

STATE OF MICHIGAN
IN THE COURT OF APPEALS

MARC SLIS AND 906 VAPOR,

Plaintiff-Appellee,

Court of Appeals No.

Court of Claims No. 19-000152-MZ

v

STATE OF MICHIGAN and
DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Defendants-Appellants.

A CLEAN CIGARETTE
CORPORATION, a Michigan
Corporation,

Plaintiff-Appellee,

Court of Appeals No.

Court of Claims No. 19-000154-MZ

v

GOVERNOR GRETCHEN WHITMER, in
her official capacity, THE STATE OF
MICHIGAN, acting through the
Governor's Office, and DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants.

APPELLANTS' APPENDIX

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Dated: October 25, 2019

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10/08/2019

STATE OF MICHIGAN

COURT OF CLAIMS

MARC SLIS, et al,

Plaintiff,

-vs-

Case No. 19-000152-MZ
Hon. Cynthia D. Stephens

STATE OF MICHIGAN, et al,

Defendants.

A CLEAN CIGARETTE CORPORATION,
a Michigan Corporation,

Plaintiff,

Consolidated with

-vs-

Case No. 19-000154-MZ

GOVERNOR GRETCHEN WHITMER, in her
official capacity, and THE STATE
OF MICHIGAN, acting through the
Governor's Office, MICHIGAN
DEPARTMENT OF HEALTH AND HUMAN
SERVICES,

Hon. Cynthia D. Stephens

Defendants.

Proceedings had and testimony taken in the

above-entitled matter before the Honorable Cynthia D.

Stephens, at 3020 West Grand Boulevard, 14th Floor,

Detroit, Michigan, on Tuesday, October 8, 2019, noticed for

2 o'clock P.M.

APPEARANCES:

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Slis, et al:

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NONE MARKED

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1 Detroit, Michigan

2 Tuesday, October 8, 2019

3 (At about 2:05 P.M.)

4 — — —

5 THE COURT: This is a hearing in the case
6 19152, which is a combined case involving both
7 Marc Slis and A Clean Cigarette as plaintiffs versus
8 the State of Michigan and the Department of Health
9 and Human Services, additionally a named party.

10 The Court would ask the counsel to state
11 your appearances for our record.

12 MR. BLAIR: Good afternoon, Your Honor.
13 Kevin Blair on behalf of Plaintiffs Marc Slis and
14 906 Vapor; my colleague, Doug Mains, as well, on
15 behalf of the same plaintiffs.

16 MR. DAVIS: Good afternoon, Your Honor.
17 Aaron Davis on behalf of A Clean Cigarette
18 Corporation.

19 MS. REED: Good afternoon, Your Honor.
20 Shaina Reed here also on behalf of Plaintiff, A
21 Clean Cigarette Corporation.

22 MR. MAINS: Good afternoon, Your Honor,
23 Doug Mains, as Kevin Blair indicated, also here on
24 behalf of Marc Slis and 906 Vapor.

25 MR. POTCHEN: Good afternoon, Your Honor,

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1 Joseph Potchen, Assistant Attorney General, on
2 behalf of the defendants.

3 MR. LONG: And James Long on behalf of
4 defendants.

5 THE COURT: This is the day and time set
6 for a hearing, a continued hearing, as to Mr. Slis's
7 prayer for injunctive relief, which has previously
8 been denied by this court, as well as his company
9 906 Vapor. At the beginning of the hearing on
10 behalf of A Clean Cigarette also seeking injunctive
11 relief.

12 The Court has received numerous papers
13 from the parties. We've got a motion for
14 reconsideration. We have a motion to exceed the
15 page limit, which was already exceeded. We received
16 a supplemental complaint, we received supplemental
17 briefs, and the parties filed witness lists. The
18 witness list that was filed -- the witness list
19 filed by Defendant State of Michigan included
20 Molly Cotant, C-O-T-A-N-T, and Dr. --

21 MR. POTCHEN: Joneigh.

22 THE COURT: Joneigh? Okay. And I'm not
23 going to do any better with the last name.

24 MR. POTCHEN: Khaldun.

25 THE COURT: Khaldun. Thank you very

1 much. The witness list filed by the plaintiff,
2 initially Mr. Slis filed his own list and that
3 included himself. We subsequently got a witness
4 list that should be in order here, but here we go.
5 Mr. Slis also added Amelia Howard and Dr. Michael
6 Siegel. A Clean Cigarette filed a witness list that
7 included five persons: Cary Lee, Mona Lee,
8 Dawn Every, Deleasha Trice and David Haight.

9 We also received motions to be allowed to
10 leave to participate as amici from both the Tobacco
11 Free Kids and Michigan Chapter of the American
12 Academy of Pediatrics. We received a responsive
13 paper opposing that request for relief. And I will
14 tell you that that would be the last thing that I
15 will hear today.

16 Counsel, you've all filed papers in
17 support of your positions. I had the opportunity to
18 hear from counsel for Mr. Slis before. Unless you
19 have something tremendously new to add, I would hear
20 from your colleague representing A Clean Cigarette
21 preliminarily, and we will hear his witnesses first
22 because that's who we scheduled. We know that you
23 have additional witnesses whom you want to call.

24 MR. DAVIS: Thank you very much, Your
25 Honor.

1 MR. POTCHEN: Your Honor, just one
2 moment. If we're going to hear their witnesses
3 first, we move that their witnesses -- I think
4 they're all lay, we ask that they be sequestered.

5 MR. DAVIS: Your Honor, my response to
6 that is the witnesses' testimony is not going to be
7 cumulative. I don't see how or what prejudice there
8 would be to allowing each of them to testify about
9 their respective role within the company and the
10 irreparable harm that we believe that they'll suffer
11 as a result. However, I will defer to Your Honor,
12 and it's not something that I will strenuously
13 object to, I just don't believe that it is necessary
14 to sequester the witnesses at this point.

15 THE COURT: I, for one, have no idea what
16 they're going to say, so I have to err on the side
17 of caution. And I ask that, frankly, any lay
18 witnesses who have been named by anybody, please
19 exit the courtroom at this time and we will call you
20 in. You do understand that you can hear everything
21 outside, right?

22 MR. DAVIS: Oh, I didn't know that, no.

23 THE COURT: I am correct?

24 COURT DEPUTY: Yes, Your Honor.

25 MR. DAVIS: They can hear everything

1 outside.

2 COURT DEPUTY: We have speakers in both
3 the hallway and the conference room.

4 MR. DAVIS: Well, that kind of defeats
5 the purpose of sending them --

6 MR. POTCHEN: Why don't we have them go
7 to an area where they can't hear the testimony?

8 THE COURT: Okay. I have no idea where
9 that is.

10 COURT DEPUTY: Your Honor, we can have
11 them escorted out to the main lobby.

12 MR. BLAIR: Your Honor, may I ask a
13 clarification question? Our lay witness is also our
14 corporate rep who may stay, correct?

15 THE COURT: Yes. A corporate rep may
16 stay on behalf of each party so you have callings.

17 MR. DAVIS: We do, Your Honor.

18 COURT DEPUTY: If we can have the
19 witnesses exit the back of the courtroom, and I will
20 meet you out in the hallway out here, please.

21 MR. DAVIS: May I proceed Your Honor?

22 THE COURT: Yes.

23 MR. DAVIS: Thank you, Your Honor. As I
24 introduced myself, my name is Aaron Davis. I
25 represent A Clean Cigarette Corporation. And, Your

1 Honor, at this time I'd like to introduce my clients
2 sitting back here over my left shoulder are Cary and
3 Mona Lee. Cary and Mona are the owners of A Clean
4 Cigarette Corporation, and they started the company
5 in a mall cart in 2010 in the Bay City Mall.

6 Through their hard work and their
7 dedication A Clean Cigarette has grown, Your Honor.
8 Last month my client had 20 stores across the state.
9 Today their future looks much more bleak. Once this
10 ban took effect last Tuesday or Tuesday night into
11 Wednesday morning, my client was immediately forced
12 to close one of it's stores and five more scheduled
13 to close by the 15th and four more are scheduled to
14 close by the 31st of this month.

15 Your Honor, we've cited to you a number
16 of 6th Circuit decisions that conclude that the
17 right to continue a business is not measurable
18 entirely in monetary damages. Here the plaintiff, A
19 Clean Cigarette, wants to sell its products to
20 consenting adults of legal age, not to live on the
21 income from a potential damages award eventually
22 from state of Michigan. If this ban remains in
23 place it will result in financial ruin to my
24 clients.

25 Significantly, my client also employs 53

1 full-time employees prior to this ban. It provided
2 those 53 employees health insurance, paid time off,
3 a Christmas bonus. Today, they've already been
4 forced to lay off one person and will lay off 12
5 more by the 15th of this month. Thirteen people
6 with health insurance and a steady paycheck will be
7 out of work and uninsured as a direct result of this
8 ban.

9 My client also has approximately two and
10 a half million dollars in inventory that it cannot
11 sell. Your Honor, I have with me an example of my
12 client's product. This is the battery, and we have
13 approximately two and a half million of these little
14 cartridges right here that we cannot sell. You'll
15 hear from -- testimony from our witnesses that the
16 average shelf life of these products is only 11
17 months. It is likely, if not certain, Your Honor,
18 that my client's products will expire prior to the
19 expiration of the ban imposed by the department and
20 the governor.

21 My clients stand to lose everything;
22 their stores, their employees, two million dollars
23 worth of product and the loss of customer goodwill.
24 My clients cannot be made whole by any kind of
25 monetary damages, Your Honor. Without a preliminary

1 injunction my clients will absolutely be financially
2 ruined.

3 Your Honor, we were in Petoskey last
4 week, as you know, and we heard the argument made by
5 the attorney general there. We've also now seen
6 their papers, which we hadn't seen before, and their
7 supplemental briefing on our issues. The AG's
8 argument rests on the conclusion that an emergency
9 exists in Michigan due to the fact that there are
10 statistics showing an increase in the usage of vapor
11 products by minors. The first six pages of the AG's
12 papers, submitted on Friday, cite to scientific
13 charts and studies about the danger of vaping
14 amongst minors. My clients do not dispute these
15 statistics, Your Honor.

16 My client can just as easily point to
17 studies and scientific data showing vapor products
18 are less harmful than traditional combustible
19 tobacco products. Respectfully, Your Honor, your
20 ruling on this motion for preliminary injunction
21 does not depend on those studies. It is beyond
22 dispute that this emergency rule is a total ban on
23 flavored nicotine vapor products for all Michigan
24 citizens.

25 The department citing the emergency that

1 may exist -- may exist only in a small subset of a
2 population, implemented a ban for all citizens,
3 including adults of legal age. This is essentially
4 prohibition, Your Honor. If this ban is not lifted
5 what is to prevent the department from next
6 implementing emergency rules citing an increase in
7 youth drinking and, thus, banning alcohol sales for
8 all citizens in Michigan. Or can it next be an
9 energy drink or cigarettes?

10 Your Honor, I would submit to you that
11 this is a profound overreach by the department and
12 the governor. As the finding of emergency was based
13 on usage by minors, at most, any ban restricting
14 sale, possession, transport, et cetera, must be
15 targeted to minors exclusively.

16 To that end, Your Honor, I would point
17 out that the legislature has already tackled this
18 problem. Public Act 18, that took effect two days
19 before the announcement of the finding of emergency
20 was made by this governor, prohibits the sale of
21 vapor products to minors. It prohibits minors from
22 transporting or possessing vapor products.
23 Recognizing that there may be an emergency amongst
24 minors, the legislature, with nearly unanimous
25 support, passed bipartisan legislation addressing

1 the public health emergency.

2 Whatever harm to minors existed at that
3 time, such harm is now addressed. The emergency
4 rules are superfluous, Your Honor. Your Honor, I
5 could pontificate as to why these rules are
6 unnecessary, how they violate the Dormant Commerce
7 Clause, how they are preemptive by the Tobacco
8 Control Act and how they are constitutional taking
9 without compensation. I won't do that.

10 I'll end my opening with this, Your
11 Honor. Last week Your Honor asked a question of
12 Mr. Potchen about transporting materials out of
13 state. You start in Michigan; you end up out of
14 state. Mr. Potchen, a division chief of the
15 Consumer Protection Bureau of the attorney general's
16 office, who I personally know to be an excellent
17 lawyer, could not answer Your Honor's question
18 without first having to consult with the chief
19 medical director; and I apologize if I got your
20 title wrong, chief medical director for the
21 department.

22 Your Honor, if these rules are so unclear
23 that Mr. Potchen could not tell you DHHS's position,
24 it's a dangerous proposition that a local assistant
25 county prosecutor, a local sheriff and his or her

1 deputies, would be asked to interpret the same
2 rules.

3 I'll give Your Honor an example.
4 Rule 2(1)b, Your Honor, says a retailer or reseller
5 shall not use imagery explicitly or implicitly
6 representing a characterizing flavor to sell, offer
7 for sale, give or otherwise distribute a vapor
8 product. Your Honor, a vapor product is not even
9 defined in these rules.

10 Arguably, our interpretation of these
11 rules is that a vapor cannot be advertised, even the
12 ones they're saying are legal now to sell, including
13 zero nicotine flavored cartridges. So, under that
14 rule 2(1)a doesn't define vapor product at all.

15 So at the conclusion of this, Your Honor,
16 my clients would ask that Your Honor grant the
17 preliminary injunction. Thank you, Your Honor, for
18 your time.

19 THE COURT: You were standing there with
20 a gift.

21 MR. BLAIR: Correct, Your Honor, just
22 making space.

23 THE COURT: It's kind of tight in here.
24 On behalf of the state of Michigan.

25 MR. POTCHEN: Good afternoon, Your Honor,

1 Joseph Potchen on behalf of the defendants. Real
2 quickly, vapor product is defined in the Youth
3 Tobacco Act. But I want to start out by saying
4 article 4, section 51 of the Michigan constitution
5 states that public health and general welfare of the
6 people of the state are hereby declared to be
7 matters of primary public concern. And the
8 legislature shall pass suitable laws for the
9 protection and promotion of public health.

10 We can appreciate that plaintiffs are
11 concerned about the impact of these emergency rules
12 and what it will have on their business. We
13 understand that they and many others have worked
14 very hard to make their business successful.
15 Oftentimes state officials need to make tough
16 choices that not everyone will be happy with.

17 Here, because the public health is a
18 matter of primary public concern, we have a great
19 public health crisis that needs to be addressed
20 immediately. Children are accessing vaping products
21 with harmful nicotine at alarming rates. The harsh
22 reality, as seen by the studies even in those states
23 with age limits on vaping products, is that our
24 children are getting access to flavored nicotine
25 products; and they're still being harmed by these

1 products.

2 And the reason is simple. Children are
3 lured into it with enticing flavors such as bubble
4 gum, cotton candy, Skittles, other sweets; and
5 they're getting hooked on nicotine. A Clean
6 Cigarette, who we just heard from, they don't
7 dispute the finding that vaping is an epidemic among
8 youth, and they also do not dispute that flavor may
9 be the driving -- the youth to these products.

10 The legislature, through the APA, has
11 created an avenue for addressing such a public
12 health crisis. They allow for the promulgation of
13 emergency rules. The defendants followed the
14 appropriate process for promulgating those rules.
15 The defendant met all the criteria identified in the
16 APA that identified a public health crisis. They
17 determined that emergency rules were necessary. The
18 DHHS articulated its reasons for the rules and
19 Governor Whitmer concurred in the emergency
20 findings.

21 Now, Your Honor, A Clean Cigarette makes
22 an argument that while we already have the changes
23 to the Youth Tobacco Act. In Michigan was one of
24 the last states to put an age restriction in selling
25 vaping products to minors. The one thing that the

1 data and information shows that age restrictions
2 alone are not enough to address the youth vaping
3 crisis. Those states with age limitations have
4 still seen a huge increase in kids in vaping.

5 This is seen in the national youth
6 tobacco survey data that's referenced a number of
7 times in the rules and in our brief and it's our
8 position that it's not enough to sit back while
9 significant harm is being caused to our children by
10 these flavored nicotine products. Their
11 disagreement with the approach that DHHS took to
12 address this crisis does not mean that the emergency
13 rules are invalid.

14 In summary, Your Honor, the plaintiffs
15 cannot make their burden for preliminary injunction,
16 they cannot show irreparable harm when this court
17 looks at the balancing of the harm and the harm of
18 the public interest that weighs strongly in favor of
19 the defendants. We have an obligation to protect
20 our public health and protecting the public health
21 of our children is clearly within the public
22 interest for all citizens. As to the substantial
23 likelihood of the merits, we have briefed why each
24 argument they set out is insufficient, from lacking
25 authority to promulgate rules, to their commerce

1 clause arguments, to preemption, to the takings, to
2 anything else they've thrown up, they all failed.
3 So accordingly we ask you to deny all their motions
4 for injunction.

