered that the transport could
21 potentially be severed out, that fixes one of
22 many problems with these rules.

23 It still does not help Mr. Slis who
24 needs these products to successfully stay away
25 from combustible tobacco products. It does not

1 save him from shutting down his store. He simply
2 cannot survive selling just 10 percent of his
3 inventory.

4 For those reasons, your Honor, again I
5 would respectfully ask again that we've renewed
6 our motion for TRO to preserve the status quo
7 until there's further hearing that these issues
8 can be addressed in more detail.

9 Among our likelihood of success on the
10 merits arguments, I believe there's a compelling
11 case that there's controlling case law that the
12 language in MCL 333 -- 2233 prohibits the
13 department from issuing rules. There are more
14 general provisions --

15 THE COURT: Counsel --

16 MR. BLAIR: Yes. Would you like me to
17 stop?

18 THE COURT: Yeah.

19 MR. BLAIR: Thank you, your Honor.

20 THE COURT: Okay. Let's start out with
21 what I'm not doing today. I'm not determining
22 that this is a good, bad or indifferent rule. I
23 am not determining that the rule is not subject
24 to considerable examination and potential
25 infirmities.

1 I am left with at this point we have a
2 rule that has been promulgated, signed off by the
3 governor that takes effect as of midnight.

4 The period of time from my receiving
5 this case and fully receiving full briefing on
6 the case has been exceptionally brief. My
7 federal colleague with three law clerks has put
8 off doing anything for 14 days.

9 I'm not willing to do that and I will
10 hear a full hearing on the merits on Tuesday,
11 October 8th.

12 Regardless of the proofs on the other
13 three factors, the Plaintiff must establish the
14 indispensable requirement of showing irreparable
15 harm. That's Michigan AFSCME Council 25 versus
16 Woodhaven-Brownstown School District, 293 Mich
17 App 143.

18 This factor is established by a
19 particularized showing of irreparable harm, not
20 mere apprehension of a future injury, but
21 relative certainty of an injury for which there
22 is no adequate remedy at law.

23 The Plaintiff has given earnest
24 testimony about harm. The first harm that we'll
25 deal with is the economic harm. While the

1 Plaintiff has presented the case -- the Court,
2 rather, with numerous cases from California and
3 from our Federal Courts in which a business being
4 driven for good or bad reasons out of existence
5 has been held to satisfy the element of
6 irreparable harm, they have not been able to
7 share with me concomitant Michigan authority.

8 In fact, in Michigan irreparable harm
9 based upon an economic injury has been almost
10 uniformly rejected, in part because most economic
11 injury does have an adequate remedy at law,
12 albeit it late, because the economic injury can
13 in fact can be calculated and damages are
14 available.

15 And in this case the damages are
16 available from a source which we know to be
17 relatively solvent.

18 He talks about a loss of good will and
19 as someone who grew up in a family that had
20 business and we understood that good will allowed
21 customers to continue going and allowed them to
22 occasionally forgive us when we lost their
23 laundry.

24 In this particular case, this is a
25 circumstance where the good will, which by the

1 way in the sale of the business can also be
2 quantified monetarily, but a diminution in good
3 will is a diminution suffered by all similarly
4 situated and therefore this court cannot find
5 that this is an irreparable harm that is
6 immediate and particular to this Plaintiff. It
7 is perhaps particular to this industry as relates
8 to other states.

9 The next harm that was presented was
10 talking about Mr. Slis and his personal use of
11 vaping products. The loss and diminution of
12 health has been held in Michigan to potentially
13 be an irreparable harm.

14 However, the Michigan Courts have also
15 required us to have that loss be more than a
16 potential, but a reality.

17 For example, an individual who was to
18 be deprived of a particular drug regimen on which
19 they had been placed by a physician and who could
20 suddenly no longer get for whom we knew this was,
21 within a reasonable degree of scientific
22 certainty, likely to exacerbate their demise.

23 While Mr. Slis earnestly says he has
24 depended on the vaping products to remove him
25 from the more harmful tobacco products for a

1 substantial period of time, when asked what would
2 happen, he honestly said he didn't know.