5 THE COURT: Call your first witness,
6 please.

7 MR. DAVIS: Thank you Your Honor.

8 THE COURT: Where are you directing the
9 witness to sit?

10 COURT DEPUTY: They're in the main lobby.

11 THE COURT: No, we're calling witnesses,
12 we're about to give testimony, where would you have
13 them sit in the courtroom?

14 COURT DEPUTY: Right over here, Your
15 Honor.

16 THE COURT: Who is your first witness?

17 MR. DAVIS: Your Honor, it is Cary Lee.

18 THE COURT: Mr. Lee, when you get to a
19 place where you are comfortable, you raise your
20 right-hand. Do you swear or affirm the testimony
21 you're about to give and the cause pending before
22 this court will be the truth.

23 **THE WITNESS: Yes.**

24 THE COURT: Thank you, sir. To the
25 extent that at anytime that a question is asked of

1 you, we need for you to answer orally. I know we're
 2 used to shaking our heads and people seeing us. The
 3 court reporter may see you, but she can't record
 4 that. She also will have difficulty with those
 5 famous American words uh-huh and uhn-uhn, so we've
 6 got to also say yes and no. If anyone asks you a
 7 question that doesn't appear clear to you, don't
 8 answer it, just say I don't understand and they will
 9 give you clarification. If at any time that you
 10 hear someone make an objection, you may not agree
 11 with me but you've got to wait until I rule on it.
 12 They will make the objection, the other side may
 13 give a response, I'll then give direction. If I
 14 sustain the objection, that means that a new
 15 question is going to be asked of you, okay?

16 **THE WITNESS: Yes.**

17 THE COURT: Thank you sir you may
 18 proceed.

19 MR. DAVIS: Thank you, Your Honor.

20 — — —
 21 C A R Y L E E

22 after having been first duly sworn to tell the
 23 truth, the whole truth and nothing but the truth,
 24 was examined and testified upon his oath as
 25 follows:

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DIRECT EXAMINATION

BY MR. DAVIS:

Q. Mr. Lee, can you stated and spell your name for the record please?

A. Cary D. Lee, C-A-R-Y, D for middle initial, Lee, L-E-E.

Q. Mr. Lee, were you at one point a user of combustible tobacco products?

A. Since 12.

Q. How long, so what's your age now?

A. I did have a stroke, so the numbers get weird for me. How old am I Mona? 59. I'm sorry, the stroke got certain areas of the brain, I'm in very good shape. I did not mean to do that to you.

THE COURT: Mr. Lee.

THE WITNESS: Yes.

THE COURT: If you can't answer something, you can indicate that.

THE WITNESS: Okay.

THE COURT: But unlike Who Want's to Be a Millionaire, can't get a life line.

MR. DAVIS: Thank you, Your Honor.

BY MR. DAVIS:

Q. So if you're 59 now and you smoked since you were 12, that's approximately 37 years?

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- 1 A. Yes, I quit a whole bunch of times but dear Lord.
- 2 Q. Did you suffer any kind of adverse health effects as
3 a result of your usage of combustible tobacco
4 products?
- 5 A. I have clogged arteries, I had a stroke and I became
6 diabetic in a brief time in the army and so a
7 diabetic who smokes is suicide.
- 8 Q. When was the last time that you smoked, what I'll
9 again refer to as, a combustible tobacco product?
- 10 A. About three days before I seen this product, I was
11 selling this guy -- I was selling this guy and I was
12 trying to make a sale and he pulled out a cigarette.
13 He's an old man and he smokes on it and I says, you
14 know I hadn't smoked for three days and I says what
15 is that, I just want to smell it. And the guy goes,
16 he must have thought I was trying to get close to
17 him and he says, oh, it's an electronic cigarette.
18 And I go, what is that? I says, well what's the
19 dangers of cigarettes. He said I don't know, the
20 tar, he said the burning -- but anyhow, did I
21 wandered off again, sorry about that --
- 22 Q. No, my question was, when was the last time that you
23 smoked a combustible tobacco product?
- 24 A. Just before I started the company.
- 25 Q. You started A Clean Cigarette in Michigan; is that

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1 correct?

2 **A. Yes, sir.**

3 Q. Do you know what year you started it?

4 **A. That's the part of the brain -- yes and no, 1980. I**
5 **started when you could still smoke cigarettes in**
6 **bars.**

7 Q. Okay. We can look that up.

8 THE COURT: Counsel, I doubt that there's
9 going to be a dispute about this.

10 MR. DAVIS: 2010, Your Honor.

11 THE WITNESS: 2010, yes.

12 BY MR. DAVIS:

13 Q. Thank you. Why did you start the company?

14 **A. When that Ed guy showed me that cigarette and I**
15 **says, I says I just want to smell it, he says you**
16 **can't smell it. And so I says, what is it. He said**
17 **an electronic cigarette. It looked just like a**
18 **cigarette. And I said, I says, I just want to hit**
19 **on it. I said I haven't had a cigarette in three**
20 **days. I was jonesing, what we call it. So he gave**
21 **me a hit on it, he gave me another hit. And he said**
22 **what's the dangers of the cigarette. I said I don't**
23 **know. And he says, well the tar and that. And he**
24 **says it's equivalent to the evidence I know. I been**
25 **in a bar, he hates cigarettes. So that -- so that's**

1 when I knew -- I walked out there I said Lord, I
2 think you want me to sell electronic cigarettes. It
3 was just like I was going to change my business.
4 And so I told my wife and she thought I was nuts and
5 this and that and I got one. But I knew, I knew I
6 could help people. You see one out of ten people
7 are super addicted, I'm one of those. And so when
8 somebody's addicted and they get hooked on
9 something. Ten kids start smoking, one gets hooked
10 for life. That's what you get when any kid starts
11 smoking.

12 Q. Do you track your customer's progress --

13 A. Yes, sir.

14 Q. -- in quitting combustible tobacco products?

15 A. Yes.

16 Q. Mr. Lee, let me ask the question, --

17 A. Yes, sir.

18 Q. -- I'll give you ample opportunity to answer the
19 question, okay?

20 A. Yes, sir.

21 Q. You said yes you track or somebody tracks
22 combustible -- usage of combustible tobacco products
23 by your clients; is that correct?

24 A. Yes.

25 Q. Okay. How do you track it or how does the company

1 track usage by customers of how long it's been since
2 they last smoked a cigarette?

3 A. Well, we ask them, are you totally off burning
4 tobacco and they say they are. Then six months
5 later we tell them it's six months we're going to,
6 you know, cheer you on. They get a coin and on this
7 coin, would you like to see it, judge.

8 THE COURT: I can see it from here.
9 Thank you sir.

10 THE WITNESS: Okay. The coin, it says
11 out of 100,000 people that's my goal, 100,000 people
12 not burning tobacco and we've only got about five
13 thousand. So that's everything. Now my blue-eyed
14 wife of all these years, we dated we was 15, she
15 never smoked, so she always thought I was the
16 stupidest guy alive. And I say, why don't you quit?
17 This argument was driving her over the years. She
18 would give up for a couple years and just not say
19 anything.

20 Q. So you track based on the --

21 A. Oh yeah.

22 Q. -- the book that you give them?

23 A. Oh yeah, we give them a certificate.

24 THE COURT: Could you repeat your last
25 question and then you'll wait and give the answer.

1 BY MR. DAVIS:

2 Q. My question was you track customers usage of
3 combustible tobacco products and you track it in a
4 book; is that correct?

5 A. Yes.

6 Q. Okay. Prior to the ban that took effect on October
7 2nd, did A Clean Cigarette sell any kind of flavored
8 products?

9 A. Yes.

10 Q. Okay. Let me ask you the next question. Did they
11 sell products or did you sell products like Fruit
12 Loops, Fanta, Nilla Wafers, Cotton Candy, anything
13 like that?

14 A. No.

15 Q. Why did you decide to offer flavored nicotine vapor
16 products, the ones you do sell?

17 A. A person smokes, they lose a lot of their taste
18 buds. When they get off burning tobacco, they get
19 their taste buds back. And so over and over they
20 say I want a different taste. So we had to get into
21 flavors. So we picked out, for us, for what we do,
22 other people have all these different flavors, but
23 when you get your taste buds back, the fight is to
24 never light up again. Everybody that ever smoked,
25 the one out of ten, is the fight, is they never want

1 to light up again. And that's just a fight. So if
2 you can make it taste better, then they won't light
3 up and it's one out of ten are super addictive. I
4 get that figure, and my pastor said this forever and
5 he's proven over and over again. When one out of
6 ten kids start smoking, one gets hooked for life, he
7 gets hooked for life.

8 THE COURT: Slow down.

9 THE WITNESS: Oh, I'm sorry, I --

10 MR. DAVIS: Your Honor, those are
11 actually all the questions I have for this witness.

12 BY MR. DAVIS:

13 Q. Thank you.

14 BY MR. LONG:

15 Q. Good afternoon Mr. Lee, my name is James Long.

16 THE COURT: Hold on a second. Even
17 though I doubt if he does, I have to ask the other
18 plaintiff's counsel if he has questions of this
19 witness.

20 MR. LONG: Oh, I am sorry.

21 MR. BLAIR: Thank you Your Honor. No, I
22 do not.

23 THE COURT: Now you may proceed.

24 CROSS EXAMINATION

25 BY MR. LONG:

1 Q. As I was saying Mr. Lee, my name is James long and
2 I'm an assistant attorney general, I represent the
3 defendants and I'm going to ask you some questions
4 related to your lawsuit, okay?

5 **A. Yes, sir.**

6 Q. Okay. You mentioned you have a coin with you and
7 you mentioned that one of your goals with respect to
8 your company is to get individuals, your clients
9 totally off of tobacco product; is that right?

10 **A. Oh, yes.**

11 Q. Combustible tobacco product?

12 **A. Yes, sir.**

13 Q. And you've been in business I think you said since
14 2011 or so?

15 **A. 2010.**

16 Q. Okay.

17 **A. November 1, 2010.**

18 Q. Okay.

19 **A. You could still smoke cigarettes in bars.**

20 Q. Okay, 2010, so approximately nine years in business?

21 **A. Be ten years -- ten years and a few months.**

22 Q. And you indicated that you've given away five
23 thousand coins thus far?

24 **A. Just short of it.**

25 Q. So how many customers over that, just short of ten

1 years time span, have you had at all of your stores,
2 do you know?

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

4 Q. Hundreds of thousands?

5 **A. Oh, no. It's hard to get people to come in. They**
6 **come in off referrals. One smoker tells another**
7 **smoker, tells another smoker, tells another smoker.**

8 Q. Do you know, yes or no, how many customers you've
9 had at all of yours stores?

10 **A. No --**

11 THE COURT: Now repeat your answer
12 please.

13 **THE WITNESS: No.**

14 BY MR. LONG:

15 Q. Now can you --

16 The COURT: Well let me finish the rest
17 of it. That wasn't the whole answer.

18 MR. LONG: Well it was the whole answer.

19 THE COURT: No, he said no, my blue-eyed
20 wife might.

21 **THE WITNESS: She might. Thank you. I**
22 **call her that we was 15. There's nobody blue-eyed**
23 **in our family, anywhere.**

24 THE COURT: Mine either.

25 BY MR. LONG:

1 Q. All right, can you tell in your amended complaint,
2 the amended complaint that A Clean Cigarette Company
3 filed indicates that it operates 20 retail stores
4 across Michigan and employs 53 people, correct?

5 **A. Yes, sir.**

6 Q. And your counsel indicated in opening statement that
7 some of those stores have since closed; is that
8 right?

9 **A. Closed one. We hire people typically 40 and above.
10 I hired one lady 67, she's 70 now I believe. We buy
11 her full health care. Until the health care is gone
12 and probably --**

13 THE COURT: Sir, the question was, sir,
14 have you closed a store.

15 THE WITNESS: We closed one so far.

16 BY MR. LONG:

17 Q. Where was that store located?

18 **A. That one's in the Bay City Mall. There's a store in
19 the mall.**

20 Q. Okay, Bay City?

21 **A. Yes, sir.**

22 Q. Can you describe A Clean Cigarette's corporate
23 structure? You have 20 stores?

24 **A. Yes, sir.**

25 Q. How are those owned by -- are you the owner, you're

1 a co-owner of all of those stores?

2 **A.** It's a corporation, but my wife and I have been
3 self-employed for 41 years since I got out of the
4 army and so we set up a corporation. We've been in
5 business for a while and the lawyer guy said you
6 should have corporation. So we formed a
7 corporation.

8 **Q.** Are any of those stores co-owned by anyone other
9 than you and your wife?

10 **A.** No, just us.

11 **Q.** All right. Have you -- out of that sir, is there
12 one corporation of A Clean Cigarette Corporation
13 that oversees all of the stores?

14 **MR. DAVIS:** Your Honor, I've got to
15 object to the relevance of this line of questions.

16 **THE COURT:** Overruled.

17 **THE WITNESS:** So how did you say that?

18 **BY MR. LONG:**

19 **Q.** I said is there one corporation that oversees all of
20 the -- I know you don't have 20 now but all of the
21 20 stores that were in operation?

22 **A.** Yes.

23 **Q.** Have you ever incorporated A Clean Cigarette under
24 any other corporate structure, limited liability
25 corporation, for example?

1 A. No. But you know when the FDA guy came out
2 inspecting us, he said they're all alike. He just
3 walks in there, he says, he asks a couple of
4 questions. We just had the FDA come through all 20
5 of our stores. It was amazing, he said -- that was
6 a high compliment to me -- it's like he says they
7 all are alike, everybody does the same policies,
8 same procedures.

9 THE COURT: Counsel, can you tell us what
10 kind of corporation this is just for the record.

11 MR. DAVIS: Me, Your Honor?

12 THE COURT: Yes, sir.

13 MR. DAVIS: Is it S corp?

14 THE COURT: If you don't know.

15 MR. DAVIS: I don't know honestly, I'm
16 sorry Your Honor. I believe it's a S corp. It is
17 an S corp, Your Honor. Thank you.

18 BY MR. LONG:

19 Q. I'll ask you this. So I'm aware there's a number of
20 A Clean Cigarette companies incorporated as LLC's or
21 that were according to the department of
22 licensing --

23 A. Yeah.

24 Q. So does that remind you of something?

25 A. I have two lawyer friends. They both been lawyers

1 the same length of time, about 30 years. They've
2 both got in an argument one time as we were sitting
3 there talking and they told me they weren't charging
4 although they both did. Should we have all these
5 corporations, should we have one, so we formed all
6 these corporations and the other guy said that's
7 stupid, you're all doing the same thing.

8 MR. DAVIS: To the extent we're getting
9 into attorney/client privilege, attorney, friends,
10 setting up with the corporation --

11 THE COURT: You mean to the extent that
12 your client is voluntarily waiving his
13 attorney/client privilege.

14 THE WITNESS: Yeah, yeah, I'm sorry.

15 MR. DAVIS: I'm going to object on the --

16 THE COURT: You can't. It's his. I
17 thing the questions sir is, did you at one point
18 have a bunch of LLCs?

19 THE WITNESS: Yes, but I thought they all
20 died or whatever they do.

21 THE COURT: Okay, but you did?

22 THE WITNESS: Oh, yes we did.

23 THE COURT: And you don't now?

24 THE WITNESS: Well we never used them. I
25 mean we don't --

1 THE COURT: They're not active?

2 THE WITNESS: No. We've never liked
3 lawyers, to be honest with you, judge. I'm sorry.

4 BY MR. LONG:

5 Q. So where is A Clean Corporation's headquarters?

6 A. In Saginaw, Michigan.

7 Q. And then you indicated, I think when you had the 20
8 stores, you employed 53 employees; is that right?

9 A. Full-time. Two of them are 30 hours a week but,
10 yeah, we buy them health care, we buy them dental,
11 we buy the everything.

12 Q. 53 employees, full-time, they were all full-time
13 employees?

14 A. Yeah but two of them worked not full shifts. It's
15 just the way the store is set up.

16 Q. Okay. And so how many employees are employed at the
17 corporate headquarters?

18 A. The corporate headquarters. Our leadership. Well,
19 we have a leadership group, if a had, he's right
20 there.

21 THE COURT: Counsel, can you approach for
22 a moment, please?

23 (Sidebar discussion off the record)

24 BY MR. LONG:

25 Q. So you testified about your experience with smoking

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1 combustible tobacco and also with E-cigarette use,
2 correct?