3 Without more certain proof on that
4 harm, we can also not find that to be irreparable
5 harm.

6 However, it is the last harm that was
7 argued that is worthy of most consideration, and
8 that is that Mr. Slis believes that he suffers
9 the potential irreparable harm of criminal
10 prosecution. For criminal prosecution and
11 unnecessary criminal jeopardy there is no remedy
12 at law. So the question is, is there a
13 reasonable certainty and probability of such.

14 This court would rule that the current
15 rule does not -- does not subject to criminal
16 prosecution persons who are in possession of
17 these products which previously were used in
18 their ordinary commercial business who transport
19 and separately store those items where they are
20 not subject to purchase along with any other
21 products in their stores.

22 We do not go as far as to say that it
23 has to be the way at which allegedly medical
24 marijuana had to be stored which was in a
25 separate and locked facility, but that to the

1 extent that these products are not on shelves and
2 are not accessible by ordinary commercial
3 clients, they are not subject to prosecution
4 according to this court's evaluation of the rule.

5 As to the transport, the Court would
6 find that the rule as written precludes the
7 transport for commercial purposes and that, since
8 it would be a prosecution brought claiming that
9 they were for commercial purposes, the burden of
10 proof lies on the prosecution to prove beyond a
11 reasonable doubt that the purpose of transport
12 was in fact for sale.

13 The Court at this point is going to
14 deny the motion for temporary restraining order,
15 the renewed motion, but will accept additional
16 arguments at the close of the hearing on the
17 preliminary injunction which, as we said, will be
18 scheduled on October the 8th.

19 The Court will afford any -- would
20 first ask if the new party, you will get an order
21 **A Clean Cigarette, will get the order of**
22 **consolidation tomorrow.**

23 I would ask if the department is
24 prepared to accept service. We don't allow
25 people to serve people in court, but I'm

1 wondering --

2 MR. POTCHEN: I usually do not unless I
3 consult with them I do not have authority to
4 accept service on their behalf. I actually know
5 him and so we can work that out.

6 MR. DAVIS: Your Honor, I was notified
7 via e-mail that my secretary had the AG served at
8 1:47 this afternoon at their office.

9 MR. POTCHEN: And to the extent --

10 THE COURT: He wasn't there, he
11 wouldn't know.

12 MR. POTCHEN: I wasn't there. To the
13 extent that there is the governor's name, they
14 have to serve the governor's office, but again --

15 MR. DAVIS: (INAUDIBLE).

16 THE COURT: Well, you all need to prove
17 that or not, but the Court will issue the order
18 of consolidation and would provide that everybody
19 has until Friday at 5 o'clock to file any
20 additional papers that they want to have
21 presented before this court, that by Monday I
22 need to know how many witnesses you're calling
23 because at this point we are going to the meat of
24 the matter.

25 The Defendant has indicated two

1 witnesses whom he intended to call. I do not
2 know if there will be more and I do not know what
3 the other parties would wish. That will
4 determine how long we have this.

5 I am going to plan to spend the
6 afternoon with you on the 8th and potentially the
7 morning of the 9th. That's how much time we're
8 going to put aside.

9 So you have any questions on behalf of
10 the Plaintiff?

11 MR. BLAIR: Your Honor, I just want to
12 clarify, so the reason our witness list is only
13 one name today because we couldn't bring anybody
14 by phone. So we'll have an opportunity to call
15 other witnesses next week, correct?

16 THE COURT: All parties will have the
17 opportunity to present witnesses next week. Am I
18 going to do them by phone, no.

19 MR. BLAIR: Understood, thank you.

20 THE COURT: And he's alluding to a
21 request could people be here by phone. For a lot
22 of reasons I said I was not aware of what the
23 technology was here and I know what the
24 technology --

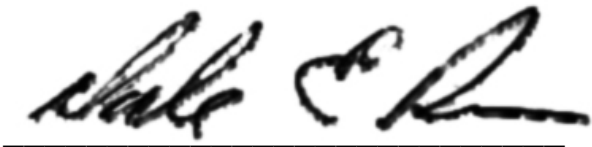
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DALE E. ROSE CSR-0087
Notary Public,
Wayne County, Michigan

My Commission expires: 7-15-24

(

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