3 **A. Oh, yeah.**

4 **Q. Okay. And what -- you currently use an E-cigarette?**

5 **A. Oh, yes.**

6 **Q. What flavor, if I may ask, do you use?**

7 **A. I use normal. I'm an old guy.**

8 **Q. Is that tobacco flavored then?**

9 **A. Yeah, yeah, that's tobacco.**

10 **Q. Okay.**

11 **A. But when I say that, artistic people, have special**
12 **coffee, artists and teachers would come into our**
13 **coffee shop, all the lawyers had double shot**
14 **Americanos. They never had any flavor at all, not**
15 **one lawyer. But when the teachers come in, they're**
16 **all having different flavors of everything else at**
17 **the espresso coffee shop. That's how it is too in**
18 **this business. We lose a lot of people because we**
19 **don't have enough flavors because some people really**
20 **like them.**

21 **Q. With respect to your use though, you used to be a**
22 **tobacco flavored nicotine product; is that correct?**

23 **A. Yes, I smoked Marlboro and I --**

24 **Q. So you do understand that a tobacco flavored**
25 **nicotine product is still available for sale,**

1 distribution, use, in Michigan under these rules,
2 correct?

3 **A. Yeah, but menthol's not on these rules.**

4 Q. No, but you don't use menthol?

5 **A. I don't.**

6 Q. That's all, that's all.

7 **A. Yeah.**

8 Q. So with respect to these rules and your ability to
9 use a flavored nicotine -- a tobacco flavored
10 nicotine vapor product, the rules aren't going to
11 have any effect on you personally in that respect as
12 far as your use?

13 **A. For me currently, no.**

14 MR. LONG: Thank you, Your Honor, I have
15 no further questions.

16 MR. DAVIS: I have no redirect, Your
17 Honor.

18 THE COURT: And you have no other
19 questions for him?

20 MR. BLAIR: Correct, Your Honor.

21 THE COURT: The witness may return to his
22 seat. And if you would call your next witness,
23 please.

24 MR. DAVIS: Thank you, Your Honor. A
25 Clean Cigarette calls Mona Lee.

1 THE COURT: Ms. Lee, if you would come
2 forward, and when you are comfortable, raise your
3 right-hand.

4 Do you swear or affirm the testimony you
5 are about to give in the cause pending before this
6 court is the truth?

7 THE WITNESS: Absolutely.

8 THE COURT: And we want you to use your
9 outside voice so everybody can hear you.

10 THE WITNESS: Sorry I'm not the talker he
11 is.

12 — — —
13 R A M O N A L E E
14 after having been first duly sworn to tell the
15 truth, the whole truth and nothing but the truth,
16 was examined and testified upon her oath as
17 follows:

18 DIRECT EXAMINATION

19 BY MR. DAVIS:

20 Q. Good afternoon can you state and spell your full
21 name for the record?

22 A. Sure, it's Ramona Grace Lee, R-A-M-O-N-A, Grace,
23 G-R-A-C-E, last name Lee, L-E-E.

24 Q. Are you an owner of A Clean Cigarette corporation?

25 A. I am.

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- 1 Q. How did you become involved in the company?
- 2 A. **When my husband got started selling the E-cigarette**
- 3 **at the Bay City Mall.**
- 4 Q. Do you hold a title with A Clean Cigarette?
- 5 A. **I have many titles but secretary-treasurer you if**
- 6 **you want to know corporate.**
- 7 Q. Are you familiar with the books and records of the
- 8 company?
- 9 A. **Absolutely.**
- 10 Q. And are you, is it fair to call you the bookkeeper?
- 11 A. **Yes.**
- 12 Q. How many stores did A Clean Cigarette have as of
- 13 September 1, 2019?
- 14 A. **Twenty.**
- 15 Q. How many stores do we -- or does A Clean Cigarette
- 16 have now?
- 17 A. **Today we have 19.**
- 18 Q. And are you taking steps to shut down more stores?
- 19 A. **We have five more that will be closing on the 15th.**
- 20 Q. Any by the end of the month?
- 21 A. **Yes, if we can't get this overturned and have**
- 22 **menthol to sell we will be closing probably another**
- 23 **five more.**
- 24 Q. How many employees did you have or A Clean Cigarette
- 25 have as of September 1, 2019?

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- 1 **A.** **We had 53.**
- 2 Q. And are most of them full-time employees?
- 3 **A.** **Yes.**
- 4 Q. Do you know what the approximate payroll per month
5 is for A Clean Cigarette?
- 6 **A.** **Absolutely. It's 130,000 a month, give or take.**
- 7 Q. Does A Clean Cigarette offer benefits, fringe
8 benefits to its employees?
- 9 **A.** **We do. We allow paid time off hours, we do
10 Christmas bonuses, we pay sales bonuses.**
- 11 Q. If you know, how much does A Clean Cigarette spend
12 on its fringe benefits for its employees per month?
- 13 **A.** **30 to 35 thousand a month.**
- 14 Q. As a result of this ban, has A Clean Cigarette been
15 forced to lay anyone off?
- 16 **A.** **We've laid off one person so far.**
- 17 Q. Was that person eligible for the benefits that you
18 mentioned?
- 19 **A.** **He was. He was the newest employee, so he was the
20 first to go and he hadn't started to get insurance,
21 but he was eligible for it.**
- 22 Q. Of the 53 employees that you used to have, now I
23 believe we're down to 52, has the company planned
24 additional layoffs as a result of this ban?
- 25 **A.** **Yeah, we have typically one or two employees per**

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1 location and so out of the next five stores that we
2 close that's going to be another 12 people that we
3 need to layoff. And additionally another ten or so
4 beyond that.

5 Q. So based on my math, it would be about half your
6 work force by the end of the month?

7 A. Well, it would be at least 20.

8 Q. So 20 down to about 32, 33, somewhere in that range?

9 A. Yes.

10 Q. Have you turned in any, planning for that, have you
11 turned in any cancellation of health insurance?

12 A. Yeah, I've already got people -- the people -- the
13 stores are closing, their insurance will end the end
14 of October.

15 Q. Is the company reviewing any other ways to save
16 money as a result of this ban?

17 A. We have -- yes, we're going to be closing --
18 shortening the hours, we'll have to close either
19 earlier or open later. We'll probably not be able
20 to pay Christmas bonuses this year.

21 Q. Are you familiar what percentage of the company
22 sales are flavored vapor product containing nicotine
23 versus what percentage contain no nicotine?

24 THE COURT: What percentage of flavored
25 product contains no nicotine?

1 MR. DAVIS: Correct.

2 THE COURT: Or what percentage of
3 product.

4 MR. DAVIS: No, what percentage of
5 flavored product contains nicotine versus what
6 percentage contains no nicotine. What's still legal
7 and what's not legal at this point, Your Honor,
8 flavored.

9 **THE WITNESS: Okay, well, --**

10 BY MR. DAVIS:

11 Q. What percentage of sales are flavored nicotine --
12 excuse me, flavored vapor products containing no
13 nicotine?

14 **A. All right, so our no nicotine cartridges have always**
15 **been just a minimum, but maybe one percent of our**
16 **sales.**

17 Q. So one percent of your overall sales per month
18 contain no nicotine flavored products that are still
19 legal under these rules?

20 **A. Yes, that's the only flavored product we have on the**
21 **shelf now.**

22 Q. Are you familiar with what percentage of company
23 sales are menthol flavored?

24 **A. Roughly 35 percent, maybe a little higher.**

25 Q. And what are the sales or what percentage of the

1 company sales, overall sales, before this ban are
2 flavored vapor products containing nicotine that are
3 now under this ban illegal?

4 **A. Another 15 percent.**

5 Q. So approximately 50 percent of your overall monthly
6 sales have become illegal as a result of this ban?

7 **A. Correct.**

8 Q. Prior to October 2nd, did you market your flavored
9 vapor products containing nicotine on your web site?

10 **A. Yes, we did.**

11 Q. Does A Clean Cigarette sell to customers outside of
12 the state?

13 **A. Yes, probably three fourths of our sales from online
14 sales go out of state.**

15 Q. As a result of there ban were you forced to make
16 modifications to your web site?

17 **A. Yeah, coming back from Petoskey, soon as we were
18 able to, we took everything off the web site that
19 was flavored with nicotine.**

20 Q. So if I was to go to your web site as a new
21 customer, as an out of state resident, would I be
22 able to find any vapor product containing nicotine
23 that I could purchase and you could ship to me out
24 of state?

25 **A. None, it's not on there.**

1 Q. So I couldn't order them -- I don't even know -- is
2 it fair to say that I wouldn't know that you possess
3 those for sale?

4 MR. LONG: I object, Your Honor, with
5 respect.

6 MR. DAVIS: I'll withdraw the question,
7 Your Honor, thank you.

8 BY MR. DAVIS:

9 Q. Is A Clean Cigarette claiming to lose most, if not
10 all, it's out of state customers that ordered
11 flavored nicotine vapor products before this ban?

12 A. **Yes, I mean they'll go to the web site and there's**
13 **nothing there for them to order.**

14 Q. Have your sales, your overall sales suffered since
15 this ban took effect last week?

16 A. **Drastically.**

17 Q. If you could tell the court how drastically the
18 sales have suffered?

19 A. **Well, prior to September 2nd, we averaged 13 to**
20 **\$14,000 worth of sales a day company wide, outside**
21 **of the web site, but just in the stores. And since**
22 **October 2nd, we have had roughly \$9,000 a day.**

23 Q. As an owner of the company, are you worried about
24 transporting the -- what I'll call the illegal
25 product, the flavored nicotine vapor product and

1 menthol product from your stores that are closing to
2 a new location?

3 **A. Well, yeah. According to the rule, the emergency**
4 **rule, all of our managers are concerned about if**
5 **they have to pick up banned product and move it**
6 **somewhere, that they could be arrested.**

7 **Q. Does A Clean Cigarette have product that they cannot**
8 **sell or market for sale because of the ban?**

9 **A. Yes.**

10 **Q. How much, do you know, that you currently have, of**
11 **product sitting in your warehouse?**

12 **A. The closest we've calculated right now is 740,000**
13 **cartridges that are either locked up in our**
14 **warehouse or sitting at the stores in boxes that**
15 **can't be sold.**

16 **Q. And what does A Clean Cigarette charge per**
17 **cartridge?**

18 **A. Between \$3.00 and \$3.75 a cartridges.**

19 **Q. So a little more than \$3,000,000 approximately?**

20 **A. Yeah, I'm not a math whiz but sure.**

21 **Q. Prior to the ban taking affect, did A Clean**
22 **Cigarette raise its prices per cartridge?**

23 **A. We did, effective July 15th when we found out that**
24 **we were going to need to fund lab testing for our**
25 **premarket approval application. We raised the price**

1 per cartridges 25 cents and I have been diligently
2 putting that 25 cents into a separate account that
3 will pay for lab deferred testing.

4 Q. Could you explain to the judge what you mean by
5 premarket approval?

6 A. Well it's technically, they call it PMTA but it's
7 premarket tobacco application and because A Clean
8 Cigarette is registered with the FDA as a
9 manufacturer, we have to support all of the data or
10 provide all the data for all the research to the FDA
11 for them to approve our product so that we can stay
12 in business after the deadline which is currently
13 May of 2020.

14 Q. What is the cost to date of the testing that's been
15 done for the premarket approval process?

16 A. Well, just one aspect of that, the laboratory
17 testing and we did a chemical analysis of our fluid
18 way back in the beginning in 2012. But now for the
19 FDA we have to provide aerosol testing and the quote
20 that we have from our lab is \$107,000 for one
21 flavor.

22 Q. Now going back to your testimony before where you
23 were saying you set a quarter aside, are you still
24 able to do that with the sales as they currently
25 stand?

1 A. Well, over the summer and since we started doing
2 that, I was averaging a \$1,000 a day going into that
3 account. And in the last six days it's more like
4 \$500.

5 THE COURT: So that I understand, the
6 product that you are required to test, is it only
7 your flavored product?

8 THE WITNESS: No, it's any product that
9 we want the FDA to approve for us.

10 THE COURT: And the FDA has to approve
11 both your flavored and your unflavored product.

12 THE WITNESS: Correct, so for every --

13 THE COURT: Just three questions. I just
14 want to make sure I understood. You indicated that
15 you had 13 to \$14,000 in sales prior to ban and
16 \$9,000 post ban. Were you referring to your
17 internet sales or your in-store sales?

18 THE WITNESS: My in-store sales. We have
19 somebody that oversees all of the web store sales,
20 so she could answer the questions regarding the
21 online sales.

22 MR. DAVIS: May I proceed, Your Honor.

23 THE COURT: Please.

24 MR. DAVIS: Thank you.

25 BY MR. DAVIS:

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1 Q. Can A Clean Cigarette survive if menthol flavored,
2 flavored nicotine vapor products were banned in the
3 state of Michigan for a year?

4 **A. No.**

5 Q. Do you believe that A Clean Cigarette has
6 established a good reputation and goodwill with its
7 customers?

8 **A. I do believe that. They count on us being there.**

9 Q. If you're forced to close at least half your stores
10 and layoff half of your employees, at the expiration
11 of this ban and year, would you be able to just
12 reopen the businesses and start again?

13 **A. No way.**

14 Q. How long have you spent getting to 10 -- or to 20
15 stores?

16 **A. We opened the 20th store over two years ago, so we
17 had already reached the point where we weren't going
18 to try to open any additional stores until we got
19 through the premarket approval.**

20 Q. Does A Clean Cigarette act as what I'm going to call
21 a support network for users of combustible tobacco
22 product?

23 **A. Absolutely. It's obviously easier for a smoker to
24 stop at a 7-Eleven or a gas station, whatever and
25 grab a pack of cigarettes. Where if they're going**

1 to switch from combustible tobacco, they need to
2 come by and see us during the hours that we are
3 available. So even shortening our hours is going to
4 make that more difficult for them.

5 But when they have a challenge like
6 they're having a hard time sticking to the
7 E-cigarette and maybe slipping and going back to
8 burning tobacco, then our people in the store are
9 there to help them and sometimes it's because maybe
10 they tried to step down to a lower level of nicotine
11 and their body is not ready for that yet. So our
12 people are there to kind of help them work through
13 it, offer suggestions. You know, maybe they need to
14 have a 24 milligram as back up and then they can go
15 to the 18 and you know, we work with them.

16 Q. So if you close some of your stores, ten of yours
17 stores by the end of the month and there are no
18 A Clean Cigarette Company stores at the other
19 location, are you going to lose the ability to
20 provide that person the support that they need to
21 stay combustible tobacco free?

22 A. Yes. We will encourage them to order online if they
23 will, but a lot of people aren't comfortable with
24 that and they won't get the support that they would
25 normally get by coming in and seeing us personally.

1 Q. I've heard from Mr. Lee that you do track how long
2 people have been combustible tobacco free?

3 A. Yeah, from early on we started to give people, you
4 know, like they've told us they've been tobacco free
5 for six months, there was a mug. And if they were
6 off tobacco for a year, there was a tee shirt. But
7 we weren't -- we didn't want to pry into their
8 personal lives and take all kinds of personal
9 information, so it was kind of a, you know, take it
10 by their word kind of thing.

11 Well, after we got involved in the
12 premarket approval process, we realized we need this
13 information to be able to show the FDA, so that's
14 when we started this book and we have a lot of
15 customers who have been with us since 2010, 2011
16 that have signed the book and gotten their
17 certificate and their coin and we have their
18 signature in writing that we can show people that
19 they're burning tobacco free.

20 Q. Thank you?

21 A. With our product.

22 Q. Thank you?

23 MR. DAVIS: I have no further questions
24 at this time, Your Honor.

25 THE COURT: Do you have any questions on

1 behalf of Marc Slis and 906?

2 MR. BLAIR: No Your Honor.

3 CROSS EXAMINATION

4 BY MR. LONG:

5 Q. Good afternoon, Ms. Lee. I'm going to ask a few
6 questions with respect to your counsel's questions.
7 And also about the corporate structure but I'll
8 start with some follow-up questions. You indicated
9 in response to actually the judge's question that on
10 average before say in September of 2019 your
11 stores -- in-store sales were around 13 to \$14,000
12 sales, gross sales per month; is that right?

13 A. **Net sales.**

14 Q. Net sales?

15 A. **Yeah. We don't mess with the state's sales tax
16 laws.**

17 MR. DAVIS: Your Honor, I believe that
18 mischaracterizes the testimony. She said per day,
19 not month.

20 MR. LONG: I'm sorry.

21 **THE WITNESS: I guess I need to listen
22 closer. Sorry.**

23 BY MR. LONG:

24 Q. And so then in October, as of October when the rules
25 took effect, the average net sales per day for

1 in-store sales is around \$9,000?

2 **A. \$9,000, yeah, that's right.**

3 Q. And you indicated, I believe, that prior to the
4 rules taking effect, three quarters of your online
5 sales were made out of state; is that right?

6 **A. Correct.**

7 Q. Do you have an approximate net value of that pre
8 rule, net sales that were made on the internet?

9 **A. I haven't looked at those numbers recently but
10 generally if we hit \$50,000 online, that's
11 considered a good months.**

12 THE COURT: Just a question on behalf of,
13 well a question relative to A Clean Cigarette.
14 Counsel, can you tell me does David Haight have the
15 records regarding the sales, the inventory warehouse
16 managers list?

17 MR. DAVIS: Yes, Your Honor.

18 BY MR. LONG:

19 Q. So with respect to the in-store sales alone, since
20 the emergency rules went into effect, there's less
21 than a 50 percent reduction in the net sales per
22 day, is that fair to say?

23 **A. Yeah, and it's interesting because some people that
24 have gotten flavors have come in and live in a
25 closet, apparently, didn't know that any of this was**

1 going on. But they've come in, and because we have
2 no flavors or menthol to sell them, we've been
3 trying to work them into, you know, try this, try
4 that. So some people have been willing to purchase
5 another flavor, a normal tobacco flavor.

6 Q. Okay. You indicated that as far as the FDA is
7 concerned, your company is considered a manufacturer
8 of vapor product; is that right?

9 A. Yes.

10 Q. Okay. So do you -- you actually -- you have a
11 factory, do you manufacture anything anywhere?

12 A. No.

13 Q. That's how they view you though?

14 A. Because we want to help people get off of burning
15 tobacco cigarettes, we will -- the first question we
16 ask them is what do you smoke now. So if they smoke
17 Newport or they smoke Marlboro, we find a cartridge
18 that's similar to what they use and similar in
19 strength, so we match them to the milligrams that
20 they would need.

21 Q. Okay.

22 A. So to get started, you know, somebody might be okay
23 with 18 milligrams, but if that's not strong enough,
24 maybe they'll need the 24, so we'll give them maybe
25 two or three options in a pack that they could get

1 started with and try and see what's going to work
2 with them and that makes us manufacturers.

3 Q. And with respect to milligrams, 24, 18, so forth,
4 you're talking about the amount of nicotine?

5 A. **The nicotine level in a cartridge.**

6 Q. All right. And so when somebody comes in and is
7 smoking combustible tobacco, is in general, the
8 first recommendation to go to a tobacco flavored
9 E-cigarette?

10 A. **It depends on what they smoke now, but sure.**

11 Q. And you can still sell both in the store and online
12 nicotine tobacco flavored vapor products, correct?

13 A. **Nicotine flavored?**

14 Q. Well, I'm sorry, tobacco flavored nicotine vapor
15 product?

16 A. **Yes.**

17 Q. You can continue to sell that?

18 A. **Right.**

19 Q. With respect to your customers that indicate they
20 are now tobacco free, tobacco combustible free,
21 that's all self reported, is that right; on their
22 behalf?

23 A. **Yes, we don't require a laboratory test, a blood
24 test that show tobacco in their system.**

25 Q. Okay. Does A Clean Cigarette, with respect to the

1 20 stores, did A Clean Cigarette own the real
2 property where those stores were located, the
3 storefront, that kind of thing?

4 **A. We own two of our buildings.**

5 Q. Where are those located?

6 **A. There's one in Saginaw on North Michigan Avenue and
7 there's one in Lansing on Larch Street.**

8 Q. Okay.

9 **A. Then we have two buildings that are under lease --
10 or a on land contract.**

11 Q. Okay. And the rest are -- you're renting
12 storefront?

13 **A. Right, landlords.**

14 Q. Okay. And I'm assuming those are various leases
15 among the main stores?

16 **A. Yeah, right.**

17 THE COURT: The store that you closed,
18 was that a lease store or an owned store?

19 THE WITNESS: That was -- we were leasing
20 a space inside a hair salon, and we were only able
21 to pull out of that readily because she had somebody
22 else that she would put in that spot.

23 BY MR. LONG:

24 Q. Besides vapor product and vapor related accessories,
25 for lack of a better term, do you sell any other

1 products in any other stores?

2 **A. We do. I mean we have a handful of accessories that**
3 **go with the electronic cigarette, the batteries and**
4 **et cetera. And we have a small line of CBD**
5 **products, tinctures and a vape cartridge.**

6 Q. So CBD products, tea shirts and a vape cartridge, is
7 that what you said? I'm sorry.

8 **A. No tee shirts, just CBD products, just a tincture**
9 **that, you know, the drops, CBD drops.**

10 Q. I'm sorry. Okay. So A Clean Cigarette is not
11 licensed to sell tobacco; is that correct?

12 **A. We are.**

13 Q. You are? Okay. So do you pay state of Michigan
14 sales -- tobacco tax?

15 **A. No, we pay -- well, actually our Larch Street store**
16 **is licensed in Lansing because we were required to**
17 **buy a tobacco license.**

18 Q. Do any of the other stores have tobacco licenses?

19 **A. No, because -- I think it's because we're still**
20 **waiting to get approved by the FDA.**

21 Q. So from your perspective though, the product you
22 sell, the nicotine -- tobacco flavored nicotine
23 product, that's a tobacco product?

24 **A. According to the FDA, yes.**

25 Q. But according to the state of Michigan it's not a

1 tobacco product, you don't know?

2 **A. They know what we sell and nobody has approached me**
3 **about having a tobacco license.**

4 Q. And you don't pay any state tobacco tax?

5 **A. No.**

6 Q. So of the vapor products that you sold before the
7 emergency rules went into effect, did you sell vapor
8 products that did not contain nicotine?

9 **A. We have no-nicks.**

10 Q. And what flavors did you sell or do you continue to
11 sell flavored products that don't have nicotine?

12 **A. All of them. We have apple, blueberry, coffee,**
13 **peach, grape and vanilla, all cigar flavors.**

14 Q. And those all come with no nicotine currently?

15 **A. That's the only thing in no-nick currently.**

16 Q. Do you sell all of your vapor product regardless of
17 whether it contains nicotine at the same price,
18 \$3.00 or \$3.75?

19 **A. We do. It takes the same amount of work to create**
20 **that cartridge than it does with or without**
21 **nicotine.**

22 Q. Where do you get the cartridges, you don't
23 manufacture them yourself, where do you get those?

24 **A. Correctly from our manufacturer in China.**

25 Q. Do you have just one manufacturer that supplies the

1 company?

2 **A. We do.**

3 Q. With respect to your customers, does A Clean
4 Cigarette have a way to confirm one way or another
5 whether or not your customers have in the past
6 smoked combustible tobacco?

7 **A. You can smell it on them when they come in, but, you
8 know.**

9 Q. Is it fair to say that you don't know whether or not
10 some of the customers have never before smoked
11 combustible tobacco product?

12 **A. That's an interesting question and that's why our
13 people are coached to say oh, what do you smoke now
14 and across the board, if you tell them oh, I don't
15 smoke but I want to try this anyway, they will turn
16 you down.**

17 Q. And is that a policy of A Clean Cigarette?

18 **A. That is my husband's policy from day one.**

19 Q. Is that a written policy of the company?

20 **A. It is.**

21 Q. Where is that written down?

22 **A. In our employee manual.**

23 Q. Anything other than individual self reporting that
24 they smoke tobacco products before purchasing the
25 product that you're able to confirm?

1 A. I don't of any.

2 Q. Okay. So, is there anything else -- they self
3 report that they've smoked a tobacco product before?

4 A. Sure.

5 Q. Any other verification?

6 A. We would have no way of knowing. We do take a
7 little trade in policy, like if you go to our Larch
8 Street store they've got all these packs of
9 cigarettes taped up on the wall, that show this
10 customer came in and traded their brand-new pack of
11 cigarettes in on a cartridge to get started with A
12 Clean Cigarette.

13 Q. With respect to online sales, either in state or out
14 of state, is there that same spinning process that
15 your employees do?

16 A. We have a program on the web site that says if you
17 smoke this, you know and it can walk them through
18 the steps and recommend to them what would be good
19 for the person that smokes Marlboro or whatever.

20 Q. As far as the flavor comparisons?

21 A. Yes, the nicotine ones.

22 Q. So are you aware of recent media reports that Kroger
23 and Walmart have indicated that they're going to
24 stop selling all vapor products in their stores?

25 MR. DAVIS: Objection.

1 THE COURT: Sustained.

2 MR. DAVIS: Thank you.

3 BY MR. LONG:

4 Q. To the extent any other sellers of vapor product
5 ceased selling product, would you expect that that
6 might increase the sales at A Clean Cigarette?

7 MR. DAVIS: Same objection, irrelevant.
8 It calls for speculation. Thank you.

9 THE COURT: Sustained.

10 BY MR. LONG:

11 Q. Out of the emergency rules you're aware you can
12 still sell your product, including vapor nicotine
13 product out of state?

14 A. Okay.

15 Q. Were you aware of that, are you aware of that?

16 A. **Yeah, we'd still -- we only have our normal flavors
17 on our web site.**

18 Q. I get that, but you can sell them out of state, you
19 understand that, all of the prior -- all of the
20 products you've had before September, right?

21 A. **Okay, sure.**

22 Q. What efforts, if any, have A Clean Cigarette taken
23 to sell its products out of state either to another
24 retailer or individuals located out of Michigan?

25 A. **That crossed our mind. We actually had a discussion**

1 with our leadership group that, oh, maybe somebody
2 could move to Ohio and start a web site there and
3 continue to sell the product but now Ohio is going
4 to be banning the product too. So, I think that's
5 pretty pointless. Everybody is jumping on this band
6 wagon.

7 Q. Have you contacted, have you taken any efforts with
8 the company to contact any other resellers out of
9 state to see if you could --

10 A. The product is all manufactured and packaged for us,
11 so it has our address here in Saginaw. And so we
12 can't ship it anywhere else and let somebody else
13 sell it.

14 Q. In the complaint, the amended complaint it indicates
15 that the average shelf life of the product is 10
16 months and I think your counsel in the opening
17 statement gave it 11 months. Do you have this --

18 A. It's our company policy that we rotate the product
19 every 10 or 11 months. So depending on when we
20 received it from the manufacturer but we want enough
21 time for a customer to purchase it without it
22 getting old.

23 Q. Do the products on the physical packaging of the
24 products have an expiration date?

25 A. They don't. That's an internal system that we keep

1 track of on our own.

2 THE COURT: Ma'am, you said you rotate
3 the product. What does rotate mean?

4 THE WITNESS: Like any store's rotation,
5 it's first in, first out. So the product that's on
6 the shelf needs to be sold first and new product
7 coming into the stores gets put in the back and
8 rotated forward.

9 THE COURT: Okay. So I don't think --
10 I'll ask a follow-up question. If rotate means
11 merely recirculate, that would mean that a product
12 never got so old that you did not sell it any
13 further.

14 THE WITNESS: No, I apologize. By
15 rotating we mean that our son-in-law who handles
16 inventory will let us know, okay, this month we need
17 to pull this product off the shelf and it's going to
18 go in recycling.

19 THE COURT: Thank you.

20 BY MR. LONG:

21 Q. The amended complaint alleges that it is illegal for
22 a retailer to possess any signage advertising its
23 vapor products. Are you familiar with the amended
24 complaint?

25 A. Yes.

1 Q. Are you familiar with that allegation?

2 A. **Yeah.**

3 Q. So the rule states that a retailer can't use imagery
4 explicitly or implicitly -- implicitly or explicitly
5 representing a characterizing flavor to sell. Are
6 you familiar with that portion of the rules?

7 A. **I am.**

8 Q. So with respect to signage, you're still able to
9 advertise flavored non-nicotine product, correct;
10 you just can't use imagery?

11 A. **We don't anyway.**

12 Q. Then you can still advertise these various flavored
13 products, correct?

14 A. **There's nothing to advertise. They're just on our
15 shelf as labeled apple or grape or --**

16 Q. Okay. Was that the case before the emergency rules
17 went into effect?

18 A. **Yeah, we've never had descriptive advertising on our
19 packaging.**

20 Q. Okay. So with respect to that portion of the rules,
21 that doesn't effect A Clean Cigarette at all?

22 A. **No.**

23 Q. I think the amended complaint, with respect to the
24 emergency rules, A Clean Cigarette does not dispute
25 that there has been a staggering increase of youth

1 usage of vape products; is that right?

2 **A. Say that again.**

3 Q. A Clean Cigarette does not dispute that there's been
4 a staggering increase in usage of vape products; is
5 that right?

6 **A. I can't dispute the headlines, but I don't think**
7 **that they could prove to me that this is true.**
8 **Simply because I've seen how even the FDA does a**
9 **survey, and when they ask if you've ever used an**
10 **electronic cigarette, that counts you as an**
11 **electronic cigarette user, even if you've puffed on**
12 **one one time. So I feel like the numbers and the**
13 **statistics are skewed. So I probably shouldn't**
14 **answer anymore than that.**

15 Q. And the -- A Clean Cigarette does not dispute that
16 there's an epidemic among youth as it pertains to
17 the use of vapor product; is that right?

18 **A. I will go on record as saying A Clean Cigarette does**
19 **not endorse youth using electronic cigarette. But I**
20 **think that the youth is going to do something stupid**
21 **no matter what you put in front of them as long**
22 **as...**

23 Q. And A Clean Cigarette does not dispute that flavors
24 are driving the increase in youth vapor products; is
25 that right?

1 **A. I don't believe that either.**

2 Q. You don't believe that either. That's in the
3 amended complaint, but A Clean Cigarette doesn't
4 dispute that?

5 **A. No, I don't dispute it, but I don't believe that**
6 **it's going to make any it difference to the youth.**

7 MR. LONG: No further questions.

8 MR. DAVIS: Redirect, Your Honor.

9 REDIRECT EXAMINATION

10 THE COURT: You guys could switch places.

11 BY MR. DAVIS:

12 Q. Ms. Lee you were asked a question a moment ago by
13 council about the drop in your sales, the drop in
14 your daily sales. Do you recall that line of
15 questions?

16 **A. I do.**

17 Q. And counsel pointed out that your sales went from 13
18 or \$14,000 a day down to \$9,000 a day?

19 **A. Yes.**

20 Q. Do you recall that question?

21 **A. Yes.**

22 Q. Okay, you've closed one store to date, right?

23 **A. Correct.**

24 Q. And you've had about a 30 percent drop in your sales
25 as the result of one store closing; is that right,

1 approximately?

2 **A. Yeah, sure.**

3 Q. So from \$14,000 a day down to \$9,000 a day?

4 THE COURT: Counsel --

5 THE WITNESS: I'm confused.

6 THE COURT: Yeah.

7 THE WITNESS: I thought he was referring
8 to sales overall based on what we can't sell. I
9 mean, I don't think it's related to the one store
10 closing.

11 MR. DAVIS: Your Honor, my point in
12 asking this question --

13 THE COURT: I know what your point is but
14 I also know your client's testimony wasn't exactly
15 that. And I encourage you --

16 MR. DAVIS: I will rephrase -- or re-ask
17 a different question, Your Honor.

18 BY MR. DAVIS:

19 Q. Do you expect that your sales are going to continue
20 to suffer and decline as a result of you closing ten
21 stores by the end of the month?

22 **A. Drastically.**

23 Q. And as you sit here today, that \$9,000 is based on
24 those stores still being open?

25 **A. Yes.**

1 Q. You were asked a question about the descriptive
2 nature of your advertising on your packaging. Were
3 you able to market online, on your web site that you
4 had apple flavored nicotine vapor product for sale?

5 **A. Yes.**

6 Q. And after this ban took effect, are you still able
7 to market that you can sell flavored nicotine or
8 apple flavored nicotine vapor product?

9 **A. No.**

10 Q. And does that include to someone out of state?

11 **A. Correct.**

12 Q. So despite the fact that you are still able to sell
13 flavored nicotine vapor product to someone out of
14 state, do they have anyway of knowing that you sell
15 that product?

16 MR. LONG: Objection, Your Honor. I
17 don't know -- he's asking --

18 THE COURT: I can't hear you.

19 MR. LONG: I think he's asking her
20 whether or not somebody else would know something,
21 someone out of state would know something.

22 THE COURT: Yeah, that's the same
23 speculative objection you made to him.

24 MR. DAVIS: I guess my point is, Your
25 Honor --

1 THE COURT: And you're going to argue
2 your point. Right.

3 BY MR. DAVIS:

4 Q. So your web site does not indicate that you sell
5 that product?

6 A. **No, we took off all flavored.**

7 Q. Does your web site indicate you sell menthol
8 product?

9 A. **No.**

10 Q. Are you able to fulfill an order for those products
11 for your out of state customers as you sit here
12 today?

13 A. **No.**

14 Q. You were asked a series of questions about landlords
15 or breaking of leases and were you an owner of, you
16 know, the actual physical storefront. I believe you
17 said you had a number of leases. Is it hard to get
18 out of your leases?

19 A. **Yeah, we just renewed a lease with the mall, and
20 those people don't want to let you out of the lease
21 ever.**

22 Q. So have you had to negotiate with the landlords or
23 with the companies about breaking your lease?

24 A. **I mean, some of them have been understanding to the
25 point that -- and because of goodwill between us and**

1 them, I mean we've rented from some of these people
2 for eight, nine years and we pay our bills on time
3 and they see the headlines, so they know what's
4 going on. But they, even if they let us out of the
5 lease, it's not like they would let us come back,
6 you know. They're going to find somebody else to
7 take that spot.

8 Q. You were asked a series of questions by counsel
9 about the product expiring, whether it be 10 months
10 or 11 months. Can you tell the judge, it is the
11 policy of the store to recycle -- a product after 11
12 months, why is it the product -- or why is it the
13 store policy to recycle the expired product after 11
14 months?

15 A. Because, I mean we want our customers to be
16 successful with this product. And if after a year
17 that flavor has diminished, we don't want to sell
18 them a product that is 10 or 11 months old and then
19 have the flavor disappear and they're left with, you
20 know, something that tastes weird.

21 Q. Are the products, do they have a food based
22 component to it?

23 A. Yeah, flavorings.

24 Q. Is there a flavoring that's food based?

25 A. Correct.

1 Q. And is that or does that expire after awhile where
2 it has some effect on the taste?

3 A. It does.

4 MR. DAVIS: Can I have a moment, Your
5 Honor?

6 THE COURT: Yes, sir.

7 MR. DAVIS: Thank you. That's all I have
8 for this witness, Your Honor. Thank you.

9 THE COURT: Thank you. You can step
10 down, return to your seat. And your next witness.

11 MS. REED: Yes, Your Honor, Ms. Reed.
12 I'd like to call Dawn Every to the stand. And she's
13 been sequestered in some distant land.

14 THE COURT: This is the point where
15 everybody gets to stand and stretch.

16 Okay, so I will answer the questions of
17 those persons who are looking at their watches. We
18 do not require our employees to work after 5
19 o'clock, so we will stop at 5 o'clock regardless of
20 where we find ourselves and resume probably
21 tomorrow.

22 We will return to session. Everyone take
23 your seats please. Ma'am if you would move forward
24 and take a seat. Do you have a place to put
25 whatever that is?

1 Can you raise your right-hand, ma'am. Do
2 you swear or affirm the testimony you're about to
3 give and the cause pending before this court will be
4 the truth.

5 **THE WITNESS: Yes.**

6 THE COURT: Would you state your full
7 name for the record.

8 **THE WITNESS: Dawn M. Every.**

9 THE COURT: Ms. Every, you missed my
10 speech so I'm going to have to give it to you.
11 Counsel is going to ask you questions, both counsel
12 will probably ask you questions. Once the question
13 has been asked, wait until they've finished the
14 whole question to answer so that the court reporter
15 will be able to record it. The court reporter also,
16 like the rest of us is used to people shaking their
17 head but she cannot record that. So we've got to
18 hear an oral yes or an oral no and not uh-huh or
19 uhn-uhn. If anybody asks you a question and you
20 don't understand it, tell the questioner that and
21 they will rephrase it. From time to time someone
22 will stand up and they now know they do have to
23 stand up and do that and make an objection. And if
24 they make an objection, try to stop. I'll give
25 direction -- I'll hear from both counsel and I will

1 either say sustained which means they have to go on
 2 to something new or overruled, at which point if you
 3 don't remember the question by then and sometimes
 4 that happens, you should tell the questioner, I
 5 don't know the question, would you please repeat it:
 6 You may proceed.

7 — — —
 8 D A W N E V E R Y

9 after having been first duly sworn to tell the
 10 truth, the whole truth and nothing but the truth,
 11 was examined and testified upon her oath as
 12 follows:

13 DIRECT EXAMINATION

14 BY MS. REED:

15 Q. Why don't you go ahead and say and spell your first
 16 and last name for the record?

17 A. **D-A-W-N E-V-E-R-Y.**

18 Q. Where do you work?

19 A. **A Clean Cigarette.**

20 Q. How long have you worked there?

21 A. **Since 2013.**

22 Q. What brought you to work at A Clean Cigarette?

23 A. **I ended up switching away from burning tobacco and I**
 24 **got pretty passionate so I wanted to work there.**

25 Q. So, I think your testimony is you were a cigarette

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1 smoker; is that accurate?

2 **A. Yes, ma'am.**

3 Q. What was your cigarette of choice?

4 **A. Marlboro menthol.**

5 Q. How long have you smoked menthol cigarettes?

6 **A. 23 years.**

7 Q. When is the last time you lit up a traditional
8 combustible tobacco cigarette?

9 **A. 2013.**

10 Q. Do you use flavored nicotine vapor products?

11 **A. I use menthol.**

12 Q. Have you ever tried a tobacco flavored nicotine
13 vaping product?

14 **A. I did, actually.**

15 Q. How did it that go for you?

16 **A. It didn't work. I wanted it to work because I
17 wanted it to not taste like what I was use to but it
18 just didn't, I couldn't make it happen.**

19 Q. How did it taste?

20 **A. Really bad, just bad.**

21 Q. Okay, I see that you brought a Tupperware bin here
22 into the courtroom. Can you tell the court what's
23 inside of that?

24 **A. What this is, this is a nebulizer. It's a machine
25 that's intended to deliver medicine to my lungs**

1 because I'm a severe asthmatic. Although back in
2 2013 I was a much more severe asthmatic than I am
3 now. This machine used to be by my bed. It would
4 be there, I would have to use it two, three times a
5 month, minimum. And then I had an inhaler I had to
6 use on a regular basis.

7 Now this sits in my garage and it
8 collects dust. This right here, this part, I mean
9 you can see it's really dusty, look, it's filthy
10 from dust, just sitting around. This part is the
11 actual prescription for the medication. This is my
12 name and it can show that 12-24-2012 was the last
13 time I had to fill this prescription.

14 Q. When you were using the nebulizer back before you
15 transitioned to the vaping products, how often would
16 you refill the prescription for your nebulizer?

17 A. For my nebulizer? Because they come in three boxes
18 so I have one box left here. For my nebulizer I'd
19 do a three box minimum every six months.

20 Q. So you would go through three boxes of nebulizer
21 medication every six months --

22 A. Give or take.

23 Q. Is that right?

24 A. Yes.

25 THE COURT: Your nebulizer medication has

1 an expiration date, does it not?

2 THE WITNESS: Yes, ma'am.

3 MS. REED: Thank you Your Honor.

4 THE WITNESS: This one was filled on
5 12-24-2012 and it says to discard on 12-24-2013. So
6 it's good for a year although it never took me a
7 year to go through it.

8 Q. When was the last time you used your nebulizer?

9 A. I know I was still using it in November of 2013, but
10 it was really rare and I only remember that because
11 in the fall when you burn leaves, I've always had
12 the worst problem with my lungs. So I was expecting
13 a much harder fall than I got. And from there it
14 just got better and better and better. That was the
15 first time I took note of that.

16 Q. Fair enough and you mentioned that you use an
17 inhaler, is that accurate?

18 A. Yes, ma'am.

19 Q. Before you transitioned to using a vapor product,
20 how often would you use your inhaler?

21 A. Couple of times a day. It was two or three times a
22 day on a regular basis, I was refilling my inhaler,
23 you know, once every three months or better.

24 Q. And since transitioning to the vapor product, can
25 you tell me how often you're using your inhaler?

- 1 A. I've only had to refill my inhaler once since 2013.
- 2 Q. Okay. What is your job title at A Clean Cigarette?
- 3 A. I'm the education director.
- 4 Q. As director of education do you have knowledge about
- 5 client demographics?
- 6 A. Yes, ma'am.
- 7 Q. Okay. What percentage of your clients are between
- 8 the ages of 18 and 25?
- 9 A. According to our market research, it would be
- 10 2.3 percent.
- 11 Q. 2.3 percent?
- 12 A. 2.3 percent, yes, ma'am.
- 13 Q. What percentage of your clientele are 35 and older?
- 14 A. Just over 83 percent, ma'am.
- 15 Q. That was 83?
- 16 A. Yes, ma'am.
- 17 Q. And as far as your employment at A Clean Cigarette,
- 18 well let me ask you this, do you have any other role
- 19 apart from being director of education with A Clean
- 20 Cigarette?
- 21 A. Yes, ma'am I'm district manager for the Muskegon
- 22 location.
- 23 Q. Do you have any idea what's going to happen to your
- 24 Muskegon store if this ban is not lifted?
- 25 A. We're slotted to close on November 15th, which would

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1 make my family and I have to move away from Muskegon
2 which is where my whole family lives.

3 Q. Do you have children?

4 A. I have three children.

5 Q. Do your kids go to Muskegon schools?

6 A. Yes, ma'am.

7 Q. So they'd need to enroll in a different school
8 district?

9 A. Yes, ma'am, they would.

10 Q. What will you do? Now you've explained to me that
11 you've tried the traditional tobacco flavored vaping
12 products and I think your words were it tastes
13 really bad. What will you do as a former cigarette
14 smoker, who's transitioned to the vaping, if you are
15 not able to buy the menthol flavored nicotine vaping
16 product?

17 A. I have to do what I've always done before, I have to
18 go back to smoking.

19 Q. Is there any doubt in your mind as you sit here
20 today?

21 A. No. If I thought that I could quit without it, I
22 would have kept that promise to my kids years and
23 years ago.

24 MS. REED: I have no further questions.

25 THE WITNESS: Thank you.

1 BY MR. LONG:

2 Q. Hi Ms. Every, my name is James long. I'm sorry, I
3 did I this again?

4 MR. BLAIR: No questions Your Honor.

5 CROSS EXAMINATION

6 BY MR. LONG:

7 Q. My name is James long. I'm going to ask you some
8 questions with respect to your employment. So when
9 did you begin smoking combustible tobacco product,
10 how old were you at the time?

11 A. I remember in the summer between my kindergarten and
12 first grade year getting in trouble for walking
13 around picking up cigarette butts that hadn't quite
14 went out and I don't ever remember stopping looking
15 for nicotine since then.

16 Q. You found that nicotine is addictive for you?

17 A. I -- yeah, I think nicotine is addictive for
18 everybody but I think it was especially addictive
19 for someone like me whose mother, before we knew
20 what was going on, smoked three, four packs a day,
21 so yeah.

22 Q. And if you, I guess had to do it all over again, you
23 would never have smoked to begin with?

24 A. That would be ideal.

25 Q. So what level of nicotine product -- I'm going ask

1 you about the menthol flavored product that you
2 used -- prior -- do you still use that product right
3 now?

4 **A. Our E-cigarette product?**

5 Q. Yes.

6 **A. Yes.**

7 Q. What kind of -- I'm assuming you have -- you have
8 that product with you, you have a number of, I
9 guess, units of the product?

10 MS. REED: Objection, assumes facts not
11 in evidence.

12 BY MR. LONG:

13 Q. Do you have a number of units of the product?

14 **A. Do I personally have a number of units of the
15 product?**

16 Q. Yes?

17 **A. I have a couple.**

18 Q. Where did you buy that?

19 **A. I bought that at A Clean Cigarette before the ban.**

20 Q. How much did you buy before the ban?

21 **A. I bought three bricks, I was hoping to get six but I
22 couldn't afford it. So I've only got about three
23 months worth when I wanted six months.**

24 Q. Okay. As far as you know, A Clean Cigarette doesn't
25 have any limitation on the amount of product an

1 individual can buy?

2 A. You have to ask somebody who sets those -- one of
3 our other members. I'm not that person.

4 Q. But as far as you know there is no limitation; as
5 far as you know?

6 A. I can't say that because I thought at one time they
7 talked about it. But again, I'm not the person you
8 should ask that question.

9 Q. So what level of nicotine is your menthol product?

10 A. 2.4 which would be equivalent to a full flavored
11 cigarette.

12 Q. And is that 2.4 milligrams?

13 A. Yes.

14 Q. And that's the maximum level that A Clean Cigarette
15 sells?

16 A. No, we do a 3.6. Which is equivalent to a
17 non filtered cigarette which is really attractive to
18 the older generation. The older generation have
19 more people in that demographic.

20 Q. Since you started smoking using the menthol vapor
21 product, have you reduced the level of nicotine?

22 A. No, but I don't think I ever intended to. When I
23 came, I wasn't someone who was looking to get off of
24 everything as some of our people do.

25 Q. So you didn't use it as a --

1 **A. As an alternative for the world's ugliest product.**

2 Q. Okay, but you didn't use it as a way to stop
3 nicotine at all?

4 **A. To stop smoking, yes. To stop nicotine, no.**

5 Q. What does director of education, what does that
6 mean?

7 **A. Well, my primary goal is to go around to different
8 places and educate them on what E-cigarettes are,
9 what they're not and who should be using them.**

10 Q. And what level of education do you have to obtain
11 the director of education position at A Clean
12 Cigarette?

13 **A. I'm a certified project manager as well as one
14 credit away from my bachelor's degree.**

15 Q. Bachelor's in what?

16 **A. Business.**

17 Q. With respect to the use of E-cigarette products, do
18 you have any special training?

19 **A. No, I'm trained like everybody else, there's not a
20 whole lot of extra training.**

21 MS. REED: Your Honor, can we approach?
22 This is getting -- I didn't offer her as an expert
23 witness. And the line that he's going down is
24 suggesting that she doesn't, she can't discuss the
25 topics she discussed. In no way did I offer her as

1 an expert.

2 THE COURT: I'm not quite sure what you
3 wanted an approach can do. If you have an objection
4 to a question, then I would anticipate hearing an
5 objection to the question.

6 MS. REED: All right, I'll object to the
7 line of questioning as irrelevant.

8 THE COURT: And I will overrule that
9 objection in general.

10 BY MR. LONG:

11 Q. So where do you go -- do you go out in the community
12 to inform people about the use of E-cigarettes?

13 A. Not so much now. Originally we had some plans like
14 that, but that just didn't seem to fit our
15 demographic. We're really looking for the long-term
16 adult smokers. So a lot of times I get with
17 different area elderly places, apartment buildings,
18 ones that want to go smoke free, the ones that want
19 to get the smell and the tar out of their buildings
20 but they've got a significant amount of older
21 smokers. And I just inform them of how this works
22 and that if they aren't a smoker, they shouldn't get
23 on it, just to protect them.

24 THE COURT: May I know what an older
25 smoker is?

1 THE WITNESS: That's a fair question,
2 ma'am. For myself, my demographic, I try to go with
3 35 and up. But I'll tell you that I try really hard
4 to get in the area of 60 and up.

5 THE COURT: Is that the older smoker?

6 THE WITNESS: Yes.

7 THE COURT: Okay. Thank you.

8 MR. LONG: I have nothing further, Your
9 Honor.

10 MS. REED: No redirect, Your Honor.

11 THE COURT: Okay, you may stay in the
12 courtroom. Take a seat. Do we know who the other
13 witness is?

14 THE WITNESS: Your Honor, can I go get my
15 coat. I didn't know to bring everything. So can I
16 go out and come back in?

17 THE COURT: Absolutely, you can come in
18 the courtroom.

19 MS. REED: The next witness is David
20 Haight, Your Honor.

21 COURT DEPUTY: I'm sorry, who counselor?

22 MS. REED: David Haight.

23 THE COURT: Remind me again who Deleasha
24 Trice is.

25 MS. REED: Your Honor, she is the web

1 store manager for A Clean Cigarette.

2 THE COURT: Is it very likely that
3 Mr. Haight is going to be asked any questions about
4 the internet? Since Mr. Hate is the inventory
5 manager?

6 MS. REED: I don't intend -- I intend to
7 ask him questions about the inventory in general.
8 The witness Ms. Trice has the most information about
9 the web store sales, Your Honor.

10 MR. LONG: I don't intend to ask
11 Mr. Haight questions about the web site.

12 THE COURT: Okay.

13 MR. LONG: Well, with respect to sales
14 possibility. If the inventory --

15 THE COURT: Okay. I was just trying to
16 get both witnesses up so we could move rapidly
17 rather than have people come up and down the
18 elevator.

19 MS. REED: Your Honor, recognizing the
20 time crunch, I imagine a five minute recess is
21 probably out of the question?

22 THE COURT: No, it's not out of the
23 question. You can ask me for one.

24 MS. REED: Will you permit a five minute
25 recess, Your Honor.

1 THE COURT: Yeah. We are in recess.

2 (A brief recess was taken.)

3 MS. REED: Your Honor, A Clean Cigarette
4 will call our next witness, David Haight to the
5 stand.

6 THE COURT: Take a seat and raise your
7 right-hand, sir. Do you swear or affirm the
8 testimony you're about to give and the cause pending
9 before this court will be the truth?

10 **THE WITNESS: I do.**

11 THE COURT: Thank you Mr. Haight, could
12 you state your first and last name and spelling of
13 both of those?

14 **THE WITNESS: David Haight, it's**
15 **D-A-V-I-D H-A-I-G-H-T.**

16 THE COURT: Mr. Haight, it's important
17 that you try to give all of your answers orally
18 rather than by gesture or shaking your head; that
19 you allow the questioner to finish the question
20 before you answer it and that if during the
21 questioning, one side or the other makes an
22 objection, wait until after we've managed that
23 before you begin speaking.

24 **THE WITNESS: Yes Your Honor.**

25 THE COURT: Thank you.

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MS. REED: Thank you Your Honor.

— — —

D A V I D H A I G H T

after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified upon his oath as follows:

DIRECT EXAMINATION

BY MS. REED:

Q. Mr. Haight where do you work?

A. A Clean Cigarette.

Q. How long have you worked for A Clean Cigarette?

A. About seven years.

THE COURT: You don't have to do that. You don't have to lean into the microphone we'll be okay.

THE WITNESS: Okay.

BY MS. REED:

Q. Sir what's your job title at A Clean Cigarette?

A. I'm the vice president of operations.

Q. As vice president of operations do you have knowledge of A Clean Cigarette's inventory?

A. I do.

Q. How many vaping cartridges do you have an inventory currently?

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1 A. 1,400,000.

2 Q. 1,400,000 cartridges?

3 A. **Approximately 1,400,000.**

4 Q. And of the 1,400,000 cartridges, can you explain in
5 percentages the difference between the nicotine
6 cartridges and the non-nicotine cartridges?

7 A. **The nicotine cartridges make up about 97 percent of
8 our inventory. The no nicotine cartridges make up
9 about 3 percent.**

10 Q. And together it makes a hundred, fair?

11 A. **Correct.**

12 Q. And if I asked you to explain the percentage of
13 flavored nicotine products versus tobacco flavored
14 nicotine products, could you tell the court the
15 percentages of those respective cartridges?

16 A. **Percentage of flavored nicotine cartridges is about
17 50 percent. The percentage of tobacco flavored
18 nicotine cartridges is about 49 percent and then the
19 no nicotine cartridges that are not tobacco flavored
20 would make up the other one percent.**

21 Q. Okay. Mr. Haight what is a cartridge retail for at
22 **A Clean Cigarette?**

23 A. **The retail price is \$3.75, but after the discounts
24 that we offer, including our bulk discount, the
25 average price is about \$3.00.**

1 Q. In dollars, in U.S. dollars, how much of your
2 inventory is now banned, is now illegal for you to
3 sell?

4 A. **At \$3.00 per cartridge, we're figuring probably**
5 **about \$2,200,000 to \$2,500,000 worth of product that**
6 **we can't sell.**

7 Q. What will happen to your business if you can't sell
8 that \$2,200,000 to \$2,500,000 in inventory?

9 A. **It's going to be devastating for us. We're going to**
10 **have to close stores, we're going to have to layoff**
11 **employees.**

12 Q. I see that you came here you're wearing a blue tee
13 shirt with, written in green, is says A Clean
14 Cigarette and then there's an insignia above it, it
15 looks like a green, a blue and a white stripe is
16 that accurate?

17 A. **I believe so, yes.**

18 Q. Is that a branding, is that a moniker that you put
19 on all of your employee tee shirts?

20 A. **Yes, that's our logo.**

21 Q. Can you tell me how many employees you have?

22 A. **We had 54, we just let one employee go, so now we're**
23 **at 53.**

24 Q. And I'm looking at an E-cigarette here and it
25 appears to bear the same brand that's on your tee

1 shirt, it says A Clean Cigarette in green and then
2 it's got those stripes that I indicated?

3 MS. REED: May I approach the witness,
4 Your Honor.

5 THE COURT: Yes.

6 MS. REED: Thank you.

7 BY MS. REED:

8 Q. Mr. Haight, is that one of the cartridges we talked
9 about?

10 A. **This is.**

11 Q. Is that branding that's on that particular
12 cartridge, is that identical on all of your
13 1,400,000 cartridges?

14 A. **Let me explain. This right here is the battery.**

15 Q. Okay, and you've removed the top colored portion and
16 there's a second portion that you're holding in your
17 right-hand; is that correct?

18 A. **In my left-hand, this portion here is the cartridge.**

19 Q. Okay.

20 A. **This is what contains the nicotine and the
21 flavoring. And this is a lithium-ion battery. The
22 cartridges that we have currently have the same logo
23 that's on the battery printed on the cartridge.**

24 Q. So you have the A Clean Cigarette branding on both
25 the battery and the cartridge; is that correct?

1 **A. That is correct.**

2 Q. Are you aware, under the new rules, and I'm going to
3 read from rule 3(1). Beginning 14 days after these
4 rules are filed with the Secretary of State, a
5 retailer or reseller shall not use, either directly
6 or indirectly fraudulent or misleading terms or
7 statements to sell, offer for sale, give or
8 otherwise distribute vapor products and then it's
9 defined in section two that fraudulent or misleading
10 terms or statements include those that are likely to
11 induce false or unevicenced beliefs regarding the
12 properties of the vapor products in a substantial
13 portion of the audience. And then those terms
14 include but are not limited to and I quote, clean,
15 end quote, safe end quote, harmless end quote and
16 healthy, end quote. Were you aware of that rule?

17 **A. I am aware of that.**

18 Q. So if this ban is not lifted, what is going to
19 happen to the 1,400,000 cartridges that you have
20 that have this branding containing the word clean?

21 **A. I honestly don't know.**

22 Q. Do you need to destroy it?

23 **A. I hope not. I hope that we're not going to destroy**
24 **1,400,000 carbonizers.**

25 Q. So if that portion of the rule remains in effect,

1 not only will you lose the 50 percent of your
2 inventory that you can't sell, a hundred percent of
3 your inventory actually can't be sold; is that true?

4 **A. If we're going by that, then you would be correct, I**
5 **believe.**

6 Q. Okay, and I imagine that you have a web domain under
7 a name similar to a clear -- I'm sorry, A Clean
8 Cigarette, is that true?

9 **A. Our web site is WWW.ACcleanCigarette.com.**

10 Q. Are you aware of customers knowing your company by
11 name?

12 **A. Yes, I mean it's our company name. We've had it for**
13 **almost ten years now. That's what all of our**
14 **customers know us by, A Clean Cigarette.**

15 MS. REED: May I have one moment, Your
16 Honor?

17 THE COURT: Certainly.

18 BY MS. REED:

19 Q. To your knowledge, sir, are your customers familiar
20 with your branding they're familiar with your logo,
21 they're familiar with your products all labeled as A
22 Clean Cigarette?

23 **A. Yes.**

24 Q. And you use that branding consistently, is that fair
25 to say?

1 **A. That is fair to say.**

2 Q. So to the extent that you're no longer able to use
3 that name, do you have any idea how your customers
4 would identify, that these -- hey, these are
5 actually the Clean Cigarette people?

6 **A. No.**

7 MS. REED: Thank you, no further
8 questions, Your Honor.

9 THE COURT: Is A Clean Cigarette trade
10 marked?

11 **THE WITNESS: No, it is not trade marked,**
12 **Your Honor.**

13 THE COURT: Thank you. Your witness.

14 EXAMINATION

15 THE COURT: Counsel I would also tell you
16 that while the demonstrative aids used earlier by
17 Ms. Every didn't need to be admitted, probably since
18 you're basing part of your argument on a branding,
19 I'm just guessing this, because that's why you asked
20 it, you need to take a picture or mark it and admit
21 it.

22 MS. REED: Thank you, Your Honor we'll
23 discussed this.

24 THE COURT: You don't object to the
25 admission?

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1 MR. LONG: Yeah, it's been discussed.

2 CROSS EXAMINATION

3 BY MR. LONG:

4 Q. Mr. Haight, my name is James long, I'm an assistant
5 Attorney General, I represent the defendants in this
6 action before the court. I'm going to ask you some
7 questions. You indicated or you discussed the
8 percentages of nicotine and non-nicotine, flavored
9 nicotine and flavored tobacco product in the current
10 inventory, but could you tell me the numbers? You
11 said percentages? But what is the total number
12 because there's been some testimony earlier today of
13 the nicotine flavored vapor product that A Clean
14 Cigarette currently has?

15 A. **The total number of nicotine flavored vapor product,**
16 **it would be in the 1,400,000 minus the 3 percent.**
17 **I'm not sure what that number is exactly but that's**
18 **what --**

19 MS. REED: Your Honor, do you have a
20 calculator if he's going to be asked to do math on
21 that magnitude?

22 MR. LONG: I like, okay.

23 BY MR. LONG:

24 Q. So are you aware that the amended complaint
25 indicates, which was filed October 4th, indicated

1 that plaintiff, which was -- is A Clean Cigarette,
2 is the plaintiff, presently is in possession of
3 840,500 flavored nicotine vapor products?

4 **A. I am aware of that, yes.**

5 Q. Is that an accurate statement as of October 4, 2019?

6 **A. As of October 4th, those were the best numbers that**
7 **we had, that is correct.**

8 Q. There's been some testimony earlier today --

9 THE COURT: Okay, since October 4th, have
10 you done any further investigation?

11 THE WITNESS: We have, Your Honor.

12 THE COURT: So you have new numbers?

13 THE WITNESS: We do have new numbers.

14 THE COURT: And in order to get to those
15 numbers, what do you have to do? Do you need a
16 calculator?

17 THE WITNESS: No, I can give you an
18 approximate, an approximate number of cartridges. I
19 believe the current number of cartridges counting
20 what's still coming from our manufacturer, we have
21 to order product about three months in advance, and
22 we already paid for that product. So counting the
23 product that we're still going to be receiving,
24 we're looking at about 740,000 cartridges that would
25 be affected by this flavor ban.

1 BY MR. LONG:

2 Q. So that's about \$100,000 less than was alleged the
3 amended --

4 THE COURT: A hundred thousand?

5 MR. LONG: 740,000 --

6 THE COURT: It's not dollars, that's all
7 I'm pointing out.

8 MR. LONG: Oh, okay.

9 THE COURT: Each cartridge has a value of
10 \$3.00 allegedly, that's the testimony I heard.

11 MR. LONG: No, no, I get that.

12 BY MR. LONG:

13 Q. So you testified that as of October 4, there's about
14 840,500 was your best estimate at that time, October
15 4th?

16 A. **That is correct.**

17 Q. And so currently now, not what's coming, but
18 currently now what does A Clean Cigarette have in
19 its inventory for flavored nicotine vapor products?

20 A. **So not counting the product that's still coming,
21 that we've already paid for, the product that we
22 currently have in our inventory is approximately
23 600,000 cartridges that would be affected by the
24 flavor ban.**

25 Q. 600,000 cartridges and what you have in addition

1 coming takes that value up to around 740,000
2 cartridges?

3 **A. Correct.**

4 Q. So my math's wrong, but 840,000 cartridges on
5 October 4th, currently have with more product coming
6 included, it will be 740,000 cartridges?

7 **A. Can I explain about that just a little bit? Is that
8 all right?**

9 Q. Is my question accurate?

10 THE COURT: He's testified twice that
11 it's 740,000.

12 MR. LONG: Okay.

13 BY MR. LONG:

14 Q. So between October 4th and today, is it safe to
15 assume that about a hundred thousand of the flavored
16 nicotine vapor cartridges were sold?

17 MS. REED: Your Honor, this is now the
18 third or maybe fourth time he's asked the same
19 question so I'll object it's been asked and
20 answered.

21 THE COURT: I'll let him answer it.

22 **THE WITNESS: Those numbers that were
23 originally in the paperwork that you're talking
24 about, the 840,000, that was based off of our August
25 inventory physical count numbers, which was the most**

1 recent inventory that we had done at that time.
2 During September we ran a sale, we tried to sell as
3 many of the flavored cartridges as possible before
4 the ban went into effect. We sold many more
5 cartridges than we normally do, which is why we have
6 about 100,000 less cartridges than what was in the
7 paperwork.

8 BY MR. LONG:

9 Q. Has A Clean Cigarette company made any attempts to
10 return any of the product to the manufacturer?

11 A. **We can't return it once we've ordered it.**

12 Q. And has that been the relationship with the
13 manufacturer since day one?

14 A. **It has.**

15 Q. And have you had the same manufacturer since -- as
16 far as -- for as long as you've been employed, seven
17 years?

18 A. **Yes, we have.**

19 Q. And that's a manufacturer in China; is that right?

20 A. **That is correct.**

21 Q. And so has there ever been a situation where a
22 product has arrived and it's been damaged in any
23 way?

24 A. **Sometimes we've received product that was damaged by**
25 **like FedEx or UPS during the shipment. We've had**

1 some products that were switched or had like water
2 damage, but it's usually not very much when that
3 does happen.

4 Q. So you've never approached or A Clean Cigarette has
5 never approached its manufacturer and attempted to
6 return product?

7 A. I believe that at certain times in the past we had
8 tried to do that. I'm not sure exactly what came of
9 that though.

10 Q. With respect to the product, in the words on the
11 product, which are A Clean Cigarette, you've
12 indicated both on the cartridge and the battery,
13 correct?

14 A. Correct.

15 Q. Is that as a result of A Clean Cigarette
16 Corporation's request of the manufacturer to put
17 that on?

18 A. It is.

19 Q. And A Clean Cigarette could request that that
20 language not be put on either the cartridges or the
21 battery, correct?

22 A. In the future we could, yes.

23 Q. And there are steps that A Clean Cigarette could
24 take to cover up that language on its cartridge or
25 battery, correct?

1 A. Actually, no, it would not be possible to do that.
2 All the cartridges are individually wrapped and
3 sealed by the manufacturer and we would have to
4 unwrap each individual cartridge in order to put any
5 kind of like sticker or covering over the top of it.

6 Q. Has A Clean Cigarette Company continued to operate
7 since the rules have gone into effect?

8 A. We have.

9 Q. And continued to sell product?

10 A. We have.

11 Q. And continued to sell product with the name A Clean
12 Cigarette on its product?

13 A. Yes.

14 Q. And according to the rules, you recognize that's a
15 violation of the rules?

16 MS. REED: Your Honor, that misstates the
17 law. 14 days pursuant to rule 3(1).

18 MR. LONG: 14 days from -- they've been
19 in effect since October --

20 THE COURT: Okay, counsel, so you're
21 going to argue the law to me, right?

22 MR. LONG: Me?

23 THE COURT: Yeah or your colleague --

24 MR. LONG: Yes, at some point.

25 THE COURT: So probably asking the

1 witness questions about the law would not be as
2 productive as you'd like to think, okay?

3 BY MR. LONG:

4 Q. Has A Clean Cigarette company taken any steps to
5 attempt to transport the now banned product out of
6 state?

7 A. **No, not at this time we have not.**

8 Q. Do they anticipate doing so?

9 A. **Currently, no, we do not anticipate doing so.**

10 MR. LONG: I have no further questions
11 Your Honor. Thank you.

12 THE COURT: Do you have any additional
13 questions of Mr. Haight?

14 MS. REED: Just one, Your Honor.

15 REDIRECT EXAMINATION

16 BY MS. REED:

17 Q. Mr. Haight, you were asked by the attorney general
18 whether you could simply return these cartridges to
19 the manufacturer. Do you recall that question?

20 A. **I do recall that.**

21 Q. Is it fair to say that from the manufacturer's
22 perspective, once the branding is on there, that's
23 unique to you and they don't want that back, is that
24 your understanding?

25 A. **That is correct.**

1 Q. So again, once the laser has hit the pen and the
2 brand is on there, there's no way the manufacturer
3 is taking that back, correct?

4 **A. Yes.**

5 MS. REED: Thank you, nothing further,
6 Your Honor.

7 THE COURT: Now we go find Mr. Trice or
8 Ms. Trice?

9 MS. REED: Ms. Trice, yes, Your Honor.

10 THE COURT: As counsel is demonstrating
11 it's time to stretch again. We'll be waiting for a
12 couple minutes, so if you want to stand, please feel
13 free to do so.

14 (A brief recess was taken.)

15 THE COURT: Ms. Trice, if you would come
16 forward, please. Ms. Trice, once you've had a seat,
17 raise your right-hand, please.

18 Do you swear or affirm the testimony you
19 are about to give in the cause pending before this
20 court will be the truth?

21 **THE WITNESS: Yes.**

22 THE COURT: Ms. Trice, could you state
23 your full name and spell it.

24 **THE WITNESS: Deleasha Trice,**
25 **D-E-L-E-A-S-H-A, Trice, T-R-I-C-E.**

1 THE COURT: Ms. Trice, you're going to be
2 asked questions by both counsel. We would ask that
3 you wait until the question is finished before you
4 share your answer. If anyone asks you a question
5 that seems unclear, please tell them that. From
6 time to time throughout the trial someone may make
7 an objection. If the lawyer starts standing and
8 making objection, if you would stop talking, we'll
9 figure out what to do about the objection and give
10 you further direction. And lastly, it's very
11 important that rather than in our informal speech
12 and language where we shake our heads in response to
13 a question, that you actually say yes or no so that
14 your answer can be recorded accurately.

15 **A. Yes.**

16 THE COURT: You good?

17 **THE WITNESS: Yes.**

18 THE COURT: Okay, you may proceed.

19

20

— — —
D E L E A S H A T R I C E

21

after having been first duly sworn to tell the

22

truth, the whole truth and nothing but the truth,

23

was examined and testified upon her oath as

24

follows:

25

DIRECT EXAMINATION

1 BY MS. REED:

2 Q. Ma'am your voice is soft so if you could keep it up
3 so everyone in the court room can hear.

4 THE COURT: Pretend it's one of your
5 kids.

6 BY MS. REED:

7 Q. Ma'am, where do you work?

8 A. **I work for A Clean Cigarette.**

9 Q. How long have you worked there?

10 A. **About six years.**

11 Q. What brought you to work at A Clean Cigarette?

12 A. **I became a Sunday school teacher and I smoked
13 tobacco and I didn't want the children to smell it
14 on me.**

15 Q. Okay, so it's fair to say you were a traditional
16 combustible cigarette smoker?

17 A. **Yes.**

18 Q. What was your cigarette of choice back when you
19 smoked cigarettes?

20 A. **Newport 100's in a box.**

21 Q. And Newport's are menthol flavor; is that right?

22 A. **Yes.**

23 Q. All Newport's, is that true?

24 A. **No, they do have non-menthol now.**

25 Q. But the particular type that you smoked was menthol?

1 **A. Menthol.**

2 Q. And we need to be careful not to talk over one
3 another or else the court reporter will have words
4 with me outside, okay?

5 **A. Okay.**

6 THE COURT: No, no, she'll have them
7 here.

8 BY MS. REED:

9 Q. Do you now use a flavored nicotine vaping product?

10 **A. Yes.**

11 Q. What flavor do you use or which flavors do you use?

12 **A. Menthol.**

13 Q. Have you tried the traditional tobacco flavored
14 nicotine vaping product?

15 **A. Yes.**

16 Q. And can you tell the court how that experience went
17 for you?

18 **A. It tastes like dirt.**

19 Q. Like actual dirt?

20 **A. Actual dirt.**

21 Q. So would it be fair to say that under the current
22 ban, you would not be interested or able to use the
23 tobacco flavored nicotine vaping product?

24 **A. Yes.**

25 THE COURT: You asked a compound

1 question. I don't know which part the yes went to.

2 MS. REED: Yes, that's fair enough, Your
3 Honor.

4 BY MS. REED:

5 Q. You understand under the ban that menthol flavored
6 nicotine vaping products are no longer available for
7 sale, that fair to say?

8 A. **Yes.**

9 Q. And I think you testified that you have no interest
10 in returning -- in revisiting the tobacco flavored
11 nicotine vaping product, is that --

12 A. **Yes.**

13 Q. I think you testified, because it tastes like dirt?

14 A. **Yes.**

15 Q. Ma'am, did you ever use an inhaler when you were a
16 traditional combustible tobacco cigarette smoker?

17 A. **Yes, I did.**

18 Q. How often would you use your inhaler?

19 A. **Couple of times a day.**

20 Q. Since transitioning to vapor products, when is the
21 last time you used your inhaler?

22 A. **This past summer, it was -- the humidity was about a
23 hundred plus, and so I had to use it then.**

24 Q. So you went from using it two or three times a day
25 to using it one time in the last six months; is that

1 accurate?

2 **A. Yes.**

3 Q. Okay. Have you ever had any lung capacity testing
4 done through your medical providers?

5 **A. Yes, I have.**

6 Q. And I understand that you're not a doctor, but can
7 you explain just generally if you have an
8 understanding of how has your lung capacity changed
9 over time?

10 **A. From the first test to the second my lung capacity
11 doubled.**

12 Q. What were the dates of those tests?

13 **A. The first one was in '13, 2013, and the second one
14 was in 2015.**

15 Q. So -- and again, I guess could you just explain what
16 was being measured, if you know?

17 **A. In 2013 my lungs were back the original age that I
18 was. So I was 34, so my lungs were back to the age
19 of 34. In 2015 my lungs were still their age, the
20 age they were supposed to be, but my lung capacity
21 doubled, it went from 6 from the first one to 11.**

22 Q. 6 what?

23 **A. It was 6 seconds that I could push air out of my
24 lungs to 11.**

25 Q. And then it went up to 11 seconds; is that your

- 1 testimony?
- 2 **A. Correct.**
- 3 Q. What's your job title at A Clean Cigarette?
- 4 **A. I am the web store manager.**
- 5 Q. Okay, as web store manager do you have knowledge of
- 6 sales both in state and out of state?
- 7 **A. Yes.**
- 8 Q. And can you quantify for me what percentage of your
- 9 web store sales are out of state sales?
- 10 **A. About half.**
- 11 Q. In dollars what does that look like on a monthly
- 12 basis?
- 13 **A. Total monthly, about 48 to 50,000 a month.**
- 14 Q. So half of that would be the out of state sales?
- 15 **A. Yes.**
- 16 Q. Okay. Since this ban went into effect, have you
- 17 changed your advertising on the web store?
- 18 **A. Yes, we have.**
- 19 Q. How so?
- 20 **A. We no longer have menthol or flavors.**
- 21 Q. And I guess just to clarify, does that mean that you
- 22 no longer advertise that you are offering those for
- 23 sale, the menthol or the flavored vaping products?
- 24 **A. Yes.**
- 25 Q. How, if at all, have your sales at the web store

1 been affected since that ban went into effect?

2 **A. They've been cut in half or lower.**

3 Q. So they dropped 50 or more percent; is that
4 accurate?

5 **A. Yes.**

6 Q. As far as the inventory for your web store and the
7 sales through your web store, do you have knowledge
8 of the sales of nicotine vapor products versus
9 non-nicotine vapor products?

10 **A. Yes.**

11 Q. Okay, can you tell the court how much of your web
12 store sales are non-nicotine versus nicotine
13 products?

14 **A. A very small percentage of our sales are zero
15 nicotine.**

16 Q. If the ban is not lifted, in other words, if the
17 restrictions that are now in place remained in
18 place, will the web store be able to maintain an
19 online presence? Will you continue to have a web
20 store?

21 **A. No.**

22 Q. What would happen if you know, to your job at that
23 point?

24 **A. I won't have one.**

25 MS. REED: May I have one moment, Your

1 Honor?

2 THE COURT: Certainly.

3 MS. REED: Thank you. Nothing further
4 for this witness, Your Honor.

5 THE COURT: And you have no questions,
6 correct?

7 MR. BLAIR: Correct, Your Honor.

8 THE COURT: Your witness.

9 CROSS EXAMINATION

10 BY MR. LONG:

11 Q. Good afternoon, Ms. Trice my name is James Long.
12 I'm an assistant attorney general. I'm going to ask
13 you some questions related to this case. You just
14 indicated that if the emergency rules are not --
15 remain in effect, that A Clean Cigarette will no
16 longer have a web site; is that right?

17 A. Yes.

18 Q. Is that your decision to make?

19 A. No.

20 Q. Whose decision, if you know, is that to make?

21 A. Cary and Mona's.

22 Q. We talked a little bit about your experience with
23 the menthol flavored vapor product and I don't know
24 if you indicated, did you start that, start using
25 that product, when did you start using that product?

1 **A. 2011.**

2 Q. 2011 and the two lung capacity tests you had were in
3 2013 and 2015?

4 **A. Yes.**

5 Q. When did you begin smoking combustible tobacco
6 product, how old were you at the time?

7 **A. Fifteen.**

8 Q. When you started smoking combustible tobacco
9 product, do you know what the age limit was that you
10 had to be, the age that you had to be to purchase
11 that product?

12 **A. I'm assuming it was 18, but no.**

13 Q. What level of nicotine of the menthol vapor product,
14 what level of nicotine do you use?

15 **A. 11 milligrams.**

16 Q. And has that been the level that you've used
17 throughout, when you started using the product?

18 **A. No.**

19 Q. What did you use when you started using the product?

20 **A. I started with 18.**

21 Q. So you worked your way down to 11 now?

22 **A. Yes.**

23 Q. And how long have you been at the 11 milligram
24 level?

25 **A. Maybe eight months.**

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1 Q. Do you have any intention to ever quit smoking? I
2 mean, if this ban had not gone into effect, were you
3 intending to try to quit vaping the menthol product
4 as well?

5 **A. No.**

6 Q. So since the emergency rules have gone into effect,
7 the web site sales are about 50 percent of what they
8 were before?

9 **A. Yes.**

10 Q. So you currently use the menthol product. Do you
11 have a supply of that?

12 **A. Yes.**

13 Q. What's your supply, how many months?

14 **A. I don't know because I'm smoking more now than
15 before. So maybe a month or so.**

16 Q. Where did you get that product?

17 **A. I bought it.**

18 Q. From A Clean Cigarette company?

19 **A. Yes.**

20 MR. LONG: Nothing further, Your Honor.

21 THE COURT: Anything?

22 MS. REED: Redirect, Your Honor. Thank
23 you.

24 REDIRECT EXAMINATION

25 BY MS. REED:

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1 Q. Ms. Trice, you testified you have about a month's
2 supply of the menthol vaping product; is that
3 correct?

4 A. Yes.

5 Q. When that month's supply runs dry, what are you
6 going to do?

7 A. I am going to the nearest 7-Eleven, I'm going to put
8 my money on the counter and I am going to ask for a
9 box of Newport 100's.

10 Q. Is there any doubt in your mind as you sit here
11 today?

12 A. No.

13 MS. REED: Thank you, nothing further.

14 THE COURT: Step down, ma'am. Now sit
15 down would be more accurate, no, not here, meaning
16 return to the gallery.

17 MR. DAVIS: Thank you, Your Honor. Those
18 are all the witnesses we have for A Clean Cigarette.

19 THE COURT: And which witnesses do you
20 have today, sir?

21 MR. MAINS: Your Honor, we have Mr. Marc
22 Slis. He's probably the only one we have time for
23 today.

24 THE COURT: Mr. Slis has more to say?

25 MR. MAINS: Yes, Your Honor.

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1 THE COURT: Than what he said before?

2 MR. MAINS: Yes, we won't be redundant.

3 MR. BLAIR: As I understand or
4 understood, we were supposed to limit the inquiry to
5 irreparable harm last week when we were told that we
6 could revisit irreparable harm and address other
7 issues with this witness today. That was my
8 understanding of the court's ruling.

9 THE COURT: I don't know how many other
10 issues a fact witness is going to go through but I
11 look forward to hearing it.

12 MR. BLAIR: Okay, thank you Your Honor.

13 THE COURT: Mr. Slis, the oath from
14 Petoskey still applies, have a seat.

15 THE WITNESS: **Yes ma'am, Yes, Your Honor.**

16 THE COURT: Spell your first and last
17 name please.

18 THE WITNESS: **First name Marc, M-A-R-C,**
19 **last name Slis, S-L-I-S.**

20 EXAMINATION

21 BY MR. MAINS:

22 Q. Mr. Slis, at 906 Vapor, could you tell us what your
23 average customer is like in terms of demographics?

24 A. **Middle-aged, semi professional.**

25 Q. Are any of your customers under the age of 18?

1 A. No.

2 Q. Do you verify age when anyone comes in to purchase
3 product?

4 A. Yes, physically with the ID and also use a FDA
5 issued age checker app on a cell phone.

6 Q. Of your customers --

7 THE COURT: Okay. I'm intrigued. What's
8 an age checker app?

9 THE WITNESS: It's an app that takes an
10 image of the bar code on the back of the license and
11 checks it electronically.

12 THE COURT: To see if it's valid?

13 THE WITNESS: Yes, it gives back the age
14 as well so there's no human error in figuring out
15 what's the date and what's the birth date and that
16 kind of thing. It comes back and says they're 18 to
17 27, whatever.

18 BY MR. MAINS:

19 Q. So in terms of your customers, what percentage are
20 using vaping as a smoking cessation technique?

21 THE COURT: We did talk about this last
22 week.

23 MR. MAINS: Okay. I'll move on, Your
24 Honor.

25 BY MR. MAINS:

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1 Q. Mr. Slis, walk through -- walk me through what
2 happens when a customer initially comes in?

3 A. The first thing we ask them is whether or not
4 they're a smoker and they're entering my store to
5 quit smoking. If the answer is yes, I ask a series
6 of questions, how much they smoke, what they smoke,
7 where they smoke, why they smoke and we look at
8 technological savvy, their age, where they work,
9 social habits.

10 I use all of that to determine the best
11 advice and nicotine level for them. And then
12 following that, leading down the actual device or a
13 couple of devices, we sit them down and we go over
14 flavors.

15 Q. And you say you go over flavors, how does that
16 process work?

17 A. The first thing I ask them to do is to look through
18 our menu, to browse through the entire menu briefly
19 and see if any flavor profiles jump out at them.
20 And while they're doing that I'll pick out a
21 representative flavor from each of the different
22 main flavor types like drinks, desserts, yogurts,
23 cereals, candies, at least one of each and that's
24 what we start with.

25 Q. So how many flavors do you carry at the store up

1 until today?

2 A. It varies a little bit, but I think the last time I
3 looked on our menu it was 70 flavors.

4 Q. And where do those flavors come from, who requests
5 them?

6 A. With the exception of one or two that I personally
7 chose or my employee Alec chose, our customers
8 determine what those flavors are. They'll either
9 vote on the sweeter flavors after taste testing them
10 or they'll request specific flavors for themselves.
11 And when enough people request a specific flavor, we
12 try to bring that in.

13 Q. Can you give me some examples of flavors that your
14 adult customers have requested?

15 A. Basically my whole menu. All of our cereals, all of
16 our candies, all of our drinks, our desserts, lemon
17 pound cake, mixed berries, fizzy lemonade, which is
18 lemon lime soda, menthol peach.

19 Q. Is tobacco one of the flavors, one of the 75 that
20 you offer?

21 A. Yes, it is, in fact that's the only flavor that our
22 customers didn't specifically request. We were
23 carrying that when I bought the store and we still
24 do.

25 Q. And when customers initially come in, do any of them

1 request tobacco flavor?

2 **A. Yeah, it's not uncommon. I did that when I was a**
3 **customer the first time. I thought that because I**
4 **was trying to quit smoking, that I needed a**
5 **cigarette flavored liquid. And typically stubborn**
6 **old guys like me that think they need a cigarette**
7 **flavored. Like myself, they tend to come back after**
8 **a day or two as soon as they can get in and they ask**
9 **to start tasting flavors and they switch.**

10 **Q. So you're saying that the person who comes in and**
11 **requests tobacco flavors initially, they don't**
12 **necessarily, they don't generally stick with that**
13 **flavor very long?**

14 **A. No, almost never.**

15 **Q. So, on this intake process, in general, how much**
16 **time do you spend with a first time customer?**

17 **A. Probably on average 40 minutes, maybe a little bit**
18 **longer if it's not too busy.**

19 **Q. And is there a follow-up? Is there another kind of**
20 **continuing education or anything like that that you**
21 **get?**

22 **A. Every single visit, if they have the time, is**
23 **educational. I try to go over all of the science,**
24 **all of the regulatory issues, the health benefits,**
25 **risks, everything. It's also what we do on our web**

1 site and our Facebook page. I post almost every
2 paper or publication that I think my customers would
3 be interested in. It's a continuing educational
4 process from beginning to end.

5 Q. And do you offer any other services at the store?

6 A. Yes, yes, I do. In addition to trying to educate
7 them so they can make their own informed opinion,
8 we -- we are -- we offer pep talks, hugs,
9 motivation, whatever it takes. I personally tell
10 all of my customers I'm available 24/7, they have my
11 phone number, they're able to get ahold of me on
12 Facebook, messenger and privately message me and I
13 tell them all the same thing anytime day or night.

14 If I'm physically capable, I'll ride into
15 the shop, I'll open up for them if they need a
16 bottle of liquid or portal, I don't care what it is.
17 I was a smoker first and then a customer and I know
18 how important it is to be able to get what you need
19 to avoid going back to smoking.

20 Q. So when a customer comes in for the first time and
21 they decide that they want to try vaping, about how
22 much do they spend usually?

23 A. It depends on the device or the devices that we
24 think best fit their needs. But between \$50 and
25 perhaps \$225, including some liquid.

1 Q. And that effectively gets you the starter kit?

2 A. Yes or really nice -- can I --

3 Q. We're getting there.

4 A. Okay.

5 Q. So it's a sizeable investment. In your experience
6 is this cheaper than buying combustible cigarettes?

7 A. In the long run it is. There's a bit of -- can be a
8 large outlay of cash to begin with, especially if
9 you're going to get into a higher end device. But
10 as time goes on when you're purchasing just liquids
11 and coils, the cost drops significantly.

12 Q. Can you explain to us the difference between an open
13 tank system and a closed tank system?

14 MR. MAINS: Your Honor, I apologize.
15 We'll get pictures of these.

16 MR. LONG: Then I guess I'm just going
17 object to the relevance of this I don't know why
18 we're getting into this.

19 THE COURT: I can't hear you.

20 MR. LONG: I'm sorry, I object to the
21 relevance of this.

22 THE COURT: I don't even know what it is.

23 MR. LONG: He's talking about open
24 systems and closed --

25 THE COURT: I know, until I know what it

1 is, I won't know if it's relevant or not.

2 MR. MAINS: I apologize Your Honor.
3 We're attempting to kind of educate everyone on the
4 differences between these because I think it goes
5 into the devices that youth are generally using.

6 THE COURT: Okay.

7 THE WITNESS: May I say something? This
8 is important because everybody's trying to make
9 decisions on things they know nothing about and you
10 just admitted that yourself. It's one of the things
11 we're running into, nobody knows what it is --

12 THE COURT: I appreciate your opinions, I
13 really do, but I don't need to hear them just now.
14 Just answer the questions.

15 THE WITNESS: Okay. Just trying to help,
16 sorry.

17 MR. MAINS: Thank you, Your Honor we'll
18 make this quick.

19 BY MR. MAINS:

20 Q. Can you explain the difference between an open tank
21 system and closed tank system?

22 A. An open tank system, if I may, (displaying device)
23 can be opened, the top can be flipped up and you can
24 put in a variety of flavors and nicotine levels
25 depending on what you like and what you need to quit

1 smoking.

2 THE COURT: Okay, so, if you can hold
3 that up again. I need to just describe it. He's
4 holding up a black -- I can't even figure out what
5 shape it is. That appears to be plastic on the
6 bottom.

7 THE WITNESS: This is the battery case.

8 THE COURT: Battery case.

9 THE WITNESS: Yes.

10 THE COURT: With a silver top which
11 opens. Okay, and that will be of course your first
12 exhibit, right?

13 MR. MAINS: Yes, Your Honor.

14 THE WITNESS: And I don't think I have my
15 other one on me. This is not -- so opening the tank
16 makes it an open tank system and you're able to vary
17 the nicotine levels and flavors. This is very
18 similar to a closed tank or closed pod system where
19 you -- what you get is what the manufacturer puts in
20 there and that's it. You're limited to whatever
21 flavors or nicotine level the manufacturer puts in.

22 BY MR. MAINS:

23 Q. And does your store sell closed tank and open tank
24 products?

25 A. No, we've never sold any closed tank products.

1 Q. Why is that?

2 A. For several reasons. Like I just stated, lack of
3 flavors and lack of varying nicotine levels in order
4 to wean them off of smoking. It takes -- as I
5 stated before, the first thing I do is learn as much
6 as I can about them and put them into the correct
7 nicotine level and you need different levels for
8 different people. Everybody's different.

9 Q. Based on your experience what percentage of your
10 customers, that you're testifying that you're
11 dealing with on a regular basis are successful in
12 quitting smoking by using vaping devices?

13 THE COURT: Restate the question loudly
14 and then you'll get the answer.

15 BY MR. MAINS:

16 Q. Based on your experience and you testified that you
17 interacted with your clients regularly, what
18 percentage of your clients are successful in ceasing
19 smoking based upon using vapor devices?

20 A. 80 to 90 percent.

21 Q. To your knowledge what is the rate of success for
22 other methods of smoking cessation?

23 A. Everything I've read says combined failure rate of
24 93 percent and a success rate of 7 percent which I
25 believe is just about the same as quitting cold

1 **turkey.**

2 Q. I want to talk about the impact to your business
3 here and I know we spoke about this before so I
4 won't be redundant Your Honor. What is the status
5 of your business since the emergency rules went into
6 effect?

7 **A. Closed as of last Tuesday.**

8 Q. And do you own or lease the building where your
9 business is located?

10 **A. I lease the storefront.**

11 Q. If the rules remain in effect, about how much longer
12 will you be able to afford the lease of that
13 property?

14 **A. The end of the month. It's already paid for. I
15 can't afford another month --**

16 THE COURT: Can you hear him? You said
17 until the end of the month?

18 THE WITNESS: Until the end of the month,
19 that's all I can afford. After that I'll have to
20 break the lease.

21 BY MR. MAINS:

22 Q. You testified last week that you had the one
23 employee, correct?

24 **A. Correct.**

25 Q. And what's the current status of that employee?

1 **A. I've let him go.**

2 Q. Now could you have remained open and sold tobacco
3 flavored products, non-flavored nic -- or flavored
4 non-nicotine products and hardware?

5 **A. No, not conceivable. That's five percent of my**
6 **sales. There's no point.**

7 Q. In your opinion has 906 Vapor established goodwill
8 with its customers?

9 **A. Yes, I think so.**

10 Q. Geographically speaking how far is your store from
11 the Wisconsin border?

12 **A. I believe it's about an hour and a half.**

13 Q. And do you know if Wisconsin has banned the sale of
14 flavored nicotine vapor products?

15 **A. I do not believe they have.**

16 Q. So your former customers could conceivably drive
17 there to purchase the products?

18 **A. They have already.**

19 Q. And to your knowledge is it possible to purchase
20 flavored nicotine vapor products on the internet?

21 **A. It is.**

22 Q. And so again conceivably your former clients could
23 purchase those products there as well?

24 **A. They have already.**

25 Q. What have you done with your inventory of flavored

1 vape products?

2 **A. Everything that was banned, I boxed up and I put it**
3 **in the storeroom in the back.**

4 Q. So it's locked away?

5 **A. I'm not able to lock the door. It's just sitting in**
6 **the storeroom closed in boxes or totes to be**
7 **specific that say not for sale.**

8 Q. And about how much inventory do you have?

9 **A. I think it's about \$10,000, maybe a little bit more**
10 **than that.**

11 Q. And that's \$10,000 of the vaping liquid?

12 **A. Yes.**

13 Q. And are you at all concerned that you may be subject
14 to arrest or prosecution for having \$10,000 worth of
15 vaping liquid in your store?

16 **A. Definitely.**

17 Q. There's been some talk today about shelf life of
18 vaping liquid. Just about how long will that
19 product last in storage?

20 **A. My product?**

21 Q. Yes?

22 **A. Well, it's going to vary. Some it's going to expire**
23 **very, very soon. Some of it may last six months. I**
24 **can't tell you. I haven't looked at every**
25 **expiration date, but we get product in, you know,**

1 every week or every couple weeks and it's going to
2 continuously expire. For all I know I have some
3 that's expired already.

4 Q. Do some of the products you sell have an expiration
5 date on it?

6 A. **Some of the bottles do, some of the bottles don't.**

7 Q. But generally speaking if the emergency rules remain
8 in effect for six months or they're extended and
9 they're in effect for a year, what percentage of
10 your product do you think would expire?

11 A. **Well, if the ban goes for a year, 100%, certainly,
12 but possibly all of it in six months as well.**

13 Q. And what happens when that product expires?

14 A. **I have to dispose of it.**

15 Q. What day did you come down here for the hearing?

16 A. **This?**

17 Q. For this hearing.

18 A. **Detroit, I came yesterday.**

19 Q. And you're staying until when?

20 A. **Tomorrow.**

21 Q. And how much vaping liquid did you bring down with
22 you?

23 A. **Five or six bottles.**

24 Q. Five or six bottles. Do you have any concern that
25 if you were pulled over on the way down here that

1 having five or six bottles on you, it may be
2 difficult to say that's for personal use?

3 **A. Definitely.**

4 Q. Is 906 Vapor your sole source of income?

5 **A. It is.**

6 Q. And do you have any business debt related to that
7 store?

8 **A. Yes, I do. I believe it's between 15 and 20,000.**

9 Q. And in addition to that do you have any personal
10 debt?

11 **A. Yes, I do. I believe that's probably around 60
12 thousand.**

13 Q. What is that debt a result of?

14 **A. The recent divorce.**

15 Q. If the rules continue in effect, do you believe
16 you'll have to declare bankruptcy?

17 **A. Most certainly I will and soon.**

18 Q. And why do you say that?

19 **A. I have no other source of income. As you just
20 mentioned, there's a lot of debt. Yeah, end of the
21 month probably I'll have to file for bankruptcy.**

22 Q. And have you had conversations with a financial
23 advisor about that?

24 **A. Yes, I've had conversations with a few people,
25 including my accountant.**

1 MR. MAINS: Thank you Your Honor. No
2 further questions at this time.

3 THE COURT: Do you have any questions of
4 this gentleman.

5 MS. REED: Your Honor, we have no
6 questions of the witness.

7 THE COURT: Do you have any questions?

8 MR. POTCHEN: Yes, Your Honor.

9 EXAMINATION

10 BY MR. POTCHEN:

11 Q. Good afternoon Mr. Slis.

12 **A. Good afternoon, sir.**

13 Q. Are you okay?

14 **A. Yeah, I'm fine. Eyes.**

15 Q. One of the things you indicated was that you were
16 concerned about the amount of product that you had
17 in storage in your store; is that correct?

18 **A. Correct.**

19 Q. And are you aware that the department of health and
20 human services has issued an interpretive statement
21 regarding the rules, specifically regarding the
22 possession of flavored nicotine vaping products?

23 **A. Yes, I don't know if I've read it in its entirety,
24 but that's not my concern.**

25 Q. That's not your concern?

1 A. No, my concern is local law enforcement. That's who
2 I have to deal with.

3 Q. Right, but you're aware that the interpretive
4 statement says that the rules don't prohibit mere
5 possession of flavored nicotine vaping products in
6 Michigan, correct?

7 A. Yes, sir.

8 Q. Then the rules actually go on to say and I can give
9 this to you if you need it. I can give it to the
10 court if the court would like a copy of it?

11 THE COURT: If it's something that
12 relates to this case I would have thought it would
13 have been filed.

14 MR. POTCHEN: It is part of our brief,
15 Your Honor. If I can approach the witness.

16 THE COURT: Certainly.

17 MR. POTCHEN: Yes, this is attached to
18 our --

19 THE COURT: Supplemental.

20 MR. POTCHEN: -- Supplemental brief.

21 BY MR. POTCHEN:

22 Q. With this clarification, you are still concerned
23 with storage?

24 A. Yes, sir.

25 Q. And why is that?

1 **A.** Because the people who would come to arrest me or
2 have an issue with that are my local law
3 enforcement. I have no idea if they have this in
4 their possession, if they care.

5 **Q.** I'd like to get a little more information and you
6 testified today about the products and flavored
7 vaping products?

8 **A.** **Yes, sir.**

9 **Q.** I was able to find a list of various flavors that
10 are out there and I don't think we have this on the
11 record yet. You've been selling flavored vaping
12 products since about 2015, right?

13 **A.** **Yes.**

14 **Q.** And there's a lot of different vaping flavors out
15 there that tastes like candy and other sweet foods,
16 correct?

17 **A.** **Thousands and thousands.**

18 **Q.** Thousands and thousands?

19 **A.** **Yes.**

20 **Q.** So some flavors, I'm just going to name a couple,
21 there's a flavor with bubble gum, correct?

22 **A.** **I assume. I'm not personally aware of that. I**
23 **don't believe we sold bubble gum flavored.**

24 **Q.** I'm not asking whether you sold --

25 **A.** **It's certainly possible. Any flavor you can think**

1 of is certainly possible.

2 Q. There's a flavor, cotton candy, correct?

3 A. It's possible. I haven't sold one or tried it
4 myself.

5 Q. You've looked at magazines and various items,
6 correct?

7 A. I've seen every flavor I can possibly imagine,
8 but --

9 Q. Right?

10 A. -- I can't remember them all. One that sticks out
11 in my head is bacon.

12 Q. Bacon flavor. Is there a Gummy Bear flavor?

13 A. I'm sure there is.

14 Q. And Skittles flavor?

15 A. I'm sure there is.

16 Q. And Lemonhead flavor?

17 A. I'm not sure what that is but --

18 THE COURT: Counsel, I think that
19 everyone would agree and I will take judicial notice
20 if permitted that there are flavors that bear
21 amazing resemblances to cereals that are marketed to
22 children, that relate to candy that children and
23 other persons who love the second most deadly thing
24 called sugar, eat.

25 MR. POTCHEN: Thank you, Your Honor.

1 Point is made.

2 BY MR. POTCHEN:

3 Q. Now you sell these products that contain sweet and
4 candy flavors, correct?

5 A. Yes, sir.

6 Q. And your web site is still up, correct?

7 A. I'm not sure what you're talking about.

8 Q. I can go online today and I can go on 906 Vapor web
9 site, correct?

10 A. Dot com web site?

11 Q. Correct.

12 A. Correct, I don't really use it. It was there when I
13 bought the store and I started to update it but I
14 sort of left that behind actually but it exists.

15 Q. And I can buy product off that web site?

16 A. No, sir, never.

17 Q. And E-cigarettes are not an FDA approved smoking
18 cessation product; is that correct?

19 A. They're FDA regulated but I don't believe they're
20 FDA approved.

21 MR. POTCHEN: Thank you, no further
22 questions.

23 THE COURT: Do you have anything further.

24 MR. MAINS: Brief redirect, Your Honor.

25 REDIRECT EXAMINATION

1 BY MR. MAINS:

2 Q. Mr. Slis, are you aware that interpretive statements
3 issued by the department are not binding on local
4 law enforcement?

5 THE COURT: Counsel, would you all stop
6 asking legal questions of the witnesses.

7 MR. MAINS: Fair enough Your Honor, I
8 withdraw the question.

9 BY MR. MAINS:

10 Q. Mr. Slis, do adults ever come into your store and
11 specifically ask for a favor that most people would
12 think is generally targeted towards children? For
13 example, has anyone ever come into your store and
14 ask for Fruity Pebbles or Skittles flavored
15 products?

16 A. **Fruity Pebbles, I carry it and it was requested by I**
17 **guess six or eight people including one of my oldest**
18 **customers, that's what she used to quit smoking,**
19 **Fruity Pebbles cereal.**

20 Q. And of those customers who specifically requested
21 that, what do you think the average age was?

22 A. **For that particular flavor?**

23 Q. Yes.

24 A. **Over 40.**

25 MR. MAINS: No further questions, Your

1 Honor.

2 THE COURT: You can step down, Mr. Slis.

3 **THE WITNESS: Thank you.**

4 MR. BLAIR: Your Honor, may I
5 respectfully suggest that we use our remaining six
6 minutes to talk about tomorrow?

7 THE COURT: May I ask if you have anymore
8 witnesses.

9 MR. BLAIR: We have one more witness, yes
10 Your Honor.

11 THE COURT: And that is who.

12 MR. BLAIR: Amelia Howard, Your Honor.

13 THE COURT: So what is your question
14 about tomorrow?

15 MR. BLAIR: What time will we be
16 starting?

17 THE COURT: 2 o'clock. The Court of
18 Appeals will have this courtroom in the morning.

19 MR. BLAIR: Okay.

20 THE COURT: So we start at 2. Was there
21 anything else you wanted to discuss?

22 MR. BLAIR: One other thing we might be
23 good use of this time. We did file a motion in
24 limine and that may effect how we proceed with our
25 final witness in our case in chief.

1 THE COURT: And you believe that you
2 would argue a motion in limine, they would respond
3 to the motion in limine and I would get a ruling in
4 six minutes.

5 MR. BLAIR: No, Your Honor I just want to
6 raise that as a housekeeping matter.

7 THE COURT: I know it's there. I don't
8 think there is really much that may happen in six
9 minutes that would be very effective. Could you
10 have some other questions?

11 MR. BLAIR: Those are my questions for
12 now.

13 THE COURT: Great, thank you. Did you
14 have any issues that you wanted to raise? Again
15 we'll start at 2 o'clock tomorrow.

16 MR. POTCHEN: No issues, Your Honor.

17 THE COURT: Thank you and we will be in
18 recess.

19 COURT DEPUTY: All rise.

20 (Proceedings adjourned about 4:57 P.M.)

21 — — —

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1 CERTIFICATE OF NOTARY PUBLIC - COURT REPORTER

2

3 I do certify that the attached
4 proceedings were taken before me in the
5 above-entitled matter; that the proceedings
6 contained herein was by me reduced to writing by
7 means of stenography, and afterwards transcribed
8 upon a computer. The attached pages are a true and
9 complete transcript of the proceedings.

10 I do further certify that I am not
11 connected by blood or marriage with any of the
12 parties, their attorneys or agents, and that I am
13 not an employee of either of them, nor interested,
14 directly or indirectly, in the matter of
15 controversy.

16 IN WITNESS WHEREOF, I have hereunto set
17 my hand and affixed my notarial seal at West
18 Bloomfield, Michigan, County of Oakland, this 11th
19 day of October 2019.

20 *Theresa L. Roberts*

21

22

Theresa L. Roberts, CSR

23

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